

IN THE MATTER OF ARBITRATION ) GRIEVANCE ARBITRATION  
)  
between )  
)  
Duluth Airport Authority ) Denial of Benefits -  
) Eddie Murray  
)  
-and- ) BMS Case No. 12-PA-0038  
)  
AFSCME Council 5 ) February 21, 2012  
))

**APPEARANCES**

**For Duluth Airport Authority**

Steven B. Hanke, Assistant City Attorney, Duluth, Minnesota  
Brian D. Ryks, Executive Director  
Randal A. Overby, Director Finance and Administration

**For AFSCME Council 5**

Sandra J. Curtis, Field Representative, Bemidji, Minnesota  
Chelsa Nelson, Field Representative  
Eddie Murray, Grievant

**JURISDICTION OF ARBITRATOR**

Article 41, Grievance Procedure, Section 41.3 of the 2011-2012 Collective Bargaining Agreement (also referred to as "CBA" or "Contract") (Joint Exhibit #1) between Duluth Airport Authority (hereinafter "Employer" or "DAA") and AFSCME Council 5 (hereinafter "Union") provides for an appeal to arbitration of properly processed disputes through the grievance procedure.

The Arbitrator, Richard John Miller, was selected by the Employer and Union (collectively referred to as the "Parties") from a panel submitted by the Minnesota Bureau of Mediation

Services. A hearing in the matter convened on December 9, 2011, at 1:00 p.m. in Room 106A, Duluth City Hall, 411 West First Street, Duluth, Minnesota. The hearing was tape recorded with the Arbitrator retaining the tapes for his personal records. The Parties were afforded full and ample opportunity to present evidence and arguments in support of their respective positions.

The Parties elected to file post hearing briefs with an agreed-upon submission date of January 31, 2012. The post hearing briefs were submitted in accordance with those timelines and received by the Arbitrator by e-mail attachment. The Arbitrator then exchanged the post hearing briefs on February 1, 2012, by e-mail attachment to the respective representatives.

The Arbitrator received a letter on February 9, 2012, from Union Field Representative Sandra J. Curtis dated February 7, 2012, protesting comments made in the DAA's post hearing brief that the Union conceded to a past practice that DAA has not made Employer contributions to an employee's deferred compensation plan or flexible spending account while an employee was receiving long term disability benefits, including a situation in 2002 involving Eddie Murray, the Grievant in this case. Ms. Curtis indicated in her letter that the Union concedes to nothing and the instant grievance dealing with Mr. Murray is the first known example of the Employer denying contributions to an employee's

deferred compensation plan while an employee was receiving long term disability benefits. The record was considered closed after receipt of Ms. Curtis' letter on February 9, 2012.

The Parties agreed that the grievance is a decorous matter within the purview of the Arbitrator, and made no procedural or substantive arbitrability claims.

**ISSUES AS DETERMINED BY THE ARBITRATOR**

1. Whether the Employer must provide deferred compensation contributions to Eddie Murray while he receives long term disability pursuant to the Collective Bargaining Agreement?
2. If so, what is the appropriate remedy?

**STATEMENT OF THE FACTS**

The facts are not in dispute. The Grievant, Eddie Murray, began his employment with DAA in October of 1989, holding the position of Airport Maintenance. He was subsequently promoted to his current position of Airport Maintenance III. The Grievant is not currently working for DAA or providing services to DAA. The Grievant is receiving long-term disability ("LTD") payments from DAA pursuant to Article 27, Long Term Disability Income, of the Contract as follows:

- 27.1 Any employee who has been continuously employed by the Airport Authority for not less than six (6) months shall be eligible for long term income protection to age seventy (70) for disability; however, there shall be no such protection for disability caused by any

injury or illness for which the employee received professional medical care or treatment within ninety (90) consecutive days prior to when the employee otherwise becomes eligible for such protection, unless ninety (90) consecutive days elapse from the time when the employee otherwise would be eligible for such protection and during such ninety (90) consecutive days the employee receives no professional medical care or treatment for such injury or illness.

27.2 For the purposes of this Article, total disability means that which is caused by illness or injury which occurs during the employee's term of employment and which prevents the employee from performing the major tasks of the employee's position.

27.3 Payment of benefits pursuant to this article to a disabled employee shall commence when the employee exhausts his/her balance of accrued sick leave with full pay provided by Article 26 of this Agreement. The amount of such protection shall be 65% of the employee's basic hourly rate as of the time that employee's sick leave is exhausted, or the parties agree to commencement of such payments, but shall not exceed an amount equivalent to a monthly rate of pay of \$3,500; however, for any pay period, the amount of such protection shall be reduced by any amount that the employee receives for such pay period as a retirement or disability pension from the Public Employees Retirement Association, the Duluth Firemen's Relief Association, the Duluth Police Pension Association, or from the federal government pursuant to the federal Old-Age, Survivors and Disability Insurance Act, and by any other disability insurance or disability annuity payment, and by any amount that the employee receives as Workers' Compensation in lieu of wages or salary. Any cost of living adjustment to any amount received as a retirement or disability pension or as Workers' Compensation shall not be used to reduce the amount of such protection. The amount of such protection for any pay period shall also be reduced by any amount that the employee receives as wages or salary during that pay period, but only when the total amount that the employee has received for

wages or salary during the calendar year exceeds \$5,000.

- 27.4 Payment of benefits due under this Article shall be calculated for each regular pay period, and shall be paid for the period at the same time as employees are then paid pursuant to Article 22 of this Agreement. For any pay period the Airport Authority may deduct from the payment of benefits any amount which the employee previously received as payments of benefits but to which the employee was not entitled because of the provisions of this Article.
- 27.5 As benefits due under this article, the employer may offer to any employee who is disabled an assignment, at such employee's present rate of pay, to any position, or one with tasks or equipment modified to accommodate employee's medical restrictions, in his/her present or lower job title, the duties of which the employee is medically able to perform. Such assignment shall not result in the denial of promotion to, or the layoff of an employee.
- 27.6 Within 24 months from the date of injury or illness causing such disability, if the employee is still receiving benefits pursuant to this Article, the employee shall:
- a. Return to the position with the Airport Authority which the employee occupied when he/she became disabled; or return to another position with the Airport Authority, which may have tasks or equipment modified to accommodate employee's medical restrictions, for which the employee is qualified, if such position is available; but only if the employee provides written information from a physician, chosen and compensated by the Airport Authority, which indicates that the employee is then capable of performing the duties of such position; or
  - b. Request rehabilitation or retraining designed to return the employee to other work which produces an economic status as close as possible to that enjoyed by the employee before the illness or injury; the

costs of such rehabilitation and/or retraining shall be borne by the Airport Authority; such rehabilitation or retraining may include, but is not limited to medical evaluation, physical rehabilitation, work evaluation, counseling, job placement, and implementation of on-the-job short-term training; or

- c. Apply for permanent total disability status. Total disability (as defined in Minnesota Statute 176.101, Subd. 5) means the total and permanent loss of the sight of both eyes, the loss of both arms at the shoulder, the loss of both legs so close to the hips that no effective artificial member can be used, complete and permanent paralysis, total and permanent loss of mental faculties, or any other injury which totally incapacitates the employee from working at an occupation which brings him/her an income.

27.7 Receipt of long-term income protection benefits shall cease at the expiration of 24 months from the date of injury or illness causing such total disability unless the employee has complied with Article 27.6 and has been determined to be returned to work, rehabilitated and/or retrained, or eligible for continuing total disability benefits because he/she is disabled as defined in Article 27.6c. Such determination shall occur upon the occurrence of both of the following:

- a. Medical verification by the employee's treating physician and a physician appointed by the Airport Authority that the determination is consistent with the employee's medical condition. In event of disagreement, a third physician mutually agreed upon by the employee and the Employer shall act as arbitrator. The arbitrator's decision as to whether the determination is consistent with the employee's medical condition shall be binding on both parties.

27.8 Disagreements under this article shall be subject to the grievance procedure.

The Grievant's disability is due to lower back problems. The Grievant has been receiving LTD payments since approximately February 14, 2011.

This is not the first time the Grievant has received LTD payments from the Employer. In fact, the Grievant did not work for the Employer and received LTD income payments from the Employer between 2002 and 2003 for diagnosed lower back and leg injuries.

Prior to receiving the most recent LTD payments, the Grievant was on a Family and Medical Leave Act ("FMLA") leave. On or about May 12, 2011, DAA delivered correspondence to the Grievant warning that he had exhausted his 12 weeks of FMLA leave after May 13, 2011. (DAA Exhibit #2). DAA indicated that since the Grievant qualified for LTD benefits under the CBA, DAA would continue to pay him LTD income of 65% of his basic hourly rate pursuant to the CBA. Id. DAA indicated that while on LTD, the only fringe benefits the Grievant would receive was DAA paid single health care coverage and \$50,000 basic life insurance coverage to the same extent as active employees. DAA further indicated that DAA contributions, if any, to the Grievant's deferred compensation, Public Employers Retirement Association, and Health Care Savings Plan accounts would end on May 13, 2011. Id.

On July 15, 2011, the Parties entered into a Grievance Settlement, which essentially added contractual longevity payments to the LTD payments received by the Grievant, based upon a grievance filed by the Union on May 11, 2001, on behalf of the Grievant.

On July 18, 2011, the Union, on behalf of the Grievant, filed a grievance alleging that the Employer was required by the Contract, including Article 19, Hospital-Medical Insurance, to provide an Employer contribution to the Grievant's deferred compensation account while the Grievant was on LTD. (Joint Exhibit #3; DAA Exhibit #3).

The grievance was denied by DAA on July 19, 2011. (Joint Exhibit #4; DAA Exhibit #4). The Union then submitted this grievance to arbitration. (Joint Exhibit #3).

#### **UNION POSITION**

The Grievant is an active employee of the DAA, as he is a public employee and meets the definition of public employee pursuant to Minnesota Statute 179A.03, subdivision 14(f) and the dictionary definition of an employee.

During the course of the Grievant's employment with DAA, he has always been entitled to and received benefits due him, including those covered by Article 9, Longevity Award, Article 14, Life Insurance, and Article 19, Hospital-Medical Insurance.

These are the only Contract provisions that make exception to or re-affirm which benefits employees are entitled to while on LTD. All other Contract provisions are silent on this subject matter.

The DAA has not presented to its employees at any time notice that they need to change how they route monies towards a flexible spending account or a deferred compensation account depending upon their leave status. In fact, when presented with this grievance regarding Article 19 of the Contract concerning the Grievant's status while on approved LTD, no mention was made of possible 26 U.S.C. Section 457 compliance requirements that might prohibit the Grievant or any employee of the DAA from receiving full compensation while on approved LTD. The DAA has not proven that the language in 26 U.S.C. Section 457 means persons on leave cannot continue to receive payments. Regardless, it is the responsibility of the Employer to notify employees of the DAA when changes in insurance contributions need to be re-directed in order to protect the full compensation they are entitled to pursuant to Article 19 when they are on LTD. When the discussion of changes to Article 19 and compliance with 26 U.S.C. Section 457 happened mid-contract, nothing was mentioned about eligibility as it relates to LTD. Therefore, the Union continues to contend that the Grievant is entitled to all lost monies withheld by the DAA during his LTD Leave and that any

further interpretation of 26 U.S.C. Section 457 and its impact on Contract language belongs properly in the venue of future negotiations between the Parties.

**DAA POSITION**

Federal law prohibits DAA from making deferred contributions to the Grievant's account because he is an inactive employee. In addition, Minnesota Deferred Compensation Plan documents also prohibit DAA from making deferred compensation contributions while the Grievant is receiving LTD payments from DAA. Therefore, neither the Grievant nor DAA may contribute to the Grievant's DAA deferred compensation account while the Grievant is not working for DAA.

The Contract does not provide for deferred compensation contributions to employees while they receive LTD payments. The only two benefits provided to individuals receiving LTD pursuant to the CBA are health insurance coverage and life insurance coverage.

The established past practice favors denial of the grievance. The Union concedes that the established past practice of the Parties is that DAA does not make Employer contributions to an employee's deferred compensation plan or flexible spending account while that employee is receiving LTD payments. Past Union employees receiving LTD under this CBA and under past CBAs

with identical language did not receive deferred compensation or flexible spending account contributions. More specifically, the Grievant did not receive deferred compensation contributions while he was receiving LTD benefits in 2002. The long-standing, accepted practice between the Union and DAA is that Employer contributions to deferred compensation are not made when an employee is receiving LTD payments.

Past practice, the CBA, and federal law as applied to the facts of this grievance indicate that DAA has not, does not, and cannot contribute to the Grievant's deferred compensation account while he is an inactive employee receiving DAA LTD benefits. For these reasons, DAA requests that the Arbitrator deny the grievance.

#### **ANALYSIS OF THE EVIDENCE**

A collective bargaining agreement is not ambiguous if the arbitrator can determine its meaning without any other guide than a knowledge of the facts of which, from the nature of language in general, its meaning depends. When interpreting contract language, arbitrators have long held that parties to an agreement are charged with full knowledge of its provisions and of the significance of its language. McCabe-Powers Body Co., 76 LA 457, 461 (1981). If the language of an agreement is clear and unequivocal, an arbitrator shall not give it meaning other than

that expressed. National Linen Service, 95 LA 829, 834 (1990); Potlatch Corp., 95 LA 737, 742-743 (1990); Metro Transit Authority, 94 LA 349, 352 (1990). Accordingly, clear and unambiguous language must be enforced, even if the results are contrary to the expectations of one of the parties, as it represents, at the very least, what the parties should have understood to be the obligations and the benefits arising out of the agreement. Heublein Wines, 93 LA 400, 406-407 (1988); Texas Utility Generating Division, 92 LA 1308, 1312 (1989); City of Meriden, 87 LA 163, 164 (1986).

Because arbitration is a creature of contract, an arbitrator's authority stems entirely from the express grant of power given by the parties themselves. Neppl v. Signature Flight Support Corp., 234 F.Supp.2d 1016 {D.Minn. 2002}; Dalfort Aviation Services 94 LA 1136, 1144 (1990). Arbitrators are not empowered to "impose" or "create" contractual obligations that are not set forth in the parties' agreement itself. An arbitrator's function is not to rewrite an agreement. An arbitrator's award must derive its essence from the agreement.

Here, the Parties have clearly defined the scope of an arbitrator's authority in Article 41, Grievance Procedure, Section 41.4 of the Contract in that the arbitrator "shall have no right to amend, modify, nullify, ignore, add to, or subtract

from the provisions of this Agreement," and the arbitrator's "decision shall be based solely upon his/her interpretation of the meaning or application of the express terms of this Agreement to the facts of the grievance presented." A grievance is defined in Article 2, Definitions, Section 2.9 of the Contract as "a dispute or disagreement raised by an employee involving the interpretation or application of the specific provisions of this Agreement by an officer or supervisory person representing the Employer."

The Arbitrator has carefully reviewed the entire Contract. What is quite evident from this extensive review is that the CBA does not provide for deferred compensation contributions to employees while they receive LTD payments from DAA. Deferred compensation is not included in the already-substantial benefit package provided to disabled employees. Article 27 of the CBA addresses Long Term Disability Income. Eligible disabled employees are generally entitled to disability income protection payments of up to 65% of the employee's basis hourly rate for a period of up to 24 consecutive months. (Joint Exhibit #1, Sections 27.3, 27.6, and 27.7). In addition to the benefits and restrictions of Article 27, DAA continues to maintain the disabled employee's health and life insurance coverage pursuant to Sections 14.3 and 19.3 of the Contract.

Both Sections 14.3 and 19.3 were negotiated by the Parties for the exclusive benefit of an "inactive employee" such as the Grievant who is not working for DAA but is receiving DAA LTD payments. Specifically, Article 14, Life Insurance, Section 14.3 provides that "[w]hile an employee is entitled to receive long-term disability income protection pursuant to Article 27 of this agreement, the Employer shall maintain such life insurance coverage for such employee as it does for active employees." Active employees receive \$50,000 in coverage. DAA has maintained the Grievant's life insurance coverage while he receives LTD.

Similarly, Article 19, Hospital-Medical Insurance, Section 19.3 provides that "[w]hile an employee is entitled to receive long-term disability income protection pursuant to Article 27 of this Agreement, the Employer shall maintain such hospital-medical insurance coverage for such employee as it does for active employees, but not dental coverage." Active employees receive "Plan 3A" hospital-medical insurance coverage. DAA pays 100% of the monthly premium for active employees electing single Plan 3A coverage and 80% of the monthly premium for those electing family-dependent Plan 3A coverage.

Section 19.3 requires DAA to maintain hospital-medical insurance coverage (Plan 3A) for LTD recipients as it does for active employees. The Grievant elected single hospital-medical

insurance coverage. DAA has maintained the Grievant's single hospital-medical insurance coverage while he receives LTD benefits under Article 27. DAA has paid 100% of the monthly premium for the Grievant's coverage. The Grievant could instead elect family-dependent hospital-medical insurance coverage, in which case DAA would maintain family coverage and pay 80% of the Grievant's monthly premium obligation.

It is clear from the evidence that only two contractual benefits provided to individuals receiving LTD are health insurance coverage and life insurance coverage. The Parties added a third benefit, when on July 15, 2011, the Parties entered into a Grievance Settlement, which essentially added contractual longevity payments to the LTD payments received by the Grievant, based upon a grievance filed by the Union on May 11, 2001, on behalf of the Grievant.

As noted in How Arbitration Works, Elkouri and Elkouri, (4th Ed., 1985) p. 355:

Frequently arbitrators apply the principle that to expressly include one or more of the class in a written instrument must be taken as an exclusion of all others. To expressly state certain exceptions indicates that there are no other exceptions. To expressly include some guarantees in an agreement is to exclude other guarantees.

This rule of contract construction is known as "*expressio unius est exclusio alterius*." Applying the "*expressio*" rule to

the instant case, it is clear that the Parties have intended to have only two exceptions in the Contract and one through Grievance Settlement for the exclusive benefit of an "inactive employee" such as the Grievant who is not working for DAA but is receiving DAA LTD payments.

Section 19.3 and the LTD provisions in the CBA only require DAA to maintain either the single or family health insurance coverage the Grievant elects to receive. Monetary contributions to the Grievant's deferred compensation plan are not part of the health insurance plan. Deferred compensation is not health insurance coverage, and Article 19 does not require DAA to make Employer contributions to the Grievant's deferred compensation plan while on LTD.

The only two benefits provided to individuals receiving LTD pursuant to the CBA are health insurance coverage and life insurance coverage, and the Parties added a third in their grievance settlement as to longevity payments. Thus, neither the CBA nor the Grievance Settlement provide for deferred compensation contributions to employees while they receive LTD payments from DAA.

Article 6, Savings Clause, Section 6.1 of the Contract provides that "[t]his agreement is subject to the laws of the United States and the State of Minnesota," Further, in Section

41.4 "[t]he arbitrator shall be without power to make decisions contrary to or inconsistent with or modifying or varying in any way the application of laws and rules and regulations having the force and effect of law." In other words, both of these Contract provisions mandate that the Arbitrator must abide by both federal and state laws when rendering his decision on the merits of this case.

Unfortunately, for the Grievant federal law prohibits DAA from making deferred contributions to the Grievant's account because he is an "inactive employee." DAA has the Minnesota Deferred Compensation Plan (MNDPC), which is an Internal Revenue Code 457(b) Deferred Compensation Plan. The Internal Revenue Code prohibits DAA from making 457(b) deferred compensation contributions on behalf of all inactive employees. Inactive and former employees do not receive employer contributions as they are not eligible to participate in DAA's deferred compensation plan. Only individuals who perform service for the employer may be participants. 26 U.S.C. § 457(b)(1). Further guidance in the resolution of this grievance is provided in the Code of Federal Regulations:

Only individuals who perform services for the eligible employer, either as an employee or as an independent contractor, may defer compensation under the eligible plan.

26 CFR 1.457-2 - Section 26 CFR 1.457-2(3)(j).

The Minnesota Deferred Compensation Plan documents also prohibit DAA from making deferred compensation contributions while the Grievant is receiving LTD payments from DAA. The Plan documents indicate that "a disabled participant may elect [deferred compensation] during any portion of the period of his or her disability to the extent that he or she has actual compensation (not imputed compensation and not disability benefits) from which to make contributions to the Plan..." (DAA Exhibit #5, p. 11). "Only individuals who perform services for the Employer as an Eligible Employee may defer Compensation under the Plan." Id., p. 6. Thus, the Plan like federal law is established and settled.

While the Grievant is a "public employee" and meets that definition under Minn. Stat. 179A.03, subdivision 14(f), the Grievant is not currently working for DAA. He provides no services to the Employer. He is an "inactive employee." As such, he is receiving imputed compensation from DAA as disability benefits. Under federal law and the Minnesota Deferred Compensation Plan, the Grievant cannot currently participate in a deferred compensation plan. Therefore, neither the Grievant nor DAA may contribute to the Grievant's DAA deferred compensation account while the Grievant is an "inactive employee" and not working for DAA.

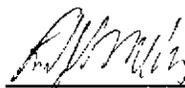
The Arbitrator has no choice but to abide by federal law and the Minnesota Deferred Compensation Plan in this case, even though these documents were not previously disclosed to the Union before the hearing. There is no document disclosure ("discovery") provision in the Contract mandating that the Parties must disclose their documents in support of their respective positions in advance of an arbitration hearing or during the processing of a grievance. Hopefully, the Parties will adhere to "professional courtesy" in the future by disclosing these documents to each other in advance of a hearing or during the processing of a grievance.

The Employer has alleged that the Union has conceded to an established past practice of the Parties that DAA does not make employer contributions to an employee's deferred compensation plan or flexible spending account while that employee is receiving LTD payments. The Employee claims that past Union employees receiving LTD under this CBA and under past CBAs with identical language did not receive deferred compensation or flexible spending account contributions, including the Grievant in 2002. Thus, according to the Employer, the long-standing, accepted practice between the Parties is that Employer contributions to deferred compensation are not made when an employee is receiving LTD payments.

The Union denies in a post arbitration letter dated February 7, 2012, that it ever conceded to a past practice that Employer contributions to deferred compensation are not made when an employee is receiving LTD payments. In fact, the Union states in their letter that the Union made it clear at the hearing that "this matter has never been brought to its attention before and, therefore, this is the first known violation of this language." As a result, the Employer failed to substantiate their claim, through any evidence, that the Union agreed to a past practice that Employer contributions to deferred compensation are not made when an employee is receiving LTD payments.

**AWARD**

Based upon the foregoing and the entire record, the grievance is denied.



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Richard John Miller

Dated February 21, 2012, at Maple Grove, Minnesota.