IN THE MATTER OF ARBITRATION	**OPINION & AWARD**
-between-	**Grievance Arbitration**
A.F.S.C.M.E COUNCIL NO. 65	**B.M.S. Case No. 11PA1070**
-and-	**Salary Step Increases**
THE COUNTY OF CARVER **CHASKA, MINNESOTA**	**Before: Jay C. Fogelberg** **Neutral Arbitrator**

Representation-

For the Union: Teresa L. Joppa, Staff Attorney

For the County: Pamela R. Galanter, Attorney

Statement of Jurisdiction-

The Collective Bargaining Agreement duly executed by the parties, provides in Article 8 for an appeal to binding arbitration of those disputes that remain unresolved after being processed through the initial three steps of the grievance procedure. A formal complaint was submitted by the Local on behalf of the Grievants on or about December 15, 2010, and thereafter appealed to binding arbitration when the parties were unable to resolve this matter to their mutual satisfaction. The under-signed was then

mutually selected as the neutral arbitrator by the parties, and a hearing convened on January 9, 2012, in Chaska, Minnesota. Following receipt of position statements, testimony and supportive documentation, each side a preference for submitting written summations. These were received on February 11, 2012, at which time the hearing was deemed officially closed.

At the commencement of the proceedings, the parties stipulated that this matter was properly before the Arbitrator for resolution based upon its merits, and while they were unable to agree upon a precise statement of the issue(s), it is believed that the following represents a fair description of the instant dispute.

The Issue-

Did the Employer violate relevant terms of the parties' Labor Agreement when it ceased to pay anniversary step increases to members of the bargaining unit after the parties reached impasse in negotiations over the 2010-11 contract? If so, what shall the appropriate remedy be?

Preliminary Statement of the Facts-

The record developed during the course of the proceedings indicates that the American Federation of State, County, and Municipal Employees,

Local 2789 (hereafter "Union," "A.F.S.C.M.E." or "Local") represents, all Assistant County Attorneys ("ACAs") who are classified as public employees within the meaning of Minn. Stat. 179.03, subd. 14, employed by Carver County ("County," "Employer," or "Administration"). There are currently three classifications for these employees: Assistant County Attorney I, Assistant County Attorney II and Assistant Count Attorney III. They provide a wide variety of legal services to the County, divided between three divisions: criminal, juvenile and civil. Together, the parties have negotiated a labor agreement covering terms and conditions of employment for members of the bargaining unit (Union's Ex. 1).

Historically, through the negotiations process, the parties established a salary grid (Joint Ex. 1; Appendix "A") which normally provides for an annual 4½% step increase. At the commencement of bargaining over the 2010-11 contract in June of 2009, however, the Employer indicated that they were seeking a "hard freeze" which meant that they were offering no increase to the salary schedule itself for the first year of the parties' new contract, and in addition, did not offer any step advancement on the schedule for 2010. Initially, as negotiations progressed, ACAs whose anniversary dates would occur, received the step increment unless they were at the top of the schedule. Negotiations were "placed on hold" for approximately

one year however, as the Employer attempted to achieve settlements with the three other bargaining units represented by A.F.S.C.M.E Council 65 in the County, prior to reaching an agreement with this unit. Consequently, bargaining resumed in earnest, in the fall of 2010. By that time three Assistant County Attorneys received step increases on their respective anniversary dates.

Following an unsuccessful attempt to resolve their remaining differences through mediation in November of 2010, the Bureau of Mediation Services certified four issues to impasse on November 30th of that year which included salaries (Employer's Ex. 4). Approximately one week later, the Administration notified the Union in writing, that they would no longer provide any within range (step) wage increases for unit members on their anniversary dates until such time as a successor agreement was implemented (Joint Ex. 2). Thereafter, a series of eight separate individual grievances were filed by those ACAs who were affected by the County's announcement, each alleging a violation of Articles XXII, XXVII, and Appendix "A" (*id.*) Eventually, the complaints were combined and appealed to binding arbitration for resolution.[1]

[1] The undersigned was also selected as the arbitrator to hear the parties' interest dispute and an award in connection with that matter was issued in August of 2011, prior to hearing the instant grievance.

Relevant Contractual , Policy & Statutory Provisions-

From the 2007-09 Master Agreement

Article XXII
Salary Rates

Section 1. Employees shall be compensated in accordance with the salary schedules attached hererto as Appendix A. Employees employed on the date of ratification of the Agreement by both parties shall be eligible for the negotiated wage and salary step increases.

* * *

Article XXVII
Term of Agreement

Section 1. This Agreement shall be in full force and effect from January 1, 2007 to December 31, 2009. Thereafter, the terms of the contract shall continue pursuant to the provisions of Minnesota Stat. 179A.20, subd. 6 (PELRA).

Appendix "A"

See Attachment

From the County's Published Personnel Policy Manual:

* * *

Procedure

*** * ***
Employee wage advancement shall occur I three ways; upon

> successful completion of the probationary period if the employee began work at the range minimum, on an annual basis, consistent with a pay for performance model or a specific percentage per year until the maximum of the range is attained, and at the time a general adjustment is implemented across the range….
>
> An employee hired or promoted after January 1, 2004 shall receive annual advancement within the pay range on the first day of the pay period following their anniversary date (original hire, demotion or promotion). Employees hired before that date shall receive annual increases on the first day of the first pay period in the calendar year.

From Minn. Stat. 179A.20 Contracts:

> * * *
>
> Subd. 6. **Contract in effect.** During the period after contract expiration and prior to the date when the right to strike matures, and for additional time if the parties agree, the terms of an existing contract shall continue in effect and shall be enforceable upon both parties.

Positions of the Parties-

The **UNION** takes the position in this matter that the County has violated Articles 22 and 27 as well as the negotiated Salary Schedule in the Contract, along with applicable statutory and policy provisions when they unilaterally ceased to pay anniversary step increases to members of the bargaining unit in 2010 on their respective anniversary dates. In support of

their claim, the Local maintains that both the continuing contract duration language found in Article 27 and M.S. §179A.20 subd. 6, mandate that the terms of the existing agreement continue in full force and effect until such time as a successor contract has been agreed to. In this instance, the Union argues that the Administration did in fact pay the 4½% annual step increase to three of the bargaining unit members prior to December 2010, when it announced that they were no longer going to provide any further step increases until the successor contract had been implemented. Moreover, they contend that the historical practice of the parties has been consistent: to pay the step increases to those eligible employees on their anniversary date regardless of the status of negotiations. According to the Local, prior arbitral decisions issued in the public sector in the state, support their view that an employer cannot simply pick and chose which contract provision(s) it will honor once the existing agreement has expired, as a negotiation tactic. Indeed, state law prohibits such conduct along with the County's own policies. Furthermore, in the Personnel Manual published by the Administration it specifically states that an employee hired after January 1, 2004, shall received their annual advancement within the pay range on the first day following their anniversary date. For all these reasons then, they ask that the grievance be sustained and that the Employer be directed to

implement and follow all terms and conditions of the Master Agreement during its current term and thereafter until a successor contract is either agreed to and executed by the parties, or otherwise ordered via an interest arbitration award. Additionally they ask that the County be directed to pay any and all future anniversary date step increases to members of the bargaining unit, even in the event that a successor agreement is not in place by the expiration date specified in the 2010-2011 contract, and until such time as a successor agreement is in place.

The **COUNTY** on the other hand, maintains that there has been no violation of the contract, the published policies of the Employer, nor applicable state statutes, when they suspended the payment of within range step increases until the terms of a successor agreement were determined. In support of their position, the Administration contends because a wage freeze was on the table as an issue in negotiations over the 2010-2011 contract, it was entirely proper for the suspension to be imposed. They assert that the instant facts differentiate this dispute from the past practice of the parties as it is the first time a wage freeze – including a step adjustment –was made a part of the issues certified by the Bureau of Mediation Services as being at impasse. Further, the County argues that the mediator appointed by the Bureau had represented to the parties that once

a certification was issued by BMS, it was entirely appropriate to discontinue step increases on an employee's anniversary date until such time as the new contract was settled. Additionally, the Employer argues that there is no language in the parties' labor agreement that mandates step increases be granted on an annual basis. The language found in Article 27, while obligating the continuation of the terms of the contract pursuant to PELRA until a new agreement is forged, therefore does not apply to this issue as there is no requirement expressed anywhere else in the document mandating annual within range increases. Further, the Administration urges that the language cited by the Union in the published policies cannot be read in a vacuum. When the two paragraphs found toward the beginning of the "Procedure" portion of the "Classification & Compensation" section are read together, it is clear that management acted properly in this instance. Finally, they maintain that the prior arbitration decisions cited by the Local in support of their position, are clearly distinguishable on the facts. For these reasons then, they ask that each of the grievances be denied in their entirety.

Analysis of the Evidence-

Distilled to the essential elements, this dispute centers on the Union's assertion that the County violated both the applicable terms of the parties' 2007-09 labor agreement as well as past practice when it unilaterally ceased paying anniversary step increases for certain members of the bargaining unit, once negotiations were declared at impasse, and the Employer's response that it was within their managerial right to do so, under the terms of PELRA, as well as the master contract.

Following a careful review of the relevant evidence and the respective arguments of each side, I find the Local's position to be more persuasive.

By law, as essential public sector employees in the state of Minnesota, these bargaining unit members are precluded from striking.[2] This fact is not in dispute. Neither is there any question but that during negotiations for a successor agreement to the 2007-09 contract – after that agreement had expired – several members of the bargaining unit who had past their anniversary date in 2010, received within range step increases of 4.5%.[3] It

[2] Minn. Stat. § 179A.03. subd. 7 includes the classification of assistant county attorneys, precluding them from the ability to strike.

[3] It was not until the interest award was rendered which favored the Administration's final position of no salary step adjustment for the first year of the successor contract, that these monies were rescinded.

was not until December of that year, that the Employer notified the Union that it would no longer provide within range wage adjustments for bargaining unit members, "….until the terms of the successor agreement have been determined" (Joint Ex. 2). In their letter to the Union, the County appeared to be relying heavily upon the advice of the BMS mediator utilized by the parties in an attempt to resolve their impasse. According to the Administration, the mediator indicated that the Administration was under no obligation to provide any further step increases until the interest arbitration process had been completed.

Article XXII of the parties' Labor Agreement references the Salary Schedule (Appendix "A") mandating that bargaining unit members be compensated "…in accordance with the salary schedules attached hereto as Appendix A" (Joint Ex. 1). That schedule calls for a 4½% wage increase at each step. No one disputes that a step is based upon one year's time. It is clear from the record that the past practice of the parties has been consistent: that assistant county attorneys who are not at the top of the schedule routinely receive the adjustment on their anniversary date. Indeed, the County's Employee Relations Director, Doris Krogman, acknowledged that each of the labor agreements for this bargaining unit that she has been associated with, have allowed for the continuation of this

compensatory process beyond the expiration of the master contract.

The County argues that since there is no provision contained in the Appendix that specifically provides how each employee moves through the salary grid, it is not relevant to the resolution of this matter. This allegation however, cannot withstand the well-demonstrated practice of the parties, nor the wording in Section 3 of Article 22 which makes reference to the "….normal step advancement increase."[4]

Further buttressing the Union's position is the language found in the Employer's own personnel policy manual (Local's Ex. 3) addressing the "Compensation Plan." That document addresses the compensatory system in place which includes designated pay grades and salary ranges. Particularly, as it relates to the instant dispute, it provides:

> "An employee hired or promoted after January 1, 2004 *shall receive* annual advancement within the pay range of the first day of the pay period following their anniversary date (original hire, demotion or promotion)…." (*id.*, at p. 2; emphasis added).

It is clear from a reading of this provision, that the normal process calls for annual advancement for employees hired after January 1st, 2004. While the Administration acknowledges the application of this language to the

[4] AFSCME witness Tom Haines, an Assistant County Attorney for the past ten years, testified without challenge that he has received a step increase on his anniversary date every year he has been with the County, except when he had been promoted to a higher classification.

current dispute, they attempt to support their actions by noting that ultimately there was no annual increase in wages for the Grievants in 2010 pursuant to the interest arbitration award. The infirmity of their argument however, lies in the fact that when they acted to withhold any further step increases in early December of 2010, there was not yet a new wage schedule in place for the bargaining unit calling for a 0% increase. Indeed that was not implemented for another eight months.

Additional evidence favoring the Union's position in this matter is found in the consistent testimony of a number of bargaining unit members called by the Local who recounted their common experience when going through the hiring process with the County. Each one indicated that when interviewed for the position of assistant county attorney, they were told they would receive annual step increases in pay. This representation from management is most consistent with Employer's Exhibits 1 -3 - the written offer of employment given to two Grievants in 2008 and one in 2010. In each, there is language which states: "The terms and conditions of your employment *will be governed* by the Carver County Personnel and Administrative Policy Manuals and the AFSCME collective bargaining unit agreement" (*id.*; emphasis added). It takes no quantum leap of faith to conclude that these members of the bargaining unit relied upon the

representations of the Administration put forth in the hiring process, in the written offers extended to each of them, and in the applicable written policies, when making their decision to accept the position.

Article 27 "Term of Agreement," *supra*, has also influenced the decision reached here. As previously noted it mandates that the "terms of the contract" are to continue following the expiration of the contract if a new one in not in place, pursuant to the terms of the Public Employment Relations Act (PELRA). M.S. §179A.20 calls for the terms of an existing contract to continue in effect past its stated expiration and "prior to the date when the right to strike matures." As the County has argued, it is undisputed that the "right to strike" does not apply directly to essential employees under state law. Rather, for those so classified impasse, as declared by the Commissioner of the Bureau of Mediation Services, is the equivalent. The Employer maintains that because the declaration of impasse triggers the limiting language found in the statute regarding "contract in effect," they were free to stop paying in-step wage increases to the bargaining unit members as of November 30, 2010 – the date the Commissioner declared impasse - absent an agreement by the parties to continue the terms and conditions of the expired agreement.

I cannot agree with the County's argument.

Under M.S. §179A.16. subd. 2, the certification of impasse by the BMS Commissioner determines which issues are to go to interest arbitration after good faith bargaining and then mediation, have failed to bring about a settlement. I find insufficient proof that the term "impasse" as used in the Act conveys no more authority to an employer to change a terms and condition of employment pending the outcome of an interest arbitration proceeding, than does the "right to strike" maturing under §179A.18. The Local's position in this regard is compelling. The only thing the term "impasse" under the statute provides to either party is the right to argue their respective case on designated issues, as certified by the Bureau, to an interest arbitrator. Impasse is not the end of the contract as a whole, nor the end of the contract in part.

Two recent arbitral decisions involving the Minneapolis School District, where the employer attempted to deny step and lane increases to its bargaining unit members (albeit non-essential employees), support the conclusion reached here. In both instances, Arbitrators Imes and Jacobs held that the District was bound to continue to abide by the expired agreement until a new contract was negotiated. *B.M.S. Cases 10-PA-0859,*

and10-PA-1133. In the latter decision, the arbitrator noted that the Employer had honored all of the terms of the expired agreement save one - step increases. In sustaining the grievance, Jacobs ruled that the District could not "pick and chose which contractual provisions they would honor and which they would ignore" (at p. 18).

The facts surrounding the instant dispute are not all that dissimilar. Here, the Administration determined that they would discontinue salary increases in light of the declaration of impasse from the Bureau and with the support of the mediator. The representations attributed to Mr. Wiesenberger however (who was not present to testify) cannot be credited here as they fall under the exclusionary rule of hearsay. More importantly, the actions of the County convey an intent not at all unlike the Minneapolis School District's. Significantly, while health insurance was an issue also certified by the Commissioner as being at impasse on November 30, 2010, it was not affected by the Administration beyond that date. Rather, the evidence demonstrates that it, and the balance of the 2007-09 agreement, continued in tact until the interest arbitration was conducted and a decision rendered. In effect, the Employer's moratorium on within range wage adjustments for bargaining unit members that went into effect on or about December 7th of that same year, amounted to "cherry-picking." It is my judgment that

neither the spirit nor the intent of PELRA allows the employer to continue to recognize some of the provisions in the contract past their expiration date (or the declaration of impasse for essential organized personnel), while at the same time discarding others. The declaration of impasse is neither the end of the contract as a whole, nor the end of it in part. Just as the Minneapolis School District could not be selective in their enforcement of the expired agreement due to a lack of a successor contract in 2010, neither can the County here pick one or more provisions of an essential employee agreement to ignore or alter during negotiations - even at the point of impasse.

Finally, the language contained in the non-discrimination provision of the parties labor agreement, in Article V ("Employer Authority"), would seem to further advance the Grievants' claim. There, in Section 3, is language mandating that the Employer administer the terms of the contract "...to all members of the units fairly and without discrimination." Arguably, when the County granted step increases to some employees on their anniversary date in 2010, but then denied step increases to other Assistant County Attorneys after December 7th of that year, its actions were discriminatory resulting in an unfair application of the contract.

Award-

Based upon the foregoing analysis of the evidence, I find the Union has aptly demonstrated that the Administration's actions were in violation of the parties master contract and the intent of the Public Employment Labor Relations Act. The Administration failed to adhere to all of the terms and conditions of the 2007-09 agreement beyond its expiration date while a successor contract was not yet in place, when it refused to pay the anniversary date step increases to eligible members of the bargaining unit.

The grievance is therefore sustained.

No specific monetary remedy is contemplated here however, as a consequence of the decision reached. This is due to the fact that the interest arbitration award issued in August of last year by the undersigned, *B.M.S. Case 10-PN-423*, favored the Administration's final position that there was to be no step increase paid to bargaining unit members for the first year of the new contract (2010).

Respectfully submitted this 28th day of February, 2012.

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Jay C. Fogelberg, Neutral Arbitrator