

IN THE MATTER OF ARBITRATION BETWEEN

AFSCME COUNCIL 5)	
	“Union”)
)	Annual Step Increase
ST. LOUIS COUNTY)	Issue
	“Employer”)

BMS Case No. 12PA0406

NAME OF ARBITRATOR: John J. Flagler

DATE AND PLACE OF HEARING: February 29, 2012; St. Louis County Courthouse

DATE OF RECEIPT OF POST-HEARING BRIEFS: March 9, 2012

APPEARANCES

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THE ISSUE

Did the Employer violate the contract when it moved the Grievant’s step increase date forward three months to account for the Grievant’s unpaid parental leave of absence?

BACKGROUND

The Grievant, Renae Darland, served as an Attorney 1 Class from date of hire on July 7, 2004 and was promoted to Senior Attorney Class on January 1, 2010 – the position she currently holds. The County awarded her the probational annual step increase some three months later on March 26, 2011 pursuant to the interpretation of Article 7, SALARIES, PAY DATES which provides that:

Employees in the Senior Attorney classification upon receiving a work performance rating of competent shall receive an increase in pay equal to the next step in the applicable pay plan attached hereto at the beginning of the pay period that includes the first of the month following one (1) year of service; two (2) years of service; three (3) years of service; and four (4) years of service. For the purposes of annual step increases, the reference to “years of service” refers to years of service in the Senior Attorney classification.

The County summarized its version of the above provision as follows:

Renae Darland

Date	Event
7-Jul-04	Hired into Attorney 1 Class
1-Jan-10	Promoted into Senior Attorney Class
6-Jan-10	FMLA – Paid
31-Mar-10	Parental Leave – No Pay
12-Jul-10	Return from Unpaid LOA
26-Mar-11	Step Increase

Stepping Information

Annual step increases are based on service in the current class. Ms. Darland’s eligibility for annual step increases is based on her last promotion date. Annual step dates are adjusted forward for each full calendar month of no pay. In Ms. Darland’s case, she had one full calendar month of no pay for each of the following months: April, May, and June of 2010; therefore her 2011 step increase was moved forward by 3 months, from January 1, 2011 to March 26, 2011.

POSITION OF THE UNION

The answer to the question: “Did the Employer violate the contract when it moved the Grievant’s step increase date forward three months to account for the Grievant’s unpaid parental leave of absence?” is found in the applicable contract, the 2008-2009 Assistant County Attorney’s Unit Contract.

That contract, under Article 7, Section 3, states in part, “Employees in the Senior Attorney classification upon receiving a work performance rating of competent shall receive an increase in pay equal to the next step in the applicable pay plan attached hereto at the beginning of the pay period that includes the first of the month following one (1) year of service; two (2) years of service; three (3) years of service; and four (4) years of service. For the purposes of annual step increases, the reference to “years of service” refers to years of service in the Senior Attorney classification.”

With the exception of the issue before the arbitrator, the applicable contract language has been consistently interpreted and applied to all bargaining unit members covered by this contract as it reads – clear and simple.

The Employer bases its argument on testimony and exhibits that do not apply to the Grievant and are therefore irrelevant such as “examples” pertaining to Basic Unit and Unclassified employees not covered by the 2008-2009 Assistant County Attorneys Unit Contract (Employer Exhibits 4 and 5 (Administration). The remaining Employer exhibits offered, with the exception of Employer Exhibit 5 (Attorneys), do not apply to the bargaining unit nor to the period in question (i.e., Employer Exhibit 8, Civil Service Rules as Revised July 6, 2010, do not apply either).

There is agreed upon contract language under other forms of leave (Sabbatical) which prohibit employees from accruing seniority and benefits under these other forms of leave. However, no such language exists under Parental Leave (Article 19, Section 3) or under Article 7, Section 3 regarding step increases.

There is no applicable contract language or practice permitting the Employer to move the Grievant’s step increase date forward three months to account for the Grievant’s unpaid parental leave of absence. The Employer has never taken such action when other bargaining unit members have taken such leave (Employer Exhibit 5, Attorneys).

There is a clear attempt by the Employer to get something through arbitration that does not exist in the current contract and prohibited under Article 20, Grievance Procedure which states: “The arbitrator shall have no right to amend, modify, nullify, ignore, add to, or subtract from the provision of the Agreement. The Arbitrator shall consider only the specific issue submitted to the arbitration in writing by the Employer and the Union, and shall have no authority to make a decision on any other issue not so submitted to the arbitrator. The arbitrator shall be without power to make decisions contrary to or inconsistent with or modifying or varying the application of laws and rules and regulations having the force and effect of law. If the arbitrator finds that the grievance concerns matters not covered by this Agreement or the procedures constrained herein have not been adhered to, the arbitrator shall return the matters to the parties without decision...Any decision shall be based solely upon the arbitrator’s interpretation of the meaning or application of the express terms of this Agreement to the facts of the grievance presented.”

POSITION OF THE COUNTY

Article 7, Section 3 of the contract provides that an employee is eligible for a step increase following “one (1) year of service.” Literally, an unpaid leave is not “service.” The Union failed to suggest any plausible reason why an unpaid leave of absence could be deemed service.

To read the contract as the Union suggests would require the arbitrator to ignore the words “of service.” Such a reading would violate a cardinal principle of contract interpretation, reiterated in Article 20, Step 4 (Exhibit 13, p. 16) that the arbitrator cannot ignore a provision of the contract. The contract must be read to give meaning to all provisions, including the phrase “of service.”

The Employer’s interpretation is consistent with the purpose of having an unpaid leave provision in the contract. The purpose of the unpaid leave benefit is to provide job security, not to increase earnings. The Grievant did not earn salary, vacation or sick leave during the leave, none of which was grieved, so neither logic nor the purpose of the unpaid leave benefit would support the Grievant earning credit toward step advancement during the leave.

To the extent the term “one year of service” may be ambiguous, negotiations history confirms that the intended meaning of the language supports the Employer’s action.

The Assistant County Attorneys are unclassified employees. A County Board resolution provided that unclassified employees were to receive the same fringe benefits as the County’s largest unit, the Civil Service Basic Unit (CSB). The consistent County practice for all employees is to move the step eligibility date forward one month for each full calendar month of unpaid leave. The same practice applies regardless of whether the unpaid leave is an unpaid parental leave of absence or other permissible unpaid leave of absence. Numerous examples were cited from the CSB (Exhibit 4) as well as from the unclassified service.

The Assistant County Attorneys unit (ACA) organized in 2007, selecting as its representative AFSCME, the same as the CSB. Melissa Honkola testified that she participated in the contract negotiations on behalf of the Employer. She stated that the unpaid leave of absence language was contained in the original Union contract proposal and was taken from the CSB. She confirmed that the 2007 ACA contract, Article 19, Section 3, is verbatim of the same provision in the 2006-2007 CSB contract. She also confirmed that the “year of service” requirement for step advancement in the 2007 ACA contract is the same as the requirement for step advancement in the CSB contract.

The unpaid leave proposal and the term “year of service” were not discussed in the negotiations because they already existed in the CSB. The Union never expressed any intent that the leave of absence or the “year of service” language would have any different meaning in the ACA contract than it did in the CBS contract.

The Grievant also participated in the 2007 negotiations, as a member of the Union negotiation committee. The Grievant did not controvert Honkola’s testimony that the Union

never indicated an intent to have the contract language mean anything different than its meaning in the CSB and its meaning as applied to the Assistant County Attorneys before they organized.

The Union had an obligation to disclose to the Employer if it intended the “year of service” unpaid leave of absence language to have a different meaning. Because the Union did not disclose that it intended a different meaning for the language, the Employer was entitled to apply the established meaning. If the Union wishes to change the meaning, it can propose to do so in future contract negotiations.

The Union argues that the arbitrator should consider only the express terms of the contract without consideration of negotiations history. The Union intends to rely on the “complete agreement” provision of the contract in support of this argument. However, the Employer’s interpretation of the contract is not dependent on adding language to the contract. Rather, it is a matter of giving literal interpretation to the phrase “year of service” and of clarifying any possible ambiguity in the term through reference to negotiations history.

The Union also suggested that the arbitrator should employ the principle that to express one thing implies the exclusion of the other, citing Article 19, Section 4, the section on sabbatical leave, which expressly provides that the employee shall not accrue seniority, vacation or sick leave on sabbatical leave. The Union would argue that no such language appears in the preceding section, Article 19, Section 3.

Section 4 makes no reference to the impact of a sabbatical leave on an employee’s step date but like other unpaid leaves, a sabbatical leave also results in the step date being advanced one month for each full calendar month of unpaid leave. (See the CSB Exhibit 12). Honkola also testified that the sabbatical leave section, like the parental leave section, came into the contract as part of the original Union proposal, was the exact same language as was already found in the CSB contract and that there was no discussion of an intent for the meaning of the language to be any different than it was in the CSB.

Finally, the Union requested more information regarding a part-time employee, Stacey Sundquist, which the Employer provided subsequent to the hearing. The information confirmed that Stacey Sundquist did not take an unpaid leave of absence extending over one full calendar month or more. More importantly, however, the information confirmed that as a part-time employee, Stacey Sundquist was required to work 1950 hours before receiving a step increase, as required by the contract. The contract is thus consistent in requiring both part-time and full-time employees to render a year “of service” before being eligible for a step increase.

DISCUSSION AND OPINION

The function of the arbitrator presented with a dispute involving contractual ambiguity requires that the ambiguity be resolved by discerning the purpose and intent of the parties’ bargain. To do so, arbitrators commonly rely on the traditional principles of interpretation or canons of construction drawn from contract law.

In the instant case, the entire matter turns on the meaning the parties appear to have contemplated when they agreed to condition the annual step increase in the Senior Attorney classification on competency and completion of the stated number of year(s) of service. Unsurprisingly, both parties assert that the term of art “year(s) of service” conveys the clear and plain meaning which favors their competing interpretations.

Such competing interpretations constitute the core meaning of ambiguity, i.e., “Language in contract is ambiguous when it is reasonably capable of being understood in more than one sense.”¹ The Union herein confidently asserts that the disputed language means the completion of the stated calendar period of time that the Grievant has continued in employment in the Senior Attorney classification. With corresponding absence of doubt, the County tolls the required period of eligibility as the time actually involved in the performance of assigned duties in the Senior Attorney job.

Several principles of interpretation as applied to resolution of ambiguity disputes prove helpful to determining the intent and purpose of the critical terms “year(s) of service” as these appear in Article 7, Section 3. The provenance of the subject language which commences with the adoption of the LEAVES OF ABSENCE, Article 20, Section 3, Parental Leave provision that was proposed by the Union in the parties’ initial collective bargaining agreement. This provision, drawn from the terms of the County’s largest employee unit contract with the Civil Service Basic Unit (CSB) which describes the practice of moving step eligibility dates forward one month for each full calendar month of unpaid leave – specifically for employees on sabbatical leave.

The Union argues that the absence of similar preclusive terms in the Parental Leave section should be read as the intentional purpose of the parties to include such leave time off as qualifying for the step increase, thereby signifying that the County improperly delayed the Grievant’s date of step increase three months to account for her three month parental leave in its “year of service” calculation.

The Union’s position ignores the fact that when the parties adopted the LEAVES OF ABSENCE provision directly from that contract covering CSB employees they did not move mere words from one document to another. Instead they appropriated the intent and purpose of those terms as consistently applied to the employees affected. Indeed, if the Union in proposing this adoption of the CSB language meant it to be given a new and different application, it had an obligation to make certain such departure from the original was clearly stated. No evidence that the Union ever distinguished such a different purpose was produced in the instant case.

Accordingly, the evidence presented by the County in its Exhibits 4 and 5 of consistent practice under its interpretation of “year of service” firmly supports its position of tolling one month of eligibility credit for each full month of actual job performance as the intent and purpose of the bargain as revealed both in negotiations history and past practice.

Lest any doubt remain after consideration of bargaining history and past practice, the traditional principles of interpretation advise careful study of the context of disputed language,

¹ Black’s Law Dictionary, 5th ed., West Publishing, St. Paul, 1979.

sometimes referred to as the canon of noscitur in sociis, or the understanding of contract language by the “company” it keeps. Accordingly, it must be observed that the labor agreement mentions two tests which must be met in order to qualify for the annual step increase: (1) The employee must demonstrate competence, and (2) must complete the service year before the annual step becomes payable.

The combination of both qualifying standards to be met prior to the salary increase indicate that the Grievant’s performance needed to be evaluated for the service year preceding her award of the commensurate step adjustment. The qualifying evaluation rating language makes clear that competence refers to a “work performance rating.” Certainly, in cases where an employee is granted the maximum parental leave period of six months, only the remaining six months of actual work performance would remain to be evaluated for the annual step increase qualifying rating of competent. This would be an absurd result.

In the Grievant’s case, there were but nine (9) months of work performance available to determine whether she qualified for an annual rating of competent. Whether three months or six months the proposition that an annual evaluation of work performance can legitimately stand as a valid rating when made on less than a full year lacks contractual support. Collective bargaining agreements must be read so as to avoid harsh or absurd results. The Grievant’s position of the required length of the work performance evaluation period fails this well traveled principle of interpretation.

Stated differently, “year of service” subsumes that the contractual test of competence covers a full year of work performance evaluation. Obviously, the competence of an employee cannot be evaluated during a period when the employee was absent from the workplace on an approved leave of absence.

This review ought not close without comment on the Union’s blanket claim of irrelevance in regard to the language of comparable leave of absence language in the CSB and the practice well known to the Union when such language, usually verbatim, was proposed by the Union and incorporated into the governing collective bargaining agreement.

Why are these facts relevant although drawn from a contract other than the governing labor agreement? The short answer can be found in the well established test of evidentiary relevance as:

...Its probative value in relation to the purpose for which it is offered.²

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Evidence having any tendency to make existence of any proposition that is of consequence to the determination of the dispute more probable or less probable than it would be without the evidence.

Fed. Evid., p. 401

Reliance on the foregoing tests of relevance firmly support the County’s evidence of a prior mutual acceptance of the CSB leave language and practice as appropriate for inclusion in

² Id.

the parties' current labor contract. This negotiations behavior certainly casts light on the intent and purpose of the governing labor agreement and not only is relevant such bargaining history and practice is dispositive.

As further evidence of the parties intent to exclude any form of benefit such as credit towards fulfilling the requisite year of service, it should be noted that no sick leave, vacation, or other compensation was paid the Grievant during her three month parental leave. This face reinforces the County's argument that the intent of this particular leave provision is simply to guarantee that employees who take parental leave will have their jobs available to them upon completion of their leave.

In sum, the unpaid parental leave provision is strictly a job security protection clause and in no sense was it ever used to provide any other benefit to an employee.

DECISION

The grievance should be and is, hereby, denied.

March 15, 2012
Date

John J. Flagler, Arbitrator