

IN THE MATTER OF ARBITRATION

OPINION & AWARD

-between-

Grievance Arbitration

TEAMSTERS UNION, LOCAL 320

B.M.S. Case No. 12PA405

-and-

Re: Contract Duration

**STATE BOARD of PUBLIC DEFENSE
MINNEAPOLIS, MINNESOTA**

**Before: Jay C. Fogelberg
Neutral Arbitrator**

Representation-

For the Union: Trevor S. Oliver & Patrick J. Kelly, Attorneys

For the Employer: Thomas R. Trachsel, Attorney

Statement of Jurisdiction-

The Collective Bargaining Agreement duly executed by the parties, provides in Article 10 for an appeal to binding arbitration of those disputes that remain unresolved after being processed through the initial two steps of the grievance procedure. Two formal complaints were submitted by the Local on behalf of the Grievants on or about July 15 and 20, 2011, and thereafter combined and appealed to binding arbitration when the parties were unable to resolve both disputes to their mutual satisfaction. The under-signed was then

mutually selected as the neutral arbitrator by the parties, and a hearing convened on June 12, 2012, in St. Paul. Following receipt of position statements, testimony and supportive documentation, each side expressed a preference for submitting written summations. These were received on July 18, 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) the following is believed to fairly describe the nature of the dispute.

Statement of the Issue-

Did the Employer breach Articles 17, 18 and/or 33 (support staff contract) or 34 (public defenders contract) of the parties' 2009-2011 agreements when, after both contracts expired on June 30, 2011, the Employer declined to resume step increases or lump sum stability payments for bargaining unit employees upon reaching their next anniversary date of employment or for those who are at the top of their position's salary range on or after July 1, 2011? If so, what shall the appropriate remedy be?

Preliminary Statement of the Facts-

The record developed in the course of the proceedings demonstrates that the Board of Public Defenders ("Employer," "Board" or "Agency") is a state judicial agency providing criminal defense services to indigent defendants in Minnesota. The Board is comprised of ten judicial districts in addition to the appellate office and the administrative services office which serves as the administration for the Agency. There are two bargaining units who have labor agreements with the Employer who have been represented by the Teamsters Public & Law Enforcement Union Local 320 ("Union," or "Local") since 1999. The assistant public defenders (estimated to be approximately 360 working for the Board) are divided among the ten district offices as well as the appellate office, and the support staff unit which is comprised of approximately 150 employees classified as investigators, paralegals, and legal secretaries.

As a state agency, the Board's fiscal year mirrors the state's, running from July 1 of through June 30 of the following year. Other than the first set of contracts executed by the parties following the two bargaining units' certification, all subsequent agreements for both have had identical two year terms with effective dates that parallel the state's biennium. The last pair of contracts executed by the parties

commenced on July 1, 2009, with an expiration date of June 30, 2011 (Joint Exs. 1.1 and 1.2). Pursuant to the language in the “Duration” clauses of both, *infra*, all terms and conditions of employment contained in the agreements, including compensation, are to remain in effect until successor contracts are put into effect.¹

From nearly the beginning, the parties have included a compensatory schedule that paid members of both bargaining units based upon their years of service. Provided they received satisfactory annual job evaluations, these employees were eligible for a “one-step advancement” effective on their anniversary (seniority) date. This language has remained essentially unaltered in each succeeding contract.

In light of the financial hardships visited upon the state in more recent years as a result of the national recession, the Union and the Board agreed to new language to the assistant public defenders’ agreement in Article XVII (“Salaries”), and to the near identical article contained in the support staff unit’s contract (Article XVII) for the 2009-11 contract term, which says: “Notwithstanding the language in the previous paragraph (guaranteeing annual step increases with a satisfactory evaluation) there shall be no step or cost of living increases

¹ For purposes of this Award, the reference to applicable contract language and the facts surrounding the two disputes are essentially identical for both bargaining units.

for fiscal year 2010 and 2011.” A similar provision was added to the “Stability Pay” Article (XVIII) which suspended the lump-sum payment to employees who had reached the top of the salary schedule. Accordingly, there were no wage increases for either unit during the time period specified.

Consistent with the language in Article XXXIV (“Duration”) after June 30th of last year, the terms of both contracts remained in effect as no new 2011 – 2013 was in place by that date.² The Board interpreted the duration language to mean that neither step increases nor stability pay was to resume on July 1, of last year, but rather that the wage freeze was to continue until such time as new contracts were in place for both bargaining units. In response, the Union submitted two separate class action grievances (Nos. 4796 & 4797) shortly thereafter alleging a violation of Articles 17 and 34 (33 in the support staff agreement) and seeking “immediate granting of step increases” for all eligible employees on their anniversary (seniority) date (Joint Exs. 2.1 & 2.2). Eventually, the complaints were paired and appealed to binding arbitration for resolution, when the parties were unable to resolve their differences at the intermittent steps of the grievance process.

² As of the date of this writing, the parties remain at impasse over a successor contract.

Relevant Contract Provisions-

Article XVII
Salaries

17.1 Salary Ranges

Each employee is assigned to a specific position and at a step on the salary range for that position at the time he or she is hired. Progression through the salary scale shall occur with a minimum on a one-step advancement on the anniversary of the employee's seniority date, provided that the employee has received a satisfactory evaluation for the proceeding year.

Notwithstanding the language in the previous paragraph there shall be not step or cost of living increases for fiscal year 2010 and 2011.

Article XVIII
Stability Pay

Stability pay is an annual, lump-sum payment paid to full – time employees who have reached the top salary limit available in their job's salary range and who are not eligible for step increases. A stability payment of nine hundred dollars (\$900) will be made following the employee's anniversary date for those employees who are at the top of their position's salary range, have received a satisfactory performance evaluation, and are not eligible for any further step increases. Stability pay is available to all full-time employees hired prior to July 1, 1999.

Notwithstanding the language in the previous paragraph there shall be no stability pay for fiscal year 2010 and 2011.

* * *

Article XXXIV
Duration

The Agreement shall remain in full force and effect for a period commencing July 1, 2009 through June 30, 2011. In the event a new agreement is not in effect after June 30, 2011, all compensation, working conditions and benefits shall remain in effect as set forth in this Agreement until a successor agreement is effected.

Positions of the Parties-

The **UNION** takes the position in these matters that the Employer violated the express terms and conditions of the parties' labor agreements covering the assistant public defenders and the support staff when they unilaterally determined that the step increases and lump sum stability payments would not be made to the Grievants who reached their anniversary dates after July 1, 2011. In support of their claim, the Local contends that the clear and unambiguous language contained in Articles 17 and 18 of the agreements, mandates that the step increase freezes negotiated by the parties were specifically limited to fiscal years 2010 and 2011. Once June 30, 2011 passed the members of both bargaining units were entitled to receive the step and longevity adjustments pursuant to the duration clause found in Article XXXIV which called for compensation and benefits to remain in effect beyond the expiration of the agreements in the event no

successor contracts had been effectuated by that time. The Union notes that the Employer has otherwise honored this language as every other provision in the 2009-11 contracts have been continued past June 30th of last year. Further, they posit that the step increases were placed into the master agreements in 1999, and were the driving force behind organizing these employees. Step increases were at the heart of the salary schedules which brought equity to the compensatory systems for these two bargaining units, and were the absolute reason why the employees were organized in the first instance. In addition, the Local asserts that the step freeze language begins with the critical word “notwithstanding” clearly indicating that an exception was being made to what has historically been the automatic nature of annual step adjustments for both bargaining units. The 2010 and 2011 suspension was obviously intended to be finite. Thus once the exact time period for the freeze expired, the step adjustments were to resume – regardless of whether or not successor agreements had been executed. For all these reasons then, they ask that the grievances be sustained and those who qualify for an adjustment to their salaries under Article 17 and/or 18, be made whole.

Conversely, the **AGENCY** takes the position that there has been no violation of the terms of the two 2009-11 labor agreements as a

result of the continuation of all terms of those contracts past their expiration. In support, the Employer maintains that the clear language in the relevant provisions of those two contracts called for no step increases. They argue that no step increases or stability payments were made during the life of those agreements as that is precisely what the parties had negotiated in 2009. Consistent with the mandate plainly set forth in the duration articles, the Board merely continued to administer the terms and conditions of those agreements as they had prior to their expiration. The Agency urges that there is no inherent right to step increases or to stability payments. Rather, they are creatures of the contracts. In order to demonstrate that the Grievants are entitled to this additional compensation, the Union needs to prove that the clear and unambiguous contract language requires the Agency to resume step increases/longevity payments following June 30th of last year. However, according to the Board, no such language exists which automatically reinstates granting step increases or stability pay once the agreements had reached their expiration dates. If that was the Union's intent, they could have appended language to the applicable provisions which would have called for the resumption of such payments effective July 1, 2011, in the event a successor agreement was not in place by then. That however, was not

accomplished. Finally, the Agency argues that the duration clause lends further support to their position as it mandates "all compensation" was to remain in effect as set forth in the expired contract pending new agreements being executed. The compensation in effect as of July 2, 2011, included a freeze on step and stability pay. Thus, consistent with that language, the Employer continued the status quo past the expiration dates. For all these reasons then, they ask that the grievances be denied in their entirety.

Analysis of the Evidence-

Even the most cursory examination of the evidence quickly reveals that this dispute centers on the step freeze provisions for fiscal years 2010 and 2011 appended to Articles XVII and XVIII, along with the duration clause found in Article XXXIV of both contracts. As it is a contract interpretation dispute, the burden of proof lies with the Grievants to demonstrate via a preponderance of the evidence that with the expiration of both agreements on June 30, 2011, the Employer was obligated to resume step increases or lump sum stability payments for bargaining unit employees upon reaching their net anniversary date.

A number of salient facts have been established on the record that warrant mention. More specifically:

- Both collective bargaining agreements remain in effect between the parties pursuant to applicable statutory law and the terms set forth in the duration clause.
- In the past, members of the bargaining unit have continued to receive insurance, holiday, vacation allowances, and other benefits specified in the contracts since July 1st of last year.
- Throughout the history of their collective bargaining relationship, the employees covered by the two agreements have generally received their step increases (provided they qualified for same) during both contract's continuation periods even if their anniversary date fell beyond the specified expiration date of the agreements (Union's Exs. 16-19).
- Adjustments in wages resulting from a higher pay scale in a succeeding agreement executed after an employee's anniversary date, have been paid retroactively upon settlement of the new contract.
- Both Chief Administrator Kevin Kajer, and Union Business Agent Kari Seime testified that it is not common for the parties to include any reference to years following the stated term of the agreements beyond the duration specified in either one. Rather, the focus has always been on the terms and conditions of the contract(s) being negotiated at the time.
- The Union and the Board alike, claim that the applicable language found in the two contracts is clear and unambiguous, supporting their respective positions.

In their closing written summary, the Local accurately articulated what I believe lies at the very core of this dispute. That is, the sentence

the parties crafted and appended to Articles 17 and 18 (Salaries & Stability Pay) *supra*.³ “Notwithstanding the language in the previous paragraph, there shall be no step or cost of living increases for fiscal year [sic] 2010 and 2011.”

Were consideration of the evidence limited to the newly-appended sentence found at the bottom of both Article XVII and XVIII, the position taken by the Union here might well have been most persuasive. Read in a vacuum, it would appear that the clear wording of the additional language indicates a definitive sunset (fiscal year 2011) which in turn, could trigger the application of the balance of both sections thereby entitling those eligible bargaining unit members a step increase or longevity payment if their anniversary date fell outside the stated term of the contract.

When both parties to an agreement maintain that the language in issue is clear on its face, yet at the same time espouse conflicting interpretations, this fact alone can lead to a finding of ambiguity. Furthermore, each individual provision, standing by itself, may appear

³ The Employer attempted to argue that pursuant to the terms of the grievance arbitration clause in the Agreements, the arbitrator is precluded from considering any issue not specified in the original written submission of complaint. Accordingly, they maintain that there should be no consideration of the stability pay language in Article 18, as that was not referenced in the Union's grievance. This position however, ignores the fact that throughout the hearing and in both parties' written summary briefs, the question of continuation of stability pay has consistently been addressed and argued along with the issue of step increases. Absent a stipulation on a precise statement of the issue(s) and in light of the record therefore, this decision and award will not be so limited.

clear and definitive, yet the result of the entire contract, when considered, may lead to a different conclusion should the various parts appear to lack complete harmony. Such is the case here.

It is the duration article, when paired with the “notwithstanding” clauses in Articles 17 and 18, that in my judgment, controls the outcome of this dispute. It is not ambiguous and falls four square on the facts surrounding this matter. In plain and clearly written language crafted by the parties, it mandates that in the event a new contract has not been effectuated by July 1, 2011, then “*all* compensation, working conditions and benefits *shall remain in effect....until a successor agreement is effected*” (emphasis added). The inclusion of the relatively broad adjective “all,” and the mandatory verb “shall” leave little room for doubt. During the designated term of the agreements the bargaining unit members were not receiving step increases or stability pay consistent with the mandate of the “notwithstanding” clause. This fact is undisputed. Then, on July 1st of last year, the “working conditions and benefits” set forth in the contract continued to be administered as status quo. With the commencement of the 2009-11 contract, none of the employees received a step increase or cost of living adjustment. Again, a fact not in dispute. The terms of the employees’ compensation addressed in Articles 17 & 18 –

no step increases and no stability pay – that were in effect prior to the expiration date, have been carried through in the exact same manner beyond June 30, 2011. This is most consistent with the clear language in Article XXXIV, and most supportive of the position taken by the Agency here. Indeed, the Union itself has accurately observed that both contracts, though past their stated term, have, pursuant to the duration clause, continued in full force and effect until the parties complete a successor agreement.

Had the additional sentence put into both compensation articles not been included, and had the Board then attempted to put a halt to progression on the salary schedule or longevity pay effective July 1, 2011, a different ruling would most likely have resulted similar to what occurred in BMS Case No. 11-1070, *A.F.S.C.M.E. Council 65 and Carver County*. There I found that the county's failure to pay anniversary step increases to eligible members of the bargaining unit following the expiration of the labor agreement but prior to the execution of a successor, violated both the terms of the master contract as well as the intent of PELRA. That is distinguishable from the instant dispute however, as there was no similar freeze provision halting step adjustments and longevity pay to be considered.

The Union has countered that the problem with such a plain-language interpretation is that even though the start and end dates set out in the compensatory articles and the duration language, may correlate, that fact alone has no bearing on the interpretation of the “notwithstanding clause.” If this exception is interpreted to mean “duration of the contract” they assert, then the language defining step increases and stability pay never come into effect, thereby rendering them surplus.

The Union’s argument however, essentially ignores the negotiations that led up to the execution of the 2009-11 agreement. It is undisputed that the Employer came to the bargaining table seeking to do away with automatic step increases (Agency’s Ex. 14, Union’s Exs. 11 & 12; testimony of Kajer). The Union however, insisted on retaining this core language which was clearly important to its members. Indeed, it has been included in nearly every contract negotiated by the parties. The eventual compromise that was agreed to thus retained the provisions consistently found in Articles 17 & 18 but with the stated exception contained in the “notwithstanding” clause.

At first glance it might not be unreasonable to conclude, as the Local contends, that enforcement of the exceptional language beyond the expiration of the contract renders the balance of both

articles essentially meaningless. A closer examination of the bargaining history however, and the unrefuted fact that core language providing for step increases and stability pay have, quite understandably, always been something of a “sacred cow” for the Union, help explain why they were not about to eliminate either of those provisions altogether. Anyone involved in the negotiation process is well aware of the fact that it is most difficult to bargain language back into an agreement that has been previously eliminated. The compromise reached in this instance reflects that understanding. Although the added sentence froze step adjustments and cost of living increases for the term of the contract, it is equally clear that the Local was not about to abandon these important salary provisions altogether. This would explain, in part, why the “notwithstanding” sentence is couched in terms of a specific period of time. In my judgment however, it does not signify that the same clause should be carved out as an exception to the clear wording in, and scope of, the duration article.

Finally, the events surrounding the stability pay language in the FY 2006-07 contracts warrant mention. As the Union points out, in that instance the parties agreed to suspend stability pay for fiscal years 2006 and 2007 - the term of the contract (Union's Ex. 18). The succeeding agreement was not executed until April 2, 2008, well

beyond the stated expiration date of that agreement. Nevertheless the Employer resumed stability payments to eligible employees on their anniversary dates, regardless of the lack of a new contract beyond June 30, 2007.

The Union maintains that the events of 2007 demonstrate the Board had interpreted that agreement exactly as the Local argues it should be construed in the instant dispute, thereby supporting their position here. A closer examination of the events surrounding those payments however, indicate that it was an aberration as much as anything else. Kajer offered essentially uncontested testimony that during negotiations surrounding that contract, a major structural change to the salary schedule for assistant public defenders was agreed to by the parties. Those changes included the removal of two steps, along with an inordinate increase in salary for those at the top of the scale (Local Exs. 17 & 18). The suspension of stability pay for the life of the agreement then was done to prevent a windfall for those at the top who were already receiving a significant adjustment as a result of the structural overhaul to the schedule. Further, the evidence shows that only a relatively few bargaining unit members were affected by the Employer's actions (approximately twenty employees as compared to over five hundred here). Most importantly, it was a

singular occurrence not repeated, nor is there any evidence that it happened at any time prior to 2007. A one time incident – particularly one affecting a relatively small subset of employees - most often does not establish a binding past practice. Such is the case here.⁴

Award-

Accordingly, for the reasons set forth above, the grievance is denied.

Respectfully submitted this 17th day of August, 2012.

/s/
Jay C. Fogelberg, Neutral Arbitrator

⁴ Additionally, there is not evidence in the record indicating that the parties' 2007 experience was even addressed at the bargaining table in 2009, when the "notwithstanding" clause was discussed and ultimately adopted.