

**IN THE MATTER OF ARBITRATION BETWEEN**

AMERICAN FEDERATION OF STATE,  
COUNTY AND MUNICIPAL  
EMPLOYEES COUNCIL 65  
And its affiliated Local 2195  
UNION

OPINION AND AWARD

Contract Interpretation/Application  
Job Posting Grievance

and

BMS Case No. 12-PA-0110

CASS COUNTY, MINNESOTA  
COUNTY/EMPLOYER

Award Dated: November 15, 2012

Date and Place of Hearing:

August 24, 2012  
Offices of the Employer  
Walker, Minnesota

Date of Receipt of Post Hearing Briefs:

October 28, 2012

**APPEARANCES**

For the Union: Teresa L. Joppa, Esq., Staff Attorney  
AFSCME Council 65  
3911 7<sup>th</sup> Street South  
Moorhead, MN 56560

For the Company: Thomas Fitzpatrick, Esq.  
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P.O. Box 367  
Brainerd, MN 56401

**ISSUES**

1. Did the County violate the Collective Bargaining Agreement or an established past practice by converting its job-specific position titles to the two Social Worker position titles of "County Agency Social Worker" and "County Agency Social Worker – Child Protection Specialist" as described in the Minnesota Merit System. If so what shall the remedy be?
  
2. Did the County violate the Collective Bargaining Agreement or an established past practice in the manner it posted and awarded job openings in the job classifications of "County Agency Social Worker" and "County Agency Social Worker Child Protection Specialist"? If so what shall the remedy be?

**WITNESSES TESTIFYING**

Called by the Union

Randy Carlson,  
Child Protection Social Worker

Amy LeBeck,  
Social Worker – Licensing

Marla Sullivan,  
Financial Worker – 40E Specialist

Chris Kapella,  
Staff Representative  
AFSCME Council 65

Called by the County

Robert Yochum,  
Cass County Administrator

Reno Wells,  
Director, Department of Health, Human and  
Veterans Services

Heidi Massie,  
Fiscal Officer, Personnel Officer  
Department of Health, Human and  
Veterans Services

Kim Minton,  
Support Services Supervisor  
Department of Health, Human and  
Veterans Services

**JURISDICTION**

The issue in grievance was submitted to the Arbitrator for a final and binding resolution pursuant to Article 13 of the Collective Bargaining Agreement (Joint Exhibit 1) between the parties and under the rules of the Bureau of Mediation Services of the State of Minnesota. The parties stipulated that the issue was properly before the Arbitrator and that he had been properly called.

At the hearing the parties were given full and complete opportunity to examine and cross-examine witnesses and present their proofs. Final argument was presented by both parties through post hearing briefs which were received by the agreed upon deadline as amended. With the receipt of the post hearing briefs the record in this matter was closed.

The issue is now ready for determination.

## STATEMENT OF THE ISSUE

The parties presented somewhat different versions of the issue to be decided. The Union framed the issue as follows:

Did the Employer violate the parties' collective bargaining agreement or an established past practice when the Employer made changes in the manner in which Social Worker positions were posted and awarded to internal applicants and which affected contract rights like promotions and transfers based on seniority, bumping rights, and the right to return to a particular position after a leave of absence? If so, what should be the remedy?

The County framed the issue as follows:

Does the parties' Collective Bargaining Agreement limit the County's inherent managerial right to determine job descriptions?

The parties deferred a final framing of the issue to the Arbitrator. After careful review of the testimony and evidence adduced at the hearing the issues to be decided are determined to be:

1. Did the County violate the Collective Bargaining Agreement or an established past practice by converting its job-specific position titles to the two Social Worker position titles of "County Agency Social Worker" and "County Agency Social Worker – Child Protection Specialist" as described in the Minnesota Merit System. If so what shall the remedy be?
2. Did the County violate the Collective Bargaining Agreement or an established past practice in the manner it posted and awarded job openings in the job classifications of "County Agency Social Worker" and "County Agency Social Worker Child Protection Specialist"? If so what shall the remedy be?

On May 26, 2011 the Union notified the Employer of its concern related to the "current practice used for posting for vacant/newly created positions" following the April 19, 2011 adoption of revised position descriptions in the Department of Health, Human and Veterans Services. It expressed a belief that the past practice for job postings in the

Department was to post job-specific openings. The Union requested information regarding the reason for changing the past practice and what would be the effect on people wanting to change positions. It noted that without a defined position it would be difficult for an employee to know what job they would be doing.

On June 9, 2011 the Union filed the instant grievance which reads in relevant part as follows:

**STATEMENT OF GRIEVANCE**

List applicable violation: Including but not limited to Article 1, Article 10.4, and any other applicable Articles of the Agreement. As a past practice Cass County has posted job specific Social Worker vacancies. Cass County has changed the posting procedure.

Adjustment required: The County will post positions as per past practice. The County will post vacancies according to Article 10.4, negotiate any and all changes of the past practice posting procedure and make the grievants whole in all respects.

The County denied the grievance at each step of the grievance procedure, and it was heard in arbitration on August 24, 2012.

The controlling contract language is found in the **Collective Bargaining Agreement Preamble, Article 2 – Inherent Managerial Rights, Article 9 – Seniority, Article 10 – Posting and Filling of Vacancies, Article 13 – Grievance Procedure, Article 15 – Leave of Absence, and Article 23 – Scope of Agreement.** In relevant part these sections of the contract read as follows:

**Preamble**

THIS AGREEMENT is made and entered into between the Cass County Board of Commissioners, hereinafter referred to as the Employer, and Local No. 2195 of the American Federation of State, County and Municipal Employees, affiliated with the American Federation of Labor and the

Congress of Industrial Organization, hereinafter referred to as the Union. This Agreement is made pursuant to and in compliance with the Public Employment Labor Relations Act, hereinafter referred to as PERLA. This Agreement has as its purpose the promotion of harmonious relations between the parties, establishment of an equitable and peaceful procedure for the resolution of differences, and to express the full and complete understanding of the parties pertaining to the terms and conditions of employment covered herein.

## **Article 2, Section 2.1 Inherent Managerial Rights**

The Union recognizes that the Employer is not required to meet and negotiate on matter of inherent managerial policy, which include but are not limited to such areas of discretion or policy as the functions and programs of the Employer, its overall budget, utilization of technology, the organizational structure, and the selection and direction and number of personnel. The Union recognizes the rights and obligation of the Employer to efficiently manage and conduct the operation of the Employer within its legal limitations. All rights and authority which the Employer has not specifically abridged, delegated or modified by expressed provisions in this Agreement are retained by the Employer.

## **Article 9, Seniority, Section 9.1 Definition**

Seniority shall be defined as an employee's length of continuous service with the County. Upon completion of the probationary period, the seniority date of the employee shall relate back to his/her initial date of employment. Length of continuous service shall be the number of hours for which an employee is compensated for regular, non-overtime scheduled work (including approved paid training) or for vacation, sick leave, or holidays or for approved leaves of absence.

## **Section 9.3 Promotion or Transfer to Another Department**

If an employee is promoted or transferred to another classification within the bargaining unit, seniority in the prior classification shall be retained and frozen.

## **Section 10.1 Vacancies Defined**

A vacancy is defined as an opening in a permanent position within the bargaining unit. A vacancy may be created by death, resignation, dismissal, transfer of an employee out of the bargaining unit, retirement, a leave of absence from which the employee does not have a right to return to the position from which the leave was granted, permanent disability, promotion, demotion, or creation of a new position. It is solely within the authority of the Employer to determine if a vacancy is to be filled.

## **Section 10.2 Procedure for Posting and Filling Vacancies**

Notice of all permanent vacancies and newly created positions shall be posted on bulletin boards, and then employees given five (5) working days time in which to make application to fill such vacancy or new position. The senior employee within the agency group (clerical, support, professional) who makes application therefor, shall be

transferred to fill the vacancy or new position provided he/she has the necessary qualifications to perform the duties of the job involved. Personnel in either of the other two agency groups shall also be given the opportunity to post and compete for vacancies in the other agency groups prior to opening the vacancy to outside applicants. The department head or other appointing authority shall make the determination as to whether or not the applicant possesses the necessary qualifications. In the event the Union does not concur in the determination, the employee shall have the right to appeal through the normal grievance procedure.

#### **Section 10.4 Job Notices**

Notice of vacancies or newly created positions shall state the type of work, place of work, rate of pay, hours to be worked, job classification, and a summary of the qualification or eligibility requirements for the position. An employee shall be responsible for meeting eligibility requirements for a position. Employees shall be required to submit a written application to the appropriate appointing authority prior to the expiration date of the posting for the position which they are applying.

#### **Section 13.1 Grievance Defined**

A grievance shall mean an allegation by an employee resulting in a dispute or disagreement between the employee and the employer as to the interpretation or application of terms and conditions contained in this Agreement.

#### **Section 13.5 Arbitrator Authority**

The arbitrator shall have no right to amend, modify, nullify, ignore, add to or subtract from the provisions of this Agreement. He shall consider and decide only the specific issue(s) submitted to him in writing by the parties, and shall have no authority to make a decision on any other issue not so submitted to him. The arbitrator shall be without power to make decisions contrary to or inconsistent with or modifying or varying in any way application of laws, rules or regulations having the force and effect of law.

The arbitrator shall submit his decision in writing within (30) days following the close of the hearing or the submission of briefs by the parties, whichever is later, unless the parties agree to an extension. The decision shall be based solely upon the arbitrator's interpretation or application of the express terms of this Agreement and on the facts of the grievance presented. The decision of the arbitrator shall be final and binding on the Employer, the Union and the employees.

#### **Section 15.3 Unpaid Leaves of Absence**

... Reinstatement after Leave. Any employee returning from an approved leave of absence as covered by this Section shall be entitled to return to employment in his/her former position or another position in his/her former classification in service, or a position of comparable duties and pay provide that the unpaid leave time does not exceed six (6) months except in the case of disability leave which shall be one (1) year. If the unpaid leave is approved for more than six (6) months, or is extended to a length greater than the equivalent of six (6) months, the employee shall have a preference to return to the first position vacancy in the department from which he/she took the leave that is

comparable to one from which the person was placed on leave. In all cases reinstatement rights relate to a return to a position within the department from which the person went on leave.

### **Section 23.1 Complete Agreement**

This Agreement shall represent the complete agreement between the Union and Employer. The parties acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make requests and proposals with respect to any subject or matter not removed by laws from the area of collective bargaining, and that the complete understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. Therefore, the Employer and the Union, for the life of this Agreement, each voluntarily and unqualifiedly waives the right and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter referred to or covered in this Agreement or with respect to any subject or matter not specifically referred to or covered in this Agreement, even though such subject or matter may not have been within the knowledge or contemplation of either or both of the parties at the time that they negotiated or signed this Agreement

In addition to the above cited contract language, this case involves certain State of Minnesota Merit System rules. The relevant sections read as follows:

#### **9575.0020 OBJECTIVES OF COUNTY WELFARE MERIT SYSTEM.**

It is the aim of the Department of Human Services of the state of Minnesota, through the establishment of the county welfare merit system, to provide appointing authorities with an effective system of personnel administration based on merit principles. Specific objectives are:

- A. economy and effective service in the Minnesota welfare and human services program;

B. the proper classification of positions so that positions essentially alike in duties and responsibilities are treated alike and positions not so alike are treated with due consideration to the nature and extent of the differences between them;

C. fair and equal opportunity for all qualified persons to compete for positions and promotions under the jurisdiction of the merit system solely on the basis of merit and fitness as ascertained through practical examinations;

D. equitable pay scales for the various classes established on the basis of equal pay for work of equal value; and

E. an attractive career service in public welfare and human services employment within the state of Minnesota.

**9575.0060 POSITIONS COVERED BY THESE RULES.**

These rules shall apply to all positions and employees in these positions engaged in the administration of community social service or income maintenance programs funded in whole or in part by federal grants-in-aid requiring a merit system of personnel management under the jurisdiction of appointing authorities except duly appointed or elected members of these boards, all employees of institutions, sanatoria, and hospitals under the jurisdiction of such boards, and the director of community social services. These rules shall be applicable to such positions until such time as the counties adopt and maintain rules affecting classification and compensation, examination, and certification of eligibles and other personnel standards acceptable to the commissioner.

**9575.1550 PREPARATION AND ADOPTION OF CLASSIFICATION PLAN.**

**Commissioner's duty.**

The commissioner of human services shall formally adopt and make effective a comprehensive classification plan for all positions covered by this chapter which shall be published as part of the Human Services Merit System Manual. The plan shall be based on investigation and analysis of the duties and responsibilities of each position, and each position shall be allocated to its proper class in the classification plan. The plan shall be developed after consultation with supervisory officials, classification specialists, and persons technically familiar with the character of the work. All classifications shall be evaluated by use of a formal job evaluation system. When complete, the classification plan shall include for each class of positions an appropriate class title, a description of the duties and responsibilities, and the minimum requirements of training, experience, and other qualifications.

**9575.1560 ALLOCATION OF POSITIONS.**

Every position under the jurisdiction of an appointing authority shall be allocated by the supervisor to one of the appropriate classes established by the classification plan. No person shall be appointed or promoted to any position until it has been properly classified as herein provided. As additional classes are established or existing classes are abolished or changed, the necessary allocations or reallocations shall be made by the supervisor to new or existing classes as necessary.

## **FACTUAL BACKGROUND**

Involved herein is a grievance that arose in June, 2011 related to posting of job vacancies within the Department of Health, Human and Veterans Services of the Employer. The County is unit of local government chartered under the laws of the State of Minnesota. It provides a variety of governmental services to the people of Cass County including Health, Human and Veterans Services. The Department of Health, Human and Veterans Services in which the instant grievance arose provides, *inter alia*, social services to children, adults and families in Cass County. The Union is the exclusive bargaining representative of the public employees in the Department, excluding supervisory and confidential employees. The parties have had a collective bargaining relationship for several years.

For many years prior to April 19, 2011 the Department of Health, Human and Veterans Services was operating with its Social Workers working in several job-specific positions. Those positions included Adult Protection Social Worker, Children's Mental Health Social Worker, Adult Services Social Worker, Child Protection Assessment Worker, Adult Social Worker/Chemical Dependency, LTC/Vulnerable Adult Social Worker, Family Based Services Social Worker, In-home Social Worker, Adult Mental Health Social Worker, etc. All of the Social Workers, regardless of their specific duties and job titles were and remain classified in pay grade 28. The schedule of the wages for each pay grade is shown in Appendix A-3 and A-4 of the Collective Bargaining Agreement. The Collective Bargaining Agreement does not specifically refer in any of its Sections to any job-specific positions for Social Workers.

Since 1996 the County has been reducing the number of specific job descriptions based on its determination that it had far too many such descriptions, and was restricted in its ability to evenly distribute work across employees with so many specific job descriptions. The County also sought to adapt its positions to those described in the Minnesota Merit System. That system utilized only two job descriptions in the area of Social Worker. They are “County Agency Social Worker and County Agency Social Worker – Child Protection Specialist”.

In early 2011 the new Head of the Department of Health, Human and Veterans Services undertook the consolidation of the many job specific positions in the Department into the two positions found in the Minnesota Merit System. At a meeting held March 9, 2011 Department Head Wells and other management representatives met with Union Staff Representative Kapella and other Union leaders to discuss the implementation of the two positions in the Minnesota Merit System. The minutes of the meeting [Employer Exhibit 4] show that the Union had concern regarding the wording used related to the assignment of job duties. The minutes demonstrate, however, that the Union was aware that there were two Minnesota Merit System job titles for the Social Workers in the Department. The minutes further demonstrate that the Union acknowledged the right of management to be able to assign duties around with the Department in order to get the work done. On April 19, 2011 the Cass County Commission approved changes from the then current job-specific County named positions for Social Workers to the Merit System titles of County Agency Social Worker or County Agency Social Worker – Child Protection Specialist.

There were no changes in pay grade made, and only the position titles were changed [Union Exhibit 9].

The record [Union Exhibit 4, Employer Exhibit 6] shows that job postings prior to the conversion to the Minnesota Merit System job titles were for job-specific openings. Union Exhibit 4 illustrates an example of such a posting for a “Social Worker – CD Case Load” and Employer Exhibit 6 illustrates such a posting for a “Children’s Mental Health Social Worker”. After the conversion to the Minnesota Merit System position titles, the Department’s job postings reflected the more general position titles of that System. Union Exhibit 3 and Employer Exhibit 7 show a job posting dated on May 18, 2011 [after the conversion] for a “County Agency Social Worker”. Neither the pre-conversion job posting nor the post-conversion job posting referred to the specific job duties to be performed. It is noted, however, that the job title used prior to the conversion did infer some specific job duties [e.g. Social Worker – CD Case Load]. It is further noted that the posting for the County Agency Social Worker position entered as Employer Exhibit 7 had attached to it the position description for that position. The position description was generic in character and described a range of social services to be provided to children, adults and families. It did not refer to job-specific duties.

Organization charts of the Department before the conversion to the Minnesota Merit System job titles [Union Exhibit 2 and 8, Employer Exhibit 1] show, as would be expected that the Social Workers were listed in their specific job titles. A chart entered as Union Exhibit 1, which was printed in July 2012, after the conversion to the Minnesota

Merit System titles, continues to show the Social Workers functioning in job-specific areas, although the chart does not describe the job titles held by each worker.

On May 23, 2011 Union represented employees Katie Thompson and Nicole Davis indicated an interest in the May 18, 2011 internal posting for “Cass County Agency Social Worker” [Union Exhibit 3, Employer Exhibit 7]. Both ladies indicated their interest in the Chemical Dependency position. They were advised by Supervisor Piprude, however, that the posted positions are for “County Agency Social Workers”, and those workers are assigned to areas where the need arises within the children’s and adult units. Because Ms. Thompson was then classified as a County Agency Social Worker she was advised that there was no need for her to officially apply. The record does not show what action was eventually taken in regard to the interest of Ms. Thompson and Ms. Davis in the posted position.

The Union filed the instant grievance as a class action grievance on June 9, 2011. It proceeded through the steps of the grievance procedure without resolution. There is no evidence in the record that the Employer raised, prior to the arbitration hearing, and the prospect that the grievance was untimely. The grievance was heard in arbitration on August 24, 2012.

## **POSITION OF THE PARTIES**

### **Position of the Union**

It is the position of the Union that the grievance be sustained and that the Arbitrator enter an order whereby the Employer restores the same position titles to those that were in place for the job class of Social Workers prior to May 2011. The Union further seeks that the Arbitrator order that the specific position titles not be changed unless there is actual substantial change in responsibilities and duties for any given position, and/or there is Union consent or agreement to change contract language about the manner in which job openings are posted or bid on, or how layoffs and bumping are to happen, or in the rights of employees to return from a leave of absence to a particular position vs. job classification under Article 15.3. The Union also seeks to have the Arbitrator enter an order whereby the Employer is directed to reopen for application/bidding under the contract, any Social Worker or Social Worker-Chemical Dependency positions which were open and not properly posted with designated specialty titles, between May 2011 and the date of this award. In support of its position the Union offers the following arguments:

1. The action of consolidating the job-specific Social Worker positions into two new positions greatly limited bargaining unit members' contractual rights to bid on or transfer into a position with new or different job responsibilities, a new or different work schedule, with different supervision, or into an area of work that they might like more than the work they were doing when a job opening was posted.
2. The change in "title" or label also potentially affects the contractual right of bargaining unit member to return from a leave of absence to their former position.
3. The parties have bargained in the past about what information will be provided in a job posting concerning a vacant position. The employer cannot unilaterally change the information provided to the Union

members in a job posting without violating the contract, especially when the actual job responsibilities or specializations of the Social Workers in the Department have not changed.

4. The Employer had no reason for changing the job titles other than to limit bumping rights under the contract. Management's claim of management rights must fall because job duties were not changed, only labels, in an effort to avoid complying with the contract and past practice.
5. For more than 25 years Cass County Social Workers have been able to bid on positions which are specialized in duties and labeled as such. Because the contract speaks to this issue already, management cannot, without negotiating with the Union, limit employees' rights to apply for or transfer into other positions, within the Agency, by minimizing the amount of information given out in a posting of a vacancy or by downsizing the choices available to bargaining unit members. The Employer cannot limit the right or ability to bump on the basis of seniority by changing the job title for posting purposes alone.
6. For over 25 twenty five years Cass County Health, Human and Veterans Services Department has designated specialty areas of work for its Social Workers, and titled the positions accordingly.
7. The Employer did not change the Social Workers' actual job responsibilities, only their job titles, and the change was made only for the purposes of "postings" and to eliminate the ability of the employees to bid on open jobs under the Union contract.
8. Because of the language in the Collective Bargaining Agreement, an "Adult Mental Health" Social Worker, with seniority, can apply for a posted opening for a "Child Mental Health" Social Worker or an opening for any other area of social work; mental health, family services, chemical dependency, elder services, etc. This is what Article 10.4 requires when it states "notice of vacancies ... shall state the type of work ...".
9. The new posting notice method eliminated the ability of Social Workers to move laterally from one position to another within the Department. This impacts employees' promotion and transfer rights under the collective bargaining agreement.

10. The language concerning promotions, transfers and bumping is found in Articles 9, 10, and 11 of the contract. If the specialty labels are removed from the jobs of Social Workers then the right to bump into a position after layoff or elimination of a positions will be limited without the Employer having negotiated at all.
11. The language in Article 15.3 regarding returning to a “position” from a leave of absence will mean one thing if “return to employment in his/her former position” is read to mean an employee has a right to return to their former “Child Mental Health” Social Worker position, versus if changed to read that the employee has the right to “return to work in the job classification of “County Agency Social Worker” generally.
12. Only those management rights not addressed by specific language are retained by management under this contract. If they are “abridged, delegated or modified” then the management right the Employer is claiming is limited by the specific language in the contract.
13. Management has, of course, the right to actually restructure the social worker’s jobs and programs or the methods by which service will be delivered to clients. However, when management is not restructuring the jobs nor the type of work being done, nor adding or eliminating programs, but instead is simply changing job titles from “specific” to “generic” in order to avoid complying with the contract’s posting and transfer or bumping procedures and potentially interfering with a Social Workers’ right to return to a preferred position, that is when the claim of “management rights” must fail.
14. The County has sought to eliminate bumping rights. County Administrator Yochum testified that he wanted to eliminate bumping rights amongst county employees. He testified that “there’s always been a posting requirement - we have people wanting to bid on ‘programs’ or ‘assignments’, so I have promoted consolidating titles.”
15. The Union did not agree to any change in contract terms at the meeting with management in March 2011 where shifting work from one social work area to another was discussed.
16. The County has violated the Collective Bargaining Agreement’s provisions regarding posting of vacancies, and seniority rights. Rights regarding layoffs, bumping, and an employee’s right to return to a specific position after a leave of absence are also prejudiced by the County’s action renaming social workers positions generically “County Agency Social Worker” and County Agency Social Worker – Chemical Dependency” [sic].

17. The County also violated the long standing, mutually agreed upon past practice between the parties.

### **Position of the County**

It is the position of the County that the grievance should be denied. In support of that position the County presents the following arguments:

1. The County has complied with the posting criteria contained in Section 10.4 of the Collective Bargaining Agreement. There is no dispute that the County complied with those requirements.
2. The Union is assaulting the plain language of the Collective Bargaining Agreement and is improperly using “past practice” to undermine managerial rights. The intent of the parties is manifested in its entirety of the Collective Bargaining Agreement. Adoption of revised job descriptions is not grievable because adoption cannot be challenged by a “past practice” claim that alleges merely that the job description has existed for a long time. Such a claim is a misuse of past practice. If the plain language of the Collective Bargaining Agreement is clear and unambiguous, that language should control. If that is not the case, the arbitrator looks to other indicia of the parties’ intent. Here the Union is hoping that the arbitrator looks beyond the four corners of the Collective Bargaining Agreement and analyzes whether there is a past practice that will add a non-negotiated term to the contract.
3. The County strenuously challenges the Union’s contention that a job description is a past practice in the first place. The Union offers no evidence that management has ever recognized through its conduct that job descriptions must be approved by memorandum of understanding, or that issuance of a job description may be the subject of a grievance. The only evidence is that there has never been a grievance, nor has there ever been any attempt to agree or negotiate around a job description. The fact that a particular job description has remained the same for a long time is not evidence of an agreement that it cannot be changed.

4. The Union concedes that all of the duties in the new descriptions are properly graded. Moreover, the Collective Bargaining Agreement recognizes that, except for the specific items covered in Appendix A-1 of the labor agreement, the grade rating system is not grievable. The reason is that the parties recognize that the work of job descriptions and job titles is best performed by the Minnesota Merit System.
5. While custom and past practice are used very frequently to establish the intent of contract provisions that are susceptible to differing interpretations, arbitrators who follow the “plain meaning” principle of contract interpretation will refuse to consider evidence of past practice that is inconsistent with a provisions that is “clear and unambiguous” on its face. If the plain meaning principle is not applied in this case, the Union will be given the gift of controlling their job duties; an inherent managerial right that the County has not clearly and unambiguously waived. The Union is attempting to gain through grievance arbitration what it could not achieve at the bargaining table.
6. If every management decision could be challenged by alleging past practice, the concept of inherent managerial rights would be completely gutted. Arbitrators hesitate to permit unwritten past practice to restrict the exercise of recognized functions of management, such as methods of operation or direction of the workforce.
7. Determining what an employee’s job duties are is a recognized function of management, and for good reason. Management has an obligation to adjust workflow to meet case load and governmental priorities. The Union recognizes this as a responsibility of the County in Article II, Section 2.1 of the labor agreement. Arbitrators are expected to give force and effect to all parts of an agreement and to avoid any interpretation which would render any significant part of a provision meaningless. Furthermore, any right not specifically waived in the Collective Bargaining Agreement is left to the discretion of the County. Because it is clear that the County has the right to change job descriptions and the County has the right to assign duties to employees, it necessarily follows that the County has the right to describe the duties in the postings in a way that comports with their expectation of what duties the employees perform.
8. The Collective Bargaining Agreement, at Section 2.1, grants the County the discretion to “efficiently manage and conduct the operation of the Employer”. The fact that the County used particular job descriptions for a number of years is not a past practice governing labor relations. If it were, virtually every practice of management

could be described as a past-practice, provided only that it has been observed for a long time.

9. The County has not waived or relinquished its inherent managerial rights and the Arbitrator may not amend, modify, nullify, ignore, add to or subtract from the provisions of the Collective Bargaining Agreement. The Preamble, complete Agreement, Grievance Defined, and Arbitrator Authority provisions of the Collective Bargaining Agreement support the County's retention of its inherent managerial rights as well as expressing the parties' intent that the arbitrator's decision can be based solely upon the express terms of the labor agreement. Therefore, there is no arbitral authority to grant the relief requested by the Union.
10. Job descriptions have never been the subject of bargaining in the past and they are not mandatory subjects of bargaining. The County has been consolidating jobs and descriptions since 1996.
11. Even though it was under no obligation to do so, the County notified the Union that it was modifying its posting information to include all duties for which a social worker is licensed. It is well known in labor relations that outward manifestations to the other side of the bargaining relationship is a factor that is considered when ascertaining the totality of the circumstances giving rise to the grievance. In the discussions with the Union, the Union leadership did not object to the adoption of Merit System job descriptions. Even if they had, the most they could do is engage the County in further discussions or attempt to change the County's position through meet and confer. The Union has no right to intrude upon the County's right to efficiently manage and conduct its operations.
12. The Union implicitly acknowledges the County's inherent managerial right to determine job descriptions and duties. The Union explicitly acknowledges that the County may assign duties to the employees regardless of whether it is specifically provided for in a job description. It necessarily follows that if the County has the right to determine job descriptions, job titles and job duties it likewise has the right to change them.
13. For the foregoing reasons the County respectfully request that the Grievance be denied in its entirety.

## **ANALYSIS OF THE EVIDENCE**

It is not disputed that the County has for many years utilized job titles that were related to specific areas of work performed by the Social Workers employed by the County. It is also not disputed that a Social Worker is licensed to perform a range of social work duties broader than those in the specific job title he/she may be working in.

In April 2011 the County abandoned the specific job titles that had been in use for many years and adopted the two social work job titles of “County Agency Social Worker and County Agency Social Worker – Child Protection Specialist” that were established by the Minnesota Merit System. Before it made that change the County discussed it with Union representatives.

The record [Union Exhibit 3, Employer Exhibit 7] shows that after the conversion to the two Minnesota Merit System job titles a posting showed the title of a vacant position of “County Agency Social Worker”. Union Exhibit 3 did not contain a position description, but Employer Exhibit 7 did. Neither the job postings nor the position description for the County Agency Social Worker referred to the job-specific type of social work to be performed [e.g. Adult Protection Social Worker, Children’s Mental Health Social Worker, Adult Services Social Worker, Child Protection Assessment Worker, Adult Social Worker/Chemical Dependency, LTC/Vulnerable Adult Social Worker, Family Based Services Social Worker, In-home Social Worker, Adult Mental Health Social Worker] that the parties had utilized in the past. Notwithstanding the use of the general

job titles in the postings after they were adopted by the County, the record [Union Exhibit 1] shows that the County continued to concentrate specific types of social work in the jobs held by individual Social Workers. It is troubling to find that for posting purposes general job titles were used, but the actual duties performed by an employee after being placed in a position appear to be the same as what was done in the past.

It is not disputed that the concentration of specific types of social work in certain positions did not violate the licensure or pay grade of the Social Worker. All Social Workers, regardless of the duties they performed both before and after the establishment of the two general social work job titles were classified in pay grade 28. Accordingly, the conversion from specific to general job titles did not affect the compensation of the social workers.

The Union asserts, however, that the change to the two general job titles denied its members the right to bid on a position that performed a specific type of social work, and further denied members returning from an approved leave of absence the right to bump, based on seniority, an employee who was then holding a position responsible for performing the type of work the returning employee desired or may have previously performed. The employer, on the other hand, contends that it has the management right to define jobs, and to assign employees to positions and duties they are qualified to perform as needed to meet the work load of the Department as it may change from time to time. Determining the merits of the respective positions of the parties first requires an examination of relevant language in the Collective Bargaining Agreement.

It is noted that the Collective Bargaining Agreement does not refer to any specific job titles. At Article 1, the represented employee group is referred to in the most general terms of “public employees”. Positions, classifications or any other such distinguishing groupings are conspicuously absent. Article 2 provides that the Employer is not required to meet and negotiate on matters of inherent managerial policy. That Article also provides that the Union recognizes the rights and obligations of the Employer to efficiently manage and conduct the operations of the Employer. It also provides that the Employer retains all rights not specifically abridged, delegated or modified by expressed provisions in the labor agreement. No reference is made in Article 2 to any job title. It does provide at Section 2.3, however, that the Union recognizes that all employees shall perform the services and duties prescribed by the Employer. Article 10 defines a vacancy in a permanent position; sets out procedures for posting and filling vacancies, and describes requirements for the content of notices of vacancies. Notably, there is no reference to job titles in Article 10. The only reference is to “position[s]”. At Article 11 the contract provides for layoffs and bumping rights. In particular, at Section 11.2 the contract requires the employee who is seeking to exercise bumping rights to state which position and in which department placement is being sought, and the name of the current employee holding that position. Article 15 at Section 15.3 provides that employees returning from approved maternity/paternity leave shall receive preferred consideration and primary consideration for return to any position for which qualified in the department from which the leave was taken whenever a vacancy occurs, but that the Employer is not required to hold the position of the employee pending return. That Section also provides

that “any employee returning from an approved unpaid leave of absence as covered by this Section shall be entitled to return to employment in his/her former position in his/her former classification in service, or a position of comparable duties and pay provided that the unpaid leave time does not exceed six (6) months ...”.

Interestingly, Article 15 provides the clearest guidance as to the intent of the parties as related to the issues in this case. Section 15.3 refers to “position” and in the context of the contract language defines that to mean the “position of the employee”. That Section also clearly provides that when an employee returns from an approved leave within six months (12 months for disability) he/she shall be entitled to return to employment in his/her former position or a position of comparable duties. [Emphasis supplied]. The language goes on to provide that when a leave of absence exceeds six months the Employer is not required to hold the position of the employee pending his/her return but that the returning employee shall receive preferred and primary consideration for return to any position in the department for which the employee is qualified. [Emphasis supplied]. A reasonable person would interpret that language as meaning that a returning employee may not bump a replacement employee from the position performing the duties previously performed, but that the returning employee would be entitled to return to a position of comparable duties. There is clearly not a contractual guarantee that an employee returning from an approved leave would be allowed to bump a replacement employee in order to regain his/her specific duties. The phrase “position of comparable duties” must reasonably be taken to mean a position involving social work duties that could differ from what the employee had been performing before taking a leave of

absence. Such a position would fall squarely within the broad job titles of “County Agency Social Worker and County Agency Social Worker – Child Protection Specialist”. Accordingly, no violation of the contract can be found related to the claim that employees returning to work after a leave of absence were denied bumping rights to return to the specific duties they had been performing.

Turning now to the Union’s claim that posting the general position titles of “County Agency Social Worker” and “County Agency Social Worker – Child Protection Specialist” violated contractual rights of employees to bid on jobs in which specific social work duties were performed. It must be noted that the controlling language of Article 10 makes no mention whatsoever of duty specific positions. All that is mentioned is “positions”. While, as previously noted, it is troubling that Union Exhibit 1 shows that the County continued to concentrate specific duties in social work positions, no contract violation can be found for doing so based on the evidence adduced at the hearing. The contract reserves to the Employer all rights not abridged by expressed specific terms in the labor agreement. Accordingly, if the Union’s position is to be upheld, there must be an express provision in the contract that limits the rights of the Employer to define a “position”. No such provision is found. The Employer may define positions along the lines of the Minnesota Merit System [i.e. County Agency Social Worker and County Agency Social Worker – Child Protection Specialist]. Article 2 of the labor agreement also provides that the Employer has a recognized obligation to efficiently manage its operations. Adopting the two Minnesota Merit System job titles is found to be consistent with that mandate.

Social workers who are now in either the County Agency Social Worker or County Agency Social Worker – Child Protection Specialist positions are understandably concerned about the duties they would be performing in their jobs. Indeed the content of any employee’s job as related to the duties to be performed is generally of fundamental importance to the employee. Also fundamentally important to the employee is who his/her supervisor may be. As previously noted, work performed in the Department continues to be aligned in the areas used in the old job titles. Given that alignment, an employee may prefer a particular assignment or to be working for a particular team leader/supervisor.

It is important to note that there is no contractual limitation to employees expressing an interest in a job that performs a particular set of duties or falls under a particular supervisor. When vacancies are posted a Social Worker may submit his/her bid expressing interest in the vacant position. Section 10.2 states in clear and unambiguous terms that “The senior employee within the agency group who makes application ... therefor, shall be transferred to fill the vacancy or new position provided he/she has the necessary qualifications to perform the duties of the job involved.” [Emphasis supplied]. It is important to note that this language provides for selection of the most senior employee who meets the requirements of the job. It is not language permitting the Employer to select the most qualified employee. While there is no language providing for bumping into an occupied position, the language of Section 10.2 clearly provides an opportunity for a senior employee to transfer into a vacant or new position upon his/her

application. It is also important to note that seniority is defined in Article 9 as length of service with the County. There is no mention of classification or positional seniority. Accordingly, the seniority to be applied in bidding decisions is County wide seniority. While the Union argued that employees were denied promotional or lateral transfer opportunities because of the Employers implementation of the two Minnesota Merit System job titles, there was no evidence adduced at the hearing to show that a senior qualified Social Worker was actually denied his/her application for transfer to any open position.

Article 10.4 of the labor agreement requires that notices of vacancies or newly created positions shall state the type of work involved, place of work, etc.. This language requires the County to describe in the job posting the specific duties to be performed. It is not sufficient to state that the work is that of County Agency Social Worker or County Agency Social Worker – Child Protection Specialist. Inclusion of the job description for those positions in the posting does not adequately describe the “type of work” to be performed as required by Article 10.4. More is needed to adequately inform applicants of the duties involved and who would supervise the successful bidder. Those are fundamental areas of interest to any applicant. The County attached a job description to its May 18, 2011 job posting [Employer Exhibit 7] for County Agency Social Worker. As previously noted, however, neither the job posting or the job description described the nature of the work involved in terms related to the specific duties [e.g. Adult Protection Social Worker, Children’s Mental Health Social Worker, Adult Services Social Worker, Child Protection Assessment Worker, Adult Social Worker/Chemical Dependency,

LTC/Vulnerable Adult Social Worker, Family Based Services Social Worker, In-home Social Worker, Adult Mental Health Social Worker]. Such description is of fundamental importance to the employee, and must be known to him/her in order to make an informed decision on whether or not to bid on the job.

The Union presented a compelling, but not convincing argument that because positions in the Department have been for many years defined along the lines of the specific duties performed that such definition rises to level of contract language. It is undoubtedly true that the nature of the jobs were in the minds of the parties as they negotiated the labor agreements over many years. Indeed, the terms of the contracts agreed to may have been influenced by that understanding. It must be recognized, however, that the duty-specific positions that were replaced by the Minnesota Merit System positions were established in the first place by the County. There was no evidence in the record of this proceeding that the parties actually bargained over the job titles or their respective duties either when they were initially established, or subsequently.

The language of Article 2 – Employer Rights and Article 23 – Scope of Agreement effectively negate the Union’s argument on past practice. Article 2 reserves to management all matters not specifically and expressly abridged by the terms of the labor agreement. Principal among those rights is the right of the County to efficiently manage its operations. Arbitrators are reluctant to uphold a past practice, even one of long standing that would abrogate such a core responsibility of management. Moreover, the “zipper clause” found in Article 23 demonstrates that the parties have agreed that the

entire understanding between the parties is contained in the written words of the labor agreement. Such an understanding severely limits the appeal of a past practice argument.

The Employer made reference to the grievance as not being timely filed. The evidence shows that the parties had engaged in discussions regarding the Union's concern related to the conversion to the two Minnesota Merit System job titles before the grievance was filed. Such discussions would be reasonably regarded as initial steps to settle the matter. Accordingly, evidence showing lack of timely filing of the grievance is not found in the record. The grievance is deemed to have been timely filed.

For all the above cited reasons the record of this proceeding compels a finding that the County did not violate the Collective Bargaining Agreement or an established past practice by converting its job-specific position titles to the two Social Worker position titles of "County Agency Social Worker" and "County Agency Social Worker – Child Protection Specialist" as described in the Minnesota Merit System. The record also compels a finding that the County did not violate the Collective Bargaining Agreement or an established past practice in the manner it posted and awarded job openings in the job classifications of "County Agency Social Worker" and "County Agency Social Worker Child Protection Specialist".

As the parties are aware an arbitrator must confine his/her decision to the interpretation and application of the Collective Bargaining Agreement. He/she cannot impose his/her sense of workplace justice. To do so would likely cause the arbitration award to be

overturned in the event of judicial review. Accordingly, this Arbitrator gave full consideration to the arguments of the parties, but was required to discern their contractual intent based on a reasonable interpretation of the contract language. The Arbitrator lacks authority to grant the Union's position based on a reasonable interpretation of the contract language. The controlling language in the Collective Bargaining Agreement is, in the mind of this Arbitrator, however, incomplete. The parties would benefit from an update of the contract language following this arbitration. The parties are encouraged to engage in bargaining to do so.

For the above cited reasons the Arbitrator must deny the grievance in accordance with the above referenced analysis.

**IN THE MATTER OF ARBITRATION BETWEEN**

AMERICAN FEDERATION OF STATE,  
COUNTY AND MUNICIPAL  
EMPLOYEES COUNCIL 65  
And its affiliated Local 2195  
UNION

and

CASS COUNTY, MINNESOTA  
COUNTY/EMPLOYER

OPINION AND AWARD

Contract Interpretation/Application  
Job Posting Grievance

BMS Case No. 12-PA-0110

**AWARD**

Based on the evidence and testimony entered at the hearing, the grievance is denied in accordance with the analysis contained herein.

*November 15, 2012*

Dated: \_\_\_\_\_

**James L. Reynolds**

\_\_\_\_\_  
James L Reynolds,  
Arbitrator