

**IN THE MATTER OF ARBITRATION BETWEEN**

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	)	<b>FMCS Case No. 13-0515-55816-3</b>
	)	
<b>MILLE LACS ENERGY COOPERATIVE</b>	)	<b>Issue: 401(k) Plan Contributions</b>
	)	
<b>(“Employer” or “MLEC”)</b>	)	<b>Site: Aitkin, MN</b>
	)	
<b>&amp;</b>	)	<b>Hearing Date: July 15, 2013</b>
	)	
<b>INTERNATIONAL BROTHERHOOD OF ELECTRICAL</b>	)	<b>Briefing Date: August 5, 2013</b>
<b>WORKERS, LOCAL NO. 31</b>	)	
	)	<b>Award Date: October 5, 2013</b>
<b>(“Union” or “IBEW”)</b>	)	
	)	<b>Arbitrator: Mario F. Bognanno</b>
	)	

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**I. JURISDICTION**

The above-captioned parties are signatories to two Collective Bargaining Agreements (“CBAs”), covering the so-called “Outside Unit” and “Inside Unit” with effective terms of January 1, 2013 – December 31, 2015 and July 11, 2011 – December 31, 2013, respectively. (Joint Exhibits 4 & 9) Pursuant to the grievance procedure incorporated in each CBA, on April 5, 2013, the Union filed a “joint” grievance on behalf of employees in both bargaining units. (Joint Exhibit 1) The Union’s statement of the grievance is as follows:

Mille Lacs Energy Cooperative is violating Inside Article X, Section 3 and Outside Article XI, Section 4 of our respective agreements. MLEC is not currently making contributions into employee 401(k) until the bargaining unit members have completed one year of service with the Cooperative.

(Joint Exhibit 1, p. 2) The Union’s settlement request states:

The Union is requesting that MLEC amends [sic] the 401(k) plan; to pay back lost contributions of all affected bargaining unit members (both units), and calculate and credit lost investment for such time as for all to be made whole.

(Joint Exhibit 1, p. 2) On April 12, 2013, the MLEC denied the Union’s grievance. (Joint Exhibit 1,

p. 7) In reply, on May 3, 2013, the Union addressed a letter to the MLEC, proposing that the

matter be expedited to arbitration and, on May 6, 2013, the MLEC agreed. (Joint Exhibit 1, p. 8 & p. 10)

On July 15, 2013, the undersigned heard the disputed matter in Aitkin, MN. Appearing through their designated representatives, the parties were given a full and fair hearing. Witnesses were sworn and cross-examined. Exhibits were accepted into the record. At the hearing, the parties jointly stipulated: (1) that the matter was arbitrable and properly before the undersigned for a final and binding decision; and (2) that the undersigned, as the Arbitrator of record, would be held harmless in any post-Award litigation that may transpire over the issue disputed herein. Finally, the parties filed timely post-hearing briefs August 5, 2013. Thereafter, the Arbitrator took the matter under advisement.

**II. APPEARANCES**

**For the Union:**

Jane C. Poole	Attorney-at-Law
Mark Glazier	Business Manager
Dick Sackett	Assistant Business Manager
Cheri Stewart	Business Representative
Jeff Coombs	Steward

**For the Company:**

Robert S. Halagan	Attorney-at-Law
Ralph D. Myakkanen	General Manager

**III. ISSUE**

The undersigned's statement of the issue in dispute is as set forth below:

Is the Company violating Article XI, Section 4 of the Outside Unit's CBA and Article X, Section 3 of the Inside Unit's CBA by withholding 401(k) plan contributions to the retirement savings of newly hired employees for one (1) year? If so, what is an appropriate remedy?

**IV. RELEVANT COLLECTIVE BARGAINING AGREEMENT LANGUAGE**

**Outside Unit: January 1, 2010 – December 31, 2012**

ARTICLE IV Grievance Procedure

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Section 4. All complaints or grievances must be submitted in writing within fifteen (15) days of their occurrence and any decision made thereon shall be made in writing.

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Section 8. ... If a complaint or grievance is not settled by negotiations or submitted to arbitration as herein provided within fifteen (15) days after written submission thereof, it shall be deemed not to exist.

ARTICLE VI – Seniority

Section 1. Employment with the Cooperative for the purpose of this Agreement shall be divided into three (3) categories:

Probationary Employees. ...

Regular Employees. ...

Temporary Employees. ...

Probationary journeyman lineman employees shall be entitled to the same benefits as regular employees and such employees shall become eligible for enrollment in the medical insurance plan. Further, such employee shall receive holidays and two (2) PTO days ninety (90) days after hire. All other classifications shall receive benefits, including four (4) PTO days after completing six (6) months as a probationary period.

Seniority shall be retroactive to the date of hire upon successful completion of the probationary period.

ARTICLE XI – Benefits

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Section 3. Effective 12-31-2009 the Cooperative has frozen the Defined Benefit Pension plan.

Section 4. Effective 1-1-2010 The Cooperative shall contribute nine percent (9%) of gross pay to the 401(k) plan (offered by the Cooperative) for each employee of the bargaining unit every pay period. This contribution is in addition to the one percent (1%) match that is currently available to all bargaining unit employees.

(Joint Exhibit 3)

**Outside Unit: January 1, 2013 – December 31, 2015**

**ARTICLE IV**      Grievance Procedure

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Section 3.      ... Step 1: ... All such complaints or differences shall be brought to the immediate supervisor in writing within fifteen (15) working days of the first known occurrence.

Section 4.      ... If a complaint or grievance is not settled by negotiations or submitted to arbitration as herein provided within the time limits set forth; it shall be deemed not to exist. ...

**ARTICLE VI**      Seniority

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Probationary journeyman lineman employees shall be entitled to the same benefits as regular employees and such employees shall become eligible for enrollment in the medical insurance plan. Effective, January 1, 2014, new employees will be eligible for enrollment following ninety (90) days of employment. Further, probationary journeyman lineman employees shall receive holidays and two (2) PTO days ninety (90) days after hire. All other classifications shall receive benefits, including four (4) PTO days after completing six (6) months as a probationary period. Seniority shall be retroactive to the date of hire upon successful completion of the probationary period.

**ARTICLE XI**      Benefits

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Section 3.      Effective 12-31-2009 the Cooperative has frozen the Defined Benefit Pension plan. The Plan shall be terminated at such time as the Cooperative has fully funded any [sic] liability obligations to the Plan. The Cooperative shall give the Union at Least sixty (60) days [sic] notice prior to the termination of the Plan and shall provide to the Employees their options as to their benefits under the Plan following termination.

Section 4.      Effective 1-1-2013 The Cooperative shall contribute nine and one half percent (9.5%) of gross pay to the 401(k) plan (offered by the Cooperative) for each employee of the bargaining unit every pay period. Effective 1-1-2014 The Cooperative shall contribute nine and three quarters percent (9.75%) of gross pay to the 401(k) plan (offered by the Cooperative) for each employee of the bargaining unit every pay period. Effective 1-1-2015 The Cooperative shall contribute ten percent (10%) of gross pay to the 401(k) plan (offered by the Cooperative) for each employee of the bargaining unit every pay period. This contribution is in addition to the one percent (1%) match that is currently available to all bargaining unit employees.

(Joint Exhibit 9)

**Inside Unit: July 11, 2011 – December 31, 2013**

**ARTICLE IV      Grievance and Arbitration Procedure**

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Section 2.      ... Step Two: ... The grievance must be submitted in writing within fifteen (15) days of the occurrence, and any decision made thereon shall be made in writing within fifteen (15) days of receipt of the complaint or grievance.

**ARTICLE V      Seniority and Employment**

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Section 2.      Employment Status. Employment with the Cooperative for the purpose of this Agreement shall be divided into three (3) categories:

Regular Full Time. ...

Regular Part Time Employees. ...

Temporary Employees. ...

Except as specifically otherwise provided in this Agreement, regular employees shall receive benefits, including four (4) PTO days after completing six (6) months as a probationary period. Seniority shall be retroactive to the date of hire successful completion of the probationary period.

**ARTICLE X      Benefits**

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Section 3.      The Cooperative shall contribute nine percent (9%) of gross pay to the 401(k) plan offered by the Cooperative for each employee of the bargaining unit every pay period. This contribution is in addition to the one percent (1%) match that is available to all bargaining unit employees.

(Joint Exhibit 4)

**V.      FACTS & BACKGROUND**

As suggested above, the present case involves two bargaining units, namely, the Outside Unit and Inside Unit. The record evidence suggests that the IBEW has represented the Outside Unit in collective bargaining since the 1960s; whereas, the Inside Unit was established in 2011, and the term of its first CBA was July 11, 2011 – December 31, 2013. (Joint Exhibit 4) The term of the Outside Unit's current CBA is January 1, 2013 – December 31, 2015. (Joint Exhibit 9)

For several years, Outside Unit and Inside Unit employees have received retirement benefits under the terms of a Defined Benefit Pension (“DBP”) plan, and a “Non-Standardized 401(k) Profit Sharing Plan.” Neither of these plans was negotiated with the Union and, thus, the Outside Unit’s pre-2010 CBAs made no reference to either plan. (e.g., see Joint Exhibit 2, the January 1, 2007 – December 31, 2009 CBA) It is uncontroverted that the Cooperative unilaterally determined the design of both plans. (Joint Exhibit 5, p. 55)

Regarding the 401(k) plan, the record suggests that since at least the September 2009, the Cooperative’s 401(k) “Adoption Agreement” with the First Mercantile Trust Company – the 401(k) plan administrator – has authorized several types of 401(k) contributions. One contribution type is dubbed “Employee Matching Contributions” (i.e., where the Employer can match an employee’s personal contribution). Relevant to the present matter is that for decades the Employer has been making matching 401(k) contributions of up to one percent (1%) of an employee’s compensation.<sup>1</sup> A second contribution type is the “Employer Non-elective Profit Sharing Contribution” (i.e., where the Employer contributes a non-matching percent of an employee’s compensation). Relevant hereto, as subsequently discussed, effective January 1, 2010, the Employer began making a non-matching nine percent (9%) gross pay contributions toward the retirement savings of employees in the Outside Unit.<sup>2</sup> (Joint Exhibit 7)

As designed, the Cooperative’s 401(k) Adoption Agreement also includes a section entitled, “Conditions for Eligibility.” Hence, paraphrased below are the Cooperative’s 401(k) plan’s participation requirements, which are applicable to both the matching and non-elective/non-matching retirement savings types of Employer contribution:

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<sup>1</sup> Henceforth, this one percent (1%) contribution rate will be referred to as 1%.

<sup>2</sup> Henceforth, this nine percent (9%) contribution rate will be referred to as 9%.

(1) To elect to make personal contributions to the 401(k) plan, the employee must have 500 hours of service with the employer within six (6) consecutive months from the employee's date of hire.

(2) To be eligible for matching and non-elective/non-matching Employer contributions, the employee must have one (1) year of employment with the Cooperative and must have worked at least 1,000 hours.

(3) The Cooperative's matching contribution will be at a minimum 1% of an employee's contribution.

(Joint Exhibit 7, pp. 4-5 and p. 14; Employer Exhibit 3, pp. 11-12) The record evidence suggests that these three features of the Cooperative's 401(k) Profit Sharing Plan have been in place for several years.

During Outside Unit negotiations that culminated in its 2010 – 2012 CBA, the MLEC proposed that henceforth it would "freeze" contributions to its DBP plan, while continuing the 401(k) Profit Sharing Plan, with its matching 1% contribution feature. This proposed change in employment terms was the focal subject of the 2010 negotiations. At the 11<sup>th</sup> hour, the parties reached a settlement, agreeing that the MLEC would (1) provide a new non-matching 401(k) contribution of 9% of an employee's gross pay, while (2) continuing the old matching 401(k) contribution of 1% of an employee's compensation. This was the agreed upon trade-off for suspending the DBP plan: A trade-off that took the form of new language in the Outside Unit's CBA – the first having to do with retirement benefits. (Testimonies of Dick Sackett, Assistant Business Manager, and Ralph Mykkanen, General Manager) Said language stated:

Section 3. Effective 12-31-2009 the Cooperative has frozen the Defined Benefit Pension Plan.

Section 4. Effective 1-1-2010 The Cooperative shall contribute nine percent (9%) of gross pay to the 401(k) plan (offered by the Cooperative) for each employee of the bargaining unit every pay period. This contribution is in addition to the one percent (1%) match this is currently available to all bargaining unit employees.

(Joint Exhibit 3; Outside Unit’s January 1, 2010 – December 31, 2012 CBA; emphasis added)

At the hearing, Mr. Sackett testified that the Union drafted the above-quoted language and that it was intended to mean exactly what it says, namely, “... that all bargaining unit employees would receive a 9% contribution on every pay period.” He also testified that details like 401(k) plan’s eligibility requirements, as summarized *supra*, were neither raised nor discussed during negotiations about the 9% and 1% 401(k) plan’s contribution rates.<sup>3</sup> On this point, Mr. Mykkanen concurred, observing that since January 1, 2010, the Employer has consistently followed its historic, “standard” eligibility definition, namely, that an employee must have 500 hours of service with the Employer within six (6) consecutive months from his/her employment date to be eligible to make 401(k) contributions, and one (1) year of service to be eligible to receive Cooperative contributions of 9% and 1% to the 401(k) plan.

In 2011, the new Inside Unit was certified and on July 11, 2011, that unit’s inaugural CBA took effect. The record evidence shows that the parties agreed to use the Outside Unit’s 2010 – 2012 CBA language with regard to 401(k) retirement savings benefits. Said language states:

Section 3. The Cooperative shall contribute nine percent (9%) of gross pay to the 401(k) plan offered by the Cooperative for each employee of the bargaining unit every pay period. This contribution is in addition to the one percent (1%) match that is available to all bargaining unit employees.

(Joint Exhibit 4)

During negotiations over the Outside Unit’s successor agreement (i.e., the 2013 – 2015 CBA), the parties agreed to terminate the DBP plan at such time that the Cooperative had fully funded its liability obligations. They also agreed that the Employer’s contribution to the 401(k)

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<sup>3</sup> The DBP plan also required that the employee work 1,000 hours in a 12-month period before the Employer was required to make contributions of 8.5% of base pay to the retirement plan. (Employer Exhibit 2)

plan would increase to 9.5%, 9.75% and 10% effective January 1<sup>st</sup> of 2013, 2014 and 2015, respectively. Said language reads as follows:

Section 3. Effective 12-31-2009 the Cooperative has frozen the Defined Benefit Pension plan. The Plan shall be terminated at such time as the Cooperative had fully funded ay [sic] liability obligations to the Plan. ...

Section 4. Effective 1-1-2013 The Cooperative shall contribute nine and one half percent (9.5%) of gross pay to the 401(k) plan (offered by the Cooperative) for each employee of the bargaining unit every pay period. Effective 1-1-2014 The Cooperative shall contribute nine and three quarters percent (9.75%) of gross pay to the 401(k) plan (offered by the Cooperative) for each employee of the bargaining unit every pay period. Effective 1-1-2015 The Cooperative shall contribute ten percent (10%) of gross pay to the 401(k) plan (offered by the Cooperative) for each employee of the bargaining unit every pay period. This contribution is in addition to the one percent (1%) match that is currently available to all bargaining unit employees.

(Joint Exhibit 9) Again, it is uncontroverted that during the negotiations of the Outside Unit's current CBA there were no bargaining table discussions about 401(k) eligibility requirements.

Jeff Coombs, Union Steward, testified that on March 20, 2013, at an Annual Benefits Review meeting, Shelley Byard, Human Resources/Payroll Specialist, informed Lori Parker – a Member Service Representative and an Inside Unit employee – that she would begin receiving the MLEC's 9% contributions "next month." Ms. Parker was hired on April 2, 2012, approximately one (1) year earlier. (Joint Exhibit 8) This, Mr. Coombs testified, was the first time he became aware of the fact that new employees were not receiving the referenced 401(k) 9% contributions until having completed one (1) year of service. Consequently, he contacted Mr. Sackett. On point, Mr. Sackett's testimony echoed that of Mr. Coombs, and he further indicated that after communicating with the MLEC, he discovered conclusively that newly hired Outside Unit and Inside Unit employees were not receiving the negotiated 401(k)

9% non-matching Employer contribution until having completed one (1) year of service.

Accordingly, he stated that he filed the Union's grievance on April 5, 2013. (Joint Exhibit 1)

The record shows that no new Outside Unit employees were hired in 2010 when the 9% Employer contribution provision was inaugurated. However, since September 2011, the following five (5) new employees were hired by the Outside Unit:

Lucas Larson	09/04/11 (Hire Date)
Steve Swedberg	06/04/12
Steve Garrison	03/11/13
Dereck Bendsen	03/18/13
Matthew Finlayson	03/17/13

The following two (2) new employees were hired by the Inside Unit:

Lori Parker	04/02/12 (Hire Date)
Kelly Butler	05/06/13

(Joint Exhibit 8)

The MLEC acknowledged that these newly hired employees did not receive either the 1% or 9% 401(k) contributions until meeting the one (1) year threshold for participation eligibility. From the MLEC's perspective, the newly negotiated/contracted 401(k) language addresses the Employer's "401(k) contribution terms," while neither addressing nor changing the "participation eligibility" terms in the 401(k) Adoption Agreement. Hence, the MLEC argued, that it was under no obligation to amend the 401(k) Adoption Agreement's eligibility terms.

## **VI. POSITIONS OF THE PARTIES**

### **A. Union Arguments**

The Union began by arguing that the MLEC's 401(k) 9% contribution obligations are spelled out in Article XI, Section 4 and Article X, Section 3 of the Outside Unit's and Inside Unit's CBA, respectively. They are not spelled out, the Union asserted, in the 401(k) Adoption

Agreement, as the Employer maintains.<sup>4</sup> The Union claimed that the Employer insists on treating these contractual provisions as if they were irrelevant and “extraneous,” which, for at least three interconnected reasons, is an indefensible position.

First, the Union maintained that these provisions are clear and unambiguous, each stating in relevant part:

(1) Outside Unit’s Article XI, Section 4 –

Section 4. Effective 1-1-2013 The Cooperative shall contribute nine and one half percent (9.5%) of gross pay to the 401(k) plan (offered by the Cooperative) for each employee of the bargaining unit every pay period. ...

(2) Inside Unit’s Article X, Section 3 –

Section 3. The Cooperative shall contribute nine percent (9%) of gross pay to the 401(k) plan offered by the Cooperative for each employee of the bargaining unit every pay period. This contribution is in addition to the one percent (1%) match that is available to all bargaining unit employees.

(Joint Exhibits 9 and 4, respectively; emphasis added) Nothing in these contractual provisions is unclear and, therefore, the Union claimed, the Employer’s reliance on the 401(k) Adoption Agreement for guidance about its contractual obligations under the 401(k) plan, while ignoring the CBAs’ 401(k) language, is misguided.

Second, the Union rhetorically asked, “*Which* employees should receive the 9% contribution?” Pointing to the above-quoted contract language, the Union answered, “... each employee of the bargaining unit...” Following this same pattern, the Union asked, “*When* should these employees receive the 9% 401(k) contributions?” and it answered, “... every pay period.”

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<sup>4</sup> From January 1, 2010 through December 31, 2012, the MLEC’s 401(k) contribution rate was 9% for the Outside Unit. (Joint Exhibit 3) From January 1, 2013 through December 31, 2013, the MLEC’s 401(k) contribution rate increased to 9.5%. (Joint Exhibit 9) From July 11, 2011 through December 2013, the MLEC’s 401(k) contribution rate was 9% for the Inside Unit. (Joint Exhibit 4) Herein, for simplicity, the undersigned will refer to a 9% contribution rate for both units.

The Union asserted that the Cooperative would have the underlined parts of the above-quoted language extended to read: "... each employee of the bargaining unit every pay period ONCE THEY BECOME ELIGIBLE UNDER THE TERMS OF THE 401(K) PLAN." The Union pointed out that the word "ELIGIBLE" is a metaphor for "after completion of one (1) year of service," which is not what the contractual language states. In this vein, the Union reminded the undersigned that his job is not to "rewrite" contractual language. Indeed, the Inside Unit's CBA – Article IV, Section 3 – states, "The arbitrator shall have no right to amend, modify, nullify, ignore, add to, or subtract from the terms and condition of this Contract." (Joint Exhibit 4)

Third, the Union urged that the truly the "extraneous" document in the present matter is the 401(k) Adoption Agreement and not the language in the CBAs. Hence, the Union observed, the 401(k) Adoption Agreement cannot trump contractual language and, further, the 401(k) Adoption Agreement is not a part of the CBAs. Citing precedents, the Union argued that the IBEW's job was to negotiate the 401(k) 9% contribution benefit, which it did, and that this benefit would be rendered meaningless if any conflicting provision in the 401(k) Adoption Agreement were permitted to supercede the negotiated benefit language.

Further, to the extent that the 401(k) Adoption Agreement conflicts with CBA language, the Employer should have amended the former to bring it into compliance with the MLEC's obligations under the negotiated CBAs. For example, if the parties had agreed in collective bargaining negotiations to increase the 1% matching contribution to 3%, then the Employer would have had an obligation to amend the 401(k) Adoption Agreement to so provide. By analogy, since the parties newly negotiated 9% 401(k) benefit for "... each employee in the

bargaining unit every pay period,” the MLEC had an obligation to amend the 401(k) Adoption Agreement to so provide but it did not do so.

Next, the Union refuted the MLEC’s claim that the one (1) year waiting period for the 9% contribution is an enforceable past practice that the IBEW failed to contest during the negotiation of either the Outside Unit or Inside Unit CBA. Initially, the Union observed that past practices are relevant in contract interpretation cases when either the contract language is ambiguous or when there is no contract language that addresses the issue in question. In the present case, the Union urged, the language in the CBAs is clear and unambiguous.

Moreover, in so many words, the Union observed that an enforceable past practice exists only when said practice, either implicitly or explicitly, is deemed by the parties to be the accepted response to a situation that has reoccurred over a long period of time. In the present case, since the MLEC began hiring new bargaining unit employees in September 2011 and simultaneously began implementing the so-called past practice of deferring their 401(k) Employer contributions for one (1) year, it cannot be claimed that this “deferral response” has endured for a long period of time. In addition, the Union argued, the IBEW was totally unaware of the fact that the September 2011 new hire and subsequently hired employees were not receiving the 401(k) contributions every pay period beginning with their first pay period. Therefore, the Union concluded, the allegation of an enforceable past practice is a fiction: The IBEW has neither acquiesced to nor accepted the Employer’s “response” of waiting one (1) year before making 401(k) contributions to the retirement savings of newly hired employees.

Further, while acknowledging that both CBAs contain a clause stating that unit employees shall receive benefits “... after completing six (6) months as a probationary period,”

the Union maintained that said acknowledgment was immaterial. (Joint Exhibit 4, p. 5; Joint Exhibit 9, p. 7) The Union contended that the Employer presented the “six (6) month probationary” argument at the arbitration hearing to rationalize its one (1) year delay position. However, the Union argued, the six (6) month language in the CBAs has nothing to do with the present issue, namely, whether the 401(k) plan’s 9% language imposes a one (1) year waiting period. Clearly, the Union argued, the “general” six (6) month language is secondary to the more “restrictive” CBA language that requires the Employer to make a 9% contribution to the 401(k) plan for “... each employee of the bargaining unit every pay period.” In the unlikely event that the probationary language is given credence, the Union pointed out that the MLEC, therefore, should have provided its newly hired unit employees 401(k) contributions after six (6) months of employment, not after one (1) year.

Still further, the Union called attention to the fact that the Cooperative has asserted previously that an appropriate remedy should only include 401(k) contributions after the date of the Union’s grievance. In view of this assertion, the Union argued that neither CBA restricts the Arbitrator’s remedial authority. Moreover, the Union urged that the undersigned dismiss the Employer’s argument that two (2) of the Outside Unit’s Grievants were hired during the term of the 2010 – 2012 CBA and, thus, that their grievances are untimely.<sup>5</sup> The essence of the Union’s dismissal plea is that since the Employer raised its untimeliness claim for the first time at the arbitration hearing, it was untimely.

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<sup>5</sup> Article IV, Section 4 of the Outside Unit’s 2010 – 2012 CBA provided that “All ... grievances shall be submitted in writing within fifteen (15) days of their occurrence and any decision made thereon shall be made in writing.” Further, Article IV, Section 8 provided that “ If a ... grievance is not settled by negotiations or submitted to arbitration as herein provided within the fifteen (15) days after written submission thereof, it shall be deemed not to exist. (Joint Exhibit 3, pp. 4-5)

Finally, for all of the above-discussed reasons the Union requested as follows: that the grievance be sustained; that the Cooperative be ordered to amend the 401(k) Adoption Agreement to comply with the contractual provisions in question; that the seven (7) grieving employees be made whole for lost contributions and lost investment earnings; and that the Arbitrator retain jurisdiction over the Award to resolve remedial issues that may arise.

**B. Employer's Arguments**

To begin, the Employer pointed out that long before the MLEC and the Union negotiated the new non-matching 401(k) 9% contribution benefit, the MLEC was already providing employees its matching 401(k) 1% contribution option. Continuing, the Employer maintained that regardless of contribution type, the Cooperative's 401(k) plan, as designed previously, included the participation requirement that to be eligible for the Employer's 1% matching contribution an employee must have been employed by the Cooperative for one (1) year. This eligibility standard was applied to all of the then existing members of both the Outside Unit – including Mr. Coombs – and what later became the Inside Unit, and it continues to be applied.

Further, the Employer argued, this eligibility standard is spelled out in the 401(k) Profit Sharing Plan's "Summary Plan Description" document, and this document was delivered to the Union on September 29, 2009, probably as a part of the parties' 2010 negotiations. (Joint Exhibit 6; Employer Exhibit 1) Still further, the Employer noted that this eligibility standard is articulated in the "Employee Handbook," copies of which local Union officials would have. Too, eligibility standards are covered every year with all employees at the Cooperative's "Annual

Benefits Review” meeting. In fact, the following overhead slide was presented at the November 9, 2011 and November 8, 2012 Annual Benefits Review meetings:

Thrift Plan Contributions

After 12 months of full time service and a minimum of 1,000 hours worked:

- MLEC makes a discretionary contribution of 9% of your annual gross income.
- MLEC also makes up to a 1% matching contribution if you contribute that much of your gross income.

(Employer Exhibits 4 & 5; emphasis added)

Continuing in this vein the Employer maintained that the Union Steward, as well as Lucas Larson and Steve Swedberg – who were newly hired during the term of the Outside Unit’s 2010-2012 CBA – attended these review meetings. Again, the 401(k)’s one (1) year/ 1,000 hours worked eligibility requirement was covered and, yet, none of these individuals grieved. Similarly, Lori Parker, who was hired in April 2, 2012, during the term of the Inside Unit’s 2011-2013 CBA attended the 2012 Annual Benefits Review meeting, at which 401(k) participation requirements were covered and, again, no grievances were filed. Finally, the Employer pointed out that since 2010, a “New Employee Orientation Checklist” is completed by each new hire. The employee is required to read, initial and date each item on this checklist. Regarding the disputed matter, item 24 in the checklist states:

24. Retirement Plans – First Mercantile Trust

THRIFT PLAN – 401(k) or ROTH PLAN *effective date* \_\_\_\_\_

- a. Employee may start pre-tax contributions on 1<sup>st</sup> of month following 6 months of employment or 1,000 hours of service
- b. Employer contributes up to 1% match after 12 months of employment and 1,000 hours of service

- c. Employer also contributes an additional 9% discretionary amount after 12 months of employment and 1,000 hours of service (9.50% in 2013 for outside unit union charges)

(Employer Exhibit 3) Based on the foregoing, the MLEC questioned the credibility of Mr. Coombs' statement that he first learned about the discussed eligibility requirement on March 20, 2013, at the 2013 Annual Budget Review meeting. Further, the grievance is untimely, given the historic application of the contracts' language; and, still further, the grievance is untimely as to any claim for benefits prior to the date of the grievance itself.

Next, the Employer observed that the parties' CBAs recognize the general concept of limited benefit participation (e.g., except for probationary journeyman linemen probationary employees – those with less than six (6) months of service – do not participate in benefits). The Employer pointed to the following contractual excerpts:

All other classifications shall receive benefits, including four (4) PTO days after completing six (6) months as a probationary period;<sup>6</sup> and

Except as specifically otherwise provided in this Agreement, regular employees shall receive benefits, including four (4) PTO days after completing six (6) months as a probationary period.<sup>7</sup>

This observation, the Employer averred, was made to demonstrate that the parties previously have negotiated benefit eligibility language, where warranted. However, in the present instance, the parties did not negotiate benefit-limiting language because said language was not warranted – it was already memorialized in the 401(k) plan's Adoption Agreement – and because they did not intend to alter the *status quo*.

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<sup>6</sup> See: Article VI, Section 1 in the Outside Unit's 2010-2012 and 2013-2015 CBAs. (Joint Exhibits 3 and 9)

<sup>7</sup> See: Article V, Section 3 of the Inside Unit's 2011-2013 CBA. (Joint Exhibit 4)

The Employer next called attention to the Inside Unit's 2011-2013 CBA and, specifically, to the following:

The Cooperative shall contribute nine percent (9%) of gross pay to the 401(k) plan offered by the Cooperative for each employee of the bargaining unit every pay period. This contribution is in addition to the one percent (1%) match that is available to all bargaining unit employees.

(Joint Exhibit 4) The Employer pointed out that these sentences are a reflection of kindred sentences found in the Outside Unit's 2010-2012 and 2013-2015 CBAs. These sentences, the Employer continued, include two references that are incongruous with the Union's interpretation of same and, further, its interpretation is limited to the following partial sentence: "... each employee of the bargaining unit every pay period." Rather than to decipher the parties' negotiating intent based on words in this partial sentence, the Employer urged the undersigned to base his interpretation on the quoted paragraph, "read as a whole."

With this interpretative rule in mind, the MLEC expanded the Union's partial sentence to read "... the 401(k) plan offered by the Cooperative for each employee of the bargaining unit every pay period." The Employer claimed that the Union's above-discussed interpretation is at odds with this expanded partial sentence. The Employer observed that the underlined part of this quote makes it quite clear that the parties intended to simply continue to rely on the existing 401(k) plan's design terms, while expanding the size of the Cooperative's contribution (from 0% to 9% of gross pay). *Inter alia*, the 401(k) plan offered by the Cooperative included the participation requirement that newly hired employees must work for one (1) year before the Employer was obligated to make the referenced 9% contribution "... for each employee of the bargaining unit every pay period." This, the MLEC explained, was why it did not change the eligibility terms in its 401(k) Adoption Agreement in 2010 and thereafter.

To highlight the Union's second incongruity, the Employer turned attention to the next sentence in the above-quoted paragraph, arguing that the whole paragraph dealt with "payment" language, not "eligibility" language. The referenced sentence reads, "This contribution is in addition to the one percent (1%) match that is available to all bargaining unit employees." Between the word "is" and the word "available" in this quote, is the word "currently," which appears in the (near) mirror image language of the Outside Unit's 2010-2012 and 2013-2015 CBAs. (Union Exhibits 3 and 9) Accordingly, the Employer maintained that when this language was negotiated – either "... the one percent (1%) match that is available to all bargaining unit employees" or "... the one percent (1%) match that is currently available to all bargaining unit employees" – the one percent (1%) match that was then available excluded ineligible employees (i.e., employees with less than one (1) year of employment). The incongruity comes into play, the Employer continued, if a non-matching 9% contribution is to be made immediately for new hires, as the Union claims, and, yet, the 1% match – "that is currently available" – is to be made upon completion one (1) year of employment with the Cooperative. In summation, the Employer urged that the "is available" or "is currently available" language only makes sense within the context of negotiations in which the bargaining parties intended to increase the amount contributed to the 401(k) plan, while not changing the 401(k) plan's eligibility criteria and other terms.

Moreover, the MLEC argued that the Union's claim that new employees are immediately eligible for unmatched 9% and matched 1% contributions to the 401(k) plan is at odds with other language in the CBAs. Specifically, for a new employee to immediately qualify for 401(k) contributions is at odds with the parties' bargained and reasonably prudent practice

of deferring benefit contributions for the new employee until the employee's probation period of six (6) months have elapsed.

Finally, the Employer argued that referenced 401(k) eligibility requirement is a major term of employment and, as such, it is a mandatory subject of bargaining, even though an implied benefit in the present case. Too, the Employer argued that the Union has known about this term of employment for years – Union members and officers alike have had to wait for one (1) year before the MLEC began making contributions to their DBP plan and to the 401(k) plan. As such, the Employer contended, said eligibility terms constitute a binding past practice, which means that it can only be changed through good faith bargaining – not by arbitral *fiat*. Too, the Employer averred that the grievance is untimely in whole or in part, as it was not filed within the CBAs fifteen (15) day window.

The parties, by their own admissions, never intended to change the 401(k) plan's eligibility requirements, only the MLEC's contribution level. For this reason, and those discussed above, the Employer requests that the grievance be denied.

## **VII. DISCUSSION & OPINION**

This case centers on the interpretation of Article XI, Section 4 and Article X, Section 3 of the Outside Unit's and Inside Unit's CBA, respectively. Specifically, the question at issue is whether these provisions are violated when the MLEC requires a newly hired employee to be on payroll for one (1) year with at least 1,000 hours of work before it begins to make matching 1% and non-matching 9% contributions to its 401(k) plan. For easy reference, these provisions are again presented:

### **Outside Unit CBA: January 1, 2013 – December 31, 2015**

ARTICLE XI Benefits

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Section 4. Effective 1-1-2013 The Cooperative shall contribute nine and one half percent (9.5%) of gross pay to the 401(k) plan (offered by the Cooperative) for each employee of the bargaining unit every pay period. Effective 1-1-2014 The Cooperative shall contribute nine and three quarters percent (9.75%) of gross pay to the 401(k) plan (offered by the Cooperative) for each employee of the bargaining unit every pay period. Effective 1-1-2015 The Cooperative shall contribute ten percent (10%) of gross pay to the 401(k) plan (offered by the Cooperative) for each employee of the bargaining unit every pay period. This contribution is in addition to the one percent (1%) match that is currently available to all bargaining unit employees.

(Joint Exhibit 9)

**Inside Unit CBA July 11, 2011 – December 31, 2013**

ARTICLE X Benefits

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Section 3. The Cooperative shall contribute nine percent (9%) of gross pay to the 401(k) plan offered by the Cooperative for each employee of the bargaining unit every pay period. This contribution is in addition to the one percent (1%) match that is available to all bargaining unit employees.

(Joint Exhibit 4)

These provisions differ in two (2) respects. First, the partial phrase "... offered by the Cooperative ..." is parenthesized in the Outside Unit's language but not in the Inside Unit's language. In the undersigned's opinion this is a difference without significant meaning. Second, the Outside Unit's language requires the Cooperative to make non-matching 401(k) contributions of 9.5%, effective January 1, 2013, with an accumulating incremental increase of .5% on January 1, 2014 and again on January 1, 2015. In contrast, the Inside Unit's matching 401(k) contribution rate is 9%, effective July 11, 2011 through December 31, 2013. While this inter-unit difference in language is substantively significant, it neither impinges upon nor affects the interpretation of the above-quoted provisions.

The genesis of these provisions was in 2010 when the Outside Unit's CBA was being negotiated. The Employer told the IBEW that it was planning to "freeze" the 8.5% of non-matching contributions that it was making to the MLEC's DBP plan. Heretofore, the DBP plan, although a mandatory subject of bargaining, was an implied term of employment and, as such, the Employer was required to negotiate its planned "freeze." Ultimately, the ratified 2010 – 2012 CBA included "freeze" language and, for this concession, the parties agreed to the new 9% non-matching Employer contribution to the 401(k) plan. In addition, the parties agreed to incorporate language in the CBA that acknowledged that the MLEC would also continue making its matching 1% contribution to the 401(k) plan. (Joint Exhibit 3) The Outside Unit's 2013 – 2015 CBA included language about the process by which the DBP plan would be "terminated." (Joint Exhibit 9, Article XI, Section 3)

During the term of Outside Unit's 2010 – 2012 CBA, the IBEW and MLEC negotiated the Inside Unit's maiden 2011 – 2013 CBA. That the DBP plan was on its way out of existence must have been known during these negotiations because the Inside Unit's CBA makes no reference to it. However, it did incorporate language that mirrored the verbiage in the Outside Unit's 2010 – 2012 CBA, having to do with the Cooperative's historic 1% matching contributions to the 401(k) plan, and with the relatively new 9% non-matching contributions to the 401(k) plan. (Joint Exhibit 4)

The question now arises about the interpretation of the language in Article XI, Section 4 and Article X, Section 3 of the Outside Unit's and Inside Unit's CBAs, respectively. Said question is: "May the MLEC delay making 401(k) plan contributions for a newly hired employee until same has one (1) year service with the Cooperative and worked at least 1,000 hours during that

year?” It is not surprising a question like this would arise because, in general, the parties seldom hold precisely the same understanding of newly negotiated contractual terms. Consequently, the undersigned is tasked with discerning what the parties’ *mutual intent* was at the time they *mutually agreed* to the contractual language in question.

The Union’s interpretation of the referenced language is based on the “plain meaning rule” of contract interpretation. The Union argued that the *mutually agreed* to language in the focal articles is “clear and unambiguous,” and, therefore, it urged the Arbitrator to assign the usual and ordinary meaning to these words since they, better than any other source, divulge the parties’ *mutual intent*. The words state that the 9% non-matching contribution in question shall be made by the Cooperative to the 401(k) plan for “... each employee of the bargaining unit every pay period.” This *mutually agreed* on verbiage is self-explanatory – “... every pay period,” means “... every pay period.” Further, the Union vehemently pressed, that the expressed words in the referenced articles do not state that an employee must have one (1) year of service with at least 1,000 hours of work before the MLEC must begin to make the 1% and 9% 401(k) plan contributions. Therefore, the Union averred, the parties *mutually intended* that the Cooperative was to begin making the referenced 401(k) contributions during a new employee’s first pay period.

Just as vehemently, the Employer rejected the Union’s interpretative analysis, arguing that an isolated phrase, even though *mutually agreed* upon, is not a reliable indicator of the parties’ *mutual intent*. Hence, the Employer urged that the phrase “... each employee in the bargaining unit every pay period” cannot be given absolute meaning absent a full understanding of its context. That is, the Employer observed that the “... each employee ...”

phrase concludes a sentence that begins with the following underlined phrase: “The Cooperative shall contribute nine percent (9%) of gross pay to the 401(k) plan (offered by the Cooperative) for each employee in the bargaining unit every pay period.” (With parentheses Joint Exhibits 3 & 9; without parentheses Joint Exhibit 4) This underlined preface to the “... each employee ...” phrase gives specific meaning to the latter. That is, the Employer argued, the parties *mutually agreed* that the 9% contribution would be made to the 401(k) plan “... offered by the Cooperative...” and not to *any other* 401(k) plan.

The undersigned ascribes to the rule that in order to infer *mutual intent* based on the written word, it is necessary to consider “context” (i.e., to consider the contract’s language “as a whole”). Thus, as the Employer urged, the Arbitrator agrees that the phrase “... each employee in the bargaining unit every pay period” cannot be independently relied on to infer the parties’ *mutual intent*.

Since at least September 2009, the Cooperative 401(k) plan has authorized matching Employer contributions of 1% of employee compensation: A retirement savings option that has been available to Cooperative employees for decades. In addition, and as authorized by the Cooperative’s 401(k) plan, since January 1, 2010 and July 11, 2011, the Employer has been making non-matching 401(k) contributions of 9% of gross pay for Outside Unit and Inside Unit employees, respectively. (Joint Exhibit 7; Employer’s Exhibits 2, 3, 4 and 5) Moreover, the 401(k) plan that was “... offered by the Cooperative...” during the parties’ 2010, 2011 and 2012 rounds of negotiations included the one (1) year delay participation qualifier among its design features.

In light of this fact, the undersigned concludes that Employer properly relied on the 401(k) Adoption Agreement and on other retirement savings documents to show that the one (1) year delay feature was incorporated in the non-matching 9% 401(k) plan that – at the time – was “... offered by the Cooperative ...” and that was *mutually agreed* to by the parties on three (3) distinct occasions. The Employer did not use the referenced “extraneous” evidence to supplant contract language, as the Union argued. Rather, this evidence was presented to give meaning to the phrase “... offered by the Cooperative ...” that modifies the phrase “... each employee of the bargaining unit every pay period.” These phrases, as a whole, suggest that the parties’ *mutual intent* was for each bargaining unit employee to receive the Employer’s 9% contribution every pay period provided that they qualify for same under the 401(k) plan that was being *offered by the Cooperative* at the time the bargain was struck.

This interpretation is reasonable since it is a reflection of the qualification requirements that have been a part of the instant workplace for decades, under both the 401(k) plan and now-defunct DBP plan. Moreover, the Cooperative’s employees, including Inside Unit and Outside Unit employees, have personally experienced the contested one (1) year delay, which is spelled out in the matching 401(k) plan’s “Summary Plan Description:” A description that at the very latest was sent to the Union with a cover letter dated September 29, 2009, two (2) months before the Outside Unit’s 2010 – 2012 CBA was negotiated, with its explicit references to the matching and non-matching 401(k) plan authorizations. Indeed, as the Employer persuasively suggested, the delivery of said description was likely prompted by the fact that the parties, for the first time, were negotiating 401(k) language. Too, the 401(k) plan’s one (1) year eligibility

requirement is cited in the “Employee Handbook” and covered at the Cooperative’s “Annual Benefits Review” meeting.

Furthermore, this conclusion is consistent with the very last sentence in the focal articles. The Outside Unit’s Article XI, Section 4 states, “This contribution is in addition to the one percent (1%) match that is currently available to all bargaining unit employees.” The Insider Unit’s Article X, Section 3 uses identical verbiage absent the underlined word “currently.” The Employer convincingly argued that the adverb “is currently” and the verb “is” highlights the fact that matching 401(k) contributions were only available or were only “currently” available to *eligible* 401(k) plan participants.

The foregoing analysis leads to the certain conclusion that the parties’ *mutually agreed* to language is a reliable reflection of their *mutual intent*, which was to sweeten the Cooperative’s current 401(k) plan – as is (i.e., as it was then designed) – with the new 9% non-matching contribution and continuation of the 1% matching contribution in exchange for “freezing” and then “terminating” the DBP plan. This certain conclusion is corroborated by the fact that the focal articles do not reference any of the Cooperative’s 401(k) plan’s design features – features that should not come as a surprise to parties’ bargaining table spokesmen. Indeed, the Union, as the drafter of the language in question, had the opportunity to resolve the question now in dispute, but failed to expressly do so in the verbiage it drafted. Also, as the record shows, the subject of the 401(k) plan’s participant eligibility was not discussed at any of the parties’ 2010 - 2013 rounds of bargaining, all of which combine to reinforce the Arbitrator’s conclusion that the parties mutually intended to retain the one (1) year design feature of the 401(k) plan, which is itself an implied term of employment.

The undersigned has considered the remaining arguments presented by the parties and determined that, if anything, they tend to support the determinative conclusion discussed above.

**VIII. AWARD**

For the reasons discussed above, the grievance is denied. The Cooperative has not and is not violating Article XI, Section 4 of the Outside Unit's CBA and Article X, Section 3 of the Inside Unit's CBA by withholding the non-matching 9% and the matching 1% contributions to its 401(k) plan on behalf of newly hired employees until they have worked one (1) year and at least 1,000 hours for the Employer.

Issued and Ordered on the 5th day of October 2013 from  
Tucson, Arizona.

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Mario F. Bognanno, Labor Arbitrator & Professor Emeritus