

IN THE MATTER OF THE ARBITRATION BETWEEN

THE MINNESOTA GOVERNMENT)	MINNESOTA BUREAU OF
ENGINEERS COUNCIL,)	MEDIATION SERVICES
)	CASE NO. 13-PA-0094
)	
)	
Union,)	
)	
and)	
)	
THE STATE OF MINNESOTA,)	DECISION AND AWARD
)	OF
Employer.)	ARBITRATOR

APPEARANCES

For the Union:

Alan W. Weinblatt
Weinblatt & Gaylord, PLC
Attorneys at Law
5874 Blackshire Path
Inver Grove Heights, MN 55076

For the Employer:

Rebecca A. Wodziak
Principal Labor Relations
Representative
Minnesota Management & Budget
400 Centennial Building
658 Cedar Street
St. Paul, MN 55155

On January 24 and 31, 2013, in St. Paul, Minnesota, a pre-hearing conference was held before Thomas P. Gallagher, Arbitrator, during which the parties presented evidence and argument concerning four grievances brought by the Union against the Employer. The grievances, which I describe more fully below, allege that the Employer was obligated by the parties'

labor agreement to continue the payment of wages and benefits to members of the Union during the partial shutdown of the government of the State of Minnesota in the summer of 2011.

The parties' purposes in holding the pre-hearing conference were two-fold -- first, to clarify the issues raised by the grievances, and second, insofar as possible, to limit the then forthcoming hearing by disposing of potential issues if such disposition was warranted by evidence presented at the pre-hearing conference.

On February 21, 2013, I issued a letter (the "Pre-hearing Conference Summary") that summarized what occurred at the pre-hearing conference. It described the issues raised by the grievances at that time, and, where possible, it made rulings based on evidence presented at the pre-hearing conference. I attach a copy of the Pre-hearing Conference Summary as an appendix to this Decision and Award -- to describe the issues originally raised by the parties and to record how the parties resolved many of those issues in grievance processing.

Subsequently, a hearing was held on five days -- on June 18 and 19, 2013, and on October 3, 24 and 25, 2013. The parties presented post-hearing written argument on December 9, 2013.

FACTS

The Employer is the State of Minnesota. The Union (sometimes "MGEC") is the collective bargaining representative of about 900 licensed engineers employed by the Employer, many of whom are engaged in the design of the state's roads and bridges, working in the Department of Transportation.

Minnesota Management and Budget ("MMB") is the department of state government that has primary responsibility for employee relations, including the negotiation and administration of labor agreements between the Employer and unions representing state employees.

The following is a brief description of the circumstances that led to the initiation of the original¹ four grievances. During the spring and early summer of 2011, the Minnesota Legislature was at impasse with the state's Governor concerning the budget for the forthcoming fiscal biennium, which was to begin on July 1, 2011, and end on June 30, 2013. On June 10, 2011, MMB, in the name of All Executive Branch Commissioners and Agency Heads issued a letter entitled "Layoff Notice" to Minnesota executive branch employees, part of which is set out below:

As you know, funds have not been appropriated to continue most executive branch agency operations after June 30, 2011. As a result, all agency operations except for those that are determined by the court to be "critical services" will be shut down. This unfortunate action is entirely due to lack of funds and reflects no discredit on your service or job performance.

This letter is to inform you of the impending shutdown and to provide notice to all employees you will be laid off or placed on an involuntary, unpaid leave of absence effective July 1, 2011, unless you are notified by your agency to report to work to perform "critical services." . . . [Emphasis in the original in bold-face or italics.]

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1. As I describe below, one of the grievances, which was initiated on June 28, 2011, was amended by a later grievance, initiated on July 26, 2011. The parties treat these two grievances as merged and refer to them, thus merged, as the "Class Action Grievance." The other two grievances, initiated on August 8 and 9, 2011, were settled after the pre-hearing conference and before the first day of hearing in this matter, June 18, 2013.

Witnesses for the Employer testified that MMB issued the Layoff Notice because it was anticipated that the budget impasse would prevent the appropriation of funding for the forthcoming new biennium before it began on July 1, 2011. In fact, the Legislature did not pass appropriation bills that funded government operations for the new biennium until July 19, 2011. The Governor signed the appropriation bills on July 20, 2011, and most executive branch operations were suspended from July 1, 2011, through July 20, 2011 (hereafter, the "shutdown period").

On June 14 and 15, 2011, MMB personnel met with leaders of seven unions representing executive branch employees -- the American Federation of State, County and Municipal Employees, the Minnesota Association of Professional Employees, the Middle Management Association, the Minnesota Law Enforcement Association, the State Residential Schools Association, the Minnesota Nurses Association and the Minnesota Government Engineers Council ("MGEC" or the "Union").

After lengthy negotiations among these parties on June 14 and 15, 2011, a tentative agreement, titled "Memorandum of Understanding" (the "MOU") was reached. All seven of the unions present during the negotiations executed the MOU. The Union did so on June 29, 2011. Representatives of three unions of faculty employed by Minnesota State Colleges and Universities ("MnSCU") were also present during the meeting of June 14 and 15, 2011, but they did not execute the MOU -- apparently because the MnSCU Trustees determined that the separate funding of MnSCU schools was sufficient to continue operations at least temporarily.

The preamble to the MOU in its final form, which is set out below, recites its purpose; from the reference to "MnSCU" in the preamble, I assume that at the time it was drafted, the drafters did not know whether MnSCU and its faculty unions would execute the MOU:

This Memorandum of Agreement is entered into this 29th day of June 2011 to address issues related to the potential shutdown of state government in the event that the Minnesota Legislature does not appropriate funding for State Agencies before July 1, 2011, or in the event that the MnSCU Board of Trustees determines that funds are no longer available to continue operations. The provisions below apply only to the term of any state shutdown which begins in 2011 and supersede any provisions to the contrary in the respective Collective Bargaining Agreements.

The Pre-hearing Conference Summary describes the four original grievances as follows:

Grievance Number 1: This grievance is a class action grievance dated June 28, 2011. Its allegations are made in response to issuance of the layoff [notice] described above. This grievance alleges that, during the expected government shutdown, the Employer would violate the parties' labor agreement:

- 1) By laying off employees in violation of the labor agreement;
- 2) By refusing to allow employees to work for a period after July 1 during a forthcoming shutdown of the state government;
- 3) By refusing to allow employees to exercise their contract right to manage their work time; and
- 4) By failing to pay employees for holidays and refusing to provide them accrual of vacation and sick leave.

Grievance Number 2: This grievance is a class action grievance dated July 26, 2011. It is an amendment of Grievance Number 1 -- "Amended to include Critical Positions." It repeats the allegations of Grievance Number 1, as described above, and it adds a new, fifth

allegation that during the shutdown period, the Employer violated the MOU that was executed by the parties on June 29, 2011:

5) By failing to assign "the most senior and capable employees" to "critical positions" and work during the shutdown.

Grievance Number 3: This grievance, dated August 9, 2011, was brought in behalf of a single grievant, Jon Jackels. (Hereafter, I may refer to this grievance as the "Jackels Grievance.") It alleges that the Employer violated the MOU by refusing to pay Jackels for eight hours of work, for which he claimed payment under the Time-Management provision of the labor agreement, described hereafter, after having worked eighty hours in a biweekly pay period that began on July 20, 2011, the last day within the shutdown period and the day previous to his recall to work on July 21, 2011.

Grievance Number 4: This grievance, dated August 8, 2011 (as appears from a poor copy), was brought in behalf of a single grievant, James Stoutland. (Hereafter, I may refer to this grievance as the "Stoutland Grievance.") It alleges that the Employer violated the MOU (and the labor agreement) by refusing to permit Stoutland to claim the use of eight hours of vacation to cover a day on which he was absent, July 22, 2011, after his recall. The allegation of contract violation is not clear. As I interpret it, it claims Stoutland should have been credited with vacation time for the hours he should have been allowed to work during the shutdown period.

On June 29, 2011, Kathleen Gearin, Chief Judge of the District Court for the Second Judicial District, issued "Findings of Fact, Conclusions of Law and Order," identifying "critical core functions of government" that should be continued during the shutdown period. The Order directed MMB to pay employees needed for the performance of such critical core functions, and it created a process by which a special master could recommend to the Court additions to the functions so identified, in response to petitions.

As I have noted, before the first day of hearing in this arbitration proceeding, June 18, 2013, the parties settled the Jackels Grievance and the Stoutland grievance, with payment by

the Employer of at least part of the amount sought by those grievances in behalf of each individual grievant. At that time, the Employer also paid as a settlement at least part of another individual claim, made in behalf of Jeffrey C. Southward, who was one of nine individuals identified as having a "seniority claim" at the pre-hearing conference.

At the pre-hearing conference, the Union made several other claims that were referred to as "seniority claims," based on allegations that several members of the bargaining unit should have been retained during the shutdown period because they were entitled to such retention in the performance of "critical services." In addition, the Union asserted a claim in behalf of Duane Greene, a former member of the Union's bargaining unit who had been promoted to a management position and laid off from that position during the shutdown period. This claim alleged that Greene, despite his promotion out of the Union's bargaining unit, still had rights that derived from the bumping provisions of the Union's labor agreement. The Pre-Hearing Conference Summary also identified other issues requiring resolution after hearing, based upon arguments made at the pre-hearing conference.

Eventually, as of October 3, 2013, the third day of hearing, the Union consolidated its arguments, eliminating many of the issues that had been identified at the pre-hearing conference -- notably, issues based on the allegation that Union members should have been retained to perform critical core functions and issues based on the allegation that Duane Greene had a right to bump into a bargaining unit position during the

shutdown period. For these and other issues that had been identified at the pre-hearing conference, their elimination did not occur by express reference. Rather, those issues were eliminated by the Union's statement, which I paraphrase, that only the following two issues needed resolution:

1. Whether, during the shutdown period, members of the bargaining unit were locked out in violation of the labor agreement, as the Union argues, or were laid off in compliance with the labor agreement, as the Employer argues. The parties' arguments about this issue recognize that its resolution may be affected by provisions of the MOU.
2. Whether, notwithstanding a possible ruling adverse to the Union's position on Issue 1, members of the bargaining unit should recover the wages and benefits lost during the shutdown period because the appropriation statutes that resolved the budget impasse on July 20, 2011, made the appropriations "effective retroactively from July 1, 2011," and thus, as the Union argues, restored the funds needed to pay wages and benefits during the shutdown period.

DECISION

Issue 1: Lockout or Layoff.

The parties agree that, for decision of issues arising in this proceeding, I should consider their 2009-2011 labor agreement as continuing in effect beyond its nominal expiration date of June 30, 2011. Article 5, Section 2, of the labor agreement, which I may sometimes refer to as the "No Lockout" provision, is set out below:

Article 5, Section 2. No Lockouts. No lockout, or refusal to allow employees to perform available work, shall be instituted by the Employer during the life of this Agreement.

The Union argues as follows. The No Lockout provision was included in the labor agreement as consideration for the Union's

agreement not to promote or engage in a strike, an undertaking made in Article 5, Section 1, of the labor agreement.

It is undisputed that during the shutdown period 1) work was available that Union members usually perform and 2) the Employer refused to permit them to do the work. The Union argues that the presence of these two conditions, which define a lockout, shows conclusively that the Employer violated the No Lockout provision of the labor agreement.

The Employer argues as follows. The action it took in refusing to permit employees to work during the shutdown period was clearly permitted by Article 13, Section 1(G), of the labor agreement. That provision, which I may sometimes refer to as the "Layoff" provision, is set out below:

Article 13, Section 1(G). Layoff. "Layoff" is defined as an interruption in employment in excess of ten (10) consecutive working days. An agency may lay off an employee by reason of an abolition of the position, shortage of work or funds, or other reasons outside the employee's control which do not reflect discredit on the employee's service.

The Employer argues that the Layoff provision establishes conditions that qualify an "interruption of employment in excess of ten (10) consecutive working days" as a layoff. A shortage of work or a shortage of funds are conditions expressly stated in the Layoff provision that qualify an interruption of employment as a layoff. The Employer concedes that during the shutdown period there was no shortage of the work usually done by bargaining unit members. The Employer argues, however, that, when it issued the Layoff Notice on June 10, 2011, it was reasonable to anticipate that it would have a shortage of funds,

caused by the budget impasse and that, without an appropriation authorized by the Legislature and signed by the Governor, it would be without legal authority to pay wages and benefits to executive branch employees.

For the following reasons, I rule that the action taken by the Employer -- whether it is called a "refusal to allow employees to perform available work" (as in the No Lockout provision) or "an interruption of employment in excess of ten (10) consecutive working days" (as in the Layoff provision) -- was not prohibited by the No Lockout provision. Rather, I rule that the Employer's action was a layoff permitted by the Layoff provision of the labor agreement.

First. Chapter 179 of Minnesota Statutes, entitled, "The Minnesota Labor Relations Act," establishes laws governing labor relations in the private sector, and Chapter 179A, entitled, "The Minnesota Public Employment Labor Relations Act," establishes laws governing labor relations in the public sector. Chapter 179A does not include a definition of "lockout," but Minnesota Statutes, Section 179.01, Subds. 9 and 7, taken together, define "lockout," thus:

Subdivision 9. "Lockout" is the refusal of the employer to furnish work to employees as a result of a labor dispute.

Subdivision 7. "Labor dispute" includes any controversy concerning employment, tenure or conditions or terms of employment or concerning the association or right of representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms, tenure or other conditions of employment, regardless of whether or not the relationship of employer and employee exists as to the disputants.

The Employer cites other authorities that define a "lockout" as requiring not only an employer's refusal to furnish work, but an intention to use that refusal to bring pressure on employees to accept management's position in a dispute between management and labor. The Employer cites the definition of "lockout" given in www.Merriam-Webster/dictionary -- "the withholding of employment by an employer and the whole or partial closing of the business establishment in order to gain concessions from or resist demands of employees." The Employer cites a similar example given in the Encyclopedia Britannica -- "the tactic of withholding employment, typically used by employers to hinder union organization or to gain leverage in labour disputes."

The Union and the Employer cite other authorities that discuss whether management's purpose of placing pressure on labor in a "labor dispute" is a requisite component of a "lockout." On balance, these authorities indicate that, as stated in the definition given above in Minnesota Statutes, Section 179.01, Subd. 9, to be a "lockout" a refusal to furnish work to employees must occur "as a result of a labor dispute."

The evidence shows clearly that the interruption of the employment of Union members during the shutdown period resulted from the impasse over a new budget -- a circumstance that cannot be considered as a tactic used "to gain concessions from or resist demands of employees."

Second. Principles of contract interpretation require that apparently conflicting contract provisions be interpreted

as a whole and not in isolation. Such an integrated reading seeks to give meaning insofar as possible to both contract provisions. In the present case, a reading of the No Lockout provision as prohibiting all refusals to allow employees to do available work would negate a primary part of the Layoff provision, which clearly states that a layoff is permitted "by reason of" a shortage of funds. The Union argues that there was not a shortage of funds, because employees who performed critical core functions during the shutdown period received wages and benefits. I find that those wages and benefits were paid by authority of Judge Gearin's order, which had limited scope, i.e., to pay only employees performing such critical core functions.

I also find that on June 10, 2011, it was reasonable to anticipate that there would be a shortage of funds with which to pay other employees during the shutdown period, and accordingly, I find that a condition was present at that time that qualified the notice of June 10, 2011, as a layoff notice, sent in compliance with Article 13, Section 1(G), of the labor agreement.²

I rule that the No Lockout provision of the labor agreement should not be interpreted so broadly that it would prevent layoffs "by reason of" a shortage of funds -- something clearly permitted by the agreement's Layoff provision. Rather, the No Lockout provision should be interpreted as prohibiting a

2. A provision of the labor agreement requires that layoff notices be sent thirty days in advance of the layoff, but the Union does not grieve the short notice period.

refusal of available employment to gain leverage in a labor dispute, in accord with the accepted definition of a "lockout."

Third. The Employer argues that, when the Union executed the MOU on June 29, 2011, it accepted the underlying premise stated many times in the MOU that the interruption of employment during the shutdown period would be a "layoff," thus excluding its characterization as a "lockout." The Employer notes that Paragraph 3(c) of the MOU states that employees "not assigned to critical positions shall be laid off or placed on involuntary unpaid leave of absence." The evidence shows that employees in the Union's bargaining unit received the Layoff Notice of June 10, 2011, and were not placed on involuntary unpaid leave of absence. The Employer argues that in at least nine paragraphs of the MOU, the language refers to employees who will not work during the shutdown period as being "laid off" or on "layoff." Nothing in the MOU refers to them as being locked out. The Employer points out that it negotiated and gained the agreement to the MOU of seven unions representing executive branch employees by providing benefits to employees that would have been unavailable to them if the government had merely shut down without such an agreement.

The Union argues that agreement to the MOU was gained without negotiations whether employees would be considered as laid off rather than locked out and that, instead, the negotiations about the MOU pertained only to benefits that might be provided in mitigation of the economic impact of the shutdown on employees. As the Union argues, the evidence does not show that the subject of a lockout was discussed during MOU negotiations.

The evidence does show, however, that, as the language of the MOU states, all parties who executed the MOU, including the Union, agreed that employees would be on layoff during the shutdown period.

Nothing in the terms of the MOU or in the evidence about negotiations that led to its adoption shows an intention to supersede Article 13, Section 1(G) (or similar provisions in labor agreements with other unions), which qualifies a shortage of funds as a valid basis for layoff.

It is clear that the interruption of the employment of Union members during the shutdown period was a layoff, done in compliance with the parties' labor agreement.

Issue 2: Effect of Retroactive Post-Shutdown Appropriations.

On July 19, 2011, the Minnesota Legislature passed appropriation bills to fund state government for the biennium that began on July 1, 2011. On July 20, 2011, the Governor signed the bills, thus resolving the budget impasse and ending the shutdown period. Laws 2011, Special Session, Chapters 1 through 10. Each of the ten appropriation statutes includes the following provision:

Unless otherwise specified, this act is effective retroactively from July 1, 2011, and supersedes and replaces funding authorized by order of the Second Judicial District Court in Case No. 62-CV-5203.

The District Court Order referred to in this provision is Judge Gearin's Order of July 29, 2011 (referred to above), which orders funding of the performance of "critical core functions of government" during the shutdown period.

The Union argues as follows. Notwithstanding my ruling that the interruption of the employment of Union members during the shutdown period was a layoff, done in compliance with the labor agreement, Union members should, nevertheless, be awarded the wages and benefits they lost while laid off. The Union urges that such an award is justified because the appropriation statutes signed by the Governor on July 20, 2011, made the appropriations retroactive to July 1, 2011, the start of the fiscal year and the start of the shutdown period.

The Union cites the provision of the appropriation statutes (set out just above), which makes the appropriation statutes "effective retroactively from July 1, 2011," and which provides that each such appropriation statute "supersedes and replaces funding authorized by order of the Second Judicial District Court in Case No. 62-CV-5203." As the Union interprets this provision, it gives authority to the state government to fund payment of the wages and benefits that laid off employees lost during the shutdown period, thus restoring any shortage of funds that might have been the basis for their layoff.

The Union argues that, if agencies of state government are permitted to retain all of the funding restored by the retroactive appropriations they received, they will receive an "unjust enrichment" to the detriment of the laid off employees.

The Employer argues that my authority as a grievance arbitrator in this dispute is limited by Article 15, Section 4, of the parties' labor agreement, which I set out below:

Article 15, Section 4. Arbitrator's Authority. The arbitrator shall have no right to amend, modify, nullify, ignore, add to or subtract from the provisions of this Agreement. He or she shall consider and decide only the specific issue submitted in writing by the Employer and the Council and shall have no authority to make a decision on any other issue not so submitted to him/her. The arbitrator shall be without power to make decisions contrary to or inconsistent with or modifying or varying in any way the application of laws, rules or regulations having the force and effect of law. . . .

The Employer argues that the executive branch employees represented by seven unions were laid off in compliance with labor agreement provisions similar to Article 13, Section 1(G), of the labor agreement between the Union and the Employer and that none of the other executive branch employees has received wages and benefits for the time they were laid off during the shutdown period. The Employer argues that, unless I find a violation of the labor agreement in this proceeding, I have no authority as a grievance arbitrator to grant the remedy the Union seeks. The Employer argues that, if the Union were to receive the remedy it seeks without the showing of a contract violation, its members would be unjustly enriched.

For the following reasons, I do not award recovery of wages and benefits lost by Union members during the shutdown period -- notwithstanding the Union's argument that the appropriation statutes should be interpreted as authorizing such a recovery.

First. Each of the appropriation statutes provides that it "is effective retroactively from July 1, 2011." There is, however, no text in these statutes that expressly states that employees laid off during the shutdown period should receive wages and benefits they did not receive during the shutdown

period. The statutes include no express statement on that subject. Without such an express statement, I find the provision that the appropriations are "effective retroactively from July 1, 2011," to be not sufficiently definite to support the payments the Union seeks.

My interpretation of these appropriation statutes as too indefinite to support the remedy the Union seeks stands on its own, but I note that in the recent shutdown of the federal government, restoration of wages and benefits to federal employees who were "furloughed" because of a shortage of funds (also caused by a budget impasse) was done by express legislation.

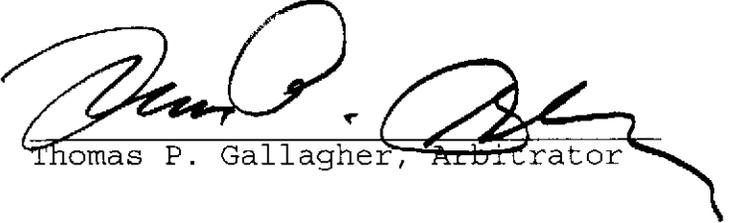
I also note that each of the appropriation statutes states that it "supersedes and replaces funding authorized by" Judge Gearin's Order of June 29, 2011. That Order, however, relates only to critical core functions of government and not to funding of wages and benefits of laid off employees.

Second. As the Employer argues, the evidence does not establish a violation of the parties' labor agreement. Rather, it shows that Union members were laid off in compliance with Article 13, Section 1(G), and that the Employer did not violate the No Lockout provision, Article 5, Section 2. In the absence of a showing that the Employer violated a provision of the parties' labor agreement, I do not have authority to grant a remedy based on the theory that employees should recover because the appropriations were "effective retroactively." Such a remedy, not based on violation of the labor agreement, is not available in grievance arbitration.

AWARD

The grievances I have identified above as Grievance Number 3 and Grievance Number 4 have been settled by the parties. The grievance that resulted from the merger of Grievance Number 1 and Grievance Number 2 is denied.

February 7, 2014



Thomas P. Gallagher, Arbitrator

THOMAS P. GALLAGHER
ATTORNEY AT LAW

2412 WEST 24TH STREET
MINNEAPOLIS, MINNESOTA 55405

ATTACHMENT
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February 21, 2013

TELEPHONE
612-374-2752
FAX 612-374-3656

Mr. Alan W. Weinblatt
Weinblatt & Gaylord, PLC
Attorneys at Law
Suite 300
111 East Kellogg Boulevard
St. Paul, MN 55101

Ms. Rebecca A. Wodziak
Principal Labor Relations
Representative
Minnesota Management & Budget
400 Centennial Building
658 Cedar Street
St. Paul, MN 55155

Re: The Grievance Arbitration Between
The Minnesota Government Engineers Council and
The State of Minnesota
Minnesota Bureau of Mediation Services
Case No. 12-PA-0094

Dear Mr. Weinblatt and Ms. Wodziak:

This letter summarizes what occurred at the pre-hearing conference in this matter, held on January 24 and 31, 2013. Because there was no transcript of the conference, the summary is based upon my notes, which may be incomplete. As you will see upon reading this summary, I am not sure about some of the allegations made by the parties. If either of you thinks that corrections, additions or modifications should be brought to my attention, please do so -- though I do not intend this statement as a broad invitation to re-argument.

The purpose and chief utility of the pre-hearing conference are twofold -- first, to clarify the issues raised by the allegations made in four grievances, and second, insofar as possible, to limit the hearing by disposing of potential issues if such disposition is warranted by evidence presented and argument made at the pre-hearing conference.

In this summary, I adopt the parties' assumptions that they are obligated by their 2009-2011 labor agreement, except insofar as their Memorandum of Understanding ("MOU"), dated June 29, 2011, has modified that agreement. Issues concerning the effect the MOU had on the labor agreement should be determined after presentation of evidence and argument at the hearing (including any post-hearing written argument). Similarly, issues relating to the effect of legislation and court proceedings should be determined after the hearing.

Four grievances are at issue, though the Employer argues that two of them are not properly before me. All of them arise out of the shutdown of state government between July 1, 2011, and July 20, 2011 (the "shutdown period"), at the beginning of a new biennium. On or about June 10, 2011, the Employer issued what it described as layoff notices to members of the Union (and to most employees of state government) because the Employer anticipated that the Minnesota Legislature might not appropriate funding for the forthcoming new biennium before it began on July 1, 2011. In fact, most operations of state government were suspended during the shutdown period because appropriations to finance those operations did not occur until July 20, 2011.

I identify the four grievances at issue as follows:

Grievance Number 1: This grievance is a class action grievance dated June 28, 2011. Its allegations are made in response to issuance of the layoff notices described above. This grievance alleges that, during the expected government shutdown, the Employer would violate the parties' labor agreement:

- 1) By laying off employees in violation of the labor agreement;
- 2) By refusing to allow employees to work for a period after July 1 during a forthcoming shutdown of the state government;
- 3) By refusing to allow employees to exercise their contract right to manage their work time; and
- 4) By failing to pay employees for holidays and refusing to provide them accrual of vacation and sick leave.

Grievance Number 2: This grievance is a class action grievance dated July 26, 2011. It is an amendment of Grievance Number 1 -- "Amended to include Critical Positions." It repeats the allegations of Grievance Number 1, as described above, and it adds a new, fifth allegation that during the shutdown period, the Employer violated the MOU that was executed by the parties on June 29, 2011:

- 5) By failing to assign "the most senior and capable employees" to "critical positions" and work during the shutdown.

Grievance Number 3: This grievance, dated August 9, 2011, was brought in behalf of a single grievant, Jon Jackels. (Hereafter, I may refer to this grievance as the "Jackels Grievance.") It alleges that the Employer

violated the MOU by refusing to pay Jackels for eight hours of work, for which he claimed payment under the Time-Management provision of the labor agreement, described hereafter, after having worked eighty hours in a biweekly pay period that began on July 20, 2011, the last day within the shutdown period and the day previous to his recall to work on July 21, 2011.

Grievance Number 4: This grievance, dated August 8, 2011 (as appears from a poor copy), was brought in behalf of a single grievant, James Stoutland. (Hereafter, I may refer to this grievance as the "Stoutland Grievance.") It alleges that the Employer violated the MOU (and the labor agreement) by refusing to permit Stoutland to claim the use of eight hours of vacation to cover a day on which he was absent, July 22, 2011, after his recall. The allegation of contract violation is not clear. As I interpret it, it claims Stoutland should have been credited with vacation time for the hours he should have been allowed to work during the shutdown period.

In the following summary of the pre-hearing conference, I treat Grievance Number 1 as merged with Grievance Number 2, referring to them usually as a single grievance, the "Class Action Grievance."

I. The Class Action Grievance.

The "Lockout-Layoff Issue." This, the primary issue, arises from the Union's argument that the Employer violated Article 5, Section 2, of the labor agreement:

No Lockouts. No lockout, or refusal to allow employees to perform available work, shall be instituted by the Employer during the life of this Agreement.

The Employer's primary response to this argument is that what occurred was not a lockout, but a layoff permitted under Article 13, Section 1(G), of the labor agreement, which is ostensibly a definition of "layoff," but one that includes conditions alleged by the Union not to have been met:

Layoff. "Layoff" is defined as an interruption in employment in excess of ten (10) consecutive working days. An agency may lay off an employee by reason of an abolition of the position, shortage of work or funds, or other reasons outside the employee's control which do not reflect discredit on the employee's service.

This definition states conditions that must be present in order that an "interruption of employment" be considered a "layoff." The parties disagree whether those conditions were

present (a disagreement centered, it appears, primarily on the Union's position that there was no "shortage of funds" that served as a "reason" for the "interruption of employment.")

The Union makes several arguments that seek to establish its position that there was no "shortage of funds" that would qualify the interruption of work as a layoff. I do not list these arguments here, except that I give the following description of two of them as examples. First, the Union argues that funds were available, though authority to spend them may not have been available. Second, it argues that, under the terms of the MOU, the non-payment of wages was suspended only until legislation was adopted on July 20, 2011, which appropriated funds for the new biennium, at which time the Employer could have and should have paid employees who had experienced an interruption in their employment by lockout. I rule that resolution of these and other arguments relating to a "shortage of funds" should occur after the hearing.

The Union also argues that the Employer did not comply with the "Layoff Procedure," established by Article 13, Section 5, of the labor agreement. Resolution of issues that arise from this argument should be determined after the hearing, except insofar as the Union has conceded during the pre-hearing conference that it does not challenge any insufficiency in the period of notice before layoff.

The Union makes other arguments relating to its allegation that its members were locked out in violation of Article 5, Section 2, of the labor agreement. I rule that resolution of issues arising from those arguments should occur after the hearing.

The Time-Management Issue. The Union also alleges under the Class Action Grievance that the Employer violated Article 6, Section 1(C), of the labor agreement (the "Time-Management" provision), which permits bargaining unit members to manage their time, thus:

Time Management. The Agency and the Council recognize that because of the professional and supervisory nature of their work, the employees covered by this agreement may be required to work varied hours, hours in excess of the normal work day and/or payroll period, work on holidays and weekends, and during several periods within a single day, making the maintenance of consistent starting and stopping times or the assignment of the number of hours worked in a day sometimes impossible.

It is recognized that employees are responsible for managing and accounting for their own hours of work and

may make adjustments in hours of work in subsequent work days and/or payroll periods, provided such time management does not result in overtime nor guarantee hour-for-hour for occasional excess hours worked.

The Employer makes substantive arguments opposing the Union's claim that the Time-Management provision was violated. In addition, the Employer argues that, at a grievance meeting on September 8, 2011, the Union withdrew any allegation that this provision was violated "immediately preceding the shutdown" when, allegedly, the Employer refused to permit bargaining unit employees to manage their work. The Employer does not argue that the Union withdrew its allegation of a violation of the Time-Management provision occurring after the start of the shutdown period. The Union denies that it intended to withdraw the allegation of a pre-shutdown Time-Management violation.

The parties agreed to present evidence and make argument at the pre-hearing conference concerning the alleged withdrawal of the Union's allegation of a pre-shutdown Time-Management violation -- to enable me to rule now whether that allegation had been withdrawn by the Union. That evidence includes the Employer's third-step response to the Class Action Grievance, dated September 30, 2011, written by Barbara Holmes, then the Assistant Commissioner of the Department of Management and Budget. In her summary of the grievance meeting of September 8, 2011, Holmes wrote:

At the grievance meeting, MGEC [the Union] withdrew the allegation that immediately preceding the shutdown, Engineers were not allowed to manage their hours of work, allegedly in violation of the labor agreement. MGEC noted that they did not agree with these actions.

Testimony presented at the pre-hearing conference corroborated Holmes' written statement that the Union withdrew its claim of a pre-shutdown Time-Management violation -- though the Union presented testimony denying that such a withdrawal had been made. Based on the presentations of the parties at the pre-hearing conference, I rule that the evidence supports the Employer's position that the Union withdrew allegations of a pre-shutdown violation of the Time-Management provision.

The Union argues that the Employer violated Article 24 of the labor agreement, which relates to the Employer's issuance of work rules, by issuing, on July 20, 2011, a Guide for Managers and Supervisors to be used upon resuming operations in the Minnesota Department of Transportation ("MDOT") -- in which the Employer limited the hours of work of employees returning to work after the shutdown. As I note below in my discussion of the Jackels Grievance and the Stoutland Grievance, allegations of violations that are based on circumstances, some occurring during the shutdown period and some after it ended, may have

sufficient connection with the shutdown period to be included as allegations made in the Class Action Grievance. I rule that issues arising from the Union's allegation of a work-rule violation and from other arguments relating to violation of the Time-Management provision alleged to have occurred after July 1, 2011, have not been withdrawn and remain at issue, to be decided after the hearing.

The Holiday and Vacation-Sick Leave Accrual Issue.
The Union makes arguments that the Employer violated the labor agreement by failing to pay employees for the holiday, July 4, 2011, which fell within the shutdown period, and by refusing to permit them to accrue vacation and sick leave during the shutdown period. I rule that resolution of issues arising from these arguments should occur after the hearing.

The Critical Core Functions Issue. The Union argues that the Employer failed to comply with an order of Chief Judge Kathleen R. Gearin, dated June 29, 2011, granting a motion of the Minnesota Attorney General to direct that "core functions of the State of Minnesota continue to operate and be funded on a temporary basis after June 30, 2011." Among its other provisions, Judge Gearin's order directed that the Commissioner of the Department of Management and Budget "shall timely issue checks and process such funds as necessary to pay for the performance of the critical core functions of government as set forth" in the court's order, and it "authorized [the Commissioner] to make payments necessary to carry out the critical core functions of the executive and legislative branches consistent with Exhibit A and the findings of fact and conclusions of law contained in this order."

In its amendment of the Class Action Grievance, dated July 26, 2011, the Union alleges that the Employer did not assign the appropriate personnel to perform the critical core functions, in compliance with Judge Gearin's order and with the MOU, which requires that such assignments are to be made by "seniority, provided that the senior employees are capable and qualified to perform the assigned work at the time of the assignment."

During grievance processing, the parties have had correspondence by email and memorandum concerning the identification of particular employees who were grievants under the Union's "seniority claims." The Union has identified, I believe, nine individuals as those grievants -- Jeffrey Southward, Wade Scepurek, David Willson, Mike Nash, Jim Loveland, Lawrence Aamodt, Mark Spafford, Michael Beer and Duane Green.

As I understand the Union's position, what it has referred to as the "seniority-claim" is the same allegation as the one that I have referred to above as its allegation that the

Employer failed to assign the proper personnel to perform "core critical functions." If this understanding is not correct, I request that, before the hearing, the Union clarify whether there are others who are included in the critical core functions claim, who they are and what, if any, distinction there is between grievants asserting a seniority claim and those asserting a critical core functions claim.

The Employer argues that Article 13, Section 1(H), of the labor agreement, set out below, provides that issues concerning the qualification of employees to perform the duties of a particular position are grievable only to the second step of the grievance procedure and that, therefore, those issues should not be decided in this arbitration proceeding:

Qualified. "Qualified" shall mean that the employee meets the registration, experience and/or educational requirements for initial appointment to the position. Upon request, the Agency shall meet and confer with the Council prior to a layoff or recall in any case where qualifications is an issue.

The determination of the Agency as to whether or not an employee is qualified to perform the duties of a particular position is grievable to the second step but is not arbitrable.

It appears on its face that Article 13, Section 1(H), of the labor agreement prevents the raising of issues relating to the qualifications of employees assigned to critical core functions in this arbitration proceeding. I am uncertain, however, whether the Union argues that the MOU or Judge Gearin's order of June 29, 2011, made Article 13, Section 1(H), inapplicable in this case. If the Union makes such an argument, it should so inform the Employer, and, if so, I will resolve issues arising from that argument after the hearing.

The Employer argues that seven of the nine employees who are identified above as "seniority-claim" grievants, are supervisors, and, as such, fall within statutory prohibitions that prevent the Employer from limiting its right to select supervisors -- Minn. Stat., Section 179A.07, et seq., and Minn. Stat., Section 43A.18. I rule that issues arising from this argument should be resolved after the hearing.

During the pre-hearing conference, the Employer objected to the inclusion of Duane Green as a grievant in this proceeding, arguing that, because Green had been promoted to a Manager's position outside the Union's bargaining unit, he cannot be represented by the Union in this proceeding. The Union responded that during the shutdown period Green had residual bumping rights that allowed him to bump back into a position represented by the Union, and that, because the right

to bump remained extant under the Union's labor agreement, Green's right to representation has continued. I rule that resolution of arguments relating to the inclusion of Green as a class-action grievant should occur after the hearing.

I rule that resolution of other issues arising from the Union's arguments related to the assignment of personnel to critical core functions should occur after the hearing.

III. The Jackels Grievance.

This grievance, dated August 9, 2011, was brought in behalf of Jon Jackels. I am unsure what allegations are made by this grievance. On its face, the grievance seems to allege that the Employer violated the MOU by refusing to pay Jackels for eight hours of work, for which he claimed payment under the Time-Management provision of the labor agreement after he worked eighty hours upon his return to work on July 21, 2011. Since the grievance, the Union has described it as grieving the Employer's refusal to pay for twenty-four hours of work rather than eight hours -- a claim that I understand to be based on the allegation that the Time-Management provision allowed Jackels to use extra hours worked after his recall as work that should be paid for in a pay period that was included in the shutdown period.

Apparently, it is alleged that the Employer's refusal to pay Jackels, whether for eight hours or for twenty-four hours, is based on the Employer's adoption of a Guide for Managers and Supervisors, used upon resuming operations in MDOT after the shutdown period.

The Employer opposes the inclusion of the Jackels grievance in this proceeding, arguing 1) that it was presented after the Class Action Grievance and was not processed as part of that grievance and 2) that, because at least some of the occurrences underlying the grievance arose after the end of the shutdown period, it does not fall within the scope of the Class Action Grievance. I rule that the allegations made by this grievance have sufficient connection with the shutdown period to warrant their inclusion in the Class Action Grievance and that, accordingly, issues relating to the Jackels Grievance should be resolved after the hearing.

IV. The Stoutland Grievance.

This grievance, dated August 8, 2011, was brought in behalf of a single grievant, James Stoutland. It alleges that the Employer violated the MOU (and the labor agreement) by refusing to permit Stoutland to claim the use of eight hours of vacation to cover a day on which he was absent, July 22, 2011, after his recall. The allegation of contract violation is not clear. As I interpret it, it claims Stoutland should have been

credited with vacation time for the hours he should have been allowed to work during the shutdown period. If my understanding of the Stoutland Grievance is correct, it has sufficient connection with the shutdown period to warrant inclusion in the Class Action Grievance. As a part of the Class Action Grievance, it does not require separate grievance processing. Accordingly, I rule that issues relating to the Stoutland Grievance should be resolved after the hearing.

February 21, 2013



Thomas P. Gallagher,
Arbitrator