

IN RE ARBITRATION BETWEEN:

**AMERICAN FEDERATION OF STATE COUNTY AND MUNICIPAL EMPLOYEES,
AFSCME COUNCIL 65**

and

MCLEOD COUNTY

DECISION AND AWARD OF ARBITRATOR

BMS 14-PA-0303

JEFFREY W. JACOBS

ARBITRATOR

May 23, 2014

IN RE ARBITRATION BETWEEN:

AFSCME Council 65,

and

McLeod County

DECISION AND AWARD OF ARBITRATOR
BMS Case # 14-PA-0303
Job Reclassification grievance

APPEARANCES:

FOR THE UNION:

Teresa Joppa, Attorney for the Union
Keith Ferrington, Business Agent
Shelly Lange, AFSCME local President
Lisa Waller-Maresh, Child Support Officer
Donna Krauth, Financial Ass't Supervisor

FOR THE COUNTY:

Susan Hansen, Attorney for the County
Pat Melvin, County Administrator
Paul Wright, County Commissioner
Frank Madden, County Negotiator

PRELIMINARY STATEMENT

The hearing was held on April 7, 2014 at the McLeod County Courthouse in Glencoe, Minnesota. The parties presented oral and documentary evidence at that time. The parties submitted Briefs dated May 5, 2014 at which point the record was closed.

ISSUES PRESENTED

The union characterized the issue as follows:

Did the Employer violate the collective bargaining agreement, CBA, when it failed to adjust the pay of three job classes of female employees after their grade assignments were re-rated by an outside consultant? If so, what is the appropriate remedy?

The County characterized the issue as follows:

Is the grievance substantively arbitrable? If the grievance is substantively arbitrable, did the County violate the collective bargaining agreement by not adopting the December 4, 2012 Dorothy Person job reevaluation recommendations?

The issue as framed by the arbitrator after reviewing the evidence and arguments of the parties as is as follows: Did the County violate the CBA when it refused to adjust the pay of the three job classes under consideration herein after their grade assignments were re-rated by an outside consultant? If so what shall the remedy be?

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement covering the period from January 1, 2012 through December 29, 2013. Article XIV provides for submission of disputes to binding arbitration. The arbitrator was selected from a list provided by the State of Minnesota Bureau of Mediation Services. The parties agreed that there were no procedural arbitrability issues but there was an issue of substantive arbitrability which will be considered along with the merits of the case.

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE III

EMPLOYER AUTHORITY

It is recognized by both parties that except as expressly stated herein, the Employer shall retain whatever rights and authority necessary to operate and direct the affairs of the Welfare Department in all of its various aspects, including but not limited to, the right to direct the working forces; to plan, direct and control all the operations and services of the Department; to determine the methods, means, organization and number of personnel by which such operations and services are to be conducted; to assign and transfer employees; to schedule working hours and to assign overtime; to determine whether goods or services should be made or purchased or contracted for; to hire, promote, demote, suspend, discipline, discharge or relieve employees due to lack of work or other legitimate reasons; to make and enforce rules and regulations; and to change or eliminate existing methods, equipment or facilities. It is also recognized by both parties that the Employer shall retain the authority and prerogative to:

1. Operate and manage affairs in all respects in accordance with existing and future laws and regulations or appropriate authorities including county personnel policies and work rules; and
2. Maintain the efficiency of the government operations; and
3. Take whatever actions may be necessary to carry out the missions of the County in emergencies.
4. Nothing in this Agreement shall prohibit or restrict the right of the Employer to subcontract work performed by the employees covered by this Agreement. The right to contract or subcontract shall not be used for the purpose or intention of undermining the Union, nor to discriminate against any of its existing employees or positions as of January 1, 1985.

ARTICLE XIV
GRIEVANCE PROCEDURE

Section A. A grievance shall be defined as a dispute or disagreement between the Employer and an employee regarding the interpretation or application of a specific term of this Agreement.

ARTICLE XXI
COMPENSATION

Article 21, Section B. Any employee promoted to a new job classification will be placed on a step in the new salary range that is at least a 3% increase above the original salary, within reason.

Article 21, Section C. A Comparable Worth review committee will be established to examine grade assignments and factor ratings on a routine basis. Any adjustments in compensation resulting from a grade change to a classification will become effective January 1 of the year following the grade change.

UNION'S POSITION

The Union's position is that the matter is and substantively arbitrable and that the County violated the CBA when it refused to implement the recommendations of its consultant who recommendation a pay increase for these affected positions. In support of this position the Union made the following contentions:

1. The union asserted that the pay grade change for the three female dominated job classifications at issue in this matter was a major issue in negotiations and that the County was well and that this was a deal breaker for the union and a major sticking point in those negotiations. Further, the union point to the language of Article 21 section B above and argued that this language did not give the County veto power over the pay grade changes after the consultant recommended the pay grade increase. While the County may have thought that, the language in the CBA, which always trumps any side agreement, does not grant to the County the power to condition any such wage increase in Board approval. The language says and means that any adjustments in compensation will become effective January 1 of the following year following the grade change. Here is nothing in that language that allows the County to renege on a commitment to increase the pay grade.

2. Even though the committee has been replaced by an outside consultant, it is clear that the recommendation was to increase the pay. Once that happened, the union asserted that the clear language of Article 21 applies to require the increase as of January 1 – just as the language provides.

3. The union also asserted that the parties specifically negotiated for, and that the union got, an agreement to increase the pay of those classifications once the review was done by the consultant and *implemented* by the end of the year.

4. The union characterized the clam now by the County that it only agreed to conduct the study and that any increase in pay would be subject to Board approval as disingenuous and contrary to what it believed I got at the bargaining table. Further, that the side agreement letters referenced and relied upon by the County do not trump clear contract language set forth above. That language provides for increases in pay on January 1st of the of the year following the grade change and has not changed for several years and several rounds of bargaining. The union further asserted that if the County had wanted to change hat language to allow for Board approval of any such increase it was incumbent on it to do so in negotiations – not by leading the union and the affected employees to believe they had won the right to get a wage increase once the consultant had recommended it and later renegeing on that promise.

5. The union further asserted that the language of the CBA is clear and unambiguous. It thus does not require resort to interpretive rules of construction to aid in determining contractual intent.

6. The union also argued that the clear intent of the parties was set forth in the language of Article 21 years ago and that the language has never changed despite several rounds of bargaining. The intent of the parties when this language was added to the contract was to give the pay equity review process some protection from political pressure and game playing like happened in this circumstance. It was also to establish when the pay adjustment would take effect and clearly provides for such increases to b effective January 1st of the year after the grade change.

7. The union maintained that what the County is really trying to do at this point is to add a requirement not found in the language and never intended to be in the language that any such pay grade increase is subject to Board approval. This is of course contrary to the most basic tenet of labor relations that a party cannot get in arbitration what it failed to get/protect in negotiations.

8. The union asserted that this is precisely what the County is doing here. It also runs contrary to the notion that parties signed the CBA with full knowledge of what is in it. The County knew that Article 21 contained no limitation on the increases for Board approval and should have negotiated a change in the language had it desired to change the result but failed to do so. As such it cannot gain an amendment to the language now.

9. The union cited the Local Government Pay Equity Act, LGPEA, and asserted that the County is not in compliance with it and that it has consistently lied to employees about when it would eventually actually do a comprehensive review of the classifications within the County. It claims that it will do so but consistently puts it off. The union asserted that the ploy to withhold these pay grades here is nothing more than a continuation of the pattern this County has used to delay pay increases even though an outside consultant has recommended they be increased. The union maintained that this is bad faith bargaining at its worst. The union further noted that the County led union negotiators to believe that the increases would be conditioned solely on the County's consultant reviewing the positions and agreeing the positions should be reclassified. The County even agreed to expedite that review by the consultant so it would be completed by the end of the year 2012. There was no agreement on the part of the Union that the County Board could countermand the consultant's report and recommendation nor was there an agreement by the union that the reclassification would be conditioned on Board approval. To say otherwise would be to add a condition in the language that is simply not there.

10. The union cited arbitrator Fogelberg in *AFSCME Council 65 and Blue Earth County*, BMS #87-PP-11-B. (1987) and noted that this case is similar in every material way. There the arbitrator was faced with a refusal by the employer to pay a clerk the higher pay rate where her supervisor fell ill and she had to do the work of a higher pay grade classification. The union asserted that by analogy the result should be the same here

11. The essence of the union's argument is that the contract is clear and requires that any pay adjustment as recommended must be implemented by January 1st of the year following the grade change. Since there is no dispute that the consultant recommended the pay increase and there is no language limiting the increase by Board approval the increase must be granted as set forth in the CBA.

The Union seeks an award finding that the matter is procedurally and substantively arbitrable and ordering the parties to proceed to a hearing on the merits.

COUNTY'S POSITION:

The County's position was that the grievance is both without merit and not substantively arbitrable. In support of this position the County made the following contentions:

1. The County asserted initially that the matter is not substantively arbitrable since job evaluations and classifications are inherent managerial rights not subject to the grievance procedure. The County cited Arbitrator Ver Ploeg in *Minnesota Teamsters Public and Law Enforcement Employees Union, Local No. 320 and County of McLeod*, No BMS Case No. (1995) and asserted that this case holds definitively that job classifications are inherent managerial rights. See also, *AFSCME Council 65 and Wright County*, BMS Case No. 10-PA-0565 (Jacobs, 2011) where the arbitrator denied a request by the union to grant an increase in pay where certain jobs had been re-evaluated. There was an agreement that jobs would be reevaluated and that those jobs with 1200 points would be reclassified, but there was no agreement the employees in question would be reclassified.

2. The County also cited *Brooklyn Park v. Brooklyn Park Police Federation*, No. C9-01-1145, 2002 WL 15635 (Minn. Ct. App. Jan. 8, 2002), where the court held that the arbitrator had exceeded the powers granted in the CBA when the arbitrator required that certain positions be posted. There was no such language in the agreement and the Court had that it was an excess of powers to add such a requirement. The County asserted that the union is in effect asking that the arbitrator add a provision to the CBA requiring the Board to negotiate job evaluations. The County argued that job evaluations are inherent managerial rights not subject to negotiation.

3. Further, there has been no express waiver of that reservation here and the arbitrator is without power to require the Board to adopt or implement the results of a job evaluation study. See, *Arrowhead Public Service Unit v. City of Duluth*, 336 N.W.2d 68 (Minn. 1983); *Minnesota Arrowhead District Council 96 v. St. Louis County*, 290 N.W.2d 608 (Minn. 1980).

4. The County asserted that even if the arbitrator finds that this matter falls within the grievance procedure and is arbitrable, the union's case fails on the merits. The County noted that the parties reached a clear tentative agreement regarding these classifications and that in both the tentative agreement document as well as a side letter – both of which were sent to the union well before the union signed the eventual CBA – the increases if any, as recommended by the consultant, would be “subject to Board approval.” The County asserted that there is no dispute that these documents were sent to the union negotiator and were shared with the negotiations committee for the union before the contract was signed. Thus, they knew that the County's position was clearly that any increase would be subject to Board approval and that it was not to be “automatic” upon the consultant's recommendation, as the union seems to suggest.

5. The County maintained that it was completely forthright with the union during and after the negotiations on the question of grade adjustments to these three classifications. Mr. Madden, the County negotiator, sent an e-mail dated July 13, 2012 setting forth the tentative agreement reached between the parties at the bargaining table that provided as follows:

CLASSIFICATION ANALYSIS FOR THREE JOBS IDENTIFIED BY MERIT SYSTEM. (Capitals in original)

County will utilize outside consultant to determine whether the classifications of Eligibility Worker, Lead Eligibility Worker and Child Support Enforcement Officer will be reclassified to a higher salary grade in the County range structure. County will attempt to have the analysis completed by December 2012. Any reclassification will be subject to County Board approval and if an increase is granted, such increase will be effective January 1, 2013. See, Employer Exhibit 1.

6. In addition, on August 3, 2012, County Administrator Melvin forwarded a side letter to Mr. Ferrington, the lead union negotiator, which mirrored the Tentative Agreement as follows:

Please note the County will utilize outside consultant to determine whether the classifications of Eligibility Worker, Lead Eligibility Worker and Child Support Enforcement Officer will be reclassified to a higher salary grade in the County range structure. The County will attempt to have the analysis completed by December 2012. Any reclassification will be subject to County Board approval and if an increase is granted, such increase will be effective January 1, 2013. See Joint Exhibit 2.

7. The County asserted most adamantly that the County was crystal clear in negotiations that any increase must be approved by the Board and that the increase was not “automatic.” These documents referenced above were sent to the union before the main CBA was signed in late September 24, 2012 yet at no point did the union or its negotiators ever ask that the language be changed or express any concern over the clear message that the increase, if any, would need to be approved by the Board. There was thus no attempt to hide anything or any evidence of bad faith bargaining. The union and its membership simply assumed that the Board would rubber stamp this but that was never the understanding nor was that ever expressed to the union or its representatives.

8. The County also asserted that the very language of Article 21 at least implicitly provides for Board approval since it calls for “[a]ny adjustments in compensation resulting from a grade change to a classification.” Such adjustments must be always approved by the Board and that was made clear to all concerned prior to the signing of the final draft of the CBA.

9. The County asserted that it was clear with the union as to what they had agreed to and fully complied with that agreement. The County was quick to point out that there was no agreement that the results of the consultant's recommendations would automatically be implemented. It was to be subject to the approval of the County Board.

10. The County also asserted that in this case it is appropriate to use both negotiations history and parol evidence to construe ambiguous language and asserted that the language of Article 21 is ambiguous, since it contains no express reference to re-evaluation of any of these positions and it contains older references to a committee that no longer exists. See, Bomstein and Gosline, *Labor and Employment Arbitration*, section 9.03(2)(c), p. 9-22 (2003); Hill and Sinicropi, *Evidence in Arbitration*, at page 52 (1980).

11. The County argued that Article 21 was never discussed in negotiations and that what was specifically discussed, as memorialized in writing as set forth above was the agreement that any increases in pay recommended by the consultant would be subject to Board approval. Thus, the union's literal reading of Article 21 is thus misplaced and subject to the specific negotiations discussed at the bargaining table.

12. Finally, the County asserted that the waiver clause does not apply here since there is nothing inconsistent between the language of the CBA and the negotiated agreement to condition any increases on Board approval for these positions. The County steadfastly maintained that there is nothing in the collective bargaining agreement affirmatively requiring the County Board to approve any reclassification. Rather, the tentative agreement and side letter memorializes the parties' intent and agreement that "any reclassification will be subject to County Board approval and if an increase is granted, such increase will be effective January 1, 2013."

Accordingly the County seeks an award of the arbitrator denying the grievance in its entirety.

DISCUSSION

The operative facts were largely undisputed. Article 21 section set forth above has been in the contract for several years unchanged from its present form. The evidence showed too that the committee referenced in that language has not been used for some time and has in effect been replaced with the use of outside consultants.

Further, the evidence showed that the parties discussed in bargaining for the present contract the reclassification of the three positions of Eligibility Worker, Lead Eligibility Worker and Child Support Enforcement Officer. There were very specific discussions about re-evaluating those positions and it was further clear that this was a very important piece for the union in those negotiations.

The parties reached a tentative agreement in bargaining that was reduced to writing not once but twice and sent to the union. Those documents, the operative portions of which are set forth above, both stated that any increase that was recommended by the outside consultant for the three positions at issue here would be subject to County Board approval. It was further clear that these documents were sent to the union's official lead negotiator well prior to the execution of the final draft of the contract. The evidence thus showed that the union was aware of the County's position that increases, if any, would be subject to Board approval. As noted above, the County's negotiator and the County administrator sent separate letters and written correspondence to the union outlining what the County believed to be the agreement reached with regard to these three specific job classifications.

The County utilized a consultant, a Ms. Dorothy Person, to conduct a job evaluation study of the three disputed positions. She recommended a grade change and an increase in pay for the three positions listed above. The union assumed that this meant that the grade changes and increase in pay would be implemented on January 1st of the following year.

In December 2012, the Board met to discuss the recommendation but tabled the request for an increase, effectively denying it, and instead indicated that it wanted to do a comprehensive study of all County positions rather than piecemealing this a few positions at a time. The nature of these assumptions will be discussed below but it was clear that the Board did not approve the increases and has not done the comprehensive study of County positions as promised at their meeting in December 2012 as of the time of the hearing in this matter.

This grievance followed and was timely processed through the appropriate grievance steps. It is against that basic factual backdrop that the matter proceeds.

SUBSTANTIVE ARBITRABILITY

The County argued that this matter is beyond the jurisdiction of the arbitrator to render a decision and is not substantively arbitrable. The essence this argument is that the case involves job evaluations that are not subject to the grievance procedure. The County further asserted that this matter is analogous to the matter before Arbitrator Ver Ploeg in *Minnesota Teamsters Public and Law Enforcement Employees Union, Local No. 320 and County of McLeod*, No BMS Case No. (1995). There the arbitrator ruled that the issue before her on those facts was not substantively arbitrable since it involved claim by the union that the job evaluation points assigned to certain positions was incorrect. On those facts the arbitrator ruled that the question of the process by which job evaluation points are assessed and rated is a matter of inherent managerial right not subject to the grievance procedure. Arbitrator Ver Ploeg noted that the negotiated language, found in Article 28 of the CBA at issue in that case, went “only to the question of how pay equity would be implemented, not to the job evaluation process and result.” She further noted that “nothing in the CBA related to job evaluation factors, the points or weight to be assigned those factors, the establishment or makeup of the committee, the evaluation process or the Rating Committee’s authority.” Slip op at page 7.

The facts here are significantly different.¹ The question here is not the process by which the points were assessed by Ms. Person but rather whether Article 21 mandates that any pay increase be granted once the rating has been done. The union pointed to Article 21 and asserted that it mandates an increase effective January 1st of the year following the rating. This is a dispute over the terms of the CBA and falls within the purview of the grievance procedure and definition of a grievance.

The County also cited the Court of Appeals decision in *Brooklyn Park v. Brooklyn Park Police Federation*, No. C9-01-1145, 2002 WL 15635 (Minn. Ct. App. Jan. 8, 2002). There the Court overturned an arbitrator's award that required the County to post certain positions where the CBA had no such provision. The rationale was that this effectively added a provision to the CBA that the parties had not placed there themselves. The Court also noted that this was a matter of inherent managerial rights and that the arbitrator had no power to infringe on those rights absent clear evidence that the parties themselves intended that to be the case. This result of course begs the question of whether an issue is indeed a matter of inherent managerial right or whether it is merely a dispute over the terms of the labor agreement that the employer simply disagrees with.

Here as noted herein, the question is not so much about the process by which the ratings were done, as was apparently the case in the Ver Ploeg decision, or what the ratings said but rather over whether a provision of the labor agreement called for the result of the job evaluation to be implemented in the form of a pay increase for these employees automatically effective January 1st of the year following the evaluation or whether those results were subject to County Board approval. That is quite clearly a question that arises under the CBA and calls into question the interpretation or application of a provision of the labor agreement itself.

¹ Indeed, Arbitrator Ver Ploeg noted that "the union conceded that the County never guaranteed that the Board would adopt the Committee's ratings. In fact, Rating Committee members ... testified that their recommendations would be subject to County Board approval." It was thus apparent that the union's claims before Arbitrator Ver Ploeg were very different from what they are now and that the union is making the very argument now that they specifically did not make before her.

The matter is thus arbitrable. The question is now whether on these unique facts, there was a requirement or an agreement to implement and grant the pay increase recommended by the consultant on these facts.

MERITS OF THE CASE AND THE AGREEMENT REACHED IN NEGOTIATIONS

The determination that a matter is substantively arbitrable means only that it is subject to the grievance procedure as a dispute or disagreement over the interpretation or application of the language of the CBA. It does not necessarily have any impact on the merits of a dispute or whether there was a preponderance of evidence to support one side or the other's position with respect to that disagreement.

The union's assertion is simple: it relies on the language of Article 21 and asserted that the language "any adjustments in compensation resulting from a grade change to a classification will become effective January 1 of the year following the grade change" means that any increase recommended must be effective January 1st of the year following the grade change. If that were the sole language at play here and if there had not been the specific negotiation over these three positions and if there had not been the two clear writings to the union discussed herein, the result might well have been very different. The language of the CBA can reasonably be read to require the pay increase effective January 1st of the year following the increase.

However, it can also be read as the County suggests and provides for when the adjustment is to be granted – as opposed to whether the increase is to be granted. It says "any adjustment," which can be reasonably read to make the increase contingent upon Board approval.² The implication is that the term "any" can be read as meaning that the increase is still contingent on something – as opposed to language that read "the increase as determined as the result of the study" or words to that effect.

² It should also be noted that in the Ver Ploeg arbitration the union apparently conceded that point albeit on somewhat different language. There though the relevant language provided that "if, as the result of a grade change, the employee's salary increases by more than \$100/month, the amount greater than \$100/month shall be incorporated into the salary in 2 equal adjustments to be made July 1 and December 1 following the grade change." Obviously that language did not specifically provide for County Board approval either yet it was assumed that it was.

Where language is ambiguous it is often necessary to resort to external evidence like the side letter and the tentative agreement letter to determine the intent of the parties of what was communicated at the table. Moreover, the union got the letter before they signed the CBA. If they had had problems it should have been brought up then, not after it was signed.

Reliance on the language of Article 21 might not have carried the day for the County alone though since it was clear that the union sought to not only have the study done but also to have the results of it implemented right away.

What did was the clear evidence that the parties negotiated over this very issue and these very positions and further specifically agreed that any increase would be subject to Board approval. The union did not seriously challenge that the letter from Mr. Madden and the County Administrator to Mr. Ferrington were not sent or that there was some other agreement. Neither was there any objection by the union prior to signing the CBA here. Both writings were sent well before that occurred and the evidence showed that the union membership was aware of these before signing the agreement. Further, there was no evidence that anyone ever suggested that the results of the study would *not* be subject to Board approval – from either side of the table. Such evidence would have been hugely significant but simply did not exist on this record.

There was finally no discussion of Article 21 in the negotiations leading to the current CBA. The language of Article 21 has apparently been in the CBA for several rounds of bargaining without changes even though the committee mentioned within it no longer exists. There has been no grievance filed over the use of outside consultants either or any objection to that process.

While clear language can, and generally does, trump any prior discussions made during negotiations, on this record it would be folly to simply ignore the clear evidence of what the agreement was with respect to these three positions. When parties specifically discuss an item in negotiations and come to a tentative agreement about it, in the absence of clear and convincing evidence to the contrary, that agreement must be given effect.

Here the language of Article 21 is ambiguous enough and the evidence of the agreement reached about these positions clear enough that the tentative agreement reflects the intent of the parties reached in bargaining. The prime directive in any contractual dispute is to divine the intent of the parties. One can scarcely imagine a clearer expression of that than what was presented here.

The union relied on an award by Arbitrator Fogelberg in *AFSCME #65 and Blue Earth County, BMS 87-PP-11-B* (1988). That case is distinguishable in that the question was whether the employees involved were entitled to greater pay because their job duties had changed and the evidence showed that they were in reality working in a higher paying classification. Here the facts show that the job duties had not changed but that they deserved to be in a higher classification than they had been placed previously. Arbitrator Fogelberg granted the grievance based on the evidence that the actual job duties being performed were in fact those of a higher pay grade. There was no evidence there of a specific agreement to do a study and that the results would be subject to Board approval.

While that may appear to be a distinction without a difference the evidence here also showed that the parties specifically negotiated over this at bargaining – a very clear difference between this case the matter before Arbitrator Fogelberg – and that they agreed as memorialized in two separate written communications to the union that any recommended increase would be subject to Board approval. There was thus on these facts a specific agreement that there would be no guarantee despite what the union and its members may have assumed about it.³

³ Having said that it is clear why these employees are angry at the Board. They were, as the old saying goes, effectively led to the fountain but suddenly denied the right to drink from it and this scenario may well be a “fool me once” proposition. It is also understandable why they are upset with the Board’s delay in doing the comprehensive job evaluation of the entire County as was promised during the December 2012 meeting – since that has not happened even yet. The arbitrator is without power to order this of course and on these facts must abide by the agreement of the parties made at the collective bargaining table and then memorialized in writing twice prior to the signing of the actual contract.

AWARD

The grievance is DENIED.

Dated: May 23, 2014

AFSCME and McLeod County Award

Jeffrey W. Jacobs, arbitrator