

IN THE MATTER OF ARBITRATION BETWEEN

County of Grant – Courtroom Employees)	BMS Case No. 05-PA-1113
& Social Services Employees)	
“Employer”)	Issue: Payroll Period
)	
and)	Hearing Date: 10-19-05
)	
Minnesota Teamsters Public & Law)	Brief Submission Date: 11-21-05
Enforcement Employees Union, #320)	
)	Award Date: 01-13-06
“Union”)	

JURISDICTION

The hearing in this matter was held on October 19, 2005, in Elbow Lake, Minnesota. The parties are signatories to a series of Collective Bargaining Agreements covering the Courthouse Employees and Social Services Employees bargaining units. Article 7.5B in both the Courtroom and Social Services labor agreements require a written arbitration decision within thirty (30) days following the submission of briefs by the parties. However, the parties, appearing through their designated representatives, waived these provisions.

At the hearing, the parties jointly stipulated that the matter is properly before the undersigned for a final and binding determination. The parties were given a full and fair opportunity to present their respective cases. Witness testimony was sworn and subject to cross-examination. Exhibits were accepted into the record. Post-hearing briefs were filed by postmark of November 21, 2005, and thereafter the matter was taken under advisement.

APPEARANCES

For the Employer:

Justin R. Anderson, Assistant Grant County Attorney

Chad Van Santan, Grant County Auditor

Zelda Avery, Grant County Human Resources Director

For the Union:

Patrick J. Kelly, Attorney

Brendt LaSalle, Legal Assistant

Joanne Derby, Business Agent, IBT, Local #320

Diane Amundson, Union Steward

Kathleen Bates, Union Steward

Ginny Frisch, Financial Worker

Rod Moe, Social Worker

Linda O'Meara, Assessment Technician

I. BACKGROUND AND FACTS

This matter involves two (2) County of Grant bargaining units, namely, the Social Service Employees and Courthouse Employees units, both represented by the Minnesota Teamsters Public and Law Enforcement Employees' Union, Local No. 320. (Employer Exhibits 2 and 3.) The fighting issue in this case deals with the Employer's unilateral alteration of the payroll period affecting these units.¹ (Employer Exhibit 8, Grant County Board of Commissioners, Special Meeting, February 16, 2005.) Without discussing the

¹ The County of Grant's Sheriff's Department employees, who also are represented by the Teamsters, Local No. 320, were affected by the Employer's unilateral alteration of the payroll period. Nevertheless, the Sheriff's Department employees are not grievants in this matter. They apparently do not dispute the Employer's actions in this case.

reasons and precise nature of the payroll period alteration at this point, it is sufficient to observe that before the policy alteration was introduced the affected employees received their pay every other Friday for working a ten (10) day period, which included work on the Friday that they were paid (hereafter referred to as “payday” Friday). Acting unilaterally, the Employer changed this policy by holding back pay for a period of one (1) week. That is, by paying for work performed during a ten (10) workday period on the Friday following the customary “payday” Friday. A phase-in strategy was implemented to achieve this change in payroll policy. Under this strategy, the Employer withheld one (1) day of pay for each of the following five (5) consecutive two (2) week pay periods:

- February 27, 2005 through March 10, 2005, with a March 11, 2005 pay day;
- March 11, 2005 through March 23, 2005, with a March 25, 2005 pay day;
- March 24, 2005 through April 5, 2005, with an April 8, 2005 pay day;
- April 6, 2005 through April 18, 2005, with an April 22, 2005 pay day;
- April 19, 2005 through April 30, 2005, with a May 6, 2005 pay day. (Union Exhibit 13).

The withholding of one (1) day of pay for each of five (5) consecutive payroll period meant that a full-time employee who worked 75 hours during a payroll period was credited for having worked only 67.5 hours, representing a 10 percent reduction in hours worked.² Consequently, the employee’s gross earnings for that period was reduced by 10 percent and, based on actual hours worked, the effective hourly wage rate paid the employee was reduced by an equivalent 10 percent.

² The full-time employee’s normal workweek is thirty-seven and one-half (37½) hours, excluding lunch breaks. (Employer Exhibits 2 and 3.)

To illustrate this general case, consider the relevant payroll records of Diane Amundson, a financial worker in the Social Services bargaining unit and Union Steward. (Union Exhibit 17.) For the two (2) week pay period ending February 26, 2005, which immediately preceded the five (5) payroll periods during which the policy was changed, Ms. Amundson was credited with having worked 75 hours at a regular hourly wage rate of \$16.91, and earning \$1,268.25 in gross wages. However, during the following five (5) consecutive payroll periods, beginning on February 27, 2005 and ending on April 30, 2005, Ms. Amundson's gross earnings fell to \$1,141.43 and, thereafter it returned to the \$1,268.25 level. That is, for each of the five (5) pay periods during which her bi-monthly pay was reduced by one (1) day's pay, Ms. Amundson's gross earnings fell by \$126.82.³ And since she actually worked 75 hours per payroll period, her effective hourly wage rate was \$15.22 and not \$16.91, her contractual hourly rate.

A purely unintended effect of the policy alteration was that the Employer, in some instances, also withheld a *pro rata* share of earned vacation, sick day and longevity hours that otherwise would have accrued. That is, the time-based benefits that normally would have accrued during each of the relevant payroll periods were reduced by 10 percent per period. Thus, to continue with the Amundson illustration, before the inception of the payroll period alteration, Ms. Amundson earned 6.92 hours of paid vacation and 1.75 hours of paid sick leave every two (2) weeks, as prescribed by contract. During the phase-in payroll periods, however, she accrued only 6.228 hours of paid vacation and 1.58 hours of paid sick leave. (Union Exhibit 17.)

³ Beginning with the March 11, 2005 payroll period, Ms. Amundson's regular hourly wage rate increased from \$16.91 to \$17.21. However, for purposes of this analysis her regular hourly wage rate is assumed to have remained constant for apple-to-apple comparison purposes.

With respect to the shortfall in time-based benefit accruals, the Employer acknowledged at the hearing that it made a mistake. The Employer stipulated that in the case of Courthouse employees, while vacation and sick leave accrual shortfalls had been corrected, their longevity accrual mistake had not yet been. Still further, the Employer stipulated that it would make the necessary time-based benefit accrual adjustments to the records of affected employees in both bargaining units before the instant Award is issued. Accordingly, the fringe-benefit aspect of this case will not be discussed further, except that fulfillment of the Employer's stipulations in relation thereto is formally ordered in the Award section of this decision.

The undersigned now turns to a discussion of the Employer's reasons for implementing the payroll period alteration. As previously implied, to implement its one (1) week holdback policy, the Employer withheld one (1) day of pay for each of five (5) payroll periods, commencing on February 27, 2005. However, prior to that date, employees in the affected bargaining units were paid bi-monthly; the typical workweek ran from Sunday to Saturday; and employees were paid on the Friday morning of each payroll period's second week. On the Monday or Tuesday preceding the Friday payday, employees would complete supervisor-signed time sheets that were delivered to the Auditing department on Wednesday. On Thursday, the following day, the Auditing department would transmit information on the bi-monthly amount payable to each employee to its commercial bank. On payday Friday, the bank would credit each employee's account by the designated amount of bi-monthly pay.

Critically, however, when completing bi-monthly time sheets, employees were required to anticipate work hours for the balance of a payroll period, namely, Tuesday

and/or Wednesday, Thursday and payday Friday. Unless previously scheduled, employees would assume that they would (1) work a normal work week; (2) not work overtime hours, if Courthouse employees; (3) not work on-call hours, if Social Services employees; and (4) not use vacation, sick or compensatory hours.⁴ Employees would use unanticipated sick or vacation leave days if they became ill between the time they turned in their time sheets and the end of the workday of payday Friday. Consequently, these ill employees would not work their anticipated and reported timesheet hours, and their earnings' statements for that pay period would not be accurate with respect to the total number of hours worked and the total number of sick leave, vacation or compensatory time hours taken. Inaccuracies like these would necessarily have to be corrected in the subsequent bi-monthly payroll period. Similarly, unanticipated overtime and on-call hours that were worked during the balance of a payroll period would neither be accurately reported nor compensated for on the instant payroll period's earnings statement. Again these inaccuracies would also have to be corrected in the next pay period.

The above-described payroll system presented the Employer with a number of concerns:

1. The wages some employees actually earned during a payroll period were not being paid on Friday paydays as required by *Minn. Stat.* §181.101; rather, unanticipated overtime and on-call hours worked could not be reported and compensated for until the subsequent payroll period (Employer Exhibit 10);

⁴ In contrast to Social Service employees, Courthouse employees are FLSA non-exempt and they do not receive on-call pay. (Employer Exhibits 2 and 3.)

2. Whenever anticipated hours of work were paid for but not actually worked, the Employer was paying for “obligations not incurred”, which is at variance with the County of Grant’s common law and fiduciary duties to protect the public treasury (Employer Exhibit 6);
3. Without contradiction, Mr. Chad Van Santan, Grant County Auditor, testified that the Minnesota Department of Economic Security, PERA and other agencies of government requires the Employer to report “actual hours worked” per employee during each payroll period. However, for example, if employees used unanticipated sick or vacation time, then hours worked information that is submitted to government agencies would not be accurate. Further, *Minn. Stat.* §181.032 requires that the Employer provide employees with accurate statements of earnings, hourly rates of pay, and total number of hours worked at the end of each pay period (Employer’s post-hearing brief at 15);
4. On a regular basis, the Employer received complaints from unit employees regarding the accuracy of their paychecks and vacation-sick leave-compensatory time bank totals;
5. Bank of the West, the Employer’s new banker, required for the first time that it must receive payroll information 48 hours in advance of the time that it was to make payroll deposits into employee bank accounts; and that without this 48-hour advance,

the bank would not guarantee that funds would be timely deposited in employee bank accounts. The Employer's current procedures for processing payroll information could not meet this 48-hour advance requirement; and

6. Following its FY 2003 audit, the State of Minnesota, Office of the State Auditor, documented a "verbal" recommendation that the Employer should implement a payroll system that would

improve internal controls by providing supervisors review and approval of timesheets prior to payment, elimination of the need for a reconciliation between actual hours worked and hours paid, and reduction in the risk an employee is paid for hours not worked.

(Employer Exhibit 1, dated October 14, 2005.) To accomplish these controls, the State Auditor observed that the Grant County would need to establish a "holdback period".

Based on this array of concerns and on discussions Mr. Santen had with the Grant County Board of Commissioners, the Commissioners unilaterally decided that the payroll system needed to be altered and, specifically, that what was needed was a one (1) week lag between the end of a payroll period and the date affected unit employees would be paid for that payroll period. Moreover, the record suggests that the Commissioners decided to phase-in this policy alteration, and they sought Union consultation on the phase-in aspect of the one (1) week holdback period.

On January 6, 2005, the Union and Employer met to discuss the matter.⁵ It is clear from the record evidence that the Employer explained why the pay policy needed to be changed by introducing a one (1) week or five (5) day holdback period. It is also clear that the parties discussed three (3) phase-in options. Namely, to withhold: (1) option #1 – one (1) day of pay for five (5) consecutive payroll periods; (2) option #2 – one-half (1/2) day of pay for ten (10) consecutive payroll periods; and (3) option #3 – two and one-half (2.5) days of pay for the last pay periods in July and December. In addition, the parties agreed to put these options to a vote by the members of the Courthouse, Social Services and Sheriff’s Department Employees units. (Union Exhibits 3, 4, 5, 6, 7 and 13; Employer Exhibits 5 and 9.)

Less clear is whether the parties at the January meeting also discussed a fourth option (i.e., option #4), which was to reject altogether the one (1) week holdback policy. Ms. Amundson testified that she thought that whatever came out of the meeting would be “brought back to the members”. However, she did not state in so many words that rejecting the Commissioners’ holdback policy ought to be one of the options put to a vote. Union Steward Kathleen Bates testified that she attended the meeting with the intent of relaying the content of matters discussed to Joanne Derby, Business Agent, and possibly to the membership. In addition, she stated that at the beginning of the meeting she brought up the need for a “no change” option on the ballot and that Zelda Avery, Grant County Human Resources Director, observed that Ms. Derby had previously made that point with her. Union Steward Linda O’Meara corroborated Ms. Bates’ testimony.

⁵ Mr. Santen and Zelda Avery, Grant County Human Resources Director represented the Employer. Representing the Courthouse employees were Kathleen Bates and Linda O’Meara; Social Services employees were represented by Diane Amundson and Rodney Moe; and Sheriff’s Department employees were represented by Union Stewards Jon Combs, Monica Krol, and Business Agent Merle King. (Employer

With respect to the holdback policy, Mr. Santen testified that he explained why it was needed. On direct examination, he also stated: “A couple of members present were opposed to it”, and during cross-examination he seemed to agree that the “no holdback” option did “come up”. However, during redirect, when asked whether the “no holdback” option came up, Mr. Santen testified: “Well, I didn’t hear it, honestly. I didn’t hear it.” Ms. Avery’s testimony corroborates Mr. Santen’s last utterance. She stated that the “no holdback” idea “...did not come up and was not discussed at the January 6, 2005 meeting.” To document her recall, she points to the minutes of the meeting, which she prepared. Her minutes make no mention of a fourth option. (Employer Exhibit 9.) Finally, both Mr. Santen and Ms. Avery testified that, in any event, the matter, namely, the fourth option, was not negotiable because the Commissioner’s planned to implement the one (1) week holdback policy.

Whether or not the fourth option was discussed at the January 6, 2005 meeting, it is clear from the record that the Courthouse and Social Services bargaining units’ bargaining agent was not willing to concede that the Employer had the right to unilaterally impose a policy of holding back one (1) week of pay. Indeed, Ms. Avery and Ms. Joanne Derby, IBT, Local #320 Business Agent, may have discussed this issue by telephone on January 31, 2005; however, this too is a point of contradiction. Nevertheless, on February 2, 2005, well before the February 16, 2005 meeting at which the Grant County Board of Commissioners voted to implement the one (1) week holdback, Ms. Derby informed Ms. Avery that the fourth option would be voted on by the

Exhibit 9.) Joanne Derby, Business Agent, Courthouse and Social Services Employees units was on vacation at the time.

two (2) bargaining units she represents. (Union Exhibits 4 and 13; also see Union Exhibit 3, the ballot used in the Courthouse and Social Services vote.)

In the February 2, 2005 letter, Ms. Derby also states that she was not convinced that the current payroll system was illegal, as the Employer claimed. Further, in a letter dated February 9, 2005, Ms. Derby writes in relevant part:

The Stewards understood that any options agreed upon would be brought to the membership for a vote along with the option to vote on “no hold back of wages” as this would be a change in the terms and conditions of employment and therefore, the change must be voted and agreed upon by the bargaining unit members.

(Union Exhibit 6, emphasis added.) Ultimately, a vote was taken and on February 11, 2005, the Courthouse and Social Services ballots were tabulated. Eight (8) Courthouse employees voted for option #4, which read as follows, “The current payroll practice will remain in place with no hold back”, and the other three (3) options received no support. Similarly, eight (8) Social Services employees voted for option #4; options #1 and #2 received one (1) vote each; and option #3 received no support. (Union Exhibit 3.) In a letter dated February 15, 2005, Ms. Derby advised Ms. Avery that both bargaining units voted against the one (1) week holdback policy change.⁶ (Union Exhibit 8.)

On February 16, 2005, the Commissioners voted to implement the discussed policy change and they opted to “...withhold 1 day per pay-period over the next 5 pay-periods, effective the pay period starting February 27, 2005.” (Union Exhibit 13.) In a letter dated February 18, 2005, Ms. Derby reminded Ms. Avery of the bargaining units’

⁶ As the Employer contends, the undersigned concludes that a plurality of the combined memberships of the three (3) bargaining units was the agreed upon standard for determining the phase-in option that ought to prevail. The Sheriff’s Department employees voted in support of option #1, which is to “withhold one (1) day of pay per pay period for the next five (5) pay periods.” Summing across the bargaining units’ option #1 was the prevailing outcome. However, the Sheriff’s Department ballot did not include option #4; whereas, the other bargaining units’ ballots did.

vote to reject the policy change in question, and advised that "...if the County proceeds forward with the one (1) week hold back of wages, the Union will be forced to file grievances". (Union Exhibit 9.) The Employer proceeded as planned to phase-in the one (1) week holdback policy, and on March 17, 2005, the Union filed class action grievances on behalf of the employees in both bargaining units. (Union Exhibit 1.) The parties were unable to resolve the grievances and the matter proceeded to the instant arbitration.

II. THE ISSUE

The parties jointly stipulated to the following statement of issue:

Did the County of Grant violate the Collective Bargaining Agreement by holding back pay for one (1) week without the consent of the Union? If so, what an appropriate remedy?

III. RELEVANT STATUTORY AND CONTRACT PROVISIONS

Statutes

Minn. Stat. §181.101

Wages; How Often Paid.

Every employer must pay all wages earned by an employee at least once every 31 days on a regular pay day designated in advance by the employer ... Unless paid earlier, the wages earned during the first half of the 31-day pay period become due on the first regular payday following the first day of work...For purposes of this section, wages are earned on the day an employee works.

(<http://www.revisor.leg.state.mn.us/data/revisor/statutes/2005/181/101.html> and Employer Exhibit 10.)

Minn. Stat. §181.032

Required Statement of Earnings by Employer.

At the end of each pay period, the employer shall give each employee an earnings statement in writing covering that pay period. The earnings statement may be in any form determined by the employer but must include:

* * *

- (c) the total number of hours worked by the employee unless exempt from chapter 177;
- (d) the total amount of gross pay earned by the employee during that period;
- (e) a list of deductions made from the employee's pay;
- (f) the net amount of pay after all deductions are made;

* * *

(See: <http://www.revisor.leg.state.mn.us/data/revisor/statutes/2005/181/032.html>)

Collective Bargaining Agreements

Article I. Purpose of Agreement

This Agreement has as its purpose ... to express the full and complete understanding of the parties pertaining to all terms and conditions of employment.

(Social Services Employees and Courthouse Employees Collective Bargaining Agreements, Employer Exhibits 2 and 3, respectively.)

Article IV. Employer Security

4.2 The Employer agrees not to interfere with the rights of employees to become members of the Union, that there shall be no discrimination ... against any employee because of Union membership ...

(Social Services Employees and Courthouse Employees Collective Bargaining Agreements, Employer Exhibits 2 and 3, respectively.)

Article V. Employer Authority

5.1 The Employer retains the full and unrestricted right to ... direct and control the operations and services of the department; ...and the perform inherent managerial functions not specifically limited by this Agreement.

5.2 Any term or condition of employment not specifically established or modified by this Agreement shall remain solely within the discretion of the Employer to modify, establish, or eliminate.

(Social Services Employees and Courthouse Employees Collective Bargaining Agreements, Employer Exhibits 2 and 3, respectively.)

Article VIII. Savings Clause

This Agreement is subject to the laws of the United States and the State of Minnesota. *** All other provisions of this Agreement shall continue in full force and effect.

(Social Services Employees Collective Bargaining Agreement, Employer Exhibit 2.)

This Agreement is subject to the laws of the United States, the State of Minnesota and the County of Grant. *** All other provisions of this Agreement shall continue in full force and effect.

(Courthouse Employees Collective Bargaining Agreement, Employer Exhibit 3.)

Article XI and Article XV11. Vacations

All Regular full-time employees shall earn vacation benefits according to the following schedule:

<u>Years of Service</u>	<u>Days of Earned Vacation</u>
0 through 1	Twelve (12) days per year
2 through 4	Thirteen (13) days per year
5 through 9	Sixteen (16) days per year
10 through 17	Twenty (20) days per year
Beginning of 18 th thru 24	Twenty-two (22) days per year
Beginning of 25 th year of (sic) more	Twenty-four (24) days per year

(Social Services Employees and Courthouse Employees Collective Bargaining Agreements, Employer Exhibits 2 and 3, respectively.)

Article X11. Leaves of Absence and Article XV. Sick Leave

12.1 Sick Leave

All regular and new full-time employees shall be credited with one (1) day of sick leave for each month of service. A day of sick leave for the purpose of this Section Shall mean seven and one-half (7 1/2) hours of pay at the employee’s regular straight time rate of pay.

(Social Services Employees Collective Bargaining Agreement, Employer Exhibit 2.)

15.1 All employees shall be credited with one (1) day of sick leave for each month of service based on regularly scheduled hours.

(Courthouse Employees Collective Bargaining Agreement, Employer Exhibit 3.)

Article XIX. Longevity

Employees shall receive longevity pay on the following basis:

Beginning 6 years	\$.10/hr
Beginning 11 years	\$.20/hr
Beginning 16 years	\$.30/hr
Beginning 20 years	\$.40/hr
Beginning 25 years	\$.50/hr

Longevity will not be added to base pay when negotiating increases in hourly wages.

(Social Services Employees Collective Bargaining Agreement, Employers Exhibit 2.)

Article XV. Rate of Pay and Article X111. Pay Plan

Both Agreements contain a schedule of pay rates organized by position and step. Pay schedules omitted. (Social Services Employees and Courthouse Employees Collective Bargaining Agreements, Employer Exhibit's 2 and 3, respectively.)

Article XX. Waiver and Article XXII. Waiver

The parties mutually acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any term or condition of employment not removed by law from bargaining. All agreements and understandings arrived at by the parties are set forth in writing in this Agreement for the stipulated duration of this Agreement. The Employer and employees Council (sic) each voluntarily and unqualifiedly waives the right to meet and negotiate regarding any and all terms and conditions of employment not specifically referred to or covered by this Agreement, even though such terms or conditions may not have been within the knowledge or the contemplation of either or both parties at the time this contract was negotiated or executed. All terms and conditions of this Agreement shall be binding on both parties hereto for the duration of the Agreement. The parties also acknowledge that all agreements and understandings arrived at are contained within this Agreement.

(Social Services Employees and Courthouse Employees Collective Bargaining Agreements, Employer Exhibit's 2 and 3, respectively.)

IV. POSITION OF THE UNION

The Union begins by noting that the Employer's decision to change the number of days in a pay period from ten (10) to nine (9) days, for five (5) consecutive payroll periods, in order to achieve its underlying policy objective of establishing a one (1) week holdback in pay, created an economic hardship for the affected employees and violates their labor agreements. The Union maintains that the Employer is required to negotiate both the (1) underlying payroll period alteration, the need for which it accepts; and (2) phase-in strategy of withholding one (1) day of pay for five (5) payroll periods. Both of these unilateral decisions, the Union argues, violates the Collective Bargaining Agreements and, in particular, articles 11 and 12 (Employer Exhibit 2), articles 15 and 17 (Employer Exhibit 3), and articles 15 and 19. In addition, pointing to *Law Enforcement Labor Services, Inc. v. County of Hennepin*, 449 N.W. 2d 725, 727 (Minn. 1990) and to *Law Enforcement Labor Services, Inc., Local 158, et al. v. Sherburne County, et al.*, 695 N. W. 2d 630, 635 (Minn. App. 2005), the Union contends that the Employer's actions in this case changes terms and conditions of employment under *Minn. Stat. §179A.03*, the Minnesota Public Employment Labor Relations Act (PELRA), which mandates that the Employer negotiate said decisions prior to their implementation.

Next, citing numerous cases, the Union observes that since the affected employees rely on full paychecks reflecting ten (10) days of pay, the Employer's action should be barred under the doctrine of equitable *estoppel*. Finally, relying on article 4 in the Social Services Employees Agreement, the Union urges that unlike the exempt supervisory employees, the paychecks of Social Workers were altered: a manifestation of contractually prohibited disparate treatment.

The Union's sought after remedy is as follows. First, that the Employer's unilateral actions in this case represent prohibited changes in terms and conditions of employment, as the latter were not the subject of prior negotiations. Second, that the Employer return to the pre-holdback payroll policy. Finally, that the affected employees be made whole with respect to both benefits and wages denied as a result of the new payroll policy's implementation.

V. POSITION OF THE EMPLOYER

The Employer begins by observing that the policy of holding back one (1) week holdback in pay was unilaterally implemented in an affirmative response to an advisory by the Minnesota State Auditor; because of the need to introduce greater operating efficiency and supervisory controls over the County of Grant's system of compensation administration; to conform to the wage earnings and hours reporting requirements of identified governmental agencies; and to be legally compliant with state laws like the provision in *Minn. Stat.* §181.101, requiring that "Every employer must pay all wages earned by an employee ... on a regular pay day ...", and the provision in *Minn. Stat.* §181.032, requiring that at the end of each pay period, the Employer must provide employees with an earning statement that includes, *inter alia*, total number of hours worked. Next, the Employer argues that the payroll policy alteration and phase-in strategy are not a term or condition of employment under PELRA, and that neither are violations of the controlling Agreements.

Rather, the Employer urges that the labor agreements do not reference to a specific pay period's pay date; that the "zipper" provisions in article 1, article 20 (Employer Exhibit 2) and article 22 (Employer Exhibit 3) allow management to deviate

from past practices; and that the Agreements do not include “maintenance of standards” language. In addition, pointing to language in article 5, the Employer contends that its contractual prerogatives to direct and control the bargaining units and to unilaterally modify terms or conditions of employment are vested, provided that they are not limited by the Agreements.

Further, the Employer asserts that while it did not negotiate the alteration to the payroll system, it did meet with the Union to discuss a phase-in strategy. Still further, the Employer contends that Social Services employees, unlike exempt and non-represented supervisory employees, receive on-call pay and, therefore, they were legitimately covered by the change in payroll policy.

Finally, the Employer promises to make whole any employee who incurred losses regarding longevity pay and the accrual of sick and vacation leave, and the Employer urges that the undersigned deny the grievances.

VI. OPINION

The first inquiry is whether the Employer’s basic policy decision to hold back employee pay for one (1) week violates the instant Collective Bargaining Agreements, as the Union alleges. Even though the Union acknowledges the need for such a policy alteration, it maintains that the change should have been negotiated since it is an established term and condition of employment. Indeed, the Union suggests that the Employer’s unilateral decision is an unfair labor practice under relevant sections of PELRA.

The Employer disagrees, arguing that the controlling Collective Bargaining Agreements do not include language that refers to the specific day on which employees

shall be paid *vis a vis* a specific payroll period. Further, the Employer observes that the parties have expressly agreed that their written contracts constitute the total sum of their joint understandings and that said contracts provide that in the absence of language to the contrary, the Employer maintains the right to unilaterally alter payroll administration policy. Still further, the Employer points to a State Auditor's advisory, compensation administrative practices, and state law as foundation for its decision in this case, implying that its conduct was neither arbitrary nor whimsical.

Having considered the record evidence and these competing arguments, the undersigned concludes that the Employer's decision to hold back one (1) week of pay is not a contract-based violation. On its face, the "zipper" language in article 1, and the much stronger language found in both article 20 (Social Services Agreement) and article 22 (Courthouse Agreement) is unambiguous, obviating the need for arbitral construction. Said language clearly states that "The parties acknowledge that all agreements and understandings arrived at are contained in this Agreement". (Employer Exhibits 2 and 3.) Suggesting that unwritten or implied customs and past practices are generally inapplicable when applying the Agreement. As a consequence, the fact that the affected employees have historically been paid on the second Friday of each payroll period is not probative of the issue.

Further, in the above-referenced articles, the parties

...unqualifiedly waive(s) the right to meet and negotiate regarding any and all terms and conditions of employment not specifically referred to or covered by these this Agreement...

(Employer Exhibits 2 and 3, emphasis added.) This language can only mean that the Union waived its right to bargain "... any and all terms and conditions of employment not

specifically referred to or covered by this Agreement”. This plain language, the fact that the Employer’s prerogatives are not limited by past practices, and the “reasonableness” of the grounds upon which the decision to change the payroll policy was based lead to the conclusion that the Employer did not violate the labor agreements.

However, whether the Employer’s unilateral policy decision is an unfair labor practice is less clear. Even to assume *arguendo* that a district court determined that the parties had the obligation to negotiate the change in payday policy would not be dispositive of the matter. The court would also have to incorporate the previously quoted waiver language into its analysis. Only if this language fails to meet the court’s “clear and unmistakable” test of a waiver of the duty to bargain, which it may, would it then sustain the Union’s unfair labor practice charge. (*General Drivers Union Local 346 v. Independent School District No. 704*, 283 N.W. 2d 524, 527 (Minn. 1979).) Ultimately, however, a court of competent jurisdiction and not the Arbitrator should decide the Union’s unfair labor practice allegation.

Next, the Union argues that the Employer’s phase-in strategy *per se* also violated the affected employees’ contractual rights, and that before the Employer implemented the phase-in plan, the Union formally communicated its non-concurrence. Specifically, the Union points to violations of the contract provisions covering Vacations, Sick Leave and Longevity. In addition, the Union argues that when the Employer paid the grieving employees for (9) days of work when they actually worked ten (10) days during five (5) payroll periods between February 27, 2005 and April 30, 2005, it also violated the Rate of Pay and Pay Plan articles in the Social Services and Courthouse Agreements, respectively.

In response, the Employer asserts that at the January 6, 2005 meeting, it sought Union input regarding the manner in which the one (1) week holdback policy ought to be implemented or phased-in; that the Union and the Sheriff's Department employees ultimately agreed to the altered payroll policy's phase-in strategy; that the Employer actions in this case were for legitimate business reasons, even compelled by law (see article 8, Savings Clause); and that any understatements of accrued time-based benefits were made in error and would be corrected.

Witness testimony and relevant documentary evidence make it clear that the parties did not mutually agree to the acceptability of the implementation strategy and/or to the (voting) method by which an agreed upon strategy would be determined, as the Employer suggests. Equally clear from the record is that while the parties were acting in good faith, they were talking past one another.

Ultimately, the undersigned concludes that it is highly unlikely that the Union Stewards who attended the January 6, 2005 meeting on behalf of the Social Services Employees and Courthouse Employees presented themselves as "authorized" bargaining agents. Indeed, in so many words, they credibly testified that they did not. Accordingly, the Union was not in violation of any agreement when it added the "no change" or option #4 to the ballot of its members. Further, since the Sheriff's Department's ballot did not include this choice its tallied outcome is not comparable to the Social Services and Courthouse tallied outcomes, precluding any determination about the option with the vote-winning plurality. Finally, the Employer knew well in advance of the Board of Commissioner's deliberations of February 16, 2005, that the Union was not in agreement with either the underlying pay policy alteration or the phase-in strategy.

Substantively, the facts of the case support the Union's contentions regarding time-based benefits and pay-based shortfalls. At the arbitration hearing, the parties resolved the issue of shortfalls with respect to the time-based benefits, but not pay-based benefits. Regarding the latter and with reference to Ms. Amundson's illustrative case, it is clear that her gross earnings fell short by \$126.82 of what it would have been in the absence of the Employer's implementation plan. In addition, it was shown that her effective hourly wage rate was \$15.22 and not \$16.91, which was her article 15 hourly wage rate. In light of these facts, the implementation strategy for phasing in the policy of withholding pay by one (1) week had the effect of violating the wage provision in articles 15 and 13 of the Social Services and Courthouse labor agreements, respectively.⁷

To summarize, although the Employer was well within its contractual rights to change the pay administration policy, its implementation worked havoc on the employees' rights to the extent that during the phase-in pay periods their effective wage rates were lower than the wage rates for which they contracted. Rather than to impose the change in pay policy at the expiration of the Agreements, or to negotiate an immediate phase-in strategy with the Union that would have left whole or had but a *de minimus* effect on the affected employees, the Employer chose to implement the policy change immediately in violation of the labor agreements. The establishment and the implementation of the change in pay policy are separable. In the opinion of the undersigned, the Employer could have affected the underlying policy change and also compensated its employees for any economic losses that would be incurred as a result.

⁷ Having determined that implementation of the Employer's payroll policy alteration had the effect of violating the pay provisions of the Agreements obviates the need to address the Union equitable *estoppel* argument.

This approach would not have placed the parties' actual, effective and intended negotiated wage rates in jeopardy.

As its final argument, the Union asserts that the Employer's actions in this case discriminate against Social Workers in violations of article 5 in their Agreement. In reply, the Employer points out that the basis for this discrimination is that Social Workers receive on-call pay, while its exempt supervisory personnel do not. And, critically, that on-call pay and on-call hours worked concerns were among the set of problems the change in payroll policy addressed.

With respect to this contention the Union failed to muster the kind of evidence needed to prove that the Employer discriminated against exempt Social Workers because of their status as Union members by favoring exempt supervisory workers who are not Union members. Other than argumentation, to which the Employer persuasively replied, the Union offered no evidence of anti-Union animus.

VII. AWARD

For the reasons discussed above, the grievances are overruled in part and sustained in part. The Employer was within its contractual rights to hold back pay for one (1) week. However, the Employer violated the labor contracts when it chose to accomplish this change by withholding one (1) day of pay for five (5) consecutive payroll periods without the Union's agreement to do so.

Employees were adversely affected by the Employer's implementation plan in violation of relevant provisions in the labor agreements. As remedy, the Employer is directed to make whole any employee who incurred losses in earning as a result. Further,

the Employer is directed to make whole any employee for time-based benefit losses they incurred as a result, as the Employer promised it would do in any event.

Finally, the undersigned shall retain jurisdiction over this matter through the end of the business day on Friday, March 3, 2006, in order to oversee enforcement of the above-ordered remedies. In the event the parties cannot agree of the appropriate levels of make whole earnings, the undersigned may reconvene the hearing to take evidence bearing on the remedy dispute and ultimately order specific make whole awards.

Respectfully submitted and ordered
on this 13th day of January 2006
from Tucson, AZ.

Mario F. Bognanno, Labor Arbitrator