

**IN THE MATTER OF ARBITRATION BETWEEN**

<b>AFSCME COUNCIL 5, LOCAL 66</b>	)	<b>OPINION AND AWARD</b>
	)	
<b>AND</b>	)	<b>BMS CASE # 05-PA-932</b>
	)	
<b>HOUSING &amp; REDEVELOPMENT AUTHORITY)</b>		<b>Grievance re:</b>
<b>OF DULUTH</b>	)	<b>Contracting Out/RIF</b>

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ARBITRATOR: Charlotte Neigh

HEARING: February 9, 2006

POSTHEARING BRIEFS RECEIVED: March 20, 2006

AWARD: April 28, 2006

**REPRESENTATIVES**

For the Union:

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For the Employer:

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**JURISDICTION AND PROCEDURE**

Pursuant to the parties' Agreement and the procedures of the Minnesota Bureau of Mediation Services, Charlotte Neigh was appointed to arbitrate this matter. A hearing was held in Duluth, at which time both parties had a full opportunity to offer evidence. By agreement of the parties, posthearing briefs were postmarked by March 17th, and the record was closed upon their receipt. At the hearing the parties waived the 30-day time limit for rendering an award, with the understanding that the award would be done within 60 days of the close of the record.

**ISSUES**

1. Whether the grievance is procedurally barred because of failure by the Union to present it at the meeting of the Board of Commissioners, as required by Step 3 of the grievance procedure.
2. If not so barred, whether the Employer violated Article 2 of the Agreement when it allowed the Grievant to be bumped from her position.

**PERTINENT AUTHORITY**

**AGREEMENT**

**“ARTICLE 2: MANAGEMENT RIGHTS**

The purpose of this Article is to establish that management retains all of its rights except to the extent to which it was agreed to be limited to or restricted by this Agreement. It is recognized that, except as expressly stated herein, the HRA shall retain whatever rights and authority are necessary for it to operate and direct the affairs of the HRA 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 HRA; 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 determine whether goods or services should be made or purchased; to hire, promote, demote, suspend discipline, discharge or relieve employees due to lack of work or other legitimate reasons; . . . to change or eliminate existing methods, equipment or facilities. . . . The HRA reserves the right to contract with third parties for goods or services of any kind, including those heretofore provided by members of this unit; however no such contract will be made which shall result in a reduction in the work force.

**ARTICLE 16: LAYOFF**

When it becomes necessary through lack of work or funds or for other causes for which an employee is not at fault to reduce the number of employees within the bargaining unit, the following procedure shall apply:

All temporary employees shall be laid off before full-time or part-time employees. If additional layoffs are required for employees, the Executive Director shall designate the job title and department in which such reductions shall occur. The least senior employee in such job title in that department shall be the first laid off. When an employee is laid off in such job title, he/she shall be permitted to exercise his/her seniority rights to bump-replace an employee with less seniority. Such employee may bump an employee in another job classification providing the bumping employee has greater seniority and qualifies for the position. The decision of the Executive Director as to qualifications shall not be subject to the grievance procedure, but may be appealed to the HRA Board of Commissioners whose decision shall be final. If found qualified by the Executive Director, such employee shall be placed in that position at the rate of pay for that position at the step he/she was at in his/her former position or the rate of pay of the new position at Step A, whichever is higher.

**ARTICLE 18: GRIEVANCE PROCEDURE**

18.1 A grievance is defined as a dispute or disagreement as to the interpretation or application of any term or terms of this Agreement. . . . If the matter is not resolved by informal discussion, it shall be settled in accordance with the following procedure:

\* \* \*

Step 3 If the grievance still remains unresolved, it shall be presented to the Board of Commissioners no later than their next meeting after the UNION demands that the Board of Commissioners hears the grievance. The UNION shall make such demand within seven (7) working days of receiving the response at Step 2, and the Board of Commissioners shall render their decision within ten (10) working days of such meeting. Nothing herein shall be construed to prohibit the Board of Commissioners from scheduling a Special Meeting to consider any such grievance. . . .

Step 4 If the grievance is still unresolved after response provided in Step 3 is due, the UNION may within ten (10) working days serve notice of intent to submit the issue to arbitration by giving written notice to the HRA. . . .

\* \* \*

18.3 Time Limits. If grievance is not presented within the time limits set forth above, it shall be considered “waived”. If a grievance is not appealed to the next step or steps within the specified time limit or any agreed extension thereof, it shall be considered settled on the basis of the HRA’s last answer. If the HRA or its agents do not answer a grievance or an appeal thereof within the specified time limits, the UNION or its agents may elect to treat the grievance as denied at the step and immediately appeal the grievance to the next step. The time limit in each step may be extended by mutual written agreement of the HRA or its agents and the UNION or its agents in each step and such extension will not be unduly withheld.”

**BACKGROUND AND UNDISPUTED FACTS**  
**RE: WHETHER THE GRIEVANCE IS PROCEDURALLY BARRED**

The HRA's challenge to arbitrability is based on steps and time limits required by the grievance procedure. Following is the sequence of relevant events:

- By letter dated 9/28/04 the Grievant was notified that: she was being bumped from her position as a Family Self-Sufficiency (FSS) Coordinator effective 10/20/04; and she would be permitted to exercise her seniority rights to bump a less senior employee in a position for which she qualified.
- By memo dated 10/5/04 the Grievant requested the position of Housing Specialist.
- A grievance dated 10/14/04 claimed a violation of Article 2 regarding contracting with third parties resulting in a "reduction in the work force", and "all other relevant articles"; the HRA's denial stated "contracted position did not result in a reduction of work force".
- On 10/22/04 the Union requested to proceed to Step 2; a meeting with the Executive Director was held on 11/10/04; on 11/22/04 he responded that the Agreement had not been violated.
- By letter dated 12/2/04 the Union requested a Step 3 hearing by the Board of Commissioners at its next meeting.
- By letter dated 12/14/04 the HRA notified the Union that the Board would not meet in December and that the grievance would be on the agenda for the next regularly scheduled meeting, which would be held on 1/25/05 at 3:30 p.m.
- By letter dated 1/27/05 to the Executive Director the Union Staff Representative stated: she had been "most disturbed" by the HRA's inability to "set any kind of meeting time with the Board last Tuesday"; she did not have 1 1/2 to 2 hours to sit and wait for a meeting; she had learned on Tuesday that this item was last on the agenda; and the lack of a time certain would have caused her to miss a scheduled medical appointment. The letter gave notice that the Union was moving the grievance to arbitration and requesting a list of arbitrators. The letter concluded by suggesting that the parties talk the following week to either select an arbitrator or reschedule the Step 3 meeting.
- By letter dated 2/2/05 the Executive Director responded to the Union's 1/27/05 letter, stating, in relevant part: the HRA did not consent to bypassing Step 3, which is a mandatory part of the grievance procedure; the HRA's position was that the Union had accepted the denial at Step 2 by failing to appear on 1/25/05 to present its appeal and so there was no grievance to arbitrate; the Union Representative had not mentioned any conflict with the meeting time in her conversation with the Deputy Director on 1/24/05 or in her meeting with the Union Steward and Grievant on the morning of 1/25/05; the first notice of her time conflict came one hour before the meeting's start time when the Union Representative called to say she had a medical appointment at 4:00 p.m.; the HRA responded then that the published notice placed the grievance hearing last on the agenda, as had been the past practice, and that the exact time could not be determined.

### Background and Undisputed Facts (continued)

- By letter dated 2/8/05 the Union Representative responded, in relevant part: she had requested to be on the agenda either before 4:00 p.m. or after 5:00 p.m. so that she could keep an important medical appointment; she was too busy to sit and wait for what could be more than an hour to get to her issue; and in the future they should try to set a “workable time” for Step 3 meetings. She concluded by requesting that the Step 3 meeting be rescheduled.
- By letter dated 2/16/05 the Executive Director responded, in relevant part: this Step 3 hearing had been rescheduled, and another Step 3 hearing was also scheduled, for the Board’s next meeting, which would be held on 2/22/05 at 3:30 p.m.
- By letter dated 2/24/05 the Executive Director informed the Union Representative: because the Union and the Grievant were not present to put forward the grievance at the 2/22/05 meeting, the Board of Commissioners considered that the grievance was waived by not being presented within the timeframes and that the decision made by management at Step 2 would stand.
- By letter dated 2/28/05 the Union Representative replied: she had not received the notice that the two grievances would be on the agenda until after the meeting; the notice letter was dated 2/17/05 (the correct date is 2/16/05) and she assumed it had not gone into the mail in time to be delivered on Friday 2/18/05; the following Monday 2/21/05 was a federal holiday with no mail delivery; and Tuesday’s mail would likely have been delivered later than the usual midday time due to a high volume of mail because of no delivery on Monday. This letter also references a letter dated 2/22/05 from the Union Representative to the Executive Director, which is not in evidence; it is characterized as asking to have the Step 3 hearing on both grievances scheduled for the April Board meeting. The Union Representative notes that the fact of her 2/22/05 letter should make it obvious that she had not yet received the notice of the 2/22/05 meeting at the time she wrote it.
- By letter dated 3/8/05 the Executive Director stated: both grievances had been heard by the Board at its 2/22/05 meeting as scheduled; the notice to the Union of the 2/22/05 meeting had been mailed 2/15/05 (not likely, as letter is dated 2/16/05); notice of the Step 3 hearing on the other grievance had been given on 2/2/05; and the Board upheld management’s decisions at Step 2 and both grievances were resolved.

This 3/8/05 letter by the Executive Director also referenced the Union’s 2/22/05 letter that is not in evidence: it characterized the 2/22/05 letter as “regarding the (other) grievance” and requesting that Step 3 hearings be scheduled for a specific time; the Executive Director stated this “is not an option our Board uses when setting their monthly agendas because it is impossible to predict the timing and flow of . . . discussion . . .”. The Executive Director’s letter also stated that the Union Representative’s assumption in her 2/22/05 letter that the April Board meeting would be on the 19th was incorrect: “As you know, the HRA Board meets on the last Tuesday of each month. Therefore the April meeting will be on April 26, 2005.”

### Background and Undisputed Facts (continued)

- By letter dated 1/28/05 the Union requested a list of arbitrators and the HRA participated in selecting one. By letter dated 12/5/05 Counsel for the HRA notified the Union Representative: “Because the union has failed to pursue arbitration of the above grievance, the employer considers the request for arbitration withdrawn.”
- By letter dated 12/6/05 the Union notified the Arbitrator of her selection and requested proposed hearing dates.
- At the beginning of the hearing on 2/9/06 the HRA raised the issue of arbitrability, based on the Union’s failure to appear for the Step 3 hearing by the Board of Commissioners. The Union argued that: the first meeting was missed because of a time conflict between the Representative and the Board; it had informed the HRA that it had not received timely notice of the second scheduled hearing; the HRA had refused to reschedule and go forward with a Step 3 hearing; and the Union was unaware that it was a continuing issue and was surprised because it had received no further information about arbitrability.

### **SUMMARY OF THE PARTIES’ ARGUMENTS**

#### THE HRA ARGUES THAT:

- Its participation in selecting an arbitrator and the hearing is not a waiver of any defenses; the collective bargaining Agreement (CBA) provides for arbitration of any dispute regarding its terms, including whether arbitration has been waived by failure to comply with time limits.
- The CBA unambiguously makes Step 3 of the grievance procedure mandatory; the Union must present its evidence and arguments to the Board of Commissioners; the failure to comply constitutes waiver of the grievance unless the step is clearly waived, which the HRA did not do. The HRA’s 2/16/05 notice of rescheduling the Step 3 meeting for 2/22/05 did not concede the jurisdictional defense.
- The Union admittedly failed twice to appear as scheduled but asserts various excuses; the lack of notice defense fails because the Grievant herself attended the 2/22/05 meeting although the 2/16/05 notice had been sent only to the Union, which indicates that the Grievant learned of the meeting through the Union.

#### THE UNION ARGUES THAT:

- The Union Representative missed the 1/25/05 meeting due to a doctor’s appointment and did not receive notice that the Step 3 hearing had been rescheduled for the 2/22/05 meeting until after it would have occurred; the HRA then refused to have a Step 3 hearing; it was the HRA rather than the Union that failed to follow the grievance procedure. To uphold the HRA’s position would allow it to avoid grievances by simply refusing to schedule the steps of the grievance procedure.

Union Arguments (continued)

- The CBA provides that if the HRA does not answer a grievance or appeal within the specified time limits, the Union may elect to treat the grievance as denied and immediately appeal it to the next step; this is the mechanism that the Union chose to exercise.
- This grievance is not procedurally barred.

**ANALYSIS AND DISCUSSION  
RE: ARBITRABILITY**

The evidence does not support the HRA's argument that it did not concede the jurisdictional defense when it rescheduled the Step 3 hearing for the February meeting. In his 2/16/05 letter the Executive Director simply stated that the HRA had "rescheduled step 3 of the grievance to be on the HRA Board agenda for their next meeting on February 22, 2005". There is no indication that this was to be anything other than a regular Step 3 hearing or that the HRA would take the position that the Step 3 hearing had been waived. It is concluded that the HRA did abandon the jurisdictional defense regarding the Union's failure to attend the January hearing; however, the HRA has retained its jurisdictional defense regarding the Union's failure to appear at the February hearing.

The HRA's argument that the Grievant's attendance at the 2/22/05 meeting proves that the Union had received notice is not supported by the evidence. Only one witness, the HRA Deputy Director, testified regarding this and the Arbitrator's notes reflect that she stated that: the Grievant requested the appeal; the Grievant didn't appear; the Grievant "was here that day" (which the Arbitrator took to mean that the Grievant was present at work that day); and there was no Union Representative present so it was not heard. Moreover, in the Executive Director's 2/24/05 letter, he states that "the union and the grievant were not present to put forward the grievance". Therefore this does not show that the Union had timely notice of the 2/22/05 Step 3 hearing for the Grievant's case.

On the other hand, the Union's argument that notice was not received until after the scheduled date is also not supported by evidence other than the Representative's assertion, which is largely based on speculation about when it was placed in the mail and possible delays in mail delivery due to a holiday. No evidence or explanation was offered regarding: the usual time required for mail delivery between the two offices; the postmark date on the envelope; the practice in the Union office regarding receiving and date-stamping mail; whether incoming mail is screened so that priority items receive prompt attention; when the notice was actually received and/or discovered; or why the Union did not initiate contact with the HRA about having missed the 2/22/05 meeting before 2/28/05, after it received the HRA's 2/24/05 letter asserting that the grievance was considered to have been waived.

The record shows that: the Board meeting was regularly held on the last Tuesday of the month, which should have been known to the Grievant and various Union representatives; and the Union knew that its failure to appear at the January meeting had seriously jeopardized the right to pursue the grievance. Given the importance of knowing whether the Step 3 hearing would be rescheduled for the February Board meeting, the Union had an obligation to take some initiative to ascertain whether it was on the 2/22/05 agenda.

Analysis and Discussion (continued)

Moreover, the record indicates that the Union had been sent notice on 2/2/05 that another grievance was scheduled for a Step 3 hearing at the 2/22/05 meeting. The Union Representative sent a letter dated 2/22/05 requesting that both grievances be rescheduled for the April Board meeting. This letter would foreseeably not be received until after the Union had once again failed to show up for scheduled hearings.

The parties have negotiated a grievance procedure that unambiguously mandates specific steps and time limits; it also expressly states that failure to abide by the time limits causes the grievance to be waived, meaning there is no longer a right to pursue it. The HRA is entitled to enforce these negotiated provisions and the Union has not demonstrated that it had justification or excuse for failing to appear at the February Board meeting.

**CONCLUSIONS**

1. The HRA waived its jurisdictional defense based on the Union's failure to appear at the January Board meeting.
2. The HRA did not waive its jurisdictional defense based on the Union's failure to appear at the February Board meeting.
3. The Union did not prove sufficient justification for failing to appear at the February meeting to present the grievance to the Board of Commissioners as required by Step 3 of the grievance procedure.
4. This unjustified failure to appear violated the contractual time limit (modified from the January meeting to the February meeting) for presenting the grievance to the Board.
5. The grievance is considered waived, in accordance with the mandate of Section 18.3, for failure to present a grievance within the contractual time limits.

**AWARD**

Arbitration of the substance of this grievance is procedurally barred by the Union's failure to present it at the February meeting of the Board of Commissioners, as required by Step 3 of the grievance procedure.

April 28, 2006

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Charlotte Neigh, Arbitrator