

IN RE ARBITRATION BETWEEN:

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

and

WRIGHT COUNTY

DECISION AND AWARD OF ARBITRATOR

BMS 10-PA-0565

JEFFREY W. JACOBS

ARBITRATOR

August 15, 2011

IN RE ARBITRATION BETWEEN:

AFSCME Council 65,

and

Wright County

DECISION AND AWARD OF ARBITRATOR
BMS Case # 10-PA-0565
Out of class pay grievance

APPEARANCES:

FOR THE UNION:

Leeann Kunze, Staff Representative
Rick Nelson, Staff Representative
Dorothy Schillewaert, former Union steward
Karen Bautch, grievant
Betty Johnson, grievant
Susan Elletson, Office Services Supervisor
Grace Baltich, Social Worker,

FOR THE COUNTY:

Pam Galanter, Attorney for the County
Dick Norman, County Coordinator
Judy Brown, Personnel Representative
Frank Madden, County's Labor Attorney

PRELIMINARY STATEMENT

The hearing was held June 15 and July 8, 2011 at the Wright County Courthouse in Buffalo, Minnesota. The parties submitted Briefs dated July 22, 2011 at which point the record closed.

ISSUES PRESENTED

The Union stated the issues as follows: Did the Employer violate the collective bargaining agreement when the employer assigned Bureau of Criminal Apprehension (BCA) duties to the grievants without negotiating a commensurate increase in pay? If so, what remedy shall apply?

The County stated the issue as follows: Is the grievance substantively arbitrable? If the grievance is substantively arbitrable, did the County violate the Labor Agreement when it determined, based upon the job evaluation process completed by the County's job evaluation consultant, that the grievants' job should remain at the Office Support Specialist grade level?

The issue as determined by the arbitrator is as follows: Is the grievance substantively arbitrable? If the matter is determined to be substantively arbitrable, did the County violate the collective bargaining agreement when it assigned additional duties to the grievant(s) without additional pay? If so what shall the remedy be?

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement covering the period from December 31, 2008 through December 31, 2011. Article VII 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.

UNION'S POSITION

The Union's position is that the County violated the contract when it assigned additional job duties of a higher scope and complexity to two individuals, Betty Johnson and Karen Bautch, without a commensurate increase in pay. In support of this position the Union made the following contentions:

1. The Union made it clear it was not seeking to challenge the employer's right to assign job evaluation points to the positions held by Ms. Bautch and Ms. Johnson. Instead, the grievance is about the employer's obligation to negotiate in good faith over the pay for the grievants' job duties and adhering to the intent of the parties at the bargaining table. The Union asserted that the agreement was that their jobs would be evaluated and assigned points that were to be used for reclassification and compensation. The clear understanding was that if the job was rated at 1200 points or more, the grievants' would be placed on a pay grade of Office Support Specialist, OSS, Sr., which carries additional pay.

2. The Union challenged the process by which the job evaluation study was done and asserted that rather than submit the actual job duties for these grievants, the County instead sent in a generic description which did not have the additional duties of working with the BCA. The Union noted that doing these studies carries with it an extraordinary high level of responsibility and can even result in criminal prosecution for the person doing it if it is done incorrectly. No other OSS has this level of responsibility and the Union asserted that the points should have been high as a result of this failure to submit the correct job duties to the evaluators.

3. The Union acknowledged that the grievants were hired by the employer to perform routine clerical work under the job title OSS. Prior to 2007 these grievants assisted Social Workers by preparing and sending out requests for background checks on pending licensure applications, including requests to law enforcement agencies for criminal history checks through the BCA, and sending out requests to other social service agencies regarding applicant's social service history. These duties were clerical and were included in the generic job description of OSS.

4. The Union noted though that after 2007, the job duties changed as the result of a statutory change and that Wright County began doing their own BCA checks. These duties were assigned to the grievants – and they were the only OSS personnel doing them after that. No other OSS personnel perform these tasks.

5. The Union asserted most strenuously that this is not simple clerical work and had been done before by civilian personnel in the Sheriff's department who were paid considerably higher than the OSS positions were. The Union asserted that this was due to the far greater level of responsibility and liability in performing this task.

6. The data the grievants handle is highly confidential and they themselves were fingerprinted before being assigned these tasks. The Union argued that their higher responsibility requires that they be paid commensurate with the level of responsibility. Even the past and present supervisors indicated that they believe the jobs these grievants hold warrants significantly greater pay due to the complexity and confidential nature of their job. See Union Exhibits C, D, E, J and U. These documents, according to the Union, show the efforts made by the grievants and their supervisors to assure that the job description accurately reflected the greater duties assigned to them since 2007, yet the generic description sent to the job evaluators did not include this critical information.

7. The supervisors both indicated that the essential functions of the grievants' job duties entail approximately 40-50% technical tasks, i.e., performing background checks including use of the BCA database and the statewide Social Service Information System (SSIS) confidential social service history database. The other OSS employees, who hold positions as receptionists, mail clerks, imaging and copying positions, which are 100% clerical. The Union argued that clearly these positions are far more than clerical positions and deserve higher pay and classifications.

8. The grievant and, significantly, their supervisors sent letters in 2008 to the County pointing out the deficiencies in the descriptions and tried again to have their approximately 50% background search duties included. See Union Exhibit E & U.

9. The matter was specifically discussed in the negotiations for the current labor agreement in the Fall of 2008. The Union believed that when the grievants' job was accurately evaluated it would result in far higher job evaluation points with a commensurate increase in classification and pay. The Union fully intended to assist the County in its 2009 Pay Equity Report and trusted that the job evaluations would proceed timely and fairly. The Union's reasonable expectation was that the job duties that the grievants have had since 2007, including their BCA and background duties, would be submitted to the evaluator.

10. Based on this understanding and reliance that the County's study would be conducted appropriately the Union agreed that any OSS employees whose job evaluation points were determined to be greater than 1200 would be reclassified. The Union and the grievants truly believed that the points for these employees would exceed that and that they would be reclassified as a result.

11. The Union noted though that after this grievance was filed another study was commenced using different job descriptions. The Union noted too that the current evaluator has interviewed the grievants separately but that the study has not been completed. See Union Exhibit T. The Union also asserted that Ms. Elletson agreed that the grievants should be treated separately from the rest of the OSS personnel and that their jobs should be reclassified.

12. The Union argued that the County failed to provide the Union with information about what exactly was submitted to the evaluators, the criteria used for determining these employees' job evaluation points and that the County unfairly lumped these employees in with the other OSS employees whose job duties are very different. As a result, the Union argued that the County's actions violate certainly the spirit of the negotiations if not the actual letter of what was agreed upon at the bargaining table. The Union was willing to allow the County to conduct the study and to submit the information but relied on their representations that the information sent to the evaluators would be accurate and would reflect the actual job duties of the various employees under consideration. Here that did not happen.

13. The Union contends that the County's actions were in fact arbitrary, capricious and unreasonable and did not reflect the clear understandings reached at the table. The Union contended that everyone believed that these individuals would be reclassified and that everyone also understood that their duties were far more complex and involved than the rest of the OSS employees.

14. The Union noted that it has no control over the job evaluation process but does retain the statutory right to negotiate wages for their employees. Wages is a mandatory subject of bargaining and the mere fact that the job evaluation points are one aspect of compensation does not preclude the Union from bargaining over wages. In fact, the right to negotiate wages is perhaps the most basic right inherent in PELRA and must be honored. Thus the County's claim that this is not substantively arbitrable must be rejected – there is nothing more arbitrable than wages.

15. The Union cited several arbitral commentators and awards in support of the claim that when workers perform duties in a higher paid classification, arbitrators generally hold that they are to be paid the wages paid to the higher classification. Here it is clear that these workers are performing duties that should be paid a higher classification and should therefore be paid more. See, *Amana Refrigeration and IAM District Lodge 169, Local 2385*, 89 LA 751 (Bowers 1987) and *Ohio & Western Pennsylvania Dock Co. and United Mine Workers, Local 50*, 39 LA 1065. (Dworkin 1962).

16. The Union countered the claim by the County that there was a settlement of these grievants' actions due to the settlement of two other employees, Ms. Blomberg and Ms. Blayr-Flowers. First, it was clear in that document that it applies only to two other employees, who are specifically named in that document. Further, there was no discussion surrounding the drafting of that document that Ms. Bautch or Ms. Johnson's grievance would be dropped. Finally, the County's representatives continued to act as though this grievance was still pending – striking arbitrators and proceeding to the hearing. The County never asserted that this matter was “settled” until the hearing and should not be allowed to make that argument here.

17. The essence of the Union's argument here is thus that while it acknowledged the right to make the assignment, it challenges the pay for this job. The Union also asserted that it negotiated in good faith during bargaining and was led to believe that the County would submit accurate information to the evaluators and that it did not – choosing instead to submit a generic form to the evaluator that did not fully reflect the job duties for these employees. As a result, the County's actions were arbitrary and discriminatory and were not in keeping with the clear agreement reached during bargaining.

The Union seeks an award finding that the matter is substantively arbitrable and ordering the County to make retroactive compensation to the grievants at a pay grade to at least OSS Sr. effective 12-31-2008, with no adverse effect on seniority, commensurate with the additional duties of a higher scope and complexity that have been assigned to and performed by the grievants.

COUNTY'S POSITION:

The County's position was that the matter is not substantively arbitrable, as a matter of inherent managerial right to conduct a job evaluation study; there was no contract violation here at all and that the grievants are appropriately paid pursuant to the job evaluation study done in this matter. In support of this position the County made the following contentions:

1. The County asserted that the grievance is in effect an end run around the clear principle that the evaluation of jobs and assignment of points is a matter of inherent managerial discretion under PELRA and the CBA. This matter is therefore not substantively arbitrable. The arbitrator simply has no power to re-assign or otherwise overturn the job evaluation points assigned to these positions. The County cited the management rights clause in the CBA as well as Minn. Stat. § 179A.07, subd. 1 and asserted that the Union is in fact seeking an award which would be patently contrary to both by asking the arbitrator to force a reclassification of the grievants.

2. Further, there is no contractual provision covering job evaluation points and thus no contractual provision that can be violated. As in most CBA's, the definition of a grievance is a dispute or disagreement as to the interpretation or application of the specific terms and conditions of the Agreement." Union Exhibit A, Article 7.1, p. 4. Accordingly, the grievance does not meet that definition and cannot be decided by an arbitrator whose power derives from the agreement.

3. The County cited in *Brooklyn Park v. Brooklyn Park Police Federation*, No. C9-01-1145, 2002 WL 15635 (Minn. App. 2002) for the proposition that the arbitrator will exceed the authority granted by the parties' CBA if the award imposes an obligation on the County to reclassify the grievants' jobs. Since there was no provision in the agreement for the posting of notices, just as there is no provision in this agreement for reclassifying jobs, any award that requires it is outside of the jurisdiction conferred on the arbitrator by the CBA.

4. The County also asserted that there was little if any evidence of the actual skill, effort, responsibility and working conditions of the OSS Sr. classification or any other higher level job classification within the bargaining unit for comparison purposes and thus no evidence on which the arbitrator can conclude that these grievants should be paid at that higher level.

5. The County pointed to the negotiations for the current labor agreement and noted that there was an agreement to make pay equity adjustments for certain classifications. The parties also created the OSS Sr. classification during those negotiations and agreed that if any OSS position were assigned job evaluation points greater than 1200 they would be reclassified. The County asserted most vehemently that there were no agreements that any particular position would receive those points, only that there would be a re-evaluation of the jobs and that those with 1200 points would be reclassified – nothing more. There was no agreement whatsoever that these employees would be reclassified or that their pay would be increased if the points did not exceed 1200.

6. The County then hired a job evaluation consultant, Hay and Associates, with the necessary credentials and expertise to conduct the study. The County has used Hay since 1995 and asserted that both the section of the consultant and the information given to the evaluator was not subject to collective bargaining and was also a matter of inherent managerial right.

7. Further, the Pay Equity Act requires that a job evaluation study be done but supports the County's assertion that the job evaluation and the job classification are inherent managerial rights. Each political subdivision shall meet and confer with the exclusive representatives of their employees on the development or selection of a job evaluation system. See, Minn. Stat. 471.994. "Meet and confer" is, of course, a term of art under PELRA and undercuts the claim that the evaluation be negotiated. See, Minn. Stat. 179A.03, subs. 10 and 11. Such language belies the Union's claim here and shows clear legislative intent that such items are inherent rights.

8. The County also asserted that the Union has changed its focus if not the actual grievance over the course of the proceeding here and that the Union's original grievance was about assignment of the points but later the Union asserted that they were challenging the right to assign duties. Neither is a matter for bargaining and both are inherent management rights. There has been no waiver or relinquishment of the County's inherent rights here and such waiver must be clear and unmistakable.

9. The County also pointed to the Waiver provisions in the CBA, Article XXI, Waiver, and asserted that the language supports the claim that only those provisions in the CBA govern the parties' rights and that anything outside of it were superseded. Further Article 6.1, Management Rights provides in relevant part that the County retained any and all managerial rights to "perform any inherent managerial function not specifically limited" by the specific provisions of the CBA. There is no provision governing job evaluations and the conclusion, according to the County is thus clear: that without any such provision the job evaluation is simply not arbitrable.

10. The County cited several prior arbitral awards involving similar issues where all the arbitrators denied grievances over almost this very issue. In each, the arbitrator ruled that there was no contractual authority to award job evaluation points the Unions wanted.

11. The County further noted that the Union alleged a violation of Article 20.1, Working Out of Classification but that this provision does not apply. In order for it to apply, the grievants must have assumed "the full responsibilities" of another position and Union witnesses acknowledged the grievants are not working out of class and that the Union presented no evidence of a "higher job classification" in which the grievants were working as the basis for asserting a violation of Article 20.1. Accordingly, there is no contractual provision that even remotely covers this situation and no authority to compel the result the Union is seeking.

12. The County noted that the result of the Hay study was a significant increase in the job evaluation points assigned to OSS employees, which had been 732 and 1104, to 1155 for the OSS employees. See, Employer Exhibit 3 and Union Exhibit P. The County asserted that the Union's claim that the study was "arbitrary or capricious" was simply untrue and that the Hay study showed a significant increase in point but not enough that it warranted a reclassification pursuant to the agreement the parties reached in bargaining. The County strongly asserted that the Union is now seeking something that it specifically agreed it would not get in bargaining.

13. The County further asserted that it never attempted to influence the consultant's determination, and the County has never negotiated the work points for any job with the Union. The determination of whether or not the grievants' job would be reclassified to OSS Sr. was based solely on the consultant's determination of the work points. The County also pointed out that other employees, Ms. Blomberg and Ms. Blayr Flowers, were reclassified pursuant to the study and that the County lived up to those agreements. See Employer Exhibit 2

14. The County made it clear to the Union that while Ms. Blomberg and Ms. Blayr Flowers would be reclassified, that Ms. Bautch and Ms. Johnson would not since their points did not rise to the agreed upon 1200 level.

15. The County also cast doubts on the testimony of the former supervisors who were called by the Union to testify that the jobs these two grievants had involved a greater number of duties and more complex duties than had been given to the Hay evaluators. The County asserted that they gave inconsistent testimony and acknowledged that they were not completely familiar with the information that was given to the Hay evaluators. Neither could they assess or comment competently on the methodology used to assess the points for these grievants. Finally, one such witness could only indicate that they had a technical expertise that should have resulted in a higher number of points. The "technical expertise" however was merely the use of computers; which in the modern workforce is hardly a special skill, especially for office and clerical workers. Thus, there was no reason on this record to support a high degree of points under any circumstances.

16. The County also countered the claim by the Union that these employees should be compared to the dispatchers, represented by another Union. The County pointed out that these employees are considered essential under the law, have far greater responsibility and duties than the grievants and are in an entirely different unit for a reason. Their duties are radically different and there is no basis for comparison to these employees.

17. Further, the County countered the claim that the Article XXII, Human Services General Provisions do not apply either and argued that there is no language calling for the evaluation points to be reassessed or for the arbitrator to reclassify these employees. That language might apply if the employees were being paid the improper wage for their classification but there is no claim for that – rather this claim is that these employees are in the wrong classification – something the County asserted all along is outside of the arbitrator’s authority to rule on.

18. In contrast, the current job description of September 21, 2010 is the most accurate description of the grievants’ duties and provides a summary of their responsibilities and does not include details of the procedures for BCA background checks in the April 18, 2008 job description Ms. Schillewaert said were important. See Union Exhibit T. Further, the County took issue with the percentage of time the Union contended these grievants spent on the BCA duties and asserted that it was perhaps 30%, not the much greater percentage asserted by the Union.

19. The County asserted that the matter was in fact settled and that this grievance should not even have proceeded to hearing. The County and the Union settled the Blomberg and Blayr Flowers matter but that settlement was intended to resolve all such grievances, including this one. The County noted that the terms of the Settlement Agreement dated May 24, 2010 constituted “the full and complete agreement between the parties relating to all grievances that have been filed relating to Office Support Specialist.” Union Exhibit V. Further, the County consistently denied the grievances after this and asserted that the matter was settled along with the Johnson and Blayr Flowers matters.

20. The essence of the County’s claim is that there is no contractual authority for the Union's claim and that this matter is not arbitrable as a matter of inherent managerial authority. There is no contractual basis for the re-evaluation of the points or for the reclassification of these employees.

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

DISCUSSION

FACTUAL BACKGROUND

The underlying facts were largely undisputed and relatively straightforward. The grievants were hired to perform clerical work under the job title Office Support Specialist (OSS) and work with other OSS employees at the Wright County Human Services building.

Prior to 2007, the grievants assisted Social Workers by preparing and sending out requests for background checks on pending licensure applications, including requests to law enforcement agencies for criminal history checks through the Bureau of Criminal Apprehension (BCA), and sending out requests to other social service agencies regarding applicant's social service history. Once the information was returned, the grievants would deliver the information to the Social Worker. These additional duties were essentially clerical and were included in the generic job description of OSS.

After 2007, a change in the applicable state law allowed expanded BCA access from law enforcement agencies to local welfare agencies. The Sheriff's Department requested that County Health and Human Services conduct their own BCA checks and these duties went to the grievants. They have been performing and certifying background checks regularly since that time. The duties assigned were previously performed the 911 Dispatchers in the Sheriff's Department. It was undisputed that the dispatchers are paid at a higher rate but it is also clear that they perform a far greater range of duties, including, not surprisingly, 911 dispatching services. The dispatchers are categorized as essential employees under PELRA and are in a different unit and a different Union.

The appropriate pay and classification was the subject of discussion during the latest round of bargaining due to the addition of these duties to the grievants' jobs. The evidence showed that during negotiations for the current Labor Agreement, the parties agreed to make pay equity adjustments for certain classifications. At that time, the OSS classification had job evaluation points of 732, 1104, 1244 and 1325. See, Union Exhibit P. These grievants' points were well below 1200 points at the time the parties began their contract negotiations.

The County also established the OSS Sr. position at about that time and relied on the Human Services Director to determine at that point which positions fits into the OSS Sr. classification. The parties further agreed during negotiations that Office Support Specialists with more than 1,200 work points would be reclassified to Senior Office Support Specialists. See, Employer Exhibit 2.

The evidence did not establish that there were any agreements to place any particular positions or employees in any specific classifications. Neither did the evidence show that the County relinquished or waived any of its inherent rights to conduct that study. While the Union asserted that it was quite certain the grievants' jobs would have more than 1200 points there was no evidence that the County agreed to that nor was there any evidence that the grievants would be reclassified. The agreement was solely that any OSS personnel whose points were greater than 1200 after the job evaluation would be placed in the OSS Sr. classification. The County in its Step 3 response reiterated that agreement reached at the bargaining table as follows: "If a determination is made that the position meets the minimum of 1,200 points addressed in negotiations, a recommendation will be made to the Human Services Board to reclassify the position to the classification of Senior Office Support Specialist." The evidence also showed that the County retained the right to select the job evaluator and retained the right to submit the information to the evaluator for purposes of determining the points.

The County selected a consultant with which it had contracted before and hired Hay & Associates to conduct the study. The evidence showed that Hay conducted an independent review of the OSS positions and determined that the grievants' evaluation points were 1155, thus not meeting the 1200 threshold. Here as no evidence that the County attempted to influence or sway this study. Neither was there sufficient evidence to establish that the County gave the Hay evaluators incorrect or inaccurate information about the jobs and duties of the employees subject to the study.

The Union asserted that the information given to the evaluators did not reflect the degree of difficulty and responsibility of the BCA tasks and that the information did not accurately reflect the amount of time they spent doing those. The grievants never testified at this hearing and the testimony about their jobs was from present and former supervisors, who gave somewhat inconsistent views of those issues.¹ On this record there was simply not enough evidence to warrant a finding that the facts were misstated to warrant a finding that the County's actions were arbitrary or capricious.²

Significantly, the County honored its agreement to reclassify Ms. Blomberg and Ms. Blayr Flowers. There was no evidence that the County skewed this study to increase their points nor any evidence of favoritism. The evidence fully supported the independent nature of the study.

The parties entered into a Settlement Agreement to reclassify Ms. Blomberg and Ms. Blayr Flowers to OSS Sr. See, Union Exhibit V. The grievance over these grievants was filed and proceeded to arbitration despite the County's assertion that the terms of the agreement was intended to settle "all grievances that have been filed relating to the Office Support Specialist." It is against that factual backdrop that the analysis of the case proceeds.

THE BLOMBERG/BLAYR FLOWERS SETTLEMENT AGREEMENT

One threshold question is whether this grievance was actually resolved by a prior settlement agreement reached by the parties in resolution of other grievances filed by two other OSS employees. As noted, the agreement reached at bargaining was that if any OSS employee's job was evaluated at a point value greater than 1200 points determined by the County's job evaluation, those positions would be reclassified at a higher grade. After the study was completed Ms. Blomberg and Ms. Blayr Flowers were indeed found to have a job that was evaluated at more than 1200 points, i.e. 1280.

¹ It was somewhat curious that neither grievant testified but on this record their testimony would likely not have changed the result. The CBA has no provision calling for a re-evaluation of the study nor to require that different information be given to the evaluators and that was the operative basis for the decision here

² One of the Union's assertions was that it was not allowed access to the methodology of the Hay system of evaluation. The evidence showed though that Hay, and other companies like it, treats this as a trade secret. The County may not have even had full access to this information. Further, the evaluation is a matter of inherent managerial right and the Union frankly does not have the right to a greater role than it had here in such studies.

Apparently here had been a grievance filed on their behalf as well by the Union and the parties entered into a settlement agreement for those grievances dated May 24, 2010. See Union Exhibit V. The preamble of that agreement defined the “grievants” for purposes of that document as Blomberg and Blayr Flowers. Further down the document, in the fourth “whereas” clause, there is again a specific reference to those two employees. Significantly, there is no reference anywhere in this document to either Ms Johnson or Ms. Bautch or their grievances. There is no mention of their grievances either.

The sole clause relied upon by the County in its argument that this grievance was settled along with the Blomberg/Blayr Flowers settlement is contained at paragraph 3 of the agreement, which provides that “This Settlement Agreement constitutes the full and complete agreement between the parties relating to all grievances that have been filed relating to the Office Support Specialist.” The County asserted that this clause subsumed all other grievances filed in a similar vein, including the one filed by these grievants. There was insufficient evidence that the parties made any specific reference to or had any specific discussions about the Johnson/Bautch grievances as part of negotiating the settlement agreement for Blombeg and Blayr Flowers. Thus the sole basis for the claim that the grievance was “settled” is the general statement found at paragraph three set forth above.

As in any contract interpretation matter, the question is the intent of the parties. Here without any evidence that there was an agreement to settle these grievances the general statement at paragraph three is insufficient to support the County’s claims here.

Further, as in any contract interpretation matter, some tools can be used to aid in interpretation. First and foremost, there is a specific reference to Blomberg and Blayr Flowers in several places, including the very preamble of the document. It is well established that a specific reference takes precedence over a more general statement in a contract. Here that works to support the Union’s claim that they had no intention of settling anything other than the two specific grievances mentioned in the May 24, 2010 document.

Second, while the County continued to deny this grievance all along for various reasons, the Union reasonably believed that this grievance was still open and had not been settled. The County's assertion has been and continued to be, that the matter was not arbitrable. That however, was stated in terms of the arbitrability of the job evaluation, discussed below. It was only quite recently that the issue of the settlement of the other grievances was raised as a reason for the denial of the grievance.

Third, there was no evidence of any discussions regarding the Johnson/Bautch grievances being settled along with the Blomberg/Blayr Flowers grievances during the negotiations leading up to the May 24, 2010 document. In determining intent of the parties, the evidence here shows quite clearly that the Union was negotiating solely for the resolution of the grievances specifically mentioned and that when that document said "all grievances" what was intended was "all grievances" filed by the two specifically referenced grievants in that document.

Accordingly, the grievance was not resolved pursuant to the May 24, 2010 document and the matter can proceed to a discussion of the merits and whether it is substantively arbitrable.

SUBSTANTIVE ARBITRABILITY/CONTRACTUAL VIOLATION

The County asserted in the strongest possible terms that this matter is not substantively arbitrable and that the Union is asking the arbitrator to effectively substitute his judgment for that of the job evaluators and order that the grievants be reclassified or to somehow assign them more points. The County argues that the arbitrator has no power to do this. There is merit to that position.

The initial question in any grievance where substantive arbitrability is raised is whether there is a provision of the labor agreement that is alleged to have been violated.

The Union asserted that since this grievance is about pay, it is by definition arbitrable and further asserted that the grievants are in fact performing work that should be at a higher rate and in a higher classification. The record did not support this argument however. The wage rates were negotiated and the grievants are being paid to the negotiated rates for OSS employees. There is no contractual violation here on that basis.

Clearly too, the CBA has no provision for job reclassification or job evaluation. The Union referred to the CBA dealing with Working out of Classification, Article XX and asserted that these grievants are working out of classification. The evidence did not support this assertion. These employees are clearly not “assuming the full responsibility and authority of a higher classification” as that clause requires. Further there was some acknowledgement during the hearing that this provision did not apply.

There was further a reference to Article XXII, but a review of these general provisions reveals that there is no language that supported the Union's claim here either. There is a reference at Section 22.9 about reclassification employees not serving a probationary period. This however applies to those employees who have been reclassified – the simple answer is that these employees were not and these provisions do not apply to this scenario.

The County cited *Brooklyn Park v. Brooklyn Park Police Federation*, No. C9-01-1145, 2002 WL 15635 (Minn. Ct. App. Jan. 8, 2002), where the Court overturned a case where the arbitrator required the employer to post notices of every job opening despite the fact that there was no provision in the CBA calling for that. The Courts vacated the award on the basis that there was an excess of powers since there was no contractual basis for the arbitrator's award. Certainly while the underlying facts of that case are different, the holding is instructive. Here there is no contractual provision allowing the relief the Union is seeking nor is there any evidence of a waiver of the managerial right to classify employees or to conduct the job evaluation study.

There is also some merit to the County's assertion that the waiver or limitation by a public employer of its inherent managerial rights must be expressed in the labor contract in clear and unmistakable language. 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). In the present case there is no contract language relating to job evaluation or job reclassification and therefore no arbitral authority to grant the relief requested by the Union.

The Union asserted that the County gave only a generic job description to the evaluators that did not accurately reflect the actual duties these grievants performed. The Union asserted that the results are not fair or reasonable and that the failure to give the evaluators the accurate information renders the County's actions arbitrary and capricious. There was no question that the work performed by the grievants is important work and that their duties are greater than those of some other OSS employees but the arbitrator is without power to re-assign those points. Neither was there sufficient evidence on this record to establish that the County's actions rose the level of arbitrariness. The Union further argued that the results are not reasonable and do not reflect the "intent of bargaining."

As noted above though, the clear intent of bargaining was that any OSS employee who received more than 1200 points would be reclassified – it was not that any specific employees would receive 1200 points. The stark reality is that the Union and the County struck a bargain that called for a job re-evaluation study without any commitments one way or the other about what that study would say and they took their chances. Clearly, with respect to the two employees who did have more than 1200 points the County lived up to their agreement. While these employees may be disappointed, this was the agreement reached in bargaining.

The Union also asserted that it had no access to the process and thus was unable to ensure the accuracy of the job descriptions given to Hay. The Union also argued that it did not have the ability to negotiate the job evaluation process, leaving it and the grievants with an unreasonable result that does not satisfy the intent of the parties at the time of negotiations nor was there reassurance the process was not arbitrary, discriminatory and capricious. The results are unfair and everyone involved was "surprised and disappointed."

Again however there was no evidence that the County has ever negotiated with the Union over a job evaluation system. The County's assertion that the information given to the evaluator is outside of the scope of arbitration on this record has some merit. There was further some merit to the County's assertion that while the study may be subject to meet and confer it is not subject to negotiation as those terms are used under the LGPEA or PELRA.

Several other arbitrators have supported this conclusion. See, *IBT #320 and County of McLeod*, (Ver Ploeg, 1995). There the arbitrator denied a very similar grievance, i.e. that the County had not adopted certain job evaluation ratings and ruled that there was no contractual provision calling for the relief the Union sought. The grievance was denied as not substantively arbitrable.

In *Dakota County and AFSCME, Council 14, Local 306₂* (Bognanno, 1993), the arbitrator denied a grievance as not substantively arbitrable where the Union requested that the arbitrator award an upward reclassification of a job classification. Again the basis of this ruling was that there was no specific contractual provision calling for the relief sought. See also, *Aitkin County and AFSCME Council No. 65*, BMS Case No. 92-PA-584 (Vernon, 1992), and *Independent School District 691 and AFSCME, Local 2780*, BMS Case No. 90-PA-1310 (Koehler, 1991), for similar results.

The Union cited *Amana Refrigeration and IAM District Lodge 169, Local 2385*, 89 LA 751 (Bowers 1987) and *Ohio & Western Pennsylvania Dock Co. and United Mine Workers, Local 50*, 39 LA 1065. (Dworkin 1962) for the proposition that the arbitrator has the authority to require an adjustment in pay to reflect the job duties assigned to employees. These cases were distinguishable and did not provide the necessary support for the Union's claims here however.

In *Amana Refrigeration*, the arbitrator ruled that the management rights clause prevented the arbitrator from assigning the work performed on some new machines the employer bought but that the arbitrator did have the authority to consider the appropriate wage rate for that work. There was however a specific provision that "the only question subject to negotiation or a grievance will be the rate of pay for the job."

Thus, even though the right to assign the work was reserved to management the parties included in that same clause a very specific provision allowing for a grievance over the rate of pay. Based on that clause the arbitrator ruled that the wages for this new work could be subject to the grievance procedure since there was a very specific provision allowing it. *Amana* is thus clearly distinguishable from the instant case.

In *Ohio & Western Pennsylvania Dock Co.* the arbitrator found that the facts of that particular case showed that the duties assigned to the workers after the introduction of a new automated oiling system in the plant were “substantially increased” over what they had been before the introduction of the new machines. See, 39 LA at page 1070.

Here there was no such evidence, even though the duties were certainly different. There was also no finding of a job evaluation that assigned points to certain positions nor was there a specific agreement made during negotiations that only those employees whose job evaluation points were above 1200 would be re-classified to a higher paying classification.

The arbitrator also found that even though there were no job descriptions attached to the negotiated wage rates set forth in the CBA, they were not inserted there without regard to the duties performed by the employees in those categories. Moreover, in a somewhat unusual ruling, the arbitrator ordered the parties to re-negotiate a new wage rate for the affected employees retroactive to the date of the implementation of the new technology. Frankly, such a ruling may not even be allowable under Minnesota State law and at the very least would compel only negotiation of a wage rate that has already been negotiated and would fly directly in the face of the negotiated understandings reached on the facts here.³ The clear factual distinctions undercut the claim that *Ohio & Western* supports the Union’s claims here.

³ Such a holding here might well be problematic in light of the holding in *Brooklyn Park v. Brooklyn Park Police Federation*, No. C9-01-1145, 2002 WL 15635 (Minn. App. 2002). As noted above however, the factual distinctions between the two cases render that analysis unnecessary on this record.

There is no authority to require the County to re-do the job evaluation study and the net effect of the Union's request here is to have the arbitrator amend the agreement reached at bargaining to require additional pay even though the 1200 threshold was not reached. That would clearly be an amendment to the agreement reached by the parties and be well outside of the arbitrator's authority. Significantly too, these employees are being paid at the OSS wage rate negotiated by the parties and even though the Union believes they should be paid at a higher rate given their duties, that is a matter for further negotiation and not for a grievance arbitrator to decide.

The clear authority supports the notion that without a specific contractual provision there is little authority on which the arbitrator can rule. The sole basis for such a ruling would require a showing of either a provision allowing the arbitrator to force the employer to negotiate over wage rates that have already been negotiated or an agreement reached in negotiations calling for a certain job evaluation result. Here, as noted, the agreement reached during bargaining was to the contrary – there was only an agreement to do the study, not for any particular result to come from the study. Indeed any such agreement would have completely undercut the validity of such a study and the independence of the evaluator. That frankly might well have opened the County up to a claim that it engaged in arbitrary or capricious actions but there was no evidence of that whatsoever.

Finally, there remains the question of whether the County violated the agreement when it assigned these duties to the grievants. The assignment of those duties was not the basis of the grievance and the Union acknowledged in its Brief that it was “not grieving the employer's management rights; rather it is about the employer's obligation to negotiate in good faith the appropriate pay for the grievants' essential job duties, adhering to the intent of the parties at the bargaining table...”

As noted above, the intent of the parties at the bargaining table was to conduct the study – the County did that. The further intent was that if a position was evaluated at 1200 points it would be reclassified – the County did that too where the points were evaluated above 1200.

Finally, there is no arbitral authority on this record for the arbitrator to require a change in the points nor to require the employer to renegotiate the compensation rates set forth in the agreement or to effectively re-do the study with different information. Thus there was no violation of the CBA on these facts and the grievance must be denied.

AWARD

The grievance is DENIED.

Dated: August 15, 2011

AFSCME and Wright County – Out of class pay Award

Jeffrey W. Jacobs, arbitrator