STATE OF MINNESOTA

BUREAU OF MEDIATION SERVICES

IN THE MATTER OF GREIVANCE ARBITRATION BETWEEN

COUNTY OF STEARNS,

EMPLOYER

-and-

IMPLEMENTATION OF AWARD

BMS CASE NO. 11-PA-0434

LAW ENFORCEMENT LABOR SERVICES, INC.,

MEDICAL EXAMINER DUTIES

UNION.

ARBITRATOR:	Rolland C. Toenges
GRIEVANTS:	Tim DesMarais, Detective Victor Weiss, Sergeant
DATE OF POST AWARD SUBMISSIONS:	October 26 2011
DATE OF ARBITRATORS AWARD:	October 31, 2011

ADVOCATES

FOR THE EMPLOYER:	FOR THE UNION:
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AT ISSUE

UNION:

Based on the Arbitrator's Award, the Grievants are entitled to back pay from September 1, 2010, representing the difference between the base pay rate they have received since then and the base pay rate of the class in which they exercise their layoff seniority rights, subject to the terms and conditions set forth in the Collective Bargaining Agreement.

The back pay should be based simply on the difference in base pay. To attempt to mitigate this amount by what the Grievant's earned, via On Call and Overtime pay in the class where placed by the Employer versus what they would have earned in the class in which they exercise their layoff seniority, is overly speculative guesswork.

EMPLOYER:

The point at which back pay is applied should be only when the Grievants have identified the class in which they will exercise their layoff seniority rights. This did not occur until after the Arbitrator's award was received.

The effect of the Grievants exercising their layoff rights results in other employees being bumped. The pay impact for the Grievants and those being bumped should all occur at the same time, with the pay adjustments only applied going forward. To adjust the Grievants pay, as the Union contends, pays employees for work that they did not perform.

Retroactive application of the change in pay affects more than simply their base pay. Retroactive pay for a Grievant, who has been paid as a Detective and bumps into the Sergeants classification, would affect more than simply base pay. Detectives receive On Call pay – Sergeants do not. Also affected is Comp Cash Out and Overtime pay.

The CBA provides that recall rights apply to an employee who is actually laid off – it does not apply to an individual who remains employed. A Grievant who chooses to bump into another position, rather than accept a layoff does not have recall rights in the position that they originally occupied.

According to Section 8.7 of the Collective Bargaining Agreement, a Grievant who moves to a different position is subject to a new probationary period of 2,080 hours.

The Employer reserves the right to continue the work of a Sergeant serving in a specialty position.

JURISDICTION

Due to a dispute between the Parties regarding implementation of the Arbitrator's Award, the Parties have requested that the Arbitrator retain jurisdiction and expand the initial Award to resolve disputes that have arisen in its implementation.

BACKGROUND

On October 14, 2011, the Arbitrator was contacted by the Parties with a request to continue jurisdiction as a dispute had evolved concerning implementation of the Arbitrator's Award, issued on September 22, 2011.

On October 25, 2011 a telephone conference was held with the Parties and the Arbitrator to discuss the issues in dispute. Due to the complexity of the issues in dispute, the Arbitrator requested that the Parties submit their respective positions in writing.

The Arbitrator received written submission from the Parties on October 26, 2011. The written submissions set forth the position of each Party with supporting argument.

DISCUSSION

On September 22, 2011 the Arbitrator issued the following Award:

> **"Employees removed from the Classification title of Detective/Deputy Medical Examiner, due to the elimination of work that distinguishes their title from the work of Detective, are subject to the provisions of Article VIII – Seniority and are entitled to the lay-off seniority rights provided therein."**

At the onset it may be useful to review how, under the terms and conditions of the Collective Bargaining Agreement, an employee can be moved from a job class with a higher pay grade to a job class with a lower pay grade:

1. Elective demotion.[1]
2. Demotion for disciplinary reasons.
3. Lay-off.[2]

In the instant case, the Grievant's job class was abolished due to elimination of the work they performed. The record shows that unilateral Employer movement of them into the Detective job class was not elective (voluntary) by the Grievants or for disciplinary reasons. Therefore, under the terms and condition of the Collective Bargaining Agreement, movement of the Grievants out of the Detective/Deputy Medical Examiner job class constituted a lay-off. As such, the Grievants are entitled

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[1] Section 21.5. "Any employee who either elects to be demoted or is demoted for disciplinary reasons will move to the top step of the demoted range provided that the individual has been employed long enough to have reached that step. . . ." [Emphasis Added]

[2] Section 8.4 "Except in those instances where senior employees are not qualified to perform remaining work duties, seniority shall determine the order of lay-off and recall from layoff. Lay-off shall be in inverse order of seniority within each classification, provided that an employee who is to be laid off and who has previously served in a lower or equal pay grade by this Agreement may request to exercise seniority rights in such classification." [Emphasis Added]

to exercise their seniority rights to move into a job class with an equal or lower pay grade in which they have previously served and are qualified.

The record shows that Grievants DesMarais, Weiss and Winkels had previously served as Sergeants, which is the job class with the next lower pay grade (21). Assuming they have sufficient seniority within the Sergeant job Class they have a right to bump into this class.

The record shows that Jansky had previously served in the Detective pay grade while working out of class as a Detective/Deputy Medical Examiner. Union Exhibit #3 shows that he was in pay grade 20 (the Detective pay grade) for approximately one and one half years (from August 1, 2004 through January 9, 2006) before being promoted to Detective/Deputy Medical Examiner. Therefore, the Employer having moved Jansky into the Detective job class, when the job class of Detective/Deputy Medical Examiner class was abolished, has the same result as if he would have exercised his seniority lay-off right to move into the next lower pay grade in which he had previously served.

The Employer argues that implementation of the Award should be upon its receipt by the Parties rather than September 1, 2010. September 1, 2010 was the date that the Grievants were removed from the Detective/Deputy Medical Examiner job class and placed by the Employer in the Detective job class.[3] Although the change in classification took place effective September 1, 2010, the Grievant's pay was not reduced until January 1, 2011.[4]

Although the violation of Section 8.4 of the Collective Bargaining Agreement technically occurred on September 1, 2010, with respect to the Grievants lay-off seniority rights, they did not suffer a reduction in pay grade until January 1, 2011[5].

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[3] Union Exhibit #7.

[4] Union Exhibit #8. The pay grade of Grievant Winkels was not reduced until later due to his having filed a Veterans Preference Appeal.

[5] Union Exhibit #8.

In fact, the Grievants by having their salary rate continued at the Detective/Deputy Medical Examiner rate from September 1, 2010 through December 31, 2010 actually received more base pay than they would have if they had exercised their seniority lay-off rights effective September 1, 2010.

The record shows that the Employer was put on notice by the Union, prior to September 1, 2010, that eliminating the Grievants job class of Detective/Deputy Medical Examiner would be a lay-off under the terms and conditions of the Collective Bargaining Agreement. The notice further indicated that if the lay-off provisions were not followed, the Union would be required to take an action to seek an appropriate award for violation of the Collective Bargaining Agreement.[6]

Relevant to the question of when the Grievants are entitled to back pay is when the Employer was aware, or should have been aware, that unilaterally moving the Grievants into the Detective job class at pay grade 20 could constitute a violation of the Collective Bargaining Agreement. The record shows that the Employer was aware, or should have been aware, upon receipt of the Union's notice of August 25, 2010. In fact, the Union had raised this issue in discussions with the Employer even earlier.[7]

The evidence is clear and convincing that elimination of the Detective/Deputy Medical Examiner job class constituted a lay-off situation under the terms and conditions of the Collective Bargaining Agreement. The evidence is also clear and convincing that the Employer knew, or should have known, that its unilateral action in moving the Grievants into the Detective class could constitute a violation of the Collective Bargaining Agreement. Accordingly, the Arbitrator finds the violation

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[6] Joint Exhibit #7, Paragraph 4. "If the County proceeds with their suggestion that the effected employees will be paid according to the pay grid as grade 20 Detective effective September 1st, 2010 the Union will continue to view this as a lay off of the employees holding the Detective/Deputy Medical Examiner positions. This lay off would require the employees to exercise their seniority rights according to Article VIII of the collective bargaining agreement. In addition, we would be required to take an action to seek an appropriate award for the violation of the collective bargaining agreement."

[7] County Exhibit #14.

occurred on the date the Grievants were removed from the Detective/Deputy Medical Examiner job Class, September 1, 2010.

Grievants DesMarais and Winkels are entitled to exercise their seniority rights to bump into the Sergeant job class where they have previously served. At this point this matter is moot with respect to Grievant Weiss, as in the interim he has been reappointed in the Sergeant job class.

The remaining issue is whether the Grievants are due back pay. The Union argues that they are due back pay from September 1, 2010, and it should be determined by the difference in base pay between the Detective/Deputy Medical Examiner pay grade and that of Sergeant.

The Employer argues that the Grievants are entitled to Sergeants pay only after they have made a request to exercise their lay-off seniority rights, with any pay adjustment called for going forward from that point. In the alternative the Employer argues that any back pay from September 1, 2010 should be mitigated by what the Grievants earned in the interim, including extra pay such as overtime and on call pay, the latter of which the Employer states Sergeants do not receive. The Employer further argues that, when this extra pay is considered, the Grievants have earned more than they would have if they were Sergeants during this time period at issue.

In the instant case, the Arbitrator has found that a violation of the Collective Bargaining Agreement occurred September 1, 2010, and the Grievants, requesting lay-off into the Sergeant job class, would normally be entitled to Sergeant pay from that date. However, the Arbitrator is not able to determine from the record what their earnings would have been had the Grievants been Sergeants. Further, a review of the Collective Bargaining Agreement shows over 30 provisions for extra/special pay in addition to base pay and no distinction of application among the job classes in the Bargaining Unit. Therefore, it appears difficult and overly speculative to attempt to determine what a Grievant would have actually earned as a Sergeant in extra/special pay.

The Employer's submission shows that the Grievant's earnings from extra pay, as Detectives, are substantial. The Employer argues that, with this extra pay, their total earnings exceeded what they would have earned as Sergeants who do not have on call pay.

The Employer states in its submission that "employees who choose to bump into another position rather than accept a lay-off do not have recall rights to the position that they originally occupied." The Employer goes on to say, "The present case involves an employee's ability to voluntarily downgrade pursuant to the lay-off language of the collective bargaining agreement. It does not involve an individual who is actually severing from the County's payroll and a break in continuous service." In support of this argument, the Employer cites Section 8.4 of the Collective Bargaining Agreement:

> Section 8.4 ". . . An employee shall remain on the recall roster for two (2) years unless he/she fails to respond to a recall notification. <u>At the end of two years, all employment and seniority rights shall terminate</u>." [Emphasis Added]

It appears that the Employer is interpreting "lay-off/laid off" as only applying to separation of employment, with the right to be placed on a recall roster. If this interpretation of the Employer's argument is correct, it would mean the Grievants are not being "laid off" (severed from employment), for they have continued employment as a Detective. This interpretation would mean the right to request use of their seniority to bump into a lower or equally paid job class, where they have previously served, could only be made after they have severed employment. Accordingly, this interpretation would mean that since they have not severed employment, they don't have the right to request exercise of their seniority rights.

The Arbitrator does not find the above Employers argument logical or compelling. The Arbitrator, having had experience with many collective bargaining agreements over many years, with the same or similar language as in the instant case, has never previously heard an interpretation such as the Employer is suggesting.

The Employer, in its submission, takes the position that a Grievant who bumps into another job class, even though having previously served in the job class, is required to serve a new probationary period. The Employer cites Section 8.7 in support of this position:

> Section 8.7. "All newly hired or rehired employees shall be required to serve a period of job probation. Additionally, any employee moving to a different position likewise shall be subject to a new probationary period.

The word "different," as used in the above language, may be open to interpretation. Does it mean any job class *different* than the one the employee is moving out of, or does it mean any job class *different* from one in which the employee has previously served and completed a probation period? The Arbitrator finds this issue beyond the scope of the instant case and not ripe for determination at this time.

Lastly, the Employer calls attention to the situation where one of the existing Sergeants, subject to be bumped, is serving in a special assignment position and questions whether a Grievant has a right to the position assignment of this less senior Sergeant. The Employer's question appears to be answered in Section 21.9 of the Collective Bargaining Agreement:

> Section 21.9. "Special duty assignments will be paid at time and one half (1 ½) for all hours worked. Special duty assignments are made for work outside the employee's normal schedule. Assignments made for special duty assignments, which may conflict with seniority, shall not be greivable." [Emphasis Added]

Further, the Arbitrator finds the Grievants lay-off right, as set forth in Section 8.4 of the Collective Bargaining Agreement, is to the Sergeant Job class, not to a specific position or assignment within the job class.

> Section 8.4. ". . .provided that an employee who is to be laid off and who has previously served in a lower or equal pay grade by this Agreement may request to exercise seniority rights in such classification." [Emphasis Added]

AWARD

The Grievants have the right to exercise their seniority lay-off rights effective the date Detective/Deputy Medical Examiner was abolished, September 1, 2010. If the Grievants (DesMarais, Weiss and Winkels) wish to exercise this right, they must submit their request to the Employer in writing no later than ten (10) business days from the date of this award. Such request and the change to the Sergeant job class shall be treated as effective September 1, 2010, for purposes length of service in the Sergeant job class.[8]

Grievants who submit a request to exercise their seniority rights to bump into the Sergeant class, within ten (10) business days from the date of this award, shall have their pay rate adjusted to a rate within the Sergeant pay grade as provided in Section 12.5 of the Collective Bargaining Agreement. Such pay rate adjustment shall become effective the beginning of the first payroll period following receipt of such request.

Due to the complexity and speculative nature of attempting to determine back pay, plus the evidence that the Grievants have received earnings substantially equal to and possibly greater than would have been earned as Sergeants, no back pay is awarded. Grievants shall not be subject to forfeiture of any compensation that may exceed what they would have earned as a Sergeant.

Any retroactive pay or benefit changes resulting from provisions in a new Collective Bargaining Agreement, succeeding the Agreement expiring December 31, 2011, shall be applied to Grievants requesting to be Sergeants as if they have been in this class since September 1, 2010.

The Arbitrator will retain jurisdiction for 60 calendar days, following the date of this award, should further clarification be necessary.

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[8] Weiss having been promoted to the Sergeant job class in the interim and submitting a request at this time would be academic, except for any benefit, such a seniority that would accrue from September 1, 2010.

CONCLUSION

Issued this31st day of October 2011, at Edina, Minnesota.

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Rolland C. Toenges, Arbitrator