

**In the matter of arbitration between
International Union of Operating
Engineers, Local 70 [Pay Rates] and the
City of Northfield, Minnesota**

OPINION AND AWARD

BMS Case No. 07-PA-1041

GRIEVANCE ARBITRATION

ARBITRATOR

Joseph L. Daly

APPEARANCES

On behalf of IUOE
M. William O'Brien, Esq.
Meg Luger Nikolai, Esq.
Miller, O'Brien & Cummins
Minneapolis, MN

On behalf of the City of Northfield, Minnesota
Cyrus F. Smythe, Ph.D.
Labor Relations Associates, Inc.
Deep Haven, MN

JURISDICTION

In accordance with the Labor Agreement between the City of Northfield and International Union of Operating Engineers, Local No. 70, for the General Unit, January 1, 2005 through December 31, 2005; and under the jurisdiction of the State of Minnesota, Bureau of Mediation Services, the above grievance arbitration was submitted to Joseph L. Daly on December 18, 2007 at the City Hall in Northfield, Minnesota. Post-Hearing Briefs were filed by the parties on January 11, 2008. A decision was rendered by the arbitrator on January 30, 2008.

ISSUES AT IMPASSE

The Union states the issue as:

Whether the Employer violated the contract by unilaterally changing the pay rates of bargaining unit members? [Union Exhibit No. 18; Post-Hearing Brief of Union at 11].

The City states the issue as:

The issue of the choice by the City of Northfield to conduct a job evaluation is not arbitrable under Minn. Stat. § 471.994. [See City Statement of Issue submitted at arbitration hearing].

RELEVANT CONTRACTUAL LANGUAGE

Article 6, Section 4: Arbitrator's Authority

The arbitrator shall have no right to amend, modify, nullify, ignore, add to or subtract from the terms and conditions of this Agreement. The arbitrator shall consider and decide only the specific issue(s) submitted in writing by the EMPLOYER and the UNION, and shall have no right to make a decision on any other issue not so submitted.

Article 21, Section 2: Employee Pay Plan-2004 & 2005

The Union agrees to place its members under the City's Employee Pay Plan. Employees shall be compensated pursuant to the terms and conditions of the City Employee Pay Plan as originally formulated by David M. Griffith & Associates (now known as Maximus) and adopted by the Northfield City Council on September 15, 1997. The Employer agrees to implement the Employee Pay Plan in good faith.

Article 21, Section 3: Employee Performance Review

Employees shall receive pay plan step increases effective upon the Employee's anniversary date, provided the Employee receives a satisfactory performance review. If the EMPLOYER fails to perform an Employee's step 1-9 annual performance review on an Employee prior to that Employee's anniversary date, that Employee will receive an automatic step increase effective on that anniversary date. If the EMPLOYER fails to perform an Employees step 10-15 annual performance reviews within thirty (30) days following that Employee's anniversary date, that Employee will receive an automatic step increase retroactive on their anniversary date.

RELEVANT STATUTORY LANGUAGE

Minn. Stat. § 471.992 **Equitable compensation relationships**

Subdivision 1. Establishment. Subject to §§ 179A.01 to 179A.25 [Public Employment Labor Relations Act] and §§ 177.41 to 177.44 but notwithstanding any other law to the contrary, every political subdivision of this state shall establish equitable compensation relationships between female-dominated, male-dominated, and balanced classes of employees in order to eliminate sex-based disparities in public employment in this state. A primary consideration in negotiating, establishing, recommending, and approving compensation is comparable work value in relationship to other employee positions within the political subdivision. This law may not be construed to limit the ability of the parties to collectively bargain in good faith.

Subd. 2. Arbitration. In all interest arbitration involving a class other than a balanced class held under §§ 179A.01 to 179A.25, the arbitrator shall consider the equitable compensation relationship standards established in this section and the standards established under § 471.993, together with other standards appropriate to interest arbitration. The arbitrator shall consider both the results of a job evaluation study and any employee objections to the study. In interest arbitration for a balanced class, the arbitrator may consider the standards established under this section and the results of, and any employee objections to, a job evaluation study, but shall also consider similar or like classifications in other political subdivisions.

Subd. 4. Collective bargaining. In collective bargaining for a balanced class, the parties may consider the equitable compensation relationship standards established by this section and the results of a job evaluation study, but shall also consider similar or like classifications in other political subdivisions.

Minn. Stat. § 471.994 **Job Evaluation System**

Every political subdivision shall use a job evaluation system in order to determine the comparable work value of the work performed by each class of its employees. The system must be maintained and updated to account for new employee classes and any changes in factors affecting the comparable work value of existing classes. A political subdivision that substantially modifies its job evaluation system or adopts a new system shall notify the commissioner. The political subdivision may use the system of some other public employer in the state. Each political subdivision shall meet and confer with the exclusive representatives of their employees on the development or selection of a job evaluation system.

FINDINGS OF FACT

1. On February 2, 2007, David Monsour, Business Representative for IUOE, Local No. 70, filed a grievance with the City of Northfield. It stated in applicable part:

Nature of Grievance

That the City has implemented a new pay plan and has not acted in good faith. That the City has reduced some bargaining unit members' rate of pay and not provided a cost of living increase.

Contract Violation(s): Article 21, Section 2; and any and all other Articles which may apply.

Remedy Desired: That all bargaining unit members be made whole in all respects.

Grievance Filed on Behalf of: Entire Local 70 General Unit Bargaining Unit [Union Exh. No. 3].

Ms. Elizabeth Wheeler, Human Resource Director for the City of Northfield, responded to Mr. Monsour stating, “per the conversation we had on April 20, 2007, the City of Northfield waives the timelines for grievances for Local 70-General Unit related to the 2006 David N. Griffith Pay Plan .”

[Unit Exhibit No. 4]

Mr. Monsour sent a letter on December 3, 2007 to Ms. Wheeler stating:

Re: City of Northfield, Pay Rate Contract Violation

Dear Ms. Wheeler:

I am writing to request that the City reinstate the employees’ wage scale and make members whole for all damages they have suffered as a result from the City’s act of discontinuing the Maximums [sic] Pay Plan. The violation of the collective bargaining agreement in this case is clear. Employee wage scales were locked in as a matter of contract and the contract has continued in effect while the parties are bargaining. Please be aware that if the Union is forced to go through with this arbitration, we will ask our attorneys to seek their fees and the Union’s costs of having to pursue this grievance.

Furthermore, we have recently become aware that the City granted what it deemed to be “retroactive pay” to transit employees who are in the existing collective bargaining unit. The Union will consider this payment to be a partial satisfaction of the back pay owed to these employees in connection with the City’s unilateral wage reduction. If you intended this payment to imply that these individuals are no longer in the bargaining unit, the Union considers this to be an unfair labor practice and will pursue all legal avenues available to it to correct this problem. In any event, please provide us with an accounting of the payments made to the City’s transit workers immediately.

[Union Exhibit No. 5]

2. The arbitrator was initially notified of his appointment on July 5, 2007 by letter from M. William O’Brien, Esq., the attorney for IUOE, Local 70. The representatives mutually selected October 23, 2007 as a date for the Arbitration Hearing. Due to a scheduling conflict of the arbitrator, the matter was rescheduled by agreement of the parties and the arbitrator to December 18, 2007. The Employer representative did not raise the issue of “arbitrability” nor request a bifurcation of the proceedings until the morning of the Arbitration Hearing, December 18, 2007.

Prior to the hearing, the arbitrator signed a Subpoena Duces Tecum ordering the representative of the City and Ms. Wheeler, the Human Resources Director, to provide to the Union copies of any

negative performance evaluation for members of the Union. [Union Exhibit No. 8]. The Subpoena Duces Tecum was served. The Employer failed to produce those particular subpoenaed materials neither prior to nor on the day of the December 18, 2008 Arbitration Hearing.

On December 18, 2007, the hearing began at approximately 9:30 a.m. The Union presented its Booklet of Exhibits to the arbitrator and to the City representative. The Union also presented its written “Issue Statement” [Union Exhibit No. 18], which stated: “Whether the Employer violated the contract by unilaterally changing the pay rates of bargaining unit members”.

The Employer responded by stating that the City refused to continue with the hearing. The Employer’s representative stated it needed time to review the Issue Statement. The arbitrator granted time to review the Issue Statement until 10:30 a.m. At approximately 10:40 a.m., the Employer representative returned to the hearing room and informed the arbitrator that the City of Northfield refused to proceed. The Employer representative claimed he needed further preparation time. The arbitrator adjourned the hearing until 12:30 p.m. At 12:52 p.m. the Employer representative returned to the hearing room with a “City Statement of Issue” and a series of exhibits. [City Exhibits 1-8]. The Employer representative demanded that the arbitrator bifurcate the hearing into two separate days. The Employer representative insisted that for the Employer to continue the hearing the arbitrator should only allow arguments concerning “arbitrability”. Then, if the arbitrator decided incorrectly, the City would have an opportunity to go to court to stop the arbitration. And if the City lost the court challenge, then a separate arbitration hearing could be scheduled to argue the “merits” of the case.

The arbitrator declined the Employer’s demand to bifurcate the proceedings. The Employer representative then argued for approximately 90 minutes the issue of “arbitrability”. The Employer’s representative contended that the matter was “not arbitrable” because of the Minnesota Pay Equity Act, Minn. Stat. §§ 471.991-999.

In its Opening Statement the Union responded to the “arbitrability” issue that the dispute arises under the Collective Bargaining Agreement of the City of Northfield and IUOE, Local 70 and not the

Minnesota Pay Equity Act. The City representative then rebutted the Union’s contention that the case was “arbitrable”. The City representative asked for more time to gather and put in further evidence to prove “the falsehood of Mr. O’Brien’s statement” [Tr. 77] “[a]nd it’s not part of the Maximus Pay Plan. And to show that, we will introduce—when we get it done—the Maximus Pay Plan. Because its important to the case”. [Tr. 77]. The arbitrator ruled that the Arbitration Hearing would continue and at the next appropriate break the City could copy the Maximus Plan and put it into evidence. The Arbitrator agreed to the introduction of the Maximus Pay Plan at a convenient time, but the City representative ultimately left the Arbitration Hearing before introducing the Maximus Pay Plan. The Arbitrator further agreed to keep the record open to allow the City representative to introduce a copy of the Maximus Plan when it was copied. The Employer representative did not submit the Maximus Pay Plan anytime during the Arbitration Hearing nor with the City’s Post-Hearing Brief, despite the fact that the arbitrator kept the record open and ruled that the Employer representative could submit the material when it was copied. However, the Union Booklet already included the Maximus Pay Plan, so it was already in evidence. [Union Exhibit No. 21; Tr. pp. 77-92]. The City representative had been given a copy of the Union Booklet at the beginning of the Arbitration Hearing at approximately 9:30 a.m. on December 18, 2007.

3. After the City’s 90 minute Opening Statement on the issue of “arbitrability”; the Union’s response; and the City’s rebuttal, the arbitrator ruled that for purposes of economy, efficiency and fairness, he would take the question of “arbitrability” under advisement and hear the “substantive merits” of the dispute. The City representative and the Human Resources person declined to participate and voluntarily left the hearing room. The arbitrator then proceeded to hear the Union’s evidence on the “merits” of the case.

4. The essential contentions of the Union are:

a. Under the parties Collective Bargaining Agreement, bargaining members are to be paid in accordance with the pay plan formulated by David M. Griffth & Associates, known by the

parties as the “Maximus Plan”. Under the Maximus Plan individual jobs are assigned a grade, depending on skills needed and complexity of the job. After determining the grade to which the particular job belongs, an Employee’s specific pay rate is determined by his or her length of employment. There are various Steps 1-9 that an Employee is to automatically move on his/her anniversary date unless he/she receives a negative Performance Review. After Step 9, an Employee no longer receives automatic Step increases. Instead, the Employee receives Merit increases based on ability to meet mutually agreed-upon goals that the Employer and the Employee establish together. Under the Maximus Plan, the City is required to make cost-of- living -adjustments (COLAs) to the Employee’s wages. The Employer can implement a COLA based upon CPI data from the previous year which is published in the *American Cities and Counties Magazine*.

b. The Employer generally failed to implement the Maximus Plan in good faith after December 31, 2005. However, by law, the contract must continue in effect until a successive contract is negotiated. While the Employer implemented a COLA in 2006, and awarded Employees in Steps 1-8 step increases, the Employer failed to award merit increases to Employees at Steps 10-15. The Employer failed to meet with Employees to establish merit goals. The Employer also failed to award merit increases for 2 years.

c. The Employer unilaterally adopted the “Kelsey Plan” in 2007 in violation of the plain contract language. The Union contends that the Employer admits that “in 2007 we abandoned the job evaluation system under the law of Griffith & Associates. And we established a new evaluation under Kelsey, which was our right to do under the Pay Equity Law, [Minn.Stat. § 471.994]”. [Tr. 44]

Most Employees’ wages were frozen as the result of the change from Maximus to Kelsey. Employees did not receive a cost-of-living adjustment. Employees did not receive Step increases. The Employees were denied the opportunity to progress to a higher step on their anniversary date. The Employees who were at Steps 10 and above had their wages reduced to the top wage rate in

the Kelsey Plan, which was lower than the Maximus Plan. Several bargaining unit members saw their hourly wage rate reduced during the first pay period of January in 2007.

d. The Union filed a written grievance regarding the unilateral abandonment of the Maximus Plan. The Union filed the grievance under Article 21, Section 2 placing the Employer on notice that a failure to continue to pay Employees according to the Griffith Plan constituted a violation of that article. The Union's grievance was unambiguous, contends the Union. The Union argues "... the City has implemented a new pay plan and has not acted in good faith ... The City has reduced some bargaining unit members' rate of pay and not provided a cost-of-living increase." [Union Exhibit No. 3, February 2, 2007 Grievance].

e. The parties processed the grievance and scheduled an arbitration hearing. The Employer did not raise the issue of "arbitrability", nor request bifurcation of the arbitration, until December 18, 2007, the date of the Arbitration Hearing.

f. The Union contends the letter of December 3, 2007 to Ms. Elizabeth Wheeler, Human Resources City of Northfield, from David Monsour, Business Representative, IUOE, Local No. 70, clearly stated the issue in writing:

I am writing to request that the City reinstate the employee's wage scale and make members whole for all damages they have suffered as a result from the City's act of discontinuing the Maximums [sic] Pay Plan. The violation of the Collective Bargaining Agreement in this case is clear. Employee wage scales were locked in as a matter of contract and the contract has continued in effect while the parties are bargaining. [Union Exhibit No. 5]

g. The Union prepared for the Arbitration Hearing. The Union requested that the arbitrator issue Subpoenas and Subpoenas Duces Tecum. The subpoenas were issued and served. The Employer did not produce several of the documents neither prior to nor on the date of the arbitration hearing, as required by the Subpoenas Duces Tecum.

h. The conduct of the Employer's representative at the arbitration hearing was intemperate. The issue presented by the Union in its written statement provided at the hearing stated

“[w]hether the Employer violated the contract by unilaterally changing the pay rates of bargaining unit members?” [Union Exhibit No. 18]. After reviewing the Union’s proposed Issue Statement, the Employer representative refused to continue with the hearing. Even so, the arbitrator permitted the Employer, at the Employer’s request, time to review the Issue Statement. The Employer returned at 10:40 a.m., at which point the Employer representative again told the arbitrator he refused to proceed. The Employer representative claimed he needed further preparation time, at which point the arbitrator agreed to adjourn the hearing until 12:30 p.m. At 12:52 p.m., having had additional time to prepare, the Employer representative re-appeared with exhibits. The Employer submitted a written Issue Statement to the arbitrator stating that the matter was not “arbitrable” by operation of the Minnesota Pay Equity Act. The Employer further insisted that the Arbitrator decide the issue of “arbitrability”; and then, in a separate and later proceeding, if necessary, after a court challenge, hear the case on the “merits”. The arbitrator declined the Employer’s demand to bifurcate the proceedings and encouraged the City’s representative to present its case with respect to both procedural and substantive matters. The arbitrator offered to hold the hearing record open so that the City could supplement the record with the Maximus Pay Plan. The arbitrator declined to bifurcate the proceedings in the interest of fairness, economy and efficiency, particularly given the length of the dispute. After having taken numerous breaks during the day, including several to prepare for the arbitration which had been scheduled for over three months, the Employer representative and the Director of Human Relations left the hearing room. The Union then presented its substantive case with a witness under oath and introduced evidence before the arbitrator.

The key arguments of the Union are:

- a. The grievance is procedurally “arbitrable”; the Employer waives any objections regarding “arbitrability” by the City’s delay and laches. The Employer received a written statement of the issue as required by the Collective Bargaining Agreement. Bifurcation is a procedural issue that is properly decided by the arbitrator. The Employer’s goal in seeking bifurcation was to needlessly multiply the proceedings.

b. The grievance is substantively arbitrable. The parties agreed to submit this dispute to arbitration when the parties mutually agreed to schedule the Arbitration Hearing for December 18, 2007.

c. The Minnesota Pay Equity Act does not bar the arbitration. The Pay Equity Act requires the parties to bargain over wage programs. The City's bargaining pattern demonstrates its understanding that MPEA-Compliant Wage Plans are subject to negotiation.

d. The Employer's discontinuation of the Maximus Plan violated the clear language of the parties' contract. The contract requires a continuation of the Maximus Plan. COLAs, Step increases, and Merit increases are required under the Maximus Plan. The Collective Bargaining Agreement requires the Employer to make Step and Merit increases upon the Employees' anniversary dates. The CBA requires annual cost-of-living adjustments. The Collective Bargaining Agreement while it is applicable provides only for the Maximus Plan, not the Kelsey Plan. This means that the attendant automatic wage increase--such as COLAs and Merit increases-- continue forward. The Employer has already offered to make retroactive payments based upon the Maximus Plan, and is apparently prepared to do so.

5) The essential contentions of the City are:

a. The grievances before the arbitrator have been unnecessarily compounded by the Union by submitting one grievance in writing for arbitration to the City for purposes of selection of the arbitrator and then submitting a different grievance in writing at the arbitration hearing for a determination.

b. The grievance submitted to the arbitrator on December 18, 2007 had not been seen by the City prior to the hearing and was not the grievance for which the arbitrator was selected. After a review by the City at the hearing of the new and unforeseen grievance raised for arbitration by the Union, the City determined that the issue raised was not arbitrable based on Minn. Stat. §§ 471.991-471.999. The City accordingly stated to the arbitrator that the new grievance raised by the Union was not arbitrable

and requested that the hearing on December 18, 2007 be limited to a determination of “arbitrability” of that new unforeseen grievance.

c. The arbitrator declined to limit the arbitration hearing to the issue of “arbitrability” of the new grievance presented by the Union at the hearing for which the City had not had the opportunity to prepare. Such a ruling was quite unlike rulings given by other arbitrators in similar circumstances.

d. Had the City seen the new grievance presented by the Union on December 18, 2007 in advance of the selection of the arbitrator and the scheduling of the hearing, the City would not have selected an arbitrator and would have refused to arbitrate such issue without the opportunity to obtain a Court ruling on the “arbitrability” of the new issue.

e. While the City agreed to present its case at the December 18, 2007 hearing with regard to the “arbitrability” of the grievance raised for the first time at the hearing, the City declined to participate in the presentation on the “merits” since the new issue was clearly not arbitrable under Minn. Stat. §§ 471.991-471.999.

f. The City was prevented by the arbitrator during its presentation on the issue of “arbitrability” from presenting an exhibit previously provided to the Union under subpoena to complete its case on “arbitrability” and rebut a statement made by the Union representative at the hearing which was a “deliberate falsehood”. The Union’s “false statement” was obviously presented in an attempt by the Union representative to influence the arbitrator on the “arbitrability” issue. By refusing to accept the exhibit and allow the City to document its relevance to its arbitrability case, the arbitrator prevented the City from fulfilling presenting its case on “arbitrability” at the hearing in violation of the State Uniform Arbitration Act.

g. The original grievance filed by the Union on February 2, 2007 [City Exhibit No. 2; Union Exhibit No. 3] is not the same grievance presented by the Union on the day of the hearing December 18, 2007 [Union Exhibit No. 18]. Further, the remedy requested on December 18, 2007 the Union requests that all members “be made whole under the Maximus Pay Plan until a successor plan is bargained” can

neither be voluntarily agreed to by the City of Northfield as a settlement of the grievance nor be awarded by the arbitrator under the specific mandates of Minn. Stat. §§ 471.991-999.

h. The David M. Griffith Job Evaluation system adopted in 1997 by the City of Northfield could not be updated because the David M. Griffith organization had ceased doing business. Under the mandate of Minn. Stat. § 471.994 the City of Northfield is required to update the existing job evaluation study or conduct a new one. As a consequence, the City conferred with all its exclusive representatives and chose the Kelsey job evaluation system for establishment of compensation under Minn. Stat. 471.992 and Minn. Stat. 471.998, for all City employees beginning January 1, 2007.

i. The action which must be followed by IUOE, Local No. 70 to establish compensation for calendar year 2007 for its General Unit cannot be through a grievance arbitration citing a job evaluation system abandoned in calendar year 2006, as provided for by unilateral City decisions to change to the Kelsey system consistent with the “meet and confer” requirements stipulated in Minn. Stat. § 471.994. Rather, the action must be to engage in contract negotiations as required under Minn. Stat. § 471.992 and Minn. Chapter 179A using the job evaluation system adopted by the City, effective January 1, 2007, as IUOE, Local 70 did with its Utility Unit and LELS did with its Police Unit and Sergeants Unit.

j. There is no case for compensation for calendar year 2007 for IUOE, Local 70 General Unit which can be brought into a grievance arbitration using the Griffith job evaluation study [aka Maximus Pay Plan] abandoned at the end of calendar year 2006 by the City as provided by Minn. Stat. § 471.994. In conclusion, the City and IUOE, Local No. 70 must continue to negotiate in good faith with regard to compensation for Local No. 70’s General Bargaining Unit for calendar year 2007. This action is required by Minn. Stat. §§ 471.991-999 and Minn. Chapter 179A to establish compensation relationships for all City job classes using the City of Northfield’s chosen values and market comparisons and any other factors which the City and Local No. 70 bring to negotiations. The City cannot submit to the Minnesota Department of Employee Relations compensation results for 2007 for City employees using two different job class values for different groups of employees under the

requirement of Minn. Stat. 471.994 and the reporting requirements of Minn. Stat. § 471.9981. [See generally Post-Hearing Brief of City of Northfield 1-6].

DECISION AND RATIONALE

A. The Issue of Arbitrability

For the City of Northfield's perspective the only issue subject to this arbitration is whether the matter is "arbitrable". From the moment the City's representative walked into the hearing room on December 18, 2007, the City representative took the position that the City of Northfield would not participate in the hearing because the matter "is not arbitrable" under Minn. Stat. § 471.994. Also, the City contended that because the written issue statement the Union presented on the morning of December 18, 2007 [Union Exhibit No. 18] was different from the grievance it filed on February 2, 2007 [Union Exhibit No. 3], the matter was not "arbitrable". The issue was not "arbitrable" for two reasons, says the City. First, the Minnesota Pay Equity Act only requires that the City "meet and confer" concerning the development of such plans. It does not require that the City collectively bargain over such a plan. Second, the City contends that the written statement of the issue changed on December 18, 2007 from the initial statement of the grievance on February 2, 2007, thus violating the Collective Bargaining Agreement and not permitting the City to properly respond to the actual grievance which was filed and for which the City prepared to contend at the Arbitration Hearing of December 18, 2007.

The City urged the arbitrator to bifurcate the hearing and rule first on the issue of "arbitrability". That way, the City contended, should the arbitrator hold that the dispute was, in fact, "arbitrable", the City could go to Court and request the Court to stop any further proceedings in Arbitration. The City representative informed the arbitrator that if the arbitrator did not bifurcate the hearing, the City would not participate in the "merit" aspects of the Arbitration Hearing.

Before the "arbitrability" issue was argued on the morning of December 18, 2007, the City initially informed the arbitrator it would not participate because the issue statement had changed. The

arbitrator gave the City representative time to respond to the written issue statement presented by the Union at the Arbitration Hearing. The hearing was scheduled for 9:30 a.m. Not until 12:52 p.m. did the City representative come prepared, with his own written issue statement and a series of documents, ready to argue the question of “arbitrability”.

The City representative then proceeded, for approximately 90 minutes, to argue that the dispute was “not arbitrable” citing the Minnesota Pay Equity Act, Minn. Stat. § 471.994. The City representative argued that changing the issue made the dispute “not arbitrable”. After the 90 minute Opening Statement by the City, the Union responded that: 1) the case was, in fact, “arbitrable”; 2) the Minnesota Pay Equity Act did not change that fact; and 3) the Union was prepared for and desired to argue both the question of “arbitrability” and the “merits” of the dispute. The Union further contended that its grievance of February 2, 2007 [Union Exhibit No. 3], its letter of December 3, 2002 [Union Exhibit No. 5], and its written statement given to the City on the morning of December 18, 2007 could not be a “more straight-forward manner of framing the issue in this case”. “The English language does not permit the Union to more clearly identify its dispute with the Employer.” [Post-Hearing Brief of Union at 16].

Issues of procedural “arbitrability” are often raised at the filing of the grievance or as soon as the reason for the objection arises. See *Drummond v. UMWA*, 748 F.2d 1495 (11 Cir. 1984). In *Drummond* the Court affirmed the arbitrator’s conclusion that the Company had waived its right to object to the timeliness of the grievance by accepting the grievance without raising the issue of contractual time limitations at the time of filing. *Id.* at 1496.

On December 18, 2007, just as the arbitration Hearing began at approximately 9:30 a.m., the Employer representative was handed a written statement of the issue as required by the Collective Bargaining Agreement. The Union’s Grievance filed February 2, 2007 [Union Exhibit No. 3] makes clear “that the City has implemented a new pay plan and has not acted in good faith. That the City has reduced some bargaining unit members rate of pay and not provided a cost-of-living increase”. *Id.* As evidence that the City clearly understood what the substance of the dispute was, Ms. Elizabeth Wheeler,

the Human Resources Director, on April 20, 2007, identified the Union's grievance as "related to the 2006 David M. Griffith pay plan". [Union Exhibit No. 4]. Then on December 3, 2007, Mr. Monsour, IUOE Business Representative, sent a letter to Ms. Wheeler [Union Exhibit No. 5] making the merits of the dispute crystal clear: "I am writing to request that the City reinstate the employee's wage scale and make members whole for all damage they have suffered as a result from the City's act of discontinuing the Maximum's [sic] Pay Plan". Then on the morning of the Arbitration Hearing, December 18, 2007, the Union's attorney presented a written statement of the issue "Whether the Employer violated the contract by unilaterally changing the pay rates of bargaining unit members?"

By a preponderance of the evidence the Union has proven that the Employer did receive a written statement of the issue as required by the Collective Bargaining Agreement. The various written documents contained a plain description of the Union's dispute with the Employer, which satisfies the requirements of the parties' grievance procedure under the CBA. The grievance refers to the Employer's implementing a new pay plan and not acting in good faith. [Union Exhibit No. 3]. The Employer offered no evidence that it was confused or misled by this statement.

The Employer did not, upon scheduling the arbitration, raise a question of the procedural sufficiency of the grievance, except on the morning of the Arbitration. It is clear from Ms. Wheeler's letter of April 20, 2007 to Mr. Monsour that the City understood the "grievances for the Local 20--General Unit related to the 2006 David M. Griffith pay plan". [Union Exhibit No. 4]. The Employer's contention that it was unaware that the Union's grievance related to the revocation of the Maximus Plan, and therefore the MPEA and the imposition of new pay rates, is not credible. The Employer representative expressly conceded that he had prepared for arguments concerning the propriety of the unilateral implementation of a pay plan. "... I know of no--no Union in the history of negotiations in the State of Minnesota—and I looked! I went to some considerable research time in preparing for this argument in case I had to make it. I talked to [the] AFL-CIO, I talked to [the] Teamsters. I talked to Unions. I talked to Employers. I talked to DOER people." [Tr. 37]. On December 3, 2007 Mr.

Monsour sent a letter to Ms. Wheeler requesting that the Employer re-think its unilateral discontinuation of the Maximus Plan governing Employee wages under the CBA. The letter specifically refers to “the City’s act of discontinuing the Maximums [sic] Pay Plan”. [Union Exhibit No. 5]

Bifurcation is a procedural issue that is properly decided by an arbitrator. Arbitrators are vested with authority to decide whether to bifurcate a hearing when parties raise both procedural and substantive issues. Elkouri and Elkouri, *How Arbitration Works* 310 (6th Ed. at 203). Elkouri notes that “it is generally more efficient to hear the case in full, because the arbitrator can still decide the question of arbitrability first”. [Id.] “Economy”, “efficiency” and “fairness” are several of the key objectives of Arbitration. The arbitrator cited these reasons for not bifurcating the hearing. The arbitrator refused to do as the City representative demanded, which was to hold a hearing on December 18, 2007 only on “arbitrability”; then, rule in writing on that issue; then, hold another hearing on another day on the “merits” of the case, but only after the City had an opportunity to go to court to try to stop the Arbitration Hearing on the “merits” if the Arbitrator held that the case was “arbitrable”.

The inefficiency and cost of such a procedure requested by the City’s representative would defeat the value of Arbitration as an alternative dispute resolution method of resolving disputes. The key objectives of Arbitration are quick, efficient, economical and fair resolution of disputes. See *Brothers Jurewicz, Inc. v. Aheari, Inc.*, 296 N.W.2d 422, 427 (Minn. 1980) “in addition, one of the fundamental objectives of arbitration—speedy resolution of disputes—could be thwarted if parties were able to delay arbitration by litigating procedural formalities before the trial court”. Citing *Bartley, Inc. v. Jefferson Parish School Board*, 302 So.2d 280 (La. 1974).

The decision whether to bifurcate lies with the arbitrator. This long held principle of arbitration law is respected by the courts. “Any decisions concerning the appropriateness of a bifurcated approach [are] best left to the arbitrator”. *United Steel Workers, Local No. 348 v. Magellan Midstream Holdings, L.T.*, 183 L.R.R.M. 2082 n. 3 (D. Kan. 2007). See, also, *Kennekott Utah Copper Corp. v. Becker*, 186

F.3d 1261, 1267 (10th Cir. 1999) (matters of procedure lie solely within the discretion of the arbitrator) (citing *John Wiley & Son v. Livingston*, 376 U.S. 543, 577, 84 S.Ct. 909, 11 L.Ed.2d 898 (1964)).

Further, the Minnesota Pay Equity Act does not bar arbitration. The Pay Equity Act requires the parties to bargain over wage programs. Contrary to the Employer's assertion that the MPEA precludes collective bargaining over the wage systems governing representative employees, the MPEA is replete with references to the Employer's obligation to comply with Minnesota Public Employment Labor Relations Act (PELRA), Minn. Stat § 179A.01, et seq. "This law [MPEA] may not be construed to limit the ability of the parties to collectively bargain in good faith". Minn. Stat. § 471.992, subd. 1. "*In collective bargaining for a balanced class*, the parties may consider the equitable compensation relationship standards established by this section and the results of a job evaluation study which shall also consider similar or like classifications in other political subdivisions". Minn. Stat. § 479.992, subd. 4 (emphasis added).

The bargaining unit in this case constitutes a balanced class, as 15 or just over half, of the bargaining unit members are female. [Union Exhibit No. 14]. The applicable statute expressly provides that wage rate plans are to be bargained by parties—i.e., the Employer and the Employees' exclusive representative. This conclusion has been affirmed by the Minnesota Court of Appeals. In *Armstrong v. Civil Serv., Comm'n*, 498 N.W.2d 471 (Minn. App. 1993), the court stated:

MPELRA ... provides the mechanism for negotiations and dispute resolution between public employees and employers, thus pursuant to § 471.992, *MPEA must be read and applied within the parameters of the MPELRA*. *Id.* (emphasis added).

And the MPEA states:

The provisions of § 471.991 to 471.999 *do not diminish a political subdivision duty to bargain in good faith under Chapter 179A*. Minn. Stat. § 471.9966 (emphasis added).

The MPEA was drafted with an eye toward preserving collective bargaining relationships that are at the core of PELRA. See Minn. Stat. § 179A.01 (identifying "orderly and constructive relationships between all public employers and their employees" as a goal of the State of Minnesota).

Based on the above analysis it is held: 1) the Union followed the contractual requirements to provide a written issue statement to the Employer prior to the arbitration; and, 2) the case is “arbitrable” and is not prevented from being arbitrated under the MPEA. The arbitrator derives his authority to decide this from the contract.

B. Merits of the Dispute.

The arbitrator advised the Employer’s representatives that he intended to hear the entire matter and would not bifurcate the hearing. The Employer representative was requested to argue both the “arbitrability” issue and the “merits” of the case. The Employer’s representative from the moment the hearing began at approximately 9:30 a.m. on December 18, 2007 stated he “would not participate”, “will not proceed”. The arbitrator gave the City representative time to respond to the Union’s written issue statement. At approximately 10:40 a.m., the City representative returned to the arbitration hearing room and again told the arbitrator the City refused to proceed. (Tr.-57). The Employer’s representative claimed he needed further preparation time to respond to the written issue statement of the Union, at which point the arbitrator agreed to adjourn the hearing until 12:30 p.m. At 12:52 p.m., the Employer representative returned to the arbitration hearing room, made an Opening Statement on the issue of “arbitrability” which lasted over 90 minutes. The Employer representative also provided a written issue statement and series of documents offered in evidence.

After the arbitrator heard the City’s “arbitrability” argument, the Union’s response, and the City’s rebuttal, the arbitrator informed the Employer and the Union that he would now hear the case on the “merits”. In response, the City representative informed the arbitrator “Well, the City will leave”. (Tr. 56). The arbitrator advised the Employer that such action might be problematic for the City in the event the arbitrator concluded that the grievance was “arbitrable”. In such a case, the Employer will have waived its right to present its case on the “merits” of the dispute. Notwithstanding this due notice, the Employer voluntarily waived its right to address the substantive claims of the Union and, in fact, left the hearing room with Ms. Wheeler, the Human Resources Director. The hearing on the “merits” continued

after the Employer representative and the Human Rights Director voluntarily left the Arbitration Hearing. The City refused to participate in the “merits” of the Arbitration Hearing. The City sent a “Post-Hearing Summary Brief” on the due date, January 11, 2008, for the written Post-Hearing Briefs.

Federal law permits an arbitrator to continue a hearing and issue an award so long as it is “based upon evidence presented to the arbitrator”. 29 CFR § 1404.14. Such ex-parte awards will be enforced by the courts. E.g., *Bowling Green Express*, 707 F.2d 254, 257 (6th Cir. 1983), *Teamsters v. Brazewell Motor Freightlines*, 292 F.2d 1, 9 (5th Cir. 1968), cert. denied 401 U.S. 937 (1971) (“neither arbitrability of the issue nor the finality of the body’s decision is watered down by (the Employer’s) election to stay away from the arbitration”).

In a case similar to the present case, an Employer abruptly left the proceedings after the parties disagreed about the proper issue statement. *Municipality of Anchorage*, 101 LA 1127 (Carr 1994). The arbitrator allowed the Union to present the “merits” of its case, noting that the Employer’s “refusal [to participate] does not, however, abrogate the requirements of the parties to arbitrate under the agreement.” The arbitrator further found that “if one party elects not to present part or all of its case, the arbitrator must rule on the basis of the evidence and testimony presented”.

In *International Association of Firefighters*, 86 LA 1201 (Alleyne 1986), the arbitrator cited Rule 27 of the Rules of the American Arbitration Association, which states that “[u]nless the law provides to the contrary, the arbitration may proceed in the absence of any party, who, after due notice, fails to present or fails to obtain an adjournment”. In other words, a party who voluntarily makes itself absent during a scheduled arbitration hearing cannot then complain about the outcome or the fact that the hearing took place ex-parte.

On December 18, 2007, the Employer had ample opportunity to argue the issue of “arbitrability”. The Employer waived its right to argue the “merits” of its case, leaving the proceedings after being duly advised of the risk of doing so. The arbitrator gave due notice to the Employer representative that he would hear the “merits” of the Union’s case. The arbitrator informed the Employer representative that

leaving the hearing could negatively affect the City in the event that the arbitrator concluded that the grievance was “arbitrable”. The Employer representative voluntarily waived the City’s right to present the City’s case on the “merits”. Notwithstanding such due notice, the City waived its right to address the substantive claim of the Union. The Employer representative said “Have a good time” [Tr. 80] and left the hearing room and did not return.

What is the substantive claim of the Union? The clear cut language of the Collective Bargaining Agreement, Article 21, § 2 states: “The Union agrees to place its members under the City’s Employee pay plan. Employees shall be compensated pursuant to the terms and conditions of the City Employee pay plan as originally formulated by David M. Griffith & Associates (now known as Maximus) and adopted by the Northfield City Council on September 15, 1997. The Employer agrees to implement the employee pay plan in good faith”.

Article 21, § 3 states: “Employees shall receive pay plan step increases effective upon the Employee’s anniversary date, provided the Employee receives the satisfactory performance review. If the Employee fails to perform an employee Step 1-9 annual performance review of an employee prior to that Employee’s anniversary date, that Employee will receive an automatic step increase on that anniversary date. If the Employer fails to perform an employee Step 10-15 annual performance reviews within 30 days following that Employee’s anniversary date, that Employee will receive an automatic step increase retroactive to their anniversary date”.

The contract language is clear and unambiguous on its face. The Employer agreed to implement the terms of the Maximus Plan during the period of the parties’ Collective Bargaining Agreement and for as long as the contract runs under the law and the term of the contract. Neither the contract nor the law provide for any circumstances under which this contractual agreement can be unilaterally abandoned. By law, the contract continues while the parties try to negotiate a new contract. At the Arbitration Hearing, the Employer offered no interpretation of the language of the CBA or the law that permitted the City to unilaterally suspend the Maximus Plan. The only rationale the City used

was that the Minnesota Pay Equity Act allows the City to break its contract at will. This the MPEA does not permit.

Notwithstanding this clear and unambiguous language in the CBA, the Employer abandoned the Maximus Plan despite the fact that the contract remains in effect. The Employer representative acknowledged during the Arbitration Hearing that the contract is to continue as if it had not expired as long as the parties are bargaining for a successor agreement. The parties have, in fact, been bargaining for a successor agreement. The revocation of the Maximus Plan contravenes the clear, unambiguous language of the contract.

The Maximus Plan provides Step increases, Merit increases, and cost-of-living adjustments (COLAs). The Employer has failed to implement Merit increases for two years, and Step increases and COLAs for one year. Employees with long tenure in the City of Northfield had their pay lowered as a result of the Employer's adoption of the Kelsey plan in violation of Article 21 of the CBA.

Prior to the December 18, 2007 Arbitration Hearing, the Union requested the arbitrator sign a Subpoena Duces Tecum requesting copies from the Employer of any negative performance evaluations of members of the Union. [Tr. 103; Union Exhibit No. 8]. The Subpoena Duces Tecum was signed and served on the City. The Employer failed to produce the documents, neither prior to nor on the day of the Arbitration Hearing. As a consequence, this arbitrator is entitled to infer that all bargaining unit members are performing satisfactorily. The arbitrator makes this factual inference. Because the Employees were performing satisfactorily under Article 21, they are entitled to Step and Merit increases in 2006, 2007 and 2008 when applicable.

On January 5, 1999, the City of Northfield Administrator issued a memorandum stating that the Maximus Plan calls for cost-of-living adjustments. [Union Exhibit No. 21]. The letter stated that the Employer "formally linked our pay plan to a ... cost-of-living index". The Administrator further noted that "the object of making this link as it provides... future employee pay plan COLAs". [Id.] The Northfield City Council adopted this "formal linkage" by City Council resolution:

The employee pay plan is adjusted once each year by the city council to reflect changes to U.S. Department of Labor's Consumer Price Index, as listed in the December issue of American City and County Magazine". [Union Exhibit No. 23]

Further there is an established past practice by the City of Northfield of awarding COLAs.

The Union's witness testified that COLAs have been typically awarded every year. Tr.-120.

In fact, the only time that the Employer has not awarded a COLA to bargaining unit members since the inception of the Maximus Plan is 2007, the year in which the Employer abandoned the Maximus Plan for the Kelsey Plan.

An arbitrator's authority to decide a dispute is derived from the Collective Bargaining Agreement. This arbitrator was mutually chosen by the parties and duly appointed by the State of Minnesota Bureau of Mediation Services. The parties came to the arbitration hearing on December 18, 2007. The City argued, for the first time at the arbitration hearing, that the grievance was not "arbitrable" based on the Minnesota Pay Equity Act and on the difference between the original grievance of February 2, 2007 and the written statement of the issue given to the City at the Arbitration Hearing of December 18, 2007.

The City's lack of "arbitrability" claims are without merit. Clear written statements of the issue were made on February 2, 2007, December 3, 2007, and on December 18, 2007. The City's contention that the original grievance is different from the issue stated at the arbitration hearing was not proven by a preponderance of evidence produced at the Arbitration Hearing on December 18, 2007. The Minnesota Pay Equity Act does not foreclose the authority of a duly appointed arbitrator to interpret the language of a Collective Bargaining Agreement. The specific issue presented to the arbitrator involves the interpretation of Article 21, §§ 2 and 3 of the Collective Bargaining Agreement. Arbitrator Richard John Miller in a recent case involving the same parties said, "[I]f there is one principle of contract interpretation upon which arbitrators agree, [it] is that where no ambiguity exists in the language of a contract, then the obvious intent of that language governs and must be enforced". *City of Northfield, Minnesota and IUOE, Local 70, BMS Case No. 07-PA-1091* (November 26, 2007). The language of

Article 21 is clear and unambiguous. The Maximus Plan is the applicable plan while the contract remains in effect. The City of Northfield agreed in the contract it made with the Union to apply this method of pay for as long as the contract existed. It can not unilaterally change the contractual agreement because it chose to adopt a new pay plan under the MPEA. The evidence offered by the Union at the Arbitration Hearing shows by a preponderance of evidence that the Step, Merit and COLA increases were agreed to by the City of Northfield by contract. The Step performance reviews were not done by the City within the thirty (30) day requirement under the contract, therefore the Employees have a right under the contract to automatic, retroactive Step increases.

The City representatives voluntarily chose to leave the hearing when the arbitrator decided to hear both the procedural and substantive aspects of the case. The City was duly notified of the risk it was taking by not participating in the “merits” of the case. The City failed to produce the subpoenaed materials. As a consequence, this arbitrator infers as a matter of fact, that all bargaining unit members were performing satisfactorily such that they would have been entitled to Step and Merit increases in 2006, 2007 and 2008 where applicable.

It is awarded that all unit members be made whole under the Maximus Pay Plan, including in the present year 2008, until the parties mutually agree upon a successor plan. The Employer is ordered to institute the following corrective measures:

1. A cost-of-living adjustment using CPI data from the previous year, which is published in the *American Cities and Counties Magazine*, awarded for the years 2007 and 2008;
2. Step increases for all bargaining unit employees as Steps 1-9 in the Maximus Pay matrix for the year 2007 and 2008 when applicable;
3. Merit increases for all bargaining unit members at Steps 10-15 in the Maximus Pay matrix for the year 2006, 2007 and 2008 when applicable.

Dated: January 30, 2008.

Joseph L. Daly
Arbitrator