IN RE ARBITRATION BETWEEN:

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

and

MARTIN COUNTY

DECISION AND AWARD OF ARBITRATOR
BMS 08-PA-0952

JEFFREY W. JACOBS
ARBITRATOR

June 9, 2008
IN RE ARBITRATION BETWEEN:

AFSCME Council 65,

and

DECISION AND AWARD OF ARBITRATOR
BMS Case # 08-PA-0952
Step adjustment grievance

Martin County.

APPEARANCES:

FOR THE UNION: FOR THE COUNTY:
Teresa Joppa, Attorney for the Union Scott Lepak, Attorney for the County
Jo Eastvold, Business Representative Scott Higgins, County Coordinator
Tom Mahoney, Appraiser Diane Larson, Acct. Tech II
Jo Eastvold, Business Representative Theresa Tieman, Payroll Clerk, Union Steward
Tom Mahoney, Appraiser Debra Mosloski, Drainage Specialist

PRELIMINARY STATEMENT

The hearing in the above matter was held on May 14, 2008 at the Martin County Courthouse in Fairmont, Minnesota. The parties presented oral and documentary evidence at which point the hearing record was closed. The parties waived post-hearing Briefs.

ISSUE PRESENTED

Did the Employer violate Article 17 of the parties’ collective bargaining agreement when it refused to advance the grievants beyond Step 12 on the parties wage appendix? If so, what shall the remedy be?

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement covering the period from January 1, 2007 through December 31, 2009. 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. At the hearing the parties stipulated that there were no procedural or substantive arbitrability issues and that the matter was properly before the arbitrator.
UNION’S POSITION:

The Union’s position was that the County violated the contract when it refused to move any employee beyond Step 12 of the salary schedule and taking the position that no one will ever go above Step 12, when there is in fact a 15-step salary schedule. In support of this position the Union made the following contentions:

1. The Union pointed to Article 17 of the labor agreement which provides in relevant part as follows:

   17.1. All employees shall be compensated in accordance with Appendix A, attached hereto (Appendix A shows 15 step matrix)
   17.3 Any employee whose hourly rate of pay falls between steps and is at or below step twelve (12) will receive an adjustment to their rate of pay effective on January 1, 2005, up to the nearest step within the employee’s grade on the salary matrix. Any employee whose hourly rate of pay falls between steps and is above twelve (12) will receive a one time adjustment of $0.24 per hour. This is not considered a step adjustment and is not precedent setting. The 2005 wage adjustment will be figured after this adjustment is made.
   17.4. All employees shall receive a performance evaluation by their supervisor annually. On January 1st each year employees who are eligible will receive a step increase based upon the performance evaluation as well as the position in the range and upon recommendation of the employee’s supervisor, and final Board approval. In a reasonable time frame following the Board’s decision Employees of this group will be notified no later than December 31.

2. The Union argued that this language clearly shows that there is a 15-step wage matrix and that the Board may not arbitrarily decide to refuse to advance employees beyond Step 12. The Board has simply refused to acknowledge that there is in fact a 15-step wage appendix and has stated that it will simply not comply with that salary schedule and refuses to advance anyone beyond step 12. The Union acknowledged that there is one person in the unit that is at step 13 but that the parties specifically negotiated for her placement at that level as reflected by the language of Article 17.3 cited above.
3. In this case, the affected Employees are at or near step 12 and all are outstanding employees whose supervisors gave them excellent evaluations. In many cases there were specific recommendations to move them to the next step in the salary schedule. See e.g. Union exhibits 3, 4, 6, 7, 8, 9, 10. The cited exhibits all showed very good to excellent reviews for various employees. The Union asserted that in some cases the supervisors were quite emphatic that these employees should get step increases and even wrote letters to the Board imploring them to essentially come to their senses and grant the increases to avoid losing these employees to higher paying jobs elsewhere.

4. The County’s Pay Equity Report sent to the State DOER even notes that there is a 15-step salary schedule. The Union points to this as further evidence that the County uses the 15-step schedule for one thing, i.e. compliance with Pay Equity, but refuses to apply it to the members on the bargaining unit whose evaluations warrant advancement to step 13 or beyond.

5. The Union argued that the Board may not simply refuse to grant increases beyond step 12 without negotiation with the Union over that unilateral change. Even though the language grants to the Board final approval, a flat out refusal to grant step increases violates the spirit of the agreement, which has a 15 step wage schedule and the bargaining history between these parties regarding wages.

6. Moreover, the language calling for a 15-step schedule must be interpreted to mean something. Language must be interpreted so as to effectuate the language. Simply saying “no” to a step beyond step 12 violates this basic tenet of contract interpretation.

7. Further, language must not be interpreted to take away a benefit that has been specifically negotiated into the agreement. The County’s position would be to do exactly that by taking away step 13, 14 and 15 of the negotiated wage schedule.
8. The Union also argued that language must be interpreted so as to be fair and reasonable and give effect to what it means as well as what it says. The Union argued that while the Board did not want a 15-step wage schedule, they never made that clear to the Union even though its minutes reflected dissatisfaction with what the language said. In fact, the Board signed an agreement with a 15-step wage schedule in it and whether they like it or not, that is what the contract says. To deny the right of the employees to advance to higher steps, even though their supervisors clearly want them to, violates the spirit of the agreement and the spirit of good faith negotiations.

9. The essence of the Union’s argument is thus that the language clearly shows a 15 step wage schedule and that the affected employees are now nearing or are at step 12 of the wage schedule where they will stagnate if the County Board’s position is upheld. Further, it is clear that these employees are outstanding and have been specifically mentioned for advancement, multiple times by their supervisors. The intent of the language as negotiated by the parties was to allow for advancement beyond step 12. Whether the County Board wants it to say that or not; it does and the arbitrator should give effect to that language.

Accordingly the Union seeks an award compelling the County to advance each of the grievants to step 13 or 14 as warranted by their evaluations and their position in the range.

COUNTY'S POSITION

The County’s position was that the contract specifically reserves to the County Board final approval over step increases. In support of this position the County made the following contentions:

1. The County pointed to the same contract provisions relied upon by the Union and the specific provisions of Article 17.3 as follows: employees who are eligible will receive a step increase based upon the performance evaluation as well as the position in the range and upon recommendation of the employee’s supervisor, and final Board approval. (Emphasis added). The County argued that this provision gives the Board the unfettered right to decide whether to advance anyone beyond step 12.
2. The County acknowledged that there is a 15-step wage schedule but noted that the decision to advance someone beyond step 12 remains vested in the County Board. The County further pointed to several sets of Board minutes in which it was publically announced that the Board did not intend to advance anyone past step 12. The Union was well aware of this and thus knew that the intent of the language in Article 17 was limited by the Board’s clear announcement of that policy. See Employer Exhibits 1, 5, 6 & 7.

3. The County asserted that there is a strong management rights clause in the agreement and pointed to Article V that provides in relevant part as follows:

   The Union recognizes the prerogative of the Employer to operate and manage its affairs in all respects in accordance with its management rights, existing and future laws and regulations of the appropriate authorities. The prerogatives or authority which the Employer has not officially abridged, delegated or modified by this Agreement are retained by the Employer.

4. The County asserted that the first question in any contract interpretation dispute is whether there is a specific clause that has been violated. Since the Union cannot point to any clause that has been violated, the standards of contract interpretation dictate that any right not specifically limited by the agreement reverts to the employer. Here the right to determine if an employee advances to step 13 is not only not abridged by the agreement but is specifically reserved to the County Board.

5. Moreover, the provisions of Article 17.3 are really for one employee who was advanced past step 12 to step 13. The fact that it took a specifically negotiated provision to get an employee past step 12 sent clear notice to the Union of how the provisions of Article 17 were to be interpreted.

6. The County further argued that Article 17.4 does not define employees “who are eligible” for a step increase. Any step increase however is conditioned on the performance evaluation as well as the position in the range, subject to the approval of the supervisor and “final Board approval.”
7. The County argued that the Board’s action to withhold step increases to anyone who does not attain a perfect 5.0 on their evaluation, and concordantly, indicating that 5’s on evaluations are not possible to get since no one’s job performance is truly perfect, is consistent with the written contract language. The County argued that the arbitrator must look to the written language to determine its intent and to enforce it. Here that written language could not be clearer.

8. The County pointed to the negotiation history and several pieces of correspondence in support of the assertion that the Union knew what this language meant. Further, the sole reason for filing the grievance now was not that the language somehow changed but rather because several members are now getting close to step 13. That latter fact does not change the contact but does show that the parties both knew well that the Board retains final authority to determine step advancement.

9. In addition, the final sentence of Article 17.4 provides as follows: “In a reasonable time frame following the Board’s decision Employees of this group will be notified no later than December 31.” This clearly implies that the Board retains the final decision on the step increase since it specifically mentions the “Board’s decision” in reference to the determination of step increases in the sentence immediately preceding it.

10. Further, Article 17.3 provides as follows:

Any employee whose hourly rate of pay falls between steps and is at or below step Twelve (12). Will receive an adjustment to their pay effective January 1, 2005 up to the nearest step within the employee’s pay grade on the salary matrix. Any employee whose rate of pay falls between steps and is at or above step twelve (12) will receive a one-time adjustment of $0.24 per hour. This is not considered a step adjustment and is not precedent setting. The 2005 wage adjustment will be figured after this adjustment is made.

11. The County argued that this is for one employee only who in fact is above step 12 and who has been the subject of this special provision for an adjustment above step 12 over the course of several bargaining sessions. Further, if the Union truly believed it had an automatic right to step increases for these employees upon the supervisor’s evaluation, there would be no need for such a provision in the agreement.
12. Finally, the County asserted that this is not a past practice case but that if the arbitrator chooses to proceed along that analysis it is clear that the elements for a past practice have not been met. There is no mutuality, as evidenced by the Board minutes indicating clearly that it demonstrated and communicated that it never intended to go above step 12. There was no acceptability since the Board never agreed to go beyond step 12 either.

13. The essence of the County’s argument is thus that the contract language is clear and provides for Board approval of all step increases and the Board has made it abundantly clear that it does not intend to allow advancement beyond step 12 at this time. The Union is well aware of this language and the Board’s policy with respect to it and knows well that the Board has full discretion here. Further, where there is no specific limitation on management’s authority, every other piece of the relationship reverts to the management rights clause. The County further argued that the parties’ contract negotiations have specifically taken this part of the relationship into account due to the provisions of Article 17.3. There is simply no contractual support for the claim that there is a right to a step increase under these circumstances.

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

DISCUSSION

There were few disputes about the underlying facts here. This is a class action grievance brought by the Union on behalf of all its members regarding the question of whether the County Board may decide not to advance individual employees beyond step 12 on the salary matrix.

The record showed abundantly clearly that the grievants who testified at the hearing are and have been outstanding employees. Their evaluations show outstanding to exemplary work in every way. There was no question that these employees are a tremendous asset to the County in whatever capacity they are working.
Some examples of the sorts of laudatory comments about these employees are as follows: Sheriff Brad Gerhardt said of Grievant Diane Larson, “Without doubt one of the most crucial employees w/in the sheriff’s office. … It is a great thing to have Diane working in our office. She deserves a ‘merit’ and ‘step’ increase.” See Union exhibit 8. “Diane qualifies for and should receive merit and step raises. I question why I am doing this as she is highly qualified and should receive compensation. They don’t; come any better than Diane.” See Union exhibit 7. “[Of Diane Larson,] “Great employee. I heartily recommend her for a merit increase.” Union exhibit 6 (Emphasis in original). Sheriff Gerhardt even went so far as to write a letter to the County Board admonishing them for their failure to approve the recommended increases and chided the Board for a “violation of collective bargaining” in their stance to not approve step increases past step 12. See Union exhibit 9.

Other supervisors were similarly frustrated by the Board’s recalcitrant position not to approve step increases beyond step 12. Grievant Debra Mosloski was also recommended for step increases several times without success. Her supervisor stated flatly that “Deb has had a full plate this year with all the redeterminations of systems and the levy process. She has worked well with the commissioners and taxpayers during these processes. She is always helpful with all questions dealing with the daily operations of the office. I appreciate the extra work she did during the tax collection in May. I recommend Deb for an increase.” See Union exhibit 4. “Deb has done an excellent job of managing the ditch systems in the county. … I appreciate that she is willing to help with problems in and outside her responsibilities. Recommended for increase!” See Union exhibit 3.

The other grievants received similar comments and sentiments from their respective managers. There was no question that these employees are exemplary at their jobs and that they are a considerable credit to their departments and the County as a whole. On this record it was well established that the employees received the necessary recommendations for merit pay increases within the meaning and intent of Article 17.4.
As noted herein, the County Board has taken the position that no one can go beyond step 12. Their rationale for this was not fully explained at the hearing although several sets of meeting minutes were introduced that showed that over time, the Board has stated quite openly that it has decided to use its discretion not to allow anyone beyond step 12. See Employer exhibit 1, 2, 5, & 7.

There is one person in the County who has gone beyond step 12 but the evidence showed that this is due to a specifically negotiated separate provision allowing that individual to do so as found at Article 17.3 The Union acknowledged that Article 17.3 was essentially for this one person and that over the course of multiple contract terms, there has been this separately negotiated language allowing for the one individual to advance beyond step 12.

The County communicated this position to the Union as early as 2003 and the parties agreed to form a committee to look at the County performance evaluation process and to “list issues and concerns and develop a plan to deal with the issues.” The evidence showed that this was in response to the County Board’s stated position that it did not want to nor would it agree to advance anyone beyond step 12. No further agreements were reached as the result of this committee and the discussion apparently led in other directions. See Employer exhibit 4.

The question here is whether the contract compels the County to grant a merit pay increase beyond step 12 where, as here, the affected employee’s managers and supervisors have clearly recommended them for such increases. As always, the contract language governs this result.

The operative language is found at Article 17.4. This provides in relevant part that “On January 1st each year employees who are eligible will receive a step increase based upon the performance evaluation as well as the position in the range and upon recommendation of the employee’s supervisor, and final Board approval. In a reasonable time frame following the Board’s decision Employees of this group will be notified no later than December 31.”
The Union asserted that this language must be interpreted in light of its stated purpose and must be fair and reasonable. It must not work a forfeiture on the affected employees and must be consistent with the other provisions of the agreement, namely, the provisions of Article 17.1 that clearly provide for a 15-step salary matrix.

The County asserted that the Board retains the discretion, as stated in the language itself, to approve step increases even though the performance evaluations are good. The County further argued that unless there is a specific clause that is being violated or a specific right limiting management’s rights, no such limitation can be read into the contract and the Board retains the right to decide whether to grant merit pay increases beyond step 12 even if there is a 15 step matrix.

This is a much thornier issue than it would at first appear and encompasses quite legitimate but competing rules of contract interpretation. Initially it is clear that, whether the County Board likes it or not, the contract has a 15-step wage matrix in it. The County Board apparently indicated that they did not want that in the contract and even passed a resolution stating that they would not agree to it with that language but at the end of the day they did. Article 17.1 and the wage appendix could hardly be clearer – there is a 15-step wage matrix. The question however is whether there is a right to advance and how does that occur. For that, one must turn to the other provisions of Article 17 and even some history to interpret that language to determine if a contract violation has occurred here.

At first blush, the language of Article 17.3. does say that “employees who are eligible” will receive a step increase. As the County notes there is no further definition of “who is eligible.” This clause must then be interpreted in light of the succeeding language essentially providing for how and under what circumstances the step increases are to be granted.
Step increases are first based upon the performance evaluation. The evidence showed that everyone was clear on that during and after negotiations. Clearly a merit pay increase is by definition based on performance. Certainly too the clause that reads “and upon recommendation of the employee’s supervisor” references the performance evaluations and the process by which merit pay increases are recommended. No issues there really.

Next the increase must be based on “the position in the range.” The evidence showed that nobody was quite clear on what that meant but there was some suggestion that people occasionally fall between ranges and that the parties have over time negotiated language that would bring them in line with the pay steps outlined in the 15-step matrix. On this record the fact that no one was completely clear on what this particular clause meant does not prove fatal to either party’s case. The real issue is the final clause of the sentence that reads “and final Board approval.”

The County argued that this language reserves to the Board the final approval to decide whether to grant a step increase. Thus, while there is a 15-step matrix, the Board gets to decide whether to grant any increase, whether it be from step 12 or any other step on the matrix. The County further argued that steps 13, 14 and 15 are there to provide the wage levels if and when the Board does decide to go beyond step 12, as it has for the one employee referenced in Article 17.3. Thus there is nothing abhorrent in that language nor anything inconsistent with the other provisions of the contract.

There is some merit to the County’s position even though it is clear that these employees deserve merit increases. In a grievance arbitration setting the arbitrator’s jurisdiction is limited to interpreting collectively bargained contract language. This language has been in the contract for several years and over the course of several contract terms. The evidence showed that the reason the grievance was brought now was in large measure due to the fact that several employees are advancing close to or are at step 12 and wish to advance beyond that. There has never been any secret about the County Board’s option regarding the glass ceiling at step 12.
Further, the fact that there is specifically negotiated language allowing one employee to advance to step 13 supports the County’s position here. If there were no reservation of Board discretion in the language, there would be no need for that language; the individual would simply advance upon the performance evaluation and recommendation of the supervisor for the increase.

Moreover, the final sentence of Article 17.4 implies that the Board retains the authority to grant merit increases. That language reads as follows: “In a reasonable time frame following the Board’s decision Employees of this group will be notified no later than December 31.” (Emphasis added). This language provides that the Board must make a decision about the step increase. It is also significant that this language was not in the 2003-04 contract but was added in the 2005-06 contract. This too suggests an understanding by the parties that the Board retained this discretion.

The Union argued that the language of Article 17.4 must be read in context with Article 17.1 providing for a 15-step salary matrix. The Union argued that contract clauses must be read as to give meaning to their words. Obviously this cuts both ways as the words do seem to indicate that step increases are conditioned “upon final Board approval.”

Having said that however, the question is whether the Board’s position not to grant advancements beyond step 12 is inconsistent with Article 17.1, which does clearly provide for a 15-step salary matrix. This is a difficult matter to reconcile. While Article 17.1 provides for the salary schedule, the more specific language of Article 17.4 provides for how an employee advances along those steps. See Elkouri at page 468-70. Moreover, the fact that there is a 15-step matrix provides the salary schedule in the event anyone does advance beyond step 12. Thus by the barest margin, the language of Articles 17.1 and 17.4 can be read consistently and in such a way to give meaning to both.
The Union asserted that the language must be fair and reasonable and cannot be read so as to allow such arbitrary actions by the Board. Elkouri provides some support for this and notes that “The implied covenant of good faith and fair dealing is similar to the principle of reason and equity, and is deemed to be an inherent part of every collective bargaining agreement. Indeed, this implied covenant is sometimes referred to as the doctrine of reasonableness. The obligation prevents any party to a collective bargaining agreement from doing anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract … The covenant does not arise out of the agreement of the parties but rather out of the operation of the law.”

Lest this be taken too far however, Elkouri cautions that “the doctrine serves as little more than an interpretative tool to aid arbitrators and judges in their case-by-case determinations of breaches of collective bargaining agreements. ... It is widely recognized that if a contract is clear and unambiguous it must be applied in accordance with its terms despite the equities that may be present on either side.” This latter admonition seems to apply here. It matters not how Draconian and shortsighted the County Board’s position is here or that people may well start leaving County employment for better paying jobs and a more sensible elected body elsewhere as long as the negotiated language grants to the Board the discretion to decide whether to grant step increases beyond step 12. Here it does and the Union did not assert nor was there any evidence that the language was somehow unclear. The essence of the Union’s argument is not that the language was ambiguous but rather that the Board’s position is out of touch with reality. That may well be the case but a grievance arbitrator is not empowered to dispense his own brand of industrial justice in the face of clear contract language. This is especially true where that language has been in the parties’ contract for multiple terms and where, as here, language was added to it that supports the argument that it means exactly what it says – that the Board retains the discretion to approve merit pay step increases. Accordingly, as tempting as it may appear to use this theory in this case, this doctrine cannot be used to overturn clear contract language.
Finally, the Union asserted that a forfeiture would occur if the County’s position is allowed to prevail. Elkouri notes that “the law abhors a forfeiture. If an agreement is susceptible to two constructions, one of which would work a forfeiture and one of which would not, the arbitrator will be inclined to adopt the interpretation that will prevent the forfeiture.” Elkouri and Elkouri, How Arbitration Works, 6th Ed. at 482. Here adopting the interpretation urged by the County would not a work a true forfeiture. A forfeiture implies that a benefit in hand or that has been conferred or vested will be taken away. Clearly, the “benefit” of advancement beyond step 12 was never truly conferred on these employees so interpreting the language as the County desires will create no forfeiture.

On these facts and given this contract language the grievance must be denied even though it is quite clear that the employees are more than deserving of a merit pay increase. However, as noted herein, the discretion to approve such an increase rests with the Board and it is not for an arbitrator in this setting to alter or amend the language of the contract.

**AWARD**

The grievance is DENIED.

Dated: June 9, 2008

Jeffrey W. Jacobs, arbitrator