IN ARBITRATION

BEFORE

MICHAEL G. MERRILL, ARBITRATOR

OPEIU LOCAL 11; LIUNA LOCAL 335; AFSCME LOCAL 307; PTE LOCAL 17; AKA, THE COALITION	)	
	)	**ARBITRATOR'S DECISION and ORDER**
Union,	)	**In Re the Matter of**
and	)	**ME TOO MOU GRIEVANCE**
CLARK COUNTY, WA	)	
Employer.	)	

FMCS CASE NO. 230515-06111

Michael G. Merrill
Labor Arbitrator
P.O. Box 1121
Renton, WA 98057

SUMMARY OUTLINE OF CONTENTS

I. PROCEEDINGS

Clark County, WA ("County") is party to collective bargaining agreements (the "CBA(s)" or "Agreement(s)") with four local unions (the "Union(s)") forming a coalition for negotiating purposes, (the "Coalition")[1]. *JS-3*. The Grievant class consists of employees (the "Grievants") who are members of the bargaining unit covered by the CBAs. *JS-4*.

On or about February 24, 2023, the Union submitted a grievance, under Step 3 of the CBAs' procedure, alleging a violation of the Agreements by a failure to increase wages required by the CBA's Me-Too language in Appendix C. *J-12*. The grievance was processed under the terms of the CBA to the point of arbitration. FMCS-listed arbitrator Michael G. Merrill, of Renton, WA, was jointly selected by the parties to hear the unresolved matter.

On due notice a hearing was held on March 25, 2024, followed by a second hearing day on March 29, both via an online Zoom-format audio-video connection. *T and TR II, respectively*. The County was represented by its Chief Civil Deputy Prosecuting Attorney, Leslie A. Lopez. The Coalition was represented by attorney Luke Kuzava, of Tedesco Law Group, Portland, OR. The parties agreed that the matter was both procedurally and substantively arbitral, and also stipulated to their joint agreement that the Arbitrator was properly empowered to decide the matter, including fashioning any remedy. *TR 7: 4-13.* Testimony and evidence, including supporting documentation, was received in an orderly manner, with particular care given to protocol and best practices for a remote hearing. *TR 6-7: 1-4.* Both hearing days were professionally recorded (respectively) by Vicky Pinson, CSR No. 2559, and Anita Mitchell, CSR 2586. *TR; TR II*. The hearing was adjourned on March 29, 2024, and the record was closed following timely submission of written briefs on June 18, 2024. In subsequent correspondence, the parties agreed to a Decision date no later than close of business, July 29, 2024.

[1] The four separate contracts all feature identical language in Appendix C, and are treated interchangeably here; all citations to the CBA or CBAs are intended to reference the contracts of all Coalition members.

II. ADMITTED EXHIBITS and STIPULATIONS

Joint

J-1 Clark County and OPEI Local 11 CBA, 2021-2024
J-2 Clark County and PTE Local 17 CBA, 2021-2024
J-3 Clark County and LIUNA Local 335 CBA, 2021-2024
J-4 Clark County and Local 307 CBA, 2021-2024
J-5 Clark County Charter
J-6 Clark County Human Resources Policy Manual
J-7 Clark County Manager Contract, 2018
J-8 Clark County Manager Contract, 2021
J-9 Clark County Manager Contract, 2022
J-10 County Manager Comparables Data
J-11 County Manager Pay History, 2018-2024
J-12 Third Step Grievance Form, w/emails, 2/24/23
J-13 County Response to Third Step Grievance, 4/25/23
J-14 Coalition's Me-Too Proposal, 4/26/18
J-15 County Supposal Excerpts, 5/3/18
J-16 Coalition Me-Too Counter Proposal, 5/3/18
J-17 Bargaining Notes, Kathleen Otto, 2018
J-18 Bargaining Notes, Mande Lawrence, 2018
J-19 Tentative Agreement Record, Maureen Colvin, 5/15/18
J-20 PTE Local 17 CBA, 2018-2021
J-21 County Me-Too Proposal, 7/20/21
J-22 Bargaining Notes, Rachel Whiteside, 7/20/21
J-23 Bargaining Notes, Daniel Harrigan, 2021
J-24 Report re: LIUNA and PTE Ratification of CBA, 2021-2024
J-25 Report re: AFSCME Ratification of CBA, 2021-2024
J-26 Elected Officials Monthly Pay, 2023-2024
J-27 2018 M-class Wage Adjustments
J-28 2019 M-class Wage Adjustments
J-29 2020 M-class Wage Adjustments
J-30 2021 M-class Wage Adjustments
J-31 2022 M-class Wage Adjustments
J-32 2023 M-class Wage Adjustments
J-33 2024 M-class Wage Adjustments
J-34 Clark County Management (Exempt) Pay Schedule
J-35 Clark County Staff Report

Union

U-1 Daily Columbian Page, 12/8/22

County

C-1 County Staff Report, 6/7/22 , re: Retention Incentive Plan
C-2 County Staff Report, 9/20/22, re: Compensation/Class Study Authorization
C-3 County Staff Report, 7/18/23, re: Baker Tilly Study Approval

C-4 Omitted
C-5 County Staff Report, 8/1/23, re: Baker Tilly Implementation Update
C-6 County Staff Report, 10/4/23, re: AFSCME Baker Tilly Implementation MOU
C-7 County Staff Report, 10/3/23, re: LIUNA Baker Tilly Implementation MOU
C-8 County Staff Report, 10/3/23, re: OPEIU Baker Tilly Implementation MOU
C-9 County Staff Report, 10/2/23, re: PTE Baker Tilly Implementation MOU
C-10 Omitted
C-11 County Staff Report, 9/20/22
C-12 Coalition Wage/Salary Percentage Increase Calculations Spreadsheet
C-13 County Staff Report, 3/26/24, re: PTE Baker Tilly Implementation MOU

JOINT STIPULATIONS

JS-1 - 19 Nineteen (19) agreed-upon stipulations of fact were submitted by the parties, and were read into the record at TR 9-19. A copy of the original submission document is included by this reference in this Decision and Order as an Appendix.

III. MOST RELEVANT CONTRACTUAL PROVISION

APPENDIX C[2]

***

It is mutually agreed by all parties effective upon ratification of the Agreement and for the duration of the Agreement the County agrees to a non-precedent setting “me too” clause; in that in the event any other non-bargaining unit employee receives a salary adjustment approved by the County Council (be it a percentage increase, or a flat dollar amount) given to any non-bargaining unit employees; that is above the agreed upon increases in Article 11 to this Agreement, the same shall be provided to all bargaining unit employees as well.

Be it further agree that this provision does not apply to binding arbitration Agreements; and does not apply to realignments for specific classifications or reclassifications for position.

This Memorandum of Understanding shall be pursuant to the terms of Article 23 Grievance Procedure should there be any dispute regarding the interpretation and/or application.

IV. SUMMARY STATEMENT OF FACTS

Clark County (“the County”) is a county in Washington state, and a public employer of over 1,500 employees. *J-S 1.* Some 12 different labor unions represent the organized portion of this workforce. *J-S 2.* Four of these Unions – the grieving parties here – are joined for collective

[2] This is a representative citation to the content at issue; the MOU is materially identical in all CBAs of the Coalition.

bargaining purposes in a coalition ("the Coalition"). *J-S 3.* The County and the Coalition have maintained bargaining agreements ("CBAs") for many years over multiple terms.

The bargaining structure on the Union side features the Coalition joined at "large table" sessions to negotiate the bulk of broadly applicable contract terms. *Id*. The parties use "small table" sessions to engage on issues specific to individual unions in the Coalition. *Id*. At the conclusion of bargaining with tentative agreement, each coalition member then ratifies their own contract separately. *TR 125-126; 24-4*.

The County bargaining structure involves both parts of its Constitutional system. Under the structure accepted by voters in 2014, the County features two branches of government. *J-5*. The legislative branch is the County Council (the "Council") consisting of five elected members. *J-5, p.4-5*. The executive branch includes the offices of the Assessor, Auditor, Clerk, Prosecuting Attorney, Sheriff, and Treasurers, all of whom are popularly elected positions. *J-5, p. 7.* The executive branch includes one additional office held by a party who is not elected, but rather is appointed by the County Council. *Id*. This is the County Manager (the "Manager") who serves as a form of chief executive officer for the County ("CEO"). The Manager is appointed by a majority of the Council members, and serves on an at-will basis under written contract terms set by the Council. *Id*. One of the Manager's duties is to conduct collective bargaining, under budget direction of the Council and as allowed by state law. *J-5, p.8*. On the County side, at the conclusion of bargaining tentative agreements must be ratified by the Council to become effective. *Id*.

The most precisely relevant term at issue in the CBA is known as a "Me Too" provision (also known as a parity clause). A Me Too provision was first negotiated in the 2018-2021 cycle. *J-19; J-20; TR II 19-22: 1-14*. Union negotiator Rachel Whiteside testified the clause was proposed by the Coalition. *TR II 116: 1-5; J-14*. Whiteside, along with lead Coalition negotiator Maureen Colvin (nee Goldberg) explained it came after previous years where wage increase goals went unmet in the face of County positions based on "structural budget problems", and unit members then were upset to see

greater increases given mid-contract to "managers and unrepresented employees." *TR II 19-22: 1-14; 116-117: 9-18.* According to both Whiteside and Colvin, the Me Too language was key to unit acceptance after the Coalition agreed to the County's 2.2% increase (for each contract year) proposal over its own original 3% demand. *J-20; TR II 50-51: 13-04; 128: 2-4.*

Coalition negotiator Whiteside testified the circumstances from the Union perspective were akin in 2021 to 2018. *TR II 137: 10-24*. The Union's wage proposal was not obtained, and the wage settlement reached was a 2.2% increase (followed by two years of 2.0%). *J-1.* Whiteside explained the Coalition fractured over the tentative agreement, with two locals refusing to ratify, pursuing mediation instead. *TR II 138-139: 19-6*. Ultimately, the entire coalition ratified the tentative agreement, but the Me Too was "key" to obtaining acceptance according to Whiteside. *Id*. The clause was slightly modified for the 2021-2024 (current) CBA and read in material part as follows:

> It is mutually agreed by all parties effective upon ratification of the Agreement and for the duration of the Agreement the County agrees to a non-precedent setting "me too" clause; in that in the event any other non-bargaining unit employee receives a salary adjustment approved by the County Council (be it a percentage increase, or a flat dollar amount) given to any non-bargaining unit employees; that is above the agreed upon increases in Article 11 to this Agreement, the same shall be provided to all bargaining unit employees as well.
>
> Be it further agree that this provision does not apply to binding arbitration Agreements; and does not apply to realignments for specific classifications or reclassifications for position.

J-1; J-2; J-3; J-4; at Appendix C.

These terms were made relevant here by events involving Kathleen Otto. Prior to February, 2019, Otto was the County Human Resource ("HR") Director and Deputy County Manager. *TR 89: 11-25*. In February she was promoted to Director of Internal Services, while also retaining the Deputy County Manager position. *Id*. In May of 2020, following the departure of the immediately preceding County Manager, Otto was promoted to Interim County Manager. *TR 90: 1-3.*

On or about February 16, 2021, the County Council made Otto the County Manager. *Id*. The

Council negotiated the terms of the contract executed with Otto effective that date. *J-S 18.* This contract governed the terms of her employ, including responsibilities and compensation, through December 31, 2022. *Id*. The last two years of this contract set Otto's annual salary at $180,000. *J-S 18; J-8; J -11.*

On or about December 6, 2022, during the term of the current CBA, a second contract was executed between Otto and the Council. *J-9; J-S 19.* This contract took effect on January 1, 2023, detailing the following annual salary structure:

2023 $198,000
2024 $207,900
2025 $218,295

J-9.

Calculating from these numbers produces the following percentage increases for Otto during this term:

2023 10% (180,000 to 198,000)
2024 5% (198,000 to 207,900)
2025 5% (207,900 to 218,295)

Union representatives Colvin and Whiteside testified they learned of the County Manager's compensation 10%, 5%, and 5% structure via reports in the local paper, the *Columbian*, originally dated December 8, 2022. *U-1; TR II 55-60: 19-25; 139-140:17-1*. With awareness the Coalition CBA provided for the comparably less 2.2%, 2.0%, and 2.0% series, contact with the County followed.

The Coalition first communicated via email to the County raising the Me Too terms of Appendix C the next day, December 9, which was followed by a meeting on January 3. *J-12*. The contacts between the parties did not resolve the matter, and a written (Step 3) grievance was filed on February 24, 2023. *Id*. The Grievance, citing to the Me Too terms in Appendix C, set forth the following to describe the "Nature of the Grievance":

> The Board of County Councilor's gave the County Manager ten percent (10%) wage increase for the 2023 calendar year and a five percent (5%) wage increase for the 2024 calendar year and did not give the same to

bargaining unit employees.

J-12.

The parties thereafter processed the grievance to the present point of arbitration.

V. STATEMENT OF THE ISSUE

Agreed-upon issue presented:

> Did the County violate the "me too" provisions of its collective bargaining agreements with OPEIU 11, LiUna 335; AFSCME Local 307, and PTE Local 17, by providing a ten percent (10%) salary increase to County Manager Kathleen Otto for the 2023 calendar year, followed by a five percent (5%) salary increase for the 2024 calendar year ?

VII. SUMMARY POSITIONS OF THE PARTIES

Union[3]

The County violated the "Me Too provision" in the CBA when it granted salary increases to the County Manager in 2023 and 2024 in excess of the increases set for the bargaining unit. The Coalition can fully bear the burden it bears to show this violation, starting with the plain and unambiguous language at issue. Every part of the parity provision supports the Coalition's position. All provisions of entitlement are met, and none of the exclusions apply.

First, there can be no dispute the salary increases of 2023 and 2024 were "approved by the County Council." The Council is the only party that has Charter authority to grant increases to the Manager, and the documents in evidence show the Council's execution by and through the Council Chair.

Next, the Manager falls within the category of "any other non-bargaining unit employee." There is no dispute the County Manager is not part of any bargaining unit at the County, so the "non-bargaining unit" portion of the key language is easily met. The Manager's "employee" status is also clear, despite multiple and evolving County arguments to the contrary. During grievance processing, records show the County argued Otto was not a "regular County employee" and was "a contract

[3] Citations omitted in both Position Summaries. The Union's Closing Brief was 43 pages; the County's Closing Brief was 22.

employee.” At hearing, the County moved toward denying Otto was an employee of any kind. These arguments all fail.

In the face of her contract – which is an Employment Agreement – Otto's own evasive resistance to using the word “employee” in her testimony under cross examination works against her general credibility as a witness. There is not a shred of evidence on record that would tend to support the notion the County Manager position is a non-employee position.

The CBA offers no specialized definition of the word “employee” nor is there any evidence the parties used the term in any sense that departs from conventional understanding. Standard dictionary definitions therefore apply, such as “Someone who is paid to work for someone else” and “A person working for another person or a business firm for pay.” Manager Otto works for the County, and performs at the County's direction under the Council's control for County compensation. The position is full time, and Otto is in fact prohibited by the County from performing paid work for any other person or entity.

The possible categories in the public sphere that might make Otto a “non employee” do not apply. She is not an elected official. Nor is she an independent contractor. The Charter states the Council determines the Manager's “terms of employment” and states the “employment shall be at-will.” The Charter in fact distinguishes the “County Manager” position from a “Contractor” position when it lists the two different categories separately on its list of positions that are excluded from HR policy application.

Bearing the title “Employment Agreement,” Otto's contract with the County provides ample evidence of employee status. The recitals go on to state the “County's desire to continue to employ” Otto, and “agree to...conditions of employment.” The entire arrangement is consistent with an employment relationship and inconsistent with an independent contractor relationship.

Washington State case law on the employee versus independent contractor question supports this conclusion. The “economic realities” test is persuasive here. The County retains full-time control

over Otto, expressly prohibiting work for any other party, which is totally inconsistent with independent contractor status. The County Manager as CEO shows the position is integral to the County, as Otto's authority extends across the board in County operations. Otto's employment benefits also reflect employee status, as they are the same as those given to M1 employees. Finally, Otto's ability to participate in the Public Employees Retirement System ("PERS") would not be possible if she were not a County employee; independent contractors hired by public entities may not participate in PERS.

These conclusions are unequivocal: The County Manager position is non-bargaining unit and squarely falls within the category of a County employee.

No dispute exists over the next analytical requirement. Otto's salary increases for 2023 and 2024 exceeded the increases for Coalition members. 2023 saw Otto gain 10% versus 2.2% for membership, and 2024 saw 5% against a 2% unit increase. All the triggering conditions for "Me Too" are plainly satisfied.

Next, the record shows none of the agreed-upon exceptions in the Me Too provisions are applicable. Given that no increase came from an interest arbitration, only the issues of realignment and reclassification possibly remain.

The County's own usage of the term "realignment" shows that cannot apply here. That specialized term must be given the specialized meaning used by the parties. The key testimony here was undisputed. Union negotiator Green proposed replacing "market adjustment" (used in the 2018 version) with "realignment" in 2021. She testified she intended the term to refer to the County's existing HR policy for realignments. Thus, there can be no dispute the County's HR Policy Manual definition of realignment must apply.

As an initial point, it must be noted the County itself has stated during Grievance processing that salary increases can occur from realignment "for other management positions" but not for County Manager. The County has also argued that County HR Policy does not apply to the County Manager. Yet, even if it did, the realignment process in the HR Policy bears no resemblance to what happened

in this case.

County policy states realignment refers to situations where the salary of “an entire class” is adjusted upwards and that realignment does not trigger an immediate pay increase. Rather, ranges for an entire class will be changed and an employee will be placed “at the step in their new range which approximately equals their former salary, that is, there is no increase associated with realignments.” Realignment thus effects pay relative to steps in a classification, and increases an employee's future earning potential, but does not provide them with an immediate pay increase.

The Otto situation bears no relationship to this process. First, there are no “steps” for a County Manager to be realigned (the County's own step tables show this). Moreover, the County's contract with Otto increased her pay immediately on commencement. There can be no doubt the Me Too exception for realignment does not apply here.

Reclassification, the final exception, also does not apply. This process is also defined in the HR Manual. It is a situation where a given classification is found to be performing duties of a different classification and is transformed into that classification. Nothing in the County's contract transformed the Manager position into another position or classification in any way.

The plain language of the Me Too provision clearly supports the Union's position here and is sufficient to decide the matter. Yet, if further evidence need be considered to find the intent of the parties, this too supports the Union argument.

The evidence is both extensive and crystal-clear that the County bargaining team understood during both 2018 and 2021 negotiations that the Me Too provision was applicable to salary increases given to management position in general. The County's very own proposal in 2018 was for a Me Too that expressly applied to salary increases for “County Managers” and stated “if increases for County Managers” are higher than for membership, the clause would be triggered. Otto's own bargaining notes evidence this understanding, and refer to “management” coverage.

The only carve-outs from this coverage came from the County. The County understood if it

wanted exceptions it ought to make those clear in the four corners of the contract. The exceptions list (discussed above) did not include any limits on “managers” to exclude the County Manager. No such limit was ever discussed or even mentioned, much less mutually intended. The proposal was for managers in general, as the County itself wrote.

This finding is consistent with the purpose of a Me Too clause in general, and here in particular. In general, where a unit has not obtained its wage goals, the primary benefit of a Me Too provision is to provide assurances to the unit that if the financial situation changes after bargaining the unit will not be left out. This is a meaningful bargaining chip and is of benefit to both sides. The provisions turns the unit into stakeholders impacted by the future success of the organization, and also reflects a commitment to fundamental fairness between rewards to managers and unit employees.

All these elements were present here. In 2018 and 2021 the County set its offer in the general 2% range and never budged. Union negotiators' testimony was uncontroverted – it was difficult to get membership to accept these paltry increases. Indeed, in 2021, two of the four Coalition members were initially unable to obtain ratification as a result. The primary purpose of the Me Too provision from the Union perspective was to prevent situations exactly like the one at hand. Indeed, the current case is perhaps the highest-level possible version of the situation the provision was meant to address: a increase to the highest ranking and most visible member of County management in mid-cycle; an increase so substantial the unit learned of it through local news.

The language that must be applied here is not the product of any mutual mistake, and its application cannot be hindered by any claim about a failed meeting of the minds. Authority holds a mutual mistake occurs when parties sign off on language that does not reflect their true agreement. A failed meeting of the minds occurs where neither party knew, or should have known, of the meaning placed on the the term by the other party. These holdings show a party cannot simply escape liability under a contract by arguing they didn't realize the contract they agreed to might later be applied against them in a certain way.

Here, the County gave serious thought to who would be included in the scope of the Me Too provision. The County successfully proposed the stated carve-outs. The County undoubtedly realized the provision using the words “any other non-bargaining unit employee” was of broad scope. A County proposal was itself general, and made clear the Me Too would apply to “county managers.” It strains credulity for the County to now claim it did not realize those broad words might be construed as including the County Manager. If there was any mistake, it was unilateral. And if there was a mistake, there is no reason for the County's mistake to result in the County escaping liability here.

From the other perspective, the Coalition's interpretation was entirely reasonable. There is no reason the Coalition would have known, or even suspected, the County considered the County Manager as outside the “any other non-bargaining unit employee” language.

The County's contract violation is overwhelmingly established. The clear language of the Me Too clause applies. It is limited in this application by no exceptions. The County here attempts to write a new exception from whole cloth. The proposed limit was neither raised, nor discussed, or proposed at the bargaining table. The Arbitrator should not accept the County's tortured reading and its proposed addition to the CBAs.

The remedy required here is what is shown on the face of the operative language: upon seeing the increase given to the County Manager, “the same shall be provided to all bargaining unit employees as well.” If the County proposes any offset as a result of the Baker Tilly results, this must be rejected.

Neither the Baker Tilly study MOUs nor the CBA contemplate or authorize offset in the event of a violation of the me too provision. In the absence of clear contract language authorizing an offset, cases show arbitrators have declined to offset their awards. An analog to this reasoning is found in Washington State case law involving insurance claims; insurers may not offset one payment against claims on a separate policy absent clear language authorizing an offset.

The operative language here says the Me Too remedial amount is “the same as” the identified

increase. It does not say the amount shall be paid “subject to offset for any other salary increases those employees may have also received during the time period in question.”

All MOUs implementing the results of the Baker Tilly study provide the all remaining terms in the CBA not expressly altered by the MOU are to “remain in effect.” There is no evidence of any intent for an offsetting effect on a Me Too violation.

In the event offset were to be contemplated, certain points must be considered. First, the Baker Tilly realignments differed among the varying classifications. Some positions received no increases. Some were smaller than the 2023 Otto increase, and some were equal to or greater than the Otto increase. Under these circumstances, a substantial amount of work by the County to ensure correct process – and substantial auditing by the Coalition – would be required. The concern here is practical. Implementation would take an unduly long time, with extensive exchanges between the parties, and possibly a return to the Arbitrator to resolve remedial disputes. A lack of incentive on the County to engage in a speedy manner would combine to produce an incentive to delay. With a 90-day limit on remedial jurisdiction, with enough delay the Coalition would become unable to ensure accuracy of the remedial amounts.

Accordingly, if a remedy is fashioned involving offset, it should be structured to either required the County to complete remedial calculations by a date certain under penalty of losing offset ability, and/or allow an extension of remedial jurisdiction beyond 90 days.

Finally, since the Baker Tilly offsets were all implemented in 2023, any offset should have no effect on the County Manager salary increase of 2024.

Employer

The County has not violated the terms of the parity, or, the “Me Too” clause. The reasons this is true start with the fundamental structure of the County government system. This structure, established by voters in 2014, features an executive and a legislative branch. The legislative branch is made up of the elected County Councilors. The executive branch holds six offices led by elected officials, as well

as the County Manager appointed by the Council. The well-defined separation between the two branches is ultimately controlling. The Charter states it “supercede(s) special and general laws which are inconsistent with the charter...”. This means the Charter must supercede the parity clause in the CBA and County HR policies. County Council is prohibited from interfering with the administration of the executive branch, expressly including prohibition from directing employees who are under the direction of the County Manager.

Once appointed by the Council and placed under contract executed with the Council, the County Manager is the CEO of the County. The County Manager serves at-will under contract, and has chief executive powers that include making budget planning proposals, contracting, and “conducting collective bargaining...subject to budget direction provided by the Council.” County Manager powers also include appointing and directing chief officers in administrative departments not otherwise established by Charter, including departments in charge of Human Resources. The County HR policies themselves are established by the Council, by resolution. These include (under Council budgeting authority) policies concerning compensation and benefits for all County employees.

The County Manager's authority in relation to this is to recommend HR policies to the Council for approval. These include policies on overall compensation (both base and premium pay), merit pay and step increase programs, and various benefit programs.

Certain other HR policies are under the independent control of the County Manager. These include recruitment, affirmative action, transfer and promotion/demotion policies; classification structures; step and classification movement systems; hours, OT, and scheduling policies; and conduct and performance standards including disciplinary procedures, layoffs and leaves. The County Manager position, however, is understandably – and expressly – exempt from these HR policies.

Accordingly, it is clear the County Manager is not a “non-bargaining unit employee.” The County Manager has a finite negotiated contract with specific salary and benefit terms not connected to any specific classification or pay plan contained in the HR policies. County employees are

classified, variously, as M1, M2 or M3 employees. Before Katharine Otto became County Manager, as as HR Director, as Deputy Manager, and even as Interim County Manager, she was classified in the M group. She was then subject to HR compensation policies, and she was a “non bargaining unit employee.” Once Otto became County Manager, she was no longer an M1 employee, and is exempt from HR policies, as per the Charter.

If Otto had received a salary increase greater than an applicable percentage received by the Coalition when she was an M1 employee, the Me Too clause would have applied. Once she became County Manager and was exempt from HR policies, she was no longer an M1 employee. The contracts between Otto and the Council evidence this truth. The February 2021 and December 2022 contracts both use terms referencing entitlement to “the same benefits as an M1.” If Otto were in fact an M1 employee, this language would not be necessary.

This conclusion is confirmed by the terms of County HR Policy No. 8.3:

> Non-represented classifications and employees are distinguished as Management 1 (M1) through Management 3 (M3), as follows:
>
> M1 Certain Departments Heads, Deputies of elected departments, and other identified senior management positions.
>
> M2 All other non-represented, FLSA-exempt employees including senior and middle managers, first line supervisory employees and non-supervising professionals
>
> M3 Non-exempt, non represented employees

The County Manager is not included in the above list, further confirming Otto is not a “non-bargaining unit employee.”

Otto's actual pay structure is yet another confirming factor here. M-class employees receive yearly wage adjustments and step increases, as well as ARPA retention incentives. The various amounts are what is approved for the M classes by the County Council. The County Manager receives none of these things. Otto's pay is solely based on the County Manager's negotiated contract with the County Council.

The “Baker Tilly” study supports the conclusion as well. This 2022-2023 County-commissioned study analyzed jobs and classifications to determine if wage adjustments were needed to bring salaries closer to external market values. The study covered all county jobs and classifications, while the executive branch jobs – including County Manager – were excluded. In the end, impacted M-class employees (as well as bargaining unit members) received lump-sums as a result of the study. The County Manager and the other Executive branch positions did not, as they are neither M-class, nor bargaining unit.

Finally, persuasive state statute, County Code and case law all support the conclusions that the County Manager is not a “non-bargaining unit employee.” The Revised Code of Washington (“RCW”) in Title 36 Chapter 40 refers to the county “CEO” position. The RCW at 41.59.020(4)(a) then states the chief executive officer is not an employee. This same RCW Title also provides a “public employee” does not include a person appointed to office by an executive head or body of a public employer for a specified term as a member of a board, commission or committee. By Clark County Code (“CCC”) the County Manager is expressly empowered to perform executive functions such as executing contracts up to $200,000, executing leases, and performing as interim executive head if councilors are unavailable to exercise their powers. Two PECB decisions illustrate the point as well. These cases show the “public employee” definition in RCW Title 56 applies only to persons who have a reasonable expectation of an ongoing employment relationship with the employer. Here, the County Manager has no such expectation. The applicable current contract expires on December 31, 2025. Because the Manager is in a contract position with a finite term, they are not an “employee” of the County such that they could be considered a “non-bargaining unit employee.”

In addition to the controlling language of the Charter, there was no “meeting of the minds” between the parties that confirms any intent to include the County Manager under the term “non-bargaining unit employee.” Washington State case law is instructive here. A valid contract requires objectively manifested mutual assent to material terms. The “context rule” is applied to determine

intent. The purpose of the context rule is to determine the parties' meeting of the minds as opposed to insufficient written expression of intent. The context rule allows consideration of extrinsic evidence, including circumstances leading to execution and reasonableness of respective interpretations, and it applies even when the disputed provision is unambiguous.

Here the parties did not clearly define whether the term “non-bargaining unit employee” applies to the County Manager. All agree the clause does not apply to elected officials. The hearing record confirms the County Manager was not even discussed while the parity clause was being bargained. Any resulting ambiguity in the term must be construed against the Coalition, as the drafter of the term. The Coalition failed to add language to the term making it clear the County Manager is included as “any other non-bargaining unit employee.” Consequently, since there was no meeting of the minds and the intent is not clearly stated in the Coalition's language, the interpretation must be construed against the Coalition.

Finally, for the sake of argument, even if the County Manager were to be included in as a non-bargaining unit employee, the position is excluded from the parity clause because the salary increase in question was due to a realignment. The parties were clear the parity clause “does not apply to realignments...”

Otto's salary for 2023-2025 was negotiated after the County HR department performed a comparative analysis in 2022, at the Council Chair's request, prior to beginning negotiations with Otto. Six comparable counties were surveyed and showed an average yearly manager salary of $196,055.67. The list included some of the same comparables as used in the Baker Tilly realignment study. Otto's resulting contract was based on these amounts, and features a “step plan” as it sets forth the Manager's salary for 2023, 2024, and 2025.

This is a “realignment” within the meaning of the parity language. HR Policy 9.6. provides “Realignment refers to those situations where the salary of an entire classification is adjusted upward based on internal or external compensation relationships.” Further, HR Policy states “If the salary is

below the minimum of the new range it shall be increased in order to place the employee on the first step."

Here, the entire classification of the County Manager salary was adjusted based on external compensation relationships as part of the formal analysis. Three separate ranges were negotiated for three separate years. Although the new ranges were not the same as the prior salary of $180,000, the 2023 $198,000 salary was the first step of the new County Manager range. It necessarily follows that because the increase in County Manager pay was due to a realignment, it is specifically exempt from the parity clause.

The County did not violate the parity/Me-Too clause provisions of the Coalition's CBAs, and no remedy need be provided.

VIII. ARBITRATOR'S DISCUSSION AND ANALYSIS

The Arbitrator's Authority and Standard of Review

The role of the Arbitrator here, as always, is to resolve the issue by applying the terms of the CBA in accord with the intent of the parties. This is axiomatic. In all cases, the intent of the parties must be an arbitrator's touchstone. Where the plain language of the CBA is sufficiently clear to reasonably resolve the dispute there is no need to look elsewhere for guidance as to the parties' intent. Indeed, an arbitrator who fails to do so violates the charge given and improperly applies his or her authority. The CBA echoes these truths with the limits on the Arbitrator stated expressly:

> The Arbitrator shall not have the power to add to, subtract from, or modify the provisions of this Agreement in arriving at a decision of the issue or issues presented, and shall confine their decision solely to the interpretation, application, or enforcement of this Agreement.

J-1, at Article 22, Sec 22.5.

Contract language is, of course, often ambiguous on its face, and it is even well known that seemingly clear language can be revealed as uncertain due to the application or presence of particular facts. These may be case facts, internal contradictions, or even contextual conflicts that

serve to create what is know as a "latent ambiguity." *Albertsons and Teamsters 952*, 127 LA 572, 575 (Gentile, 2010).

Whether an ambiguity is patent or latent, in the face of less than clear language arbitrators are not without resources to discern the parties' intent. In such cases, these resources may include the parties' practice, their bargaining history, and the context of disputed language as construed vis-à-vis the agreement as a whole, its purpose(s), and in its relationship to other terms of the agreement. Throughout such process, standard rules of contract interpretation will apply as an arbitrator divines the intended application of terms that do not clearly resolve the matter at hand through their plain and unambiguous meaning alone. This will be done in the instant case as may necessary.

Here, as in all cases, this Arbitrator will only rule in accord with the intent of the parties as he has found it. He will not alter or ignore the terms of the parties' agreement(s). He will neither add to nor delete from the parties' agreement(s).

The Agreed-Upon Facts and the Burden of Proof

The fundamental facts giving rise to the instant dispute are straightforward. Distilled to their essence, the facts triggering the Grievance fit in a single sentence: The Coalition contract provides for wage increases in 2023 and 2024 that are lower on a percentage basis than salary increases given thereafter to the County Manager in those same years. There is no contest on these points. Both parties submit them in argument, and further discussion or citation is unnecessary at this point. The contest between the parties is joined over the language that becomes relevant under those facts.

It is axiomatic and also beyond the need for citation that, as the party alleging a contract breach, the Coalition bears the burden of establishing the relevant language it cites was intended by the parties to be applied under those facts.

The Word "Employee" in the Me Too Terms of Appendix C

The CBA contains what is known as a “Me Too,” or “Parity” clause, memorialized within a Memorandum of Understanding (“MOU”) . This provides:

> It is mutually agreed by all parties effective upon ratification of this Agreement and for the duration of the Agreement the County agrees to a non-precedent setting “me too” clause; in that in the event any other non-bargaining unit employee receives a salary adjustments (*sic*) approved by the County Council (be it a percentage increase, general cost of living increase, or flat dollar amount) given to any non-bargaining unit employees; that is above the agreed upon increases in Article 11 to this Agreement, the same shall be provided to all bargaining unit employees as well.
>
> Be if further agreed that this provision does not apply to binding arbitration Agreement; and does not apply to realignments for specific classifications or reclassification for position.

J-1, Appendix C.

<u>The Broad Common Definition of “Employee,” and as Compared to Contractor</u>

The contest is joined at the point of the word “employee” and the earlier modifier “any.” The parties disagree on whether the County Manager falls under the meaning of “any...employee” intended by the parties.

Shouldering its initial burden, the Coalition offers the plain meaning of the word as indicative of intent, citing dictionary definitions that the Arbitrator is willing to accept, at least as a starting point for analysis. The Arbitrator simply takes notice that from general usage dictionaries (Cambridge and American Heritage) to specialty dictionaries (Black's Law Dictionary) the definition consistently features elements of “work for another” and “for compensation.” The Arbitrator accepts the Coalition's citations in this regard showing the common, and broad, dictionary meaning of “employee.”

The record establishes that Otto works for the County for compensation, which fits under the common definition of “employee.” As a threshold issue, analysis confirms she is not compensated as an independent contractor. The Coalition's position here is persuasive.

The County's own posture also supports this conclusion. The County Charter states the Council “shall establish the county manager's terms of employment” and that the status shall be

"employment at-will." *J-5, at 7*. Further, the Charter distinguishes the County Manager position from contractor status directly, by setting it out as a category separate and apart from the "contractor" category in its list of employees who will be exempt from application of County HR policy. *Id., at 10-11*. The contract executed by the County with Otto is equally distinctive. This contract is titled "Employment Agreement..." and its recitals confirm the County's "desire to continue to employ" Otto. *J-9.* This "continue" phrasing of course recognizes Otto's history as both Deputy Manager and Interim County Manager. Notably, the County's own submissions in this case agree that in those prior positions Otto would have been an "employee" subject to the me-too clause. *TR II, 102, 4-8.* As such, the use of "continue to employ" further confirms maintained "employee" status as opposed to indicating any separation point to some new "non-employee" form in the County's relationship with Otto.

Washington State court case law provides further support. Given that the instant case is not a tort-liability matter, the better applicable analysis focuses on the most relevant "economic reality" considerations. See generally, *Antifinson. v. FedEx*, 159 Wash. App. 35 (2010). The examination in this analysis focuses on the extent to which the party at issue is financially dependent on the putative employer. *Id. at 42*. Here, Otto is expressly under the County's control with regard to "any outside pursuit" that would diminish her ability to perform for the County. *J-9, at 6*. Even a pursuit that could be "perceived as such" must be reported to the County and is subject to County approval. *Id*. The connection forged by the three-year contract between Otto and the County creates a materially significant "degree of permanence" in the relationship as well. Finally, the services Otto renders as County Manager, a position akin (at least) to CEO, is undeniably an integral part of the County's operation.

If follows that the County Manager is not outside the broad commonly-understood common definition of "employee" due to any special status as some form of contractor. The County Manager stands squarely withing the dictionary definition of "employee." With that finding made, the burden

shifts to the County to show why the County Manager does not fit the definition of “any...employee” that was intended by the parties in their CBA.

A main County argument centers on holding the County Manager outside this broad reach using a narrower definition of the word “employee” that is contained in usage under the specific circumstances at hand. These arguments include analysis based on the County HR Policy Manual, and certain Washington State statutes and Clark County Code provisions, as well as the overall “constitutional” structure of County government under the Charter. These will be addressed in turn below.

Before going further, it should be noted that the most appropriate and precise analysis isolates the term “employee” from “non-bargaining unit.” The status of County Manager as an employee may reasonably be in question; the bargaining unit status of that position is not. Even beyond any potential legal restrictions, there is no reasonable basis on which to conclude that either bargaining party would even attempt to define the County Manager as anything other than non-bargaining unit. For purposes of the facts at hand here, bargaining unit status is a binary question. A given subject is either represented by a union, or they are not. The County Manager is not represented by a union, and it is beyond doubt the position fits under any reasonably intended meaning of the term “non-bargaining unit.” [4]

The Impact of the HR Policy Manual

Returning to the County's argument on the County Manager's employee status, the analysis begins with the HR Policy Manual and the fact that the position is neither subject to HR policy nor part of the M1, M2, M3 system set forth in HR Policy. The County points out these M-level employees receive yearly wage adjustments, step increases, and ARPA retention incentives, while the Manager's contract features none of these things. The County cites how Otto's contract references benefits that

[4] This is confirmed as well by the bargaining history on record. In its first incarnation in 2018 the Me Too clause included the phrase “bargaining unit or non-bargaining unit employee”. *J-19, p. 100*. The record reflects this term was changed in 2021 bargaining, after the County explained that other non-coalition units considered this inclusion as an improper limitation of their bargaining rights. This sequence further reflects the parties use of bargaining status as a simple binary question.

are the “same as” M-class, instead of saying “like other M1 employees,” thus further distinguishing the Manager from the other non-bargaining unit M-class employees.

The County's argument becomes its most specific in its reference to HR Policy section 8.3. *J-6, p. 51.* Here the Policy contains the following in a section entitled, “Employee Categories”:

> Non-represented classifications and employees are distinguished as Management 1 (M1) through Manager 3 (M3), as follows:
>
> M1 Certain Department Heads, Deputies of elected departments, and other identified senior management positions.
>
> M2 All other non-represented, FLSA-exempt employees including senior and middle managers, first line supervisory employees and non-supervising professionals.
>
> M3 Non-exempt, non-represented employee.

Id.

The County of course points out the County Manager is not included in this list, and follows with the conclusion that the Manager is therefore not an employee.

These arguments are accurately stated and completely convincing in establishing the County Manager does not fall under the “employee” category as that term is used in the County HR Manual. But, the question before the Arbitrator is the intended meaning of “employee” as used by the parties in the CBA, not the HR Manual.

There is nothing in the record that indicates the HR Policy Manual was discussed between the parties during bargaining on this part of the Me Too proposal. There is no reference to the “HR Policy Manual” in the CBAs, and there is no reference that would make it a controlling document or even a guide in the respects noted here.[5] The next question must be whether the HR Policy Manual content, and the concepts contained therein, were somehow so well known to the parties as to be within their common unspoken understanding. There is nothing in the record to support such a showing. The impact of the actual discussion on the meaning of “employee” will be addressed as the Analysis continues. At this point, it enough to reasonably conclude that the HR Policy Manual content

[5] There are references to “County policy” in the CBA content about vacation, leaves, and substance abuse; none about employee classification or organizational structure.

is not available to the County, without more, as a source for defining the term “employee” as intended in the CBAs.

The Impact of RCW and County Code Provisions

The discussion may now turn to the County arguments referencing Washington State Law and County Code. It is true the RCW at 41.59.020(4)(a) states that “the chief executive officer of an employer” is not an “employee.” However, Chapter 59 is devoted to the Educational Employment Relations Act, self-stating “(t)he purpose [of which] is to prescribe certain rights and obligations of the educational employees of the school districts of the state of Washington...”. *RCW 41.59.010*. The expressly stated “Definitions” following in that chapter at .020 can have little relevance to the present facts.

The RCW at Chapter 56 on “Public Employees' Collective Bargaining” states the term “public employee” excludes “any person (a) elected by popular vote, or (b) appointed to office pursuant to statute, ordinance or resolution for a specified term of office as a member of a multimember board, commission, or committee, whether appointed by the executive head of body of the public employer...”. *RCW 41.56.030(12)*. This language from the Chapter 56 “Definitions” section is also inapplicable here. The record shows the County Manager is neither an office holder, nor appointed as a member of a board, commission, or committee. Further, the County Manager's employment contract, while of specified duration, does not establish a “term of office” within the meaning of this definition.[6]

RCW Title 36 does apply to counties, and Chapter 40 concerns county budgets. *RCW 36.40*. The County points out here that, at multiple points, this chapter addresses various functions or duties of “the elected Auditor or CEO designated in a charter county...”. *RCW 36.40.010; .040; .050*. While presumably applicable here, there is nothing in these terms that directly addresses the status of the

[6] It fits here to note the PECB cases submitted by the County. While not creating a 'term of office” under this RCW, the existence and duration of the Manager's contract do create a “reasonable expectation of an ongoing relationship” that takes the position outside the findings in *Thurston County Fire District 8*, Decision 11524-A (2013) and *City of Auburn*, Decision 4880-A (1995).

County Manager (or CEO) as an “employee.” In addition, the Arbitrator takes notice that Clark County government features an elected County Auditor, indicating the language does not apply to the County Manager under the Clark County structure in any event.

Finally in this regard, the County cites the Clark County Code sections that expressly address the County Manager's authority. Two sections permit the Manager to execute certain contracts (leases, plus other services up to $200,000), and one makes the Manager an interim executive head in the event an existing elected councilor becomes unavailable to perform. *CCC 2.09.030; 2.48A.050*. These too do not address the status of the Manager as an employee, and instead highlight that even the Manager's executive powers are expressly limited compared to councilors' executive authority.

The import of the analysis on the impact of State law and County code is twofold. As with the HR Policy Manual, if these elements had been discussed by the parties during bargaining, it is every likely to have had definitional impact. Further, even without such discussion, if law or code made finding the County Manager to be a County employee flatly illegal this would have obvious consequences since illegal bargains are unsupportable on multiple grounds. Here, however, the record does not show any discussion of code or law during bargaining, and the analysis has shown no application that would bear on the “legal status” of the Manager as a County employee.

The Impact of The County Charter and Governmental Structure

The County has also submitted that the overall structure of the County under its Charter supports a finding the Manager is not an “employee” within the meaning of the contested language. Indeed, the County submits the Charter supercedes the parity clause in the CBAs, because it explicitly states it shall “supercede special and general laws which are inconsistent with the charter and ordinances to the extent permitted by the State Constitution.” *J-5, p.4*.

The County aptly explains the two-branch structure set up by the Charter. Summarized, the County Council constitutes the legislative branch, while elected officeholders, with the County Manager, comprise the executive branch. *J-5, p.4-9*. The Manager does have certain executive

powers (those not reserved to the elected office holders). *Id*. It is true the Manager functions as a form of CEO. *Id*.

Here again, there is no evidence the Charter structure of the County was discussed at the bargaining table during framing of the operative language at issue. Nevertheless, if in fact the Charter acted so as to make it illegal (as expressly contrary to Charter) to find the County Manager to be an "employee," the impact would certainly be material.

There is no such showing. To the contrary, as was noted above, the Charter references the Manager's "terms of employment" shall be established by the Council. *J-9*. The contract the County Council executed with Otto describes itself as an "Employment Agreement" confirms a desire to "employ" the Manager. *Id*. There can be no question the Charter is further confirmation that the County Manager is a unique position, but the Charter does not of itself support a conclusion that the Manager cannot be an "employee" within the meaning of the Me Too clause or that the Charter legally prevents such a finding.

However, considerations relating to the uniqueness of the Manager amidst the bargaining do merit a final discussion.

<u>The Bargaining History; the Unique County Manager Position as a County Employee; and, the Meeting of the Minds</u>

Both parties submit that the meaning of the contested language is clear and unambiguous and is sufficient to resolve the question presented without more. To be sure, the bare fact that two opposing readings of the same language arrive at different conclusions does not necessarily equate to an ambiguity in the language or otherwise create a need to review context. Many times, one of two readings will simply be deemed to correctly reflect the clear intent of the parties shown in the language. But, at other times, the varied interpretations may reasonably be seen as a persuasive element showing that the various tools available to find intent are justly applied. It is appropriate here to make use of such tools.

The origin of the disputed language is not in dispute. Indeed, several parties involved in the

current presentation (notably, County Manager Otto) were involved in the bargaining process producing the language from its very beginning in the preceding 2018 CBAs. In 2018 bargaining the Coalition cited its perception of a history of “found money” after bargaining that allowed the County to give larger increases to other employees after Coalition bargaining closed. *TR 116-117: 19-18*.

The sequence of subsequent proposals began with the Coalition's Me Too using “any non-bargaining unit employee” for the key parity target. *J-14*. The County counter-proposal added a non-precedent recitation, and identified “County Management staff” and “County Managers” as the parity target, noting explicitly, “the Coalition will get the same increase as the managers.” *J-15*. The Coalition returned, eliminating the managers references, and again using the phrase, “any bargaining unit or non-bargaining unit employee.” *J-16.* In the end, the parties blended the two proposals.

The final 2018 Me Too MOU at Appendix C included the non-precedent language, and the parity target was the Coalition's “any bargaining unit or non-bargaining unit employee.” *J-19, p. 100*. However, this final version also included a new paragraph listing exceptions to the clause. This specified the provision did not apply to binding interest arbitrations and “market adjustments for specific classifications for positions.” *Id*. The record reflects that these exceptions were proposed by the County. *TR II, 36-40: 18-5; 123-126: 19-4*. The County also engaged in a “thorough” discussion on its position that elected officials would also be outside the intended coverage of the Me Too language, and this was understood and agreed by the Coalition. *TR 33: 11-20*.

The next bargaining came in 2021. The County proposed to renew the Me Too clause, but deleting inclusion of other “bargaining units,” so as to reduce the parity target only to other “non-bargaining unit employees.” *J-12*. The stated explanation concerned an undesirable negative impact (a possible ULP) on other Unions' bargaining rights being impacted by the Coalition agreement. *TR II 130:3-19*. With regard to exceptions, the County proposed changing “market adjustments” to “realignments.” *Id*. The stated reason was to bring this specific term into line with its use in the HR Policy Manual. *J-6, p. 57; TR 53-54: 12-10; TR II 130-132: 20-25*.

As in 2018, there is no disagreement that the Union failed to reach its financial compensation targets and the Me Too was included as a necessary means of insurance that other County employees would not receive more favorable financial terms. Testimony reflects that at an earlier point, the Coalition had proposed no Me Too, indicating if its wage proposals were accepted it would not be needed, but the County ultimately did not meet the demand and the Me Too was consistently part of the County proposals. *TR 136: 1-24*. Accordingly, the current Me Too language was agreed-upon and stands in the CBAs here.

There is great significance in this history. The sequence shows that while the County originally proposed to limit the parity target to management, the Coalition's response was to enlarge the pool to "other non-bargaining unit employees." This history confirms an intent toward *expanding* the definition, rather than limiting it. The sequence shows the County using "County management staff," "managers," and even "County managers" interchangeably. *J-15*. It logically follows that the expanded phrase "non-bargaining unit employees" was intended to include non-unit County managers to the broadest extent.

This record and this reasoning confirms this intended coverage of the key term was indeed mutual, in both 2018 and 2021. But, the County now avers the managers it intended to include do *not* include the one manager here at the issue – the County Manager. The record is disputed as to the precision with which any reference to the County Manager was made in bargaining.

Witnesses agree (as referenced above) that "management" and even "county managers" were broadly included within the meaning of the key term by uncontested mutual intent. This agreement breaks down at *the* County Manager. Union negotiators Whiteside and Goldberg testified they believed that the County Manager was included. *TR II 122-123: 21-5; 36: 1-8*. Otto (present at the table as County negotiator in her role(s) prior to becoming County Manager) testified that the County Manager was never discussed. *TR 120: 20-24*. When scrutinized, the testimony from Coalition negotiators ends at confirming with certainty only that the County never affirmatively *excluded* the County Manager position. *TR II 36: 9-14; 120: 14-17*. Despite the lack of precise visible assent that is

apparent in this record, it holds significant value in this Analysis.

On this record the County argues because “the Coalition did not add language to the term 'any other non-bargaining unit employee' making it clear that the County Manager is included” there is no clear statement of intent. The County submits the resulting lack of “a meeting of the minds” means the “interpretation must be construed against the County.” The Arbitrator cannot agree.

The operative principles of interpretation that will be applied in such a case are found in the Restatement 2nd of Contracts, at Section 201, titled “Whose Meaning Prevails”:

> (1) Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning.
>
> (2) Where the parties have attached different meanings to a promise or agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made
>
> (a) that party did not know of any different meaning attached by the other and the other knew the meaning attached by the first party; or
>
> (b) that party had no reason to know of any different meaning attached by the other, and the other had reason to know the meaning attached by the first party.

As has been discussed hereinabove, the record here goes a long way toward supporting a finding that the simple use of the word “employee” includes all County manager employees, including the County Manager. Yet, the County's central negotiator, Otto, testified that she did not intend to include the County Manager position within this meaning. The County offered the extensive material discussed hereinabove to show interpretative elements known to Otto that supported this conclusion.

Indeed, it is apparent to the Arbitrator that the County Manager position is unique among other management at the County. There is no question that the County Manager has executive authority that goes well beyond any found in other managers. The references to “CEO” status affirm this, even though the executive authority is notably limited by the Charter (which reserves a bulk of authority to

the elected officials in the executive branch).

It is this unique status that raised the question of greatest concern to the Arbitrator: was this unique status so apparent and so self-evident that no communication on the subject was needed from the County, and the burden instead fell on the Coalition to expressly expand upon its use of the word "employee" in order to include the County Manager? Consideration of every element of the record has been necessary to answer this extremely close question.

This consideration of course included all the foregoing discussion and analysis, but also a review of other elements of the County Manager position that might objectively set it apart from other manager positions in what might be the necessarily obvious fashion. To this end, the County referenced the "14th Amendment" concepts the County applies to other managers, but not to the County Manager (notably requiring a Loudermill-style hearing opportunity on involuntary separation). The County also emphasized the County Manager is the only manager chosen by Council, and the only manager that has a separate individual contract with the Council. The County Manager is the highest position on the operational management chart and is part of the executive branch, with a form of direct-report to the legislative branch.

But, in contrast stand many commonalities shared between the County and other managers well beyond and in addition to the basic (and still notable) "Manager" title. The County publishes a Salaried/Management (Exempt) Pay Schedule on its website that includes the County Manager as simply another manager entry alongside all other managers. *J-34; TR 134-135: 19-20*. Unlike with regard to elected members of the executive branch, the County Council has the same freedom it does in setting or approving pay for other managers that it has with regard to the County Manager's salary-based compensation. In addition, the County Manager shares the same holiday and vacation and leave and time-off benefits as other managers. TR II 131-132: 12-11. And, of course, the County Manager is permitted to participate in the State Public Employee Retirement system, as do other county employees.

In the end, the answer to the Arbitrator's question is in the negative. The County Manager position is unique, but not outstanding from other managers enough to answer the question favorably for the County argument here. Despite its differences, the position shares enough commonality that it would *not* "go without saying" that it is impossibly outside the bounds of "any...employee" at the County.

The more reasonable and better supported conclusion reverses this posture, and finds that if the County wished to exclude the County Manager position from the word "employee," it bore the burden to propose language that expressed this intent. The record is replete with references in the proposed language and verbally at the bargaining table to "County managers" and "management." The use of these terms by both sides and in both forms is unrefuted.

Also unrefuted is the 2018 sequence between the County's counter-proposal and the Coalition response. As discussed, after the County affirmatively added the multiple "manager" references, the next (and ultimately final) version of the key language came in reflecting an expansive intent. The Coalition at that point proposed to remove references to managers and went beyond simply to "any...employee."

On these facts, it is reasonable to conclude the Coalition's intent would have been reasonably apparent, and that the meaning attached to "employee" by the Coalition included every County manager, and even *beyond* to the unique County Manager (if one wishes to hold that position out from the other County managers). The County had previously and successfully proposed other limiting exclusions to the clause. The record (and accompanying argument) made by the County here contains multiple bases on which a proposal to exclude the County Manager could have been well and reasonably argued.

But the County did not bring the HR Policy Manual, and the State RCWs, and the County Codes, and the County Charter to the bargaining table to make these arguments.

Further, when the County raised the need to recognize that elected officials were intended to

be outside the Me Too target purview, it did not add the County Manager to the discussion, even though this position is a part of the executive branch along with the elected officials.

As such, there was nothing on the table to limit application of the broad and commonly-used definition of the term "employee."[7] Under its ordinary meaning, and without restriction, this term encompasses the County Manager.

The cited accepted principles of contract interpretation show that a contract is not deprived of meaning in the situation at hand. Even if the County did not apply the same meaning to "employee" that the Coalition did, (a) the Coalition did not know and had no reason to know of the County's restrictive view, and (b) the County knew or had reason to know the Coalition's intended meaning was the most broad and commonly understood meaning of "employee," and included an intent that was even more expansive than the County's own initial recitation of the "management" and "county managers" as the parity target.

The Realignment Exception in the Me Too Terms of Appendix C

The County submits that the even if the County Manager is found to be an "employee" covered by the Me Too language, the salary increases at issue are expressly excluded because they were due to a realignment. It avers the HR Policy serves to define the term "realignment." The County emphasizes the following content:

> Realignment refers to those situations where the salary of an entire classification is adjusted upward based on internal or external compensation relationships.
> ***
> If the salary is below the minimum of the new range it shall be increased in order to place the employee on the first step.

J-6, p. 57.

The record reflects that prior to negotiating Otto's 2023-2025 contract, the Council ordered a

[7] A relevant supporting case is *Port Jefferson Pub. Sch. Bd. of Educ.*, 82 LA 978 (Marx, 1980). As here, in *Port Jefferson*, the meaning and any limits on the word "employee" were not discussed. *Id. at 980*. As such, the arbitrator held "the absence of negotiations discussion as to the word 'employee," rather than limiting the meaning, goes to make it all-inclusive." *Id*.

comparative analysis on county manager salaries at six comparable Washington State counties. *TR 73-75: 7-22; J-10; C-11*. The average annual salary for the surveyed group came in at $196,055.67. *J-10.* The subsequent negotiations produced Otto's $198,000 2023 salary, and her $207,900,00 2024 amount. The county submits these increases amount to “two steps” and are within the meaning of a realignment, and thus outside the purview of the Me Too clause.

The record does confirm the County HR policy was intended to define “realignment” as used in the Me Too clause. *TR 53-54:12-10*. Regardless of this, the problems with the overall argument are multi-fold. First, the fact that the HR Policy Manual does not apply to the County Manager militates sharply against any argument that the realignment concept described within it could even possibly apply to the position. Indeed, the grievance processing record here shows the County argued previously that realignment was not applied to the County Manager because the County Manager was not an M-level manager.[8] *J-13, p. 7.*

Moreover, Otto's own testimony indicated that no “classification” exists that includes the County Manager. *TR 135: 13-20*. Otto also confirmed the County Manager contract does not provide for any “steps.” *TR 135-136: 21-1*. The HR Policy language on realignment refers to both these terms, indicating an ill-fit for the County Manager under the definition in any event.

Rather than any realignment, the record reflects the County Manager's contract negotiations saw a comparative pay analysis used as a bargaining tool to assist in reaching a negotiated agreement that included a salary increase(s) that could be properly justified on a competitive basis. As such, the realignment exception does not apply here.

Conclusion on the Intended Meaning and Application of the Me Too Terms

This Analysis has shown that determining the parties' intent as necessary to resolve the issue presented was not possible using the written terms of the CBAs alone. Those terms were not sufficiently clear and unambiguous in their application under the given facts. As such, consideration of

[8]It is important to note that the above finding vis-a-vis the County Manager as an “employee” did not hold the Manager was an M-level manager, and did not declare the HR Policy applied to the position.

the context of the language's drafting, including but not limited to its bargaining history, was referenced as the best means to divine the parties' intent on the meaning of the language in question.

After careful consideration of the entire record, the intent of the parties has become manifest. The meaning and intent of the phrase “any other non-bargaining unit employee” is shown to include the County Manager position.

The single most important word of this phrase, “employee,” stands clear in its broadest and most common definitional form. As proposed by the Coalition, the term only expanded on the County-proposed use of the terms “management” and “manager” and “County manager.” As such, when the County thereafter proposed exceptions to the language, notably including negotiating clarity on excluding elected executive branch County officials but at the same time failing to also exclude the County Manager, or even discuss any other limits on “employee,” it is reasonably concluded the word is properly interpreted as including the County Manager because the County Manager is an employee of the County.

Accordingly, the terms of the subject Me Too clause are applicable to the salary increases received by County Manager Katherine Otto in 2023 and 2024. Therefore, the County violates the CBAs if it fails to apply the terms of the Me Too language in Appendix C therein.

The Baker Tilly Study and Remedial Calculation Considerations

The County Council approved a compensation and classification comparative study in September of 2022. *C-2; TR II, 65-66: 6-5*. The purpose was to address County recruitment and retention efforts, with an eye toward both realigning current job salaries classifications and maintaining competitive hiring in the marketplace. *TR II 69: 1-10.* The County Manager position was not included. *TR II 70-71: 25-4*. The resulting Baker Tilly study was completed and the results presented to the Council for approval in 2023 and to the Coalition for inclusion in the CBAs. *C-3; C-5; C-6; C-7; C-8; C-9.*

The results of the study are complex, and it must speak for itself; for present purposes it

suffices to note the parties agree the implementation increased compensation for certain employees, including Coalition employees. *Id.; TR II 107: 14-24*. No employees had reductions in compensation. *TR II 107: 19-22*. The implementation(s) occurred later in year 2023, but the record reflects certain retroactive applications back to an earliest date of January 2, 2023. *TR II 108: 2-23.* A separate Memorandum of Understanding was executed with each Coalition local implementing the results. *C-6; C-7; C-9; C-9.*

The impact of Baker Tilly here is with regard to remedy. The Coalition argues at length against any application of the salary/pay related results of Baker Tilly to the remedy required here, most notably against applying the Baker Tilly changes to offset liability.

It is true that in certain specific circumstances an arbitrator on occasion will decline to consider potentially offsetting elements in fashioning a remedy. In the case cited by the Coalition, the arbitrator declined to consider the impact of possibly pyramided hours when remedying for lost hours from an unrelated contract violation. *Heil Backing Co*, 27 BNA LA 90 (Klamon, 1956). This highly fact-specific case does not represent any broad arbitral tenor against offsetting in make-whole remedy situations.

To the contrary, persuasive authority broadly confirms:

> Generally, where back pay is awarded, it is reduced by any interim earnings in order to prevent grievants from profiting as a result of [the contract violation]. This practice is consistent with the theory behind make whole relief. Make whole relief is not intended to reward or punish either party. Rather, it is intended to allow the parties to resume their employment relationship as if the [remedied event] had never occurred.

Brand, *Discipline and Discharge in Arbitration*, BNA (1998) at 382. And see generally, Elkouri and Elkouri, *How Arbitration Works*, 6th ed. BNA (2003) at 1200, et seq.

In fashioning the remedy for the Me Too situation here, the intent of the parties previously found speaks to the need to consider subsequent wage or salary increases made to grieving employees. The record reflects the roots of the proposal are in equity. The Coalition intended to remedy the perceived history of, and future potential for, “budget problems” resulting in less-than-desired increases that were “somehow” later overcome after bargaining had closed. *TR II 117: 2-18*.

Coalition negotiator Whiteside put it this way:

> Um, again, so it was designed that should the budget outlook or forecast improve, that our members could be *made whole*, so if the budget outlook improved and another bargaining unit, through bargaining, or any non-represented employees were given an annual wage increase or merit increase or bonus, that that would also apply to our members.

TR II 117: 6-12 (emphasis added).

It is apparent the goal was to be made no more than whole in the event the Me Too language was triggered. The make whole intent described by negotiator Whiteside is reflected in the Me Too language where the word "same" is used to describe the remedial amount. If an actual pay rate were not used in setting the given differential calculation starting point, the result would be likely to produce an increase that puts the unit member at a gained-percentage rate ending up *above* "the same as" the parity target. Accordingly, in view of the accepted principles of a make-whole award and the intent of the parties, when calculating remedial amounts here it is necessary to consider the actual rate of pay/salary at the point the remedy inures as that may have been impacted by Baker Tilly changes.

As an example for potential guidance to the parties, under this reasoning and with regard to the triggering 2023 10% increase for the County Manager, the calculations may not in all cases be a straight 7.8% (the difference between the negotiated 2.2% unit increase and the County Manager increase). Rather, the 2023 impact of the Baker Tilly-related increases must be considered as a form of offset. To make the guidance example more specific, if a Baker-Tilly application had raised an employee's rate such that the new total for the relevant 2023 increase would amount to an additional 5% on top of his starting pay (instead of the original 2.2%), the remedial differential would be 2.8% (to reach the 7.8% remedial amount) calculated from the appropriate date[9]. In that way, the starting point for the remedial differential calculation must use whatever higher rate may be in place for a given employee or class or step after the Baker Tilly adjustment.

As the Coalition has argued, it is understood this may create a markedly more complex remedy

[9] Although the record is less than perfectly clear on this element, it would appear that this date is intended to be the date the triggering increase (Otto's new +10% rate) went into effect.

calculation process, at least for the 2023 year.[10] Even though this may be so and delay in any required make-whole adjustments may result, the complexity of an appropriate remedy cannot overcome an arbitrator's duty to apply the intent of the parties as expressed in the language of their CBA. The language and intent of the parties requires calculating the make whole remedial amounts using the impact of Baker Tilly increases where required to ensure that the remedy produces the parity in increase intended by the Me Too clause, and no more.

VIII. ARBITRATOR'S DECISION AND ORDER

Following careful consideration and within the bounds of his authority, and based on the above analysis of the entire record and the conclusions accordingly made, the Arbitrator **decides**:

> The County did violate the Me Too provisions of its collective bargaining agreements with OPEIU 11, LiUna 335; AFSCME Local 307, and PTE Local 17, by providing a ten percent (10%) salary increase to County Manager Kathleen Otto for the 2023 calendar year, followed by a five percent (5%) salary increase for the 2024 calendar year [to the extent it then failed to provide “the same” to all bargaining unit employees as well].[11]

It is therefore **ordered**:

> The County shall make all effected bargaining unit members whole for

[10] Nothing in the record and nothing now known to the Arbitrator appears to reflect a similar consideration for the 2024 year; however, the Arbitrator's statement to the parties at TR II 100-102 is applicable. This ruling intends only to answer the issue presented, via the Arbitrator's conclusions regarding the meaning, intent and applicability of Appendix C under the facts at hand. The record on remedy considerations for both 2023 and 2024 was not fully built. While some limited guidance regarding offset considerations has been given in an attempt to place the effort on sound footing, other than the fundamental make-whole order nothing herein is intended to rule in any final fashion on calculations of precise remedial liability as a result of this Decision and Order. Any detailed remedial calculations are for the parties, and questions, issues and disagreements on same may be brought to the Arbitrator for resolution on unilateral motion during the period of retained jurisdiction.

[11] In precise terms, the act of simply providing the stated increases to the County Manager is not in and of itself a CBA violation; the violation comes when the County fails to apply the language as required after the triggering increase is identified and held to fall withing the meaning and application of the Me Too language.

any violation, as discussed in the Arbitrator's Discussion and Analysis. The make-whole process shall be executed with all due speed that is reasonably possible. Pre-award interest shall not be included on any remedial amounts that are determined to be owing. However, interest at 1% per month, compounded monthly, shall become payable going forward on any required make-whole amounts that remain due and owing more than thirty (30) calendar days following the end of the Arbitrator's retained jurisdiction (originally set for ninety (90) calendar days following the date of this Decision and Order, subject to extension by mutual agreement only). If the Arbitrator's jurisdiction is extended, in no event shall the date set for imposition of interest be later than one-hundred and fifty (150) calendar days after the date of this Decision and Order. The Parties are directed to fully and promptly cooperate with reasonable information requests by either side made during the remedial process as necessary to perform any remedy calculations, audit calculations, and otherwise execute the remedy as may be necessary with all due speed and in good faith.

Pursuant to the agreement of the parties, the fees and expenses of the Arbitrator shall be equally split between them.

Signed and Submitted this 29 day of July, 2024,

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Michael G. Merrill
LABOR ARBITRATOR