IN ARBITRATION PROCEEDINGS PURSUANT TO AGREEMENT BETWEEN THE PARTIES

In the Matter of:

___,

___ Award Back Pay Issue

Union,

and

___,

Arbitrator Lee Hornberger

Employer.

DECISION AND AWARD

1. APPEARANCES

For the Union:

___

For the Employer:

___

2. INTRODUCTION

This arbitration arises pursuant to a Collective Bargaining Agreement (CBA) between [Union] and [Employer]. [Employer] discharged [Grievant]. After the Union disputed the discharge, the matter was ultimately submitted to arbitration. Pursuant to the procedures of the CBA, I was selected by the parties to conduct a hearing and render a final and binding arbitration award. On August 13, 2012, I issued an Award in which I concluded that [Grievant] was not discharged for just cause and that she should be reinstated with benefits, full seniority, and partial back pay. Quoting CBA, section 7.4, the Award indicated "The back wages shall be limited to the amount of wages that [Grievant] would otherwise have earned, less any unemployment compensation and all

other employment compensation received from any source during the period in question." In addition, I retained jurisdiction until November 30, 2012, to resolve any implementation issues.

The Employer has reinstated [Grievant]. A disagreement has arisen as to how to compute the back pay due to [Grievant]. During the back pay period, [Grievant] worked for ___ corporation as an employee and for ___ as an independent contractor. The parties agree that all of the W-2 income from ___ corporation can be deducted from the back pay. A dispute has arisen concerning how much can be deducted from the back pay concerning the independent contractor services provided to ___. If the gross revenues from ___ are utilized, as the Employer contends, $6,955.00 would be deducted from the back pay. If the business deductions are allowed, as the Union contends, $907.43 would be deducted from the back pay. That dispute has been submitted to me for resolution. The final submission on that issue was received by me on November 8, 2012.

3. POSITIONS OF THE PARTIES

A. For the Employer

The Employer maintains that $6,955.00 which is all of the monies [Grievant] received from ___ during the back pay period should be deducted from the back pay. According to the Employer, there should be no "netting" or "deducting" from that amount in order to reduce the amount of the ___ compensation to $907.43. All the money [Grievant] received from ___ is within the definition of "compensation." This is consistent with the CBA's utilizations of the word "compensation." "Employment compensation" does not mean "net profits." A future IRS audit of [Grievant]'s deductions

could change those deductions. It is irrelevant whether [Grievant] was an employee or independent contractor of ___.

B. For the Union

The Union maintains that [Grievant] should be permitted to deduct her business expenses from the monies received from ___ and only the resulting $907.43 should be deducted from the back pay. According to the Union, only that portion of the net income earned from ___ should be deducted from the back pay. [Grievant] had to obtain certifications and had other expenses associated with her ___ instruction business. She should be allowed the same deduction for these expenses as allowed by the IRS, and it is only the taxable net income that should be equated to "employment compensation" for purposes of the back pay offset.

4. ISSUE

Pursuant to CBA, section 7.4, "All claims for back wages shall be limited to the amount of wages that the employee would otherwise have earned, less any unemployment compensation and all other employment compensation received from any source during the period in question," should all of the ___ $6,995.00 be deducted from the back pay, or should business deductions be allowed and $907.43 deducted from the back pay?

5. RELEVANT CONTRACTUAL LANGUAGE

ARTICLE VII
GRIEVANCES

Section 7.1 Grievances
Step 5:
Powers of an Arbitrator. The arbitrator shall have no power to alter, amend, add to or subtract from the express terms of this Agreement or make any recommendation with respect thereto. … .

Section 7.4 Claims for Back Wages
All claims for back wages shall be limited to the amount of wages that the employee would otherwise have earned, less any unemployment compensation and all other employment compensation received from any source during the period in question.

6. DISCUSSION

The instant situation involves a contract interpretation in which I am called upon to determine the meaning of some portion of the CBA between the parties. I may refer to sources other than the CBA for enlightenment as to the meaning of various provisions of the contract. My essential role, however, is to interpret the language of the CBA with a view to determining what the parties intended when they bargained for the disputed provision of the agreement. Indeed, the validity of the award is dependent upon my drawing the essence of the award from the plain language of the agreement. It is not for me to fashion my own brand of workplace justice nor to add to or delete language from the agreement.

In determining the meaning of the instant CBA, then, I draw the essence of the meaning of the agreement from the terms of the CBA of the parties. Central to the resolution of any contract application dispute is a determination of the parties' intent as to specific contract provisions. In undertaking this analysis, I will first examine the language used by the parties. If the language is ambiguous, I will assess comments made when the bargain was reached, assuming there is evidence on the subject. In addition, I will examine previous practice by the parties related to the subject. When direct evidence is not available, circumstantial evidence may be determinative. For the reasons that follow, I conclude that the amount that the Employer can deduct from the back pay concerning ___ is derived from the Schedule 1040, line 12, “Business income” amount, $907.43, not the Schedule C-EZ, line 1, amount.

The back pay period and the deductions are spread over two years. Even though there are two Schedule C-EZs involved, this decision refers to the Schedule C-EZs in the singular.

The issue revolves around what the term "employment compensation" means in CBA, section 7.4. There is no evidence of pre-contract negotiations and bargaining history. There is no evidence of the custom and past practice of the parties. The Employer argues that the phrase includes income and money from all work sources, whether employer-employee or independent contractor, and without deduction of any business expenses. The Union apparently agrees that the word "compensation" includes independent contractor compensation but that, in the case of independent contractor compensation, IRS deductible business expenses should be deducted.

All words of the CBA have to be given meaning. "Ordinarily, all words used in an agreement should be given effect. The fact that a word is used indicates that the parties intended it to have some meaning … ." Elkouri & Elkouri, How Arbitration Works (6th ed), p 464. Each word and phrase of a contract is to be given meaning. *Id.* This situation involves not only an analysis of the meaning of the word "compensation," but also of the word "employment" in light of the fact that the parties chose to put the word "employment" in front of the word "compensation." The word "employment" must have been put in the CBA "employment compensation" phrase for a reason.

The common meaning of "employment compensation" means compensation from an employer-employee relationship, not from an independent contractor situation.

In the absence of evidence of mutual understanding of the CBA "employment compensation" phrase, dictionary definitions can be considered. In some situations,

dictionary definitions can be found to support different viewpoints. Elkouri & Elkouri, pp 450-452.

Compensation has been defined as "Remuneration and other benefits received in return for services rendered; esp., **salary or wages**." Black's Law Dictionary (9th ed), p 322 (2009); and "the money received by **an employee from an employer as salary or wages**." *New Oxford American Dictionary*, p 354 (3d ed)(2010). Emphasis added.

Employment has been defined as "[t]he relationship between **master and servant**." Black's Law Dictionary, p 604; and "[t]he action or process of employing; the **state of being employed**." *New Oxford American Dictionary*, p 130. Emphasis added.

Furthermore, "[t]he term 'employment,' depending on whether one views it from the standpoint of the employer or employee, means the act of employing or the state of being employed." 9 Michigan Civil Jurisprudence, Employment Relationship §1, p 15.

[Grievant] was an independent contractor of ___. She was not an employee of ___. Concerning the money from ___, [Grievant] was self-employed. She was an employee of herself. The IRS recognizes this situation by allowing [Grievant] to deduct her business expenses on Schedule C-EZ. [Grievant]'s "employment compensation" from ___ is the Schedule 1040, line 12, "Business income" amount.

The Union agrees with the Employer that at least [Grievant]'s net monies from ___ can be deducted from the back pay due to her. This is consistent with [Grievant] being an employee of herself, not ___.

The Employer argues that a hypothetical future IRS audit could result in some of her Schedule C-EZ self-employment expenses being disallowed. But the same hypothetical future IRS audit could result in additional expenses being allowed or the

discovery of presently non-revealed W-2 or "cash" employee income. Not doing a present appropriate back pay calculation because of the possibility of a future IRS audit changing present day back pay calculations would mean there could never be a present day calculation. In addition, there is no allegation of an incorrect deduction on [Grievant]'s Schedule C-EZ, no allegation of there not being an independent contractor relationship, and no request for a hearing.

[Grievant]'s Schedule C-EZ is prima facie evidence of the validity of the deductions in it, absent evidence or a specific allegation to the contrary.

The Employer argues for a definition of the word "compensation" based on how that word is used elsewhere in the CBA. But the issue is not just the meaning of compensation, but the meaning of the phrase "employment compensation." The word compensation cannot be interpreted in CBA, section 7.4, without defining "employment."

The Employer argues that it, without contest, deducted from the back pay calculation the entire income from [Grievant]'s W-2 income from the health care corporation employer that she worked for as a W-2 employee. In that case, there was an employment relationship between [Grievant] and the W-2 employer. There was not a W-2 employment relationship between [Grievant] and ___.

The Employer argues that [Grievant] might be entitled by the IRS to deductions in the ___ independent contractor relationship but not in a W-2 employment relationship. However, that is not because of anything that [Grievant] has done. It is because the Government has chosen to give self-employed individuals the right to take certain business deductions. That is inherent in the independent contractor relationship as recognized by the IRS and the meaning of the word "employment." There is no allegation

that [Grievant] was an employee, rather than an independent contractor, of ___.

[Grievant] had at least two options concerning her independent contractor status. She could have formed a one person Corporation, had all ___ monies paid to the Corporation, legally deducted the IRS authorized business deductions, and had the Corporation pay her W-2 income for the W-2 income distribution to her. Or she could have done what she did: not form a Corporation, be a sole proprietor, have the ___ 1099 monies paid to her, legally deduct the IRS authorized deductions on her Schedule C-EZ, and keep the remainder as Schedule 1040, line 12 "Business income." A Michigan corporation is a separate entity from the owners of that company. The Employer agrees that, if there were a corporate employer, only the W-2 employee income would be deducted from the back pay. Given the wording of the phrase "employment compensation," the Schedule 1040, line 12, "Business income" has to be treated the same way as the W-2 income amount.

Furthermore, IRS Form 1040 calls employer-employee income "Wages, salaries, tips, etc. Attach Form/s W-2" and the independent contractor $907.43 "Business income or (loss). Attach Schedule C or C-EZ." As recognized by the IRS, a reasonable interpretation of "employment compensation" in an independent contractor situation is "Business income … ." IRS Form 1040.

Interpreting "employment compensation" in CBA, article 7.4 as meaning the same as "business income" on IRS Form 1040 is an interpretation that is both linguistically reasonable and reasonable in light of the law. Elkouri & Elkouri, p 474.

The crucial points in this case include (1) the common and reasonable interpretation of the phrase "employment compensation," (2) the inclusion of the word

"employment" in the "employment compensation" phrase, (3) [Grievant] could have legitimately created a one person corporation and the $907.43 would have come to her via a W-2 payment from her own corporation, (4) a reasonable definition of "employment compensation" for a sole proprietor is the Schedule 1040, line 12, "Business income" amount, (5) there was no allegation of incorrect deductions on [Grievant]'s Schedule C-EZ, (6) there was no allegation of there not being an independent contractor relationship, (7) there was no request for a hearing, (8) the totality of the circumstances, and (9) the wording of the CBA.

7. CONCLUSION AND AWARD

In conclusion, having read and carefully reviewed the evidence and argumentative materials in this case and in light of the above discussion, the amount that the Employer can deduct from the back pay concerning ___ is derived from the Schedule 1040, line 12, "Business income" amount, $907.43, not the Schedule C-EZ, line 1, amount. This is not a modification of my Award. It is a clarification. *Oakland Co v Oakland Co Deputy Sheriff's Ass'n*, unpublished opinion per curiam of the Michigan Court of Appeals, issued August 9, 2011 (Docket No 297022).

If, on or before 4:30 p.m., November 30, 2012, the Union or the Employer advises me by e-mail or other writing of any dispute regarding the remedy, my jurisdiction shall be extended for so long as is necessary to resolve disputes regarding the remedy. If I am not advised of the existence of a dispute regarding the remedy directed herein by that time and date, my jurisdiction over this grievance shall then cease.

Dated: November 19, 2012

/s/Lee Hornberger
Lee Hornberger
Arbitrator

Traverse City, Michigan