IN THE MATTER OF THE ARBITRATION

Between

EMPLOYEE ORGANIZATION
Association of San Diego County Employees
Charging Party

And

EMPLOYER
County of San Diego
Respondent Party

C.S.M.C.S. Case # ARB-16-0477

GRIEVANCE

Interpretation of Section A1
Article 9 of the 2013-2017
CR and CM Memorandum of
Agreement

OPINION and AWARD

PRELIMINARY INFORMATION

CASE PRESENTATION – APPEARANCES

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JANUARY 26, 2018 HEARING RECORDED AND TRANSCRIBED IN TWO (2) VOLUMES

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Volume 2, pp. 38 – 191 [1] Josie C. Gonzalez, C.S.R. ; **The Sullivan Group of Court Reporters;** 402 West Broadway; Suite 1270; San Diego, CA 92101; (619) 566-0036: (323) 938-8750 [Fax]

LOCATION OF HEARING

County Administration Center
Tower 8
1600 Pacific Highway
San Diego, CA 92101

AUTHORITY TO ARBITRATE

Stipulation by the Parties to Defer Unfair Labor Practice (ULP) Charge Filed by the Union Against the County of San Diego to the State of California Public Employment Relations Board (PERB) to Final and Binding Arbitration. Stipulation dated July 21, 2017.

WITNESSES (in order of respective appearance)

FOR THE COUNTY

KEN WEIDMANN, Jr.
Senior Labor Relations Officer

EBONY SHELTON
Director, Office of Financial Planning

FOR THE ASSOCIATION

KATHERINE RYAN
Executive Director, Association of San Diego County Employees

JOANN HOFELICH
President, Association of San Diego County Employees

WALLY GUTIERREZ
Chief Steward

[1] Volume 2, was paginated beginning at p. 1 through p. 154 as Volume 1 was not transcribed by the Sullivan Group. Thus, the total number of pages was calculated by adding the total number of pages for both transcript volumes.

ISSUE

As the County of San Diego and the Association, together, hereinafter the Parties, did not present a mutually agreed upon statement of the issue to be resolved on the merits by the Arbitrator at the hearing, the County in its post-hearing brief framed the issue as follows:

COUNTY STATEMENT OF THE ISSUE

Did the County properly implement the Employer Offset Elimination provision in the Memoranda of Agreement (MOA) for the Crafts Unit (CR) and the Construction, Maintenance, Operations & Repair Unit (CM) that provided that, "all employees shall receive a wage increase as an even exchange for the remaining offset elimination" when it gave all employees in the CR and CM Units a salary increase beginning June 9, 2017? [2]

ASSOCIATION STATEMENT OF THE ISSUE

At the outset of the hearing the Arbitrator inquired of the advocates as to whether they had framed a mutually agreed upon statement of the issue to which they responded they had not. However, Association advocate Cunningham stated for the record that he suspected the Association and the County's statement of the issue would be the same. As the Association's post-hearing brief was void of framing a statement of the issue, the Arbitrator adopts the County's statement of the issue as the issue before him to be resolved on the merits.

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[2] The accepted standard response following the framing of the issue is to pose the next question as to what shall constitute a proper remedy. Here, the County did not pose the proper remedy question. Had the question been posed, it would read, "If not (meaning the County did not properly implement the Offset Elimination provision of the Memoranda of Agreement), what shall be the proper remedy"?

Although the Association acquiesced in framing the issue both at hearing and in its post-hearing brief, it did request as a remedy that the Arbitrator order the County to recalculate the offset payment consistent with the language of the contract and intent of the parties with respect to salary increases and pay Tier A and Tier B bargaining unit members of the Association retroactively to make them whole.

RELEVANT DOCUMENTATION

Applicable to both the **CR Memorandum of Agreement, June 28, 2013 – June 22, 2017** (Ex.26) and the **CM Memorandum of Agreement , November 05, 2013 – June 22, 2017** (Ex.27) is **Article 9, Employee Benefits, Section A1. Retirement Offset** which reads in pertinent part as follows:

> **Effective December 27, 2013, in exchange for the offset reduction specified above, employees shall receive a 2.2% salary adjustment.** [3]
>
> **Effective June 9, 2017, the offset shall be eliminated.**
>
> **Effective June 9, 2017, all employees shall receive a wage increase as an even exchange for the remaining offset elimination. The amount of this even exchange shall be based on the Fiscal Year 2016-17 Adopted Budget for the bargaining unit and will be determined by converting the amount appropriated for offset to a percentage of the total salaries and benefits. Total salaries and benefits shall include base salary, supplemental pay, employer retirement contributions, other post-employment benefits, OASDI and Medicare. The amount of this increase for employees will be cost neutral to the County and in no way shall it result in a cost increase to the County** (Exs.26&27). [4]

BACKGROUND

Prior to the 2009 Memorandum of Agreements (MOAs) negotiated by the County and its bargaining units which included the CR Unit of the Association and subsequently the CM Unit of the Association, the Agreements included a provision whereby the County agreed to pay a portion of the employee's share of the pension cost to fund the employee's retirement. [5] The employee's share of the pension cost paid by the County was known and referred to as either the Employer Retirement Offset or the truncated version as the Employer Offset. Beginning with the MOAs negotiated in 2009, the County began to reduce the Employer Offset it was contractually obligated to pay on behalf of its

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[3] This was the salary adjustment specified in the **CR Memorandum of Agreement** (Ex.26). The salary adjustment specified in the **CM Memorandum of Agreement** (Ex.27) was different, to wit: The salary adjustment for all employees at Step 5 or above of the salary range was set at 2.0% and for all employees at Steps 1-4 of the salary range was set at 1.0%.

[4] The Arbitrator notes this is the Memorandum provision at issue in this arbitration.

[5] It was noted that the CM Unit came into existence in 2013 as a result of the employees comprising the Unit decertifying representation from the Service Employees International Union (SEIU).

bargaining unit employees. These Employer Offsets were applicable to employees classified as Tier 1, Tier A, and Tier B . The Tier classifications were predicated on the years the employees commenced employment with the County. Tier 1 is the oldest classification established sometime prior to 2002. [6] Tier A was established in 2002, Tier B was established in 2009 and a fourth Tier, Tier C was established as of December 1, 2012 as a result of the passage of the Public Employee Pension Reform Act (PEPRA). Tier C employees who entered the County's retirement system on or after January 1, 2013, were prohibited by PEPRA to have any percentage share of their pension contribution paid by the County. [7] The CR bargaining unit has employees arrayed in all three (3) Tiers whereas the CM bargaining unit has only Tier A and Tier B employees. [8] As of 2013, the year the two (2) MOAs in question were negotiated, there were approximately 421 Tier A employees, approximately 57 Tier B employees, and 12 Tier C employees who were hired by the County on or after December 1, 2012.

Beginning with the MOAs negotiated between the County and its various bargaining units in 2009, and subsequently the successor MOAs negotiated in 2013, including the subject CR MOA effective June 28, 2013 (Ex.26) and the CM MOA effective November 5, 2013 (Ex.27), the Parties (the Association and the County together) agreed the County's percentage contribution of the employee's share of their pension cost would, in the first year of the MOA (Fiscal Year 2013-2014) be 33% accompanied by a salary increase in exchange for the Employer Offset to be paid in two (2) steps. [9] Initially, in negotiations for the successor MOAs to the 2009 MOAs that expired in 2013, the County and the Association bargained for a two (2) year agreement. Subsequently, as a result of a "Me Too" letter dated May 28, 2013, issued by the County to the Association's CR Unit, negotiations were reopened which resulted in adding another two (2) years to the

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[6] At the time this arbitral hearing was held, January 26, 2018, there were 22 employees County-wide classified as Tier 1 employees and none of these 22 employees were bargaining unit employees represented by either the CR or CM Units of the Association.

[7] Employees hired by the County on or after December 1, 2012 were subject to PEPRA.

[8] All twelve (12) Tier C employees belong to the CR bargaining unit (Ex.22).

[9] The salary increase for the CR Unit was 1.2% to be applicable to all steps and paid December 27, 2013 and another 1.0% salary increase applicable to all steps to be paid in January, 2014. Also, see fn.3 Supra regarding a different salary adjustment for the CM bargaining unit effective December 27, 2013. It was explained that the Employer Retirement Offsets were to be balanced out by salary increases such that employees would not bear a reduction in compensation or, in the Party's parlance, the balance would be employee neutral.

MOA and most relevant to this arbitration, the agreement by the Parties to provide for the elimination of the Employer Retirement Offset as set forth in Section A1 of Article 9 reproduced in its entirety above (see page 4 of this *Opinion and Award*). [10] In the four (4) year agreement the Parties agreed there would be no Employer Offset in the second and third year of the MOA (FY 2014-2015 and FY 2015-2016 respectively) and in the fourth year of the MOA as provided for in Article 9, Section A1, the remaining Employer Retirement Offset was set to be eliminated (Ex.14). [11]

In complying with the obligation to eliminate the Employer Offset altogether as provided for in Article 9, Section A1 of the CR and CM MOAs, the County devised a formula to calculate the final percentage salary increase as the "even exchange" for the implementation of the final Offset . As described by the County, the numerator of the equation was the amount appropriated by the County for the Offset as set forth in the Fiscal Year 2016-2017 (the fourth and final year of the MOA) Adopted Budget for the bargaining unit. The denominator was the total salaries and benefits for the bargaining unit which included: base salary, supplemental pay, employer retirement contributions, other post-employment benefits, OASDI and Medicare. [12] The result of this calculation yielded the percent increase in salary which was then applied across-the-board to **all** employees within each of the two (2) Association bargaining units. The record evidence reflects that under the County's calculation Tier A employees in both the CR and CM bargaining units were set to receive effective June 9, 2017, a 1.35% increase in salary as an even exchange for a 3% offset elimination, Tier B employees in the CR bargaining unit were set to receive a 1.35% increase in salary as an even exchange for a 2.33% offset elimination, Tier B employees in the CM bargaining unit were set to receive a 1.33% salary increase as an even exchange for a 2% offset elimination, and Tier C

[10] The "Me Too" letter from Jeannine Seher, the Labor Relations Manager, Labor Relations Division of the County's H.R. Department to Kay Ryan the Association's Executive Director and Chief Negotiator for the 2013 MOA, reads as follows: Should another bargaining unit achieve an agreement that includes an item previously requested by the Association, the County agrees to meet and confer with the Association over the negotiation of such a benefit(s) or provision (Ex.23).

[11] In lieu of an Employer Offset in the second and third year of the MOA, Association bargaining unit employees received a one-time-lump sum bonus of 2% minus $250 (pre-tax) to be paid out a week after June 26, 2014 in the second year and a 2% salary increase effective June 26, 2015 in the third year (Ex.14).

[12] No monetary amounts for either the numerator or denominator were presented as evidence by either party to show the actual calculation of the resultant percentage applicable in determining the various salary increases.

employees were set to receive a 1.35% increase as an even exchange for a 0% offset and no offset elimination (Ex.14).

As the Association did not agree with the County's interpretation of Section A1 of Article 9 pertaining to the calculation of the percentage increase in salaries allocated to Tier A and Tier B bargaining unit employees, by including Tier C in the allocation, it sought to meet and confer with the County on this issue pursuant to Section 3505 of the Meyers-Milias-Brown Act (MMBA) in advance of June 9, 2017, the date the County was contractually obligated by the provision set forth in Article 9, Section A1 to implement the salary increases. [13] The record evidence reflects the County rejected the Association's effort to convene a meet and confer meeting, which prompted the Association on June 2, 2017, one (1) week prior to implementation of the salary increases as provided for by the provision and terms set forth in Article 9, Section A1 of both the CR and CM Agreements, to file an Unfair Labor Practice Charge (ULP) against the County with the California Public Employment Relations Board (PERB) (Charge No. LA-CE-1182-M). As part of this ULP, the Association also sought to have the Board invoke injunctive relief against the County to stop it from implementing the salary increases on June 9, 2017 as calculated and apportioned over the bargaining unit employees of both bargaining units. The County opposed the Association's request for injunctive relief which was denied by PERB on June 13, 2017. Subsequently the Board set a hearing on the Association's ULP complaint for July 25 and 26, 2017 and simultaneously, the Board established a briefing schedule for the County's motion to defer the dispute to binding arbitration. In fact, as noted elsewhere above, the dispute at issue is before the Arbitrator by stipulation

[13] The Association's effort to seek input regarding the County's interpretation of Article 9, Section A1 pursuant to the Meyers-Milias-Brown Act occurred on May 2, 2017 memorialized by letter of that date from Association Counsel James Cunningham to Susan Brazeau of the County (no title for Ms. Brazeau indicated in the letter), characterized as a Pre-Grievance Notification per Article 11, Section 3, laying out the Association's position that contrary to the County's position Section A1 was applicable to Tier C employees, Counsel Cunningham argued that Tier C employees were not entitled to receive any salary increase tied to the elimination of the Employer offset as the County had been prohibited by the pension law (PEPRA), to contribute any percentage to the pension contribution required to be paid by Tier C employees (Ex.13). According to a written declaration dated June 2, 2017 by Katherine Ryan, Association Executive Director appended to the filing of the Association's Unfair Labor Practice charge, the County responded to the Pre-Grievance Notification letter on May 23, 2017 indicating it was planning to go forward with implementing the offset elimination and wage increase on June 9, 2017 (Ex.17).

by the Parties entered into July 21, 2017, to defer the ULP to binding arbitration (Ex.17). [14]

By letter dated July 28, 2017, and transmitted by email, PERB notified the Arbitrator of the Parties' mutual selection from a list of arbitrators submitted by the State Mediation and Conciliation Service (SMCS) to hear the subject issue and resolve the issue on its merits. [15] Through an exchange of emails between the Parties and the Arbitrator, the arbitration hearing was scheduled to be convened and was convened on January 26, 2018. On February 26, 2018, the County submitted the transcribed recording of the hearing to the Arbitrator in two (2) volumes by email (see p.2 of this *Opinion and Award).* Post-hearing briefs were submitted by the Parties and received by email attachment by the Arbitrator as scheduled, on March 12, 2018.

[14] The actual stipulation reads as follows: **1.** The grievance raised by the ULP complaint will be deferred to binding arbitration as provided for in the Memoranda of Agreement entered into between the parties; **2.** The parties shall use their best efforts to complete the arbitration within ninety days of the appointment of an arbitrator; and **3.** Each party shall pay one-half of the arbitration costs as provided for in the MOA.

[15] For some unexplained reason, the Arbitrator did not receive PERB's email letter apprising of his mutual selection to preside over the matter of this arbitration. In light of no response by the Arbitrator to his selection, Senior Labor Relations Officer of the County, Ken Weidmann contacted the Arbitrator by telephone on August 29, 2017 apprising him of his mutual selection by the Parties and also sending him by email, PERB's July 28, 2017 letter of appointment. Thereafter, the Parties and the Arbitrator exchanged a number of emails between September 14, 2017 and January 3, 2018 for the sole purpose of securing mutual agreement on a date to hold the arbitration hearing. On January 3, 2018, both Parties notified the Arbitrator they were available to hold the arbitration hearing on January 26, 2018.

OPINION

At the outset the Arbitrator concurs, as articulated by the County in its post-hearing brief, given that the subject grievance is a contract interpretation case the Association bears the burden of proof and, additionally, the key determination to be made by the Arbitrator boils down to what is meant by the term **"all"** employees as construed within the context of the Section A1 provision of Article 9 as set forth by identical language in both the CR and CM Memorandum of Agreements, Exhibits 26 and 27 respectively.

The Arbitrator is of the view the meaning of the term, **"all"** can be discerned by subjecting the term to the following three analyses, to wit: **1)** Bargaining History; **2)** Past Practice; and **3)** Contract Construction.

1. Bargaining History

It is clear that from at least 2002 through the first half of 2013, the Employer Offset applied to employees classified in any one of three established tiers, Tier 1, Tier A, and Tier B. Additionally, the written record evidence reflects that when the Parties reopened negotiations for both the CR and CM Agreements for the purpose of adding an additional two (2) years to the already agreed upon successor two (2) year MOA to the expiring 2009 MOA, the Parties took into account passage of the Public Employees Pension Reform Act (PEPRA), effective January 1, 2013 which prohibited the County from paying any portion of an employee's pension contribution for employees entering the County's pension program on and after January 1, 2013. Thus, employees in Tier 1, Tier A, and Tier B were exempt from PEPRA's prohibition but nevertheless, it prompted the Parties to negotiate the elimination of the Employer Offset for these Tier employees. At what appears to be the last negotiation session to consummate the four (4) year MOA set to expire June 22, 2017, held on November 7, 2013, the Parties reached Tentative Agreement on various changes requested by the Association's CR Unit one of which was to Article 9, Section 1, modifying language which provided for Tier A and Tier B employees to get a 1.2% salary adjustment in exchange for the offset to be paid effective

December 27, 2013 added to a 1% salary adjustment to be paid in January, 2014, thereby yielding a total salary adjustment of 2.2%(Exs.25 & 26). The CM Unit employees also received a salary adjustment effective December 27, 2013, but it differed from the percentage salary adjustment paid to the CR Unit (Ex.27). On the same date of December 27, 2013, twelve (12) employees were added to the CR Unit classified as Tier C employees (Ex.22), and specified in the four (4) year MOA as employees not entitled to any Employer Offset as such offsets were barred due to PEPRA becoming law. The CM Unit did not acquire any Tier C employees. Senior Labor Relations Officer Ken Weidman in his testimony verified the 1.2% salary adjustment was to compensate the Tier A and Tier B employees of the CR Unit in exchange for the 33% Employer Offset asserting this increase was cost neutral to the affected employees and the second salary adjustment of 1% to be paid in January, 2014 was an added salary adjustment for adding two (2) additional years to the MOAs to be paid to all employees meaning employees arrayed in all three (3) Tiers which included Tier C employees. According to Weidman, the salary increase given to Tier C employees was the same overall increase given to Tier A and Tier B employees, to wit; a 2.2% increase. In other words, even though Tier C employees were excluded by law from the application of an Employer Offset, nevertheless, in this first year of the four (4) year MOA, Tier C employees were treated to the same salary increase given to Tier A and Tier B employees thereby benefitting from the 1.2% of the 2.2% salary increase attributed to the Employer Offset. Weidman testified the Association did not object to this application of the salary increase paid to the Tier C employees by filing a grievance.

Another change agreed upon by the Parties to Article 9 and central to this arbitration, was the addition of the language which became Section A1, the provision under scrutiny here that provided for the elimination of the Employer Offset. A reading of witness testimony pertaining to how this provision was worded makes crystal clear the Association was intent on achieving the objective of no employee losing any money of their take home pay in calculating the remaining Employer Offset at the end of the fourth year of the MOA; that, theoretically for example, if the employee were to give up an offset of 3% they should get a salary adjustment equivalent to the 3%; in other words, a

dollar for dollar exchange. According to Chief Steward, Wally Gutierrez, the County was in accord with this Association objective testifying that during negotiations he asked Jeannine Seher the County's chief negotiator a number of times. "will our employees go home with less money when the exchange is effected" to which Seher responded "no" every time he raised the question.

Significantly, Seher was not called by the County to testify regarding the Associaiton's claimed assurance employees would not go home with less money when the exchange was effected, but instead the County produced Ebony Shelton, Director, Office of Financial Planning who acted in the capacity as advisor to Wiedman during the 2013 negotiations. Contrary to the Association's witnesses regarding the County's assurance when negotiating the language constituting Section A1 of Article 9 that there would be a dollar for dollar exchange for giving up what was remaining of the Employer Offset, Shelton testified that one dollar ($1.00) of offset is less than one dollar ($1.00) of salary increase due to the fact that one dollar ($1.00) of offset is not enough to fund one dollar ($1.00) of a salary and benefit increase due to the cost of benefits. Shelton related she was involved in drafting the language of Section A1 in order to make sure it reflected the methodology used by the Financial Planning Office in determining the fiscal impact for eliminating the offset and to make sure the result was cost neutral to the County. [16] Shelton explained it was necessary to describe the methodology to be used since the elimination of the offset was to occur four (4) years in the future and therefore at the time the language was drafted neither the County nor the Association possessed the actual numbers necessary to do the math. Wiedman, in his testimony related that the crux of the calculation depended on the adopted budget for each Bargaining Unit which is comprised of numerous variables, most significant of which is the composition of the Bargaining Unit, meaning the number of employees comprising each of the three (3) Tiers as well as what their salaries would be, variables unknown to the Parties in 2013

[16] Shelton noted the identical language of Section A1 dealing with the elimination of the Employer Offset is included in the Agreements with thirteen (13) other bargaining units the County negotiates with and all fourteen (14) bargaining units together represent approximately fourteen thousand (14,000) employees employed by the County.

as to what they would be in 2017 and characterizing the adopted budget as a "bucket of offset money".

Shelton further explained that the formula used to calculate a reduction in the Employer Offset and the formula used to calculate the elimination of the Employer Offset is similar but not the same as the calculation for the reduction has to account for the cost of benefits in order to be cost neutral to the employees meaning there would be no decrease in their take home pay whereas, the calculation for the elimination of the offset does not have to account for the cost of benefits thereby making it cost neutral to the County.

Shelton related that negotiations regarding the Employer Offset centered on two (2) aspects, the first on the issue of reducing the offset and the second, on eliminating the offset. With regard to the former, reduction of the offset was intended to be cost neutral to the Bargaining Unit employees as a whole whereas, the latter aspect, elimination of the offset was intended to be cost neutral to the County. Shelton testified that the intent of the phrase in Section A1 reading, "all employees shall receive a wage increase *as an even exchange for the remaining offset elimination* was intended as clarification the "exchange" would be cost neutral to the County. In his testimony, Wiedman noted that the elimination of the Employer Offset was a County-wide proposal. Shelton conceded that if Tier C employees were removed from the calculation in determining the percentage of the salary raise in exchange for the elimination of the offset, the percentage raise applicable to Tier A and Tier B employees would have been higher than the 1.35% raise they received.

The above summary of the Bargaining History pertaining to the Employer Offset clearly reflects that the County treated the reduction of the offset that occurred in 2013, distinctly differently than it treated the elimination of the offset effected in 2017. Most significant is the fact that the percentage calculated for the salary raise in exchange for the reduction in the offset excluded the Tier C employees of which at the time there were a total of twelve (12) in the CR Unit and none in the CM Unit. So the County's argument the

Association did not grieve the fact that Tier C employees received the identical 2.2 % salary increase in 2013 is absolutely of no relevance to the implementation of the salary raises that were calculated pursuant to the terms contained in Section A1 of the MOAs. It is abundantly clear the County separately calculated the percentage raise in salaries for Tier A and Tier B employees in exchange for the reduction in the offset which translated to an equivalent 1.2% increase and then, as acknowledged by the County, it added to this amount an additional 1.0% increase and called this increase in salary an equity adjustment for the Association's agreement to add another two (2) years to the already negotiated and agreed upon two (2) year MOA. The significant difference between granting Tier C employees the same 2.2% salary increases as was granted the employees in Tier A and Tier B in 2013 as opposed to including Tier C employees in calculating the percentage increase in salaries in 2017, is that Tier A and Tier B employees were not negatively impacted by granting the same salary increase to Tier C employees in 2013, meaning that even if Tier C employees were not granted any increase in salary in 2013, Tier A and Tier B employees still received the percentage increase in salary they were entitled to receive for the reduction in the offset whereas, this was not the case associated with the percentage increase in salary Tier A and Tier B employees were entitled to receive in 2017. It is also noted by the Arbitrator that the 2013 percentage increase in salaries granted to all three (3) Tier employees, A,B and C, were not subject to the provision set forth in Section A1 of Article 9 which pertains only to the calculation of the percentage in salary increases due to be paid to employees in 2017 which is the sole issue before the Arbitrator in this proceeding.

The evidence is overwhelming that during negotiations for terminating the Employer Offset there was no "meeting of the minds" by the Parties as to what the language of Section A1meant when negotiations for this provision was concluded. Given assurances by the County during negotiations that no Association employee would lose money as a result of permanently ending the offset in exchange for a salary increase, the Association walked away from the bargaining table believing this assurance was solidified by the very first phrase of Section A1 which stated that "all employees shall receive a wage increase as an ***even exchange*** followed by a description of the formula to be used to

meet this assurance though neither Party knew what the formula would yield in terms of an actual percentage increase in salary four (4) years hence. Furthermore, the Association believed the term, ***even exchange*** meant a dollar for dollar exchange and in negotiations indicated to the County ad nauseam that this was its understanding of the County's assurance that no employee would lose any money as a result of ending the offset. The County walked away from the bargaining table intending that inclusion of the word, "**all**" meant including employees in all three Tiers, A, B, and C in calculating the percentage to be applied in determining the appropriate salary increases. The record testimony by County witnesses Weidman and Shelton reveals that the County was quite aware when it concluded negotiations for Section A1 that by inserting the term **all** in this phrase, it was not agreeing with the Association that the exchange to take place would be a dollar for dollar exchange though the County was not forthcoming in providing this information to the Association's bargaining committee members. Specifically, the County knowingly and intentionally did not reveal to the Association that the term **all** was going to include Tier C employees in the calculation of the percentage to be applied to the salary increase notwithstanding the fact that Tier C employees never received an offset and, in fact, was prohibited by PEPRA to receive an offset. By the very fact that Tier C employees would be included in the subject calculation meant that Tier C employees would be sharing an increase in salary the Association was led by the County to believe would be confined to Tier A and Tier B employees only, based on the assurance no Association employee would suffer a loss of pay, that is, lose any money as a result of the ***even exchange*** that would occur on June 9, 2017.

The County, knowing full well at the time of negotiations as acknowledged by Weidmann's and Shelton's respective testimony that, in fact, including Tier C in the calculation for the percentage to be applied to the salary increases in 2017 would diminish the salary increases given to Tier A and Tier B employees and therefore not result in a dollar for dollar exchange and deliberately withholding this information from the Association during bargaining clearly constitutes bad faith bargaining on its part. Such bad faith cannot be condoned nor excused on grounds put forward by the County that the concept of a dollar for dollar exchange was simply unworkable with respect to its

calculation and implementation especially because the identical A1 provision was included in the agreements of thirteen (13) other bargaining units covering a total of approximately fourteen thousand (14,000) other employees. Such bad faith collective bargaining moreover cannot be supported by the County's claim it withheld this significant information from the Association at all times during negotiations because the Association never asked how the formula would be applied and implemented.

Contrary to the County's insertion of the term, **"all"** in the provision governing the salary increases to be disbursed in 2017, the final year of the four (4) year CR MOA and CM MOA, was intended to include Tier C employees, it is clear from the above exposition of what occurred in negotiations that the Association was blindsided by lack of candor on the part of the County by being led to believe the offset in 2017 would be implemented in the same way it had been implemented in past years, to wit, that the calculation of salary increases for Tier A and Tier B employees would be predicated on the exchange for whatever remained of the Employer Offset. Additionally, the County misled the Association into believing that no employee in its bargaining unit would receive less money as a result of implementing the Section A1 provision as written knowing full well at the time the provision was negotiated that the raise in salaries would not result in an even exchange dollar for dollar and that including Tier C employees in the overall calculation would, in fact, diminish the salary increases for Tier A and Tier B employees.

2. **Past Practice**

As far as the Association's understanding of the method utilized by the County to determine salary increases in the past, its only knowledge was predicated on the calculation associated with a given and revealed percentage Employer Offset scheduled to occur each year of a consummated collective bargaining agreement. As noted elsewhere above, Tier C employees were never a part of this calculation as Tier C employees first came into being the latter part of December, 2012 and additionally, were prohibited from receiving any offset by the passage of PEPRA. As testified to by

Shelton, the calculation performed by the County in 2013 and in prior years to determine the percentage increase in salary in exchange for the applied percentage Employer Offset differed from the calculation performed to determine the percentage increase in salary in exchange for the remaining percentage offset to be applied as a means of completely eliminating the offset at the expiration of the 2013-2017 Memorandum of Agreement. As such, there was no established past practice that supports the method utilized by the County to determine the percentage increase in salaries in exchange for the remaining percentage offset to be applied as a means of eliminating the offset altogether; more specifically, the inclusion of Tier C employees in the calculation. As further support for this finding of no established past practice, also noted elsewhere above, is the fact that the percentage increase in salary in exchange for the percentage offset to be utilized in ending the offset at the end of the fourth year of both the CR and CM MOAs was subjected to the negotiated terms set forth in Section A1 whereas, the exchanges that occurred in prior years were not governed by this specific contractual language.

3. Contract Construction

It is undisputed that the contract language of Section A1, the subject provision under scrutiny in this arbitration is positioned in both the CR MOA and the CM MOA under the Article heading, Employee Benefits and in particular, Section A1 under the heading, **Retirement Offset**. The opening paragraph of this Section states clearly and unambiguously that each employee shall contribute via payroll deduction retirement contribution in the amount appropriate to its Tier with the ***exception that the* County *will contribute a designated contribution rate on behalf of the General employee covered by this Agreement*** (not stated verbatim, emphasis by the Arbitrator). That language is followed by charts listing the percentage contribution the County is to make to the employees' retirement fund on behalf of the employees in each Tier, Tiers A and B for each year of the Agreement. This part of Section A1 also makes clear that the County will make no such retirement contribution on behalf of Tier C employees by

unequivocally providing that there is no offset applicable to Tier C. Section A1 continues by including the language comprising the disputed provision. Here in the very first sentence the disputed term **all** appears followed by the remainder of the sentence, "***employees shall receive a wage increase as an even exchange for the remaining offset elimination***. When reading this entire sentence within the context of the whole of Section A1, it becomes obvious that the disputed term cannot include Tier C employees given the fact at the beginning of Section A1, the only offset contributions to the retirement fund made by the County on behalf of employees are made only on behalf of Tier A and Tier B employees coupled with the precise language that there is ***"No Offset"*** for **Tier C**.

The one and only conclusion that can be drawn from the above discourse is that contrary to the County's position that the term **"all"** as set forth in Section A1 of Article 9 is inclusive of all three (3) Tier employees, is that when analyzed from just the perspective of contract construction, the term **"all"** applies only to Tier A and Tier B employees as they were the only employees subject to the Employer Offset.

In summation, the Arbitrator determines that based on the foregoing analysis of Bargaining History, Past Practice and Contract Construction, all three (3) analyses support the finding that the disputed term, *"all"* as set forth and construed within the entire context of Section A1, Article 9 does not include Tier C employees as so asserted by the County.

AWARD

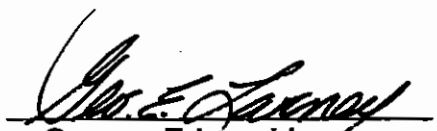
Based upon the findings set forth in the preceding Opinion section of this Opinion and Award, and with the authority vested in the Arbitrator by mutual agreement by the Parties to defer the Unfair Labor Practice complaint to binding arbitration (Ex.17), the Arbitrator determines that the County did not properly implement the Employer Offset Elimination provision, Section A1 of the 2013-2017 CR and CM Memorandum of Agreement thereby improperly denying Tier A and Tier B employees the percentage salary increases to which they were entitled to receive beginning June 9, 2017. Accordingly, the Arbitrator grants the following relief as requested by the Association and restated by the Arbitrator:

> **The County is directed, consistent with the language of the A1 provision as construed by the findings of this arbitration herein, to recalculate the Employer Offset Elimination by excluding Tier C employees from the calculation, applying the resultant outcome to Tier A and Tier B employees only and paid retroactively from June 9, 2017 until such time as the payment is effectuated.**

Additionally, the County is directed to meet its lawful obligation under the Meyers-Milias-Brown Act to meet and confer with the designated members of the Association pertaining to the matter of the recalculation.

The Arbitrator retains jurisdiction over this matter until such time as the recalculation of the Employer Offset Elimination is implemented. Consistent with the terms of the deferral agreement, Each Party to this arbitration is to pay one-half of the arbitration costs as provided for in the MOA.

GRIEVANCE SUSTAINED



George Edward Larney
Arbitrator

June 29, 2018