AMERICAN ARBITRATION ASSOCIATION

In the matter of:	)	
	)	
FRATERNAL ORDER OF POLICE, LODGE #4	)	
Officer Juanika Ballard and	)	
Officer Margaret Selby, Grievants	)	
	)	Case No. 16 390 00098 11
Union	)	
	)	Lois Hochhauser, Arbitrator
and	)	
	)	
BALTIMORE COUNTY GOVERNMENT, MARYLAND	)	
	)	
Employer	)	
	)	

Appearances:

Union Representatives: Michael Clash-Drexler, Esq.
Susan Sommer, Esq.
Michael Laufert, Esq.

Employer Representative: Jennifer Frankovich, Esq.

OPINION AND AWARD

I. Introduction

The demand for arbitration in this matter was filed) with the American Arbitration Association by the Fraternal Order of Police, Lodge #4 (Union or FOP herein) on behalf Officer Juanika Ballard and Officer Margaret Selby, Grievants. The Union charged that the Baltimore County Government (Employer or County herein) violated the terms of the parties' Memorandum of Understanding (MOU), a charge denied by the Employer. This Arbitrator was appointed to hear this matter on or about March 17, 2011.

Michael Clash-Drexler, Esq. represented the Union and Grievants. Susan Sommer, Esq., of Lambda Legal Defense and Education Fund, Inc.; and Michael Laufert, Esq.,co-counsel, also represented Grievants in this matter. Jennifer Frankovich, Esq., represented the Baltimore County Government. The representatives, as agreed upon by the parties, submitted written arguments and stipulations in lieu of an evidentiary hearing in a timely manner. They presented oral argument and addressed questions raised by the Arbitrator on September 26, 2011 at 400 Washington Avenue in Towson, Maryland.[1] In addition to the representatives, the following individuals were present at the September 26 proceeding: Juanika

[1]The Arbitrator commends the representatives on the excellence of their written and oral arguments.

Ballard; Margaret Selby; David Rose, FOP Lodge #4; Cole Weston, FOP Lodge #4; and Jordan Watts, Jr., Esq., Legal Director, Baltimore County Police Department. The record closed on September 26, 2011.

II. **Issues**[2]

Did Baltimore County violate the Memorandum of Understanding between the Baltimore County Administration and the Fraternal Order of Police, Lodge #4, July 1, 2010 - June 30, 2012 (MOU) when Baltimore County determined that Baltimore County employees who married same-sex spouses in jurisdictions that confer civil marriage between members of the same sex are not entitled to employee benefits granted by Baltimore County based on spousal status? If so, what is the appropriate remedy?

III. **Findings of Facts**

The facts in this matter are not in dispute and are stated by the parties in their Joint Stipulation of Issues, Facts and Exhibits.(Paragraphs 1-33). The Union is the exclusive bargaining representative for certain employees of the Baltimore County Police Department. Baltimore County is a chartered County in the Statement of Maryland, The Department is a unit of the County, which is the employer of bargaining unit members, including Grievants. The Union and the County entered into an MOU for the period from July 1, 2010 through June 30, 2012. The Agreement provides that bargaining unit members are entitled to certain benefits, including health and vision benefits for spouses; upon to 40 hours of annual sick leave if a spouse is ill; and bereavement leave with pay for the death of a spouse, stepchild or a spouse's immediate relatives.

Grievants are police officers and are members of the Union. In 2009, each Grievant married a same-sex spouse in a jurisdiction in which same-sex couples may legally marry. Each Grievant attempted to enrol her spouse for health insurance and obtain other benefits based on having a spouse. Grievants subsequently enrolled their spouses in the County's health benefits program and in August 2010, Baltimore County began deducting premiums from their paychecks reflecting spousal coverage. Grievant Ballard received a health insurance card for her spouse and was advised by her insurer that her spouse was covered. However, on August 23, 2010 both Grievants were informed that the County refused to provide coverage based on its conclusion that Grievants were not entitled to the same contractual benefits for their spouses since same sex marriages are not recognized in Maryland.

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[2]The issues were framed by the parties in their "Statement of the Issue". Joint Stipulation of Issues, Facts and Exhibits.

Grievant Selby filed her grievance on August 24, 2010 and Grievant Ballard initiated her grievance the following day.[3] The grievances assert that denial of contractual benefits to same sex spouses[4] violate the MOU, Article 4 of the MOU and is contrary to Maryland law. The grievances were denied at each level, and on December 6, 2010 were denied by the Country's acting Labor Commissioner.[5]

IV. **Relevant Laws, Regulations and Contractual Provisions**

A. Memorandum of Understanding between the Baltimore County Administration and the Fraternal Order of Police, Lodge #4 (July 1, 2010 - June 30, 2012)(JE-1)

> Article 4: Nondiscrimination - The provisions of this [MOU] shall be applied equally to all employees in this bargaining unit without discrimination as to age..., sex...marital status or membership in the Fraternal Order of Police. If relevant State or Federal law exists which deals with such discrimination, the standards contained in said statues shall apply.
>
> Article 8: Grievance Procedure (in pertinent part only)
> Section 8.3 Grievance Steps
> Step 4: ...The arbitrator shall have no authority to add to, detract from, alter, amend or modify any provision of this Memorandum of Understanding or any rules and regulations of any agency of this County...

B. Md. Code Ann., Fam. Law §2-201

Only a marriage between a man and a woman is valid in

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[3]Officer Ballard supplemented her grievance on January 14, 2011 to aid the claim that she was unlawfully denied paid bereavement leave which she requested following the death of her spouse's father.

[4]In this document, the term "same sex marriage", "same sex couple" and "same sex spouse" are limited to those same sex couples or spouses who entered into marriages in jurisdictions where it is legal for same sex couples to marry.

[5]The Arbitrator agrees with the County that the additional facts offered by the FOP, regarding Grievants' commendable employment history and particular situations, are not relevant and were not considered in reaching her decision in this matter. Baltimore County, Maryland and Baltimore County Police Department's Memorandum in Response to Grievants Juanika Ballard and Margaret Selby's Arbitration Complaint ("County Brief" herein), p. 3.

this State.

V. Positions of the Parties

The Union's position is that the Employer must provide the same contractual employment benefits to the spouses of Grievants. It contends that Maryland common law comity principles recognize an out-of-state marriage provided the marriage is valid in the jurisdiction where it took place. It points to the Opinion issued by Maryland Attorney General Douglas Gansler on February 23, 2010 which concluded that if presented with the issue, Maryland's Court of Appeals would "likely" recognize out-of-state same-sex marriages provided that those marriages were valid in the originating jurisdictions. (95 Op. Att'y, p. 4). It maintains that the Attorney General's opinion is entitled to "great weight and respectful consideration." *Read Drug & Chem Co. v. Claypoole*, 165 Md. 250, 257 (1933). The Union points out that a Maryland circuit court has since relied on the Opinion to allow a same-sex spouse to invoke spousal privilege authorized by law. *State of Maryland v. Snowden*, Case No. 21-K-11-45589 (Cir.Ct. Wash. County June 23, 2011). FOP argues that Maryland should look to New York which prior to legalizing same-sex marriages on June 24, 2011, was similar in its statutory and judicial approaches as Maryland, and recognized same sex spouses in a variety of instances, including extending insurance coverage. Memorandum in Support of Grievants' Arbitration Complaint ("Union Brief" herein), 12, ft. 9.

The Union maintains that pursuant to comity principles Maryland recognizes many types of out-of-state marriages that could not be legally entered into in the state. It points to the marriage of uncle and niece which although a criminal offense in Maryland, has been recognized by the State when entered into in a jurisdiction where it is legal for uncles and nieces to marry. *Fensterwald v. Burk*, 129 Md. 131 (1916). Maryland also recognizes common law marriages if legally established according to the laws of other jurisdictions although such marriages cannot be established within the State. *See, e.g., Mendelson v. Mendelson*, 75 Md. 486 (1988). The Union maintains that Maryland does not need to enact a law recognizing same sex marriages in order to afford the recognition, since to do so would diminish the comity rule. (Union Brief, 13). It also notes that although the Maryland General Assembly could enact legislation banning the recognition of same sex marriages, it has not done so, although such legislation has been introduced both before and after the issuance of the Attorney General Opinion in February 2010. (Union Brief, 14-15). In contrast, the Union notes that 40 other states have enacted laws denying recognition of same sex marriages.(Union Brief, 15-17). To put this issue in historical context, the Union notes that Maryland

added specific legislation when it prohibited interracial marriages in 1935. See Md. Ann. Code Art 27 §365. This, the Union argues, supports its position that same sex marriages do not violate Maryland public policy. Indeed, the Union notes that since the issuance of the Attorney General Opinion, Maryland now grants spousal leave for State employees for the purpose of paid sick leave, paid bereavement leave, and employee-to-employee leave donations; and the Board of Regents of the Maryland University System now includes same sex spouses within the definition of spouse.(Union Brief, 20).

The Union argues that it was not required to bargain for these benefits separately since it is not seeking a new benefit, but only the enforcement of a benefit to which these spouses are already entitled.(Union Brief, 22). It asserts that the County's failure to provide the benefits is a form of sex discrimination (since the benefits would have been provided to Grievants if they were males and married to females) as well as a form of discrimination based on marital status, both of which are prohibited by the MOU. (Union Brief, 23). According to the Union, it also violates Maryland State law which prohibits discrimination based on sexual orientation since the County is essentially providing benefits to spouses unless they are lesbian, gay or in a same-sex marriage. See Md. Code Ann., State Gov't §20-606.

The County's position is that Maryland law prohibits the recognition of same sex marriages, based on Md. Code Ann., Fam. Law §2-201 which states that "[o]nly a marriage between a man and a woman is valid in this State." Therefore, the County argues, even if the marriage of a same sex couple was performed in a jurisdiction in which that marriage is legal, it still is not entitled to recognition in Maryland. The County further argues that the FOP did not bargain for these benefits and therefore it is outside of the MOU and outside the scope of the Arbitrator's authority. Finally it contends that it is unclear if health care providers would authorize such benefits.

The Employer points out that the Attorney General's Opinion is an opinion, and not the law. It does not require adherence and there is no certainty that it correctly anticipates how the Maryland Court of Appeals would rule if the issue was before it. It cites a recent decision in which the local court concluded that same sex marriages are invalid under State law. *Nicole Brown v. Yvonne Keller*, Case No. 24-D-10-001660 (Cir. Ct. Balti City, May 27, 2011)

The County also argues that the Arbitrator is without authority to hear this matter. It notes that the Opinion, issued on February 23, 2010, preceded the May 25, 2010 completion of the

current MOU and that since the BCC Code, at Section 4-5-310 requires the parties to negotiate the terms and conditions of employment, it should have been raised as an issue by the Union during negotiations. The County argues that the Arbitrator has "no authority to add to, detract from, alter, amend or modify any provision of this [MOU] or any rules and regulations of any agency of the County" and that since benefits to same sex spouses are not included in the MOU, the issue cannot be considered by the Arbitrator. It cites the findings of Labor Commissioner Designee James Nolan in support of its position. (County Brief, pp. 8-9).

Finally, the Employer argues that the principle of comity is inapplicable to matters which violate the public policy of the state in which comity is sought. It asserts that comity will not apply to a foreign act which is inconsistent with or repugnant to State policy. It contends that recognition of same sex marriages is inconsistent with Maryland public policy and cannot be utilized. (County Brief, 13).

In its Reply Memorandum in Support of Grievants' Arbitration Complaint ("Union Reply",herein)Reply Brief, the Union argues that the MOU covers same sex spouses asserting that although the MOU does not define the term "spouse", the 2011 Benefits Enroll Guide, which took effect on January 1, 2011, defines a spouse as a person in a marriage that is "legally recognized in the State of Maryland." It further contends that the MOU does not exclude same sex spouses, and so the Arbitrator has the authority to utilize the plain language in the MOU. (Union Reply, 4). The Union, in fact, contends that if the Arbitrator excludes same sex spouses, she would be altering the MOU, which she is forbidden to do. The Union cites, *Balti Constr., LLC v. Mayor & City Council*, 161 Md. App. 388 (2005)(citation omitted)in support of its conclusion that in Maryland "parties are presumed to have contract mindful of the existing law." The Union argues that the County's claim that Section 2-201 is an "express legislative prohibition on the recognition of same-sex marriages violates the stipulation by the parties that there is no state in Maryland that prohibits the State's recognition of out-of-state marriages of same-sex couples. It contends that"[i]f all it took to trigger the [public policy] exception was inconsistency with Maryland law, there would be no recognition of common law marriages, which are prohibited in the state, or of uncle-niece marriages, which not only are prohibited but criminalized." (Union Reply, 22).

The Union maintains that the County's interpretation violates the MOU's non-discrimination clause which bars discrimination against gay and lesbian members as well as Md. Code Ann., State Gov't §20-901(a) which prohibits discrimination against a county employee based on sex, marital status and sexual orientation. (Union Reply, 8).

VI. **Analysis and Conclusions**

The parties present thorough and cogent argues to support their positions, and the Arbitrator will first address the major arguments of the parties.

First, with regard to the weight that should be given to the Attorney General Opinion, the Arbitrator concludes that it carries little weight. The Opinion responded to an inquiry of Richard Madaleno of the Maryland Senate asking if Maryland can recognize same sex marriages legally performed in other jurisdictions and countries. The Attorney General's opinion is "clearly 'yes'". (95 Op. Att'y, p. 4). However, the Attorney General cautioned that the opinion he was rendering was an opinion and not law:

> An Attorney General opinion is not itself the law of Maryland in the same sense as a statute enacted by the Legislature or court decision elaborating the common law or construing a statute. Rather it is an interpretation of the statutory or common law that can guide a client agency and may be persuasive to a court reviewing agency action based on the opinion...Thus, what we say in this opinion is a prediction, not a prescription as to how the Court would approach this issue under current law. (95 Op. Att'y, p. 4, ft. 1).

Although the Opinion does not carry the weight of law, it does present a thorough and thoughtful analysis of the law and advises the public on how the highest legal officer for the State anticipates the matter would be analyzed and decided by the Court of Appeals.

The second argument raised by the Union is that refusal to recognize Grievants' marriages violates Article 4 of the MOU which prohibits discrimination based on sex or marital status. The Arbitrator does not agree that this would constitute sex discrimination since benefits would have been provided to Grievants if they were men married to women rather than women married to women. She does not agree that it is discrimination based on marital status because it is based on lack of marital status, and neither party has raised the issue on opposite sex couples who seek benefits but are not married. However, Article 4 requires adherence to Stated and federal anti-discrimination laws. As the Union points out, Md. Code Ann., State Gov't § 20-606 prohibits discrimination based on sexual orientation. The County provides benefits to spouses unless they are in a same sex marriage which would identify spouses as gay or lesbian. Thus, the exclusion appears to violate the Maryland code barring discrimination based on sexual orientation.

The Employer raises the argument that the Arbitrator cannot address the issue pursuant to Article 8 of the MOU, since it is outside the scope of the MOU and she is barred from adding to the terms of the MOU. The Employer contends that the Union failed to raise the issue in negotiations and it was not considered when drafting the MOU. The Union counters the argument asserting the position that it did not need to separately negotiate the issue since it is implicitly included.

After carefully considering the arguments, laws and legal principles presented by the parties, the Arbitrator concludes that the recognition of same sex marriages legally entered into in another jurisdiction is not against the public policy of the State of Maryland. Article IV of the Constitution ensures that "full faith and credit" will be given to the public acts, records and judicial proceedings of another State. The reason for this rule of comity is to provide uniformity and, in the case of marriages, allow individuals legally married in one State to be considered legally married in another State. This forms the basis of the principle of comity. As stated in the Attorney General's Opinion:

> There are no formal prerequisites to recognition of an out-of-state marriage. Maryland courts observe "the general rule that a marriage valid where contracted or solemnized is valid everywhere, unless it is contrary to the public policy of the forum. (95 Op. Att'y, p. 11).

Maryland law states that only a marriage between a man and a woman is valid. *See,* Md. Code Ann., Fam. Law §2-201. The State, however, has never enacted a law barring same sex marriages. Other jurisdictions have specifically addressed the issue so as to obviate the need for any question or interpretation. *See, e.g.*, Arkansas Code §9-11-107 (2011(b) which, while recognizing marriages contracted outside of the jurisdiction states that "[t]his section shall not apply to a marriage between persons of the same sex." Colorado, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky and Louisiana are among those jurisdictions explicitly excluding otherwise valid same sex marriages from recognition. Maryland legislation, on the other hand, has been proposed but has failed to be enacted. (95 Op. Att'y, p. 44). This supports the conclusion that these marriages are not considered to violate public policy or otherwise warrant public prohibition.

Marriages that are prohibited in Maryland, such as common law marriages, are accepted as valid by the State if they were entered into legally in the jurisdiction of origin. Maryland has recognized marriages between uncles and nieces, even though such relationships would result in criminal prosecution, provided the marriages are valid in the originating jurisdictions. In his advisory opinion,

the Attorney General pointed out that polygamous marriages are legal in many more jurisdictions in the world than same sex marriages. He noted, however, that although Maryland has no law explicitly recognizing same sex marriages, it "provides significant recognition and support of same-sex relationships" while polygamous relationships "remain a crime and a basis for disqualifying an individual from certain inheritance rights." (95 Op. Att'y, p. 44).

Public policy is not static and determining what is repugnant is a fluid process. Both reflect the time in which the determination is made and the evolution of thought and law. Individuals who criticize interfacial marriages, which were once prohibited by law and repugnant in the State of Maryland, may now find themselves on the opposite side of the law, since even the articulation of that position may violate anti-discrimination laws. Another example of how the change of time shifts both public policy and the interpretation of law is the use of Maryland Criminal Law §3-322 which prohibits "unnatural or perverted sexual practices" and was relief on in the past to criminalize sexual practices between same sex couples. Courts no longer consider private, noncommercial sexual relations between same sex couples to violate the law and have specifically enjoined its use. *See, e.g., Williams v. Glendening*, No. 980363031/CL-1059, 1998 WL 965992 (Balti. City Cir. Ct. 1998).

The Arbitrator concludes that she has complied with Article 8 of the MOU in reaching her decision. Parties are not required to negotiate every specific word, and it is reasonable for parties to use the commonly accepted meanings of words and phrases. It is reasonable to this Arbitrator that when the Union negotiated the MOU, it assumed that the word "spouse" included same sex spouse, in light of not only the Attorney General Opinion, but the inclusion by other State agencies, stated in the Benefits Enrollment Guide and by courts of same sex spouses in any benefit or privilege available to opposite sex spouses. Either party could have questioned how inclusive the word "spouse" should be, but neither party did and it is unreasonable to penalize only one party when it acted from a reasonable perspective.

VI. **Award**

The relief sought by the Union includes: providing the "spousal health insurance benefits retroactively and with a waiver of any pre-existing condition or other exclusions that would not now apply had the County timely enrolled Grievants' spouses when coverage was first sought; retroactively granting Grievant Ballard the bereavement leave to which she is entitled, confirming that Grievants and their spouses are eligible for all spousal benefits under the MOU; and providing Grievants with "make-whole damages in an amount to be determined."

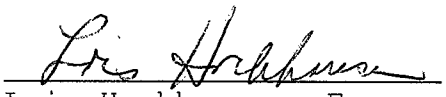
Based on a detailed review and analysis of the testimonial and documentary evidence as well as the arguments presented by the parties, the Arbitrator concludes that the grievance should be, and hereby is, granted; and she awards the following relief:

(1) The County shall provide spousal health insurance benefits to the spouses of Grievants; and shall either reimburse them for expenses incurred that would have been provided had such coverage been available when the application process been completed or, if permitted, make such benefits retroactive to that date.[6]

(2) The County shall pay Grievant Ballard for any unpaid leave she incurred for which she would have been entitled pursuant to the MOU.

(3) The County shall ensure that Grievant and their spouses are provided with all benefits as same spouses are entitled to receive pursuant to the MOU.

(4) The parties shall notify the Arbitrator by no later than December 15, 2011 if they want her to address the matter of "make-whole damages". If she does not hear from the parties by 5:00 p.m. on that date, she will assume they do not need her assistance to resolve that matter.



Lois Hochhauser, Esq.
Arbitrator

November 17, 2011

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[6]In this matter, Grievants sought and obtained health insurance benefits for their spouses, so the date of retroactivity is known. The Arbitrator is hesitant to direct the County to grant "a waiver of any pre-existing condition or other exclusions that would not now apply had the County timely enrolled Grievants' spouses when coverage was first sought" because in her experience that waiver is determined by the insurance provider and not the Employer. The Arbitrator can address this issue is the parties ask her to determine the "make-whole damages", but at this point, she believes that the relief ordered which provides reimbursement for any medical expense that would have been covered had coverage been provided in a timely manner addresses Grievants' request.