

IN THE MATTER OF THE GRIEVANCE ARBITRATION BETWEEN

Minnesota School Employees Association,
Union

and

BMS Case No. 08-PA0857

Independent School District No. 482, Little Falls,
Employer

NAME OF ARBITRATOR: Bernardine Bryant
Assistant Faith Latimer

DATE AND PLACE OF HEARING: March 27, 2008
Little Falls, Minnesota

BRIEFS RECEIVED: No written briefs

DATE OF AWARD: April 16, 2008

APPEARANCES

FOR THE UNION: Don Gilbertson, Field Representative
Greg Gardner, Field Representative
Janet M. Peterson, Food Service Manager
Mary Jo Morgan, former Assistant to the
Superintendent and Human Resources

FOR THE EMPLOYER: Patricia A. Maloney, Attorney
Tina Wheeler, Director of Food Services

INTRODUCTION

This is a grievance Arbitration between Minnesota School Employees Association (MSEA or Union) and Independent School district #482, Little Falls (District or Employer). MSEA represents Food Service Employees of District #482. In 2007 the District implemented a change in its policy regarding uniforms worn by Food Service Employees. This action was grieved in November 2007. The parties processed the grievance to Arbitration. The Hearing was held on March 27, 2008 in Little Falls Minnesota. The parties were in dispute on one jurisdictional issue, whether the grievance was timely filed, as well as the original dispute regarding uniform policy. Both issues were presented at hearing March 27. The parties had full opportunity to present evidence and examine witnesses. The parties chose to give oral closing arguments, and the record was closed March 27, 2008.

ISSUE

1. Was the grievance timely filed?
2. The parties having not agreed to the statement of the issue at the hearing delegated that responsibility to the arbitrator. On the basis of the evidence and testimony at the hearing, the issue to be resolved is as follows:
Did the Employer violate the Contract when it required employees beginning in fall 2007 to wear certain uniform shirts on the job, and deducted the cost of those shirts from the employees' clothing allowance?
If so, what shall be the remedy?

APPLICABLE CONTRACT PROVISIONS

From the Master Agreement between the parties effective:

July 1, 2005 through June 30, 2008

Article VIII Hours of Service

Section 8 Clothing Allowance

The District shall reimburse employees who have successfully completed the probationary period a maximum of one hundred and thirty five dollars (\$135.00) the second year of the contract for the cost of uniforms and appropriate work shoes to be worn on the job. Payment will be made by the District upon a receipt(s) of purchase from the employee. All employees shall wear a uniform on the job, as selected and provided by the District and in accordance with Internal Revenue Service guidelines. Employees shall have input into the selection of the uniform to be worn. The District will provide aprons for all cooks to be worn on the job.

Article IX Grievance Procedure

Section 1 Definitions

f. A grievance arises when the grievant knows or should have known of the events giving rise to the grievance. Failure to file a grievance within the time specified shall be deemed a waiver of the grievance.

Section 2 Level I

Within ten days of the time an alleged grievance arises, the grievant shall file with his/her supervising administrator, the "Employee Claim of Grievance". Within ten (10) days of such filing, the employee and the employee's supervising administrator shall meet and shall attempt to resolve the claim of grievance on an informal basis.

UNION POSITION

The Union argues the Employer made a unilateral change in the terms and conditions of employment when in 2007 it required the food service employees to purchase uniform shirts selected by the District. Prior to that time, the employees were required to wear shirts of the color designated for each day of the week. As long as the shirts were the correct color, employees were free to purchase a variety of non-uniform styles of shirt. They were then reimbursed for the cost of the shirts, upon submission of receipts to the District. Receipts were submitted twice per school year in November and May. Employees were reimbursed for any amount up to the contractual limit of \$135. Money spent on shirts was reimbursed in the same manner as that spent on pants and shoes used on the job.

The Union asserts a binding past practice existed with respect to the choice and purchase of shirts worn on the job. In support of its past practice argument, the Union maintains that the procedure outlined above was followed consistently since at least 2001. It was clearly understood by both management and the Union. Both the District Food Service Manager, Ms. Janet Peterson, and Former Assistant to the Superintendent, Dr. Mary Jo Morgan, testified there had been consistent practice in this area. In addition, each time the contract was bargained, the dollar limits for uniform allowances in Article VIII Section 8 were costed as part of the economic package. Therefore, employees relied on the uniform allowance as part of their negotiated benefits.

The Union argues that regardless of the details of the language in Article VIII Section 8, the uniform procurement process outlined above, in essence became a term and condition of employment. If the Employer wished to change that process they were obliged to negotiate the change.

During the spring of 2007, the Union was in discussion with the Employer concerning the uniform policy at issue in this case. Union Business Representative, Don Gilbertson, expressed the Union position in letters dated April 9, May 23, and May 30, 2007 to District Director of Food Services, Tina Wheeler and District Chief Financial Officer, Nancy Henderson.

In a letter to Ms. Wheeler dated April 9, 2007, Mr. Gilbertson stated in part:

“It is my understanding that the District is considering making a unilateral change in the application of the language contained in Article 8, Section 8 of the Agreement between MSEA and ISD #482.

It is the Union’s position that:

1. Any change in procedures for reimbursement of uniform items is a negotiable issue and must be negotiated by the parties.
2. Any change in the practice of allowing style selection by the individual employee is also a negotiable issue; as it has been an accepted practice since January 2001 to allow individual style choice by each employee....(Employer Ex 6)

In addition, further correspondence continued:

“The Union maintains that a unilateral change in how the uniforms are provided to employees of the unit must be negotiated with the Union as a *term and condition of employment...*” and “It is important to note here that the actions taken by the individuals within the Unit should not be taken as any agreement with all of the conditions stipulated in your 4/24/07 memo...Specifically, the Union believes that the cost of the new styles is a subject of bargaining between the parties, and as of yet remains unresolved.”.... (Employer Ex 11 and 13).

Throughout the latter part of the 2006-07 school year the Union was still advocating that the District not implement the uniform policy change. When these efforts failed and bargaining unit members were harmed by the deductions for the new uniform shirts from their uniform allowance in November, the Union filed a grievance.

The Union asks as remedy in their written grievance that employees be made whole for the cost of the uniform shirts by crediting that amount back to the employees’ allowances.

EMPLOYER POSITION

The Employer argues first that this grievance be dismissed as untimely. The grievance was not filed until November 7, 2007. This was about seven months after the Union became aware the Employer was changing the requirements concerning uniform shirts. Therefore, the Union failed to meet the 10 day time limit set forth in Article IX of the contract, Grievance Procedure.

With respect to the merits of the grievance, the Employer argues its actions concerning employee uniforms complied fully with the contract. Director of Food Services, Tina Wheeler, testified that the Employer wanted to change to a more consistent uniform for food service employees. She believed the uniform shirts would have a more professional appearance, and more readily identify those who work in food services. She contacted a uniform vendor. In late March or early April 2007 Ms. Wheeler brought sample uniform shirts to a staff training to show employees, and to get their input on style and color preferences. She later distributed order forms to employees. She testified that because she understood this was a change of policy, she accommodated employees by permitting them to 'carry over' money from the previous year's uniform allowance, if any remained. After receiving input from employees, she ordered the shirts in accordance with the order forms the employees filled out as to size, color, number and collar style. By ordering the shirts in bulk the District got a price discount. Each shirt cost between \$10.20 and \$12.75 depending on size and collar style. The District paid for the logo on each shirt. The employees were also given the opportunity to order the shirts themselves, which none of the employees chose to do. (Testimony of Ms. Wheeler and Employer Exhibits 7-9, 12, 13, 15 and 17)

The Employer asserts the contract language grants it the right to select employee uniforms, with input from employees. The Employer has the right to require appropriate uniforms be worn on the job, and to deduct the cost of such uniforms from the employees' uniform allowances. The Employer further argues that the language in Article VIII Section 8 is entirely clear and unambiguous:

“The District shall reimburse employees who have successfully completed the probationary period a maximum of one hundred and thirty five dollars...for the cost of uniforms and appropriate work shoes to be worn on the job...All employees shall wear a

uniform on the job, as selected and provided by the District...Employees shall have input into the selection of the uniform to be worn..." (Employer Ex 5)

Therefore, the Employer argues the question of past practice is not relevant in this case. Its actions complied with the plain contract language.

ARBITRATOR DISCUSSION AND OPINION

Timeliness Issue

The initial dispute to be addressed is the Employer's argument regarding timeliness. The formal grievance in this case was filed in November 2007, while the Union was aware of the Employer's 'uniform policy' change in spring of 2007. However, details of the events prior to the grievance filing are relevant to the question of timeliness. In April 2007 Field Representative, Don Gilbertson sent a letter to the District's Food Service Director, Tina Wheeler stating in part as follows:

It is my understanding that the District is considering making a unilateral change in the application of the language contained in Article 8, Section 8 of the Agreement between MSEA and ISD #482.

It is the Union's position that:

1. Any change in procedures for reimbursement of uniform items is a negotiable issue and must be negotiated by the parties.
2. Any change in the practice of allowing style selection by the individual employee is also a negotiable issue: as it has been an accepted practice since January 2001 to allow individual style choice by each employee....

If the District wishes to bargain the issues please let me know, otherwise I will expect no changes in the application of Article 8, Section 8. (Employer Exhibit 6)

This letter was followed by other communication between the Union and the District. The District voiced its view that the uniform policy did not require negotiation, and the Union voiced its view that it was a negotiable item. This communication included Mr. Gilbertson informing the District on May 23, 2007 the Union intended to file a grievance on the issue if it was not resolved by bargaining. In a letter of May 30, 2007 to Ms. Wheeler from Mr. Gilbertson he stated that the employees would make size and style selection as requested by the District, but that "the Union believes that the cost of the new styles is a subject of bargaining between the parties, and as of yet remains unresolved." (Employer Ex. 11 and 13)

It is clear from the above correspondence that the Union did not ‘sit on its rights’ during the spring of 2007, but, in fact, articulated clearly that it thought the Employer had an obligation to bargain the issue, and continued to voice its objections while the uniform ordering process ensued. It is also clear there were two disputed parts of this policy. The first was the degree of choice employees were given regarding what to wear on the job. The second was the deduction of money from employees’ allowances. When the argument described above failed to be resolved, the District implemented the second part of the policy, deduction of money from employee clothing allowances. The Union argues that the action of the District in November 2007 when it deducted the cost of the shirts was the point when damages were suffered by the employees, which then triggered the formal grievance.

The Arbitrator is persuaded the two parts of this dispute are not separable. The Union clearly objected to the Employer’s actions regarding the uniforms, and attempted to dissuade it from fully implementing the policy. After these attempts failed, the November action, which allegedly caused monetary loss, was grieved in a timely fashion.

Therefore, the grievance is ruled to be timely and analysis will proceed to the substance of the dispute.

The Union asserts, first, that the language at issue is ambiguous. Second, it argues that the procedure used in the past for employees purchasing their own work clothing with later reimbursement from the District was consistent and well understood enough to constitute a past practice, superceding the written contract language.

Field Representative Gilbertson stated at the hearing that he believes the language in Article VIII Section 8 is ambiguous, in that it ‘has not been updated correctly’. In support of this assertion, Dr. Mary Jo Morgan, former Assistant to the Superintendent, testified that the wording of the second and third lines of that paragraph contain a clerical error. She stated that because of a computer “crash” and ensuing problems following negotiations for the 2003-2005 contract, the reference to the clothing allowance for the first year of the contract was accidentally left out when it was redrafted. Therefore, the phrasing in the 2001-2003 agreement “a maximum of one hundred and twenty five

dollars (\$125.00) the first year of the contract” was not meant to be deleted from the 2003-2005 agreement. The error was apparently repeated in the current contract. Dr. Morgan’s testimony was credible and undisputed by the Employer.

The Arbitrator concludes that the \$125.00 allowance for the first year of the agreement does belong in Article VIII Section 8 of the current agreement. Since the Employer administered the clothing allowance as if that language was included, the discrepancy was not noted in this grievance, and no corrective action by the Arbitrator is required with regard to that clerical omission.

Other than the clerical omission, the Union presented no evidence or testimony in support of its argument that the contract language is ambiguous. Rather, it argued that despite the written contract language, employees have always selected their own shirts to be worn on the job. Ms. Janet Peterson, District Food Service Manager, testified that there had been a ‘gentlemen’s agreement’ to that effect. Ms. Peterson testified that the District’s only concern about uniforms was that the correct colors be worn each day at all the schools.

Ms. Peterson’s testimony regarding the consistent practice for how shirts were selected and paid for was clear and credible. In fact, the District Food Services Director’s testimony did not contradict the Union’s assertion about what the practice had been. She testified she was aware of the fact that the new uniform policy was a change for employees from prior years.

However, the evidence about past practice is not relevant to the threshold question; is this contract language unambiguous?

Since the parties agreed at the hearing that the reference to Internal Revenue Service guidelines is not in dispute, that reference is re-dacted here. The language in the contract for the contract years 2001-2003, 2003-2005, and 2005-2008 that was originally negotiated in the 2001-2003 contract reads as follows:

“All employees shall wear a uniform on the job, as selected and provided by the District.....Employees shall have input into the selection of the uniform to be worn. The District will provide aprons for all cooks to be worn on the job.”

These words are clear and easy to understand. Arbitrators generally recognize that the most reliable source of intent and purpose of a contract provision are the words the parties chose and expressed in the written agreement. There may have been prior understandings as to what employees could decide, but those conversations did not translate to the clear contract language that was written into the agreement in 2001-2003. During the 2001-2003 negotiations the language at issue was changed. It changed *from*: “All employees shall wear a uniform on the job, as selected by the District and the employees.” *to the following*: “All employees shall wear a uniform on the job, as selected and provided by the District.....” There was no evidence presented by the Union to support the proposition that these words are not clear and unambiguous or that the parties did not intend to include in the contract the plain meaning of these words. When contract language is clear and unambiguous arbitrators are generally not persuaded to change the explicit terms of the contract.

Dr. Morgan testified that although the language was changed in the 2001-2003 contract, the practice regarding uniforms/work clothes did not change. She further testified that the District always believed it had the right to choose uniforms, but had never overruled the employees’ choice of styles in the past. This testimony is consistent with Ms. Peterson’s testimony. Prior to 2007, the practice had been consistent to permit employees to choose their own shirts. The Employer from the 2001-2003 contract to 2007 had not chosen to exercise its authority to select employee uniforms. In *Ford Motor Company*, 19 LA 237,241-242 Arbitrator Harry Shulman stated, “...A practice may be choices by management in the exercise of managerial discretion as to the convenient methods at the time. In such cases, there is no thought of obligation or commitment for the future. Such practices are present ways, not prescribed ways of doing things.” In this case, the evidence and testimony is clear that the District did not intend to give up its right to use its authority specifically given to it by the contract language negotiated in the 2001-2003 agreement.

Finally, although uniform selection authority was spelled out in contract, the Employer recognized that exercising this authority was a change from how selection was done in the past. Arbitrator Dunua in *Mead Corp* 43 LA 661,663 emphasized that the

party changing a prior method do so clearly so as to eliminate any mistaken reliance on continuation of a practice.

The record is clear that in the spring of 2007 the Employer put the employees and Union on notice that the system for selecting uniform shirts would change for the 2007-08 school year. There was correspondence between the Union and District managers about the issue. The District was cognizant of the potential increased cost to the employees and made accommodations to help reduce the cost of the shirts the employees would have to incur. Ms. Wheeler spoke to employees about the changes and brought sample shirts for employees to get their input prior to ordering. Therefore, employees and the Union were given fair notice of the Employer's decision to begin implementing its contractual right.

DECISION AND AWARD

The Arbitrator finds the contract language to be clear and unambiguous.

The grievance is denied.

Bernardine Bryant, Arbitrator

Date April 16, 2008