

IN RE ARBITRATION BETWEEN:

**AMERICAN FEDERATION OF STATE COUNTY AND MUNICIPAL EMPLOYEES,
AFSCME COUNCIL 65**

and

MARTIN COUNTY

DECISION AND AWARD OF ARBITRATOR

BMS 08-PA-1211

JEFFREY W. JACOBS

ARBITRATOR

June 9, 2008

IN RE ARBITRATION BETWEEN:

AFSCME Council 65,

and

DECISION AND AWARD OF ARBITRATOR
BMS Case # 08-PA-1211
Part time grievance

Martin County.

APPEARANCES:

FOR THE UNION:

Teresa Joppa, Attorney for the Union
Jo Eastvold, Business Representative
Deb Lutz, grievant
Kari Buntjer, grievant
Teresa Tieman, Payroll Clerk, Union Steward

FOR THE COUNTY:

Scott Lepak, Attorney for the County
Scott Higgins, County Coordinator
Rebecca Bentele, Victim/Witness Coordinator

PRELIMINARY STATEMENT

The hearing in the above matter was held on May 14, 2008 at the Martin County Courthouse in Fairmont, Minnesota. The parties presented oral and documentary evidence at which point the hearing record was closed. The parties waived post hearing Briefs.

ISSUE PRESENTED

Did the Employer violate Article 17 of the parties' collective bargaining agreement when it refused to grant merit pay increases to two part time employees? If not, what shall the remedy be?

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement covering the period from January 1, 2007 through December 31, 2009. Article VII provides for submission of disputes to binding arbitration. The arbitrator was selected from a list provided by the State of Minnesota Bureau of Mediation Services. At the hearing the parties stipulated that there were no procedural or substantive arbitrability issues and that the matter was properly before the arbitrator.

UNION'S POSITION:

The Union's position was that the County violated the contract when it failed to grant merit pay step increases to two part time employees on January 1st, of each year. In support of this position the Union made the following contentions:

1. The Union asserted that this case, a companion case to *AFSCME Council 65 and Martin County*, BMS # 08-PA-0952, is about when the part-time employees are eligible for a step increase pursuant to Article 17.4 and pointed to Article 17.4 that provides in relevant part as follows:

17.4. All employees shall receive a performance evaluation by their supervisor annually. On January 1st each year employees who are eligible will receive a step increase based upon the performance evaluation as well as the position in the range and upon recommendation of the employee's supervisor, and final Board approval. In a reasonable time frame following the Board's decision Employees of this group will be notified no later than December 31.

2. The Union asserted that the two affected part time employees are excellent performers and that their evaluations show that they have earned merit increases. Ms. Lutz' evaluation from December 2007 shows an overall performance evaluation of 4.75 on a scale up to 5, which is of course an excellent mark. See Union exhibit 1. Much the same can be said for the other part time employee, Ms. Buntjer. Her evaluations all show consistently outstanding performance and ratings of 4's and 5's in many areas. See Union exhibits 3, 4, 5, & 6.

3. The Union argued that the County cannot now arbitrarily impose a requirement that the part time employees work an equivalent to 2080 hours before getting a step increase. This is not found in the collective bargaining agreement and in fact that language makes it clear that all employees are to be evaluated and are eligible for step increases on January 1st of each year.

4. The Union argued that the County Board cannot simply abrogate clear contract language under the guise of the "board discretion" language found in that same article nor can it add a provision requiring 2080 hours worked where none is found. The essence of the Union's argument is that the part time employees are to be eligible for merit increases at the same time everyone else is.

Accordingly the Union seeks an award of the arbitrator granting the part time employees merit pay step increases effective January 1st of each year.

COUNTY'S POSITION

The County's position was that there is no limitation on the right of the County to determine that part-time employees must work the equivalent of 2080 hours before being eligible to receive a merit pay increase. In support of this position the County made the following contentions:

1. The County's arguments here were similar in nature to the assertions made in the companion case referenced above, *AFSCME Council 65 and Martin County*, BMS 08-PA-0952. The County argued that there is again no definition of the employees who are "eligible" found in Article 17.4. Thus, the zipper clause found at Article XVIII as well as the management rights clause reserve to the Board all decisions about the workforce except those specifically limited in the agreement. The Management Rights clause, Article V, provides in relevant part as follows:

The Union recognizes the prerogative of the Employer to operate and manage its affairs in all respects in accordance with its management rights, existing and future laws and regulations of the appropriate authorities. The prerogatives or authority which the Employer has not officially abridged, delegated or modified by this Agreement are retained by the Employer.

2. The County argued that Article 17.4 requires that all employees get evaluated but it does not provide that they must get step increases nor does it specify when that is to happen.

3. Further, Article 17.4, as in the companion case, provides that all step increases are subject to Board approval. Here the board has indicated that employees are to work full time equivalent of 2080 hours before they are eligible for a step increase. There is nothing in the agreement that limits that right nor any specific language requiring otherwise. Therefore there is no contract violation since there is nothing in the contract limiting the inherent management right to establish this policy.

4. Moreover, there were no part time employees working for the County when the current agreement was negotiated so there could not have been any implicit contractual intent to somehow provide for a step increase for them at any particular time.

5. Further, the County argued that there cannot be any binding past practice given the apparent mistake in granting merit pay increases at the improper time for one of the part time employees, Ms. Buntjer. As County exhibit 3 shows, there was a mistake but that has not been rectified to place her back on a 16-month schedule for step increases. None of the element of past practice is present. There was no mutuality or acceptability in this “practice.” It was not longstanding, since it happened once and it was not consistent, since it only occurred with regard to one employee.

The Union seeks an award of the arbitrator sustaining the grievance and requiring that the part-time employees be declared eligible for merit pay increases on January 1st of each year.

DISCUSSION

The facts were straightforward and for the most part undisputed. There was considerable discussion about an apparent error made by the County at one point with respect to the merit increases for Ms. Buntjer and whether that action constituted some sort of binding past practice. On these facts it did not and these facts did not merit much discussion other than to mention them in passing.

Ms. Buntjer works 30 hours per week and the County took the position that she would thus have had to work 16 months to gain full time equivalency of 2080 hours. She should have been granted merit increases every 16 months. See County exhibit 3. She was not and the error was discovered and corrected. The Union did not raise a serious past practice argument here though and rested its case on the language of Article 17.4.

As in all cases of contract interpretation the determination of what it means starts with the language itself. As noted above, the facts presented here did not lend themselves to a past practice analysis for the reasons stated by the County's representative at the hearing. The apparent "error" made by the County in and of itself would not rise to the level of a binding practice. The issue here is whether there was an error at all in granting merit pay increases to part time employees based on 2080 equivalency and requires a determination of whether the County is required under the provisions of Article 17.4 to grant part time employees merit increases on January 1st of each year.

The question however is whether there is a provision allowing, or rather disallowing, a further requirement that the employees work 2080 before being eligible for a step increase. Once again the question of who are the "employees who are eligible" as that term is used in this language.

The Union asserted that the clear implication of the language is that all employees are to be evaluated annually and that the essence of the language when taken as a whole means that the employees are to be evaluated for step increases by December 31st of each year. The Union also asserted that there is no language at all requiring that an employee work 2080 hours prior to being eligible for a step increase and that the remainder of the language clearly demonstrates an intent that all employees will receive a step increases.

The County argued just the opposite based on the very same language. That is to say that there is in fact nothing in the agreement requiring when an employee is to receive a step increase since it is always subject to Board approval. Here the Board determined that in order to get a step increase one must work 2080 hours prior to being eligible for step increases. Since there is nothing contrary in the agreement nor any language limiting that right, the Board has every right to impose that requirement under the theory that everything vests in management except those matters which are specifically limited by the express terms of the labor agreement.

Once again too, this is a thornier question than it would first appear. There is nothing in the agreement regarding 2080 hours. Further, it is clear that the topic of part time employees did not arise in the bargaining for this agreement since there were none employed by the County when it was negotiated. There is no practice that would aid in the determination so the inquiry is limited to the terms of the language itself and nothing more.

It is axiomatic in labor relations that the terms of the written contract are somewhat sacrosanct and must at times be read as a statute would. They must also be read as a whole so as to be able to determine their meaning in the context of the entire agreement.

The first sentence of Article 17.4 clearly requires that all employees, not just the full time employees, receive a performance evaluation annually. Further the language clearly implies that the evaluation will be done prior to January 1st of each year and that the affected employee will be notified of the decision regarding step increases no later than December 31. There seems to be no dispute about that requirement.

The question is who is eligible for the step increase. Whereas the companion case was about whether an employee can advance beyond step 12 subject to the Board approval, this case is about when an employee is eligible for a step increase. Reading the language as a whole and giving effect to the entire section it is clear that the contractual language as expressed by its terms is that eligibility is not determined by the number of hours worked. As noted the first sentence requires that the performance evaluation *shall* be done annually. The second sentence requires that on January 1st each year employees who are eligible will receive a step increase based upon, among other things, “the performance evaluation,” which clearly refers to the annual performance evaluation mentioned in the first sentence.

Eligibility thus is apparently to be determined on January 1st of each year, not after a certain number of hours are worked by the employee. Having said that however, the rest of the language of Article 17.4 still applies and the final approval for the step increase rests with the Board as noted in the companion case. While the Board cannot arbitrarily impose a 2080-hour requirement in the face of clear contractual language requiring an annual performance evaluation, it still does retain the final approval on the step increases; just as the language states.

The Board retains in this language the right to determine whether a step increase is to be granted just as the supervisor has the right to recommend whether such an increase would be granted. As noted in the companion case, the question of whether an employee can go above step 12 is also reserved with the Board. However, this language requires that all employees be at least eligible for a merit may step increase on January 1st of each year based upon the performance evaluation as well as the position in the range and upon recommendation of the employee's supervisor and final Board approval. It should be noted that the arbitrator does not have the authority to require step increases in any particular case since that is reserved to the supervisor and the Board as set forth above. The question of when the part time employees were eligible for such increases is the sole issue determined in this matter.

AWARD

The grievance is **SUSTAINED** as set forth above

Dated: June 9, 2008

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Jeffrey W. Jacobs, arbitrator