

IN RE ARBITRATION BETWEEN:

UNIVERSITY OF ST. THOMAS

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 120

**SUPPLEMENTAL DECISION AND AWARD ON REQUEST FOR CLARIFICATION
FMCS CASE # 070617-57235-3**

JEFFREY W. JACOBS

ARBITRATOR

July 7, 2008

IN RE ARBITRATION BETWEEN:

University of St. Thomas,

and

DECISION AND AWARD OF ARBITRATOR
FMCS CASE # 070617-57235-3
Grievance matter

Teamsters Local 120.

APPEARANCES:

FOR THE UNION:

Martin Costello, Hughes & Costello
Katrina Joseph, Hughes & Costello

FOR THE UNIVERSITY:

Phyllis Karasov, Moore, Costello & Hart
Martin Kappenman, Moore, Costello & Hart

PRELIMINARY STATEMENT

The Decision and Award on the original grievance was rendered on January 21, 2008 reinstating the grievant with full back pay and accrued contractual benefits. The Union raised several issues with respect to the back pay award as well as other benefits the Union and the grievant claim she is owed pursuant to the original Decision and Award. The parties waived an evidentiary hearing and agreed to submit the matter on written Briefs only. The parties' Supplemental Briefs were received by the arbitrator on May 23, 2008. The parties' respective Reply Briefs were received on June 13, 2008 at which point the record was closed.

ISSUE PRESENTED

1. What amount of overtime is owed to the grievant, if any?
2. Did the Employer properly charge the grievant for insurance premiums for insurance policies while she was terminated?
3. Is the grievant entitled to bid on a position at the O'Shaughnessy Educational Facility that became available while she was terminated?

UNION'S POSITION:

The Union took the position that the grievant is entitled to some \$11,633.90 in overtime that the grievant would have worked had she not been terminated in this matter. The Union further contended that the grievant should not have been charged for insurance premiums for insurance she did not have and could not have used during the period of her termination. Finally, the Union took the position that during her termination a position came open that she could have bid for and, since she was senior to the person who eventually got it, would have been awarded the job. In support of this position the Union made the following contentions:

1. With regard to the back pay issue the Union noted that the original award read as follows:

Accordingly, the grievant is to be reinstated within 5 business days of this Award and shall be made whole for all lost back pay, less any unemployment or other government compensation, wages earned or other salary or compensation for working she may have received in the interim, along with full contractually accrued benefits including but not limited to any seniority benefits.

2. Based on this language the Union contends that the grievant is entitled to payment not only of her regular salary but also any overtime she would have been eligible for during the period of her termination. This amounted to some \$11,633.90 and would have entailed 348 hours of overtime.

3. The Union argued that the grievant worked as much overtime as she could prior to her termination and that there was no reason to believe she would not have bid on and been awarded the same amount of overtime as before.

4. The Union argued that the purpose of a "make whole" remedy is to place the person in at least as good a position as they would have been in had the improper termination not occurred.

5. The Union asserted that arbitral precedent supports such a remedy and that here; the amount of overtime is not speculative or arbitrary since it is based on the overtime worked by the person immediately junior to her.

6. The Union further contends that the grievant's long work record and history of working considerable overtime, as set forth in her wage records for several years prior to the termination make it obvious that simply paying her straight salary doesn't make her whole. She would have worked at least as many hours of overtime as did the junior person to her.

7. With respect to the health insurance premiums, the Union's claim is quite straightforward: the grievant was charged for health insurance that she could not have used and never did use. The grievant was forced to let her insurance lapse during her termination since she did not have the funds to pay for it. Fortunately, she did not have any health issues during this time but certainly could have.

8. The Union argued that when the University paid her the back pay some \$3,291.1 for health insurance, \$632.83 for dental and \$748.34 for life insurance was deducted from that back pay award. She never used either the dental or health insurance. The Union argued that it is manifestly unfair and a failure to comply with the back pay award herein to charge her for premiums for insurance she never had and could not use. Indeed had she been forced to undergo treatment; it is unlikely or even impossible for her to go back now and get the health or dental insurer to pay for that treatment. Accordingly, the Union seeks an award ordering the reimbursement of the health and dental insurance premiums as set forth above.

9. With regard to the open position, the Union claims that a job at the O'Shaughnessy OEC came open during her termination that she would have bid on had she been working. This was a position that had better hours and was regarded as a preferable job. The person who got the job was junior to the grievant. The Union argued that had she been there she could have and would have bid on that job and been awarded the position. She should thus be allowed to bid for that position.

10. The Union countered the claim that such a bid would be prohibited by policy and asserted that she did not want the job at Murray Herrick Hall but rather at O'Shaughnessy, where her sister would not have been her supervisor. The person who got that job is junior to the grievant and the grievant would thus have been awarded the job

The Union seeks an award for \$11,633.90 in additional back pay for lost overtime, ordering a refund to her for the dental and health insurance premiums deducted from her back pay and ordering the Employer to permit the grievant to bid on the OEC facility position.

UNIVERSITY'S POSITION:

The University's position is that it has discharged all of its obligations under the original decision and award. It paid the grievant full salary and treated her as if she had not been terminated with regard to health/dental insurance by deducting and paying to the insurers both the University's and the grievant's share of those premiums. Further, the University argued that the grievant would not have been eligible for the opening at OEC and would not have been awarded that position under any circumstances. In support of this position the University made the following contentions:

1. With regard to overtime, the University contends that a make whole remedy does not typically entail payment of overtime that was not worked. There was further no evidence adduced at the original hearing as to how much overtime she would have worked and no actual claim for overtime made there. All that was requested and awarded was "back pay."

2. The University argued that back pay is in fact typically regarded as the salary to which the employee would have been entitled had they stayed working. Here all back pay was paid in full immediately in compliance with the arbitrator's original decision in this case.

3. The University asserted too that the arbitral precedent cited by the Union is misplaced and cited Elkouri and noted that most arbitrators reject overtime payments where the amount is too speculative. The University noted that there is a substantive difference between mandatory overtime and voluntary overtime in those awards and comments. Here all overtime was voluntary. Thus, any award of overtime would be completely speculative and without factual basis.

4. Moreover, the University asserts that the Union's comparison to the junior employee who worked 348 hours of overtime is misplaced factually as well. That employee worked a different shift and some of the hours he worked as overtime for him were actually during the grievant's regular shift. Certainly an employee cannot be paid for regular hours and then overtime hours for the same hours.

5. With regard to the health and dental premiums, the University argues that they treated her as if the termination had not occurred and properly deducted these premiums from the back pay. Had she stayed working those would absolutely have been deducted from her paychecks pursuant to the labor agreement.

6. The University argued that the fact that she had no claims during this time is a red herring. The University first noted that while she claims to have needed medical treatment but deferred it due to not having insurance no evidence was ever shown to this effect. Further, the fact that she did not use it does not alleviate the obligation to pay for it. Indeed, the University asserted, if a person could simply go back retroactively and claim a refund of premiums simply because they had no need for treatment would undermine the entire system of health insurance.

7. Here too, the University argued that it paid its share of those premiums pursuant to the arbitrator's original order. To allow the grievant a refund of her share would be to grant her a windfall that is neither appropriate nor called for in the award or in arbitral precedent. Insurance premiums must be paid whether a claim for treatment is made or not.

8. With regard to the claim to allow a bid to an open position the University first noted that the job to which the grievant refers is not a job she could even have had. The University has an anti-nepotism policy that is strictly enforced that prevents a person from being supervised by a family member. The grievant was reinstated to her former position at Dowling Hall but wanted to be reassigned to a position in Murray Herrick Hall where she would have been supervised by her sister, a scenario prohibited by policy.

9. The University further claims that the grievant would have been supervised by her sister at either of these two jobs, i.e. Murray Herrick or O'Shaughnessy. In either case a bid into that position would have been prohibited by policy and the express terms of the labor agreement reserving to the University the right to determine qualifications for positions as set forth in Article Two Section 2 & 2(a) and Article Fourteen, Management's Rights.

The University seeks an award of the arbitrator denying the grievance in its entirety.

DISCUSSION

OVERTIME ISSUE:

The essence of the Union's claim for overtime is that the grievant has a long history of working overtime and that she certainly would have worked considerable overtime had she stayed employed. The Union claims that she missed out on some 348 hours of overtime and asserted that the person junior to her did work those hours and that this is a proper measure of the amount of overtime she would have worked.

The University raised the specter that the comparison on a factual basis may not be all that accurate by asserting that the junior employee worked a different shift. Thus his overtime hours may well have conflicted with the grievant's regular schedule in some cases thus obviating any possibility of overtime hours. Further, the University argues that none of the overtime is mandatory and distinguished the cases where overtime is made a part of the back pay award on that basis.

Trying to divine what amount of overtime would have been worked where it is voluntary is always difficult at best and highly speculative at worst. Certainly the grievant's record shows a desire to work overtime hours and it is certainly true that she probably would have worked some overtime had she not been terminated here.

However, several things militate against an award of overtime in addition to the back pay already awarded. First, it is speculative as to how much overtime she would have worked even if there were no factual dispute about whether she could have worked overtime as compared to the one junior employee who did. This is especially true where the overtime claimed is voluntary and not mandatory. Arbitration awards must be based on something other than a guess. While it is clear she likely would have worked some overtime, it is not possible to say now whether she would have or even could have worked all the hours claimed. To pluck a figure out of the air would be to do exactly that – pluck a figure out of the air.

Second, there is an apparent factual dispute here over whether the hours claimed to have been available to work overtime even would have been truly available to her. Without an evidentiary hearing to explore these facts it simply wasn't possible to determine on the written record what hours would have been available and which would not. The parties were given the express opportunity to hold an evidentiary hearing and both declined representing that the issues could be determined on a set of written Briefs. Even though the parties attached various documents to their Briefs there was no chance to delve into these for accuracy or materiality or even foundation. Without that, while the documents were taken at face value, it simply does not overcome the concern that an award of overtime hours that might have been worked is too speculative to be sustained. Accordingly, this request must be denied.

DENTAL AND HEALTH INSURANCE PREMIUMS:

The essence of the Union's claim here is that the University should not have deducted dental and health insurance premiums from the back pay award since the grievant never had it during her termination and could never have used it. Initially, this argument holds some appeal but fails when more closely examined.

First, there is merit to the University's claim that it paid its share of the premiums to the health insurers and to refund the money paid for the grievant's share would be to grant her a windfall. Second, the claim that she would have made certain claims for medical treatment and prescription medications is again somewhat speculative. There was no evidence introduced on this point either at the hearing or in this proceeding and it was simply not known what the grievant would have treated for if she could have.

Finally, there is also merit to the University's argument that the mere fact that the grievant did not have any medical or dental expenses during this period did not relieve her of the obligation to pay for health insurance. Obviously if she had, a claim for those expenses could have been made and would under these facts very likely have been awarded. Here however, the terms of the contract are clear and require that the employee share in the cost of those premiums and this appears to have been done. Accordingly, this claim must also be denied.

OPEN POSITION ISSUE:

The essence of the Union's claim here is that during the period of the grievant's termination a position came open that she would have been eligible to bid for that was regarded as a somewhat more favorable job. A junior employee was awarded this job and it could be presumed that the grievant would have been awarded the job had she been employed to do so.

Again, the arbitrator found himself in something of a difficult situation here as there again appeared to be a factual dispute between the parties as to which position they were talking about and whether University policy would have prevented her from getting it. Frankly, an evidentiary hearing would have been helpful here.

Initially, the Union claimed that the job in question was for a position on third shift at OEC. The University on the other hand asserted that the grievant at first wanted to be reinstated to that OEC position on the 11:00 p.m. to 7:30 a.m. shift but that this request was denied. She then requested to bid into the 11:00 p.m. to 7:30 a.m. shift at Murray Herrick Hall. No resolution of that factual issue was possible on the record presented here.

Further, the University asserted that the grievant would not have been eligible for either the OEC or the Murray Herrick position, as the grievant's sister would have been her direct supervisor in direct contravention of University policy. The Union on the other hand asserted that the grievant's sister would not have been her supervisor on the third shift OEC position. There was not resolution of that factual issue either.

Moreover, there appears to be an entirely separate dispute over whether the University's anti-nepotism policy is in violation of the labor agreement, see pages 6 & 7 of the UST Reply Brief. Obviously there were no facts adduced in the original hearing nor here over this question and that frankly must be the subject of an entirely separate grievance proceeding if the parties truly want an answer to that question. All that can be done now is to clarify whether the grievant must be allowed to bid into some other position as a part of the reinstatement order in the original award.

The reinstatement order in the original decision was that the grievant be "reinstated." No specific position was referenced but the intent was to reinstate her to her former position, whatever that was. If that position still exists she is to be reinstated to that. If for some reason that position does not exist the grievant is to be reinstated into an equivalent position in terms of pay and other contractual benefits.

If the grievant wishes to bid out of that position once she has been reinstated that is entirely to be determined by the terms of the labor agreement and is expressly outside of the purview of this matter. On this record that is all that can be awarded or clarified, as to go beyond the facts available would be to create the arbitrator's own record and to assume facts not in evidence. This I decline to do.

Accordingly, since it is not known at this point whether the grievant's sister would in fact be her supervisor or whether that policy is or is not in conformity with the terms of the labor agreement, the order to reinstate the grievant stands as originally drafted and as clarified above.

AWARD

The request for additional overtime as back pay is DENIED.

The request for reimbursement of health insurance premiums is DENIED.

The request to allow the grievant to bid on a different position to the one she had upon her termination that came open during her termination is DENIED as set forth above.

Dated: July 7, 2008

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Jeffrey W. Jacobs, arbitrator