

**IN THE MATTER OF ARBITRATION
BETWEEN**

**DAKOTA COUNTY COMMUNITY CORRECTIONS
ASSOCIATION**

and

DAKOTA COUNTY,

**ARBITRATION DECISION
AND AWARD**

BMS Case No. 07-PA-0857
(Return from Leave of Absence)

Arbitrator:

Andrea Mitau Kircher

Date and Place of Hearing:

May 9 and June 5, 2008
Hastings, Minnesota

Date Record Closed:

July 29, 2008

Date of Award:

August 25, 2008

APPEARANCES

For the Association:

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INTRODUCTION AND JURISDICTION

Dakota County (“Employer” or “County”) and The Dakota County Community Corrections Association (“Association”) are signatories to a collective bargaining agreement (“Contract”) that covers the time period relevant to this dispute. The Association represents certain employees, including the Grievant, who work in the County’s Community Corrections Department (“Department”).

The Arbitrator was duly selected pursuant to the Contract, and conducted a hearing at a mutually agreeable time in the Employee Relations Training Room, Dakota County Administration Center, Hastings, Minnesota, on May 9 and June 5, 2008. During the hearing, the arbitrator received exhibits, and witnesses testified under oath, subject to cross-examination. The parties agreed to file Post-Hearing Briefs simultaneously, and the record closed when the Arbitrator received the last Brief on July 29, 2008.

ISSUE

The parties presented written statements of the issue as required by Article 7.5 (a) of the Contract, and each stated the issue somewhat differently:

The Association states the issue in its Brief:

Did the County breach the terms of the Collective Bargaining Agreement and violate the rights of the grievant by refusing to allow her to return to her assigned position as a full-time probation officer in the Intake Unit upon her return from an approved disability leave in December 2006? If so, what is the appropriate remedy?

The Employer objects to the Association's statement, arguing that it is too broad. It states the issue:

Did the County violate Article 18.4 of the Labor Agreement by not assigning the Grievant to a position at the Western Service Center in Apple Valley upon her return from medical leave on or about December 8, 2006?

The Grievance, Joint Exhibit 2, states the relevant issue as:

Nature of Grievance: 1. Dakota County's failure to abide by Labor Agreement regarding leave of absence/return to work policy.

At the hearing, the Association stated that the disputed portions of the Contract were Article XVIII, Leaves of Absence, and Article IV (Non-Discrimination). In its Brief, the Association does not rely on Article IV, perhaps leaving the question of discrimination for

another venue. The Association does argue that the County improperly applied Article 18.4 to reinstatement of the Grievant.

The Association includes in its proposed issue statement some general language about the possibility that the County has violated some “rights” of the Grievant. It is not clear whether this statement includes other “rights” than the right to a reasonable interpretation and application of Article 18.4. If it does, I must reject the invitation to look at rights other than whether the employer’s actions violated the terms of the Contract.¹

After reviewing all the evidence, it is my opinion that both parties are asking me to interpret or construe the language of Article 18.4 as applied to the facts of this case:

Did the County violate Article 18.4 when it did not reassign Heidi Maahs-McCann (“Grievant”) to the full time probation officer position in Apple Valley upon her return from medical leave on or about December 8, 2006?

RELEVANT CONTRACT PROVISION

ARTICLE XVIII

...

Article 18.4 Return from Leave. Except as otherwise provided herein, upon completion of the leave of absence the Employer will, *when practicable*, return the employee to the position held prior to the commencement of the leave; if said position is no longer available, the Employer will offer the employee another available position for which the employee is eligible. (Emphasis provided.)

SUMMARY OF RELEVANT FACTS

The Grievant began her employment with the County in 1994, as a probation officer in the Adult Intake Unit of the Community Corrections Department. Most of the Intake Unit work takes place in Hastings, Minnesota, the County seat. Intake Unit employees are involved in bail evaluations, presentence investigations, chemical assessments, and risk assessments, among

¹ See, Article VII. Further, this case was not presented as an unjust discharge. A just cause inquiry arises under Article X, Discipline.

other things, for the Dakota County Court system.² The Intake Unit Probation Officers meet with people convicted of gross misdemeanors and felonies immediately after sentencing, most frequently in Hastings.³ The Unit also staffs outlying offices, including in the Western Service Center, in Apple Valley. From 2000 to December 8, 2006, the Grievant worked primarily in Apple Valley. She greatly preferred working in Apple Valley.⁴

The Grievant has had to cope with serious health problems. In 1999, she took a 6-month medical leave for cancer treatment and returned to work full time in the same job. In early 2006, she was diagnosed with a brain tumor. On March 10, Ms. McCann (“Grievant”) submitted a request for leave to undergo surgery.⁵ The County granted a leave of absence pursuant to the FMLA from April 4, 2006, as requested.⁶ The anticipated time of the leave was four to six weeks. The Grievant was not, however, able to return to work in four to six weeks, and thereafter, it remained unclear for some time when she would return. The County received a number of requests for extension of her leave of absence, all of which it approved:

- On April 24, 2006, Dr. Hall extended the Grievant’s leave until after assessment on May 15, 2006 when he anticipated the Grievant would be able to return to work;
- On May 10, 2006, her leave was extended through June 15, 2006 by Dr. Hesse;
- On June 7, 2006, her leave was extended, after a note from Dr. Hesse, through July 14, 2006;
- On July 11, 2006, her “return date [was] uncertain” according to Dr. Hesse, recommending extension through July 31;
- On July 25, 2006, Dr. Hesse recommended her leave be extended through August 23, 2006.⁷

On August 24, 2006, the Grievant returned to work four hours per day. The reduced hours were consistent with her Doctor’s recommendations. At that time, the Grievant was

² Testimony of Grievant, Tim Cleveland, and other probation officers.

³ Testimony, T. Cleveland.

⁴ Testimony, Grievant.

⁵ Employer Ex. 1

⁶ Employer Ex. 1

⁷ Employer Ex. 1-4

reassigned to the Intake Unit in Apple Valley. Her return to work on a part-time basis was approved until September 20, 2006, after which the Grievant was expected to return to work on a full-time basis. On September 21, she returned to work full time, but was only able to maintain full time hours for two weeks.

On October 5, 2006, the Grievant advised her supervisor, Randy Shimizu, that a Dr. Torkelson was restricting her from working for 30 additional days.⁸ On October 12, the Grievant states she was diagnosed with Chronic Fatigue Syndrome.⁹ On November 1, a different physician, Dr. Ikramuddin, restricted the Grievant from returning to work for at least six weeks when he wished to see her for a follow-up appointment.¹⁰

During the last half of 2006, the workload for other employees in the Intake Unit was greater per person than it had been, and the County managed in various ways. Testimony indicated that two part time employees worked full time hours to take up the slack, cases were reassigned to others, Supervisor Shimizu took on casework duties, reducing the amount of time he was spending on administrative tasks. It was not unusual for the division to shuffle duties to fill in for employees on leave for significant periods of time.¹¹ Employees taking maternity leave, for example, often take long leaves or do not leave and return exactly when expected.¹²

Sometime in October, another long-term employee in the Unit submitted his notice of retirement. Eric Ellstad was a probation officer who handled a heavy workload.¹³ Supervisor Shimizu, Tim Cleveland, Deputy Director of the Community Corrections Adult Division, and Director Barbara Illsley began discussions about how to cover the workload in the Intake Unit.¹⁴

⁸ Employer Exhibit 3.

⁹ Testimony, Grievant

¹⁰ Employer Exhibit 4

¹¹ Testimony, Matt Majovski

¹² *Id.*

¹³ Testimony, Tim Cleveland, Deputy Director

¹⁴ *Id.*

Eventually, they decided that they should post a job opening for the Grievant's position. The first notice was posted in November for a Probation Officer position at Apple Valley.¹⁵ This notice was replaced with an identical notice, but for the location of the position, which had been changed to Hastings.¹⁶

The Grievant learned about this from her co-workers rather than management personnel.¹⁷ She telephoned Nancy Hohbach, Deputy Employee Relations Director, in late November. Ms. Hohbach advised her that if she was back to work before the job was filled, she could retain her position.¹⁸ Unfortunately, neither Barbara Illsley, Director of the Community Corrections Department, nor Deputy Director Tim Cleveland informed Ms. Hohbach that they had different plans.¹⁹

On December 6, relying on Ms. Hohbach's statement, the Grievant obtained a doctor's approval for her return to work on December 8, starting with 4 hours per day, 4 days per week and gradually increasing hours so that she would be back to full-time within six weeks. She faxed this information to Ms. Illsley, Mr. Shimizu, and Ms. Hohbach.²⁰

Despite the fact that Grievant reported to work on December 8 and her position had not yet been filled, she was not reinstated to her previous position. Instead, Mr. Cleveland advised her that she would be placed in the Transfer Unit. This Unit was located in West St. Paul, where she was to work on transfers and report to a different supervisor, Phyllis Grubb.²¹ Mr. Cleveland testified that this work was selected because it was Probation Officer work, was less time

¹⁵ Association Ex. 21.

¹⁶ Association Ex. 22

¹⁷ Testimony, Heidi McCann

¹⁸ Testimony, McCann and Hohbach

¹⁹ Testimony, Hohbach

²⁰ Testimony, McCann

²¹ There is evidence that Supervisor Shimizu and the Grievant did not work well together prior to the Grievant's first leave of absence in April of 2006. The parties did not develop facts regarding this problem at the hearing, except in Joint Exhibit 2, the Grievance, which includes a complaint by the Grievant that Mr. Shimizu had not followed through with the employee assistance program's mediation recommendations.

sensitive, and there was a tremendous backlog in the Transfer Unit. He testified that this job was a better fit for someone in an unpredictable work status. As Deputy Director, he believed it was not practicable to return her to her position in December. Duties in the intake unit were time sensitive, and the short staffing was wearing on everyone. Returning her to work part time in a full time position would increase workload pressure on others, and the County was in a hiring freeze.²² Department Director Illsley made the decision to reassign the Grievant to the Transfer Unit. She stated that there was little time pressure in the Transfer Unit and the County could provide the Grievant flexibility in her work hours. The Grievant's supervisor would not be Mr. Shimizu, but Phyllis Grubb. It was Ms. Illsley's intent to return the Grievant to a job in Apple Valley when she was able to work full time again.²³

The Grievant reported to work on December 8, 2006 and met with Mr. Cleveland and Mr. Shimizu. She was surprised to learn that she was to report to the Transfer Unit rather than her old job that was still open. The Grievant did not like her new position. She believed it was more stressful because the commute was longer, the work was somewhat different, the environment was unfamiliar, and she felt the County had treated her unfairly. The Grievant believes that this stress aggravated her Chronic Fatigue Syndrome.²⁴

When the Grievant began working at the Transfer Unit, she filed a request for reasonable accommodations with the County. She asked for a modified work schedule, flexible work hours, rest breaks in a private area, and telecommuting from home for part of her workload. The healthcare provider recommended these accommodations,²⁵ and eventually, the County decided

²² Testimony, T. Cleveland.

²³ Testimony, B. Illsley.

²⁴ Testimony, Grievant

²⁵ There is some dispute about the request to telecommute. Employer Ex. 12, a letter from Grievant's physician to the County, dated January 19, 2007, indicates that the Grievant could work a full time job with appropriate rest periods, and flexible work hours. Dr. Hesse recommends telecommuting as a possible alternative accommodation.

that it would be able to provide the requested accommodations, except for telecommuting, which it decided was unnecessary and unreasonable for this position.²⁶

The Grievant worked in the Transfer Unit for six months, never working up to full time, and then asked for a leave of absence in July 2007, after the County told her it would no longer fund that position. The County granted an unpaid personal leave through December 31, 2007.²⁷ The Grievant never returned to full time work with the County and now is working at a horse farm about 12 hours per week and has no health insurance.²⁸ She believes she can work about 5 hours a day, and stated that she does not know if she could return full time for the County.²⁹

ASSOCIATION POSITION

The Association argues that the County should not have posted the Grievant's job during her leave of absence, because that action violates its longstanding practice of holding positions open during leaves of absence and reinstating employees when they return. The Association claims that, when the Grievant returned to work on December 8, the County should have reinstated her to the position and location where she worked at the commencement of her leave. The Association argues that this case is about protecting employees on disability leave from having their jobs taken from them arbitrarily and without just cause. It claims that the County should be required to establish in this case that it had the contractual right to remove the Grievant permanently from her position while she was on disability leave and that it exercised that right for just and legitimate reasons. The Association claims that the County did not meet that burden of proof.

²⁶ Employer's Ex. 14-20. A few County employees telecommute, but not Intake Unit Probation Officers.

²⁷ Employer's Ex. 25

²⁸ Testimony, Grievant.

²⁹ Testimony, Grievant.

With regard to Article 18.4 the Association contends 1) that the words “when practicable” mean the employee will be returned to the position held at the commencement of the leave when the position is still available; and 2) that the Contract must be read in a manner consistent with the parties’ agreement that employees on disability leave should be treated more favorably than employees taking personal leave.

The Association argues that the Grievant was a productive and loyal Probation Officer in the Community Corrections Intake Unit. When she developed a brain tumor and subsequently, chronic fatigue syndrome, the County behaved unreasonably by posting her job and filling it with another employee, and this was a breach of the Grievant’s rights under the collective bargaining agreement and established past practice.

EMPLOYER POSITION

The Employer maintains that it was not practicable to return the Grievant to the full-time position she held in Apple Valley prior to the commencement of her leave, and that it is the sole judge of its own staffing needs. The fact that the Employer never posted a job while an employee was on leave before does not mean it has waived its right to do so when necessary. The Employer claims that the Grievant’s ability to return to work and maintain a regular work schedule had proved unpredictable over the eight months prior to December, and that under Article 18.4 it had discretion to assign her to a different unit, so long as her work was Probation Officer work and her pay was the same. The Employer points out that reassigning the Grievant was intended to assist her in a transition from restricted work hours back to full time employment, and that she suffered no loss because of the temporary assignment to the Transfer Unit.

DISCUSSION AND DECISION

It is axiomatic that in a dispute concerning the meaning of contract language, arbitrators seek to determine and carry out the intent of the parties. Here, the parties negotiated language intended to settle the question of what the County has agreed to do when an employee returns from leave.

Article 18.4 provides: "...upon completion of the leave of absence, the Employer will, when practicable, return the employee to the position held prior to the commencement of the leave;...(Emphasis provided.) When construing the meaning of Contract language, arbitrators often refer to the "plain meaning" rule. There is no need to look outside the Contract for explanation of its meaning if the language is clear on its face. Both parties take the position, in essence, that the language is clear.

The Association argues that the parties intended "when practicable" to mean that when the employee returns and her position is available, the Employer is required to reinstate her in it. The Employer disagrees with this proposition. Assigning work is a management function.³⁰ The Employer agreed to limit its authority in 18.4, but it intended the caveat, "when practicable" to give it considerable discretion to determine the best way to run its organization. The Employer explains, "when practicable" means when internal reorganizations occur, when budgetary problems arise, or when the components of a job are rearranged and another set of tasks takes precedence. Because "when practicable" is subject to more than one meaning, Article 18.4 is ambiguous and I will use evidence outside the "four corners" of the Contract to clarify contractual intent.

³⁰ Article V of the Contract provides that the Employer retains the right to direct personnel and to perform any inherent managerial function not specifically limited by the Contract.

The County presented a number of reasons why it was not practicable to return the Grievant to her prior position on December 8. The Intake Unit needed more than a part time employee. It had a hiring freeze that limited the number of jobs it could create and fund in the Unit. It wanted to reorganize the tasks in the Unit and wanted more help in Hastings. Most importantly, for the 8 months prior to December, the Grievant had not demonstrated her ability to work a regular, predictable schedule, so that reassigning her to the Apple Valley position from which she went on leave was not practicable. It needed a full time employee to fill the full time position. The County had extended the length of the Grievant's leave five times before she actually returned to work on a part-time basis in August. Then she went out on a leave of absence for 30 days, and the County subsequently extended the leave for another six weeks. It became increasingly difficult to cover the Grievant's workload. Regular attendance is a requirement of the position.³¹

The Employer demonstrated that it had a rational basis for deciding it was not in the organization's best interest to reinstate the Grievant to her previous job in December 2006. There is no indication that the County intended to limit its ability to make such decisions when it agreed to Article 18.4. Employees returning to work after a leave of absence are like employees who never left. The County retains discretion to change the duties or location of all its employees' assignments. In other words, the County has agreed to reassign returning employees except when it has a rational basis for deciding not to.

In the past, the County had never posted a job vacancy while the incumbent was on leave. The Association argues that this constitutes a binding past practice which should be read into the collective bargaining agreement, and that the County breached the agreement by posting the Grievant's job in November 2006. The Association also argues that the County reinstated all

³¹ Association Exhibits 9 and 10.

those returning from a leave of absence to their previous positions and the County was bound by this practice.

For a past practice to have a binding effect on the parties, the Association must establish that the practice existed, and that the parties had mutually accepted it. Many arbitrators, when called upon to decide whether a past practice is a binding provision of the labor agreement, distinguish between cases where the past practice provides an employee benefit and cases where the practice affects a basic management function. See, Elkouri & Elkouri, How Arbitration Works, at 610, BNA (6th ed. 2003). Arbitrators hesitate to permit unwritten past practice to restrict the exercise of recognized functions of management, such as methods of operation or direction of the workforce. *Id.* at 612.

[C]aution must be exercised in reading into contracts implied terms, lest arbitrators start re-making the contracts which the parties themselves made. The mere failure of the Company, over a long period of time to exercise a legitimate function of management, is not a surrender of the right to start exercising such right... Mere non-use of a right does not entail a loss of it.

Id. at 612 (citation omitted.)

The same concepts are set out in Umpire Harry Shulman's often quoted decision regarding the binding force of past practice regarding assignment of work:

But there are other practices which are not the result of joint determination at all. They may be mere happenstance, that is, methods that developed without design or deliberation. Or they 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 merely present ways, not prescribed ways of doing things. The relevant item of significance is not the nature of the particular method but the managerial freedom with respect to it. Being the product of managerial determination in its permitted discretion such practices are, in the absence of contractual provision to the contrary, subject to change in the same discretion. The law and the policy of collective bargaining may well require that the employer inform the Association and that he be ready to discuss the matter with it on request. But there is no requirement of mutual agreement as a condition precedent to a change of practice of this character. *Ford Motor Co.* 19 LA 237, 241-42 (Shulman, 1952)

Elkouri & Elkouri, at 613

When an arbitrator decides to enforce an extra-contractual custom or practice, the arbitrator is persuaded that the parties intended the practice to be part of the labor agreement. The practice the Association considers binding is that the County never posted a job as a vacancy or reorganized its duties while its incumbent was on leave, and that it had reinstated all employees returning from leave in their previous positions. Although these practices were in effect, the evidence does not suggest that the Employer intended to surrender its right to assign work differently. The fact that the County had not done so may well have been a default position, never considered by management until the Grievant's difficulties brought it into focus. There is insufficient evidence of mutuality for me to turn history into a binding practice by reading it into the Contract. The County did not waive its right to the basic management function of assigning work, because it did not knowingly agree to do so.

Although the Association argued convincingly that the County, through its layers of supervisory personnel, communicated inadequately with the Grievant during the time in dispute, it did not establish that the County violated the Contract when it made decisions affecting the Grievant's work assignment in November and December 2006.

AWARD

The Grievance is denied.

Dated: August 25, 2008

Andrea Mitau Kircher
Arbitrator