

IN RE ARBITRATION BETWEEN:

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

and

BENTON COUNTY

DECISION AND AWARD OF ARBITRATOR

BMS 08-PA-1183

JEFFREY W. JACOBS

ARBITRATOR

August 20, 2009

IN RE ARBITRATION BETWEEN:

AFSCME Council 65,

and

Benton County.

DECISION AND AWARD OF ARBITRATOR

BMS Case # 08-PA-1183

Flex schedule, Seniority and Vacation grievance

APPEARANCES:

FOR THE UNION:

Teresa Joppa, Attorney for the Union
Sandy Block, grievant
Kathy Balvitsch, grievant
Janet Ackerman, Union Steward
Jo Musel Parr, Business Representative

FOR THE COUNTY:

Terrence Foy, Attorney for the County
Tammy Bigelow, HR Director
Peggy Koscielniak, Fiscal Supervisor
Timothy Martin, Human Services Director

PRELIMINARY STATEMENT

The hearing in the above matter was held on July 9, 2009 at the Benton County Board Room in Foley, Minnesota. The parties presented oral and documentary evidence at which point the hearing record was closed. The parties submitted Briefs dated July 30, 2009 at which point the record was closed.

ISSUE PRESENTED

The Union presented the issue as follows: Whether or not the Employer, Benton County, violated the Collective Bargaining Agreement when the Employer implemented a work schedule which prohibited senior employees in a particular department from exercising their vacation bidding rights as they have in the past and as is permitted by the Contract.

The County presented the issue as follows: Whether the County violated the Collective Bargaining Agreement (CBA) when it declined to grant the grievant's vacation request.

The issue as determined by the arbitrator is as follows: Did the County violate Article 16 and/or Article 11 of the parties' collective bargaining agreement when it implemented a new work schedule that discontinued the prior flextime schedules and when it denied the grievant's vacation requests? If so, what shall the remedy be?

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement covering the period from January 1, 2008 through December 31, 2009. Article 7 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 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 implemented new work schedules and discontinued the prior flextime schedules that would not permit the most senior employees to take their vacations when they wished. In support of this position the Union made the following contentions:

1. The Union pointed to the provisions of Article 11.11, which provides in relevant part as follows:

Article 11.11. By mutual agreement between the employee and his/her Department Head, flex scheduling may occur between 6 A.M. to 7 P.M. Monday through Friday to a maximum of 10 hours per day. Due to the nature of the position, and by mutual agreement of the social workers and his/her Department Head, social workers may work outside the set flex time hours to meet the needs of their clients.

2. The Union also pointed to the provisions of Article 16.3, which provides as follows: "Article 16.3 Vacation periods shall be selected on the basis of first come/first served. If requests are received on the same day, the senior employee shall be granted the vacation." The Union also noted that Article 16.8 further provides that after an employee accumulates 280 hours of vacation they must "use it or lose it." See Article 16.8.

3. Ms. Block, who has 34 years of service with the County, is the most senior person in the Fiscal Unit, where this grievance arose. She is in the position of having to use her hours or risk losing them pursuant to these provisions.

4. Ms. Block has for some 17 years, taken vacation on Friday afternoons and Mondays to accommodate a second job she has. This position does not conflict with her work at the County but she does need to go home after working at the County to get ready for it.

5. The Union asserted that the affected employees have virtually no contact with the public at this point due to a change in their responsibilities. Thus, the Union asserted there is no business reason to change the longstanding practice of allowing flextime for these employees. The Union asserted that what is far more likely is that due to a personality conflict within the Department whereby several of the employees are not on speaking terms, the junior employees have complained that they are not getting their vacation requests honored and for whatever reason have the ear of the manager. The manager, Ms. Peggy Koscielniak, has met with the junior employees in closed door sessions to discuss changing the schedule and did not allow the two more senior employees access to the meeting or her decision making process. After these meetings, the schedule changed and Ms. Block and Ms. Balvitsch, were not allowed to use their vacation as they had in the past.

6. The Union asserted that the clear provisions of Article 16 as well as the longstanding consistent practice, requires that the seniormost employees, here Ms. Block and Ms. Balvitsch, should be allowed to get their vacation requests honored as they have in the past.

7. The Union further asserted that the new “coverage” week schedule violated the contract and past practice as well since it is contrary to the provisions of Article 16.3 requiring that the vacation requests be honored on a first come first serve basis and that seniority should govern if there is any conflict. Here, Ms Block has submitted her vacation requests for Friday afternoons and Mondays already and clearly is the first person to submit those requests. The requirement that the employees must find their own replacement for their coverage weeks finds no support in the contract and is not possible currently given the situation within the department and the personality conflicts with these employees.

8. The Union asserted that this change should have been negotiated with the Union prior to its implementation but was not. It was unilaterally implemented without consulting the Union at all.

9. The Union asserted too that the practice of approving junior employee's vacation requests on days where senior employees also requested vacation is a clear violation of Article 16.3. That requires that seniority must govern where there are conflicts in vacation requests. The Union pointed to situations where Ms. Block has requests vacation on her coverage weeks and been denied but junior employees have been granted vacation for that same time.

10. The essence of the Union's argument is that the longstanding practice of allowing flextime and requiring that vacation requests be approved on a first come first served basis must be upheld. Here the most senior employees have requested vacation days that have not been honored because of the unilateral change to a requirement of a "coverage week" and that this change violates Article 16 of the labor agreement.

Accordingly the Union seeks an award from the Arbitrator requiring the Employer to comply with Article 11 and 16 related to vacation bidding/selection and to no longer restrict the senior employees' ability to take vacation on any given week if they are the first to submit a request for a day off. The Union further seeks an order prohibiting the County from requiring employees to find their own substitutes in order to take a vacation day or sick day during certain coverage weeks. Finally, the Union seeks reinstatement of Ms. Block and Ms. Balvitsch's flexible scheduling arrangements.

COUNTY'S POSITION

The County's position was that there was no contract violation here since the language specifically reserves to the County Board the right to establish work schedules and the hours of work and to change those schedules as the needs of the County change over time. In support of this position the County made the following contentions:

1. The County acknowledged many of the facts giving rise to the case but asserted that the contract does not support the Union's claims here.

2. The County first pointed to what it termed a broad management rights clause found at Article 5.1, which reads in relevant part as follows: The Employer retains the full and unrestricted right to operate and manage all manpower, facilities and equipment; ... to establish work schedules and to perform any inherent managerial function not specifically limited by this Agreement.” The County asserted that this is not limited by the provisions of Article 16, as discussed below, and that the County retained the right to establish the “coverage week” work schedule.

3. Further the County pointed to the provisions of Article 11, which read in relevant part as follows:

11.2 Work Week: The Work Week shall be forty hours of work for full-time employees. Normal work days shall be Monday through Friday, except for functions requiring departure from the normal schedule.

11.3 Work Days: The normal work day for full-time employees shall consist of eight hours of work plus an unpaid meal period.

11.4 Work Shift: Work shifts, staffing schedules and the assignment of employees thereto shall be established by the Employer.

11.5 Work Schedule Changes: The Employer shall notify employees five working days in advance of any permanent schedule changes in their work schedules. Temporary changes in work schedules shall be at the Employer’s discretion.

11.11 By mutual agreement between the employee and his/her Department Head, flex scheduling may occur between 6:00 a.m. to 7:00 p.m. Monday through Friday to a maximum of 10 hours per day. ...

The County argued that these provisions allow the Employer to set schedules and to change schedules as needed. While it allows for flextime, the language does so only upon mutual agreement. Here the mutuality of that has clearly changed and the Employer determined that a coverage week was necessary in order to provide coverage from 8:00 to 4:30 every day.

4. The County also pointed to the provisions of Article 16 in support of its position. The County also relied upon Article 16.3, which reads “Vacation periods shall be selected on the basis of first come/first served. If requests are received on the same day, the senior employee shall be granted the vacation.” The County argued that there is no requirement in this language that vacations will always be granted; it merely provides that seniority applies only if there is a conflict in requests by employees as set forth above. This tiebreaker system was never intended to be a guarantee of vacation.

5. The County also pointed to Article 16.10, which reads as follows: “Vacation time off shall be approved by the Department Head. Vacation time may be denied if the Department Head determines that the needs of the Department will not be served if the time off is granted.” The County asserted that this language gives the County discretion to determine if vacation time will or will not be granted and that no binding past practice was or ever has been created because of the way it was done in the past. The County used its discretion in a certain way then but has elected to use it in another way now – no binding practice was created.

6. The County asserted that it determined that it was best for the Unit and for business reasons to divide Friday coverage among all 4 members of the Unit. Initially a voluntary system was tried whereby people would volunteer to provide coverage but in late 2007 no one volunteered to cover open dates. Since the members of the unit were unable to work out a resolution of the problem amongst themselves, the supervisor had to impose one .

7. The County noted that it could have, pursuant to the language cited above, simply reverted to the standard 8:00 to 4:30 schedule but determined that some flex time would be allowed as that generally benefits employees. Thus, although not required by the labor agreement, unit employees were allowed to select their coverage weeks based on seniority. Coverage weeks are those weeks in which the individual employee is required to cover the time and can only take vacation if they find a substitute for their schedule. The County acknowledged at the hearing that if an employee becomes ill during the coverage week they can take sick time. The County argued that the assertion by the Union that people would have to work while they were ill if they could not find a substitute to cover for them was simply inaccurate.

8. The County further asserted that there was no binding past practice created in the flextime schedules even though they were in place for a long period of time. The County argued that the explicit contractual language governs this case and past practice does not apply. Past practice is generally used to give meaning to ambiguous language but here the language is clear.

9. Further, the County argued that the flex schedules were done as a discretionary act and that this fact undercuts the claim of a binding past practice. Moreover, even if a past practice is found to have existed, the underlying reason for it has now changed – Ms. Block had been unable to give out EBT cards in the past and could therefore have taken Fridays and Mondays off. Since that distinction has now been eliminated there is no further reason for that practice to exist.

10. The County asserted that if the Union’s position were to be adopted, it would effectively negate the clear provisions of Article 11. The County has reserved the power to set and alter schedules, the work week, the hours of employment and the assignment of work. It would further negate the provisions of Article 16.10 that specifically reserve to the County the right to grant vacation. Finally, it would create an absolute right to vacation that is simply not there – the provisions of Article 16.3 simply do not say that and do not guarantee vacation.

11. The essence of the County’s argument is that there is no contractual support for the claim that there is a right to vacation as asserted by the Union nor is there any evidence to support a binding past practice.

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

DISCUSSION

The grievance arose out of the Accounting Unit in the Benton County Human Services Department. There are four employees in the Department currently, Ms. Block and Ms. Balvitsch are two of them. The others did not testify at the hearing and are apparently Account Techs. The evidence showed that for many years Ms. Block has been allowed to use her accrued vacation time to take Friday afternoons and Mondays off in order to work at a second job.

The evidence further showed that the Unit employees were allowed flextime. County witnesses testified that this is not required under the contract but that flextime can be of benefit to the employees and thus they support it as a way to provide a benefit to the employees.

Until 2007 three of the employees in the Unit issued EBT cards to welfare recipients. The evidence showed that Ms. Block was not authorized to issue EBT cards and so performed other duties. She has apparently never processed the EBT cards. There was little if any other contact with the public other than to issue those EBT cards.

In 2007 the EBT duties were moved to a different office within the County. The Union argued that at this point there was no “real” reason to have coverage from Monday through Friday from 8:00 a.m. to 4:30 p.m. The County determined though that coverage was needed for all those hours and thus implemented a schedule requiring so-called “coverage weeks” for the Unit employees. Each employee was thus required to cover a week, and this was done on a rotating basis, requiring the affected employee to be at work from 8:00 a.m. to 4:30 p.m. Monday through Friday. If the employee wanted to take vacation they were required to find a replacement to cover that time. The evidence showed that the shifts were selected by seniority but that each employee was required to take 12 or 13 “coverage weeks” each year.

The evidence further showed that the County tried this on a voluntary basis for a time but that it did not work. This was apparently due to the personal tensions among some of the employees within the Unit such that several of them were not even on speaking terms with each other. The Union argued that it “suspected” some collusion between the junior employees, who did not testify at the hearing in the matter, and the Fiscal Supervisor, Ms. Koscielniak, since there were apparently meetings behind closed doors among those individuals. No evidence was adduced though about what those meetings were about nor was there any evidence to suggest that there was a discriminatory intent behind what the County did in implementing the coverage week schedules. Ms. Koscielniak, testified credibly that she attempted to work with the employees to avoid having to mandate the schedule but that the Department Head had required coverage for the full Monday through Friday schedule and that in order to be fair to all employees she felt it necessary to try to distribute the Friday afternoon coverage equitably among all the employees. When this did not work, she required the coverage schedule.

The County could have reverted to a standard 8:00 a.m. to 4:30 p.m. shift but decided to continue to allow for some flextime in order to give the employees that option. All that changed under these facts was that for 12 or 13 weeks out of each year, (depending on the employee's seniority and how the calendar fell), the employees were subject to the "coverage week" and would have to find a replacement if they desired to take vacation time. ¹

The Union argued that this new schedule was a violation of Article 16 of the labor agreement as set forth above largely because it prevented Ms. Block, the most senior employee in the Unit, from taking her Fridays and Mondays off as she has in the past. Ms. Block has now submitted her vacation requests well in advance but has not had them all approved. The Union argued that Article 16.3 set forth above requires that vacation requests be granted on a first come first served basis. Since Ms. Block has her requests in well before anybody else, so the argument goes, she must be allowed to take Friday afternoon and Mondays as she had in the past.

The question is whether the contract prohibits what the County did here. The starting point, as in all contract interpretation cases, is the contract language itself. The language does not support the Union's claims under these unique facts and circumstances.

First, there is nothing in the contract requiring the County to grant vacation time. Indeed, the contract provides just the opposite. Article 16.10 provides as follows: "Vacation time off shall be approved by the Department Head. Vacation time off may be denied if the Department Head determines that the needs of the Department will not be served if the time off is granted." Thus, a close reading of the language at issue here reveals that Article 16.3 is subject to the provisions of Article 16.10, which reserves to the County the discretion to grant or deny any vacation requests.

¹ The evidence showed that this would not apply to sick time though and that if an employee became ill during their coverage week they would not have to find a replacement but could simply use sick leave as appropriate.

Second, there is nothing in the contract requiring that vacation requests be granted by seniority nor is there any language requiring that the senior employee be granted their vacation when they want it. The only language pertaining to this is found in Article 16.3 requiring seniority to be used only if the vacation requests are received on the same day. Presumably this would mean that multiple requests for the same day were received by the supervisor on the same day and some sort of tie-breaker system would need to be implemented to determine which employee got the day off. Here though that inquiry is not strictly at issue and the outcome of that discussion frankly does not matter since the question is whether the language contains some sort of guarantee to vacation days. It does not. As noted above, the clear language of Article 16.10 reserves to the County the discretion to grant or deny vacation requests.

The Union argued that there in fact was very little need to implement the coverage week schedule since the Unit no longer deals with the public much at all. The Human Services Director, Mr. Martin, testified credibly though that the posted hours are 8:00 a.m. to 4:30 p.m. and that other counties have been embarrassed when people show up and no one is there. He further testified credibly that the Benton County Board expects coverage for those hours and that he is therefore required to maintain those hours and did not want to have to explain a citizen complaint of that nature to the Board.

The Human Services Director could have simply discontinued the practice of allowing flextime completely, as noted above, he determined to allow it but to distribute the time equitably. Notably, seniority was still used in determining which weeks would be selected. Ms. Block was allowed to pick her weeks first. Thus whether implementation of the coverage week schedule is a good idea or not is not the issue. The issue is whether the County violated the CBA by withholding vacation requests. The County determined that the business needs of the Department dictated that the schedules be changed to provide adequate coverage from 8:00 a.m. through 4:30 p.m.

Further, the labor agreement reserves to the County a very clear right to determine schedules and hours of work. The Union did not seriously challenge this right. Its argument was based on the claim that there was another more insidious reason for the change. That however, as noted above, was not borne out by the facts adduced at the hearing. The County thus has a clear right to establish its work schedules and hours of operation and could eliminate flex time altogether.

The Union argued that the flex time may be eliminated only by mutual consent and relied on the language of Article 11.11, which provides in relevant part as follows: “By mutual agreement between the employee and his/her Department Head, flex scheduling may occur between 6 A.M. to 7 P.M. Monday through Friday to a maximum of 10 hours per day.” The Union constructed a clever sounding argument that was essentially that once the flex time is implemented, it can only be eliminated by mutual agreement. Certainly, so the Union’s argument went, an employee could not unilaterally change their schedules without the consent of management. True enough, but this case is not strictly about flex time schedules, it is about whether the County violated the agreement in implementing the coverage week and whether it violated the agreement by refusing to grant certain vacation requests for days off during those weeks unless the affected employee can find a replacement.

Further, under the terms of this agreement the County can unilaterally change its schedules because it is the employer and has the right to. Article 11.11 does not require that flex time be implemented forever and, since the County retains the right to change schedules and hours of operation. Finally, Article 11.11 uses the term “may” and reveals an intent that still allows considerable discretion by the County as to whether to implement a flex time schedule. It does not mandate that flex time be implemented or maintained. Thus there was no violation of that provision of the contract by the County’s actions in implementing the coverage week here.

The Union further argued that there was a past practice created over time due to the longstanding and consistent practice of granting certain vacation requests simply because they had been granted that way in the past that somehow bound the County to doing it this way in the future. On this point, Elkouri and several very prominent commentators' comments are particularly germane. Elkouri notes as follows:

Arbitrators are often hesitant to permit unwritten past practice or methods of doing things to restrict the exercise of legitimate functions of management. For example, such hesitance was evidenced by Arbitrator Whitely McCoy: But caution must be exercised in reading into contracts implied terms, lest arbitrators start remaking 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.” Elkouri and Elkouri, *How Arbitration Works*, 5th Ed. at P. 635.

Further, Elkouri cites the now famous admonition of Arbitrator Harry Shulman as one of the most cogent and provocative statements published regarding the binding force of custom and past practice as follows:

“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 that developed 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.” Elkouri, *supra*, at p. 636.

Here that quotation could not be more applicable. The evidence showed that even though Ms. Block has had her vacation requests granted on the same basis this was, as Arbitrator Shulman, aptly points out, an exercise of management discretion each and every time. The circumstances and business needs of the Unit have now changed such that Management has decided to exercise its inherent discretion over vacation requests differently. Both the broad Management rights clause as well as the clear language of Article 16.10 allow this. Thus, no binding past practice was created under these facts.

Here though the question was whether there was a contract violation based on the implementation of the coverage week schedule. There was not; as the language of the CBA clearly reserved to the County the right to change schedules and set hours of operation. Setting the coverage week schedule did not run afoul of the terms of Article 11 and was within the clear purview of the management rights clause. Further, there was no violation of the CBA by the refusal to grant the employees' vacation requests, even though they have already been submitted, since the clear terms of Article 16.10 reserves to the County the right to grant or deny such requests.

In the final analysis, it is regrettable that the employees in the Department are having such a difficult time getting along. Certainly that has made everyone's job more difficult in this case and indeed appears to be one of the main driving reasons this case arose in the first place. That issue is one that remains well outside the arbitrators power and purview to repair and can only be rectified by adult level discourse and compromise. Hopefully that can occur and people can perform their jobs and stay civil at the same time.

AWARD

The grievance is DENIED.

Dated: August 20, 2009

AFSCME and Benton County award.doc

Jeffrey W. Jacobs, arbitrator