

IN RE ARBITRATION BETWEEN:

TEAMSTERS LOCAL #320

and

RAMSEY COUNTY

CORRECTED DECISION AND AWARD OF ARBITRATOR

BMS 09-PA-0801

**JEFFREY W. JACOBS
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ARBITRATOR

SEPTEMBER 16, 2009

IN RE ARBITRATION BETWEEN:

Teamsters Local #320,

and

Ramsey County.

DECISION AND AWARD OF ARBITRATOR
BMS Case # 09-PA-0801
Kathleen Wesely Grievance

APPEARANCES:

FOR THE UNION:

Paula Johnston, Attorney for the Union
Vance Rolfzen, Union Steward
Kathleen Wesely, grievant
Marshall Tschida, Captain RCCF

FOR THE COUNTY:

Marcy Cordes, Labor Relations Manager
Arthur Cavara, Former Superintendent, RCCF
Al Carlson, Superintendent RCCF
Chris Belfield, Administrative Captain RCCF
Jean Gramling

PRELIMINARY STATEMENT

The hearing in the above matter was held on August 4, 2009 at the Ramsey County Correctional Facility at 297 Century Ave. S., Maplewood, Minnesota. The parties presented oral and documentary evidence at which point the hearing record was closed. The parties submitted Briefs dated August 21, 2009 at which point the record was closed.

ISSUE PRESENTED

The Union stated the issue as follows: Did the County violate the settlement agreement dated May 11, 1994 (also referred to as the "MOA"), past practice, and/or any applicable contract articles when it informed the grievant that after January 8, 2009 she was subject to being assigned to any post rather than being assigned exclusively to the facility control room if she worked overtime.

The County stated the issue at the hearing as follows: Does the MOA dated May 11, 1994 provide the grievant, Kathy Wesely, the right to work *all* of her overtime shifts in the RCCF Control Room. In its Brief the County stated the issue slightly differently as follows: The issue in this case is whether the Memorandum of Agreement between Ramsey County and Teamsters Local 320, dated May 11, 1994, gives the Grievant the right to work all of her overtime shifts in the Ramsey County Correctional Facility control room.

These are similar in nature but the issue as determined by the arbitrator is as follows: Did the County violate the Memorandum of Agreement dated May 11, 1994 when it informed the grievant that after January 8, 2009 she would be subject to assignment to posts outside of the control room if she worked overtime? If so, what shall the remedy be?

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement covering the period from January 1, 2009 through December 31, 2011. 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 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 an Agreement, known as the Memorandum of Agreement, MOA, dated May 11, 1994 between the grievant and the Union and the County, when the County assigned the grievant to a work location other than the Control Room to work overtime. In support of this position the Union made the following contentions:

1. The grievant has been with the Ramsey County Correctional Facility, RCCF, for more than 25 years. She filed a grievance alleging discrimination and claiming a violation of Article 2.4 of the labor agreement due to the County's refusal to hire her as a general duty correctional officer based on her gender. The original grievance was introduced as Union Exhibit 3.

2. That grievance was settled and a Memorandum of Agreement, MOA, drafted and signed by the parties. See Joint Exhibit 5. That document provides as follows:

Ramsey County Community Corrections and Ramsey County Correctional; Facility management, in mutual agreement with Teamsters Local 320, and Kathy Wesely, Grievant, hereby agree to the following Settlement of the grievance dated 3-24-94, claiming violation of the labor contract article 2.4 (discrimination):

1. That Kathy Wesely, RCCF C.O., shall be assigned to work and bid shift patterns exclusively in and for the RCCF's control room while an employee of the Ramsey County Correctional Facility. Seniority shall be based on fulltime control room hours worked.

2. That Kathy Wesely, RCCF, C.O., withdraws any and all requests, claims, remedies concerning adjustment to her vacation, sick leave and seniority hours as part of the acceptance of this settlement offer.

3. That settlement MOA was signed and dated 5-11-94 by representatives of the RCCF management team, Local 320 and Ms. Wesely. The Union asserted that it was always intended to include all hours worked, including overtime, and that the grievant would not have signed it if it had included such a limitation. The fact that the parties have applied the MOA in exactly the way the grievant and her Union intended it to be applied over the course of nearly 15 years simply adds credence to the grievant's position here.

4. The Union further noted the stipulation between the parties that "the parties agree, that since the MOA was signed in 1994, any overtime hours worked by the grievant have been worked in the facility control room." The Union argued that this fact, coupled with the clear language of the MOA, providing that Ms. Wesely be assigned to work and bid shifts exclusively in the RCCF control room, make it clear that the intent was that all hours, not simply "regular" shift hours be worked in the control room.

5. The Union further argued that the issue here is not and should not be limited to only those situations where another officer is assigned to work on light duty. The Union asserted that the issue here, as it did in 2007, involved all overtime hours, not just those where some one is assigned light duty. The MOA makes no such distinction and the arbitrator can and should rule on the issue of overtime in general, and not limit his decision to overtime situations involving a light duty officer assigned to the control room.

6. As further evidence of that intent, the Union pointed to Ms. Wesely's grievance dated 2-16-07 where the County attempted to do the very thing it has attempted to do here. There, the County tried to assign Ms. Wesely to work outside of the control room for overtime hours. The Union further alleged that the 2007 grievance, Union Exhibits 1 & 2, were not about her regular bid for her shift but was in fact about an overtime assignment.

7. That 2007 grievance was adjusted in the Union's and Ms. Wesely's favor at the Step 1 grievance step by Mr. Carlson as follows: Grievance upheld. Met with and informed Local 320 stewards Vance Rolfson and Brett Ohnstad on 2/27/07(sic)." The Union alleged that this again provides clear evidence that the parties MOA was intended to cover all hours, including any overtime hours, since the 2007 grievance was in fact about overtime hours. The Union pointed out that Ms. Wesely bids her regular shift in the fall of the year and that the 2007 grievance arose in February, thus it was clearly not over her regular shift but rather about overtime.

8. Both Ms. Wesely and the steward, Mr. Rolfson, testified to this as well. Mr. Rolfson further testified that he met with Mr. Carlson in 2007 and discussed that this was an overtime grievance at that time and that everyone understood what the grievance was about.

9. The Union further introduced evidence that Ms. Wesely has lost overtime opportunities due to the County's actions here and that she either did not take overtime assignments because she feared she would be assigned to work outside of the control room or that she was not called in for when other officers left for various reasons. See Union Exhibits 4 and 5.

10. The grievant alleged that she lost some 47.50 hours due to work she did not receive, See Union Exhibit 4, and another 141.50 hours when work was assigned to junior officers because she did not bid for that time due to her concern that she would be assigned to work outside the control room. See Union Exhibit 5. The Union asserted that the question of whether the grievant actually would have accepted these overtime opportunities is irrelevant in determining a make whole remedy. The only relevant fact is that she had a right of first refusal for the overtime listed, which she was prevented from exercising due to the County's actions.

11. The essence of the union's claim is that the MOA provides very clear language and even emphasizes the word "exclusively" so it was crystal clear that all hours worked "while an employee of the Ramsey County Correctional Facility" were to be worked in the control room. Further, that MOA was not to cover only her regular bid shift since it uses the terms "work and bid shift patterns." If it had been intended to apply only to the regular bid shift patterns it would have been limited to that. Instead, it uses the term "work" as well, which clearly shows an intent that all her hours, including any overtime hours were to be assigned in the control room.

12. Further, as noted above, the parties' application of this MOA since 1994 whereby Ms. Wesely has always been assigned her hours, including all overtime hours, in the control room speaks loudly to the intent as well. Finally, the very fact that the 2007 grievance on this identical issue was resolved in Ms. Wesely's favor shows that the County has known all along what the MOA meant. The fact that circumstances may have changed to make it more difficult to assign personnel with the limitation placed on the County's rights to assign does not alter the agreement nor undercut its enforceability now.

The Union seeks an award of the arbitrator requiring the County to abide by the MOA and not assign the grievant to work only in the Control Room, including overtime hours. Further, the Union seeks an award requiring the County to make the grievant whole for any lost overtime hours and other benefits as the result of the County's violation of the MOA herein.

COUNTY'S POSITION

The County's position was that there was no violation of the MOA and that the intent of the MOA was never to include overtime hours. In support of this position the County made the following contentions:

1. The County acknowledged the existence of the MOA but argued that it does not mean what the Union says it does. The County argued that the MOA limits only the right to assign her outside the control room for regular shifts but did not encompass overtime hours.

2. The County asserted that nowhere in the MOA is the term “overtime” mentioned. The County alleged that it would never have agreed to limit the right to assign her overtime hours outside of the control room since it needs the discretion to assign people wherever they are needed for overtime hours. Initially the County asserted that the MOA mentions “bid shift patterns” and alleged that its application is limited to that, and did not apply to overtime hours. There was no mention at all of overtime in the MOA.

3. The fact that she has worked all her hours since 1994, including overtime, does not alter the meaning of the MOA. The employer simply exercised its discretion to assign her to the control room for overtime hours in the past but that was simply an exercise of discretion in a particular way.

4. Currently, the RCCF is dealing with financial constraints that were not present in 1994 and must be even more fiscally conservative and efficient than in years past. Further, when employees who are injured at work are given restrictions of “no inmate contact” or words to that effect, the control is virtually the only place within the facility where that restriction can be accommodated. When the grievant is also working there on overtime situations will arise where two employees are doing the work of one, thus creating a terribly inefficient use of staff. It would be far more effective to allow the facility to schedule the grievant to work outside of the control room in these situations.

5. The County argued that the 2007 grievance was about her regular shift and that a mistake was made in not allowing the grievant to bid on the control room for her regular shift. Mr. Carlson testified that it was his understanding that the 2007 grievance was not about overtime. If the grievance had been about overtime he would not have upheld the grievance then.

6. Further, with respect to the lost time claim, the County alleged that the hours set forth on Union Exhibit 5 are simply too speculative since there was no entitlement to those hours. The officers listed on that Exhibit could have called in anyone they wished to work for them if and when they left early. There was no evidence that they would have called the grievant for any of those hours.

7. The County made a similar argument to the hours listed on Exhibit 4 and asserted that while the grievant has considerable seniority there is no certainty that she would have bid for those hours when they became available.

8. The County further asserts that the Union's interpretation of the MOA leads to an absurd result since licensing and regulatory requirements require the RCCF to have a certain number of employees on duty in specified positions. Deviations in staffing levels can create both risk management and safety concerns. Further, any interpretation of the MOA which would require the RCCF to schedule two officers to work overtime to fill one shift is nonsensical. The RCCF should never have to choose between being over budget and being out of compliance with the staffing plan filed with the State of Minnesota Department of Corrections.

9. Finally, the County argued that the grievant's monetary claim to hours she might have worked but chose not to is both without evidentiary support and is too speculative to be awarded. There was no showing that she would have bid for or taken these overtime opportunities based on her seniority or her place on the schedule and these should not be awarded even if the arbitrator finds a violation of the 1994 MOA.

10. The essence of the County's case is thus that the MOA did not cover overtime hours; only the regular shifts and that the fact that she has been assigned all overtime hours in the control room since 1994 does not alter what the parties intended when the MOA was negotiated. Further, the lost time claim should not be granted since the claim is far too speculative and lacking in evidence as to what the grievant would actually have worked.

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

DISCUSSION

The matter arises out of the Memorandum of Agreement, MOA, the parties executed in settlement of the grievance filed by Ms. Wesely in 1994. That language provides the starting point for whether the County's attempt to schedule the grievant outside of the control room for overtime hours is in violation of the MOA now.

The grievant filed a grievance in 1994 alleging discrimination by the County. After that was filed and went through various stages, the parties executed a MOA in settlement of Ms. Wesely's grievance. There was clearly a quid pro quo by this agreement. The grievant agreed to withdraw her grievance based on gender discrimination in exchange for the County's agreement that Ms. Wesely would "be assigned to work and bid shift patterns exclusively in and for the RCCF's control room while an employee of the Ramsey County Correctional Facility." (Emphasis in original). It is important to note that the emphasis on the word "exclusively" is in the original. This fact supports the claim that "all" hours would be worked in the control room.

The evidence further showed that the County sought to assign the grievant to overtime hours in 2007 and that she filed a grievance over that issue at that time. As will be discussed below, that grievance was upheld. In January of 2009, the Employer again told the grievant that she would no longer be working exclusively in the control room during overtime hours. Again, the County told the grievant that she would be subject to assignment to any post by the on-duty lieutenant. The grievant turned down or did not bid on certain overtime opportunities she claimed she would have taken but did not since she was not certain if she would be assigned in the control room.

The County argued that there is no specific reference to "overtime" in the MOA. That is true enough but a cursory reading of the MOA reveals that this does not undercut the Union's claim. The MOA specifically refers to Ms. Wesely's work and shift patterns "while an employee" of the RCCF. This language clearly encompasses "all" hours worked, whether those hours are worked on a regular shift or on overtime.

Further, if the agreement had been intended to be limited only to her regular shift hours it could have easily said that. Instead it goes beyond “bid shift patterns” and includes “work” as well. In addition, the specific reference to such work being “exclusively” in the control adds additional support for the claim that the original intent was that all her hours worked while an employee of the RCCF would be worked in the control room. Thus, the plain language of the agreement supports the Union's claim that all hours worked are to be assigned in the control room.

Moreover, the parties stipulated that all of the overtime hours worked since 1994 have been worked in the control room. It stretches credibility somewhat to assume that at no point in 15 years have there ever been any situations where the County wished to assign her to work outside the control room, either due to some light duty assignment of another officer or for some other reason, yet did not due to the effect of the 1994 MOA.

One of the time-honored methods to determine contractual intent is to examine how the parties have in fact applied the agreement. Here, the parties have 15 years of history to examine in this regard and the parties stipulated that all of the overtime hours worked by the grievant since 1994 have been in the control room. These facts made it quite clear that despite testimony now to the contrary, the intent of the MOA when it was executed was that Ms. Wesely work all hours in the control room.

Finally, the evidence showed that the 2007 grievance involved herein was in fact over an overtime issue, which was similar to if not identical to this very case. The County witness testified that it was his understanding that the matter arose out of the grievant’s claim to a regular shift, and not an overtime claim. The Union’s witnesses testified to just the opposite based on their recollection. The fact that swung this determination though was the date of the 2007 grievance, which was in February 2007. The evidence showed that the grievant bids the regular shifts in the fall, perhaps September and that it is therefore far more likely than not that the 2007 grievance was not over regular shift since the timing simply does not jive here. Thus it was clear from the evidence that the County certainly believed that the MOA covered overtime in 2007 and thus upheld the grievance.

The County argued that interpreting the MOA as the Union contends would lead to an absurd result and that arbitral commentators have frequently held that such results should be disfavored. Where two results are plausible, arbitrators will in fact tend to rule against one that creates an absurd or unmanageable result. The evidence here did not support this assertion however. What the agreement does do is to make more difficult to schedule employees because the County specifically gave up some of its right to schedule this grievant due to the effect of the MOA.

Simply because it is more difficult to schedule people or to deal with light duty restrictions with other employees is not to be equated with a nonsensical result however. The limitations placed on the otherwise inherent right of the employer to schedule its workers is no greater than any other similar type of limitation typically found in labor agreements around the State. Indeed, collective bargaining agreements frequently involve limits on an employer's inherent rights. Here, the limits placed on the right to schedule this grievant were the result of a negotiated, arms length settlement of a grievance that involved the very sort of trade-offs and concessions that are frequently at the very heart of collective bargaining.

Moreover, this is exactly the way the parties have applied this agreement for 15 years. It can hardly be said to have suddenly become "absurd" now.

The question of whether the grievant is entitled to the hours she allegedly lost as the result of the County's breach of the MOA is something of a mixed bag. The County asserted that no back pay should be awarded since the question of whether the grievant would or would not have worked the hours she claims she lost is simply too speculative to be awarded. The Union on the other hand, asserted that it does not matter that the determination of the hours sought may be speculative and that there must be consequences for the breach of a clear agreement. The Union claimed that the grievant had a right of first refusal for these hours given her seniority and her placement on the schedule.

Both of these positions have some merit in this inquiry. The County asserted that there is simply now way to know now what hours the grievant would have worked if she had chosen to and there is some truth to that. Going back now and attempting to determine what might have happened if something else had happened entails a measure of speculation that is a bit like trying to hit a moving target from another moving target. The County asserted that she could have worked any of those hours “as long as it fell within the parameters established by the Superintendent” and therein lies the problem. The Union argued that the County chose to breach the MOA and there must be some consequences for that. Further, the Union argued that the grievant was not afforded the opportunity to work the overtime hours since there was no assurance at that time that the County was going to abide by the MOA. There is some merit to this assertion as well. Moreover, as will be discussed below, there was evidence on which a determination of the overtime opportunities the grievant would have worked can be made.

The hours she claims were in two separate categories apparently. Union Exhibit 4 shows the hours she lost where other officers were in the control room and took time off that she could have signed up for if she had known for certain she would have been assigned to work in that same control room. These totaled some 47.50 hours. The difficulty here though that the evidence showed that the officer could ask anyone they wished under the particular circumstances outlined on Union Exhibit 5 to work for them. There is no guarantee that the grievant would have been asked to work these hours. These hours cannot be award because they are simply too speculative. The County’s argument on these hours thus has merit and that part of the Union’s grievance is denied.

The other set of hours is found on Union Exhibit 5. This presents a different and more difficult problem since the hours listed on Union Exhibit 4 were based on a different theory. The claim is that the grievant would have signed up for the overtime hours listed there but did not since she was not certain if the County would assign her to work outside the Control Room. She did not sign up for that overtime because of the County’s position in this grievance.

This presents a very close issue since there is an element of speculation here as well. The grievants' testimony on this point was credible and showed that she had sufficient seniority to have been entitled to these hours and that she would indeed have bid on and been awarded those hours but for the County's breach here. On this record, the grievant is entitled to reimbursement for the hours lost as listed on Union Exhibit 5.

AWARD

The grievance is SUSTAINED IN PART AND DENIED IN PART. The Union's claim that the MOA applies to all hours worked by the grievant, including overtime hours is SUSTAINED. The Union's claim for back pay for the hours set forth on Union Exhibit 4 is DENIED as set forth above. The Union's claim for back pay for the hours listed on Union Exhibit 5 is SUSTAINED as set forth above.

Dated: September 16, 2009

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Jeffrey W. Jacobs, arbitrator