

IN RE ARBITRATION BETWEEN:

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

and

WRIGHT COUNTY

DECISION AND AWARD OF ARBITRATOR

BMS 09-PA-0933

JEFFREY W. JACOBS

ARBITRATOR

December 31, 2009

IN RE ARBITRATION BETWEEN:

AFSCME Council 65,

and

Wright County

DECISION AND AWARD OF ARBITRATOR
BMS Case # 09-PA-0933
Maryann Miller grievance

APPEARANCES:

FOR THE UNION:

Teresa Joppa, Attorney for the Union
Mary Ann Miller, grievant
Leeann Kunze, Staff Representative
Grace Baltich, Local Union President

FOR THE COUNTY:

Pam Galanter, Attorney for the County
Dick Norman, County Coordinator
Judy Brown, Personnel Representative

PRELIMINARY STATEMENT

The hearing was held on September 24, 2009 at the Wright County Courthouse in Buffalo, Minnesota. The parties presented oral and documentary evidence at that time. The parties submitted Briefs dated December 4, 2009 at which point the record was closed.

ISSUES PRESENTED

Is the grievance untimely and procedurally arbitrable?

The parties raised a substantive arbitrability issue as follows: Was the grievant a probationary employee when she was served with a letter dated February 23, 2009 that she would be terminated effective February 26, 2009?

The parties agreed that the matter would be bifurcated and that only these issues were to be determined at this point. The matter would be tried on the merits only if the arbitrator decided that the matter was procedurally and substantively arbitrable.

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement covering the period from December 31, 2008 through December 31, 2011. Article VII provides for submission of disputes to binding arbitration. The arbitrator was selected from a list provided by the State of Minnesota Bureau of Mediation Services.

The parties agreed to bifurcate the hearing and determine the substantive and procedural arbitrability issues. This as noted herein is essentially a determination of whether the grievant is or is not a probationary employee and thus entitled to a full evidentiary hearing on the merits and whether the grievance was timely filed. If the arbitrator determines that the matter is arbitrable then a second hearing will be set to hear the matter on the merits. No evidence on the merits was submitted.

UNION'S POSITION

The Union's position is that the matter is both timely and substantively arbitrable and should proceed to a hearing on the merits. In support of this position the Union made the following contentions:

1. The Union asserted most strenuously that the grievant was not on probation when she was terminated on February 26, 2009. The Union pointed to the provisions of Article 14 of the labor agreement, which provides as follows: "All newly hired or rehired employees will serve a six (6) month probationary period." The Union argued that this language is clear and unambiguous and does not differentiate between full or part time employees. Thus, the Union argued, all employees, including part time employees serve a 6-month probationary period after which they are entitled to the full protection of the labor agreement. The Union also noted that several other provisions make reference to probationary status but do not modify or alter the clear provision requiring that the probationary period is six months.

2. The Union noted that the grievant was hired as a part time nurse on January 15, 2008 and argued that under the clear contract language her probationary period expired on July 15, 2008. The Union argued that when she was hired she was not clearly told that her probationary period would extend to a full year. The Union did not acknowledge that the grievant even got that document; at best she said she may have seen it but paid little attention to it even if she got it since it was not emphasized or discussed much at the meeting at which she was hired.

3. The Union asserted that the handwritten notes on the document cited by the County were neither clear nor would it trump clear contract language to the contrary. Simply because the employer asserts something does not allow it to unilaterally alter clear contract language.

4. The grievant had a work injury on September 30, 2008 and had back surgery as a result of that injury in December 2008. She was never told at the time that her probationary status had been extended. Moreover, she had actually worked 1040 hours, a six-month equivalency in November 2008. Thus even if the County's assertion is correct, i.e. that there is a pro-rated probationary status, she would have reached that in November 2008.

5. The grievant was placed on a medical leave following her surgery and it was anticipated that she would return to work in February 2009. She met with her supervisors on February 18, 2009, fully a month and several days after the one-year point from her hire date, to discuss her return to work. Still the County did not advise her at that meeting that she was on probation and discussed a return to work. It was not until February 27, 2009 that the County attempted to terminate her employment alleging that she was probationary.

6. The Union asserted that the County's allegation regarding untimeliness is nonsense. The contract does not provide for a step increase upon the successful completion of probation so there is no reason for the grievant to have assumed she was entitled to one as of July 2008. Again, any claim of "practice" by the County does not negate the clear provisions of the labor agreement. Simply because the County did not grant a pay increase in July 2008 does not negate the grievant's right to file a grievance over her termination months later. The County asserted that the grievant should somehow have known that she was due for a step increase following her probation and that the fact that she did not receive it in July 2008 started a time clock running on the claim that she was not probationary. The Union asserted that this argument misses the point entirely – for one thing, the grievant would never have known that she was entitled to a step increase because that is not in the contract; it is another of the County's nebulous practices that nobody seems to know about.

7. Moreover, this grievance is not about the grievant's step increase; it is about her termination. That, of course, did not occur until February 2009 and it is ludicrous to assume that she should have filed a grievance in July 2008 over an event that did not happen until February 2009. Thus, the assertion that the failure to file a grievance over the failure of the County to grant a step increase in July should be rejected out of hand by the arbitrator.

8. The Union vehemently opposed the County's assertion that it has a binding past practice allowing the extension of the probation for part time employees. The Union argued that there was no mutuality here since the Union was never made aware of the County's unilateral practice of using a pro-rated probationary period in clear contravention of the contract language cited above. The Union argued that the Union must be made aware of a past practice for it to be binding and that there was no evidence that they ever were. Union witnesses claimed that they were never made aware that the County was unilaterally changing the contract. The Union cited Elkouri for the proposition that the non-exercise of a right does not equate to a binding past practice. The Union has the right to decide when and under what circumstances to enforce the provisions of the labor agreement. Here the Union never had notice that the County was interpreting the labor agreement in this way and thus there can be no binding past practice.

9. Further, this exact situation seems not to have occurred in the past since no part time employee has been denied probation in a situation like this. Thus, the element of consistency is also lacking in this instance thus also negating the County's claim of a binding past practice. Obviously for a past practice to be binding it must have occurred in the past and here it has not thus negating one essential element of past practice.

10. The Union also countered the claim that there was a resolution of this grievance during the step meeting. The Union asserted that there was no indication by the Union that simply having the County be clearer the next time this situation arose was a resolution of this grievance.

11. The essence of the Union's claim is that the contract clearly provides for a six-month probationary status. Even if one assumes that it is pro-rated as the County suggests, the grievant in fact was employed for longer than one year. She further had sufficient hours on a pro-rated basis to satisfy probation as of November 2008. The Union asserted that there is no binding past practice that would overrule clear and unambiguous contract language;. Several elements necessary for such a practice are missing; namely, mutuality and consistency at the very least.

The Union seeks an award finding that the matter is procedurally and substantively arbitrable and ordering the parties to proceed to a hearing on the merits.

COUNTY'S POSITION:

The County's position was that the grievance is both procedurally non-arbitrable as untimely and is not substantively arbitrable. In support of this position the County made the following contentions:

1. The County alleged that the grievant was still in probationary status despite her hire date of January 15, 2008. The County asserted that the grievant was hired on a half-time basis and that the County has had for more than 25 years a longstanding, well understood and accepted practice of pro-rating probationary periods for part-time employees. The County put on witnesses who have been with the County for decades who testified that the practice of calculating probationary periods for part time employees based on full time equivalency has been in place for as long as they have been there.

2. The County further alleged that the grievant was informed of this when she was hired and even received a document with clear handwritten notes on it indicating that she would be subject to a 12-month probationary period because of her half time status. This message was relayed to her during the interview and again when she was hired so the grievant cannot now be heard to say that she did not know when her probation would end.

3. The County further asserted that the Union and all of the affected employees are well aware of this practice. There have been labor agreements in place since at least 1987 all of which have the same language in it regarding probationary status as set forth in Article 14 of the current agreement. Despite that, the County has always applied that language for part time employees based on full time equivalency. Here that would mean that the grievant must work for at least 12 months before passing probation. Thus, for a person hired on a 0.5 FTE basis, such as the grievant, must serve a 12-month probation and that this has always been applied consistently for more than 25 years.

4. The County noted too that even though the grievant's hire date was January 15, 2008, her probation was extended due to her medical leave following her work injury. Moreover, the County asserted that this has always been done on the basis of "months" not hours worked as suggested by the Union. Thus, the fact that the grievant had worked 1040 hours as of November 2008 does not control this situation. The clear practice is to require 12 months, less any medical leave time, and that would have extended Ms. Miller's probation until after February 26, 2009.

5. The County also asserted that the grievant was told during her interview that she would be eligible for a step increase upon completion of probation. The County noted that the grievant was not granted an increase in July 2008 and that this obvious fact should have alerted her to the fact that her probationary period was not over in July. The County acknowledged that there is nothing in the labor agreement specifically calling for a step increase upon completion of probation but asserted again that this has been a longstanding practice to grant such raises after employees complete probation.

6. She did not file a grievance over the lack of a step increase in July 2008 and the County asserted that this renders the instant matter untimely. The County argued that the grievant would have known in July 2008 that she did not get a step increase and that this would have been obvious to her on her paycheck. The County asserted that the grievant cannot now come and argue that she should have been on permanent status when she knew she had not passed probation in July. Clearly this grievance is well past the 21-day period called for under Article 7.6 and should be denied as untimely.

7. Following her work injury the grievant was placed on a medical leave starting November 7, 2008 through February 7, 2009. She was allowed to use personal leave for that time. This leave was extended to February 26, 2009 due to her medical. Her request to extend the leave beyond that was denied. Further, even though the grievant did not receive the February 23rd letter until March 3, 2009, she acknowledged that she was told verbally by Ms. Brown that the letter was mailed and that she had actual knowledge of its contents.

8. The County asserted the extension of the grievant's probation was consistent with the way in which personal leaves have been applied in the past. See County Exhibit 8. Thus she would have known that her leave was set to expire due to the information given to her for her personal medical leave. The grievant was terminated prior to that time; thus she is not entitled to the protection of the grievance procedure or to the just cause provisions of the labor agreement.

9. The County cited several prior examples where a medical leave was applied to extend a probationary period for a County employee. The County again asserted that the Union was aware of this practice and never claimed that it was unaware of this practice either.

10. The County argued that all of the elements of a binding past practice are present here and cited *Ramsey County v AFSCME Council*, 309 N.W. 2d, 785, 788 (Minn. 1984) for the proposition that a past practice can amend ambiguous language of a labor agreement.

11. Here the County argued the language is at least ambiguous since it is not clear from the language what the term "month" means and can be interpreted in different ways. It can be interpreted as 173.33 hours worked or a calendar month. The practice has been applied consistently to aid in this interpretation and has always been applied to mean a calendar month. Thus the practice can and should be used here to aid in the interpretation of the language of Article 14.

12. The County argued that a practice can even be used to supplant clear language if the elements of a practice are present. Here, even if the arbitrator finds the language clear, the practice effectively changes it to require full time equivalency for the calculation of probationary periods for part time employees. The County cited *Ramsey County* for this as well.

13. Finally the County argued that the so-called zipper clause should not prevent the practice from being applied here. The County cited *Ramsey County* as well as many commentators for the proposition that a zipper clause does not negate a clear practice that has gone on for years. The County noted that it is not credible that the Union did not know that this practice had been in effect since there have been 9 or more contract negotiations through which the practice has been applied.

14. The essence of the County's argument is that the County has had a longstanding and accepted practice of applying full time equivalency for part time employees. The County also asserted that there is an equally longstanding practice to extend probationary periods where there is a medical or personal leave during the period of probation. Here the grievant was hired with the understanding that she would serve a 12-month probationary period that was later extended in November 2008 until February 26, 2009. The grievant was therefore within her probation when she was terminated. Under the clear terms of the labor agreement, she is not entitled to the protection of the labor agreement during probation.

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

DISCUSSION

The grievant was hired January 15, 2008 as a part-time, 0.5 FTE, public health nurse. There was considerable dispute about what the grievant was told at the time of her interview and during the meeting she had with Ms. Brown at the time of her actual hire.

Ms. Brown testified that she informed the grievant that her probationary status was actually going to be a year rather than the 6-months called for in the labor agreement. Employer Exhibit 3 shows several handwritten notes so indicating that change.

The grievant also testified credibly that she may or may not have been told this and does not recall if she took that document home with her after the meeting. What was clear was that this conversation did not emphasize the point and that she paid little attention to when her probationary status would end. She relied on the labor agreement. The parties acknowledged, albeit to different conclusions, that the labor agreement does not distinguish between full or part time employees and provides for a 6-month probation period as set forth above. See Article 14.1

On this record, no clear conclusions can be reached as to whether the grievant was adequately informed of the change in probationary status. Moreover, even if it was made clear to her at the time of these meetings, one party cannot unilaterally change a contractual provision simply by saying “it’s not so.” Merely telling an employee something which is in contravention of clear contract language does not change the language.

Moreover, even the County’s policy statements provide for a 6-month probationary period. See County Exhibit 1. There is no exception for part-time employees either in the labor agreement or in the policy statements. Further, policy section 205.04 even prohibits an extension of the probationary period. The Union asserted that these statements when read together supports the argument that the probationary status is 6 months and cannot be extended beyond that.

The point here is that the statements made to the grievant, who was a new hire and who would have had no knowledge of the provisions of the labor agreement, could not operate to change the clear language in the labor agreement. The question is thus whether there is a binding past practice at work here that has amended the clear provisions of the labor agreement.

TIMELINESS – PROCEDURAL ARBITRABILITY

Initially before even reaching the question of whether the grievant was probationary and thus entitled to the protections of the grievance procedure it must be determined if the grievance was processed in a timely fashion. It was clear that here it was.

The County's argument is a bit derivative here. The County argued that the grievant should have known she was entitled to a step increase "upon passing probation" and that she did not receive one in July 2008, when six months since her hire date had passed. Thus, the argument goes, the act complained of, i.e. her failure to become a permanent, non-probationary employee, occurred in July 2008 when she did not get a step increase and she should therefore have filed a grievance over her failure to make probation then rather than waiting until February or March of 2009.

There are several grave problems with this argument. First, the act complained of here is not the failure to get a step increase but rather the letter advising the grievant that she was terminated. There is no question that the grievance was filed well within the time frames required in the contract from that date. It is axiomatic that the grievance must be filed within the prescribed time frames set forth in the labor agreement from the date of the act complained of. Here that was the date the grievant was served with her termination letter. Obviously if she had waited to file a grievance in March 2009 over the failure to grant her a step increase in July 2008 we would have a very different discussion but that is simply not the case here.

Moreover, it was not clear if the grievant knew she was entitled to such an increase. There was some testimony that she was told she would get an increase when she passed probation. Even if this were true that would have governed her rights to grieve the failure to get the pay increase but would have no effect on her rights to grieve a termination, which occurred more than year after her hire.

On this record, the evidence showed that the grievance was timely filed and that the matter should proceed to the discussion of whether the grievant was a probationary employee or not when she was terminated.

SUBSTANTIVE ARBITRABILITY – WAS THE GRIEVANT PROBATIONARY?

The County argued that the practice of pro-rating probationary periods has been in place for literally decades and that the practice meets all the necessary requirements of a binding past practice as outlined in the seminal case of *Ramsey County v AFSCME Council*, 309 N.W. 2d, 785, 788 (Minn.

1984). There the Court affirmed an award whereby the arbitrator sustained a grievance for greater vacation time than was provided for in the labor agreement.

Perhaps the best known case in Minnesota was *Ramsey County v AFSCME*, 309 N.W.2d 785 (Minn. 1981). There the arbitrator found that the parties' practice with respect to vacation accrual rates differed from the clear language of the contract. The matter arose when it was discovered that employees had for years been receiving vacation accruals and payments upon their departure from the County that were very different from what the clear language of the contract indicated. The County had argued that the clear language of the contract, and it was, indicated that the County had simply been paying the incorrect accrual rates for years and that it was simply done in error. The County also argued that the language of the contract where clear must always govern lest the whole process of negotiations be threatened with too liberal a use of past practice.

The employer in Ramsey County also argued that the so-called zipper clause made the past practice argument moot. This clause, it was argued prohibited the use of any practice or matter outside of the present collective bargaining agreement from being considered. It was supposed to prevent the very argument being made by the Union in that matter.

Despite that, the arbitrator ruled in favor of the employees because the practice, even though different from the clear language in the labor agreement, met the tests for a binding past practice. The Supreme Court held in *Ramsey County* as follows:

“[p]ast practice has been defined as a ‘prior course of conduct which is consistently made in response to a recurring situation and regarded as a correct and required response under the circumstances.’ Certain qualities distinguish a binding past practice from a course of conduct that has no particular evidentiary significance: (1) clarity and consistency; (2) longevity and repetition; (3) acceptability; (4) a consideration of the underlying circumstances; (5) mutuality. 709 N.W.2d at 788, n. 3 (Citing from Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements*, in *Arbitration and Public Policy* 30 (S. Pollard ed. 1961).

Thus, the essential feature of any award, whether it is derived from reliance on past practice or not, is whether it “draws its essence from the labor agreement.” See, 709 N.W.2d at 790-91. It appears thus pretty clear that in Minnesota at least, it is well settled that custom and practice of the parties may be used to provide interpretation of existing language or it may be used to establish that the practice is binding even in the face of contrary and clear contract language, as in *Ramsey County*.

Other commentators have noted that a true binding past practice can provide clarity to unclear language, provide for the filling of so-called “gaps” in language, i.e. where the labor agreement is silent on a particular subject, and even to amend clear contract language, especially where the practice has persisted through several contract negotiations. Elkouri states it in slightly different terms as follows: In the absence of a written agreement, ‘past practice,’ to be binding must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties.” Elkouri and Elkouri, *How Arbitration Works*, 5th Ed. p at 632 citing to *Celanese Corp. of America*, 24 LA 168 (Justin 1954).

It should be noted however, that there is a reluctance of many arbitrators to overturn or alter what appears to be clear contract language. Not all arbitrators are so quick to allow evidence of past practice much less to use it to overturn clear contract language to the contrary. Elkouri cites to Arbitrator Whitley McCoy as follows:

“ ... caution must be exercised in reading into contracts implied terms lest the arbitrators start remaking the contracts which the parties have themselves made. The mere failure of a 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 the loss of it. See Elkouri at 635, citing to *Eso Standard Oil*, 16 LA 73 (McCoy 1951).

There is some debate still over the application of past practice with some quite preeminent arbitrators and commentators arguing that clear language cannot under any circumstances be amended even by a practice that meets all of the elements set forth herein. The Courts in Minnesota and what

appears to be at least a preponderance of arbitrators, hold to the notion that a practice that meets all of the elements of a binding past practice can indeed amend even clear language.¹

Having said that however, it appears that the measure of proof necessary are, and legitimately should be, somewhat greater since the sanctity of the written and agreed upon words of a labor agreement must be maintained. Practices that are not mutual or well understood or accepted or which do not cover the situation at hand may well not be granted that exalted status of binding past practices sufficient to render meaningless or to amend clear contract language to the contrary. It is such a situation with which we are faced in this matter.

It is clear that given the precedent cited above that under the proper circumstances a past practice can be used to create a right that draws its essence from the agreement even in the face of clear contractual language that is different from the practice and even in the face of a zipper clause that purports to erase such practice. The question here is whether all of the elements of a true binding past practice are present to create a separate contractual “provision” calling for a pro-rated probationary period for part time employees.

Initially, the first question is whether the language is ambiguous or not. The County argued that the term “month” as used in the language is ambiguous and that the practice clarifies that term to call for a pro-rated period. The County argued that there is no definition of “month” in the labor agreement and that it could be used to mean several different things. This argument rang somewhat hollow here however. The Union at one point argued that the grievant should be granted permanent status since by November of 2008 she had more than 1040 hours worked for the County and by the measure suggested by the County that should be sufficient to grant her permanent status. In response to that however, the County both in its Brief and at the hearing, argued that hours are not to be used and that “month” has always been interpreted to mean calendar month.

¹ Elkouri discusses this division of opinion at some length in the 5th Edition of *How Arbitration Works* at page 652 – 652.

The County cannot now argue that month is unclear when it argued in this same case that it was.² Here, the contract language is clear and unambiguous – the question is whether the elements of a binding past practice have changed it.

Certainly parties can, and often do through the course of time, act in such a way as to make it clear that they have altered contractual language. Before that can be determined, arbitrator and commentators require that the elements above have been met. Longevity is one that must first be applied. Clearly, a practice which happens once or very infrequently may not carry the day for the party arguing that a past practice exists. Here though, the County witnesses testified credibly that they have applied it consistently for years.

It was clear that the County administrators believed that the probationary periods were to be pro-rated. It was clear that they have been pro-rating it for years and that this has been consistent throughout the years. It was also shown that there have been other employees who have been hired on a part-time basis whose probationary period was extended beyond the 6-months and was pro-rated. See County Exhibit 6. Thus, the elements of longevity and consistency appear to have been met. That however is not all that is required – the elements of mutuality and acceptance are also required and those were not shown to be present here.

Here, as in *Ramsey County*, the language pertaining to probationary periods has stayed the same throughout several rounds of negotiations. By one measure, this mitigates in favor of the County since the practice appears to have been in place even though the parties left the language of Article 14.1 alone for years. That however is not the sole question here – there is the question of whether the Union was aware this was going on and whether it accepted that probationary periods were pro-rated for part-time employees. On this record these elements were lacking for several reasons.

² The County argued that the Union's argument that the grievant's probation should have ended in November or December of 2008 shows the ambiguity of the language. This however fails to appreciate the Union's argument here, which was to point out the inherent difficulty of the County's assertion that the grievant did not possess a pro-rated amount of time to pass probation. The Union was essentially pointing out that by any measure the grievant had enough time in to have passed probation. It was not, as the County suggests, an acknowledgement that the language of Article 14.1 was ambiguous and needed past practice to aid in its interpretation.

First, and significantly, the evidence showed that this exact scenario has not happened before. The record demonstrated that no previous part-time employees of the County have ever been terminated for failure to make probation. Thus, the question of how the probationary period was actually calculated has not arisen and the Union had no chance to challenge it after an actual dispute.

This fact undercuts the notion of mutuality but also that of consistency as well. While past practice has been called many things, one definition describes it as a consistent response to a recurring set of circumstances. Obviously, if something has not happened before it is difficult to call it a consistent response.

Moreover, the Union was not placed on notice that this was going on. While it is true that the current Union representative for this unit have not been in their respective positions for as long as the County administrators who testified about the practice, it was clear too that the Union was never informed in any meaningful way that the County has been pro-rating the probationary periods of part-time employees in this way.

There was certainly no affirmative notice to the Union by the County at any point along the way here that the probationary periods were being calculated this way. Further, there was no evidence that any employee other than this grievant was ever placed in any adverse situation or that their contractual rights were in any way adversely affected or even arguably so, by the County's practice of pro-rating the probationary period calculation.

The County asserted that the employees have known about this practice and that such knowledge must be imputed to the Union as well. Indeed there is some precedent for this argument. Some arbitrators have held that awareness of a practice can be implied to the Union based on the knowledge of the employees especially where a practice has gone on for long periods of time.³

³ See Elkouri, 5th Ed, at page 633, n. 12 and cases cited therein.

Initially it was not entirely clear that the affected employees did actually know about it or that there was some understanding by them of the possibility of a contractual violation. Assuming arguendo that there was however, it is not always the case that the knowledge by the line employees can be imputed to the Union as a whole such that a binding past practice is created.

Further, the fact that the issue has not arisen cannot be used to create an implied term in the face of clear and express language such as is in place in Article 14.1. The County pointed to several examples of part-time employees whose probationary periods were pro-rated, See County Exhibit 6. It was clear though that these employees were eventually placed on permanent status. That being the case, they would not have grieved the technical violation on the contract since they “made” probation. As the Union correctly pointed out, “the non exercise of a right does not amount to a ‘negative past practice’ and thus become a forfeiture of it once changed. Arbitrators consistently hold that even if a party has not done so in the past, the party retains the right to police the agreement at any point.” Elkouri and Elkouri, *How Arbitration Works*, 6th ed. at page 239-240.⁴

This is especially true in a situation where the affected employees have not been harmed and therefore did not bring a grievance. The Union may under some circumstances be held to the knowledge of the employees as the County argued. Here though the evidence showed that the Union was never made aware of this and that the scenario that occurred here has not occurred before. Under these circumstances the use of practice to negate clear contract language would be inappropriate.

Thus, the essential elements of mutuality and acceptance were missing here. Obviously a unilateral practice, even one that has gone on for years, is not binding on the other party unless there is evidence that the other party knew of it and accepted it as a part of the labor agreement, or at least as a part of the labor relations culture within a bargaining unit.⁵

⁴ Elkouri also noted as follows: A related rule is that a party’s failure to file grievances or to protest past violations of a clear contract rule does not bar that party, after notice to the violator, from insisting upon compliance with the clear contract requirement in future cases. See also, Elkouri, 5th Ed at page 652.

⁵ See Elkouri 5th Ed at page 633, n. 14 and cases cited therein.

It must, in the words of the Supreme Court, draw its essence from the labor agreement – or, as here, from some mutually accepted understanding of what the practice is under existing contractual language. That was the essential piece missing here.

Having made this determination it is unnecessary to determine whether the grievant's probationary period had passed because of the number of hours she had worked by November 2008 or whether in fact a full year had passed when she was served with notice of termination. Further there is no need now to determine whether she actually received the letter of termination in a timely fashion since she claimed she did not get it until early March 2009. On this record, her probationary period was 6 months, just as the collective bargaining agreement provides. That time had clearly passed as of July 2008 and she was a permanent employee entitled to the full protections of the labor agreement at that point.

Here is one final argument raised by the County that deserves some discussion though. The allegation is that this case was actually settled as the result of a meeting at the grievance step meeting between Union and County representatives. As the Affidavit of Mr. Madden shows, there clearly was a discussion about this grievance and both sides maintained their respective positions. The County understood that the Union had proposed a global resolution to this grievance when it suggested that the County be far clearer the next time it hired a part-time employee. The County apparently agreed to that suggestion, and rightfully so since the facts and circumstances of this hiring were murky at best.

The Union did not share that understanding and proceeded with the grievance to the surprise and consternation of the County's representatives. The Union asserted that there was nothing inconsistent with its assertion that the County had better do this in a clearer fashion the next time and its desire to continue on with this grievance. The Union expressed the same sort of surprise that the County felt but in the exact opposite direction.

As Louis B Mayer once quipped, “an oral contract isn’t worth the paper it’s written on.” That was never truer than here. There was no confirmation sent at the time of the step meeting or immediately thereafter regarding the parties’ understanding of the discussions at that meeting. Apparently there was a discussion about doing this differently but neither side walked away with the same understanding of what that meant insofar as this grievance was concerned.

Parties need to be able to settle grievances based on a handshake or, more to the point, upon the oral representations of the other party – when you have a deal you have a deal and labor relations would collapse if that culture ever changed. That is particularly true in this State since parties do not typically practice labor relations by ambush.

Here however, the grievant was not in attendance at the step meeting. Obviously had there been an affirmative statement that the grievance would be dropped by the Union or the grievant, the County could quite legitimately have relied on that in assuming the grievance was resolved. That, of course, did not happen here and neither was there an affirmative confirmation of the supposed settlement of the grievance. It was somewhat troublesome to learn of this scenario and both parties could learn a valuable lesson from this experience but the arbitrator is without power to fashion a remedy or to decide the case differently given the facts and determinations set forth above.

Accordingly, on this record, the award is that the contract language is clear and requires a 6-month probationary period for the grievant. Further, there was no binding past practice that altered that clear language and the grievant was thus a permanent employee as of the time of her termination. The matter will now proceed to a hearing on the merits.

AWARD

The grievant is determined not to be probationary. The matter will now proceed to a hearing on the merits.