

OPINION AND AWARD

OF

DAVID S. PAULL

In the Matter of the Interest Arbitration Between

Lake County Supervisory Association

AND

Lake County, Minnesota

(Interest Dispute 2008, 2009 and 2010)

BMS Case No. 09 - PN – 0924
Date Issued: February 1, 2009

Appearances

On behalf of Lake County Supervisory Association (Association)

R. Thomas Torgerson
Linda K. Libal

Association Lawyer
Association Treasurer

On behalf of Lake County (County or Employer)

Steven C. Fecker

Lawyer for Lake County

Statement of Jurisdiction

Lake County Supervisory Employee Association (Association) is the exclusive bargaining representative for the purpose of negotiating the terms and conditions of employment in a bargaining unit comprised of all supervisory employees of the County who are public employees within the meaning of Minnesota law, *M.S. Chapter 179A, Section 179A.03, Subd. 14*, excluding confidential and all other employees.

The parties are signatory to a collective bargaining agreement effective for the period beginning January 1, 2006 and ending December 31, 2007 (CBA). The CBA remains in full force and effect from year to year thereafter unless either party gives notice of the intent to modify no later than November 1, 2007. There are approximately 13 employees currently covered by the CBA.

Negotiations for a successor collective bargaining agreement were conducted, but the parties were unable to resolve all outstanding issues. On July 27, 2009, the Minnesota Bureau of Mediation Services (BMS) received a written request from the Employer to submit the unresolved issues to conventional interest arbitration. On August 5, 2009, the BMS certified the following issues for conventional interest arbitration pursuant to *M.S. 179A.16, subd. 2* and *Minn. Rule 5510.2930*.

1. Length of Contract – Should the Contract be Two or Three Years – Article 17.1
2. Wages - What Amount, If Any, Should A Pay Increase Be – Article 6.1

3. Wages – For 2008 – Article 6.1
4. Wages – For 2009 – Article 6.1
5. Wages – For 2010 – Article 6.1
6. Insurance – What Shall The Insurance Be for 2010 – Article 9. 1
7. Insurance – If a VEBA Plan, What Amount Shall the Employer contribute to the Employees Plan – Article 9.1
8. Insurance – What Should The Employer’s OPT OUT Payment Be, If Any – Article 9.1
9. Severance – What Shall The Language Be – Article 9.6/7
10. Retirement- How Shall Bill Lind’s Benefit Be Calculated
11. Compensatory Time – Language Regarding Use of Comp Time for Exempt Employee – Article 6.3
12. Compensatory Time – Banking and Payout of Comp Time for Exempt Employee – Article 6.3

The arbitrator was selected from a panel provided by the BMS. A hearing was conducted on Thursday, December 17, 2009, at the Lake County Courthouse. The parties were provided with an opportunity to present evidence in support of their respective positions. The parties also agreed to submit post-hearing briefs postmarked Monday, January 4, 2010. The briefs were postmarked in a timely manner and the last brief was received on January 6, 2009.

At the hearing, the City offered as evidence Employer Exhibits 131 and 167. The Union objected to the admission of these exhibits on the grounds that they were not

supported by the data from which they were created. As a condition to admissibility, the County agreed to provide copies of the supporting documents directly to the Association.

However, on December 23, 2009, the County provided notice that Exhibits 131 and 167 were withdrawn. With the receipt of the County's notice, the record was closed after the briefs were received.

Preliminary Matters

Employment Environment

The record indicates that the County is located approximately 170 miles northeast of the state capitol, in the “Arrowhead” region of northeastern Minnesota. The County encompasses a total of approximately 2100 square miles. A map provided by the parties indicates that hundreds of lakes and streams are contained within the County. The entire northern third of the County is within the Boundary Waters Canoe Area Wilderness. The population of the County is approximately 10,921 residents.

In addition to the unit of 13 supervisors, the County employs approximately 222 employees. The County bargains collectively with several other union groups, including a unit of 14 deputy sheriffs represented by Law Enforcement Legal Services, a unit of 38 courthouse employees represented by Teamsters Local Union 320, a unit of 27 human services workers represented by AFSCME Council 5, a unit of 11 jailers/dispatchers represented by Teamsters Local Union 320, a unit of 19 Highway employees represented by AFSCME Council 65 and 95 workers at Sunrise Home, a county operated nursing facility, represented by AFSCME Council 5. The County employs approximately 18 persons in non-union positions.

General Standards

Generally, awards in interest arbitration disputes depend on the analysis of several factors, including internal comparisons, the employer’s ability to pay, external market wage comparisons and cost of living. Where applicable, it is proper to consider the amount of turnover in the bargaining unit or the degree to which employees have been

retained. The law further provides that any award consider the provisions of the Local Government Pay Equity Act, *Minn. Stat. Sec. 471.991 et. seq.* (Pay Equity Act). However, an interest arbitration award may not be based solely on pay equity considerations.

Issues 6, 7 and 8

Health Insurance for 2010

Article 9.1

Association Proposal

Noting that the 2008-2009 insurance coverage is already provided for in the current collective bargaining agreement, the Union proposes that negotiating health insurance provisions for 2010 is unnecessary and premature, taking the position that the issue should be left for future bargaining, specifically for the collective bargaining agreement for the 2010-2011 period.

County Proposal

The County proposes a significant change in health insurance plans for 2010, taking the position that the health insurance for calendar year 2010 should be a specific plan known as the Voluntary Employee Beneficiary Association (VEBA) 823.

Specifically, the County proposes to revise Article 9, Section 1, effective as of the end of December 31, 2009, as follows:

Section 1. Medical-Hospitalization-Surgical Coverage: Effective the first of the month following the date of employment, the Employer shall pay on behalf of the employee, the amount of the premium of the employee-selected medical-hospitalization-surgical insurance plan, with the Employer contribution not to exceed 80% of the monthly premium for single coverage or \$408.00 per month (\$417.00 per month effective 2007), whichever is greater, for the Blue Cross/Blue Shield Low Option Plan, or 80% of the premium for Blue Cross/Blue Shield Low Option Plan for family coverage.

Effective as of the end of December, 31, 2009, Section 1 above will be deleted and Section 1 set forth below will be in effect:

Section 1. Medical-Hospitalization-Surgical Coverage: The Employer will offer a VEBA 823 group health insurance plan effective January 1, 2010. All plan

provisions are governed by the Summary Plan Description (SPD) and not by the labor contract.

Effective the first of the month following the date of employment, the Employer shall pay eighty percent (80%) of the single monthly premium or eighty percent (80%) of the family monthly premium for the VEBA 823 plan. The employee shall pay the remaining twenty percent (20%) of the monthly premium for the coverage selected by the employee.

In addition, the Employer shall contribute to the VEBA account of each eligible employee, according to the following schedule:

<u>Commencing Year</u>	<u>Single</u>	<u>Family</u>
2010	\$1690	\$3250

The Employer's annual contribution to the VEBA accounts shall be made in four (4) equal quarterly installments, payable as of the beginning of each quarter of the calendar year to then-eligible employees. For 2010, the Employer may advance quarterly payments in individual hardship cases, subject to the employee's obligation to repay the Employer in the event the employee is not employed long enough during the year to have been entitled to the quarterly payments which were advanced.

The Employer shall be obligated to make only one (1) VEBA account contribution on behalf of an employee. Therefore, if the employee is enrolled as a dependent of another employee for whom the Employer has made a family coverage contribution, the Employer is not obligated to make a separate single coverage contribution on behalf of the employee.

Effective 2010, for employees who are eligible for group insurance but elect to waive coverage, the Employer shall pay annually to the employee's Post-Employment Health Care Savings Account, an amount equal to the difference, if any, between the Employer's contribution to the VEBA account of an employee with single coverage and the employee's annual share of the premium for single coverage, payable in quarterly installments at the beginning of each calendar quarter to an employee who is then eligible for the quarterly payment.

Award

The County's proposal is awarded. Other than the VEBA 823 health insurance provisions, no part of the 2008-2009 collective bargaining agreement shall extend into year 2010.

Analysis

The issue of whether the agreement should address the nature of health insurance for year 2010 is pivotal in this dispute. It is noted that the County's 1% wage proposal for 2009 is proposed to be "subject to revision" if the VEBA plan is not awarded for 2010. It is further noted that the County's only proposal for 2010 is health insurance. In every other respect, the County agrees to a contract length of two years.

Given the dependence of the wage and duration issues on the nature of the insurance award, it seems prudent to resolve the insurance question first. The County's health insurance proposal is the only term negotiated that seeks to extend the collective bargaining agreement beyond the two year duration sought by the Association.

Positions of the Parties

The County's position is that its proposal should be awarded because every County settlement, including all but 2 employees groups, have adopted the VEBA 823 plan and the VEBA 823 is a plan is more cost effective than the current plan, for both the County and the employees.

The Association does not take a precise position on the merits of the VEBA 823 plan, as compared with the current insurance benefit. According to its witness Linda

Libel, the Association objected to the new provisions because (1) it did not have a sufficient voice in choosing the plan, (2) the County's proposed contribution was insufficient and (3) the plan was unnecessarily complex. Precedent is cited by the Association for the proposition that an interest arbitrator "should not alter long standing contractual arrangements in the absence of a compelling reason to do so."

While these points are pertinent and credible, they are insufficient to support the Association's position. The evidence disclosing a sharp rise in health insurance costs is not disputed. The need to reduce these costs, especially in the context of current economic downturn, appears to be sufficiently compelling to support the award.

Ability to Pay

The County does not contend that it lacks the ability to pay for the Association's proposals. However, it did provide economic data that indicates that it is facing financial challenges that are relevant to the award.

The record shows that the *per capita* personal income of a county resident is nearly \$6,000 per year less than the Minnesota average and that the *per capita* property taxes are higher than Carlton, St. Louis, Itasca and Koochiching counties. The County's undesignated fund balance declined in 2008 and 2009, despite significant levy increases.

Additionally, the County, like most regions in the state, is experiencing the effects of the current recession. Unemployment is historically high and the largest employers in the County have completed cutbacks. Increases in federal payments in lieu of property tax for the BWCA lands are being partially offset by losses of nearly \$500,000 due to

state reductions in funding. Mining revenues in the form of the taconite tax have decreased due to reduced levels of production.

For the period beginning in 2004 and ending in 2007, the County experienced a 54.2% increase in group health insurance premiums. The County purchases its health insurance through the Northeast Service Coop pool and it benefited from a 20% supplement from this insurance purchasing pool. The pool represents 56 jurisdictions, including five counties and over 3000 employees. Without the additional 20% provided by the pool, the premiums percentage increase would certainly have been more.

In response to these rapidly increasing costs, Lake County formed a management insurance committee to study alternatives. The committee examined various plans. Labor representatives were invited to attend the proceedings. The conclusion of the committee was that a VEBA plan would generate a 15% - 30% reduction in premiums. Thereafter, the County resolved to raise the issue in the approaching 2008-2009 contract negotiations.

The VEBA 823 Plan as Proposed by the County

The VEBA 823 plan, as proposed by the County, has high deductibles. Specifically, the VEBA 823 plan calls for deductibles of \$2600 per person and \$5200 per family. After the deductible is met, the plan provides 80% co-insurance (80% paid by the plan and 20% paid by the employee) until the annual out-of-pocket maximum of \$3500 per person or \$6500 per family is reached. Thereafter, the plan pays all claims at the rate of 100%.

The Current Plan

The coverage, as proposed, is the same as the current Blue Cross Blue Shield low option plan. But in the current plan, the deductible and out-of-pocket maximums are substantially lower. Specifically, the annual deductible in the current plan is \$300 for single coverage and \$900 for families. The out-of-pocket maximum for a single person is \$1500 and \$3000 for families.

However, the higher deductibles and out-of-pocket limits are somewhat offset for each participating employee through a device known as the “VEBA account.” In addition to paying the premium, the County is required under the plan to contribute into a VEBA account for each participating employee in the amounts proposed. The account is not subject to income tax. The funds contributed into this account may be used by participating employees for claims that occur within the deductible period, as well as for co-insurance payments. Unused balances carry over and may be accumulated and used in future years. The account is portable, in that it may be taken by the employee to a different job with a different employer.

Cost Savings

The objective of these proposed new provisions is no mystery. In proposing VEBA 823, the County hopes to lower health care costs by discouraging employee utilization. “Instead of the employee’s money going for premiums,” the County maintains, “the employee has the potential to keep monies which are not expended for claims.”

The amounts contained in the VEBA accounts are indicative of whether the goal of reduced utilization is achieved. The County notes that, in each settled contract in which the VEBA 823 plan has been adopted, it is obligated to make the same contribution amount it is proposing in this interest proceeding. For those bargaining unit that have agreed to it, the VEBA 823 plan appears to have reduced employee utilization. After only 1¾ years, ¾ of a year for some of the units, employees have accumulated, on average, a little less than \$2000 in their VEBA accounts. Of the 68 employees listed, only 12 (17%) have zero balances, indicating a high rate of utilization for those employees. The majority of employees, approximately 32%, have balances in excess of \$1900, indicating a lower rate of utilization.

Another feature of the VEBA 823 plan appears to compensate unit employees for the higher deductible and out-of-pocket limits. As of the date of hearing, six unit employees, approximately 46%, waive insurance. Pursuant to the VEBA 823 plan, these employees receive a payment equal to the difference between what the County contributes to a single coverage employee's VEBA account and the employee's premiums cost for single coverage. There is no corresponding waiver payment under the current plan.

The cost savings for the County under the VEBA 823 plan will be significant. For 2010, the County's cost, when compared to the current plan, will be \$7,494.80, or 1.17% of the entire payroll cost. It is noted that \$4212 in additional costs were incurred by the County because the bargaining unit employees were not on the VEBA 823 plan in 2008. For 2009, the extra cost was \$2005, or .31% of payroll.

Internal Comparables

As of the date of hearing, six out of County's seven bargaining units, plus the non-represented group, have settled their respective collective bargaining negotiations and have agreed to be covered by the VEBA 823 plan. Only the Highway workers and the Supervisory unit have not settled their contracts for 2008 and 2009. The settled units, including the non-represented group, constitute approximately 203 of the County's 235 employees.

External Comparables

The County asserts that the counties of Carlton, Aitkin, Cook and Koochiching are comparable to Lake County, because these counties are the only counties in the region to have adopted VEBA plans. The Association maintains its position that the Counties arguments that the VEBA 823 plan is "the best insurance plan for it and its employees" is not relevant, since the proposal exceeds the two year duration. However, the Association does point out that the Counties position is "clearly undercut" because, of the four counties, three adopted VEBA 100 plans (Carlton Aitkin and Cook) and only one (Koochiching) adopted a VEBA 823 plan. "The County's own committee report," the Association asserts, "confirmed that the County could indeed maintain up to three different plans and could generate a 15-30% reduction in premiums by switching to a VEBA 100 plan."

The Association's contention is supported by the record. However, the County notes that the Association supplied no cost comparison data for 2010 and that the VEBA

100 plan would cost both the County and employees substantially more, based on the “high utilization by Lake County employees.”

The County’s proposed premium for 2010, \$476 for single and \$1142 for family coverage, is higher than Koochiching (\$350-\$936) and Cook (\$450-\$1124) counties, but lower than Carlton (\$573-\$1378) and Aitkin (\$578-\$1092) counties. This indicates that, in terms of amount of the employer contribution, the County’s proposal is in a reasonable range.

The cost of living data provided in the record were not particularly helpful in resolving this health insurance issue.

Issue 1

Length of Contract (Duration)

Article 17.1

Association Proposal

The Association seeks an award of a two-year term, beginning January 1, 2008, and ending December 31, 2009.

County Proposal

The County also proposes that a two year contract be awarded. However, the County seeks an award that also permits the bargaining unit to convert to the VEBA 823 plan in 2010.

Award

The County's proposal is awarded. A collective bargaining agreement of two years duration is awarded, beginning January 1, 2008, and ending December 31, 2009, with the exception that the agreement shall provide for the conversion of the bargaining unit to the VEBA 823 plan, as soon as possible in 2010. The VEBA 823 provisions shall be in force until a new agreement is negotiated by the parties.

Analysis

The Association's contentions with regard to the final term of the agreement are neither financial nor economic in nature. However, the Association does convincingly

argue that the County has “consistently utilized contracts of a two-year duration and has never, until now, demanded a contract extending terms into a third year. The Association repeats its previously cited principle that an interest arbitrator “should not alter long standing contractual arrangements in the absence of a compelling reason to do so” and refers to a previously decided interest arbitration in support of the rule that the “burden is properly placed upon the party to the negotiation proposing a change.”

The Association further notes that the six organized bargaining units have negotiated two year terms “for the last 14 years or more” and that the Association itself has agreed to two year terms in the last eight contracts. The County, the Association declares, did not propose its “three year term” until April of 2009, months after the commencement of negotiations.

These factors indicate that the agreement should be two years in length, with the exception of the insurance provision.

The Association’s arguments also focus on the insurance issue. It argues that the County has failed to demonstrate any “compelling need” for the insurance change it proposes. Insurance for the term of this agreement, the Association maintains, is already set. The 2010-2011 negotiations “have not yet commenced,” it argues, and “are not a proper subject of arbitration.” The County’s position, argues the Association, eliminates its contributions for the existing three policies, replacing them with one policy, the VEBA 823 plan, “[A]ll of those changes . . . for the third year of the contract, i.e. 2010.”

The Association also argues that the County’s position, that the VEBA 823 is the best insurance plan, is “not relevant to the subject of the term of the contract.” The County “had more than two years” to reach agreement, but failed to do so.

By default,” the Association asserts, “current insurance coverages continue.” The Association accuses the County of “ignoring the Association” from the fall of 2008 to the spring of 2009. “Had the County desired to have an interest arbitrator impose insurance requirements for the historical two-year contract term covering 2008 and 2009, it could and should have earnestly pursued negotiation with the Association prior to expiration of the 2006-2007 contract in the fall of 2007 and, if unsuccessful, sought interest arbitration at the time.” The Association asserts that the County’s failure “does not constitute a justification to expand the contract term to three years.”

However, although the record appears to support several of the Association’s contentions, there does appear to be a persuasive reason to award the VEBA 823 plan. The significant rise in health insurance costs is sufficient to constitute a “compelling need” for some type of change, despite the 14 year consistent record of negotiating two year agreements.

The Association contends that the County failed to devote sufficient attention to negotiating a final agreement. The Association, in effect, charges that the County created its own emergency by “ignoring” the Association.

The record shows that, on November 2, 2007, the County sent the Association a message indicating that its counter proposal was “not agreeable.” There is evidence that the parties met in September of 2008 and again on April 14, 2009. The County made a comprehensive proposal on health insurance dated April 28, 2009. There is evidence that negotiations were occurring in August of 2009.

It is clear that the parties did not negotiate on a regular basis. The reasons for this schedule are not made totally clear by this record. There is an email from the County’s

negotiator indicating a concern that Minnesota law “prohibits supervisors from negotiating jointly with non-supervisory units.”

It is difficult to evaluate this issue in the context of the record submitted in this proceeding. Regardless, nothing in evidence indicates that the pattern and frequency of the negotiating sessions between the parties would support a different award. In any event, this does not appear to be the proper forum to consider whether the County’s bargaining was improper or did not comply with the law.

Issues 2, 3, 4, and 5

Wages for 2008, 2009 and 2010

Article 6.1

Association Proposal

The Association proposes that the base wage for 2008 be increased by 2% and that a similar 2% wage increase be awarded for 2009.

County Proposal

The County proposes that the base wage be increased 2% for 2008 and 1% for 2009. The County also proposes that no change in the base wage be awarded for year 2010.

Award

The Association's position is awarded.

Analysis

In the hearing and in its statement of position, the County has indicated its intention to modify its position to a 2% increase to base wage in 2008 and 2009, if the bargaining unit is willing to "convert to the VEBA 823."

The record clearly supports the Association's proposal, regardless of the insurance benefit. There is no reason, based on this record, to subject the issue of wages for 2010 to this proceeding.

Both parties agree that, in determining the appropriate wage rate, great deference must be given to the internal comparables. The cases state that the internal comparisons are the “single most important” factor in determining wage increases in interest cases.

Here, the record indicates that, in all of the four bargaining units settled as of the date of the hearing, the County has agreed to 2% increases in 2008 and 2% increases in 2009.

External comparables also support the award. The record indicates that 2% or greater base wage increases for 2008 were agreed to in all Region 3 settlements, including the counties of Aitkin, Carlton, Cook, Itasca, Koochiching and St. Louis. For 2009, three of the six Region 3 counties have agreed to base wage increases of at least 2%. Of the remaining three counties, two awarded increases ranging from 2.5% to 3.5% in 2008.

The CIP increases for 2008 and 2009 further support the award. The CPI for 2007 was 2.8%. The CPI for 2008 was 3.8%. Both of these statistics support the award

Issues 9 and 10

Severance for 2008 and 2009

Calculation of Lind Severance

Article 9, Sections 6 and 7

Association Proposal

The Association proposes that the current severance provisions be modified by returning to the severance provisions contained in the collective bargaining agreement in force for 2004-2005. The Association further proposes that the severance calculated for Bill Lind and all future bargaining unit retirees be calculated in accordance with the 2004-2005 provision.

County Proposal

The County proposes no change to the current provision be awarded.

Award

The County's position is awarded.

Analysis

Article 9, Section 6, generally provides that, upon termination of employment, the County will no longer have an obligation to contribute for health insurance. However, the collective bargaining agreement does provide for some County payments to retirees.

Article 9, Section 7, Subd. 2 provides as follows:

For an employee who qualifies for severance under Subd. 1 above who retires at a time when the employee is eligible for and will immediately begin receiving PERA retirement benefits, the Employee shall, *upon the employee's retirement, pay the Employer's contribution to the monthly premium for single coverage under the Lake County group medical insurance plan* for up to thirty-six (36) months of premiums at the month premium rate in effect at the time of retirement. (emphasis supplied)

For any months during the thirty-six (36) month period that the employee/retiree will be eligible for Medicare the amount of the monthly premium shall be computed based on the premium at the time of retirement for single Medicare supplement coverage through the same carrier with which the employee had coverage during Lake County employment.

In no event shall the payment under this Subd. 2 exceed the amount of accumulated, unused sick leave remaining after the ten percent (10%) or twenty percent (20%) payment provided for in Subd. 1.

For the period beginning 2004 and ending 2005, the collective bargaining agreement required the County to make a cash payment to those bargaining unit workers who had retired or terminated employment through voluntary action. The payment was based on the amount of sick leave hours accumulated by each employee. 10% was paid to those employees who retired or terminated with 15 or more years of service. For those with 20 years of service, 20% of accumulated sick was paid. The provision also permitted the employee to waive his or her payment and apply the entire sick leave accumulation to the insurance premium until depletion or the passage of 3 years, whichever occurred first.

For the 2006-2007 collective bargaining agreement, a change was made. The County proposed to use a health care savings plan to administer its severance payment obligations. The Association agreed to the County's proposal.

Since the implementation of the new health care savings plan provisions, the County has paid severance in the amount of 80% of the pertinent premium amount, rather than the 100% previously paid.

The Association takes issue with the County's action. The Association believes that the language proposed by the County and eventually agreed upon by the parties in 2006-2007 was a continuation of the past practice, that is, that the County would pay 100% of the retiree's monthly insurance premium. Ms. Libal testified that the Association agreed to the changes without ever understanding that the benefit had been changed or was being reduced. The Association further charges that the County did not endeavor to explain the changes when proposed.

As a result of the new provision, at least as interpreted by the County, retired employee Bill Lind did not receive the amounts he would have received under the prior calculation. The record indicates that he has received \$5434.60 less than he would have received if he had retired under the previous provision. The Association contends that Mr. Lind will sustain additional "losses" in the future, unless the County is required to calculate the severance under the prior provision. "The money the County has refused to pay to Mr. Lind is money that belongs to Mr. Lind, it is his accrued sick leave," asserts the Association. It notes that other bargaining unit members will be subject to similar losses in the future. It asks that the proposed language be awarded on "equitable grounds."

The County takes the position that the language change was not achieved "unilaterally" and that "the appropriate forum for considering these trade-offs is in negotiations and not in interest arbitration." The County notes that the Association "negotiated for some trade-offs at the expense of others" during bargaining. The County further notes that its proposal to limit its contribution to single coverage as opposed to the single coverage premium is not unique in Lake County, as the Human Service unit has the same provision.

The Association's proposal cannot be awarded in the context of this record. It is certainly possible that the County's actions in bargaining for the 2006-2007 provision were improper. It is also possible that the County's interpretation of the current provision is incorrect and that the equities are with the Union in this matter. It is equally possible, based on this record, that this is not the case.

However, in addition to the lack of a record, the issue is not well suited to interest arbitration. The factors and principles considered by arbitrators in interest cases are quite different from contract rights cases. Conventional rights grievance arbitration would appear to be a better forum to resolve this type of issue.

Issues 11 and 12

Comp Time for Exempt Employee

Banking and Payout of Comp Time

Article 6, Section 3, Subd. 4

Association Position

The Association proposes that Article 6, Section 3, Subdivision 4 be modified to guarantee that exempt supervisory accrue compensatory time and are paid for unused compensatory time in the same manner as non-exempt supervisors.

County Proposal

The County opposes the Association's proposal and proposes no change.

Award

The County's position is awarded.

Analysis

The parties' collective bargaining agreement, at Article 6, Section 3, Subdivision 4, provides as follows:

Employees who are eligible for overtime compensation due to *Subdivision 2 above* and who receive compensation in the form of compensatory time shall be allowed to take compensatory time only at such times as mutually agreed between employee and the employer. Compensatory time may be banked to a maximum of eighty (80) hours at any one time. Employee may elect to carry over a maximum of sixty (60) hours of compensatory time to the next year. Any compensatory time not taken by the employee before the end of the payroll year or carried over in accordance with the provisions of this subdivision shall be paid in cash before the end of January. (emphasis supplied)

Subdivision 2 of Article 6, Section 3 refers only to those supervisors deemed to be "non-exempt" under the Fair Labor Standards Act. Pursuant to this provision, it would

appear that exempt supervisors would not be eligible for the benefit contained in Subdivision 4.

Of the 13 supervisors listed as members of the bargaining unit, only 5 are considered non-exempt.

The Association takes the position that the “contract proposals should be adopted to reflect the contract as both parties had interpreted it for many years.” To the Association, the agreement already “expressly grants . . . both exempt and non-exempt employees the right to compensatory time,” as well as payment for unused compensatory time.

The record indicates that a bargaining unit employee, Scott Veitenheimer, was recently paid cash for accrued compensatory time. Mr. Vietenheimer was paid on May 5, 2008 for compensatory time accrued in 2008. The County confirms that similar payments have been made to thirteen other employees for accrued unused compensatory time in years 2005, 2006, 2007 and 2008, totaling approximately \$10,000.

The parties differ as to the significance of these payments. The County takes the position that these payments were made in error. In support of this proposition, the County offers a letter, written by Human Rights Administrator Cammie B. Young dated January 12, 2009. Ms. Young’s letter bases her conclusion on the language of the provision. “Subd. 4 refers to non-exempt supervisors (Subd. 2), not exempt supervisors (Subd. 3).” Ms. Young states. “Therefore, exempt supervisors do not have a compensatory time maximum, carry over limits, or cash provision.”

The Association counters that these payments constitute a valid past practice. This practice is consistent with the current contract language, the Association argues,

since the language after the first sentence appears to apply to all employees. To the County's assertion that these errors could not have formed a valid practice because the payments were never authorized, the Association counters by noting that all of the payments were made prior to Ms. Young's employment as County Human Resources Administrator.

It does appear that, prior to Ms. Young's letter, the bargaining unit members were permitted to avail themselves of the benefits of Article 6, Section 3, Subdivision 4, including the accrual and cash payment for accrued compensatory time.

Article 6, Section 3 does appear to unambiguously make a distinction between non-exempt supervisors and exempt supervisors. However, issues of this type are typically considered in conventional rights grievance arbitration, where questions of ambiguity relate directly to the question of whether there is any basis to consider past practice.

When considered in the context of traditional interest arbitration standards, there does not appear to be sufficient reason to award the change requested.

Summary of Award

Issue 6, 7 and 8: Health Insurance for 2010 – Article 9.1

The County's proposal, seeking the conversion of the bargaining unit to the VEBA 823 plan, is awarded.

Issue 1: Duration of Contract – Article 17.1

The duration of the collective bargaining agreement will be two years, beginning January 1, 2008 and ending December 31, 2009, except that the health insurance provisions awarded above shall be in force from January 1, 2010, until the parties negotiate a successor agreement.

Issues 2, 3, 4 and 5: Wages for 2008, 2009 and 2010 – Article 6.1

The Association's proposal is awarded. The base wage for 2008 shall be increased by 2%. The base wage for 2009 shall be increased by 2%.

Issues 9 and 10: Severance for 2008 and 2009 / Calculation of Lind Severance – Article 9.6

The proposed modification to Article 9.6 is not awarded.

Issues 11 and 12: Compensatory Time for Exempt Employees/Banking and Payout of Compensation Time – Article 6, Section 3, Sub. 4

The proposed modification to Article 6, Section 3, Subd. 4 is not awarded

February 1, 2010
St. Paul, Minnesota

David S. Paull, Arbitrator