

**IN THE MATTER OF ARBITRATION BETWEEN**

THE AMERICAN FEDERATION OF  
STATE, COUNTY AND MUNICIPAL  
EMPLOYEES, MINNESOTA COUNCIL 5  
AND ITS AFFILIATED LOCAL 2454  
AFL/CIO  
UNION

and

CITY OF DAYTON, MINNESOTA  
CITY/EMPLOYER

OPINION AND AWARD

Contract Interpretation  
Vacation Accrual Grievance  
BMS Case No. 09-PA-0907

Award Dated: March 10, 2010

Date and Place of Hearing: January 7, 2010  
Offices of the Bureau of Mediation Services  
St. Paul, Minnesota

Date of Receipt of Post Hearing Briefs: February 8, 2010

**APPEARANCES**

For the Union: Nola Lynch, AFSCME Field Representative  
Cynthia M. Nelson, AFSCME Field Representative  
300 Hardman Avenue South  
South Saint Paul, Minnesota, 55075

For the City: George C. Hoff, City Attorney  
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**ISSUE**

Did the City violate the provisions of Article 19 – Part Time Employees and Article 20 – Vacations of the Collective Bargaining Agreement between the parties by adjusting vacation accruals in 2009? If so, what shall the remedy be?

**WITNESSES TESTIFYING**

Called by the Union

Victor Martinez,  
Maintenance Worker  
Union Steward

Shirley Slater-Schulte,  
City Clerk, City of Albert Lea  
Former Administrator, City of Dayton

Lynn Reichstadt,  
Police Administrative Assistant  
Union Steward

Larry King,  
Maintenance Worker

Mark Carlson,  
Maintenance Worker

Called by the City

Erin Stwora,  
Assistant to City Administrator

Samantha Orduno,  
Administrator, City of Dayton

**JURISDICTION**

The issue in grievance was submitted to James L. Reynolds as a sole arbitrator pursuant to the provisions of Article 5 of the Collective Bargaining Agreement (Joint Exhibit 2) between the parties and under the rules of the Bureau of Mediation Services of the State of Minnesota. The parties stipulated that issue was properly before the Arbitrator and that he had been properly called.

At the hearing the parties were given full and complete opportunity to examine and cross-examine witnesses and present their proofs. Final argument was provided through post hearing briefs submitted to the Arbitrator by each party. The briefs were received by the agreed upon deadline. With the receipt of the briefs by the Arbitrator, the record in this matter was closed. The issue is now ready for determination.

## **STATEMENT OF THE ISSUE**

The parties stipulated at the hearing that the issue in this case is:

Did the City violate the provisions of Article 19 – Part Time Employees and Article 20 – Vacations of the Collective Bargaining Agreement between the parties by adjusting vacation accruals in 2009? If so, what shall the remedy be?

The grievance (Joint Exhibit 1) was filed on February 4, 2009 and reads in relevant part as follows:

**STATEMENT OF GRIEVANCE:**

The employer violated the contract and long time past practice by changing how a year of continuous service is defined for purposes of calculating the rate of vacation accrual.

**CONTRACT VIOLATIONS:**

Article 1 - Purpose of Agreement, Article 5 - Grievance Procedure, Article 6 - Definitions, Article 19 - Part Time Employees, Article 20 - Vacations, Article 25 - Waiver and any and all other applicable provisions of the contract.

**REMEDY SOUGHT:**

The employer will continue their long standing past practice and recognize continuous years of service for all years worked regardless of the number of hours worked in a year for all employees of this bargaining unit when calculating vacation accrual rates.

The City responded to the grievance on March 10, 2009. In its response, denying the grievance, the City noted that the parties had waived the time limits for processing the grievance.

The controlling contract language is found in ARTICLE 19 – PART - TIME EMPLOYEES, and ARTICLE 20 – VACATIONS. They read in their entirety as follows:

## ARTICLE 19. PART-TIME EMPLOYEES

Part-time employees who are regularly scheduled to more than twenty (20) but less than forty (40) hours per week shall be eligible for pro-rata benefits under this AGREEMENT in the areas of holidays, vacation, and sick leave and eligible for insurance benefits as determined the EMPLOYER.

## ARTICLE VACATIONS

20.1 Full – time employees will earn vacation as follows:

Less than five (5) years of continuous service 6.67 hrs. per full month worked.

Less than ten (10) years of continuous service 10.00 hrs. per full month worked.

Less than sixteen (16) years of continuous service 12.00 hrs. per full month worked.

More than sixteen (16) years of continuous service 14.00 hrs. per full month worked.

20.2 Employees may accumulate no more than one and one-half times the amount of vacation that they can earn in a year.

20.03 Employees who leave the employ of the EMPLOYER in good standing will be paid their accumulated vacation.

In addition to the above cited contract language the City has promulgated certain policies that bear on this case. They are contained in Joint Exhibit 14, and read in relevant part as follows:

### **Vacation Leave With Pay**

Subdivision 1. Amount Allowed. Every permanent employee having less than five (5) years consecutive full-time service shall earn vacation leave at the rate of 5/6 working day for each calendar month of full-time service. Each permanent employee with at least five (5) but less than ten (10) consecutive years of full-time service shall earn vacation leave at the rate of one and one-quarter (1 ¼) working days for each calendar month of full-time service; and each permanent employee with at least ten (10) years of consecutive full-time service shall earn vacation

leave at the rate of one and one-half (1 ½) working days for each calendar month of full-time service. Permanent employees with over sixteen (16) years of consecutive full-time service shall earn vacation leave at the rate of 1 ¾ working days for each calendar month of full time service.

\* \* \* \*

## **FACTUAL BACKGROUND**

Involved herein is a grievance that arose in February of 2009 related to the City changing how vacation leave was accrued. The City is a municipal corporation incorporated under the laws of the State of Minnesota. The Union is the exclusive bargaining representative for the employees of the City who are described in Article 2.1 of the Collective Bargaining Agreement. The parties have maintained a collective bargaining relationship for many years. The current Collective Bargaining Agreement (Joint Exhibit 2) became effective January 1, 2008 and continued in full force and effect through December 31, 2009. For all relevant times the employees involved in this grievance were covered by its terms.

The instant grievance (Joint Exhibit 1) was filed on behalf of all employees of the City who are represented by the Union. Notwithstanding that the grievance was filed covering all employees represented by the Union, the case centered on three particular employees: Lynn Reichstadt, Mark Carlson and Larry King.

The controlling contract language found in Article 19 and Article 20 of the Collective Bargaining Agreement has been incorporated into the labor contract without change since the first contract between the parties that was adopted in 1998. The dispute in this case

centers on how vacation benefits are to be pro-rated in accordance with the language of Article 19. In particular the dispute relates to how the annual hours worked by an employee effect his or her “years of continuous service” as that term is applied in determining vacation accrual. The record shows that employees who are regularly scheduled to work less than twenty hours per week accrued no vacation benefit. There is no record that the absence of such accrual for covered employees working less than 20 hours per week was ever grieved. It is not disputed that employees regularly scheduled to work forty hours per week receive the vacation benefit described in Article 20.

In particular, this dispute centers on how “years of continuous service” are calculated for vacation accrual purposes for those employees who work more than 20 but less than forty hours per week. The Union contends that from the time the controlling contract language was inserted into the Collective Bargaining Agreement to the time of the instant grievance, the City consistently credited employees with a “year of continuous service” each and every year regardless of how many hours they worked during the year. The City, on the other hand contends that there is no consistent pattern to how the employees were credited with a “year of continuous service”.

The record shows that Grievant Reichstadt was hired on February 1, 1998. Between her hire date and 2002 she worked less than twenty hours per week and received no vacation accrual. Sometime during 2002, Ms. Reichstadt began working half-time for the City. She then began to receive a vacation accrual for the first time. That accrual was at the rate of one-half of that provided to full time employees with less than five years of

continuous service. On her anniversary date of on or about February 1, 2003 Ms. Reichstadt had reached five years of employment in some capacity with the City. In 2003 and 2004 Ms. Reichstadt continued to work a schedule of approximately half-time. During those years she continued to receive vacation accrual at one-half of the rate provided to full time employees with less than five “years of continuous service”, even though she had by February 2003 worked five years for the City in some capacity and by February 2004 she had worked six years for the City in some capacity. In 2005, with seven years since her hire date in 1998 Ms. Reichstadt worked 1602 hours and received vacation accrual of 5.2 hours per month which is 1602/2080ths of the amount of vacation accrual that would have been earned by a full time employee with less than five “years of continuous service”. Effective January 1, 2006 Ms. Reichstadt began working full time. She then was bumped up to a vacation accrual rate of 10 hours per month. That rate of vacation accrual is provided to employees with more than 5, but less than 10 “years of continuous service”. Ms. Reichstadt reached the eighth anniversary of her 1998 hire date with the City in 2006. In 2007 and thereafter Ms. Reichstadt continued to work full time for the City. She received 10 hours per month of vacation accrual in 2007 and reached her ninth anniversary with the City that year. In 2008 she was bumped to 12 hours per month of vacation accrual, which corresponds to the contractually provided accrual rate for employees with more than 10 but less than 16 “years of continuous employment” with the City. Ms. Reichstadt achieved the tenth anniversary of her 1998 hire date in 2008. In 2009 the Employer determined that Ms. Reichstadt had only 5.9 “years of continuous service” with the City based on crediting her with no years of service from 1998 through 2002, and pro-rated years of service from 2003 through 2009.

Grievant Mark Carlson began his employment with the City in June of 2001. From his hire date in 2001 through 2003 he worked less than 20 hours per week and received no vacation accrual. By June of 2003 he had completed two years of employment in some capacity with the City. In 2004 and 2005 he worked more than 20 but less than 40 hours per week. Notwithstanding that he worked over 20 hours per week in 2004 and 2005 he received no vacation accrual in those years. In June of 2006 Mr. Carlson reached the fifth anniversary of his hire date. In 2006 he continued to work more than 20 but less than 40 hours per week, a total of 1670 for the entire year. He was credited in 2006 with earning 8 hours per week of vacation accrual. This vacation accrual is based on pro-rating his 1670 hours (80 percent of full time) against the ten hours of vacation accrual that the labor contract provides for full time employees with more than 5 but less than 10 “years of continuous service”. In 2007 and 2008 Mr. Carlson worked full time and received the full time vacation accrual of 10 hours per month. In 2009 the Employer determined that Mr. Carlson had only 5.13 “years of continuous service” with the City based on crediting him with no years of service from 2001 through 2003, pro-rated years of service from 2004 through 2006, and full time credit in 2007 through 2009.

Grievant Larry King was hired by the City in April 2003. Throughout his employment with the City he worked more than 20 but less than 40 hours per week. Specifically he worked 31 or 32 hours per week (80 percent time) during his employment with the City. In 2003 through 2005 he was credited with earning 80 percent of the 6.67 hours per month vacation accrual of a full time employee. In 2006 Mr. King was credited with the

6.67 hours of vacation accrual that the contract provides for a full time employee with less than five “years of continuous service”. The record shows, however, that Mr. King worked 80 percent time in 2006. The same thing happened in 2007, with Mr. King receiving 6.67 hours of vacation accrual while working 80 percent time. In 2008 Mr. King reached the fifth anniversary of his hire date. In that year he was credited with 80 percent of the 10 hours per month of vacation accrual that the contract provides for a full time employee with more than five, but less than ten “years of continuous service”. In 2009 the Employer determined that Mr. King had only 5.41 “years of continuous service” with the City based on crediting him with pro-rated years of service from 2003 through 2009.

City Administrator Orduno and her Assistant, Erin Stwora were both hired by the City in 2005. It is not disputed that neither Ms. Orduno nor Ms. Stwora were involved in the negotiations that resulted in the language of Article 19 and Article 20 of the Collective Bargaining Agreement. It is also not disputed that the parties did not negotiate any change to that contract language during the period since Ms. Orduno and Ms. Stwora were hired by the City.

The City discovered what it believed to be an error in how the “years of continuous service” credit was determined when an employee who had been absent for some time due to illness requested that the City monitor her vacation accrual. In the course of monitoring vacation accrual for that employee the City discovered what it believed were errors in how vacation accruals were credited to employees over several years. Upon

discovering what it believed were errors in determining vacation accruals the City announced its intention to reduce the “years of continuous service” and the related vacation accruals that had been credited to the Grievants. It is not disputed that the City unilaterally reduced the “years of continuous service” and accrued vacation for the affected employees. While discussions were held between the Employer and the Union, no settlement was reached. The Union filed the instant grievance and the matter was heard in arbitration on January 7, 2010.

## **POSITION OF THE PARTIES**

### **Position of the Union**

It is the position of the Union that the grievance be sustained and that all employees be reimbursed lost vacation accrual, lost banked vacation hours, and that they be made whole. In support of that position the Union offers the following arguments:

1. The intent of the parties in negotiating and agreeing to the controlling contract language was to “call a year a year regardless of the number of hours worked during the year and regardless of whether an employee was full-time, part-time or seasonal.
2. In the subsequent contract negotiations the parties did not discuss any changes to the vacation language or how a continuous year of service was defined.
3. The intent of the parties was deliberate and intentional since at the time the language of Article 19 and Article 20 was negotiated there were many part-time employees working for the City and crediting a year of service regardless of the number of hours worked was regarded as a benefit for them.
4. The City Council minutes clearly show that Ms. Reichstadt was given credit for full years of service during the years that she worked part-time for the City. She was never a temporary employee of the City.

5. The Employer had a number of serious problems with their payroll system and records.
6. Neither Ms. Orduno nor Ms. Stwora can testify with any certainty to the intentions of the Employer prior to 2005, the year they were both hired. Neither one can possibly know what the Employer's intent was in regards to Article 20 and how a "year of service" was defined.
7. The phrase "continuous years of service" is used in the City's Public Purpose Expenditure Policy, and clearly relates to "continuous years of service with the City from the employee's initial start date whether it is part-time or full-time."
8. The Collective Bargaining Agreement makes no reference to a year of continuous service being 2080 hours. It takes precedence over and predates the Personnel Policy that defined a year of service as 2080 hours.
9. The City's position that pro-rating is a two part process that involves prorating both the vacation accrual rate and the years of service is not defined anywhere. The two part process is only Ms. Orduno's personal understanding of the process. Ms. Slater-Schulte testified that in all of her years as City Administrator she had never heard of pro-rating being used as a two part process involving both the vacation accrual rate and the years of service.
10. The contract language is clear and unambiguous, and supports the Union's position. It makes no mention of 2080 hours being required for a year of service.

### **Position of the City**

It is the position of the City that the language of the Collective Bargaining Agreement is clear and unambiguous and the grievance should be denied. In support of that position the City offers the following arguments:

1. The language of Article 20 provides that only "full-time" employees who work a full month of full time work are entitled to earn and accrue vacation at the rates specified.

2. Seasonal or part-time employees who are not “regularly scheduled” to work “more than 20 hours per week” are not entitled to any benefits under Article 20. That Article includes a two part vacation formula that gives rate of accrual benefit for “years of continuous service” and establishes vacation hours.
3. Article 19 clearly provides that eligible part time employees “shall be eligible for pro-rata benefits under this Agreement in the areas of ... vacation.” The term “pro-rata” is not defined in the CBA, but is ordinarily and commonly accepted to mean “in proportion according to a precisely determined element, as share or liability.” Vacation accrual is a benefit that is to be pro-rated under Article 19. Accordingly, the part-time employee working one half of the hours of a full time employee is entitled to proportionate accrual, or one-half of the credit for a “year of continuous service”. By prorating the credit for “years of service”, vacation is accrued at a proportionate rate.
4. The Union’s argument against prorating the credit for years of service fails to give any consideration to the actual hours scheduled or worked by an employee and therefore does not fully “prorate” the vacation benefits as required in Article 19.
5. In the case of Ms. Reichstadt the Union seeks to use five non-qualifying years to accrue a benefit increase based on a higher credit for “years of continuous service”.
6. This matter should be decided solely on the clear and unambiguous language of the CBA. The Union conceded in its opening statement that the language in the contract is clear and unambiguous. Accordingly, any argument or evidence relating to past practices or other alleged sources of guidance should be disregarded.
7. There is no past practice with respect to accrual of years of continuous service credit for vacation benefits. The Union presented no evidence that would show such an unequivocal, clearly enunciated and acted upon practice that is readily ascertainable over a reasonable period of time.
8. The City’s spreadsheet (City Exhibit 1) shows that the Union’s asserted “consistent practice” lacks any support.
9. The alleged past practice asserted by the Union has never been clearly enunciated and acted upon. The City has not followed such a practice, much less stated it publicly, announced it, or proclaimed it.
10. The City’s spreadsheets show that for over a decade there has been no “readily ascertainable” “fixed practice” with respect to accrual of increases or bumps in vacation benefits, let alone one that both parties

have accepted and agreed upon. Rather the evidence shows that the City had no set, ascertainable system for accruing years of service for increases or bumps in vacation benefits and in fact had changed the payroll systems that award vacation time, three times in the past five years.

### **ANALYSIS OF THE EVIDENCE**

The controlling contract language is found in Article 19 and Article 20 of the labor agreement. Both parties to this dispute claim that the contract language is clear and unambiguous and supports their positions. It is difficult to understand how contract language could be clear and unambiguous and yet support the divergent positions of the parties. That would cause a reasonable person to believe that there must be something about the language that is not so clear and unambiguous. That is indeed the case. The language provides for prorating of vacation accrual benefit. It is not disputed that the basis of prorating is the number of hours that an employee works during a year. What is disputed is whether the prorating is limited to the number of hours of vacation time earned in a month, or are the years of continuous service to be prorated as well. The contract language is silent on how the prorating is to be done. It only states that the vacation accrual for part time employees is to be prorated from that earned by full time employees. A reasonable person would find such silence in the controlling contract language to be ambiguous.

Article 20 provides the vacation benefit for full time employees. In particular it provides the number of hours per month of vacation benefit that a full time employee will accrue per full month worked. The City points to the phrase “per full month worked” as a showing that the parties intended to prorate for a part time employee the “years of

continuous service” based on the hours worked. That position is misplaced. Had the parties intended the phrase “per full month worked” to apply to part time employees for purposes of earning additional years of continuous service they would have placed that restriction in Article 19, where the vacation benefit for part time employees is directly described. Article 19 only provides that the vacation benefit is to be prorated, but says nothing about a “full month worked”.

A reasonable reading of the language of Article 19 and Article 20 compels a finding that the language is not clear and unambiguous. Accordingly, the Arbitrator must look at the practices of the parties to discern their intent when agreeing to the language. The role of an arbitrator in reviewing ambiguous contract language is to attempt to determine the intent of the parties at the time the language was agreed to by examining how they have applied the language over the years. In the absence of clear contract language the arbitrator will look for a binding past practice that is demonstrated by actions that are 1) unequivocal, 2) clearly enunciated and acted upon, and 3) readily ascertainable over a reasonable period of time.

In this case the narrow issue is whether the parties intended “years of continuous service” to be prorated, as the City claims, or counted year for year regardless of how many hours were worked in the year as the Union claims. The evidence, while not crystal clear, supports the Union’s position. More to the point, there is absolutely no evidence that the City prorated “years of continuous service” from 1998 to 2009. Indeed, as soon as the City determined years of service should be prorated the instant grievance was filed.

Careful scrutiny of the record, including witness testimony and City Exhibit 1 was undertaken to determine if there was affirmative evidence in support of the position of either the Union or the City on the matter of prorating of years of continuous service. No evidence of prorating years of service was found. On the other hand, the evidence that years of service were not prorated was clouded by inconsistencies in the vacation accruals that were granted to the Grievants. Those inconsistencies, however do not rise to a level sufficient to convince a reasonable person that the parties had actually intended to prorate years of service.

Union witness Slater-Schulte testified without challenge that the parties never prorated years of service during the lengthy time she was City Administrator. Even more significantly Ms. Slater-Schulte testified without challenge that the parties affirmatively decided during the negotiations that resulted in the language of Article 19 and Article 20 to not prorate the years of service, and recognized that would be an added benefit to the part-time employees engaged by the City at the time. It is noted that Ms. Slater-Schulte was on the employer side of the bargaining table during those negotiations, and would not likely have had any motivation to give a pro-Union interpretation to the language unless that was indeed the intent of the parties.

The inconsistencies referred to above that relate to Ms. Reichstadt show that in 2003, 2004 and 2005 she had worked more than 5 years from her hire date, but was not bumped to the level of vacation accrual related to more than 5 but less than 10 years of service until she began to work full time on January 1, 2006. After ten years from her hire date

she was bumped in 2008 to the level of accrual related to more than 10 but less than 16 years of service. The inconsistencies that occurred in 2003, 2004 and 2005 were subsequently brought into alignment in 2006 and then again in 2008. That pattern simply does not support a finding that the practice of the parties was so inconsistent that a past practice would be denied. Specifically, and importantly the pattern clearly does not rise to a level that would convince a reasonable person that the parties intentionally did not recognize the years she worked less than 20 hours per week in the period from 1998 to 2002. The record shows that those years were credited to her in 2006 and again in 2008.

In the case of Grievant Carlson some inconsistencies were also found. In 2004 and 2005 he worked more than 20 but less than 40 hours per week, but received no vacation accrual in those years. In 2006 he reached the fifth anniversary of his hire date and worked 1670 hours. He received a prorated vacation accrual of 8 hours per week. That was a prorated figure based on more than five but less than 10 years of service. At that time Mr. Carlson had more than five but less than 10 years of service from his hire date. The record of how Mr. Carlson accrued vacation benefit does not support a finding that the years of service were prorated.

Grievant Larry King consistently worked more than 20 but less than 40 hours per week. Accordingly, he was eligible for vacation benefits. The record shows that he received the appropriate prorated vacation benefit in 2003-2005. In 2006 and 2007, however, he received a vacation accrual of a full time employee even though he was working only 80 percent time. In 2008 Mr. King reached the fifth anniversary of his hire date and was

appropriately credited with 8 days of vacation accrual based on his 80 percent employment and his more than 5 but less than 10 years of service. The inconsistencies in his record do not support a finding that the parties intended to prorate the years of service. He was bumped to the next level of vacation accrual based on the passage of the calendar years of his employment even though he was working 80 percent of the time. His years of service were not prorated.

This detailed analysis of the Grievants' records, and the testimony and evidence adduced at the hearing compels a finding that there has been a consistent and binding past practice of not prorating the "continuous years of service" for vacation accrual purposes. If a change to this practice is desired the language of the Collective Bargaining Agreement must be clarified through the collective bargaining process. For all the above cited reasons the grievance must be sustained.

**AWARD**

**IN THE MATTER OF ARBITRATION BETWEEN**

THE AMERICAN FEDERATION OF  
STATE, COUNTY AND MUNICIPAL  
EMPLOYEES, MINNESOTA COUNCIL 5  
AND ITS AFFILIATED LOCAL 2454  
AFL/CIO  
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CITY OF DAYTON, MINNESOTA  
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OPINION AND AWARD

Contract Interpretation  
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Based on the evidence and testimony entered at the hearing, the grievance is sustained. Employees who had their “years of continuous service” reduced by the prorating applied by the City are to have those years of service and the related vacation accrual rates and banked vacation hours restored. In the event this award results in employees going over their maximum banked hours, they shall be granted a reasonable period of time in order to bring their banked hours within the maximum.

Dated: March 10, 2010

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James L Reynolds,  
Arbitrator