

IN RE ARBITRATION BETWEEN:

ISD #741, PAYNESVILLE SCHOOLS

and

SEIU, LOCAL 284

DECISION AND AWARD OF ARBITRATOR

BMS No. 11-PA-0386

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ARBITRATOR

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March 14, 2011

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DECISION AND AWARD OF ARBITRATOR

BMS Case # 11-PA-0386

Karen Hecimovich grievance

APPEARANCES:

FOR THE UNION:

David Hoaglund, Contract Organizer
Karen Hecimovich, grievant
Marlin Pauly, former custodial employee
Donna Ahrens, former District employee
Sandy Leyendecker, custodian

FOR THE DISTRICT:

Kevin Rupp, Attorney for the District
Todd Burlingame, Superintendent of Schools
Theresa Geers, Payroll Specialist
Linda Mayer, Administrative Assistant

PRELIMINARY STATEMENT

The hearing was held on February 10, 2011 at 9:30 a.m. at the District Offices at 217 West Mill St, Paynesville, Minnesota. The parties presented oral and documentary evidence at that time and submitted post-hearing Briefs on March, 2, 2011 at which point the record was closed.

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement for 2009-2011. Article XI provides for binding arbitration of disputes. The arbitrator was selected from a list provided by the State of Minnesota Bureau of Mediation Services.

ISSUES

Did the School District violate the collective bargaining agreement when it did not award vacation time to Karen Hecimovich for time spent on a 19 month unpaid leave of absence? If so what shall the remedy be?

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE III – DEFINITIONS

Section 5 Full-Time Employee: full time employee is defined as working 2080 or more hours annually.

Section 6 Part-Time Employee: Part time employee is defined as working less than 2080 hours annually.

ARTICLE VIII

Section 8 Vacation

Subd. 1: Full-time custodians shall be granted paid vacation at the beginning of each fiscal year. Vacation for new employees will be pro-rated based on date of hire. Vacation for part-time employee will be pro-rated. Vacation will be granted based on the following continuous years of service:

After 1 full year	10 days
After 9 full years	15 days
After 18 full years	20 days

UNION'S POSITION

The Union took the position that the District violated the labor agreement when it refused to pay the grievant her 15 days of vacation when she returned from an unpaid medical leave. In support of this the Union made the following contentions:

1. The Union pointed to the provisions of Article VIII set forth above and asserted that it is clear and unambiguous. It requires that 15 days of vacation, paid in one lump sum, as has been the longstanding practice of the District, must be paid to any employee with 9 full years of service. The grievant has been with the district since 1999 and as such has more than 9 years of service.

2. At no point has the grievant ever been "terminated" or in some other status, even though she has been on medical leave several times. All these leaves were approved and she was always allowed to return to her regular jobs once she returned. She never lost seniority or any other contractual benefits under the labor agreement and is the most senior employee in the custodial unit. See Joint exhibit 1, listing the grievant's seniority and hire date. Her leaves even though unpaid were never deducted from that seniority. Accordingly she should therefore be treated as if she has all of the years of service necessary to qualify her for the full 15 days under the contract.

3. The grievant was working at her normal job as a custodian for the District in July of 2008. The custodians are on 12-month appointments so there is no "summer break" as there might be for other school employees. She worked some 3 months until October of 2008 when she needed to take medical leave to care for her husband who has serious medical problems.

4. Following her medical leave in October 2008 she was out until early December. She returned for approximately three days but unfortunately fell at home seriously injuring her arm. During that time she underwent surgery on her arm in April of 2009 and was unable to return to her regular duties until July 2010. She thus was out of work in an unpaid status for the remainder of the 2008-09 school year and all of the 2009-10 year.

5. The Union asserted however that the language of the contract does not draw that distinction in any way on whether someone is in an unpaid or paid medical leave. It simply says that a full time employee, and the grievant's assignment was always that of a full time employee, gets 15 days of vacation on July 1st of each year. The Union noted that the contract specifically says "vacation will be granted based upon the following continuous years of service...after 9 full years, 15 days" and does not say earned or accrued based upon days worked. As noted above, the grievant's service has never been broken as evidenced by the fact that she is still at the top of the seniority list. Thus she should be paid for the full 15 days based on her continuous years of service with the District.

6. The District did not give her those 15 days but instead gave her a pro-rated amount using the approximately 3 months that she worked from July 2008 to October 2008 when she went out on leave the first time. The Union did not take issue with that calculation itself but instead argued that there should have been no pro-ration at all – the grievant should have received the full 15 days without pro-ration at all.

7. The Union asserted that the fact that the grievant's leave was unpaid makes no difference under the terms of the labor agreement. The language does not speak to whether the leave is paid or not. The Union witnesses testified that the vacation accrual is based on the seniority list alone – if someone has the requisite number of years of continuous service they are entitled to the 15 days. Here the grievant's service was always continuous; she never quit or was terminated.

8. The Union further asserted that past practice supports interpretation of the labor agreement. The Union noted that other employees have taken long periods of unpaid leave but were credited the full amount of vacation under the terms of the labor agreement on July 1st of the year.

9. The Union pointed to the history of this clause through the years and noted that it has always been interpreted in this way. If a person was on leave they would be credited the appropriate amount of vacation irrespective of their pay status during that leave.

10. The Union noted that the grievant's situation is very dire and that her husband's health condition compels her to use all available sick leave and vacation. She is therefore in an unpaid status for much of the time. Equity supports the conclusion that she be entitled to her full vacation accrual.

The Union seeks an award granting the grievant her the full 15 days of vacation.

DISTRICT'S POSITION:

The District took the position that no contract violation occurred. In support of this the District made the following contentions:

1. The District pointed out that the grievant is a 12-month employee but has been out on various medical leaves both for her husband's health issues as well as her own. The grievant was out on an unpaid medical leave from mid-October 2008 until December 2008 when she returned for approximately 3 days. She was out again on yet another unpaid medical leave from December 2008 until July 2010. Thus she missed approximately 9 months of the 2008-09 school year and literally all of the 2009-2010 school year – she did not work at all during the latter year even though she maintained her employment status with the District. Both of these medical leaves were unpaid.

2. The District pointed to the language of the contract as well and noted that the current language defines full and part time employees very simply as follows: full time employee is defined as working 2080 or more hours annually and a part time employee is defined simply as an employee who works less than 2080 hours annually. The District also asserted that the language of Article 3 section 6 uses the word "Working, not "scheduled to work" or some other terminology.

3. The District then argued that the grievant was a part time employee for the 2008-09 year since she did not work nor was she paid for 2080 hours. She worked only three months that year; actually she took unpaid leave for 194 days and did not return to work until July 5, 2010.

4. The District then pointed to what it asserted is clear language in Article VII and asserted that full-time custodians are granted paid vacation but that vacation for part-time employees is pro-rated. The District's main argument is that the grievant was appropriately considered a part time employee for the 2008-09 year and that pro-rating her vacation was appropriate.¹

5. Further the District argued that there is no provision for unpaid time in the agreement other than an oblique reference to it in Article VIII section 5 that says only that "If an employee is on authorized leave, or absent beyond time authorized by these leave Provisions, such leave will be unpaid." Since the grievant had used up her accrued leave time she was placed on unpaid leave. The District asserted that if the parties had intended to excise someone from the pro-rating provisions of the vacation article who was on unpaid leave they could have done so but did not. Accordingly, there is no contractual provision that calls for the grievant to get her full vacation even though she only worked some three months in the entire school year at issue here.

6. The District noted that the Union and the District have agreed on several collective bargaining agreements over time. Originally, and for several rounds of bargaining thereafter, the language of Article III did not contain the definitions of part time and full time employees that the current agreement does. The District asserted that this was changed for the 2007-09 contract. The District argued that any claim for "past practice prior to that is of no evidentiary value since those cases pre-date a significant change in contract language and thus any practices that existed under these provisions would have expired with the change in the language.

¹ There was no dispute that the actual calculation of the pro-ration of the grievant's vacation was done "correctly." The question in this matter was whether it was appropriate at all. There was also no dispute that the grievant was not making a claim for vacation for the 2009-2010 school year since she did not work at all that year. The question is whether the District appropriately pro-rated the vacation for 2008-09 even though the grievant returned to work in July 2010 following her 19 month unpaid medical leave.

7. The District further argued that for approximately 30 years the District has required custodians to earn their vacation pay and that it is not paid on the first day of employment. Article VIII, Section 7, subd. 1 of the 1980-1982 contract provided in relevant part as follows: “Full-time custodians shall be granted two weeks paid vacation following the first full year of employment (three weeks after completing nine (9) years of continuous service).” See Joint Exhibit 4. The same requirement of earning the full amount of vacation time after one full year of employment is in the current agreement as well. This provision supports the claim that a custodian must “work” to qualify for vacation. The grievant did not work at all in 2009-10 and was not entitled to vacation for that year and was entitled to a pro-rated amount based on the time she actually worked and was paid during 2008-09.

8. The District asserted that the Union would change the clear language of the agreement to a prospective calculation of vacation and further argued that the assertion that the grievant is automatically entitled to 15 days of vacation irrespective of the number of hours she worked is diametrically opposed to the contractual language. The District argued that its approach of looking at the actual number of hours is not only more in line with the language but also more equitable.

9. The impact of the Union’s claim is that the grievant would be entitled to the same 15 days of vacation as her co-workers who really did work a full 2080 hours even though she worked only 3 months in the 2008-09 school year. To allow this incongruous result would be both inconsistent with the clear terms of the agreement and does a disservice to the other employees who did in fact work their full time hours and who were not in an unpaid status.

10. The District further noted that the instances relied upon by the Union as evidence of past practice were materially different from the one presented here. In one case the employee's leave was occasioned by a workers compensation injury and he was in a paid status. Further, Mr. Pauly indicated that he did not receive vacation for the unpaid time of his leave, which seriously undercut the

claim by the Union that unpaid time counts toward vacation. The District argued that the very purpose of “vacation: is to provide a needed break from work.

11. Here the grievant was already off work for 9 months and did not qualify under either the clear terms of the agreement nor by the very underlying purpose of vacation time in the first place.

12. The District acknowledged that paid time off is counted toward full time status, otherwise a person would literally have to work 2080 hours per year, which is not contemplated by the contract since it clearly does provide for certain paid time off. Here however, the grievant was in an unpaid status, a fact that the Union neither disputes nor grieved, and she must therefore be treated as a part time employee, despite her “appointment” under the terms of the contract and as such must have her vacation pro-rated just as any part time employee.

The District seeks an award denying the grievance in its entirety.

MEMORANDUM AND DISCUSSION

There was no dispute over the underlying facts of the matter. The grievant is the most senior employee in the custodial unit, having been hired on February 2, 1999. She does therefore have approximately 12 years seniority with the District. The grievant is on a 12-month appointment.

When the grievant began working for the 2008-09 school year she received her vacation days in a lump sum per the contract. It was clear that the vacation earned is placed into the employees’ vacation accounts in a lump sum per the provisions of Article VIII depending on the number of years of seniority each employee has. The evidence further showed that by October of 2008 the grievant had already used up her accrued leave time, including the vacation leave, and had no leave time remaining.

In October the grievant took unpaid leave to deal with her husband’s medical condition. She was out for approximately three months and returned for a few days in December 2008. Unfortunately, she fell and injured her arm, which again resulted in her disability and necessitated that she stay off work to treat her injuries. She underwent surgery in April of 2009 and had restrictions on her arm, which prevented her from returning to work at that time. She was out for the rest of the 2008-

09 school year due to the poor results from that arm surgery and had restrictions that prevented her from returning to work.

She had expected to return in the fall of 2009 but in November 2009 she was involved in a motor vehicle accident, which again resulted in her disability and prevented her from returning to work. She was granted unpaid leave for this entire time and, as noted above, was on unpaid status for the entire remainder of the 2008-09 school year from December 2008 and was on unpaid status for the entirety of the 2009-10 school year. She was thus out on an unpaid medical leave from December 2008 until she finally returned to work on July 5, 2010.

Since the grievant did not work at all in the 2009-10 school year the grievant is not seeking vacation for that year. The grievant's claim is for the entire 15 days vacation pay for the 2008-09 school year even though she worked until October and then for a few days in December of that year and was on unpaid status all of the 2009-10 school year.

The grievant was apparently on a medical leave in 2004 and was out of work from April to October of 2004. She testified that when returned at that time she was granted her full vacation time pursuant to the contract. That was 9 day at that time since she did not have enough length of service to qualify for the 15 days set forth in the matrix in Article VIII. The Union alleged that this situation is no different and should be treated similarly under the contract and under a past practice theory.

As with any case involving contract interpretation the analysis starts with the language of the contract itself. Here, as cited above, the contract provides that any part-time employee, defined as an employee working less than 2080 hours per year, is entitled to vacation on a pro-rated basis. There is no question that the grievant worked less than 2080 hours in the 2008-09 school year and that her leaves, while approved, were unpaid. There is no other condition in the language that creates an exception to this provision. The question now is whether there is some other provision or practice that supports the Union's view that the grievant is entitled to her full vacation leave despite this seemingly clear language.

The evidence showed that the contract changed with the 2007-09 contract to the current language. Prior contracts did not have the definitions of part time and full time employees in Article III set forth above. The 2005-07 contract, for example, had no such definition in it and provided essentially that “terms not defined in this Agreement shall have those meanings as defined by the P.E.L.R.A. of 1971, as amended.” PELRA provided a definition of “part time employees” as follows: “part-time employees whose service does not exceed the lesser of 14 hours per week or 35 percent of the normal work week in the employee's appropriate unit.” There was apparently no definition in the labor agreement prior to 2007-09 of a full time employee. The current language has such a definition and defines a full time employee as one who works 2080 hours per year.²

Article VIII of the 2005-07 contract, as an example, contained a clause that read: Full-time custodians (working 12 months) shall be granted two weeks paid vacation following the first full year of employment (three weeks after completing nine (9) years of continuous service). Employees working less than forty (40) hours per week will have their vacation pro-rated. ...” The language changed slightly from 40 hours per week to 2080 hours per year. It was entirely clear why this language was changed. What was clear was that it did and that the current agreement has a clear definition of a part time employee contained within it and that it also contains clear language requiring that part-time employees have their vacation time pro-rated.

At this point it is clear that the contractual language itself does not provide sufficient support for the grievant’s claims here. The Union however also raised a past practice issue and claimed that the prior practice between these parties shows a consistent and mutually accepted pattern of paying the full vacation leave in this type of situation.

² The District acknowledged that paid leave time would be counted toward the 2080 hours. This seems reasonable and consistent with the language of the contract since otherwise one would literally have to “work” 2080 hours per year, which would be entirely inconsistent with the other paid leave provisions of the contract. Here though the question is whether the grievant is entitled to her full 15 days vacation leave even though she was in an unpaid status from October to December 2008 and than again from December throughout the remainder of the school year.

Past 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.’ See Richard Mittenenthal, *Past Practice and the Administration of Collective Bargaining Agreements*, in *Arbitration and Public Policy* 30 (S. Pollard ed. 1961). A past practice is thus nothing more, or less, than a custom or an accepted way of doing things as between two parties to a labor agreement that can provide either assistance in interpreting contract language where that language is ambiguous or to provide a binding set of terms for matters not included in the labor agreement. Clearly, as the commentators have discussed, the mere fact that something happens once or even multiple times does not necessarily mean that a binding past practice has occurred.

The Minnesota Supreme Court held in *Ramsey County v AFSCME*, 309 NW2d 785 (Minn. 1981) as follows:

“past 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 NW2d at 788, n. 3 (Citing from Mittenenthal, *Past Practice and the Administration of Collective Bargaining Agreements*, in *Arbitration and Public Policy* 30 (S. Pollard ed. 1961).

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 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 *Esso Standard Oil*, 16 LA 73 (McCoy 1951).

The eminent arbitrator Harry Shulman has also observed the need for caution as well in using past practice for more than it was intended. He stated as follows:

“There are other practices which are not the result of joint determination at all. They may be mere happenstance, that is, methods that developed without design or deliberation. Or they may be choices by Management in the exercise of managerial discretion as to the convenient methods at the time. In such cases there is no thought of obligation or commitment to the future. Such practices are merely present ways, not prescribed ways, of doing things. Being the product of managerial determination in its permitted discretion such practices are, in the absence of contractual provision to the contrary, subject to change in the same discretion.” Elkouri at p. 636 citing to *Ford Motor Co.*, 19 LA 237, 241 (1952).

Much has been written and discussed about past practice and whether it takes precedence over clear contract language. In some cases it has been held that it does but the practice must be very clear in those circumstances and evince a mutually accepted and consistent way of doing things that demonstrates a clear understanding between parties that, despite language of the contract, some other way of doing things is the way it is done. On this record the evidence was insufficient to establish that.

The grievant testified that she was on an unpaid leave in 2004 and was paid her full vacation pay without any pro-ration. As noted above, the scenario where the other employee was on paid workers compensation leave was certainly different. Mr. Pauly’s situation was likewise. Further all of these scenarios pre-dated the change in the labor agreement in 2007-09 to the current language. While there are some similarities in contractual language they are certainly different. It is axiomatic that the practice can essentially expire with a change in contract language, since the practice must draw its essence from the labor agreement.

The Union is arguing that the practice, if one exists at all, does so in order to clarify existing contractual language; not to create an obligation entirely outside of that language. Thus, this practice must draw its essence from the existing language. Accordingly too, if the language the practice was intended to interpret or clarify changes, so too does the practice. It is against that back drop of arbitral reasoning that this case proceeds.

The Union argued that the provision in the prior contracts are similar enough to the current language that what occurred under the prior contract should be continued under the current agreement. The Union also introduced testimony from a former custodial employee, Mr. Pauly, who was also a member of the bargaining unit, who testified that he received his full vacation leave days even though he was out of work for a long period of time. The evidence was less than consistent with regard to that testimony however since he also acknowledged on cross-examination that he did not in fact receive vacation for the unpaid time of his leave.³

The most compelling argument in favor of the Union's position here is the testimony from the grievant that she was on an unpaid leave in 2004 for several months yet received her full vacation pay the following year. As noted though, this was before the amendment to the labor agreement. There was no evidence that the same thing has occurred under the “new” language drafted into the agreements after the 2007-09 agreement. On this record there was insufficient evidence to establish a binding past practice that obligates the District to pay the full vacation, especially in light of the clear contractual provisions requiring that vacation for part-time employees is pro-rated.

Further, several of the necessary elements of a binding past practice are lacking. The evidence did not show that this was a consistent or longstanding practice. At best it may have occurred once, if at all, in 2004, prior to the contractual amendments defining part and full time employees. Moreover, there was insufficient evidence of mutuality on this record and no showing that the parties intended that employees who worked only 3 months or so during the year would still received their full complement of vacation days the following July 1st. The District's witnesses indicated that the contrary was the case and that doing so would be unfair to those employees who in fact did work 2080, or have enough paid time under the contract to cover any short term absences, to reach 2080 hours.

³ It should be noted that the Union also made reference to another employee who allegedly got full vacation pay even though he had been in an unpaid status. That time however was covered by workers compensation, whereas the grievant's leaves were not work related, and were for a far longer period of time, i.e. a matter of 19 months as opposed 6 to 8 weeks.

The Union also presented testimony that the vacation is paid “according to the seniority list,” or words to that effect. Several union witnesses including the grievant indicated their understanding of the agreement and noted that they believed it required the district to pay the full complement of vacation time to anyone who works even a little in a particular school year based on the scheduled set forth in Article VIII. It was clear that this is what they believed but it is not what the negotiated language says. That language says that part time employees, who work less than 2080 hours per year as the grievant did, are to have their vacation paid at the rate appropriate to their level of seniority but that it will be pro-rated for the number of hours they worked.

Without more there is very little an arbitrator can do, despite the compelling circumstances in which the grievant finds herself.⁴ To change this language without more evidence to do so would be a clear cut violation of the grievance procedure.

On this record it was clear that the contractual language requires pro-rating of vacation for part-time employees and the clear definition of part-time employees. It was also clear that the grievant fit that definition on this record,. Further, on this record there was insufficient evidence of a binding past practice necessary to alter the interpretation of the clear language of the parties’ contract. Accordingly, the grievance must be denied.

⁴ Clearly the grievant’s personal situation is dire in that she must take care of her ailing husband and deal with her own health issue. It was for this reason that she used up her vacation and other accrued leave time so quickly. There was no suggestion that her use of these leaves is not appropriate. This decision is thus based entirely on the language of the labor agreement. However compelling the grievant’s situation is, the analysis must derive from the contract and nothing more.

AWARD

The grievance is DENIED.

Dated: March 14, 2011

Jeffrey W. Jacobs, arbitrator

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