

IN THE MATTER OF THE ARBITRATION BETWEEN

Minnesota Teamsters Public and Law Enforcement
Employees' Union, Local No. 320

Union

and

Heritage Living Center, Park Rapids MN

Employer.

OPINION AND AWARD

Grievance of Teamsters,
Local 320
(Contract interpretation)

BMS Case No.11PA0126

ARBITRATOR:

Janice K. Frankman, J.D.

DATE OF AWARD:

May 23, 2011

HEARING SITE:

Law Enforcement Center
Court Avenue
Park Rapids MN 56470

HEARING DATE:

April 6, 2011

RECORD CLOSED:

May 2, 2011

REPRESENTING THE UNION:

Kevin M. Beck, Esq.
Kelly & Lemmons, P.A.
7300 Hudson Boulevard North
Suite 200
Saint Paul MN 55128

REPRESENTING THE EMPLOYER:

Lloyd Peterson, Senior Labor Law
Staff Consultant
Trusight
9805 45th Avenue North
Plymouth MN 55442

JURISDICTION

The hearing in this matter was held on April 6, 2011. The Arbitrator was selected to serve pursuant to the parties' collective bargaining agreement and the procedures of BMS. Both parties were afforded a full and fair opportunity to present their cases. Witnesses were sworn and their testimony was subject to cross-examination. The Employer and the Union submitted Post-hearing Briefs which were received by the Arbitrator on May 2, 2011, at which time the record closed and the matter was taken under advisement.

ISSUES

The parties' statements of the issue set out in their Post-hearing Briefs follow:

Union

Did the Employer violate the collective bargaining agreement when it unilaterally changed the schedule to avoid overtime payment?

Employer

- A. Is the Union's Grievance #4483 dated 7/22/2010 'Step III' Class Action properly before the Arbitrator?
- B. Based on the current Labor Agreement, does the Employer have the right to adjust and/or change employee work schedules.

After review of the hearing record, the Arbitrator believes the following to be an accurate statement of the issues:

1. Is this case procedurally arbitrable?
2. Did the Employer's action violate the parties' Collective Bargaining Agreement? If so, what is the remedy?

BACKGROUND AND SUMMARY OF THE EVIDENCE

This class action Grievance was filed on July 22, 2010, on behalf of all Union members objecting to the manner in which several employees were scheduled for work during the pay period which included the July 4, holiday. The Employer is Hubbard County Heritage Living Center ("Employer", "Heritage"). Its services include provision of skilled care. The bargaining unit includes 'All employees of the Hubbard County Heritage Living Center who are employed for more than fourteen (14) hours per week and more than sixty-seven (67) days per year, excluding supervisory and confidential employees.' There are 76 members in the Unit. Joint Exhibit 1, page 1

Procedural Arbitrability

Heritage raised the issue of arbitrability of this matter for the first time at hearing, asserting that it had not agreed to waive Steps 1 and 2 of the grievance process set out in the parties' Collective Bargaining Agreement ("CBA") and therefore, the matter is not properly before the Arbitrator.

The Grievance document includes a "Step III" notation in handwriting at the top of the page just above the date of the Grievance. Union Exhibit 3. Union Steward Peggy Ciampi drafted and hand-delivered the Grievance to Executive Director Kurt Hansen the same day. She customarily consulted with Union President Joanne Derby before filing a Grievance and she also customarily delivered grievances directly to Mr. Hansen at the direction of the Director of Nursing. In this case, Ms. Ciampi alerted Mr. Hansen to the fact that the Union was beginning the grievance process at Step III because they had just settled an identical grievance in May, 2010. Mr. Hansen could not recall any discussion with Ms. Ciampi when she delivered the Grievance to his office. He agreed that he had proceeded to handle the Grievance as reported by the Union.

Ms. Derby sent a letter dated July 26, 2010, by fax and regular mail, to Mr. Hansen referring to the July 22, 2010 Class Action GR#4483, captioned "Holiday Rotation Pay". She wrote:

The Union is appealing the above reference (sic) grievance to Step III of the Grievance Procedure as stated in the Labor Agreement between the parties.

Please contact my office to schedule a date and time to hear this matter.

Union Exhibit 7

On August 2, 2010, Mr. Hansen requested an extension to August 9, to respond to the Union's Grievance. Ms. Derby agreed to his request the same day. When the Union did not receive a response, Ms. Derby sent a letter dated August 17, advising Mr. Hansen that the Union was proceeding to arbitration (Step 4) and that she was requesting that the Bureau of Mediation Services send a list of arbitrators to both parties. Mr. Hansen sent Ms. Derby an email response the same day:

Just received your fax letter, request to take the OT issue to arbitration.

This morning I sent Lloyd a few dates for negotiations that work for us. I would like to put this grievance on our agenda to discuss on the date we pick either before or after negotiations. Lloyd would be present.

Please let me know if this does not work for you. If that's the case we'll arbitrate it.

Union Exhibit 11

The Grievance was not discussed in conjunction with CBA negotiations. By letter dated January 5, 2011, the Arbitrator was advised that she had been selected to hear this matter. She provided hearing date availability by letter dated January 10, 2011, and on February 24, 2011, the April 6, hearing date was confirmed by email.

Earlier Grievances; Contract Negotiation

Class action Grievances were filed on November 23, 1999, and March 17, 2010, in which the same or similar issues were raised with regard to holidays, overtime and reduction of hours to avoid overtime pay. CBA Articles 7.1 and 8.8, past practice and applicable laws were cited in the March and July, 2010, Grievances. The March, 2010, Grievance was started at Step III. Each of the Grievances seeks a make whole remedy for all employees adversely affected by the Employer's actions. The two earlier Grievances were settled. There is no evidence in this record as to what the parties' relevant CBA language was in 1999, or the facts which led to the March 17, 2010, Grievance. The current CBA became effective October 1, 2009.

Letters exchanged by Ms. Derby and Mr. Hansen in May, 2010, report the resolution of the March, 2010, Grievance:

Hansen to Derby, May 11, 2010:

* * *

Per our discussion we propose the following remedies;

- Make effected (sic) staff 'whole' by paying them 8 hours of miscellaneous pay to make up the 8 hours lost for the pay period dated March 26 through April 8, 2010. Employees affected include (names omitted) and (names omitted) will be credited 8 hours vacation they took to make up the reduced hours.
- We'll work cooperatively to anticipate problems with certain holidays in the future and arrange the employee schedule to prevent the issue from occurring again. (emphasis added)

* * *

Union Exhibit 4, page 3

Derby to Hansen, May 13, 2010:

The Union is withdrawing the above referenced grievance based on your letter by e-mail dated May 11, 2010. The grievance was resolved per the remedy requested by the Union by making the grievants listed in your letter whole and in the future, management will abide by the Labor Agreement for holidays and overtime.

Union Exhibit 4, page 2

The "Facts of (this) Grievance" and "Remedy Requested" are set out as follows:

Group II of the holiday rotation was given an additional day off in lieu of holiday pay, being paid for 80 hrs. Group I of the holiday rotation weren't given any additional days off resulting in their being pd 80 reg. hours plus 8 hours holiday pay, pd out at 88 hours with no overtime. Unlike the previous grievance, Group II worked 64, pd. Out at 72 hrs with holiday pay, resulting in taking away the paid holiday benefit. Employees effected (sic): (names omitted) and yet to be named.

Make everyone whole, follow contract language, past practice, & pay overtime if applicable. Come to a final consensus on holiday rotation.

Union Exhibit 3

The Union's depiction of negotiation of the current Contract relative to the issues in this case was not refuted by the Employer. The Employer proposed deletion of Article 8.8 in exchange for a \$.05/hour increase in wages which the Union turned down, advising Heritage the provision which calls for counting holidays and vacation days toward overtime was more valuable to the membership than its offer.

Scheduling Process; Schedule and Pay for Period July 2-15, 2011

Peggy Ciampi has been employed at Heritage as a Certified Nurse's Aide for 15 years. In 2000, she took a training course and became a Trained Medical Assistant. When she became a Union Steward in 2001, she was asked by the Director of Nursing to work one day per month scheduling CNAs. The job position was eliminated in January, 2011.

Heritage utilizes block scheduling which results in employees having essentially the same schedule month over month. The blocks which individual employees work vary by days of the week scheduled, shift hours including a variety of start times and week-ends off. The facility is staffed 24/7 every day of the year. For the past eight years, Ms. Ciampi presented monthly schedules to Director of Nursing Diane George by the fifteenth of the month for the following month. Fourteen day pay periods, Friday through Thursday, replicated the block schedule for each employee. Ms. George reviewed Ms. Ciampi's work and made some changes. Final schedules were posted by Ms. George and were available for change requests and to note unexpected schedule changes for a variety of reasons including illness and departure of an employee. Those posted schedules, altered for the changes, provide the basis for payroll computation for bi-weekly pay.

The focus of this Grievance is the pay period July 2 – July 15, 2010, which included the recognized July 4, holiday which fell on a Sunday in 2010. Ms. George altered Ms. Ciampi's schedule for that 14 day pay period because it included too much

overtime. Ms. Ciampi had scheduled employees for work consistent with the block scheduling, which for some resulted in an overtime position when the July 4, holiday was accounted for. Those for whom July 4, was a regular work day which they worked, were paid double time unless, by agreement with management, they chose compensatory time and regular pay for the holiday.

Ms. George testified that she sought to reduce overtime wherever possible over her eight year tenure as Director of Nursing. Consequently, she removed regular block schedule days from some employee's schedules for that pay period, accounting for the July 4, paid holiday. The intended result, except for those employees regularly scheduled to work July 4, was that employees received straight pay for 80 hours. In at least one case, an individual scheduled for vacation, had two days "cut" from her schedule so that she worked 8 days and was compensated for regular, holiday and vacation time for a total of 80 hours straight pay. See, Ciampi testimony.

Relevant Collective Bargaining Agreement Provisions

Mr. Hansen, Ms. Derby and Ms. Ciampi are signatories of the current Contract. Each has been employed by or had a working relationship with Heritage for 15 years or more. Articles IV, VII, VIII, X, XI and XIX address Management Rights; Work Week and Shift Assignment; Overtime; Vacations; Holidays; and Grievance Procedure respectively. Relevant excerpts from each Article are cited and quoted below.

ARTICLE IV. EMPLOYER SECURITY AND MANAGEMENT RIGHTS

- 4.2 It is recognized that, except as expressly stated herein, the Employer retains the right to operate and manage all facilities and equipment; to establish functions and programs; to set and amend budgets; to determine the utilization of technology; to establish and modify organizational structure; to select, direct and determine the number of personnel; to contract with vendors or others for goods and/or services as long as the acts do not subvert the Agreement between the parties; and to perform any inherent managerial function not specifically limited by this Agreement. (emphasis added)

Joint Exhibit 1, pages 2 and 3

ARTICLE VII. WORK WEEK AND SHIFT ASSINGMENT

- 7.1 The normal work week for full-time employees shall consist of forty (40) hours.
- 7.2 The normal work day and normal work shift shall consist of eight and one-half (8 ½) consecutive hours, and shall include an unpaid thirty (30) minute lunch period. Employees who are required by the Employer to remain at their work location throughout their entire work shift shall have a

normal work day and a normal work shift consisting of eight (8) consecutive hours.

- A. Employees shall be scheduled to be off at least every third weekend.

Joint Exhibit 1, page 6

ARTICLE VIII. OVERTIME

8.1 An employee required to work in excess of forty (40) hours during said work week period or in excess of eight (8) hours in any workday (beyond normal work shift) shall be paid a (sic) one and one-half (1 ½) times their regular pay rate for excess time so worked. A work week shall be defined as Friday through Thursday. An employee who works more than five (5) consecutive days shall be entitled to overtime at one and one half (1 ½) times their regular pay rate per supervisor approval or person in charge.

8.3 Employees shall not work overtime unless authorized to do so by the Employer.

8.4 Overtime shall be voluntary, based on seniority, but may be assigned on the basis of inverse seniority within a classification. This provision shall not be construed to require the Employer to break in on work in progress, nor shall it be construed to require either a call back, or the assignment of an employee not qualified to perform the work.

Overtime offered, but refused, shall be noted for purposes of overtime rotation.

8.6 Compensation shall not be paid more than once for the same hours under any provisions of this Agreement.

8.7 Overtime payment required by this Section, upon mutual agreement of the parties, may be in the form of equivalent compensatory time off. Compensatory time including holiday comp time not used may not be carried over from one calendar year to the next.

8.8 Vacation and holiday leave shall count toward the calculation of overtime. (emphasis added)

Joint Exhibit 1, pages 6 and 7

ARTICLE X. VACATIONS

10.1 Full-time employees only shall accrue vacation benefits as follows:

Initial employment to end of 1st year
40 working hours (5 days)

.....

- 10.5 An employee who is on vacation may be called and asked to work, but said employee shall not be required to return to work. Employees on vacation would only be called in an emergency situation.

Joint Exhibit 1, page 9

ARTICLE XI. HOLIDAYS

- 11.1 The following days (10) **will be** recognized as paid holidays for all employees:

New Year's Day	Veteran's Day
President's Day	Thanksgiving Day
Good Friday	Memorial Day
Independence Day	Labor Day
Columbus Day	Christmas Day

- 11.2 For employees who work a Monday through Friday schedule, and a holiday falls on Sunday, the following Monday **will be** considered the official holiday, or when such holiday falls on Saturday, the preceding Friday **shall be** considered the official holiday. For all other employees, the holiday **shall be** observed on the calendar day on which it falls.
- 11.3 Days recognized as a holiday which occur within an employee's approved and compensate vacation or sick leave period will not be chargeable to the employee's vacation or sick leave.
- 11.4 All employees who are **required to work on a holiday shall receive pay or compensatory time off earned at two times (2x's) his/her base rate for each hour worked on said holiday.** (emphasis and boldface added)

Joint Exhibit 1, page 9

ARTICLE XIX. EMPLOYEE RIGHTS – GRIEVANCE PROCEDURE

19.4 PROCEDURE

Grievances, as defined by Section 10.1, shall be resolved in conformance with the following procedure:

(detail of Steps 1 – 4 omitted)¹

19.5 ARBITRATOR'S AUTHORITY

A. The arbitrator shall have no right to amend, modify, nullify, ignore, add to, or subtract from the terms and conditions of this Agreement. The arbitrator shall consider and decide only the specific issue(s) submitted in

¹ Steps 1-4 set out customary requirements for the filing of grievances, including the person to whom the grievance or appeal is properly directed, deadlines for filing and for responding to the grievance at each step.

writing by the Employer and the Union and shall have no authority to make a decision on any other issue not so submitted.

* * *

19.6 WAIVER

If a grievance is not presented within the time limits set forth above, it shall be considered 'waived.' If a grievance is not appealed to the next step within the specified time limit or any agreed extension thereof, it shall be considered settled on the basis of the Employer's last answer. If the Employer does not answer a grievance or an appeal thereof within the specified time limits, the Union may elect to treat the grievance as denied at the step and immediately appeal the grievance to the next step. The time limit in each step may be extended by mutual written agreement of the Employer and the Union in each step.

(emphasis added)

Joint Exhibit 1, pages 16 and 17.

OPINION AND FINDINGS

Arbitrability

This case is properly before the Arbitrator. The Employer has not supported its assertion that the case should be dismissed for failure of procedural arbitrability. It raised its objection for the first time at this hearing after participating in the processing of the Grievance beginning with Mr. Hansen's request for an extension of time to respond to it in early August, 2010. His testimony at hearing further supports this conclusion. He admitted no objection to proceeding at Step III, and agreed that he continued to participate in the process.

The parties' CBA provides clear language which details a customary step process, including mandatory language that the detailed procedure "shall" be followed. Here, the Employer's actions constitute waiver of enforcement of the literal Contract language. In making its argument in this case, it recognized that there could be acceleration of the handling of a grievance through the steps by agreement of the parties, arguing that there had been no such agreement. It is noted that the March 17, 2010, Grievance, which raised the same or similar issues, apparently was also started at Step III as provided on the filed Grievance form.

The Grievance: Past Practice

It is appropriate to sustain this Grievance in part. The Employer has violated the parties' Agreement to the extent it altered the undisputed established practice of block scheduling to avoid overtime during the pay period beginning July 2, 2010, and ending July 15, 2010. The plain and unambiguous language of the parties' CBA sets out a clear prescription for providing holiday time and compensation. The Contract mandates

that ten specified holidays be recognized as paid holidays for all employees. It also requires that both vacation and holiday time be accounted for in determining overtime compensation.

The Union's apparent argument that the Employer is required to provide a 40 hour work week without accounting for a paid holiday is unsupported. There is no express or implied provision in the Contract which, in effect, mandates provision of overtime under these circumstances. It appears, from the myriad of work schedules which exist among the bargaining unit members, that pay period compensation will vary for each individual, from holiday to holiday and year to year, when the Contract language, as written, is properly applied.

In sum, the Contract and clear practice of the parties call for scheduling of work, consistent with block scheduling, taking into account holidays and including them as paid work days which may also be recognized, like vacation days, as a basis for paying overtime whenever the total exceeds 40 hours in one week. Neither party has provided support for a conclusion that any other established past practice exists to, in effect, create a contract provision, or to replace, defeat or otherwise interpret the Contract provisions in question. To be regarded as an established past practice, and therefore enforceable against a party challenging it, there must be proof of recognition and acceptance of the practice by both parties.

While it may appear redundant and unnecessary to expand this discussion, it is appropriate to observe that the Grievance and the evidence and testimony presented at hearing raise tangential questions which may be at the heart of the parties' conflict over these issues. The CBA clearly provides that employees are entitled to compensation for a full 40 hour work week, either through actual work or any combination of paid vacation, holidays, other authorized paid leave or sick time and actual work. In addition, they are entitled to be paid for or to receive mutually agreed upon compensatory time whenever they are required to work on a holiday. While this Grievance identifies "(coming) to a final consensus on holiday rotation" as a remedy, the topic was not addressed at hearing. It appears that the rub is actual or perceived inequity in compensation during pay periods which include a holiday, a topic which is appropriately raised and resolved through bargaining.

Contract Interpretation

There are numerous principles of contract interpretation which may be considered in labor arbitration. In this case, the several relevant provisions have been read together to give meaning to the Contract as a whole with regard to the provision of compensation, particularly as they apply to holiday pay and overtime. The Union has urged the Arbitrator to view the Employer's proposal during 2009 Contract negotiations to delete Article VIII, paragraph 8.8, which provides, "Vacation and holiday leave shall count toward the calculation of overtime." in a manner which considers the provision in isolation, and would improperly support a conclusion that the proposal was made to

extinguish entitlement to overtime during a pay period which includes either vacation or holiday time.

Management Rights

The Employer has framed a substantive issue which is considerably broader than the issues the Grievance raises. There has been no suggestion that the Employer is without authority to adjust or change employee work schedules or to manage its business in a fiscally responsible manner. The CBA specifically anticipates “necessary changes” and, to the extent there is no limiting or other specific provision in the Contract, the Management Rights provision provides considerable latitude with regard to management of the workforce. In this case, express Contract provisions, including the undisputed established practice of block scheduling, set the parameters and limitations to which the parties agreed and by which the Employer is constrained.

It is appropriate to direct the Employer to make all employees whole for the pay period July 2 – July 15, 2010, to the extent accurate accounting for hours worked or otherwise compensated, and the holiday, have resulted in less than full and accurate compensation consistent with these Findings and Opinion. It is also appropriate to direct the Employer to schedule employees for work, consistent with well-established block scheduling, accounting for paid holidays to which all employees are entitled, on the days and in the manner set out in the parties’ Collective Bargaining Agreement.

AWARD

The Grievance is sustained in part. Employees shall be made whole and scheduled for work as set forth in the foregoing Opinion and Award. It is appropriate for the Arbitrator to retain jurisdiction for 60 days from the date of this Award for the limited purpose of assisting the parties in the implementation of this Award.

Dated: May 23, 2011

Janice K. Frankman, J.D.
Labor Arbitrator