

IN THE MATTER OF THE ARBITRATION BETWEEN

Teamsters Local No. 320

UNION

-and-

BMS Case No. 11-PA-0787

City of Minnetonka, Minnesota

EMPLOYER

ARBITRATOR: Christine D. Ver Ploeg

DATE AND PLACE OF HEARING: April 19, 2012
 Minnetonka Police Department
 Minnetonka, Minnesota

DATE OF RECEIPT OF POST-HEARING BRIEFS: May 18, 2012

DATE OF AWARD: May 31, 2012

ADVOCATES

For the City

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James Stromberg, **GRIEVANT**

ISSUE:

Did the Employer violate the parties' collective bargaining agreement when it denied severance pay to the Grievant? If so, what shall be the remedy?

BACKGROUND

This case has been brought by Teamsters Local No. 320 (hereinafter “Union”) on behalf of the Grievant who previously was employed as a patrol officer by the City of Minnetonka, Police Department (hereinafter “Employer”). The Union is the Grievant’s exclusive representative.

The dispute which gives rise to this arbitration stems from the Employer’s denial of severance pay to the Grievant. The Union submits that this denial violates the parties’ collective bargaining agreement; the Employer submits that it does not.

The essential facts in this case are not in dispute. The Grievant began his career as a Police Officer for the City on May 15, 1989. In January of 2011 he voluntarily resigned his employment with the City to accept a position in the private sector. As of January 2011 the Grievant had been employed by the City for 23 consecutive years and met the service requirement for an annuity from PERA, but as he was 46 years old at the time he did not meet PERA’s age requirement of 50 years.¹ Based upon his age, the Employer concluded that the Grievant was not eligible for severance pay. The Union claims that denying the Grievant severance pay violates Article 29.13 of the parties’ agreement.

The background to Article 29, Severance Pay, is relevant to this case. The City has historically had a severance pay provision in its Personnel Policies. Prior to 2008, the parties’ collective bargaining agreement was silent on the subject of severance pay and thus, as a gap-filler, the Employer applied the Personnel Policy’s severance pay provisions to bargaining unit members. However, the parties’ December 18, 2005-December 27, 2008 collective bargaining agreement did include a Retiree Health Savings Plan. When the parties learned that its provisions violated IRS regulations, they agreed to eliminate them and instead incorporate the provisions of the severance pay policy, word for word, in their 2009 collective bargaining agreement.

¹ The PERA Police and Fire Plan Benefit which the Employer uses to determine an employee’s eligibility for an annuity from PERA at the time of separation from employment indicates that a Police Officer must be at least age 50 and have three years of service in order to be eligible for a reduced annuity benefit with PERA. The Grievant was age 46 at the time of separation. For Officers hired prior to July 1, 1989, such as the Grievant, if the Officer satisfies the Rule of 90 (age plus service credits equaling 90), the employee is also eligible for an annuity benefit with PERA. The Grievant did not satisfy the Rule of 90.

When the parties incorporated the existing Personnel Policy severance pay language verbatim into their 2009 Agreement they did not discuss its terms nor how the City applied them. Since that time the parties have engaged in two successive contract negotiations during which they have not discussed Article 29, and its terms remain unchanged to today.

Article 29's provisions are not only identical to the City's Personnel Policy from which it was directly lifted, but the exact same language is found in the City's two other union contracts (LELS which represents the Police Dispatchers and Local No. 49 which represents public works employees). The City's Personnel Policy regarding severance pay applies directly to all non-union employees, as well as the Sergeants who are represented by this same Union, IBT 320, but whose contract is silent on the subject of severance pay.

In short, every City employee is subject to identical severance pay provisions, whether directly under the Personnel Policy or in a collective bargaining agreement. Pursuant to those requirements, an employee must first meet a three-prong threshold: the employee must be a regular employee, have ten years of continuous service, and leave the City in good standing. There is no question that the Grievant meets these threshold requirements.

Next, an employee who meets the threshold requirements becomes eligible for severance pay if he or she demonstrates one of the following reasons for departing City service: (1) elimination of position, (2) retirement, (3) separation, or (4) an illness, service-connected injury, illness or death. The only reason applicable to the Grievant is the third reason, separation. The language at issue states:

29.13 Separation from city employment with (sic)² the employee is eligible, based on age and/or service requirements, for an annuity from the Public Employees Retirement Association.

The Union relies on this language to argue that the Grievant needed to fulfill only *one* of the PERA requirements. The key language is found in the phrase "age *and/or* service requirements" which clearly indicates that by fulfilling the years of service requirement the Grievant became entitled to the severance pay; his age was irrelevant.

By contrast, the City offered evidence that for at least 18 years the eligibility requirements applied to all employees, both union and non-union (approximately 200 employees), have been: (1) 10 years of continuous years of service with the City, (2) departing in good standing, and (3)

meet *both* the age and service requirements at the time of separation or retirement to be eligible for an annuity from PERA.

On behalf of the Grievant the Union filed a timely grievance protesting the City's denial of his severance pay. The parties were unable to resolve their differences concerning this matter in earlier steps of the grievance process, and have agreed that this dispute is now properly before the arbitrator for resolution. The parties and the arbitrator met for a hearing on this matter on April 18, 2012, and the parties submitted post-hearing briefs which the arbitrator received on May 18, 2012.

RELEVANT CONTRACT LANGUAGE & CITY PERSONNEL POLICY

The City of Minnetonka Personnel Policy 10.2, Severance Pay, and the Parties' current Collective Bargaining Agreement both provide in relevant part:

ARTICLE XXIX. SEVERANCE PAY

29.1 To be eligible for severance pay, employees must be regular employees on the date of termination, and have a total of 10 years of continuous service as a regular employee. Severance pay is granted to eligible employees when they leave the municipal service in good standing for one of the following reasons:

29.11 Elimination of their classification or position by the City.

29.12 Retirement with immediate eligibility for an annuity from the Public Employees Retirement Association.

29.13 Separation from city employment when³ the employee is eligible, based on age and/or service requirements, for an annuity from the Public Employees Retirement Association.

29.14 Mandatory retirement or termination of employment due to health reasons, service-connected injury, illness or death.

29.2 Employees are entitled to severance pay equal to the greater of:

² The word "with" is a typographical error. The language should read "Separation from employment *when...*" The correct term will be used throughout this decision.

³ See footnote 2.

29.21 Four weeks pay plus one additional week of pay for each year of serve beyond 10 years, not to exceed a total of 13 weeks of pay at their basis rate of pay, or

29.22 One-third of the employee's accumulated sick leave at their basic rate of pay.

DISCUSSION AND DECISION

In this case the Union has had the burden of proving that the Employer's denial of severance pay to the Grievant has violated the parties' collective bargaining agreement. In concluding that the Union has not met that burden, I have considered the evidence and argument on the following questions.

1. What guidance does the language of Article 29.13 provide in this matter?

The Union argues that the plain language of Article 29.13 clearly and unequivocally supports its position in this dispute. By contrast, the Employer submits that this language is ambiguous. For the following reasons I find that the language supports the Union.

To be eligible for severance pay the Grievant must demonstrate that he separated from City employment for the following reason:

29.13 Separation from city employment when the employee is eligible, based on age and/or service requirements, for an annuity from the Public Employees Retirement Association.

The Grievant has fulfilled the service requirement. However, his age at the time of separation, 46 years old, does not fulfill PERA's 50 years requirement. The question is whether the phrase "based on age and/or service requirements" can in any way be construed to mean anything other than "either" rather than "both." It cannot. For this language to mean "both," it would have been reasonable, easy and obvious for the parties to use the word "and" rather than "and/or." On its face "or" does not mean "both."

Despite this finding, the City submits that other aspects of Article 29 create confusion and render Section 20.13 ambiguous. For example, using the phrase "immediate eligibility" in Section 29.12 but not including the term "immediate" in Section 29.13 creates confusion. The Grievant testified that the absence of the word "immediate" from Section 29.13 means that

because he will be eligible for an annuity from PERA at some point in the future when he turns age 50, he is “eligible” for a PERA annuity. The City submits—and notes that the Grievant has acknowledged—that the Section 29.13 phrase “when the employee is eligible” connotes present tense and not future tense.

The Union rejects this argument by noting that if 29.13 required “immediate” eligibility for PERA annuity, it would say so in the same way that the immediately preceding section, 29.12, specifically provides in the case of a “retirement.”

29. 12 Retirement with *immediate eligibility* for an annuity from the Public Employees Retirement Association. (emphasis added)

The Union submits that the fact that “immediate” is not used in Sec. 29.13 indicates that a separating employee need not have the *present* ability to draw monthly annuity payments in order to receive severance. The Union further argues that to adopt the City’s interpretation would result in Section 29.12 and 29.13 addressing the exact same circumstance. I agree that is not a reasonable construction of the contract.

Other ambiguities⁴ cited by the City are not relevant to the question at hand. For these reasons I find that the plain language of Section 29.13 supports the Union’s position that the Grievant is entitled to severance pay by virtue of his years of service to the City, and that per the terms of the contract his age is not a bar to that benefit.

2. Does the parties’ past practice nevertheless permit the Employer to require that a separating employee meet both the age and service thresholds?

Past practice generally

It is well established that a proven past practice can be deemed binding in the case of ambiguous contract language, or no contract language at all. However, this is not a task undertaken lightly. Determining when a past practice exists and when, if ever, it should be accorded the same status as written contract language, is perhaps the most difficult question that

⁴ Other examples the City cites include: (1) the typographical error “*with* the employee is eligible” instead of “*when* the employee is eligible,” (2) the inclusion of the phrase “service requirements” “for an annuity from PERA” may create confusion relative to eligibility for a full annuity or reduced annuity from PERA, and (3) those phrases may also create confusion relative to the means to calculate “service requirements” whether based on years of service or service credits.

confronts labor arbitrators. The difficulty of this task, however, does not permit evasion of this responsibility for it is well-accepted that:

A union-management contract is far more than words on paper. It is also all the oral understandings, interpretations and mutually acceptable habits of action which have grown up around it over the course of time. Stable and peaceful relations between the parties depend upon the development of a mutually satisfactory superstructure of understanding which gives operating significance and practicality to the purely legal wording of the written contract. *Coca-Cola Bottling Co.*, 9 LA 197 (1947) Arbitrator Arthur Jacobs.

Within the National Academy of Arbitrators, Arbitrator Richard Mittenthal's definition of a past practice has been recognized as "the most authoritative treatment."⁵ Arbitrator Mittenthal analyzed the factors generally applied by arbitrators in determining whether workplace activity qualifies as a "past practice" and found them to be⁶:

- (1) Clarity and consistency of the pattern of conduct,
- (2) Longevity and repetition of the activity,
- (3) Acceptability of the pattern, and
- (4) Mutual acknowledgment of the pattern by the parties.

The National Academy of Arbitrators has gone on to state that:

⁵ Citing Richard Mittenthal's classic definition, the Minnesota Supreme Court has stated:

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

Ramsey County v. American Federation of State, County and Municipal Employees, Council 91, Local 8, 309 N.W.2d 785, 788 n.3 (Minn. 1981)

⁶See Mittenthal, Richard, *Past Practice and the Administration of Collective Bargaining Agreements*, 59 Mich. L. Rev. 1017 (1961) cited in National Academy of Arbitrators, *The Common Law of the Workplace. The Views of Arbitrators*. p. 82. BNA 1998.

Past practice may be used (a) to clarify ambiguous contract language; (b) to implement general contract language; or (c) to create a separate, enforceable condition of employment. Some arbitrators use past practice to modify or amend clear and unambiguous contract language.⁷

This case presents a significant challenge to the Employer in that it does not entail weighing past practice in the context of ambiguous contract language or silence. For reasons discussed above, the plain language of Sec. 29.13 supports the Union's position in this case. Thus, the Employer seeks to amend the contract's clear and unambiguous language. It seeks to do so with evidence of an unwavering and long standing practice that directly contravenes the literal terms of the severance pay benefit, as found in all of its union contracts as well as its personnel policy.

The burden of proof has now shifted to the Employer, and it is a high burden. However, it is not an impossible burden. As noted above, the National Academy of Arbitrators has recognized that, "Some arbitrators use past practice to modify or amend *clear and unambiguous* contract language." (Emphasis added).

The Minnesota Supreme Court has also recognized that past practice can, under exceptional circumstances, prevail over clear contract language. In *Ramsey County and AFSCME Council 91, Local 8*, 309 N.W.2d 785, 791 n.5 (Minn. 1981) certain Ramsey County employees received a more generous vacation benefit than provided for in the labor agreement throughout approximately three consecutive contract terms. The County discovered this mistake when it converted to a computerized personnel system, and thereupon notified the employees that their vacation schedule would henceforth be subject to the contract's terms. When the union filed a grievance the county denied it claiming that the language of the labor agreement was clear and unambiguous on its face. In finding for the Union the Minnesota Supreme Court stated:

"[A]n arbitrator does not exceed his powers within the meaning of Minn. Stat. § 572.19, subd. 1(3) (1980) if the award draws its essence from the collective bargaining agreement, viewed in light of its language, its context and any other indicia of the parties' intent, including past practice."

⁷National Academy of Arbitrators, *The Common Law of the Workplace. The Views of Arbitrators*. Sec. 2.19(2), p. 81. BNA 1998.

The court rejected the argument that past practice may not be considered when contract language is clear and unambiguous, and specifically acknowledged that an arbitrator may rely on past practice even when contract language is seemingly clear and unambiguous.

This case presents the question whether the Employer's evidence of a past practice is similarly so compelling that it should overcome the clear and unambiguous language of Sec. 29.13.

Past Practice in this case

There is no question that for at least the last 18 years all City employees, both union and non-union (approximately 200 employees), have been subject to the same provisions regarding the severance pay benefit. Language regarding that benefit was first adopted in the City's personnel policies, and the very same language has been and continues to serve as a "gap" filler in Union contracts that have been or are silent regarding that benefit. The language has also been adopted verbatim in the Union contracts which now do address severance pay. In short, every City employee is and has been subject to identical severance pay provisions, whether directly under the Personnel Policy or in a collective bargaining agreement.

Throughout this entire time all employees who have separated from City employment have been—according to the literal language of the applicable provision—entitled to the severance pay benefit *if* "the employee is eligible, based on age *and/or* service requirements, for an annuity from the Public Employees Retirement Association." (Emphasis added). Thus, on the face of it employees who throughout these many years have sought the severance pay benefit based upon Sec. 29.13 should have been required to meet only its age requirement or its service requirement, but not both.

Nevertheless, the evidence demonstrates that also for at least the last 18 years *all* City employees, both union and non-union, who have separated from City employment have been subject to *both* the age and service requirements.⁸ It is undisputed that of the approximately 200 employees who have departed City service, 18 have been denied severance pay based upon their failure to meet both requirements. No individual and no union has ever grieved or otherwise protested this practice.

⁸ The only exceptions to this requirement have been in cases of involuntary layoffs.

This is compelling evidence of a past practice. It meets the tests of clarity, longevity, repetition and consistency. The Union does not deny this. What the Union does deny is that the City's practice meets the test of mutuality. The Union cites *International Paper and United Steelworkers, Local 1458*, 130 LA 267, 276 (Holley, 2012) in support of the proposition that:

The critical difference between mere prior conduct and past practice is the concept of mutuality. Unless it can be established that the alleged past practice represents a mutually agreed upon response to a particular situation, the prior conduct will not be treated as a past practice, but rather will be considered a mere, non-binding "present way of doing things."

The Union submits that there is no mutuality because before this grievance it never knew that the City had denied severance to members solely on the grounds that they did not meet both the age and service requirements. The Union had no way of knowing of the City's application of Section 29.13 because until the instant case only two other bargaining unit members had been denied that benefit. Of those two bargaining unit members, the one patrol officer who separated from City service in 2010 not surprisingly failed to protest this denial given that he had been charged with a serious crime and was later convicted. No one knows why the other patrol officer who left City service in 2001 failed to protest his lack of severance pay, but there is no question that he never brought this matter to the Union's attention. In short, the Union submits that there is no evidence that it was ever aware that the City was denying severance pay because the separating employee failed to meet both the age and service requirements. The Union submits that this lack of mutuality constitutes a fatal flaw in the Employer's claim of a binding past practice.

Discussion: I have considered the Union's evidence and argument on the question of mutuality but find that it is overcome by the following evidence and argument.

First, it is widely accepted that when an employer notifies its employees of a practice, it effectively notifies the union of the practice. In *Minnesota Teamsters Local 320 v. Anoka County*, 365 N.W.2d 372 (Minn. Ct. App. 1985) the court held that when bargaining unit employees learn of a practice, the union effectively learns of the practice. *Id.* at 374. The Employer has also cited Fairweather's *Practice and Procedure in Labor Arbitration*, for the proposition that an employee's knowledge constitutes knowledge on the part of the Union. This principle was stated by Arbitrator Tatum as follows:

[The Company] has consistently since 1947 refused to permit a leave for this purpose, and it has only permitted one who had gone out for maternity reasons to return as a new employee. To this the Union has acquiesced until the filing of this grievance. The argument by the Union [stated] that it did not know of the practice of the Company because such had not been communicated to it by the members. It must be concluded that the employees through the years have known of the policy of the Company and the knowledge of the employee must be the knowledge of the Union; and too, in the plant the Union has its officials or committeemen who are in daily contact with the employees. Therefore, through the years the committeemen must have known of the position of the Company. The knowledge of the committeemen must be the knowledge of the Union.

Fairweather, *Practice and Procedure in Labor Arbitration*, 282 (2nd ed. 1983); citing *Chattanooga Box and Lumber Co.*, 44 LA 363, 376 (Tatum, 1965)

The Employer has also cited Minnesota cases in which public sector arbitrators have rejected claims by unions that it had no knowledge of a practice because no employee had brought the issue to its attention:

The Union claims as a defense that it had no knowledge of the Policy because no employee brought it to the attention of the Union or its Union Officers. This argument fails because the practice of requiring employees on a leave of absence without pay to pay the premium costs for insurance coverage in accordance with County Policy has been so extensive that the Union is assumed to know of the practice, or clearly should have known of the practice.

Scott County and Law Enforcement Labor Services, Inc., BMS Case No. 92-PP-63-B (Miller, 1992), p. 31.

For at least 18 years all separating employees, including two bargaining unit members, have been required to meet *both* the age and service thresholds to be eligible for severance pay. In the cases of the two bargaining unit members, first in 2001, and then in 2010, the Union business agent, the steward and the Grievant were all present. Moreover, within the police department other employees have also been denied severance pay for this reason. It is reasonable to conclude that persons not only within this relatively small department, but also throughout City Hall, would be aware that the Employer was requiring that a separating employee meet both the age and service requirements to be eligible for severance pay. This has apparently been such an accepted practice that until this grievance no employee—either union or non-union—has ever protested.

Another basis for finding that the Employer's past practice prevails over contract language is found in the fact that the parties never actually negotiated the terms of Article 29, Severance Pay. At no time in 2009, nor in the parties' two subsequent contract negotiations, did they ever discuss these terms or how the City was applying them. Instead, the parties simply incorporated the existing severance pay policy word for word into the 2009 contract after a related provision was found to violate IRS regulations and had to be removed. It would be one thing if the parties had mutually discussed the "and/or" phrase and expressly agreed that it would be applied as written. However, they did not do that. It is clear that their intent was to maintain the status quo.

Moreover, the Employer offered compelling evidence that it would *never* have agreed to such an understanding. Not only was the Employer in the midst of an extraordinary financial crisis at this time so that it would never have agreed to expanding the scope of this benefit,⁹ it also would not have agreed to change the rules to treat members of this bargaining unit differently than all other City employees.

AWARD

For the above reasons this grievance is hereby denied

May 31, 2012



Christine Ver Ploeg, Arbitrator

⁹ The Employer offered evidence that at that time the City did not have the financial resources to expand employee benefits, and broadening eligibility for severance pay would have resulted in considerable expense. For example, since 1999, the average severance payment has been \$14,921. If this average cost were applied to the 18 employees, including the Grievant, who were not eligible for severance pay based on the uniform interpretation and application of the severance pay benefit, the cost to the City would have been \$268,578.