

THE MATTER OF ARBITRATION BETWEEN

_____)
MINNESOTA TEAMSTERS PUBLIC &)
LAW ENFORCEMENT EMPLOYEES)
UNION, LOCAL 320,)
)
Union,)
and) **EXCESSIVE WORKLOAD**
) **GRIEVANCE**
)
)
STATE BOARD OF PUBLIC)
DEFENSE,)
)
Employer.) **BMS Case No. 12-PA-0194**
)
_____)

Arbitrator: Stephen F. Befort

Hearing Dates: March 22, 2012
May 23, 2012

Post-hearing briefs received: June 22, 2012

Date of Decision: July 18, 2012

APPEARANCES

For the Union: Trevor Oliver
Patrick Kelly

For the Employer: Sara Gullickson McGrane
Jessica Marsh

INTRODUCTION

Minnesota Teamsters Public & Law Enforcement Employees Union, Local No. 320 (Union), as exclusive representative, brings this grievance claiming that the State Board of Public Defense (Employer) has violated the parties' collective bargaining agreement by

assigning excessive caseloads to the assistant public defender attorneys who are members of this bargaining unit. The Employer acknowledges that the unit attorneys have heavy workloads, but maintains that this condition does not offend any provision of the parties' agreement. The grievance proceeded to an arbitration hearing at which the parties were afforded the opportunity to present evidence through the testimony of witnesses and the introduction of exhibits.

ISSUES

Did the Employer violate the parties' collective bargaining agreement by assigning "excessive" workloads to the assistant public defender attorney unit members?

If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE I. PURPOSE OF AGREEMENT

It is the intent and purpose of this Agreement to:

- 1.1 Assure sound and mutually beneficial working and economic relationships between the parties hereto;

ARTICLE IV. EMPLOYER AUTHORITY

- 4.1 It is recognized and agreed that, except as expressly modified by this Agreement, the Employer retains all inherent managerial rights necessary to operate and direct the affairs of the Employer and its agencies in all its various respects.
- 4.2 These rights include but are not limited to the right to determine policy, functions and programs; determine and establish budgets; utilize technology; relieve Employees due to lack of work or other legitimate issues; determine the methods, means, organization and number of personnel by which such operations and services are to be conducted; and select and direct personnel;
- 4.3 Any terms of employment not specifically established or modified by this Agreement shall remain exclusively within the discretion of the Employer to modify, establish or eliminate.

ARTICLE IX. SAVINGS CLAUSE

9.1 This agreement is intended to be in conformity with all applicable and valid federal and state laws and those rules or regulations promulgated there under having the force and effect of law which are in effect on the effective date of this Agreement.

ARTICLE X. EMPLOYEE RIGHTS—GRIEVANCE PROCEDURE

10.6 Arbitrator’s Authority.

A. Authority

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

* * *

ARTICLE XXV. HOURS OF WORK

25.1 Standard Work Schedules.

For full-time Employees, the standard work schedule consists of 80 hours of work within a two (2) week pay period.

25.2 Standard Work Week

The standard workweek consists of five (5) consecutive days totaling forty (40) hours. The standard workweek is Wednesday through Tuesday (to coincide with the payroll calendar). . . .

25.3 Compensatory Time

The nature of the work dictates that professional staff’s work hours be whatever is needed to properly represent our clients. Upon approval of the Appointing Authority, a full-time Employee shall earn one and one half (1 ½) hours of compensatory time for each hour exceeding the standard forty (40) hour work week.

To the extent that a given professional’s hours consistently and meaningfully exceed forty (40) hours per week, that person is encouraged to discuss the issue with the person’s Appointing Authority.

25.8 Meal and Rest Periods.

Each Employee who works more than four (4) hours per day shall normally have a duty-free unpaid meal period of no less than thirty (30) minutes nor more than sixty (60) minutes, the duration of which is at the discretion of the Appointing Authority. Each Employee shall have a 15-minute rest period during each four (4) hours of scheduled work. The scheduling of Employee rest periods is at the discretion of the Appointment Authority. Rest periods may not be accumulated.

ARTICLE XXVI. COMPENSATORY TIME BANKS

26.1 Size of Bank.

An Employee’s compensatory time bank earned prior to the effective date of this agreement may not exceed 40 hours.

26.2 Use of Compensatory Time

Employees shall be permitted to use compensatory time off upon request provided that the request is made fourteen (14) or more calendar days in advance and use of time does not unduly disrupt the operations of the Appointing Authority. The Appointing Authority may waive the fourteen (14) day notice requirement. Compensatory time may not be taken during the payroll period earned.

FACTUAL BACKGROUND

The State Board of Public Defense

The State Board of Public Defense is an agency in the Minnesota judicial branch charged with providing criminal defense services to indigent clients. Constitutional and legislative requirements mandate the appointment of public defender attorneys for criminal defendants who cannot afford to hire legal counsel. The Employer provides these services through attorneys and staff serving in ten judicial districts. The Employer employs 350 full-time equivalent attorneys who handle approximately 150,000 cases each year.

Minnesota statutes provide a legislative framework for the Employer’s obligations. Minn. Stat. § 611.15 states that “the court shall advise [a criminal defendant] of the right to be represented by counsel and that counsel will be appointed to represent the person if the person is

financially unable to obtain counsel.” Minn. Stat. § 611.18 further provides that “if it appears to a court that a person requesting the appointment of counsel satisfies the requirements of this chapter the court shall order the appropriate public defender to represent the person at all further stages of the proceeding through appeal, if any.” The Minnesota Supreme Court has ruled that a public defender “may not reject a client, but is obligated to represent whoever is assigned to her or him, regardless of her or his current caseload or the difficulty the case presents.” Dziubak v. Mott, 503 N.W.2d 771, 775 (1993).

Legislative appropriations constitute the primary funding source for the Employer’s operations. Minn. Stat. § 611.27, subd. 7 limits the state’s obligation for the cost of public defender services “to the appropriations made to the Board of Public Defense.”

The Employer and the Union have negotiated a series of collective bargaining agreements beginning in 2000. Union Business Agent Kari Seime testified that the union attempted unsuccessfully to obtain a caseload cap for individual attorneys during negotiations in 2000.

The Grievance

The individual grievants in this matter are assistant public defender attorneys serving in Minnesota’s third judicial district which geographically encompasses the southeast corner of the state. The grievants assert that the Employer requires them to handle an excessive caseload in violation of various contract provisions as well as ethical standards that the grievants contend are incorporated in the parties’ contract. As a remedy, the grievants seek an order directing the Employer to adopt and implement a maximum attorney caseload limit.

Assistant Public Defender Caseloads

The Minnesota legislature appropriated money in 1989 to fund a weighted caseload study of assistant public defender caseloads. In 1991, following the completion of this study, the

Employer adopted a caseload standard goal for full-time assistant public defenders of 400 new cases per year. The 400 caseload standard is for a blended caseload in which more time consuming case assignments, such as felonies, are accorded a greater weight than various less time-consuming assignments. State Public Defender John Stuart, the Employer's chief executive officer, testified that he regards the 400 caseload standard as an aspirational goal rather than a maximum ceiling.

The Union submitted a considerable amount of data depicting assistant public defender workloads. This evidence shows that third district assistant public defender attorneys opened an average of between 660 and 745 cases per full-time attorney in the last five years. The evidence also shows that it is not uncommon for individual assistant public defender attorneys to have more than 120 open cases at any point in time. Third District Chief Public Defender Karen Duncan testified that she considers blended caseloads of more than 120 clients to raise "red flags."

The Union maintains that this caseload level is excessive. The Employer, for its part, agrees that current caseload levels are higher than desirable. The parties' point of disagreement concerns whether these heavy caseloads constitute a violation of the parties' collective bargaining agreement.

The three testifying grievants all stated that it is not possible to handle their assigned duties within the confines of a normal forty-hour workweek. Most of the grievants have submitted requests for compensatory time as authorized by the parties' collective bargaining agreement. Grievant Jeff Johnson, for example, claimed more than 100 hours of compensatory time in both calendar 2010 and 2011.

The Union submitted a considerable amount of evidence describing other negative consequences of high caseload levels. Grievants testified that the heavy workloads compel them to take a “triage” approach to client representation which consists of hurriedly handling emergencies while cutting corners on more routine cases. Grievants testified that they frequently do not have adequate time to meet with clients, prepare witnesses, review physical evidence, or otherwise adequately prepare for hearings and trials. All three testifying grievants stated that heavy workloads have made it difficult for them to practice in conformance with the recognized Best Practices for Public Defenders.

Ethical Concerns

The Union maintains that excessive caseloads for assistant public defender attorneys create an unreasonable risk that such attorneys will violate the Rules of Professional Conduct. A Comment to Minnesota Rule 1.3, for example, states that a lawyer’s workload must be controlled to ensure that the lawyer can provide competent representation to each client. Minnesota Rule 6.2 admonishes against the acceptance of appointments that are likely to lead to the violation of professional conduct rules. Professor Norman Lefstein, an expert witness called by the Union who teaches at Indiana-Indianapolis Law School, expressed the opinion that the caseloads serviced by the grievants are excessively high and pose a real danger of professional responsibility lapses. He reviewed the ABA Eight Guidelines of Public Defense Related to Excessive Workloads and opined that the Employer’s caseload assignment practices were not in conformance with these guidelines. Professor Lefstein testified that, in his opinion, a full-time assistant public defender should not be required to handle more than 100 open cases or more than 30-35 felony cases over the course of a year. He also expressed the opinion that compliance with ethical obligations is not contingent upon the adequacy of funding.

In response, State Public Defender Stuart testified that he is not aware of a single assistant public defender in Minnesota who has been disciplined for conduct relating to having too many cases. Stuart expressed the opinion that while individual attorneys may not have enough time to do everything they would like to do for a particular client, there is no objective evidence that they are taking on more work than they can ethically handle.

Employer Efforts to Limit Caseloads

The Employer, meanwhile, presented evidence of its efforts to reduce assistant public defender caseloads. The Employer cited short-term efforts at caseload balancing and the assignment of tasks to support staff. On a more long-term basis, the Employer has advocated for diversion programs, the increased use of volunteers, and securing approval for relieving assistant public defenders from the obligation to provide representation of public in CHIPS cases. In addition, the Employer has been successful in petitioning the Minnesota Supreme Court for attorney registration fee increases to augment funding for public defender programs. The Employer asserts that these efforts have contributed to a drop in attorney caseloads over the past five years. The Union contends, however, that this trend is attributable to a decline in criminal filings, but that caseload, nonetheless, remains at a dangerously high level.

POSITIONS OF THE PARTIES

Union

The Union contends that the Employer has violated the parties' collective bargaining agreement by assigning excessive caseloads to unit assistant public defender attorneys. The Union initially argues that the Employer requires unit members to handle far more cases than deemed appropriate under recognized public defender caseload standards. The Union maintains that this policy violates the parties' agreement in two ways. First, these assignments cause the

assistant public defender attorneys to work more than the forty hours per week contemplated by Article XXV of the agreement. Second, these excessive assignments are inconsistent with ethical rules that are incorporated by Articles I and IX of the agreement. As a remedy, the Union requests that the arbitrator order the Employer to adopt and implement a maximum caseload standard for individual assistant public defender attorneys.

Employer

The Employer acknowledges that the assistant public defender attorneys are carrying heavy caseloads but denies that this constitutes a breach of the parties' collective bargaining agreement. The Employer asserts that it has the inherent managerial authority to make workload assignments and that the agreement contains no language limiting either this right or the size of employee caseloads. The Employer further contends that none of the contract provisions cited by the Union actually support the Union's position. The Employer claims that Article XXV does not establish a maximum ceiling on hours an attorney may work, but instead expressly states that "professional work staff hours be whatever is need to properly represent our clients." With respect to the claim based on Articles I and IX, the Employer argues that the Union has failed to show that the current level of attorney caseloads has resulted in any actual violation of ethical rules. Finally, the Employer maintains that the Union's requested remedy would cause a violation of constitutional and statutory provisions that require the Board of Public Defense to represent all clients assigned by the courts within the confines of the funds appropriated by the state legislature.

DISCUSSION AND OPINION

The Workload Fact Issue

Much time and attention was devoted at the hearing to the matter of assistant public defender caseloads. The Union submitted evidence showing that current caseloads are substantially above recognized guidelines, and the Union contends that these caseloads are “excessive” in nature. The Employer does not dispute this data and acknowledges that the caseloads are heavier than desirable. In short, there really is no debate that the assistant public defender attorneys are carrying extremely heavy caseloads. The pertinent question, accordingly, is whether these heavy caseloads violate the parties’ collective bargaining agreement. That question is addressed in the following sections.

Article XXV

The Union maintains that the Employer’s practice of assigning excessive caseloads violates Article XXV of the parties’ collective bargaining agreement. Section 25.2 of the agreement states that “the standard workweek consists of five (5) consecutive days totaling forty (40) hours.” The Union asserts that the Employer’s case assignment practices violate this provision since most assistant public defenders find it impossible to handle their caseloads within a 40 hour workweek.

The problem with this line of attack is that while the agreement refers to a 40 hour workweek as “standard,” it does not establish that benchmark as a maximum ceiling. In fact, Section 25.3 of the agreement refutes such a claim by stating, “the nature of the work dictates that professional staff’s work hours be whatever is needed to properly represent our clients.” Thus, Section 25.3 recognizes that assistant public defender attorneys, as FLSA-exempt professional employees, may need to work in excess of 40 hours per week if necessary to

accomplish their representational duties. This interpretation is made explicit in the remainder of that section which states that, “upon approval of the Appointing Authority, a full-time Employee shall earn one and one half (1 ½) hours of compensatory time for each hour exceeding the standard forty (40) hour work week.” Clearly, the agreement would not permit an employee to earn compensatory time for work performed beyond 40 hours per week if 40 hours per week served as an absolute maximum working hours limit.

Article I and IX

The Union’s Case

The Union additionally claims that the Employer’s workload assignments cannot stand because they violate relevant ethical standards embodied in the Minnesota Rules of Professional Conduct. The Union contends that these ethical standards are incorporated in the parties’ collective bargaining agreement in two ways. First, the Union points to Section 1.1 which states that the intent and purpose of the parties’ agreement is to “assure sound and mutually beneficial working and economic relationships between the parties” The Union maintains that workload assignments that compel ethical violations are incompatible with the concept of “sound and mutually beneficial working and economic relationships.” Second, the Union relies on Section 9.1 which provides that “this agreement is intended to be in conformity with all applicable and valid federal and state laws and those rules or regulations promulgated there under having the force and effect of law.” The Union asserts that the Minnesota Rules of Professional Conduct are among those rules and regulations against which the parties’ agreement must be measured.

The Union argues that the Employer’s failure to limit the number of case assignments threatens unethical representation in violation of the Minnesota Rules of Professional Conduct. The Union expressly references the following rules:

- **Rule 1.1:** A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
- **Rule 1.3:** A lawyer shall act with reasonable diligence and promptness in representing a client.
- **Rule 6.2:** A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as: (a) representing the client is likely to result in violation of the rules of professional conduct or other law;

The Union particularly relies on Comment 2 to Rule 1.3 states that “a lawyer’s work load must be controlled so that each matter can be handled adequately.”

The Union argues that the Employer’s excessive workload assignments make it difficult for the assistant public defender attorneys to represent clients in a manner that conforms to the recognized Best Practices for Public Defenders. The Union maintains that the grievant attorneys frequently do not have adequate time to meet with clients, prepare witnesses, review physical evidence, or otherwise adequately prepare for hearings and trials.

The Union also relies on the testimony of expert witness Professor Lefstein who expressed the opinion that the caseloads serviced by the grievant attorneys are excessively high and pose a real danger of professional responsibility lapses. He reviewed the ABA Eight Guidelines of Public Defense Related to Excessive Workloads and found that the Employer’s caseload assignment practices were not in conformance with these guidelines. He also expressed the opinion that public defender attorneys cannot be expected to handle more than 100 open cases at any one time in a competent manner. Since the grievant attorneys all have caseloads in excess of this target, Professor Lefstein testified that he believed that the Employer’s caseload assignments were inconsistent with the spirit of the professional conduct rules.

The Union’s presentation makes several points that have merit. It is clear that the assistant public defender attorneys in Minnesota are overworked and face considerable

challenges in representing their clients. As a matter of public policy, one can certainly debate the adequacy of the legislature's appropriation of funds for the public defender function. It also is true that at some point excessive caseloads may lead to lapses in the ethical duties of competent representation. For the reasons that follow, however, I do not believe that the current caseload levels constitute a violation of the parties' collective bargaining agreement.

The Employer's Case

The Lack of Any Express Contractual Caseload Limitation

As a first line of defense, the Employer argues that its caseload assignment practices do not violate the parties' agreement for the reason that the agreement contains no specific limitation on caseload levels. As the Employer points out, Article IV of the agreement preserves the Employer's managerial right to operate and direct the affairs of the Board except as expressly modified by the terms of the agreement. Pursuant to Section 4.2, this reservation includes the right to determine the number of personnel and to direct their activities.

It is undisputed that the agreement contains no express provision that limits the size of assistant public defender caseloads. The record indicates that the Union sought to obtain such a limitation during negotiations in 2000 but was not successful in doing so. In the absence of a contractual limitation, the Employer admittedly is accurate in asserting that the caseload numbers, without more, are not in and of themselves a violation of the parties' agreement.

The Absence of Actual Ethical Violations

The cornerstone of the Union's grievance is that the heavy assistant public defender caseloads pose a danger of ethical violations. While that certainly is a legitimate concern, the Employer's responsive argument is even weightier. Here, the Employer submits that there is no evidence that any assistant public defender in Minnesota has been charged with a violation of the

Minnesota Rules of Professional Conduct due to excessive caseload responsibilities. The lack of any established ethical violations or even any alleged ethical violations provides strong evidence that the Employer's current practices are not in violation of the pertinent ethical rules. In this regard, State Public Defender Stuart's testimony provides an apt summary:

I think on the whole they [the assistant public defender attorneys] are not taking on more matters than they can handle. The question is whether people have enough time to do everything that they would like to do on a case. You know, it's just hard to get public dollars to pay for that to happen.

The Employer, of course, needs to be diligent in ensuring that its caseload assignment practices do not place the assistant public defender attorneys in a position in which they will be unable to provide competent representation to their clients. The record in this matter, however, does not establish that this condition currently exists.

The Union's Requested Remedy Would Conflict with State Law

The Union's requested remedy in this matter is an order directing the Employer to adopt and implement a specific caseload limitation for individual assistant public defender attorneys. Such a remedy is not permissible, however, since the Public Employment Labor Relations Act forbids arbitrators from issuing decisions that are in conflict with state law. See Minn. Stat. §§ 179A.21, subd. 3 and 179A.16, subd. 5.

The Union's requested remedy would violate state law in this instance since it would require the Employer to decline to represent some indigent clients appointed by state courts. Pertinent constitutional and legislative requirements mandate the appointment of public defender attorneys for criminal defendants who cannot afford to hire legal counsel. The Minnesota Supreme Court has ruled that a public defender "may not reject a client, but is obligated to represent whoever is assigned to her or him, regardless of her or his current caseload or the difficulty the case presents." Dziubak v. Mott, 503 N.W.2d 771, 775 (1993). In undertaking

this obligation, the State Board of Public Defense is limited to the appropriations made by the state legislature. See Minn. Stat. § 611.27, subd. 7.

Both State Public Defender Stuart and Chief Administrator Kevin Kajer persuasively testified that the Employer could not implement the 400 caseload/year standard as a maximum ceiling within the limits of the budget appropriated by the state legislature without declining to represent eligible clients appointed by state court judges. Indeed, Mr. Kajer testified that in order to implement Professor Lefstein's suggested maximum individual caseload for felony caseloads, the Employer would need to hire more than 100 additional lawyers at a cost of about 90 million dollars beyond appropriated funds. Clearly, the Employer is not in a position to adopt a strict numerical case quota within current budgetary restrictions without violating mandatory representational duties.

Conclusion

This grievance raises significant issues concerning constitutional duties, public policy, and workplace fairness. Constitutional requirements dictate that the state must provide legal representation to indigent criminal defendants. The adequacy of legislative funding for such services raises difficult public policy concerns. Unfortunately, the current state of affairs leaves considerations of workplace fairness on the bottom of this particular totem pole. The lack of adequate state funding for constitutionally mandated public defender services requires assistant public defender attorneys to work long and stressful hours on a shoestring budget. But this is not a problem that has been caused by the failure of the State Board of Public Defense to fulfill its obligations under the parties' collective bargaining agreement. Ultimately, the problem at hand is political in nature and requires a resolution in a different forum.

AWARD

The grievance is denied.

Dated: July 18, 2012

Stephen F. Befort
Arbitrator