

THE MATTER OF ARBITRATION BETWEEN

ISD696)	BMS Case No. 12 PA 1204
Ely Minnesota)	
“Employer”)	Issue: Severance Payout
)	
and)	Hearing Date: 09-19-12
)	
)	Brief Submission Date: 10-05-12
)	
Ely Education Association)	Award Date: 11-01-12
)	
)	Anthony R. Orman,
“Union”)	Arbitrator
)	

JURISDICTION

The hearing in this matter was held on September 19, 2012, in Ely, Minnesota. The parties appeared through their designated representatives. Both parties were afforded a full and fair opportunity to present their case. Witnesses’ testimony was sworn and subject to cross-examination. Exhibits were introduced into the record. The parties stated the grievance was properly before the Arbitrator. The parties submitted their statement of issues and agreed that the arbitrator would frame the issue. Post-hearing briefs were submitted on or about October 5, 2012, and thereafter the matter was taken under advisement.

APPEARANCES

For the Union:

Joselyn Murphy Union Representative/Grievant

For the Employer:

Kelly Klun Attorney

Ray Marsink School Board Chair

I. BACKGROUND AND FACTS

Joselyn Murphy (Union Representative/Grievant and here in after referred to as Grievant) was a seventeen plus year employee of ISD 696 (Here in after referred to as Employer). In January of 2012 the Grievant retired from her position as a principal for Independent School District 696. Upon her retirement the Grievant received a severance payment from the Employer dated January 6, 2012. The Grievant reviewed the calculations and determined the outcome was incorrect.

Shortly after determining the calculation was incorrect the Grievant met with Connie Ojala, Bookkeeper, for the Employer. Ms. Ojala reviewed the calculations with the Grievant and determined that the calculations were consistent with the Employer's policies.

The dispute over the calculations was determined to be how the daily rate was calculated. The Employer used the annual salary (\$88187.00) divided by duty days of 210 plus 10 holidays. The Grievant used just the 210 duty days and excluded the 10 holidays. The difference between the two calculations was \$2023.54.

After some discussion between the parties the Employer informed the Grievant the long standing practice of using the 210 duty days plus 10holidays had not been grieved by a previous retiree and the Grievant would have to follow the formal grievance procedure. On February 18, 2012 a grievance was filed and subsequent moved to arbitration.

II. THE ISSUE

Did the Employer violate the collective bargaining agreement when it calculated the daily rate of pay for Grievant's severance, under Article 10 Retirement Benefits, by dividing her annual salary by her 210 duty days plus 10 additional holidays instead of just her 210 duty days?

III. RELEVANT CONTRACT PROVISIONS AND GOVERNING RULES

2009-2011

ARTICLE X - RETIREMENT BENEFITS

Section 1. Severance Pay: Principals who have completed at least 15 years of full-time service with the school district who are at least 55 years of age shall be eligible for severance pay pursuant to the provisions of this article upon submission of a written resignation accepted by the School Board.

Subd. 1. Eligible principals upon retirement shall receive as severance pay an amount equal to 106 days to be paid at the principal's daily rate of pay as per contract.

Subd. 2. In applying these provisions, a principal's daily rate of pay shall be the basic daily rate at the time of retirement, as provided in the basic salary schedule for the basic school year, and shall not include any additional compensation for extracurricular activities or other extra compensation.

ARTICLE XI - DUTY YEAR

Section 1. Duty Days:

Subd 1. The school district shall establish the calendar and the principal's duty days for each school year, the principals shall perform services on such days as determined by the school district, including those legal holidays on which the school district is authorized to conduct school, and pursuant to such authority as determined to conduct school.

Subd, 2, Duty Year. The duty year for administrators shall be:
K-12 Principal - 210 duty days.

1999-2001

ARTICLE X - RETIREMENT BENEFITS

Section1. Severance Pay: Principals who have completed at least 15 years of full-time service with the school district who are at least 55 years of age shall be eligible for severance pay pursuant to the provisions of this article upon submission of a written resignation accepted by the School Board.

Subd.1. Eligible principals upon retirement shall receive as severance pay an amount equal to 50% of the accrued sick leave days plus 10% of the bonus days accrued times the daily rate of pay as determined from his/her last position on the salary schedule. In no case, shall compensation exceed 100 days' pay.

Severance Pay Clarification: The following statement should clarify the number of sick leave days used in the Severance Pay formula. The total number of sick leave days used in the formula is determined by adding 50% of the unused sick leave days up to a maximum of 135 days plus the bonus days accrued during the period of employment.

Example: 135 sick leave days X .5 plus 43.0 bonus days (10% of 430) = 100 days (maximum)

The Severance Pay Policy limits the maximum severance days to 100 days. Note: Bonus days are determined by taking 10% of the total number of accrued bonus sick leave days.

Subd. 2. In applying these provisions, a principal's daily rate of pay shall be the basic daily rate at the time of retirement, as provided in the basic salary schedule for the basic school year, and shall not include any additional compensation for extracurricular activities or other extra compensation.

ARTICLE XI - DUTY YEAR

Section 1. Duty Days:

Subd 1. The school district shall establish the calendar and the principal's duty days for each school year, the principals shall perform services on such days as determined by the school district, including those legal holidays on which the school district is authorized to conduct school, and pursuant to such authority as determined to conduct school.

Subd, 2, Duty Year. The duty year for administrators shall be:

High School Principal - 210 duty days.

Elementary Principal - 210 duty days. (Includes Title I)

1991-1993

ARTICLE X - RETIREMENT BENEFITS

Section1. Severance Pay: Principals who have completed at least 15 years of full-time service with the school district who are at least 55 years of age

shall be eligible for severance pay pursuant to the provisions of this article upon submission of a written resignation accepted by the School Board.

Subd.1. Eligible principals upon retirement through age 62 shall receive as severance pay an amount equal to 50% of the accrued sick leave days plus 10% of the bonus days accrued times the daily rate of pay as determined from his/her last position on the salary schedule. In no case, shall compensation exceed 100 days' pay. Retirement at age 63 shall be paid 40% of accrued sick leave and retirement at age 64 shall be paid 30% of accrued sick leave as severance pay based on the same method of determining pay.

Subd. 2. In applying these provisions, a principal's daily rate of pay shall be the basic daily rate at the time of retirement, as provided in the basic salary schedule for the basic school year, and shall not include any additional compensation for extracurricular activities or other extra compensation.

ARTICLE XI - DUTY YEAR

Section 1. Duty Days:

Subd 1. The school district shall establish the calendar and the principal's duty days for each school year, the principals shall perform services on such days as determined by the school district, including those legal holidays on which the school district is authorized to conduct school, and pursuant to such authority as determined to conduct school.

Subd, 2, Duty Year. The duty year for administrators shall be:
High School Principal - 210 duty days.
Elementary Principal – 205 duty days.

IV. POSITION OF THE UNION

The Ely Principal's Association had no knowledge of the districts "past practice" in its calculation of the principals severance. Without such knowledge there could be no mutual agreement or acquiescence. ISD 696 alleged the existence of a "past practice" however the testimony as heard and evidence as presented did not prove that a "past practice between ISD 696 and the Ely Principals Association had ever been established.

V. POSITION OF THE EMPLOYER

The parties' collective bargaining agreement is ambiguous with regard to the formula utilized in calculating the daily rate of pay for severance. The District followed a clear, consistent, long-lived and mutually accepted past practice when calculating the daily rate of pay for Ms. Murphy's severance. In light of the forgoing, the arbitrator should deny the grievance.

VI. OPINION

Both parties agree that the issue is whether there is or is not a valid past practice. The Employer has cited for the purpose of definition, "Richard Mittenthal, *Past Practice and the Administration of the Agreement*, 59 MICH. L. REV 1017 (1961). When the terms of the collective bargaining agreement are ambiguous, a practice which comports to the factors is binding on the parties and enforceable under contract grievance procedures. *See ELKOURI & ELKOURI, HOW ARBITRATION WORKS 605-30 (6th ed. 2003).*"

Arbitrators have used the following standards to determine if there is a valid past practice.

- The practice is unequivocal.
- The practice is clearly enunciated and acted upon.
- The practice reasonably ascertainable over a reasonable period of time.
- The practice is fixed and established practice accepted by both parties.¹

¹ "A past practice may be given binding effect as an implied term of a labor agreement if the practice is unequivocal, clearly enunciated and acted upon, and reasonably ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. Grand Haven Stamped Products Co., 107 LA 131, 137 (Daniel, 1996); Arizona

It is also the burden of the party alleging the past practice to provide the burden of proof.² In this case it is the Employer who is alleging the past practice. Therefore, the Employer's evidence must meet a higher burden of proof for the Employer to have met the test of all four standards.

First, is the practice is unequivocal?

The Employer provided documentation for the calculations for retirement benefits for three retiring principals. (Joint Exhibits 2D, 4C, 6C and 11) All three employees had their base rate calculated using 210 duty days and 10 holidays. The Arbitrator believes that the record shows the Employer has met the burden of proof for this standard.

Second, is the practice clearly enunciated and acted upon?

In the case of the first retirement recipient (Bob Scheuer) a request was made on June 18, 1993 by him (Joint Exhibit 2B) that his retirement is provided to him in two payments. On that letter are hand written notes with dates that two payment were made to him equaling his calculated retirement benefit. A second letter dated April 5, 1995 (Joint Exhibit 2A) by the payroll clerk (Carolyn Fendt) describes a second payment made in 1994 to Mr. Scheuer as reflected in the hand written note for the second payment of Joint Exhibit 2B. There is no evidence presented of Mr. Scheuer contesting the calculations.

Aluminum Co., 78 LA 766 (Sass, 1982); Elkouri and Elkouri, *How Arbitration Works*, pp. 606-08 (6th Ed. 2003).”

² The burden of proof is on the party alleging the existence of a binding past practice to establish that one exists. *See Reynolds Packaging Group, Reynolds Consumer Products and Bellwood Printing Pressmen*, 38 LAIS 134, 2010 WL 6777140 (Etelson 2010).

In the case of the second retirement recipient (Bob Jolonen) the calculation were made and presented in a document (Joint Exhibit 4C) which was prepared by the new payroll clerk (Connie Ojala). Although the document was not dated Mr. Ojala stated she spoke with Mr. Jolonen about it because Mr. Jolonen had requested full payment which she referenced in a hand written note dated June 12, 2001. While both Ms. Ojala and Mr. Jolonen could not say for sure if Mr. Jolonen had or had not seen this document Mr. Jolonen did testify he received full payment as recorded. Ms. Ojala testified Mr. Jolonen would have received a check stub with the information of the amount and deductions. (Joint Exhibit 4D) There is no evidence presented of Mr. Jolonen contesting the calculations.

In the case of the third retirement recipient (The Greivant) Ms. Ojala calculated and prepared a document in the same way she had for Mr. Jolonen. The Grievant contested the calculations even though she was told the calculations were performed in the same manner as her predecessors.

The Arbitrator believes that the record shows the Employer has met the burden of proof for this standard.

Third, is the practice reasonably ascertainable over a reasonable period of time?

In answering the previous question the evidence shows the Employer has used the same practice since at least since 1993 with the retirement of Bob Scheuer to the present time of the Grievant's retirement. It is probable that the practice was used as far back as 1986. In a memo to Mr. Gornik (Business Manager) dated May 29, 1986 (Joint Exhibit 4B) concerning Mr. Jolonen's vacation Ethel outlined a discussion she had with Mr.

Jolonen. Ethel in the memo was Ethel Shojoberg who was the bookkeeper at that time. The content of the memo discussed duty days, vacation and 10 holidays. In response to the memo Mr. Gornik, in a hand written note dated June 2, 1986, listed duty days, vacation and holidays.

The Arbitrator believes that the record shows the Employer has met the burden of proof for this standard.

Fourth, is the practice fixed and established practice accepted by both parties?

In its brief the Union as represented by the Grievant states, “The Ely Principal’s Association had no knowledge of the districts “past practice” in its calculation of the principals severance. Without such knowledge there could be no mutual agreement or acquiescence.” The Grievant further testified that as the sole member of the bargaining unit, and as the chief negotiator for the bargaining unit, she was not aware of the practice.

The Grievant provided two letters in evidence from Edward Anderson, PhD dated September 13, 2012 (Union Exhibit 1) and Tom Bruels dated September 17, 2012 which support the Grievant’s position. The Arbitrator notes the Employer has objected to receiving these letters into evidence because there was no opportunity to cross examine the parties as witnesses and they were not sworn statements. The Employer also questions whether the two parties ever participated in calculating the retirement benefits of a person retiring from this bargaining unit.

In further support of her position the Grievant called Mr. Jolonen to testify that he did not know 10 holidays were added to the 210 duty days to calculate his retirement benefit. Mr. Jolonen testified if he had been aware at the time of his

retirement that 10 holidays had been added to the calculations he would have grieved it.

The Employer states, “Both the Union and District knew the practice existed and agreed with the practice or, at least, allowed it to occur. In this case, payments have been made and the severance checks for Mr. Scheuer and Mr. Jolonen were cashed with no grievances brought forward. For the purpose of making an award the arbitrator must determine whether both parties were aware of the practice when making his decision. In cross examination by the Employer Mr. Jolonen was shown the calculation sheet (Joint Exhibit 4C) and asked if he had been shown the document before. He stated he could not remember if he had or had not. Mr. Jolonen was also questioned by the Employer about discussion reflected in a memo by Ethel to Mr. Gornick (Joint Exhibit 4B) while he was an elementary principal. He stated he could not remember.

It is on this fourth standard of past practice the Arbitrator must make his decision if both parties knew about the practice. First we must define who the parties are that had to have knowledge. They are clearly defined in Article II Recognition of Exclusive Representative, Section 1, of the Collective Bargaining Agreement (Joint Exhibit 5A-1) as the School Board of Independent School District No. 696 and the Ely Principals Association. The distinction comes when asking the question did the right parties know about the practice of computing the 210 duty days and 10 holidays.

The Grievant provided two letters of past Superintendents who stated they were unaware of the practice as presented by the Employer. These letters were

instructive and Arbitrator has studied the two letters carefully. He has determined both individuals were employed sometime between Mr. Jolonen's retirement and the Grievant's. Because of the testimony given by all of the parties and the dates of employment given by the two parties in their letters it does appear neither individual participated in calculating an actual retirement benefit for a member of this bargaining unit. From the testimony of Ms. Ojala it is apparent this process was accomplished in the business office by the manager and/or the bookkeeper. Therefore the two letters provide no direct evidence as the two parties' direct knowledge of actually calculating retirement benefits on behalf of the Employer.

Mr. Jolonen's testimony was the most direct about the Union's knowledge about the process. In his testimony he said he did not remember seeing his calculations by Ms. Ojala (Joint Exhibit 4C) or if he had a discussion prior with Ethel Shojoberg as recorded in her memo to Mr. Gornick (Joint Exhibit 4B). Because the incidents concerning Mr. Jolonen were many years ago it is understandable if he had problems remembering such events.

Because time may makes memory less reliable the Arbitrator is required to make his ruling on the most significant direct evidence. In this case the Grievant has stated because she did not know about the policy the Union did not know about the policy and therefore the Employer has not met the burden of proof for the fourth element of past practice. On its face the Arbitrator could agree with her, but due to the uniqueness of this bargaining unit one must look farther. The bargaining unit has only had one or two members at a time. At each period those members may have bargained something that is not clearly delineated in the contract yet has

created a practice which may not have been passed on orally to the next member or members. Due to this fact the Arbitrator must look to recorded evidence.

The Grievant states there are no holidays negotiated in the collective bargaining agreement. Under Section 1 Duty Days, Subd. 1 in each of the collective bargaining agreement (Joint Exhibits 1-12, 3-11 and 5-11) is the following provision, “including those legal holidays on which the school district is authorized to conduct school, and pursuant to such authority as determined to conduct school.” Holidays are referred to in regards to duty day in all of the contracts. Further in Subd. 1 the School District is given the sole power to set the calendar. Holidays are referenced by Ethel Shojoberg in her memo to Mr. Jolonen and again by the hand written notes by Mr. Gornick in 1986 (Joint Exhibit 4B). The written calculations for Mr. Scheuer’s and Mr. Jolonen’s retirement benefits (Joint Exhibit 2D and 4C and D) also include 10 holidays. These are all actions of Union Members who represented themselves and the Union concerning the implementation of the collective bargaining agreement.

In negotiating collective bargaining agreements it is not unusual for the Employer to have a policy to negotiate language and benefits as similar as possible between bargaining unit for ease of administration and bargaining power. In negotiating benefits these same collective bargaining agreements are use as internal comparison. In this arbitration the Employer has raised a compelling argument concerning the similarity between the Principal’s agreement and the Teacher’s agreement. The language concerning holidays in the Section 1 Teachers Duty Days of the Teacher’s Collective Bargain Agreement (Joint Exhibit 18-18) is the same as

the Principal's agreement. In both collective bargaining agreements specific holidays are not defined. The only place there is any actual references to specific holidays is a hand written note identified by testimony and noted as Mrs. Nickerson's. In the note the holidays are identified. There is no way to determine when the note was written except to say it was during her tenure. The holidays identified are not as important as the number of which there are 10 and that the reference is they applied to the teachers bargaining unit. Further confirmation as to 10 holidays being applied for both the teachers and the principals is in Mr. Ojala's notes (Joint Exhibits 7A and B).

The Arbitrator believes that the record shows the Employer has met the burden of proof for this standard.

VII. AWARD

For the reasons set forth above the grievance is denied and Arbitrator has determined the Employer did not violate the collective bargaining agreement. This award is final and binding.

Issued and ordered on this 1st day of November,
2012 from Duluth, Minnesota.

Anthony R. Orman, Labor Arbitrator