

IN RE ARBITRATION BETWEEN:

**UNITED AUTOMOBILE, AEROSPACE, AGRICULTURAL AND IMPLEMENT WORKERS
OF AMERICA, UAW,**

and

CITY OF AUSTIN, MINNESOTA

DECISION AND AWARD OF ARBITRATOR

BMS Case No. 12-PA-0926

JEFFREY W. JACOBS

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IN RE ARBITRATION BETWEEN:

UAW,

and

City of Austin, MN.

DECISION AND AWARD OF ARBITRATOR
Swimming pool grievance
BMS Case # 12-PA-0926

APPEARANCES:

FOR THE UNION:

Mike Krumholz, Union Representative
Greg Bell, steward
Lynn Thompson, Park and Rec employee
Terry Corkill, Park and Rec employee

FOR THE EMPLOYER:

Cy Smythe, Labor Representative
Kim Underwood, Dir. of Park and Rec/Forestry
Trisha Wiechmann, HR Director

PRELIMINARY STATEMENT

The hearing was held September 25, 2012 at City Hall in Austin, MN. The parties submitted Briefs dated November 2, 2012.

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement covering the period of January 1, 2008 to December 31, 2010. The grievance procedure is contained at Article V. The arbitrator was selected from a list maintained by the Bureau of Mediation Services. The parties agreed that there were no procedural arbitrability issues and that the matter was properly before the arbitrator.

ISSUE

Did the City violate Article 6.9, when it used seasonal/part-time employees to perform work at the swimming pool on September 8, 2011? If so, what is the proper remedy?

RELEVANT CONTRACTUAL PROVISIONS

The parties cited several provisions of the labor agreement in relevant part as follows:

ARTICLE 2.1 - RECOGNITION

The Employer recognizes the Union as the exclusive bargaining representative for the collective bargaining purposes and to have a representative of their own choosing. The terms maintenance employee or employees shall mean those employees or employee of the City of Austin Parks Department who are on straight time and engaged in maintaining the park system.

Examples are the Marcusen Ball Park, Austin Swimming Pool and such other properties or buildings as shall be acquired by the Park and Forestry Board.

ARTICLE 2.2 - RECOGNITION

The Employer may hire “temporary” and “seasonal” employees as those terms are defined by M.S.A. 179A.03, Subd 14(e) and 14(f). It is understand (sic) and agreed that the Collective Bargaining Agreement with Austin Park and Recreation Department does not apply to these employees. The Employer shall be permitted to determine such work schedules, working conditions, wages, hours and benefits as the employer deems appropriate for the “temporary” and “seasonal” employees as above defined and such employees shall not be subject to this collective bargaining agreement.

ARTICLE 6.9 - SENIORITY

Overtime Seniority

- A. Full time employees must be asked first
- B. Senior person in the job classification first, second, etc.
- C. Then to seniority roster on all scheduled overtime.
- D. Casual overtime shall be according to people doing like job when the situation arises.
- E. Emergency call is to remain as is.

RELEVANT STATUTORY SECTIONS¹

179A.03 – DEFINITIONS

Subd. 14 Public employee or employee ...

(5) part-time employees whose service does not exceed the lesser of 14 hours per week or 35 percent of the normal work week in the employee's appropriate unit;

(6) employees whose positions are basically temporary or seasonal in character and: (i) are not for more than 67 working days in any calendar year; or (ii) are not for more than 100 working days in any calendar year and the employees are under the age of 22, are full-time students enrolled in a nonprofit or public educational institution prior to being hired by the employer, and have indicated, either in an application for employment or by being enrolled at an educational institution for the next academic year or term, an intention to continue as students during or after their temporary employment;

UNION’S POSITION

The Union took the position that the City violated the labor agreement when it used seasonal and temporary employees to paint the City’s swimming pool on September 8, 2011 and that full-time employees should have been offered overtime to perform that work. In support of this position the Union made the following contentions:

¹ Minn. Stat. 179A.03 Subds. 14 (e) and (f) have now been renumbered as Subds. 14 (5) and (6). The substance of those provisions has not apparently changed however.

1. The Union asserted that the scenario that occurred on September 8, 2011 has not occurred before and that even though the City can use temporary and seasonal employees, the City is not allowed to use such employees to do the same work as the full time employees are doing. On September 8, 2011 the Union argued that in the past the City has taken the temporary and seasonal employees off the job and used full time, bargaining unit employees who were allowed to work overtime when the need arose.

2. The Union asserted that in the past, the City has always sent the seasonal workers home when overtime would result from additional work and that the full time employees would then be called in to finish the job and be paid overtime. The Union asserted that this has been a consistent and longstanding practice within the City. The Union further asserted that the past practice must be adhered to in this instance since there was overtime available for the full time workers yet the seasonal workers were allowed to finish the job, thus denying the overtime to full time workers in violation of Article 6.9. The Union distinguished those situations where the seasonal workers did not possess the requisite skill or training, i.e. in situations involving heavy equipment or tree trimming where they did not have the needed skills or experience to perform the work.

3. The Union also pointed to 179A.03 and asserted that the City should have asked the full time employees to work overtime first, i.e. before asking PT employees to perform bargaining unit work. The Union also asserted that the City is not complying with the terms of PELRA, 179A.03 subd. 14 (f) since the temporary workers were not under the age of 22 and were not enrolled in a public education institution.

4. The Union also pointed to the provisions of Article 6.9, which it argued trumped the provisions of Article 2.2 set forth above, and requires that overtime be offered to full time employees first before any such overtime goes to seasonal or temporary employees. The Union further noted that the swimming pool is specifically listed in the recognition clause as a place where the Union is the exclusive representative for employees performing maintenance work there.

5. The Union noted that there is no dispute that on September 8, 2011 several seasonal employees and one full time employee were assigned to re-paint the swimming pool. There were other bargaining unit employees who were available to be called and who could have done that work. If they had they would have received overtime. The Union asserted that pursuant to Article 6.9 cited above, they must be called out in order of seniority for overtime opportunities and that the City violated the CBA when it failed to do so here.

6. The Union asserted that the City arbitrarily kept 3 seasonal workers on a job after the normal shift ended and assigned them to keep working painting the pool and kept one full time bargaining unit member there to help. What should have happened, according to the Union is what has happened in the past, which is for the full time employee to take the part time employees back to the shop and send them home and then to use bargaining unit employees to complete the job. Had that occurred here, those full time employees would have been eligible for overtime work.

The Union seeks a ruling sustaining the grievance and ordering that the City pay the three senior employees who were not asking to stay on the job, 2 hours of overtime based on the 2 hours of overtime paid to the full time employee that did stay on the swimming pool job that day.

CITY'S POSITION

The City's position is that there was no contract violation and that the grievance should be denied in its entirety. In support of this the City made the following contentions:

1. The City asserted that the provisions of Article 2.2 are clear and specific and allow exactly what occurred in this scenario. It allows the City the discretion to assign these temporary workers to whatever tasks it deems appropriate and further makes it crystal clear that those workers are not subject to the provisions of the CBA.

2. Further, the City asserted that the practice has been quite the opposite of what the Union suggests and asserted that seasonal workers have frequently been used to complete jobs like this in the past. While sometimes they are taken home at the end of the shift that was due to other factors and did not set any sort of binding precedent.

3. Further the provisions of Article 6.9, by definition, do not apply to the seasonal workers and is intended only to apply to divisions and assignment of overtime as among the full time bargaining unit workers.

4. The City further asserted that if the Union's argument were allowed to prevail it would effectively negate the City's ability to ever use seasonal workers since using them would virtually always result in the "loss" of some work, overtime or otherwise, from full time workers.

5. The City cited PELRA as well and noted that the history of that law, specifically with regard to the use of seasonal workers, was a specific agreement between labor and management going back to the very inception of the law in 1971. Both sides wanted exceptions to allow the use of seasonal workers to cover the time when, especially during the summer, there was additional work but which would not necessary bind a public employer to paying the same wages and benefits paid to Unionized full time employees.

6. The City also noted that the Union's reading of the law is incorrect and countered the claim that there was a violation of PELRA. Specifically in Subd 14 (f), now (6), the Union claimed that the seasonal workers were not in college but the use of the word "or" in that provision exempts any worker who works less than 67 days or who works less than 100 days and is a full time college student under the age of 22. These workers fell under the first exception in the law and the City did not violate either the CBA or the law.

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

MEMORANDUM AND DISCUSSION

The operative facts were undisputed and straightforward. The City of Austin, as many public employers do, hires seasonal and temporary workers during the summer months to cover the additional work in the parks and in the City's swimming pool. The Union noted that it does not take exception to that right and agreed that the City can certainly use these workers for that purpose consistent both with PELRA and with the CBA. There was no direct evidence as to how many hours these employees or more specifically the three seasonal workers involved in this case, worked or whether they fell under either the 67-day or the 100-day exception. Without such evidence it can only be assumed that they fell under one or both of them and that for the purposes of this decision, they were exempted under the law and were not considered "public employees" for purposes of PELRA's collective bargaining provisions. None of those employees testified nor was there evidence provided by either party as to their actual hours or number of days worked.

It was undisputed that on September 8, 2011, three seasonal workers along with a full time employee were assigned to paint the City's swimming pool. The seasonal workers completed the job even though they all worked beyond the regular shift. None of those workers were paid overtime for their work however since they did not work more than 40 hours in that week.

The evidence did not establish a binding past practice as the Union suggested. There was conflicting testimony regarding the practices of sending seasonal workers home in every case that has arisen similar to that which presented itself on September 8, 2011. The evidence showed rather that sometimes the seasonal workers would be sent home at the end of a shift and others they might not and that depending on the type of work to be performed there were times when the seasonal workers would work after the shift ended to complete necessary work.

Past practice has been defined as a ‘prior course of conduct which is consistently made in response to a recurring situation and regarded as a correct and required response under the circumstances.’ See, Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements*, in *Arbitration and Public Policy* 30 (S. Pollard ed. 1961). Elkouri has defined it as follows: ‘past practice,’ to be binding must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties.” Elkouri and Elkouri, *How Arbitration Works*, 6th Ed. at 632 citing to *Celanese Corp. of America*, 24 LA 168 (Justin 1954).

Clearly, as the commentators have discussed, the mere fact that something happens once or even multiple times does *not* mean that a binding past practice has occurred. The question is thus whether having done something in the past, that course of conduct will be binding in the future. This discussion will thus focus on whether something is a *binding* past practice as opposed to a happenstance event that has no particular evidentiary or contractual significance and therefore does not bind the parties to doing it that way in the future.

It should be noted that there is a vast distinction between a past practice, i.e. one that has merely gone on for a while and a *binding* past practice, which is one that can supplement, add to or even be inconsistent with CBA language. The eminent arbitrator Harry Shulman observed the need for caution in using past practice for more than it was intended as follows: “There are other practices which are not the result of joint determination at all. They may be mere happenstance, that is, methods that developed without design or deliberation. Or they may be choices by Management in the exercise of managerial discretion as to the convenient methods at the time. In such cases there is no thought of obligation or commitment to the future. Such practices are merely present ways, not prescribed ways, of doing things. Being the product of managerial determination in its permitted discretion such practices are, in the absence of contractual provision to the contrary, subject to change in the same discretion.” Elkouri at p. 636 citing to *Ford Motor Co.*, 19 LA 237, 241 (1952).

Here there was considerable evidence that the practice of sending seasonal workers home at the end of a shift was exactly what Arbitrator Shulman had in mind and that these instances were nothing more than examples of the City exercising its inherent right to determine what work went to those seasonal workers and when they got it.

Perhaps the best known case in Minnesota regarding the establishment of a binding past practice is *Ramsey County v AFSCME*, 309 N.W.2d 785 (Minn. 1981). There the arbitrator found that the parties' practice with respect to vacation accrual rates differed from the clear language of the contract. The matter arose when it was discovered that employees had for years been receiving vacation accrual payments upon their departure from the County that were different from the clear contract language. The County argued that the clear language of the contract (and it was) showed that the County had simply been paying the incorrect accrual rates for years and that it was simply done in error. The County also argued that clear language must always govern lest the whole process of negotiations be threatened with too liberal a use of past practice.

Despite that, the arbitrator ruled in favor of the employees because the practice, even though different from the clear language in the labor agreement, met the tests for a binding past practice. The Supreme Court held in *Ramsey County* as follows:

“past practice has been defined as a ‘prior course of conduct which is consistently made in response to a recurring situation and regarded as a correct and required response under the circumstances.’ Certain qualities distinguish a binding past practice from a course of conduct that has no particular evidentiary significance: (1) clarity and consistency; (2) longevity and repetition; (3) acceptability; (4) a consideration of the underlying circumstances; (5) mutuality. 709 N.W.2d at 788, n. 3 (Citing from Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements*, in *Arbitration and Public Policy* 30 (S. Pollard ed. 1961).

The evidence was insufficient to establish the elements of a binding practice as set forth in *Ramsey County* or the arbitral commentators. There was no evidence of consistency, as noted. Neither was there sufficient evidence that this was a clear, mutually accepted or established way of doing things nor any agreement that seasonal workers would always be sent home and overtime granted to available full time workers as the Union suggests.²

At the end of the day however, the question of whether there was or was not a binding practice was rendered moot by the clear and specific contractual language involved in this case. First, the language of Article 2.2 are somewhat rare in that it specifically references seasonal and temporary employees and provides that the “Bargaining Agreement with Austin Park and Recreation Department does not apply” to those employees. That article further grants very specific and clear powers to the City to determine their work schedules and to assign those workers as it sees fit. Thus unless there is some provision of the labor agreement that was violated here the Unions case cannot prevail. Upon a thorough review of the language of the CBA and the facts of this case there was not.

First, the provisions of Article 6.9 do not apply to the seasonal workers for the very reasons set forth in Article 2.2 above. That language appears to determine the division of overtime as between bargaining unit members, just as the City suggested at the hearing. Thus, the mere fact that seasonal workers stayed past the normal shift to complete that painting job did not violate that article.

Second, the fact that the seasonal workers were not paid overtime was also a significant factor in this case. The Union’s claim is based on the notion that somehow other full time employees lost overtime opportunities due to the City’s request that the seasonal workers stay to complete the painting job. This argument however if carried to its logical conclusion would effectively negate the City’s right to hire seasonal workers at all.

² The City argued too that there was a past practice in its favor and that it frequently used seasonal workers in the way they were used here. No decision need be reached on this question however given the language of the CBA and the facts that the Union bore the burden of proof on the question of whether there was a binding past practice that required the City to pay overtime in this circumstance.

While the Union acknowledged at the hearing that the City has the right to hire such seasonal workers the net effect of this grievance, if sustained, would seriously undermine that right by requiring that any time a seasonal worker was performing work that might have allowed a full time worker to get overtime, the full time worker must be given that overtime opportunity.

Third, PELRA specifically grants to public employers the right to hire certain seasonal and temporary workers as long as they stay within the limits in terms of the number of days they work during the year. As long as that happens these individuals are not considered “public employees” for purposes of PELRA. Further, this objective is further strengthened by the clear provisions of Article 2.2 set forth above.

Moreover, as the City argued, the provisions of PELRA were not violated in this matter. The Union’s claim in this regard is misplaced. M.S. 179A.03 excludes certain seasonal and temporary workers from the definition of “public employee” as follows: “employees whose positions are basically temporary or seasonal in character and: (i) are not for more than 67 working days in any calendar year; or (ii) are not for more than 100 working days in any calendar year and the employees are under the age of 22, are full-time students enrolled in a nonprofit or public educational institution prior to being hired by the employer, and have indicated, either in an application for employment or by being enrolled at an educational institution for the next academic year or term, an intention to continue as students during or after their temporary employment.” This requires that the employees be seasonal or temporary. Here it was undisputed that they were.

It further excludes temporary and seasonal workers who work less than 67 days in a calendar year. In the alternative, the statute excludes any seasonal or temporary worker where they work less than 100 days and is under the age of 22 and, to paraphrase, are college students, as set forth in the language of the law. All of these conditions must be met to exclude those workers but it must be remembered that this provision is drafted in the alternative – either condition can operate to exclude certain seasonal and temporary workers.

Thus, the claim that these particular workers were not under the age of 22 nor were apparently enrolled in an educational institution does not apply here if the workers worked less than 67 days in a calendar year. On this record there was no evidence that they worked more than that. Thus the evidence did not support the claim that the City violated PELRA in using these particular workers to paint the pool that day.

On this record, there was insufficient support either statutorily or contractually for the Union's claims. Accordingly, based on the facts of the case and the clear contract language set forth above, the grievance must be denied.

AWARD

The grievance is DENIED.

Dated: November 14, 2012

Jeffrey W. Jacobs, arbitrator

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