

IN RE ARBITRATION BETWEEN:

AUSTIN EMPLOYEE'S ASSOCIATION, AEA

and

CITY OF AUSTIN, MINNESOTA

DECISION AND AWARD OF ARBITRATOR

BMS Case No. 11-PA 1013

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Vacation pay grievance

BMS Case # 11-PA-1013

APPEARANCES:

FOR THE UNION:

Brandon Lawhead, Attorney for the Union
Lucy Johnson, City Clerk,
Justin Parkin, grievant
Mary Ann Levine, President of AEA

FOR THE EMPLOYER:

Cy Smythe, Labor Representative
James Hurm, City Administrator
Trisha Weichmann, HR Director

PRELIMINARY STATEMENT

The hearing was held January 9, 2013 at City Hall in Austin, MN. The parties submitted Briefs dated February 4, 2013.

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement covering the period of January 1, 2008 to December 31, 2010. The parties have a more current contract for the period from January 1, 2011 to December 31, 2013 but this matter arose under the 2008-2010 contract. The grievance procedure is contained at Article VI. 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

When does the grievant become eligible for his additional weeks of vacation under Article 11?

RELEVANT CONTRACTUAL PROVISIONS

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

ARTICLE VI – DEFINITION OF A GRIEVANCE

6.1 - A grievance is defined as a dispute or disagreement as to the interpretation or application of the specific terms and conditions of this AGREEMENT.

ARTICLE XI - VACATION

11.1 - Each full time City employee is entitled to vacation on the following basis: When the date of hire is between January 1st and July 1st, on the following January 1st, credit for two (2) weeks will be given. When the date of hire is between July 1st and October 1st, credit for one (1) week will be given on the following January 1st. When the date of hire is between October 1st and January 1st, credit for two (2) weeks will be given on January 1st, a year later.

11.2 – After one (1) year of service, the employee will receive a total of two (2) weeks vacation and after five (5) years of service the employee will receive a total of (3) weeks vacation and after twelve years of service will receive a total of four (4) weeks vacation and after twenty (20) years of service will receive a total of five (5) weeks vacation and after twenty five (25) years of service will receive six (6) weeks vacation. The extra week of vacation will be added to the employee's vacation balance on their employment anniversary date.

UNION'S POSITION

The Union asserted that the City violated the labor agreement when it took the position that the grievant's vacation would be adjusted only on January 1st of 2011 and not on his anniversary date as provided for in Article 11.2 of the CBA. In support of this position the Union made the following contentions:

1. The City noted that the grievant's date of hire was September 8, 2009 and that he received one week of vacation as of January 1, 2010, just as the CBA language provides at Article 11.1. His one-year anniversary however was September 8, 2010 and the Union contended that he should therefore have been credited with an additional week of vacation on that date pursuant to the clear language of the final sentence of Article 11.2.

2. The Union pointed to the language of Article 11.2 as the operative language and asserted that it was placed there after the provisions of Article 11.1 and that the contract itself was drafted by the City. Thus any patent or latent ambiguity must be resolved in the Union's favor using well-established contract interpretive principles.

3. The Union further pointed to the negotiation history of these provisions and noted that in the 1999-2001 contract negotiations while the Union proposed adding the clause calling for the additional week of vacation to be added on the anniversary date applying only to the 5th, 12th, 20th and 25th anniversary, the City's response made no such distinction. Further the language itself makes no such distinction. Moreover, the City's counterproposal, sent to the Union by letter dated December 1, 1998, simply says "The employer will add the additional week of vacation on the anniversary date of the employee's hire." It made no distinction for whether this was for a new hire or the second year, 5th year etc. It simply stated that the additional week would be added on the anniversary date of hire – just as the applicable language in the CBA does.

4. Neither party's proposal was adopted word for word and the arbitrator must therefore be guided by the language itself; despite the seeming inconsistency between the language of Articles 11.1 and 11.2 regarding when the additional week of vacation is credited to the employee's vacation account. The Union asserted that the negotiation history does not govern the result here – the CBA language does. Despite the proposals that may have gone back and forth between the parties, these documents do not provide the best evidence of the result, whereas the clear language of the CBA does.

5. The Union also asserted that the language of Article 11.2 is more specific in terms of when the additional week of vacation is to be credited. It provides that "after one (1) year of service, the employee will receive a total of two (2) weeks vacation." This is simply further clarified in the final sentence to make it absolutely clear that the vacation week is added on the anniversary date, here that was September 8, 2010.

6. The Union asserted that Article 11.1 calls only for how and when the *first* week of vacation is to be credited after the date of hire and does not govern the *additional* weeks; that is what Article 11.2 deals with. Thus, the Union asserted, there is no inherent fatal inconsistency between the provisions at all. They can be interpreted to be perfectly consistent with each other in this manner – 11.1 specifically deals with the first week of vacation and Article 11.2 deals with the additional weeks.

7. Further, even if the arbitrator finds that there is the inconsistency as argued by the City, that does not render the matter non-arbitrable. The grievance procedure and long established labor relations principles mandates that the arbitrator is to interpret the CBA. That would of course include resolving any apparent inconsistencies or ambiguities in the language. The Union asserted that the argument put forth by the City is that the very contract it drafted is now void due to the apparent inconsistency between the two provisions at issue here. This argument has been rejected in other forums and must be rejected again here as well. See *United Steelworkers of America, AFL-CIO v. General Elec. Co.*, 211 F. Supp. 562 (1962).

8. The Union further asserted that the letter sent to the grievant outlining the terms of his employment and when he could expect to get the additional weeks of vacation is not consistent with the terms of the CBA. The Union argued that the CBA governs the result here; not a letter sent to the grievant (who would of course not have been familiar with the terms of the CBA upon his hire when he got that letter.) Further it was only after consultation with his Union representative that the grievant realized the error in the credit of his vacation week. He acted upon that immediately upon learning it.

9. The Union countered the claim by the City that there is a “past practice” regarding the granting of vacation by noting that this has never arisen before. There is thus no “past practice” since literally none of the elements necessary to establish such a practice are present.

10. Finally, the Union noted that there were attempts to resolve this grievance as part of the overall negotiations for a new contract but those efforts failed. The Union noted that while settlement may have been preferred, settlement did not occur here and that these negotiations do not govern the result nor should they be given serious evidentiary weight in this matter. See City exhibit H.

The Union seeks a ruling sustaining the grievance and ordering that the City grant the grievant his applicable additional vacation week as of his one year anniversary date.

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 there is an inherent inconsistency between the clear provisions of Article 11.1 and the provisions of Article 11.2. The City characterized this as a somewhat classic case of two provisions that are seemingly at odds with one another. In fact the City asserted that the arbitrator faces a conundrum in this case.

2. The City further asserted that if the arbitrator ruled in favor of the City that result might well be at odds with the provisions of Article 11.2 and that if the arbitrator were to rule in favor of the Union that result would be at odds with the provisions of Article 11.1. Either, the City claimed that the arbitrator is "damned if he does and damned if he doesn't."

3. The City took the position that given this inherent inconsistency the matter is not substantively arbitrable and should be denied on that basis alone. The arbitrator would by definition have to add to or amend the parties' contract in order to render a ruling on this matter. Doing so is prohibited by the clear terms of the grievance procedure. The City took the position that this matter may only be resolved through negotiations between the parties and that the arbitrator is without power or jurisdiction to amend the contract in the manner sought by the Union.

4. The City pointed to what it claimed was the clear language of Article 11.1 that provides "when the date of hire is between July 1st and October 1st, credit for one (1) week will be given on the following January 1st." The City noted that it fully complied with this provision and granted the grievant his one week of vacation effectively January 1, 2010, just as that provision calls for.

5. In addition, the City asserted that it then applied the terms of the CBA correctly by not granting the grievant his additional week of vacation on his one-year anniversary date but rather only on January 1, 2011.

6. The City asserted that the language of Article 11.2 calling for the additional week to be granted on the anniversary date applies only to the additional weeks of vacation for where an employee has worked for 5, 12, 20 or 25 years and does not apply to the employee's second year of employment.

7. The City pointed to the grievant's appointment letter which specifically sets that out and clearly informed the grievant he would not be granted an additional vacation week until January 1, 2011. He took the position fully aware of that and should not be allowed to change it now.

8. The City asserted that the intent of the language, despite the fact that the language does not quite accurately provide for it, was that the anniversary date language would only apply to the 5, 12, 20 and 25 year thresholds. The City pointed to the original proposal made by the Union in the 1999-2001 negotiations, see City Exhibit F, and noted that it specifically applied *only* to those levels. That proposal, made by AEA, stated as follows: "Employee be eligible for additional vacation on the anniversary date of the employee's hiring date. *This pertains only to the employee's who have reached their 5th, 12th, 20th and 25th anniversary date.*" (Emphasis added.) In response to this, the City agreed and sent back its response as follows: "The Employer will add the additional week of vacation on the anniversary date of the employee's date of hire."

9. The City asserted that the clear intent of this exchange was that the additional week added on the anniversary date only applied to those longer term employees and was never intended nor applied to someone in the grievant's position; i.e. who had worked for the City for only a year.

10. Further, the City noted that this is a small unit but that the additional week of vacation has never been granted in the fashion sought by the Union. At no point has the Union ever asserted that the additional week of vacation for a short-term employee must be added on the one-year anniversary date until the grievant raised this issue in 2010. The City noted that the provision has been in the CBA for nearly ten years and that this long held understanding should be given weight here. The City argued that no new employee has received the vacation benefit requested by the Union in this case and that to allow this now would constitute an unauthorized change to the contract.

11. Finally, the City noted that there were attempts made to settle this grievance and that the tentative agreements reached on this very question was to preserve the City's understanding and apply the anniversary date language only to the 5, 12, 20 and 25 year anniversaries. There was also some tentative agreement to pay the grievant an additional week of vacation, see letter dated October 22, 2010, but this too apparently fell through. The City asserted that even though these were in the nature of settlement discussions they show that the original intent of the parties was consistent with the City's long held interpretation of the language.

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

MEMORANDUM AND DISCUSSION

The operative facts of this case were not in dispute. The grievant was hired as an Engineering Technician on September 8, 2009. Prior to his hire he was sent the letter dated August 9, 2009, City Exhibit F, which outlined the terms of his employment. That letter set forth various wage and benefits available to the employee and indicated that "you will be entitled to one week (40 hours) of vacation on January 1, 2010 to be used in 2010(as defined in the unit agreement). You will receive two weeks (80 hours) on January 2011;¹ and receive increases based on the following guidelines. After five (5) years of service, you will receive 120 hours of paid vacation, 160 hours after 12 years, 200 hours after 20 years of service and 240 hours after 25 years of service."

The grievant contacted his Union representative on or about his one-year anniversary date and was told that he should be entitled to the additional week of vacation on his anniversary date, not on January 1st of 2011. This grievance ensued.

The parties both pointed to the negotiation history of Article 11. The evidence showed that the AEA proposed a change in the language to the vacation article from which had existed prior to the 1999-2001 CBA. The 1996-98 language of Article 10.1 provided as follows:

¹ The typed portion of the letter showed the date of 2010 but this was crossed off and 2011 was hand written into the letter. The evidence showed that this was an obvious typographical error. The question, as discussed below was whether the CBA trumped the terms of this letter.

Each full time City employee is entitled to vacation on the following basis: When the date of hire is between January 1st and July 1st, on the following January 1st, credit for two (2) weeks will be given. When the date of hire is between July 1st and October 1st, credit for one (1) week will be given on the following January 1st. When the date of hire is between October 1st and January 1st, credit for two (2) weeks will be given on January 1st, a year later.

A review of the 1996-1998 CBA shows that the language what was then Article 10.1 stayed the same over time whereas Article 10.2, now Article 11.2, was changed. The language that appears in what is now Article 11.2 has remained the same since the 1999-2001 negotiations until the time of the operative CBA in this case.

The parties both pointed to the negotiation history of that provision. It was clear that the AEA proposed a change to the language of the vacation article from what had been in place in the 1996-98 CBA. The document entitled "1999-2001 A.E.A. Contract Proposals," found in City exhibit F had a number of proposals. Paragraph # 18 contained the language pertaining to vacations as follows: "Employee be eligible for additional vacation on the anniversary date of the employee's hiring date. This pertains only to the employee's who have reached their 5th, 12th, 20th and 25th anniversary date."

There was no evidence of what the parties may have discussed about that or whether there were any other concessions or negotiations about it. The employer sent back a counter proposal dated December 1, 1998, which again had a number of counterproposals to what the Union had requested. One of those was the apparent agreement that "The employer will add the additional week of vacation on the anniversary date of the employee's hire."

The City argued that this was obviously in response to the Union's proposal that had already clarified that the anniversary date adjustment only applied to the 5, 12, 20 and 25 year adjustments to vacation and did not apply to the second week of additional vacation.

The Union countered that there were many such proposals and counters and that through the negotiation process what eventually ended up in the actual signed labor agreement did not literally adopt either of these proposals. Thus, while negotiation history may be important, here there is no hard evidence as to contractual intent other than the contract language.

The evidence further showed that this scenario has apparently never arisen under the language placed in the 1999-2001 CBA even though the language has been in the CBA for approximately 10 years. It certainly has not arisen until the grievant was hired.²

There was evidence that the parties attempted to resolve this grievance through negotiations both for this particular grievance as well as part of an overall contract negotiation. See City exhibit H. The evidence showed however that those efforts failed and that the grievance was not settled.

It is against that backdrop that the analysis of the case proceeds. Several things are clear from the outset. First, as noted above, this case does not proceed on a past practice analysis. Indeed it cannot since several of the critical elements necessary to establish such a practice simply do not exist. It is thus not necessary to go through an exhaustive exploration of the factors needed to prove up a binding past practice since it was clear that this situation has not arisen before.

Second, while the parties' efforts to resolve and settle this grievance are commendable those settlement discussions and even the tentative agreements were not given great weight here. Settlement negotiations or offers are generally not considered relevant or even admissible in most proceedings. To do so would potentially compromise that very effort and chill settlement negotiations if one side or the other were allowed to introduce them as evidence in support of their respective case.

Moreover, here, it was apparent that the settlement negotiations were part of the discussions about a new CBA. It is even more important that those settlement discussions not be used as evidence in such a matter. Thus, those discussions were not given weight on this record.

Third, the City's assertion that this case is not arbitrable because of the apparent inconsistency in two provisions of a labor agreement is without substantial merit. The legitimate role of the arbitrator under this and indeed virtually all labor agreements is to interpret the language. This can and must include those cases where there is an apparent conflict between two provisions of the agreement.

² Because of this there is no true past practice argument that can be made. Past practice analysis relies on the notions of consistency and longevity. Where it is clear that this fact scenario has not come up before, such facts undercuts a claim for a binding past practice. As discussed more herein, this case proceeds on the language of the CBA alone.

This does not entail an amendment or addition to the language but rather the interpretation of it; often in such a way (as here) to interpret the disputed clauses so as to be consistent with each other. As discussed more below, these two clauses can be reconciled in a way that creates consistency and does not add to, delete or amend the language in any way. To assert that language that may appear to be inconsistent is not subject to the grievance and arbitration procedure is to perpetuate a problem that the grievance procedure was specifically designed to alleviate and would be an abdication of the very role arbitrators were designed to fill.³

Elkouri has perhaps the best pronouncement on this issue as follows: “when the parties attach conflicting meanings to an essential term of their putative contract, is there then no “meeting of the minds” so that the contract is not enforceable against an objecting party? Hardly. The voidability of a presumed contract arises only in the limited circumstances where neither party knew, or should have known, of the meaning placed on the term by the other party, or where both parties were aware of the divergence of meanings and assumed the risk that the matter would not come to issue.” Elkouri and Elkouri, *How Arbitration Works*, 6th Ed. at p. 428.

Elkouri further notes, citing *Colfax Envelope v Graphic Communications Union, Local 458-3M*, 20 F. 3d 750, 145 LRRM 2974 (7th Cir. 1994), that “when parties agree to even patently ambiguous terms, they submit to have any dispute resolved by interpretation. That is what courts and arbitrators are *for* in contract cases – to resolve interpretative questions founded on ambiguity.” See, Elkouri at p. 429-30. It was almost as if Elkouri was talking about this very case.

In any case involving the interpretation of a collective bargaining agreement the question is that of contractual intent. The starting point and perhaps the best place, to commence that inquiry is with the language itself. The City asserted that the two clauses, Article 11.1 and 11.2 cannot be reconciled. They are, according to the City completely at odds with one another and cannot be read consistently.

³ As one prominent arbitrator used to say, “unresolved labor disputes never die, they just reappear in different forums.” It is that end result that labor advocates and arbitrators alike strive to avoid.

The Union however provided a far more persuasive approach, and that can readily be found in the language itself. Clearly Article 11.1 applies to the “first” adjustment of the new employee’s vacation account. It specifically refers to the first week of vacation where the employee is hired between July 1st and October 1st. Here the employee was hired in September. That language says simply that credit for one (1) week will be given on the following January 1st. That was done here. The clear language of that provision does not discuss the additional weeks of vacation. It merely deals with the first week.

The language of Article 11.2 deals with the additional weeks. That language is far more specific and far more applicable to the present situation. It provides that “after one (1) year of service, the employee will receive a total of two (2) weeks vacation. It of course then provides that “the extra week of vacation will be added to the employee’s vacation balance on their employment anniversary date.” When these two provisions are read together it provides a very clear answer to the question of when the week is to be added – on the anniversary date.

Further, there is no fatal inconsistency between these two interpretations. It is axiomatic that arbitrators will attempt to read contract clauses as follows: A. So that they have meaning; B. To be consistent with each other; and C. to avoid a harsh or absurd result. The interpretation above accomplished all those goals. Clearly, the parties could easily have intended that the first week of credited vacation be granted on January 1st of the year following an employee’s hire and that the additional weeks be credited on the anniversary date. There is nothing inherently absurd in that scenario. Further, interpreting these clauses in this way gives them both a cogent meaning that is neither inconsistent with each other nor with any other provisions of the labor agreement.

Moreover, even when using time honored contract interpretative principles the Union’s position prevails. First, it was apparent from this record that Article 11.2 was added later than Article 11.1. The 1996-98 language to what was then 10.1 (now 11.1 due to renumbering) was not changed but Article 11.2 certainly was. It is clear that Article 11.2 is thus newer than Article 11.1.

The parties are presumed to know their contract and are presumed to intend that any language added later is consistent with existing language. However, the later language generally takes precedence where there is an inconsistency since it was in fact added later. Here those principles apply to the Union's favor.

Accordingly, the grievance is sustained and the City ordered to adjust the grievant's vacation account in accordance with this Award and to make him whole for any lost contractual benefits.

AWARD

The grievance is SUSTAINED as set forth above.

Dated: February 18, 2013

Jeffrey W. Jacobs, arbitrator

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