

OPINION AND AWARD

OF

DAVID S. PAULL

In the Matter of the Arbitration Between

**AMERICAN FEDERATION of STATE, COUNTY and
MUNICIPAL EMPLOYEES, GREATER MINNESOTA
COUNCIL 65**

AND

**INDEPENDENT SCHOOL DISTRICT No. 316 –
GREENWAY SCHOOLS**

(Calculation of Overtime Pay)

**Date Issued: September 23, 2013
BMS No. 13-PA-0562**

OPINION

Preliminary Matters

The Arbitrator was selected by mutual agreement from a list provided by the Minnesota Bureau of Mediation Services. A hearing was conducted in Coleraine, Minnesota, on August 14, 2013. The American Federation of State, County and Municipal Employees (Union) was represented by Teresa Joppa. The Independent School District No. 316 Greenway Schools - Coleraine was represented by John Colosimo. Both Ms. Joppa and Mr. Colosimo are Minnesota lawyers. Due to the unavailability of a witness, additional testimony was presented by telephone on August 15, 2013.

At the hearing, the testimony of witnesses was taken under oath and the parties presented documentary evidence. No court reporter was present and no transcript was prepared.

After the witnesses were heard and the exhibits were presented, the parties agreed to submit written closing arguments on or before August 27, 2013. The written submissions were received in a timely manner and thereafter, the case was deemed submitted and the record closed.

Issue

The parties agreed on a statement of the issue:

Did the District violate the collective bargaining agreement by refusing to include all paid time, such as paid time accumulated for vacation time, sick leave and holidays, in the calculation of overtime and if so, what is the proper remedy?

Neither party has raised an issue of procedural arbitrability.

Relevant Contract and Municipal Code Provisions

The following contractual provisions are deemed pertinent to this grievance:

ARTICLE VI RIGHTS OF MANAGEMENT

Section A.

The management of the School District No. 316 and the direction of the working forces, including the right to direct, plan and control school district operations; to hire, recall, transfer, promote, demote, suspend, discipline and discharge employees for good and sufficient reasons; to lay off employees because of lack of work or for other legitimate reasons; to introduce new and improved operation methods and/or facilities; and to change existing operating methods and/or facilities, and to manage the School District in the traditional manner are vested exclusively in the Employer.

The foregoing enumeration of rights and duties shall not be deemed to exclude other inherent managerial rights and management functions not expressly reserved herein, and all management rights and management functions not expressly delegated in this Agreement are reserved to the School District.

ARTICLE XVI OVERTIME HOURS

Employees within the custodial, maintenance crafts, that want overtime must sign up with their supervisor (or designee). All overtime hours shall be on a rotating basis. An accurate record shall be kept for all hours refused and hours worked. All such hours shall be posted each month.

Section A.

In the case of extra work load, all employees who have registered for overtime hours or extra work hours in accordance with Section B shall be given preference over outside the bargaining agreement personnel for all such hours, providing they are qualified to perform the duties involved and said hours will not interfere with their regular 8-hour shift or normal regular daily work shift. Once an employee has been offered and the employee has accepted an overtime or extra work shift, the Employer is not required to change the employee's accepted work shift to offer a shift of more hours.

Extra work load is defined as work that cannot be performed by the regular employees during the normal day shift, or afternoon shift working hours as assigned within their respective classifications.

Section B.

Overtime work on a job other than an employee's current job classification shall be paid at the rate of the job class worked.

Section C.

An employee who chooses compensatory time off in lieu of overtime shall be compensated 1.5 hours for every hour of overtime allowed. Compensatory time off shall be taken at the discretion of the Employer, but never later than the end of the following pay period. The employee may take the wages due at time and one-half of the regular pay rate. The supervisor must approve the accumulation of compensatory time prior to its accumulation.

[Section D contains several special provisions for overtime hours requested by the Maintenance Supervisor.]

Summary of Facts

The Parties

The District is a Minnesota political subdivision and an independent school district located in Coleraine, Minnesota. Approximately 1100 students attend class in 12 grades within the District, utilizing four separate buildings. The geographical range of the District includes the neighboring communities of LaPrairie, Coleraine, Bovey, Taconite, Marble, Calumet, Pengilly, Trout Lake Township, Iron Range Township, Greenway Township, Lawrence Lake Township and Nashwauk Township.

The Union is the exclusive representative in a bargaining unit that consists of all public employees, excluding those employees who perform supervisory, confidential and instructional duties. The bargaining unit consists of approximately 60 employees. The District also bargains with Education Minnesota, which represents approximately 76 teachers..

The District and the Union are signatory to a collective bargaining agreement effective for the period beginning July 1, 2011, and ending June 30, 2013 (CBA). The parties are agreed that the CBA governs this dispute. There is evidence to indicate that the District has been engaged with the Union in a collective bargaining relationship for the past 50 years.

Calculation of Overtime Prior to 2013

The evidence establishes that, for a period of almost 30 years prior to 2013, the District calculated overtime for the bargaining unit employees by utilizing all paid time, including hours accumulated for vacations, holidays and sick leave.

The CBA is silent with regard to what hours should be included in an overtime calculation. However, the consistent utilization of this method of calculation was confirmed by several witnesses, including a school custodian and a retired mechanic. Both of these witnesses were actively employed by the District for approximately 25 years. Both confirmed that, in their individual cases, overtime was calculated by the District by including not only hours specifically worked, but also those hours accumulated during vacation, holiday and sick leave.

Two Union business agents, Mark A. Mandich and Karen Y. Burthwick, also affirmed the existence of the practice. Together, Ms. Burthwick and Mr. Mandich served the bargaining unit for about 30 years, though several successive District superintendents. Ms. Burthwick began representing the unit employers in December of 1987. Mr. Mandich, the current business agent, has served since Ms. Burthwick's retirement in February of 2006. Both credibly testified that the District's calculation of overtime for their unit members was based on all paid hours regardless of source, including leave hours credited for vacations, holidays and illness.

The evidence further establishes that the bargaining unit members were aware that the District's method of calculating overtime was somewhat atypical, given the more common method of calculation utilized by similar bargaining units in the state, which are based on hours actually worked. However, Dan E. Bibeau testified that the bargaining unit members considered the inclusion of all accumulated hours to be a special benefit which was considered by the parties during times in which overall wage rates were negotiated.

Change Overtime Calculation

In a letter to Mr. Mandich dated November 26, 2012, District Superintendent Mark Adams notified the Union that the administration had "recently discovered that overtime hours have been paid to employees in error. Noting that holiday hours, vacation

time and sick leave “have been favorably counted to determine the number of overtime hours,” Mr. Adams declared the calculation method an “error . . . a misappropriation of public dollars.”

The letter further cited to a federal law, the Fair Labor Standards Act (FLSA), implying that the law required overtime to be calculated based on actual hours worked in a seven-day work week. “Holiday hours, vacation time, sick leave, etc. are not counted in figuring overtime hours,” the letter continued. The letter also contained the statements set forth below:

Neither the ISD #316 School Board nor district administration was aware of this error until October 2012. As a results, this mistake has been corrected and overtime hours will be paid when an employee works over 40 total **actual** work hours in a seven-day work week (Monday to Sunday). (emphasis supplied)

The testimony was somewhat vague as to the actual effective date for the change in calculation. However, there was evidence to suggest that the change in calculation of overtime pay occurred on or about January of 2013.

The District did not seek to negotiate this change with the Union prior to implementation.

Knowledge of the Overtime Calculation Method

Mark T. Adams, the District’s current superintendent, testified that prior to the fall of 2012, he was not aware that the District calculated overtime for bargaining unit members using all hours, regardless of source. Randy D. Jurganson, employed in the District’s Human Relations Department, testified that she first became aware of the method by which the District was calculating overtime while engaged in modifying the

District's employee time-keeping system in 2012. Ms. Jurganson testified that she thereafter "researched" the District's payroll records and could find no evidence that overtime was calculated using paid leave hours in every case. Superintendent Adams testified that they had talked with several prior school superintendents, and that these conversations confirmed the statements in the letter of November 26, 2012.

Superintendent Adams further testified:

- When he started in 2009, he became aware of on certain errors and mistakes made by administrative staff in general and the payroll clerk in particular.
- That the District had been in the status of "statutory operating debt" for in excess of 20 years.
- When he began his duties as superintendent, the business and financial affairs were in a state of chaos and that he and his staff had worked to try and remedy the problem.

The evidence established that at least one former bargaining unit member, Hal Leisure, was elected to the school board during the time that the prior overtime calculation method was in effect. Mr. Leisure, now deceased, was a school bus driver prior to his election.

Positions of the Parties

The Union

The Union begins its written statement of position by asserting that, for nearly thirty years, the District has calculated the 40 hour figure for overtime purposes by included amounts credited for paid leave, such as sick pay, vacation and holidays. The District, the Union contends, has never denied this. Rather, the letter of November 26, 2012, contended that the past overtime calculations, which included paid sick leave, vacation and holidays, were “paid to employees in error” and in violation of the Fair Labor Standards Act. The Union further maintains that the change in calculation was achieved unilaterally and without negotiation or with its consent.

With regard to the District’s knowledge of the method of calculation, the Union refers to the testimony of Mr. Case during cross examination. In this regard, the Union contends that Mr. Case agreed that it “was possible that past school administrators did know that paid leave was included in the 40 hours counted toward overtime.” Ms. Burthwick, the Union contends, testified that when she started with AFSCME in 1987, she was told about the overtime calculation by “the superintendent, the HR folks, as well as the members.” Ms. Burthwick, the Union argues, further testified that the District “had to have know of the practice” because it was so long standing. The payroll clerks, the Union argues, had no incentive to act contrary to instructions, as they were not members of the union.

The Union further suggests that the language employed by the parties in Article XVI, Section D, indicates that the supervisors had knowledge of how overtime was calculated, in connection with their contractual obligation to distribute onetime equally. This language, the

Union argues, directly contradicts the District's suggest that Custodial Supervisor Smith did not know how overtime was calculated.

Anticipating that the District will argue that past District administrators were incompetent, the Union argues that "fiscal incompetence" is not proof that the administrative did know of the practice.

There is a history of the District acting to "change one union benefit or another without negotiating it," according to the Union. In support of this contention, the Union offers two cases, a 2003 Minnesota Court of Appeals case between the District and Education Minnesota and a case to which AFSCME was party, heard and decided by Arbitrator Gil Vernon.

The Union argues that the FLSA does not require any employer to count hours that are not actually worked, like paid leave. However, the Union notes that, while prior collective bargaining agreements consistently made reference to the FSLA, the reference has been deleted from the most recent two. "Doesn't this tell us that the parties had agreed to do differently?" the Union asks. To the Union, this change is evidence that the parties recognized that the method of calculating overtime was not consistent, under their agreements, with the minimums suggested in the FSLA.

Finally, the Union submits that "even if the Arbitrator were to decide that there was not a past practice in how overtime was calculated," the entire matter is a mandatory subject of bargain which cannot be unilaterally modified.

The Union concludes by suggesting that all affected employees should be "made whole and paid any and all overtime due and owing to them under the former method of calculating overtime."

The District

The District begins its presentation by commenting on the evidence. None of the Union's witnesses, the District contends, could testify for anyone other than himself as to whether or not the calculation of overtime pertained to all members of the unit." Other witnesses, the District suggests, testified only to their "understanding" regarding the existence of the practice. No research was conducted by any of the Union's witnesses relating to the alleged practice.

By contrast, the District argues, the research conducted by the District business manager "could find no consistency . . . that this was done in every situation and how far back it may have gone." The District contends that its letter of November 26, 2012, states correctly that "the district had not become aware of the mistake until a new computerized system had been set up which picked-up the error or mistake in or about October of 2012." The accuracy of this assertion is further confirmed by the testimony of the Human Resource Officer, as well as Superintendent Adams.

Superintendent Adams, the District asserts, established that what the Union describes as a practice was "errors and mistakes . . . unapproved behavior and conduct." The financial state, the District maintains, was "absolute chaos." The District further contends that the overtime calculation "irregularity" is "contrary to CBA." The District further argues that "getting credit for paid leave as actual hours worked . . . amounted to a misappropriation on public funds in a school district that had, and continues to be, financially strapped." The District asserts that Superintendent Adams "talked with one or more of his predecessors" and came to the conclusion that neither the administration nor the business office had any knowledge that this was occurring.

The District cites to a case cited by the Union because, is contended, it emphasizes "the importance of mutuality." In that case, the district argues, there was "overwhelming evidence" of a longstanding, mutually recognized and applied practice. "Here," the District argues, "there

is absolutely no evidence that either the business office or the administration had any knowledge of the mistake.” Although the job supervisor may have signed the time cards, the District asserts, “he would have no idea or understanding of how overtime was calculated.”

The District points out that Article XVI requires employees to sign up with their supervisor and that “it is considered an extra work load as long as it doesn’t interfere with their regular shift . . . This language clearly implies, if not states, that overtime is only considered for those people who are coming out of an active work situation so as to be considered an extra work load.”

The burden of proof, the District points out, is on the Union in this case, as the party alleging the existence of a binding past practice. Several additional cases are cited to confirm the element of “mutual acceptance” in past practice cases. Under the Fair Labor Standards Act, the District notes, overtime is defined as “time actually worked beyond a prescribed threshold . . . the [law] does not require payment for time not worked such as a vacation, sick leave or holidays.” The District disputes the Union’s contention that the parties can agree to exceed the requirements of the FLSA by taking the position that payment for leave is not included. The basic elements necessary to conclude that a past practice exists is cited by the District.

The District concludes by suggesting that the grievance must be denied because the Union failed to “carry its burden” to demonstrate the existence of a binding past practice.

Analysis and Award

Applicable Principles

The issue presented by the parties for resolution, whether the District is obliged to continue calculating overtime using hours beyond those actually worked, is not addressed by the CBA.

The Union claims that for approximately 30 years, overtime for the bargaining unit members has been calculated using all hours accumulated, regardless of whether the employee was actually present on the job. Specifically, the Union asserts that during this period of time, the calculation of overtime included hours earned during non-work activities such as vacation periods, sick time and holidays. On the basis of the evidence it produced, the Union contends that the prior method of calculating overtime is a binding past practice that cannot be unilaterally modified.

It long been generally accepted in collective bargaining settings that certain practices existing between the contractual parties can be regarded as conditions of employment, even where a written agreement is silent regarding the activity. This principle was already well established when it was confirmed by the United States Supreme Court in *Steelworkers v. Warrior & Gulf Navigation Co.*, 80 S. Ct. 1347 (1960), which recognized that the “practices of industry and the shop” can be a “part of the collective bargain agreement although not expressed in it.”

However, not every practice may be considered an implied and enforceable term of a collective bargaining agreement. The elements required for a past practice to be binding on the parties are well established and require little review. Unilateral action is insufficient. The essence of a binding past practice is the mutual and continued acquiescence in a clearly

discernible activity. Only strong evidence of (1) a clear and unequivocal activity, (2) consistently used and (3) mutual acceptability, will be sufficient. *See, Virginia Regional Medical Center and AFSCME Council 65*, BMS Case No. 11-HA-935 (Frankman, 2011); *Harbison-Walker*, 114 LA 1302, 1305 (Smith, 2000); *See also, Celanese Corp.* 24 LA 168, 172 (Justin, 1954). In *Dixie Machine Welding*, 88 LA 734 (Baroni, 1987), the Arbitrator stated:

For a matter to be given “binding practice” effect as an implied term of the agreement, it must be well established and strong proof of its existence will ordinarily be required. In the absence of written documentation for [a] past practice to be binding on both parties, it must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed and established practiced accepted by both parties.

Existence of Past Practice

The District does not concede the existence of the activity or the consistency with which it has been utilized over the years. In support of its contention that no practice exists, the District makes reference to discussions with prior superintendents and research conducted by Ms. Jorgenson.

However, the lion’s share of the District’s position addresses the question of “knowledge.” The District maintains that the practice cannot be an implied term of the CBA because it had no awareness of the overtime calculation method. What the Union describes as a past practice, the District terms a mistake based in “unapproved behavior and conduct.”

The record, however, does contain sufficient evidence to establish the existence of a clear, unequivocal and consistent practice regarding the method by which the District calculated overtime hours in the bargaining unit. Two witnesses, each of whom had been employed by the District for at least 25 years, testified that their overtime calculation were based not only on hours actually worked, but on non-working hours accumulated during vacation time, sick time

and holidays. Similar testimony was provided by the two Union business agents, together serving the bargaining unit for in excess of 30 years, based on their respective experiences with the bargaining unit.

The evidence indicates that a former school bus driver, Mr. Leisure, was a bargaining unit member who was eventually elected to the school board. This item of evidence is certainly not as persuasive as the direct testimony provided by the two bargaining unit members and the Union business agents. However, it does provide some circumstantial indication that, in addition to Mr. Leisure, other members of the school board were aware of the practice.

However, perhaps the most convincing evidence that the practice was in existence is the District's letter to the bargaining unit of November 26, 2012. This letter is clear and convincing evidence that the practice, as suggested by the Union, did indeed exist. No witness was produced to testify that overtime was calculated in any other manner.

In addition to the testimony of Ms. Jorgensen and Mr. Adams that they were not aware of the practice, the District provided evidence of certain research activities and interviews of prior superintendants. More specifically, Ms. Jorgensen testified that she examined certain administrative records and did not find indications that any particular practice was used consistently. Superintendent Adams testified that he called and spoke personally with prior superintendants. The substance of his testimony was that no former superintendent with whom he had contact had knowledge of any existing practice concerning the method in which overtime was calculated. This evidence on behalf of the District certainly provides information that is relevant to the issue presented. It was admitted without objection.

However, this evidence is not as convincing as that presented by the Union on this point. Although Ms. Jorgensen credibly testified that certain research had been conducted, she did not

provide any details or examples of how this research was conducted. Superintendent Adams testified generally about his interaction with prior superintendants. However, none of the prior superintendent contacted was called as a witness. No confirmatory writings were introduced. Thus, the form of the evidence made an evaluation of its value more difficult and less persuasive.

Knowledge and Mutuality

Despite the credible but imprecise testimony indicating that neither Mr. Adams nor Ms. Jorgensen was aware of the practice until the update of record procedures began, the record is sufficient to establish the element of “mutual acceptance.”

To establish this element, a proponent is not limited to direct evidence or express testimony. Rather, it is permissible to establish and imply mutual acceptability from the totality of the circumstances. Specifically, mutual acceptance of a given practice can be deemed to exist on the basis of convincing evidence of long-established and consistent utilization. In *Bethlehem Steel Co.*, 33 LA 374, 376 (Valtin, 1959), it was noted that “in the case of a practice so long continued and so widespread, Supervision’s awareness – even if not directly provided – must reasonably be presumed.”

In *Bethlehem Steel*, the practice at issue appeared to be in existence for approximately 8 years. In the instant case, the District calculated overtime using non-work hours for a much longer time than did the disputants in *Bethlehem Steel*. The evidence establishes that the District calculated overtime in this manner for in excess of 25 years – more than enough to support a presumption of mutual acceptance.

The concept that there can be no mutuality without actual knowledge is, at first glance, both a reasonable and attractive one. Mr. Adams and Ms. Jorgenson are both relatively new to

District administration. Their reaction to the discovery of the practice, and their desire to make immediate changes, is completely understandable.

However, “mutuality,” and not “knowledge,” is what is required by this analysis. In this case, the length of time over which this practice has existed is sufficient to establish its mutual acceptance by both sides. The cases teach that mutually acceptability can be demonstrated, even in the absence of knowledge on the part of recent administrators, based on well established mutually accepted prior custom. Superintendent Adams and Ms. Jorgensen may not have been aware of the practice. But the mutual acceptability of the custom is implied based on the evidence.

Federal Labor Standards Act

The District correctly points out that the Fair Labor Standards Act of 1938 defines overtime as time actually worked. However, that law establishes national minimum standards. The FLSA does not require that overtime be calculated based on actual hours. Parties to collective bargaining negotiations are free to calculate overtime in any manner they chose, so long as the minimum requirements of the law are respected. The past practice establish here does not violate the FLSA.

Having carefully considered the testimony and exhibits received into evidence, as well as the closing written arguments submitted by the parties, it is Arbitrator's opinion that the District failed to comply with a past practice that had become an implied term of the collective bargaining agreement, when it modified the manner in which overtime hours were calculated in its letter dated November 26, 2012. All affected employees should be made whole for any losses.

The grievance is *SUSTAINED*.

A W A R D

1. **IT IS THE OPINION** of the Arbitrator that Independent School District No. 316 violated the terms of the collective bargaining when it modified the manner in which overtime hours were calculated in its letter dated November 26, 2012.
2. **IT IS THE AWARD** of the Arbitrator that all affected members of the bargaining unit should be for any losses caused by the breach.

September 23, 2013
St. Paul, MN

David S. Paull