

**THE MATTER OF ARBITRATION BETWEEN**

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**AFSCME MINNESOTA COUNCIL 5,** )  
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 ) **Union,** )  
 ) **and** ) **VALURE STANDBY**  
 ) **PAY GRIEVANCE**  
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 ) **CITY OF DULUTH,** )  
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 )  
 ) **Employer.** )  
 ) **BMS CASE NO: 14-PA-0595**  
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Arbitrator: Stephen F. Befort  
Hearing Date: January 21, 2014  
Post-hearing briefs received: February 7, 2014  
Date of Decision: February 27, 2014

**APPEARANCES**

For the Union: Amanda Wilson  
For the Employer: Steven Hanke

**INTRODUCTION**

AFSCME Council 5 (Union), as exclusive representative, brings this grievance claiming that the City of Duluth (Employer) violated the parties' collective bargaining agreement by unilaterally altering the established past practice for computing standby pay. The Employer maintains that it had the authority to modify the former practice since it gave clear notice to the Union of its intent to cease the practice and provided the Union with the opportunity to engage in

bargaining with respect to that decision. The grievance proceeded to an arbitration hearing at which the parties were afforded the opportunity to present evidence through the testimony of witnesses and the introduction of exhibits.

### **ISSUE**

Did the Employer violate the parties' collective bargaining agreement when it stopped paying employees on standby from the point of callout to the point of return?

### **RELEVANT CONTRACT LANGUAGE**

#### **ARTICLE 18 – STANDBY SCHEDULING AND PAY**

18.3. (a) Employees who are on standby duty shall receive two (2) hours of pay at their current Basic Hourly Rate for each Shift they perform duty Monday through Friday and three (3) hours of pay at their current Basic Hourly Rate for each Shift they perform duty on Saturdays, Sundays, and holidays.

(b) Employees who are on standby duty and are required to report back to work shall also receive pay at time and one-half their current Basic Hourly Rate for any time actually worked.

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18.5. Public Works and Utilities - Utility Operations Division:

- (a) Crew staffing levels shall be determined by the Appointing Authority. Crews shall consist of only Utility Operations Leadworker and/or Utility Operations Employees who have completed the Water & Gas Maintenance Apprenticeship Program or the Utility Operator Apprenticeship Program. This duty will commence at 7:30 AM on Monday of the assigned week and continue until 7:30 AM of the following Monday. During this period, the crew shall work their regular day Shift hours from Monday through Friday and, in addition, they shall remain on call and be immediately available for any emergency work during all non-work hours of their standby duty Assignment. When Employees are called out on standby, they shall notify the dispatcher to clock them in and out. Standby leadworkers shall be the first contact for after hours calls for all four utilities (sewer, stormwater, water, and gas). Employees will be scheduled and compensated on holidays the same as Saturdays and Sundays.

## **FACTUAL BACKGROUND**

Darrel Valure, the grievant, has worked for the City of Duluth for five years as a utility operator in the Employer's Utility Operations Division. In that capacity, he is responsible for maintaining the operation of the City's public utilities, such as water and sewer lines.

In addition to working on regularly scheduled shifts, utility employees with seniority can bid to serve on weekly standby shifts. Employees serving on standby are subject to being called out to perform emergency work during non-scheduled work time. Employees on standby receive extra pay for the inconvenience of being on call as well as time and one-half pay for "any time actually worked" in performing the emergency tasks.

Mr. Valure was on standby during the week of July 29 – August 8, 2013. During that week, the City Utility Dispatch Office contacted Mr. Valure and dispatched him to flush a water hydrant in the Fond du Lac area of Duluth on an emergency, non-scheduled basis. In responding to this call, Mr. Valure drove a city vehicle from his home in Hermantown to the Fond du Lac site. After completing the emergency task, Mr. Valure submitted both his drive time and the time spent at the Fond du Lac site working on the hydrant, thereby seeking standby pay for a total of 90 minutes. Mr. Valure's supervisor, however, approved pay only for fifteen minutes of site-based work but not for any of the 75 minutes of commuting time.

Mr. Valure testified at the hearing that the parties had a longstanding past practice of compensating standby work from the time of call out to the time of return. This practice resulted in the compensation of both travel and on-site time. Four other utility employees corroborated this testimony. Utility Lead Worker Harvey Maas, for example, testified that the Employer had consistently compensated drive time in responding to standby callouts for at least 25 years.

The Employer does not dispute the existence of this past practice. The Employer's contention, instead, is that it took appropriate steps to terminate that practice.

On November 29, 2011, the Employer gave written notice to the Union that it intended to cease following the past practice of paying for standby travel time following the expiration of the parties' 2011 collective bargaining agreement. The notice indicated that the Employer did not believe that the agreement's language compelled such a practice, and that the Employer would cease providing compensation for standby travel unless negotiations for a successor collective bargaining agreement affirmatively required such payments.

As it turned out, the parties agreed not to negotiate a new collective bargaining agreement for 2012, but to have the terms of the 2011 agreement continue in effect. David Montgomery, the Employer's Chief Administrative Officer, testified that the Employer did not implement the proposed standby travel policy during 2012 because the Employer thought that it was important to give the Union the opportunity to bargain over the issue prior to the implementation of any change in practice.

Early in 2013, the parties initiated bargaining for what eventually resulted in the current 2013-2016 collective bargaining agreement. On April 3, 2013, the Employer again gave notice to the Union that it intended to implement a new overtime policy unless the current round of bargaining precluded that step. The draft "Overtime Policy" attached to that correspondence specifically excluded pay for travel time from an employee's home to any work site.

On April 9, 2013, representatives of the Employer and Union met to discuss the Employer's proposed change in policy. At the meeting, Union Business Agent Ken Loeffler-Kemp cautioned Employer representatives that the proposed Overtime Policy included terms and

conditions of employment that constituted mandatory subjects of bargaining. In response, Mr. Montgomery summarized the Employer's position as follows:

And we are giving you notice that we read this [collective bargaining] agreement and interpret it a certain way, and we are putting you on notice that our interpretation of the existing language says this. If you disagree with this and think it says something else, you have the opportunity to negotiate into this agreement. And we have the opportunity to do the same. And when we are done negotiating in good faith, we will either agree or disagree. Our point in the letter was to say, this is our interpretation and you have the opportunity to put language in so it says what you think it says. So you are put on notice that this [proposed Overtime Policy] says something. . . . But we will negotiate in good faith and we agree that changing language in this agreement is subject to this negotiation.

Neither party submitted any proposal with regard to the compensation for standby travel pay during the 2013 negotiations. As a result, the June 3, 2013 tentative agreement did not include any change in the operative language of section 18.5 of the parties' agreement. The Union negotiating committee's summary submitted to members on June 7, 2013 stated that the Union position with regard to the standby travel pay issue was to "file grievances." The 2013-2016 collective bargaining agreement was ratified on July 1, 2013.

The Employer unilaterally implemented its proposed Overtime Policy on July 15, 2013.

The policy contains the following language with respect to travel time:

*Hours Worked:* Hours actually worked by an employee, including employer-approved paid breaks of 15 minutes or less. Hours Worked generally includes time when employees are required to be on duty or at the employer-prescribed Work Site. Hours Worked...does not include paid time off such as vacation, holiday, personal leave, sick leave, and funeral leave hours.

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*Work Site:* Location at which the employer has directed the employee to perform work.

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*Working Time Limitations*

1. Employees shall not work prior to or following their scheduled hours of work unless directed to do so by their supervisor.

2. Employees shall not take work home or work while at home unless directed to do so by their supervisor.

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#### *Travel Time*

Employee travel shall be conducted during regularly scheduled work hours whenever possible. Employee travel outside regularly scheduled work hours must be pre-approved by the employee's supervisor.

1. Travel time from home to work before the regular work day and from work to home at the end of the regular work day is not considered Hours Worked. This is true even when employees are driving a City vehicle.
2. Travel time from Work Site to Work Site during the normal workday is considered Hours Worked. Travel time from home to the first Work Site of the day and from the last Work Site of the day to home is not considered Hours Worked. If the Employer requires employees to pick up and/or drop off a City vehicle at a location other than the regular Work Site that location is considered a Work Site, and time spent driving from and to that location are considered Hours Worked.
3. Travel time from home to work in emergency situations outside the normal working hours is not considered Hours Worked when employees travel to their regular Work Site prior to reporting to the emergency Work Site. Whenever possible, employees shall be required to first report to their regular Work Site in these situations.

The Employer provided a copy of the new policy to all unit employees. In addition, department supervisors explained the new policy during morning meetings, and all unit employees were required to sign a document acknowledging receipt of the new policy.

The Union filed a grievance on behalf of Mr. Valure on August 9, 2013. The dispute has now proceeded to this arbitral forum.

### **POSITIONS OF THE PARTIES**

#### **Union:**

The Union contends that the parties had a longstanding past practice pursuant to which the Employer compensated unit employees for travel time in responding to standby time call-outs. The Union further maintains that the subject of standby travel pay is a term and condition of employment which an employer may not alter without first bargaining to agreement or

impasse. Since it is undisputed that the parties did not engage in bargaining with respect to the topic of standby travel pay, the Union contends that the Employer's unilateral alteration of the parties' past practice constitutes a violation of the parties' collective bargaining agreement.

**Employer:**

The Employer does not deny the existence of the past practice alleged by the Union, but claims that it took appropriate steps to end that practice. The Employer gave notice to the Union that it would no longer be bound by the former practice once the current collective bargaining agreement expired, and the Employer additionally offered to engage in negotiations with respect to the topic of standby travel pay. The Union, however, did not raise the issue during the 2013 round of bargaining. Because of the Employer's advance notice and the lack of any language in the collective bargaining agreement to the contrary, the Employer claims that it is no longer bound by the former practice and that it had the authority to implement its new Overtime Policy.

**DISCUSSION AND OPINION**

The parties assert starkly different positions with respect to this grievance. The Union maintains that a clear past practice binds the Employer to provide compensation for standby travel time and that the Employer cannot shed this obligation on a unilateral basis. The Employer, on the other hand, contends that it is entitled to cease a past practice that is not compelled by the terms of a collective bargaining agreement through clear notice and a willingness to negotiate. Both assertions have some merit, but, in the end, I conclude that the Employer's cessation of standby travel pay does not violate the terms of the parties' collective bargaining agreement.

It is well-recognized that a clear and well-established course of past practice may provide significant guidance in interpreting the terms of a collective bargaining agreement. A "past

practice” arises from a pattern of conduct that is clear, consistent, long-lived, and mutually accepted by the parties. Richard Mittenthal, *Past Practice and the Administration of the Agreement*, 59 MICH. L. REV. 1017 (1961). A practice that comports with these factors generally is binding on the parties and enforceable under contract grievance procedures. See ELKOURI & ELKOURI, *HOW ARBITRATION WORKS* 12-1 to 12-6 (7th ed. 2012).

In this instance, it is clear that the parties have adhered to a past practice of compensating standby travel time, even though the parties' contract is silent on this topic except to state that unit employees shall be entitled to pay "for any time actually worked." The Union introduced the testimony of five unit employees, each of whom described a clear and consistent practice of compensating unit employees for standby travel time. Utility Lead Worker Harvey Maas testified that the Employer provided pay for standby travel during all 25 years of his tenure with the City of Duluth. The Employer does not contest the existence of this past practice.

The Union also is correct in asserting that the topic of standby travel pay is a term and condition of employment under Minnesota's Public Employment Labor Relations Act (PELRA), Minn. Stat. sec. 179A.03, subd. 19, and that this topic is subject to a duty of mandatory negotiation, Minn. Stat. sec. 179A.07, subd. 2(a). As a general rule, an employer may not unilaterally alter the status quo with respect to a mandatory topic of bargaining without first bargaining either to an agreement or an impasse. See Katz v. NLRB, 369 U.S. 73682 S.Ct. 1107 (1962) (NLRA); General Drivers Union Local 346 v. Independent School Dist. No. 704, Proctor, 283 N.W.2d 524 (Minn. 1979) (PELRA). In this case, the Union and Employer did not engage in collective bargaining prior to the Employer's implementation of its new Overtime Policy which eliminated standby travel time for unit employees.

In spite of these general principles restricting unilateral action, an exception exists with respect to a past practice that is not explicitly incorporated in the language of the parties' collective bargaining agreement. The leading treatise on labor arbitration describes this exception as follows:

. . . an impressive line of arbitral thought holds that a practice that is not subject to unilateral termination during the term of the collective bargaining agreement is subject to termination at the end of said term by giving due notice of intent not to carry the practice over to the next agreement; after being so notified, the other party must have the practice written into the agreement to prevent its discontinuance.

ELKOURI & ELKOURI, HOW ARBITRATION WORKS 12-15 (7th ed. 2012).

The Minnesota Court of Appeals has endorsed this exception in Minnesota Teamsters Public & Law Enforcement Employees Union Local 320 v. Anoka County, 365 N.W.2d 372 (Minn. Ct. App. 1985). In that case, the Anoka County Sheriff's Office had long had a practice of permitting deputies to take home county vehicles. Following the expiration of the parties' collective bargaining agreement, the County notified the Union of the discontinuance of the take-home car policy. Negotiations for a successor agreement did not address the take-home car policy, and the Union brought an unfair labor practice charge challenging the County's unilateral alteration of the policy. The court of appeals ruled for the County, finding that an employer may unilaterally change a term and condition of employment that is not enshrined in a collective bargaining agreement when a union fails to engage in negotiations to retain the former practice following the employer's notification of its intention to alter the practice in question.

The Employer's actions in this instance fit within the contours of this exception. First, the provision of standby travel pay resulted from past practice rather than the dictates of contract language. Second, the Employer notified the Union of its intent to alter the practice following the expiration of the existing collective bargaining agreement. Third, the Employer indicated its

willingness to engage in negotiations over the topic, but the Union did not raise the issue during the 2013 round of bargaining. Fourth, as a result, the current collective bargaining agreement does not contain any explicit language obligating the Employer to compensate unit employees for standby travel time. Under these circumstances, the Employer has taken the necessary steps to repudiate the prior past practice and its unilateral change in compensating for standby travel pay does not constitute a violation of the parties' collective bargaining agreement.

**AWARD**

The grievance is denied.

February 27, 2014

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Stephen F. Befort  
Arbitrator