

BEFORE THE ARBITRATOR

In the Matter of the
Arbitration between

CITY OF BREEZY POINT
MINNESOTA

And

BMS Case No. 13-PA-0712

LAW ENFORCEMENT LABOR SERVICES, INC.

ARBITRATION AWARD

Appearances:

Attorney Steven C. Fecker, Johnson, Killen & Seiler, on behalf of the City.

Attorney Isaac Kaufman, General Counsel, on behalf of Law Enforcement Labor Services, Inc.

The above-captioned parties, hereinafter referred to as LELS or the Union and the City or Employer respectively, are parties to a collective bargaining agreement providing for final and binding arbitration. The undersigned was selected from a panel provided by the Minnesota Bureau of Mediation Services pursuant to said agreement. Hearing was held in Breezy Point, Minnesota on July 19, 2014. No stenographic transcript was made. Briefs were filed and the hearing was declared closed on August 8, 2014. All parties were given the opportunity to appear, present evidence and testimony, and to examine and cross-examine witnesses. Now, having considered the evidence, the positions of the parties, the contractual language and the record before her, the undersigned issues the following Award.

ISSUE:

The parties framed the issues as follows:

City

Is the grievance not procedurally arbitrable because the Union failed to proceed “promptly” as required by Article 4 and 8?

Did the City’s scheduling of the grievant for the holiday pay period violate the contract? If so, what is the appropriate remedy?

Union

Has the City violated the collective bargaining agreement by scheduling its police officers for additional days off to offset their pay for holidays not worked pursuant to Section 18.3?

The undersigned adopts the following framing of the issue:

Did the City violate the parties' collective bargaining agreement by mandating a day off for employees in pay periods where they were paid for holidays not worked? If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS:

ARTICLE 4 – EQUAL APPLICATION

...

Section 4.3 In addition to the responsibilities that may be provided elsewhere in this Agreement, the following shall be observed:

(1)...All grievances shall be considered carefully and processed promptly in accordance with Article 8 of this Agreement.

ARTICLE 8 – GRIEVANCE PROCEDURE

...

Step 3 – A grievance unresolved in Step 2 or Step 2A and appealed to Step 3 by the Union may be submitted to arbitration in accordance with the Minnesota Public Employment labor Relations Act, Minnesota Statutes, Chapter 179A as amended, and the “Rules Governing the Arbitration of Grievances” as established by the Bureau of Mediation Services. From the list of arbitrators furnished by the Bureau of Mediation Services, each party shall in turn strike one name until only one name remains, and the last remaining individual shall be designated as the arbitrator. The party striking first shall be determined by a flip of the coin.

Section 8.4. Arbitrator’s Authority. The arbitrator will have no right to amend, modify, nullify, ignore, add to, or subtract from the terms and conditions of this Agreement. The arbitrator shall consider and decide only the specific issues(s) submitted to the arbitrator in writing by the Employer and the Union and shall have no authority to make a decision on any other issue not so submitted.

Section 8.5. Waiver. If a grievance is not submitted within the time limits set forth above, it shall be considered “waived.” If a grievance is not appealed to the next step within the specified time limit or any agreed extension thereof, it shall be considered settled on the basis of the Employer’s last answer...

ARTICLE 10 – HOURS OF WORK

Section 10.1. Work Schedules. The sole authority in establishing work schedules is the Employer.

Section 10.2. Nothing contained in this or any other article shall be interpreted to be a guarantee of a minimum or maximum number of hours the Employer may assign Employees...

Section 10.3. Scheduling. The Union recognizes that a reasonable condition of employment is a requirement that employees work a schedule of hours as established by the Employer. The

Employer reserves the right to designate shifts and establish work schedules based on public necessity as determined by the Employer.

ARTICLE 18 – HOLIDAYS

...

Section 18.2. Observed Holidays. The following days will be observed as paid holidays for all eligible employees.

New Year's Day
 Martin Luther King Day
 Presidents Day
 Memorial Day
 Independence Day
 Labor Day
 Columbus Day
 Veterans Day
 Thanksgiving Day
 Day after Thanksgiving
 Christmas Day

...

Section 18.3. Holiday Pay-Holiday Not Worked. If an eligible employee is not scheduled to work the holiday, the employee shall receive pay at the employee's regular hourly rate for the number of hours equal to the normal shift length for the day on which the Holiday falls.

ARTICLE 27 - WAIVER

Section 27.1. This Agreement represents the entire Agreement of the parties and shall superseded all previous agreements. The parties acknowledge that during the negotiations which resulted in this Agreement each had unlimited right and opportunity to make demands and proposals with respect to any subject or matter no removed by the law from the area of collective bargaining and that all of the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement.

Section 27.2. The Union agrees that the Employer shall not be obligated to meet and negotiate with respect to any subject or matter not specifically referred to or covered in this Agreement. All terms and conditions of employment shall continue to be subject to the Employer's direction and control.

...

FACTS:

The City employs four full-time police officers who organized for the first time around 2010. The Union, Law Enforcement Labor Services, Inc., hereinafter LELS, was certified as their collective bargaining representative. Shortly thereafter, the parties commenced bargaining for their first collective bargaining agreement. LELS Business Agent, Doug Biehn presented the City with an existing contract from another represented city to use as a template and starting

point. The City, upon receipt, submitted a redline draft with some changes. While it is unknown what the template contained, the redlined draft contained the language of Section 18.3 which ultimately ended up in the parties' collective bargaining agreement. There was no discussion by either party as to whether holiday pay for hours not worked was to be considered as additional compensation to a normally scheduled 80 hour work week.

In the redline draft submitted, the City proposed Article 10 language granting it the sole authority in establishing work schedules, eliminating any language about a standard scheduling procedure or regular schedule of hours, along with language speaking to a standard workday or work week. The City language granting it sole and exclusive authority over scheduling was incorporated into the parties' agreement.

Prior to organizing, it is undisputed that the Employer had unilaterally established a practice wherein it paid officers for holiday pay not worked and scheduled them for an 80 hour work week in the pay period in which the holiday fell. Based on the Employer's practice at the time the contract was negotiated, the holiday pay for holidays not worked constituted additional compensation.

Negotiations lasted almost two years and in May of 2012, the parties settled on two collective bargaining agreements, a one-year agreement for calendar year 2011, which took effect retroactively, and a three year successor agreement for 2012-2014. There is no evidence of any proposals or counterproposals with regard to the Section 18.3 language incorporated into the agreement; specifically, the City never raised the idea of scheduling additional days off to offset holiday pay for holidays not worked.

At all times prior to July 19, 2012, when officers regularly scheduled days off have fallen on the holidays listed in Section 18.2 of the contract, they have been paid for those holidays not worked at a straight time rate in addition to the wages for their regularly scheduled duty hours, typically 80 hours for every two-week pay period.

On July 19, City Administrator Joe Rudberg sent Biehn an e-mail which informed him that the City was in the process of revising schedules to take into consideration holiday time. He said, "in other words if we have a holiday we'll recognize the holiday time within the 80 hour pay period." Through a series of subsequent e-mails, Biehn replied that "if an officer's normal day off is the holiday, they get holiday pay (as additional compensation.)" Rudberg rejected this contention and sent Biehn an e-mail on July 26, informing him that the City would be proceeding with the change, citing Section 10.2 language.

On Labor Day 2012, the City instituted its new scheduling practice, the result being that officers who earn holiday pay for holidays not worked would be scheduled an additional day off during the same pay period. It has continued this practice on most, but not all, occasions where the officer has not worked the holiday. This change has resulted in a reduction in the number of hours for three of the four officers in the bargaining units, Officers Rieber, Dwyer and Garcia.

On or around November 30, 2012, the City proposed a Memorandum of Understanding intended to codify its new practice, which the Union declined to agree to.

On December 2 and 3, Officer Rieber and Officer Dwyer, two of the bargaining unit employees affected, filed grievances over the issue. Officer Dyer's grievance at Step 1 stated:

“I am grieving not receiving 12-hours of holiday pay for the day after Thanksgiving, as required by Article 18.3 or (sic) the contract.” Police Chief Kevin Merschman stated, “Your pay reflects that you were credited 12 hours on November 23 for the holiday not worked.

In its Step 2 letter, Biehn stated that “in lieu of paying holiday pay for holidays not worked the City has scheduled the Grievants off on different days without pay.”

The parties maintained their respective positions and the grievances were timely processed through the grievance procedure at Step 1 and Step 2, with the Union submitting a Step 2 letter dated March 4, 2013. Thereafter, on March 6, 2013, the Union requested a panel of arbitrators. The City heard nothing further with respect to the grievance until one year later, on March 11, 2014, when counsel for the Union contacted the City’s counsel and requested to strike arbitrators.

The City took the position that the grievance was untimely based upon the contract language in the grievance procedure. The matter was then submitted to the undersigned for determination.

POSTIONS OF THE PARTIES:

LELS

LELS insists that the grievance is procedurally arbitrable. Acknowledging that approximately one year had elapsed between the Union’s request for a list of arbitrators and the selection of an arbitrator in this case, LELS argues that the City’s arguments should be rejected because the collective bargaining agreement does not specify what “processed promptly” means, nor does it contain any specific time limit for the selection of an arbitrator or the scheduling of a hearing. Noting that Section 8.3 sets forth in detail the steps to be followed when proceeding to arbitration, there is no mention of a time limit for following said steps.

According to the Union, the City’s argument regarding the timeliness of the arbitration is in the nature of a laches defense and arbitrators have repeatedly held that, in order to establish such a defense, the employer must show more than mere delay in the proceeding, but also actual harm or prejudice resulting from the delay. It cites arbitral precedent to support this argument. Here there is no evidence that the City incurred actual harm as a result of the Union’s delay in advancing its grievance.

With regard to the merits, LELS maintains that the City’s unilateral practice of scheduling additional off days to offset the holiday pay for holidays not worked violates Section 18.3 of the collective bargaining agreement. According to LELS, Section 18.3 explicitly provides that an officer who is not scheduled to work on a specified holiday shall receive straight-time pay for that holiday. It submits that the arbitrator should look to the intent of the parties in negotiating the holiday pay provision of the agreement. Constructions favoring the purpose of the provision are to be favored over constructions which tend to conflict with the purpose of a provision. It is undisputed that on or around Labor Day, the City began scheduling additional days off to offset holiday pay for holidays not worked and that this is a change from the City’s past practice. The city admitted as much in Rudberg’s e-mails wherein he stated that the Employer would be revising schedules to change the practice. This unilateral change has resulted in the reduction in the number of hours that three of the bargaining unit members have been scheduled to work. It also resulted in a corresponding significant reduction in the total

compensation of these bargaining unit members. As of the date of the hearing, the three officers had lost a total of 190 straight time hours.

The unilateral change was made less than four months after the first collective bargaining agreement was settled. The City never informed the Union of its intent to change its holiday pay practice. Had the City done so, this would have impacted the value of the officers' total compensation package not only with respect to holiday pay but possibly with respect to other benefit provisions as well. LELS stresses that the intent of the parties in including Section 18.3 was to maintain the existing practice regarding holiday pay, i.e., for officers to continue to receive holiday pay for holidays not worked in addition to wages for regularly scheduled work hours. This is the interpretation that favors the purpose of the holiday pay provision.

The City has relied primarily on Article 10 of the collective bargaining agreement which provides that the City is the sole authority in establishing officers' work schedules and that there is no guarantee of a minimum or maximum number of hours assigned to officers. A proposed MOU in November 2012 undercuts this argument because it serves as an admission by the City that the change to the holiday pay practice was a proper subject of bargaining, and that the City did not have the authority under the existing terms of the agreement to impose this change unilaterally. Furthermore, if Section 18.3 is found to be in conflict with Article 10, then based upon accepted principles of contract interpretation, the provision dealing specifically with holiday pay for holidays not worked must take precedence over the more general language concerning work schedule authority.

Finally, interpreting the language in Article 10 as broadly as the City does would mean that the City has the authority to unilaterally reduce officers' scheduled work hours in any manner that it sees fit. Given that the officers in the bargaining unit are full-time employees, it would be absurd to conclude that this was the intent of the parties. In some sense, LELS maintains that scheduling additional days off for officers whose regular days fall on holidays has the effect of an involuntary furlough which some arbitrators have found to be a reduction violating the collective bargaining agreement.

In conclusion, the Union submits that the grievance is arbitrable and that the City by scheduling additional days off for its officers to offset the pay they properly received for holidays not worked has repeatedly violated the collective bargaining agreement. The grievance should be sustained and the officers made whole for the wages they lost as a result of this practice.

CITY

The City claims that the grievance is not procedurally arbitrable because the Union failed to proceed "promptly" as required by Article 4 and Article 8. The Union did not argue that it proceeded "promptly." A delay of over a full year does not constitute "prompt" action. Rather the Union made three excuses for its failure to do so.

The first response was that "it happens." In response to the case that the Union cites in support of a finding of timeliness notwithstanding the delay, the City points out that the contract language in that case did not contain an obligation to act "promptly."

The second response was that the Union's legal department was busy with cases which had a higher priority. Notwithstanding this assertion, parties do not get a pass on contractual obligations because they are busy with other matters. A party who is "too busy" should proceed

promptly to select an arbitrator as required by the contract and then work out a hearing date or involve the arbitrator if there are scheduling difficulties.

The Union's third argument involved the presumption of arbitrability which it claimed the City could not overcome because it was not prejudiced by the delay. The case upon which the Union relies was one where that employer did not have language requiring prompt processing and the employer relied solely on equitable principles of laches and estoppel. Evidentiary presumptions do not override express contractual obligations entered into by the parties. Even if this were the case, the Union's conduct in this matter, i.e., its demonstration of awareness of the lack of timeliness followed by months of silence would lead a reasonable person to believe that the grievance was not being pursued. Had the City known that the Union was continuing to pursue the grievance, it could have potentially implemented additional alternative budget measures while the grievance was being resolved. Having not acted with clean hands, the Union cannot now assert an equitable defense of lack of prejudice.

Anticipating the Union's argument that Article 8 does not contain a specific time period for selecting an arbitrator, the City argues that the reference in Section 4.3(1) to grievances being "processed promptly in accordance with Article 8" refers to all aspects of Article 8 having to do with processing the grievance. It would not make sense to apply the obligation to proceed "promptly" only to those steps of the grievance procedure which already have a fixed time limit. The phrase "promptly" would be meaningless and unnecessary if it applied only where a fixed time limit already existed.

According to the City, Section 8.5 Waiver applies to all aspects of processing the grievance because the phrase "time limits set forth above" includes the obligation to proceed "promptly" under Section 4.3(1). Section 8.5 requires no showing of prejudice in order for the grievance to be deemed waived.

One year is too long. One year without any plausible justification is especially too long. The grievance is not procedurally arbitrable and should be dismissed.

With regard to the merits, the City insists that this is a scheduling grievance, not a holiday pay grievance. Despite the Union's efforts to make it appear to be a holiday pay grievance, by misstating the payroll facts in the Step 1 and 2 grievance documents, the City has complied with Section 18.3. The officers who did not work the holiday received pay for the shift hours for the day and the pay was recorded for the holiday proper. The officers received exactly what was bargained for, a day of pay without having to work. There has never been any claim that pay for a holiday not worked is anything more than straight time pay for the normal shift hours of the holiday.

What LELS is really arguing is that the City violated the contract by its scheduling of employees in a holiday pay period alleging that the officers should have been scheduled for 80 hours for the pay period, in accordance with the usual schedule pattern, such that holiday pay for time not worked was "additional compensation." It avoided reference to scheduling in the grievance documents because the contract is clear that the Employer retains unlimited scheduling discretion.

The City cites arbitral precedent to support its contention that it was entitled to schedule as it did irrespective of past practice which had occurred within the contract period. The City stresses that the language in the contract here contains even stronger language regarding employer discretion in scheduling than that in the case cited. Union proposals to limit the

Employer's scheduling discretion were rejected during negotiations. There is nothing in Section 10.2 which can be interpreted as granting a guarantee of a minimum or maximum number of hours that the Employer may assign employees. There is no exception whereby the Employer is obligated to schedule an employee for 80 hours straight time work in a pay period in which the employee will not work a holiday so as to make the unworked holiday pay additional compensation.

The past practice upon which the Union relies is a scheduling practice, not a holiday pay practice. This past scheduling practice relied upon by the Union occurred before the contract was negotiated and ratified. Practices prior to a first contract are not binding because there is no mutuality. Moreover, past practice cannot be used to modify clear and unambiguous contract language. Here there is no ambiguity whatsoever regarding the City's scheduling authority under Article 10 nor is there ambiguity what is to be paid for holiday work under Section 18.3, past practice cannot be used to modify clear cut language.

The City relies upon Article 27, Section 27.1 and 2, the contract's zipper clause, as supporting the contention that the parties dealt with the issue of past practice by agreeing during negotiations that practices not referenced in the contract continue to be subject to the City's discretion and control without being subject to negotiation with the Union.

Anticipating that the Union may try to use past practice and negotiating history to interpret Section 18.3 in arguing that it was the City who originally proposed that employees would receive pay for holidays not worked, the City maintains that it was the Union that made the proposal originally. The City's proposal merely broke holiday pay into two parts, pay for holidays worked and pay for holidays not worked. There was no representation by either the Union or the City to the other party that pay for a holiday not worked was intended to mean additional compensation or a holiday bonus.

The parties did negotiate about the number of hours to be paid for holidays not worked, with the Union proposal being incorporated into the contract. According to the City, at no time did the parties agree either expressly or by implication that pay for holidays not worked would be over and above what the employee earned based on scheduled hours during the pay period.

The Employer insists that its failure to negotiate before changing the schedule is irrelevant to the issue before her because this is not an unfair labor practice and this issue was not submitted in the Statement of Issue presented at the hearing by the Union. Anticipating that the Union would argue that the new schedule was a change in terms and conditions of employment not covered by the contract, the City stresses that the parties did thoroughly negotiate clear and unambiguous language granting the City the unrestricted scheduling authority under Article 10 while rejected Union proposed language that might have supported the grievance. In the City's view, the arbitrator is not authorized to amend Section 18.3 by adding the phrase "as additional compensation" to it. Furthermore, the waiver set forth in the Article 27 zipper clause leaves matters not specifically covered by the contract subject to the Employer's discretion.

Assuming for the sake of argument that the Union prevails, the City believes that any remedy should be prospective only. If the schedule had not been changed for holiday pay periods, Officer Dwyer would have been scheduled for an additional straight time day, for which he would have received pay for the time worked. If he had elected to voluntarily take a day off, he would not have been paid for the day off. The remedy should therefore be prospective only, since the grievant did not work the day. A retroactive remedy would make the grievant more than whole. He would have the benefit of the day off to use for his own purposes and yet would

receive a day of pay for that day off, something that would not have occurred in the absence of the schedule change. It is true that the officer would have had the opportunity to work an additional day, but he would only have been paid if he had actually worked that day and he did not do so.

The City requests that the grievance be dismissed due to the Union's failure to promptly proceed. In the alternative, if deemed arbitrable, the arbitrator should deny the grievance on the merits.

DISCUSSION:

Arbitrability

The City concedes that the grievance was timely processed until LELS requested a panel of arbitrators. It is the one-year period from the date that LELS requested the panel in 2013 to the point where it contacted the City's counsel in 2014 to which the City objects. The question here is whether such a lapse in time makes the grievance procedurally inarbitrable based upon the interpretation of Article 4 and Article 8 or whether the Union has waived its right to take the grievance to arbitration by the one year lapse in striking a panel.

Article 4 makes it clear that all grievances shall be "processed promptly in accordance with Article 8 of the Agreement." This language is somewhat ambiguous because there is no definition of the term "promptly." Moreover, it is clear that Article 4, Section 4.3 mandates that the grievances be processed promptly "*in accordance with Article 8 of the Agreement.*" (emphasis added.) Examination of Article 8 unambiguously sets forth the time limits for processing grievances with respect to Steps 1 and 2. Step 3, however, contains no such express time limitations for the time period between when the Union requests a panel and the time when it actually begins to strike names from the list provided by the Bureau of Mediation Services.

Given the presumption of arbitrability which attaches to questions of procedural arbitrability, the language must be clear and unambiguous to establish a finding that LELS waived its right to proceed. Because there are no time limits set forth in the Section 8.3 Step 3 clause while there are specific time limits set forth in the Steps 1 and 2 clauses it is reasonable to infer that the time "promptly only applies to the processing of the grievance at Steps 1 and 2, and not to Step 3 proceedings involving the receipt of a panel and selection of the arbitrator.

The conclusion is buttressed by Section 8.5, the Waiver provision, which applies to the submission and processing of the grievance. It states that "if a grievance is not submitted within the time limits set forth above, it shall be considered "waived." It also provides that "if a grievance is not appealed to the next step within *the specified time limit or any agreed extension thereof* (emphasis added), it shall be considered settled on the basis of the Employer's last answer..." Here, again, this waiver clause makes it clear that it applies only to situations where the grievance is not submitted within the time limits set forth in the grievance steps above or when it is "not appealed *to the next step within the specified time limit*". (emphasis added.)

A lapse of one year between the request for a panel and contacting the other party to strike from the panel is not "prompt" under any construction of that term. However, the City has not established that the term "prompt" applies to the Step 3 selection of the arbitrator. If the parties wish to make it apply, they must do so at the bargaining table by amending the language. Therefore, it is concluded that the grievance is not untimely and is procedurally arbitrable.

Merits

There is no real controversy with respect to the facts of this case. At the time the initial contract was signed and for two months into the contract, the City paid bargaining unit employees holiday pay for holidays on which they were not scheduled to work. It also usually scheduled them for 80 hours during the pay period in which the holiday fell. The City, believing that it could rely upon the newly bargained language granting it the exclusive authority to set schedules for employees, made a change to offset the financial cost of the unworked holiday pay by scheduling employees for a day less during the applicable time period. The question is whether or not it may do so under the collective bargaining agreement.

Analysis involves interpretation of two clauses in the parties' contract: Article 10 and Article 18. Article 10, Sections 10.1, 10.2, and 10.3 grants to the Employer broad authority to schedule employees as it sees fit. Sections 18.2 and 18.3 specify observed holidays and grant holiday pay at the employee's regular hourly rate for the number of hours equal to the normal shift length for the day, to bargaining unit employees who are not scheduled to work on the specified holiday. The intent of and purpose for such a clause as Section 18.3 is to provide additional pay to employees for holidays on which they are not scheduled to work. That was the status quo from which the parties bargained Section 18.3, and the status quo at and initially after the execution of the contract.

The evidence and testimony establish that the City's intention in reducing by a day hours worked during any pay period in which an unworked holiday falls was a direct attempt to offset the financial impact of paying for an unworked holiday. Because there has been no evidence presented to suggest that the City has reduced the scheduling of hours worked on any other occasions, it is obvious that it has attempted to circumvent the mandate of Section 18.3 through scheduling solely with respect to holiday pay periods and only where the officer did not work the holiday. What it has effectively done is to mandate an unpaid furlough day for any bargaining unit employee who was eligible to receive holiday pay for hours not worked.

The authority granted under one provision of the collective bargaining agreement cannot be used to undermine compliance with another provision of the agreement. Thus, reliance upon general scheduling authority, cannot be used to contravene the payment of holiday pay for unscheduled and unworked holidays.

It is true that at least one other arbitrator has ruled contrary to the analysis set forth above. Arbitrator Gerald E. Wallin in *City of St. Francis*, BMS Case Nos. 10-PA-0088, 10-PA-1021, and 10-PA-1024, relying upon the City's exclusive right to schedule. The undersigned, however, prefers to harmonize the provisions of the agreement. The Employer may not use its scheduling authority to undermine the holiday pay provision by reducing the hours and therefore, effectively furloughing employees for a day within the affected pay period, so as to offset the monetary impact of the unworked holiday pay provision. By unilaterally doing so, it has violated the parties' collective bargaining agreement.

Remedy:

The City requests that any remedy be prospective only, pointing out that employees did not work on the days for which they are claiming pay. In light of the ruling set forth above, i.e., that the City effectively wrongfully involuntarily furloughed said employees to circumvent the holiday pay provision, they should have been scheduled to work and are entitled to a make whole remedy for lost hours.

Accordingly, it is my decision and

AWARD

1. That the grievance is procedurally arbitrable.
2. That the City **did** violate the parties' collective bargaining agreement by mandating a day off for employees in pay periods where they were paid holiday pay for holidays not worked.
3. As a make whole remedy, the City is directed to pay bargaining unit employees for all days where they were not scheduled to work during applicable holiday pay periods.

Dated this 9th day of September, 2014, in Madison, Wisconsin.



Mary Jo Schiavoni, Arbitrator