

IN RE ARBITRATION BETWEEN:

LAW ENFORCEMENT LABOR SERVICES, LELS,

and

CITY OF FOREST LAKE, MN

DECISION AND AWARD OF ARBITRATOR

BMS Case No. 13-PA-0861

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October 27, 2014

IN RE ARBITRATION BETWEEN:

LELS,

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City of Forest Lake, MN.

DECISION AND AWARD OF ARBITRATOR

Flex time grievance

BMS Case # 13-PA-0861

APPEARANCES:

FOR THE UNION:

Isaac Kaufman, Attorney for the Union
Thomas Cockburn, Patrol Officer
Det. Scott Graff, Union Steward
Nicholas Kent, Patrol Office, K-9 Officer
Lorita Sajous, LELS paralegal
Brent DeGroot, Patrol Officer, SWAT Team
Matthew Smith, Patrol Officer

FOR THE EMPLOYER:

MaryLee Abrams, Attorney for the City
Richard Peterson, Director of Public Safety
Greg Weiss, Police Captain
Bruce Peterson, Police Sergeant
Mark Richert, Police Sergeant
Aaron Parrish, City Administrator
Ellen Paulseth, City Finance Director

PRELIMINARY STATEMENT

The hearing was held September 2, 3 and 11, 2014 at the City Offices in Forest Lake, MN. The parties submitted briefs dated October 2, 2014.

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement, CBA, covering the period of January 1, 2013 through December 31, 2015, although the contract under which this grievance arose was from January 1, 2010 through December 31, 2012. The grievance procedure is contained at Article 7. 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.

ISSUES

The union stated the issues as follows: Has the City of Forest Lake violated the Collective Bargaining Agreement by requiring officers who attend training outside their regular scheduled work hours to “flex” their work hours so as to avoid paying those officers overtime? If so, what is the appropriate remedy?

The City stated the issue as follows: Did the employer violate the labor agreement when it adjusted officers work shifts to allow for attendance at training?

The issue as determined by the arbitrator is as follows: Did the City violate the collective bargaining agreement, CBA, when it “flexed” officers’ hours to avoid paying overtime or compensatory time when the officers were attending training on scheduled days off? If so what shall the remedy be?

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 3 – DEFINITIONS

3.6 SCHEDULED SHIFT: A consecutive work period including rest breaks and a lunch break.

ARTICLE 5 – EMPLOYER AUTHORITY

5.1 The Employer retains the full and unrestricted right to operate and manage all manpower, facilities and equipment; to establish functions and programs; to set and amend budgets; to determine the utilization of technology; to establish and modify the organizational structure; to select, direct and determine the number of personnel; to establish work schedules; and to perform any inherent managerial function not specifically limited by this AGREEMENT.

5.2 Any “term or condition of employment” not specifically established by this AGREEMENT shall remain solely within the discretion of the EMPLOYER to establish, modify, or eliminate.

ARTICLE 9 – SENIORITY

9.5 Senior employees shall be given shift assignment preference after twelve (12) months of continuous full-time employment.

ARTICLE 16

16.4 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.

ARTICLE 19 – OVERTIME

19.1 Overtime for all employees shall be paid at one and one-half (1½) times the employee’s regular rate of pay or compensatory time for hours in excess of the regular SCHEDULED SHIFT upon approval of the department head of the overtime worked.

UNION’S POSITION

The union took the position that the City violated the CBA when it flexed the hours of officers who took training on scheduled days off to avoid paying overtime or compensatory time. In support of this position the union made the following contentions:

1. The union initially asserted that the City has entirely misconstrued the nature of the grievance. The City kept focusing on so-called “2080 time” whereby an officer is required to pay back 78 hours of time per year since they are paid for 2080 hours but are scheduled for 77 hours per pay period. That leaves them 78 hours short and they make that up. The union asserted that this case has nothing to do with 2080 time and acknowledged that the officers do indeed need to pay that time back somehow over the course of a year. The union and its witnesses noted that most officers have that time paid back well before the end of the year – many by July.

2. The union asserted that the difference between this claim, involving flex time, and 2080 time is a critical distinction. The former involves simply paying back the city for the 78 hours of 2080 time. That can be done through a variety of means – either by working extra shifts to make up the time or by returning earned time to account for the 78 hours. There is a quid pro quo involved in paying back the 2080 time. The latter involves what the union termed a clear violation of the CBA whereby the City unilaterally changes an officer’s schedule when that officer works on a scheduled day off to attend training. The union noted by contrast, when officers are required to flex their hours to attend training on scheduled days off, they sacrifice off-duty time and receive nothing in return.

3. These two matters are thus different and should not be confused. Further, the City’s reliance on the contract proposals to alter the way in which 2080 time was done is also of no relevance here because the two issues are so different.

4. The basis of the union's claim is that the officers bid by seniority on their shifts pursuant to Article 9 as set forth above and expect to schedule their personal lives around that schedule. The City has been requiring them to flex the hours by changing their schedule during weeks when the officers are required to take training¹ by reducing their schedule to avoid paying overtime or comp time as the case may be.

¹ Some of the training was required to maintain the officer’s POST licenses and other training was simply for professional development and skill enhancement. The parties did not draw a distinction between whether the training at play was required for POST licensure or not. See discussion of *LELS and City of Roseville*, *infra*.

5. The union noted that the department has a patrol schedule made up of 11-hour shifts. Patrol officers are scheduled to work either every Monday and Tuesday or every Wednesday and Thursday, along with every other weekend consisting of Friday to Sunday. Officers bid for these patrol shifts on an annual basis, according to their seniority, see article 9. Following the bid, officers are notified of their regular shift as well as their scheduled days off. They rely on these schedules to schedule other matters in their lives – such as vacations, day care and other family issues.

6. The union pointed to two specific examples occurring in October 2012 where two officers' regular schedule was to have Wednesdays off. Those officers attended training on a Wednesday due to the training schedule, but their hours were flexed to avoid paying overtime. The union noted that in one case the officer was not even aware until later that his time slip had been changed by the duty Sergeant.

7. The sergeant simply whited out the request for overtime for the extra hours these officers worked and then the City changed their hours, reducing/"flexing" them in following days to avoid paying overtime in the week in which these officers worked the Wednesday for training purposes. Both officers attended training for 9.75 hours (including drive time) on their regular scheduled day off but were paid for only 7.25 of those hours at the overtime rate. This was due to the flexing of their schedules.

8. The union noted that the practice of changing officer's schedules has been in place for some time and further stipulated that there is no claim for back pay prior to November 1, 2012 even if this grievance is sustained. The union however did not agree that there was a truly binding past practice in place even though flexing has been going on for some time. The union asserted that the practice was sporadic and inconsistent and was never mutually agreed upon.

9. The union asserted though that even if one finds that there was such a binding past practice, it repudiated the practice during negotiations for the current, 2013-2015, CBA on multiple occasions and multiple messages to the City stating clearly that any such practice would no longer be tolerated and that if the City wanted to change the practice it would have to change the CBA language. No such language change was effected.

10. The notice to the City in the contract proposal dated January 23, 2013 read as follows:

Discussion Item – Flexing Schedules

The Union has anecdotal evidence that employees may or may not have been asked to flex their schedules. There is an active grievance on this issue; however, the Union is repudiating any past practices, should they exist, regarding the flexing of shifts. The Union would entertain any proposals from the Employer regarding this issue, otherwise, would enforce the current contract language which prohibits this activity. See, Union Ex. 17. See also, summary of contract proposals. Union Ex. 18.

11. The union asserted that this notice constituted clear repudiation of any existing practice and placed the City on notice that the union would no longer accept the practice of flexing schedules to avoid overtime. See, *AFSCME #5 and City of Duluth*, BMS 14-PA-0595 (Befort 2014) where the language of repudiation read 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.

12. The union argued that this language was similar in nature to what was given to the City here and must be held to have the same effect. See also, *Teamsters Local 320 and University of Minnesota*, BMS Case #12-PA-0114 (Crump 2012).

13. The parties proceeded to interest arbitration but the relevant language in the CBA remained unchanged. Thus, the union asserted, the practice of flexing schedules was repudiated and the language of the contract must now control.

14. Moreover, the union claimed that the shift bidding provision, when read together with the overtime provisions, prohibits the City from unilaterally changing the schedules without the payment of overtime when the officers are required to work on their regularly scheduled day off for training purposes. When this occurs, the City must pay appropriate overtime/comp time.

15. The union relied on the language of the CBA at Articles 9 and 19 set forth above, both of which the union asserted limits the right of the City to unilaterally change a bid regularly scheduled shift. The union maintained that words in a labor agreement must be read together and that specific clauses must be given preference over general provisions. Here the general management rights clause is specifically limited by the shift bidding provisions of Article 9 and the overtime requirement is set forth in Article 19. The union asserted that when reading these two provisions together it is clear that the intent of the parties was that bid shifts were to remain in place pursuant to the bidding process and that any change in that shift requires the payment of appropriate overtime/comp time. Otherwise, the shift bidding process is rendered meaningless if the City can simply change it at its whim.

16. The union noted that the CBA defines “scheduled shift” as “[a] consecutive work period including rest breaks and a lunch break.” Officers are scheduled for 11 hour shifts and work typically 77 hours per pay period (thus the need for 2080 time) and that the shifts are for a pre-determined period. The officers should be allowed to rely on their bid shift with the stated days off, see above. The union acknowledged that some officers, i.e. Detectives, School Resources Officers and K-9 Officers, do not bid their shifts, but are assigned regular work hours and should still be able to rely on their regular days off as days off.

17. The union noted too that the violations are ongoing and that the City continues to flex the schedules of officers who take training on their scheduled days off. The union relied on the contract language set forth above and asserted that the management rights clause is subject to the specific provisions of the CBA.

18. The union argued that the shift bidding process establishes the “regular shift” for an officer and that those shifts are bid by seniority. The City cannot now unilaterally change a shift that was bid on by the officer and then deny that officer overtime for working extra hours on a scheduled day off.

19. The union relied on several recent awards by other arbitrators in support of its position. In *Law Enforcement Labor Services, Inc. and City of Roseville*, BMS Case #07-PA-1084 (Fogelberg 2009) the union prevailed where the City refused to pay overtime/comp time for training hours for non-POST required training on the officers’ scheduled days off. There, as here, “members of the bargaining unit submit their schedule requests for the following calendar year, bidding for vacation days and days off which are generally awarded based upon their seniority. The schedule is then published for the year.” Slip op at page 4. The City simply refused to pay overtime for the training hours, largely due to budget constraints, opting instead to give the officers additional days off.

20. In the Roseville award, the union noted that Arbitrator Fogelberg ruled that “an employee’s ‘regular schedule’ is the one bid on toward the end of each year for the succeeding year.” He further held that the plain meaning of the overtime language required training taking place outside this “regular schedule” must be paid at the overtime rate. That language provided as follows: Employees will be compensated at one and one-half (1½) times the employee’s regular base pay rate for hours worked in excess of the employee’s regularly scheduled shift.” It is thus almost identical to the provision of Article 19 set forth above, which reads: Overtime for all employees shall be paid at one and one-half (1½) times the employee’s regular rate of pay or compensatory time for hours in excess of the regularly SCHEDULED SHIFT upon approval of the department head of the overtime worked.” The term “regularly scheduled shift” being the operative term in the language.

21. The union also cited *City of North St. Paul and Law Enforcement Labor Services, Inc.*, BMS Case #11-PA-0933 (Yaeger 2013) where the union prevailed in a case involving an officer working a short time after the training to complete it. See also, *AFSCME Council 65 and City of Princeton*, BMS Case #11-PA-0786 (Frankman 2012), where the union also prevailed and the employees were awarded overtime pay at time-and-a-half when “called in for work at a time other than the employee’s normal scheduled shift.” There the employees were called in to clear snow and the employer attempted to grant them additional time off rather than to pay overtime. These cases thus involved virtually the same issue of an employer attempting to avoid overtime by flexing schedules rather than honoring the overtime provisions of the agreement when it requires officers to work on a regularly scheduled day off.

22. The essence of the union's argument is that the 2080 time issue is simply a red herring and that this case revolves around the plain language of the CBA, i.e. Article 9 and 19, which require shift bidding by seniority and overtime for work “hours in excess of the regular SCHEDULED SHIFT.” The union asserted that the term shift means the regular shift including the regular days off and that working on the days off for training is precisely what the language contemplates – and that overtime is mandated. Further, that even though there may have been a past practice of flexing schedules (a fact not conceded by the union) any such practice was effectively repudiated during negotiations for the 2013 -15 CBA. The CBA language now governs this matter.

The union seeks a ruling that the City violated the CBA by flexing officer’s schedules to avoid overtime/comp time for training on a regularly scheduled day off and for appropriate back pay for any affected officer(s) during the current labor agreement. The union asked that the arbitrator render an award sustaining the grievance, ordering the City to cease and desist from the practice of flexing hours where officers work their regular days off and to grant any appropriate back pay to all affected officers due to this claimed violation from the filing of this grievance to the present.

CITY'S POSITION

The City's position is that there was no contractual violation here at all and that the practice of flexing hours is allowed by the clear terms of the CBA and by the party's longstanding practice to do exactly that. In support of this the City made the following contentions:

1. The City focused largely on the 2080 hour issue and noted that law enforcement is of course a 24/7 operation that requires very different shifts from a standard "9 to 5" shifts. These officers are scheduled for 11 hours shift and work typically 77 hours per pay period. Thus they are required to pay back 78 hours per year. 2080 is the standard requirement in law enforcement and the union and its members all know that. The City also noted that in 2008 the department asked the officers which of several options for shift scheduling they preferred. They selected overwhelmingly the 11 hour shift option with payback of the extra 78 hours.

2. Later, when the union sought to eliminate 2080 time and thus change their shift schedules to a more permanent structure, the City rejected this idea as an infringement on its inherent right to establish work schedules and direct the workforce.

3. The City asserted that there is in fact a close interrelationship between the 2080 time and the City's ability to flex officer schedules when they work on scheduled days off for training. The Chief explained the two work together and that adjusting schedules is the way in which 2080 time is implemented. The City noted that the union steward agreed with this assertion and agreed that the officers do in fact owe that time back.

4. The City relied on the management rights clause set forth in Article 5.1 and 5.2 above and asserted that it retained the right to change schedules to meet the needs of the City. Further, that there is no guaranteed minimum or maximum number of hours. See, Article 16 above.

5. The City pointed out that officers' schedules can contain differing lengths of shifts depending on what the department needs and that people frequently change their own shifts for personal reasons. The City asserted that it has been very accommodating in changing schedules when requested and asserted too that it is a family friendly department. It will thus meet the needs of people to alter their schedules or trade with others in the event of a family emergency or other family needs.

6. The City argued that there is nothing in either of the articles relied upon by the union that takes away or limits the City's otherwise unfettered right to alter schedules. Article 9 simply allows people to bid a shift but there is no guarantee that the shift will never change. Further Article 19 merely provides that overtime will be paid if, and only if, the officer works more than his regularly scheduled shift in a particular week. There is nothing in either of those two articles that discusses flexing the schedules. That right is, according to the City, retained in Article 5, Management rights to "establish work schedules."

7. The City also noted that the union sought to change and later do away with 2080 time altogether. The City noted that there were various proposals on the bargaining table from the union but these were rejected by the City and no changes were ever made in the 2013-2015 contract. The City contended that the union is now effectively trying to gain something through arbitration it was unable to gain through negotiation.

8. The City also pointed to a longstanding past practice of advising officers at every level and in every position that their hours may vary. See City Exhibits 2, 3 and 5. The City also asserted that this practice has been well understood and accepted by all officers, consistently enforced and applied and in place for 30+ years.

9. The City also drew the link between 2080 time and flexing by asserting that training is considered 2080 time and that taking training is one method by which the extra time is paid back to the City.

10. Counsel for the City also distinguished the Roseville and North St. Paul cases cited by the union. The City noted that in North St. Paul, the question there had to do with whether overtime was worked where an officer ran slightly over the regular shift during training, by some 15 minutes, and was therefore entitled to overtime pay for that extra ¼ hour. The basis of the arbitrator's ruling there was simply that the officer spent extra time as a valid extension of his shift. That is not what is at issue here nor is it remotely similar factually.

11. In the Roseville matter, the facts were radically different in that the practice there had been the exact opposite of the case in Forest Lake. There the City of Roseville *had* been paying overtime for extra training time and not been flexing hours. The City simply changed that due to budget cuts in 2004 without negotiating the change with the union. Further, the contract language was somewhat different and there was a specific MOU that defined and specified the shifts as 6 days on, 3 days off," which according to a footnote "...was altered by mutual agreement in 2008 to 12 and 10 hour shifts, with either three or four days off." The arbitrator's decision was based on a specific finding that the City was attempting to "change an existing practice" without negotiation. Here the facts are the exact opposite – the City asserted that the union is attempting to change an existing practice even after negotiation failed to achieve their goals.

12. Further, the City asserted that the impact of an award in the union's favor might well be a detriment of certain officers, especially night shift officers. They would have to use their own benefit hours to rest prior to training, which typically occurs during the day. The City also noted that it has been very generous with training – offering even advanced training to younger officers in order to enhance skills, even though the training was not required. Awarding the union's claim here might well jeopardize the City's ability to offer this training in the future.

13. Further, the union's position would make it more difficult for the officers to pay back the 2080 time, resulting in some having to use accrued benefit time to do so. The City alluded to the fact that as a result of these possible problems with the union's position in this matter, there was some dissension about whether to proceed with this grievance among the ranks of the officers.

14. The City took considerable issue with the union's claim that it repudiated the past practice of flexing schedules. First, the notice was not a clear repudiation of a specific past practice and was at best an oblique reference to a practice but never explained what the union was seeking.

15. Second, the mere fact that the union sought to repudiate the practice, even if the repudiation is found to be valid, demonstrates the clear knowledge and acceptance that there was indeed a binding past practice. Thus, since such practices exist throughout the life of a CBA, no damages of any kind can be awarded prior to the effective date of the 2013-2015 CBA. Moreover, a union cannot simply "repudiate" a managerial right. The union is seeking to somehow do an end run around the clear language allowing the flexing of schedules.

16. Finally, the union was unable to gain a change in the language and mistakenly sought to rely upon the language of the CBA in support of its position. In fact, as the City noted above, the CBA does not prohibit flexing of schedules. Accordingly, the management rights article allows such flexing of schedules and the parties' practice only supports that right.

17. The City introduced numerous examples of other CBA's where LELS has negotiated specific language limiting the right to flex schedules or where they have negotiated language setting forth very specific schedules. Here no such language exists and the lack of such language again demonstrates the intent of these parties to allow flexing. The City maintained adamantly that any change in the language and the practice must occur at the bargaining table.

18. The essence of the City's argument is that the CBA nowhere prohibits the practice of flexing schedules where officers take training on scheduled days off. The parties' practice for more than 30 years supports the City's position. The union is simply seeking to gain through arbitration what it was unable to gain through negotiation by a failed attempt to repudiate the practice. As noted above, one cannot repudiate a management right. Any such change must come at the bargaining table, not through grievance arbitration.

The City seeks an award denying all grievances in their entirety.

MEMORANDUM AND DISCUSSION

FACTUAL BACKGROUND

There was very little dispute about the salient facts of the case. The union filed this matter as a class action on behalf of all affected employees even though the factual basis for the claim stemmed from two officers who attended training in October 2012 on their scheduled days off. Both had attended an investigative training course over the course of three days, two of which were their regularly scheduled days off. The training ran for eight hours each day for a total of 24 hours and included between 1.5 and 2 hours per day of drive time.

As noted herein, officers typically work an 11-hour shift but the training did not fill all of that time on the days these two officers attended. Both submitted requests for overtime due to the fact that they worked on their scheduled days off. The evidence showed that the time requests were changed/adjusted by the department such that they received some overtime for the time they requested but not all of it.

The officers' submitted time sheets for 9.75 hours of straight time on October 16 (the first of the scheduled days off); 10 hours of straight time on October 17 (the second day worked on their scheduled day off); and 2.25 hours of straight time plus 7.25 hours of compensatory time on October 18. The Sergeant deleted these entries and replaced them with 7.25 hours of compensatory time on October 16 and 11 hours of straight time on October 17 and 18, respectively. Thus, the "flex" of the shifts to minimize the amount of overtime/comp time paid.

The union filed a grievance over these facts but it was agreed that the scope of the grievance would encompass the general issue of flexing schedules for training time on scheduled days off. See Union exhibit 7. Also, there was a stipulation at the hearing that no back pay would be claimed prior to November 1, 2012 in the event the grievance was sustained.

There are 20 officers in the bargaining unit, including Patrol Officers, Detectives, School Resource Officers and a K-9 Officer. The department maintains a patrol schedule made up of 11-hour shifts. Officers are scheduled to work either every Monday and Tuesday or every Wednesday and Thursday, along with every other weekend (Friday to Sunday). Officers bid for these patrol shifts according to their seniority with the department and are then notified of their regular shift rotation for the following year, including their scheduled days off.

There is a clear history of flexing hours within this department, i.e. where officers work hours outside their regular scheduled shifts at a straight-time rate of pay, while taking off an equivalent number of hours from a regular shift. Further, officers have requested to flex their shifts or have done so voluntarily by trading hours to cover for other officers. The officers have now stopped this practice but only after the filing of this grievance. The evidence here was clear that the practice of flexing shifts met the necessary elements of a past practice (although as discussed more herein, there is no provision covering flexing of schedules and the management rights clause also allows this practice). This is a longstanding, consistent, adequately communicated and mutually understood practice within this department.

The evidence also showed that the CBA in effect when these grievances arose expired on December 31, 2012. Soon thereafter, the parties began negotiations for the new, 2013-2015 CBA. The union sent a notice to the City during negotiations as follows:

“Discussion Item – Flexing Schedules

The Union has anecdotal evidence that employees may or may not have been asked to flex their schedules. There is an active grievance on this issue; however, the Union is repudiating any past practices, should they exist, regarding the flexing of shifts. The Union would entertain any proposals from the Employer regarding this issue, otherwise, would enforce the current contract language which prohibits this activity.” See, Union Ex. 17.

The parties went to interest arbitration over the 2013-2015 contract but no change was made to any of the operative language regarding overtime, shift scheduling or management rights set forth above. The parties certified 20 issues but neither flexing schedules nor 2080 time was included and Arbitrator Miller’s decision did not address these issues. See, *LELS and City of Forest Lake*, BMS #13-PN-0704 (Miller 2013).

There was no dispute that the City has continued the practice of flexing time in these situations after the filing of this grievance. The union showed that one officer who is on the SWAT team has consistently been required to do training on his normal day off. SWAT training typically occurs on the third Wednesday of each month and he normally has that day off. When this has happened his schedule is flexed and he is required to adjust his hours and is paid straight time for the training.

Likewise, the K-9 officer attends training once per month, usually on his normal Wednesday off. The K-9 officer does not bid a shift but is rather assigned one that best utilizes his specialized training and that of the dog. When he has attended training he has been required to return to the station to complete his shift thus causing considerable inconvenience and some expense for day care for his young son. Typically, he gets two to three weeks prior notice of the training so he can make arrangements to accommodate that.

There was little question that the practice has continued over time. The evidence showed that there have been some 31 instances where officers were required to flex shifts to attend training on their scheduled days off. Twenty five of these instances occurred after the union sent the repudiation notice to the City during negotiations regarding flex time for training. The vast majority of those involved the SWAT officer's training. As discussed herein, the question was not so much whether the practice continued – it did – the question is whether it was allowed under the CBA and/or by the practice that has existed in the Forest Lake Police department for more than 30 years. It is against that factual background that the analysis of the case proceeds.

2080 TIME

Considerable time and testimony was expended at the hearing over the question of 2080 time. The union asserted most adamantly that these issues are separate and that there is no dispute that the officers owe 78 hours of time back to the city each year since they typically work seven 11-hour shifts per pay period but are paid for 80. This leaves 78 hours (3 X 26 pay periods) owing to the City each year. The evidence showed too that most of the officers pay this time back well before the end of the year and that there are various ways to do this.

The City argued that they were closely tied together and that the union has attempted on several occasions to eliminate 2080 time from their schedules without success and that this demonstrates the union's attempt to gain something through arbitration it was not able to garner in negotiations.

On this point the union's assertions had some merit. There is no question that 2080 time is a part of these officers' schedules and that they owe it back. How they do it is not under review in this matter. Further, the evidence never fully established how these concepts are tied together such that the discussions about eliminating it somehow govern the result in this case.

Thus the 2080 discussion was in large measure a bit of a red herring and did not factor heavily in the decision. This decision was based on the language of the CBA and the practice that has existed for years.²

THE COLLECTIVE BARGAINING AGREEMENT LANGUAGE

As in all case involving the interrelation of disputed language, the starting point is the language itself. The union's claim is based on the assertion that Article 9.5, which provides that "Senior employees shall be given shift assignment preference after twelve (12) months of continuous full-time employment" and 19.1, which provides for overtime for "hours in excess of the regular SCHEDULED SHIFT," effectively means that once an officer bids on a shift, any deviation from that shift by flexing the schedule when that officer takes training must result in a payment of overtime.

The union also argued that the provisions of a CBA must be read together in order to ascertain the intent of the parties and asserted that when read together, these clauses override any claim to managerial rights found in Article 5 and are a specific statement that the parties intended to limit the right of the employer to change these shifts once they have been bid pursuant to Article 9.

Indeed, the union is correct in that provisions of a CBA must be read together and in context in order to determine the intent of the parties. First, though the CBA is silent on the question of flexing of schedules for training time. There is no specific provision one way or the other here. As the City pointed out, other CBA's to which LELS is a party have language that might well convey the meaning the union desires here. Those other provisions in other jurisdictions were not strictly germane to the question here but provided some minor evidentiary support for the claim that if the union wanted to negotiate language specifying the hours of a shift or to limit the employer's authority, it could certainly try to do so at the bargaining table.

² There was some evidence that the union proposed language during the negotiations for the current CBA that would have altered the shifts in order to eliminate 2080 time but this was still a somewhat tenuous connection to this grievance.

As a general proposition, a broad management rights clause is subject to the specific limitations in the CBA. Here there is no specific limitation and the management rights clause appears to allow the flexing of schedules under these unique facts and circumstances. Where there is no specific limitation the broad management rights clause can indeed prevail.

Moreover, there are other clauses in the CBA that supported the City's position. Article 3.6 defines a "scheduled shift" as "a consecutive work period including rest breaks and a lunch break." Article 19.1 provides for overtime pay for hours worked "in excess of the regular SCHEDULED SHIFT." There is no definition of the number of days in a week nor any specific provision calling for the actual days off in this CBA. That of course does not mean that the only way overtime is to be paid is for hours worked contiguous with a particular shift. The City can of course still be required to pay overtime for additional hours worked in a pay period.³

Here though the question is whether there is a specific contractual limitation on the City's ability to flex officer schedules when they take training on their scheduled days off. As discussed herein, this clause at least does not provide that limitation.

Further, Article 9 provides for shift bidding by seniority. There was very little evidence of how this actually works or what exactly the officers bid on when this occurs. Moreover, in contrast to the union's claim that Article 9 controls this matter there is the language of Article 16, which essentially provides that there is no guaranteed maximum or minimum number of hours that may be assigned.

The union asserted that if the City's position is allowed to prevail, Article 9 is rendered meaningless. However this case is not about a general right by the City to change the schedules at its whim. That is strictly not the issue. This is a very limited set of facts and circumstances involving the flexing of a schedules when there is training performed on a scheduled day off. This case involves the straightforward issue of whether the City can flex a shift to avoid paying overtime when the officer attends training on a scheduled day off. No decision is reached on anything beyond that.

Further, the clear evidence showed that overtime is being paid and that the very officers who are bringing this grievance have seen their overtime pay increase over time. The evidence thus did not bear out the union's claims in this regard and there was no evidence that article 9 has been rendered meaningless even though the City has continued to flex shifts under these circumstances even after the signing of the new CBA.

In summary, the CBA language does not support the union's position here. It is understandable that when an officer bids on a shift that has a stated set of days off that the officer can reasonably rely on those as the normal/regular days off for the most part. There is however the very real evidence that officers understand that their hours can be moved around, have been moved around for years under these circumstances and that training will sometimes occur on their normal days off.

PAST PRACTICE AND REPUDIATION OF PAST PRACTICE

As noted above, the CBA is silent on the specific issue of flexing of schedules. The union's claim is based on an implied limitation on the City's right to flex schedules based on the bidding of shifts and the overtime article. However, this silence on the question of flexing, even if one assumes that the inherent managerial rights may be infringed by the provisions of Articles 9 and 19, is supplemented by the very strong evidence of a past practice in favor of flexing these schedules for years.⁴ Given the CBA language here, it may be academic whether there is a true binding past practice or not but even if one assumes that the contractual silence must be supplemented by extrinsic evidence, such as a past practice, that practice supports the City's right to flex these schedules under these circumstances.

³The overtime language does not restrict the right to change the shift; it simply says that overtime will be paid if the officers work beyond it.

⁴ The fact that the practice continued after the current CBA was executed and after this grievance is not strictly determinative on these facts. The essential question is whether the City maintained the right to do this or whether there was a limit on that right either in the parties' practices or in the language.

Perhaps the best known case in Minnesota was *Ramsey County v AFSCME*, 309 N.W.2d 785 (Minn. 1981). There the arbitrator found that the parties' practice with respect to vacation accrual rates differed from the clear language of the contract. The matter arose when it was discovered that employees had for years been receiving vacation accruals and payments upon their departure from the County that were very different from what the clear language of the contract indicated.

The County argued that the clear language of the contract, and it was, indicated that the County had simply been paying the incorrect accrual rates for years and that it was simply done in error. The County also argued that the language of the contract where clear must always govern lest the whole process of negotiations be threatened with too liberal a use of past practice.

The Minnesota Supreme Court held as follows:

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

The evidence in this matter showed that the City of Forest Lake has been flexing shift times in these circumstances and that this practice met all the essential elements of a binding past practice. It is longstanding; it has been going on for more than 30 years. It was mutually understood and clear; the officers and the union were well aware of this practice even before these grievances arose in October 2012. It was also accepted by the parties as the agreed upon way of doing things when these facts arose. Further, the union's repudiation was essentially an acknowledgement of the practice itself. One might well ask the rhetorical question, why repudiate a past practice if indeed there is no past practice?

It was consistently applied and unequivocal. There was no evidence that the City ever deviated from this or that it ever acceded to a demand not to flex the shifts under these circumstances. It was accepted by all the officers and by the union. There is little question that there was a well understood and accepted practice allowing the City to flex schedules in these circumstances.

At this point the evidence showed that the language did not provide any clear limitation on the City's right to flex schedules under these circumstances. Moreover, the practice was entirely consistent with the City's position that it had the right to do this and that it exercised that right consistently over a long period of time. The remaining question is whether the Union's purported repudiation of the practice was effective in changing it.

REPUDIATION OF THE PAST PRACTICE

The union sent a message to the City seeking to effectively repudiate the practice of flexing schedules. The City argued that this was not an effective repudiation because it was not specific enough. On these facts however, it was clear what the union wanted and that the practice they complained of was that of flexing the schedules to minimize overtime where officers attended training on scheduled days off. To assert that the City was somehow not aware of what practice the union was talking about flies in the face of the evidence in the case. The question though is twofold: first, can one party to a labor agreement "repudiate" a management right not otherwise limited in the CBA and second, was the union required to change the language in order to change the practice?

The first, question is perhaps the easiest to answer. Where the employer exercises a right it has under the agreement a union's attempt to alter or undermine that right through repudiation during negotiations is not effective under those circumstances because the practice is based on clear contract language and is consistent with the provisions of the CBA. Further, one simply cannot eliminate a managerial right through a claimed repudiation of a past practice simply because the employer has exercised it consistently over time. As Arbitrator Shulman once noted:

"There are other practices which are not the result of joint determination at all. They may be mere happenstance, that is, methods that developed without design or deliberation. Or they may be choices by Management in the exercise of managerial discretion as to the convenient methods at the time. In such cases there is no thought of obligation or commitment to the future. Such practices are merely present ways, not prescribed ways, of doing things. Being the product of managerial determination in its permitted discretion such practices are, in the absence of contractual provision to the contrary, subject to change in the same discretion." Elkouri 6th Ed. at p. 636 citing to *Ford Motor Co.*, 19 LA 237, 241 (1952).

This pronouncement is relevant here as well. The right to flex schedules is not found in the CBA but neither is there any specific limit on it either. Thus to the extent that this is a management right no repudiation of it would have been effective anyway.

Second, even if one assumes that there was an effective attempt to repudiate this practice, there is then the question of whether, and how, a repudiation of this nature would have worked. Perhaps the most widely used ploy to obviate past practice is to repudiate the practice during negotiations. Past practices are part of the CBA and may be eliminated or modified by one party giving the other notice of intent to terminate the practice at the end of the current CBA. The weight of arbitral authority holds that even absent a change in the underlying basis for a past practice and even though that practice may not be subject to change during the life of a contract, that practice **is** subject to termination by one party giving the other notice of intent not to carry over the practice into the next contract. This must generally be done during contract negotiations. Once this has been done, the party seeking to continue the practice must negotiate the practice into the collective bargaining agreement.

Further, the eminent Professor Richard Mitterenthal states as follows:

Consider first a practice that is, apart from any basis in the agreement, an enforceable condition of employment on the theory that the agreement subsumes the continuance of existing conditions. Such a practice cannot be unilaterally changed during the life of the agreement. For ... if a practice is not discussed during negotiations most of us are likely to infer that the agreement was executed on the assumption that the practice would remain in effect.

That inference is based largely on the parties' acquiescence in the practice. If either side should, during the negotiation of a later agreement, object to the continuance of this practice, it could not be inferred from the signing of the new agreement that the parties intended the practice to remain in force. Without their acquiescence, the practice would no longer be a binding condition of employment. In the face of a timely repudiation of a practice by one party, the other must have the practice written into the agreement if it is to continue to be binding." Elkouri and Elkouri, *How Arbitration Works*, 6th Ed. at p. 643-44, Citing Mitterenthal, *Past Practice and the Administration of Collective Bargaining Agreements*, proceedings of the 14th Annual Meeting of the NAA.

For example, in *SEIU Local 284 and ISD 272, Eden Prairie Schools*, BMS CASE # 03-PA-819 (Jacobs 2003) the parties had an admitted past practice of paying overtime during weeks in which the employees were paid for holidays and vacation etc. and where they were paid for more than 40 hours. The contract language was quite clear and was to the contrary of how the actual practice had been operating. Without more, this would likely have been a situation like *Ramsey County*, where the past practice would have prevailed over the contract language, despite its apparent clarity. The contract language in question as well as the practice had existed over the course of several negotiation periods. The practice was to pay over time for hours paid versus hours actually worked in a week where a paid holiday such as Labor Day fell and where the employees were called in to work additional hours. There were thus weeks in which the employees had been paid for more than 40 hours due to the paid holiday but actually worked less than 40 hours.

During negotiations however, the District sent a letter to the union advising it of the intent to terminate the practice of paying overtime in weeks where a holiday or other paid time off fell. The union took the position that the practice would continue after the contract unless there was a change in the contract language. No change was made to the existing contract language despite the notice from the District that it would discontinue the practice of paying overtime upon the signing of a new CBA.

Based on the almost unanimous line of arbitral authority, the practice was allowed to be discontinued on these facts. See also, *National Tea Company*, 94 LA 730 (1990) wherein the arbitrator held that past practices do not necessarily continue ad infinitum, but may be repudiated by either party through timely and proper notice on intent to do so before or during negotiations. The CBA language was both specific and clear in Eden Prairie and in order to change the practice the union, seeking to keep the practice, must therefore have effected a change in the language, but failed to do so.

In *Gillette Company*, 1996 W.L. 874463 (Fogelberg 1996) the arbitrator discussed a fact scenario very similar to that presented in *Eden Prairie Schools*. There he found that management had fulfilled its obligation to put the union on notice of the intention not to continue the practice that had been in existence for several years during the negotiations for the labor agreement. The union thus had the obligation to bring this up in negotiations and place language regarding the practice into the agreement. The union did not do that and instead chose not to address the matter at all, arguing later that the practice continued unless there was a change in the contract language.

The arbitrator found that the exact opposite was the case and held that the company had successfully repudiated the practice. “Once placed on notice of the timely repudiation of the practice, the obligation switched to the union to bargain over this subject at the next round of negotiations. Yet this was not accomplished, and consequently the ‘practice’ was properly eliminated by Management.” See, *Gillette Company* slip op. at page 4. Accord, *Copaz Co and UFCW Local 7A*, 1993 W.L. 790196 (Traynor 1993).

Thus, it is fairly clear that a binding past practice can be repudiated by giving timely notice of the intention to do so. Once this has been given, it falls to the party seeking to continue the practice to negotiate this into the contract. One cannot simply assume that because the underlying language did not change, that the practice will continue. Thus, as in *Eden Prairie* and *Gillette Co.*, if the language is clear, the party seeking to *keep* the practice must change the language in order to change the result. If the language does not change the implication is that the practice was repudiated.

Conversely, if the language is ambiguous and the practice has been used to clarify it, the party seeking to *change* the practice must seek to amend the contractual language in order to change the result. If the language does not change the implication is that the practice remains in effect.⁵

⁵ As many commentators have observed, where the practice is necessary to give effect to an ambiguous provision or where the CBA is silent and relies upon the practice to give it life the party seeking to change the practice by repudiation during negotiations must seek to change the language in order to repudiate the practice. Otherwise, if there is no change in the language the presumption is that the practice continues without abatement. See Mittenthal, *supra*.

The cases cited by the union were reviewed in detail. In *Law Enforcement Labor Services, Inc. and City of Roseville*, BMS Case #07-PA-1084 (Fogelberg 2009) the arbitrator ruled in favor of the union in what at first blush appears to be a similar case. There the City sought to flex schedules for officer training time in order to avoid payment of overtime.

There were several very significant differences in the facts of this case however. First, as Arbitrator Fogelberg found, the practice was the opposite of that presented here. There the City had apparently been paying overtime in these circumstances.

The arbitrator noted several salient facts that he found had a huge impact on the outcome of that decision. One of them was that “Prior to the events leading to the submission of the grievances by various members of the bargaining unit, any training – either POST or that mandated by the Administration - which fell on an officer’s regularly scheduled day off, would be compensated at the rate of time and one-half.”

He further noted that “The Memorandum of Understanding found in the current Master Contract, *supra*, expresses the parties’ agreement that an employee is not eligible for overtime if he/she is sent to training during a shift they are already scheduled to work.” The clear implication of this is that the officers were to be paid overtime if the training fell on a scheduled day off.

Second, there was a specific MOU discussing the shifts. That MOU provided as follows:

Memorandum of Understanding

The 2006-07 contract language regarding time and one-half for training is to be interpreted as follows:

- 1) The terms “regular schedule” means the usual 6 days on, 3 off schedule.
- 2) The training must be “in excess of the employee’s regular schedule.” In other words, if an employee is sent to training in lieu of working his/her regular shift, that time will not be compensated at time and one-half. It will only count towards the employee’s required 48 hour shift.
- 3) The employee has the choice of cash or compensatory time on all overtime earned under the provisions of the contract (up to the maximum of 60 hours), including training time and holidays.

Thus Arbitrator Fogelberg was faced with a different set of facts and contractual provisions. The ruling there, while somewhat similar, does not control the result here.

Likewise Arbitrator Yaeger in *LELS and North St. Paul*, supra, was faced with a much simpler case involving an officer whose training ran 15 minutes longer than it was scheduled to. He ruled in favor of that officer and granted overtime. That obviously is a very different scenario as well.

At the end of the day, the union's position here presented an interesting and very clever attempt at an end run around the provisions of the CBA through a claimed repudiation of the practice. However for the reasons stated above, i.e. that the CBA does not prohibit this practice, the practice has been consistent and the clear fact that there was no change in the contractual language the grievance must be denied. Finally it should be noted that this case, is as always, limited to these facts and should not be construed beyond these in terms of any other provision of the labor agreement.

AWARD

The grievance is DENIED.

Dated: October 27, 2014

Jeffrey W. Jacobs, arbitrator

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