

ARBITRATION DECISION - AWARD

IN RE

Cambridge-Isanti School District ISD 911
Cambridge, Minnesota

and

BMS #07-PA-395

School Service Employees Local 284 SEIU

DISPUTE:

Overtime work hours.

Arbitrator:
Daniel G. Jacobowski, Esq.
April 24, 2007

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JURISDICTION

APPEARANCES: School District: Attorney Patrick J. Flynn of
Knutson Flynn & Deans.

Local 284: Laurie Stammer, Regional Contract Organizer.

HEARING: Conducted on February 7, 2007 at the school district
office in Cambridge, on these multiple contract grievances,
pursuant to the procedures and stipulations of the parties under
their collective bargaining agreement. A court reporter
transcript was provided. Briefs were received March 26, 2007.

DISPUTE

ISSUE: Did the school district violate the contract when it
discontinued the past practice of including paid non-work hours
in the count of 40 hours for overtime, or instead did it have
the right to do so?

CASE SYNOPSIS: The parties' contracts provide that all work
over 40 hours per calendar week shall be paid at the overtime
rate of time and one-half. Over many years the district has
maintained the past practice of including paid non-work hours in
the computation of 40 hours, such as for vacation, holidays, and
sick leave. In the 2005 negotiations for the current contract,
the district proposed, and then gave notice to the union of its
intent to restrict the practice to work hours and to discontinue
the inclusion of paid non-work hours. The union rejected the
proposal and gave notice that it would grieve any such
discontinuance. Effective July 1, 2006, the district
discontinued the practice of including the paid non-work hours,
and multiple grievances resulted. They are consolidated in this
arbitration.

CONTRACT PROVISIONS APPLICABLE OR CITED: (The following excerpts are from the custodian's contract. The language in the other unit contracts is essentially the same. The key clause at issue is underlined by the arbitrator.)

ARTICLE VI - RATES OF PAY

Section 2. Hours of Service:

Subd. 1. Basic Work Week: A regular work week shall consist of forty (40) hours, normally five (5) consecutive eight (8) hour days, exclusive of lunch, for full-time employees...

Subd. 7. All work over forty (40) hours per calendar week shall be paid at the overtime rate of time and one-half. Work performed on holidays as defined in the Agreement will be paid at the overtime rate of double time. Overtime shall be rotated as equitable as possible among employees who sign the overtime roster. Building overtime shall be rotated within each building, starting with full-time employees and then if no full-time employees want to work then it is passed down to the permanent part-time employees with the least senior having to accept if no senior employee accepts."

ARTICLE XIV - GRIEVANCE PROCEDURE

Section 1. Grievance Definition: A "grievance" shall mean an allegation by a custodian or maintenance employee resulting in a dispute or disagreement between the custodian or maintenance employee and the School District as to the interpretation or application of terms and conditions of employment insofar as such matters are contained in this Agreement...

Section 8. Arbitration Procedures...

Subd. 8. Jurisdiction: The arbitrator shall have jurisdiction over disputes or disagreements relating to grievances properly before the arbitrator pursuant to the terms of this procedure. The jurisdiction of the arbitrator shall not extend to proposed changes in terms and conditions of employment as defined herein and contained in this written Agreement...In considering any issue in dispute, in its order the

arbitrator shall give due consideration to the statutory rights and obligations of the public school boards to efficiently manage and conduct its operation within the legal limitations surrounding the financing of such operations."

ARTICLE XV - DURATION

"Section 2. Effect: This Agreement constitutes the full and complete Agreement between the School District and the Exclusive Representative representing the employees. The provisions herein related to terms and conditions of employment supersede any and all prior Agreement, resolutions, practices, School District policies, rules or regulations concerning terms and conditions of employment inconsistent with these provisions."

BACKGROUND - FACTS

The parties have contracts covering several employee units. The first was for custodians in 1969 and similar contracts were added in subsequent years for secretary clericals, teacher aides, food service, and paraprofessional employees. Since 1969 and in the subsequent contracts, the contracts have contained the provision that all work over 40 hours per calendar week shall be paid at the overtime rate of time and one-half. That provision has remained unchanged and is in the current contracts effective July 1, 2005 through June 30, 2007, with one through July.

Over the many years the district has maintained the past practice of including paid non-work hours in the accumulation of the 40 hours for overtime, such as for vacations, holidays, and sick leave. However, this became an issue in the 2005 negotiations when the district took the position that the practice of including paid non-work hours was beyond the contract language, and it proposed modifying and clarifying the language to refer to actual hours worked over 40. The union disagreed and rejected the proposal and the contract language remained unchanged. However, in the continuing negotiations, the district gave notice of its position and that hereafter it would calculate overtime based only on hours worked and not paid time off and that the past practice will cease. The union response was that if was discontinued, grievances would be submitted. On June 9, 2006 the district gave written notice to all employees that effective July 1, 2006 it would discontinue the inclusion of paid time off hours in the calculation of the

40 hours toward overtime and that it would then be based upon hours worked only. Thereafter, two initial grievances were filed by custodians RP and AB when they failed to receive overtime for extra hours worked when the July 4 holidays were not included in their 40 hours for overtime. Other multiple grievances were followed by others, and the parties agreed to consolidate all of the grievances on this same issue for this arbitration.

The union case: Several union witnesses testified that overtime commonly occurred for extra hours for extra-curricular events or when the schools were allowed for community events. A common one was Sunday services for church groups, when custodians were needed to service the buildings. Grievant RP noted that proximate to the July 4 holidays he worked a weekend Sunday to cover a church group and only received straight time pay, not being given credit for the holiday pay and a day of paid sick leave. Grievant RB told when he had to come in on his holiday to fill in for a fill-in for other absent employees. Another custodian had experienced the past practice over his 30 years with the district, until the district gave notice twice of its discontinuance, once during negotiations and later by the letter effective for July 1. The union also noted that in the prior 2001 negotiations, the prior then superintendent submitted a proposal to stop the past practice of including paid non-work hours and to restrict it to actual hours worked for overtime, but that nothing further was done on the matter in those negotiations. Another employee noted that the weekend overtime for building use by outside groups had an impact on family life. The custodial union steward testified that since the district discontinuance of the past practice, employees have been reluctant to work weekend overtime at the regular rate when they have paid non-work hours in their work week.

The school district case: The director of finance who had been with the district since 1999 and participated in the 2005 negotiations, was initially unaware that the district had been including paid non-work hours in the 40 hour count for overtime until it was raised in May 2005 by the former superintendent. It was her opinion then that the past practice was a mistake and that the contract language only applied to actual hours worked. The new current superintendent came on duty in July 2005 and himself reached the same conclusion. He stated that in the negotiations with all of the groups he clearly stated the district intention to discontinue the practice of including paid non-work hours toward overtime and that was further clarified by the June letter to all employees including union stewards of the discontinuance effective July 1, 2006. Although the contract negotiations were concluded and signed in April 2006 the district bypassed Memorial Day and decided to make it effective July 1 to

give adequate notice to the employees. He did not recall if the letter was sent to the union office, but he did specify it went to all of the union stewards as employees.

ARGUMENT

UNION: In brief, the union submitted the following main points in its argument that the district violated the contract by changing the meaning of overtime language outside of contract negotiations.

1. It is well settled practice and law that changes in the agreement can only be made through negotiations. The union rejected the district proposal to change the language in the negotiations and gave notice it would grieve a practice change by the district. 2. The district was well aware of the past practice under the contract language and it was not a new discovery in negotiations. The fact of their initial proposal to modify the language and as made earlier in 2001, indicates the district was aware that the proper way to make changes are through negotiations. 3. Contract language will presume to have the meaning given to it by a continued past practice over many contracts. (citing Elkouri) 4. The union as exclusive representative received no notification of the June letter effecting the discontinuance of the practice on July 1. The notice sent to all employees during their summer months and not sent to the union was not effective. 5. The district claimed that no one is forced to work overtime is inconsistent with the contract requirement and practicality that someone must be forced to work the school building hours. 6. The district changed the interpretation of the contract language outside of negotiations. Even the superintendent admits that the contract language was not changed. 7. It is unfair to employees to be denied overtime pay when they sacrifice their time and family values for the weekend work. 8. Respectfully, the arbitrator is asked to find in favor of the union position and to make whole any employees harmed by the district action.

SCHOOL DISTRICT: In brief summary, the district submitted the following main points of argument in support of its position that it acted properly in discontinuing the overtime payment of overtime contrary to the clear language of the contract and after notice and opportunity to the union to bargain.

1. The grievance must be denied as the arbitrator lacks jurisdiction to decide issues outside the scope of the collective bargaining agreement. A grievance is defined as applicable to matters contained in the agreement. The jurisdiction of the arbitrator shall not extend to proposed changes in terms and conditions of employment as defined and contained in the agreement. The arbitrator shall give due consideration to the statutory rights and obligations of the public school boards to efficiently manage and conduct its operation within the legal limitations surrounding the financing of such operations. These limitations are provided in the contract. The claims of the

union that extend beyond the agreement do not fall within the arbitrator's jurisdiction. Arbitration of the issue is appropriate only if it is shown that there is agreement to arbitrate the controversy in question.

2. The union arguments regarding past practice do not sustain the grievance. The overpayment of overtime represents not a past practice but a mistake on the part of the school district. The mistake of overpayment in the past is insufficient to create a binding term of employment, even if a payroll mistake over a long period of time.

3. Notwithstanding what has occurred in the past, the mistaken payroll practice was clearly repudiated by the school district. It is well recognized that a past practice may lose its binding quality through the manifestation of a parties' lack of continuing assent as by repudiation in negotiation or a change in contract language. The contract zipper clause recites that the agreement constitutes the full and complete agreement between the parties and that its provisions supersede all prior agreements or practices which are inconsistent. By these provisions the parties expressly agreed that the district was not obligated to abide by any alleged past practice unless such practice was specifically written into the agreement. The agreement does not provide for overtime pay based upon hours paid as opposed to hours worked. The district has no duty to continue overpayment of overtime to its employees.

4. The district and its employees have a responsibility in the administration of public funds for salaries and benefits. The current contracts were ratified in the spring of 2006, following notice that the district would no longer overpay under their respective contracts for overtime. Each unit was afforded the full opportunity to negotiate language that would have provided for payment of overtime consistent with a mistaken payroll procedure. The union did not obtain and did not attempt to negotiate such language. Respectfully, based upon the clear language of the contracts, advance notice to the union of the district's intention, the union's opportunity to negotiate and the obligation of the school district to its public, the grievances must be denied. The district cited a number of cases it claimed as supportive.

DISCUSSION - ANALYSIS

Upon full analysis, I have decided that the facts and principles applicable sustain the union grievances that the district violated the contract, and did not have the right to discontinue the practice of applying the paid non-work hours to the 40 hours for overtime. I have so decided based upon the following reasons and factors.

1. I reject and do not sustain the district claim that the issue is outside the scope of the agreement and beyond the arbitrator jurisdiction. This claim is based in the first

instance upon the mistaken premise that the contract language is clear and unambiguous in its requirement that the work hours apply to the 40 hour count, as well as the hours over 40, and that there is no room for interpretation otherwise. I disagree.

2. To the contrary, I find that the issue does present the question for interpretation of whether the work hour requirement does not apply to the 40 hours and that the non-paid non-work hours are properly includable, as enhanced by the continuing practice over the years. This issue for interpretation does fall within the jurisdiction of the arbitrator, and is consistent with the grievance clause applicable to interpretation or application of the terms and conditions contained in the agreement. I have reviewed the cases cited in the district brief and find that many are distinguishable, or not applicable, and not controlling to the precise issue and district claim here. To the contrary, I find that the analysis and decision herein are consistent with the holdings that decisions must flow from the essence of the agreement and its related provisions, as noted in the key cases of the U.S. Supreme Court in United Steelworkers v. Warrior and Gulf Navigation, 363 U.S.574, 46 LRRM 2416, among the Steelworkers Trilogy Cases, and the Minnesota case of Ramsey County v. AFSCME Council 91, 309 N.W.2d 785. In general, among the leading authorities and cases in which the jurisdiction of the arbitrator or the past practice has not been upheld have been in cases where the issue was clearly outside the scope of the agreement, or where the employer discontinued benefit was not recited nor related to any provision of the agreement. Such is not the case here where the issue relates to an interpretation of the clause and the practice continued under it.

3. Here I find that the work hours are required for the hours over 40. The language does not specifically require that the 40 hours be hours of work as distinct from paid non-work hours, with the further fact that such paid non-work hours have been applied for overtime in continuation over the many years.

4. This finding takes into account the essence of the agreement as a whole, where provisions can relate to others in the agreement. In this connection, the basic work week is defined as consisting of 40 hours of a normal five 8-hour days for full-time employees, with the salary computed on the basis of 2,080 hours per year. Overtime hours are beyond this schedule of 40 hours per week. The concept of overtime with its rotation and the work week schedule, contemplate that hours over 40 will be regarded as overtime hours with the inherent recognition that some of the hours in an employee's scheduled work week will take into account paid non-work hours such as for

holidays, vacations, and sick leaves as elsewhere provided in the agreement. The effect of the employer interpretation or position would diminish the overall pay benefit to employees for these allowed and entitled provisions and benefits.

5. I reject the employer claim that the practice of including the paid non-work hours among the 40 was a mistake by the school district. There is no evidence of that whatsoever in the case, and that was mere speculation or assumption by the new management in the negotiations. The district proposal in its 2001 negotiations indicates the then superintendent was aware of the practice. Also, to the contrary, the very proposal of the district to modify or clarify the language indicates that it felt the language needed change or clarification to support its position. Ultimately, of course, the language remained the same and was not changed in the current contracts.

6. The zipper clause does not apply since the practice is an interpretation of an existing clause and obligation in the agreement and commonly leading arbitrators have held that where the issue does involve interpretation of an existing clause, such interpretation will not be precluded by the zipper clause herein noted.

7. In summary, I conclude that the issue is arbitrable, and find that the paid non-work hours applicable are properly includable within the 40 hours for the overtime pay requirement.

DECISION -AWARD

DECISION: The union grievance is sustained that the district violated the contract.

AWARD: The district is directed to make proper repayment to all affected employees who were improperly denied the required overtime payment consistent with this decision.

Dated: April 24, 2007

Submitted by:

Daniel G. Jacobowski, Esq.
Arbitrator