



IN THE MATTER OF ARBITRATION)	GRIEVANCE ARBITRATION
)	
between)	
)	
State of Minnesota, Department)	Emergency Leave -
of Human Services)	Weather Emergency
)	
-and -)	
)	
Minnesota Association of)	
Professional Employees)	November 13, 2007

APPEARANCES

For State of Minnesota, Department of Human Services

Sandi Blaeser, Labor Relations Representative, Department of Employer Relations
Martha J. Watson, Human Resources Director
Michael Haney, Business Service Manager
Paul Larson, Deputy Commissioner, Department of Employer Relations

For Minnesota Association of Professional Employees

Sheila Pokorny, Business Agent
Jane Richey, Business Agent
Robert Haag, Assistant Executive Director
Ruth Pfaller, Social Worker Specialist, Steward

JURISDICTION OF ARBITRATOR

Article 9, Grievance Procedure, Section 3, Procedure, of the 2005-2007 Collective Bargaining Agreement (Joint Exhibit #1) between State of Minnesota, Department of Human Services (hereinafter referred to as the "State", "Employer", "Agencies" or "DHS") and Minnesota Association of Professional Employees (hereinafter referred to as "MAPE", "Association" or "Union")

provides for an appeal to arbitration of disputes which remain unresolved after being processed through the grievance procedure.

The Arbitrator, Richard John Miller, was mutually selected by the Employer and the Association (collectively referred to as the "Parties"). A hearing in the matter convened on October 30, 2007, at 9:00 a.m. at the MAPE Building, 3460 Lexington Avenue North, Shoreview, Minnesota. The hearing was tape recorded with the Arbitrator retaining the tapes for his records. The Parties were afforded full opportunity to present evidence and arguments in support of their respective positions. The Parties elected to make closing arguments, with copies to the Arbitrator, in lieu of filing post hearing briefs, after which the record was considered closed.

ISSUES AS DETERMINED BY THE ARBITRATOR

1. Did the Employer violate the emergency leave provisions of the Collective Bargaining Agreement or Administrative Procedure 5.4 and/or the August 3, 1982 Emergency Leave Grievance Resolution for Employees Represented by MAPE when it denied emergency leave to Union employees at the Minnesota Sex Offender Program in Moose Lake, Minnesota on March 1 and 2, 2007?
2. If so, what is the appropriate remedy?

STATEMENT OF THE FACTS

The facts are simple and undisputed. The State in the MAPE Collective Bargaining Agreement agreed to the following emergency leave provision in Article 14, Section 2F:

The Commissioner of Employee Relations, after consultation with the Commissioner of Public Safety, may excuse employees from duty with full pay in the event of a natural or man-made emergency if continued operation would involve threat to the health or safety of the individuals.

Similar or same emergency leave provisions were also prevalent among other State employee groups. Some Agencies required employees to work during an emergency, and if they were unable to come to work they did not have to take leave. Some Agencies required employees to work, and if they were unable to come to work they had to take leave. Some Agencies believed that they could invoke emergency leave without consulting Department of Employee Relations ("DOER"). Suffice it to say, the State's practice with regard to invoking emergency leave was fractured.

The Union filed class action grievances concerning the State's emergency leave denials for weather emergencies invoked by the Employer on January 20 and 22, 1982. (Union Exhibit Section D, Document 1). The grievances were resolved on July 15, 1982, wherein the State agreed to make the Union employees whole. In addition, the Parties agreed to the following:

In return for getting agreement to make the employees whole, the Association has agreed to a uniform statewide procedure, which will be created by administrative procedure. Under that procedure, agencies may submit a request to the Commissioner of the Department of Employee Relations to have essential facilities permanently exempted from the invocation of emergency leave in the future. Appointing Authorities interested in being considered for inclusion on

this list of state facilities which will not be subject to the invocation of emergency leave should submit a written request to Commissioner Sundquist by September 1, 1982, specifying the reasons for exclusion.

Secondly, the Association has also agreed that there may be particular situations wherein the Appointing Authority may, on a case-by-case basis, exempt certain individuals from emergency leave, despite the fact that the balance of the facility might close. This clause is intended to clarify that you may decide to hold over a boiler operator, or an individual who has to get out a project with an immediate deadline, or others whose services are necessary, despite an overall emergency closing.

(Id.)

In light of the 1982 grievance settlement and the mixed emergency leave practice in other Agencies, the Employer implemented Administrative Procedure 5.4, Time Off in Emergencies, effective December 23, 1982 (Statutory Reference 43A.05, Subd. 4). (Employer Exhibit #3; Joint Exhibit #5).

Administrative Procedure 5.4 reads as follows in relevant part:

TIME OFF IN EMERGENCIES

Description and Scope - M.S. § 43A.05, Subd. 4 permits the Commissioner of DOER to excuse employees from duty and to authorize appointing authorities in the executive branch to pay employees for time off work during natural or man-made emergency situations. This Administrative Procedure specifies that the Commissioner has the authority to declare an emergency situation, close agencies, and authorize payment to employees who do not report to work or are sent home from work after an emergency has been declared. Appointing Authorities retain the authority to close or not close their facilities at any time.

Responsibilities -

Employees, appointing authorities, and DOER have responsibilities in emergency situations.

A. Employees:

1. If not needed to provide essential services, employees should take personal responsibility for own health and safety and coordinate with the appointing authority to be excused from work during natural or man-made emergencies.
2. To listen to local radio and television stations and/or follow their internal agency procedures prior to start of work shift to determine whether facilities in area have been closed due to natural or man-made emergencies.

B. Appointing Authorities:

- Determine if facilities should remain open or be closed as appropriate during situations that could impact the health and safety of their employees and results in temporary unavailability of work. The decision as to whether the employee absence is with pay as declared by DOER or charged to some other approved leave is secondary to the health and safety of the appointed authorities' employees.
- Develop and maintain a Time-off in Emergency Plan which specifies:
 1. Essential staffing requirements to be maintained during emergency situations.
 2. The name and phone number of the individual(s) who can make closure decisions.
 3. Steps/procedures to follow in making closure decisions.

4. The name and phone number of the agency contact and back-up person responsible for implementing the plan.
 5. Internal operating procedures to be followed during a natural or man-made emergency, including notification of closure for persons with hearing, vision, or other impairments.
- Keep current emergency contact lists used by agency and DOER in providing notification of emergency declarations.
 - Request exemption from invocation of emergency leave for essential work units or employees.
- C. Department of Employee Relations:
- Declare the emergency that may adversely impact the health and safety of employees and to ensure consistency among state agencies in a geographic area.
 - Notify appointing authorities in the applicable geographic location of the declaration of the emergency.
 - Authorize appointing authorities in the emergency area to pay employees for time off work as appropriate.
 - Approve recommendations of Appointing Authorities as to which state agencies and/or facilities are to be exempted from the invocation of emergency leave.
 - Exempt certain individuals and operations from emergency leave on the basis of essentiality of services rendered or other staffing or work-related considerations (case-by-case basis) on request of appointing authority.

(Id.)

On January 28, 1983, Richard C. Brainerd, DOER Deputy Commissioner, sent a memo to Leonard Levine, Commissioner of Public Welfare, indicating that Mr. Levine's request to have

certain facilities permanently exempted from the invocation of emergency leave in the future has been approved. This exemption includes all staff in the State hospitals and nursing homes that are 24-hour care facilities. (Employer Exhibit #11, p. 7). The reason for this exemption is that any and all staff are needed in these 24-hour care facilities with patients in residence at all times. (Id., p. 8). There were other 24-hour care facilities that requested and were ultimately granted exemption under the emergency leave provision contained in Administrative Procedure 5.4. (Id., pp. 9-13).

While the name of the administrative agency has changed over the years from Department of Public Welfare to State Operated Services ("SOS"), DHS now oversees an array of statewide campus and community based programs serving people with mental illness, developmental disabilities, chemical dependency and traumatic brain injury. (Employer Exhibit #16).

Since the effective date of the grievance settlement and Administrative Procedure 5.4 in 1982, DHS facilities have adhered to a consistent practice of exempting employees from emergency leave. The State has allowed exemptions to emergency leave for certain non-essential employees working for the Department of Corrections ("DOC") and the Department of Transportation ("DOT"), but never to staff in DHS facilities.

During collective bargaining negotiations for the 1983-85 contract the Union attempted to bargain away the 1982 grievance settlement and Administrative Procedure 5.4 by proposing language that "[w]hen emergency leave days are granted, institutional employees shall not be exempted or required to take other types of leave." (Employer Exhibit #12, pp. 23-24). The Employer also attempted during the 1985 collective bargaining negotiations to eliminate the emergency leave provision. (Union Exhibit Section B, p. 8). The negotiation proposals by both MAPE and the State were unsuccessful. As a result, the emergency leave provision contained in Article 14, Section 2F has remained in successor contracts, including the current Contract.

The Union has filed a multitude of grievances challenging the State's practice of exempting weather essential staff from emergency leave for natural and man-made emergencies. (Employer Exhibit #9). This includes the weather emergencies declared by DOER on March 4, 1985, at the Cambridge State Hospital and the failure of DHS to declare a snow emergency at the Willmar facility on November 27 and 28, 2001. (Employer Exhibits #10, 11). The Union sought in these grievances to have all affected staff be paid emergency leave. The grievances were denied by the State. The Union decided to withdraw the grievances and not to pursue them to arbitration until the instant grievance was filed.

The instant grievance relates to a weather emergency declared by DOER on March 1 and 2, 2007, for certain counties where State operated facilities reside. Specifically, a snow emergency was declared for Carlton County for March 2, 2007, beginning at 5:30 a.m. and ending at 4:30 p.m. (Joint Exhibit #2). DHS operates the Minnesota Sex Offender Program ("MSOP") in Moose Lake, Minnesota which is located within Carlton County. Besides the actual DHS Building, there is a 50 bed sex offender program operated by DHS that is physically located in the Minnesota Correctional Facility ("MCF") right next door. The program at the MCF is administered directly to inmates rather than committed sex offenders that are housed at the DHS Facility. There will be an expansion of the MSOP Facilities which will be using the prison as an actual part of MSOP and not as a part of the prison.

There were 48 Union members employed in the MSOP at the time of the declared emergency. (Joint Exhibit #4). There were only a few Union members with four-wheel drive vehicles that were able to get to work on March 2, 2007. The other Union members were not able to get to work, including Ruth Pfaller, a Social Worker Specialist and Union Steward. Ms. Pfaller had scheduled that day a group session with the sex offenders which had to be canceled due to her absence.

As per DHS practice, those Union members that could not get to work on March 2, 2007, were not compensated for emergency leave pay. (Joint Exhibit #2). They were deemed to be weather essential employees and not entitled to emergency leave. Those employees had the option to take vacation or compensatory time if they wanted to be paid for the day or take leave without pay. (Union Exhibit Section E). Some of the employees working at the DOC Facility next door were deemed to be not weather essential employees and were allowed to receive emergency leave. In fact, all of the professional staff at the DOC Facility, where Ms. Pfaller actually performs her job duties were paid emergency leave, rather than being required to use vacation or another form of leave.

The Union filed a grievance on March 7, 2007, protesting DHS's decision to exempt Union members from emergency leave. (Union Exhibit Section A, p. 1). The grievance was denied by the Employer, and the Union ultimately appealed it to final and binding arbitration pursuant to the contractual grievance procedure. (Id., pp. 2-4).

ASSOCIATION POSITION

There is no dispute that the Employer has the inherent management right to determine weather essential employees.

Weather essential employees are those essential employees defined in M.S. 179A. There is nowhere in Administrative Procedure 5.4 that exempts all employees from emergency leave. While DHS has the right under Administrative Procedure 5.4 to exempt certain staff from facilities those exemptions are to be done on a case-by-case basis. The Union has never agreed to a blanket exemption and this case would not be one of those exemptions. In fact, there are DOC Facilities and Department of Transportation Facilities that are no longer considered exempt and the Employer did not get the exemption for the MSOP.

While the Union has withdrew grievances pertaining to emergency leave, they were withdrawn without prejudice. The withdrawal of those grievance is no way means that the Union has agreed with the SOS emergency leave exemption.

Just because the Union attempted in negotiations to change the emergency leave provision does not mean that they agree with the exemption. To the contrary, the Employer attempted to completely remove the emergency leave provision from the contract during collective bargaining negotiations.

Many of Ms. Pfaller's co-workers have not been informed of their weather essentiality and the "culture" of not being eligible for emergency leave. Since many of the Union members could not get to work during the declared snow emergency due to

their health and safety concerns, they are entitled to emergency leave. In the alternative, the Employer did not go to the required extraordinary means to get these weather essential employees to work on the declared weather emergency to accomplish their adequate staffing needs.

There is no reference anywhere in the Contract, Statutes or Administrative Procedure 5.4 that weather essential employees are not entitled to emergency leave pay. The Employer suffered no loss from weather essential employees not being able to come to work on the declared snow emergency.

Not meeting the Employer's own tests under Administrative Procedure 5.4 and not having any supporting documentation or language in the Contract as to who is and is not actually entitled to emergency leave pay, the Union requests that the Arbitrator rule on behalf of the Union that the MSOP Facility was closed and that they were not weather essential employees nor PELRA essential employees and entitled to the emergency leave pay.

STATE POSITION

The sole issue before the Arbitrator is whether the Employer violated the emergency leave provision. The State has not violated this contractual provision. This language is completely discretionary.

The history of emergency leave is compelling in this case. DHS Facilities have since 1982 exempted employees from emergency leave. The MSOP Facility in Moose Lake is a recognized DHS Facility and falls under the same consistent practice. The Union has dropped many grievances showing that the State has the inherent managerial right to grant or not grant emergency leave.

The instant grievance is not substantively arbitrable. Assignment and direction of personnel is an inherent managerial right. The Union may not bargain the designation of employees as weather essential. Nor is it proper for such designation to come from this Arbitrator. The proper party to designate staff as weather essential is State management; the party tasked with maintaining the operation of the business entity.

The term "weather essential" refers to emergency leave and not the right of essential employees to not strike under PELRA.

Time and time again, the Union has chosen not to address the very issue that is before the Arbitrator. A review of the previous emergency declarations and the maps that indicated where the emergencies were declared discloses no record of grievances being filed in these situations, despite weather essential employees being required to work or use leave to cover an absence. The cases that the Union did present were not on point; they were from a different Agency, they did not include weather

essential employees and one of them was not even regarding a weather event.

There is an established past practice in this case. Consider the definition of a past practice: A uniform response (weather essential employees must report to work or take leave to cover an absence) to a recurring situation (it is Minnesota and we had numerous weather emergencies) over a substantial period of time (this goes back to the early 80's) implicitly or explicitly recognized by the Parties as the proper response (the 1982 grievance settlement, the acknowledgment by the Union in the 83-85 round of bargaining and the many weather emergencies affecting DHS employees that have gone unchallenged).

Based upon the foregoing arguments, the Employer requests that the grievance be denied.

ANALYSIS OF THE EVIDENCE

DHS provides essential services to the most vulnerable citizens in the State. As a result, all DHS employees who work with or in any way support these citizens need to be encouraged and motivated to perform their jobs despite what may seem unfair or inconvenient even during an emergency.

It is part of management's inherent rights to staff its operations and to establish reasonable rules regarding terms and conditions of employment, with the caveat that these rights not

be inconsistent with the provisions of the Collective Bargaining Agreement or any other agreement reached between the Parties.

The Contract language in Article 14, Section 2F, Emergency Leave, states that the Commissioner of DOER, "...after consultation with the Commissioner of Public Safety, may excuse employees from duty with full pay in the event of a natural or man-made emergency if continued operation would involve threat to the health or safety of the individuals." Clearly, this Contract language is discretionary and emergency leave may or may not be granted for all or some or none of the employees.

MAPE tacitly argues that the 1983 documents that reference State hospitals and nursing homes that are 24-hour care facilities do not apply to the MSOP in Moose Lake. MAPE claims that since MSOP is not called a "state hospital" or "nursing home" that it is not covered by the 1982 grievance settlement or Administrative Procedure 5.4. While names of programs have changes over the years, the foundation of exempting from emergency leave the staff who provide the 24-hour services or support for these vulnerable citizens has remained a constant. It is undisputed that since the grievance settlement and promulgation of Administrative Procedure 5.4 in 1982, DHS management has had the exemption of invocation of emergency leave

in place for all staff involved in the direct care/24-hour care settings, including MSOP in Moose Lake.

Clearly, MSOP is a 24-hour care facility. It is staffed by nurses, security counselors, psychiatrists, therapists, social workers, information technologists and supervisors of various types. Whether one refer to the DHS Facility in Moose Lake as a hospital, a treatment center, or a sex offender program does not matter. It operates like every other DHS/SOS 24-hour care facility and has been treated the same for purposes of not invoking emergency leave for weather essential employees.

It is clear that neither the Contract language in Article 14, Section 2F, nor the grievance settlement nor Administrative Procedure 5.4 defines the term "weather essential." The Union claims that the term "essential" must be given the meaning referenced in PELRA. Under PELRA an "essential" employee does not have the right to strike. However, the term "essential" as referenced in "weather essential" refers to emergency leave, and not whether an employee has no right to strike.

The term "weather-essential" has evolved since 1982 and beyond to mean employees exempt from the invocation of the emergency leave. In fact, during the 1983-85 collective bargaining negotiations the Union attempted to bargain away the agreement it made in the 1982 settlement by proposing language

that "[w]hen emergency leave days are granted, institutional employees shall not be exempted or required to take other types of leave. Employees who are able to work shall earn one (1) hour of compensatory time off for each hour worked during the emergency." This fact that the Union proposed this limitation and pay penalty language (which incidentally was not agreed to by the State) is evidence that the Employer had the right to exempt staff from emergency leave, with the caveat that this right must be consistent with the terms and conditions contained in the settlement agreement and Administrative Procedure 5.4.

It is axiomatic in labor arbitration that the mere failure of a party, over a long period of time, to exercise their right to an agreement reached between the parties is not a surrender of the right to start exercising such right. Mere non-use of a right does not entail a loss of it.

It is undisputed that since the grievance settlement and promulgation of Administrative Procedure 5.4 in 1982, the Union has filed numerous grievances protesting the exemption of Union employees from receiving emergency leave pay, but withdrew all of the grievances before reaching the arbitration step contained in the contractual grievance procedure. The instant matter is the first case reaching final and binding arbitration regarding this issue.

The Union's non-use of its right to challenge the exemption of emergency leave does not entail a loss of it. This is especially true in light of the fact that both the settlement agreement and Administrative Procedure 5.4 both indicate that weather essential employees are to be determined on a case-by-case basis. Thus, the Union's failure, over a long period of time, to exercise their right to have weather essential employees determined on a case-by-case basis, and not a blanket denial for all Union members, is not a surrender of their right to start exercising such right.

A case-by-case determination of weather essential employees rather than a blanket denial of emergency leave is not a creation of the Arbitrator. To the contrary, the State has performed case-by-case determinations of weather essential employees, pursuant to Administrative Procedure 5.4, for employees in DOT and DOC and found some to be not weather essential and thus eligible for emergency leave pay. In fact, all of the professional staff at the DOC Facility in Moose Lake, where Ms. Pfaller actually performs her job duties were found to be not weather essential employees and thus eligible for emergency leave pay. The State must therefore partake in a case-by-case analysis to determine which DHS employees are truly weather essential and which, if any, are not truly weather essential and thus eligible

for emergency leave pay under Article 14, Section 2F. Most certainly, the Union has the right to challenge the findings of the State in another arbitration proceeding if the results are deemed to be unfair, arbitrary, capricious or discriminatory.

In the alternative, a better approach would be for the Union and the State to negotiate and reach an agreement as to which Union members are weather essential and which Union members are not weather essential. This would avoid another arbitration proceeding over this same issue.

AWARD

Based upon the foregoing and the entire record, the grievance is sustained in part and denied in part as noted above.



Richard John Miller

Dated November 13, 2007, at Maple Grove, Minnesota.