

IN RE ARBITRATION BETWEEN:

SERVICE EMPLOYEES INTERNATIONAL UNION, SEIU, LOCAL 26

and

ABM BUILDING SECURITY

DECISION AND AWARD OF ARBITRATOR

FMCS CASE 060321-54667-7

JEFFREY W. JACOBS

ARBITRATOR

July 17, 2006

IN RE ARBITRATION BETWEEN:

SEIU, Local #26,

and

**DECISION AND AWARD OF ARBITRATOR
FMCS CASE 060321-54667-7
Pay for training grievance**

ABM Building Security.

APPEARANCES:

FOR THE UNION:

Brendan Cummins, Miller and O'Brien
Renita Wicker, ABM employee
Dan Klingensmith, former Union President
Todd Dahlstrom, Union Organizer
Lesa Manson, ABM employee
Danny Ballard, SEIU

FOR THE EMPLOYER:

Scott Rauser, Spence, Rickey, Sweeney & Gernes
John Zingaro, Midwest Regional Manager
Michael Boyd, Operations Supervisor

PRELIMINARY STATEMENT

The above matter came on for hearing on June 26, 2006 at the FMCS Offices in Minneapolis, Minnesota. The parties presented testimony and documentary evidence at that time. The parties submitted post hearing Briefs dated July 6, 2006 and were received by the arbitrator on July 7, 2006.

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement covering the period from March 19, 2005 through December 31, 2007. Article 20 provides for submission of disputes to binding arbitration. The arbitrator was selected from a list provided by the Federal Mediation and Conciliation Service.

ISSUES PRESENTED

Whether the Employer violated Article 5.2 when it refused to pay for the employee's pre-assignment training? If so what shall the remedy be?

RELEVANT CONTRACT PROVISIONS

Article 5.2 Employees shall be paid straight time at account wage rate for all account-specific, State mandated C.E.U. and Company required training. Overtime will be paid in excess of forty (40) hours in a workweek.

PARTIES' POSITIONS

UNION'S POSITION

The Union took the position that the Employer violated the training clause, Article 5.2 when it refused to pay for employee's pre-assignment training and subsequently deducted \$80.00 from employees' paychecks to pay for this training. In support of this position the Union made the following contentions:

1. The Union argued that the language of Article 5.2 cited above was plain and unambiguous and requires that the employees be paid for any training that is required for them to work as a security guard in Minnesota.

2. The Union argued further that a person must either have a license and have completed a course of study mandated by the State of Minnesota in order to work as a security guard. This is known as pre-assignment training. In the alternative, a person must complete the course within 21 days of being hired as a security guard.

3. This training is therefore required by the Company, even though it is also mandated by the State, and as such falls within the definition of "Company required training" found in Article 5.2

4. The Union argued, contrary to the assertion by the Company, that there is no distinction drawn in the contract language between "Company required" and "State required training." The Employer is responsible for ensuring that all of its employees are trained properly and that they are properly licensed in order to legally work in the State as security guards. Thus, the Employer requires its employees to undergo the State mandated training in order to get a license to work as a security guard at all. The Union asserted that the term "Company required" training includes any and all training required by the Company, whether it is also required by the State or not

5. The Union argued that under the principle of *ejusdem generis* when a list of specific items is followed with a more generic term it is assumed that the parties intended to include the latter term in the list of terms that are like the specific ones. Thus, when the language uses the terms “account specific” and “State mandated continuing education units (CEU’s)” these two items fit into the more general term “Company mandated training.” Thus any “Company mandated training” would include the former two terms and the Company must pay not only for any account specific and CEU training but also for any Company mandated training, including any training required of employees to be initially licensed to work as a security guard. Here that would include the pre-assignment training.

6. The Union noted that it is undisputed that the Employer has been for many months requiring new hires to sign an agreement allowing the Employer to deduct \$80.00 and in some cases even \$150.00 from employee pay checks to pay for the pre-assignment training. It is this deduction that is the focus of this arbitration.

7. The Union also argued that requiring this illegally bypasses the Union as the exclusive bargaining representative by allowing the Employer to deal directly with the employees on a matter of wages and hours and other terms of employment. The Employer dealt directly with the affected employees, the discussion and/or action was about the wages or hours of employment and the Union was excluded from the discussion. All three of those tests were met here and the Union asserted that this was an unlawful bypassing of the requirement that any such discussion must include the Union and be bargained with them.

8. The Union also argued that the Employer’s actions violated State law as well. Under Minn. Stat. 181.79 an authorization must be signed by any employee whose paychecks are affected specifically authorizing the deduction. Here some of the employee’s may not have signed them and the Employer could not produce authorizations from all of the employees who have had deductions taken from their paychecks for pre-assignment training. Moreover, several of the authorizations were wrong and allowed a deduction of \$150.00, not the \$80.00 that the training cost.

9. The Union countered the argument by the Employer that this matter was not procedurally properly filed by arguing that this is a continuing violation since it has been going on for months. The Union filed this grievance immediately after it became aware of it in March of 2006.

10. The Union also asserted that the grievance is general enough to allow for the inclusion of a claim not only for the training itself but also for the wages lost by the affected employees. The Union argued that the grievance is for a violation of Article 5.2 and that the Employer 's argument is overly formalistic. The Union asserted that the grievance clearly is about both the training and the pay for attending the courses.

11. The Union argued that even if the arbitrator were to find that the language was ambiguous, the bargaining history of this contract fully supports the Union's claim that the pre-assignment training was intended to be covered by this language. Union negotiators testified that they were very concerned about lack of proper training in the industry and that pay for training was a major aspect of these negotiations.

12. The essence of the Union's argument is that the language is clear and requires that any Company required training, including pre-assignment training, be included in the language of Article 5.2 and that the employees must be paid for this training. Further, that the deduction of money from the employee's paychecks is a violation of the contract, Federal labor law, since it bypassed the Union, and even State law since in some cases no written authorization for the deduction could be produced by the Company.

The Union seeks an award of the arbitrator sustaining the grievance, ordering the Company to cease requiring bargaining unit employees to pay for pre-assignment training and ordering the Employer to pay for all employees' pre-assignment training and to reimburse any employee who has had money deducted from their pay to reimburse the Company for this training.

EMPLOYER'S POSITION:

The Employer's position was that there was no contract violation and that the clause only requires the Company to pay the employees their wages for certain types of training and was never intended nor does it provide for reimbursement for pre-assignment training. In support of this position and Employer made the following contentions:

1. The Company first argued that the scope of the grievance is limited to that which is stated on the grievance itself. Here it is for the refund of the \$80.00 course fee charged for pre-assignment training and does not include anything else. The terms of the grievance form itself provides "ACSS has required employees to pay for their own training in violation of Article 5.2 of the collective bargaining agreement and any other provisions that may apply." There are no other provisions that apply.

2. Moreover, the remedy requested says nothing about pay it references only the training. The remedy itself states as follows: That any employee who has had this deducted from their pay be refunded what is owed to them and for this practice to stop." Again, the grievance says nothing about pay or wages and refers only to the training itself. The only deduction from the employees' paychecks was for the training – nothing else. Finally, at the hearing, the Union's own representative acknowledged that the grievance was only about the reimbursement for the cost of the training.

3. The Employer also argued that the grievance was untimely and cannot apply to any alleged contract violation prior to the filing of the grievance. The practice allegedly started on or about March 19, 2005. The grievance was filed on March 6, 2006, nearly a year later. Even under a continuing violation theory any remedy ordered must be limited to the time set forth in Article 20 for the filing of a grievance. Here that is 5 days under step 1 of the grievance procedure. See Article 20, step 1. Page 19 of the CBA.

4. On the merits, the Company also argued that the language was plain and unambiguous. It refers only to account specific, State mandated CEU (Which it asserted was understood by all concerned to be continuing education not pre-assignment education) and Company mandated training. The Employer asserted most strenuously that everyone involved in the negotiations understood clearly what was meant by that. It did not include –pre-assignment training and of course does not use the term pre-assignment training, as it certainly could have if the parties had intended that to be included.

5. The Company argued that pre-assignment training is not State mandated CEU training. Pre-assignment training is a 12-hour course required of all licensed security guards to work as such in this State. It is portable like any other license, such as a nursing license or law license, and allows the bearer to work for any security Company. Everyone understands that the Employer offers this training at a reduced cost but that there is no obligation whatsoever for the licensee to work for ABM once they have completed the training. That is why the employee’s sign an authorization allowing the deduction of the \$80.00 cost of the pre-assignment training.

6. State mandated CEU training is an annual 6-hour course required to retain the license. This is paid for under the terms of the CBA but is very different from the 12-hour initial pre-assignment training course referenced above.

7. The Company asserted most vehemently that the 12-hour pre-assignment training is not “Company mandated training” under the terms of Article 5.2 “Company required training” includes such things as sexual harassment training, safety and ergonomics but has never included pre-assignment training and the language of Article 5.2 was drafted specifically to make it clear that it did not. That is why the language of Article 5.2 does not use the term pre-assignment training but rather State mandated CEU training.

8. The Company pointed to the rule of contract interpretation known as *expressio unius est exclusio alterius*, i.e. to say one thing is to exclude another. Here the list is very specific and includes only the 3 things on the list; it does not say State mandated pre-assignment training and was never intended to include State mandated pre-assignment training.

9. The Employer also pointed to bargaining history and asserted that the Union could not provide any specific evidence or testimony that the parties intended pre-assignment training be included in Article 5.2. The Union could offer only the vaguest statement that training was important in the negotiations but little else. Since the Union bears the burden of proof, such nebulous testimony cannot carry the day. The other Union witnesses provided no testimony about the negotiations and were not even aware that the employees had signed authorizations allowing the deduction.

10. Moreover, the testimony of the actual employees could not have been stronger for the Company. They all said that they clearly understood the purpose of the deduction and that they understood why the Company was taking the deduction and that they fully accepted the practice.

11. The essence of the Employer's argument is that the language specifically excludes pre-assignment training. Moreover, the Union's grievance is limited to the time immediately prior to the filing of the actual grievance in March 2006 and must be limited in substance to the claim for reimbursement for the training cost and cannot now be expanded to include a claim for anything else.

The Employer seeks an award of the arbitrator denying the grievance in its entirety.

MEMORANDUM AND DISCUSSION

The Employer is a security agency that employs security agents to provide building security in and around Minnesota. Under Minnesota law a properly licensed security agent, such as those employed by ABM and represented by the Union, must complete a 12-hour course of training within 21 days of employment. This training is mandated by the State and is portable. In other words, a person once so licensed may work at any security agency. This so-called pre-assignment training is not specific to ABM.

The evidence showed that the cost of this course varies but generally runs about \$150.00 dollars in the open market. ABM offers the course to prospective employees at a cost of \$80.00 apparently as an enticement to people to work for them as opposed to competitive agencies. The evidence showed too that this is a very competitive business.

The evidence showed that the Employer has been since March of 2005, when the labor agreement was first effective, and for some time prior to that, offering employees who needed the 12 hour pre-assignment training the opportunity to take the course at a reduced cost of \$80.00. The Employer had the affected employees sign an authorization allowing the deduction of the \$80.00 cost of this training at the rate of \$20.00 per paycheck until the \$80.00 was paid. The grievant stated that she understood the reasons why this was being done and that she understood that the pre-assignment training and licensure gave her the opportunity to work as a security guard anywhere in the industry.

The evidence showed that some of the authorizations actually allowed the deduction of \$150.00 but that these were done in error. There was no evidence to suggest that \$150.00 had actually been deducted and that in fact only \$80.00 has been deducted from the affected employees.

There was some evidence to suggest that training was a topic of discussion during negotiations for this labor agreement. There was very little evidence about the language of Article 5.2 and insufficient evidence to show that the parties intended anything other than what the language actually says.

Initially, it must be determined whether this is a timely grievance. The Employer did not raise this issue in its Brief but did raise the issue at the hearing. The Employer argued that the grievance is untimely since it was filed on March 6, 2006 yet references the practice going back to March of 2005. The Union argued that the matter is a continuing violation and that it filed the grievance as soon as it was made aware of the practice of deducting money from the employee's paychecks.

The parties' grievance procedure requires that the grievance must be filed within 5 days of the event being grieved. Arbitral precedent and generally accepted labor relations principles recognizes the concept of a continuing grievance. See Elkouri and Elkouri, *How Arbitration Works*, 6th Ed. at 218-19. It is axiomatic that such a grievance can be filed at almost any time the subject matter of the grievance is occurring but that the remedy is limited to the time frame states in the grievance procedure prior to the filing of the grievance. Here that translates into the determination that the grievance is timely but that any remedy would be limited to 5 days prior to March 6, 2006. Accordingly, it is determined that the grievance is procedurally proper as a continuing grievance but that the remedy, if any, be limited to 5 days prior to the filing of the actual grievance.

Next there was the issue of the substance of the grievance itself. The Employer adamantly argued that the only matter to be determined is the claim set forth in the grievance itself. As noted above, the grievance itself claimed a violation of Article 5.2 as follows: "ACSS has required employees to pay for their own training in violation of Article 5.2 of the collective bargaining agreement and any other provisions that may apply." Moreover, the remedy requested says nothing about pay it references only the training. The remedy states as follows: That any employee who has had this deducted from their pay be refunded what is owed to them and for this practice to stop." Again, the grievance says nothing about wages and refers only to the training itself.

The Union argued in its Brief that the grievance was stated sufficiently broadly as to put the Employer on notice of the Union's claim. The Union argued that "the contract violation is clearly alleged in the grievance form, which states that the Employer 'has required employees to pay for their own training in violation of Article 5.2 ...'" The Union cited Elkouri and argued that one should not exalt form over substance and that the Employer's assertions here do exactly that by naively assuming that the grievance is only about one small part of the disputed language when it clearly is about the pay for training. The Union also argued that this was no surprise to the employer and that they knew all along what the grievance was about irrespective of the technicalities of the grievance form itself.

However, inherent in the notion of disputes such as this and the very nature of grievances is the issue of notice to the Employer of what exactly is being grieved and what it must therefore defend. Here the grievance form clearly talks about pay for training; it does not discuss or reference payment of wages for the time spent doing the training. Moreover, the remedy requested is also specifically directed to the cost of the training and seeks reimbursement of the amounts deducted from their paychecks for the pre-assignment training, i.e. the \$80.00, as the specific remedy requested.

Finally, the Union representative, when questioned about what this grievance was about, also acknowledged that it was to get reimbursement for the cost of the training paid by the affected bargaining unit employees. There was no indication that the grievance was about payment of wages during the time spent at the training sessions or the like. Accordingly, it is determined that the substance of this grievance is about the cost of the training only.

On the merits, the first thing one must look to in order to gain guidance in the decision is of course the language itself. Article 5.2 is quite plain and unambiguous but does not say what the Union argues it says. It says simply that “Employees shall be paid straight time at account wage rate for all account-specific, State mandated C.E.U. and Company required training. Overtime will be paid in excess of forty (40) hours in a work week.” Nowhere in that language is there a reference to payment for the training itself. It speaks to the wages paid for certain types of training.

The evidence showed that there is a distinction in this industry between State mandated CEU, i.e. continuing education units, and State mandated pre-assignment training and that they are very different sorts of training. One is a 12-hour training required to get a license to work as a properly licensed security agent in Minnesota while the other is a 6 hour course required to maintain the license once it has been obtained. Moreover, the very fact that “State mandated CEU” is listed separately from “Company required training” is further evidence of the parties’ intent in this matter and on these unique facts that they intended “Company required training” to include something different from any State mandated training, whether that training be for pre-assignment or CEU courses.

The Union argued that the Company requires that their agents have the 12-hour pre-assignment training in order to work and that the pre-assignment training is therefore subsumed in the term “Company required training.” The evidence showed however that the parties did not specifically list the pre-assignment training in the list of items covered by Article 5.2 and that in fact “Company required training” is for a very different sort of training all together. Accordingly, the Union’s argument lacks sufficient evidentiary support in this matter.

Accordingly, the grievance must be denied for several reasons. First, this grievance is about reimbursement for the cost of the pre-assignment training only. The contract language itself simply does not provide sufficient support for the Union’s claim to reimbursement since it speaks only to the payment of wages for certain types of training. It does not actually speak to payment for training at all.

Second, there is merit in the Employer’s argument that the language of Article 5.2 does not cover and was not intended to cover pre-assignment training. Had the parties intended to cover that training that language could easily have been added to the list but obviously it was not. On these facts there is greater merit to the Employer’s claim that under the principle of *expressio exclusio* the separate listing of the required training compels the conclusion that they were intended to be separate and that “Company required training” did not under this language subsume any and all other types of training. On these facts, “Company required training” was intended to cover something very different from the 12-hour pre-assignment training to gain licensure to work as a security guard. This fact coupled with the evidence of negotiation history supports the Employer’s argument that the language was not intended to provide coverage for the cost of the State mandated 12-hour pre-assignment training.

Finally, the Union argued that there may have been violations of federal law due to the allegation that the Employer is dealing directly with the employees on a matter of wages and terms of employment. That may or may not be a matter for the NLRB to determine and there was no evidence or argument that this was a deferral matter under the *Collyer* doctrine. Thus, that allegation cannot be dealt with in this forum at this time.

In addition, the Union argued that there was a violation of State law due to the inconsistencies in the authorizations. It should be noted that M.S. 181.79, subd. 1 allows for the deduction of money from the employee's paycheck if the employee specifically authorizes it. The employees who did testify at the hearing indicated that they understood what this was for, why it was being deducted and that the cost of the pre-assignment training through the Employer was generally cheaper than getting it in the open market. The evidence showed that the authorizations were all voluntary. Moreover, there was evidence to suggest that while errors in the authorizations were present, in fact no more than \$80.00 was deducted from any employees' paycheck even though some authorized \$150.00. Ultimately however this is not a matter over which the arbitrator has jurisdiction and no decision can be made on this question.

Accordingly, based on the evidence as a whole and the contract language at issue, the grievance is denied.

AWARD

The grievance is DENIED.

Dated: July 17, 2006
ABM bldg. Security and SEIU #26

Jeffrey W. Jacobs, arbitrator