

**IN RE ARBITRATION BETWEEN:**

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**AFSCME COUNCIL 5**

**and**

**RAMSEY COUNTY, MINNESOTA**

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**DECISION AND AWARD OF ARBITRATOR**

**BMS Case # 06-PA-0719**

**JEFFREY W. JACOBS**

**ARBITRATOR**

**July 6, 2006**

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AFSCME Council 5,

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DECISION AND AWARD OF ARBITRATOR  
BMS Case 06-PA-0719

Ramsey County, MN

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**APPEARANCES:**

**FOR THE UNION:**

Tom Burke, Field Rep. for the Union  
Joyce Carlson, Union Rep.  
Jean Foster, grievant  
Edward Kichler, steward  
Dan Olson, Chief Steward

**FOR THE COUNTY:**

Jean Gramling, Labor Relations Manager  
John Johnson, Labor Relations Manager  
Dorothy McClung, Dir. Property Records & Revenue  
Susan Roth, Mgr. Abstract, Title and Ownership Div.  
Gerene Johnson, Mgr. Revenue and Public Service Div.

**PRELIMINARY STATEMENT**

The hearing in the above matter was held on June 12, 2006 at 9:00 a.m. in the Ramsey County Government Center West at 50 West Kellogg Blvd. in St. Paul Minnesota. The parties presented oral and documentary evidence at which point the evidentiary record was closed. The parties submitted Briefs postmarked June 30, 2006 and received by the arbitrator on July 3, 2006. The parties stipulated that there were no arbitrability issues and that the matter was properly before the arbitrator.

**ISSUES PRESENTED**

Whether the Employer violated the collective bargaining agreement when it implemented a policy denying overtime to employees who had used sick leave or vacation during the week. Does the Employer owe the grievant overtime pay for the Saturday she offered to work? If so what shall the remedy be?

**CONTRACTUAL JURISDICTION**

The parties are signatories to a labor agreement covering 2003, 2004 & 2005. Article 15, section 15.4 provides for submission of disputes to binding arbitration. The arbitrator was selected from a list provided by the State of Minnesota Bureau of Mediation Services.

## **UNION'S POSITION:**

The Union's position is that the grievant is entitled to pay of the hours she offered to work on a Saturday and that the County violated the contract when it implemented a policy in contravention of the procedural requirements of the contract and contrary to the provisions of Article 14 requiring payment of overtime for any scheduled work on a day off. In support of this position the Union made the following contentions:

1. The Union's position was that the provisions of Article 14 call for the payment of overtime under the circumstances presented here. Article 14 provides as follows:

Time and one half shall be earned under any of the following conditions:

(1) All work performed in excess of the work day.

(2) All work performed in excess of forty (40) hours in any work week except for those employees at Lake Owasso residence and the correctional institutions. For these employees all work in excess of eighty (80) hours in a bi-weekly pay period.

(3) All work performed by full-time employees on a scheduled day off.

2. The Union asserted that the grievant was told during the week that she was needed to work overtime and that indeed there was a huge need for overtime in the Department given the change in State law requiring certain matters be completed in a very short time. The Department was calling people in to work overtime generally in that time frame.

3. The Union and grievant asserted that he asked her supervisor if it would be OK if she came in to work Saturday even though she had taken some sick time during the week. She argued that she raised the issue of overtime for the Saturday work and that she was never told she would not get it.

4. The grievant appeared for work on Saturday and was ready to work when she was confronted by her supervisor asking why she was there. The grievant asserted that she thought they had cleared up any misunderstanding about her being there, that overtime work was available and that she was entitled to it. After the supervisor told her that she was perhaps not going to get overtime and that she should leave, she left. She filed the grievance however to get the pay that she felt she should have gotten for the work she would have done that Saturday.

5. The Union further argued contrary to the position of the Employer, that no policy regarding use of sick time has ever been properly posted in accordance with the labor agreement. Moreover, a prior arbitration made it clear that any such policy must have been filed with the Union in writing before taking effect. Article 19.4 clearly requires that any work rule must be posted and copies furnished to the Union. That was simply not done here.

6. The Union further argued that not only was there no procedural support for the implementation of this policy since it was not done in accordance with the labor agreement, such policy is patently contrary to the provisions of the labor agreement and would be null and void anyway.

7. The essence then of the Union's argument is that the clear terms of the labor agreement require the payment of overtime under these circumstances and that there is no exception for sick leave and vacation. The grievant did use sick time during the week in question but appeared for work on a Saturday. Pursuant to the clear terms of the agreement, she must be paid for the hours she would have worked on that day.

The Union requests an Award requiring the County to pay the grievant for the hours she offered to work on the date in question and to cease and desist its policy of denying overtime pay where the affected employee uses sick leave or vacation time during the week. .

## **COUNTY'S POSITION**

The County's position is that there was no violation of the agreement and that the County has a policy of not paying for overtime even on a scheduled day off where the employee has used sick leave or vacation during the week. In support of this position the County made the following contentions.

1. The County argued that there has been a longstanding policy in the Department that if a person used sick leave or vacation time during the week in question, no overtime would be payable even if that person worked on a Saturday, i.e. a scheduled day off. Moreover, pursuant tot the management rights clause of the labor agreement, the County has the right to promulgate such a policy.

2. The grievant did in fact use sick time during the week in question and while she was paid for that time, she did not work that time. According to the policy, she is not entitled to the payment of overtime.

3. The County introduced testimony that even though the policy against payment of overtime where the affected employee uses sick or vacation time during the week is unwritten it is well known and that the supervisors tell the employees about it.

4. The County asserted that the mere failure to post this pursuant to the labor agreement is merely a technical violation and should not negate what the employees all clearly know.

5. Here the grievant used sick time, was told she would not be entitled to overtime for Saturday work and yet appeared for work on Saturday anyway.

6. Moreover, she did not actually perform any work at all, See Employer Exhibit 2 and should not be paid for work she did not perform..

7. The essence of the County's claim is that there is a policy against the payment of overtime even for work on a scheduled day off if the employee has used sick leave or vacation time during the week. The management rights provision of the contract give the County the right to promulgate such a policy in order to make clear when overtime pay will and will not be paid. Since the grievant did use sick time during the week she is not entitled to payment of overtime. Further, the grievant was given the option of remaining at work but was told she would only be paid straight time. She chose to leave and should not be paid for time she did not actually work.

The County requests an award denying the grievance in its entirety.

### **DISCUSSION**

The facts are very straightforward. The grievant works in the Abstract, Torrens and Ownership Department, ATO, at Ramsey County as a Tax Clerk 3. She is a full time employee.

The evidence showed that in the fall of 2005 the Department was under considerable pressure to catch up with its documentation and other filings due to a change in State law requiring that certain documents be processed in a 15-day period. The evidence showed that due to the change, the Department needed to offer overtime work in order to get caught up. Over the course of several months the Department did an admirable job of getting caught up and in compliance with State law in this regard. It was clear that overtime was necessary to get this work done and that it was offered on a fairly frequent basis during this time frame.

The grievant had used sick time during the week ending Saturday September 24, 2005. She apparently did speak with her supervisor about Saturday work but nothing definitive was determined about whether she would be granted overtime pay. The County asserted that she had been told that she would not get it but the evidence overall showed that the supervisors were somewhat surprised when the grievant appeared for work that Saturday and did not quite know what to do with her. The evidence did however show that she was offered the opportunity to stay but that she was told she would be paid straight time only.

The County asserted that there was a policy in place to the effect that overtime would not be paid pursuant to Article 14 if the employee had used sick leave or vacation time during the week. No policy was placed into evidence and the evidence showed that the policy was not written nor was it ever given to the Union pursuant to Article 19.4 of the labor agreement. It is clear that the policy, if any, cannot be applied here since it did not comply with the posting and notification requirements of the labor agreement. A prior arbitration between these parties also supports the Union's position in this matter. See, *AFSCME Council 14 and Ramsey County*, BMS # 94-PA-5211, (Chatman 1994). The arbitrator held that the failure to properly post the rule and to notify the Union circumvented the agreement and was therefore of no effect. The evidence supports this conclusion here.

More importantly however, it is axiomatic that any unilaterally implemented work rule must not be in conflict with the clear provisions of the labor agreement. Here the terms of Article 14 could not be clearer. They require that overtime is paid for all work in excess of 40 in a workweek, with the exception of the Lake Owasso facility. It also requires payment of overtime for all work performed by a full time employee on a scheduled day off. There is no exception for the use of sick time or vacation time. The management rights clause of the labor agreement do not give the County the right to promulgate a policy which is in conflict with the provisions of the labor agreement. The general right to establish work rules does not grant to the Employer the right to obviate the clear terms of the labor agreement. Here the clear terms of the labor agreement provide for the payment of overtime without exception for the use of sick or vacation time.

Turning to the specific facts of this matter, the evidence absolutely established that the grievant is a full time employee and came to work on a scheduled day off. Under the clear and unambiguous terms of Article 14.3 she is entitled to overtime. Since that provision applies it is unnecessary to determine whether she would also be entitled to overtime under the provisions of Article 14.2 requiring the payment of overtime for all work performed in excess of forty hours in any work week.

Had the parties desired to place an exception in this language for the use of sick time they could certainly have done so. Indeed there was evidence to establish that they in fact did place similar language in the contract between the County and another local within Ramsey County. See, Union Exhibit 6. Here however they did not. The implication of this is also very supportive of the Union's claim. Accordingly, the grievance is sustained with respect to the claim that there is no exception in the language of Article 14 for the use of sick time and vacation time. Moreover, the grievant must therefore be paid for any time she actually worked on the Saturday in question.

Having said that however there is no support for the payment to the grievant for the hours she claims she would have worked had she been allowed to stay, but did not actually work. First, she was offered the chance to remain at work and left because she was told she would only be paid straight time. Second, the contractual provisions require payment for “all work performed.” Under this provision there is no contractual support for the claim that the grievant should be paid for any work not performed. Moreover, it is entirely too speculative to assume the number of hours she would have worked that day. The evidence showed that overtime was voluntary and that there was no requirement that the grievant work a certain number of hours that Saturday. Under these facts it would be manifestly unfair to pay her for hours not worked. Accordingly, the part of the grievance that seeks to obtain compensation for the grievant for the time not worked on that Saturday is denied.

#### **AWARD**

The grievance is **SUSTAINED IN PART AND DENIED IN PART**. The grievance is sustained as set forth above insofar as it relates to the policy of denying overtime for work on a scheduled day off where the employee was paid for sick or vacation time during the week in which the overtime is worked. It is further sustained to order the payment of overtime pay to the grievant for the actual time she worked on the Saturday in question.

The grievance is denied however for the hours the grievant claimed she would have worked but did not on the date in question. The grievant is to be paid only for the time actually worked.

Dated: July 6, 2006

Ramsey County and AFSCME Council 5 – overtime.doc

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Jeffrey W. Jacobs, arbitrator