

IN THE MATTER OF ARBITRATION

-between-

L. E. L. S. LOCAL UNION NO. 196

-and-

**THE UNIVERSITY OF MINNESOTA
TWIN CITIES CAMPUS**

OPINION & AWARD

Grievance Arbitration

B.M.S. Case No. 11PA577

Re: Unpaid Furlough

**Before: Jay C.Fogelberg
Neutral Arbitrator**

Representation-

For the Union: Issac Kaufman, General Counsel

For the University: Shelley Carthen Watson, Assoc. General Counsel

Statement of Jurisdiction-

The Collective Bargaining Agreement duly executed by the parties, provides in Article 8 for an appeal to binding arbitration of those disputes that remain unresolved after being processed through the initial two steps of the grievance procedure. A formal complaint was submitted by the Local on behalf of the Grievants on or about December 28, 2010, and thereafter appealed to binding arbitration when the parties were unable to resolve this matter to their mutual satisfaction. The under-signed was then mutually

selected as the neutral arbitrator by the parties, and a hearing convened on May 9, 2011, in Minneapolis and continued on June 1st. Following receipt of position statements, testimony and supportive documentation, each side expressed a preference for submitting written summations. These were received on July 11, 2011, at which time the hearing was deemed officially closed.

At the commencement of the proceedings, the parties stipulated that this matter was properly before the Arbitrator for resolution based upon its merits, and that the following represents a fair description of the issue.

The Issue-

Did the Employer violate the Collective Bargaining Agreement by imposing a 24 hour unpaid furlough on the members of Law Enforcement Labor Services, Local No. 196? If so, what shall the appropriate remedy be?

Preliminary Statement of the Facts-

The record developed during the course of the proceedings indicates that Law Enforcement Labor Services, Local 196 (hereafter "Union," "LELS" or "Local") represents, all Police Officers and Sergeants whose hours of service exceed fourteen per week or thirty-five per cent of the normal work week

and more than sixty-seven work days per year, who are employed by the University of Minnesota ("University," "Employer," or "Administration") at their Twin Cities, Duluth and Morris Campuses. Together, the parties have negotiated a labor agreement covering terms and conditions of employment for members of the bargaining unit (Union's Ex. 1).

Faced with financial stringency in 2009, the University's Board of Regents approved a resolution affirming President Bruininks' recommendation that the employees at each of the University's three campuses would be placed on unpaid furloughs in FY 2010. The action taken was to be system-wide affecting represented bargaining units, civil service staff, faculty, academic P&A employees and senior administrators as well.

In the spring of 2010, the University notified all employees and unions that the campuses would be closed during the week between the Christmas and New Years holidays at the end of that year in an effort to reduce costs. Attendant with the closures was notification that there would be a three day furlough to be served during that week. Thereafter, the Employer engaged in negotiations with all organized employee units regarding implementation of their plan. However, the parties reached an impasse with Local 196 when no agreement could be achieved through bargaining. Consequently, the

Local filed a formal grievance on November 29, 2010, alleging violations of Articles 10 (Seniority), 21 (Holidays), 28 (Salaries), and 30 (Longevity) along with the parties' past practice.¹ Eventually, the matter was appealed to binding arbitration for resolution, after being processed through the initial steps of the grievance process.

Relevant Contract Provisions-

Article 10 Seniority

* * *

10.4 A reduction of work force will be accomplished on the basis of departmental seniority.

Article 21 Holidays

* * *

21.9 If shift sizes are reduced during holidays, senior employees on affected shifts will be allowed to work if they so desire, provided that the holiday is not a regularly assigned day off.

Article 28 Salaries

28.1 Pay rates based on years (2080 straight time hours) in classification.....

¹ At the outset of the hearing, the Union indicated that they were withdrawing their allegations regarding a violation of the Holiday Pay Article and the Contract Clause.

Article 30 Longevity

30.1 Longevity payments shall be made to eligible employees according to the following schedules (a year of service is 2080 straight time hours worked), except for the limitation on service hours outlined in Article 28.1.....

Positions of the Parties-

The **UNION** takes the position in this matter that the University's unilateral decision to impose a 24 hour unpaid furlough in FY 2011 on members of the bargaining unit violated relevant terms and conditions of the parties' Master Agreement. In support of their claim, the Local contends that while the Employer may choose to label their action a "furlough," what in fact occurred was a reduction in the work force within the Campus Police Department. A reduction in force is addressed in the Contract and controls what the Administration is seeking to impose here. While other employee groups within the University's system may not be organized and consequently have no collective bargaining agreement to reference, that is not the case here. In this instance, the bargained agreement specifically provides that seniority is to be followed where there is a reduction in force. That has not occurred in each instance since the Employer imposed the

furlough however. Rather, at times less senior employees were retained while those with greater longevity have been furloughed. The Union acknowledges the financial difficulties currently facing the University and other publicly funded entities. Nevertheless, they argue that the terms of the contract that has been negotiated by the parties must be honored. Moreover, as it pertains to the Police Department, the Administration has not demonstrated financial hardship. Rather, they have seen fit to hire more officers and issue promotions. Accordingly, for all these reasons they ask that the grievance be sustained and that the University be directed to refrain from laying off officers without regard to the seniority and other relevant contract provisions, and to make whole those who have already been adversely affected by the action.

Conversely, the **UNIVERSITY** takes the position that there has been no violation of the Labor Agreement as a result of the imposition of the 24 hour unpaid furlough. In support of their argument, the Employer asserts that due to the financial difficulties that the Administration has been faced with the past several years, an extraordinary response was necessary to counteract the loss of revenue which the University has been experiencing. Accordingly, it was determined that an imposition of a relatively brief unpaid furlough was to be put in place for FY 2011. The Employer maintains that the

action taken by the Board of Regents was system-wide, and will save the University some \$18.5 million dollars when paired with reductions in salaries for faculty, and other employees of the University. Additionally, they note that all unionized employees within the University agreed to the plan with the exception of Local 196. The Administration contends that given the fact that there is no language in the parties' Labor Agreement that addresses furloughs, it may impose them under the management rights clause found in Article 5. Further, the Employer asserts that a furlough is not a permanent reduction in force or a layoff as it is by definition, temporary and finite. The Union's reliance on language in the Master Contract referencing 2080 hours is misplaced, in the Administration's view, as it is not used to signify any guarantee of straight time hours for the Grievants. Rather it is referenced for the purpose of defining a normal year of service and to provide direction as to when an employee has achieved the requisite number of hours worked to be eligible for longevity pay. For all these reasons then, they ask that the grievance be denied in its entirety.

Analysis of the Evidence-

During the course of the proceedings, a considerable amount of time and effort was devoted to the financial crisis facing the University in 2009 and 2010, which ultimately led to the decision to implement system-wide furloughs as part of their cost-cutting measures. Alternatives were addressed, and the relative savings realized through implementation of the furlough considered. The parties met and discussed the matter on more than one occasion, prior to reaching an impasse. However, this is not an interest arbitration. As both sides have acknowledged, I am not being asked to decide whether the Administration's decision was fiscally prudent, or that other means of reducing costs would be more effective. Rather, as a grievance arbitrator I have been called upon to examine the facts surrounding the dispute *vis-à-vis* the applicable language in the parties' labor agreement to determine whether the furloughs ordered violated the terms and conditions of their contract. Accordingly, the budgetary circumstances of the University are not deemed relevant to my deliberations and will not be made a part of this decision.

Even a cursory review of the record quickly indicates that the threshold question to be considered is whether the mandated three day furlough for the Grievants (and the vast majority of employees throughout

the University – organized or otherwise) which was implemented primarily during the last week in 2010, was tantamount to a reduction in force and therefore subject to the negotiated layoff section of the contract (Article 10), as the Union maintains, or was sanctioned under the management's rights provisions found in Article 5 – the defense advanced by the Employer.

As the moving party, the Local bears the initial burden of proof to demonstrate by a preponderance of the evidence that the furlough, by any other name was in fact a reduction in force and therefore governed by the language in found in Article 10 ("Seniority," *supra*) of the parties' Labor Agreement. In this regard, they have placed no small amount of reliance on the 2010 award of Arbitrator Tom Gallagher, in *Teamsters Local 329 and the County of Pope* (BMS Case No. 10-PA-0870) as support for their position. In *Pope*, the arbitrator found that the mandatory furloughs imposed on all non-supervisory hourly employees that comprised the bargaining unit (one hour each week during calendar year 2010), violated the collective bargaining agreement as they constituted, in essence, a "reduction in the work force." Such a reduction, he found, violated the parties' agreement which mandated that it be accomplished "...on the basis of classification seniority within the department" (Union's Ex. 22; p. 19).

To be sure, Arbitrator Gallagher's decision was thorough and well-reasoned. However, I find it is distinguishable from the instant dispute, and therefore limited in its persuasion. The matter before me for resolution does not involve an identical issue when examined more closely. In *Pope County*, the parties went to considerable lengths to craft what the arbitrator described as "...a detailed system for reducing the hours worked by employees..." (*id.* at p. 22). He noted that there were no fewer than five sections detailing the layoff process and an additional four regarding recall from layoff. In the instant matter however, there are no similar provisions. Rather, there is only a scant reference in Section 10.4 – contained in a single sentence – which calls for the reduction of the work force to be accomplished, "...on the basis of departmental seniority" (Joint Ex. 1; p. 6).

More importantly, the Gallagher decision placed considerable weight on the contractual provision that established a normal work week at either 40 or 37½ hours. Given the language in the parties' agreement which utilized the mandatory auxiliary verb "shall" in defining a "normal work week," the arbitrator concluded that the reserved managerial prerogative to establish work schedules did not give the employer the right to reduce hours via a furlough, because doing so would reduce the work of the grievants, "...below the hours defined as the normal work week for full time

employees” (*id.* at p. 21). The effect of such a furlough, he reasoned, would be tantamount to changing their status to that of part-time employees, and therefore contrary to the intent of the language.²

In the instant dispute, beyond the fact that there is no clearly delineated layoff provision, most significantly there is also an absence of similar language which can reasonably be interpreted as a guarantee of a normal work week. Nowhere in the parties’ master agreement is there the type of provision relied upon by the arbitrator in *Pope County* clearly delineating the number of hours that comprised the work week for members of the affected bargaining unit. Moreover, under cross-examination, the Local’s President Jason Tossey, acknowledged that there is nothing in the contract which specifically limits the Administration’s right to implement furloughs. This unrefuted fact serves to buttress the University’s position that in the absence of language addressing furloughs or otherwise guaranteeing hours of work for the Grievants, they properly exercised their managerial rights as reserved in Article 5. More particularly, Section 5.1 states: “...the Employer retains the sole right to operate and manage all personnel;” to “...direct and determine the number of personnel,” and; “to establish work schedules.” (Joint Ex. 1; at p. 2). While I do not share the University’s view

² Arbitrator Gallagher further observed that other parts of the contract he was reviewing contained language tied to the definition of a normal work week, such as sick leave and vacation benefits.

that the right to establish work schedules necessarily encompasses the imposition of a furlough, the Administration's reserved prerogative to establish or modify terms and conditions of employment "not specifically established or modified" by the parties' labor agreement as set forth in Section 5.2, does.

The lack of a defined work-week notwithstanding, the Union notes that in Section 28.1 of the master contract, the hourly and monthly pay rates set forth therein are based on 2080 straight time hours in the job classification. Thus, they argue, since the number of hours worked over a year by full-time officers in the Department has been established at 2080, it follows that furloughing each of the Grievants has the effect of reducing them to part-time status which is not authorized anywhere in the labor agreement. This conclusion is bolstered, according to the Local, by the fact that longevity pay and probationary periods also make reference to the annual 2080 straight time hours (Sections 12.1 and 30.1).

At first glance, the Union's position would appear to track the ruling of Arbitrator Gallagher in *Pope County*. Upon closer examination however, the Grievants' argument begins to lose altitude.

Section 28.1's reference to 2080 hours is parenthetical as regards pay rates. There is no definitive language indicating that the parties intended

the benchmark to constitute a guarantee of hours to be worked in any given year, unlike the relevant contract provisions considered in the *Pope County* matter. It is more probable, in my judgment, that the reference was placed in the agreement to provide direction, as the University has argued, and to simply give the employees a general idea of the wages they might normally earn on either an hourly or monthly basis. Nowhere in either Section 26.1 addressing pay rates nor in 30.1 where longevity payments have been established, is there definitive language setting forth the normal work week or month in any detail. The language crafted by the parties did not utilize the mandatory verbiage similar to that found in *Pope County*, which might otherwise be construed as a guarantee of hours. A definition of a year of service, as found in the master contract, is not tantamount to an established, certified and therefore “normal work week” which the reader might otherwise recognize as a guarantee.

The conclusion reached here finds further support in the unrefuted fact that no established past practice exists between the parties indicating that they have consistently interpreted their working agreement to guarantee 2080 hours of straight time each year for members of the bargaining unit. Deputy Police Chief Charles Minor, a member of the UMPD for over fifteen years, and a former Union Steward for this bargaining unit,

offered essentially unrefuted testimony that there has never been a guarantee of 2080 hours during his tenure in the Department. Moreover, he offered that there have been numerous occasions in which officers have not worked 2080 straight time hours in any given year due to such factors as leaves of absence under FMLA or other unpaid leaves, and therefore would not receive full pay based on the benchmark, for that particular year. In sum, I would concur with the Employer that the inclusion of a definition of a year of service in the master agreement was intended to provide guidance as to when an employee has achieved the requisite number of hours worked to be eligible for an increase in salary or longevity pay, and that the monthly and hourly listing of wages in Article 28 exists more as a convenience to give employees a general idea of what they might earn within that measurement.³

Finally, I have been guided in part in this matter by the use of dictionary definitions – general, legal, and specific to the industrial relations process – which do little to equate a furlough with a “reduction of work force” referenced in Section 10.4 of the parties’ contract. *Webster’s New*

³ The Local urges that it is critical to note that the parties’ contract does not contain a disclaimer that 2080 hours is not a guaranteed amount of work. I must respectfully disagree with their argument, however. It is the guarantee of hours which must be expressly stated in order to establish a minimum amount of work. Short of a well-established practice, such a significant term and condition of employment should not be implied or inferred based upon its absence in a collective bargaining agreement.

World Dictionary, defines "furlough" to be a temporary leave of absence. In *Black's Law Dictionary*, 6th Ed. a similar description of the word is offered, characterizing it as a temporary leave of absence, "...to one in the armed services, or to a governmental official or an employee..." Perhaps most significantly, *Roberts' Dictionary of Industrial Relations*, BNA Books 4th ed., explains the term as, "A leave of absence from work or other duties...to meet some special problem. *It is temporary in nature since the employee plans to return as soon as the furlough period is over*" (at p. 273; emphasis added).

The Civil Service Reform Act also includes a definition of "furlough," calling it "the placing of an employee in a temporary status without duties and pay because of lack of work or funds or other non-disciplinary reasons." The common thread running through all of the above definitions is the temporary nature of the action. Quite unlike any layoff, an employee who is furloughed fully expects to return to his/her employer's workforce. It is a finite act as opposed to a reduction in force which is indefinite. No change in employment status normally accompanies a furlough. Seniority and contractual benefits – particularly for those in a bargaining unit – are expected to continue. When the University placed the Grievants on furlough, the evidence demonstrates conclusively that no positions in the

bargaining unit were eliminated. Nor was the overall size of the workforce in the Department reduced. Nearly all the witnesses on both sides of the table testified that each of the officers who were furloughed has remained on the force and in the employ of the University, and continue to accrue the benefits specified in the master agreement.

Award-

Accordingly, for the reasons set forth above, the grievance is denied.

Respectfully submitted this 4th day of August, 2011.

Jay C. Fogelberg, Neutral Arbitrator