

IN THE MATTER OF THE ARBITRATION BETWEEN

Greater Minnesota AFSCME Council 65,

Union

and

OPINION AND AWARD

Grievance of
AFSCME, Council 65
(Overtime Threshold Computation)

Virginia Regional Medical Center,
Virginia, Minnesota

Employer.

BMS Case No. 11-HA-935

ARBITRATOR:

Janice K. Frankman, J.D.

DATE OF AWARD:

October 4, 2011

HEARING SITE:

Virginia Regional Medical Center
901 9th Street North
Virginia MN 55792

HEARING DATE:

August 25, 2011

RECORD CLOSED:

September 9, 2011

REPRESENTING THE UNION:

Sarah Lewerenz, Attorney at Law
AFSCME Council 65
517 West 6th Street
Duluth MN 55806

REPRESENTING THE EMPLOYER:

William R. Smith, CEO/Human
Resources Director
Virginia Regional Medical Center
901 9th Street North
Virginia MN 55792

JURISDICTION

The hearing in this matter was held on August 25, 2011. The Arbitrator was selected to serve pursuant to the parties' collective bargaining agreement and the procedures of BMS. Both parties were afforded a full and fair opportunity to present their cases. Witnesses were sworn and their testimony was subject to cross-examination. The parties submitted post-hearing briefs which were received on September 7 and 9, 2011, from the Employer and the Union respectively, when the record closed and the matter was taken under advisement. The Union's request for a short extension to file its Brief was granted. Accordingly, its Brief was filed timely.

ISSUE

The parties submitted the following statements of the issue(s) set out in their Post-hearing Briefs:

Union

Does a valid past practice exist under which the Virginia Regional Medical Center must pay overtime pay at the time and one half rate to employees covered by the AFSCME Council 65 Service and Support bargaining unit (sic) based on ALL hours compensated instead of based on actual hours worked? If such a valid past practice does exist, what shall the remedy be in this matter?

Employer

Does clear, consistent and unambiguous contract language prevail over past practice?

Following careful review of the hearing record, the Arbitrator believes the following is an accurate statement of the issues:

Did the Employer violate the parties' Collective Bargaining Agreement when it failed to pay the Grievant overtime compensation for a two week pay period in November, 2010, and changed the manner in which the threshold for overtime compensation is determined for all bargaining unit members? If so, what is the remedy?

BACKGROUND AND SUMMARY OF THE EVIDENCE

The Virginia Regional Medical Center ("VRMC") is owned by the City of Virginia, Minnesota. At the time of this hearing, it operated a Regional Hospital with approximately 100 beds and a Convalescent Care Center with approximately 30 beds. The parties have had a long-term collective bargaining relationship. The Union represents this Service and Support bargaining unit of 120 employees. It also

represents the Licensed Practical Nurses (“LPN”), covered by a separate Collective Bargaining Agreement with VRMC.

William R. Smith is the Interim CEO and Director of Human Resources for VRMC. He represented the Employer at this hearing and did not testify. It may be inferred from this record that Mr. Smith took his position with VRMC in mid-2010.

Virginia Hummel has been employed by VRMC for 23 years. She is a Medical Records Clerk, and has served as a Trustee of the Union and on its Executive Board. This Class Action Grievance was filed on December 8, 2010, on behalf of her and all members of the bargaining unit.

The Collective Bargaining Agreement (“CBA”) dated January 1, 2010, in effect at the time the Grievance was filed, was extended by its terms, to the date of the current CBA which became effective on May 1, 2011, the date of its ratification. Both CBAs are a part of this record. It is unclear when the 2011 LPN CBA became effective.¹

The Grievance; The Union’s Case

The Grievance cites violation of several provisions of the CBA and invokes past practice in support of its claim for lost wages as a result of incorrect overtime payment. It seeks a make whole remedy on behalf of Ms. Hummel and the bargaining unit.

For the pay period November 7 – 20, 2010, Ms. Hummel was paid for 91 hours including 58.5 regular pay, 32 hours vacation pay and .5 hour overtime pay. She and two other long-term employee witnesses testified that during their entire tenure at VRMC, they had been paid overtime at the rate of straight time and one-half based upon all compensated hours in a pay period. The claim here is that the Grievant was shorted overtime pay for time when she was called into work because of shortage of staff, during a pay period when she was on paid vacation.

Jane Johnson retired in June, 2009, after more than 42 years as a bargaining unit member employed at VRMC. She was active in the Union serving as a Trustee, Executive Board member, Treasurer and other positions during most of her working years. She testified that she worked a lot of overtime and was always compensated based upon the total number of hours for which she was paid in a pay period including hours worked, vacation, sick, holiday and other paid leave days. She believed that all employees of VRMC were paid overtime pay on that basis.

Marion Kishel worked for VRMC for nearly eleven (11) years beginning in 1999, as an administrative assistant. She was not a bargaining unit member. She became a payroll technician, and for 9 ½ years, she worked with the bargaining unit payroll. All types of paid leave including vacation, sick, holiday, jury duty, personal and funeral leave hours were counted toward the overtime threshold. The process did not vary

¹ The CBA cover page is dated, “Ratification Date, 2011 – December, 2011”. The signature page only provides dates after Mr. Smith’s signature (“3/16/11” and “eff.3/20/11”).

during Ms. Kishel's tenure with VRMC. All administrators and managers were aware of the computations, which each verified as correct before employees were paid. They each received periodic detail with regard to the amount of overtime which had been paid to those whom they supervised.

In 1990-1991, VRMC computerized its payroll system. Computer software was used to calculate and pay overtime. The software was programmed to recognize the several paid leave categories in the computation of the threshold for overtime pay.

Two previous Human Resources Directors responded to the Union Business Agent Ida Rukavina's December, 2010, requests for information concerning the practice of calculating the threshold for overtime pay. She advised them that she was preparing for a grievance meeting with the Virginia Hospital Commission ("Commission") in January, 2011, and would appreciate their confirmation that the VRMC was aware of and had acknowledged the past practice.²

Louis Russo was HR Director of VRMC from January, 1971 to March, 1981. He responded to Ms. Rukavina's December 16, email on December 23, 2010: "As to your question, all hours paid were considered the same as hours worked for the calculation of overtime, seniority, vacation etc. If you have any questions in this regard, please feel free to call me." Union Exhibit book, page 41. Ms. Rukavina shared their email exchange with the Commission during the Grievance process.

Stephen Roskoski was HR Director at VRMC from August, 1988 to an unspecified date in 2010, when Mr. Smith succeeded him. Mr. Roskoski responded, as follows, to Ms. Rukavina, by letter dated December 28, 2010, which she submitted to the Commission:

* * *

The known practice by both the management of the Virginia Regional Medical Center and AFSCME was that all hours of pay (except premium pay, such as Sunday Pay and Extra Call) were utilized for the calculation of overtime. The overtime hour calculation included actual worked hours and the benefit hours for holiday, vacation, sick leave, funeral leave, personal days, etc.

I was the Human Resources Director starting in August of 1988 and this practice was in place prior to the beginning of my tenure with the Medical Center. Up until 1991, the payroll was calculated manually until the implementation of the current CPSI computer system. The Medical Center directed the set-up of the CPSI payroll system and, at that time, continued the overtime payment practice.

* * *

Union Exhibit book, page 42

² The Virginia Hospital Commission, by its President, is one of four signatories to the parties' Collective Bargaining Agreements.

The Employer's Case

In response to a pre-hearing Subpoena Duces Tecum, Mr. Smith stipulated via email dated August 4, 2011 as follows:

. . . . I will stipulate for the record that the weekly O.T. calculation for employees covered by the Service and support labor agreement has been calculated on hours paid rather than hours worked consistently at least since 2005 up to pay period ending 10/23/10 when it was changed to hours worked which is the basis of this case. I will also stipulate that department managers verify by signature each pay period such things as hours worked and other hours to be paid such as vacation, sick or holidays not worked. Also – there are no policies or documents that I am aware of other than the applicable labor agreement and federal state law that cover the local over time threshold calculation for AFSCME employees at VRMC. . . .

Union Exhibit book, page 45

Mr. Smith also produced a sworn “Summary of Events” document in response to the Subpoena which provides the following statements:

- New Payroll Clerk started work at VRMC on August 30, 2010.
- In the course of learning her new job, she questioned why weekly overtime was being paid to some employees who did not work over forty (40) hours in a week but due to vacation, sick or holiday (paid but not worked) were paid over forty (40) hours with the hours greater than forty (40) at overtime rates.
- I investigated the involved AFSCME labor agreements and concluded that (1) per the agreement with the Licensed Practical Nurse's, while unusual, the inclusion of paid hours to calculate weekly overtime was proper per the expressed terms and that (2) per the agreement with the Service and Support employees was in conflict with and in error per the expressed terms (sic).
- I notified the Union when the error was discovered and instructed that it be corrected to the terms of the Service and Support Agreement on a current basis (no retroactivity).
- The calculation was changed to the terms of the Service and Support contract the pay period ending 10/23/2010 and continues as such today.

Union Exhibit book, page 40

Richard Weiss, Manager of Facility and Environmental Services, has been employed by VRMC for 4 ½ years. He supervises bargaining unit members and agreed that he had authorized payment of overtime for employees following the threshold computation as described by the Union witnesses. He stated that he became aware that the computation process was “in conflict with the Collective Bargaining Agreement” after a new payroll clerk was hired on August 30, 2010. He stated that his practice in supervising his employees was to follow the CBA language and that he agreed with the change which had been made in October, 2010, in the threshold computation for overtime pay which had been made.

Mr. Weiss was a part of the negotiation team for the Employer in January, 2011, for the current CBA. He did not participate in negotiations in 2009, for the January – December, 2010, CBA. He was referred, on direct examination, to proposals made during bargaining of the current CBA; to several provisions within the Agreement as ratified in May, 2011; and to the 2010 CBA, agreeing that there had been no change in the language in question in this matter. He stated he was told that, without a change in the 2010 Contract language, the Employer would continue to calculate the overtime threshold based only on hours worked in a pay period.

Mr. Weiss was also referred to the current AFSCME CBA with the LPNs which includes express language that all hours for which the employee is paid shall be considered hours worked in administering the Agreement. Mr. Weiss does not supervise employees covered by the AFSCME/LPN Agreement.³ He agreed, on cross-examination, that he had no labor relations training and was not versed with respect to the impact and application of “past practice” in the context of a labor agreement.

Collective Bargaining for 2011 CBA

Union Exhibit Book, pages 46 -51 and Employer Exhibits H and I set out written proposals made by the parties during bargaining sessions on January 6, 12 and 31, 2011. Ms. Rukavina’s testimony is unrefuted that none of the Tentative Agreements reached during negotiations addressed how the overtime pay threshold was to be calculated. In her view, the negotiations resulted in a CBA which did not change the past practice.

The parties exchanged written proposals at the first negotiation session on January 6, 2011. The following Employer Proposal addressed overtime which was rejected by the Union: “Weekly overtime: Agree to enforce existing contract language (hours worked basis) rather past practice (hours paid).” Union Exhibit Book, page 46 and Employer Exhibit I

At their second meeting on January 12, the Employer provided the Union with a copy of the 2010 CBA where proposed changes were underlined and interlined. The changes included adding the following underlined sentence at Section 6.3 of Article 6 which addresses Holiday Provisions and which was rejected by the Union:

³ The several relevant provisions of the parties’ CBAs in effect for 2010 and 2011 are detailed below at pages 7-10.

* * *

Actual hours worked on the holiday shall be counted for the purpose of computing overtime for that week. All weekly overtime is based on hours worked. An employee requested to be on call for a designated holiday shall receive call pay at the rate set forth in Section 5.6 for hours on call, time and one-half (1 ½) for hours worked on the holiday, and straight time holiday pay, pro-rated for part-time.

Union Exhibit Book, Page 48

On January 31, the Employer provided alternative Proposals A and B both of which made reference to Tentative Agreement Items along with three other areas. They made no reference to the topic of overtime. The CBA which resulted from the negotiations became effective on May 1, 2011 and will expire on December 31, 2011, or from year to year unless either party gives proper notice of a desire to terminate or amend the Agreement.

Relevant Contract Provisions

Articles 2, 3, 5, 6 and 15 of the parties' CBAs effective for the period January, 1, 2010, to the present, address Intent and Purpose, Rights of Management, Hours of Work, Holiday Provisions and Grievance Procedure respectively.⁴ The current CBA between the Union and the Employer which applies to the Licensed Practical Nurses is also a part of this record. Articles 6 and 10 of the LPN Agreement address Employee Definitions and Salaries and Scheduling respectively. Relevant provisions of the Agreements of the two bargaining units follow:

Service and Support Unit Agreement

ARTICLE 2 INTENT AND PURPOSE

Section 2.1

Purpose: The purpose of this Agreement is . . . (c) to establish standard hours of work, rates of pay, and working conditions:
Employer Exhibit B, page 4

ARTICLE 3 RIGHTS OF MANAGEMENT

* * *

⁴ This record includes the parties' two most recent Collective Bargaining Agreements, one for the period January 1, 2010-December 31, 2010, effective on the date that the Grievance was filed; and the Agreement which followed it and became effective upon ratification on May 1, 2011. There has not been a line by line comparison of the two Agreements. The provisions cited and quoted in this Background portion of this Award are identical in the two Agreements. Citation will be to the Agreement in effect the date the Grievance was filed, which was offered and received as Employer Exhibit B.

Section 3.2

Successors and Assignees: This Agreement shall be binding upon the successors and assignees of the parties hereto, under this contract, and no provisions, terms or obligations herein contained shall be affected, modified, altered, or changed in any respect whatsoever by any change of any kind of the ownership, or management of either party

Id. at page 5

ARTICLE 5
HOURS OF WORK

Section 5.1

Definition of Work Week: The normal hours of work shall be eight (8) hours per day and forty (40) hours per week. The work week shall consist of five (5) consecutive days of eight (8) hours each. All hours worked in excess of eight (8) hours per day or forty (40) hours per week shall be compensated for at time and one-half (1-1/2) rates. The Hospital does not guarantee eight (8) hours per day or forty (40) hours per week.

There shall be no pyramiding of overtime or premium pay.

* * *

Id. at page 7

ARTICLE 6
HOLIDAY PROVISIONS

Section 6.1

Definition of Holidays:

* * *

Holiday pay, for holidays not worked, shall not exceed eight (8) hours of pay per holiday.

* * *

Section 6.3

Eligible full-time employees who are required to work on any of the above holidays shall be compensated either (a) at time and one-half (1-1/2) rates for their work that day and shall receive one (1) day off with pay equivalent to the hours worked on said holiday, or (b) shall receive pay at

two and one-half (2-1/2) times their straight time hourly rate for all hours worked on a holiday, in lieu of holiday pay as defined in Section 6.1.

Actual hours worked on the holiday shall be counted as time worked for the purpose of computing overtime for that week.
(emphasis added)

* * *

Id. at pages 12 and 13

ARTICLE 15
GRIEVANCE PROCEDURE

Section 15.1

Grievance Procedure Steps: Any dispute or controversy involving the interpretation or application of any of the terms or provisions of this Agreement shall be submitted under the grievance procedure as herein provided.

* * *

Step 5 -

* * *

The decision of the arbitrator will be final and binding upon the Union, the Hospital, and the employee. The decision shall be made within thirty (30) days following the close of the hearing.

Id. at page 32

LPN Agreement⁵

ARTICLE 6
EMPLOYEE DEFINITIONS

* * *

Section 6.6 Definition of Hours Paid:

For the purpose of determining probation, vacation, seniority, length of service, etc., computation will be based on hours paid. . . .

Employer Exhibit J at page 7

ARTICLE 10
SALARIES AND SCHEDULING

* * *

⁵ This record does not report the history of the LPN Collective Bargaining Agreement. Its term is “Ratification Date, 2011 –December 31, 2011”, with provision for extension by its terms. Mr. Smith executed the Agreement as Chief Executive Officer. He made the following notations after his signature; “3/16/11 eff. 3/20/11”. There is no evidence as to the date of ratification by either the VRMC Hospital Commission or the Union.

Section 10.4 Definition of Work Week:

The normal hours of work shall be eight (8) hours per twenty-four hour period and forty (40) hours per week. The work week shall consist of no more than five (5) days of eight (8) hours each. All hours worked in excess of eight (8) hours per twenty-four hour period, or more than eight (8) consecutive hours or more than forty (40) hours per week shall be compensated for at time and one-half (1-1/2) rates.

There will be no pyramiding of overtime or premium pay.

* * *

Section 10.10 Hours Worked:

All hours for which an LPN receives any pay shall be considered hours worked. (emphasis added)

Id. at page 15

OPINION AND FINDINGS

It is appropriate to sustain this Grievance. The Union has satisfied its burden of proof, demonstrating that the Employer breached the parties' CBA when it incorrectly calculated overtime pay to which the Grievant was entitled for overtime worked during a two week period when she received paid vacation compensation. The evidence and testimony supports a conclusion that a long-standing, well-established past practice, recognized by both parties, applies in this case. It is, indeed, a time-worn term and condition of the parties' Collective Bargaining Agreement. The practice calls for computation of overtime pay when the forty hour per week threshold has been met including hours worked and hours for which an employee has otherwise properly received straight time compensation, in this case, vacation pay.

The Employer has failed to demonstrate that clear and unambiguous Contract language supports its case, or that, in any event, it was entitled to unilaterally repudiate the practice which has existed for more than four decades. Following its "direction to correct an error" which led to this Grievance, its attempts to amend the parties' Contract to address the issue, failed through bargaining a few months later. The Employer cannot now accomplish through arbitration what it could not achieve at the bargaining table.

This case raises issues of contract interpretation, particularly when and how past practice is established and properly enforced, and whether and how it may be reversed, refuted or repudiated. The facts of cases which raise these issues are determinative of the outcome and distinguish one matter from another. The unique and determinative facts of this case will be highlighted below, having been set out in detail in the foregoing Background and Summary of the Evidence. It is also appropriate to address the parties'

cases and their arguments in support of their positions as well as the matter of the Arbitrator's jurisdiction which has been expanded by the parties to the extent this Award is prospective and applicable to the CBA which was the subject of bargaining following the filing of this Grievance and which became effective on May 1, 2011, and is due to expire on December 31, 2011, unless extended per its terms.

Past Practice

The parties have invoked and cited Richard Mittenthal's time-worn and thorough paper on the topic of Past Practice, published in the early 1960's Proceedings of the National Academy of Arbitrators. Mr. Mittenthal is a highly revered labor arbitrator who is often cited and quoted in labor arbitration awards. Awards prepared by other labor arbitrators, including this Arbitrator, in which past practice was a principal issue, have also been submitted for consideration in resolving the issues in this case.

As its statement of the issue reveals, the Employer has relied entirely on its belief that the CBA provides clear and unambiguous language precluding the establishment of a practice contrary to its express terms. In fact, its premise is flawed. There is no clear and unambiguous language which directs the computation of the threshold for payment of overtime. There is no discrete overtime provision.

The Contract language upon which the Employer relies in support of its case, is quoted above at pages 7-9. It appears in the Articles, and Sections within them, which define and describe the Work Week and provisions for Holiday pay. Read within the context of the two Articles and within the Agreement as whole, there is no support for the broad conclusion that Contract language provides a prescription for computation of the overtime threshold or precludes establishment of an enforceable practice, as occurred in this case.

Arguably, the Contract is silent on the topic, and the established practice created a term and condition of the parties' Agreement. In any event, there is overwhelming evidence of a long-standing, mutually recognized and applied practice which is not properly regarded as "a mistake" and can only be repudiated through bargaining.

The Employer introduced into evidence its Contract with the Union which applies to the LPN unit for comparison with this bargaining unit's Contract. It is noteworthy that the two Agreements include nearly identical provisions with regard to the definition of work week and provisions for holiday pay, and are distinguished by the express provision in the LPN Agreement at Article 10, Section 10.10 which defines hours worked: "All hours for which an LPN receives any pay shall be considered hours worked." While the LPN Contract does not provide an express provision for computation of the overtime threshold, it clearly and unambiguously defines and expands the meaning of "hours worked", the issue which is at the heart of this dispute. It is a provision which expressly reflects the established practice in this case.

In addition to the Employer's stipulations and admissions as to the application of the past practice, its proposals at the bargaining table in January, 2011, are tantamount to admission that 1) bargaining was required to reverse or repudiate the past practice and, 2) clear and unambiguous contract language was required to accomplish the task.

Contract Interpretation

Many principles of interpretation are employed in resolving contract disputes. In this case, as suggested just above in the discussion of past practice, the language upon which the Employer has relied must be closely read within the context of the portion of the Contract in which it appears and within the context of the Agreement as a whole. This Contract provides for compensation at varying rates for work within and beyond an established work week; for shift differential, Sunday, call, longevity and quick change work; and for holidays, vacation, sick and funeral leave, jury duty and authorized leaves of absence. The different rates include straight time, premium, "standard" overtime at time and one-half, as well as other unique rates. In addition, there are provisions for compensatory time-off under certain circumstances. In short, there is no clear and unambiguous language which prescribes or limits the manner in which pay for overtime work shall be computed.

Jurisdiction

The parties have uniquely presented two Agreements for interpretation, the first effective on the date the Grievance was filed, and the second, their current Agreement. They have addressed the lengthy history of their collective bargaining relationship through and including bargaining for the 2011 Agreement which was ratified after the Grievance was filed and meetings were held to discuss it. Neither document provides for or limits the Arbitrator's jurisdiction. Typically and traditionally arbitrators are limited to interpretation of language within the four corners of the Collective Bargaining Agreement and prohibited from modifying or creating new language. The recognition of an established and enforceable past practice represents acknowledgment of the parties' expansion and evolution, through practice, of their written Agreement.

The Parties' Cases; Burden of Proof

The Union has sustained its burden of proof and met the Employer's arguments in support of its case. The Union's case was made through clear corroborating witness testimony, unrefuted statements of tenured management, documentary support of bargaining history, and clear demonstration of knowledge and acceptance of the practice in question by the parties. The Employer's assertions and arguments that it took the action it did to correct a "mistake"; that the Union was required to bargain for express Contract language in order to preserve the admitted past practice; and that the Commission ratified the 2011 Agreement as written and without knowledge of the past practice were all effectively met. The Employer failed to address or effectively refute witness testimony and sworn statements provided by union and management witnesses which supported unwavering practice for more than 40 years. It is unrefuted fact that

two decades ago management programmed computer software to include all sources of pay in the computation of the overtime threshold. Finally, the Employer's many admissions, through its witness testimony, pre-hearing stipulations and statements, and proposals made during bargaining bolstered the Union's case.

It is appropriate to sustain this Grievance making whole the Grievant and all bargaining unit members adversely affected by the Employer's decision to change the manner in which it computes the overtime threshold beginning with the pay period which ended on October 23, 2010, and continuing. It is also appropriate to direct the Employer to cease and desist computing the overtime threshold in the same manner and to recognize the past practice. Finally, it is appropriate for the Arbitrator to retain jurisdiction of this matter for a reasonable period of time, for the sole purpose of assisting the parties with the implementation of this Award.

AWARD

The Grievance is sustained. Consistent with the foregoing Opinion and Award, the Employer shall:

1. Make whole the Grievant and all other adversely affected bargaining unit members.
2. Cease and desist from computing the threshold for overtime pay in the manner which resulted in this Grievance.
3. Reinstatement the established past practice recognized in this Opinion and Award.

The Arbitrator shall retain jurisdiction of this matter for a period of 60 days from the date of this Award for the sole purpose of assisting the parties with implementation of it.

Dated: October 4, 2011

Janice K. Frankman, J.D.
Labor Arbitrator