

IN THE MATTER OF THE ARBITRATION BETWEEN;

**Law Enforcement Labor Services, Inc.
Local 309**

-and-

**ARBITRATION OPINION
AND AWARD**

City of St. Cloud

BMS No.: 09-PA-0887

Arbitrator

Richard A. Beens

Appearances

For the Union:

**Christopher K. Wachtler, Esq.
Collins, Buckley, Sauntry and Haugh, P.L.L.P.
W-1100 First National Bank Building
332 Minnesota Street
St. Paul, MN 55101-1379**

For the Employer:

**Gary N. Gustafson, Esq.
St Cloud City Hall
400 2nd Street
St. Cloud, MN 56301**

Date of Award

December 27, 2011

JURISDICTION

This arbitration arises pursuant to a Memorandum of Understanding (“MOU”) between Law Enforcement Labor Services, Inc., Local 309 (“Union” or “Grievant”) and the City of St. Cloud, Minnesota (“Employer” or “City”).

The undersigned neutral arbitrator was selected by the parties to conduct a hearing and render an arbitration award. The hearing was held on December 6, 2011 in St. Cloud, Minnesota. Neither party raised procedural objections. Both were afforded the opportunity for the examination and cross-examination of witnesses and for the introduction of exhibits. Final, written briefs were filed on December 21, 2011. The record was then closed and the matter deemed submitted.

ISSUE

It was left to the arbitrator to formulate the issue, which is found to be:
Does the City have the right to order an employee to not work on a holiday when the holiday falls on a regularly scheduled workday?

FACTUAL BACKGROUND

The City of St. Cloud is a Minnesota municipal corporation and is the county seat of Stearns County. Located in east central Minnesota, St. Cloud has a population of slightly under 66,000.¹ It’s full-time police force currently includes four lieutenants who comprise the grieving supervisory bargaining unit represented by LELS Local 309. A review of Local 309’s history is helpful.

When the supervisory bargaining unit was created during 2003 and 2004, it

¹ United States Census Bureau, 2010 (<http://quickfacts.census.gov>)

consisted of three Captains and one Lieutenant. The Captains served directly under the Chief and created their own schedules. However, the Lieutenant's schedule was set by his supervising Captain. In 2005, one Captain retired. His slot was then filled by a new Lieutenant. The departments command structure was reorganized in 2007. The two existing Captains were promoted to Assistant Chiefs. As Assistant Chiefs, they were no longer eligible for membership in the Local 309 bargaining unit. In their place two new Lieutenant positions were created. Local 309 has consisted of four Lieutenants from that time to the present.

Lieutenants have never had the right to set their own work schedules. From January, 2009 forward, posted departmental schedules clearly mark their assigned workdays.² The Lieutenants customarily work 40 hours per week and are scheduled from 7 AM through 3 PM Monday through Friday. Absent an emergency situation, they never work on Saturdays or Sundays. If they work overtime hours, they are paid one and one-half times their regular rate of pay.³ Additional benefits include twelve (12) paid holidays.⁴ If a lieutenant works on a holiday, he or she is paid time and one-half for all hours worked in addition to their regular holiday pay.⁵ By their very nature certain holidays require an elevated police presence. For the City of St. Cloud, the 4th of July is one. Another has been St. Cloud State University "move in day." Usually falling on Labor Day, it is the time several thousand students, often accompanied by their families, return for the beginning of the new school year. Both holidays are marked by large

² Exhibits 6, 7, and 8.

³ Exhibit 2, Article 12.1.

⁴ Exhibit 2, Article 15.1.

⁵ Exhibit 2, Article 15.1

groups of celebrating people necessitating all available officers, including Lieutenants, to be on duty.

The specific issue giving rise to this arbitration occurs when a holiday falls on a regularly scheduled work day. According to Union witnesses, prior to 2008 Local 309 members had two options: 1) they could take the holiday off and simply receive their straight-time holiday pay, or, 2) they could work the holiday and receive time and one-half for the holiday hours worked plus their straight-time holiday pay. When the holiday fell on their normally scheduled workday, they had to request and receive approval from their supervisor to take the day off.

Beginning in 2008, the process changed. The national financial recession and declining local government aids from the state legislature squeezed the City of St. Cloud's budget from then to the present. The City's property tax levy and general fund expenditures have both decreased approximately 7% during the period. Local government aids were reduced by \$3.8 million.⁶ Fiscal reality has led to significant changes in City operations.

In early 2008, the Mayor and City Council ordered a city-wide hiring freeze, reduction in capital spending, and elimination of out-of-state training. As a result, the City has 45 fewer employees, mainly through attrition, today than in 2008. The Police Department, one of the City's largest budget items, was also ordered to reduce expenditures wherever possible without resorting to lay-offs. No new squad cars have been purchased for three years. Officer use of take-home cars was eliminated. The

⁶ Exhibit 17.

salaries of five officers is now covered through a COPS grant.⁷ St. Cloud State University agreed to hold “move in day” a week before Labor Day in order to reduce the need for holiday overtime pay. Finally, in 2008, the police Chief informed the Assistant Chiefs that, absent emergency needs, Lieutenants should not be allowed to work on holidays. That order has remained in effect to the present forms the dispute leading to this arbitration. After being disallowed work on Veteran’s Day, which fell on his normally scheduled weekday in 2008, a member of Local 309 filed the present grievance.⁸

APPLICABLE CONTRACT PROVISIONS⁹

Article V - Management Rights

It is recognized that, except as expressly stated herein, the City shall retain whatever rights and authority that are necessary for it to operate and direct the affairs of the City in all of its various aspects, including, but not limited to:

- 1) *The right to direct the working forces.***
- 2) *To plan, direct, and control all the operations and services of the City.***
- 3) *To determine the methods, means, organization, and number of personnel by which such operations and services are to be conducted.***
- 4) *To hire, promote, assign, and transfer employees.***
- 5) *To contract for goods or services.***
- 6) *To demote, suspend, discipline, or discharge employees for just cause.***
- 7) *To make and enforce reasonable rules and regulations.***
- 8) *To change existing methods, equipment, or facilities.***
- 9) *To lay off employees as the City determines to be necessary for lack of***

⁷ Community Oriented Policing Services (COPS) is an office of the United States Department of Justice. In February, 2009 COPS was appropriated \$1 billion under the American Recovery and Reinvestment Act to be spent on an effort to create and preserve police jobs.

⁸ Exhibit 13.

⁹ Exhibit 3. Although all the MOU provisions quoted here are taken from the 1-1-2006 through 12-31-2008 contract, they have remained unchanged from the initial 2004-2005 CBA to the present day.

work, lack of funds or other reasons without reference to incompetence, misconduct or other behavioral considerations. (Emphasis added)

Article XI - Work Schedules

11.1 Posting. *Work schedules, including starting and quitting times, will be posted on the departmental bulletin boards at all times. Upon becoming aware of the need for a schedule change, a reasonable effort shall be made by the employer to post any change in work schedules at least three (3) working days or five (5) calendar days in advance of the change, provided, however, that in the case of an emergency, the department head may for the duration of the emergency change work schedules without prior notice. The City shall make a reasonable effort to post work schedules on or before January 15 of each year. **The City retains the sole discretion to schedule its employees to best meet the needs of the City.** The department head may change work schedules without prior notice for any employee place on administrative leave. (Emphasis added)*

Article XV - Holidays

15.1 Holiday Pay. *Employees shall receive the following twelve (12) paid holidays:*

<i>New Year's Day</i>	-	<i>January 1</i>
<i>Martin Luther King's Birthday</i>	-	<i>3rd Monday in January</i>
<i>President's Day</i>	-	<i>3rd Monday in February</i>
<i>Good Friday</i>	-	<i>Friday preceding Easter Sunday</i>
<i>Memorial Day</i>	-	<i>Last Monday in May</i>
<i>Independence Day</i>	-	<i>July 4</i>
<i>Labor Day</i>	-	<i>1st Monday in September</i>
<i>Columbus Day</i>	-	<i>2nd Monday in October</i>
<i>Veteran's Day</i>	-	<i>November 11</i>
<i>Thanksgiving Day</i>	-	<i>4th Thursday in November</i>
<i>Christmas Eve</i>	-	<i>December 24</i>
<i>Christmas Day</i>	-	<i>December 25</i>

15.2 Work on Holidays. *Captains and Lieutenants shall be paid time and on-half for all hours worked on a holiday in addition to their regular holiday pay. Upon their request, and with the approval of the department head, employees may be compensated for holiday pay in time off equivalent to hours earned.*

UNION POSITION

The Union contends that under the MOU, Lieutenants have an absolute right to work on a holiday when it falls on one of their regularly scheduled workdays. Their contention is based on several provision in their labor contract setting out a “request and approve” process when an employee desires leave. In other words, the Union contends the employee has an absolute right to work on a regularly scheduled day unless he or she specifically requests leave from the job.

Past practice forms a second basis for the Union position. They contend the “request and approve” process in place prior to 2008 with respect to work on holidays constitutes a binding past practice.

CITY POSITION

The City argues Articles 5.1 and 11.1 give them the power to schedule employees as they see fit in order to best meet the municipality’s needs. Further, they contend there is no evidence supporting a binding past practice of Lieutenant’s right to work on holidays.

OPINION AND AWARD

The instant case involves a contract interpretation in which the arbitrator is called upon to determine the meaning of some portion of the memorandum of understanding between the parties. The arbitrator may refer to sources other than the MOU for enlightenment as to the meaning of various provisions of the contract. The essential role of the arbitrator, however, is to interpret the language of the MOU with a view to determining what the parties intended when they bargained for the disputed provisions of

the agreement. Indeed, the validity of the award is dependent upon the arbitrator drawing the essence of the award from the plain language of the agreement. It is not for the arbitrator to fashion his or her own brand of workplace justice nor to add to or delete language from the agreement.

In undertaking this analysis, an arbitrator will first exam the language used by the parties. This objective approach "...holds that the "meaning" of the language is that meaning that would be attached to the integration by a reasonably intelligent person acquainted with all the operative usages and knowing all the circumstances prior to and contemporaneous with the making of the integration."¹⁰ If the language is clear and unambiguous, that is the end of the inquiry. A writing is ambiguous if, judged by its language alone and without resort to parol evidence, it is reasonably susceptible of more than one meaning.¹¹ Parol evidence cannot be used to create an ambiguity.¹²

Contract Interpretation

As the Union points out, the MOU is replete with examples of "request-and-approve" processes. In essence, the employee must work on a given day unless he has requested and received supervisory approval to take the day off. Included are personal leave under Article 16.11, vacation before October 1 under Article 16.6, comp time under Article 12.1, and sick leave, funeral leave military leave, leaves of absence with or without pay, parental leave, family/medical leave and "union" leave, all under Article 18. They culminate this litany with the last line of Article 15. *"Upon their request, and with the approval of the department head, employees may be compensated for holiday pay in*

¹⁰ Elkouri & Elkouri, *How Arbitration Works*, Sixth Edition, (2003), Chapter 9.1.B.i.

¹¹ See *Metro Office Parks Co. v. Control Data Corp.*, 205 N.W.2d 121 (1973).

¹² See *Instrumentation Servs., Inc. v. Ben. Res. Corp.*, 283 N.W.2d 902 (Minn. 1979).

time off equivalent to hours earned.” Base on these provisions in the MOU, the Union brief concludes,

“In other words, the employee wanting the holiday off must ask to be compensated in time off. The MOU contains no mechanism for the City to force employees to take holidays off.” (Emphasis theirs)

I disagree with the Union’s logic for several reasons.

First and foremost, it completely ignores the remainder of the MOU. Hornbook law teaches that a contract must be read as a whole, not alone from a single word, phrase or provision.¹³ Article 5.1, the Management Rights clause, empowers the City to “...direct the working forces,” “to plan, direct, and control all the operations and services of the City,” and, “To determine the methods, means, organization, and number of personnel by which such operations and services are to be conducted.” Similarly, Article 11.1 provides that, “The City retains the sole discretion to schedule its employees, to best meet the needs of the City.”

The Union argument does not take into account, much less reconcile, the clear and unequivocal language of these provisions. Management rights are on an equal footing with Union rights and cannot be so blithely ignored. Article 5.1 specifically provides, “...except as expressly state herein, the City shall retain whatever rights and authority that are necessary for it to operate and direct the affairs of the City in all of its various aspects...” Similarly, Article 11.1 specifically states, “The City retains the sole discretion to schedule its employees, to best meet the needs of the City...” “ There is no express language in the MOU that gives Local 309 members the absolute right to work

¹³ Elkouri & Elkouri, *How Arbitration Works*, Sixth Edition (2003) Chapter 9.3.A. viii.

any particular day, much less any particular holidays. Ultimately, this argument rests on a tortured extrapolation of unrelated “request-and -approval” clauses. Each sets up a specific process whereby an employee requests a certain type of leave that must be approved by a department head. If anything, these processes are extensions of the City’s right to schedule employees. When the needs of the City warrant, the requests can be denied. The final scheduling option belongs to the City, not the employee. It is a breathtaking leap of logic to argue that employees have the absolute right to work any given day simply because other types of leave is subject to the employee’s request and supervisory approval. Adoption of the Union position would mean the City only has scheduling discretion when it is requested by the employee. This argument upends the clear contractual language in 5.1 and 11.1 giving the employer the unfettered right to schedule its workforce.

Finally, the Unions reliance of the last sentence of Article 15.2 is misplaced. *“Upon their request, and with the approval of the department head, employees may be compensated for holiday pay in time off equivalent to hours earned.”* This provision gives the employee an option, with departmental approval, of taking either pay or comp time for holiday work -- nothing more and nothing less. It cannot be extrapolated into a right to holiday work, particularly in light of the Management Rights provisions in Articles 5.1 and 11.1. I find no ambiguity in the MOU language on this subject.

Past Practice

In the alternative, The Union contends that the right-to-work holidays has become a binding past practice. As such, it should carry the same force and effect as a written contract provision. For reasons outlined below, I disagree.

A past practice is defined as “the understood and accepted way of doing things over an extended period of time.”¹⁴ The party alleging the past practice has the burden of proving its existence and strong proof will ordinarily be required.¹⁵ In the absence of a written agreement, “past practice,” to be binding on both parties, must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties.¹⁶ The last element, “accepted by both parties,” implies that the practice has been mutually accepted by both parties.¹⁷

A review of the evidence in this case is helpful. At the time the Union was formed in 2003, it consisted of three Captains and one Lieutenant. One Captain has retired. Two of the then Captains, now Assistant Chiefs Stawarski and Wilson, testified. Neither recalled the right to work on holidays being an issue while they were Union members. Captains scheduled themselves and usually took holidays off unless needed for days requiring extra policing such as July 4th and Labor Day. The one Lieutenant at the time the Union formed was Thomas Justin. He is currently President of Local 309. Lieutenants have never had the right to schedule themselves. Before 2007, they were scheduled by Captains. Subsequent to the departmental reorganization, they were scheduled by Assistant Chiefs. He recalled always working on holidays unless he requested and obtained permission to be off. David LaBeaux was promoted to Lieutenant

¹⁴ Richard Mittenenthal, *Past Practice and the Administration of Collective Bargaining Agreements*, in *Arbitration and Public Policy*, Proceedings of the 14th Annual Meeting, National Academy of Arbitrators, ed. Pollard (BNA Books 1961), 30.

¹⁵ Elkouri & Elkouri, *How Arbitration Works*, Sixth Edition (2003), Chap. 12.2.

¹⁶ Elkouri & Elkouri, *How Arbitration Works*, Sixth Edition (2003), p. 608.

¹⁷ Elkouri & Elkouri, *How Arbitration Works*, Sixth Edition (2003), Chap. 12.3.

in 2005 following the retirement of the third Captain. When a holiday falls on a regularly scheduled shift day, he wants the opportunity, and believes he has the right, to earn the extra money, one and one-half times normal pay plus eight hours holiday pay. In other words, 20 hours pay for 8 hours of work. His position is motivated by entering the “high-five” salary years prior to his retirement and his wish to maximize his income during that period. Beginning in late-2008, the City, pursuant to the Chief’s orders, would no longer allow him to work those days, except in cases of special policing needs like July 4th or Labor Day.

I find it difficult to conclude these facts meet any of the elements in the definition of past practice quoted above. The evidence is not “unequivocal.” No one appears to have considered, much less discussed, Lieutenant’s right to work holidays as an issue until money became an issue in the City police budget. Lieutenants may have worked most holidays prior to the departmental reorganization, but this was never “clearly enunciated” as a right. It is more credible to believe they had to work because Captains regularly took the days off and left administrative work to the lower ranking Lieutenants. Last, there is no evidence of any conscious agreement between the City and Union. All agree this issue has never been brought up in any negotiations between the parties.¹⁸ The evidence before me is best described and analyzed by the following excerpt:

“A practice .. based on mutual agreement may be subject to change only by mutual agreement. Its binding quality is due, however, not the fact that it is a past practice but rather to the agreement in which it is based.

But there are other practices which are not the result of joint determination at all. They may be mere happenstance, that is, methods that developed without design or deliberation. Or they may be choices by management in the exercise of

¹⁸ Exhibits 20, 21, and 22.

managerial discretion as to convenient methods at the time. In such cases there is no thought of obligation or commitment to the future. Such practices are merely present ways, not prescribed ways, of doing things. The relevant item of significance is not the nature of the particular method but the managerial freedom with respect to it. Being the product of managerial determination in its permitted discretion such practices are, in the absence of contractual provision to the contrary, subject to change in the same discretion....But there is no requirement of mutual agreement as a condition precedent to a change of a practice of this character.

A contrary holding would place past practice on a par with written agreement and create the anomaly that, while the parties expend great energy and time in negotiation the details of the Agreement, the unknowingly and unintentionally commit themselves to unstated and perhaps more important matters which in the future may be found to have been past practice.”¹⁹

I see no design, deliberation, or mutual agreement in how Lieutenants were scheduled on holidays before 2008. More than anything else, it was simply a function of the departmental needs and the chain of command. Using Shulman’s rationale, there is no binding past practice and the City was perfectly within its rights to unilaterally alter the Lieutenants’ holiday schedule from 2008 to the present. It was merely an extension of the same managerial discretion that required them to work when the Captains took holidays off. That discretion can only be altered if the City and Union agree to do so at the bargaining table.

Summary

I found no basis in the MOU supporting the Union’s contention that Lieutenants have an absolute right to work on holidays falling within their regularly scheduled workdays. On the contrary, there is clear and unambiguous language delineating the City’s right to schedule its workforce. Further, based on the evidence before me and the

¹⁹ Shulman, *Umpire*, Ford Motor Co. - UAW. Opinion A-278 (Sept. 4, 1952), 19 LA 241-42 (1952). Quoted favorably by Past Academy President Richard Mittenthal in a paper presented to the National Academy of Arbitrators on October 30, 1993 and reported in the 1994 Proceedings of the National Academy of Arbitrators, p. 184.

rationale outlined above, I find the Union has not met its burden of proving a past practice.

AWARD

The grievance is DENIED.

Dated: 12/27/11

/s/ Richard A. Beens

Richard A. Beens, Arbitrator