

In the Matter of the Grievance Arbitration Between

Minnesota Nurses Association,
Patricia Winger, grievant,

and

County of Clearwater,
Employer

Before:

Arbitrator Harley M. Ogata

BMS Case No. 15-PA-0248

Date and Place of Hearing:

March 9, 2015
Clearwater County Courthouse
Bagley, Minnesota

Date Briefs submitted:

March 23, 2105

Advocates:

For the Union:

Adam Kamp
Labor Counsel
Minnesota Nurses Association

For the Employer:

Terrence Foy
Ratwick, Roszak & Maloney

Introduction

This is a contract language grievance arbitration between the above-named parties. In sum, the union asserts that the employer improperly underpaid the grievant because it did not grant her a salary increase when she purportedly reached the 15 YEAR step on the salary scale. The employer asserts that the grievant was properly compensated because she had not yet reached the 15 YEAR step on the salary scale. It asserts that experience credits granted upon initial placement on the scale do not count toward subsequent longevity increases.

The employer placed the grievant on the 3 YEAR length of service step of the salary scale at her hire date due to granting credit for outside work experience. The union asserts that those three years count towards her advancement to the 15 YEAR step upon her 12th anniversary. The employer asserts that the grievant, and all others like her, only advance to the 15 YEAR step upon working for the employer for 15 years with no credit given for the 3 years granted upon initial placement. It asserts that it has uniformly and openly followed this interpretation of the contract since 2000 and therefore has established a past practice that is binding on the parties.

The parties agree that the issue is properly before the arbitrator.

Issue

Did the employer violate the collective bargaining agreement (CBA) when it denied the grievant advancement to the 15 YEAR length of service step on the salary scale before she actually worked fifteen years?

Factual Background

The employer hired the grievant in 2001. After negotiating with the grievant, the employer placed the grievant on the 3 YEAR step of the salary scale contained in Appendix A of the CBA. On each subsequent anniversary date, the employer advanced the grievant to the next step on the scale. In other words, on the first year anniversary, she advanced to the 4 YEAR step, on her second anniversary, she advanced to the 5 YEAR step and so on, year after year.

The scale steps advance on a yearly rate from 1 YEAR to 10 YEAR. After that, the next length of service step on the scale is 15 YEAR. When the grievant reached her 12th year anniversary, she expected to move up to the 15 YEAR step on the scale, having not had an increase for 5 years. In her mind, she should have advanced to the 15 YEAR step based on her initial 3 years of credit plus her subsequent 12 years of service. The employer disagreed and stated that the initial 3 years credit did not carry over to advancement to the 15 YEAR step on the scale. Its position was that a person needed to have 15 years of

actual service with the county in order to be advanced to the 15 YEAR step, regardless of how much credit they initially received.

Discussion

Is the language in question ambiguous?

The language in question is contained in “Appendix A – Salary Scales” of the collective bargaining agreement between the parties.

APPENDIX A – SALARY SCALES

LENGTH OF SERVICE
START
3 MONTHS
1 YEAR
2 YEAR
3 YEAR
4 YEAR
5 YEAR
6 YEAR
7 YEAR
8 YEAR
9 YEAR
10 YEAR

15 YEAR
20 YEAR
25 YEAR
30 YEAR

(Salary amounts omitted)

In addition, Article 18A of the CBA states that

All nurses will be paid on the basis of the wage rates set forth in Appendix A to this contract. Nurses shall receive a step increase on their anniversary date. The Hire date is noted as the anniversary date and also the initiation of the bargaining unit seniority date.

The employer initially placed the grievant on the 3 YEAR length of service step. The next year, the employer advanced her to the 4 YEAR step. She advanced to the next step in each subsequent year through the 10 YEAR length of service step. 5 years later, she was denied advancement to the 15 YEAR step.

The employer asserted that there is a differentiation between granting what it labelled initial "experience credit" for advancement on the salary scale. First, there is nothing in the language of the contract that would support that position. The term "experience credit" does not appear anywhere in the relevant language and appears to be a term used unilaterally by the employer to differentiate experience credit from length of service under the CBA. Second, if it were true that there is a difference between treatment of "credit" for placement on the

schedule and its use for advancement on the schedule, the employer, to be consistent, should not have granted advancement on the scale for the first three years of employment until the grievant's years of service with the county "caught up" to the scale.

All of this is consistent with the language of the contract that indicates that "[n]urses shall receive a step increase on their anniversary date." The grievant, and all other nurses, moved to the next length of service step on their anniversary date until the year after they reached the 10 YEAR step. To remain consistent, the language, if applied internally consistent, would require the employer to grant a step increase for the 15 YEAR step at the five-year mark after attaining the 10-year increase.

The employer next asserts that the steps beyond 10 YEAR are longevity steps that are somehow different than yearly raises listed before the tenth year. There is nothing that would differentiate the steps from each other so as to treat them differently. The arbitrator is aware that there are many contracts that have such longevity increases contained in them, but there is no indication in the plain language of this contract that the 15 YEAR, 20 YEAR, and other steps are longevity increases of that kind. In fact, all of the above steps are listed under the heading "length of service," with no additional language indicating that the 15 YEAR step and the other steps beyond it are treated differently.

Accordingly, the arbitrator reads the contract as unambiguously equating “length of service” to include the initial length of service credit granted by the employer at the time of initial hire. Once granted credit for length of service on the salary schedule, such credit should be counted forward for all step increases contained in the contract without diminution.

Is there a past practice that would override the clear language of the contract?

The employer asserts that a uniform past practice has been established between the parties that would override the arbitrator’s interpretation of the contract. It is well established both in Minnesota law and arbitral practice that a past practice can override either ambiguous or unambiguous language in a collective bargaining agreement. *Ramsey County v. AFSCME, Council 91, Local 8, 309 N.W.2d 785 (1981)*. The elements of a past practice and its efficacy is also well established.

“Past practice has been defined as ‘a prior course of conduct which is consistently made in response to a recurring situation and regarded as a correct and required response under the circumstances. Certain qualities distinguish a binding past practice from a course of conduct that has no particular evidentiary significance:

- (1) Clarity and consistency
- (2) Longevity and repetition
- (3) Acceptability
- (4) A consideration of the underlying circumstances
- (5) Mutuality

Id. at 788, n.3.

The “practice” in question falls short of meeting this definition. First, the employer asserts that it has uniformly applied its interpretation of dropping “experience credits” once a nurse reaches the 15 YEAR step of the contract since 2000. Although the evidence presented at the hearing supports this assertion, the employer only had two opportunities to apply its interpretation in that period of time. One concerned the grievant. The other concerned a person who retired three months after failing to obtain the alleged correct step placement. Both of the incidents occurred in 2013.

In order for this arbitrator to find a binding past practice, the practice must either have much more longevity than the one incident (in the same time frame as the grievance) or be clearly open so as to leave little argument that the parties mutually agreed to it and accepted it.

It is clear from the testimony that the employer believed sincerely that it was interpreting the contract correctly. The problem here is that the employer’s interpretation was not communicated clearly to the union such that the union could either acquiesce or object. Based on the record before the arbitrator, the union objected in a timely fashion and cannot be held to have either agreed to the practice or somehow be estopped from objecting to it.

On the issue of notice, there is some potential conflict in the testimony regarding whether the grievant or other employees who were hired above step

one on the contract were put on notice about the employer's position on the step advancement once the employee got to the 15 YEAR step.

The testimony of the employer's two witnesses in this area, Bonnie Engen and Marissa Hetland, laid out the position of the employer in this regard. The two witnesses are the current and former Director of Nursing for the employer and were responsible for conducting the hiring for the employer. Ms. Engen was the Director at the time of the hiring of the grievant.

Engen testified that it was her practice to inform each hire of the way they would move through the schedule, including how they would not be granted credit for length of service beyond the 10th year. She testified further that she did not have a recollection of specifically informing the grievant of this, but does remember negotiating over the grievant's initial placement (step 3). She remembers informing the grievant that she could not give her any more credit than 3 years and that other people within the bargaining unit would object if she went higher.

Engen also testified about the hire of Cathy Blair. Her testimony was consistent here regarding facts relevant to this arbitration. She remembers hiring Blair at the 10 YEAR step and remembers having to get Board permission to do so. She also did not remember specifically informing Blair about the policy taking away experience credit upon attaining the 10 YEAR step, but believes she followed her practice of so informing each such hire.

Both the grievant and Blair testified that they were certain they were not informed of this policy. The grievant indicated that she was not happy about being placed at three years given that she was a very experienced nurse with well over that many years of practice. She testified further that under the circumstances, she would have certainly remembered being told about the time gap in question here.

Blair testified similarly. The arbitrator found Blair's testimony to be particularly compelling. First, her demeanor during her testimony gave credence to her words. Second, upon being asked an initial question about the "policy", Blair responded to a question by stating "oh you mean (you are asking about) the new interpretation of when I will get a step increase?" Her response was spontaneous and credible with no hint of sarcasm. Finally, and most compellingly, it is clear from the totality of her testimony that she would have remembered being told at the time of hire that she would not get a pay increase for 15 years.

Finally, Engen testified that the parties never discussed this issue in bargaining. The evidence indicates that the issue was never discussed with the union outside of bargaining either and nothing else in the record would bring this arbitrator to the conclusion that the "policy" was established as a binding past practice on the party. Most tellingly, the elements of acceptability and mutuality

are wholly missing here and the arbitrator declines to overrule what is otherwise clear language based on this record.

Decision

The grievance is sustained. Based on the foregoing discussion, the grievant should be placed on the 15 year step of the salary schedule retroactive to the date she would have received that step if the employer had properly included her credit of three years that was granted at her date of hire.

Dated: March 30, 2015

A handwritten signature in black ink, appearing to read "H. Ogata", with a long horizontal stroke extending to the right.

Harley M. Ogata

Arbitrator