

In the Matter of the Arbitration Between

Minnesota Public Employees Association,
Jacob Willis, Grievant,

And

BMS Case No. 15PA0792

University of Minnesota

Arbitrator:

Harley M. Ogata

Date and place of hearing

February 4, 2016
Kirby Student Center
University of Minnesota Duluth

Date of submission of briefs

3/29/2016

Appearances:

For the Employer

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For the Union

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Introduction

This is a contract interpretation arbitration. The dispute involves the payment of leftover vacation and compensatory time upon the separation from service of the grievant, Jake Willis. The parties view this dispute quite differently.

The employer's position and statement of the issue indicates that it followed the contract by paying out the correct amount of leftover vacation and comp time into the Post Retirement Health Care Savings Plan (PRHCSP) in accordance with the express terms of the contract. The union counters that, while that may be true (there is a small dispute about the actual hours left in the vacation and comp time bank), the employer nevertheless violated the contract by not allowing the grievant the opportunity to either cash out his two banks or otherwise use up his accumulated vacation or comp time by taking time off prior to the time that the remaining balance of vacation and comp time would be deposited into the PRHCSP.

The provisions regarding the PRHCSP are contained in a Memorandum of Understanding (MOU). During the hearing, the parties disputed the current validity of the MOU. The union took the position that the MOU might not be valid because the MOU's effective dates had ended. In its post-hearing brief, however, the union conceded that the MOU is still in effect despite its references to a now-expired collective bargaining agreement.

The employer's position is that it followed the terms of the contract when it funded Willis' PRHCSP with his remaining vacation and comp time. Since the union has now conceded the validity of the PRHCSP, that would normally be the end of the inquiry. There is no question that the employer properly deposited the remaining hours of vacation and comp time into the PRHCSP. However, the union has posited numerous equitable principles in support of its view that Willis should have been allowed to liquidate his banks while still employed, in an effort to drain his accounts down to a theoretical zero amount. In other words, he wanted money rather than health care benefits. The arbitrator therefore accepts the union's issue on this matter which is:

Was Grievant Jacob Willis effectively denied the use of his accrued Vacation and Comp Time benefits, and if so, what should the remedy be?

Factual Background

The grievant, Jake Willis, was a patrol officer with the University of Minnesota Duluth Police Department (UMDPD). He worked there for nine years until he got a job with the City of Duluth Police Department in January of 2015.

In anticipation of changing jobs, the grievant asked his supervisor, Lt. Sean Huls, if he could cash out his vacation and comp time upon separation. The grievant testified that Huls said he "thought" he could cash out his vacation but not his comp time. Based on that conversation, the grievant testified that he proceeded to plan for his separation by holding back from using vacation under his understanding that he would be able to cash out the vacation time. Huls, on

the other hand, went to check on this and was told that any leftover comp time and vacation time could not be cashed out and would be deposited in the PRHCSP.

Huls then went back to the grievant and informed him of this. The grievant then reversed his pre-separation strategy and began using up as much of his banked time as possible. However, not only was his separation date approaching quickly but staffing demands on campus prevented him from depleting all of his banked time. His supervisor, Huls, worked with him to take off as much time as possible, but he was still not able to get the hours down to zero.

The parties agree that the required maintenance of minimum staffing levels contributed to the grievant's inability to use up his accumulated vacation and comp time. In addition, each Duluth campus officer is granted one primary vacation "pick" that guarantees one continuous vacation period, for any length of time chosen by that officer. The "pick" is granted each officer in the order of seniority. In an effort to alleviate the potential harm caused by the supervisor's initial error, the employer offered the grievant the chance to extend his primary pick (which was to take place at the end of November). The grievant declined the offer.

The payroll sheets for the month of December show that in an effort to help him reduce his accumulated balances, the employer allowed the grievant to use 45 hours of vacation time and 20 hours of comp time. Employer exhibit 12, union exhibit 6. There is a slight discrepancy in the two accountings. On 12/1/2014,

the union contends that the grievant used one hour of vacation. The official pay sheet shows nothing. On 12/4/2014, the union contends that the grievant used 8 hrs. of Accrued Comp Time (ACT) and 1 hour of earned comp time (CT). The official pay sheet shows 7 hours of ACT used and 2 hours of CT. The total used is the same. To the extent that there is a discrepancy between the grievant's accounting and the official pay sheet, the arbitrator finds the pay sheet to be better evidence especially in light of the fact that each one of them is signed by the grievant after the statement which reads "I certify that the time recorded represents actual hours of employment for the period indicated." Finally, each pay sheet ends with the hours balanced forward and the pay sheet signed by the grievant on his severance date (January 3, 2013) states that he has 57.125 hours of combined comp time as a balance.

The collective bargaining agreement between the parties contains three provisions relevant to this arbitration. There is a Memorandum of Understanding:

MOU Re: Post Retirement Health Care Savings Plan

During the negotiations of the 2012-2013 labor contract the parties agreed to the following:

- The University shall provide for participation in a post retirement health care savings plan for all eligible bargaining unit members.
- Effective the first pay period in May 2008 all bargaining unit employees, at the time of separation of employment from the University, shall have the value of their unused vacation and compensatory time balances paid directly into the post retirement health care savings account.

- Effective January 1, 2009 employees eligible for pension contributions shall have 1% of the pension eligible earnings deducted from their pay and deposited directly into the post retirement healthcare savings account.

This agreement shall be (sic) remain in place under the same terms as listed above for the duration of the 2010-2011 contract agreement.

The parties agree to this Memorandum of Understanding on the 12th day of May, 2014.

The relevant portion of the Overtime provision reads:

Article 14.7 Overtime

If permitted by law, overtime may be compensated by equivalent time off. Equivalent time off must be taken at a time that is mutually agreeable between the employee and his/her supervisor.

Finally, the relevant provisions concerning vacation are:

17.4

The maximum number of accumulated vacations days for an employee shall not exceed the number of vacation days that may accrue within a two year period.

17.5

Any employee who is about to lose vacation leave because he/she has been denied a vacation request and will therefore reach the maximum accumulation shall be entitled to cash out forty hours of vacation, or alternatively, shall be allowed to take such vacation necessary to prevent such loss.

Analysis

The arbitrator finds the language regarding the PRHCSP to be clear and unambiguous in its relevant sentences. It is true that there is some confusion

caused by the dates being wrong, but those sentences are not relevant to this arbitration once the union has conceded the ongoing validity of the MOU.

The union raises numerous equitable arguments in support of its position that but for the actions or inactions on the part of the employer, the grievant would have had his vacation and comp banks reduced either to zero or close to it. The union cites the equitable doctrines of impossibility, impracticability, detrimental reliance, and unclean hands to support its position that it was the employer's fault that the grievant could not use up his banked time and that, therefore, he should receive the amounts in question in cash, not in health benefits.

In sum, the union's position in this matter is that the employer's actions caused the grievant to fail to exhaust his vacation and comp time banks and that he shouldn't suffer the consequences of the employer's actions or inactions. To support this position, it asserts that the grievant sent an email to HR on September 22, 2014 asking whether he could be paid for his remaining earned comp, sick and vacation time. The evidence supports the contention that he never received a response to this inquiry. The assertion here concerns the union's position that this failure to respond to the inquiry helped create a circumstance under which the grievant did not plan well to exhaust his vacation and comp time.

Next the union asserts that the grievant went to his supervisor and asked whether he would be allowed to cash out vacation and comp time. The grievant

asserts that Huls told him that he “thought” he would be paid for vacation time and not comp time. Huls testified that he could not remember the exact conversation, but does not dispute what the grievant asserted.

There is some question as to exactly when this conversation took place, but it occurred no later than October. Huls checked into this issue with those who would know and was informed that vacation would not be paid out, but the value of both vacation and comp time would be deposited in the PRHCSP. He informed the grievant of this fact.

Based on the earlier interaction, where he was told that Huls thought his vacation would be cashed out, the grievant apparently used his sole vacation “pick” which would occur around Thanksgiving. However, the length of the vacation would not zero out his bank on the assumption that he would cash out the remainder.

The union next asserts that staffing levels for the UMDPD are very low which makes it doubly difficult to take time off because of coverage issues. The employer does not dispute this.

Finally, the union asserts that once the vacation payout issue was clarified, there was not enough time to exhaust all of his banked vacation and comp time despite the assistance of his supervisor in scheduling as much as he could in the time remaining. The employer also does not dispute this.

The union’s primary argument is that these facts created an unfair set of circumstances, caused by the employer, which frustrates the core intent of the

contract, which is to be compensated in cash for time worked, not in health benefits.

The arbitrator finds the relevant language of the MOU to be clear and unambiguous. Any and all vacation and health benefits leftover at the time of separation is to be transferred to the PRHCSP. The arbitrator notes that unrefuted evidence showed that one former employee was paid his remaining vacation and comp time in cash upon separation, rather than having those funds transferred to the PRHCSP. The arbitrator finds that, based on the testimony and evidence introduced at the hearing, this cash payout was made in error by the payroll department. The arbitrator notes that optional cash payouts violate IRS rules and would result in the IRS invalidating the legality of the PRHCSP.

Finally, the payout given to the other person in question is not the same remedy that the union seeks here. The union makes no argument that the grievant should be allowed a cash payout based on the language. Its argument focuses on the fact that the grievant should have been allowed to take the time off while still employed.

Notwithstanding the clarity of the language in question, the union raises the argument that it was the employer's fault that the grievant was not able to use the time in question prior to severance. The arbitrator has some sympathy for this argument but finds that the equities are not as clear as the union asserts.

First, the grievant was not purposely misled about the language of the contract. His supervisor said he "thought" he could cash out his vacation but not

his comp time, but followed it up with further inquiry and informed the grievant as timely as he could about his error. In addition, this error only pertained to vacation and not comp time, so the grievant was put on notice that he should use his comp time because it would not be cashed out.

In an effort to help alleviate any problems created by the initial misinformation, the supervisor told the grievant he could extend his vacation pick so as to use more vacation. The grievant chose not to extend the vacation. In other words, the grievant failed to mitigate his damages.

The grievant sought information about this cash out issue from other sources as well. The grievant was given the language of the contract in October from a former union steward. Additionally, the other former steward who testified about getting the cash payout also testified that he told the grievant that leftover vacation and comp time would go to the PRHCSP. These facts undermine the union's equitable arguments.

The union next argues that the fact that the Duluth campus police department is understaffed, makes it virtually impossible to use all of a person's vacation and comp time. This is exacerbated by the employer's policies which, in combination, make it very difficult to take comp time in cash and mandate that certain work must be taken in comp time. The record supports the union's position on this issue and the employer does not dispute this assertion.

However, those facts, in combination with the other arguments made by the union, do not compel a decision that would effectively mandate that the

employer grant the grievant's request for time off. It is clear that the employer made efforts to allow the grievant to take time off. As noted earlier, the employer accommodated the use of 45 hours of vacation and 20 hours of comp time in the month of December alone. The arbitrator finds this a good faith effort under the circumstances of maintaining adequate staffing levels.

The union next argues that the MOU in question is in conflict with Article 17.5 of the contract. As stated earlier, Article 17.5 states:

Any employee who is about to lose vacation leave because he/she has been denied a vacation request and will therefore reach the maximum accumulation shall be entitled to cash out forty hours of vacation, or alternatively, shall be allowed to take such vacation necessary to prevent such loss.

However, Article 17.5 must be read in conjunction with Article 17.4, which immediately precedes it. That provision reads:

The maximum number of accumulated vacations days for an employee shall not exceed the number of vacation days that may accrue within a two-year period.

The union's argument here is that Article 17.5 "envisions prevention of a complete loss of vacation due to vacation denials." Union brief at 11. Reading the two articles together, Article 17.5 only applies to vacation denials for those at the maximum accumulation in order to prevent that person from losing vacation. That analysis does not apply here. Finally, Article 17.5 only allows for vacation payouts or the taking of payouts to the extent that it would prevent accrual over the maximum amount under Article 17.4. This argument should be taken to the bargaining table.

Finally, there is a dispute about the number of hours in question. The union contends that the grievant is due more hours in both vacation and comp (whether paid out in cash or, conceivably, as deposits to the PRHCSP). The arbitrator decided the comp time issue earlier in the decision when it was concluded that the employer's number of comp time hours (51.125) is the correct amount to be used here. This is based on the fact that the grievant signed each payroll sheet which states: "I certify that the time recorded represents actual hours of employment for the period indicated." The number of comp time hours listed on the final pay sheet for the grievant lists 51.125.

The union first raised claims regarding the number of remaining comp time and vacation hours in its post-hearing brief. The union has the burden of proof in this regard. The arbitrator carefully checked the record in this case and cannot find sufficient evidence to support the union's argument regarding vacation accumulation as well as comp time

Conclusion

For the foregoing reasons, the grievance is denied.

Respectfully submitted,

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

Harley M. Ogata, arbitrator

Dated April 18, 2016