

**IN RE ARBITRATION BETWEEN:**

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**LAW ENFORCEMENT LABOR SERVICES**

**and**

**CITY OF BLAINE, MN**

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**DECISION AND AWARD OF ARBITRATOR**

**BMS 15-PA-0671**

**JEFFREY W. JACOBS**

**ARBITRATOR**

**May 16, 2016**

IN RE ARBITRATION BETWEEN:

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LELS,

and

City of Blaine, MN.

DECISION AND AWARD OF ARBITRATOR  
BMS Case #15-PA-0671  
Mike Bozell grievance

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**APPEARANCES:**

**FOR THE UNION:**

Scott Higbee, Union  
Mike Bozell, grievant  
Dennis Kiesow, union business representative  
Nate Hatampa, union steward

**FOR THE CITY:**

Susan Hansen, Attorney for the City  
Sheri Chesness, HR Director

**PRELIMINARY STATEMENT**

The hearing in the above matter was held on April 6, 2016 at the Blaine City Hall, 10801 Town Square Dr., Blaine, MN. The parties presented oral and documentary evidence at which point the hearing record was closed. The parties submitted briefs dated April 29, 2016.

**ISSUES PRESENTED**

The parties stipulated to the issues as follows:

Did the city violate Article 22.1 of the collective bargaining agreement including the long-standing past practice of the parties by providing the Grievant, who waived health insurance coverage under the city's group plan, with the city contribution toward the cafeteria plan minus the premium amount of the lowest cost single plan plus \$50.

**RELEVANT CONTRACT LANGUAGE**

The EMPLOYER agrees to contribute One Thousand Twenty Dollars (\$1,020.00) per month per employee for the purchase of required and/or optional benefits of the cafeteria plan from January 1, 2015 through December 31, 2015.

## **PARTIES' POSITIONS**

### **UNION'S POSITION:**

The union's position was that the city violated the contract when it failed to pay the grievant his full \$1,020.00 per month as set forth in Article 22.1 above to the grievant. In support of this position the Union made the following contentions:

1. The union acknowledged that there was a prior grievance filed contending that those officers who opted out of city provided health insurance were entitled to the full amount set forth in Article 22.1 but that the grievance was dropped due to the clear evidence of a past practice between the parties of compensating officers who waived health insurance.

2. The union though asserted that it properly placed the city on notice of its intent to repudiate the past practice by letter dated March 27, 2014 and informing the city that the practice of paying those who opted out of health insurance less than the full amount set forth in Article 22.1 would be stopped.

3. The union expected the city to make a proposal to bargain over this subject but it never did. The union was thus satisfied that the city understood and agreed that the practice would thus cease and the parties would revert to the contract language requiring the full payment of the benefit set forth in Article 22.1

4. The union took the position that based on that clear repudiation made during bargaining, the city had the obligation to negotiate specific language for the lesser amount but failed to do so. Accordingly, the union contended that the past practice ceased and its member who opted out of health insurance were entitled to the full amount provided for in Article 22.1

5. The grievant opted out of city provided health insurance in 2004 and while he knew he was receiving less as a cash payment than what was provided for in Article 22.1 he was never aware of how it was calculated or the rationale behind that. He eventually began questioning the calculation and concluded that he was being shorted and should have been receiving the full amount in Article 22.1.

6. He filed a first grievance over this but, as noted above, that grievance was dropped due to the strong evidence of exactly the practice the city claimed was in place for many years.

7. When he filed this grievance the city simply denied it again and stated that there was an “on-going past practice of the city to make dollar adjustments to those who opt out.” That was the sole basis for the stated reason to deny the grievance. The city never claimed, as it does now, that it might harm their experience rating with LOGIS or cause their premiums to increase. The city relied again on the on-going past practice assertion in the second grievance just as it did in the first with few if any substantive changes in its position – a position that the union claimed must be different in order to be sustained since the past practice was effectively repudiated.

8. After the repudiation however, the union filed a second grievance claiming that the practice was repudiated and thus over and that the clear language now applied.

9. The union countered the claim by the city that there was a negotiated quid pro quo for certain wage concessions and that this was the exchange for dropping the proposal to require the full payment of the benefit to any officer who opted out of the health insurance and argued that irrespective of what the city assumed, the city had the obligation to bargain different language into the agreement but failed to do so. In fact, the city expressed very little interest in the language of Article 22.1 due to anticipated change to the Affordable Care Act, ACA. Thus no changes were made to the language and the union contended that the past practice died with the expiration of the old contract. The failure of the city to negotiate changes based on its incorrect assumptions about possible changes in the ACA are not a valid reason for violation of the CBA now.

10. The union contended that the language of Article 22.1 is clear and unambiguous and requires a cash payment to officers for the purchase of required and/or optional benefits under the city’s cafeteria plan. The union also countered the city’s assertion that the union had the obligation to negotiate different language into the agreement and asserted that just the opposite was true – the city had to negotiate different language once the practice was repudiated yet it failed to do so.

11. The city cannot have it both ways – relying on a past practice yet not recognizing that the practice is no longer in place due to the repudiation.

12. The union argued that a practice cannot be unilaterally discontinued during the life of the contract but may be repudiated during negotiations for a successor contract by placing either party on clear notice of the intent to repudiate it. That was exactly what the union did here and the city failed to negotiate or even propose substitute language.

13. The union alluded to the changes in the LOGIS requirements as a basis for the cessation of the practice as well. Under the prior contracts, the union argued that LOGIS had certain requirements that provided a basis for the reductions in payments to affected opt out employees. Those requirements have now changed and the basis for the practice are now no longer valid. The union contended that once the underlying purpose for a past practice to be in place has changed, the practice changes or ceases to exist with it.

14. The union argued finally that the claim that an award in the union's favor would be too expensive is not controlling a contract violation is a contract violation and the city has the responsibility to pay for its failure to act here. The essence of the union's claim is thus that the contractual language is clear and unambiguous and that any past practice that allowed the city to reduce payments to affected employees is no longer valid due to the repudiation of that practice and the city's failure to negotiate language into the successor contract allowing the reduction now.

The union seeks an award of the arbitrator ordering the city to sustain the grievance and to make all employees who opted out of insurance coverage whole by ordering the city to pay them the full amount set forth in Article 22.1

## **CITY'S POSITION**

The city's position was that there was no contract violation. In support of this position the city made the following contentions:

1. The city asserted that for approximately 20 years there has been a longstanding and consistent practice regarding payments to employees who opt out of health insurance. This practice is well known to all affected city workers, including the grievant and as far back as 2003 the city's HR person distributed a notice as follows:

Employees who are covered through their spouse's group sponsored plan elsewhere may waive the Core Medical coverage. EMPLOYEES WHO CHOOSE TO WAIVE COVERAGE MUST PROVIDE PROOF OF COVERAGE. The lowest cost single health insurance premium will be deducted from your employer contribution, but in lieu of receiving Medical coverage, employees will receive a credit of \$50.00 monthly to use in the City's cafeteria plan toward other benefits or taken as taxable cash compensation. See, Employer Exhibit 7. (Capitalization/emphasis in original).

2. Similar notices were given to employees during open enrollment periods as well. Those notices set forth the amounts that would be deducted from the city contribution and the amounts that were to be contributed to take coverage and to those who waived it. Thus there can be no serious question that the grievant and the union were both well aware of the practice and of the city's policy with respect to those who opt out of city provided health insurance.

3. The city also noted that the same provision found in the LELS contract is in the other contracts between the City of Blaine and its other bargaining units and none of those other units have taken the position that this union now has nor has there been any issue with other employees in similar situations to the grievant here. It has been virtually unchanged except for increases in the monthly amounts for all that time.

4. The city argued that the union acknowledged that this practice was valid when it filed and then withdrew a grievance over this very issue. The city noted that the union was on notice of the validity of this practice and that it met all of the requirements for a binding past practice as set forth in the seminal case on this question in Minnesota in *Ramsey County v American Federation of State, County and Municipal Employees, Council 91, Local 8*, 309 N.W.2d 785, 788 n.3 (Minn. 1981).

5. The city also noted that when the union sent its purported repudiation notice on March 7, 2014 it immediately responded and informed the union of the arbitral precedent requiring that the union, not the city, must seek a change in the language since the language upon which the practice is based is in itself ambiguous. The city noted that nowhere in the language of Article 22.1 is there any mention of the cash payments to employees who opt out or how that is done. Yet the union fully acknowledged that practice when it withdrew the first grievance over this very issue.

6. The city cited several prior arbitration awards and argued that the union has it exactly backwards – where the practice is inconsistent with a clear contract clause the party seeking to keep the practice must seek a change in the language. Where the practice is necessary to give effect to unclear or ambiguous language then the party seeking to change the practice must negotiate a change in the language. Here the language is unclear, thus the union, not the city, needed to negotiate new language. There was no change in the language even though the union clearly knew of the practice and that the language itself nowhere provides for the cash payments to employees who opt out of health insurance or the calculation by which that is done. The city argued that on this basis alone the union’s case fails.

7. The city noted that both the grievant and the union steward have been given cash, taxable payments over the course of several years as the result of the opt out yet the language does not provide for that. Despite the claim that the language of Article 22.1 is clear the city noted that the union's witnesses admitted that the language itself does not even mention the practice and that the practice is necessary to give effect to the language.

8. The city noted that the union *did* propose language that would have given it what it wanted in this case – but it failed to get that language in the contract and the CBA remained unchanged. The city asserted that the union is now running into the axiomatic rule that a party may not gain in arbitration what it was unable to gain through negotiation. See City exhibit 11, at page 2, exhibit 12, where it was specially noted that the union would drop a number of its demands, including the opt out provisions it sought in Article 22 “if wages were accepted” and Exhibit 2 at page 4.

9. Finally, the city noted that during negotiations, it was made abundantly clear that if the city agreed to wage increases, the remainder of the unions' demands were resolved. There was thus a specific quid pro quo for the withdrawal of the union's request for changes in Article 22.1, as well as other matters, and that the city would never have agreed to such large wage increases if there had been any sense whatsoever that the union would still seek the payments it now seeks under Article 22.1. The city asserted that this is yet another ground for denial of the union's grievance based on a specifically negotiated settlement.

The city seeks an award of the arbitrator denying the grievance in its entirety.

## **MEMORANDUM AND DISCUSSION**

### **FACTUAL BACKGROUND**

The underlying facts are straightforward. It was undisputed that the city has had a practice in place for over 20 years regarding payments to employees who opt out of health insurance. The evidence showed that if employees opt out of city provided health insurance, for whatever reason, they could do so as long as they provided proof of insurance. The grievant opted out of health insurance in 2004 since his wife has health insurance through her employer.

The other details of the practice were that once an employee has successfully opted out of/waived health insurance, the city provided employees the city contribution toward the cafeteria plan minus the premium amount of the lowest cost single plan plus \$50. The testimony of Ms. Chesness was persuasive in this regard. The grievant acknowledged that this is what he has been receiving as well even though he was never told how the calculation was made until more recently. For almost 20 years, no employee who has waived health insurance coverage has received the contribution amount for employees who do not waive coverage.

There was further no question that this practice met all of the requirements for a binding past practice set forth by commentators such as Richard Mienthal and under the holding of *Ramsey County v AFSCME, Local 8*, 309 N.W.2d 785, 788 n.3 (Minn. 1981) citing Richard Mienthal, *Past Practice and the Administration of Collective Bargaining Agreements in Arbitration and Public Policy*, 30 (S. Pollard ed. 1961). The details of the practice and how it came into existence was not strictly relevant to the determination of this matter but suffice it to say that the union filed a grievance over this very question in December 2013. That grievance was withdrawn by the union who acknowledged then and at this hearing that the city's past practice would control the result. The grievance was dropped.

During negotiations for the current CBA, the union sent a letter to the city purporting to repudiate the past practice. See union exhibit 9. The city responded to that letter advising the union that if the union wanted a change in the practice it would have to seek a change in the language of Article 22.1 through negotiations.

Significantly the union did propose a change in that language during negotiations, see employer exhibit 2, in which the union negotiators listed as item #6: "the union requests the city correct the way the Opt-Out has been handled." The city specifically rejected this proposal and stated in its response that, "the City rejects the union's proposed change for a change in the opt out clause." See Ms. Chesness testimony and notes in this regard.

Negotiations proceeded and discussion were held on a number of items but at the end of the day no change was made to the language of Article 22.1. The language in the agreement stayed the same as it had been for years and remained consistent with the provisions in other agreements the city has with other labor unions representing other employees.

There was also persuasive evidence that the parties negotiated a significant increase in wages and that the city was led to believe that this increase in wages would satisfy and resolve other outstanding issues – including most importantly the opt out issue at play here. Employer Exhibit 12 provided persuasive evidence that "the opt out provision was "OK with union if wages accepted."

The wage increase requests were accepted and the city believed that the other issues were resolved. There was insufficient evidence that the union gave notice to the city during negotiation that it still held the opt out issue open or that it would grieve it despite the acceptance of the union's wage proposals. There was thus persuasive evidence on this record that other was an agreement, irrespective of the validity of the repudiation issue, to resolve the opt out issue and leave things as they had been in the past if the wage proposal was accepted.

The grievant filed yet another grievance essentially seeking the same thing as the first grievance over this matter after the signing of the current CBA seeking payment of the full amount of the city contribution in January 2015. That was processed through the appropriate steps of the grievance procedure. The parties agreed that there were no procedural arbitrability issues and that the matter was properly before the arbitrator. It is against that general factual backdrop that the analysis if the case proceeds.

### **REPUDIATION OF PAST PRACTICE**

As noted above there was no dispute that there was a binding past practice in place. While the city argued that it met all of the requirements and cited several arbitral awards and arbitral articles in support of that proposition, it was clear that the union acknowledged the practice and eventually withdrew the first grievance over this question because of it. The focus thus is initially whether the practice was properly repudiated through the service of the March 7, 2014 letter and the subsequent negotiations between the parties. On this record, while the union made an attempt to repudiate the practice regarding the opt out provisions, it was clear that the practice was not repudiated and that the union's argument failed in this regard.

Perhaps the most widely used ploy to obviate past practice is to repudiate the practice during negotiations for the next contract. Past practices are part of a collective bargaining agreement and may be eliminated or modified by one party giving the other notice of the intent to terminate the practice at the end of the current contract.

The great weight of arbitral authority holds that even absent a change in the underlying basis for a past practice and even though that practice may not be subject to change during the life of a contract, that practice **is** subject to termination by one party giving the other notice of intent not to carry over the practice into the next contract. This must generally be done during contract negotiations. Once this has been done, the party seeking to continue the practice must negotiate the practice into the collective bargaining agreement.

One arbitrator noted that “There are a number of circumstances that a past practice can be eliminated. A practice may be eliminated [...] where the parties, dissatisfied with the past practice, negotiate language that makes the former custom a nullity. [...] **Arbitrator Mittenthal stated: ‘And the mere repudiation of the practice by one side during the negotiation of a new agreement, unless accompanied by a revision of the ambiguous language, would not be significant.’**” (Emphasis added). See, *Standard Furniture Mfg.*, 122 LA 986, 993 (Howell 2006). Arbitrator Howell cited to Arbitrator Mittenthal’s seminal article on past practice, *Past Practice and the Administration of Collective Bargaining Agreements*, Proceedings of the 14<sup>th</sup> Annual Meeting of the National Academy of Arbitrators (BNA 1961).

There appears to be a difference between a repudiation of a past practice where the language is *ambiguous*, and thus reliant upon the practice to give it the meaning the parties intended, versus the repudiation of a practice based upon *clear* language, which may not. In the former instance the parties would need to negotiate different language in order to overcome the practice even where there has been a repudiation of that practice during negotiations by one party. In the latter instance, unless the parties do negotiate different language, the clear language would overcome the practice where one party has properly repudiated it during negotiations.

Arbitrator Mittenthal stated as follows:

“Consider first a practice which is, apart from any basis in the agreement, an enforceable condition of employment on the theory that the agreement subsumes the continuance of existing conditions. Such a practice cannot be unilaterally changed during the life of the agreement. For ... if a practice is not discussed during negotiations most of us are likely to infer that the agreement was executed on the assumption that the practice would remain in effect.

That inference is based largely on the parties' acquiescence in the practice. If either side should, during the negotiation of a later agreement, object to the continuance of this practice, it could not be inferred from the signing of the new agreement that the parties intended the practice to remain in force. Without their acquiescence, the practice would no longer be a binding condition of employment. In the face of a timely repudiation of a practice by one party, the other must have the practice written into the agreement if it is to continue to be binding.” Elkouri, at p. 643-44, Citing Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements*, proceedings of the 14<sup>th</sup> Annual Meeting of the NAA.

In *SEIU Local 284 and ISD 272, Eden Prairie Schools*, BMS CASE # 03-PA-819 (Jacobs 2003) there was evidence that the language at issue was clear yet the practice was quite different. There the parties had an admitted past practice of paying overtime during weeks in which the employees were paid for holidays and vacation etc. and where they were paid for more than 40 hours. The contract language in question as well as the practice had existed over the course of several negotiation periods and provided for overtime only for hours worked, not hours paid. It was clear that the language required overtime pay only for actual worked hours. The practice was to pay over time for hours paid versus hours actually worked in a week where a paid holiday such as Labor Day fell and where the employees were called in to work additional hours. There were thus weeks in which the employees had been paid for 40 hours due to the paid holiday but actually worked less than 40 hours.

During negotiations the District sent a letter to the union advising it of the intent to terminate the practice of paying overtime in those weeks where a holiday or other paid time off fell. The Union took the position that the practice would continue after the contract unless there was a change in the contract language. No change was made to the existing contract language despite the notice from the District that it would discontinue the practice of paying overtime as set forth above upon the signing of the new agreement.

Based on the almost unanimous line of arbitral authority, the practice was allowed to be discontinued on these facts. See also, *National Tea Company*, 94 LA 730 (1990) wherein the arbitrator held that past practices do not necessarily continue ad infinitum, but may be repudiated by either party through timely and proper notice or intent to do so before or during negotiations.

The decision was based on the clarity and unambiguous nature of the language of the CBA. Because the contractual language was so clear it was incumbent on the party seeking to keep the practice in place to effect a change in the language. Failing to do so under those facts resulted in the discontinuance of the practice. Here the facts were very different in that the language is not clear at all and is in fact silent on the existing practice. See also, *Gillette Company*, 1996 W.L. 874463 (Fogelberg 1996) the arbitrator discussed a fact scenario very similar to that presented in *Eden Prairie Schools*. There he found that management had fulfilled its obligation to put the Union on notice of the intention not to continue the practice which had been in existence for several years during the negotiations for the labor agreement. The Union thus had the obligation to bring this up in negotiations and place language regarding the practice into the agreement. The Union did not do that and instead chose not to address the matter at all, arguing later that the practice continued unless there was a change in the contract language.

The arbitrator found that the exact opposite was the case and held that the company had successfully repudiated the practice. “Once placed on notice of the timely repudiation of the practice, the obligation switched to the Union to bargain over this subject at the next round of negotiations. Yet this was not accomplished, and consequently the ‘practice’ was properly eliminated by Management.” *Gillette Company* at p. 4 of the opinion. See accord, *Copaz Co and UFCW Local 7A*, 1993 W.L. 790196 (Traynor 1993).

This line of thought essentially means that if the language is clear but the practice is different, then the party seeking to *keep* the practice in place after repudiation by the other party must seek to change the language. This is the *Eden Prairie* scenario described above. If the language does not change, then the practice goes away.

If, on the other hand, the CBA language is unclear, ambiguous or is silent on the subject and the practice is necessary to interpret or give life to that language, then the party seeking to *change* the practice must seek a change in the language. If the language does not change the practice continues.

Here we are faced with a different situation from the *Eden Prairie* scenario. Despite the union's claim that the language is clear the practice was very different from the language, which is completely silent on the question of making cash payments in the manner in which this was done for over 20 years. It was thus clear that the practice was necessary to give effect to ambiguous, unclear or, in this case, silent contractual language. It was thus incumbent upon the union to change the language not the city. The city was thus correct in sending the union notice in response to the March 7, 2014 letter.

Moreover, the fact that the language did not change as the result of the negotiations means that the practice did not change either. The repudiation argument fails due to these facts.

## **CONTRACT NEGOTIATIONS**

The city provided yet another ground for its position here and that was the agreement reached in negotiations for the current agreement. First, the mere fact that the union brought a proposal to the table meant perhaps that it knew what it needed to do as set forth above, i.e. change the language. So it made an apparent attempt to do just that.

Doing so though on these facts provided a double edged sword in that while the union knew it likely needed to effect change in the language, despite what it argued at the hearing, putting the issue on the table and not getting a change in the language undercut its claim that it did not have to effect a change in the language. Otherwise there would in fact have been no need to place this issue on the bargaining table.

Second, the clear fact that the union's proposal was rejected meant squarely that it did not effect any change in the practice and is now attempting to gain through arbitration what was not achieved through bargaining. It is axiomatic that an arbitrator may generally not grant to one party something it put on the table in bargaining but was unable to place into the contract. To do so would run afoul of the jurisdiction granted to an arbitrator in the grievance procedure.

Finally, and perhaps most significantly on this record, there was the compelling evidence that there was a specific quid pro quo of a large wage increase in exchange for the union dropping its other demands – specifically the opt out provision issue. City witnesses gave persuasive testimonial and documentary evidence of this. Further the fact that the union could provide no documentation of anything to the contrary was of some consequence here as well.

Thus it was clear on this record that the negotiations provided considerable support for the city's arguments here. Accordingly, the grievance must therefore be denied due to the lack of evidence of a successful repudiation of the past practice, and the negotiations that resulted in the current agreement as discussed above.

### **AWARD**

The grievance is DENIED.

Dated: May 16, 2016

City of Blaine and LELS 2016 AWARD.doc

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Jeffrey W. Jacobs, arbitrator