

IN RE ARBITRATION BETWEEN:

MINNESOTA PUBLIC EMPLOYEES ASSOCIATION, MNPEA

and

CARVER COUNTY

DECISION AND AWARD OF ARBITRATOR

BMS CASE # 14-PA-0986

JEFFREY W. JACOBS

ARBITRATOR

September 21, 2015

IN RE ARBITRATION BETWEEN:

MNPEA,

and

DECISION AND AWARD OF ARBITRATOR
BMS CASE # 14-PA-0986

Carver County, Minnesota

APPEARANCES:

FOR THE UNION:

Joe Ditsch, Attorney for the Union
Robert Fowler, Attorney for the Union
Tom Perkins, Union Official
Chadd Smith, Deputy Sheriff, grievant
Stephen Glaser, Deputy Sheriff

FOR THE COUNTY:

Pam Galanter, Attorney for the County
Kristin Hack, Interim HR Director
Jason Kamerud, Chief Deputy

PRELIMINARY STATEMENT

The hearing in the matter was held on August 21, 2015 at the Carver County Government Center in Chaska, Minnesota. The parties submitted briefs to the arbitrator on September 11, 2015 at which point the record was closed.

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement covering the period from January 1, 2011 through December 31, 2012. Article VII provides for submission of disputes to binding arbitration. The arbitrator was selected from a panel maintained by the Bureau of Mediation Services. The parties stipulated that there were no procedural arbitrability issues.

ISSUE PRESENTED

The union stated the issue as follows: Did the parties agree to a furlough for deputies on named Holidays in the 2012-2013 Collective Bargaining Agreement?

The County stated the issue as follows: Did Carver County violate Article 8.5.2 of the Labor Agreement when it scheduled the Grievant, Deputy Chadd Smith, off work on December 25, 2013, on the Christmas Day Holiday, and paid him eight (8) hours of holiday pay?

Upon a review of the evidence and arguments in the matter the issue as framed by the arbitrator is as follows: Did the County violate the CBA when it failed to pay the grievant an extra 4 hours of pay for the holiday that fell on December 25, 2013? If so what shall the remedy be?

RELEVANT CONTRACTUAL PROVISIONS

Article 3.1 The Employer retains the full and unrestricted right to operate and manage all manpower, facilities, and equipment; to establish functions and programs; to set and amend budgets; to determine the utilization of technology; to establish and modify the organizational structure; to select, direct and determine the number of personnel; to establish work schedules; and to perform any inherent managerial function not specifically limited by this Agreement.

Article 7.3 Nothing contained in this Article shall be interpreted to be a guarantee of a minimum or maximum number of hours the Employer may assign employees.

Article 8.2 Designated eight (8) hour holidays are:

- New Year's Day – January 1
- Martin Luther King Day – Third Monday in January
- President's Day – Third Monday in February
- Memorial Day – Last Monday in May
- Independence Day – July 4
- Labor Day – First Monday in September
- Veteran's Day – November 11
- Thanksgiving Day – 4th Thursday in November
- Friday after Thanksgiving
- Christmas Day – December 25

Article 8.5.1 An employee who is scheduled to work, and works the holiday, will accrue eight (8) deferred holiday bank hours as their compensation for the holiday. Employees may accrue deferred holiday banks hours not to exceed one hundred fifty-two (152) hours. Effective 1/1/2013 deferred holiday bank hours shall be used, subject to mutual agreement between the Employer and the employee and in accordance with the procedures governing vacation usage. Holiday bank hours which exceed the one hundred and fifty-two (152) hour maximum shall be paid out at the next regular pay day.

Article 8.5.2. An employee who is not scheduled or is scheduled off and does not work on the holiday shall receive eight hours of pay for the holiday.

UNION'S POSITION

The union's position was that the County violated the agreement when it failed to pay the two grievant's holiday pay while they were off due to work related injuries. In support of this position, the union made the following contentions:

1. The union asserted that the County's effort to take 4 hours of pay away from affected employees is nothing more than a unilateral non-negotiated scheme to save money. The union noted that beginning in 2009, at about the time of the great recession, the County cut two of the four 12-hour general deputies' shifts on holiday. Doing this saved considerable cost because the County would not therefore pay deputies what it had been paying them prior to these changes.

2. The union asserted that the language found at Article 8.5.2 was never agreed to by the union and characterized it as "gotcha" language that was never intended to be in the contract and did not reflect a meeting of the minds.

3. The union noted that there was both an MOU stemming from a grievance in 2011 that required pay of the deputies' regular shift for holidays that were not worked. The operative language of that MOU provides as follows: "When a Deputy Sheriff assigned to patrol is scheduled off on a designated holiday, and the remainder of the Deputy's team is scheduled to work, those scheduled off will receive holiday compensation commensurate with their regular daily shift." The union asserted that despite the expiration clause contained within the MOU, it continued pursuant to the continuing contract rule until the next contract is negotiated. The provisions of the prior CBA covering 2010-2011 contained specific language regarding the normal work year. That provision is in relevant part as follows; the normal work year shall be two thousand eighty hours (2080) to be accounted for by each employee through: (a) hours worked on assigned shifts; (b) holiday and (c) assigned training and (d) authorized leave time." The union noted that this language existed even though deputies normally work 2184 hours per year. The union pointed to the MOU as "fixing" this discrepancy and setting forth the ongoing understandings about pay or designated holidays where the deputy does not work – i.e. 12 hours.

4. The union further noted that pursuant to the MOU and the union's understanding of the obligation to pay 12 hours of pay for a holiday that is not worked, the County in fact paid deputies in this exact scenario, i.e. where they did not work on a designated holiday, 12 hours of pay. This was the practice in all of 2013 and was only changed after Christmas day and after Deputy Smith had submitted his pay request as discussed below.

5. The union also noted that the union's proposal was to not sign additional MOU's during the negotiations for the 2012-2013 CBA, but rather to put such understandings in the contract. The union further argued that there was no discussion at all during those negotiations regarding compensation when a deputy does not work on a designated holiday. Even though there was considerable discussion about other provisions in Article 8, including the pay for working on such holidays. Accordingly, there was no meeting of the minds regarding compensation if a deputy did NOT work on a holiday

6. The union further asserted that without such a meeting of the minds the arbitrator must reform the contract to the understanding the union had during those negotiations. The union understood that the provisions of the MOU would continue until changed. Further, the union would never have agreed to the major change in compensation set forth in Article 8.5.2 without a significant quid pro quo or some sort of concession by the County. There was none here, the union asserted, and there was thus no agreement on the 8 hours.

7. The union also noted that the County paid the 12 hours for designated holidays throughout 2013 – until Christmas Day – just as the union had understood.

8. The union noted that there is very little if any dispute about the underlying facts of this case with respect to Deputy Smith. He was scheduled to work on Christmas day 2013 but only a few days before that day he was taken off the schedule and not allowed to work that shift. He then submitted a request for 12 hours.

9. The County only then informed Deputy Smith and the union that it had suddenly changed the practice “to what the contract said,” or words to that effect, and would not pay the 12 hours but only 8.

10. The union asserted too that this amounts to a unilateral furlough for deputies on named holiday that was neither the intent of the parties nor consistent with the understandings reached during negotiations for the 2012-2013 contract.

11. The union argued quite adamantly that the language of Article 8.5.2 is not what they agreed to in those negotiations. Mr. Fowler, who conducted the negotiations on behalf of the union, indicated that the County said nothing about what eventually became Article 8.5.2 at any point in the negotiations leading the union to believe that the practice of paying 12 hours on holidays not worked would continue. There were no notes or other written confirmation of any discussions about a reduction of the pay on holidays. Mr. Fowler even sent an e-mail on October 3, 2012 indicating that he did not feel as though there was a meeting of the minds and that he was not sure what we [the union] were voting on.

12. The union asserted that these facts show that the parties were simply not communicating and that there was no meeting of the minds on the question of pay for holidays not worked. While there was considerable discussion about pay for holidays that *are* worked there was no agreement on holidays *not* worked.

13. The union argued that either the parties did come to an agreement to pay 12 hours for holidays not worked, as evidence by the consistent practice of doing so for the first 11 months of 2013 or there was no agreement at all. The contract therefore has incorrect language and should be reformed by the arbitrator to reflect the true intent of the parties.

14. The union cited the Restatement of Contracts for this proposition and argued that here, the parties attached significantly different meanings to the contract and neither party knows or has reason to know of the differing interpretation by the other party.

15. The union understood the language of Article 8.5 to apply only to deputies who were not scheduled to work, not the broad interpretation asserted by the County. The union further claimed that it expressed this confusion to the employer thus leading to the conclusion that there was no meeting of the minds on that clause and that it should not therefore be enforced.

16. The union also countered the County's claim that there was a quid pro quo for the change in language in Article 8.5.2. The union did not and would not have agreed to a reduction in compensated hours from 36 hours to 32 hours paid for a holiday worked but ask nothing for the reduction from 2184 hours per year to 2080. The County's position effectively reduces the number of compensated hours from 2184 to 2080 without any commensurate concession by the County.

17. The union noted that the consequences of the County's change is significant. Deputies stand to lose 5 holidays plus another 20 hours of pay if the County's position is sustained. This significant reduction in pay would never have been agreed to by the union if it had known of the County's unexpressed intention to change the established way of paying for holidays not worked.

18. The essence of the union's case is thus that the intent manifested during negotiations was the understanding attached to the MOU from the MLK grievance. There was no discussion about changing it and the union understood something very different from that expressed by the County and applied by the County throughout all of 2013. Deputy Smith was taken off the schedule at the last minute and was not even told of the change in the County's position until after the day in question. Thus the implied agreement is consistent with the union's understanding and the arbitrator should either sustain the grievance or reform the contract to conform to the union's understanding of the language in Article 8.5.2.

Accordingly, the union seeks an award sustaining the grievances and making both grievants whole, including back pay for the loss of holiday pay.

COUNTY'S POSITION:

The County's position was that there was no violation of the agreement in this matter. In support of this position, the County made the following contentions:

1. The County asserted that the operative language of Article 8.5.2 is clear and unambiguous and calls for 8 hours of pay where a deputy does not work on a holiday.

2. The County further argued that it is within its inherent managerial rights to schedule deputies, including the right to take them off the schedule, as it did in this matter, and have them not work on a designated holiday. The County further noted that Deputy Smith acknowledged that right and did not dispute the employer's right to schedule employees as necessary.

3. The County pointed to Article 3 set forth above, and asserted that it retains the inherent right "to establish work schedules." Taking an employee off the schedule is well within that right. The County cited *LELS and City of St. Cloud*, BMS 09-PA-0887 (Beens 2011) for that proposition. The County argued that it is beyond dispute that a public employer retains that right.

4. The County argued that since 2009 it has been a well-known policy to reduce costs by having a reduced number of deputies work on designated holidays. This was done to meet the operational needs of the department, which typically has been to have fewer deputies on those holidays. The long practice has been to schedule 2 deputies on duty during holidays and the union acknowledged this at the hearing and throughout the grievance process.

5. The County also argued that both Deputy Smith and Deputy Glaser received 8 hours of pay and did not work the Christmas holiday. Both acknowledged that the contract language in fact says exactly that and that what Deputy Smith really wants is for the language to say something different. The County argued that the arbitrator simply does not have the power or jurisdiction to amend the contract in the manner the union seeks.

6. The County turned to the MOU over the MLK holiday that was executed in 2011. The County first noted that it expired per its terms on December 31, 2011. Further, the MOU provides that “the parties agree to discuss this and other holiday provisions in the next negotiation” and that it “does not set a precedent for future agreements.” The County noted that it was abundantly clear that the MOU was a one-time, non-precedent setting settlement of a grievance and did not bind future actions.

7. The County refuted the union’s claim that the action to comply with Article 8.5.2 constitutes a furlough of employees. First, the union raised this argument for the first time at the hearing and never raised it during the grievance steps. Second, the union’s reliance on *City of Breezy Point and LELS*, BMS 13-PA-0712 (Schiavoni 2014) is misplaced. The County argued that Breezy Point is distinguishable and did not involve the same issue or the same sort of contract clause as exists here. There the parties had negotiated providing that employees who were not scheduled to work would be paid for the number of hours equal to their regular shift – similar to the MOU which expired at the end of 2011. Here the contract language specifically provides for 8 hours of pay on designated holidays if the employee does not work. Thus the reliance on *Breezy Point* is inapposite.

8. The County then turned to the negotiation of the language and noted that it was made clear to the union what Article 8.5.3 said and what it meant. The County also noted that the union was disingenuous when it asserted that there was no discussion of that language and pointed to Union Exhibit 20, under Tab 7 at page 6 of the proposed contract language. There Mr. Fowler not only acknowledged reading the provision, which was at that point numbered 8.3.2 but had the identical language found at Article 8.5.2 that found its way into the final document, but also made a minor change to it from the words “holiday pay” to “straight time.”

9. The County argued that there was no “gotcha” at all and that the parties knew exactly what was agreed to in that language. Indeed, Deputy Smith acknowledged that 8 hours of pay is precisely what that language calls for but that he thinks it *should* say something else. That is not within the power of an arbitrator to change or amend but rather is something for the parties to negotiate in bargaining. The union acknowledged that 8.5.2 is not ambiguous – they just do not like it.

10. The County also countered the claim that Article 7 somehow supports the union’s case and noted that it calls for a normal work year but that the more specific language of Article 8 governs holiday pay. The County argued that it is axiomatic that specific language takes precedence over general language or, as in this case, language that deals with another issue.

11. The County also countered the claim that there was no quid pro quo for the language in Article 8.5.2 and asserted that in fact, there was a concession made in exchange for that language. The County noted that following the negotiations, union committee members Josh Baker and Tim Gerber, initialed every page of the contract and presumably read each page to confirm the contract accurately reflected the terms that were negotiated. Neither of these gentlemen were called at the hearing and the County asserted that the arbitrator should draw an adverse inference from the absence of their testimony that it was clear to the union that they were agreeing to a reduction from 12 hours of holiday pay to 8 hours in exchange for an increase in the offer on wages. There was also a reduction in the threshold amount to get additional pay.

12. County witnesses discussed a proposal to increase wages in the amount of \$0.90 per hour for employees earning less than \$25.00 per hour. In response to that the union sought a reduction in that threshold to \$23.50 per hour and indicated it would be easier to get the necessary votes for contract ratification if the County would agree to that threshold, knowing that the quid pro quo for that was the reduction in holiday pay ours to 8 hours. The County agreed to that reduction and argued that the union is now seeking to effectively renege on its agreement reached in bargaining and that it is merely attempting to gain something through arbitration it was unable to gain through negotiation.

13. The County also noted that despite this grievance the parties again negotiated the same language in the 2014-2015 contract. There was little if any discussion of that provision in the negotiations for the current contract. Thus, the County asserted, the parties' understanding of that language remains as it was when the language was originally negotiated and what the language said.

14. Finally, the County acknowledged that through an error or lack of communication with payroll, deputies were paid by mistake the 12 hours throughout most of 2013. Once the error was discovered, Chief Deputy Kamerud took steps to correct the errors and notify the union and the impacted employees that the County would now follow the contract language.

15. The County cited the venerable Harry Shulman and argued that the error did not establish a precedent and that it was "mere happenstance" that the error occurred and did not obviate or amend clear contract language.

16. Further, the fact, as noted above, that the parties negotiated the very same language in the subsequent CBA shows that the parties understand what Article 8.5.2 means. The union even attempted to change that language in the negotiations for the current CBA but was unable to change the language. The union fully understood what it was negotiating for in the 2012-2013 CBA. The County has been entirely consistent now and pays 8 hours – without any subsequent grievances filed by the union – since December 2013.

17. The essence of the County's case is that since 2009 it has exercised its inherent right to schedule deputies off during holidays; the contract language is clear and provides for 8 hours, not 12, for deputies who do not working on a holiday; and that the union knew that was the interpretation reached during negotiations and got something in exchange for it. Both deputies received 8 hours

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

DISCUSSION

FACTUAL BACKGROUND

The facts giving rise to these consolidated grievances were straightforward. Deputy Smith was scheduled to work on December 25, 2013 but a few days prior to that was taken off the schedule and told he would not be needed that day. The County claimed this was an error and that he should not have been on the schedule and that once it was discovered he was notified that he was not needed to work on that holiday.

Deputy Glaser had been scheduled off that day for what he called “many months.” Neither deputy worked on Christmas Day 2013. Deputy Smith submitted a pay request for 12 hours of pay for the holiday. Neither Deputy was paid for 12 hours; both were paid for 8 hours and either used leave time or the time to make up for the time.

The evidence also showed that since 2009 the County has been scheduling fewer deputies to work on certain holidays in order to save costs. The County has attempted to schedule holidays on an equitable basis and the evidence showed that it is understood that the County has the right to schedule its employees to meet the operational needs of the department. The evidence further showed that the crux of the grievance here is not an assault on the right of management to schedule the employees but instead is over the pay for not work on a holiday and the interpretation of Article 8.5.2 set forth above.

There was a grievance filed on February 11, 2009 over the compensation for deputies assigned to patrol who are scheduled off on a designated holiday. That grievance pertained to Martin Luther King Day and was resolved by MOU dated in August 2011. As noted above, that MOU was drafted as to not set a precedent for future cases and expired by its terms on December 31, 2011.¹

¹ It was also between the County and LELS, not MNPEA.

On this record, the claim that the MOU somehow carried over into the successor labor agreement did not find sufficient evidentiary support. While some in the union thought it did, and as discussed below, there was evidence that the County continued to pay 12 hours of holiday pay well beyond the expiration of the MOU and well into the time frame covered by the 2012-2013 CBA.

There was considerable testimony regarding the negotiations for the 2012 2013 agreement. The union asserted that it did not understand that the terms of Article 8.5.2 would apply to a situation where a deputy who had been on the schedule was suddenly taken off at the last minute.² The union also argued that there was no meeting of the minds on this article and that therefore there was no actual contract. The evidence showed otherwise.

LELS and the County had a CBA in place for 2010 and 2011. That contract did not contain similar language to that which appears in Article 8.5.2 in the 2012-2013 contract. MNPEA was certified to represent the deputies covered by the LELS contract and began negotiations for the successor agreement. The evidence showed that the negotiations were protracted but that eventually the parties negotiated and signed a labor agreement covering 2012 and 2013, See, Joint Exhibit 1. It was further clear, as discussed below, that the parties initialed each page of that agreement.

The union argued that there was “no discussion” of Article 8.5.2, yet as Tab 7, Union exhibit 20 at page 6 shows, the union not only saw what eventually became Article 8.5.2 but also made a change to it as part of their proposal. See also, Union Exhibit 22, where the language again appears as part of the proposal.

Further, the union negotiator sent an e-mail dated October 3, 2012 to Ms. Doris Krogman, the County negotiator, in which he stated “I feel as though we are not ‘meeting on the minds’ as to what we are voting on, the language isn’t clear.” Ms. Krogman responded back with some instructions on cashing-out procedures for “holiday comp.” See, Union Ex 24 at Tab 10.

² This argument was somewhat curious in that Deputy Glaser was notified months in advance that he was not on the Christmas Day schedule yet was included in this grievance.

Despite this apparent lack of understanding the union signed the agreement and its representatives initialed each page indicating that they had read the contract and understood it. The evidence thus showed that while there was not much discussion about what eventually became Article 8.5.2 there was clear notice to the union of what the County wanted.

There was also some evidence to suggest that there was a quid pro quo for the provisions found at Article 8.5.2. As outlined page 14 of the County's brief, there was discussion about eliminating longevity and the County proposed wage increase at certain pay levels. For example, the County proposed a \$0.90 per hour increase for those employees earning less than \$25.00 per hour. The union countered with lowering the threshold for the wage increase to those earning less than \$23.50 per hour. That was eventually accepted.

Thus, while there was not, and rarely is, a clear pathway to knowing whether a particular item found in a labor agreement was placed there specifically in exchange for another particular item it appears here that there was an exchange that led to the insertion of the language of Article 8.5.2 here. These discussions went on all while there was discussion of the holiday article and while the language found at Article 8.5.2 was in the proposals for the union and its negotiators to see. They did not raise any question about that language nor did they express the claim, raised later, that the language applied only to deputies who had previously been scheduled off.

The contract was signed by union officials in late October 2012 and by the County on November 20, 2012. The County sent a message to the union dated January 15, 2013 specifically indicating that "Section 8.5.2 was effective January 1, 2013." See Union Exhibit 26 found at Tab 21. There was no apparent question raised about the effect of that by the union.

However, the evidence also showed that for whatever reason, the payroll department continued the old practice of paying deputies whose schedules were for 12 hours but who had not worked on a holiday the 12 hours. The evidence as a whole showed that was indeed an error and that it continued throughout the bulk of 2013. It was not until after December 25, 2013 that the union and Deputy Smith was notified that the practice of paying the 12 hours would no longer continue and that the County would revert to the strict terms of the contract.

The grievance in this matter was filed on behalf of Deputy Smith and all others similarly situated. Both Deputy Smith and Deputy Glaser were not paid for the 12 hours but were paid for 8 and were told to use other accrued leave time to make up any difference to their regular schedule. The grievance was processed through the appropriate steps of the grievance procedure and culminated in the arbitration. It is against that factual backdrop that the analysis of the case process.

WAS THERE A “MEETING OF THE MINDS” DURING THE CONTRACT NEGOTIATIONS FOR THE 2012-2013 REGARDING ARTICLE 8.5.2?

The union argued that the contract is in error and did not reflect the parties’ agreements at the bargaining table. Indeed, Deputy Smith acknowledged that Article 8.5.2 provides for 8 hours of pay, not 12, but asserted that it “should say” 12 hours.

The real and patently obvious problem with this argument is that it says 8 – not 12 and that the union negotiators knew what it said, signed the contract with that language in it and initialed each and every page. Based on this, it was not shown that there was a failure of the meeting of the minds, even though the union now claims that it did not understand the County’s interpretation of the contract. As discussed below, it was troubling that the County then continued the practice of paying 12 hours until after deputy Smith submitted his pay request, but the mere fact that there was a difference in interpretation of a disputed contract clause in no way undermines the binding effect of the contract.

The question is thus not whether there was or was not a contract – there was. The question is what the contract says and means in this context and on these facts.

As Elkouri discusses, it is sometimes argued that there was no agreement at all and that the contract is invalid because of it. In the common law, unless there is a meeting of the minds, there is no contract and the parties go their separate ways. See, Simpson on Contracts, 2nd Edition West Publishing, 1965; See also, Restatement of Contracts, Section 22. This is sometimes referred to as mutual assent and requires that parties manifest to each other mutual assent or agreement to the same bargain at the same time. If they do not then under common law no contract is created. See also, Restatement of Contracts (Second) Section 201 (1981).

That is typically not what happens in labor agreements however. The U.S. Supreme Court stated that a collective bargaining agreement is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate ... the arbitration of labor disputes ... is part and parcel of the collective bargaining process itself.” See, *Steelworkers v Warrior and Gulf Navigation Co.*, 363 U.S. 574, 578 (1960).

There are many times when the parties either do not anticipate or even discuss a particular scenario because they never considered it at all or they did consider it but got the contract done and left some ambiguity in it to be determined later. This does not invalidate the contract it merely allows for the dispute to be determined later. Once there has been a determination, the parties retain the ultimate power to “fix’ it through negotiations in the next round of bargaining.

Elkouri has perhaps the best pronouncement on this issue as follows: “when the parties attach conflicting meanings to an essential term of their putative contract, is there then no “meeting of the minds” so that the contract is not enforceable against an objecting party? Hardly. The voidability of a presumed contract arises only in the limited circumstances where neither party knew, or should have known, of the meaning placed on the term by the other party, or where both parties were aware of the divergence of meanings and assumed the risk that the matter would not come to issue.” Elkouri and Elkouri, *How Arbitration Works*, 6th Ed. at p. 428.

Elkouri notes, citing, *Colfax Envelope v Graphic Communications Union*, 20 F. 3d 750, 145 LRRM 2974 (7th Cir. 1994), that “when parties agree to even patently ambiguous terms, they submit to have any dispute resolved by interpretation. That is what courts and arbitrators are for in contract cases – to resolve interpretative questions founded on ambiguity.” See, Elkouri at p. 429-30.

Even assuming the union had a different interpretation of the language or Article 8.5.2, a fact strongly undercut by the fact that the union made changes to that very language before the CBA was signed, there was insufficient support for the claim that the arbitrator has the power to “reform” the contract. That is generally not the way it works in labor relations. If there is a difference of opinion about the meaning of the contract, the parties may take the matter to an arbitrator who then renders a final and binding decision over the language. Reforming a collective bargaining agreement is not only contrary to the grievance procedure in the CBA but also arguably directly contrary to the Steelworkers Trilogy holding against arbitrators dispensing their own brand of industrial justice.

Accordingly, the question of a meeting of the minds does not control this case. Even if that were the case, the appropriate remedy for that is a grievance procedure at which an arbitrator can render a decision about what a particular clause means in the context of that labor agreement. If that is not what the parties intended, or the intent changes, the parties can re-negotiate the language.

THE MEANING OF ARTICLE 8.5.2 AND THE EMPLOYER’S RIGHT TO SCHEDULE

There is very little question that Article 8.5.2 means exactly what it says – an employee who does not work on a designated holiday gets 8 hours of pay. There was no question that this is the clear and unambiguous meaning of the contract clause at issue. Even the union witnesses acknowledged that this is what the contract clause says but simply argued that this is not what they thought they were agreeing to. This argument held little evidentiary weight, especially in light of the discussion above. The mere fact that one party does not understand clear language gives very little power to an arbitrator to fix that problem.

It was also quite significant that the prior contract did not contain similar language to Article 8.5.2 and the successor contract did. This latter fact was strong evidence that the parties indeed fully understood what that language said. That the union may not have understood it the same way the County did gives rise to a grievance but not to reformation of the agreement

Further, the 2014-2015 contract was negotiated after the facts giving rise to this grievance became known. There was also evidence that the union sought to change the language of Article 8.5.2 but was unsuccessful in doing so. That language appears in the contract now unchanged from its prior form. Finally there was no evidence of any further grievances filed even though, as noted below, the County has continued the 8 hours of pay practice in 2014 and 2015. While the union might well argue that this outcome of this grievance will impact all cases arising after Deputy Smith's grievance, these facts did not strongly support that view. It was clear on this record that the parties now fully understand what the language means and in fact signed a contract with that language in it knowing full well the County's position with respect to it.

Further, there is little question that the County had the right to change the schedule. Article 7 contains a clear provision that there is no minimum or maximum number of hours. The union argued that other provisions regarding 2184 hours impacted the holiday pay.

It is axiomatic however that the more specific language of the holiday pay article- especially given that it so clearly governs this precise situation – takes precedence over more general language. On this record it was clear that the County did not relinquish or limit its right to change the schedule even as late as it did here.

THE PARTIES PRACTICE THROUGHOUT 2013

As noted above, the case would be over at this point and the County would prevail given the clear contract language. The problem for the County is that for whatever reason it continued paying 12 hours. This was shown to be an error but certainly gave rise to the assumption by the affected employees that they would get paid 12 hours if they did not work a holiday. Indeed they all did in 2013 – except for Deputies Smith and Glased.

Further, had the County notified the union and the affected employees of the error before December 25, 2013 the result here might have been different but again this notification was not done until afterwards. The error was not even noticed until Deputy Smith submitted his pay request.

There was merit in the claim that on these facts the two grievants should be entitled to their pay of the extra 4 hours given the County's failure to notice the erroneous pay and to notify the union and the grievant's of this until after December 25, 2013. Whether this amounted to a full-fledged past practice was doubtful however given the very clear contract clause at issue and the County's argument, based on Profssor Shulman's oft-quoted pronouncement that if a practice is a mere happenstance it does not rise to the level of a binding past practice. On this record, the determination of whether this was a past practice is moot since any such practice is generally co-terminus with the existing labor agreement from which it derives. Here the contract expired on December 31, 2013 anyway and a new contract has now taken its place with the same clear language in it that calls for 8 hours. There was further no evidence that the County continued paying 12 hours past January 1, 2014 and clearly placed the union on notice of its intention not to ay 12 hours before the new contract was signed.

Accordingly, some remedy is appropriate but not the one the union seeks.

REMEDY

Given the record as a whole, it was shown that there was a practice of paying 12 hours in these circumstances that was in place, despite the language of Article 8.5.2 until December 25, 2013. That fact calls for both deputies to be paid the 4 hours of extra pay for that holiday. However, as discussed above, this practice expired with the 2012-2013 labor agreement and did not continue into the successor contract. On that question, the grievance must be denied.

The County noted that while Deputy Smith was notified only a few days prior to December 25th that he would not be scheduled on, Deputy Glaser knew for months that he would not be scheduled that day. That distinction does not alter the result here though in that it was not until after December 25th that the error was discovered and the union and affected employees were notified that the County would follow the contract. As discussed above, under these unique circumstances this error did not bind the parties beyond the expiration of the 2012-2013 contract.

Thus, both Deputy Smith and Glaser are entitled to an additional 4 hours of pay for the December 25, 2013 holiday. As discussed above though, this result does not bind future decisions. It is clear that the County retained the inherent right to schedule, including the right to schedule deputies off work on holidays, and that the CBA language is clear and requires 8 hours of pay in these circumstances.

AWARD

The grievance is **SUSTAINED IN PART AND DENIED IN PART**. Deputy Smith and Deputy Glaser are to be paid the additional 4 hours of holiday pay for the December 25, 2013 holiday. The language of Article 8.5.2 is hereby interpreted to require 8 hours of pay for deputies who do not work on a holiday consistent with the County's position in this matter in cases that fall within the purview of the 2014-2015 CBA.