IN THE MATTER OF ARBITRATION

BETWEEN

American Federation of State, County, and Municipal Employees, Council 5 [Class Action Unit 8 Corrections, Locals 599, 600, 608, 915, 1539, 1988, 2728, 3607, and 3887]

And

State of Minnesota Management and Budget (MMB) Department of Corrections (DOC)

OPINION AND AWARD

BMS Case No.: 25-PA-0179

ARBITRATOR

Joseph L. Daly

APPEARANCES

On behalf of AFSCME, Council 5

Joseph Broge, Field Representative

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On behalf of State of Minnesota MMB

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JURISDICTION

This Class Action arbitration is held pursuant to the Agreement between Unit 208 and the State of Minnesota, July 1, 2023 through June 30, 2025 [Joint Exhibit 1]; under the jurisdiction of the State of Minnesota Bureau of Mediation Services. The Class Action Grievance Arbitration, to include many affected locals, was held and submitted to Joseph L. Daly, Arbitrator, at the State of Minnesota, Bureau of Mediation Services, St. Paul, Minnesota, on November 20, 2024. Post hearing briefs were filed on by the parties on December 20, 2024. The Opinion and Award was rendered on January 3, 2025.

ISSUE AT IMPASS

The union states the issue as:
Did the employer violate past practice when it unilaterally discontinued paying for missed overtime opportunities?

The State of Minnesota MMB states the issue as:
Did the employer violate the collective bargaining agreement when it entered into non-precedent setting settlements with the union to resolve grievances regarding overtime distribution errors in a mutually agreeable way? If so, what should be the resolution?

RELEVANT CONTRACT LANGUAGE

Article 6 - Overtime and Article 17 - Grievance Procedure: The full CBA can be located at https://mn.gov/mmb-stat/000/az/labor-relations/afscme/unit8/2023-2025/AFSCME-Unit-8-Contract-2023-2025.pdf

RELEVANT STATUTES

Minn.Stat. Sec.179A.22 State and its Employees; Negotiations
Minn.Stat. Sec.43A.06 Powers and Responsibilities; Labor Relations

INTRODUCTION

On October 12, 2023, the union filed a class action grievance alleging that the Minnesota Department of Corrections (DOC) "unilaterally changed a bona fide past practice regarding missed overtime opportunities. Instead of paying for incidents of missed overtime on a dollar-for-dollar basis… [DOC] now seeks to simply offer a future shift to the affected individual." The grievance was denied by DOC on April 4, 2024, and appealed to MMB for arbitration on May

13, 2024. This overtime distribution error grievance [admitted by the employer] became the first in at least twenty (20) years to go to an arbitration hearing.

The union and the employer agree that the contract does not specify a remedy when there has been an overtime distribution error. The union contends that when the employer violates this part of the agreement and n error skips over a more senior employee who volunteered for overtime, the past practice has long been to pay the skipped employee for the hours they would have worked had they been correctly selected. Testimony offered at the arbitration hearing by the former AFSCME Council 5 Field Representative, the present AFSCME Local Vice President and Corrections officer, and various union witnesses was that the payment for missed overtime opportunities has been going on for “at least the past 20 years.”

Employer MMB contends that the overtime distribution errors have been consistently resolved through the grievance process. The employer contends “there is no predetermination on how an overtime distribution grievance appealed to arbitration should be resolved.” “Overtime distribution grievances have been resolved in several ways once they have been appealed to arbitration.” “They may have been settled for straight time pay for the overtime hours missed; or at the appropriate overtime rate for overtime hours missed; or at the appropriate overtime rate for a fraction of the missed overtime hours; or sometimes the grievances have been withdrawn by the union without a remedy. Further, the employer contends that past practice has been “expressly disclaimed in a settlement document” in that it would be “non-precedent setting.” “The mutually agreeable grievance settlements between the state and the union all contain a non-precedential clause which establishes that the agreement does not set any precedent.” [See Post Hearing Brief of MMB].

Consequently, the questions are: 1) Has the union proven by preponderance of the evidence that past practice for over 20 years shows when there is an overtime distribution error, the less senior employee is paid for missed overtime opportunities? Or, 2) has the employer shown that it has entered into non-precedent setting settlements with the union to resolve grievances regarding overtime distribution errors in a mutually agreeable way?

<u>POSITION OF AFSCME COUNCIL 5</u>

1. AFSCME Council 5, Unit 8 Corrections, Locals 599, 600, 608, 915, 1539, 1988, 2728, 3607, and 3887 filed a class action alleging that the employer, State of Minnesota, acknowledged

a bona fide past practice of “overtime shall be offered on the basis state seniority to the most qualified and capable employee who is working on the immediately preceding shift and who volunteers during the first hour their shift.” But in the rare event that the employer violates this part of the agreement and accidentally skips over a more senior employee who volunteered for the overtime, the past practice has long been to pay the skipped employee for the hours they would have worked had they been correctly selected.

2. AFSCME Council 65 staff member Jolene Kjelsus (nee Catudio) was working as a field representative for AFSCME Council 5 and was the lead negotiator for the union during the 2019-2021 bargaining sessions. She testified that the employer acknowledged the bona fide past practice. She stated that the acknowledgement was made by MMB Chief Negotiator Austin Neese when he proposed a change [Union exhibits 1 and 2]. These exhibits demonstrate by contemporaneous notes taken by members of the union’s bargaining team, the affirmation and acknowledgement of the past practice by using the words “repeatedly” and “multiple times” during bargaining.

3. AFSCME Local 915 Vice President and Corrections Officer Jeff Vars also testified that the employer agreed with the union’s interpretation of the past practice during the 2019-2021 bargaining sessions. Officer Vars has been involved in contract negotiations since 2005, first as a member of the General Assembly and then as negotiating chair for the past four contracts. Officer Vars also serves as the president of the Corrections Policy Committee, which is the overarching governing body of all the individual corrections locals located at each facility throughout the state. It was in that capacity that he made the ultimate decision to pursue a class action grievance on this matter, since it became evident that all individual locals were having the same problems and that the employer had suddenly decided to abandon past practice.

4. Officer Vars testified that the past practice of paying for missed overtime opportunities has been going on for “at least the past 20 years.” He further testified that while it was sometimes settled through a settlement and release document, it was most often done informally. He testified that the practice was so routine that often a supervisor would be notified of the missed overtime and the effected employee would simply be instructed to put the missed hours on her/his timecard as a remedy. His unrefuted testimony highlights an unequivocal past practice and one that has been in place for decades.

5. Dan Gorman, President of Local 600 and a Corrections Officer at MCF-Stillwater, testified that the employer clearly and unequivocally acknowledged the past practice of paying overtime during the 2019-2021 bargaining sessions. He was able to prove this through the notes he took at the bargaining table [Union exhibit 3]. In those documents, he wrote "which has been the practice" when quoting MMB's lead negotiator Austin Neese as well as Mr. Neese later comments, "They have all been payed [sic] OT even if not worked."

Officer Gorman, a Department of Corrections employee since 2005, also testified he had signed innumerable settlement and release documents paying out missed overtime and it was often remedied informally as well.

6. The union contends that the parties have been here before. It cites *AFSCME Council 5 [on behalf of Daniel McDonald] and State of Minnesota MMB,* BMS Case no. 24-PA-0817 showing that Arbitrator Patrick Kelly held that the MMB had a past practice of calculating distance driven when it came to layoffs, i.e., using road miles rather than direct distance should be the deciding factor. The employer prevailed with *their* past practice argument in that case. Now the employer is challenging past practice in this case. If anything, the case for past practice in this case is far stronger here than it was in the case decided by Arbitrator Kelly. With overtime payments, the employer fully acknowledged the past practice and sought to change it in contract negotiations. No such acknowledgement or bargaining history existed in the previous case, yet past practice prevailed.

7. The employer denies the existence of a past practice and attempts to deny that they acknowledged the past practice during the 2019-2021 contract negotiations. Minnesota Management and Budget's chief negotiator for that period, Austin Neese, did not participate in the arbitration hearing in this matter and could not testify or be cross examined. Instead their witnesses included Minnesota Management and Budget Labor Relations Director Jennifer Ziegler (nee Claseman), who started her role in 2019 and Department of Corrections Human Resources Director Laurie Jandro, who began her career with the DOC in 2021. Neither one of these individuals has a direct experience or longevity to speak authoritatively on the past practice between the parties.

8. The employer attempts to utilize a variety of settlement and release documents that specified a remedy other than payment to refute the existence of past practice [State exhibit 1]. Obviously, these documents were individually selected because they deviated from the norm, and

in terms of sheer numbers can in no way be compared to 20+ years of various settlements (both formal and informal) that support the past practice.

9. At the same time, the employer finds itself making a contradictory argument. First, the employer asserts that there is no past practice because settlement and releases are “non-binding” and “shall not be cited in any future arbitration proceeding whatsoever,” yet at the same time attempt to use different “non-binding” settlements to refute the same practice.

10. Had the union known that documents clearly stating they were not to be used in any future arbitration proceeding would be rendered admissible by this arbitrator, the union could have brought a near countless number of examples. The employer never challenged the union’s witnesses when they testified that such examples exist in numbers “more than [we] can count.”

MMB’s Jennifer Ziegler testified that in order to qualify as a past practice, it needs to be known not just to the agency but to Minnesota Management and Budget. She was firm on the fact that MMB had no knowledge of a past practice and that if it did, it would simply issue a “termination of past practice letter” during negotiations.

This argument is nonsensical, since it was MMB’s own chief negotiator who acknowledged the past practice and proposed to change it during the 2019 bargaining sessions [Union exhibits 1, 2, and 3]. Both the agency and MMB were well aware of this past practice, otherwise why would they have proposed language to change it? Ms. Ziegler attempted to say that the union was misinterpreting Mr. Neese’s words, but it is highly questionable that she was even present during the opening sessions of bargaining in 2019. While she was quite adamant about being present for the entire thing (and she was indeed present at the end of the bargaining sessions in the fall), no one from the union’s table team recalls her being there and she appears no where on record for the opening sessions in May of 2019.

The employer makes an argument that there was “no individual grievant” for the class action that the union filed. This is a new defense that was never raised prior to the arbitration hearing and, even if it had been, it is not correct. As Officer Vars stated during his testimony, there was a decision to combine all the local grievances into one class action since the decision to stop honoring the past practice was department wide. Union Exhibit 5 contains individual grievances at the local level so the employer’s argument here is not correct. In those documents, local officials expressed their disappointment with the change.

11. In the employer's Step 3 grievance response to the union's grievance, the employer states "in the 2005 round of bargaining the union sought a remedy of paying these employees for overtime when they were not properly called. To which the state was not interested…." This is not correct, as evidenced by the union's actual opening contract proposal for 2005 [Union exhibit 4]. There is no union suggestion or mention of missed overtime remedy in the union's proposal to be found in the entire document. There was, evidently, discussion of the issue across the table as evidenced by bargaining notes presented by the employer. [State exhibit 3]. While no one present at this arbitration hearing can testify to the document's accuracy or authenticity, it still shows that even in 2005 there was a practice of paying for missed overtime opportunities.

12. Department of Corrections Human Resources Director Laurie Jandro testified that it was her decision to cease paying out missed overtime opportunities. While she was expressly noncommittal when it came to past practice, she admitted that she did not know what a past practice was in regard to a labor agreement and that she was unaware of the parties' bargaining history when she made the decision. Her position is understandable. It makes sense that she would bemoan paying employees for time they did not work, especially when she was relatively new to the department and neither knew of nor understood the past practice. However, she could have made a correction when she was made aware of the existence of the past practice rather than doubling down on the refusal.

13. The parties have a bona fide contract clarifying past practice to pay for missed overtime opportunities. The unrefuted testimony of the union's witnesses and the evidence illustrate the long-standing nature of this practice as well as Minnesota Management and Budget's clear and unequivocal acknowledgement during the 2019-2021 bargaining sessions.

Allowing the employer to make a unilateral change and effectively force through something that they were unable to achieve during negotiations would have an immense deleterious effect on the relationship between the parties. The union asks that you sustain this grievance, uphold the past practice and instruct the parties that such a change, if it is to be made, needs to be done at the bargaining table.

POSITION OF EMPLOYER MMB DEPARTMENT OF CORRECTIONS

1. The contract language is clear on how overtime is to be distributed but is silent on situations where overtime is not distributed in accordance with the collective bargaining agreement.

2. Overtime distribution errors are consistently resolved through the grievance process. Any mutually agreed to remedy to settle a grievance is arrived through a discussion between the Department of Corrections and the union. There is no predetermination of how an overtime distribution error grievance is to be resolved. Before the Department of Corrections proposes a possible remedy to the union, "they take into consideration the facts of the situation, what's going on at the time, what's happening with that employee, what the requests are made by the employee and management." Testimony of Ms. Laurie Jandro, Human Resources Director.

3. This case by case grievance analysis has resulted in the parties mutually agreeing to resolve grievances by allowing the affected employee to work a future overtime shift on a mutually agreeable future date; it has also resulted in entering into settlement agreements in which the employees that were "missed" for overtime were paid a lumpsum amount equivalent to the overtime shift they missed as if they had worked; it has also achieved settlement agreements that were resolved by letting the employee pick a future shift, or the Department of Corrections took into consideration that at the time there were "not enough employees to do the work…we had more work than people." [Id.]; and by resolving grievances in this manner it could prevent another employee from being forced to work overtime."

4. The union failed to provide any convincing evidence of overtime distribution errors being resolved outside the grievance procedure. The union did not explain why they agreed to resolve several overtime distribution error grievances by other means than the alleged past practice, including agreeing to offer the affected employee a future alternative overtime shift if they claim that such a remedy is "unworkable."

5. The union's claim that the Department of Corrections proposed remedy proposal is "unworkable" has no merit. Allowing an employee to pick a future agreeable overtime shift would not have incurred "further contract violations," but could avoid the agency having to force someone to work. The union fails to recognize that there is nothing in the collective bargaining agreement requiring that the Department of Corrections to immediately move from a volunteer

list to forcing employees and rather DOC was able to execute the settlement agreements permitting employees to pick a mutually acceptable future shift after exhausting the volunteer list and before forcing any other workers on to an overtime shift. Despite all of this, the union was never obligated to accept grievance remedies contrary to their preferred resolution.

Despite the union's claims to the contrary, offering to resolve overtime distribution grievances by allowing the affected employee to pick a future shift is not a new occurrence. Even in the early days of the unit 8 contract being separate from the Multi-Unit Contract, there were several grievances where DOC offered to resolve them by assigning the affected employee's a future unscheduled overtime shift which the union declined and proceeded to appeal the grievance to arbitration and were ultimately resolved by the parties agreeing to pay the affected employee straight time for the hours they missed.

6. The union's claim of a past practice is unfounded. For past practice to be binding, it must be unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period as a fixed, and established practice accepted by both parties. See, Elkouri and Elkouri, *How Arbitration Works 7th ed., 2012* p. 12-4 citing *Celanese Corp. of America*, 24LA168 (Arbitrator Justin, 1954).

7. The union cannot point to a grievance resolution as having precedential value and be used to show evidence of a past practice when the agreement itself says "expressly disclaimed in a settlement document that it would be non-precedent setting" Id. Elkouri & Elkouri, See generally pg. 9-31.

The mutually agreeable grievance settlements between the state and AFSCME all contain a non-precedential clause, which establishes that the agreement does not set any precedent.

8. Arbitrator Richard Mittenthal in his seminal article *Past Practice and the Administration of Collective Bargaining Agreements*, in Arbitration and Public Policy 30 (S. Pollard, ed. 1961) more specifically defines past practice and its elements as:

> Past practice has been defined as a 'prior course of conduct which is consistently made in response to a recurring situation and is 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.

9. The core argument of the union claiming the existence of a past practice, in resolving overtime distribution errors, centers around a proposal made by the state during the 2019-2021 round of bargaining. During that round of bargaining the state proposed contract language on how to remedy overtime distribution errors. The state proposed that the remedy of any overtime distribution error should be "50% of the payment of overtime hours missed that the employee would of [sic] worked…" This proposal was ultimately dropped. The union claims that in this proposal the employer fully acknowledged the agreed-upon interpretation of the contract in terms of missed overtime remedy and sought to negotiate a change. This theory neglects to recognize that the parties had both before and after this proposal settled cases in a variety of different ways. The union is missing a key element of establishing a past practice-that there is a consistent and mutually agreeable practice. The employer proposed a simple, efficient remedy that would be a clear and consistent remedy and neither side would need to take into consideration the circumstances of the case, but rather the only determination if in fact an opportunity overtime was missed.

10. Bringing a contract proposal to the bargaining table does not indicate that a past practice exists. At no point did the state acknowledge the existence of a past practice. The state did talk about how overtime errors were being remedied at that time. The bargaining notes introduced by the union lack any indication that the state acknowledged any sort of past practice. Neither the state's proposal nor the bargaining notes from either party from the 2019-2021 round of bargaining show any mutual acknowledgement of a past practice that has been "unequivocal, clearly enunciated and acted upon" or had been accepted by both parties. The fact that the remedy to overtime distribution grievance varies is still true today as highlighted in Ms. Jandro's and Ms. Ziegler's testimony.

11. Overtime distribution error grievances have been resolved in several different ways over the last two plus decades. Mutually agreed to resolutions include: (1) Paying the grievant the overtime rate for the hours missed; (2) paying them straight time for the hours missed; (3) paying them overtime for a portion of the hours missed; and (4) allowing the grievant to choose a future mutually aggregable overtime shift. There has never been one consistent method on how these types of grievances have been resolved. It is well established that management agreeing to a remedy proposed by the union to settle a grievance does not create a binding past practice. It is simply management exercising managerial discretion as to the convenient methods of resolution.

12. There is no “mutuality” between the parties regarding the existence of the alleged past practice the union claims.

13. The arbitrator’s authority is limited by the parties’ contract. AFSCME is asking the arbitrator to read into the contract language that does not exist. They are asking the arbitrator to disregard how the parties have acted and resolved overtime distribution grievances for the past 20 years. Article 17, section 5 of the collective bargaining agreement states, “The arbitrator shall have no right to amend, modify, nullify, ignore, add to, or subtract from the provisions of this agreement.” [Joint exhibit 1]. It is not for the arbitrator to fashion his or her own brand of workplace justice nor to add to or delete language from the collective bargaining agreement.

If AFSCME wants a standard remedy of paying an employee for missed overtime opportunity, AFSCME must bargain such remedy into the contract.

14. The hearing record shows that overtime distribution errors are resolved through the grievance process and has been resolved in a number of different ways over the past twenty years. The union failed to introduce any evidence to counter this fact. The parties consistently agree that no grievance remedy settlement is precedential to any consequential grievance. This means that each new grievance stands on its own and any remedy that may be proposed by either party is based on the circumstances surrounding the events that lead to the grievance.

Despite the union’s insistence to the contrary, a bargaining proposal brought forward in negotiations is by no means any sort of admittance to an existing past practice. It simply means that a party is proposing language that would remedy any overtime distribution errors in a more consistent and streamlined process. Moreover, if the employer wanted to extinguish an established past practice, the employer would provide notice, and opportunity to bargain and be permitted to move forward in a manner inconsistent with the established past practice upon implementation of a successor agreement, which is a simple process to implement.

Based on the evidence presented at the arbitration hearing and the arguments in this post-hearing brief submitted by the state of Minnesota and MMB, the Department of Corrections respectfully requests that the grievances be denied in all respects.

DECISION AND RATIONAL

When it is asserted that a past practice constitutes an implied term of a contract, strong proof of its existence ordinarily will be required. Elkouri and Elkouri, *How Arbitration Works 6th ed.* at 607, citations omitted. To be binding on both parties, the past practice must be "(1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties." Id. at 608.

The employer has shown in its evidence that such mistakes have sometimes been simply taken care of; often dealt with after a grievance has been filed; and other resolutions have been achieved rather than the resolution of lost pay that the union requests in this class action.

Considering that the remedy over the years has not always been uniform, there has not been a mutually accepted remedy. Further, a number of settlements have written into them that the settlement is "non-precedential."

The union has not shown by a preponderance of the evidence "clarity", "repetitive", "mutuality" or "acceptable by both parties" that such a past practice is agreeable to both sides.

The remedy for these specific situations of admitted error and when not written into the contract is best left to the bargaining process. Arbitrators have been and should be very hesitant to add language to a collective bargaining agreement, especially when the contract itself in Article 17, Section 5 says that an arbitrator has no right to "add to… provisions of this agreement." Arbitrator Harry Shulman regarding past practice wrote that "[T]here may be other practices which are not the result of joint determination at all. They may be happenstance, that is, methods that developed without design or deliberations. Or they may be choices by Management in exercise of managerial discretion as to convenient methods at the time." Elkouri & Elkouri, *How Arbitration Works 6th Edition* at 613.

Based on the above it is held that the union has not shown by a preponderance of the evidence a uniform past practice when the employer makes an incorrect overtime error in distribution of the overtime. The class action grievance is denied.

January 3, 2025

Date

[s] Joseph L. Daly

Joseph L. Daly

Arbitrator