BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between OFFICE and PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, LOCAL 95, AFL-CIO and PORTAGE COUNTY	Case 80 No. 43974 MA-6134

Appearances:

Mr. Mike Salmon, Business Agent, OPEIU, Local 95, appearing on behalf of the Union.
Mr. Philip Deger, Personnel Director, Portage County, appearing on behalf of the County.

ARBITRATION AWARD

The above captioned parties, hereinafter the Union and the County or Employer respectively, are parties to a collective bargaining agreement providing for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to hear a grievance. A hearing was held on August 27, 1990 in Stevens Point, Wisconsin. The hearing was not transcribed and the parties did not file briefs. Based on the entire record, I issue the following award.

ISSUE

The parties stipulated to the following issue:

> Whether or not the County has the right to unilaterally compel bargaining unit members when to take their earned compensatory time off?

PERTINENT CONTRACT PROVISIONS

The parties' 1990-1991 collective bargaining agreement contains the following pertinent provisions:

ARTICLE 3 - MANAGEMENT RIGHTS

The Employer possesses the sole right to operate the County and all management rights repose in it except as expressly limited by this Agreement or memoranda of understanding. These rights include, but are not limited to, the following:

B. To establish reasonable work rules and schedules of work;

C. To hire, promote, transfer, schedule and assign employees in positions within the County;

. . .

ARTICLE 13 - HOURS OF WORK/OVERTIME

Section 4: Overtime

. . .

B. Compensation: Any overtime worked shall be compensated by compensatory time off or pay, at the discretion of the Director/Administrator. If any employee is contacted at home by telephone for consultation, they shall be compensated at the applicable rate. However, accumulated compensatory time in excess of the following thresholds shall be received in pay:

1/1/90	150 hours
7/l/90	80 hours
1/1/91	40 hours

For shift differential for County Health Care Center employees, see Appendix "B".

BACKGROUND

Employes in the bargaining unit involved here have long been able to earn compensatory time (hereinafter comp time) by working overtime. The parties' 1981-1983 contract provided for same in Article 13, Section 4, B. That section further provided that once such comp time was earned, it had to be "taken at a time mutually agreed to between the employee and the department head" and also had to be "utilized within sixty (60) days of the date it was earned unless mutually agreed to otherwise." The record indicates that this latter requirement (i.e. the part about using

comp time within sixty days) posed an administrative problem for the Employer and was not being enforced while no problems existed with the former requirement (i.e. the part about comp time being taken at a time mutually agreed to between the employe and the department head). In the negotiations for the 1984-1985 contract, the Union proposed deleting this provision because of the problems connected with the sixty day limitation period and the County agreed to delete same. A new paragraph was inserted in its place which specified how comp time was earned but was silent on when and under what circumstances it could be taken. Article 13, Section 4, B was modified in successive labor agreements concerning how comp time was earned but continued to remain silent on when and under what circumstances it could be taken. That section was modified again in the most recent round of contract negotiations (i.e. the 1990-1991 contract) after the Employer expressed the view that accumulated comp time levels were becoming too high. The Employer proposed a cap on comp time accumulation which was accepted by the Union and incorporated into the present contract.

The record indicates that after the "mutually agreed" language was deleted from the parties' 1981-1983 contract, comp time was not unilaterally scheduled by the Employer; rather it was still scheduled by mutual agreement between the employe and their supervisor. The scheduling of comp time was not discussed in any subsequent negotiations (including the most recent negotiations) nor has the Employer ever proposed changing the method by which comp time is scheduled and/or taken by employes.

FACTS

The facts are undisputed. The Employer decided to reduce the accumulated comp time of Ellen Brikowski, a part-time home health nurse, because she had the highest level of accumulated comp time in the department. In January, 1990, department supervisor Jennifer Cummings directed Brikowski to take 30 hours of comp time that month because the department's full-time home health nurse was then available to assume Brikowski's work load. Brikowski took the comp time as directed and grieved it.

POSITIONS OF THE PARTIES

The Union answers the stipulated issue in the negative. In its view, the County does not have the right to determine when bargaining unit employes take their comp time. The Union acknowledges that its position in this matter is not based on explicit contract language because the contract is silent on this point and has been since the mutual agreement language was deleted from the contract in 1984. Instead, the Union relies on an alleged past practice which provides that ccmp time is to be taken by mutual agreement between the affected employe and their supervisor. According to the Union, that practice, which it submits was never repudiated, should be controlling here. The Union contends the County violated this practice when it directed the grievant to take 30 hours of comp time at a particular time. As a remedy for this alleged contractual breach the Union requests the following: (1) an order directing the County to return to

the previously existing practice of comp time being taken on dates mutually agreed to between the employe and their supervisor; and (2) an order restoring to the grievant the 30 hours of comp time she was forced to take off so that she can take that comp time at a date mutually agreeable to her and her supervisor.

The County answers the stipulated issue in the affirmative. In its view, it has the inherent management right to determine when bargaining unit employes take their comp time. In support thereof, it relies on the fact that the parties deleted the mutual agreement language from the contract in 1984 and consequently the contract is now silent on the matter of how comp time is taken. It believes that given this contractual silence, the Management Rights clause controls and allows it to schedule comp time at its pleasure and/or unilateral prerogative. The Company believes that should the arbitrator rule in favor of the Union, this will result in the deleted mutual agreement language being placed back into the contract. The County therefore asks that the grievance be denied and no remedy awarded.

DISCUSSION

At issue here is whether the County has the right to determine when employes take their earned comp time off. The Union contends the Employer cannot unilaterally make this determination while the Employer obviously disputes this contention. If it is found that the Employer cannot unilaterally decide when employes take their earned comp time then the Employer violated the contract because that is what happened here. On the other hand, if the Employer can unilaterally decide when employes take their earned comp time then no contractual violation occurred.

In deciding this question the undersigned will focus first on the applicable contract language. If that language does not resolve the matter, attention will be given to evidence outside the so-called four corners of the agreement.

Article 13, Section 4, B specifies that employes who work overtime can be compensated for same by either comp time off or pay. Only comp time is involved here. The contract language does not address how this comp time is to be taken though. Specifically, it does not provide whether it is management that determines when employes take their comp time or whether this decision is made by the employes themselves. Thus, the parties have not included language in their present agreement covering this situation. Given this contractual silence on the question of how and when employes can take their comp time, it follows that the existing language does not specifically address the issue here. That being so, the pertinent language is simply unclear on this point.

Having found the contract language to be ambiguous on how and when comp time is taken, attention is turned to the other evidence relied upon by the parties, namely bargaining history and an alleged past practice. Both are forms of evidence commonly used by arbitrators to

interpret ambiguous or silent contract language.

As just noted, bargaining history can be a useful guide in interpreting ambiguous or silent contract language. However, in this case it is of limited use. This is because while the bargaining history demonstrates historically how the current contract language on comp time came to be, it does not establish that the parties ever reached a specific intent or a mutual understanding during their negotiations on a topic which they chose not to address in their contract language, namely how and when comp time is taken by employes. That being the case, it is held that the bargaining history is simply not helpful in deciding the instant matter.

Of far greater usefulness herein is the parties' past practice on the point. Evidence of the manner in which the parties have carried out the terms of their agreement in the past is indicative of the interpretation that should be given where the contract is silent on the topic. It is generally accepted by arbitrators that an alleged past practice, in order to be binding on both parties, must be unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed and established past practice accepted by both parties.

Here, the Union asserts, and the County does not deny, that after the mutual agreement language was deleted from the parties' 1981-1983 contract, employes nevertheless continued to take their comp time at dates that were mutually agreed upon by the employe and their supervisor. Accordingly, no dispute exists over the existence of this practice.

Unwritten practices, such as the one existing here, are generally held to be binding during the term of the agreement where the evidence of their existence and mutuality can be clearly established in the record. This flows from the assumption that the parties cast their bargaining proposals in terms of the entire network of agreements and understandings between them, and intend to be bound by them unless explicit notice to the contrary is given in negotiations. Thus, if a particular practice is not repudiated during negotiations, it may be said that the collective bargaining agreement was entered into upon the assumption that this practice would continue in force. In this way, practices may by implication become an integral part of the contract. 1/

Here, the discontinuation of the instant practice was not raised by the County at any time during negotiations for the current collective bargaining agreement nor was the practice itself a subject of the negotiations. Given the parties' awareness of the instant practice and the County's failure to repudiate the practice during the negotiations, it is reasonable to conclude that the parties intended for the practice to continue in force. Thus, the practice of allowing employes to take their camp time at dates that are mutually agreed upon has become an enforceable condition of

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1/ "Past Practice and the Administration of Collective Bargaining Agreements" by Richard Mittenthal, Collective Bargaining and the Arbitrator's Role (Washington, BNA Inc., 1962).

employment and, by implication, a part of the collective bargaining agreement with as much binding effect as a written provision.

It is therefore held that having failed to repudiate the existing practice, the County may not during the life of the current contract unilaterally discontinue same. The existing practice has become an enforceable condition of employment and part of the parties' written agreement due to their conduct. Both parties are bound by that practice during the life of the current collective bargaining agreement.

The Employer nevertheless contends it retains authority under the Management Rights clause (Article 3), specifically that portion allowing it to "establish reasonable . . . schedules of work" and to "schedule and assign employees", to determine when employes take their comp time. I would agree were it not for the existing practice on the matter. However, it has already been found that a past practice constituting an enforceable condition of employment exists and that past practice is far more specific than is the Management Rights language noted above in addressing how comp time is to be taken. That being the case, it is the past practice and not the Management Rights clause that controls here. Inasmuch as the County failed to abide by that practice here it violated the collective bargaining agreement. In order to remedy this contractual breach the County is directed to cease unilaterally determining when employes can take their accumulated camp time. Additionally the County shall reinstate for the duration of this contract the previously existing past practice of comp time being taken by mutual agreement between the employe and their supervisor.

Attention is now turned to the remedy applicable for grievant Brikowski. The Union contends that the 30 hours comp time she was forced to take in January, 1990 should be restored to her and she should be allowed to take that comp time at a future date mutually agreeable to her and her supervisor.

Arbitrators are split in their views concerning the remedy that should apply to an employe who is improperly forced to take a vacation. One view is that monetary damages should be assessed against the employer since in forcing an employe to take vacation at a particular time it caused an inconvenience to the employe. On the other hand, a significant number of arbitrators have held that no effective remedy is possible in such a case because the employe is not damaged merely by being forced to take a vacation at a time other than when the employe wanted. 2/ Of these two views the latter is more frequently adopted than the former.

In accordance with this majority view, the undersigned likewise declines to award a monetary remedy to grievant Brikowski for being forced to take her comp time at a time other than when she wanted. In so finding, it is noted that arbitrators are certainly authorized to assess

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2/ Hill and Sinicropi, Remedies in Arbitration, BNA Books, page 135.

damages for contractual violations. These damages though must be related to the losses suffered by the aggrieved party. Here, the difficulty lies in determining just what damages the grievant suffered when she was forced to take her comp time at a time other than when she preferred. The short answer concerning same is that no damages have been shown. In light of this finding, no monetary damages are awarded to the grievant for her inconvenience in being forced to take 30 hours of comp time in January, 1990.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

That the County does not have the right to unilaterally compel bargaining unit members when to take their earned compensatory time off. The County is therefore directed to reinstate the previously existing practice concerning same for the duration of the current contract.

Dated at Madison, Wisconsin this 24th day of October, 1990.

By Raleigh Jones /s/
Raleigh Jones, Arbitrator

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