BEFORE THE ARBITRATOR

In the Matter

of the Arbitration of a Dispute Between

GREEN COUNTY DEPUTY SHERIFF'S ASSOCIATION

and

GREEN COUNTY

Case 131
No. 54917
MA-9825

Appearances:

Mr. Richard Thal, General Counsel for WPPA/LEER, and **Mr. Thomas W. Bahr**, WPPA/LEER, appearing on behalf of the Association.

Brennan Steil Basting and MacDougal S.C. by **Attorney Howard Goldberg**, appearing on behalf of the Employer.

ARBITRATION AWARD

The Green County Deputy Sheriff's Association, hereinafter referred to as the Association, and Green County, hereinafter referred to as the Employer or the County, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances arising thereunder. The Association made a request, with the concurrence of the Employer, that the Wisconsin Employment Relations Commission designate a commissioner or member of its staff to hear and decide a grievance filed by the Union. The undersigned was so designated. Hearing was held in Monroe, Wisconsin on September 11, 1997. The hearing was not transcribed; the parties filed post-hearing briefs and reply briefs. The record was closed on November 20, 1997.

ISSUE

The parties agreed to the framing of the issue as follows:

> Did the County violate Section 14.01 of the Collective Bargaining Agreement when it refused to allow Association members the right to accrue holiday compensatory time because these Association members were at the 80-hour cap for Section 10.03 overtime compensatory time? If so, what is the proper remedy?

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE X - WORKDAY AND WORKWEEK - OVERTIME

10.03: Overtime shall be paid for all hours worked in excess of forty (40) hours in one week. Employees shall be entitled to accrue up to eighty (80) hours of compensation time in lieu of overtime pay. Once elected, employees shall not be entitled to receive cash in lieu of compensatory time unless the employee shall terminate, or be terminated, from his or her employment. Employees shall also be entitled to receive payment of accrued compensatory time for the time the employee is on sick leave (up to a maximum of eight hours per day) and his or her sick leave account is exhausted. These provisions are subject to all laws and regulations in effect from time to time.

. . .

ARTICLE XIV - HOLIDAYS

14.01: All regular employees shall be entitled to the following holidays with pay:

New Year's Day	Thanksgiving Day
Good Friday	December 24
Memorial Day	Christmas Day
Independence Day	December 31
Labor Day	

Full-time employees shall receive their regular rate of pay for each of these days as a holidays benefit. Full-time employees who work on any of the above listed holidays shall, in addition, be paid at their regular rate of pay for such work. Holidays worked would qualify for compensatory time off at an agreed upon date between the employee and the department head. If the request is of an immediate nature (within a 30-day period) the employee shall be notified within seven (7) work days of the Employer receiving such request. If the request is (sic) for a compensatory day off is in excess of 30 days from the date of the request, the employee shall be notified of the status of his/her request within 30 days of the Employer receiving such request.

BACKGROUND:

Both sides agree to the facts of this case. Under Section 10.03 of the prior 1994-95 labor contract between the parties, bargaining unit members had the option of accruing up to 480 hours of overtime compensatory time in lieu of a cash premium payment. Specifically, Section 10.03 contract language provided, "Compensatory time may be offered in lieu of pay to the extent provided by law." Allowing compensatory time accrual up to 480 hours was consistent with the provisions of the Fair Labor Standards Act (FLSA). The Act also permits a public employer and a union to bargain collectively for a cap less than 480 hours.

In negotiating a successor labor agreement to the 1995-96 contract, the parties agreed to reduce the overtime compensation time bank to eighty hours per bargaining unit employee. The parties further provided that once an employee elected to receive compensatory time, that employee would not be permitted to either change his or her mind and cash out their accumulated compensation time unless they retired or their employment was otherwise terminated. Finally, it appears that the parties agreed that any employee who had accrued compensatory time in excess of eighty hours would be able to retain the excess. They would not, however, be permitted to accumulate any additional compensatory time resulting from overtime until his or her respective accrued times had fallen below the eighty hour cap

It is also undisputed that in bargaining the County initially presented the following proposed modification to Section 10.03 of the 1995-96 labor contract: "Employees shall be entitled to accrue up to eighty (80) hours of compensatory time in lieu of pay." The County explained the basis of its proposal was to cap accumulated compensatory time. A tentative agreement to an amended version of this proposed sentence was reached. The amended version read: "Employees shall be entitled to accrue up to eighty (80) hours of compensatory time in lieu of overtime pay."

Unfortunately, the parties were not able to reach a voluntary agreement to a successor agreement in its entirety. Consequently, final offers, along with all tentative agreements reached by the parties, were certified and submitted to the arbitrator. No changes to Section 14.01 of the 1995-96 labor contract which deals with the matter of holiday compensatory time were proposed by either side. The tentative agreement to modify Section 10.03 (as outlined above) was submitted to the arbitrator by each side, as part of its respective final offer.

Following the certification and submission of final offers to the arbitrator, the parties discovered that they had neglected to discuss whether the 80-hour comp time cap was applicable to accrual of holiday compensatory time arising under Section 14.01. Predictably, self-interest governed the respective view of each side: initially, the County primarily argued that the tentative agreement to an 80-hour cap controlled compensatory time generated by both overtime and holiday work; the Association took issue with this interpretation, arguing that the 80-hour cap applied only to comp time generated by overtime.

Although assisted by a mediator, the parties were unable to resolve their interpretation difference. Although an interest arbitration award was issued on July 2, 1996, inasmuch as final offers had been submitted before the parties discovered their conflicting interpretations of the tentative agreement they had reached, the interest award did not resolve the conflict. The tentative agreement reached by the parties which modified Section 10.03 was included in the arbitration award.

The parties executed the successor agreement covering the term of 1996-97 on September 10, 1996. On September 13, 1996 four bargaining unit members learned their request to bank the compensatory time they claimed for working on the Labor Day holiday had been denied on the grounds that each of the four wanting to bank their respective Labor Day comp time had already accumulated more than eighty hours of compensatory time. Each grievant was instead paid monetarily for their Labor Day work.

Each of the four bargaining unit members subsequently filed a grievance. Each 1) alleged that the type of compensation to be received for holiday work is solely at the employee's discretion, and 2) challenged the denial of each of their respective requests to be compensated in the form of further accumulating additional compensatory time off.

POSITIONS OF THE PARTIES

Association's Position

"It is the Association's position that in contract negotiations, the County specified that the newly created 80-hour cap limited the accrual of compensatory time earned pursuant to Article X, Section 10.03 overtime provisions. Thus, this 80-hour cap does not apply to holiday comp time earned pursuant to Article XIV holiday pay provisions." (Association's Brief, pp.1, 2)

The Association argues that the parties did not intend that the establishment of the Section 10.03 80-hour cap would limit the accrual of Section 14.01 holiday comp time; therefore, according to the Association, the collective bargaining agreement should be construed to prohibit the County from applying the 80-hour cap to an aggregate that includes both overtime comp and holiday comp time hours.

The Association asserts that the present dispute arose because the parties never considered during their contract negotiations whether the new Section 10.03 80-hour cap would apply to any type of comp time other than compensatory time generated when employees elect to bank comp time hours in lieu of receiving a cash overtime payment. In support of this contention, it points to the Section 10.03 limitation of the 80-hour cap to the accrual of "compensatory time in lieu of overtime pay." In further support of this view, it quotes from a letter written by the former Green County Corporation Counsel (Exhibit 11 at p. 2): "Apparently, sometime between January 10, 1996 and February 20, 1996, there was a telephone conference between Howard Goldberg and Tom Bahr regarding the applicability of the 80 hour cap to compensatory time as it resulted from holidays under Section 14.01 of the labor agreement. I am told that both parties agreed that there was no discussion with regard to the applying of Section 10.03 to Section 14.01. . ."

Thus, according to the Association, the Arbitrator should construe the contract in a manner that prohibits the Employer from unilaterally applying the 80-hour cap to the aggregate of both overtime and holiday comp time hours.

The Association avers that the task of the arbitrator is to fill in a gap that exists because the parties failed to consider whether the Section 10.03 80-hour cap applied to Section 14.01 holiday comp time accrual. The Association believes filling in the gap is easy because of the Employer's agreement to insert the word "overtime" as a modifier of "pay" in the contract modification the Employer proposed to Section 10.03 during negotiations. Applying the 80-hour cap to holiday comp time, would, in the opinion of the Association, ignore this piece of bargaining history.

The Association believes that the Fair Labor Standards Act is relevant to this dispute. The Association notes that the FLSA provides that FLSA comp time accrued in accordance with a

contractual agreement may be used within a reasonable time after the request for use is made, if such use does not unduly disrupt the operation of the agency. The Association points outs that this regulation does not apply to non-FLSA comp time, e.g., comp time that may be earned as a result of holiday work. The Association believes this distinction is helpful in recognizing that bargaining unit employees have different rights under federal law with respect to using Section 10.03 overtime comp time (i.e., FLSA comp time) and Section 14.01 holiday comp time (i.e., non FLSA comp time). From this, the Association urges it was reasonable for it to expect the Employer to segregate overtime comp time and holiday comp time. It is also reasonable to ask the arbitrator to construe the Collective Bargaining Agreement in a manner that recognizes that federal wage and hour law treats Section 10.03 comp time differently than Section 14.01 comp time, according to the Association.

The Association believes the Employer has created a problem for itself. The Association does not believe the Employer can properly refuse to allow bargaining unit members the right to accrue holiday comp time pursuant to Section 14.01 when they have reached the Section 10.03 cap. While one solution may be two separate comp time accounts for each affected employee, that may not be the only solution. But, asserts the Association, it is up to the County to establish some procedure that permits employees to accrue holiday comp time regardless of whether they have reached the Section 10.03 cap.

Employer's Position

The Employer posits that the holiday compensation only qualifies under the Agreement for compensatory time treatment, but that the Sheriff has still retained his discretion to grant or deny such a request. The Employer further asserts that the Sheriff's refusal to grant the grievants' requests was for legitimate reasons.

The Employer believes the Arbitrator should be guided by the actual words in the contract, the intent of the parties (if that intent can be shown), and the past practices of the parties in dealing with contract wording. The Employer contends the words of the contract are clear and unambiguous, the past practice of the parties regarding the Employer's discretion to grant or deny compensatory time requests is not in dispute, and that the intent of the parties is also known and not in dispute.

The Employer argues that under the former labor agreement, employees were not automatically entitled to receive compensatory time, if such was their election, under either Section 10.03 or Section 14.01. Under the previous labor contract, Section 10.03 read as follows:

> 10.03. Overtime shall be paid for all hours worked in excess of forty (40) hours in one week. Compensatory time may be offered in lieu of pay to the extent permitted by law. Payroll for those employees will include time and one-half (1 1/2) whenever directed to do so.

But, according to the Employer, under the new Section 10.03, employees are automatically entitled to compensatory time, without the need for Employer approval.

Contrary to the view of the Association, the Employer asserts that employees have never had the unfettered right to elect compensatory time under Section 14.01, and that that has remained unchanged. The Employer believes that the granting of compensatory time under Section 14.01 has always been within the discretion of the Sheriff. The Employer notes that Section 14.01 has remained unchanged, and asserts that no changes to Section 14.01 were even discussed by the parties. Thus, the Employer argues, the Employer's discretion to grant or deny comp time requested under Section 14.01 has also remained unchanged.

The Employer further contended that its intent with respect to its accumulated comp time cap was two-fold: 1) it intended to place within reasonable bounds the amount of payout in the future and 2) it wanted to eliminate a "run" on the Sheriff's budget if a number of employees were to elect to receive a cash payout of accumulated comp time at the same time.

The Employer asserts there is no basis for the Association's claim that elimination of Employer discretion applies to both Sections 10.03 and 14.01, but the eighty-hour cap applies only to Section 10.03.

The Employer further argues that acceptance of the Association's position would result in two unintended effects: 1) the Employer would have to create two separate compensatory time banks; 2) the sheriff would lose the discretion to grant or deny requests for compensatory time arising under Section 14.01.

Finally, the Employer avers that the Sheriff's refusal of the requested compensatory time in the instant matter was reasonable as to all four employees. In each case the individual requesting compensatory time was over the 80-hour accumulated compensatory time cap preferred by the Sheriff, the Employer notes. The Employer explains that the Sheriff wanted to reduce the total number of accrued compensatory time claims that existed so that " . . . the County could not be hit with a large dollar outlay at one time." (Employer's Brief, p. 13)

Reply of Association

In reply to the Employer's brief, the Association contends that the County has shifted its position. The Association asserted the County had previously defended the grievance on the grounds that the 80-hour cap applied to all comp time, regardless whether the comp time emanated from overtime or holiday work. Now, according to the Association, the County was defending the grievance on the grounds that the Employer had discretion to grant or deny comp time requests made under Section 14.01.

Contrary to the Employer's argument, the Association denies that Section 14.01 gives the Sheriff the discretion to prohibit deputies from electing to accrue comp time off in lieu of receiving cash payments for holidays worked. The Association believes that under Section 14.01 an employee eligible for the holiday benefit may either opt to be paid in cash (at straight time) for all holiday hours worked or to accrue the hours (at straight time) as compensatory time off at an agreed date.

The Association argues that prior to the present dispute the Sheriff never once disapproved of an employee opting to receive his earned Section 14.01 holiday benefit in the form of comp time. At the same time, the Association argues, the Sheriff has always had (and continues to have) discretion as to when accrued comp time may be used. But, according to the Association, Section 14.01 has no language that gives the Sheriff the discretion to deny a comp time accrual request as long as the employee has earned the holiday benefit by working on one of the nine listed holidays.

Neither does the Association believe the form used by employees to request Section 14.01 comp time supports the Employer's contention as to its discretion to grant or deny Section 14.01 comp time requests. The Association views the form as a means of the Employer verifying that the employee has worked the holiday time claimed.

According to the Association, the Employer's interpretation of Section 14.01 that comp time requests for holiday work are subject to the approval of the Sheriff conflicts with the parties' explicit agreement to establish an 80-hour cap that applies only to comp time generated from working overtime.

Reply of Employer

In its reply, the Employer asserts that it has never claimed the new language that modified Section 10.03 was also intended to modify Section 14.01. The Employer agrees that the new language applies only to Section 10.03.

The Employer's position is that the Sheriff always has had the authority, under Section 14.01, to grant or deny comp time requests in lieu of cash, and the denial of the grievants' requests in this instance is totally consistent with those continued rights.

The Employer argues that if the Association's position in this matter is sustained, the Sheriff will lose the discretionary power he now has pursuant to the provisions of Section 14.01 without benefit of bargaining. The Employer contends that only if the Sheriff exercises his discretion in a manner that is "'unreasonable, arbitrary, capricious, discriminatory or made in bad faith'" may such actions be nullified.

The Employer believes it has the right to limit discretionary benefits provided its reasons for doing so are not unreasonable. The Employer notes that prior to the time grievants made their comp time requests the Sheriff had made it known that he thought the levels of accumulated comp time for bargaining unit members were too high. Although the Employer had been able to place limits on the ability of employees to cash in their comp time, it is still concerned that it could be "hit hard" if one or more of the employees with high levels of comp time were to leave employment with the department.

The Employer does not believe the Association has been able to point to any contract language which gives the grievants the right to accumulate holiday comp pay in lieu of cash, if the Employer elects not to authorize such accumulation.

Finally, the Employer asserts that the FLSA is not relevant to this grievance except to show that if the Association's position is adopted the Employer would be forced to maintain two separate comp time banks. This, according to the County, is something it never wanted to do, and further cites the Association as acknowledging this.

DISCUSSION

It appears that the parties are now in agreement that the 80-hour cap inserted into Section 10.03 of the parties' 1995-96 labor contract controls only comp time requested as a result of overtime work.

There can be little doubt that the Employer has abandoned one of its original positions in this regard.1/ It was a prudent shift: it seems clear enough that by virtue of the negotiated insertion of the word "overtime," the 80-hour cap provision applies only to comp time generated by overtime work.

The sole, remaining question is whether Section 14.01 gives bargaining unit employees the absolute right to bank compensatory time in lieu of cash for work performed on holidays.

After listing nine holidays, Section 14.01 provides in relevant part:

> Full-time employees shall receive the regular rate of pay for each of these days as a holiday benefit. Full-time employees who work on any of the above listed holidays shall, in addition, be paid at their regular rate of pay for such work. Holidays worked would qualify for compensatory time off at an agreed upon date between the employee and the department head. If the request is of an immediate nature (within a 30-day period) the employee shall be notified of the confirmation or denial within seven (7) work days of the Employer receiving such request. If the request is for a compensatory day off in excess of 30 days from the date of the request, the employee shall be notified of the status of his/her request within 30 days of the Employer receiving such request.

"If the language of an agreement is clear and unequivocal, an arbitrator generally will not give it a meaning other than that expressed." 2/ "There is no need for interpretation unless the agreement is ambiguous."3/

In the instant matter, the agreement does not appear ambiguous. While Article XIV specifically provides that "(h)olidays worked would qualify for compensatory time off," the time off to which reference is made is limited to " . . . an agreed upon date between the employee and the department head." This clearly broadcasts that there are two elements to any compensatory time off claimed as a result of holiday work: 1) a request for the use of compensatory time on a date certain by the employee; 2) an agreement to the date requested by the department head.

This is in sharp contrast to the current language of Section 10.03 that deals with compensatory time emanating from overtime work. As the Employer points out, that language now grants employees the absolute right to receive compensatory time for overtime work in lieu of payment in cash (subject, of course, to an 80-hour cap). No such language appears in Section 14.01.

Moreover, Section 14.01 contains no language that authorizes the general *accrual* or *accumulation* of *any* comp time. Under this section, if compensatory time off is granted, it is granted for a specific date to which agreement was reached by the employee and department head. There is no provision for its accumulation in a comp time "bank." This, of course, is not the case with respect to Section 10.03 in which an employee, at his or her option, is entitled to accrue comp time up to 80 hours.

In the instant case, then, it seems to me that the holiday work of the grievants merely *qualified* for compensatory time. But, for the compensatory time to be granted there must be agreement between the employee and the department as to the date such comp time shall be taken. Obviously, that was not achieved, for no specific dates were even requested. Inasmuch as Section 14.01 does not authorize the comp time accrual of accumulated comp time, the Sheriff's denial of the comp time accrual requests was a permitted response under the contract.

Since I find no ambiguity with respect to Section 14.01 language, past practices cited by either side are immaterial.

AWARD

The within grievances of the four members of the Green County Sheriff's Department are denied.

Originally Dated at Madison, Wisconsin February 25, 1998. Typographical errors in case numbers corrected and Award re-issued.

Dated at Madison, Wisconsin this 14th day of April, 1998.

Henry Hempe,A. Henry Hempe /s/
Arbitrator

ENDNOTES

See, for example, Exhibit 1 which consists of a letter from the Green County Corporation Counsel James Wyss which states in relevant part: "The cap on compensatory time, although couched in terms of overtime during negotiations by both parties, was intended to place a cap on compensatory time from any and all sources, whether it be from overtime or holiday time." However, this letter also suggests the sole ground now relied on by the Employer: "Although the contract does provide in Section 14.01 that holidays would qualify for compensatory time, the provision does not necessarily mean that employees have an unqualified right to elect and receive compensatory time without restriction."

Elkouri & Elkouri, *How Arbitration Works,* 482 (5th ed., 1997).

Elkouri, *supra,* 470.