

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

GREEN LAKE COUNTY

and

AFSCME LOCAL 514C

Case 73
No. 55365
MA-9995

Appearances:

Attorney John B. Selsing, 120 E. Huron Street, Berlin, Wisconsin 54923, on behalf of Green Lake County.

Mr. James E. Miller, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, for the Union.

ARBITRATION AWARD

On July 16, 1997 Local 514-C, AFSCME, AFL-CIO filed a Request to Initiate Grievance Arbitration with the Wisconsin Employment Relations Commission which requested the Commission to appoint either a Commissioner or a member of its staff to serve as the sole arbitrator to issue a final and binding award relative to a dispute between the parties. The undersigned was subsequently appointed. A hearing was held on September 23, 1997. A transcript was made and briefs have been filed and exchanged.

ISSUE

The Union framed the issue as follows:

Did the employer violate the contract when it paid out accumulated overtime to the grievant in cash rather than allow the grievant to take this accumulation off in the form of compensatory time? If so what is the remedy?

The County framed the issue as follows:

If the contract does not speak to the contrary in terms of the overtime pay, does the County have the right to establish reasonable rules and policies specifically defining the use of compensatory time?

In its brief the County identified two issues:

Issue I Did Green Lake County follow the terms of the contract?

Issue II Did Green Lake County apply a past practice to an ambiguous provision of the contract?

I define the issue as:

Did the Employer violate Article 14 of the collective bargaining agreement when it cashed out Grievant's accumulated compensatory time because Grievant had not used it within 31 days of accumulation?

RELEVANT CONTRACT LANGUAGE

ARTICLE 2 RECOGNITION

...

The Employer and Green Lake County retain and reserve the sole right to manage its affairs in accordance with all applicable laws, resolutions, ordinances and regulations. Included in this responsibility, but not limited thereto, is the right to determine the number and classification of Employees, the services to be performed by them; the right to manage and direct the work force; the right to establish qualifications for hire and to test and judge such qualifications; the right to hire, promote and retain Employees; the right to transfer and assign Employees; the right to demote, suspend, discharge for cause or take other disciplinary action subject to the terms of this AGREEMENT and the grievance procedure; the right to release Employees from duties because of lack of work or lack of funds; the right to maintain because of lack of work or lack of funds; the right to maintain efficiency of operations by determining the method, means and personnel by which such operations are conducted, including the right to contract out provided that the exercise of this right shall not result in layoff of permanent Employees (Employees other than part-time, seasonal or probationary) and provided that in the case of the layoff of non-permanent Employees that the Employer shall have the burden of proving that the exercise of such right will result in a more

economical operation of the department, and to take whatever actions are reasonable and necessary to carry out the duties and responsibilities of the Employer.

ARTICLE 14

OVERTIME PAY

A. Employees shall be paid at the rate of time and one-half (1-1/2) their regular rate of pay for all hours worked in excess of their normal work schedule per week. Time and one-half (1-1/2) will be paid for work on Saturday and Sunday. Employees who are requested and report to work during their scheduled vacation shall be paid overtime in addition to their vacation pay. Employees may take overtime in the form of pay or compensatory time off. If an employee wants to receive overtime in cash, the employee must notify his supervisor within thirty (30) days of earning the overtime of this desire for payment in cash; payment will be made at the end of the month following the request. In the event the employee wants to take overtime as compensatory time off, the employee must work out the time with his supervisor.

POSITIONS OF THE PARTIES

Position of the Employer

The Employer followed the contract in that the supervisor worked out the schedule so that the time would be taken off within 31 days or the employee would receive pay. This is consistent with a longstanding practice which was only lapsed for a period of two years. Ms. Lyons has only returned to working out the scheduling the way it used to be and she has never denied any employee time off if they use it within 31 days.

In determining what is meant by Article XIV, it has to be harmonized with Article 2 - Recognition in which the County reserves the right to make reasonable rules and policies.

Alternatively, if the contract is ambiguous then the past practice should give definition to the parties' intent. The past practice is predominantly the same as the policy and if the Arbitrator concludes that the contract lacks a reasonable time term relative to compensatory time usage and the Arbitrator is inclined to fill the gap in the language, the Arbitrator should fill it with the language of the policy.

Position of the Union

The County's suggestion that the Union's interpretation of Article 14 could severely handicap the ability of the department to operate normally is an exaggeration. Since the

Page 4
MA-9995

employees of the Human Service Department receive little overtime, there is little likelihood that its use could disrupt department activities.

The language of the contract is clear. Even the language of the policy is clear that it has no application where it conflicts with specific provisions of collective bargaining agreements. The County's actions and arguments are simply an attempt to void the contract language while ignoring its duty to bargain.

The County's arguments are illogical and a strained construct designed to avoid its agreed upon responsibilities. While the contract might be improved by the addition of a time term for taking of compensatory time, its absence does not mean that the County may unilaterally impose a 31 day term abrogating the "work out" language.

The County seems to believe that its desire for a uniform policy relative to compensatory time use takes precedence over both the current contract providing for employee involvement and its duty to bargain. Further, simply because some employees in the past have been acquiescent in the face of the County's unilateral change in working conditions, does not mean that a binding past practice has developed. Finally, the fact that the County met with Union leadership on this issue and announced the employees' representative was going to develop a policy, does not mean that the Employer can implement its policy where it conflicts with the contract and is unagreed to by the Union.

BACKGROUND

The contract language has been in effect for the entire period relevant to this dispute. The language of the Policies and Procedures Manual has also existed for the entire period relevant to this dispute. Prior to January 1997 the supervisor of the economic support unit of the County's Human Services Department took a relatively informal approach to the accumulation and use of both compensatory time and flex time. In January 1997 the management of the Human Services Department concluded that it was important to get the economic compensatory time and flex time accumulation and usage on a more businesslike basis. Therefore a form was developed for prior approval of working overtime and for compensatory time usage in addition to other efforts. The Human Services Department also adopted the policy of cashing out compensatory time that had not been used within 30 days of being earned. (The cash out apparently did not occur automatically, but only when the employee requested to use it after the 30 day period). It is this cash out policy which gives rise to this grievance.

DISCUSSION

As noted earlier, the Union's position is that this is a clear violation of the last sentence of Article 14A. The Employer's position is that since the contract is silent relative to the period of time over which compensatory time may be accumulated, the Employer is free to adopt a reasonable rule. According to the County, this is what the supervisor has done, adopted the

Page 5
MA-9995

County's non union policy in the absence of an employee's failure to work out use of the compensatory time as leave within 31 days.

The task of the Arbitrator is to determine the intent of the parties as disclosed by the contract language. What does the last sentence of Article 14 - Overtime mean? "In the event the employee wants to take overtime as compensatory time off, the employees must work out the time with his supervisor." It is clear that before the employee can take the time off, the supervisor must approve the request. It does not require the supervisor to have any express standards at all, only to act reasonably. The question is whether the parties intended to limit the accumulation of compensatory time. It is obvious that since the contract provides that an employee who wants overtime as cash must notify the supervisor within 30 days, that the parties could not have intended to automatically cash out an employee after 30 days because then the contract language would be useless. In other words the parties must have intended that compensatory time could be carried beyond 30 days or they would not have put in the requirement that an employee wanting cash must request it within 30 days. Therefore, it is clear that when the parties bargained the language the parties thought about the subject; time term for compensatory time use, and decided not to limit accumulation, and rely, instead, on the good faith and good judgment of the employee and supervisor.

Does the fact that the sentence does not have a time term make it unclear? No, it is clear that the parties decided in the contract not to attempt further definition but rather to leave it up to the employees and supervisor. The fact that the supervisor would rather not have the authority/responsibility under the contract does not mean that she can avoid it by adopting a policy which cashes out an employee's accrued compensatory time every 31 days.

The Employer is now concerned that unlimited accumulation of compensatory time is deleterious to the Employer's ability to manage. There are several ways of addressing that concern. The best is to negotiate reasonable terms with the Union. That process started, but then veered into rule making rather than negotiation. The Employer also has the right to adopt reasonable rules or policies, but may not do so in a way that abrogates clearly expressed rights or benefits. Here the Employer, by contract, agreed that the supervisor would "work out" compensatory time use with each employee on a request-by-request basis. It anticipates that the Employer will consider workload and staffing and approve requests to use compensatory time if service will not suffer but does not anticipate the unilateral imposition of a rule. The rule abrogates the right to accumulate compensatory time.

A collective bargaining agreement trumps a personnel policy. The personnel policy itself recognizes that. Even if the language were unclear, the intent of the parties would be ascertained through bargaining history and past practice. However, if the language were unclear, past practice would not favor the County's position because for two years prior to January 1997, compensatory time usage was worked out on a case-by-case basis without the 31-day wipeout. Where a specific subject is addressed in a detailed manner in a contract, the Employer may not unilaterally supply a missing term since in such circumstances, the duty to bargain supersedes residual management rights.

Page 6
MA-9995

I find that the Employer violated Article 14 of the contract when Supervisor Lyons cashed out Grievant's accumulated compensatory time without Grievant's approval.

AWARD

It is ordered that the Employer cease and desist from enforcing its 31-day cash out of compensatory time policy as it relates to members of Local 514C, AFSCME, AFL-CIO.

Dated at the City of Madison, Wisconsin this 30th day of April, 1998.

James R. Meier /s/

James R. Meier, Arbitrator

rb
5670wrđ