

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**LOCAL 2414, AFSCME, AFL-CIO**

and

**CITY OF MUSKEGO**

Case 63  
No. 56960  
MA-10474

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Appearances:

**Mr. John P. Maglio**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

**Mr. John E. Drana**, Attorney at Law, Lindner & Marsack, S.C., appearing on behalf of the City.

**ARBITRATION AWARD**

The Union and the City named above jointly requested the Wisconsin Employment Relations Commission appoint the undersigned as the arbitrator in a dispute over the use of compensatory time. A hearing was held on March 3, 1999, in Muskego, Wisconsin, at which time the parties were given an opportunity to present their evidence and arguments. The parties completed filing briefs by April 29, 1999.

**ISSUE**

The issue to be decided is:

Did the City violate the collective bargaining agreement when it denied Kathleen Revolinski the use of one and one-half hours of compensatory time on August 14, 1998? If so, what is the appropriate remedy?

## CONTRACT LANGUAGE

### ARTICLE X - OVERTIME

Section 10.01. So long as there is scheduled a 4-2, 4-2 work schedule, there shall be a fifteen (15) minute call-in roll call prior to the start of the shift. All employees who work in excess of their normal regularly scheduled workday of eight and one quarter (8-1/4) hours or regularly scheduled workweek shall receive time and one-half (1-1/2) for all such hours worked. Payment for such overtime shall be made on each pay period, provided, however, that an employee who has worked overtime shall have the alternative of being paid for such overtime or be granted compensatory time off at the rate of one and one-half (1-1/2) hours for each overtime hour worked up to a total accumulation of compensatory time off of sixty (60) hours at any one time. For employees who are regularly scheduled to work a 5-2, 5-2 workweek, they shall be paid time and one-half (1-1/2) their regular rate for all hours worked outside the employee's regular shift of hours.

### BACKGROUND

Kathleen Revolinski is a clerk/dispatcher with the City, working a day shift of 7:00 a.m. to 3:00 p.m. On August 13, 1998, she found out that her husband would not be available to have a stereo installed in their car the next day. The appointment for the work on the car was for 2:30 p.m. on August 14<sup>th</sup>, and Revolinski needed to take an hour and a half off of work and leave at 1:00 p.m. to keep that appointment. (All dates refer to the year 1998 unless otherwise stated.)

Another dispatcher, Laura Becker, came in about 2:45 p.m. to work the 3:00 p.m. to 11:00 p.m. shift. Revolinski asked her to work for her on the next day, and Becker agreed to come in an hour and a half early. Revolinski had around 30 hours of compensatory time in the bank and intended to use compensatory time to cover the hour and a half. Becker expected to receive time and a half for the extra hour and a half. Revolinski again called once she got home and checked with her husband, and Becker again agreed. While they were on the phone, Becker checked with Captain John Daley to get an ok on the compensatory time.

Daley knew that a couple of people were gone – one on a long-term injury leave and another on vacation or family leave. Daley told Becker that Revolinski could plan on taking the time off, but he would have to check with the Chief the next day to see whether it would be compensatory time or a trade of time. Becker called Revolinski back later and told her that Daley had to talk to the Chief, that there might be a problem and they might have to trade time. Revolinski told Becker that she did not trade time with others, since there were four occasions in the past when she traded time with employees who quit and did not return the time.

Daley testified that he spoke with Chief John Johnson about 8:00 a.m. on August 14<sup>th</sup>. Daley was aware of Revolinski's reason for the use of compensatory time for the car appointment. The Chief said that the City does not pay overtime in a situation like that, but that they could trade time. Because two people were out of the office on leave, the City would have to incur overtime to cover for Revolinski's request. The Chief was aware of the reason for the request and did not find it compelling.

Revolinski testified that between 11:30 a.m. and noon on August 14<sup>th</sup>, she spoke with Daley. He told her that she would have to trade time. Revolinski objected to trading time, but she left at 1:00 p.m. and Becker took over, with neither agreeing with management on how the time was to be counted. Revolinski and Becker were paid for eight hours of straight time, while Revolinski worked six and a half hours and Becker worked nine and a half hours. They did not trade time to make an adjustment for the difference. They knew they were going to file a grievance over the matter. Becker was an alternate steward for the Union at that time.

Revolinski has used compensatory time in the past, and her understanding was that it could be used as long as someone could cover her shift. She was aware of a policy (#410) which will be noted later, and interpreted it to mean that it allowed for the use of compensatory time if a replacement was available. She was giving less than 24 hours notice, and thought Section III, A, 3 of the policy covered the situation. While that section refers to short notice for sick calls or emergency compensatory time, Revolinski believed that her situation was an emergency.

There have been occasions in the past where employees were allowed to take compensatory time and others worked for them on an overtime basis. On March 14, 1997, Telecommunicator Hanson took four hours of compensatory time off, and Telecommunicator Hovland worked an extra four hours on Saturday, March 15, 1997. On January 1, 1994, Becker used four hours of compensatory time which was picked up by Telecommunicator Wissing on an overtime basis. On May 8, 1994, Becker used one hour of compensatory time, which was also covered by Wissing who received time and a half for that hour. Becker used compensatory time for personal business or matters that were not emergencies, and her requests for the use of such time were not denied. Becker asked for more records, but the City did not have records for the year of 1995.

The City does not dispute that it has granted the use of compensatory time off for personal business or matters that would not be seen as emergencies in the past. Daley noted that they generally grant compensatory time off when there are other employees to cover the workload. The office usually has one dispatcher, one clerical, another clerical that does some court work and one court clerk. On August 14<sup>th</sup>, one person was on vacation and another was out on a long-term leave for a work-related injury. Daley testified that if the request for time off was not for an emergency and no one was available to cover the work, the request would be denied. There have been times when no one was available and the situation was not an emergency, requests for compensatory time off have been granted. The Chief agreed that employees have been allowed to use compensatory time, with others coming in on an overtime

basis to cover for them, when the situations have not been emergencies. For example, the Chief has granted the use of compensatory time off for a wedding. The Chief considers it within his discretion to grant or deny the use of compensatory time, and acknowledged that some subjective judgment is involved in such decisions.

The parties do not agree on the impact of a policy called #410 and dated February 14, 1992. The employees believe that the policy allows for the use of compensatory time when someone volunteers to cover the shift, and the management believes that the policy is to fill a position in a vacancy or an emergency but not a policy to grant time off. The relevant portions of the policy state:

I. PURPOSE.

The purpose of this policy is to give direction as to the filling of vacancies in the telecommunicator/clerk ranks due to illness, vacations, and compensatory time off.

II. POLICY.

The ability of the City of Muskego to provide emergency services dispatching to its residents requires the staffing of the Public Service Answering Point (PSAP) by trained professional personnel. The intent of this order is to insure that the staffing of the PSAP is accomplished when vacancies occur by the absence of scheduled personnel.

III. PROCEDURES.

A. Short Notice of Less Than 24 Hours for Sick call or Emergency Compensatory Time:

The Officer in Charge when the notice is received will arrange coverage using the following procedure:

1. Use the on-duty clerk, if available, to cover the shift (i.e. use on-duty dayshift clerk to cover the open dayshift telecommunicator's shift).
2. If no clerks are scheduled for duty (Step 1), the on-duty telecommunicator will be held over 4 hours and the succeeding telecommunicator will report 4 hours early. If there are clerks on or scheduled for duty, they can be used to fill the 4 hour hold overs. When there are telecommunicators and clerks available to cover the 4 hour hold over, the one with the most seniority may refuse to hold over. The person with the least seniority will then be required to cover the shift.

3. The person who will be held over may contact any other Department telecommunicator or clerk who may volunteer to cover either all or part of the shift. The held over person will be responsible to notify the shift supervisor if the coverage changes.

4. If step 1 or 2 above are not possible due to a hardship or other exigent circumstances, the shift supervisor will order the first telecommunicator or clerk contacted, starting with the least seniority, not scheduled to work this day, in for duty.

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### **THE PARTIES' POSITIONS**

#### **The Union**

The Union states that the collective bargaining agreement allows an employees to accrue compensatory time off in lieu of overtime pay, and also restricts the accumulation of comp time to 60 hours at any one time. That limitation is the only restriction contained in the agreement. While the City may argue that it has the management right to restrict comp time where its use results in the City paying overtime, the bargaining agreement does not contemplate such a restriction. Nor does the General Order #410 which was written by the City.

Steward Becker testified that in the past, employees were allowed to use comp time and were replaced by other employees who received overtime pay. In those cases, the employees were not required to trade time. Examples of replacing compensatory time off with overtime were shown in Union exhibits #'s 8, 9 and 10. The Union asserts that clearly, there is a practice that goes back at least five years where employees were able to take comp time even when it resulted in the City paying overtime to the person replacing the vacated hours. Management did not produce records for the schedules from 1995, although Becker requested them.

The Union submits that the City's refusal to allow Revolinski to use comp time off violated the collective bargaining agreement. The agreement does not contemplate the refusal of comp time requests. The City's General Order does no more than police the replacement of comp time requests. The long-established practice of the City is to replace comp time requests with overtime pay when necessary. Revolinski needed the time off on August 14<sup>th</sup>. She complied with the General Order #410 by finding a person willing to cover her absence. The Union would submit that requests to use comp time can be denied only in instances where another bargaining unit member cannot cover the time off.

Moreover, the Union notes that Revolinski heard nothing about her request until shortly before her appointment. To decide to deny her request one and one-half hours before the need was absurd. People earn compensatory time off, and it is theirs to use. Allowing the

Employer to cavalierly say “no” an hour and a half before the need would render the contract meaningless. The Union asks that the grievance be sustained, that the request of Revolinski for comp time on the 14<sup>th</sup> be ordered that the Becker, who replaced Revolinski, be paid one and one-half hours of overtime for working on August 14<sup>th</sup>.

### The City

The City contends that its refusal to grant the request for compensatory time off along with the request for payment of overtime comports with the collective bargaining agreement as well as applicable federal wage and hour laws. The decision to deny the request for comp time was a discretionary decision made by Chief Johnson, which was well within his management rights based on legitimate concerns, and it was not arbitrary or capricious. The Chief has the right to direct the workforce of the police department, and he determines whether or not one shall be granted requests for comp time off and whether another shall work overtime, not the Grievants.

Under the Fair Labor Standards Act, public employers are permitted to compensate their employees with compensatory time off in lieu of overtime. Compensatory time off arrangements must be under an agreement between the employer and the employee’s representatives. Here, the parties provided in Section 10.05 of their bargaining agreement that an employee may choose to take comp time in lieu of pay. However, the contract is silent on the issue of when an employee may be granted use of his or her comp time. Thus, the City submits that Article 1, Management Rights, controls where it vests the right to direct the work force in management.

The City asserts that the Grievants presented no evidence that the City violated any provision of the collective bargaining agreement or the Fair Labor Standards Act. The record shows that the denial of comp time was reasonable. The request not an emergency but was in order to allow Revolinski to have a stereo installed in her car. While the Grievants point to General Order #410 in support of their grievances, the Chief did not violate the provisions of that order. General Order #410 is a policy which gives employees notice and direction as to how vacancies will be filled when they occur where an employee is granted comp time off. The Chief first determines whether or not to grant an employee’s request for comp time off. The procedures of General Order #410 do not apply in this case. Section 3(a) applies in short notice of less than 24 hours for “emergency compensatory time.” Revolinski’s request for compensatory time was not an emergency.

The Grievants’ attempt to establish a past practice falls far short of its intended goal. The decisions to grant comp time off and replace personnel with employees on overtime in 1994 and 1997 were not supported with evidence detailing the circumstances surrounding those requests.

The City asks that the grievance be denied.

### DISCUSSION

The collective bargaining agreement in Section 10.01 gives employees the alternative to being paid for overtime or “be granted” compensatory time off. Nothing in the contract gives employees the unrestricted right to determine when they may take compensatory time off. That is left to management, who schedules employees’ hours and grants or denies employees the right to work overtime.

There is no past practice that would be considered binding and enforceable by the three instances shown where employees took comp time off and others worked on overtime in 1994 and 1997. A past practice must be unequivocal, clearly enunciated and acted upon, readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. The three instances in the record do not amount to a past practice.

The City correctly notes that General Order #410 does not apply to this case. The order tells employees how vacancies are to be filled. Moreover, the portion of the order cited by the Grievants deals with emergencies. The need to keep an appointment to have a car stereo installed is not an emergency in anyone’s book. While it is frustrating to miss or cancel appointments or reschedule them, it is an ordinary fact of working life and not an emergency.

Under the facts of this case, the City had a valid reason to deny the use of overtime to replace Revolinski in order to accommodate her request for compensatory time off on August 14<sup>th</sup>. There was no violation of the collective bargaining agreement.

### AWARD

The grievance is denied and dismissed.

Dated at Elkhorn, Wisconsin, this 12<sup>th</sup> day of May, 1999.

Karen J. Mawhinney /s/  
Karen J. Mawhinney, Arbitrator