BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**WISCONSIN COUNCIL 40,
AFSCME, AFL-CIO**

and

DOOR COUNTY (COURTHOUSE)

Case 111
No. 57164
MA-10537

(Wittstock Grievance)

Appearances:

Mr. Grant P. Thomas, Corporation Counsel, Door County, P.O. Box 670, Sturgeon Bay, Wisconsin 54235-0670, on behalf of the County.

Mr. Gerald D. Ugland, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 370, Manitowoc, Wisconsin 54220-0370, on behalf of the Local Union.

ARBITRATION AWARD

According to the terms of the 1996-99 collective bargaining agreement between the Door County Board of Supervisors (County) and Door County Courthouse Employees, Local 1658, AFSCME, AFL-CIO (Union), the parties requested that the Wisconsin Employment Relations Commission designate a member of its staff to hear and decide a dispute between them regarding whether the Employer could refuse to allow employes to accrue compensatory time rather than paying them overtime payments. The Commission designated Sharon A. Gallagher, a member of its staff to hear and decide this dispute. The hearing was held at Sturgeon Bay, Wisconsin on March 8, 1999. No stenographic transcript of the proceedings was made. The parties submitted their post-hearing briefs by April 12, 1999 and reserved the right to file reply briefs within ten working days after the receipt of initial briefs.

ISSUE

The parties were unable to stipulate to an issue or issues for determination in this case. The Union suggested the following issue:

> Did the Employer violate the collective bargaining agreement when it refused to allow Julie Wittstock to accrue work in excess of eight hours as compensatory time? If so, what is the appropriate remedy?

The County suggested the following issues:

1) Whether a public employer may pay an employe cash overtime rather than permit an employe to accrue compensatory time.

2) Whether a public employer may unilaterally reduce an employe's accrued compensatory time by making cash (overtime) payments.

The parties agreed to allow the undersigned to frame the issues based upon the relevant evidence and argument and their suggested issues.

Based upon the relevant evidence and argument in this case, as well as the suggestions of the parties, I find that the Union's issue more reasonably states the controversy between the parties and it shall be determined in this case.

RELEVANT CONTRACT PROVISIONS

ARTICLE 16 – WORK SCHEDULE, OVERTIME PAY
AND COMPENSATORY TIME

. . .

C. **Compensatory Time:** Compensatory time off in lieu of overtime payment may be granted by the mutual agreement of the employee and his or her Department Head at times agreed to.

Employees shall be limited in accumulating compensatory time to eighty (80) hours. Any time over the amount shall be paid to the employee. This provision shall take effect on January 1, 1990. Compensatory time accumulated, but not taken off in the calendar year of accumulation,

> shall be taken off by June 1 of the following year. However, if carried over compensatory time is (sic) not used by June 1 of the following year, it shall be paid out at the regular rate payable at the time it is paid.
>
> Employees shall be paid for all compensatory time accumulated, but unused at the time of termination.
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> . . .

BACKGROUND

The parties have had a collective bargaining relationship since the first contract negotiated between them covering the years 1986 through 1987. In that contract, the parties negotiated Article 16 – Work Schedule, Overtime Pay and Compensatory Time. In Section C. of Article 16, the parties included the following:

> **Compensatory Time:** Compensatory time off in lieu of overtime payment may be granted by the mutual agreement of the employee and his or her Department Head at times agreed to.
>
> . . .
>
> Employees shall be paid for all compensatory time accumulated, but unused at the time of termination.

During the parties' discussions, the Employer was concerned that the Department would not be disrupted by the use of compensatory time. At the time the above-quoted provision was negotiated, the parties never discussed whether the Employer had a right to control the accumulation of compensatory time. There is no evidence on this record to indicate whether the Union or the County originally proposed that compensatory time be included in the contract.

During negotiations over the 1991-93 collective bargaining agreement, the County sought to limit the amount of time that employes could accrue on the books as compensatory time so that a large amount would not have to be paid out if employes quit or were otherwise terminated. The introductory language of Article 16, Section C, therefore remained unchanged and the parties agreed to insert the following language into Article 16, Section C, prior to the final paragraph previously listed:

> Employees shall be limited in accumulating compensatory time to eighty (80) hours. Any time over the amount shall be paid to the employee. This provision shall take effect on January 1, 1990.

Again, the question never came up whether the employe had a right to select compensatory time over receiving overtime payment.

The parties reached an impasse regarding the 1994 contract, but later reached a full settlement during mediation before the Wisconsin Employment Relations Commission. As a part of that mediated settlement, the County sought and was able to gain a concession from the Union regarding the fact that compensatory time could not be endlessly accrued but that it would be paid out on a date certain. The language inserted into Article 16, Section C read as follows:

> Compensatory time accumulated, but not taken off in the calendar year of accumulation, shall be taken off by June 1 of the following year. However, if carried over compensatory time is (sic) not used by June 1 of the following year, it shall be paid out at the regular rate payable at the time it is paid.

Again, the subject whether it was the sole option of the employe to select compensatory time or overtime payment was not discussed by the parties during mediation.

It is also clear that the subject of accrual of compensatory time versus overtime payment was not the subject of discussions in neither the 1995-96 agreement nor the current collective bargaining agreement. It is undisputed that in recent years, the County has given probationary employes (who have no accrued sick leave) the opportunity to accrue and use compensatory time when they are in need of time off related to illness. It is also undisputed that prior to the instant grievance, no employe had been refused the right to accrue compensatory time rather than taking overtime payments. The County has an overtime/compensatory time request form which employes generally need to submit for approval to their department head in circumstances where the need for overtime/compensatory time is known in advance and can be requested and authorized.

FACTS

During the week of August 31, 1998, Wittstock worked four hours in excess of 40 hours per week and eight hours per day. On her time card for that week, therefore, Wittstock listed four hours of compensatory time. It is undisputed that Wittstock never submitted an overtime/compensatory time request form to her supervisor, Nancy Robillard prior to inserting her request for compensatory time on her time card for the pay period August 23-September 5,

1998. On September 17, Wittstock discovered on her paycheck that she had been denied compensatory time and had been paid for four hours of overtime during that previous pay period.

Wittstock admitted that she and Robillard did not reach an agreement before she submitted her time card regarding her request to accrue compensatory time during the week of August 31, 1998. Wittstock stated that she merely mentioned that she would be requesting compensatory time to Robillard, and Robillard did not respond to her comment. The Union failed to produce an overtime/compensatory time request form covering the disputed four hours of requested compensatory time. The documentary evidence showed that Robillard merely marked her denial of Wittstock's request for compensatory time on Wittstock's time card and never spoke to Wittstock about it before she denied her compensatory time. Wittstock was properly paid time and one-half for the four hours she worked during the week of August 31, 1998. Wittstock timely filed the instant grievance which was processed to arbitration.

POSITIONS OF THE PARTIES

Union

The Union argued that the disputed language has always meant that employes merely have to arrange with their department head to take compensatory time off, and that the provision has never meant that employes needed to get permission before accruing compensatory time. In this regard, the Union noted that various provisions of the Courthouse contract, including those pertaining to Hazardous Weather, Vacations and Holidays support this position.

In addition, the Union pointed out that the County Highway Department contract at Article VIII, Section 1, Compensatory Time, states that "employes shall have the option to accumulate overtime worked. . .in the form of compensatory time off." The Union urged that this language was unnecessary in the Courthouse unit, as the employes always had the option to decide whether or not to accrue compensatory time or be paid overtime. Furthermore, the Union noted that the parties never negotiated regarding whether the employes had the right to accrue compensatory time rather than be paid overtime. According to the Union, it was assumed to be the employe's choice.

Thus, the Union argued that Wittstock was merely exercising her prerogative to take her overtime as compensatory time in September, 1998 when she placed the notation of four hours of compensatory time on her time card. Indeed, the Union noted that Wittstock informed supervisor Robillard that she (Wittstock) was going to take the time as compensatory

time and that Robillard failed to respond, and merely denied Wittstock's right to take compensatory time without any notice to Wittstock, by paying Wittstock overtime for the 4 hours

involved herein.

The Union noted that the contract does not make a distinction between tenured and probationary employes for purposes of accrual of compensatory time. The Union argued that the County's grant of compensatory time to probationary employe Schaffer was unfair to tenured employes such as Wittstock. Whether Wittstock used the compensatory time as her private bank account, as claimed by the Employer, is not relevant to this case, and the Union in its brief objected to the submission of this evidence on the record, although it had failed to object at the time the evidence was submitted at the hearing. In addition, the Union noted that whether or not Wittstock had difficulty using her four weeks of vacation time is also irrelevant to this case, and should not be considered herein.

The Union argued that the accrual of compensatory time was common prior to 1998, and noted that in 1997, Wittstock accrued the maximum compensatory time, 80 hours. However, the Union noted that this accrual in 1997 was unusual due to a heavier than usual workload in the Department. Furthermore, the Union noted that the County had allowed employe Jome to accrue compensatory time after Wittstock had been denied accrual of compensatory time.

The Union asserted that Article 16, Section C, paragraph 1 was bargained for scheduling purposes only; that it was never discussed and the Employer never asserted that it could decide whether overtime would be accrued as compensatory time. In addition, the parties bargained a cap on compensatory time to cover the situation where employes might leave and to limit the amount of compensatory time payout necessary under the contract. The County's main concern in the negotiations surrounding Article 16 was that it needed to avoid disruption to the various County offices covered by the contract so that employes and their supervisors would need to agree when the compensatory time would be taken off.

The Union argued that Article 16, Section C, paragraph 1 is like the Vacation and Floating Holiday language in the Agreement (Articles VII(E) and VIII(A)). All of this language was put in the collective bargaining agreement to avoid scheduling problems when time is taken off, not to address accrual. Furthermore, the Union noted that the Employer produced no witness to contradict the Union's evidence regarding the above. Thus, the Union argued that employes should get the benefit of the compensatory time provision if they choose to use it; that the contract does not say that the Employer can choose between overtime and compensatory time for employes and that this has been the case since the parties' first contract in 1986. Indeed, the Union noted, no employes have ever been refused the right to accrue compensatory time before this case arose.

In regard to the Fair Labor Standards Act, the Union argued that that statute requires that an agreement must be reached in advance before overtime worked will be accrued as compensatory time. The Union urged that the collective bargaining agreement is such an

agreement in advance. Only where no collective bargaining agreement exists can there be individual agreements on compensatory time. The collective bargaining agreement in this case allows the County to cash out employes' compensatory time only on June 1st. Therefore, the County cannot, without the employe's permission, cash out their compensatory time when the County chooses to do so. Finally, the Union noted that the County failed to provide any evidence of bargaining history contradictory to its evidence.

The Union noted that the County Clerk's office now has more employes, and that the workload has been decreased. It also noted that it was the County that proposed to allow vacation accrual to increase in the effective labor agreement by allowing carryover of vacation time. In all of the circumstances of this case, the Union urged that the past practice clearly shows that it is the employes' choice to take compensatory time or to receive overtime pay. The Union noted in this regard that acceptance of a past practice may be tacit; that the right to select compensatory time is a definite benefit to employes; that the practice has existed for 13 years since the parties' first collective bargaining agreement; and that subsequent limitations on accrual have been bargained by the parties and they have not disturbed the past practice allowing employes to decide whether they wish to receive compensatory time or overtime. The collective bargaining agreement provides for compensatory time and does not prevent employes from choosing compensatory time except by limitations on maximum accrual.

The Union therefore sought an award allowing employes to choose compensatory time over overtime and offering Wittstock and any other similarly situated employes the right to exchange overtime payment received for compensatory time accrued and to make all affected employes whole.

County

The Employer argues that the language of Article 16, Sections B and C is clear and unambiguous, and determinative of this case. As the language is not subject to more than one reasonable interpretation, the County argued that evidence of practice is irrelevant. In addition, the County noted that the contract makes clear that overtime must be paid for overtime hours actually worked; that compensatory time may be substituted for cash overtime if there is a mutual agreement between the Employer and the employe, all pursuant to Article 16, Sections B and C.

In addition, the County urged that the Fair Labor Standards Act provides rights that are similar to those expressed in the collective bargaining agreement and consideration of the FLSA would be appropriate in this case. The Employer noted that a large part of the reason

why Congress allowed governmental employers to grant compensatory time rather than paying overtime was to avoid large cash payments to employes, for which they could not properly budget in a governmental setting. Furthermore, the County noted that the FLSA authorizes

public sector employers to offer compensatory time in lieu of cash overtime and that mutuality is a condition precedent to compensatory time being accrued and used in lieu of cash overtime payments.

The County therefore argued that it could reduce an employe's accrued compensatory time by making cash overtime payments and that the collective bargaining agreement does not prohibit such actions by the County. This is not a case, the County urged, where the collective bargaining agreement is silent on the disputed subject. Therefore, in the County's view, there is no room for admission of past practice or evidence of custom to alter the clear meaning of Article 16. Furthermore, the County noted that there was no mutual agreement to amend the clear language of Article 16 and there is no consistent practice as the Union has claimed. The County contended that the non-use of the right should not entail its loss. The County therefore urged the undersigned to deny and dismiss the grievance.

Reply Briefs

Union

The Union urged that the County had misapplied both the FLSA and a case cited in its brief. The Union reiterated its argument that the collective bargaining agreement constitutes an agreement in advance regarding compensatory time, making the FLSA inapplicable.

The Union also contended that the alleged windfall employes receive when they are paid out for compensatory time earned in the prior year after June 1st of the subsequent year is neither relevant nor monetarily significant. In the Union's view, as the contract clearly requires employes to have the option to accrue comp time, the grievance must be upheld by the Arbitrator.

County

The County argued that Article 16, Section C is not susceptible to more than one interpretation: overtime payment is mandatory while giving compensatory time off is discretionary, requiring the agreement of the employe and the Department Head. The County also argued that the Union's comparison of Article 16, Section C to Articles 7 and 8 of the contract and to the Compensatory Time provision in the Highway Department contract were of no assistance in determining the outcome of the case. Furthermore, the County took issue with the Union's interpretation of the FLSA, arguing that it should be applied herein. The

County therefore urged that the grievance be denied and dismissed as the Union has failed to carry its burden of proof herein regarding past practice, bargaining history and the proper interpretation of Article 16.

DISCUSSION

Several preliminary matters should be dealt with before I reach the substantive issue herein. First, I observe that the employe's reason for wishing to accrue compensatory time rather than receiving overtime payments is neither relevant nor material to this case. Therefore, this evidence as well as the evidence regarding workload fluctuations at the County, whether employes have difficulty scheduling and taking their vacation time off and how many hours of compensatory time were accrued and/or paid out to unit employes in the past, has no bearing in this case, and this evidence has not been considered herein.

In addition, I find that the language of Article VIII, Section 1 contained in the Highway Department bargaining agreement is so differently worded as to make it of no use in determining the issue in this case. In the Highway Department contract, the compensatory time clause specifically states that "employes shall have the option to accumulate overtime worked. . . in the form of compensatory time off." (emphasis supplied). In the Courthouse agreement, in contrast, no reference is made to the term "option" and the mandatory verb "shall" is not used therein. These differences are vast enough to require that the Highway Department language be disregarded in this case. For similar reasons, I do not find the language of Articles VII and VIII of the effective agreement to be instructive regarding the issue raised herein. 1/

1/ In this regard, I note that the verb "shall be scheduled" is used in Article 7, while the verb "shall be granted" is used in Article 8. In the Hazardous Weather provision in Article 16 the verb "shall be entitled" is used.

Furthermore, the parties have argued strongly regarding the applicability of the Fair Labor Standards Act to this case. I agree with the Union that the collective bargaining agreement between the parties which contains a provision at Article 16, Section C covering compensatory time constitutes an agreement in advance which makes the FLSA inapplicable to this case.

I now turn to the substantive issue in this case. This case involves the proper interpretation of the first sentence of Article 16, Section C. That sentence reads as follows:

> Compensatory time off in lieu of overtime payment may be granted by the mutual agreement of the employe and his/her Department Head at times agreed to.

The Union has argued that the reference to mutual agreement in this sentence only requires that agreement be reached regarding when compensatory time will be taken off. In the Union's view, mutual agreement is not required for the selection of compensatory time rather than overtime payment; this selection, in the Union's view, can only be made by the employe. I disagree. In my view, this sentence clearly requires mutual agreement for both the granting of compensatory time off in lieu of overtime payment as well as for planning when compensation time granted will be taken.

This analysis of the disputed language is supported by the use of the verb "may be granted". If the parties had intended employes to have the absolute right to select compensatory time whenever they wished, the parties should have used the verb "shall be granted", rather than the permissive verb "may be granted". Also, the use of a form of the verb "granted" denotes allowing, permitting, consenting or bestowing. In addition, the object of the sentence, "mutual agreement", specifically refers back to the subject of that sentence, "compensatory time off". Thus, the disputed sentence operates to grant an automatic cash payout of overtime unless mutual agreement is reached that compensatory time will be accrued in lieu thereof. The language of Article 16, Section C clearly requires a mutual agreement by the employe and the Department Head before compensatory time "may be granted" and it requires that when compensatory time off is to be taken, the employe and the Department Head must first reach an agreement thereon as well.

The fact that the County has never (before this case) denied compensatory time to an employe does not mean that the County has waived its contractual right to refuse to agree to the accrual of compensatory time. It is axiomatic in grievance arbitration that the failure to assert a right granted by the language of a contract, does not mean the right is forever lost. Also, I find it unremarkable that the parties never discussed at negotiations the meaning of the first sentence of Article 16, Section C, and that the parties amended other parts of this Section. It is possible that the County and the Union felt no comment was necessary, although the parties may have had different interpretations of the disputed language.

The facts of this case clearly show that although (in conversation) Wittstock informed Department Head Nancy Robillard that she intended to request compensatory time for the extra hours she worked during the week of August 31, 1998, Robillard never agreed to Wittstock's

request. Thus, mutual agreement to the accrual of compensatory time was never reached either in conversation or at any time before Wittstock turned in her time card for the pay period. 2/

2/ The Union has argued that Robillard should have notified Wittstock in advance that she (Robillard) intended to deny Wittstock's compensatory time request. The contract does not require such notification.

Rather, Robillard merely paid out Wittstock for the extra hours she had worked during the week of August 31, 1998, on Wittstock's next paycheck. Given the lack of mutual agreement to Wittstock's request to accrue compensatory time, I find there was nothing improper in the County's paying overtime to Wittstock, as the language of Article 16, Section C provides for such an automatic payout.

The Union has argued that it is somehow improper for the County to allow probationary employes to accrue and use compensatory time when they are ill or otherwise need to take time off work. As Article 16, Section C uses the verb "may be granted", it is the County's prerogative, if it chooses, to reach mutual agreement with probationary employes (or any other employes) to accrue and to use compensatory time during their probation or at any other time. 3/ Based upon the relevant evidence and argument in this case, and in light of the

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3/ The Union offered no evidence that the County had a bad faith motive or otherwise discriminated against Wittstock by denying her request to accrue compensatory time herein.

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fact that Wittstock was paid for all hours in question at a time and one-half rate, I therefore issue the following

AWARD

The Employer did not violate the collective bargaining agreement when it refused to allow Julie Wittstock to accrue work in excess of eight (8) hours as compensatory time. The grievance is therefore denied and dismissed in its entirety.

Dated at Oshkosh, Wisconsin this 18th day of June, 1999.

Sharon A. Gallagher /s/
Sharon A. Gallagher, Arbitrator

SAG/gjc
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