BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS (IAFF), LOCAL 487, AFL-CIO

and

CITY OF EAU CLAIRE

Case 254
No. 61882
MA-12093

(Grievance 2002-800)

Appearances**:**

Mr. Greg Stegge, President, IAFF Local 487, appearing on behalf of the Union.

Mr. Christopher Bloom, Attorney, Weld, Riley, Prenn & Ricci, appearing on behalf of the City.

ARBITRATION AWARD

The above-captioned parties, hereinafter referred to as the Union and the City, respectively, were parties to a collective bargaining agreement which provided for final and binding arbitration of grievances. Pursuant to the parties' request, the Wisconsin Employment Relations Commission appointed the undersigned to decide Grievance 2002-800. Hearing on the matter was held on April 11, 2003 in Eau Claire, Wisconsin. The hearing was not transcribed. The parties filed briefs and reply briefs by June 19, 2003, whereupon the record was closed. Based on the entire record, the undersigned issues the following Award.

ISSUE

The parties were unable to stipulate to the issue to be decided in this case. The Union frames the issue as follows:

> Did the City violate the Department's collective bargaining work rules and practices therein, when it denied Firefighter/Paramedic Chris Bell's request to accumulate comp time in lieu of overtime pay? If so, what is the appropriate remedy?

The City frames the issue as follows:

> Did the City violate the collective bargaining agreement when it denied the grievant's request to accrue compensatory time? If so, what is the remedy?

Since the parties were unable to agree on the issue, the undersigned has framed it. Based on a review of the record, the opening statements at hearing and the briefs, the undersigned has framed the issue as follows:

> Did the City violate the collective bargaining agreement when it denied the grievant's request to accrue compensatory time for training overtime that he worked? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 2000-2002 collective bargaining agreement contained the following pertinent provisions:

ARTICLE XXXIV
WORK RULES

Section 1. Existing work rules are made part of this Agreement.

Section 2. The establishment of new work rules affecting wages, hours of work, or conditions of employment shall be subject to negotiations and mutual agreement prior to their effective date.

PERTINENT WORK RULES

The Department's work rules have been compiled into a document entitled "Suggested Operational Guide" (SOG).

The SOG contains a provision dealing with "Compensatory Time Replacement Duty". That two-page provision provides in pertinent part:

PART:	**SUBJECT:**
Administrative Guideline	*Compensatory Time Replacement Duty*

PURPOSE:

This guideline explains the allowance of an employee to accumulate compensatory time in lieu of pay for replacement duty worked.

SCOPE:

This guideline shall affect all 24-hour personnel of the Eau Claire Fire Department.

GUIDELINE:

Compensatory time in lieu of pay for replacement duty will be granted as follows:

- When the replacement duty day is worked, the employee shall indicate on their time sheet as to whether pay or compensatory time is desired.

. . .

The SOG also contains a provision dealing with "Employee Time Reports". That six-page provision provides in pertinent part:

PART:	**SUBJECT:**
Administrative Guideline	**Employee Time Reports**

PURPOSE

To ensure appropriate compensation to employees of the Department and to ensure accurate record keeping for auditing purposes.

SCOPE

This guideline shall apply to personnel on the Eau Claire Fire Department.

GUIDELINE

Eau Claire Fire Department employees are paid on a biweekly basis. Time reports are collected and reviewed Monday morning (every other week) and turned in to the Payroll Department by Monday noon. Paychecks are distributed to employees on Thursdays at 11 a.m.

. . .

There are three sections under which hours are recorded: DIRECT HOURS, OVERTIME HOURS, and INDIRECT HOURS.

DIRECT HOURS

. . .

OVERTIME HOURS

. . .

INDIRECT HOURS

Any hours that do not fit in the aforementioned two sections are to be recorded in this section.

1. **Time Code** – Choose from the codes listed. Most of the codes are self-explanatory, i.e. 200 (Vacation). Code 265 (Comp Time Earned @ 1.5) is to be used by an employee who worked overtime hours and wishes to be compensated in Compensatory Time as opposed to money. Code 350 (Training) is to be used by an employee who spent on-duty hours at off-site training. Code 351 (Training @ 1.5) is to be used by an employee who attended training on an overtime basis. Codes 355 (Training – Paramedic) and 356 (Training – Paramedic @ 1.5) are to be used in a similar manner as codes 350 and 351 but are specifically for paramedic-related training.

. . .

BACKGROUND

Employees in the fire department can generate overtime in a number of ways. Three of the ways will be mentioned here. First, employees can work what is known as FLSA overtime. This occurs when the employee works beyond 56 hours in a week. Second, employees can work what is known as replacement duty. This occurs when the department has to replace an absent employee to maintain minimum staffing. Third, employees can work overtime by attending training sessions.

There are two ways that employees can be compensated for working overtime. One way is pay and the other is compensatory time (hereinafter comp time). Firefighters who work FLSA overtime and replacement duty can be compensated by either pay or comp time. The choice is theirs. However, firefighters who work training overtime do not currently have this choice; they can only take pay and cannot take comp time for it. This case involves a firefighter who worked training overtime and wants to accrue (i.e. accumulate) comp time for it.

. . .

The parties' collective bargaining agreement does not contain any provision which deals with comp time. Thus, there is no contract language which specifies when and how comp time is granted, or which deals with the accrual of comp time in lieu of pay.

The collective bargaining agreement does contain language though which says that the department's work rules are part of the collective bargaining agreement. Thus, the department's work rules are incorporated by reference into the collective bargaining agreement. These work rules have been compiled into a document entitled "Suggested Operational Guide". This document is known by the acronym SOG.

One of the provisions in the SOG is entitled "Compensatory Time Replacement Duty." That SOG specifies that 24 hour personnel (i.e. firefighters) can "accumulate compensatory time in lieu of pay for replacement duty worked." As previously noted, firefighters who work replacement duty can be compensated by either pay or comp time. They simply indicate on their time sheet whether they want pay or comp time.

Another provision in the SOG is entitled "Employee Time Reports". That SOG sets the procedure for completing employee time reports. It does not specify though when and how comp time is granted.

The record indicates that in one instance in 2001, Firefighter Bruce Buchholz was allowed to accrue comp time for attending paramedic training. (Note: The record does not indicate how many hours were involved). At the hearing, Fire Chief Bruce Fuerbringer characterized this one instance where an employee was granted comp time for paramedic training as an administrative oversight (i.e. a mistake).

The record further indicates that the department's two fire inspectors, who are in the same bargaining unit as the firefighters, can accrue comp time for all the overtime they work. Inspectors work a different schedule than firefighters. Inspectors work a 40 hour week while firefighters work a 56 hour week. If an inspector is absent from work, they do not have to be replaced. When firefighters are absent though, they do have to be replaced.

Finally, the record indicates that in October, 2002, the parties settled a grievance filed by Firefighter Dave Lombardo. At issue in that case was whether Lombardo could use 24 hours of his accumulated compensatory time on November 24, 2002. The settlement was that he could.

FACTS

On October 17, 2002, Firefighter/Paramedic Chris Bell worked four hours of overtime while attending off-duty paramedic training. When he subsequently filled out his time sheet, he requested comp time for those four hours in lieu of pay. Fire Chief Fuerbringer denied Bell's request.

The Union grieved the Chief's denial of Bell's request to receive comp time instead of pay for this overtime. The grievance was denied. The grievance was processed through the contractual grievance procedure and was ultimately appealed to arbitration.

POSITIONS OF THE PARTIES

Union

The Union's position is that Bell's request for comp time should have been granted. According to the Union, the City violated the collective bargaining agreement, work rules and practices when it denied Bell's request to accrue comp time in lieu of overtime for training. It elaborates on this contention as follows.

The Union notes at the outset that the contract language applicable here is Article XXXIV (Work Rules). That article says, in pertinent part, that "the existing work rules are made part of this Agreement." The work rules, of course, are found in the department's SOG.

As the Union sees it, just one SOG is applicable here, and it is the one entitled "Employee Time Reports." The Union avers that SOG addresses the accumulation of comp time and clearly and unambiguously gives employees the right to earn comp time instead of money for all overtime hours worked. In support thereof, it relies on the language in the "Indirect Hours" section that twice says that "Code 265 (Comp Time Earned @ 1.5) is to be used by an employee who worked overtime hours and wishes to be compensated in Compensatory Time as opposed to money." The Union cites the general arbitral principle that when contract language is clear and unambiguous, the arbitrator's task is to simply apply it to the facts. The Union argues that if the arbitrator does that, and applies the "Employee Time Reports" SOG to the instant facts, the grievance will be sustained.

The Union disputes the City's contention that comp time can only be accumulated for replacement duty overtime. According to the Union, the SOG which the City relies on to support that contention (i.e. the one entitled "Compensatory Time Replacement Duty") does not govern how comp time is accumulated; instead, it governs how and when comp time can be taken (once it is accumulated) and the maximum amount of comp time that can be accumulated. As the Union sees it, the City misrepresents the meaning of that SOG to the arbitrator. The Union avers that this misrepresentation is based on the poorly written and ambiguous "Purpose" section of the SOG which, in its view, is contradictory to the entire SOG and does not reflect the intent of the SOG's "Guideline" section. It contends this fact was established at the hearing by Mr. Bloom when he cross-examined Lt. Hanson. The Union maintains that nowhere in that SOG's "Guideline" section is there any language which restricts employees from earning comp time for overtime other than replacement duty overtime.

The Union also relies on the general arbitral principle that specific language governs over more general language. According to the Union, the specific language is the "Employee Time Reports" SOG while the general language is the "Compensation Time Replacement Duty" SOG. Building on that premise, the Union asks the arbitrator to apply the "Employee Time Reports" SOG here rather than the "Compensatory Time Replacement Duty" SOG.

Next, the Union calls attention to the fact that Firefighter Buchholz was once granted comp time for paramedic training. It implies that since Buchholz was granted comp time for that, it should have also been granted to Bell.

Finally, the Union calls attention to the fact that fire inspectors can earn comp time, as opposed to money, for their overtime hours worked. The Union disputes the City's assertion that the fire inspectors are governed by a different "agreement" covering comp time than the firefighters are.

In order to remedy this contractual violation, the Union requests that Bell be given comp time for the overtime hours which he worked on October 17, 2002.

City

The City's position is that the grievance should be denied. It elaborates on this contention as follows.

The City notes at the outset that firefighters can currently accrue comp time in just two instances: 1) when they work replacement duty and 2) when they work FLSA overtime. The City avers that these are the only two instances where employees can currently accrue comp time in lieu of pay. To support this premise, the City cites the SOG dealing with replacement duty comp time, the comp time accrual request form and the parties' past practice.

As the City sees it, what the Union is trying to do via this grievance is expand the accrual of comp time to cover another factual situation, namely training. In other words, the City believes that the Union is attempting to obtain greater rights with respect to the accrual of comp time than it currently has. The City contends that this expansion should not be allowed because there is no contract provision or SOG that allows employees to accumulate comp time for training. Additionally, the City submits that if the Union's proposition is accepted, this would result in there being no limit upon employees' accrual, and use, of comp time. The City maintains this would have a tremendously adverse impact upon staffing, increasing operational costs exponentially.

The City disputes the Union's contention that the SOG dealing with "Employee Time Reports" is applicable to training. According to the City, that SOG just governs the procedure for completing employee time reports; it does not govern when employees may elect to accrue comp time (which, of course, is the issue here).

The City contends that even if that SOG is applicable here, the two SOG's must be reconciled. It cites the general arbitral principle that the meaning of a general provision is restricted by a more specific provision. It avers that the SOG governing employee time reports is a general provision establishing the procedure for completion of time reports, while the SOG on compensatory time replacement duty is a specific provision pertaining to one aspect of the time reports – comp time accrual requests. As the City sees it, this specific provision restricts the SOG on employee time reports with respect to comp time accrual. The City maintains that if the SOG on employee time reports is found more specific than the SOG on comp time replacement duty, this would render the latter SOG meaningless and ineffective with respect to the accrual of comp time. The City urges the arbitrator to avoid that interpretation.

Next, the City addresses the fact that Firefighter Buchholz once accrued comp time for training overtime. The City disputes the Union's contention that this one instance establishes an "agreement" between the parties to allow employees to accrue comp time for all overtime

hours worked. The City avers that under the applicable FLSA rules, employees can only be allowed to accrue comp time for those hours in which the parties have agreed or have an understanding prior to the performance of the work that comp time be accrued. The City asserts that there is no agreement between the parties to allow the accrual of comp time for paramedic training. Instead, the only agreement between them is to allow employees to accrue comp time for replacement duty and FLSA overtime. The City also contends this one instance where comp time was allowed for paramedic training time did not create a binding past practice that it had to be allowed in all instances involving training. Aside from that, the City notes that the Fire Chief testified that the one instance where comp time was granted for training overtime was a mistake. It further notes that all four management witnesses testified that the practice in the department, for at least the last 20 years, is that comp time can only be accrued for replacement duty and FLSA overtime.

Next, the City addresses the fact that the 40-hour employees (i.e. the fire inspectors) can accrue comp time while 24-hour employees cannot. It maintains there is a valid reason for this difference. To support this premise, it cites the Chief's testimony that the reason the 40-hour employees can accrue comp time for all overtime is because they are often on the job for long hours. The City asserts that it has a different agreement and understanding with 40-hour employees than it does with the 24-hour employees concerning comp time accrual. Additionally, the City calls attention to the fact that the SOG on comp time replacement duty specifies that it applies to all "24-hour personnel" of the Eau Claire Fire Department.

Finally, the City contends that the Lombardo grievance settlement (which is part of the record) provides no insight to this case. According to the City, the issue in the Lombardo grievance was the use of accumulated comp time; it was not whether Lombardo could accrue comp time which, of course, is the issue in this case.

In sum, the City believes that the grievance is without merit and should therefore be denied.

DISCUSSION

At issue here is whether the City violated the collective bargaining agreement when it denied the grievant's request to accrue comp time for training overtime that he worked. Based on the rationale which follows, I find no contractual violation occurred.

My analysis begins with a review of how this discussion is structured. I will first address the applicable contract language. After that, I will review the SOGs relied on by the parties. Finally, I will review the record evidence concerning an alleged past practice.

Since the basic subject matter of this case involves comp time, the logical starting point for purposes of discussion is to ask rhetorically whether there is any contract language dealing with comp time. That question is answered in the negative. A review of the collective bargaining agreement indicates it does not address that topic. This contractual silence on same means that the parties have not included language in their present agreement dealing with comp time.

The parties agree that the only contract language applicable here is Article XXXIV (Work Rules). That article says that the department's work rules are part of the collective bargaining agreement. Since the work rules are incorporated by reference into the collective bargaining agreement, this means that a violation of a work rule constitutes a violation of this particular contract provision.

The focus now turns to an examination of the work rules cited by the parties. In this case, each side relies on a different work rule. The Union relies on one entitled "Employee Time Reports" while the City relies on one entitled "Compensatory Time Replacement Duty". Each is reviewed below.

The SOG entitled "Employee Time Reports" sets the general procedure for completing employee time reports. That's all that it does. Contrary to the Union's contention, it does not specify when and how comp time is granted or address how comp time is accrued. Specifically, it does not say that comp time has to be granted for overtime related to training. The part of the language which the Union relies on in the "Indirect Hours" section (i.e. the part which says that "Code 265 (Comp Time Earned @ 1.5) is to be used by an employee who worked overtime hours and wishes to be compensated in Compensatory Time as opposed to money") does not say that comp time has to be granted for each and every factual situation that arises. The Union's interpretation (i.e. that this language gives firefighters the right to comp time for all overtime hours worked) reads more into the language than is there. In my view, what that provision means is that when a firefighter has a choice of comp time or pay, such as when they work FLSA overtime or replacement duty, they are to use Code 265 to identify their choice. This SOG though does not say that firefighters who work training overtime get a choice in that matter. As a result, that SOG is not dispositive of the outcome here.

The focus now turns to the SOG entitled "Compensatory Time Replacement Duty". For background purposes, it is noted again that firefighters can work what is known as replacement duty when the department has to replace an absent firefighter to maintain minimum staffing. When that happens, the firefighter who works replacement duty can be compensated by either pay or comp time. The choice is theirs. The SOG states that firefighters can "accumulate compensatory time in lieu of pay for replacement duty worked."

That said, the question in this case is not whether firefighters who work replacement duty can accrue comp time; it is whether firefighters who work training overtime can accrue comp time. On its face, the SOG just referenced deals with replacement duty and does not say anything about training overtime. That being the case, the SOG dealing with replacement duty is not dispositive of the outcome here either.

Since neither the contract language nor the SOGs cited by the parties address whether firefighters who work training overtime can accrue comp time, it is necessary for the undersigned to look elsewhere for guidance in answering this question.

When a contract is silent on a given point, arbitrators often look to extrinsic evidence for guidance. One type of such evidence is past practice. Past practice is a form of evidence which arbitrators commonly use to help them fill in gaps in a collective bargaining agreement. The rationale underlying its use is that the manner in which the parties have carried out the terms of their agreement in the past provides reliable evidence of what the parties intended it to mean.

The focus now turns to the alleged past practice. It is generally accepted by arbitrators that for a practice to be considered indicative of the parties mutual intent and be binding, the conduct must be clear and consistent, of long duration and accepted by both sides. The City asserts that the record evidence meets all of these criteria and, thus, is entitled to be given effect herein.

I find that there is a practice which is entitled to contractual enforcement. The record establishes that firefighters currently accrue comp time in just two instances: 1) when they work replacement duty and 2) when they work FLSA overtime. The first instance is specifically sanctioned by the SOG just referenced (i.e. the one entitled "Compensatory Time Replacement Duty"). The second instance is not addressed in either the collective bargaining agreement or a SOG, but is governed by federal regulations implementing the FLSA. These are the only two instances where firefighters can currently accrue comp time in lieu of pay. In other words, these are the only two instances where firefighters can be compensated for their overtime by either pay or comp time. In these two instances only, the choice is theirs. It's been this way in the department for at least 20 years.

In finding that practice to exist, I am aware that there are factual situations documented in the record which do not fit into this pattern. They will be examined next.

In one instance in 2001, Firefighter Buchholz was allowed to accrue comp time for attending paramedic training. Obviously, in this instance, comp time was not limited to just replacement duty and FLSA overtime, but was instead granted for training. Be that as it may, it is a generally-accepted arbitral principle that a single instance does not create or alter a

practice. Accordingly, I find that this single instance was insufficient to expand the practice just noted to also cover training.

The record also establishes that fire inspectors have a different practice than firefighters concerning the accrual of comp time. Fire inspectors can accrue comp time for all the overtime they work; they are not limited to accruing comp time in just the two factual instances where they work replacement duty and FLSA overtime like the firefighters are. This means that fire inspectors can accrue comp time in more factual instances than firefighters can. This more liberal practice can be attributed, in part, to the following factual differences: the fire inspectors work a different schedule than the firefighters (i.e. 40 hours a week versus 56 hours a week) and do not have to be replaced when absent (while the firefighters do). Having established that there is one practice for firefighters concerning the accrual of comp time and another practice for fire inspectors concerning the accrual of comp time, the question is which practice applies herein: is it the one for the firefighters or the one for the fire inspectors? I find that the practice for the fire inspectors is not applicable to the grievant (Bell) because he's not a fire inspector; he's a firefighter/paramedic. That being so, the practice that applies to him is the one for the firefighters. The City complied with that practice when it did not allow the grievant, a firefighter, to accrue comp time for training overtime that he worked.

In my view, this case can be summarized thus: what the Union is attempting to do here is expand comp time accrual for firefighters beyond its current coverage. At present, firefighters cannot accrue comp time for training. That's what the Union is trying to get, via the arbitration process. There is no contractual justification for this proposed expansion because there is no contract provision or SOG that specifically allows firefighters to accumulate comp time for training. Instead, the practice for firefighters limits comp time accrual to just replacement duty and FLSA overtime. Application of that practice here results in the denial of the grievance. Accordingly, no contract violation has been found.

In light of the above, it is my

AWARD

That the City did not violate the collective bargaining agreement when it denied the grievant's request to accrue compensatory time for training overtime that he worked. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 20th day of August, 2003.

Raleigh Jones /s/
Raleigh Jones, Arbitrator

REJ/gjc
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