

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 2771, AFSCME, AFL-CIO

and

WAUPACA COUNTY

Case 135

No. 61965

MA-12118

Appearances:

Gerald Ugland, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

James Macy, Attorney at Law, Davis & Kuelthau, S.C., appearing on behalf of the County.

ARBITRATION AWARD

The Union and Employer named above are parties to a 1999-2001 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties asked the Wisconsin Employment Relations Commission to appoint an arbitrator to hear and resolve the grievance of Cary Ogden. The WERC appointed Steve Morrison, then a member of its staff, as the arbitrator. Mr. Morrison held a hearing on May 13, 2003, in Waupaca, Wisconsin, but before the parties filed briefs, Mr. Morrison left the employment of the WERC. The WERC substituted Karen J. Mawhinney, a member of its staff, as the arbitrator to decide the case. The parties completed filing briefs on September 26, 2003.

ISSUE

The parties did not stipulate to the framing of the issue. The Arbitrator finds that the issue is:

Did the Employer violate the collective bargaining agreement when it took Cary Ogden off the on-call rotation in 2002? If so, what is the appropriate remedy?

BACKGROUND

The Grievant is Cary Ogden, who has worked for the County for 13 years. He was an outreach prevention specialist, Social Worker II, for the last seven years. He provides case management services, targeted case management, and inpatient hospitalization coordination. He was also a member of the on-call after-hours team 12 years and scheduled employees for the last 7 years. The on-call system takes care of issues arising after regular working hours, such as emergency detentions and inpatient hospitalizations.

The regular work schedule is 7 and ¼ hours a day, or 36 and ¼ a week. Overtime at time and a half does not kick in until an employee reaches 40 hours a week. Employees are paid \$131.75 a week for being on call. On-call employees also get compensatory time for actual time worked. There are actually three on-call systems – one for the nursing unit, another for juvenile justice and the child welfare unit, and a third that handles emergencies in the mental health and alcohol and drug emergencies. The Grievant is in the last group. Some employees may serve in more than one area if qualified.

In the spring of 2002, Alan Stauffer was the Grievant's direct supervisor. He spoke with him about his overtime and learned that he Grievant was carrying a pager after hours when he was not on call. The Grievant said he was making himself available for calls from hospitals, doctors, staff, etc. Stauffer told him that he was concerned that the Grievant was exacerbating his accumulation of overtime or compensatory time. Stauffer told him to stop carrying a pager when he was not working and not on call.

On August 29, 2002, the Grievant was out in the field and paged by Dr. James Fico, the clinical coordinator for the Department of Health and Human Services. He asked that the Grievant take the rest of the day off as well as the next day, a Friday. The Grievant indicated that he could not do that, because he was with a client at a clinic for an assessment and treatment meeting. He asked if he was being laid off or told that he could not come to work, and he was told that he would need to take some time off to resolve the compensatory time issue. The Grievant said he had an entire appointment schedule for the next day and he could not take the day off. He got back to the office about 4:00 p.m. on Thursday and received an e-mail message from Stauffer stating that he was directed not to work any compensatory time without specific verbal or written permission prior to the compensatory time event.

The Grievant worked on August 29, 2002, and did not use any compensatory time on that day. He took the next day, a Friday, off as a vacation day.

On September 4, 2002, Stauffer sent the Grievant an e-mail note that stated:

This is to notify you that you continue to be instructed, per article 13.04, that you are not to earn any overtime or compensatory time without specific verbal or written approval from either myself or Dr. Fico. At this time until you are

able to reduce your total comp time on the books to a level that is approved by management by taking comp time off we do not intend to authorize any comp time. Because the earning of comp time while on call under article 14.02 is governed by article 13.04 including approval of the earning of comp time by management and the fact that at this time approval is not granted you are therefore not qualified to be on call. Until further notice you will not be put on the on-call schedule for the mental health unit.

Stauffer and the Grievant also met on September 4, 2002, and discussed the compensatory time. Stauffer indicated that the Grievant's compensatory time totals were too high. The Grievant had accumulated about 68 or 69 hours, and he could accumulate 72 and a half hours as indicated in the bargaining agreement. After 72 and a half hours, overtime hours are paid in cash. Stauffer wanted the Grievant to take time off during his regular schedule during the day to use up the accrued compensatory time. The Grievant told him that he planned on taking time off in October of 2002, and had told Stauffer that also in August. The Grievant believed that he usually took his compensatory time as time off rather than being paid for it. The Grievant planned on using about six days in October of 2002. He usually accumulated about two to six hours of compensatory time while serving a week on call.

The Grievant volunteered to be on call for 12 years. At times, only two volunteers were maintained the rotation schedule and he asked management to look for more volunteers. He did not know of any time where the Employer refused to allow someone to be on call.

The Grievant was not put on the on-call rotation from early September until December 23, 2002. No one was willing to volunteer for that rotation. Stauffer told him on October 30, 2002, that he was eligible to be on call again because his compensatory time balance was at an acceptable level.

Michael Phalen has been a social worker with the County for 24 years and is on the executive board of the Union. He served on call for 14 years and he was not aware of anyone except the Grievant that was taken off the on-call rotation.

Stauffer has had people available for on-call duty but not been able to use all of them. All the social workers are trained in the juvenile justice system and would be eligible for on call in that area. But Stauffer has not agreed to having all of them being on call. He could not recall a time that anyone was forced to be on call.

Management has been historically concerned about the pay out of overtime and monitored it for several years. Supervisors receive reports on the status of employees' compensatory time bank and pay out of overtime every two weeks, as well as year-end reports. Stauffer has talked to employees about their compensatory time banks as the banks grow larger and the end of the year grows nearer. The County has preferred that employees take the time

off rather than pay them for the overtime, due to budgetary concerns. The County has strongly encouraged employees to take time off instead of cash. The Grievant was never mandated to take compensatory time off.

THE PARTIES' POSITIONS

The Union

The Union asserts that the contract provides a limitation for compensatory time, and the Employer imposed a limit different from that contractual provision. Article 14.02 provides for on-call service and clearly provides that on-call employees will receive, in addition to the differential pay, compensatory time for actual time worked. The regulation of that compensatory time is determined by Article 13.04, which provides for crediting of compensatory time. Article 13.05 limits accumulation of compensatory time up to the employee's two week schedule.

The Union notes that the Grievant's understanding of the voluntary system is that the employee is the volunteer. The Grievant has been involved in the on-call program for 12 years. He was not aware of the Employer ever refusing to allow an employee to volunteer for on-call duty.

The Union states that the Employer's ultimatum was contrary to the contract and that the Employer made an unreasonable demand to take time off in August of 2002. The Employer wanted the Grievant to flex his time off or to use his compensatory time. There is no provision for flex scheduling in the contract. The Employer insisted that the Grievant take off the rest of the day on August 29 as well as August 30, 2002. The contract provides for a normal work week and a normal work day. Fico wanted to interfere with the application of the contract by insisting that the Grievant take off the rest of the day on August 29th and not come to work on August 30th. The contract provides that scheduling of compensatory time shall be arrived at mutually between the employee and department head.

The Union contends that the Grievant's removal from the on-call rotation violated Article 14.02. The Grievant was still a volunteer and was removed from the on-call rotation against his will. The Union asks that he receive on-call pay for the time he was denied access to that rotation between August 29 to December 24, 2002. The Union further asks that the Grievant be provided accrual of compensatory time that was accrued by the person who took his place in the on-call rotation. The Union also asks that the Employer be directed to cease and desist from requiring the Grievant to take compensatory time off at times when he has not agreed mutually to be off using compensatory time, and that the Employer be directed to cease and desist from requiring the Grievant to flex his schedule to avoid additional accrual of compensatory time.

The County

The County submits that because neither overtime nor a position on the on-call rotation are guaranteed by the contract, the withdrawal of the Grievant from the on-call rotation was within its management rights. The management rights gives the County the exclusive right to maintain the efficiency of operations and determine the amounts of services to be performed. The language is not ambiguous, and it was undisputed at the hearing that the County has wide discretion in determining the number of employees to be placed on the on-call rotation.

Additionally, the County asserts that there is no guarantee of overtime in the collective bargaining agreement. There is no guarantee of on-call duties either. Participation in the on-call system is voluntary, except the least senior employee may be required to be on call when no one volunteers. At times, there have been more volunteers than necessary to staff the on-call rotation, and at times, managers have elected not to have certain employees be on call.

The County had legitimate concerns over its financial resources to continue to pay out compensatory time not used at the end of the calendar year. The County's actions are reasonable given the fact that the Grievant was only removed from the on-call rotation for a limited period of time to allow his compensatory bank balance to be lowered. The Grievant was not forced to use compensatory time without the mutual agreement required by the contract. The County simply exercised its right to make efficient decisions regarding overtime costs.

In Reply, the County

The County submits that it did not impose an unreasonable limitation on the Grievant's compensatory time. To the extent that the Grievant argues that he lost overtime opportunities by being removed from the on-call rotation, his grievance must be denied because there is no guarantee of overtime in the bargaining agreement. Likewise, there is no guarantee of on-call duties in the agreement. There is no guarantee that one would ever be placed on the on-call rotation, and there have been more volunteers than necessary to staff the on-call rotation at times.

The Union cannot be permitted to argue issues which it specifically waived at the hearing. The Union argued in its brief that it was a violation of the agreement for the County to attempt to create flexible scheduling. While the Grievant started his testimony by stating that he felt the County was forcing him to use compensatory time without mutual agreement required by contract, he later indicated that this issue was not part of the grievance. The Grievant admitted that the County did not require him to use any compensatory time without his mutual agreement. Arguments waived during hearing or raised for the first time in reply briefs should not be considered.

DISCUSSION

The starting point, as always, is the contract language. There are several relevant provisions in this case.

ARTICLE 2 – MANAGEMENT RIGHTS

2.01 The Employer possesses all management rights except as otherwise specifically provided in this agreement and applicable law. These rights include, but are not limited to the following:

. . .

F) To maintain the efficiency of operations;

. . .

I) To determine the kinds and amounts of services to be performed as pertains to the operations and the number and kinds of classifications to perform such services;

. . .

ARTICLE 13 – NORMAL WORK WEEK AND WORK DAY/OVERTIME

13.01 The normal work week and the normal work day shall be as follows: The normal work week shall be 36.25 hours per week to be worked in five (5) consecutive 7.25 hour days, Monday through Friday. The normal hours of work shall be from 8:00 a.m. to 4:00 p.m., 45 minute duty-free lunch.

. . .

13.04 Employees shall be paid at their regular hourly rate for any hours worked in a normal work week in excess of 35.25 hours up to 40 hours per week, or compensatory time at the straight time may be taken. Employees shall be compensated at the rate of time and one-half of the employee's hourly rate of pay for all hours worked in excess of 40 hours per week. In lieu of said overtime pay (time and one-half), employees may receive compensatory time off. Such compensatory time shall be granted at time and one-half for time worked in excess of 40 hours in the normal work week. Scheduling of such compensatory time shall be arrived at mutually between the employee and department head. All time paid shall be considered time worked for overtime pay and compensatory time purposes, including time and one-half.

13.05 Compensatory time may be accumulated up to the employee's regular two week schedule. If at the end of any given calendar year compensatory time remains on the books, the employee shall receive the appropriate dollar equivalent. Such compensatory time earned at a straight time rate shall be paid out at the appropriate dollar equivalent. Such equivalent shall be computed by multiplying the employee's applicable rate by the number of hours or parts thereof remaining.

...

ARTICLE 14 - CALL-IN/REPORTING PAY AND ON-CALL PAY

...

14.02 Professional Employee On-Call Pay. Differential pay will be paid at the rate of \$1.00 per hour for each hour of on-call (e.g., in Community Services Division, \$131.75 for each employee who is on-call for an entire week. The \$131.75 is arrived at by taking the total number of hours in the week (168 minus the 36.25 work hours), with the balance of \$131.75.) For all employees, it is understood that participation in the on-call systems is voluntary, except that the least senior qualified employee may be required to be on-call when volunteers are unavailable. On-call employees will receive, in addition to the differential pay, compensatory time for actual time worked. Such compensatory time shall be granted on an hour for hour basis and figured in fifteen (15) minute increments. Such compensatory time shall be granted in accordance with the provisions of Section 13.04.

The Employer is correct – the bargaining agreement has no guarantee of overtime or on-call assignments. The fact that on-call duty is voluntary certainly weighs against the Grievant. While he appears to believe that once he volunteers, the Employer has to accept his service, that it not the case by contract.

The Employer did not violate the contract by taking the Grievant off the on-call rotation list. It had a reasonable basis for doing so and did not abuse its discretion to maintain efficiency and determine the level of services. While the Employer was far out on a limb when it told the Grievant to take a certain day off and part of another day off without his mutual consent, the Grievant did not acquiesce and cannot grieve what never happened. The grievance is only over the denial of on-call duty – and the denial does not violate the contract.

The Union argues that Article 13.05 limits accumulation of compensatory time up to two weeks or 72.5 hours, and the Grievant had not yet reached that limitation. However, the contract states that employees may accumulate up to two weeks. There is nothing that guarantees employees that much overtime accumulation.

AWARD

The grievance is denied and dismissed.

Dated at Elkhorn, Wisconsin this 10th day of October, 2003.

Karen J. Mawhinney /s/

Karen J. Mawhinney, Arbitrator