

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**LABOR ASSOCIATION OF WISCONSIN AND  
WISCONSIN INDIANHEAD TECHNICAL COLLEGE CUSTODIAL &  
MAINTENANCE EMPLOYEE'S ASSOCIATION, LOCAL 722**

and

**WISCONSIN INDIANHEAD TECHNICAL COLLEGE**

Case 77  
No. 63967  
MA-12764

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**Appearances:**

**Thomas A. Bauer**, Labor Consultant, Labor Association of Wisconsin, 206 South Arlington Street, Appleton, Wisconsin 54915, appearing on behalf of the Association.

**Victoria L. Seltun**, Attorney at Law, Weld, Riley, Prenz & Ricci, S.C., 3624 Oakwood Hills Parkway, Eau Claire, Wisconsin 54702, appearing on behalf of the Employer.

**ARBITRATION AWARD**

Wisconsin Indianhead Technical College, hereafter WITC or Employer, and Labor Association of Wisconsin and Wisconsin Indianhead Technical College Custodial & Maintenance Employee's Association, Local 722, hereafter Association, are parties to a collective bargaining agreement that provides for final and binding arbitration of grievances. Upon the request of the Association and WITC, the Commission appointed Coleen A. Burns, a member of its staff as arbitrator to hear and decide the instant grievance. Hearing was held in Superior, Wisconsin on March 30, 2005. The hearing was transcribed and the record was closed on June 8, 2005, following the submission of written briefs.

**ISSUES**

The parties have stipulated to the following statement of the issues:

Did the Employer violate the terms and conditions of the collective bargaining agreement when the Employer denied the Grievant's compensatory time request for April 26, 2004?

If so, what is the appropriate remedy?

**RELEVANT CONTRACT PROVISIONS**

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**ARTICLE XII – WORK WEEK**

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Section 7. In lieu of payment for overtime, employees may accumulate compensatory time by making said election to his/her immediate supervisor at the end of each work week. The maximum accumulation shall be 24 hours, and shall be liquidated at the end of each fiscal year (June 30). Vacation requests shall take precedent over compensatory time off requests.

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**BACKGROUND**

Prior to the implementation of the parties' 2001-2004 contract, the custodial employees in the Association's bargaining unit were subject to the "Overtime Hours" policy contained in WITC's Administrative Procedures. This policy, in relevant part, states as follows:

... It is preferred that overtime is first considered for pay. An option for the employee is compensatory time, if approved by the appropriate supervisor and the employee agrees. Timesheets will be kept on file for this work, and employees will be compensated according to:

1. Pay based upon their hourly wage: 1½ time pay over 40 hours, straight pay over their work week up to 40 hours.
2. Compensatory time is allowed within the pay period the time was earned. Hours worked over and above 40 hours/week will be compensated at the rate of 1.5 times the number of hours worked.
3. WITC's work week is defined as Saturday through Friday.

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Conditions

1. Whenever possible, employees should be paid for hours worked above 40 hours/week. If this is not possible, the supervisor may authorize compensatory time provided such compensatory time is used no later than two weeks following the close of the pay period in which it was earned. If compensatory time cannot be used within this time frame, employee will be reimbursed as overtime. Overtime or compensatory time must be approved in advance by the appropriate supervisor, taking into consideration existing work loads and budget availability.

**NOTE:** Compensatory time will not be allowed to accumulate beyond two weeks following the close of the pay period in which it was earned.

...

During the negotiation of the 2001-2004 agreement, the parties agreed to the language contained in Article XII, Section 7.

Custodian Colleen Manecke, hereafter Grievant, is a member of the Association's collective bargaining unit and is employed at WITC's Rice Lake campus. On April 13, 2004, the Grievant requested to use eight (8) hours of compensatory time on April 26, 2004, which request was denied by her supervisor, Dean King. On or about April 21, 2004, a grievance was filed on this denial. The "Settlement Requested" in this grievance is "To be able to use the banked compensatory time for time off as has been done in the past."

WITC's Vice President of Human Resources, Perry Palin, denied this grievance, in a letter dated August 4, 2004, which states:

On Wednesday August 4 we discussed a grievance filed on behalf of Colleen Manecke, custodian at the WITC - Rice Lake campus. The grievance argues that Ms. Manecke worked overtime hours, accumulated compensatory time pursuant to the contract, requested time off, and this request was denied on at least one occasion. The applicable collective bargaining agreement language is found in Article XII:

Section 7. In lieu of payment for overtime, employees may accumulate compensatory time by making said election to his/her immediate supervisor at the end of each work week. The maximum accumulation shall be 24 hours, and shall be liquidated at the end of each fiscal year (June 30). Vacation requests shall take precedence over compensatory time off requests.

Overtime was assigned to Ms. Manecke in the same way that it has been assigned to other members of the bargaining unit. Ms. Manecke did elect overtime hours to be placed in a compensatory time bank. It is clear that an employee must make "compensatory time off requests," and cannot choose unilaterally when the time will be taken off. It is also clear that approved "vacation requests shall take precedent over compensatory time off requests."

Facility Maintenance Supervisor Dean King is charged with carrying out the work of the department with the resources that are provided to him, including the time and effort of the members of the work force. Mr. King must exercise supervisory discretion to balance the needs of the campus with the rights of the employees. Ms. Manecke's presence was needed at the college, Mr. King was within his supervisory discretion to deny a request for a specific day off, and no violation of the contract occurred.

The parties have stipulated that the grievance is properly before the Arbitrator.

### **POSITIONS OF THE PARTIES**

#### **Association**

The relevant contract language, Section 7 of Article XII, was negotiated into the contract during the bargaining of the July 1, 2001 through June 30, 2004 collective bargaining agreement. Association Steward Jerry Smith, who participated in these negotiations, testified that the understanding of the parties was that:

1. Employees were allowed to convert overtime to compensatory time up to a 24-hour cap.
2. The 24-hour cap must be used within the fiscal year, identified as July through June 30.
3. Any compensatory time used by the employee could be replenished by the employee so long as it occurred within the fiscal year.

Association Steward Loren Kalla corroborated this testimony that the compensatory time off bank can be replenished during the fiscal year. The Association Stewards' testimony was not challenged by the Employer at hearing.

Consistent with Association Steward's testimony that employees are to be allowed to replenish the compensatory time off bank during the fiscal year, the Grievant submitted a request for 8 hours off on April 26, 2004 to be used for a doctor's appointment. In the fiscal year 2002-2003, the Grievant's usage of compensatory time off was consistent with the collective bargaining agreement language and the Association's understanding of this language.

Although WITC's Vice President of Human Resources testified that the collective bargaining language could be interpreted such that an employee only receives 24-hours of compensatory time off per year, he did not refute the fact that no complaints were received from the supervisory staff regarding the Grievant's usage in 2002-2003. The record clearly illustrates that the parties had negotiated that employees were allowed to replenish the compensatory time off bank during the fiscal year.

The Grievant's supervisor, Dean King, told the Grievant that he denied her request initially based upon the Administrative Procedures applicable to non-represented employees. Only when he was told by Human Resources that Administrative Procedures did not apply to the collective bargaining agreement did he withdraw his position regarding that document. Supervisor King also stated to Association Steward Kalla and the Grievant that the Grievant used too much compensatory time off and that he needed to take a stand.

No proof was offered to substantiate Supervisor King's claim that he denied the claim because of lack of coverage. If there was a lack of coverage, the Employer is entitled to use temporary help for excessive workload beyond the normal needs of the institution. Supervisor King's claim that he denied the request because of increased workload is inconsistent with the fact that, when the Grievant used sick leave on April 26, 2004, the Employer did not call in temporary staff to fill-in for the Grievant.

No notes were provided to substantiate Supervisor King's claim that he had discussed the excessive use of compensatory time off with the employees at previous staff meetings. Supervisor King's previous denials of the Grievant's compensatory time requests also illustrate that the Grievant was being singled out because she used more compensatory time than other employees.

The Employer violated the collective bargaining agreement when the Employer unreasonably denied the Grievant's compensatory time off request for April 26, 2004. The remedy requested in the grievance is reasonable and should be awarded by the Arbitrator. The Arbitrator should also:

1. Order the Employer to follow the negotiated procedure when the employee's request time off, which is that:
  - a. Employees are allowed to convert overtime to compensatory time up to a 24-hour cap.
  - b. The 24-hour cap must be used within the fiscal year, identified as July 1 through June 30.
  - c. Any compensatory time used by the employee could be replenished by the employee so long as it occurred within the fiscal year.

2. That WITC discontinue violating the collective bargaining agreement.
3. That the sick day that the Grievant was required to use for April 26, 2004 be credited back to her sick leave bank, and that 8 hours of compensatory time be applied to that day.
4. Further, that the Arbitrator order any other remedy that she deems is appropriate in the instant case.

### **Employer**

Prior to the 2001-2004 collective bargaining agreement, WITC had an administrative procedure that allowed for the accrual and use of compensatory time off by the next pay period. When the parties negotiated their 2001-2004 agreement, the union proposed an open-ended compensatory time bank that did not need to be liquidated at the end of the year. WITC proposed a maximum cap of 24 hours. There was no discussion at the bargaining table as to whether this 24 hour maximum bank was subject to replenishment during the fiscal year.

The parties agreed to the language of Article XII, Section 7. This language, which is clear and unambiguous, is very specific that the maximum accumulation shall be 24 hours and shall be liquidated at the end of each fiscal year. This clear language should be enforced.

The Association's interpretation, that the bank can be replenished as it is used throughout the year does not make any sense. It would allow a bargaining unit member to accrue and use an unlimited amount of compensatory time during the course of the year. If the Association intended replenishment, then it should have discussed this at the bargaining table and included language to that effect.

The Grievant was permitted to use 51 hours of compensatory time in fiscal year 2002-2003. Supervisor King's concerns about the amount of compensatory time off used by the Grievant were addressed in meetings with the Grievant and other bargaining unit members, including union Stewards. In those discussions, supervisor King clarified that the contract only provided for a maximum accumulation and use of 24 hours of compensatory time. He also confirmed that, due to the existing workload constraints, he could not allow employees to use more than 24 hours of compensatory time within the fiscal year.

WITC management did not suggest that banked time could be replenished once it was used. Assuming *arguendo*, that the contract language is ambiguous, there is no binding past practice which permits the replenishment of the Grievant's compensatory time bank.

WITC management has sole discretion to deny, or to approve, the Grievant's request for compensatory time off. Balancing work loads and vacation requests is a reasonable basis for denying a request for compensatory time off. Management has not exercised its discretion in an arbitrary, capricious, unreasonable or discriminatory manner. Rather, this type of balancing is necessary to ensure sufficient operations at the Rice Lake campus.

The Employer's denial of the Grievant's request for compensatory time off was consistent with the language of the collective bargaining agreement; consistent with management's inherent rights; and was motivated by good faith business reasons. The grievance should be denied.

### DISCUSSION

The Association, contrary to the Employer, argues that the denial of the Grievant's request for compensatory time off on April 26, 2004, violates Article XII, Section 7. According to Facilities Maintenance Supervisor Dean King, he denied the request because the Grievant had used 24 hours of compensatory time during the fiscal year and "our workload was heavy."

Article XII, Section 7, states as follows:

Section 7. In lieu of payment for overtime, employees may accumulate compensatory time by making said election to his/her immediate supervisor at the end of each work week. The maximum accumulation shall be 24 hours, and shall be liquidated at the end of each fiscal year (June 30). Vacation requests shall take precedent over compensatory time off requests.

Contrary to the argument of the Employer, this contract language is not clear and unambiguous. Given that employees may elect to accumulate compensatory time at the end of each work week, it reasonably follows that the 24 hour "maximum accumulation" is enforced at end of each work week. Thus, the most reasonable construction of the plain language of Article XII, Section 7, is that employees may elect to accumulate compensatory time at the end of each work week in which they have less than 24 hours of accumulated compensatory time.

Association Stewards Jerry Smith and Loren Kalla were present at the negotiation of the parties' 2001-2004 collective bargaining agreement, as was WITC's Vice President of Human Resources, Perry Palin. Kalla recalls that the union wanted to bank compensatory time so that it could be used in increments that were more beneficial to its members and that the employer proposed a twenty four hour cap. Palin recalls that the union did not want to have any maximum to the bank and did not want to liquidate the balance at the end of the fiscal year, but that the employer did. Palin could not recall that the parties had any discussions about replenishing the bank when they negotiated Article XII, Section 7. Kalla and Smith both stated that they understood that, once employees accumulated 24 hours of compensatory time, the employees could not add to this accumulation until they had used some of the 24 hour accumulation. Kalla and Smith did not state that they discussed this understanding with the Employer.

The evidence of bargaining history does not establish that the parties had any discussion regarding the meaning of the phrase "The maximum accumulation shall be 24 hours," or that the parties otherwise discussed the application of the 24 hour maximum accumulation. The

evidence of bargaining history does not establish that the parties intended Article XII, Section 7, to be given a meaning other than that which is reflected in the plain language of this provision.

The language of Article XII, Section 7, was agreed to at the time that parties negotiated their 2001-2004 collective bargaining agreement. Thus, there is no evidence of past practice that is relevant to the determination of the parties understanding of this language at the time that this language was negotiated.

The grievance arose from supervisor King's denial of the Grievant's request to use compensatory time on April 26, 2004. The parties agree that Article XII, Section 7, compensatory time earned in one fiscal year cannot be carried over into the next fiscal year. The fiscal year is July 1 through June 30.

The 2001-2004 collective bargaining agreement was executed on April 24, 2002. During fiscal year 2002-2003, supervisor King permitted the Grievant to use 51 hours of compensatory time. The testimony of supervisor King and the Grievant establish that the Grievant's use of these 51 hours started a continuing dialog regarding the use of compensatory time. On at least one occasion, the dialog included Association Steward Kalla. Association Steward Kalla, as well as the Grievant, was advised by supervisor King that employees were entitled to use no more than 24 hours of compensatory time during the fiscal year. It is not evident that any union representative acknowledged that supervisor King was correct.

During the fiscal year 2003-2004, supervisor King authorized the Grievant to use 27 hours of compensatory time between July 1 and December 31, 2003. At or about the time that supervisor King approved the last of these 27 hours, in December of 2003, he advised the Grievant that she had reached her maximum use of compensatory time. Supervisor King recalls that he initially denied a Grievant request to use compensatory time in March of 2004, but, after receiving an e-mail and accompanying note from the Grievant, he authorized the Grievant to use 24 hours of compensatory time in March of 2004. (See also ER EX #1) At that time, supervisor King told the Grievant "No more compensatory time off until July 1, 2004." Thereafter, Supervisor King authorized the Grievant to "bank" 10 ½ hours of compensatory time for work performed on April 3, 10, and 11, 2004. (ER EX #1). It was not until the Grievant requested to use 8 of these 10 ½ hours for April 26, 2004, that supervisor King refused to authorize the Grievant to use "banked" compensatory time. The evidence of the "practices" that existed prior to the grievance establishes that King approved the use of more than 24 hours of compensatory time in a fiscal year.

As the Employer argues, during the negotiation of the parties' successor agreement, the Association submitted a written proposal that includes the following:

Section 7. In lieu of payment for overtime, employees may accumulate compensatory time by making said election to his/her immediate supervisor at

the end of each work week. The maximum accumulation shall be 24 **forty (40)** hours, and shall be liquidated at the end of each fiscal year (June 30). Vacation requests shall take precedent over compensatory time off requests.

It is not evident that, at the time that the Association presented this proposal, or at any other time, the Association acknowledged that the existing language did not provide the Association with the right to replenish the 24 hour maximum accumulation.

In summary, as discussed above, the most reasonable construction of the plain language of Article XII, Section 7, is that employees may elect to accumulate compensatory time at the end of each work week in which they have less than 24 hours of accumulated compensatory time. The record provides no reasonable basis to conclude that the parties mutually intended any construction of Article XII, Section 7, other than that which is reflected in its plain language. By denying the Grievant's request for compensatory time on the basis that the Grievant had already used 24 hours of compensatory time during the fiscal year, the Employer violated Article XII, Section 7, of the parties' collective bargaining agreement.

Supervisor King also denied the Grievant's request for compensatory time on the basis that "our workload was heavy." Article XII, Section 7, expressly provides the Employer with a right to give vacation requests precedence over compensatory time off requests. However, as the Employer argues, the use of the terminology "compensatory time off requests" reasonably implies that the Employer also has management discretion to grant or deny the "request."

Generally speaking, the Employer has the right to exercise management discretion in a manner that is not arbitrary, capricious, discriminatory or in bad faith. As the Employer argues, there may be times in which workload requirements are such that the Employer has the right to deny an employee's request for compensatory time off. However, as the Association argues, the record does not establish such a workload requirement in the present case.

As a review of supervisor King's testimony reveals, he did not base his denial upon a workload problem that was specific to April 26, 2004. Rather, he based his denial upon his conclusion that he "had to take a stand" because the normal workload is so heavy and employees have so many other leaves available that he "can't allow more than 24 hours of compensatory time per fiscal year for everybody." By rejecting the Grievant's request because he "had to take a stand," rather than reviewing the merits of the Grievant's request on the basis of the workload requirements specific to April 26, 2004, supervisor King exercised management's discretion in a manner that was arbitrary and capricious.

### **Conclusion**

The Employer violated the terms and conditions of the collective bargaining agreement when the Employer denied the Grievant's compensatory time request for April 26, 2004. The appropriate remedy for this violation is to provide the Grievant with the right to restore the

eight hours of sick leave that she used on April 26, 2004 by replacing this sick leave with eight hours of compensatory time earned during the 2005-2006 fiscal year.

Having no reasonable basis to conclude that, in the future, the Employer will violate the collective bargaining agreement by either not permitting employees to replenish the maximum accumulation of 24 hours, as permitted by Article XII, Section 7, or by exercising its management right to deny or grant compensatory time off requests in a manner that is not arbitrary, capricious, discriminatory or in bad faith, the undersigned does not consider it appropriate to order the Employer to discontinue violating the collective bargaining agreement, or to order the Employer to follow the negotiated compensatory time procedure. Prior to reaching this conclusion, the undersigned considered that the Grievant's request for compensatory time on June 11, 2004 was denied. The undersigned notes that this denial was based, in part, on "vacations needed to be taken."

Based upon the above and foregoing, and the record as a whole, the undersigned issues the following

**AWARD**

1. The Employer violated the terms and conditions of the collective bargaining agreement when the Employer denied the Grievant's compensatory time request for April 26, 2004.

2. To remedy the Employer's violation of the collective bargaining agreement, the Grievant shall be allowed to restore the eight hours of sick leave that she used on April 26, 2004 by replacing this sick leave with eight hours of compensatory time earned during the 2005-2006 fiscal year.

Dated at Madison, Wisconsin this 2nd day of September, 2005.

Coleen A. Burns /s/

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Coleen A. Burns, Arbitrator

