BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MONROE COUNTY HUMAN SERVICES PROFESSIONAL EMPLOYEES, LOCAL 2470-A, AFSCME, AFL-CIO

and

MONROE COUNTY

Case 182
No. 65623
MA-13274

(Compensatory Time Grievance)

Appearances:

Mr. Daniel R. Pfeifer, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 18990 Ibsen Road, Sparta, Wisconsin 54656, on behalf of the Union.

Mr. Ken Kittleson, County Personnel Director, Monroe County, 14345 County Highway "B", Room 3, Sparta, Wisconsin 54656, on behalf of the County.

ARBITRATION AWARD

Monroe County Human Services Professional Employees, Local 2470-A, AFSCME, AFL-CIO (herein the Union) and Monroe County (herein the County) have been parties to a collective bargaining relationship for many years. At the time the sequence of events leading to the grievance herein began, the parties' 2003-2004 collective bargaining agreement had expired and the parties were negotiating a successor agreement. On February 21, 2006, subsequent to the issuance of an interest arbitration award, the parties filed a joint request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over the repudiation by the County of a past practice regarding carryover of compensatory time balances from year to year and requested that the undersigned be appointed to hear the dispute. A hearing was conducted on May 8, 2006. The proceedings were not transcribed. The parties submitted briefs on June 30, 2006, whereupon the record was closed.

ISSUES

The parties did not stipulate to a statement of the issues. The Union would frame the issues, as follows:

Was it improper for the County to unilaterally discontinue the past practice regarding accumulation of compensatory time? If so, what is the appropriate remedy?

The County would frame the issues, as follows:

Did the County violate the collective bargaining agreement when it put the Union on notice during negotiations that it was evaporating the past practice regarding compensatory time accumulation? If so, what is the appropriate remedy?

The Arbitrator adopts the Union's characterization of the issues.

PERTINENT CONTRACT LANGUAGE

ARTICLE 8 – HOURS OF WORK

Section 1. The standard work day shall consist of eight (8) hours, 8:00 A.M. to 4:30 P.M., except for a one-half (1/2) hour unpaid lunch period. The standard work day may be modified by the mutual agreement of the employee and the supervisor. The standard work week shall consist of five (5) work days, Monday through Friday, inclusive, or as mutually agreed otherwise. As circumstances may warrant, the Director may implement needed temporary modifications of this schedule. There shall be no split shifts. Should the County find it necessary to require evening or night shifts, the impact of that decision shall be bargained with the Union.

Section 2. Work performed by professional staff outside the standard work week, as defined in Section 1 above, shall be known as compensatory time, for which the employee shall receive an equivalent amount of time off, providing such time is earned in increments of at least one-quarter (1/4) hour.

BACKGROUND

At the hearing, the parties agreed to submit the matter upon a stipulation of facts, as follows:

1. The parties' previous collective bargaining agreement expired on December 31, 2004.

2. The bargaining unit in question is composed of Professional Social Workers.

3. During negotiations over a successor agreement, the County announced an intention to repudiate an existing past practice regarding accumulation of compensatory time, as defined in Article 8, Section 2 of the contract.

4. The practice existing in 2004 was that Social Workers had no cap on accumulation of comp time during the calendar year, but all comp time earned during the calendar year had to be used by February 28 of the following year.

5. To replace the practice, the County adopted a 40 hour rolling comp time cap consistent with the policy contained in the County Personnel Manual, which had been in effect since the 1990s.

6. During contract negotiations, the parties reached a tentative agreement on comp time accumulation consistent with the County policy, but the parties' tentative agreements were dropped when the contract was submitted to interest arbitration.

7. In a prior interest arbitration investigation session with Investigator David Shaw, the County argued that it had appropriately repudiated the existing past practice, whereas the Union argued that the practice could not be repudiated because it interpreted existing contract language.

8. The parties disagreed over who had the burden to seek a change in the existing contract language regarding comp time.

9. The final offers of the parties for purposes of interest arbitration made no reference to comp time.

10. On December 28, 2004, Gene Phillips, Director of the Human Services Department, issued a memorandum stating that henceforth the County would be handling comp time accumulation for bargaining unit members in accordance with the existing County policy.

11. On August 15, 2005, the Union filed a prohibited practice complaint with the Wisconsin Employment Relations Commission against the County over its repudiation of the existing practice during the contract hiatus. Subsequent to discussions with Conciliator Richard McLaughlin, the parties agreed to submit the matter to arbitration, whereupon the prohibited practice complaint was withdrawn.

12. The interest arbitration award for the parties' successor agreement was issued on December 5, 2005.

13. The collective bargaining agreement is silent as to comp time accumulation.

14. The practice is consistent with County-wide policy.

15. On January 1, 2006, the County once again announced its intention to repudiate the existing practice regarding comp time and apply the County Personnel Policy regarding comp time to bargaining unit members.

16. No bargaining unit members were harmed by the change in policy.

In addition to the above stipulation, Director Phillips testified that the original impetus to change the practice came from the bargaining unit members, who believed the policy applying to other Department employees was superior to theirs. The County did not object and the mater was negotiated, resulting in the tentative agreement to add the County policy to the contract. After the policy was implemented in late 2004, the bargaining unit members objected, resulting in the filing of the prohibited practice complaint. Eventually, the bargaining unit members voted to retain the existing practice, which led to the instant grievance.

POSITIONS OF THE PARTIES

The Union

The Union asserts that there is no dispute about either the existence of a past practice as to comp time usage, or what the practice was. The Union does not dispute that the County gave notice of its intent to evaporate the practice. The County took the view that it had the right to evaporate the practice because the contract said nothing about accumulation of comp time and that it was the Union's responsibility to negotiate language into the contract on the issue. The Union maintains that a practice which gives meaning to language in the contract becomes implied in the contract and cannot be unilaterally repudiated. Therefore, if the County wishes to change the practice it has the burden of negotiating the change. The Union cites BROWN COUNTY, WERC CASE 527, NO. 50880, MA-8414 (Buffett, 1/31/95) in support of its position.

Article 8, Section 2 addresses the issue of comp time, but says nothing about accumulation. Thus, the practice clarified the ambiguity in the contract regarding that issue. Arbitrator Buffett made it clear that such a practice can only be terminated by changing the contract language. Since the language did not change, the practice remains in effect and the grievance should be sustained.

The County

The County operates on the premise that on matters where the contract is silent on a particular issue, a County personnel policy on the matter prevails. This is the case with many subjects, such as vacation usage and accumulation. Thus, when confusion arose regarding comp time accumulation, the County sought to standardize the practice for purposes of consistency.

Initially, the issue was raised by bargaining unit members, who thought management had a better arrangement regarding comp time accumulation. This was the first time management was aware of the discrepancy. The matter was raised in bargaining and the parties reached a tentative agreement consistent with the County policy. Unfortunately, the parties did not reach a settlement and the matter was submitted to interest arbitration without the comp time language being included in the final offers. The County concedes that it initially evaporated the practice prematurely, but that no harm was done. Eventually, the practice was properly evaporated on January 1, 2006 and the County policy was implemented.

The County asserts that it properly gave the Union notice of its intent to evaporate the practice and that the Union had an opportunity to bargain the issue, but failed to obtain a change in the language. Arbitrator Lionel Crowley has held that a timely repudiation of a practice puts the other party on notice that it will no longer acquiesce in the practice so that the other party is aware that it must bargain language to secure the practice in the future. WINNEBAGO COUNTY, WERC CASE 311, NO. 57139, MA-10524 (Crowley) This, the Union failed to do. The County has rationalized the practice to be consistent County-wide and the grievance should be denied.

DISCUSSION

There is no dispute as to the existence of a past practice regarding accumulation of compensatory time, nor what the practice was. It is also not disputed that the County put the Union on notice in a timely fashion that it intended to evaporate the practice. What is disputed, and all that is disputed, in this grievance, is whether the County had the ability to unilaterally repudiate the practice. If so, then the practice ceased to exist on January 1, 2006 and the effective practice is now that which is contained in the County Personnel Policies Manual. If not, then the practice remains as it was – an unlimited cap on comp time accumulation, but with the proviso that comp time balances must be used before February 28 in the year following accrual.

The Union asserts that, while the general rule is that an existing past practice may be effectively repudiated by putting the other party on notice during contract negotiations, there are certain types of practices that may not be unilaterally repudiated. These would be practices that have a basis in contract language, based on the reasoning of Arbitrator Jane Buffett in BROWN COUNTY, WERC CASE 527, NO. 50880, MA-8414 (Buffett, 1/31/95). It is the Union's position, therefore, that if the County wanted to evaporate the practice it needed to

negotiate language into the contract establishing the method to be used for determining comp time accumulation. For the reasons set forth below, I disagree and find the BROWN COUNTY case distinguishable.

In BROWN COUNTY, the employer repudiated a long-standing practice of paying out a retiring employee's entire year's unused bank of vacation and personal days in the year of retirement, regardless of when during the year retirement occurred. The new policy was to be a payout of pro-rated vacation and personal days, depending on when during the year the employee retired. The Grievant was a retiree who received prorated benefit payouts. There was no dispute that the employer had given timely notice of its intent to repudiate the practice. Nonetheless, Arbitrator Buffett ruled that the employer could not unilaterally repudiate the practice because the practice was tied to contract language. Specifically, the provision in question stated that vacation benefits would be prorated for first year employees as of January 1 following their first partial year of hire. In the Arbitrator's view, this language stated a intention of the parties to limit proration to only those circumstances and the practice of not prorating at retirement, therefore, was consistent with the intent of the parties evinced by the contract language. She held, therefore, that if the County wanted to expand the practice of prorating benefits into other areas it must negotiate it.

Here, the contract is altogether silent on the subject of to what degree comp time may be accumulated and when it must be used. There is no language that would support an intention that accumulation be unlimited on a yearly basis with a hard usage date, nor is there language that would support the rolling 40 hour cap set forth in the County Personnel Policies. By repudiating the practice, therefore, the County was not unilaterally changing a practice that had its basis in contract language, but rather was repudiating a practice that grew up due to the absence of contract language. Unlike BROWN COUNTY, therefore, the County's action was not inconsistent with any undergirding principle of comp time usage that can be gleaned from reference to the pertinent contract language. That being the case, this practice was not of a type exempting it from unilateral repudiation, so long as the notice was timely and properly give, which it was.

For the reasons set forth above, and based upon the record as a whole, I hereby enter the following

AWARD

It was not improper for the County to unilaterally discontinue the past practice regarding accumulation of compensatory time. The grievance is denied.

Dated at Fond du Lac, Wisconsin this 30th day of October, 2006.

John R. Emery /s/

John R. Emery, Arbitrator
JRE/gjc
7058