BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

AFSCME, LOCAL 734, AFL-CIO

and

CITY OF MENOMONIE

Case 99
No. 66576
MA-13566

(Comp Time Grievance)

Appearances:

Mr. Steve Hartmann, Staff Representative, Wisconsin Council 40, AFSCME, AFL CIO, P.O. Box 364, Menomonie, Wisconsin, appearing on behalf of Local 734.

Ms. Pamela M. Macal, Weld, Riley Prenn & Ricci, S.C., 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin, appearing on behalf of City of Menomonie.

ARBITRATION AWARD

Local 734, AFSCME, AFL-CIO, hereinafter "Union," and City of Menomonie, hereinafter "City," requested that the Wisconsin Employment Relations Commission assign Lauri A. Millot of the Commission's staff to hear and decide the instant dispute in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The hearing was held before the undersigned on February 27, 2007, in Menomonie, Wisconsin. The hearing was not transcribed. At the conclusion of the hearing, the parties presented oral arguments and requested an expedited award. Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Expedited Award.

ISSUE

The parties stipulated that there were no procedural issues in dispute and framed the substantive issues as follows:

Did the city violate the collective bargaining agreement when it denied John Johnson the opportunity to earn compensatory time on April 15, 2006? If so, what is the appropriate remedy?

DISCUSSION

The language in dispute is contained in Article 7.07 of the parties' collective bargaining agreement and reads as follows:

> 7.07 Compensatory Time. Employees shall have the option to elect to accrue compensatory time instead of receiving pay under Section 7.02 for overtime hours worked. Compensatory time accrual shall not exceed forty (40) hours. Compensatory time-off shall be taken at a time mutually agreeable to the City and the employees, however, requests to use accrued compensatory time shall originate only with the employee. The employee shall give the employer at least one (1) week notice when requesting compensatory time off. This notice may be waived by the employer on a case-by-case basis. Compensatory time shall be used in the calendar year earned and shall not carry over into the next calendar year.
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> The city retains the right to deny a compensation time request. If a conflict arises out of more than one employee requesting the same time off and allowing all employees desiring to take their time off at the same time would be detrimental to the operation of the division or work group, seniority shall prevail in granting such time off.

The City argues that this language, as modified by a binding past practice, allowed the City to deny Street Department employee John Johnson, hereinafter "Grievant," the opportunity to accrue compensatory time for time worked on April 15, 2006. Johnson, although a Street Department employee, worked overtime on that date in the Landfill which is a separate department for funding purposes.

Looking first to the language of the parties' agreement, the language is clear and unambiguous. Employees are afforded complete discretion to elect whether their overtime hours are paid out or are accrued as compensatory time. The language does not place any limitations on employees with this regard except when the hours will create a balance of greater than 40 compensatory time hours at which time the overtime is to be paid out. [1] The language supports the Union's position.

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[1] Evidence was not offered as to Johnson's compensatory time balance as of April 15, 2006. As such, I will conclude that the four hours worked on that date would not have created a situation where his balance was in excess of 40 hours.

The City argues that the language of the agreement was modified by a binding past practice. The City maintains that after the language was adopted, it identified various implementation concerns which resulted in a meeting between City and Union officials in February 2002. The City raised four concerns at this meeting including 1) the impact of compensatory time earned in one funding department and used in a different funding department, 2) whether the language applied to both regular and seasonal employees, 3) whether/how employees earned double time and finally, 4) whether an employee's compensatory time balance carries over from one year to another. The City argues that the parties agreed during the February 2002 meeting that compensatory time was not available to employees for hours worked in a different funding department. While it is true that the Deputy Treasurer Comptroller Kim Mensing testified to this agreement, the evidence as a whole does not support that such an agreement was reached. City Administrator Lowell Prange was present at the February 2002 meeting and does not corroborate Mensing's testimony that a "consensus" was reached by the parties. Prange confirmed that a discussion took place, but was unable to state that the parties' had reached agreement.

The City asserts that the parties' practice since the February 2002 meeting supports a finding that the language was modified as Mensing testified. To be recognized as a binding past practice, the parties conduct must have "clarity, consistency, and acceptability." Elkouri & Elkouri, *How Arbitration Works*, 6th Ed. p. 608-610 (2004). Clarity relates to uniformity, consistency embraces repetition over time, and acceptability addresses mutuality. *Id*. The evidence does not sustain a finding that a practice exists as the City posits.

Since 2002 when the language was bargained, there have been four instances where an employee worked overtime in a department with a different funding account than the department in which the employee's regular position is funded. [2] In all four of these instances, the employee was allowed to earn compensatory time. This contradicts the City's asserted practice The City argues that these four instances are the result of error and should not be considered as evidence to reject the asserted practice. The problem with this argument is that these are the only known instances, in addition to the pending grievance, in which an employee has worked overtime in a different funding department and has requested to earn compensatory time. Mensing acknowledged that, excluding the Grievant, there was no record of past instances in which an employee requested cross department compensatory time and was denied.

With regard to mutual knowledge, Mensing appears to be the only individual that has knowledge of the agreement between the parties as to cross department funding. As indicated above, Prange did not believe a consensus had been reached on the issue. Mensing testified that at the conclusion of the February meeting, the Union was going to reduce to writing the

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[2] There were two additional instances in which an employee earned compensatory time after working in a different department, but in each of these occasions the employee also earned compensatory time in his/her own funding department thus negating a finding that these two instances are the same as the facts giving rise to the grievance.

parties' agreement. The Union did not do this. Mensing may have contacted the Union leadership on multiple occasions subsequent to the meeting, but the Union's failure to provide documentation of the alleged agreement allows for the conclusion that either an agreement was never reached or the Union may have verbally indicated their agreement at the meeting, but had second-thoughts. Regardless, the fact that a memorialization never transpired points to a lack of mutual assent.

The parties bargained modifications to the language of 7.07 which further demonstrates that they did not agree to limitations on the use of earning compensatory time. Section 7.07 first appeared in the parties' 2001-2003 labor agreement and was modified for the 2004-2005 labor agreement. The two modifications included an increase in the amount of time that an employee may earn and imposed the limitation of the year end carry-over. The cross department issue was not addressed and included in the successor labor agreement. The parties understood the manner in which implementation concerns are procedurally addressed in the context of collective bargaining, affirmatively addressed the City's carry-over issue, and failed to address the cross department issue.

The City legitimately points out that it is responding to its auditor's concerns regarding the payment of utility obligations from the general fund. The denial of all cross department earning of compensatory is one way for the City to address the auditor's concerns, but it is not the only way. The City has at its disposal other internal mechanisms that will allow it to comply with external law and the labor agreement.

In conclusion, the language of Section 7.07 is clear and unambiguous. The City's asserted practice is not supported by the record. The City exceeded its contractual right when it denied the Grievant the opportunity to earn compensatory time.

AWARD

1. Yes, the City violated the collective bargaining agreement when it denied John Johnson the opportunity to earn compensatory time on April 15, 2006.

2. The appropriate remedy is to direct the City to comply with the language of Article 7.07 of the parties 2004-2005 collective bargaining agreement.

Dated at Rhinelander, Wisconsin, this 5th day of March, 2007.

Lauri A. Millot /s/

Lauri A. Millot, Arbitrator

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