BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WAUPACA COUNTY

and

WAUPACA COUNTY PROFESSIONAL AND NON-PROFESSIONAL EMPLOYEES UNION, WCCME, AFSCME-AFL-CIO, LOCAL 2771

Case 156
No. 66033
MA-13412

(Brenda Rice Snow Day Grievance)

Appearances:

Alyson K. Zierdt, Davis & Kuelthau, S.C., 219 Washington Avenue, Post Office Box 1278, Oshkosh, Wisconsin, appearing on behalf of Waupaca County.

Houston Parrish, Staff Representative, AFSCME District Council 40, 1457 Somerset Drive, Stevens Point, Wisconsin, appearing on behalf of Wisconsin Council 40, AFSCME-AFL-CIO Local 2771.

ARBITRATION AWARD

Waupaca County, hereinafter County or Employer, and Waupaca County Professional and Non-professional Employees Union, WCCME, AFSCME-AFL-CIO, Local 2771, hereinafter Union, are parties to a collective bargaining agreement that provides for the final and binding arbitration of grievances. The Union, with the concurrence of the Employer, requested the Wisconsin Employment Relations Commission appoint a WERC commissioners/staff arbitrator to hear the instant grievance. Staff member Coleen A. Burns was so appointed and a hearing was held on September 18, 2006 in Waupaca, Wisconsin. The hearing was transcribed, with the transcript being filed on October 9, 2006. The record was closed on December 29, 2006, following receipt of all post-hearing written arguments.

Having considered the evidence, the arguments of the parties, the relevant contract language, and the record as a whole, the undersigned makes the following Award.

ISSUE

The parties were unable to stipulate to a statement of the issue(s). At hearing, the Union framed the issue as:

Should the Grievant be paid for time worked prior to a "snow day" being effective on February 16, 2006 at 1:30 p.m.?

At hearing, the Employer framed the issues as:

> Did the County violate the contract when it paid the Grievant for working 7.25 hours on February 16, 2006 when the County offices closed at 1:30 p.m. due to a snow emergency, and the Grievant had worked 5.75 hours up to that time?
>
> If so, what is the appropriate remedy?

CITED CONTRACT PROVISIONS

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:

A) To direct all operations;

B) To establish reasonable work rules and schedules of work;

C) To hire, promote, transfer, schedule and assign employees;

D) To suspend, demote, transfer, discharge, and take other disciplinary action against employees for just cause;

E) To layoff employees because of lack of work or other legitimate reasons;

F) To maintain the efficiency of operations;

G) To take reasonable action, if necessary, to comply with state or federal law;

H) To introduce new or improved methods or facilities or to change existing methods or facilities;

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;

J) To contract out for goods and services, provided, however, that no employee shall be on layoff or laid off or suffer a reduction of hours as a result of such subcontracting;

K) To take whatever action is necessary to carry out the functions of the County in situations of emergency;

L) To designate a person in charge to manage that department in the absence of the department head.

2.02 It is further agreed by the Employer that management rights shall be exercised reasonably.

. . .

Article 10 – Grievance Procedure

. . .

10.02 Step 4.

. . .

Arbitration proceeding shall be implemented in a manner prescribed by the arbitrator. The decision of the arbitrator shall be final and binding on both parties, subject to judicial review. In rendering his/her decision, the arbitrator shall neither add to, detract from, nor modify any provisions of this agreement. . . .

. . .

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 36.25 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 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 remaining.

13.06 In addition to the above, the parties agree that if an employee has exhausted paid time (i.e., sick leave, vacation, etc.) compensatory time may be utilized.

. . .

Article 24 – <u>Snow Days</u>.

24.01 The County Board Chairman (or his/her designee) shall designate what shall constitute a "snow day" or other day of emergency when employees ***shall be released from work without loss of pay.*** Employees leaving before the effective time of such declared emergency shall forfeit pay or may (with supervisory approval) be granted vacation time or compensatory time. If vacation time or compensatory time is granted to an employee prior to the effective date of the declared emergency, it is understood that vacation time or compensatory time must be used by the employee to cover the rest of their regularly scheduled work day. Employees not regularly scheduled or on other approved absence

(vacation, sick leave, etc., except as outlined above) on said day of emergency shall not be eligible for any snow emergency. 1/

. . .

Article 28 – Entire Memorandum of Agreement

28.01 This agreement constitutes the entire agreement between the parties and no verbal statement or practice shall supersede any of its provisions. Any amendment to this agreement shall be effective only when placed in writing and signed by the Employer (or designee) and the Union (or its designee).

To the extent that the provisions of this agreement are in conflict with the existing ordinances, resolutions or rules, the agreement controls.

1/ Per stipulation of the parties, a typo in Line Two has been changed from "of" to "or."

BACKGROUND

Brenda Rice, hereafter Grievant, is employed by the County in the County's Department of Health and Human Services (DHHS). Consistent with normal procedure, on February 13, 2006, the Grievant filled out an "Absence Report" for the pay period of 2/12 – 2/25/06. On this report, the Grievant indicated that she had "Planned" sick leave of 1¼ hours on February 17th, from 2:45 until 4:00 p.m., and stated "may flex this wk." On February 13, 2006, this "Absence Report" was signed by the Grievant's supervisor, Chris Machamer.

The Grievant worked outside of her normal work schedule of 8 a.m. to 4 p.m., with an unpaid duty-free lunch from 12:15 to 1 p.m., on Monday, February 13; Tuesday, February 14; and Wednesday, February 15, 2006 and earned .75, .75 and 1.25 hours of comp time respectively. Machamer subsequently authorized payment of this comp time.

On February 15, 2006, the Grievant and other employees supervised by Machamer received the following:

From: Chris Machamer

To: HS Economic Support

Date: 2/15/2006 9:43 AM

Subject: Planning for Bad Weather

> Most of you know that the forecast for tomorrow is lots of snow. Most of you also know that is very unlikely that the Courthouse will ever shut down for bad weather. The last time it happened, the County Board Chair got a tremendous amount of flack for it, so he vowed never to do it again. We have a different Chair now, but not sure what he will do.
>
> If you feel that it is not safe to be on the road and don't think you should come to work, or you think you need to leave early tomorrow, you may take vacation time, comp time if you have it, floating holiday or flex your time. You might want to check your schedules today and prepare for it.
>
> If the Courthouse does actually close before the start of the workday, we will use the phone tree to try to reach all of you. Take a copy of it home so you have it. It is attached. Chances are, we won't be using it.
>
> If you can make it in tomorrow, it may be a good day to get caught up on things. Clients who are scheduled may choose not to come in. I will probably be here – I'm not planning to go to Madison tomorrow, but our 4-wheel drive truck will probably make it this far no matter how much snow we get. Who knows, maybe the forecast is wrong and it's all a bunch of hype?!

On February 16, 2006, the Grievant began work 15 minutes prior to her normal start time and worked through her normal lunch period. At approximately 1 p.m., the Grievant learned that a "snow day" emergency had been called and that the Courthouse would be closing at 1:30 p.m. that day. Consistent with this closing, the Grievant left work at 1:30 p.m.

When the Grievant initially submitted her "Time Report" to Machamer, she claimed that, for February 16th, she had 8 ¼ hours on February 16, 2006, which included 2.5 hours of snow pay and no comp time, and that she had worked 6¼ hours on Friday. This "Time Report" was not accepted by her supervisor. (T. 57-58). After several revisions, the Grievant, at the direction of her supervisor, submitted a "Time Report" that indicated, for February 16th, the Grievant had 7.25 hours, of which 1.5 hours was "snow pay." (County Ex. #4)

On or about March 8, 2006, a grievance was filed alleging that the County failed to pay the Grievant for time worked on February 16, 2006. The grievance was denied and, thereafter, submitted to arbitration.

POSITIONS OF THE PARTIES

Union

The Grievant's normal work week is 36.25 hours, with a normal daily schedule of 8 a.m. to 4 p.m., with an unpaid duty-free lunch from 12:15 to 1 p.m. For ten years and while under the supervision of Chris Machamer, the Grievant has been flexing these work

hours; which allowed the Grievant to adjust her work hours in order to avoid taking time off of work or expending a benefit earned (e.g., sick time or comp time).

The Grievant had a doctor's appointment scheduled for Friday, February 17, 2006. The Grievant provided her supervisor with an "Absence Report" that notified her supervisor of this fact and that the Grievant may be flexing her time that week to accommodate that appointment. Machamer approved this "flex time" by signing the Grievant's absence report. This was the same procedure that been used for the past ten years.

Relying upon this approved "flex time", the Grievant started work 15 minutes early on February 16 and then worked through her lunch, expecting to go home at 4 p.m. At approximately 1 p.m., the Grievant learned that a "snow day" emergency had been called and that the Courthouse would be closing at 1:30 p.m. that day.

The County acknowledges that the Grievant used the terms "flex time" and "compensatory time" somewhat interchangeably during the hearing. The Grievant worked more than her normal hours on February 16th so that she could accommodate her scheduled doctor's appointment on February 17th. She did not "flex" in response to Machamer's email regarding the snow forecast. She used the term "comp time" on her time report because there is no place to report "flex time" and Machamer acknowledged that "comp time" could be used as "flex time."

Had the Grievant's flex time not been approved, she would have worked her normal work schedule and would have been compensated for 2.5 hours of snow pay like other employees. The Grievant would have taken sick leave on February 17th, but would not have worked an extra hour for free on February 16th.

The County paid the Grievant for her normal 36.25 hours of work for that week. However, the County only compensated the Grievant for 1.5 hours for the "snow day" when the Grievant was scheduled to work an additional 2.5 hours that day (alternatively, the County paid her for the 2.5 hours of "snow day" but refused to pay her for the extra hour she had worked before 1:30).

Union witness Michael Phelan, who bargained Article 24, testified that the Grievant should have been paid for all time worked prior to 1:30 p.m. The one instance of past practice from nine years ago is not compelling.

Other County employees who were scheduled to work additional hours did, in fact, receive additional hours of "snow day" pay. This is consistent with the February 24, 2006 email that was issued by the County's Personnel Director.

The County has received an extra hour of work from the Grievant and has not compensated the Grievant for this time. Notwithstanding the County's argument to the contrary, the Article 24 "snow day" language only stands for the proposition that the employees will not be harmed for time they are actually released from work.

The County's conduct towards the Grievant is inequitable and violates Article 24 of the labor contract. In remedy of the County's contract violation, the County should credit the Grievant with the one hour of sick leave time that the County forced her to use on February 17, 2006 as a result of its actions. The County should also be ordered to cease and desist in the future. The Union also requests payment for any other employee who was denied compensation past 1:30 p.m. on February 16, 2006 under the rules set forth in Ms. Welch's February 24, 2006 memo, *i.e.*, employees should be paid through the time they were scheduled to work on February 16, 2006.

County

There was no evidence presented at hearing concerning the circumstances of any other employee. As such, the Union's demand in this regard must be rejected.

The "Absence Report" approved by Machamer on February 13th indicated approval of the planned sick leave of February 17th. Although the Grievant indicated that she "may flex this week," she did not identify when she planned to work additional time. The Union's claim that Machamer pre-approved February 16, 2006 comp/flex time for the Grievant rests on insubstantial grounds.

During the week of February 12th, the Grievant had accrued comp time that could have been used by the Grievant for her February 17th doctor's appointment. It was the Grievant's own choice to use sick time on February 17th.

On February 15th, the County Clerk/Administrative Coordinator sent an email to all courthouse employees, reminding them to review the County and Union Contract policies on handling snow emergencies and to contact the Personnel Director with questions or concerns. The Grievant's supervisor sent an email stating her opinion that it was not likely that the Courthouse would shut down for bad weather and offering employees the opportunity to make up time if they concluded that it was not safe to come to work. This offer included "flexing" time.

The one instance of past practice, as recalled by the Personnel Director, is that all employees were paid only for their regularly scheduled work time, regardless of individual varying circumstances. Where, as here, the benefit results from unusual circumstances, it may be sufficient to establish a binding past practice.

The parties have bargained contract language addressing "snow days," *i.e.*, Article 24. The clear and unambiguous language of Article 24, consistent with Phelan's testimony regarding bargaining history, states that an employee will not lose pay as the result of a "snow day." Phelan did not testify that it was the intent to give County employees the opportunity for a financial windfall on "snow days." Under Article 10, the Arbitrator does not have authority to add to, detract from, nor modify any of the provisions of the agreement.

The County has been consistent in its application of the "snow day" policy by not allowing individuals to accrue comp time on top of receiving full pay for the "snow day." The Grievant worked for 5.75 hours and was paid for 7.25 hours. The Grievant did not lose pay for February 16, 2006. Nor has she been treated in a manner that is inconsistent with the Personnel Director's February 24th email.

The County has complied with the provisions of Article 24. The grievance is without merit and should be dismissed.

DISCUSSION

Issue

The parties' stipulated that this grievance is properly before the Arbitrator. Upon consideration of the arguments of the parties and the record, including the grievance that was filed and processed through the grievance procedure, the undersigned has concluded that the issue is most appropriately framed as follows:

1. Did the County's method of compensating the Grievant for February 16, 2006 violate Article 24 of the parties' collective bargaining agreement?

2. If so, what is the appropriate remedy?

Merits

Article 13.01 identifies the "normal work week" and "normal work day" for employees, such as the Grievant. However, as the witness testimony demonstrates, this "normal" work week and work day can be altered with the approval of management. (T. 16-17; 87-88)

The record establishes that the Grievant and her supervisor operated under a long-standing procedure regarding employee work schedules. Under this procedure, Machamer's February 13, 2006 signature on the "Absence Report" provided to Machamer by the Grievant (County Ex. #2, Jt. Ex. #4) constituted Machamer's authorization for the Grievant to flex her work hours during the payroll week beginning February 12, 2006. Additionally, under this long-standing procedure, the Grievant did not have to provide Machamer with prior notice of when she would be flexing her work hours. (T. 26-29; 76-80; 87-88)

The Grievant and Machamer also had a prior agreement that the Grievant could earn up to 2 hours of "comp time" per week without specific authorization from Machamer. (T. 88-89) Although Machamer's testimony on this point is somewhat confusing, the undersigned is satisfied that this 2 hour limitation on "comp time" did not preclude the Grievant from also flexing time within the payroll week beginning February 12, 2006. (T. 101.)

The Grievant and Machamer each understand that "comp time" and "flex time" are different benefits. At times, however, the Grievant and Machamer use the two terms interchangeably. (T. 67; 96) Accordingly, a reference to "comp time," *per se*, does not conclusively prove that "comp time" and not "flex time" was intended.

"Flex time" is time worked outside of the normal schedule for the purpose of taking subsequent time off during that schedule without loss of pay or having to use leave time. The effect of "flex time" is that there is no net gain in pay. "Comp time" is also time worked outside of the normal schedule, but, inasmuch as "comp time" may be taken as pay, as well as time off, there may be a net gain in pay.

The Grievant wrote "May flex this wk," directly under that portion of the "Absence Report" stating that she intended to take "Planned Sick Leave" of 1 ¼ hours on February 17, 2006. This conduct reasonably indicates that the Grievant is advising Machamer that the Grievant might flex hours during the week of the "Planned Sick Leave" for the purpose of earning time that could be used in lieu of the "Planned Sick Leave." This was, in fact, Machamer's understanding. (T. 87-88)

On Wednesday, February 15, 2006, Machamer sent an e-mail to HS Economic Support employees, including the Grievant, reporting a forecast of "lots of snow" for Thursday, February 16, 2006. (County Ex. #1) Also reporting that it was "very unlikely that the Courthouse will ever shut down for bad weather," Machamer stated:

> If you feel that it is not safe to be on the road and don't think you should come to work, or you think you need to leave early tomorrow, you may take vacation time, comp time if you have it, floating holiday or flex your time. You might want to check your schedules today and prepare for it.

The above language does not provide authorization for employees to earn comp time on February 16, 2006. It does provide authorization for employees to flex their normal work hours on February 16, 2006 for the purpose of accommodating the employee's safety concerns regarding inclement weather.

Machamer's email does not address previously authorized comp time or flex time. Nor does it require employees, such as the Grievant, who had prior authorization to "flex" and/or earn "comp time" to provide any information regarding their work schedules for February 16, 2006. A reasonable employee would assume, therefore, that this email did not have any impact upon prior agreements regarding the employee's right to "flex" and/or earn "comp time."

Machamer's view that it was very unlikely that the Courthouse would be shut down for bad weather was shared by Union Chief Steward Mike Phelan. According to Phelan, the last time there was a "snow day" called it was such a "mess" that he never thought there would be another County Board Chairman that would declare a "snow day." Phelan states that, even

though it had been snowing during the day on February 16, 2006, he had not anticipated that a "snow day" would be called and was surprised when a "snow day" was called. (T. 15)

Later that same day, Mary Robbins, the County Clerk/Administrative Coordinator sent an email (County Ex. #8) advising "Courthouse Users" of the following:

> **Subject:** POSSIBLE SNOWSTORM THURSDAY
>
> It's Wisconsin. In light of the Weathermen's predictions, Please review all of your policies on handling conditions concerning snow emergencies, keeping in mind that it is the County Board Chair's call to close the Courthouse operations. I have included the section in the Personnel Policies and Procedures and the Emergency Procedures Booklet for your review. Also, refer to your respective Union Contracts. **Questions or other concerns please contact Mandy Welch, Personnel Director. Thank you.**
>
> **Personnel Policy states:**
>
> O. INCLEMENT WEATHER. Inclement weather may make it impossible for employees to come to work, or it may require employees to leave work before the end of normal office hours. Employees may request that this time off be charged to unused vacation, leave without pay, or choose to "make up" the lost time within the week of the incident with the Department Head's approval. Employees of the Highway Department, Sheriff's Department, Lakeview Manor, and Office of Emergency Government will be required to report to work when scheduled or "called-in" to provide public safety services and resident care regardless of weather conditions.
>
> **From the Courthouse Emergency Procedure Booklet.**
>
> SNOW EMERGENCY
>
> A. You are responsible for reporting to work at your regularly scheduled time regardless of prevailing weather conditions. If you anticipate being adversely affected by severe weather because of the location of your residence, condition of your automobile, etc., you are expected to make whatever arrangements are necessary in advance to avoid being either tardy or absent from work.
>
> B. Please refer to your Personnel Policy and/or Department Rules.
>
> C. When weather conditions have reached a sufficient state of severity to warrant closing the Courthouse, this information will be relayed to each employee through notice from the County Clerk's Office to each department head and or designee.

> D. When the Courthouse operations are discontinued and canceled prior to the start of the work day, and there is no way of notifying all employees affected, such announcement will be made by local radio stations (WDUX 92.7 FM or WFCL 1380 AM) as a public service.

Robbins' email does not address previously authorized comp time or flex time. Nor does it require employees, such as the Grievant, who had prior authorization to "flex" and/or earn "comp time" to provide any information regarding their work schedules for February 16, 2006. A reasonable employee would assume, therefore, that this email did not have any impact upon prior agreements regarding the employee's right to "flex" and/or earn "comp time."

The Grievant worked outside of her normal work schedule on Monday, Tuesday, and Wednesday. This time was subsequently reported and paid as "comp time." (County Ex. 4)

At approximately, 12:35 p.m. on February 16, 2006, the County Clerk/Administrative Coordinator sent an email to all "Courthouse Users" advising as follows:

> Subject: Emergency Snow Day Feb. 16
>
> COUNTY BOARD CHAIR DICK KOEPPEN ANNOUNCED TODAY THAT THE COURTHOUSE WILL BE CLOSED TODAY FEB. 16, 2006 AT 1:30 P.M. PLEASE DRIVE SAFELY

The Grievant, who did not receive this email at the time that it was sent, first learned of this Courthouse closure at approximately 1:00 p.m., as other employees returned from lunch. (T. 34) It is undisputed that, on February 16, 2006, the Grievant worked from 7:45 a.m. to 1:30 p.m. (T. 86)

At 12:58 PM on February 16, 2006, the County Personnel Director sent an email (County Ex. #9) to all "Courthouse Users" advising as follows:

> Subject: Snow Day
>
> Please note the following:
>
> Employees leaving before the effective time of such declared emergency shall forfeit pay or may (with supervisory approval) be granted vacation time or compensatory time. If vacation time or compensatory time is granted to an employee prior to the effective time of the declared emergency, it is understood that vacation time or compensatory time must be used by the employee to cover the rest of the regularly scheduled work day. Employees not regularly scheduled or on other approves absence vacation, sick leave, etc., except as outlined above) on said day of emergency shall not be eligible for any snow emergency.

> Any questions regarding any of the above please contact our office at ext 6210 or myself at 6211.

At the time that this email was issued, the Grievant had worked nearly all of the "extra" hour that is being claimed by the Grievant.

In an email dated "2/17/06 9:43 AM," (County Ex. #5) Machamer queried her employees, including the Grievant, (T. 80) as follows:

> Please let me know if you came in early or worked through lunch yesterday in anticipation of flexing your schedule and leaving early (before you knew that we were closing early). Please give me the times that you worked yesterday. Thanks.

The Grievant responded at 10:10 AM as follows:

> 7:45 a.m. to 1:30 p.m. I was flexing as I am taking off this afternoon. Also, I put in extra hrs as this was a process week.

In an email dated "2/27/2006 10:39 AM," (County Ex. #6) Machamer queried the County Personnel Director as follows:

> Brenda claimed 1.0 hr. of accrued comp time on Thurs., 2/16 because she worked 7:45 – 1:30 straight, including lunch. She went home at 1:30 when the courthouse closed. She said she did not put in comp time in order to leave early, and had the courthouse not closed, she would have worked straight through. That would be consistent with what she has done other weeks.
>
> Is it acceptable to give her credit for earning 1 hr. of comp time that day, or must I count that toward the time she got off for the snowday? She did not get an approval from me either way ahead of time. She actually had approval to work 38.25 hrs. that week, and she put in 40 hrs. counting this 1 hr. She said she thought that when she sent me an email on Tuesday that week reporting on her workload and also stating that she estimated at that time that she would need 40 hrs. that week, that since I had gotten back to her, that I had approved it. How do you suggest I handle this?
>
> Thanks.

The Personnel Director responded in an email dated "2/27/06 10:44 AM" (County Ex. #7) as follows:

> We have had a number of similar questions. She would get 7.25 hours for the day.

> One exception, we came across is where comp/ot was approved was in one of the Judge's office because they required the employee to stay past 1:30 to handle something.

The above email was forwarded to the Grievant by Machamer in an email dated "2/27/06 10:46 AM" (County Ex. #7), along with the following statements from Machamer:

> Here is the answer from Mandy. I will need you to change your time sheet to take off the hour of comp time on 2/16 and reduce the amount of snow time to 1.5. Thank you.

In an email dated "02/27/06 11:25 AM," (Jt. Ex. #6) Machamer advised the Grievant:

> I have to go back to this email – I have to ask you again to redo your time sheet. You cannot get more than 7.25 hrs. If you wish to discuss it with Mandy, you may do so.

In an email dated "2/27/06 11:47:12 AM" (Jt. Ex. #6) the Grievant advised the Personnel Director:

> I worked 12:15 – 1:00 on 2/16/06 in order to take off early on 2/17/06 for a prearranged doctor's appointment. I worked 7:45 – 12:15, and then flexed time 12:15 – 1 for Fridays time off, and again 1 – 1:30 when the courthouse closed for the day. I put in an 8 hr. day. I had also come in 7:45 – 8 in order to do work, prior to any indication that the courthouse would be closing. I should also be allowed this comp time as it was intended to be "work" for the week, not anticipating leaving early 2/16/06. I am only eligible for 2.25 snow day as Chris will not allow me to earn comp time during the same day. I do not agree with this but am willing to accept I donated ¼ hr to the county. When I worked during the lunch hr it was with the intention of taking time off on Friday; therefore I am entitled to my 8 hrs on 2/16/06. Please respond to this at your earliest convenience.

The Personnel Director responded in an email dated "02/27/06 12:44 PM," (Jt. Ex. #7) as follows:

> According to the times you outlined in your e-mail, you worked a total of 5.75 hours on Thursday the 16th. You would receive the remainder of the 7.25 hr day in snow emergency pay (1.5 hrs).
>
> I realize you would like to apply the maximum snow emergency pay to your workday and credit the remainder of your working hours to comp or flextime; however, the contract is quite clear and I don't believe it was intended to provide that ability. If you have further questions let me know.

The Grievant responded in an email dated "02/27/2006 1:16.55 PM" (Jt. Ex. #7) as follows:

> I disagree with your statement. I had intended on working through the lunch hours prior to Thursday. The weather was not a factor in my working during the lunch hour. In fact my doctor's appointment (which stated I would flex the time) was approved by Chris Machamer 1/13/06, well before the snow storm.

Conclusion

Machamer authorized the Grievant to "flex" hours during the payroll week of February 12, 2006 so that the Grievant could used those hours for her "Planned Sick Leave" on February 17, 2006. Additionally, Machamer had authorized the Grievant to earn "comp time" during that same week. Under existing procedures, Machamer did not schedule when the "flex time" or "comp time" would be worked, but rather, left that to the discretion of the Grievant.

Machamer's email of February 27, 2006 indicates that the Grievant's authorization to earn "comp time" was limited because the Grievant had approval to work only 38.25 hours that week. (County Ex. #6) This email, as well as Machamer's testimony at hearing, indicates that, for the relevant payroll week, the Grievant misunderstood that she had permission to work up to 40 hours per week. (T. 89)

The emails issued by the County's representatives on February 15, 2006 address the impact of adverse weather on employee work schedules. These emails do not address the arrangement between the Grievant and Machamer that allowed the Grievant to "flex" her work schedule and/or earn "comp time" during the payroll week beginning February 12, 2006.

On February 16, 2006, the Grievant worked outside of her normal workday prior to the time that the Grievant had a reasonable basis to know that the County would call a "snow day" for that day. As soon as the Grievant was queried about her February 16, 2006 work hours, she responded that she had worked outside her normal work day for the purpose of "flexing" time for "taking off" on February 17, 2006 and putting in extra hours. At no time did the Grievant state that she had flexed hours on February 16, 2006 because of snow. (T. 87)

The Grievant reiterated her position that, on February 16, 2006, she intended to work hours in addition to her normal work day during her email exchanges with supervisors, as well as at hearing. (T. 33) As Machamer acknowledged in her email to the Personnel Director (County Ex. #6), the Grievant's claim that, on February 16, 2006, she also had intended to work her normal work hours is "consistent with what she had done other weeks."

The most reasonable conclusion to be drawn from the record evidence is that the Grievant did not flex hours in response to inclement weather concerns. Rather, the record reasonably demonstrates that the Grievant worked outside of her normal work schedule because she had a prior arrangement with her supervisor that authorized her to work these hours <u>in addition to her normal work hours on February 16, 2006.</u> (Emphasis supplied)

To be sure, Machamer had not specifically approved "flex" time for February 16, 2006. For the purposes of this proceeding, however, it is sufficient that Machamer had authorized the Grievant to "flex" time during the week in which the Grievant had the "Planned Sick Leave" and that, at the time of this authorization, both the Grievant and Machamer understood that the Grievant had the right to choose when to work the time that would be "flexed" for the "Planned Sick Leave." The Grievant has consistently maintained that she worked 12:15 to 1:00 p.m. as "flex" time.

The Grievant has claimed that she wanted to receive "comp time" for the 15 minutes worked from 7:45 to 8 a.m. As discussed above, at that time, there was disagreement as to whether or not the Grievant was authorized to earn "comp time" for those 15 minutes. However, the undersigned is persuaded that the long-standing procedure between the Grievant and Machamer was sufficiently flexible that, if the Grievant erred in claiming "comp time" for those 15 minutes, then Machamer would have permitted the Grievant to use those 15 minutes as "flex" time for the "Planned Sick Leave" of February 17, 2006. (T. 87-88)

Under the language of Article 24.01, Snow Days, "employees shall be released from work without loss of pay." Contrary to the opinion of the Personnel Director, this language does not mean that employees receive their normal workday's pay. (T. 106) Rather, it means that the "release" due to the "snow day" cannot result in a loss of pay to the employee.

For the Grievant to be released at 1:30 p.m. on February 16, 2006 without loss of pay, the Grievant had to receive the benefit of all of the hours that she had been authorized to work on February 16, 2006. For the reasons discussed more fully above, the undersigned has concluded that these authorized hours consisted of 8.25 hours within a work schedule of 7:45 a.m. to 4:00 p.m. Thus, as the Grievant initially claimed, she was entitled to 2.5 hours of "snow pay," *i.e.*, for the hours from 1:30 p.m. to 4:00 p.m. (T. 60)

Such a conclusion is consistent with Phelan's understanding regarding the intent of Article 24 when it was bargained, *i.e.*, employees would not lose pay as a result of the "snow day" (T. 12), as well as the County's treatment of Phelan. On February 16, 2006, Phelan received 9 hours of pay because he had an alternate schedule, approved by his supervisor, in which he worked 9 hours on Thursday. (T. 16- 17). The evidence of past practice regarding the "snow day" that occurred nine years ago lacks sufficient detail to warrant any conclusion regarding the application of Article 24 to the instant set of facts. (T. 134)

Under the long-standing procedure between the Grievant and her supervisor, the 8.25 hours that she would have worked on February 16, 2006, but for the "snow day," were compensable as 7.25 hours of pay and one hour of "flex" time to be used for the "Planned Sick Leave" on February 17, 2006. The Grievant received 7.25 hours of pay, but did not receive the one hour of "flex" time. Contrary to the argument of the County, this denial of one hour of "flex" time results in a loss of pay because it required the Grievant to use other pay, such as sick leave or comp time, for her "Planned Sick Leave" on Friday, February 17, 2006.

In summary, the County's method of compensating the Grievant for February 16, 2006 violated Article 24 of the parties' collective bargaining agreement. In remedy of this contract violation, the Union requests that the County make the Grievant whole by restoring one hour of sick leave to the Grievant.

The Grievant used 1.5 hours of sick leave on February 17, 2006. (County Ex. #4) But for the County's violation of Article 24, the Grievant would have had one hour of "flex" time to use in lieu of this sick leave. It is an appropriate make-whole remedy to restore one hour of sick leave to the Grievant.

The last "snow day" occurred nine years ago. The record presented at hearing does not provide a reasonable basis to infer, much less conclude, that the County has engaged in a "practice" of denying employees the "snow day" benefit that was denied to the Grievant. The Union's request that the County be ordered "to cease and desist such practice in the future" is not appropriate and, therefore, has been denied.

The grievance, as filed and processed through the grievance procedure, requests the County "To make whole any similarly effected employee." (Jt. Ex. #2) As reflected in the Personnel Director's Third Step Grievance Response of May 16, 2006, the County understood that the grievance included a request to "make whole any similarly effected employee." While phrased somewhat differently, the Union renewed this request in it initial brief.

The record before the undersigned is inconclusive with respect to the issue of whether or not there are any "similarly effected employees." The Personnel Director acknowledges that there are employees who on February 16, 2006, like the Grievant, came in early and/or worked through their lunch period. (T. 125). It is not clear, however, whether these employees came in early and/or worked through their lunch period for the purpose of working additional hours that had been authorized by their supervisor, like the Grievant, or, unlike the Grievant, were "flexing" their normal 7.25 or 8 hour work day in order to leave work early.

In the latter case, employees would only be entitled to be paid for their normal 7.25 or 8 hour work day. Thus, employees who "flexed" their normal 8:00 a.m. to 4:00 p.m., 7.25 hour work day, by coming in early and/or working through their lunch hours, for the purpose of leaving early would receive less "snow day" pay, *i.e.*, pay for hours not worked, then would those who did not come in early and/or work through their lunch period. Such a result would not be inequitable or in violation of Article 24 because the "flexing" employees would have "lost" less pay as a result of the 1:30 p.m. "snow day" closure.

Notwithstanding the County's argument to the contrary, it is appropriate to make-whole any "similarly effected employee". The undersigned will retain jurisdiction for sixty days from the date of this Award for the purpose of resolving any disputes with respect to this remedy.

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

AWARD

1. The County's method of compensating the Grievant for February 16, 2006 violated Article 24 of the parties' collective bargaining agreement.

2. The appropriate remedy is to make whole the Grievant and similarly effected employees.

3. To make whole the Grievant, the County is to immediately restore one hour of sick leave to the Grievant.

4. The undersigned retains jurisdiction for the sole purpose of resolving disputes regarding the make-whole remedy and will exercise this jurisdiction if either party, within sixty days of the date of this Award, requests, in writing and with a copy to the opposing party, that this jurisdiction be exercised.

Dated at Madison, Wisconsin, this 30th day of March, 2007.

Coleen A. Burns /s/

Coleen A. Burns, Arbitrator

CAB/gjc
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