BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

DOUGLAS COUNTY

and

DOUGLAS COUNTY DEPUTY SHERIFF'S DEPARTMENT – JAIL DIVISION, LOCAL 441A, WISCONSIN PROFESSIONAL POLICE ASSOCIATION/LAW ENFORCEMENT EMPLOYEEE RELATIONS DIVISION

Case 270
No. 65613
MA-13270

(Compensatory Time Grievance)

Appearances:

Frederic P. Felker, Corporation Counsel, 1313 Belknap Street, Superior, Wisconsin, 54880, on behalf of Douglas County.

Mark R. Hollinger, Attorney, Wisconsin Professional Police Association, 340 Coyer Lane, Madison, Wisconsin, 53713, on behalf of Douglas County Deputy Sheriff's Department – Jail.

ARBITRATION AWARD

Douglas County, herein the County, and Douglas County Deputy Sheriff's Department - Jail Division, Local 441A, Wisconsin Professional Police Association/Law Enforcement Employee Relations Division, herein WPPA/LEER or Association, are parties to a collective bargaining agreement which provides for the final and binding arbitration of certain disputes. On February 22, 2006 the Association filed a Request to Initiate Grievance Arbitration with the Wisconsin Employment Relations Commission concerning a grievance involving compensatory time roll-over. The Commission designated Paul Gordon, Commissioner, to serve as arbitrator. Hearing was held in the matter on July 26, 2006, in Superior, Wisconsin. A transcript was prepared. A briefing schedule was set. Due to a medical condition of one of the advocates the briefing schedule was extended and the record was closed on May 9, 2007.

ISSUES

The parties stipulated to the following statement of the issues:

> Did Douglas County violate the collective bargaining agreement when it took the position that employees hired before December 31, 2002 could only accrue a total of 150 hours of compensatory time in each calendar year with no rolling cap?
>
> If yes, then what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

The dispute concerns language in the agreement which was made when the parties were in the process of making a new Jail Division unit, whose members had previously been part of a larger unit with County law enforcement employees. That language was carried forward from the 2003-2004 Agreement to the 2005-2007 Agreement. Provisions from several of those agreements are set out below.

ARTICLE 27

(2002 Agreement. Last joint deputy-jailer CBA)

. . .

Cash conversion shall be based on the wages in which the compensatory time was earned. No employee shall accumulate more than a gross total of three hundred thirty (330) hours. All hours in excess of three hundred thirty (330) hours shall be paid in the calendar year earned.

ARTICLE 27

(2003 Agreement. First Deputy CBA after bargaining unit split)

. . .

For employees hired before the ratification of this agreement, with an exception of thirty-two (32) hours of compensatory time earned per calendar year, all compensatory time earned in the calendar year shall not be carried over into the following calendar year. Consequently, at the beginning of each new calendar year, an employee's total balance of compensatory time may not increase by more than thirty-two (32) hours. Compensatory time off shall be taken with the approval of the Employer. Cash conversion shall be based on the wages in which the compensatory time was earned. No employee hired before the ratification of the agreement shall accumulate more than a gross total of three hundred thirty (330) hours. All hours in excess of three hundred thirty (330) shall be paid in the calendar year earned.

Employees hired after the ratification of this contract will be limited to a total of 120 hours of compensatory time earned in a year which if not used within the year will be paid off at year end.

ARTICLE 27

(2003-2005 Agreement. First jailer CBA after bargaining unit split)

. . .

Section 3.

. . .

Compensatory Time:

1. Employees hired before 12/31/02, shall be allowed to accrue a maximum balance of one hundred fifty (150) compensatory hours. All overtime hours worked in excess of the one hundred fifty (150) balance shall be paid in cash overtime. Those employees who are above the 150-hour maximum as of the ratification of this agreement, will be allowed to maintain this balance until they move below the 150 hour cap at which time they will be subject to the cap. The balance of compensatory hours which exceeds forty (40) hours as of the 1st pay period in December will be paid to the employee in cash at the rate of pay it was earned. With an exception of forty (40) hours of compensatory time earned per calendar year, all compensatory time earned in the calendar year shall not be carried over into the following calendar year. Consequently, at the beginning of each new calendar year, an employee's total balance of compensatory time may not exceed forty (40) hours. Compensatory time off shall be taken with the approval of the Employer.

   Cash conversion shall be based on the wages in which the compensatory time was earned.

2. Employees hired on or after 1/1/03, shall be allowed to accumulate a maximum of eighty (80) compensatory hours in a calendar year. All hours in excess of eighty (80) shall be paid in cash overtime. The balance of compensatory hours as of the 1st pay period in December will be paid to the employee in cash at the rate of pay it was earned. Compensatory time off shall be taken with the approval of the Employer.

. . .

ARTICLE 27

(2005-2007 Agreement)

. . .

Section 3.

. . .

Compensatory Time:

1. Employees hired before 12/31/02, shall be allowed to accrue a maximum balance of one hundred fifty (150) compensatory hours. All overtime hours

worked in excess of the one hundred fifty (150) balance shall be paid in cash overtime. Those employees who are above the 150-hour maximum as of the ratification of this agreement, will be allowed to maintain this balance until they move below the 150 hour cap at which time they will be subject to the cap. The balance of compensatory hours which exceeds forty (40) hours as of the 1st pay period in December will be paid to the employee in cash at the rate of pay it was earned. With an exception of forty (40) hours of compensatory time earned per calendar year, all compensatory time earned in the calendar year shall not be carried over into the following calendar year. Consequently, at the beginning of each new calendar year, an employee's total balance of compensatory time may not exceed forty (40) hours. Compensatory time off shall be taken with the approval of the Employer.

Cash conversion shall be based on the wages in which the compensatory time was earned.

2. Employees hired on or after 1/1/03, shall be allowed to accumulate a maximum of eighty (80) compensatory hours in a calendar year. All hours in excess of eighty (80) shall be paid in cash overtime. The balance of compensatory hours as of the 1st pay period in December will be paid to the employee in cash at the rate of pay it was earned. Compensatory time off shall be taken with the approval of the Employer.

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ARTICLE 5

(2005-2007 Agreement)

VESTED RIGHT OF MANAGEMENT. The County possesses the sole right to operate the County Government and all management rights reside in it, subject only to the provisions of this Contract and applicable law, shall be vested exclusively in the Douglas County Board of Supervisors through its duly appointed Committees. The Department Head, through authority vested in him/her, by either the Douglas County Board or the State Statutes shall have the right to exercise full control and discipline in the proper conduct of the Law Enforcement Department operation.

Management rights include:

A) To direct all operations of the County.

B) To hire, promote, schedule and assign employees to positions with the County

To determine the hour of employment and the length of the work week and to make changes in the detail of the employment of the various employees from time to time as it deems necessary for the efficient operation of the Law Enforcement Department.

C) To suspend, demote, discharge and take other disciplinary action against employees for just cause.

D) To relieve employees from their duties.
E) To take whatever action is necessary to comply with State or Federal law.
F) To induce new or improved methods or facilities
G) To contract out for goods and services, however, no bargaining unit member would be laid off due to contracting out.
H) To determine the methods, means and personnel by which County operations are to be conducted.
I) To take whatever action is reasonably necessary to carry out the functions of the County in situations and emergency.
J) To establish reasonable work rules and schedules of work.
K) To maintain efficiency of County operations.

The Union and the members agree to cooperate with the Board and/or its representatives in all respects to promote its efficient operation of the Law Enforcement Department.

The provisions of this Article are, however, subject to the rights of the employees as set forth in other Articles contained in this Agreement.

BACKGROUND AND FACTS

In 2002 Douglas County was expanding its jail facilities and consequently its jail staff. The County was going from approximately five jail sergeants, 13 jailers and 10 vacant jailer positions to adding approximately 25 more jailers. The County and the Association were in the process of negotiating a new collective bargaining agreement for a new bargaining unit consisting exclusively of County jailers. Prior to this the jailers and deputies had been in the same bargaining unit.

The Association had been interested in having their jailer members covered under protective status provisions. Protective status provides increased retirement benefits and costs the County more to fund, approximately $84,000.00. The Association and the County recognized in 2002 that protective status was a benefit to bargaining unit members and a benefit to the County in terms of attraction and retention of law enforcement employees. At the same time the County recognized that protective status was something of a quid pro quo for Association concessions on the carry over of compensatory time, which makes staffing very expensive. Of specific interest to both parties was the subject of a rolling cap or hard cap on how many compensatory hours could be accumulated or accrued in a calendar year and then carried forward to the next year. The Association was very interested in maintaining rolling caps that could be replenished at a high number of hours and carried over to following years, especially for employees hired before 12/31/02. The County was very interested in

implementing non-replenishing hard caps (flat caps)[1] at lower hours not capable of being carried forward to the next year. Protective status and compensatory time carry over became subjects of negotiations, along with other subjects, in the contract bargaining for the 2003-2005 collective bargaining agreements for the new jailer unit and the remaining deputy unit. The County considered these in its costing of the various proposals that were negotiated.

These bargains resulted in agreements providing for protective status and changes in compensatory time accumulation and carry over. As mentioned above, the carry over language in the Jailer 2003-2005 agreement was carried forward into the 2005-2007 agreement, the agreement in effect at the time the instant grievance was filed. Neither party either kept or had available many detailed bargaining session notes. The scant notes available contain a word or phrase that supports each party's respective position. The party's positions are reflected in the notes from a January 27, 2003 session. Association notes reflect "cap 150 rolling". County notes reflect the Association position of "rolling cap 150 annually" of and the County position as "no rolling cap." Some proposed language, as set out below, survives. The County would prepare language proposals for bargaining sessions. If agreed to by the Association then follow up proposals would indicate those tentatively agreed to. On February 21, 2003 the County prepared an Article 27 proposal on compensatory time. It did not include a specific type of 40 hour carry over provision. At the bargaining session an Association negotiator raised the issue of a specific type of 40 hour carry over provision. There was limited discussion as to the caps. A 40 hour provision and cap provisions varying by hire date and accumulated balances were then added to a new document later prepared by the County and provided to the Association as part of an overall proposed agreement between the parties (the marking of TA for tentative agreement was not included in the final version because it was made as a complete agreement proposal). The Article 27 provision consists of some 2002 agreement language that was modified by striking out some provisions and adding other italicized provisions. This was drafted by the County, presented to the Association as part of an overall tentative agreement, and then put into the collective bargaining agreement.

The February 21, 2003 version states:

ARTICLE 27

~~With an exception of thirty-two (32) hours of compensatory time earned per calendar year, all compensatory time earned in the calendar year shall not be carried over into the following calendar year. Consequently, at the beginning of each new calendar year, an employee's total balance of compensatory time may not increase by more than thirty-two (32) hours.~~ Compensatory time off shall be taken with the approval of the Employer.

[1] The parties variously refer to this type of cap as a hard cap or a flat cap, meaning the same thing. It is the total number of compensatory hours an employee may accumulate or accrue in a calendar year. With a hard or flat cap any of those hours used by the employee may not be replenished in that year.

Cash conversion shall be based on the wages in which the compensatory time was earned.

Employees hired before 12/31/02, ~~No employee~~ shall ***be allowed to*** ~~accumulate more than a gross total of three hundred thirty (330)~~ ***accrue a maximum balance of one hundred fifty (150) compensatory*** hours. All overtime hours worked in excess of ~~three hundred thirty (330)~~ ***the one hundred fifty (150) balance*** shall be paid in ***cash overtime*** ~~the calendar year earned.~~ ***Those employees who are above the 150-hour maximum as of the ratification of this agreement, will be allowed to maintain this balance until they move below the 150 hour cap at which time they will be subject to the cap. The balance of compensatory hours as of the 1st pay period in December will be paid to the employee in cash at the rate of pay it was earned.***

Employees hired on or after 1/01/03, shall be allowed to accumulate a maximum of eighty (80) compensatory hours in a calendar year. All hours in excess of eighty (80) shall be paid in cash overtime. The balance of compensatory hours as of the 1st pay period in December will be paid to the employee in cash at the rate of pay it was earned.

Compensatory time off shall be taken with the approval of the Employer.

The changes made to the Article after the February 21, 2003 bargaining session and then presented to the Association were as follows:

Compensatory Time:

~~With an exception of thirty-two (32) hours of compensatory time earned per calendar year, all cempensatory time earned in the calendar year shall not be carried over into the following calendar year. Consequently, at the beginning of each new calendar year, an employee's total balance of compensatory time may not increase by more than thirty-two (32) hours. Compensatory time off shall be taken with the approval of the Employer.~~

1. Employees hired before 12/31/02, shall be allowed to accrue a maximum balance of one hundred fifty (150) compensatory hours. All overtime hours worked in excess of the one hundred (150) balance shall be paid in cash overtime. Those employees who are above the 150-hour maximum as of the ratification of this agreement, will be allowed to maintain this balance until they move below the 150 hour cap at which time they will be subject to the cap. The balance of compensatory hours which exceeds forty (40) hours as of the 1st pay period in December will be paid to the employee in cash at the rate of pay it was

earned. With an exception of ~~thirty-two (32)~~ ***forty (40)*** hours of compensatory time earned per calendar year, all compensatory time earned in the calendar year shall **not** be carried over into the following calendar year. Consequently, at the beginning of each new calendar year, an employee's total balance of compensatory time may not ~~increase by more than thirty-two (32)~~ ***exceed forty (40)*** hours. Compensatory time off shall be taken with the approval of the Employer.

Cash conversion shall be based on the wages in which the compensatory time was earned. ~~No employee shall accumulate more than a gross total of three hundred thirty (330) hours. All hours in excess of three hundred thirty (330) shall be paid in the calendar year earned.~~

2. Employees hired on or after 1/1/03, shall be allowed to accumulate a maximum of eighty (80) compensatory hours in a calendar year. All hours in excess of eighty (80) shall be paid in cash overtime. The balance of compensatory hours as of the 1st pay period in December will be paid to the employee in cash at the rate of pay it was earned. Compensatory time off shall be taken with the approval of the Employer.

The immediately above cited language, except for the parts stricken through, became part of Article 27 in the collective bargaining agreement that was ratified, approved and signed by the parties in May 2003.

The County was attempting to hire jailers for the vacant and newly created jailer positions to staff the new jail by October 2003. A new Sheriff took office in January 2003 while there was not a Jail Administrator. The previous Jail Administrator had become ill and his responsibilities were assumed in mid 2003 by the Chief Deputy doing double duty as acting jail administrator. In January 2004 the current Jail Administrator assumed those duties. In the meantime there was a large volume of training of jailers which resulted in overtime or compensatory hours being accumulated by bargaining unit members on a rolling cap basis. Some jailers hired before 12/31/03 accumulated more than 150 hours and carried over their balances. Some jailers hired later accumulated more than 80 hours and carried over their balances. The jail overtime costs, which includes compensatory time, were exceeding the budget. The Sheriff and other County administrators were concerned about these costs, but attributed it in large measure to extra training for new jailers and related matters. Compensatory time, vacations and other related matters were administered by a jail payroll and finance specialist who was hired in the summer of 2003.[2] The Jail Administrator, being new to the position in a newly expanded jail operation, thought that the jail payroll specialist was

[2] There is no record of what, if anything, the jail finance specialist was told by management as to how to administer the compensatory time provisions in the jailer's agreement.

taking care of compensatory time administration. He did not concern himself with how compensatory time was administered. In September of 2005 the Sheriff's Department office manager brought to the Jail Administrator's attention the language in the agreement concerning hours and cap limits. He then reviewed the language of the agreement and conferred with the County's labor consultant who had negotiated the contracts. He was told it was a 150 hard cap and an 80 hour hard cap, depending on hire date. Until September, 2005, other than the non-management payroll specialist, no one in a position of management for the County had been aware of the way that compensatory time was being accumulated for the jailers after the 2003-2005 agreement was ratified.

The Jail Administrator then circulated a memo to staff dated 09-07-05 referencing compensatory time. It stated in pertinent part:

> Based on the 2005-2007 Contract between Local 441 and Douglas County, Article 27, employee's are allowed to accrue/accumulate 150 or 80 hours (based on your hire date) of compensatory time each year. All overtime worked in excess of the 150/80 hour shall be paid in cash overtime. Some of you have exceeded this in direct violation of this agreement. These numbers are not caps but accruals.
>
> Starting with this next pay period I will be instructing the Payroll Department to pay out overtime per this contract language. This will only affect certain staff members at this time. If you are unsure as to your current accruals please see me.

The Association filed a grievance dated January 30, 2006 contending a violation of Article 5, Article 27 and mutually recognized past practice. The grievance was described as:

> ISSUE: Did the Employer violate the labor agreement when it took the position that the maximum allowable compensatory time earned in one calendar year, for employees on or before December 31st, 2002 was 150 total hours which could not be built back to 150 hours until the succeeding calendar year?
>
> FACTS: Association members hired on before December 31st, 2002 are limited to build compensatory time to 150 hours per year in violation of the labor agreement, which is in violation of both the collective bargaining agreement and mutually recognized past practice which has been mutually established over a long period of time.

The grievance requested a remedy of allowing employees hired on or before December 31st, 2002 to accumulate 150 hours of compensatory time pursuant to the current labor agreement in force and effect, and that the 150 hour cap is also a rolling cap. The County denied the grievance and this arbitration followed.

Further facts appear as in the discussion.

POSITIONS OF THE PARTIES

Association

In summary, the Association argues that pursuant to Article 27 employees hired before December 31, 2002 are subject to a rolling cap accrual of compensatory time only, while employees hired on or after January 1, 2003 are subject to a flat cap accumulation of compensatory time.

The Association contends that Article 27 provides a clear indication that the cap on compensatory time in the two tiers of employees (those hired before December 31, 2002 as opposed to those hired after January 1, 2003) is to be handled differently. The County's drafter would not have used different language for each cap if a flat cap was intended for both classes of employees. Comparing the language of the clauses, the fact that employees hired on or after January 1, 2003 could accumulate 80 hours *in a calendar year,* and those hired before that date did not have their cap modified by such a clause is significant and telling. Those hired before December 31, 2002 are not subject to the restriction of accumulating 150 hours *in a calendar year,* thus in the context in which this clause is found such employees are to be permitted to accumulate more than 150 hours in a calendar year so long as they do not have more than 150 hours at any one time. The clear implication is that the clause "*in a calendar year"* had significant meaning that is consistent with the Association's position and inconsistent with the County's position.

The Association argues that employees hired before December 31, 2002 have been permitted to accumulate compensatory time with a rolling cap. Previously they could accumulate up to 330 hours on a rolling cap basis. The status quo was a rolling cap. In exchange for protective status the Association agreed to lower the cap from 330 on a rolling cap to 150 hours with a rolling cap and 80 hours with a flat cap for the respective classes of employees. The County admits this status quo ante remained unchanged for those hired before December 31, 2002 until the September 7, 2005 memorandum. This is three years after the County contends a change to a flat cap occurred and through another series of negotiation sessions for the 2005-2007 contract. It is not reasonable for the County to not know there was a rolling cap when it claims a rolling cap was crucial to approximately $84,000 in savings. In a feat of unusual memory the County Human Resource Specialist attributes "no rolling cap" to

WPPA Business agent. The arbitrator should take these notes at face value and see them for

what they are – a rolling cap for employees hired before December 31, 2002 and no rolling cap for those hired after January 1, 2003. It is unreasonable to think the County obtained a flat cap for all employees since January 2003 when it permitted a rolling cap until September 7, 2005. If the flat cap was crucial the County would have enforced it had they actually negotiated it three years ago. The county's claims are dubious. The County provided no proof the parties agreed to the flat cap for those hired before December 31, 2002, and no record of a tentative agreement exists supporting the County. Almost three years of a rolling cap is strong evidence that the Association's position is correct. Were the situation reversed the County would howl with protest and indignation.

The Association also argues that any ambiguity in Article 27 should be construed against the County because the County negotiator proposed and drafted the language. This is a standard rule of contract interpretation. Any ambiguity in Article 27 is made clear by closely examining the language and by the practice until September 7, 2005. But if any uncertainty remains as to the intent of the parties the Association asks the ambiguity be construed against the County who proposed the language.

County

In summary, the County argues that the contract language clearly favors the County's position of a flat 150 hour cap on compensatory time per year and not a rolling cap. The language in paragraph 2 of Article 27 clearly states that employees "hired on or after 1/1/03, shall be allowed to accumulate a maximum of eighty (80) compensatory hours in a calendar year." There are explanations for this and other differences with paragraph 1. On balance paragraph 1 read as a whole is consistent with the County's interpretation. "Accrue" is a verb meaning "to come into existence as an enforceable right or claim." It also could mean "to accumulate periodically." It has also been defined as 1. to be received in regular or increasing amounts, or 2. accumulate or receive. The Jail Administrator interpreted the terms accrue and accumulate to mean the same thing. A plausible explanation for the difference is that accrue might apply to things that have already happened. "Maintain balance" appears only in paragraph 1. Balance is "to compute the difference between the debits and credits" or "to equalize in number, force, or effect; to bring into proportion" or "to measure competing interests and offset them appropriately." Another dictionary defines balance as "a condition on which different elements are equal or in the correct proportions" or "a figure representing the difference between credits and debits in an account." This word clearly implies a weighing or offsetting of certain things, quite possibly the hours of compensatory time accumulated as offset by compensatory time used. This is consistent with the County's position insofar as paragraph 1 refers to existing employees who had indeed accumulated balances of compensatory time. These hours were to be retained as a balance for those employees whose "balance" remained over 150 hours until their "balance moved below the 150 hour cap" at which time they would be subject to the "cap". Future employees hired after December 31,

2002 would have no balances, only future accumulations. The statement "all overtime hours

worked in excess of the one hundred and fifty (150) balance shall be paid in cash overtime" is entirely inconsistent with the Union's interpretation that hours worked in excess of 150 may be taken as compensatory time rather than cash, such that the balance can be worked back up to 150 hours. Members simply cannot both be paid in cash for hours worked in excess *and* take those hours as compensatory time. And both old and new contract language states that "compensatory time off shall be taken with the approval of the Employer. This evinced intent that the County has control over taking compensatory time irrespective of caps or limits, rolling or flat. Rolling caps were allowed as a practice under the prior contract, but were never build into the new contract itself. This reinforces the obvious intention that the County be given control over compensatory time taken by members.

The County argues that the Union should have known the meaning attached to the contract language in paragraph 1 of Article 27, Section 3 of the contract. The voidability of a presumed contract arises only in the limited circumstances where neither party knew, or should have known, of the meaning placed on the term by the other party, or where both parties were aware of the divergence of the meanings and assumed the risk that the matter would not come to issue. It argues that this Arbitral authority is entirely consistent with the facts here and supportive of the County's position. The County's negotiator drafted the language. The Union had absolutely no reason to believe the language meant anything different than the position the drafter took during negotiations that there would be no rolling cap on compensatory time. It was also clear that at the conclusion of the negotiations the County had no reason to believe the Union had agreed to anything but a flat cap on the 150 hours of compensatory time. The Union had clearly been placed on notice as to the County's position during the negotiations and had allowed the County's negotiator to draft the language. There is no record that the Union either objected to or requested clarification of the language as drafted by the County negotiator.

The County further argues that the rolling cap on compensatory time, as having only been established by past practice, was effectively purged by the County during the negotiations process. There is nothing in the record to indicate what the term "gross total" really means. It does not imply a rolling cap, if anything the contrary. The 330 hours had as a matter of practice been treated as a rolling cap. This was never established within the four corners of the agreement. An otherwise binding practice may be modified or eliminated where the underlying basis for the practice has changed. Practices exist largely by acquiescence. After one party had indicated during negotiations that the practice would be discontinued there is no longer acquiescence. This was the unequivocal intent of the County (at negotiations) not to interpret the agreement any longer to allow for a rolling cap. The onus then fell on the Union to negotiate a rolling cap affirmatively into the agreement, which it failed to do.

The County argues that any remedy should be only remedial and prospective in nature. To take the original consideration off the table and put the parties back to their original positions would be virtually impossible. Placement under the Protective Service Retirement

System would seem impossible to undo, and the Union has not requested a return to the 330 hour gross total system with a rolling cap. The Union has not asked for a back award and there is no basis for a back award. The only conceivable and logical remedy would be to prospectively award the Union a rolling cap interpretation to the language with future application only.

DISCUSSION

The parties agreed to new language to address a new situation, but now disagree over what that language means. The dispute centers around new language in a contract for a new bargaining unit, which language was derived in part from that used in a prior contract covering all members in a single unit. Additionally, the new bargaining unit consists of three separately identifiable groups with different provisions for Article 27 purposes. Article 27 states:

ARTICLE 27

(2005-2007 Agreement)

. . .

Section 3.

. . .

Compensatory Time:

1. Employees hired before 12/31/02, shall be allowed to accrue a maximum balance of one hundred fifty (150) compensatory hours. All overtime hours worked in excess of the one hundred fifty (150) balance shall be paid in cash overtime. Those employees who are above the 150-hour maximum as of the ratification of this agreement, will be allowed to maintain this balance until they move below the 150 hour cap at which time they will be subject to the cap. The balance of compensatory hours which exceeds forty (40) hours as of the 1st pay period in December will be paid to the employee in cash at the rate of pay it was earned. With an exception of forty (40) hours of compensatory time earned per calendar year, all compensatory time earned in the calendar year shall not be carried over into the following calendar year. Consequently, at the beginning of each new calendar year, an employee's total balance of compensatory time may not exceed forty (40) hours. Compensatory time off shall be taken with the approval of the Employer.

   Cash conversion shall be based on the wages in which the compensatory time was earned.

2. Employees hired on or after 1/1/03, shall be allowed to accumulate a maximum of eighty (80) compensatory hours in a calendar year. All hours in excess of eighty (80) shall be paid in cash overtime. The balance of compensatory hours as of the 1st pay period in December will be paid to the employee in cash at the rate of pay it was earned. Compensatory time off shall be taken with the approval of the Employer.

The three readily identifiable groups of employees are: 1) those hired before December 31, 2002; 2) those hired before December 31, 2002 who had above 150 hours of compensatory time as of the ratification of the agreement (as opposed to those who had less hours), and; 3) those hired on or after January 1, 2003. The dispute has to do with the first two of these groups. The Association contends that these employees are subject to a rolling cap accrual of compensatory time and are not limited to accumulating only 150 hours in a calendar year. The Association argues that a past practice exists in support of its position, and that any ambiguity should be interpreted against the drafter, in this case the County. The Association's arguments do not differentiate between those employees hired before December 31, 2002 who have less than 150 hours as of ratification and those who had more than 150. The County's arguments do make this distinction.

It is the responsibility of the arbitrator to interpret the collective bargaining agreement as it is written by the parties. If the language is clear and unambiguous the arbitrator must apply it as written by the parties. Language is ambiguous if it is fairly susceptible to more than one meaning. Words are given their ordinary meaning unless they are technical. If they are technical they are given their technical meaning. When language is ambiguous, it is the responsibility of the arbitrator to interpret the language by looking at the context of its usage, the purpose of the provision, the usage of similar phrases in the agreement, the history of the language and the past practices of the parties. Arbitrators also use the rules of contract construction ordinarily used by arbitrators and the courts. Here, the language in Article 27 is drafted differently for each of the three groups of jailers. It is also drafted differently than that in the first contract for the deputies after the unit was divided.

The 2002 agreement between the parties had limited language addressing a 330 hour cap that was applied by the parties as a rolling cap that could be carried over from year to year. The new language that was negotiated when the new jailer bargaining unit was formed contains important differences as to the groups of jailers. One difference concerns those hired on or after January 1, 2003. Such jailers are limited to accumulating a maximum of 80 compensatory hours per year and any balance of hours as of December 1st must be paid out. Those employees are not the subject of the dispute in this case. The other difference in the groups under the new language makes a distinction between employees hired before December 31, 2002 who had at that time 150 or more hours of compensatory time when the agreement was ratified, and those who had less than 150 hours of compensatory time. This difference is very important. For those with more than 150 hours the language sets out an exemption from the caps. The operative language is:

> Those employees who are above the 150-hour maximum as of the ratification of this agreement, will be allowed to maintain this balance until they move below the 150 hour cap at which time they will be subject to the cap.

What is key about this language is that those employees can "maintain" their balances until below 150 hours. To maintain is a clear allowance to replenish and carry over. To keep what they had. The sentence itself indicates that such employees are not subject to the cap. Thus, to provide for this group's ability to maintain an excess above 150 shows by contrast, if not the clear language of the rest of the provision itself, that those with less than 150 hours were not able to maintain their hours. The provisions for those in excess of 150 hours must be read along with the provisions for those below 150 hours, and both must have meaning. If they were not treated differently then the language and mechanics of "maintain" would become meaningless. Arbitral construction of agreements cannot render any provision meaningless.

This language is transitional in nature. It appears in both the 2003-2005 agreement and the 2005-2007 Agreement. Had it been eliminated in the 2005-2007 agreement that would indicate that it was limited to the former agreement. Yet it was retained, indicating the exemption from the cap was intended to remain as long as the hours remained above 150. This provision in the 2005-2007 agreement would be meaningless otherwise.

At the time the language was bargained presumably there were employees who had more than 150 hours of compensatory time accrued. There is not a lot of evidence on this point, but the County negotiator did recognize this "maintain" provision as a way to grandfather in such employees.[3] This also adds meaning to the Association's bargaining position that it was insisting of having rolling caps in the face of the County's position that

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[3] This is reflected in the testimony of the County's lead negotiator and drafter, who testified at Tr. 144, 145:

> Q. Subject to the cap in what sense?
> A. Well, as long as they didn't go below 150 hours - - if they were at 300, they could go down to 200 and then go back up. But once they hit below 150, then they're subject to the cap.
> Q. And they can't go back up?
> A. They can't go back up.
> Q. So that was to accommodate those employees who had already exceeded the 150 hours?
> A. Right, it would be for that transition year of 2003.
> Q. That was just for the year?
> A. Well, unless they carried it over - - if they held on to their balance into the next year without going below the 150 – hour cap, they could maintain that. So long as they were above that 150 – hour cap, they were grandfathered employees, if you will, that they could stay above that 150 – hour cap. Once they went below it, then they were going to be subject to it.
> Q. Once they went below it, would they also then be subject to the carryover provision?
> A. Yes.
> Q. But if they maintained the balance above 150 hours, they were subject neither to the fixed cap or to the carryover provision that follows?
> A. Right. And that's the third element is the carryover provision, which did not exist, per se, in the prior contract.

there be no rolling caps. Splitting those hired before December 31, 2002 into two groups

based on the 150 hour mark provided the meaning that the Association sought for the group with more than 150 hours. It also puts those with less than 150 hours in a situation similar to the newer hires who could only accumulate a maximum of 80 hours with a hard, or flat cap.

The inclusion of the 40 hour carry over provision in the new language for those hired before December 31, 2002 also indicates that this is a hard or flat cap for those with less than 150 hours at ratification. The language is as follows:

> The balance of compensatory hours which exceeds forty (40) hours as of the 1st pay period in December will be paid to the employee in cash at the rate of pay it was earned. With an exception of forty (40) hours of compensatory time earned per calendar year, all compensatory time earned in the calendar year shall not be carried over into the following calendar year. Consequently, at the beginning of each new calendar year, an employee's total balance of compensatory time may not exceed forty (40) hours.
> (emphasis supplied)

This indicates several things. Based on the negotiations the parties were specifically changing a 40 hour carry over into the following year. Previously it had been limited to a 32 hour increase under the 2002 agreement. This difference in hours is also a difference between increasing a number and carrying over a number of hours. Not only was the number of hours changed, but new language was added to require the balance over 40 hours actually be paid in cash. The previous 2002 agreement provided only that hours over the 330 hour cap were to be paid in cash. The 2002 agreement by its terms allows for increases in the accumulated hours up to 330. The new provisions require payouts in of anything over 40. Additionally, the new language makes a change by underlining the word "not", where it had not been underlined in the 2002 reference to carrying over 32 hours. To underline something is to emphasize it. Whereas the parties both recognize that there had been a practice under the prior language where carry over in excess of 32 hours was happening, the new agreement changes this by emphasizing not in reference to carry over. That must have meaning as well. It recognizes a change from the prior agreement and how it had been administered.

The Association contends that if a yearly hard cap was intended for those hired before December 31, 2002 the language would say so and be similar to that for the later hires. That provision includes the phrase "in a calendar year". However, reading the Section 3 in its entirety, it contains a similar pay out provision for the first pay period in December, contains a specific carry over limit as noted above and states forty (40) hours of compensatory time "earned per calendar year", and does reference a calendar year for that carry over which was emphasized by adding the underlined "not". The context of Section 3 is in terms of a calendar year which supports reading the language for both of those groups in terms of a calendar year.

Although different definitions were supplied in the briefing herein, the parties did not appear to have placed any material distinction on the use of either accrue or accumulate in their negotiations, drafting or application. Rather, they appear to have used both words in the same sense, differentiating the hours by either a rolling cap or a flat, hard cap, and by whether the hours can be carried over to the next year.

Reading Article 27, Section 3 (1) in its entirety, giving meaning to all parts of it, and noting the changes from its predecessor, convinces the undersigned that for those hired before December 31, 2002 who did not have 150 hours of compensatory time as of ratification were then subject to a 150 hard, or flat cap. They cannot be replenished. Only 40 as of the first pay period in December can be carried over into the next year, when a new maximum of 150 can be accrued. This actually can potentially add up to a total of 190 hours, as the County acknowledged at the hearing, because 150 hours may be accrued each year on top of 40 that can be carried over. For those who had in excess of 150 hours as of ratification, they are allowed to maintain their balances and are not subject to the cap. The cap provisions were new. These employees were not subject to those provisions until falling below 150 hours. Until they are below 150 hours their balances are rolling, can be replenished, and can be carried over under the new language.

The matter of past practice is at issue. The jail payroll specialist continued to treat compensatory time in the same way it had been done in the past as a rolling cap. This person was new to the job. The jail administrator and sheriff were new. The jail was expanding. No one in management for the County was monitoring how compensatory time was being administered or whether it was in conformity with the agreement. The County did note it was not experiencing the savings in overtime budget it had expected, but attributed this to increased training time for the newly hired jailers as part of the jail expansion. In September 2005 the jail administrator became aware of the agreement's provisions and was later advised by the County's lead negotiator that the agreement contained hard caps of 80 hours and 150 hours. He then issued the memorandum which was grieved in this case. The Association maintains that the past practice of the parties, including rolling caps for the jailers' agreement, shows the parties have bound themselves to rolling caps for those hired before December 31, 2002.

A practice is binding on the parties when it is "1) unequivocal; 2) clearly enunciated and acted upon; and 3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by the parties." Elkouri & Elkouri, *How Arbitration Works*, 6th ed., p. 608 (2003). To be an established practice accepted by the parties both parties must be aware of the practice. There must be mutuality. Here it is clear that the County management was not aware of the way the compensatory time was being administered by the jail payroll specialist since the formation of the new bargaining unit. There is no mutuality. The practice was not accepted by both parties so as to be binding. *See, e.g.* IRON COUNTY, WERC, MA-13123 (Gordon, August 8, 2006) (No binding past practice where County not aware status of sick leave bank lists being kept as a joint list for both union and management employees).

Nor does the previous practice of the parties in allowing rolling caps establish a continued past

practice here. This is because there was specific, new language drafted for this bargaining unit. It was a new bargaining unit with a new agreement. The prior practice from the larger combined unit has not grafted onto this agreement because of the specific language negotiated into the agreement, which is not a rolling cap for those not grandfathered in. That practice was recognized for only those who were grandfathered in. And as the County has argued, the underlying circumstances for the prior practice changed with the formation of a new unit and new contract. This principle is stated in LABOR AGREEMENT IN NEGOTIATION AND ARBITRATION, Zack & Block, BNA, 1983, where they quote Arbitrator Sylvester Garrett and then further comment:

> "A custom or practice is not something which arises simply because a given course of conduct has been pursued by management or the employees on one or more occasions. A custom or a practice is a usage evolved by men as a normal reaction to a recurring type situation. It must be shown to be the *accepted* course of conduct characteristically repeated in response to the given set of underlying circumstances. This is not to say that the course of conduct must be *accepted* in the sense of both parties having agreed to it, but rather that it must be *accepted* in the sense of being regarded by the men involved as the *normal* and *proper* response to the underlying circumstances presented."
>
> Moreover, practice is the product of a particular set of circumstances, Arbitrators have uniformly held that when those circumstances change, the practices surrounding them may also change, That is a critical (and logical) distinction between practice and the labor agreement.
>
> p. 10. Citations omitted.

This is not strictly a repudiation or renunciation as the County has argued. There is no evidence in the record that during negotiations the County told the Association it was repudiating or renouncing a past practice. However, it is the negotiating of new agreement language which changed the underlying circumstances so that the prior practice is no longer applicable. Here there is no binding past practice that requires the compensatory time for jailers, other than those hired before December 31, 2002 who had more than 150 hours as of ratification and not gone below 150 hours since, be administered as a rolling cap.

The Association argues that in bargaining the County did agree to a rolling cap for employees hired before December 31, 2002 and that the County provided no proof that the parties agreed to a flat cap for such employees. The best that can be garnered from the parties' bargaining notes is that the issue of a rolling cap was discussed and there was a difference of opinion on it. The Association wanted rolling caps and the County did not. The discussion above shows that the language does reflect an agreement by the County and the Association

that there would be a rolling cap for those who had more than 150 hours as of ratification, and

a flat cap for the others on an 80 hour or 150 hour basis. The changes made in the proposed Articles during bargaining show that on February 21st the County draft proposed eliminating all language for carrying over hours into the following calendar year. A different amount of hours was requested by the Association and a carry over of 40 hours was then put into the proposed language. Also, the word "not" was then underlined in the revised language in the same carry over sentence. Additionally, the word "increase" from the 2002 agreement was changed to "exceed" in the final draft of the 40 hour carry over. To not increase by more than 32 hours would be to allow more than a certain number to attain. To not exceed forty hours is a maximum and is reflective of a hard or flat cap. These are proposed changes made to written drafts of the provisions and are more reliable than the notes taken by either side because the drafts were what was actually exchanged by the parties. The County gave the final draft to the Association as part of an overall final proposed agreement. The Association did not question the matter further or propose any additional changes. The element of a quid pro quo was present in the form of the addition of protective status for jailers. The Association then signed the agreement with this language in it.

The Association may have misunderstood that by this language it was agreeing to rolling caps only for those who had 150 hours at the time of ratification. Nonetheless, that is the language the Association agreed to and it was language the County understood. The bargaining history of record reveals the position of the County was made known to the Association and provided in the form of the written proposed agreement. Without any further questioning or proposals from the Association before the agreement was signed, the County has no reason to believe the Association had a different meaning for this new language. As the County argues, this is a situation as contemplated by the RESTATEMENT (2ND) OF CONTRACTS:

> Where the parties have attached different meanings to an agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made that party did not know or had no reason to know of any different meaning attached by the other and the other know, or had reason to know the meaning attached to it by the first party.

A related principle is stated in THE COMMON LAW OF THE WORKPLACE, ST. Antoine (BNA, 1998):

> . . . Arbitrators, for example, rely on an objective theory of interpretation instead of using a subjective approach to understanding contractual language. The objective test is that which a reasonable person in similar circumstances would believe disputed contractual verbiage to mean. The objective theory of interpretation is rooted in a common sense policy that contract interpretation ought to be based on objectively verifiable information and not on a party's subjective intention that cannot be objectively examined. Using an objective approach to standards of contract interpretation lends doctrinal stability to principles on which arbitrators rely.
>
> p. 65. Citations omitted.

The new agreement language clearly defines three sets of jailers and exempts one group from the caps. Standard contract interpretation resolves any ambiguity as to whether the caps for those under 150 hours are rolling or not. They are not. Even if the Association may have been mistaken as to the implications of this language on those with less than 150 hours, that is what they agreed to.

The Association argues that the language in the agreement should be construed against the County because the County's negotiator drafted it. Resort to this rule of construction would be appropriate if there were no other basis upon which to interpret the language. However, as set out above, the distinctions in the way the three different groups were treated, the changes from the predecessor agreement with the combined unit and the bargaining history provide a basis to interpret the agreement. It is not necessary to construe the language against the County simply because the County was the drafter.

Having determined what the language means, it is now necessary to apply it to the September 2005 memo from the jail administrator. That memo did not address the group of jailers who may have maintained 150 hours so as to be exempt from the caps. If there were such jailers at that time the memo would not apply to them. The memo stated, among other things, that all overtime worked in excess of the 150/80 hours shall be paid in cash overtime. The memo did also state that this will only affect certain staff members at this time. It is not clear from the memo if this was a reference to those who may have maintained the 150 hour exemption. If that group of jailers has not been allowed to maintain 150 or more hours then the memo would have been incorrectly applied to them and the County's position would violate the collective bargaining agreement as to them. The evidence at the hearing did not specifically address any jailer who may have been in this group (if any remained at all). The memo was applied correctly to those hired before December 31, 2002 who had not had 150 hours by ratification, to those who may have gone below that number since then, and to those hired after January 1, 2003.

Accordingly, based on the evidence and arguments presented in this case, I issue the following

AWARD

1. The grievance is sustained to the extent that the memorandum of September, 2005 was applied to those jailers, if any, who were hired before December 31, 2002, had at least 150 hours of compensatory time as of ratification and have maintained at least that amount since then until September 7, 2005. As a remedy, for any such jailer who has had their compensatory hours reduced by pay out of overtime, they shall be allowed to replenish their compensatory

hours to the number immediately before September 7, 2005 and continue to maintain their balances above 150 hours without being subject to the caps in Article 27.

2. For all other bargaining unit members the County's position and memo does not violate the collective bargaining agreement and the grievance is denied.

Dated at Madison, Wisconsin, this 6th day of August, 2007.

Paul Gordon /s/
Paul Gordon, Commissioner

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