

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**HUMAN SERVICE CENTER LOCAL 79-A**

and

**HUMAN SERVICES BOARD OF ONEIDA, VILAS AND FOREST COUNTIES**

Case 20  
No. 66935  
MA-13693

(Compensatory Time Grievance)

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**Appearances:**

**Mr. Dennis O'Brien**, Staff Representative, AFSCME, Wisconsin Council 40, AFL-CIO, 5590 Lassig Road, Rhinelander, Wisconsin, appearing on behalf of Local No. 79-A.

**Mr. John Prentice**, Attorney, Simandl & Murray, S.C., 20975 Swenson Drive, Waukesha, Wisconsin, appearing on behalf of Human Services Board of Oneida, Vilas and Forest Counties.

**ARBITRATION AWARD**

Human Service Center Local 79-A hereinafter "Union," and Human Services Board of Oneida, Vilas and Forest Counties, hereinafter "Board," requested that the Wisconsin Employment Relations Commission provide a list of staff arbitrators from which the parties would select an arbitrator to hear and decide the instant dispute in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. Lauri A. Millot, of the Commission's staff, was selected to arbitrate the dispute. The hearing began before the undersigned on November 19, 2007 at Rhinelander, Wisconsin. The hearing was not transcribed. The parties submitted post-hearing briefs and reply briefs by June 23, 2008 at which time the record was closed. Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Award.

**ISSUES**

The parties stipulated that there were no procedural issues in dispute, but were unable to agree as to the substantive issues.

The Union framed the issues as:

Did the Board violate the collective bargaining agreement when it reduced, then eliminated, compensatory time banks for the Grievant's when it mandated use of compensatory time, and refused to pay out wages in compensatory time earned? If so, what is the appropriate remedy?

The Board framed the issues as:

Did the Board violate the collective bargaining agreement when it reduced compensatory time banks and mandated use of compensatory time and refused to pay out wages for compensatory time earned? If so, what is the appropriate remedy?

Having considered the evidence and arguments of the parties, I frame the issues as:

1. Did the Board violate the Article 10 of collective bargaining agreement when enforced the 165 hour, 90 hour and "zero" hour draw down provisions of Overtime/Compensatory Time Policy?
2. Did the Board violate Article 10 of the collective bargaining agreement when substituted compensatory time for requested vacation leave?
3. If yes to any of the above, what is the appropriate remedy?

**RELEVANT CONTRACT LANGUAGE**

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**ARTICLE 2- MANAGEMENT RIGHTS**

The Board possesses the sole right to operate the Human Services Organization and all management rights repose in it, subject only to the provisions of the Agreement and applicable law. These rights include, but are not limited to the following:

- A. To direct the operations of the Organization.

. . .

- F. To maintain efficiency of organization operations entrusted to it.

. . .

H. To introduce new or improved methods or facilities.

I. To change existing methods or facilities.

. . .

L. To determine the methods, means and personnel by which operations are to be conducted.

Any dispute with respect to the improper application of said management rights contrary to language contained in this Agreement may be processed through the Grievance and Arbitration procedure contained herein; however, the pendency of any grievance or arbitration shall not interfere with the right of the Board to continue to exercise these management rights.

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#### **ARTICLE 10 – HOURS OF WORK**

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- a. Overtime: Employees required to work other than their normal scheduled hours of work shall receive compensatory time off or pay for all overtime hours worked. Professional employees who are exempt under the FLSA shall receive pay or time off at the straight rate and all other employees shall receive pay or time off at the straight rate for hours worked up to forty (40) hours and at the time and one half rate (1½) for hours worked in excess of forty (40) hours. Compensatory time off or pay shall be determined by mutual agreement between the employee and supervisor, but in the event of no agreement, the employee shall receive pay for overtime hours worked, however, requests for comp time off shall not be unreasonably denied. Compensatory time may be taken off at the employee's convenience subject to approval by the Executive Director or his/her designee.

Prior approval shall be obtained for all overtime hours worked except in emergency situations where prior approval cannot be obtained because of the need to provide services on an emergency basis.

When an employee works less than his/her regularly scheduled hours per week, the hours he/she is short must be made up or covered by vacation time or accrued compensatory time. Otherwise the time will

be considered leave without pay and adjustments will be made in the employees pay for that period.

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### **BACKGROUND AND FACTS**

In 2005, the Board experienced a large budget deficit and therefore engaged in a comprehensive review of expenditures. During the review, the Board noticed that the salary line item was well into the red and further investigation revealed that three-fourths of the Board staff were working overtime. Concurrent to budget evaluation, the Board began an overall evaluation of its policies and procedures. As a result, Ann Cleereman, Executive Director, focused her attention on drafting a policy that would reduce overtime expenses. Cleereman submitted a draft Overtime/Compensatory Time Policy to the Board's Policy Committee. In the draft dated March 29, 2005, management recommended language in order to gain compliance with the Fair Labor Standards Act. Management's specifically recommended that employees would be limited to carrying no more than 240 hours by freezing their banks as April 1, 2005 and for any employee that was carrying an excess of 240 hours in their comp bank as of April 1, 2005, they would need to make arrangements with their immediate supervisor to use that excess time prior to December 31, 2005.

The Policy Committee modified the Overtime/Compensatory Time Policy as presented, and its final version, as revised June 2005, reads as follows:

**PURPOSE:** To comply with Fair Labor Standards and Board directive to control costs, as well as to provide consistent standard for all employees.

### **POLICY:**

1. The normal working hours of the agency are **8:00 A.M. – 4:30 P.M., Monday through Friday.**
2. Any employee who is not working the “normal” working hours of The Human Service Center, must have pre-approval for their alternate schedule. (See Policy-“Alternate Work Schedule.”)
3. The Human Service Center currently has a **no overtime policy in effect** for all its employees.
4. To comply with Fair Labor Standards for public employees, no employee may carry more than 240 hours in their comp bank; therefore, as of April 1, 2005, **all comp banks are frozen.**

5. Any employee carrying an excess of 240 hours in their comp bank as of April 1, 2005, must make arrangements with their immediate supervisor to use that excess time prior to December 31, 2005. Banks must be further reduced to 165 hours by December 31, 2006; 90 hours by December 31, 2007; and all comp banks must be at a "zero balance" by December 31, 2008.
6. Employees may not waive their right to overtime. In other words, you may not perform work for The Human Service Center and not be paid for that work. If performing job description responsibilities before 8:00 A.M. and/or after 4:30 P.M. results in unauthorized overtime, the employee will be subject to the standard disciplinary process of The Human Service Center.

. . .

Management's general practice with regard to new or modifications to policy was to make the changes on the computer server. Employees are not notified of the changes, but have access to the server. That did not occur in this instance. Rather, on January 24, 2006 Judy Citro, Administrative Assistant, sent the following e-mail to all staff regarding the Overtime/Compensatory Time Policy:

After the Policy Committee met in May and reviewed many of the policies and procedures we had in place, all were changed on the server except for the Overtime/Compensatory Time Policy. Item number 5 stated that comp banks had to be down to 240 hours at the end of 2005. The Policy Committee also set up guidelines for 2006-2008 which I have changed in the policy on the server. Also, the Committee removed several paragraphs in the policy that referred to Authorization of Overtime, their reasoning being we have a No Overtime Policy in effect. If you have any questions regarding these changes in the policy, please contact me. I apologize for this oversight (sic) with item #5 and appreciate it was brought to my attention this early in the year so employees have time to comply with the request for 2006. Thanks!

Following distribution of the above e-mail, Dennis Nelson, Union Steward, responded to Citro in an e-mail and inquired, "Don't you think the changes in the policy now conflict with the language in the Labor Contract that is between the Board and the Union?" Nelson stated to Citro that he believed there was a conflict and that he would be checking with Union Officials regarding the new policy.

Citro responded to Nelson's question on January 27, 2006 as follows:

Dennis: I think Ann will take that before the Policy Committee as that was their decision. I got the memo you sent Teri and Teri's response to Ann (for the file). I think the idea about using comp to pay for extended medical after retirement is a good one, but I honestly never heard the union bring any mention of that to the table. Has it been brought forward in the past (like prior to my arrival here)?

After receiving no response from the Citro, Nelson sent Cleereman an e-mail on October 19, 2006 asking:

Ann,

In January of this year, Judy Citro sent out an "all staff e-mail reminding us of the changes in the Overtime/Compensatory Time Policy. Some of the changes regarded the use of banked hours by certain dates. In her memo Judy asked if we had questions regarding these changes to let her know. I did have a question and asked her, "Do you think the changes in the policy now conflict with the language in the Labor Contract?" Judy responded saying she thought you would be taking that issue before the Policy Committee.

Now that we are approaching the end of the year, I am wondering if you did bring the question up before the Policy Committee/Board and if so what was the outcome. If it was not brought up, are we still expected to begin using up our banked comp time in accordance with the policy? Please let me know soon some (sic) so I can make plans regarding my banked time.

Thank you.  
Dennis

Cleereman responded to Nelson in an e-mail on October 19, 2006 as follows:

Dennis I took the policy to the Policy Committee last year. We had the policy stating that we just wanted banks to get down to 200 hours and the Policy Committee changed it to state that the banks need to get totally down to 0 or paid out. They did it over a few years so people could have the option of taking the time off during the years. I do not see how this policy conflicts with the contract. All these policies were reviewed by our attorney and they have been in place for 1½ years and the Union has not questioned any of them?

Dennis could you please cc John [Turzenski] in on these e-mails or better yet go to him with the questions...if he cannot answer it...he will come down and discuss it with me. I am glad you feel comfortable coming to me with the

questions, but I need John to learn his job duties and bypassing him does not help that. Thanks!

Any more questions let me know...

The Union filed three grievances concerning the Board's policy. The first was filed on behalf of Julie Hankwitz on November 21, 2006 which stated:

Article 10C of the Labor Agreement has been violated in that Julie has been asked to reduce her comp time bank to 164 hours by 12/31/06 and its is not convenient for her to make that reduction by then. Also, she has been asked to submit a reduction play while other employees have not been asked.

Hankwitz filed a second grievance on December 7, 2006 and stated:

Article 10-c of the labor contract has been violated. Tamara instructed Julie to use 10.99 hours of comp time by 12/31/06. To comply, Julie chose to be paid for those hours. Tamara wants her to take the time off instead. In cases of such disagreements, the employee is to be paid.

A third grievance was filed on January 10, 2007 on behalf of Dennis Nelson and stated:

Article 10-C of the labor agreement has been violated in that Dennis received a payout of 35.14 hours [on] 1/5/07 from his banked comp time to reduce his comp time bank to 165 hours. Dennis did not request the payout. Per Article 10-C "Compensatory time off or pay shall be determined by mutual agreement between the employee and supervisor."

All grievances were processed through all steps of the grievance procedure.

Additional facts, as relevant, are contained in the **DISCUSSION** section below.

### **POSITIONS OF THE PARTIES**

#### **Union Brief**

The Board violated the clear language of the collective bargaining agreement when it exceeded its management authority and unilaterally promulgated a policy in a manner which ignored the contract, and eliminated compensatory time and employees' compensatory time banks.

There are several facts not in dispute. These include: 1) the parties agreed to the concept of compensatory time which could be acquired in lieu of paid overtime; 2) employees

choose to take compensatory time in lieu of pay; 3) there was no limitation on the number of hours that an employee could accumulate in his/her compensatory time balance bank ; and 4) some employees maintained a compensatory time bank.

The Union concedes that mutual agreement for use of compensatory time is required. As a result, if a supervisor does not agree to the accumulation of compensatory time requested by an employee, then the employee may not accumulate time. The Union further concedes that after the Employer became aware of the federal restriction on the maximum accumulation of compensatory time, it had the contractual right under Article 2 to comport with federal standards. But, the Board's actions far exceed its authority and violated the labor agreement.

The Union suggests that the Board should shoulder the burden to show that its actions were within the scope of its authority. The facts establish that Director Cleereman presented a plan to the Policy Committee addressing the potential federal standard violation. In response, the Policy Committee first insisted on a limit lower than the federal standard and then enthusiastically called for the elimination of all employee compensatory time banks.

The Board's claim that the Union agreed to the compensatory time policy changes lacks merit and violates the parties' labor agreement. Article 25 provides that the labor agreement constitutes the parties entire memorandum of understanding and that any amendments or supplements must be signed by both parties. The Union was never provided a copy of any policy change as it related to compensatory time and compensatory time banks. The Board's claim that posting a policy change on the Board's network, however untimely as occurred in this instance, constitutes either notice or acceptance is laughable.

The Union brought its concerns regarding the apparent conflict between the policy and the collective bargaining agreement two days after it became aware. The Employer agreed to "take it to the Board". Greater than nine months later, the Union received a response from Cleereman and thereafter filed grievances. The Board's claim of waiver is absurd.

The Union is not seeking a financial "windfall" as the Board asserts. Rather, the Union is asking for management to be told that it must cease and desist from ignoring the terms of the collective bargaining agreement. Moreover, the Union seeks an order that will allow an employee who wishes to reestablish his/her compensatory time bank up to a maximum of 240 hours the opportunity to do so.

### **Board**

The Board is not prohibited from buying out employee compensatory time banks. No contract language exists that addresses the buying out of compensatory time. The Board established a three-and-one-half (3½) year schedule to reduce employee compensatory time banks to zero.



The Union's grievance is barred by operation of the doctrine of laches. The Union waited until the end of 2006 and beginning of 2007 to object to the policy which was greater than one-and-one-half (1½) years after implementation. The Union should not be rewarded for waiting months to object to the compensatory time buyout especially since they are asking for restoration of the banks. Had the Union acted diligently, the Board could have negotiated a resolution to the issue during bargaining.

The Board has the obligation and contractual right to make decisions in order to maintain compliance with federal law. Federal law requires that compensatory time banks not exceed 240 hours. The Board's imposition of a 240 hour maximum compensatory time bank was lawful.

The Board decision to no longer allow employees to accrue compensatory time for overtime hours worked is consistent with the terms of the collective bargaining agreement. The agreement provides that the employee and the supervisor must mutually agree to the manner in which overtime hours will be credited to the employee, i.e. whether they will receive compensatory time or payment for overtime hours worked. Compensatory may only be taken if the Executive Director or his/her designee offers approval. The Board decided that it no longer wished to deal with compensatory time accrual and instructed management to deny its approval. The collective bargaining agreement gives the Board this right. The Board's policy does not unduly limit the use of compensatory time by the employees.

If the Board violated the labor agreement, the status quo should be maintained. The employees seek to have their compensatory time restored, thus they are seeking a double remedy since they have already been paid out for the time earned. The law does not allow employees to gain a windfall, especially from a public entity, when it serves to protect employee rights.

Accrual and use of compensatory time off in lieu of cash payment for overtime is allowed in only the public sector and must be administered in such a way that protects the public's interests. Compensatory time off was designed to help public entities contain costs and efficiency. The labor agreement provides the Board the right to object to the accrual of compensatory time and the existence of compensatory time banks and the policy changes as announced by the Board is consistent with these rights.

The grievances should be dismissed.

### **DISCUSSION**

These grievances relate to the Board's implementation of an Overtime/Compensatory Time Policy and its interrelation with Article 10 of the collective bargaining agreement.

Article 2 of the parties' collective bargaining agreement is the Management Rights clause and it provides the Board with broad discretion as to the management of the facility.

The traditional management view is that “management has reserved its right to manage unless it has limited its right by some specific provision of the labor agreement.” Elkouri and Elkouri, *How Arbitration Works*, 6<sup>th</sup> Ed. 2002 p. 640, citations omitted. Thus, unless the Board has negotiated specific language that limits its rights in the arena of overtime and compensatory time, then the Board’s actions in this regard are consistent with the labor agreement. I therefore move to Article 10 and the Hours of Work clause.

Article 10, sub-section C addresses overtime. The section provides that:

... Professional employees who are exempt under the FLSA shall receive pay or time off at the straight rate and all other employees shall receive pay or time off at the straight rate for hours worked up to forty (40) hours and at the time and one half rate (1½) for hours worked in excess of forty (40) hours. Compensatory time off or pay shall be determined by mutual agreement between the employee and supervisor, but in the event of no agreement, the employee shall receive pay for overtime hours worked, however, requests for comp time off shall not be unreasonably denied. Compensatory time may be taken off at the employee’s convenience subject to approval by the Executive Director or his/her designee.

Thus, the parties have negotiated regarding the topic of overtime and compensatory time. Since the parties have negotiated on this mandatory subject of bargaining, the Board’s Overtime/Compensatory Time Policy may not conflict with the negotiated language. Moreover, the Board may not unilaterally take back a term or condition of employment that it has granted through the bargaining process.

The facts establish that prior to April, 2005, the Board allowed employees to accrue compensatory time and to maintain a compensatory time bank in excess of 240 hours. After adoption of the Overtime/Compensatory Time Off Policy, the Board denied employees the previously granted right of carrying a balance of greater than 165 hours in 2006 and 90 hours in 2007 in their compensatory time off bank. The Policy further created an obligation for the employees to annually draw down their compensatory time banks to a “zero” balance or complete liquidation by 2008.

Nowhere in the language of subsection C does it recognize the accrual of compensatory time nor the maintenance of a compensatory time bank, but the record supports a finding that employees have been granted these benefits for some time. Board Executive Director testified that as of 2005, some employees had greater than 400 hours of banked compensatory time. The Union disagreed as to the bank balances, but acknowledged that at least Nelson and Hardwitz had at least 165 hours of compensatory time at the end of 2006. Although the record is silent as to when and how long it took the employees to earn these hours, it is fair to say that it took greater than a year or two, and likely greater than five years, for the employee to bank that many hours. Accordingly, I find that the past practice of

accumulating compensatory time and maintaining accumulated compensatory time in a compensatory time bank was proven at hearing.

The issue then is whether the Board may unilaterally change a past practice relating to employee compensatory time banks. Management generally has the freedom to make changes in processes and procedures in the exercise of basic management functions, but if an established custom or practice involves a “benefit” of peculiar personal value to the employees, then it is binding on the employer. Elkouri and Elkouri, *How Arbitration Works*, 6<sup>th</sup> Ed. (2002) p. 616. This is not a case where the Board’s actions involved primarily a method of operation or control of the work force, but rather, the Board’s action eliminated a benefit – the right to earn, accrue and maintain a compensatory time balance - which the employees have enjoyed for some time.

In MICHIGAN DEPARTMENT OF STATE POLICE, 92 LA 403 (Borin, 1989), the issue presented was whether an employee had the right to accrue compensatory time. Although the employer had not denied requests to accrue compensatory time in the past, it unilaterally changed its policy and denied employees the right to accrue compensatory time. Arbitrator Borin sustained the grievance concluding that since the practice of accruing compensatory time involved a working condition, the employer could not unilaterally change that practice.

In SHEBOYGAN COUNTY, 105 LA 605 (Dichter, 1995), the County issued a memorandum which informed employees that it would no longer approve compensatory time for sick leave absences although it had never denied any employee requests in the past. Finding that the County had breached the collective bargaining agreement, Arbitrator Dichter stated:

The Employer participated in negotiations. It was aware that the sick leave provision allowed for the accumulation of sick leave, but it was also aware that employees could and did utilize compensatory time when ill, notwithstanding the fact that they had sick leave available. It did not attempt to change that practice or the contract language during negotiations. It is not permissible for it now to do so unilaterally,. It is bound by the practices that existed when the agreement was negotiated.

SHEBOYGAN COUNTY, 105 LA 605 (Dichter, 1995)

I now move to the specific Board actions grieved.

### **Compliance with Overtime/Compensatory Time Policy**

Two of the grievances presented in the case relate to the course of action management followed in its attempt to bring employee compensatory leave banks into compliance with maximum compensatory leave bank hours as contained in the Overtime/Compensatory Time Policy. Management first directed an employee to create a plan of action that which would

reduce her compensatory leave balance to 165 hours by December, 31, 2006. The second course of action involved the involuntary pay out of compensatory time hours in excess of 165 at the end of 2006.

Grievant Julie Hankwitz was directed by her supervisor on or about November 21, 2006 to reduce her compensatory time bank by 10.9 hours by December 31, 2006. This was so that Hankwitz's compensatory time bank would be in compliance with the 165 hour maximum as created by the Overtime/Compensatory Time Policy.<sup>1</sup> There is no evidence in the record to explain how or why the Board settled on the amount of 165 hours, other than it was not a number recommended by management.

Grievant Dennis Nelson was paid out for 34.14 hours of compensatory time in January 2007. Nelson did not request this pay out. Rather, the Board liquidated the hours in order to reduce Nelson's comp time bank to 165 hours.

The record establishes that the parties' had a binding past practice of allowing employees to accrue and maintain a compensatory time leave balance. Consistent with the decisions in STATE OF MICHIGAN, *Id.* and SHEBOYGAN COUNTY, *Id.*, I find that the directive to Hankwitz to deplete her balance by 10.9 hours and the pay out of 34.14 hours to Nelson so that their compensatory leave balances would comply with the Board Policy directive of 165 hours, violated the collective bargaining agreement. Moreover, the Board's adoption of the Overtime/Compensatory Time Policy which conflicted with the parties' binding past practice of allowing employees to accrue and maintain a compensatory leave balance amounted to an arbitrary and capricious exercise of management rights.

#### **Substitution of Compensatory Leave Hours for Vacation Leave**

After Hankwitz received the directive from her supervisor to reduce her compensatory time balance by 10.9 hours, she complied with the directive and requested a pay out for the 10.9 hours. Hankwitz's supervisor denied the request and unilaterally altered Hankwitz's vacation request such that she used the 10.9 hours of comp compensatory time prior to requested vacation leave.

Article 10-C provides that "compensatory time off or pay shall be determined by mutual agreement" and that "[i]n this instance, Hankwitz requested pay and the Board desired that she use compensatory time to cover an anticipated absence. The parties therefore did not "mutually agree". When the parties cannot mutually agree, the language of 10-C provides that that "in the event of no agreement, the employee shall receive pay for overtime hours". The clear language of Article 10 provides that the Grievant was entitled to payment for the 10.9 hours.

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<sup>1</sup> The Board's Policy directed employees to reduce their compensatory time bank to the FLSA mandated 240 hour maximum by the end of 2005. The Union does not dispute the Board's management right to ensure compliance with federal law and does not dispute the Board's right to direct this reduction.

Not only did the Board violate the clear language of the collective bargaining agreement when it denied Grievant Hankwitz payment for the 10.9 hours, its decision to substitute Hankwitz's compensatory time for requested vacation leave violated the labor agreement. Inclusive to the compensatory time administration procedures contained in 10-C is the clause, that "compensatory time may be taken off at the employee's convenience". This clause vests all rights as to when compensatory time may be requested with the employee, subject to approval by management. When the Board required Hankwitz to substitute her compensatory leave for vacation leave, the Board violated the labor agreement.

The Board argues that the Union was aware of the policy and failed to file a grievance until greater than one-and-one-half years after it was adopted. The Board specifically stated at hearing that there were no procedural issues in dispute. Thus, it waived its right to make this argument. Assuming arguendo it had not, the facts establish that the employees were not notified of the Policy until January 2006 and immediately thereafter the Union communicated its concerns. The Union further pursued this issue later in 2006, in the absence of a promised response from management, when implementation of the Policy would affect the Union membership. Thus, while the Union did not file a grievance in January 2006, it certainly put the Board on notice of its concerns and timely filed the grievances when its members would be harmed by the Policy.

#### AWARD

1. Yes, the Board violated Article 10 of the collective bargaining agreement when it enforced the 165 hour, 90 hour and "zero" hour draw down provisions of Overtime/Compensatory Time Policy.

2. All employees affected by the Board's improper enforcement of the Overtime/Compensatory Time Policy, effective November 2006, and thereafter, are to be permitted to buy back at the rates contemporary with the dates of overtime worked, any or all overtime for which they received payment and to convert it to compensatory time. Such buy back rights are to be exercised immediately and until the end of the business day on October 30, 2008 at which time affected employees who do not make any request shall be considered to have forfeited all buy back rights.

3. Yes, the Board violated Article 10 of the collective bargaining agreement when it substituted compensatory time for requested vacation leave for Julie Hankwitz in December, 2006 and the appropriate remedy is to restore Hankwitz's compensatory leave balance with 10.9 hours and to remove 10.9 hours from her vacation leave.

Dated at Rhinelander, Wisconsin, this 13th day of October, 2008.

Lauri A. Millot /s/

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Lauri A. Millot, Arbitrator

LAM/gjc

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