BEFORE THE ARBITRATOR

In the Matter of the Final and Binding Interest Arbitration Dispute between

WISCONSIN PROFESSIONAL POLICE ASSOCIATION/LAW ENFORCEMENT EMPLOYEE RELATIONS DIVISION

and

PORTAGE COUNTY (SHERIFF'S DEPARTMENT)

WERC Case 180, No. 63183, MIA-2565
Dec. No. 31158-A

APPEARANCES:

For the Association:
Mr. Thomas W. Bahr, Executive Director, Wisconsin Professional Police Association, 340 Coyier Lane, Madison, WI 53713.

For the Employer:
J. Blair Ward, Esq., Assistant Corporation Counsel, Portage County, 1516 Church Street, Stevens Point, WI 54481.

ARBITRATION AWARD

The Association has represented a bargaining unit of Sheriff's Deputies for a number of years; the parties' most recent collective bargaining agreement expired on December 31, 2003. On January 8, 2004, the Association filed a petition with the Wisconsin Employment Relations Commission requesting arbitration pursuant to Section 111.77 (3) of the Municipal Employment Relations Act, Wis. Stats. Efforts to mediate the dispute by a staff member of the Commission were unsuccessful, and an impasse investigation was closed by the Commission's order for binding arbitration dated November 30, 2004. The undersigned Arbitrator was appointed by Commission order dated December 14, 2004. A hearing was held in this matter in Stevens Point, Wisconsin on March 3, 2005. No transcript was made, both parties filed briefs, the County filed a reply brief, and the record was closed on May 6, 2005.

Statutory Criteria to be Considered by Arbitrator
Section 111.77(6)

(a) The lawful authority of the employer.
(b) Stipulations of the parties.
(c) The interests and welfare of the public and the financial ability of the unit of government to meet these costs.

(d) Comparisons of the wages, hours and conditions of employment of the employees involved in the arbitration proceedings with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally:

1. In public employment in comparable communities.
2. In private employment in comparable communities.

(e) The average consumer prices for goods and services, commonly known as the cost of living.
(f) The overall compensation presently received by the employees, including direct wage compensation, vacation, holidays and excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.
(g) Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.
(h) Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties in the public service or in private employment.

The Association's Final Offer

The Association's final offer consists of all tentative agreements reached between the parties, together with the status quo from the 2001-2003 Agreement on all remaining items.

The Employer's Final Offer

1. All tentative agreements.
2. Section XV -- Hours of Work
   C. Overtime: Delete: "At the end of the year the employee shall have the option to have compensatory time in either paid out or carried over up to a maximum of two hundred (200) hours into the next year." Add (effective 1/1/05): "However, any accumulated compensatory time in excess of two hundred (200) hours will be received in pay."
3. Section XV -- Hours of Work
   D. Training Time: Modify to add underlined language as follows: "Under this Section one (1) school day shall be equivalent to one (1) workday when the training and travel time for the school day is for six (6) hours or more. If the training and travel time is not for six (6) hours or more the employee is expected to return to work after the training is complete for the remainder of their shift...

The Association's Position

The Association notes first that there is no testimony or other evidence implying that the lawful authority of the Employer is at issue here, that a number of items technically included in both final offers are essentially stipulated by the parties, including wages, and that the parties also stipulated at the hearing to language required to facilitate implementation of the new disability insurance package. The Association argues that interests and welfare of the public are best served by an award in the Association's favor, because maintenance of a high level of morale is imperative to officers' well-being and because the key issue here is one in which the status quo is not out of line with the comparables. The Association sees other law enforcement departments as the key test, because the

issue of compensatory time accrual is different for law enforcement departments, which work 24 hours a day, seven days a week, than for other types of bargaining unit. The Association argues that the Employer has put nothing into evidence to indicate any difficulty in meeting the costs of the Association's final offer, so that inability to pay is not a factor.

The Association argues that of the County's offer of data from 15 municipalities all over the state should be rejected, as the parties agreed in a prior interest arbitration in 1995 to a list of municipalities which should serve as the external comparable pool, and since the County has made no showing to indicate that this list was no longer valid. Thus Marathon County, Wood County, and the cities of Marshfield, Wausau, Stevens Point, and Wisconsin Rapids should remain the external comparables. The Association argues that the primary dispute concerns maximum accrual of compensatory time, and that there is no pattern or consistency among the external comparables on this issue. The Association points to a range from a low of 50 hours in Wisconsin Rapids to 480 hours in Stevens Point, and argues that this reflects particular municipalities and their associated unions reaching agreements which address particular local conditions. The Association also argues that the County's argument concerning internal comparability should be rejected, because deputies work substantially different shifts, workdays, and duties compared to all other employees of the County, pointing particularly to the fact that the other employees cited by the County work a Monday to Friday schedule with day shift hours.

The Association argues that the Association's final offer is consistent with settlements among the comparables and with the cost of living generally, and that nothing in the overall structure of wages and benefits in this Department elevates any of the employees to such a level compared to the comparables that the Association's final offer could be regarded as unreasonable. The Association further argues that there are no changes in the circumstances during this proceeding, or other factors customarily considered, that appear relevant. Thus, the Association focuses on the well-known, three-pronged "Reynolds test" of a proposed change in existing contractual language:

1. Does the present contract language give rise to conditions that require change?
2. Does the proposed language remedy the condition?
3. Does the proposed language imposes an unreasonable burden upon the other party?

The Association asserts that the County's data supporting its argument that the existing language causes a problem are flawed. The Association argues that the parties voluntarily negotiated the current language only recently, in 2001, and that there is a presumption that it was negotiated in for good reason. One such reason, the Association asserts, is to allow officers to bank enough compensatory time to cover the potential annual "deficit hours" caused by the Department's unusual work schedule. The Association points to testimony by the Chief Deputy that it is not unusual for officers to owe more than 50 hours at the end of the year and that "most guys owe around 80 hours." The Association also pointed to testimony by one sergeant that he has experienced as much as a 149 hour deficit. The Association also argues that under Section VII of the Agreement, probationary employees are not allowed any sick leave access during their probationary period, so that if one becomes ill or injured, accrued compensatory time is the only way to remain in a pay status. The Association argues that the real causative factor for the County's problems is not compensatory time accrual, but rather, high levels of overtime, pointing to the Chief Deputy's testimony to the effect that the County had been short on deputies during 2004 but was moving to fill the vacant positions, thus curtailing the need for overtime along with accrual of compensatory time. The Association therefore argues that there is no

need demonstrated for the change, as well as a burden on officers created by the proposed change. The Association describes the County's proposed quid pro quo as inadequate to compensate for this burden.

The Employer's Position

The County argues that there is currently no cap in the collective bargaining agreement on compensatory time, so that the maximum accumulation is limited only by the Fair Labor Standards Act, to a maximum of 480 hours. The County argues that the interests and welfare of the public are best served by reducing this large maximum to 200, because a pattern has developed in which when a deputy uses compensatory time off, either one less deputy must be scheduled for that shift, or a replacement deputy must be scheduled to take his or her place. The County argues that it is not in the best interests and welfare of the public either to provide the public with less than full protective services, or to pay the replacement deputy time and a half as well as time and a half rate of comp time to the deputy taking the time off, the practical result in many instances. The County points to its Exhibit 18 as showing that in 2004, the Department had to choose between one option or the other on 155 different days. Because of tight staffing in general, the County argues that calling in deputies to replace those who take compensatory time has the effect of pyramiding the total entitlement to compensatory time, as each deputy is then replaced by another who has to be called in at the overtime rate. The County argues that a cap of 200 hours keeps some limit on this trend. The County also argues that it has experienced large end-of-year payouts under the current system, which is difficult to budget for, and that it is not unreasonable to attempt to mitigate the financial impact at the end of the year by capping the total accrual per deputy at all points during the year.

In its brief the County agrees to the same list of comparables as argued by the Association. With respect to settlements among those comparables, the County notes that Marshfield settled at a 2.3% wage increase for 2004 and the City of Stevens Point settled at 2.125% for that year, with the City of Wausau settling for 3%. The only two municipalities in the comparable pool which settled for more for 2004 (Wisconsin Rapids at 3.5%, and Wood County at 4%) also incorporated increases in employees' contributions toward health insurance premiums at that time. None of the comparables are settled for 2005, such that the evidence shows that Portage County has either met or exceeded its external comparables in a wage increase terms. On the specific issue of compensatory time, Portage County provides more flexibility than most of the comparables: the City of Stevens Point and the City of Wausau have the FLSA maximum accumulation of 480 hours, but the others are substantially lower, with Marathon County at 56 hours, Wood County at 100 hours, the City of Marshfield at 70 hours and the City of Wisconsin Rapids at 50 hours. The County argues that its offer is thus substantially greater than most of the comparables. The County notes that there is no evidence in the record with respect to private employment.

The County argues that the CPI for January 2004 was 1.82% and for January 2005 it was 2.62%, both of which are handily exceeded by the County's 3% wage offer in each year, supporting the reasonableness of the County's final offer. The County argues that the substantial increase offered in the disability insurance benefit should be regarded as a quid pro quo in support of the County's proposals on compensatory time accrual and training time, since the present disability insurance benefit has remained unchanged since the early 1980s and since the County agreed to match the

standard (set in other internal units) specifically as a way to offer a quid pro quo for the compensatory time accrual change proposed. The County notes that there have been no relevant changes in circumstances during this proceeding, but as to "other factors" points to its Exhibit 3, showing maximum compensatory time balances for other municipal employers which are admitted not to be comparables, arguing that while these are not intended in derogation of the parties' agreement as to external comparables, they are supporting evidence as to what is considered reasonable over a broader geographic area, and that the range is from 24 hours to 144 hours, with five employers not allowing compensatory time carry-over at all. Similarly, the County argues that it is appropriate to compare to internal comparables in this respect, noting that the only bargaining unit similar to the deputies is the Corrections officers' group, which has no contractual cap on compensatory time and is allowed a maximum of 200 hours carried over to the following year. All other units have either zero or 40 hours maximum accrual, or must use up all compensatory time within either 31 days of earning it, or 60 days from the date of the month in which it was earned, depending on the unit in question.

The County responds to the Association's concern for new deputies by arguing that its 200 hour accrual proposal is ample to cover the needs of new deputies, pointing to three deputies hired in 2003 and calculating that each of the three accumulated enough compensatory time to be able to carry some over to the next year both in 2003 and 2004, while only one of the three ever approached 200 hours at any one time in his bank. That one, however, had a balance of 427.5 hours at the end of 2004, an extraordinarily high number that calls into question any possible need for it for such purposes as the "makeup of deficit" hours argued by the Association. The County argues that under the current system, by the end of 2004 the deputies as a group were holding over 5000 hours of compensatory time balances, so that the County is now required to maintain a large financial reserve to allow for the possibility of a lump-sum end-of-year payout of over $110,000. The County argues that this is unreasonable, and that its disability insurance improvement represents a significant quid pro quo which will cost the County an additional $9,400 per year (at 2005 rates), a significant amount given that there is no evidence that any employee will be significantly harmed by a change that leaves them free to accumulate more compensatory time hours than most of them ever accumulate anyway.

With respect to training time, the County argues that this proposal merely codifies existing past practice and implements a reasonable interpretation of the existing language. The County notes that the Association offered no testimony or other evidence supporting any objection to this change.

In its reply brief, the County contends that the two provisions it has sought changed in its final offer are minimal requests which have little impact on the Association or any of its members. The County argues that only one newly hired deputy accumulated in excess of 200 hours at any one time even though the Association's argument was predicated on the needs of newly hired deputies. The County argues that it is the Association which should offer a quid pro quo for the generous level of wages offered here along with the disability insurance improvement, and that the Association has made no such offer. The County argues that the Association has offered no evidence to support how the County's proposed change would decrease morale of deputies or otherwise harm the public, and also that the County has stipulated to the list of comparables and is not trying to mislead anyone, but that even within those comparables the majority have sharply less than the 200 hour maximum accumulation proposed here; that the internal comparables should not be ignored; and that the deputies seven-day-on/seven-day-off schedule actually allows more flexibility for employees to take time off to make personal plans that might be true in other bargaining units; that the overall

compensation factor should favor the County since only one of the comparable municipalities offers an LTD plan to officers; and that the fact that a large number of officers do not have compensatory time banks over 200 hours is not the issue. Instead, the County argues, the issue is that all of the officers are free to accumulate large compensatory time banks, such that the pattern of increases seen over the past few years, if left unchecked, will create serious problems for scheduling and for the Department's ability to manage its budget effectively. The County argues that the fact that it was willing to negotiate a high effective accumulation limit in 2001 should not bar it from proposing a change, with a suitable quid pro quo as proposed here, when experience demonstrates that the existing arrangement proved unworkable. And with respect to the alleged need for large amounts of accrued compensatory time to make up for hours owed at the end of the year under this Department's schedule, the County contends that it is mostly new deputies who owed the County about 80 hours of time, not all deputies, and that the County ends up each year owing senior deputies time, not the reverse. The County also argues that even the 80 hours most new deputies out is still significantly under the maximum bank the County is proposing, and argues that the one instance of a 149 hour deficit in the record appears to have dated from almost 20 years ago. The County also notes that it is not proposing to change the number of hours a deputy can carry over into the following year, so that many of the points made by the Association are irrelevant.

Discussion

Training Time:

There is no evidence in the record to indicate either that the training time proposal of the County is anything other than the minor clarification of existing practice the County argues, or that the existing practice has caused any particular problem in the absence of clear language. But the Association makes no argument against this proposal. I see no reason why the County should be expected to put forth a quid pro quo for so noncontroversial an item, and I conclude that it does not weigh significantly for or against either party's proposal.

Compensatory Time Accrual:

It is clear that compensatory time, more than most benefits, reflects practices and management styles peculiar to one particular department. Here, some evidence favors the County's argument that the numbers of hours accumulated have at times gotten out of hand. In particular, while there was no dispute among witnesses that staffing levels generally assume adequate coverage with one officer missing on a shift, the County has shown in its Exhibit 18 not only 155 different days in 2004 on which at least one shift was short by more than one officer, but that often, more than one shift was affected, with a total of more than 300 shifts in 2004 on which there was a shortage of at least two officers. There is also some inherent logic to management's concern that large amounts of compensatory time, coupled with tight staffing, can lead to a "pyramiding" situation, in which an employee who has put in eight hours' overtime is entitled to 12 hours of compensatory time off, and an employee called in to replace him or her is then entitled to 18 hours off, and so on.

But most of these do not represent situations in which multiple deputies were using comp time at the same time. Instead, most shifts in which two or more officers were off appear to represent situations in which one officer was allowed compensatory time and another was either on vacation or training time, or became sick. It is not clear whether a majority of these instances would have been known before the comp time was approved; I note that the existing contract language allows management

discretion as to whether to allow any particular shift off as comp time.[1] And the Association did not directly rebut the County's evidence of an increasing pattern of compensatory time taken: Employer's Exhibit 16 shows between 85 and 93 hours taken per officer on average in 1998, 1999 and 2000, with 114 in 2001, 136 in 2002, 115 in 2003, and 144 in 2004.

Yet there is also evidence that the pattern of increases in comp time taken per officer may not be permanent. In particular, the Chief Deputy testified that the Department was one deputy short for most of 2004, due to a delay in hiring, and that this increased overtime sharply. Filling one 2088-hour employee's time for a full year could alone logically generate as much as fifty hours' additional overtime for each of 40 deputies. It is therefore conceivable that this one delayed hire could have effectively accounted for the entire increase from 2003 to 2004 in comp time taken (29 hours per officer on average.) These seem unlikely to become routine; a retirement followed by a new hire who did not work out, together with an expired eligibility list that delayed a replacement, should not be assumed to be a recurring situation. Thus it is not clear that the trend, if such there be, will continue. Furthermore, even for 2004, Employer's Exhibit 6 shows that of the 41 officers in this unit, only 15 reached an accumulation of something over 200 hours even once during the year. But among these 15, even assuming that every hour marked as "comp taken/paid out" was actually taken as comp time rather than paid out in cash[2], only about half reduced their totals to below 200 hours by the end of the

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[1] I do not, however, believe that this should be treated as a particularly effective remedy for the problem complained of by management, because the result could be perverse; no evidence was offered that rebutted the Chief Deputy's testimony that supervisors have tried to accommodate employee requests, and it does not seem in either party's interest to lay stress on an increased rate of management denial of compensatory time requests as a solution, as this would likely exacerbate tensions over this issue.

[2] The evidence in the record does not allow distinguishing whether compensatory time shown an Exhibit 16, other than at the end of the year, was taken out in cash or in time, but it is quite clear that it cannot have been taken out in the form of time in every instance, based simply on the numbers; for example, deputy Paul Stroik took out 203 hours' comp time in a single pay period in 2004, which manifestly could not have all been in the form of time.

year. Under existing language, the remainder were paid out in cash anyway for the hours over 200 at the end of the year. I do not accept the County's argument that it makes much difference whether a budget record needs to be kept to the end of the year, or for some shorter period, given that the County is plainly capable of maintaining spreadsheets and databases.

At the same time, it is notable that a substantial majority of the unit, even in the year which put the greatest stress on overtime because of the hiring delays, never reached 200 hours accumulated compensatory time at any point. The record is not sufficiently detailed to permit a full understanding of whether only new deputies typically owe time to the Department at the end of the year under its unusual schedule, or whether this pattern is more widespread. I can only rely on the Chief Deputy's testimony that it is not unusual for a deputy to owe fifty hours and that "the most" owed is about 80 hours at the end of the year. This suggests that the pattern is broader than just among the new deputies, and also indicates that the accumulation of compensatory time is somewhat illusory, because it appears to be a standing pattern that employees turn in part of their compensatory time accrual to make up the deficit. On the other hand, it is also worth noting that new deputies appear to have the opportunity to earn significantly more compensatory time under either party's proposal than any amount of sick leave they could hope to accrue in their first year.

The overall consequence is something of a "tempest in a teapot." The Association exaggerates the effect of the proposed change, both in terms of the new deputies' need for the existing arrangement and in terms of any likelihood that the majority of the employees in the unit would be affected. Meanwhile, the County has offered a very reasonable quid pro quo for a change of no great consequence: I accept that the County need not otherwise have offered to agree to the Association's proposed change in the disability provision, given its highly comparable wage increases and the general level of benefits. But the offer of a suitable quid pro quo is the last of the elements considered in the three-pronged test for a reason: A party should not be able to force a change in contract language against the wishes of its counterpart merely by putting "enough" on the table in some unrelated benefit. Here, I must conclude that the County has exaggerated the need for the change in the first place. It was entirely predictable upon introducing the current contract language, only one contract ago, that some employees might indeed accumulate compensatory time banks over 200 hours at some point or other during the year, while only a minority have done so. Furthermore, based on the evidence, the conditions that gave rise to significantly higher comp time usage for 2004 may well have been ameliorated by the end of the year. Also, the Employer's proposal, as written, seems to run some risk of exacerbating rather than reducing actual draw-down of comp time—the main problem, as that is what triggers the "pyramiding" problem—precisely because it eliminates the ability to bank so much of it that substantial amounts will remain unused into the new year and thus be paid out in cash then.[3] And the asserted pattern of increases shows an additional inconsistency: In 2003, "comp time actually taken" levels dropped back to roughly those of 2001, casting further doubt on whether a long-term trend is present.

[3] Based on Employer's Exhibit 6, this seems to have happened in 2004 with more than half of the 15 deputies who accumulated over 200 hours at all.

In a nutshell, under the well accepted three-pronged test, it is the need for a change that must be demonstrated first. Where the parties are essentially at par over all three elements taken together, and particularly where the evidence of need for a change, as well as the efficacy of the particular new formula proposed, has significant weaknesses, the status quo must prevail.

The Statutory Factors:
In terms of the specific statutory factors, the lawful authority of the Employer and financial ability are not at issue. The stipulations of the parties include a package that is in no way remarkable, except for the addition of a benefit offered as a quid pro quo, which is discussed below. The interests and welfare of the public are served both by high employee morale and by the Employer's ability to keep costs under control, but since neither element appears as severely impacted as the respective party urges, this factor is essentially neutral. In external comparability terms, the Employer's proposal is closer to the average of the comparables, but two of the comparables have the same arrangement as the current language here, and neither of those is claimed to have the offsetting factor of a likely end-of-year time deficit to be made up by the employee. I conclude that the external comparability factor is neutral. Internal comparability generally favors the County (except for the corrections officers, as to whom there is little evidence in the record) but is not entitled to much weight on the particular issue that governs this matter, because compensatory time accumulation is so specific to the manner of operation of a particular department and because none of the other internal bargaining units has a comparable work schedule. Comparability to the private sector was not argued. The CPI and overall compensation factors are neutral for the same reasons as apply to the stipulations of the parties. And there were no material changes during this proceeding. That leaves the "other factors," which here heavily turn on the customary three-pronged test for evaluation of a proposal of imposed change in contract language. As noted above, I find that this factor favors the Association, because the evidence supporting the need for a change and supporting the efficacy of the change actually proposed are not strong enough, even in view of the reasonable quid pro quo offered.

Summary

There might admittedly come a year when patterns of accumulation and use of compensatory time would justify the proposal the County made here, or more likely, a reformulation that better addresses the weaknesses noted. But because of the clearly present temporary factors causing an apparent spike in overtime in 2004, and because the evidence permits doubt as to whether implementing the County's proposal would reduce the actual usage of compensatory time among the minority of officers who ever accumulate more than 200 hours, the County lacks the factual basis to show that there is a real and continuing problem that would be solved by the language proposed and is not solvable to a similar level by other means, e.g. by greater expedition and efficiency in replacing deputies who leave. Thus while the Association, in my view, would not be significantly harmed by the Employer's proposal, it should not be forced to accept it. Since the training time proposal advantages neither party, the Association's final offer prevails.

For the foregoing reasons, and based on the record as a whole, it is my decision and

AWARD

That the final offer of the Association shall be included in the parties' 2004-2005 collective bargaining agreement.

Dated at Madison, Wisconsin this 5th day of July, 2005.

By_____
Christopher Honeyman, Arbitrator