

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :  
 of a Dispute Between :  
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 GREEN COUNTY : Case 115  
 : No. 45928  
 and : MA-6805  
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 GREEN COUNTY HUMAN SERVICES EMPLOYEES, :  
 LOCAL 1162-A, AFSCME, AFL-CIO :  
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Appearances:

Mr. Thomas Larsen, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.  
Mr. James A. Wyss, Green County Corporation Counsel, appearing on behalf of the County.

ARBITRATION AWARD

Green County Human Services Employees, Local 1162-A, AFSCME, AFL-CIO, herein the Union, pursuant to the terms of its collective bargaining agreement with Green County, herein the County, requested the Wisconsin Employment Relations Commission to designate a member of its staff as an arbitrator to hear and decide a dispute between the parties. The County concurred with said request and the undersigned was designated as the arbitrator. Hearing was held in Monroe, Wisconsin on January 9, 1992. No transcript of the hearing was taken. The parties completed the filing of post-hearing briefs on February 10, 1992.

ISSUE:

The parties stipulated to the following issue:

Under the contract between the parties, does an employe have the choice, up to 40 hours, between accruing compensatory time off or receiving overtime payment for overtime worked, or, does the County have the right to make the choice of payment or allowing accrual of compensatory time off for overtime worked?

BACKGROUND:

On March 22, 1991 1/ employes of the County's Human Services Department received a memorandum, dated March 21, from Dani Maculan, the Human Services Director. The memorandum read as follows:

The Human Services Board and Management have adopted the following policy effective March 20, 1991:

Green County Human services shall allow employees to accumulate compensatory time off at a rate of one and one half hours for each hour of overtime worked in lieu of overtime pay, up to a maximum accumulation of sixteen (16) hours.  
 All overtime worked beyond 16 hours of

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1/ Unless otherwise specified, all other dates herein refer to 1991.

compensatory time shall be paid.

Additionally, all overtime shall be paid in full at the end of the County fiscal year (December 31), for unrepresented employees, and each calendar year (June 30) for all represented employees.

An employee shall be paid in full for overtime worked at a rate of one and one-half hours to every hour of overtime worked by notifying the business office of your desire.

Compensatory time in excess of 16 hours has been converted to overtime and paid on this check.

During the parties' negotiations for their 1987-88 contract, the County proposed to add to Section 20.02 of the prior contract the following language: "In lieu of overtime pay, employees may receive compensatory time off at a rate of one and one-half (1 1/2) hours for each hour of overtime worked up to a maximum accumulation of forty (40) hours of compensatory time; all overtime hours worked beyond forty (40) hours of compensatory time shall be paid." Said proposed addition was agreed to, without change, by the Union and has remained as a part of Section 20.02 at all times relevant to this matter.

There was testimony that the Director who preceded Maculan arbitrarily decided which employees would be given compensatory time off and which employees would be paid for overtime work. The current Union President testified that during the period after Maculan became the Director in 1989 and prior to March 20, overtime always was accumulated as compensatory time off, up to a maximum accumulation of 40 hours, unless the employee requested to receive pay instead of compensatory time off. The Union President was not aware of any instance prior to March 20 where an employee with less than 40 hours of accumulated compensatory time off received pay instead of compensatory time off unless the employee requested pay.

A memorandum, dated September 28, 1988, given to new employees by the Department's Business Manager concerning payroll, timecards and personnel worksheets contained the following: "Comp time is given for overtime at a 1.5 to 1 ratio; the maximum amount of comp time that can be accumulated is 40 hours. After 40 hours are accumulated, overtime must be paid. We want to avoid paying overtime as it is not included in the budget, so please use some comp time when

your bank is approaching the 40 hour limit." Said language also is contained in a similar memorandum on those same topics from the Business Manager, dated February 27, 1991.

RELEVANT CONTRACTUAL PROVISIONS:

ARTICLE III  
MANAGEMENT RIGHTS

- 3.01 It is agreed that the management of the County and the direction of employees are vested exclusively in the County, and that this includes the right to direct and supervise the work of employees; to hire, promote, demote, transfer or layoff employees; to suspend, discharge or otherwise discipline employees for just cause; to plan, direct and control operations; to determine the amount and quality of work needed, by whom it shall be performed and the location where such work shall be performed; to determine to what extent any process, service or activities of any nature whatsoever shall be added or modified; to change any existing service, practices, methods and facilities; to schedule the hours and assignments of duties, and to establish reasonable work rules. The provision of this Article shall not be used for the purpose of undermining the Union or discriminating against any of its members.
- 3.02 The County and the Union have all the rights which they had at law except those expressly bargained away in this Agreement.

ARTICLE XX  
HOURS OF WORK

- 20.01 Hours of Work. The normal hours of work are eight (8) hours per day and forth (40) hours per week, one hundred seventy-three (173) hours per month. The normal hours of work are 8:00 a.m. to 5:00 p.m. with one (1) hour off, without pay, for lunch. Employees in the unit may request one-half (1/2) hour lunch hours with appropriate adjustment to the beginning or ending hours of work. The decision to grant (or rescind) such request shall be at the sole option of the Director of Human Services, or his/her designee, which shall not be unreasonably withheld. It may be necessary for certain employees to have a regular schedule outside of the previously-mentioned hours. A flexible schedule of hours other than that set forth above shall be mutually agreed to by the Employer and the Union on the condition that it is regular and is not used to avoid payment of overtime. The parties agree that the Employer shall have the right to establish at least one night time clinic for the benefit of the public, and employees may be

directed to work at such clinic in lieu of working during the normal hours of work. Pay for such work shall be at the regular rate. Hours that are given herein do not represent either minimum or maximum, but rather the normal hours of work.

- 20.02 Overtime. All hours worked outside of the regular hours of work and/or that are after forty (40) hours per week are paid at the rate of one and one-half (1 1/2) times their normal rate of pay. In lieu of overtime pay, employees may receive compensatory time off at a rate of one and one-half (1 1/2) hours for each hour of overtime worked up to a maximum accumulation of forty (40) hours of compensatory time; all compensatory time shall be paid.
- 20.03 Call-out Pay. Employees called out to work at a time not consecutive with their regular schedule of hours shall receive the equivalent of a minimum of two (2) hours of wages, either as compensatory time or pay.
- 20.04 Beeper Pay. Qualified members of the bargaining unit shall be responsible for wearing and responding to the "beeper" during nonwork hours over a one week interval on a rotating basis. Such employee shall be compensated on a per diem basis. Members wearing the beeper during the nonwork hours on weekdays shall be compensated at a rate of fifteen dollars (\$15) per day while members wearing the beeper on weekends and holidays shall be compensated at a rate of twenty-four (\$24) dollars per day.

#### POSITION OF THE UNION:

The Union contends that the intent of the parties, as well as the past practice, shows that the determination as to how overtime is to be compensated lies with the employe. Prior to March 21, the County's stated policy was to encourage employes to take earned overtime as compensatory time, as evidenced by the memoranda issued to new employes by the Business Manager. Testimony showed that employes who decided to take overtime in wages would mark their time cards to show that choice. The fact that the County deemed it necessary to develop and communicate a new policy, regarding the accumulation of compensatory time, supports the Union's position. An agreement on compensatory time between the parties, pursuant to the Fair Labor Standards Act, does not mean that the employer automatically shall be the sole determiner of whether an employe will be allowed to accumulate compensatory time.

The Union proposes that the County be required to reinstate the compensatory time taken away from the employes without the employes being required to buy back the compensatory time. At the very least, the County should be required to make an apology to the affected employes.

#### POSITION OF THE COUNTY:

The County argues that the sole right to determine whether to make payments for overtime worked or to credit compensatory time off is completely

within the discretion of the County. The language at issue was proposed by the County and was adopted in its entirety without change in negotiations. The County clearly intended to use, and does use, this language as a management tool. Since it is the County's language and there can be no compensatory time without it being in the contract, it is clearly the right of the County to pay or to allow compensatory time as it desires. Further, the language does not specifically state that the employe may make the determination of whether to be paid or to receive compensatory time off for overtime worked.

The management rights clause of the contract retains to the County all rights not bargained away in the contract, including the specific right to schedule the hours of employes. The County has in the past changed its practice on compensatory time. None of th previous practices have ever been questioned by the Union. The County had the right to implement such changes in the practice of compensating employes for overtime.

Section 20.02 uses the words "may receive compensatory time" which indicates the employe does not have an absolute right to compensatory time. Section 553.26 of the Fair Labor Standards Act specifically states that the employer has the option of providing compensatory time off in lieu of overtime pay. It does not matter whether previously cash was paid or compensatory time off was given. Subsequent change from payment or compensatory time does not affect the County's right to change again.

#### DISCUSSION:

Section 20.02 does use the term "may receive" in discussing compensatory time off for employes. Standing alone, said term could support the County's assertion that the decision to grant compensatory time off rather than pay for overtime was reserved to the County. However, the sentence containing the term "may receive" goes on to use the term "shall be paid" with reference to overtime beyond 40 hours of compensatory time. Thus, it is clear the County retained sole control over the form of compensation for overtime when the employe already had accumulated 40 hours of compensatory time. If the County had intended to also retain the right to make the decision of whether overtime would be taken as compensatory time off or would be paid when the employe had accumulated less than 40 hours of compensatory time, such an intent could have been stated in a clear manner as well. Instead, by mixing a mandatory term "shall" with a permissive term "may" in the same sentence, it can be argued that the language gives the employes the right to decide whether to take overtime as pay or as compensatory time until the employe has accumulated 40 hours of compensatory time, at which level overtime then would be received as pay without any choice by the employe. Since the language is ambiguous, other factors must be considered in determining the proper interpretation of the language.

Under the 1978-88 contract, which was the first contract to contain the disputed language, there does not appear to have been a consistent administration of Section 20.02. Rather, the Director, in an apparently arbitrary and inconsistent manner, determined which employes would receive payment and which employes would receive compensatory time for overtime. Under the 1988-90 contract, when the current Director, Maculan, assumed that position in 1989, said Director, to her credit, implemented a uniform policy under which each employe was allowed to decide whether to receive compensatory time or payment for overtime. There is no evidence that the parties discussed a change in either the language or the administration of Section 20.02 during their negotiations for a successor to the 1988-90 contract. Therefore, the County now can not unilaterally alter, over the objection of the Union, the manner in which it was administering Section 20.02 both under the 1988-90 contract and during the negotiations for a successor contract. The employes

had a reasonable expectation that the County would continue its existing practice of administering Section 20.02. If the employees had been advised of the County's desire to change said practice, then such could have been a subject for negotiations.

The existence of a practice, under which each employee decided whether to receive payment or compensatory time for overtime, is supported by the memos issued by the Business Manager. Those memos urge the employees to use compensatory time when their accumulations approach the 40 hour limit so as to avoid the payment of overtime because it is not included in the budget. If the County had retained the right to decide whether an employee would receive pay or compensatory time off for overtime when the employee had accrued less than 40 hours of compensatory time off, then the County could have directed the employees to take compensatory time off rather than requesting the employees to do so. Further, the memo dated February 27, 1991 contained the same request as earlier memos for employees to use compensatory time, even though all employees by then were covered by an overtime pay line item in the 1991 budget. Although the County contends those memos were not official County policy, it is difficult to believe management was unaware of the existence of the memos. Regardless, the memos were issued by a non-bargaining unit employee. Accordingly, it was reasonable for the employees to assume the memos represented the County's policy.

Section 553.26 of the FLSA must be read in conjunction with the other relevant sections. The undersigned believes that Sect. 553.23(a)(2) permits the parties to restrict, through their contract, the unrestricted employer's option expressed in Sect. 553.26. As discussed above, the undersigned interprets Section 20.02 of the contract to contain such a restriction of the County's ability to unilaterally substitute cash for compensatory time off.

The undersigned concludes that, under the contract, the employe has the choice between accruing compensatory time off or receiving overtime pay until the employe reaches the contractual maximum accumulation of 40 hours. Therefore, the County's decision in March 1991 to automatically pay for overtime worked after an employe accumulates 16 hours of compensatory time off, rather than to allow an employe to accumulate 40 hours before automatically paying for overtime, violated Section 20.02 of the contract. However, the undersigned is not persuaded that the County's violation warrants an award of punitive damages. This case did not involve a repeated breach of the contract. Neither was the violation flagrant in nature. Rather, the County acted in accord with its interpretation of the contract. Although the County's interpretation was not upheld, said interpretation was not so devoid of reason as to be frivolous in nature.

Based on the foregoing, the undersigned enters the following

AWARD

That, under the contract the employe, rather than the County, has the choice, up to a 40 hour maximum, between accruing compensatory time or receiving overtime pay for overtime worked.

Dated at Madison, Wisconsin this 16th day of April, 1992.

By \_\_\_\_\_  
Douglas V. Knudson, Arbitrator