

BEFORE THE ARBITRATOR

 :
 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 WISCONSIN PROFESSIONAL POLICE :
 ASSOCIATION/LEER DIVISION : Case 51
 : No. 47299
 and : MA-7224
 :
 PRICE COUNTY (SHERIFF'S DEPARTMENT) :
 :

Appearances:

Cullen, Weston, Pines & Bach, Attorneys at Law, by Mr. Richard Thal,
 appearing on behalf of the Union.
 Slaby, Deda & Marshall, Attorneys at Law, by Mr. David Deda, appearing on
 behalf of the County.

ARBITRATION AWARD

On April 10, 1992, the Wisconsin Professional Police Association/Law Enforcement Employee Relations Division, hereinafter the Union, with the concurrence of Price County, hereinafter the County or Employer, requested the Wisconsin Employment Relations Commission to appoint a member of its staff to act as the impartial Arbitrator in a dispute concerning the appropriate rate of pay for employes taking earned overtime as comp time off. A hearing in the matter was held on July 24, 1992, at which time the parties were afforded the opportunity to adduce testimony and introduce documentary evidence. At the commencement of the hearing, the parties waived the requirement of Article 7, C. 2. that provides for an Arbitration Board comprised of one member selected by each party and the impartial member to be selected from a panel of five arbitrators supplied by the Wisconsin Employment Relations Commission. A stenographic transcript of the proceedings was not taken and the parties orally argued their case in lieu of filing posthearing briefs.

ISSUE:

At the commencement of the hearing, the parties were afforded an opportunity to attempt to stipulate to a statement of the issue to be resolved by the Arbitrator, but they were unable to reach such stipulation. Therefore, the undersigned frames the issue as follows:

Did the County violate the collective bargaining agreement when it paid Deputy Sprague for overtime earned taken as compensatory time at the 2190 hourly rate of pay? If so, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE:

ARTICLE 10 - HOURS OF WORK AND KELLY DAYS

- A. Work Year: The normal work year shall consist of 2,190 hours which is an average of approximately forty-two (42) hours per week. The actual work schedule is to be six (6) days on and two (2) days off. The County may change

the work schedule in emergencies. After taking into account the twelve (12) Kelly days, the actual hours worked is 2,094.

. . .

- E. Kelly Days To Be Taken: Kelly days shall be taken by the employee during the calendar year earned. One Kelly day is considered earned for each month worked. Fifteen (15) days or more in a month is to be considered a month worked for the purpose of calculating Kelly days. Kelly days for the entire year are to be granted to the employee on the first day of the year. The employee can take the Kelly days at any time during the year. If an employee terminates employment and has taken more Kelly days than that employee has earned the employee is to repay the value of those Kelly days to the County. The value of a Kelly day is computed by taking twelve (12) times the monthly salary and dividing by 2,190 hours (hours per year) rounded off to the nearest one cent (1 cent) times eight (8) hours. The time for taking Kelly days can be extended an additional ninety (90) days past the calendar year at the joint agreement of the employee and the Sheriff.

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ARTICLE 13 - OVERTIME

- A. Deputies who are required to work in excess of the scheduled work day or work week shall receive pay at time and one-half (1 1/2) or compensatory time off at time and one-half (1 1/2) at the Deputy's discretion. Overtime must be approved by the Sheriff or Chief Deputy in advance except in an emergency. The hourly rate is to be computed by taking twelve (12) times the monthly salary and diving (sic) by 2,094 hours (hours per year) rounded off to the nearest one cent (1 cent). Time and one-half (1 1/2) payment, if the Deputy selects pay instead of compensatory time, shall be rendered to the Deputy no later than the last pay period of the following month.
- B. Scheduling: Compensatory time shall be taken at times mutually agreed upon by the Sheriff or Chief Deputy and the employee.

. . .

- F. Cashing in Compensatory Time: Compensatory time already on the book can be taken as pay if the employee puts in a request for a minimum of eight (8) hours on the form designated by management to be turned in with the regularly submitted semi-monthly time card. The payment for this compensatory time is then to be made at the same time as the semi-monthly paychecks are

distributed.

ARTICLE 14 - HOLIDAYS

. . .

- C. Holiday pay shall consist of eight (8) hours pay at the employee's regular hourly rate of pay if he does not work on the holiday. For purposes of calculating holiday pay the regular hourly rate of pay is to be computed by taking twelve (12) times the monthly salary and dividing by 2,190 hours (hours per year) rounded off to the nearest one cent (1 cent). Employees scheduled to work on a holiday shall receive compensatory time or salary at the rate of one and one-half (1 1/2) hours for each hour worked.

ARTICLE 16 - SICK LEAVE

. . .

- G. Payment for Unused Days: Employees who retire shall be paid, at their regular daily rate of pay at retirement, for one-half (1/2) their accumulated unused sick leave. In the event of death while in the employ of the Sheriff's Department, payout at the above rate shall be made to the employee's estate. The hourly rate of pay for calculating the value of unused sick days is to be computed by taking twelve (12) times the monthly salary at time of retirement and dividing by 2,190 hours (hours per year) rounded off to the nearest one cent (1 cent).

APPENDIX A

SALARY SCHEDULE

	<u>Effective 1/1/91</u>			<u>Effective 1/1/92</u>		
	<u>Monthly</u>	<u>* Hourly **</u>		<u>Monthly</u>	<u>* Hourly **</u>	
		(2094)	(2190)		(2094)	(2190)
Deputy						
-After 2nd year (1)	\$1,921.67	11.01	10.53	\$2,017.75	11.56	11.06
-After 1st year (2)	\$1,846.96	10.58	10.12	\$1,939.31	11.11	10.63
-Start	\$1,685.08	9.66	9.23	\$1,739.33	10.14	9.70

*The hourly rate of 2094 is calculated by taking twelve (12) times the monthly salary and dividing by 2094 hours and is to be used for overtime.

**The hourly rate of 2190 is calculated by taking twelve (12) times the monthly salary and dividing by

2190 hours and is to be used for the value of a Kelly Day in the event repayment is owed by employee to Employer, for holiday pay and for unused sick days upon retirement.

BACKGROUND

The dispute in this case concerns the County's policy regarding pay to employes for overtime hours worked and taken as comp time in lieu of a cash payment. In the mid-1980's, in order to comply with the requirements of the Fair Labor Standards Act, the parties in their negotiations for the 1986-87 collective bargaining agreement reduced the number of hours worked by deputies from the previous 2190 hours to 2094 hours. The difference in hours worked was accounted for by granting employes the difference in Kelley days. From the inception of the 1986-87 collective bargaining agreement wherein the aforesaid change first took affect, until 1991, when the Union complained, the County paid employes the lower hourly rate, which was obtained by multiplying the monthly salary by 12 and dividing by 2190 hours, when employes accepted pay as opposed to comp time off. After receiving the Union's complaint, the Employer agreed that overtime banked as comp time, but ultimately taken as pay should be paid at the hourly rate based upon 2094 hours of work. Subsequent to the resolution of that dispute, the Union filed the subject grievance. This grievance contends that the County is inappropriately compensating employes who work overtime, bank the hours earned as comp time and ultimately taken as comp time off because when they take that time off, the County compensates them at their hourly rate based on 2190 hours instead of the higher hourly rate specified in Article 13 - Overtime.

This dispute is clearly one of contract interpretation, and the facts giving rise to the instant grievance are not disputed. The County believes the crux of the issue is that the rate of pay for overtime hours worked is not involved unless the employe takes pay for the overtime instead of taking compensatory time off. The County has paid employes in the same manner for overtime and compensatory time since the 1986 contract took affect. If an employe works eight hours overtime and wants comp time off, that employe receives 12 hours off. That is what was done in the grievant's case and that is why there is now a grievance. The grievant wants 12 hours off, plus an additional .50 cents per hour for each 12 hours of comp time used. However, the contract doesn't say time and one-half plus .50 cents an hour, rather, it only says comp time at time and one-half. The County believes the grievance is ridiculous inasmuch as if an employe works eight hours and is given 12 hours off, there is no entitlement to an additional .50 cents per hour. It believes that the rate of pay is not involved in calculating overtime when taking overtime earned as compensatory time off. Appendix A lists the salary and monthly figures. An employe's pay is one-half (1/2) the monthly amount for 24 pay periods for those employes working a 6-2 schedule. When the Employer pays 24 times per year, some pay periods have 15 or 16 or 14 days in them, and days worked vary depending upon when the employes' off days occur. For example, a 15 day period equals 11 or 12 days work. Regardless of what an employe works, if no overtime or holiday pay is earned, the gross pay will always equal one-half of the monthly salary. While the paychecks always show 80 hours worked for the period, it is not significant because on every check for every employe 80 hours worked is shown, irrespective of the hours actually worked. Therefore, when overtime earned is taken as comp time off rather than receiving pay, there is no need for the rate of pay to be considered because the employe receives the same amount of pay for the period as always, even though he/she worked 12 hours less.

The County has always tried to negotiate out of comp time for overtime because of the replacement problem it creates. Thus, the 2094 hours only comes

into play if an employe elects to be paid his overtime earned instead of taking the overtime hours earned in the form of compensatory time off.

The County believes that the contract language is clear and unambiguous and that the past practice supports its reading of the contract. It insists it is doing what it has done since 1986, except when a mistake was made with respect to the payment of overtime when an employe cashed in compensatory time instead of taking compensatory time off. Notwithstanding that mistake, the County believes it has and is correctly paying employes for compensatory time off, and therefore requests that the grievance be denied.

The Union, to the contrary, argues that several Deputies are not being paid the proper rate of pay when taking comp time off in lieu of overtime pay.

The language pertaining to overtime in Article 13 (A) states that the hourly rate is to be computed by dividing 12 times the monthly salary by 2094 hours and under the '92 contract that equates to \$11.56 per hour. The 2094 hours came about in 1986 in response to the 1985 Garcia decision making the Fair Labor Standards Act applicable to county employers. At that time the total number of hours worked under the 6-2 work schedule was reduced by granting employes 12 Kelley days per year, and thus the actual hours worked in any calendar year dropped from 2190 to 2094. It is the 2094 hours that are used in dividing the annual salary to calculate the overtime rate, and not the 2190 hours that were worked under the 6-2 schedule prior to the 1986 changes. The Union believes the reason that the 2094 hours was used in calculating overtime rate is because it made sense because employes receiving 12 Kelley days were no longer going to be working 2190 hours.

The Union asserts that the contract provides for two types of overtime pay, comp time off and overtime pay. In either case, however, the contract states in Article 13 "Deputies who are required to work in excess of the scheduled work day or work week shall receive pay at time and one-half or compensatory time off at time and one-half at the Deputy's discretion... The hourly rate is to be computed by taking 12 times the monthly salary and dividing by 2094 hours rounded off to the nearest one cent." The Union believes the contract is clear and requires that the compensatory time off be paid at the same rate as if the employe had taken the overtime earned in pay instead; and that the past practice of the County on this matter is irrelevant.

Furthermore, the County has not provided a sufficient explanation as to why it should be permitted to pay employes who choose to take compensatory time off for overtime earned at a lower rate than if that employe were to take pay for the overtime earned. Thus, the Union requests that the grievance be sustained and that the Arbitrator order the County to make the grievant whole by awarding him the difference between what he was paid and what he should have been paid for any compensatory time taken from the date of the award back to five days prior to the date of the grievance.

DISCUSSION

The undersigned's review of the contract language and the arguments of the parties have led him to conclude that the grievance should be sustained. The County's position that rate of pay is not a relevant consideration when granting employes comp time off is logical and persuasive as a means to discourage employes from taking comp time in the absence of any contract language to the contrary. However, both in Appendix A and Article 13, the language states that the hourly rate calculated by taking 12 times the monthly salary and dividing by 2094 hours, is to be used for overtime purposes. Whereas, the same Appendix A provides that the hourly rate of 2190 hours is to be used in determining the value of a Kelley day "in the event repayment is owed by employe to employer," calculating the rate of pay should an employe be scheduled to work on a holiday and elect to take compensatory time or be paid,

and when paying employes for unused sick days. Clearly, the parties, when they negotiated the changes in the 1986-87 collective bargaining agreement, saw a need to have two rates of pay specified in the contract and identified which rate was applicable in different circumstances.

In Article 13 - the parties saw fit to chose only the higher compensation rate for all overtime worked. The County's arguments, however, require the reader to assume that the higher rate is only applicable if the employe takes the overtime earned as pay, and not as compensatory time off. Also, the County position requires the additional assumption that hourly rate only has reference to cash payments and not pay for comp time. Were the contract language to specify that employes taking compensatory time in lieu of pay for overtime work be paid the hourly rate calculated at 2190 hours, the Employer's position would be sustained. However, the language does not so provide.

When one contrasts the language of Article 13 with Article 14, which expressly provides that employes who are scheduled to work on a holiday and take pay or compensatory time for the hours worked are to be paid at the hourly rate calculated by using 2190 hours, clearly, had that been the parties' intent in dealing with overtime, they could have so specified. Significantly, however, overtime is the only instance specified in Appendix A when the 2094 hours rate of pay is to be used for calculating compensation.

Furthermore, it is worth noting that the County in its letter of December 10, 1985, to the Price County Deputies Association indicated its preference to continue to pay overtime rather than "allow compensatory time because of the difficulty in scheduling and to limit the use of part-time employes who do not have as much training as full-time employes." Clearly, however, as evidenced by the 1986-87 contract language continued to date, the County was not successful in persuading the Deputies that overtime earned could not be taken as compensatory time off. If the Union agreed in its negotiations in 1985, to accept a lower rate of pay when taking compensatory time for overtime earned at the higher rate, language was not written to reflect that agreement. Further, there was no testimony at the hearing concerning bargaining history which would support a finding that the Union reached such an agreement with the County. Thus, the language, as written, is clear and unambiguous in providing overtime is to be earned at the higher rate of pay based upon a work year of 2094 hours, and there is no language providing that employes will be compensated at a lower rate if they decide to take any time off in lieu of a cash payment.

Therefore, based upon the foregoing, the undersigned believes that the only conclusion that can be reached in this case is that the contract requires the 2094 hourly rate be used in compensating employes for overtime earned irrespective of whether it is taken as pay or in the form of compensatory time off. Consequently, the County, when granting compensatory time off in lieu of overtime pay, must pay employes for the comp time hours used at the 2094 hourly rate specified in Appendix A of the contract and not at their normal rate of pay calculated using 2190 hours.

Based upon the foregoing and the record as a whole, the undersigned enters the following

AWARD

The County did violate the collective bargaining agreement when it paid Deputy Sprague at the hourly rate calculated using 2190 hours instead of 2094 hours for overtime earned and taken as compensatory time off. Consequently, the County shall pay Deputy Sprague the difference between what he was paid when taking overtime earned as comp time off for the period commencing on January 2, 1992, five days prior to the date of the instant grievance, and ending with the implementation of this Award.

Dated at Madison, Wisconsin this 15th day of September, 1992.

By _____
Thomas L. Yaeger, Arbitrator