

IN THE MATTER OF ARBITRATION

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GRIEVANCE ARBITRATION

between

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Comp Time - Mark Barlau

**City of Northfield,
Minnesota**

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**BMS Case No. 06-PA-1221
BMS Case No. 06-PA-1256
BMS Case No. 06-PA-1257**

-and-

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**Law Enforcement Labor
Services, Inc., Local
No. 293**

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April 30, 2007

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APPEARANCES

For City of Northfield, Minnesota

Cyrus F. Smythe, Consultant, Labor Relations Associates,
Deephaven, Minnesota
Elizabeth C. Wheeler, Human Resources Director
Gary G. Smith, Police Chief

For Law Enforcement Labor Services, Inc., Local No. 293

Marylee Abrams, General Counsel
Tiffany Schmidt, Staff Attorney
Dan Vannelli, Business Agent
Thad Monroe, Steward
Tim Halverson, Captain (Subpoena)
Mark Murphy, Sergeant (Subpoena)
Mark Barlau, Grievant

JURISDICTION OF ARBITRATOR

Article 5, Employee Rights, Section 5.4, Step 5 of the 2005 collective bargaining agreement (Joint Exhibit #6) between City of Northfield, Minnesota (hereinafter "City" or "Employer") and Law Enforcement Labor Services, Inc., Local No. 293 (Police Patrol Unit) (hereinafter "Union" or "LELS") provides for an

appeal to arbitration of disputes that are properly processed through the grievance procedure.

The Arbitrator, Richard John Miller, was selected by the Employer and the Union (hereinafter "Parties") from a panel submitted by the Bureau of Mediation Services. A hearing in the matter convened on November 29, 2006, and March 22, 2007, at 9:30 a.m. at City Hall, 801 Washington Street, Northfield, Minnesota. The hearing was tape recorded with the Arbitrator retaining the tapes for his records. The Parties were afforded full opportunity to present evidence and arguments in support of their respective positions. The Parties elected to file posting hearing briefs which were received on April 20, 2007, after which the record was considered closed.

ISSUES AS FRAMED BY THE ARBITRATOR

1. Is the grievance substantively arbitrable?
2. If arbitrable, did the City violate the Collective Bargaining Agreement or court decisions when it denied the Grievant the opportunity to use compensatory time at his convenience and when the City unilaterally forced him to use compensatory time?
3. If a violation occurred, what is the appropriate remedy?

STATEMENT OF THE FACTS

The Grievant, Mark Barlau, was hired by the City as a Police Officer in November 1977. Prior to 2002, Police Officers were allowed to accumulate compensatory time in lieu of overtime pay,

in accordance with the Fair Labor Standards Act ("FLSA"). There was no limit set by the City as to how much compensatory time could be accrued.

Prior to 2002, the exclusive representative for Police Officers was Teamsters Local #320. There was no language addressing compensatory time in the collective bargaining agreements between the City and Teamsters Local #320. (Joint Exhibits #1, 2).

In 2002, LELS became the exclusive representative for the Police Officers. In the 2002 collective bargaining agreement, the Parties negotiated language in Article 10, Overtime, Section 10.4, which provides:

Employees may accumulate up to a maximum of 80 hours comp time in lieu of payment. Comp time may only be used with the specific permission of the Employer.

At the time this contract language was negotiated, several Police Officers had accrued compensatory time banks that greatly exceeded the 80 hour limit. This was well known to the Employer. The Grievant had 337 hours of compensatory time accrued when the 2002 contract was executed.

Union Business Agent Dan Vannelli and Union Steward Thad Monroe were present during negotiations for the 2002 collective bargaining agreement. Mr. Vannelli testified that during negotiations with the City in 2002, there was discussion about

the new compensatory time language. The Union proposed a variety of plans to reduce the excess compensatory time Police Officers had accrued over the 80 hour cap. The City rejected each of the plans. It was discussed the "problem" would take care of itself over time since any use could not be replenished until a Police Officer dropped below the 80 hour cap. No agreement to resolving this problem was placed in writing by either Party.

Union Steward Monroe testified there was no contractual requirement to reduce the compensatory time balance down to 80 hours, nor was there a date or deadline set to reduce banks to the 80 hour cap. He stated it was discussed at a Union meeting that the City wanted Police Officers to reduce their compensatory time balances to 80 hours, and Officers could no longer accrue more than 80 hours. The Grievant testified that Mr. Monroe advised him during negotiations that the City did not mandate or require the Police Officers with over 80 hours to reduce their compensatory time balances to the 80 hour limit.

There were no changes made to the compensatory time language found in Section 10.4 in the subsequent collective bargaining agreements negotiated for 2003, 2004 or 2005. (Joint Exhibits #4-6). In fact, this matter was not even discussed during those negotiations. (Union Exhibits #2-4). Thus, it clear from negotiations that no contract language was negotiated in the 2002

contract and subsequent contracts as to what was to happen to the accrued compensatory time banks Police Officers had already earned in excess of the 80 hour limit. Further, there was no "side agreement" between the Parties during this time as how to reduce the excess compensatory time Police Officers had accrued over the 80 hour maximum.

The Grievant testified he was never told by the City to reduce his compensatory time balance to 80 hours. On or about February 19, 2003, City Human Resources Director Elizabeth Wheeler sent a letter to the Grievant regarding the amount of his compensatory time accrual. The letter did not reference that the Grievant had to reduce his compensatory time balance to the 80 hour limit. (Union Exhibit #1).

On December 21, 2005, the City raised their concern that some Union members have not chosen to reduce their compensatory time banks to 80 hours. As a result, the City was intending to schedule time off in 2006 for those Police Officers exceeding the 80 hours of maximum compensatory time. (Union Exhibit #5).

At that time Mr. Vannelli scheduled a meeting with the City to discuss the matter. The meeting occurred on January 17, 2006. At the meeting Mr. Vannelli raised a concern that it was difficult for Police Officers to get time off due to reduced staffing levels. City Consultant Cyrus Smythe recommended the

City simply pay the Police Officers who were above the maximum of 80 hours compensatory time. The Union agreed with this recommendation. Mr. Vannelli offered to discuss other options in case a buy out did not receive approval by the City Council, but the City indicated it was not necessary. Unfortunately, on January 30, 2006, Mr. Vannelli received a letter from Ms. Wheeler stating that the City did not have the money to buy back the Police Officers compensatory time down to the 80 hour limit. (Union Exhibit #6).

Thereafter, the Grievant received notice from Mr. Monroe that he should reduce the amount of compensatory time he had on the books. The Grievant responded by submitting requests to the City for 260 hours of compensatory time off in 2006. (Union Exhibit #17). Those requests were spread out over a six month period and the first request was five weeks away from the date in which it was submitted. Some of the time off requests were approved (90 hours) while others were denied (170 hours). (Union Exhibit #18).

The reasons given by Sergeant Mark Murphy on March 24, 2006, for denying the Grievant's request for some of the days off was because it is the policy of the Police Department to allow time off only when it would create a shift shortage or create overtime, which would have occurred on those requested days off.

(Union Exhibit #18). The Employer then unilaterally scheduled time off for the Grievant on the days he was denied his request for compensatory time. Ultimately, 15 days off were approved by the City and 9 days were assigned off by the City. The City granted one of the Grievant's requested days off (July 4, 2006) by calling in another employee on overtime to accommodate the Grievant.

The Union submitted four compensatory time grievances on behalf of the Grievant. (Joint Exhibits #7-10). The Parties agreed to consolidate the grievances for the purpose of one arbitration hearing. (Joint Exhibit #11).

UNION POSITION

The grievances are substantively arbitrable as they pertain to an interpretation of the contract language in Section 10.4 with respect to compensatory time.

Federal case law supports the Union's position. The use of compensatory time cannot be denied based on shift shortage because the Employer is not willing to pay overtime to cover the requested time off. A financial hardship to the Employer is not considered an undue hardship as specified by the FLSA.

The City has violated the collective bargaining agreement and federal law with respect to the denial and forced use of compensatory time off. The Grievant was attempting to bring his

compensatory time balance down to the 80 hours established in the collective bargaining agreement. He submitted the appropriate forms to obtain permission for the days he wanted to utilize compensatory time. The Grievant was complying with the collective bargaining agreement, yet the City refused to allow him the time off or pay out the time to him. The City cannot avoid compensating the Grievant for time he has already worked. Legally, this is due him either in the form of overtime pay or as time off, because he has already worked the overtime hours to accrue his compensatory time. However, the City took the hard line approach of when and how compensatory time could be used by the Grievant and made no attempts to accommodate his requests.

For the foregoing reasons, the Union respectfully requests the grievance be upheld. The Union requests the Grievant receive monetary compensation for the compensatory time he was forced to use at the Employer's demand, and be able to submit requests for his additional compensatory time off. The City must be required to make the necessary accommodations to grant the Grievant's compensatory time off requests.

CITY POSITION

The City has the right under the collective bargaining agreement to schedule employees off on accumulated compensatory time to meet the maximum individual limit agreed to by the

Parties in Section 10.4 of the contract. Consequently, the grievances are not arbitrable.

All bargaining unit employees, except the Grievant, agreed to and did schedule themselves off on compensatory time to comply with the provision of Article 10 of the contract and the Christensen et al v. Harris County et al supreme court decision.

The 2002 collective bargaining agreement specifically dealt with the issue of compensatory time for the first time. The Parties made a good faith effort to provide three employees with compensatory time accumulations over the maximum accumulation provided by the contract a reasonable time period to use accumulated compensatory time in excess of the amount allowed. When employees refused to abide by the contract to reduce their accumulated compensatory time balances to the agreed on maximum, the City with the full knowledge and agreement of the Union began to force the employees to use their excess time. The Grievant was the only Police Officer who failed to reduce his compensatory time to the 80 hour maximum. When the Grievant failed to schedule himself off for sufficient hours the City utilized its right under the contract's Employer Authority Article to schedule time off to meet the maximum agreed to by the Parties.

The City accumulated the Grievant's request for time off consistent with the Police Department's past practices of

accommodating employee requests for use of accumulated paid time off.

The City has the right by the language of Article 7 and 10 of the contract, by law and the arbitration decision rendered by Arbitrator Jack Flagler in City of Forest Lake and LELS, BMS Case No. 97-PA-435 (1997) agreement to force the use of the excess compensatory time. The issue raised by the Grievant is, therefore, not arbitrable.

ANALYSIS OF THE EVIDENCE

Compensatory time is earned at the convenience of the Employer, when the Employer needs an employee to work overtime. The use of compensatory time is the paramount issue in this case. Specifically, the issue is whether the City violated the contract and/or the law by scheduling the Grievant off on accumulated compensatory time to meet the maximum 80 hour limit agreed to by the Parties in Section 10.4.

The Employer argues that the grievances are not arbitrable, since there are no "substantive" provisions in the collective bargaining agreement for the use of compensatory time. As a result, the City avers that it has the unilateral right under Article 7, Employer Authority, of the contract to decide when the Grievant is allowed to use his compensatory time beyond the 80 hour limit.

The Employer's substantive arbitrability claims involve the proper interpretation by the Arbitrator of contract language contained in Article 7 and Section 10.4. Because compensatory time is a benefit provided for under Section 10.4, the grievances are arbitrable.

The City argued at the hearing that none of the grievances reference a denial of the Grievant's request for compensatory time. The grievances all reference forced use of compensatory time. Union Business Agent Vannelli testified this was a typographical error on his part, and the grievances were filed based on the denial of the ability to use compensatory time. Mr. Vannelli also testified he had numerous phone conversations with City Human Resources Director Wheeler and City Consultant Smythe concerning the grievances. He reiterated to them on several occasions that the grievances involved both the forced use and denied use of compensatory time with respect to the Grievant. Mr. Vannelli's testimony was not refuted by the City. As a result, the grievances filed on behalf of the Grievant by the Union are substantively arbitrable, as to both the forced use and denied use of compensatory time.

The Union alleges that the City violated federal law (FLSA) when the Employer refused to allow the Grievant to take compensatory time off on the days designated by the Grievant and

then forced the Grievant to use days designated by the City to reach the 80 hour maximum limit.

"Compensatory time off is paid time off the job which is earned and accrued by an employee in lieu of immediate cash payment for employment in excess of the statutory hours for which overtime compensation is required by section 7 of the FLSA." 29 C.F.R. § 553.22. Compensatory time represents time worked and must be paid to or used by an employee. An employer may not withhold the payment of compensatory time earned if an employee leaves employment.

Section 207(o)(5) of the FLSA provides that "[a]n employee of a public agency which is a State, political subdivision of a State...who has requested the use of such compensatory time, shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency." 29 C.F.R. § 553.21, Section 7(o)(5)(B); 29 U.S.C. § 207(o)(5). The City is an employer covered by the federal statute and falls under this section of the FLSA with respect to employees earning and using compensatory time.

Several federal courts have been involved in the interpretation of the provisions of the FLSA. The 8th Circuit Court of Appeals ruled the State of Missouri Department of

Corrections violated the FLSA when it unilaterally imposed a policy which forced employees, against their wishes, to use accrued compensatory time at times scheduled solely by the employer. Heaton v. Moore, 43 F.3d 1176 (8th Cir. 1994). The Court of Appeals interpreted 29 U.S.C. § 207(o)(5) to provide that employees are allowed to "bank" compensatory time in the equivalent of an employee-owned savings account which is essentially the property of the employee. The Court reasoned that as an employee would have the right to spend their overtime cash payment as they chose, so they should be allowed to spend the banked compensatory time as the employee chooses. The Court held that Section 207(o)(5) gives the employee the right of access to and control of the use of the banked compensatory time, subject only to the employer's right to deny the requested use of the compensatory time if it would unduly disrupt the employer's operations. Id. Federal courts have ruled it is not an undue disruption under the FLSA for an employer to have to pay another employee overtime to cover a request for compensatory time off. Robert Beck v. City of Cleveland, (6th Cir App. No. 02-3669, 2004).

In Debraska v. City of Milwaukee, 131 F.Supp.2d 1032 (E.D. Wis. 2000), the U.S. District Court ruled Section 207(o)(5) imposes a restriction on an employer's efforts to prohibit the

use of compensatory time when the employee requests to do so; the provision says nothing about restricting an employer's efforts to require employees to use compensatory time.

The United States Supreme Court had the opportunity to rule on the effects of the FLSA with respect to compensatory time in Christensen v. Harris County, 529 U.S. 576, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000). The Supreme Court decided to grant certiorari because the Courts of Appeal were divided on this issue. In Christensen, there were 127 deputy sheriffs employed by Harris County. They were non-union employees without a contract. As the deputies accumulated compensatory time, Harris County became concerned that it lacked the resources to pay monetary compensation to those deputies who worked overtime after reaching the statutory cap on compensatory time accrual. Harris County then implemented a policy under which the deputies' supervisor established a maximum number of compensatory hours that may be accumulated. When the deputies approached the maximum they were asked to take steps to reduce accumulated compensatory time. If the deputies did not do so voluntarily, the supervisor would order the deputies to use their compensatory time at specified times designed by Harris County.

In Christensen, the Supreme Court interpreted Section 207(0)(5) and concluded:

At bottom, we think the better reading of § 207(o)(5) is that it imposes a restriction upon an employer's efforts to prohibit the use of compensatory time when the employees request to do so; that provision says nothing about restricting an employer's efforts to require employees to use their compensatory time.

529 U.S. at 585.

Thus, in Christensen, the Supreme Court established that nothing in the FLSA or its implementing regulations prohibits a public employer from compelling the use of compensatory time. In other words, Christensen held that an employer had the right to place employees off on compensatory time unless an agreement specifically prevented such action. The Union, however, argues that Christensen is easily distinguished from the present fact situation. First, the deputies in Christensen refused to voluntarily reduce their accumulated compensatory time bank. In the instant case, the Grievant made great effort to reduce his compensatory time bank by providing at least six weeks notice before his first requested day off, and substantially more notice for the subsequent days he requested off.

The Union also argues there is an important distinction between Christensen and the present case in that Northfield Police Officers are unionized with a collective bargaining agreement covering compensatory time, while in Christensen they were non-union deputies without an agreement. The fact that

employees are unionized or non-unionized is not a valid distinction since all public employees are governed under the provisions of the FLSA.

Moreover, the fact that the Northfield Police officers have a collective bargaining agreement and the deputies in Christensen did not have an agreement does not bear a valid distinction, since the collective bargaining agreement in Section 10.4 is silent on the issue of forcing Police Officers to use compensatory time hours in excess of the maximum accrual of 80 days. Section 10.4 simply states that Police officers may accumulate up to a maximum of 80 hours of compensatory time.

The majority of arbitrators have recognized the broad authority in management to operate its business absent clear limitations in a collective bargaining agreement or by binding past practice. Potlatch Corp., 79 LA 275 (1982); Pillsbury Co., 75 LA 529, 531 (1980). Arbitration and court decisions reserve to the employer rights in all matters except those usurped by law, conceded in the collective bargaining agreement, or by past practice. Pabst Brewing Co., 88 LA 660 (1987); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 583 (1960); Vacaville Unified School District, 71 LA 1028 (1971); St. Louis Symphony Society, 70 LA 481-82 (1978). In fact, the Parties have recognized these employer rights in Article 7,

Employer Authority, of the collective bargaining agreement as follows:

- 7.1 The EMPLOYER retains the full and unrestricted right to operate and manage all manpower, facilities, and equipment; to establish functions and programs; to set and amend budgets; to determine the utilization of technology; to establish and modify the organizational structure; to select, direct and determine the number of personnel; to establish work schedules; and to perform an inherent managerial function not specifically limited by this AGREEMENT.
- 7.2 Any term and condition of employment not specifically established or modified by this AGREEMENT shall remain solely within the discretion of the EMPLOYER to modify, establish or eliminate.

It is clear from this contract language that management rights are inherent and are nevertheless reserved and maintained by the Employer. The Employer has the right under Section 7.1 to establish the work schedules of Police Officers, including the scheduling of the Grievant's compensatory time days off.

There is nothing in the contract language in Section 10.4 that limits the City from denying use of compensatory time with respect to the Grievant requested days off and then forcing him to use compensatory days off on the days designated by the City. As a result, these scheduling rights remain solely within the discretion of the Employer pursuant to Section 7.2.

The testimony of City Police Chief Gary Smith establishes that the Police Department has consistently dealt with the issue

of requests by employees for paid time off, whether such time off involves accumulated vacation, holiday, or compensatory time, by attempting to grant such requested time off consistent with the City's public service needs - including sometimes granting such requested time even though such granting required the City to ask employees scheduled off to come in on overtime pay. In fact, the Chief granted the Grievant one of his requested compensatory days off (July 4, 2006) by calling another employee on overtime to accommodate the Grievant.

The Chief also testified that he accommodated the Grievant's request for compensatory time off consistent with the Police Department's past practices of accommodating employee requests for use of accumulated paid time off. The Chief's testimony in these regards was not refuted by the Union. As a result, past practice supports the City's position.

The bargaining history of Section 10.4 does not support the Union's position, as it is undisputed that the Parties discussed, but never agreed to, resolving the problem of those Police Officers who were in excess of the 80 hour compensatory time maximum when this language was first placed in the contract in 2002.

In the final analysis, the grievances are without merit, as they are without support by the provisions of the contract in

Sections 7.1, 7.2 and 10.4. Further, the Supreme Court decision in Christensen is controlling with respect to the proper interpretation of FLSA, and is not distinguishable from the present fact situation.

AWARD

Based upon the foregoing and the entire record, the grievances are denied.



Richard John Miller

Dated April 30, 2007, at Maple Grove, Minnesota.