

IN THE MATTER OF ARBITRATION BETWEEN

STATE OF MINNESOTA DEPARTMENT)	
OF TRANSPORTATION)	
“Employer”)	
)	BMS Case No.
AND)	08-PA-0650
)	
THE MINNESOTA GOVERNMENT)	
ENGINEERS COUNCIL (MGEC))	
“Union”)	

NAME OF ARBITRATOR: John J. Flagler

DATE AND PLACE OF HEARING: March 14, 2008; Minneapolis, MN

DATE OF RECEIPT OF POST-HEARING BRIEFS: April 14, 2008

APPEARANCES

FOR THE EMPLOYER: Anthony F. Brown
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FOR THE UNION: Dana Wheeler
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THE ISSUE

The Employer's statement of the issue is:

Did MN/DOT violate Article 6, Section 1. External Employees, C. Time Management when some employees used the time sheet payroll code, Time Not Paid (TNP) to record actual hours worked and to document time management? Did the Employer violate the contract when it required employees to classify hours worked as Time Not Paid (TNP) and subsequently as Time Management (TM)?

Arbitrator's Version: The Council's issue statement appropriately expresses the contractual question.

POSITION OF THE EMPLOYER

Article 6, Section 1. Exempt Employees C. Time Management is the bargained agreement on how employees are to manage their time. The second paragraph of that section was bargained into the 1999-2001 Labor Agreement. This language replaced the payroll period averaging language in the previous contracts. The language under Time Management has not changed since the second paragraph was added in the 1999-2001 Agreement. Article 6 was changed in the 2001-2003 Agreement when separate sections were added for Exempt Employees and Non-Exempt Employees. This change was made to add clarity.

Article 6, Section 1 Exempt Employees, D. Overtime is the language that describes how exempt employees are assigned overtime and how they are compensated for that overtime. The overtime language explicitly requires that all overtime be approved in advance by the Agency. Approved overtime is liquidated in cash or compensatory time at the option of the Agency after consulting with the employee. These provisions are clear and have been in every two year State of MN/MGEC Agreement.

Article 6, Section 1 Exempt Employees E. Compensatory Bank was separated from D. Overtime in the 2005-2007 Agreement. This was done for ease of reading and to parallel language in Section 2 Non-Exempt Employees. In both Section 1 and Section 2, the Compensatory Bank is exclusively for overtime. It is not a time management tool.

Three methods for recording actual hours worked and to document time management by exempt employees were described at the hearing:

1. Use of the payroll code Time Not Paid (TNP). The TNP payroll code has been used since 2000. In February of 2002, Jim McKane, MN/DOT Labor Relations Manager, wrote a memo on how the TNP payroll code was to be used and how it comports with the MGEC Labor Agreement. This memo was copied to MGEC Executive Director, Glenn West.

2. Use of the concept of time management (TM). This time management is not a payroll code. Instead it allows exempt employees to track their time management in the remarks section of the time sheet.
3. Use of a personal spreadsheet or calendar separate from the time sheet.

In the 2007-2009 Contract Bargaining, MGEC made proposals attempting to have the definition of Compensatory Time changed from approved overtime to a time management tool. Those proposals were not agreed to by the Employer and were not incorporated into the 2007-2009 Agreement.

Time management is not overtime. The concept of Time Management implies, by its definition, that working extra hours is not overtime – it is time to be managed. The parties’ understanding of the language at Article 6, Section 1C Time Management is clear. Exempt employees work variable hours, hours in excess of the normal work day or payroll period without consistent schedules or work days. The parties recognized this fact and bargained that exempt employees will have the ability to manage their own time as long as “such time management does not result in overtime nor guarantee hour-for-hour for occasional excess hours worked.”

Overtime must be approved in advance by the Agency and compensatory time is approved overtime. The language of Article 6, Section 1D Overtime is also clear. Every negotiated MGEC contract states that the Agency has to approve the work in advance for it to be considered overtime. Every MGEC contract has language stating that compensatory time is a form of approved overtime. “Overtime worked may be liquidated at the rate of straight time in either cash or compensatory time...” Every MGEC contract states that compensatory time overtime is placed in the compensatory time bank for the employee to use or to liquidate at a later date.

MGEC witness Dave Mavec testified that he has been approved for overtime and that those hours were placed in a compensatory overtime bank. Rich Peterson, MN/DOT Labor Relations Manager, testified that there have been times when the Agency has given blanket approval for exempt employees to receive overtime that could be liquidated in compensatory time. He also testified that recently the compensatory overtime banks were liquidated for all MN/DOT employees covered by the MGEC contract, including those classified as Exempt under Article 6, Section 1 Exempt Employees.

Section 1C Time Management and Section 1D and 1E Overtime are mutually exclusive concepts. Therefore, extra hours worked and managed by the employee are not compensatory time overtime hours.

All three employer witnesses who were chief negotiators on the MGEC Agreements (Skarda, Pettis & Brown) stated that the current and past provisions of the time management language never considered extra hours worked as approved overtime. The extra hours worked under the “time management” provisions were to be used through the payroll period averaging

process (pre 1999-2001) or through the employees managing hours as described in the current language found in the second paragraph of Section 1C.

Three Council witnesses (Kamnikar, Anderson and Mavec) testified about their own time management. They stated all of the extra hours they worked were done in performing their regular job duties. All three testified that none of these hours had been pre-approved by the Agency as overtime. All three testified that they were allowed to take off every extra hour of work that they had accounted for even though the contract does not require that the employee be allowed to take off these hours on an hour-for-hour basis. None have ever been told they could not take these hours off, and none have “lost” any of these hours.

The three State negotiators who negotiated the time management language in Section 1C contend that each of the three Council witnesses were granted paid time off as the language calls for whether they recorded their time (1) directly on the time sheet with payroll code TNP; (2) in remarks section of the timesheet calling it time management; or (3) on a calendar or spreadsheet.

The Council made proposals at the 2007-2009 bargaining table intending to make compensatory time a part of Section 1C Time Management. There would be no need to propose that language if the Council believed that formal compensatory time could already be used by the employee in managing his or her time. The Employer disagrees with the notion that formal compensatory time can be used as a time management tool and rejected those proposals made by the MGEC.

The Council’s grievance and arguments are without merit. The Council did not identify any contract language that was violated. The Council’s statement of the issue does not cite any contract language or provision that was violated. Instead three Council witnesses described different ways to record their time under Section 1C Time Management. Not only was no violation of any language shown, the Council demonstrated three different ways that its members do record their time and properly follow the contract language.

The Council’s opening statement quotes the contract language. However, failing to quote D. Overtime of Section 1, they list A., B., and C. and then jump to E. Compensatory Bank and state that Section E is the method for time management. Leaving out D. confuses the fact that time management is not overtime and that compensatory time is a form of overtime. The Council can only reach their argument by leaving out clear contract language.

Not only does the Council omit an essential subsection (D. Overtime) of Section 1, it cites subsections E. and F., not from Section 1, but from Section 2 Non-Exempt Employees is language not before the Arbitrator. The grievance is about exempt high level professional engineers; not about non-exempt employees being compensated at time and one-half overtime liquidated in cash or compensatory time off.

The Council was unable to show that anyone was harmed. All of the Council witnesses testified that they were allowed hour-for-hour time off with one employee being able to take 7 days off out of 10 work days in one pay period and 8 days off out of 10 in another.

The Council offered no remedy for any alleged violation. The Council's requested remedy – to have extra hours worked under Section 1C converted to compensatory overtime, as defined in Section 1D calls for the Arbitrator to ignore or modify clear contract language – the language that states time management and overtime are mutually exclusive concepts. These concepts are addressed separately in the contract.

Another remedy requested by the Council was to have “lost” vacation restored when an employee lost vacation and also used the payroll code TNP. The Council offered no evidence to show how the use of Time Management payroll code had anything to do with the provisions of Article 8, Vacation Leave, Section 2 Allowances. Instead, they offered into evidence a document at Council Tab #7, showing vacation forfeited in one fiscal year, 2007 and putting it in the same chart with the hours of Time Not Paid listed on employee time sheets for three fiscal years, 2005, 2006, and 2007. Any Council remedy requesting that vacation forfeited in one fiscal year should be restored based on a time management payroll code used in the previous three fiscal years should be rejected.

POSITION OF THE UNION

The Employer began the use of TNP for “exempt” employees in 2002 after an audit by the U.S. Department of Labor, Wages and Hours Division found that the State's treatment of all employees as “exempt” from the Fair Labor Standards Act, not to be in accordance with the law.

MGEC successfully modified the 2005-2007 Contract to provide employees with potential additional compensation by allowing them to convert up to forty (40) hours of compensatory time into deferred compensation once per year.

The Employer's inconsistent practice requiring the use of TNP, which was largely unknown to the employees and MGEC, clearly conflicted with the new compensation terms.

The Employer had several responses to the grievance. First, MnDOT Deputy Commissioner Doug Differ, in a Meet & Confer, stated that the use of TNP was inappropriate and directed the use of TNP stop. MnDOT's second response, through Labor Relations Director Rich Peter, was confirmation that he had directed MnDOT districts to stop using TNP. Third, MnDOT's Rich Peterson claimed surprise that TNP was still being used by districts or offices. Fourth, for the first time, MnDOT claimed uncertainty about whether or not the use of TNP as a compensation code was appropriate. Two things that are clear are that (1) MnDOT's use of TNP is applied to employees in the same bargaining unit consistently, and (2) employees represented by MGEC are not part-time employees.

Federal wage and hour laws allow employment contracts to provide more generous terms than required by law. The MGEC contract did that for “exempt” employees in Article 6, Hours of Work and Overtime providing for a Normal Payroll Period (Section 1, B.), Time Management (Section 1.C.), Overtime (Section 1.D.), Compensatory Time (Section 1.E.), and Converting Comp time to Deferred Compensation (Section 3).

Minnesota Statute 179A requires that the employer is expected to negotiate in good faith, and put into writing terms and conditions of employment with regard to hours of employment and compensation, including use of TNP.

The Preamble of Contract states “any agreement which is to be included as a part of this Agreement must so indicate, must be reduced to writing, and must be signed by the parties to this Agreement.” There is no such agreement pertaining to TNP and later to the new code, TM. Nor is there any language that could lead one to conclude that those benefits clearly outlined two bullets above might otherwise be denied through the application of Employer Rights language in Article 3.

The Contract states exempt employees may expect a normal pay roll period of 80 hours. (Article 6, Section 1.B.) There are many times when employees work more than 80 hours and do not claim the time.

The Contract provides for employees to be compensated in cash or compensatory time. (Article 6, Section 1.D.).

Starting with the 2005-2007 Contract, Article 6, Section 3 allows an employee to convert up to 40 hours of Comp Time to Deferred Compensation. This was an important benefit needed to obtain voluntary agreement for the successor agreement to the prior contract. The Employer violated that provision of the Contract when it required employees to record time worked as TNP rather than paying cash for those hours as Overtime or allowing them to be recorded as Comp Time.

The Employer has many codes to record time worked for an employee managing his/her time. There are two codes specially for recording Comp Time; hours earned and used. It's likely other reasons MnDOT inconsistently requires the use of TNP has to do with denying employees the compensation in the form of (1) conversion of Comp Time, or (2) paying out TNP when an employee is terminated or retires from employment.

No other agencies reported use of TNP.

Employees have incurred financial losses provided for by the ability to convert Comp Time to Deferred Compensation and elimination of vacation hours due to an inconsistent requirement to use TNP before the use of vacation for some employees.

This grievance is a predecessor to any collective bargaining discussion pertaining to hours of work and TNP. After the problem arose, MGEC engaged the Employer in such discussion, first in the meet and confer process and then in bargaining, to voluntarily resolve the differences created by MnDOT when it unilaterally instituted TNP. There was the contract violation, then there was a grievance, next came discussion and bargaining and finally the issue of the contract violation to resolve in arbitration.

Comp Time is the contractual provision for additional hours worked that are not paid as overtime. Comp Time codes are the best mechanism for recording additional hours worked in as

much as they show both the earning and use of such time allowing for a more accurate record of an employee's work hours and greater public accountability.

Some time after discussion about hours worked between the State and MGEC on collective bargaining for the 2007-2009 contract, that direction was changed to using the code TM for hours previously recorded as TNP.

As evidenced by the reduced number of hours coded as TNP in FY 2007, unlike TNP code, the TM code is untraceable in the State's RCA system and no such hours in FY 2008. As such, accountability to the public for hours worked and taken off, or for compensation due to an employee, are less traceable.

The Employer's inconsistent practice re: Comp Time and TNP, there are others, within District 2, that are allowed Comp Time.

Employer was required to use TNP, before using vacation time and that resulted in forfeiture of some hours of vacation leave. If allowed, employees would have converted Comp Time to Deferred Compensation as per the contract.

Maver's construction-related MnDOT job requires considerable travel to work sites, making it impossible to complete the work in an 80 hour pay period. He does not always record all hours worked on an hour for hour basis. He is required to record additional hours worked as TNP.

Janelle Anderson confirmed that others in District 4, usually working construction projects, are allowed the use of Comp Time. She was not. At MnDOT Central office she has been told to use Comp time, but not record it as such, but instead to track it "as cuff time," which she does with a spreadsheet.

Labor Relations Officer Rich Peterson testified that he believed that earning overtime and compensatory time requires work on a "special project." This is incorrect. The requirement for a "special project" is only required in the AFSCME and MAPE contracts, not in the MGEC compensation plans.

Acknowledged that "cuff time" is used by MnDOT employees who have an expectation that a normal pay period is eighty hours. He denied that it required preapproval, as does overtime. This conflicts with MGEC's concern that employees use accurate time reporting and MnDOT has agreed that employees should do so. He could not state that employees were ever informed of the use of TNP.

Jill Pettis, Past Compensation Manger for DOER and State Negotiator of the 2005-2007 MGEC contract stated that prior to the Fair Labor Standards audit, the State treated most MGEC employees as "exempt." As a result of that audit the State was ordered to backpay of hundreds of thousands of dollars. Shortly thereafter, in 2002, MnDOT began the use of TNP.

She agreed that none of the participants, when negotiating terms for a Memorandum of Understanding pertaining to the two week shut down of state government, raised any awareness of TNP in lieu of Comp time. Consequently some employees worked, some employees got to use vacation/sick, holiday, comp time while those with TNP were unable to get paid for the extra hours worked prior to the shut down.

The remedy to this violation of the contract should include:

1. Finding that the use of TNP and TM cause violations of the terms of the MGEC Contract since the employees lose identified contractual benefits that provide for additional compensation.
2. Giving employees who lost vacation time, due to the use of TNP, a choice of having those lost vacation hours restored, cashed out or converted to Deferred Compensation.
3. Allow employees who worked extra hours and were required to code those hours as TNP or TM, the opportunity, over the next three years, to convert existing or future TNP/TM/Comp Time hours to Deferred Compensation. The annual cap on the conversion would be increased temporarily up to the number of hours TNP previously accrued each year, not to exceed forty additional hours per year.
4. Make the grievant(s) whole by above or other means.

The Contract provides that an employee might expect an 80 hour pay period and that sometimes the work of the Employer will take more time. When that happens, it provides means to address that extra work time either overtime, compensatory time, not necessarily hour for hour, with an obligation that the employee is responsible for managing and accounting for the work time. Furthermore, the Employer reviews every time sheet the employee submits and has no claim that employees have abused the system or are seeking benefit from hours not worked.

The Contract is the foremost guide to terms and conditions of employment. No one denies the Employer the rights afforded in Article 3 of the Agreement. Payroll codes are not a subject either party has brought to bargaining. However, the application of the TNP and TM codes conflicts with terms both parties agreed to. Based on Employer data, incomplete due to employees directed to work "on the cuff" or use TM, there is a small population affected. Number two above affects very few people. It has no financial cost to the State but allows those employees the contractual right to have used that time rather than lose it.

Any employee who used TNP or TM shall be eligible up to the amount of TNP/TM earned not to exceed 40 hours per fiscal year for years 2005, 2006, 2007 and 2008. The remedy gives back to employees a benefit the Employer took away from them when it required the use of TNP.

DISCUSSION AND OPINION

The parties were unable to agree on a statement of the issue and deferred the question to the Arbitrator.

The Arbitrator's version of the issue recognizes that neither the Council's nor the DOT's statement raises a justiciable question. The Council's statement does not even pose a question for which any meaningful remedy can be fashioned:

Did the employer violate the 2005-2007 and 2007-2008 contracts between the State of Minnesota and the Minnesota Government Engineers Council when it (1) required employees to the payroll code TNP (Time Not Paid) rather than recognize time worked as either regular time or compensatory time, and (2) disallow employees to recognize comp time recorded as TNP for the purpose of converting comp time to deferred compensation?

This statement suffers multiple defects including:

- Incomplete sentence following (1) the statement does not contain a verb. I infer the statement is meant to read “required employees to use...”
- The sentence “rather than recognize time worked as either regular time” conveys no understandable idea. Of course the DOT recognizes time worked as regular time – for the first 40 hours on the clock. Further, it makes no sense for the Employer to use any of the first 40 hours actually worked as compensatory time.
- The sentence following (2) fails to convey any cogent meaning. Comp time and TNP are two distinctly different wage measures.

The Employer's statement of the issue also fails to express a testable question when it asks: Did MnDOT violate Article 6, Section 1. Exempt Employees, C. Time Management when some employees use the time sheet payroll code Time Not Paid (TNP) to record actual hours worked and to document time management? The hearing record makes clear that the Council's grievance has nothing to do with some employees using TNP to record actual hours worked but, rather, the dispute arises from MnDOT requiring some exempt employees, but not others, to use TNP to code hours actually worked past 40 in a week, which were not treated as overtime hours.

Further, the mere use of the TNP code does not go to the core of the dispute which actually challenges the non-payment of overtime and/or conversion to comp time of those hours required to be worked over 40 hours in a week.

With these defects in the statements of both DOT and the Council herein identified the following Arbitrator's version of the issue, framed at the request of the parties expresses the Arbitral question as follows:

Did the Employer violate any applicable provision of the collective bargaining agreement by not compensating employees either by overtime pay or comp time for time worked over 40 hours in a work week but, instead, merely required the coding of such hours as Time not Paid (TNP) or Time Management TM? If so, what remedy applies?

It should be clear from the foregoing discussion and culminating in the Arbitrator's statement of the issue that unless and until the underlying, remediable claim is properly identified and expressed it is not possible to conduct a cogent analysis of the evidence and arguments.

ON THE MERITS

The Council as the moving party bears the burden of showing that MnDOT violated some provision(s) of the labor contract. If the Council were to succeed in meeting this primary burden, the concomitant requirement would be to fashion a remedy compatible with the terms of the agreement.

A confounding aspect of this entire dispute arises from the Council's frequently repeated argument that somehow MnDOT's requirement that the grievants record their hours worked beyond 80 in a payroll period as Time Not Paid (TNP) causes them to lose overtime or comp time, e.g., on page 2 of the Council's brief, the Council argues:

Starting with the 2005-2007 Contract, Article 6, Section 3 allows an employee to convert up to 40 hours of Comp Time to Deferred Compensation...The employer violated that provision of the contract when it required employees to record time worked as TNP rather than paying cash for those hours as Over Time (sic) or allowing them to be recorded as Comp Time.

This argument lacks merit. Article 6, Section 1.D states that the Agency retains the discretionary authority to approve work, in advance for overtime payment. The collective bargaining agreement further provides that "Overtime worked may be liquidated at the rate of straight time in either cash or compensatory time." The argument that the Agency can force employees who have worked approved overtime to substitute the code Time Not Worked for approved overtime which has, in fact, been worked lacks support in the record.

No witness came forward to testify that any Agency supervisor or management person told him or her in effect, "record those approved overtime hours you worked as TNP so that we don't have to pay cash for them or convert them to comp time." Such proposition is absurd but, if the Council can supply proof that this blatant violation of contract ever actually occurred, I will keep the record open for three calendar months to receive such proof and promptly direct remedy in full.

It should be stated here for purposes of absolute clarity that TNP and approved overtime are mutually exclusive payroll references. "Overtime pay" means payment for time worked in excess of the 40 hour standard established by law, collective bargaining agreement, employer

policy and/or industry practice. See R.C. Ehrenberg Fringe Benefits and Overtime Behavior, Lexington Books, Lexington, MA (1976). TNP by contrast, means Time Not Paid.

The Council's arguments suggest that if exempt employees were not required to record excess hours worked as TNP, they would be paid for these hours – even when not approved for overtime payment, or convert these excess hours to Comp Time. This proposition is simply wrong. The Council was unable to cite any contractual provision which would automatically trigger overtime payments or comp time conversion for excess of 40 hours worked.

On the contrary, the contract language relied on by the Council derives from subsections E and F of Section 2, Non-Exempt Employees. This grievance concerns exempt high level professional employees, not about “covered” employees who qualify for time and one-half pay for overtime work payable in cash on compensatory time off.

The conclusion that follows from these definitions is that the Council has been unable to show any harm to grievants from the requirement for exempt employees to use Time Not Paid (TNP) to record hours worked in excess of 40 per week (80 per pay period) which have not been approved for overtime cash payments or compensatory time. One is hard pressed to imagine a more descriptive term for recording unapproved overtime – thus not eligible for premium pay – than Time Not Paid.

The record shows, by contrast, that the use of TNP provides employees and management a means of documenting extra hours worked for purposes of justifying time later taken off work. All of the Council's witnesses admitted in cross-examination that, even though not expressly required by the Agreement, they had been permitted to take time off on an hour-for-hour liquidation of their excess hours worked. From this testimony it must be concluded that none of these witnesses had actually “lost” any of their excess hours and the Council produced no other evidence that their grievants were harmed and therefore were entitled to remedy.

The fact that MnDOT's enforcement of the TNP coding requirement was spotty and inconsistent does not constitute “harm” to the grievants. The Time Management procedures of the Agency allowed for extra hours to be recorded and credited through two additional means – use of TM coding that provides for tracking extra hours in the remarks section and/or personal spreadsheets as well as personal calendar notations. At risk of being repetitive, the fact should be restated at this juncture – TNP is not some artifice for avoiding payment of overtime, which requires preapproval, nor is TNP a means of denying eligible employees compensatory time which is a form of overtime and thus requires the same approval in advance.

TNP is simply a means of coding, for purposes of Time Management, hours worked beyond the standard 40, for the primary purpose of documenting eligibility for time off to balance work periods.

The foregoing analysis and findings compels to the conclusion that, even if the Agency's required use of TNP and TM payroll designations did not violate the collective bargaining agreement – which it did not, the Council's proposed remedy would require the Arbitrator to amend applicable provisions of the Agreement and/or to add new concepts to those provisions.

In regard to the remedy plea that vacation time forfeited by grievant in one fiscal year, who used TNP for such lost time, should be restored to them, the Council has failed to show that the use of TNP for those forfeited vacation days had anything to do with the loss of anyone's vacation time.

The loss of the vacation time shown in employee time sheets for fiscal years 2005, 2006, 2007 resulted solely from the terms contained in Article 8 Vacation Leave, Section 2 Allowances. Even if the employees involved had used the remarks section of their time sheets to document their forfeited vacation days rather than the TNP code, they would still have lost this vacation time. Obviously, such lost vacation time cannot be restored by arbitral award without modifying the Agreement in violation of the authority vested in the Arbitrator.

Finally, the Council's request that extra hours worked under Section 1C. be converted to compensatory overtime would require the Arbitrator to ignore Section 1D. This request, again, confuses time management and overtime which are covered in distinctly separate provisions of the Agreement. To repeat the contractual distinction – time management and compensable overtime are mutually exclusive propositions.

The Council certainly established, however, that a deeply felt and persistent concern of its members needs to be addressed. That concern focuses on a widely held belief that employees who work extra hours are not being appropriately compensated for their time. It seems doubtful that the findings and conclusions of this Award will serve to resolve this concern among employees affected. The more effective response probably must be pursued at the bargaining table and also through further clarification by management communication of the distinction between time management as a concept and practice, and the concept and practice of compensable overtime.

DECISION

Based on the foregoing findings and conclusions, the grievance is hereby denied.

May 8, 2008
Date

John J. Flagler, Arbitrator