

**BEFORE MARTIN HENNER
ARBITRATOR**

IN THE MATTER OF AN INTEREST ARBITRATION BETWEEN

CLARK COUNTY CORRECTIONS DEPUTY GUILD)	OPINION
Guild)	and
)	AWARD
and)	
)	Interest Arbitration
CLARK COUNTY, WASHINGTON)	
Employer)	PERC CASE No.
)	129523-1-17
)	
)	

REPRESENTING THE GUILD:

**DARYL S. GARRETTSON, Of Counsel
FENRICH & GALLAGHER, P.C.
LAFAYETTE, OREGON**

REPRESENTING THE EMPLOYER:

**EMILY A. SHELDRIK
SENIOR DEPUTY PROSECUTING ATTORNEY
CLARK COUNTY PROSECUTOR'S OFFICE**

HEARING HELD ON:

NOVEMBER 9, 2017

AT:

VANCOUVER, WASHINGTON

DATE OF AWARD

MARCH 16, 2018

INTRODUCTION

This Award pertains to an interest arbitration under Washington State Statute, RCW 41.46, applicable to strike prohibited bargaining units when an employer and a union come to an impasse in negotiations over a collective bargaining agreement.

Clark County, Washington (County) and the Clark County Corrections Deputy Guild (Guild) reached an impasse in their mid-contract negotiations to replace language in their Collective Bargaining Agreement (Agreement) pertaining to compensation and payroll.

On July 18, 2017, after the failure of mediation, the Washington Public Employment Relations Commission certified that an impasse had been reached on the Party's Agreement, Article 11, Section 11.2, Payroll, and Article 10, Section 10.4.5, Compensatory Time. Thus interest arbitration procedures could be invoked. It assigned Case No. 129523-I-17 to the matter.

Thereafter, the undersigned was selected by the parties to serve as the Arbitrator.

The hearing on the matter was held in a conference room of the Clark County Sheriff, Vancouver, Washington, on November 9, 2017.

Briefs of the parties were submitted to the Arbitrator by mail on December 29, 2017, and were promptly received the following week.

As the Parties had adjusted their previously agreed upon submission date for the briefs to a date just prior to when the Arbitrator was scheduled to travel out of the country for an extended period, both parties agreed to waive the deadline for submission of this Award.

The Guild was represented by Daryl S. Garrettson, Of Counsel to the Oregon law firm of Fenrich & Gallagher, P.C. The County was represented by Emily A. Sheldrick, Clark County Senior Deputy Prosecuting Attorney.

Both parties were afforded a full opportunity to offer written evidence, examine and cross examine witnesses, and submit arguments in support of their positions. In fact, both advocates made excellent arguments in support of their positions.

BACKGROUND

In 1997, as a result of an interest arbitration, Guild members were moved to an hourly pay payroll from their prior monthly salary plus overtime system. This new payroll system presented personal budgeting problems for some of the members, as their four day on / four day off 12 hour shifts, paid semi-monthly, provided widely varying paycheck amounts. Depending on his or her schedule, a member's compensation could fluctuate from as few as 84 hours to as many as 96 hours on a given paycheck.

Accordingly, to address that problem, the parties negotiated a payroll stabilization program, which provides each member with a payroll stabilization account (PSA). Members may elect to reduce the number of hours they will be paid in a pay period and bank the excess hours in their PSA. They may then elect to be paid for some of the hours banked in other pay periods.

The language of the current Article 11, Section 11.2, and the County's Fact Sheet describing its Payroll Stabilization Program allows the members the right to bank and to

withdraw any number of hours they wish, subject only to a maximum limit of 50 hours which may be banked.

Article 11, Section 11.2, at issue in this arbitration, provides (in part) “Employees shall be eligible to participate in the payroll stabilization program, consistent with the terms of that program as applied to the Deputy Sheriff’s Guild.”

The County practice has been not to report the income to its employees for the PSA hours banked until they have been cashed in and payment to the employee has been made.

In 2015, the County was notified by the Washington State Department of Retirement Systems (DRS) that its practice violated DRS rules. The County practice permitted employees to defer income from one calendar year to another, which could affect retirement benefit calculations, especially by increasing an employee’s pay during his or her final years of work prior to separation or retirement. It also permitted employees to defer payment for hours worked until pay or step increases had occurred, increasing their income.

DRS indicated that for the County to be able to continue the payroll stabilization program, it would have to report the income it was paying out for the pay periods when earned, possibly going back years. Testimony from payroll personnel indicated this would impose a large administrative burden if the payroll stabilization program were to continue.

When the County legal department reviewed the matter, it also determined that the payroll stabilization program violated US wage and hour laws and regulations. The law allows employers like the County to permit employees to defer payment for overtime hours, and to instead bank such hours, at time and half, for use as compensatory

(comp) time off in the future. But this exemption from the general requirement that payment for all hours worked must be made in the regular paycheck, applies only to overtime hours.

If regular hours are worked but not paid, and are instead banked as PSA hours, a violation of Federal Law has occurred.

The Guild argues that the County has failed to consult experts in tax law to confirm its finding that the payroll stabilization program violates Federal rules. But it fails to offer any testimony or evidence to contradict the County lawyer's conclusion.

The Guild also disputes that an excessive administrative burden would occur if the payroll stabilization program were retained. It notes that the County made no effort to see if a computer program could be written that would simply and easily provide the necessary data to the DRS, and thus permit the payroll stabilization program to continue.

The Guild also notes that the County learned as early as 2005 that the DRS deemed the payroll stabilization program problematic. Thus it could have dealt with it during the normal negotiation process when a new contract was being negotiated.

I need not deal with these objections, as both the County and the Guild have accepted that the payroll stabilization program will be ended, and each side has made proposals on what new contract provisions should be adopted to facilitate that end.

ISSUES FOR DETERMINATION

In an interest arbitration such as this, where a contractual provision which has previously been agreed upon in bargaining by the parties must be replaced, the

Arbitrator should seek to draft a replacement provision which addresses the same problem as the provision requiring replacement.

In this case, the payroll stabilization program, which is to be terminated, was designed to provide some measure of payroll leveling for employees who would otherwise be subjected to wide swings in their semi-monthly paychecks. Both parties had previously agreed to this objective when they negotiated the payroll stabilization program.

Thus, in my consideration of the parties' proposals, I will be noting how well each one attempts to provide a solution to the objective of achieving some measure of payroll stability.

Payroll Stabilization Program

The Guild and the County have both proposed to eliminate the language in Article 11, Section 11.2, relating to the payroll stabilization program. Thus, the following sentence from that section will be deleted:

“Employees shall be eligible to participate in the payroll stabilization program, consistent with the terms of that program as applied to the Deputy Sheriff’s Guild.”

The County also has proposed that, with the elimination of the payroll stabilization program, all PSA banked hours be cashed out at the employee’s current pay rate. As the payroll stabilization program will be ended, that appears to be a necessary step, and will be so ordered.

Compensatory Time Option

Currently, Article 10, Section 10.4.5, allows employees to accrue compensatory time, in lieu of receiving payment for overtime hours, at a time and one-half rate, up to a

maximum of 96 hours. There is no current provision for cashing out (instead of using) such compensatory time, until the time of an employee's termination.

In recognition of the elimination of the payroll stabilization program, the County proposes that Section 10.4.5. be amended as follows:

1. to increase the number of compensatory time hours an employee can accrue up to 110 hours.
2. to permit employees to cash out any and all compensatory time hours accrued over a minimum balance of 20 hours, which must be maintained,
3. to restrict such cashing out of compensatory time hours to only three dates each calendar year, such dates to be determined by the end of the preceding calendar year.

The Guild has proposed:

- 1 to increase the number of compensatory time hours an employee can accrue up to 144 hours.
- 2 to allow employees to cash out compensatory time hours once each month.
3. to set a maximum number of hours permitted to cashed out at 48 hours in a calendar year.

Thus the issues of dispute between the parties are:

- how many compensatory time hours an employee can accrue?
- how often those hours can be cashed out?
- will there be a limit on the maximum number of hours that can be cashed out?
- will there be a requirement that a minimum number of hours remain after such cashing out?

DISCUSSION

At the last interest arbitration between the County and the Corrections Deputy Guild, in 2015, Arbitrator Alan Krebs issued an opinion that confirmed the following as comparator jurisdictions: Kitsap (WA), Spokane (WA), Thurston (WA), Clackamas (OR), Washington (OR) and Lane (OR). These jurisdictions were offered as comparators at the hearing before me, without objection from the Guild.

Compensatory Time Accrual

Testimony reporting the results of a telephone survey of these counties established that none of them allowed compensatory time bank accrual greater than a maximum of 100 hours.

In response, the Guild noted that the County survey failed to ascertain whether any of these comparable counties included employees on 12 hour shifts, with 4 days on and 4 days off.

Looking at internal comparisons, nor do any Clark County employees enjoy compensatory time bank accrual of more than the 110 hours being proposed by the County in this matter. But again, none of these other employees work 12 hour shifts, with 4 days on and 4 days off.

The Guild argues that with the demise of the payroll stabilization program, its members are losing their PSA bank. The PSA bank permitted them to have enough hours to level out their varying paychecks.

They argue it is proper for them to be awarded a 48 hour increase in the maximum number of compensatory time hours which they can bank, going from 96 to

144 hours. It is noted that because of their members' 12 hour shifts, the 48 hour change actually represents an increase of only 4 work days.

The County argues that an excessive number of compensatory time hours which can be banked may lead to unanticipated excessive costs.

When employees utilize compensatory time for extra days off, other employees may be required to work overtime if minimum staffing requirements in the jail are to be met. And these employees also will earn either time and one-half pay or compensatory time hours at that rate. This could lead to a cascading affect, if these employees also then utilize the hours for extra days off, generating a need for yet other workers to work overtime.

I judge this fear of cascading costs to be misplaced. Section 10.4.5 specifically provides that consent of the Sheriffs Department is required for compensatory time usage. Thus compensatory time requests may be denied, if they impact minimum staffing requirements. This issue ceases to exist if compensatory time is cashed out.

Cashing out Compensatory Time

The Guild's proposal attempts to maintain the status quo, with some minor modifications. As its members are losing the opportunity to bank up to 50 PSA hours, it requests an increase of 48 hours to the prior compensatory time maximum, at the same time accepting an annual maximum limit of 48 hours which could be cashed out.

It also offers a reduction of the number of times when hours can be cashed out from 24 (semi-monthly) to 12 (monthly), to ease the County's administrative burden.

Currently, the County does not permit employees to cash out their compensatory time hours. PSA hours can be cashed out. As the payroll stabilization program is being

eliminated, the County proposes to now permit compensatory time hours to be cashed out, with some limits.

The County notes that its comparator jurisdictions either do not permit the cashing out of compensatory time at all (2 jurisdictions) or limit cashing out to once or twice a year, and sometimes only if the compensatory time hour accrual exceeds a minimum number of hours (4 jurisdictions).

All of the jurisdictions that permit such cashing out specify the dates when that will occur.

The County claims that its payroll department faces administrative burdens in complying with DRS requirements when compensatory time hours are cashed out. It understands that DRS rules to require that compensatory time hours paid out must be reported to DRS according to the value of those hours when they were earned, which may have been years earlier and at different rates of pay. This will require the tracking of the value of compensatory time hours when banked, and identifying and reporting the values of the particular hours being cashed out.

Accordingly, the County proposes that an employee be permitted to cash out all compensatory time hours, but only three times each year. To assure that its compensatory time scheme meets Federal wage and hour laws and regulations, its proposal also requires that the pay periods for the three cash out payments be set or selected by the end of the prior calendar year.

The County also proposes that only compensatory time in excess of 20 hours banked be eligible for cashing out. While two or three of the comparable jurisdictions

also have a minimum number of compensatory time hours to be maintained, above which hours can be cashed out, this is not a universal requirement.

The County has not indicated why such a minimum is needed or desirable.

FINDINGS

As both parties are in agreement in proposing that Section 10.4.5 be amended to give employees the ability to cash out compensatory time hours, there is no need for me to make findings about its appropriateness.

I do find that among the comparable jurisdictions, none permit the banking of more than 100 hours.

The County has no bargaining unit with a compensatory time cap exceeding 110 hours at this time.

I am cognizant of the need to consider what comparable jurisdictions provide and what this employer provides to its other employees. I must also consider issues of cost to the employer to fund and administer any benefit awarded.

But the cost or administrative expense of any benefit being awarded in this case will likely be offset by savings attributable to the benefit being eliminated. Neither party has submitted any evidence regarding increased costs which might be incurred if one or the other of the proposed contract revisions is adopted.

Most importantly, in this situation, I am attempting to draft language that replaces an employee benefit which has been in the parties' collective bargaining agreement for over 20 years. Presumably, that language was agreed to by them in the course of negotiations.

As such I am trying to craft contract provisions which, as much as is feasible, maintain the status quo.

I find it appropriate to adopt the Guild's proposal of increasing the maximum number of compensatory time hours to 144, which is a 48 hour increase from the present. This adjustment merely reflects a transfer of the lost 50 PSA hours from the eliminated payroll stabilization plan into an enhanced compensatory time cap.

However, I am sensitive to the increased administrative costs which will be incurred by the County payroll department, as it must track an employee's compensatory time hours at the time they were earned and then report them when finally cashed out.

Accordingly, I will adopt the County's proposed language, restricting the cashing out of compensatory time hours to only three dates each calendar year. To meet the County's concerns regarding Federal wage and hour rules, I will further require that the three cash out pay periods be the shortest payroll time periods, unless the employee has selected alternative pay period dates by the end of the prior calendar year.

As no rationale was provided by the County for the requirement that employees must maintain a minimum balance of 20 hours of compensatory time, only being able to cash out hours above that minimum, I reject the County proposal to add that as an additional requirement.

To further reduce the administrative expense to the County, I will adopt the Guild's proposal to limit the total number of compensatory time hours an employee may cash out in a calendar year to 48 hours.

AWARD

1. Section 11.2 of the Collective Bargaining Agreement will be modified to delete the following sentence:

“Employees shall be eligible to participate in the payroll stabilization program, consistent with the terms of that program as applied to the Deputy Sheriff’s Guild.”

2. Employees with banked PSA hours shall be paid for these hours forthwith.

3. Section 10.4.5. shall be modified to read as follows:

Compensatory Time Option.

With consent of the department, an employee may elect to accrue compensatory time off at the rate of time and one-half (1 1/2) in lieu of overtime payments up to a maximum accumulation of one hundred forty-four (144) hours. Employees will be permitted to cash out some or all of their accumulated compensatory time up to a maximum of forty-eight (48) hours within a calendar year. Such cashing out of compensatory time will be limited to three (3) payroll dates annually, which dates shall be on the payroll dates with the employee’s shortest scheduled hours, unless the employee has selected alternative dates by the end of the prior calendar year.

Employees who have accumulated the maximum compensatory time balance will be paid at the overtime rate for future accruals. Unused compensatory time off shall be paid off at the employee’s regular rate at the time of termination. Compensatory time off shall be scheduled in accordance with procedures set forth in Article 7 of this Agreement.

Respectfully Submitted on March 16, 2018, at Eugene, Oregon

Martin E. Henner
Arbitrator