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**IN RE THE ARBITRATION BETWEEN:**

City of Crystal, Minnesota,

**BMS File No. 10-PA-0289**

Employer,

and

**GRIEVANCE ARBITRATION  
OPINION AND AWARD**

Law Enforcement Labor Services, Inc.

Union.

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Pursuant to **Article 7** of the collective bargaining agreement effective January 1, 2008 through December 31, 2009, the parties have brought the above matter to arbitration.

The parties stipulated that no procedural issues are before the arbitrator and the matter is properly before the arbitrator for a final and binding determination.

A grievance was submitted on March 16, 2009.

A hearing was conducted on October 28, 2011 at the Crystal City Hall.

Briefs were submitted November 14, 2011 and the record was closed.

**APPEARANCES:**

**FOR THE EMPLOYER**

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**FOR THE UNION**

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**ISSUE:**

**The issue as submitted by the Union:**

*Did the City of Crystal violate its collective bargaining agreement with LELS by denying Officer Peter Underthun's request to be paid overtime for six hours of his violent offender saturation detail on March 5, 2009?*

*If so, what is the appropriate remedy?*

**The issue as submitted by the Employer:**

*Did the City violate Article 14, Compensatory Time, of the collective bargaining agreement when it provided the Grievant Peter Underthun with compensatory time for his work hours on a March 5, 2009 voluntary special assignment?*

**RELEVANT CONTRACT LANGUAGE:**

**Article 2 – Recognition**

2.1 The EMPLOYER recognizes the UNION as the exclusive representative under Minnesota Statutes, Section 179A.03, Subdivision 14, for all police personnel in the following job classifications:

Police Officer (Patrol Officer)

**Article 3 – Definitions**

3.3 EMPLOYEE: A member of the exclusively recognized bargaining unit.

3.9 OVERTIME: Work performed at the express authorization of the EMPLOYER in excess of the EMPLOYEE'S scheduled shift.

**Article 5 – Employer Authority**

5.1 The EMPLOYER retains the full and unrestricted right to operate and manage all personnel, 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 any inherent managerial function not specifically limited by this AGREEMENT.

5.2 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.

### **Article 7 – Employee Rights – Grievance Procedure**

#### **7.5 Arbitrator’s Authority**

A. The arbitrator shall have no right to amend, modify, nullify, ignore, add to, or subtract from the terms and conditions of this AGREEMENT. The arbitrator shall consider and decide only the specific issue (s) submitted in writing by the EMPLOYER and the UNION, and shall have no authority to make a decision on any other issue not so submitted.

### **Article 13 – Overtime**

13.1 Employees will be compensated at one and one-half (1-1/2) times the employee’s regular base pay rate for hours worked in excess of the employee’s regularly scheduled shift. Changes of shifts do not qualify an employee for overtime under this Article.

13.2 Overtime will be distributed as equally as practicable.

13.3 Overtime refused by employees will, for record purposes under Article 13.2, be considered as unpaid overtime worked.

13.4 For the purpose of computing overtime compensation, overtime hours worked shall not be pyramided, compounded, or paid twice for the same hours worked.

13.5 Overtime will be calculated to the nearest six (6) minutes.

13.6 Employees have the obligation to work overtime or call backs if requested by the EMPLOYER unless unusual circumstances prevent the employee from so working.

**Article 14 – Compensatory Time**

An employee may earn compensatory time off at the rate of one and one-half (1-1/2) times in lieu of paid overtime under **Article 13.1**. An employee may accrue up to a maximum of 48 hours of compensatory time. Employees will be able to cash out banked comp time once per calendar year by requesting to do so no later than December 1 of each year. The use of compensatory time shall be in accordance with current vacation practices. The City will allow carry over of a maximum of 48 hours compensatory time from year-to-year.

**FACTUAL BACKGROUND:**

On March 5, 2009 the grievant, Officer Peter Underthun was offered work on “saturation project” organized by the *Northwest Suburban Hennepin County Violent Crime Collaboration Group*. The Crystal Police Administration considers participation in crime prevention programs that involve cooperation between multiple jurisdictions to be important. However, like most, if not all Minnesota cities, the City of Crystal is finding it difficult to fund what could be viewed as special projects. The Administration determined that the March 5, 2009 “saturation project was a special project and told Officer Underthun that any hours he worked on the saturation project beyond his normal schedule would be compensated using compensatory time off. Officer Underthun agreed to work the saturation project on March 5, 2009. When he accepted the work, he made no comment regarding the condition that payment for overtime worked be made using compensatory time off.<sup>1</sup>

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<sup>1</sup> Accepting an offer to work an additional shift is different than negotiating terms and conditions of employment, which is the purview of the exclusive bargaining representative! (**Article 2**)

Other Officers who worked the same detail, agreed to accept compensatory time off in payment for the overtime worked.

At least one officer turned down the overtime because his compensatory time off bank was near the 48 hour limit.

After the work was completed, Officer Underthun submitted a claim for overtime pay for the overtime hours he worked, rather than a request for compensatory time off. The request for overtime pay was denied and Officer Underthun grieved the denial.

The parties are in agreement that some overtime work may only be paid at one and one half times the normal wage, due to the funding source for the work. Three examples of overtime work situations for which compensatory time off has not been available are:

- Security for the Republican National Convention
- The Safe & Sober/Night Cap program and
- The annual Crystal Frolics

The Republican National Convention and the Safe and Sober/Night Cap programs have required that payment be made by cash overtime. The Crystal Frolics committee pays for approximately one third of the events police budget, which appears to correspond to the cost of police time over and above straight time for the event. The Union has not disputed the need to pay cash overtime in the above situations. The issue in this arbitration is whether the Employer may unilaterally determine that cash overtime is not available for specially selected overtime work.

The Officers who have worked with the Explorer program learned that the program would have to be discontinued, if cash overtime was paid to participating Officers. In order to keep the program operating, Officers have generally claimed compensatory time off in lieu of overtime payment, when they have worked overtime in conjunction with the Explorer program.

Between 2005 and 2009 there are examples of Officers who have been paid cash overtime for work with the Explorer program.<sup>2</sup> The preponderance of evidence clearly supports the contention that the Officers working with the Explorer program who have taken compensatory time off did so voluntarily. There is no credible evidence that compensatory time was taken based upon an order or directive.<sup>3</sup>

### **SUMMARY OF UNION POSITION:**

**Article 13** and **Article 14** of the collective bargaining agreement are plain and unambiguous. **Article 13** says that Officers “will be compensated at one and one-half (1-1/2) time the employee’s regular base pay rate for hours worked in excess of the employee’s regularly scheduled shift.” The language of **Article 13** affirmatively asserts how officers “will be” compensated for overtime work. **Article 14** contains permissive language whereby Officers “may earn” compensatory time in “lieu of” overtime payment. The Union contends that **Article 13** and **Article 14** read together, using the plain meaning of the language, mean that cash overtime is to be paid, unless the officer elects to be paid in the form of compensatory time. In support of the plain meaning argument, the Union notes that Black’s Law Dictionary defines “in lieu of” to mean “[i]nstead of; in place of” in substitution of.” *Black’s Law Dictionary*, 6<sup>th</sup> ed. (1990).

The Union looks to a decision made by Arbitrator Ver Ploeg in 1997, Teamsters Local 320 and Dakota County, wherein the Arbitrator determined that a “straight forward reading of that provision demonstrates a presumption that overtime work will be recognized with overtime compensation.” The language in question in the Dakota County case says that bargaining unit members “shall receive approved overtime compensation at the rate of time and one half... In

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<sup>2</sup> The Union notes at least 10 instances and cites Union Exhibit 24 in support of the claim.

<sup>3</sup> A Deputy Chief did testify, unconvincingly, that she claimed compensatory time off for Explorer work and considered the suggestion from a higher ranking Officer that she claim only compensatory time off an order.

lieu of such overtime payment, the employee may request compensatory time off for overtime worked at time and one half.” The fundamental principle in this arbitration is the same as in the Dakota County case, there is presumption of cash overtime for extra shifts. The collective bargaining agreement does not permit the City to deviate from the presumption and unilaterally assign mandatory compensatory time shifts.

The intent of the parties should be construed from the instrument as a whole and not from a single work or phrase. In this instance, allowing the City to assign certain shifts as mandatory compensatory time would significantly prejudice officers who are at or near the 48-hour cap, which would force them to choose between foregoing the extra shifts and the additional income from the extra work or cashing out their compensatory time earlier than they planned.

The Union’s position is supported by the City’s practice in applying **Articles 13 and 14** to work details outside of regularly scheduled shifts. Documents produced by the City establish hundreds of instances in the six months leading up to March 5, 2009, where officers chose freely between cash overtime and compensatory time off. Typically a past practice is not established by a six month history of conduct. However, it was the City that asserted that a longer time period for document production was unduly burdensome. The City should not be allowed to argue that the time period is too short to establish a past practice, since additional document production was precluded to accommodate the City’s request.

The Explorer program does not create a precedent for mandatory compensatory time for overtime shifts. Neither the current Police Chief nor the former Chief issued an order or directive requiring that Explorer advisors be paid only with compensatory time. The testimony clearly establishes that advisors agreed to take compensatory time for most of their extra shifts, as part of an informal, voluntary effort to lower overtime costs for the program to the City and make the

program affordable for the City. Despite the voluntary practice, Explorer advisors were paid cash overtime on at least 10 separate occasions between 2005 and early 2009.

Whether the City violates the collective bargaining agreement, when it prohibits accrual of compensatory time in instances where all or some of the funding for a program is obtained from an outside source, like the Safe & Sober/Night Cap program, the Crystal Frolics or the Republican National Convention, is a completely different issue than whether the City may require accrual of compensatory time for overtime work. Furthermore, the Union acknowledges that instances where an outside source is funding overtime work, the City cannot claim reimbursement for hours that have been “banked” but not yet paid.

The Union asks that the grievance be sustained and that Officer Underthun be awarded six (6) hours of overtime pay at time and one half.

**SUMMARY OF EMPLOYER’S POSITION:**

The Employer argues that the collective bargaining agreement does not say that it is the sole discretion of the employee to determine whether compensatory time or overtime is paid for overtime hours worked. In the collective bargaining agreement between the City of Crystal and the LELS Police Supervisors unit, Local 56, the compensatory time off language specifically states that it is the sole discretion of the employee whether compensatory time is accrued or overtime compensation is paid. If LELS intended to negotiate a provision that gives Officers sole discretion in determining whether compensatory time is accrued or overtime compensation is paid, it knew what language needed to be used. **Section 7.5** does not allow an arbitrator to create a provision that does not exist in the collective bargaining agreement.

The Management Rights provision of the collective bargaining agreement makes the following reservation at **Section 5.2** “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.” There is no condition in the collective bargaining agreement which limits the City’s right to offer Officers a voluntary shift on a special assignment for compensatory time only. Hence, the City retains the right to offer Patrol Officers voluntary shifts on a special assignment for compensatory time only. It is management’s inherent managerial right retained in **Section 5.2** of the agreement.

Patrol Officers have not always been given the ability to choose whether they will receive compensatory time off or payment for overtime hours worked. When Officers worked the Republican National Convention, they were required to take payment for overtime. When Officers work Safe and Sober/Night cap special assignments, they are required to take payment for overtime. Also, when Officers work the Crystal Frolics, they must be paid for overtime. In all of the above instances, Officers have not been allowed to claim compensatory time off. Furthermore, Patrol Officers have been required to receive compensatory time off for overtime related to the Explorer program.

A clear past practice exists whereby Officers have been required to earn compensatory time off or receive paid overtime compensation for certain voluntary special projects. The voluntary special project upon which Officer Underthun worked on March 5, 2009 should be treated the same as the other special projects cited by the Employer and the grievant should be required to accept compensatory time off for his overtime work.

The grievance should be denied.

**OPINION:**

**Articles 13** and **14** of the collective bargaining agreement establish the terms under which bargaining unit employees will be compensated for overtime. **Article 13** directs that

overtime “will be compensated at one and one-half (1-1/2) times the employee’s regular base pay rate for hours worked in excess of the employee’s regularly scheduled shift.” The directive is clear and unambiguous. No part of **Article 13** reserves in management a right to deviate from compensating bargaining unit employees at one and one-half times the employee’s regular base pay rate for overtime work. The discretion reserved by management in **Section 5.2** of the agreement does not apply to overtime compensation, because the term is clearly established in **Article 13**. **Article 14** gives bargaining unit members the possibility that they “may” earn compensatory time off “in lieu” of overtime payment. **Article 14** establishes the possibility of substituting compensatory time off for payment of overtime wages for bargaining unit members. The opportunity to earn compensatory time off in lieu of payment for overtime is granted to the “employee” by **Article 14**. No portion of **Article 13** or **Article 14** suggests that management may elect to compensate an employee for overtime work by directing that only compensatory time off is available for the overtime work.

**Section 7.5 - A** of the collective bargaining agreement prohibits the arbitrator from creating or modifying any of the terms of the collective bargaining agreement. “The arbitrator shall have no right to amend, modify, nullify, ignore, add to, or subtract from the terms and conditions of this AGREEMENT.” Since neither **Article 13** nor **Article 14** creates a managerial right to require an employee to accept compensatory time off in lieu of payment for overtime and the arbitrator has no right to amend, modify or add to the terms of the agreement, the arbitrator must find that the Employer violated the terms of the collective bargaining agreement, when it would not compensate the grievant for March 5, 2009 overtime work by payment of one and one half times his regular base pay rate for the six hours of overtime he worked.

The remedy for the contract violation is for the Employer to pay the grievant for six hours of overtime at one and one half times his base rate of pay at the time the work was performed.

While the language found in the collective bargaining agreement between the City of Crystal and LELS Supervisors, Local No. 56 employs more specific language than found in the text of the agreement with Local No. 44, the plain meaning of **Article 13** and **Article 14** of the agreement between Crystal and Local No. 44 is clear and unambiguous. Just as several differently styled hammers may be used to drive a nail, a specific purpose may be accomplished using different contract language. The fact that the language in the Local No. 56 collective bargaining agreement very specifically gives Sergeants sole discretion to select how they will be compensated for overtime does not mean that the arbitrator should add unspecified managerial rights to **Article 13** and **Article 14** of the Local No. 44 collective bargaining agreement.

In the 2008-2009 Labor Agreement between Local 56 and the City, the parties created a situation whereby Sergeants have sole discretion to select how they will compensated for overtime work. In the same agreement the parties also required that Captains be compensated for overtime using compensatory time. At **Section 13.7** the agreement states, “The form of compensation shall be in compensatory time.” The employment relationship between Police Supervisors and the City is in some ways different than the relationship between the City and Patrol Officers. The collective bargaining agreement that is the subject of this arbitration does not give the Employer the right to determine that a Patrol Officer may only be compensated for overtime work on a designated project with compensatory time off and the arbitrator does not have authority to add a managerial right to the agreement.

The Employer did not establish by a preponderance of the evidence the existence of a past practice requiring compensatory time off to be claimed for overtime worked by advisors to

the Explorer program. The testimony clearly demonstrated that advisors to the Explorer program voluntarily elected to accept compensatory time off in lieu of overtime for overtime related to the Explorer program. **Article 14** of the collective bargaining agreement provides that employees “may” earn compensatory time in lieu of overtime compensation, which is what the Explorer advisors elected to do. There is no documentation of any order or policy statement stating that employees may only claim compensatory time in lieu of compensation for overtime relating to the Explorer program. Finally, there have been instances where Explorer advisors have been paid for their overtime. There is insufficient evidence to find the existence of a binding past practice whereby the Employer may restrict Patrol Officer compensation for overtime work to compensatory time off.

Based upon the plain meaning of **Article 13** and **Article 14** of the collective bargaining agreement, the grievance should be upheld.

**AWARD:**

- 1. The grievance is hereby upheld.*
- 2. The grievant shall be paid overtime compensation at the rate of one and one half times his regular base pay for overtime hours worked on the March 5, 2009 Saturation Project.*

**Dated: November 30, 2011**

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**James A. Lundberg, Arbitrator**