

In the Matter of

Arbitration between)	
)	
City of Austin, Minnesota,)	ARBITRATION AWARD
(Employer),)	
)	
and)	<u>Compensatory Time Grievance</u>
)	
American Federation of State, County, and)	
Municipal Employees, AFL-CIO, Council 65,)	
(Union).)	

BMS 05-PA-703

Appearances

For the Employer:

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For the Union:

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Jurisdiction

On June 30, 2004, **the American Federation of State, County, and Municipal Employees, AFL-CIO, Council 65**, (Union) presented to the City of Austin, Minnesota (Employer) a grievance challenging the Employer's change in compensatory time use and accumulation, on behalf of the class of "all supervisors." On October 29, 2004, the Union presented to the Employer a grievance challenging the Employer's refusal to grant compensatory time to Valerie Pitzen (Individual Grievant or Grievant). The grievance was brought under the Collective Bargaining Agreement in effect between the Union and Employer covering the period January 1, 2002, through December 31, 2004, executed December 1, 2003. The parties were not able to resolve the matter through their grievance procedure and have submitted the dispute to final and binding arbitration before Arbitrator Sara D. Jay, who was jointly selected by the parties.

The arbitration hearing was held in Austin, Minnesota, commencing on April 3, 2006. At the close of the Union's case, the Employer requested an adjournment so that it could contact the arbitrator in a related interest arbitration to request clarification of his Award. The parties did so, and a second day of hearing was held on August 24, 2006. The parties waived service by certified mail in writing.

At the hearing, both parties were given a fair and equal opportunity to present their respective cases. The arbitrator accepted exhibits into the record; witnesses were sworn and testimony was subjected to cross-examination. Closing argument was made in the form of posthearing briefs which were timely received on October 2, 2006, on which date the record is deemed closed.

Issues

The parties did not agree on a statement of the issues. The arbitrator will therefore frame the issues as presented by the parties, as follows:

- Did the Employer violate the Agreement by changing the accrual and use of compensatory time for members of this unit in June 2004?
- Did the Employer violate the Agreement by denying use of compensatory time off to the Individual Grievant for an illness in October 2004?
- If so, what should be the remedy?

Relevant Contract Provisions

Article III – Employer Authority

- 3.1. The Employer reserves to itself all rights, power and authority exercised or had by it prior to the time that the Unit became the collective bargaining representative of the employees here represented except as specifically limited by express provisions of the agreement.

Article XV – Premium Pay

- 15.1 Effective January 1, 1997, overtime at the rate of time and one-half will be granted to the positions designated below for any hours worked in a seven day period (Sunday through Saturday) in excess of 48 hours provided that the department head approves the hours to be worked in advance. For the purpose of calculating above, holiday and sick hours will be considered hours actually worked.

Eligible positions: Park Supervisor, WWTP Maintenance Supervisor, Sewer Maintenance Supervisor, Assistant Street Superintendent and Assistant Shop Supervisor.

Factual Background

The Employer is a city in southern Minnesota. Its supervisory employees have formed a bargaining unit which was initially an independent union named Austin Associates Organization. In 2004, the employees voted to make their unit part of AFSCME 65, with Jo Eastvold becoming their representative.

The current City Manager, James Hurm, began in his position in April 2003. In contrast, many of the employees in the unit are very long-term employees. Jon Erichson, the city engineer, began with the City as assistant city engineer in 1979. Jim Samuel, superintendent of the waste water plant, began his employment with the City in 1973, entering management in 1992 and becoming superintendent in 1998. The Individual Grievant has been recreation supervisor since 1986, in a position that was made full-time in 1988. While that position has had different names, according to uncontradicted testimony, it has been the same position in all the years she has held it. The police captain, Curt Rude, has been with the Employer for 22 years. He became management in approximately 2000, having worked his way up from the position of police officer. Other members of the bargaining unit hold similar long tenure. Because the employees in this unit are supervisors, they are not held to rigid schedules, and may often work more than a forty-hour week.

According to Messrs. Erichson and Samuel, the Grievant and Capt. Rude, when they were hired or became managers, managerial employees received compensatory time off when they worked

over forty hours in a week. At least from 1979, compensatory time was received on an hour-for-hour basis; compensatory time was received on some basis in and after 1973. The Employer incorporated the compensatory time policy in its personnel manual in 1996. The relevant policy provides:

Compensatory Time – Regular and probationary full-time and part-time employees may receive and accrue compensatory time (comp time) in lieu of payment for hours worked over the normal forty (40) hours in one week.

- A. *Non-exempt* - Eligible non-exempt employees will receive comp time at the rate of one and one-half (1½) times the hours worked over forty (40) hours.
- B. *Exempt* - Eligible exempt employees may receive comp time on an hour for hour basis. Any comp time left in an employee’s account upon resignation, discharge or retirement will be forfeited.

....

Compensatory Time Off

Accrued comp time may be used upon approval by the employee’s supervisor. Comp time may be taken in blocks of thirty (30) minutes or more.

The compensatory time arrangement was used as an incentive for employment, and was announced to employees offered new positions. For example, the letter offering the position of Planning and Zoning Administrator in May 2000 states that “paid overtime ... does not exist for salaried positions. Overtime hours are recorded as comp time for time off with pay on a one-for-one basis, subject to [supervisor] approval for time off.” The Employer accounted for accrued compensatory time debt to the bargaining unit employees in its financial statement dated December 31, 2002. Contracts with both the current (2003) and former (2000-2003) city managers refer to the compensatory time accrual.

In 1979, compensatory time due to each employee was listed on a monthly sheet. Later, compensatory time accrual was listed on each employee’s pay stub, along with vacation and other accruals. Since 1979, bargaining unit employees have been recording their hours on time sheets, which includes use of compensatory time. Employees have used their compensatory time in lieu of sick leave. The Arena Manager, upon diagnosis with a serious illness, was permitted to use his compensatory time, thus conserving his sick leave, which had a payout of value to his family. A current supervisor used compensatory time when he had a medical problem and surgery in December

2002, and again following October 2003, largely for doctor visits.

In 2002, the parties began negotiations for a new contract. The Individual Grievant was among the representatives for the Union. No one appeared at hearing who had been present on behalf of the Employer throughout the negotiations. The former Union, AAO, put forth proposals on April 30, 2002, which included wage and benefit adjustments, but did not refer to compensatory time. The Employer (through the former city manager) responded to those proposals on April 30, 2002, and made four counter-proposals. The last counter-proposal states: “4. Accumulation of comp. Time shall be approved in advance by the Employer before it can be earned and shall be approved in advance before it is used for time off.” This language appears on the third page of a letter addressed to four bargaining unit members and the AAO; the second page carries the heading, “Employer Proposals,” which are numbered 1-4.

AAO responded in a document which appears to have been received on July 3, 2002. That document covers compensatory time as its eighth item, stating: “Our group has been treated with exempt employee status. It would be a violation of the Federal Fair Labor Standards Act for us to entertain concessions in this area. We question the legality of tracking time and to the accumulating of compensatory time for the exempt employees.”

The Employer’s August 6, 2002, response to the Union, is entitled: “RE: Labor Agreement 2002-2004, Proposal Response to the AAO Request of July 3, 2002.” As to compensatory time, the four-page response states: “Tracking of hours above the normal workday/week is to cease. Employer will adopt a written policy on normal work hours and availability of exempt employees that meets the position/policy requirements. No contract provision exists in the 2001 Labor Agreement with AAO on the subject of comp. hours, therefore no payment for any such hours is required from the Employer to the Employee for such hours now or at any other time. The use of any comp. hours on the city records may continue until an exempt employee has none left.”

On November 14, 2002, the former city administrator wrote to the AAO bargaining team, stating that the Employer would wait for a vote by AAO members on the Employer’s August 6 offer. The Employer stated that its offer would be withdrawn if not accepted by the Union on or before

November 22, 2002. On November 21, 2002, a local private attorney wrote to the Employer that he was representing the AAO, and memorialized the parties' agreement that the Union would have until December 2, 2002, to respond to the offer. On December 2, 2002, the attorney wrote to the Employer's then-city administrator, stating that the Union had rejected the offer, and requested arbitration as soon as possible. The Employer contacted its consultant, who had apparently not been involved in the bargaining; the consultant promptly requested interest arbitration from the Minnesota Bureau of Mediation Services. The issues he listed did not explicitly include any issues by name, other than "Waiver – New Article." The Union's attorney wrote to the Bureau indicating that eight of the issues listed by the Employer had been resolved, listing four issues and stating "The Austin Associates Association also reserve an issue of overtime." Twenty-three issues were listed in the request for final positions sent by the Bureau; the twenty-third issue was "Overtime - Determine Language - New." The Employer's final position on that issue was "no change in the current labor agreement." The private attorney submitted a final position which included no specific language on overtime, nor on several other issues.

In the interim, AAO members voted to become an AFSCME unit. The unit was certified on October 23, 2003, and Jo Eastvold was assigned as the unit's bargaining representative. On April 28, 2003, as previously mentioned, a new City Manager had been brought in. The new City Manager had never heard of a compensatory time policy like the one in use by this Employer, according to his testimony at hearing. He did not immediately begin participating in negotiations.

In April 2003, while negotiations for the contract were continuing, the 2000-2003 City Manager had written a letter to the City Council stating that their practice with regard to compensatory time was not in compliance with the Fair Labor Standards Act (FLSA). He suggests specific reforms, and states that "no further accumulation of so-called comp. hours is to occur as per FLSA." The memo also contains specific language changes suggested for the policy change and states that the City Administrator should be given authority to set core hours for each exempt employee. The memo further states, "This matter has not been addressed in the past AAO Labor Agreements as a specific article." He suggested that compensatory time be limited to a maximum of

80 hours per year, and that approval of the City Administrator be required in advance of the use of compensatory time off.

The Union responded to the letter on April 22, 2003, stating, "It is our position that this letter inaccurately provides information and conditions on the policy of compensatory time." The Union notes that the FLSA states that exempt employees "need not be paid overtime," which is not a prohibition on payment of overtime. The Union response also notes that the current contract identified employees to be compensated for overtime, and states, "The City cannot change this without negotiating in good faith." The Union letter also refers to the handbook policy, demonstrating that "compensatory time is allowed and has been for in excess of 25 years. ... The Policy as proposed in indicative of a retaliatory move against AAO members and the current contract arbitration.... We look forward to working on this with the appropriate representative and would encourage any action on this to be tabled at this time."

In June 2003, the City Administrator sent notes to the City Council stating that he had "drafted a new policy concerning comp time for exempt employees and will be meeting with several of them next week to explain the policy and to ask for their input. I will make it clear that this is not negotiation but rather a request for input." The matter was not resolved, and no changes were made in the recording and accumulation of compensatory time.

The parties were unable to resolve their differences as to the collective bargaining agreement, and interest arbitration was scheduled for December 16 and 17, 2003. In November 2003, new efforts were made to settle the contract. A memorandum from the City Manager dated November 26, 2003, states that it is a summary of the agreements reached by the parties on certain items, but also states that it is a final offer. Salary increases across the board, adjustments for certain positions, vacation adjustment for the Assistant Engineer and a reference to the August 6, 2002 items, are made in that final offer.

Following receipt of that letter, the parties negotiated further. The Employer brought in new local attorneys. According to the Union representatives who were present for negotiations, the contract was resolved when the Employer took the issue of compensatory time off the table, thus

swinging three Union votes needed for approval of the tentative agreement. The contract was executed on December 1, 2003, and is the contract in effect during the times relevant to these grievances.

In June 2004, the City Administrator wrote a memo to the Mayor and City Council on compensatory time. The memo states:

The issue of compensatory time for exempt employees was first raised in April 2003 [by the predecessor City Administrator].... The issue was set aside during the time of contract negotiations and has only recently been raised again.....

It is important for management that we retain 'management rights.' Certain policies, ... such as this policy, are not part of the contract and are therefore not negotiable. This is a very important position for us to maintain.

However, it must be recognized that the City, approximately eleven years ago, adopted the current policy, which in fact calls for keeping track of time over 40 hours on an hour-for-hour basis... It is not against the law for the City to have such policies, but it is very unusual. The memo recommends that the policy be changed, noting that the City Administrator had met with the AFSCME representative, and that management and the Union were not in agreement over negotiability of the matter, nor on the content of the changed policy.

On June 21, 2004, the Council adopted changes to the compensatory time policy as recommended by its administration. The new policy eliminates compensatory time and further states that no overtime is paid to exempt employees. The new policy provides for "personal time off" to be taken by adjusting work schedules to less than eight hours per day at various times throughout the year. Permission of the City Administrator is required in "special and unusual circumstances" for an employee to be granted personal time of an eight hour day or longer. Under the new policy, compensatory time accumulated prior to the adoption of the policy is available to employees to be used as only personal hours off with approval of the department head and/or City Administrator. Compensatory time is forfeited upon resignation, discharge or retirement, as under the previous policy. Adoption of the new policy was grieved by the Union as a class action, on June 30, 2004.

The matter remained unresolved and has proceeded to arbitration.

In September 2004, a member of the bargaining unit, the Individual Grievant, needed surgery and six weeks of recuperation time. Her supervisor, also a member of the bargaining unit, approved the request. The City Administrator then denied the request, stating the request was not consistent with “our policy,” referring to the 2004 policy. The letter states, “use of your accrued sick leave bank is appropriate to use for recuperating from surgery. Of course vacation time may be used as well.” The Individual Grievant and others had previously been permitted to use compensatory time to cover illnesses and recuperation, to save sick leave which can be paid out upon death or retirement, or used at a time of greater need. Denial of the use of compensatory time to the Individual Grievant was also promptly grieved, and has proceeded to arbitration.

In addition, the matter was tangentially brought before Arbitrator Jeffrey Jacobs, as related to interest arbitration for the 2004-2006 collective bargaining agreement between the parties. Arbitrator Jacobs was asked to decide the language on compensatory time, if any, to be placed in the collective bargaining agreement. His decision, issued March 28, 2006, makes what is in essence a contingent award, which is dependent on whether a binding past practice is found here, awarding the Union’s position if a binding past practice is found, and the Employer’s position otherwise. Matters submitted in interest arbitration have been resolved in that forum, and are not before this arbitrator.

Positions of the Parties

Position of the Union

The Union takes the position that the Employer has violated the collective bargaining agreement and its obligations under the Public Employees Labor Relations Act (PELRA) by changing its compensatory time policy. According to the Union, compensatory time accrual and use is a well-established and binding past practice in this city. In order to change a binding past practice, an employer must negotiate an agreement, the Union states. No agreement was negotiated by the parties, the Union asserts, and the Employer did not properly repudiate the practice. The Union notes

that compensatory time has been tracked and accumulated by supervisory employees for over 20 years. Compensatory time continued to be tracked in the same manner without change until the first date of hearing in this case, and now only the name of the category has been changed. The Union quotes at length from Arbitrator Jacobs' interest award as to repudiation of past practice and the evidence before him, as well as citing Elkouri & Elkouri, *How Arbitration Works*, 6th Ed (2002) in support of its position on past practice.

The Union maintains that no change in the compensatory time benefit was negotiated in 2003 or thereafter. Noting that the Employer, not the Union, included compensatory time in the issues to be resolved in interest arbitration, the Union suggests that the Employer is being inconsistent. The Union asserts that compensatory time is a term or condition of employment and therefore must be negotiated and agreed under the requirements of PELRA. Unilateral implementation of changes in benefits is a unfair labor practice, in the Union's view. In support of this allegation, the Union cites *Education Minnesota - Greenway v. ISD 316 Coleraine, MN*, 673 N.W. 2d 843 (Minn. App. 2004), *rev. denied* (wage freeze, health insurance freeze) and *West St. Paul Federation of Teachers v. ISD 197*, 713 N.W.2d 366 (Minn. App.2006)(health insurance plan features) in which unfair labor practices were found based on unilateral changes.

The Union asserts that FLSA and exempt employee status have no bearing on arbitrability of issues under PELRA. The FLSA, the Union says, sets a floor and not a ceiling for compensation. The Union quotes a Minnesota League of Cities advice memo for the proposition that the FLSA does not negate existing overtime or compensatory time policies for exempt employees. In addition, the Union discusses the effect of the decision herein under the interest award.

The Union asks that a binding past practice be found, and for reinstatement of hour- for-hour accrual of compensatory time, to be used in lieu of vacation, sick leave, and all circumstances allowed in the past. The Union further asks that employees negatively affected by the change in the policy in June 2004 be made whole, and for such other remedy as the arbitrator may find just. The Union additionally requests that the arbitrator retain jurisdiction over disputes over implementation of the Award.

Position of the Employer

The Employer takes the position that the matter is not substantively arbitrable. The Employer asserts that the change in compensatory time policy did not violate the collective bargaining agreement, and was within its rights. The Employer states that the parties' intent is evident in the Agreement, where overtime for a few positions is explicitly provided, and no other overtime or compensatory time provisions are included. Thus, the Employer reasons, the parties' intent was to continue a practice of unilateral decision-making by the Employer on the matter of overtime. The Employer contends that the parties recognized the Employer's right to make decisions following "meet and confer" meetings in the Employer Authority article. According to the Employer, that intent was reinforced during negotiations for the 2002-2004, by the City Administrator's April 30, 2002 letter redefining compensatory time practices, the legality of which was questioned by the Union. The Employer states that it replied, agreeing that compensatory time for exempt employees was not negotiable.

The Employer views the City Administrator's letter of August 6, 2002 as notice to the Union that the Employer intended to cease providing compensatory time. According to the Employer, the Union did not challenge the Employer's stated intent to discontinue existing compensatory time practices. Since the Union then signed the 2002-2004 collective bargaining agreement which continues to contain no reference to compensatory time after receipt of the Administrator's letter, the Employer reasons that the Union had notice and agreed to the discontinuance of the existing compensatory time policy. If the Union wished to retain the practice, the Employer states, it had the burden of proposing language for that purpose.

Alternatively, the Employer argues that if there is a past practice with regard to compensatory time, it is that the "meet and confer" provisions of Minn. Stat. §179A.06, subd. 4, will be followed in determining compensatory time. That provision governs "policies and matters other than terms and conditions of employment." The Employer asserts that compensatory time was handled in that manner in 1996, creating a binding past practice that compensatory time is not a term or condition of employment under the statute.

The Employer states that it did not change its policy immediately after announcing its intent to change in 2002, because it needed to wait until it renewed “meet and confer” meetings with the Union. The Employer states that when the revised policy was issued, it was merely implementing the change of which it had warned the Union in August 2002. The Employer timely repudiated its past practice, it states, and was entitled to implement it in 2004.

The Employer maintains that its policy was unilaterally established, and not included in the collective bargaining agreement. The collective bargaining agreement covers only those matters expressly written in the Agreement, says the Employer, and those matters do not include compensatory time. If the Union wanted the matter included, it was responsible for bringing it to the table. The Employer also notes that the Union raised the issue of legality as to covering overtime for exempt employees; the Employer views that question as a demonstration that the Union agreed that the matter was not negotiable. The Employer further asserts that non-negotiable matters cannot be subject to the *Ramsey County v. AFSCME* past practice decision, 309 N.W.2d 785 (Minn. 1981). Thus, the Employer concludes, there can be no effective past practice.

For these reasons, the Employer asks that the grievances be denied.

Discussion

This case centers on a past practice and the parties’ past treatment of compensatory time and hours beyond the standard work week often worked by members of this bargaining unit. The parties do not disagree as to the facts, for the most part. Instead, the disagreement is over the significance of the facts, in particular with regard to interpretation of past practice.

A binding past practice, according to accepted definition, is a practice which is unequivocal, clearly enunciated, and readily **ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties.** Minnesota courts have agreed that a past practice can be binding, even where it directly contradicts the language of a collective bargaining agreement. *Ramsey County v. AFSCME Council 91*, 309 N.W.2d 785, (Minn. 1981). A past practice can be

binding even when an expression of an Employer's retained rights might seem to conflict with that interpretation. *Id.*

Here, the practice of granting hour-for-hour compensatory time, to be used to cover any type of leave, is long-standing, having existed in its current form for at least twelve, and more probably for over 25 years. The practice is clearly enunciated, having been embodied in the Employer's written policies as it had been practiced previously, according to the consistent descriptions and testimony of the long-term employees affected by the compensatory time practice. The existence and continuation of the practice is all the more clear from the fact that it was used as an incentive in hiring employees. *Ramsey County* recognizes that a past practice becomes part of a collective bargaining agreement, even if not written into the express language of the agreement. The compensatory time policy here memorialized a practice which met all the criteria to be a binding past practice.

A binding past practice can be ended by effective repudiation during negotiations for a collective bargaining agreement. *See, LELS v. City of Luverne, 463 N.W.2d at 550.* **The Employer is correct that if a practice is effectively repudiated during negotiations, the Union bears the onus for coming forward with language to reinstate the practice, individually or as a general adoption of past practices.**

The Union did not propose language to place compensatory time as practiced by the parties in the 2002-2004 collective bargaining agreement. However, the predecessor to any Union obligation to make such a proposal was lacking: there was no effective repudiation during negotiations. The Employer's letter stating that the compensatory time practice would be discontinued is clearly labeled a proposal. The Union made a counter-offer following that proposal which rejected the changes to compensatory time, and negotiations continued for many months after the Employer included a proposal to eliminate compensatory time, its second proposal related to compensatory time.

Ultimately, no language on compensatory time was included in the collective bargaining agreement, nor in the parties' final bargaining. The Union witnesses understood that the

matter of compensatory time had been withdrawn in order to settle the contract. The City Administrator's correspondence to the Council confirms this understanding, stating that the matter was dropped during negotiations. The Administrator's correspondence to the Council does not say that an announcement was made that the change would be implemented. That correspondence, as well as the surrounding circumstances and credible testimony, do not permit characterizing the Employer's August proposal to end compensatory time accumulation as a repudiation during negotiations.

The parties were negotiating a contract, so if Employer wanted to keep the matter on the table, it was the Employer's responsibility to make a renewed proposal to end compensatory time, a binding past practice. The Employer did not do so. Thus, the practice continued to be binding under the 2002-2004 collective bargaining agreement. The actions of the parties appear to recognize this, as the accumulation of compensatory time and its use was unchanged until June 2004.

The Employer has put forward several other theories to contradict the conclusion that the compensatory time practice was not binding. Based on the contract language, the Employer appears to refer to the principle of *expressio unis, exclusio alterius*, that where a contract gives a limited list of items, the intent is to exclude all others. The Employer suggests that the contract's listing of certain positions which receive overtime pay demonstrates an intent to exclude all other positions from receiving any other compensation for overtime. In many instances, that principle would apply as described by the Employer. However, here, the overtime language and the compensatory time policy have co-existed for many years, as shown by the many predecessor agreements submitted in evidence. Further, monetary compensation for overtime is one form of pay, while compensatory time is a different form, although serving a similar purpose. No evidence was given as to when, or why, the specific overtime language was placed in the contract and how the parties reconciled it with the compensatory time policy. The principle of *expressio unis* cannot reasonably be applied to these facts.

Other theories have been offered to nullify the compensatory time practice. It was

suggested that the parties had a binding past practice of treating compensatory time as a “meet & confer” subject. However, there is scant support in the evidence for that characterization of the facts. The compensatory time past practice arose so long ago that no one remembers how, when or why it came into being. Those who could know unanimously stated that the practice pre-dated the 1996 policy statement, and possibly their own tenure of over twenty-five years. The evidence shows that the practice was written down in 1996, but it clearly existed prior to being written down. There was no evidence that the written policy in 1996 did anything other than accurately place in writing a practice known to both parties, mutually acknowledged and possibly mutually agreed. Under these circumstances, it cannot be presumed that the policy was unilaterally instituted at its commencement.

No changes had been made to the policy between 1996 and the negotiations for the 2002-2004 contract. Thus, it cannot be shown that the parties have treated compensatory time under “meet & confer” provisions prior to the time this grievance arose. Even if the parties had done so once in the past, one time is not sufficient to establish a past practice. To be binding, a past practice must be repeated over a considerable time, so as to be known to and expected by both parties. Here, no custom or practice has been established as to how compensatory time has been treated in the past for purposes of negotiations. Moreover, it is uncertain that a practice of parties can decide the legal status of a matter relating to employment. For example, if parties decided to treat wages as a permissive “meet & confer” subject, wages would still be a mandatory subject of bargaining under the law.

It is also suggested that the lack of an explicit provision on compensatory time in the collective bargaining agreement reflects an intention to exclude compensatory time from the contract, as a binding past practice. The problem with this theory is that a past practice is based on an action. It cannot be based on inaction, which is invisible to both parties, and therefore cannot have been clearly enunciated.

Reference is also made to whether compensatory time is a permissive policy matter which is not arbitrable. Minnesota court cases have stated that matters of inherent managerial

policy are excluded from grievance arbitration, as well as from mandatory negotiation. *Cloquet Educ. Ass'n v. Independent School Dist. No. 94, Cloquet*, 344 N.W.2d 416, (Minn. 1984). However, a binding past practice may exist on a permissive subject of bargaining; no court or arbitration case to the contrary has been cited. Perhaps more important, compensation for work, which is the basis for compensatory time off, is a form of wage, much like any other form of leave time. Unlike ride-along policies for police officers, for example, the compensatory time policy has no broader policy implications for the Employer's control of the efficiency and effectiveness of the workplace.

The Employer changed the policy unilaterally, eighteen months after the contract was signed and after the matter was dropped in negotiations. If the bargaining history were clearer, it could seem that the Employer is attempting to achieve in this arbitration what it did not acquire in the negotiations for the 2002-04 Agreement. However, it is possible, in the hand-off between City Administrators and differing Unions, and possible inexperience of certain representatives who are no longer representing the parties, that the implications of the Employer's actions in proposing and then dropping its proposal on elimination of the compensatory time benefit were not fully understood by the Employer's agents or tracked by the parties. In any event, the Employer did not give unambiguous notice to the Union of an intent to change a practice. Rather, it made a proposal to reformulate compensatory time for this bargaining unit, and did not counter the Union's refusal of the proposal. Credible testimony indicates that the proposal was dropped by the Employer to achieve settlement on the contract. The decades-long practice was therefore still in effect at the time of signing of the 2002-2004 contract and continued to be a part of that contract for its duration. Unilaterally altering that policy therefore was a violation of the collective bargaining agreement.

Award

The parties in this case had a practice of allowing compensatory time off on an hour -for-hour basis for many years, and through many collective bargaining agreements. The practice was not incorporated in the contract, but was incorporated in a written policy in 1996. During negotiations for the 2002-2004 Agreement, a proposal was made which included elimination of the compensatory

time benefit. The proposal was rejected and the evidence shows that the proposal was dropped. Thus, the practice was not effectively repudiated during negotiations for the 2002-2004 contract. No other practice or interpretation was shown which would contradict the conclusion that the compensatory time policy and practice continued to be binding during the term of the 2002-2004 contract.

The grievances are sustained. The Employer shall make whole the Individual Grievant and any other employee who has been negatively affected by the June 2004 change. As requested by the Union, and acknowledging that the remedy may be affected by Arbitrator Jacobs' contingent award in interest arbitration, the arbitrator will retain jurisdiction for the sole purpose of resolving any difficulties in implementation of the remedy herein for 90 days from the date of this Award, plus mailing, *i.e.*, February 1, 2007.

Date: November 1, 2006

Sara D. Jay, Arbitrator

December 22, 2006

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Re: AFSCME Council 65 and City of Austin, Minnesota
BMS Case 05-PA-703 (Compensatory Time)
Application for Change of Award

Dear Counsel:

The Application for Change of Award and the Objection thereto have been received and reviewed, as has Minn. Stat. §572.16. That statute provides limited grounds for changing an arbitration award, including clarification, or “where the award is based on an error of law.” Subd. 1(b), (c). The final submission was received on December 1, 2006.

The City has made its request for change based on an asserted error of law. However, in large part, the City appears to base its request on factual conclusions which are contrary to the facts as found by the arbitrator, rather than an error in the law applied. The facts as found in the Award are based on the testimony which the arbitrator found to have greater credibility. The Award explains the reasons for rejecting the City’s assertion of effective repudiation of the compensatory time practice during negotiations. The only assertion made by the City in its Application that was not covered in the Award relates to the Handbook. It is noted that, although the Handbook states that it is not intended to create a contract, the Handbook also states on the same page that labor agreements take precedence over the handbook. As explained in the Award, the past practice became part of the labor agreement, and the arbitrator found credible the Union’s testimony that the City explicitly withdrew its proposal to eliminate the compensatory time practice in order to settle the collective bargaining agreement. For these reasons, and for the same reasons stated in the Award as issued, the arbitrator respectfully declines to alter the Award.

The City alternatively requested clarification of the Award, as to the scope of decision. The issues to be decided in the Award were:

- Did the Employer violate the Agreement by changing the accrual and use of compensatory time for members of this unit in June 2004?
- Did the Employer violate the Agreement by denying use of compensatory time off to the Individual Grievant for an illness in October 2004?
- If so, what should be the remedy?

December 7, 2006

Page 2

City of Austin & AFSCME Council 65

The Award states: "The grievances are sustained. The Employer shall make whole the Individual Grievant and any other employee who has been negatively affected by the June 2004 change." Those are the issues decided by the grievance arbitrator. The content of the 2005-2007 collective bargaining agreement is not an issue submitted to or decided by this arbitrator, having been decided in a separate arbitration, BMS Case 05-PN-772, before Arbitrator Jeffrey Jacobs, in March 2006.

Nonetheless, this arbitrator did retain jurisdiction for the purpose of assisting in implementation of the remedy, and accordingly notes that Arbitrator Jacobs, at page 7 of his Award, stated: "If she [this grievance arbitrator] determines that the Union is correct and that there does exist a binding past practice then the Union's position will be awarded." The grievance Award determined that a binding past practice exists. The Union's position as stated in the interest case (page 4) was:

... an Award of the following language be added to the contract: The City will make no change in comp time benefits usage and accrual for 2005, 2006 and 2007. Pre-2004 policy on comp time accrual and use will continue and be made part of this agreement. Members of this bargaining unit may continue to accrue and use comp time as they did in the past (hours over 40 per week shall be accrued as comp time at straight rates for later use by the employee). Employees can use their comp time hours with the approval of their supervisor. Once the employee submits a resignation or retires, comp time hours will not be paid out or otherwise used by the employee.

The Award as to the language of the collective bargaining agreement was made by Arbitrator Jacobs, and this arbitrator believes his intent to be quite clear.

In the grievance arbitration decided by this arbitrator, the Award states: "As requested by the Union, and acknowledging that the remedy may be affected by Arbitrator Jacobs' contingent award in interest arbitration, the arbitrator will retain jurisdiction for the sole purpose of resolving any difficulties in implementation of the remedy herein for 90 days from the date of this Award, plus mailing, *i.e.*, February 1, 2007." Please let me know if I can be of further assistance.

Sincerely,

Sara D. Jay
Arbitrator

cc: Cyrus Smythe, Consultant