In the Matter of the Arbitration

between Washington Federation of State Employees ("Federation")

and

The State of Washington Department of Agriculture ("State" or "Department").

Findings, Discussion and Award.

Case Numbers:	American Arbitration Association case No. 75 390 157 07. Arbitrator's case No. JA1A.
Representing the Federation:	Julie L. Kamerrer, Esq., and Younglove & Coker, P.L.L.C., P.O. Box 7846, Olympia, WA 98507.
Representing the Department:	Stewart A. Johnson, Senior Counsel, Asst. Attorney General, P.O. Box 40145, Olympia, WA 98504.
Arbitrator:	Howell L. Lankford, P.O. Box 22331, Milwaukie, OR 97269-0331.
Hearing held:	In the offices of the Department in Yakima, Washington, on April 20, 2009.
Witnesses for the Federation:	Jay Harris, Robert Newell, and Trena Bultena.
Witness for the Department:	Diane Leigh, Chuck Dragoo, John Daly, and Karen Cozzetta.
Post-hearing argument received:	From both parties by email on April 27, 2009.
Date of this award:	May 5, 2009,

Until June 2006, the Horticultural Inspectors (aka Fruit & Vegetable Inspectors) working in the Yakima area were given the option of taking overtime compensation either in the form of immediate payment or in the form of comp time. Beginning July 1, 2006, local management changed its policy and began to allow comp time rarely if at all. The Federation grieved that change. The parties agree that the issue presented in arbitration is: Did the agency violate the 2005-2007 Collective Bargaining Agreement (primarily Article 7.5) when it reduced the granting of comp time rather than overtime; and if so, what is the appropriate remedy? The parties agree that there are no issues of substantive or procedural arbitrability and that the burden is on the union to show, more likely than not, that the Agency violated the CBA as alleged. The hearing was orderly. Both parties had the opportunity to present evidence, to call and to cross-examine witnesses, and to argue the case. Both parties filed timely post-hearing briefs.

FACTS

Background. The current, 2005-2007 collective bargaining agreement is the first statewide agreement between the parties after the 2002 statutory change allowing full collective bargaining for state employees. Before that statutory change state employees' conditions of employment were determined by an amalgam of individual agency collective bargaining (over a limited pallette of issues), Department of Personnel administrative rules, and local practice. Under that prior arrangement the Yakima Fruit and Vegetable Inspectors were allowed a more or less unfettered choice between taking overtime compensation in the form of immediate payment at time and a half or as comp time at time and a half. Comp time had to be used within one year of its accrual or it was automatically paid, and the scheduling of comp time was left to the mutual convenience of an employee and his or her supervisor. Vacation scheduling and comp time scheduling were entirely separate procedures before the current contract; and this grievance arises in substantial part because the new contract co-mingles the scheduling of vacation time and comp time.

Both before the current contract and extending into that contract period, vacation time for the Inspectors was scheduled on a seniority basis. Every employee filed a vacation schedule request during the month of January, and management granted vacation time on a seniority basis and announced the results on March 1. Yakima area management determined the number of available vacation slots on the basis of historical experience of workload throughout the year with the numbers varying from three slots per day during the busier parts of the year all the way up to eight per day during the least busy parts. The new, 2005-2007 CBA does not detail a particular procedure for scheduling vacation time and, with the concurrence of the local stewards and bargaining unit employees, Yakima managers continued the prior procedure into the period covered by the new contract.

Before the new statewide CBA, individual agency agreements and practices differed with respect to granting and scheduling comp time. When the parties started bargaining their first complete statewide agreement on that topic, they began with widely different proposals. The Federation's initial proposal included a provision that "Compensatory time off may be accrued in lieu of cash at the employee's discretion." The State, on the other hand, began by proposing the language which eventually became the heart of Article 7.5 of the new agreement: "The Employer may grant compensatory time in lieu of cash payment for overtime to an overtime-eligible employee, upon agreement between the Employer and the Employee . . ." The State was particularly concerned to avoid large accumulations of comp time liability since such liabilities are unfunded. And throughout the negotiations process the State addressed that goal in at least three different ways. First, it proposed a requirement that "Employees must use compensatory time prior to using vacation leave, unless this would result in the loss of their vacation leave."[1] Second, the State proposed that "All compensatory time must be used by June 30 of each year." And finally, the State proposed that "The Employer may schedule an Employee to use his or her compensatory time with seven (7) calendar days' notice." The Federation responded to the employer's proposal requiring comp time to be used before vacation leave with language specifically denying that requirement: "Employees will not be required to use compensatory time before using vacation leave." The Federation also proposed a biennial (rather than annual) close-out of comp time accounts; and, of course, it opposed the state's seven-day cram-down comp time scheduling proposal. The final resulting contract language is the following:

7.5 Compensatory Time for Overtime-Eligible Employees

A. Compensatory Time Eligibility

The Employer may grant compensatory time in lieu of cash payment for overtime to an overtime-eligible employee, upon agreement between the Employer and the employee. Compensatory time must be granted at the rate of one and one-half (1-1/2) hours of compensatory time for each hour of overtime worked.

* * *

C. Compensatory Time Use

Employees must use compensatory time prior to using vacation leave, unless this would result in the loss of their vacation leave. Compensatory time must be used and scheduled in the same manner as vacation leave, as in Article 11, Vacation Leave.

[1]The contract establishes a cap for accumulated vacation hours with a "use it or lose it" approach to hours in excess of that cap.

How the grievance arose. The new contract went into effect on July 1, 2005, and vacation scheduling for that year had already been completed by March 1. The first vacations to be scheduled under the language of the new contract, therefore, were those approved on March 1of 2006. Under the new language of Article 7.5 C, all accumulated comp time was scheduled in addition to each employee's vacation time for 2006. The result of that additional demand on the same number of available vacation slots was immediately obvious. About a month after the approval date, the vacation scheduler wrote a memo noting that:

> [O]f 52 inspectors in Yakima only 4 out of the lower 27 were able to get an entire week signed off. The upper 25 inspectors were able to get one or more weeks signed off.
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> The 2004-05 vacation schedule had 54 inspectors put in for time off and had 90 days throughout the year that [were] not filled to the maximum.
>
> The 2005-06 vacation schedule had 54 inspectors put in for time off and had 65 days throughout the year that [were] not filled to the maximum.
>
> The 2006-07 vacation schedule had 52 inspectors put in for time off and had 04 days throughout the year that [were] not filled to the maximum . . .

Local management was particularly concerned that so many junior Inspectors had been unable to take even one week of consecutive days of vacation in the face of the additional demand created by scheduling accumulated comp days together with vacation days. It appeared that the subsequent year might further magnify that problem because the demand on the same number of vacation slots would include that year's accrued vacation time, that year's accrued comp time, and vacation time which employees had not had to use in the prior year because of the availability of comp time.

Local management sought advice and direction from HR and from upper management and the acting assistant director provided a memo addressing the issue:

> This is a reminder to management that the granting of compensatory time is discretionary in nature and that you are always able to provide cash payment at one and one-half times the normal salary for overtime worked by overtime eligible employees. Should you decide to offer compensatory time it is up to the employee to determine if they wish to choose it in lieu of cash compensation for the overtime worked.
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> Article 7.5 of Master Agreement (CBA) speaks to Compensatory Time for Overtime-Eligible Employees. The contract follows FLSA in that it reads " . . .*The Employer may grant compensatory time in lieu of cash payment for overtime to an overtime-eligible employee, upon agreement between the Employer and the employee . . .*" [emphasis to the contract language added in the memo.]

On July 1, local management officially adopted a policy of insisting on immediate payment for overtime except in extraordinary circumstances. The union grieved the consequences of that change.

DISCUSSION

In its case in chief, the Federation established the parties' practice under the prior Agency agreement and established management's subsequent unilateral departure from that practice. But, as the Department pointed out, nothing in the Federation's case up to that point suggested that Section 7.5.A of the current, State-wide Agreement should not be taken to mean just what it says on its face: "The Employer *may* grant compensatory time in lieu of cash payment for overtime to an overtime-eligible employee, upon agreement between the Employer and the employee," i.e. a bargained recognition of management's discretion to offer comp time or not. Equally important, the current Agreement expressly cuts off appeals to past practice: Section 46.1 provides,

> This Agreement constitutes the entire agreement and any past practice or past agreement between the parties—whether written or oral—is null and void, unless specifically preserved in this Agreement.

To the extent that the language of the CBA leaves any room for doubt in this case, the Department's case established the bargaining history of Section 7.5 without any substantial dispute: The Federation proposed language that would have expressed an employee's *right* to comp time, exactly what the Federation argues for in this proceeding; and that proposal was unsuccessful. In light of that bargaining history, there is no room for serious doubt that the parties understood the word "may" in Section 7.5.A to be just what it seems to be at first blush, an agreement to give the Employer discretion to offer comp time—subject to the agreement of the individual employee—or to withhold it.

The point of labor arbitration is to give the parties the benefit of their bargain at the table, so the Federation's task, in the face of such a record, is almost insurmountable. The Federation's well-argued Post-hearing Brief makes two valiant attempts. First, it focuses on the expression, "*agreement* between the Employer and the employee" in Section 7.5.A and points out that there could not be "agreement" over the clear objection of the Inspectors. But that focus is misplaced. There was never any dispute that the Department cannot *force* Inspectors to accept comp time; and that is the point of the expression "upon agreement ..." The question is whether the *Inspectors may force* the Department to *offer* comp time. And that part of the parties' deal is memorialized earlier on in 7.5.A: "The Employer *may* grant compensatory time..." The bargaining history makes it clear that the parties understood the word "may" as a memorial of their agreement that the Employer has discretion to offer comp time or not.

Finally, the Federation attempts to avoid the thrust of Section 46.1 (set out on page 5, above) by arguing that local management extended the long-established prior practice into the period of the new, State-wide Agreement when management continued to grant comp time during the initial year of that agreement. I assume, for purposes of argument, that even after a party has bargained for an express recognition of discretion in some particular part of a CBA, that party may lose some or all of its discretion by allowing the development of a clear practice that limits it. The problem with applying that rule to the case at hand, from the Federation's point of view, is that this record is simply inadequate to show the development of such an enforceable practice after Section 46.1 cut off all practices established before the new contract went into effect. On the contrary, as the Department points out, vacations had already been set when the new contract took effect, and the very first episode of vacation choice under that contract demonstrated that a large number of junior employees would not get even a single week of consecutive days off when comp days were scheduled "before" vacation days. This is not an instance of one party "sitting on its rights:" local management immediately took steps to avoid that consequence in the future. There were two obvious ways to go about that, and both were suggested in the initial memo that brought the vacation scheduling problem to light:

> Some possible scenarios to correct this prior to next year– Cash out all comp time and pay as overtime when earned...
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> Allow each inspector to submit only the time they will earn for the 12 months they are submitting for (April thru March) the first go around and they can submit a second time after the list has been gone through once.[2]

The second of those suggestions would probably have required the agreement of the Federation local, because the parties had specifically discussed and agreed to the continuation of their prior practice for vacation scheduling when the new Agreement replaced the prior Agency agreement. As far as this record shows, local management never made that proposal (even though the problem of scheduling vacation time for the junior Inspectors had not yet been apparent when the parties initially agreed to continue the old vacation scheduling procedure into the new contract). But the State had bargained for the discretion to offer comp time or not, and local management properly exercised that discretion as soon as it first experienced the adverse consequences of the new CBA provision requiring comp time to be scheduled before vacation time. There was no practice to the contrary because there had been no prior opportunity to develop a practice to the contrary under the new, State-side Agreement.

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[2] The two-rounds approach is certainly one of the most common ways of dealing with the problem of providing some access to uninterrupted vacation time for junior employees when the total available vacation slots would otherwise be consumed by their seniors. Nothing in the facts or outcome of this case prevents the parties from revisiting that alternative solution.

In short, the new State-wide CBA expressly grants the Department the discretion to offer comp time or not; nothing in the record here shows that the Department did not exercise that discretion properly in this instance; and there was no time to develop a restrictive practice after the new contract cut off all previously-established practices. The grievance must be dismissed.

AWARD

The agency did not violate the 2005-2007 Collective Bargaining Agreement (primarily Article 7.5) when it reduced the granting of comp time rather than overtime. The grievance is dismissed.

Respectfully submitted,

Howell L. Lankford
Arbitrator