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November 27, 2009

Via email mpenner2@telus.net; original to follow by mail

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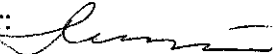
Dear Sir:

Re: Arbitration - GNWT & UNW - November 17, 2009

I enclose for service upon you arbitration award.

Yours truly,

EMERY JAMIESON LLP

Per: 

Phyllis A. Smith

PAS\jk
Enclosure

IN THE MATTER OF AN ARBITRATION

AND IN THE MATTER OF A COLLECTIVE AGREEMENT FOR THE
PERIOD ENDING MARCH 31, 2009;

AND IN THE MATTER OF A POLICY GRIEVANCE RESPECTING
THE BANKING OF HOURS FOR STATUTORY HOLIDAYS BY
CORRECTIONS WORKERS

BETWEEN:

UNION OF NORTHERN WORKERS

(“the Union”)

AND:

GOVERNMENT OF THE NORTHWEST TERRITORIES

(the “Employer”)

Before a sole arbitrator, Phyllis A. Smith, at Yellowknife, NWT on November 17, 2009

Appearances:

For the Union:

Michael Penner

For the Employer:

Erin Delaney
Nicole MacNeil

AWARD

I. NATURE OF THE DISPUTE

This matter involves a grievance filed by the Union claiming that the Employer’s policy imposed in the Human Resources Manual as Directive 609 – “*Lieu Time*” which capped

employees' entitlement to bank hours in lieu time at 75 hours (and less at the discretion of Managers) violated the Collective Agreement. The parties proceeded by way of an agreement as to the following facts:

1. *At all material times the Employer is the Government of the Northwest Territories.*
2. *At all material times the Union is the Union of Northern Workers.*
3. *The Collective Agreement between the Union of Northern Workers and the Minister Responsible for the Public Service, expiring March 31, 2009 (hereinafter, the "Collective Agreement") is the pertinent Collective Agreement.*
4. *The Collective Agreement contains Appendix A2 that specifically addresses the terms and conditions of employment of Corrections Security Shift Workers (hereinafter "Corrections Workers").*
5. *Pursuant to Article 16.05(b) of the Collective Agreement, Corrections Workers have requested the Employer to bank hours that a Correction Worker has worked on a statutory holiday.*
6. *Pursuant to Appendix A2.03 (e) of the Collective Agreement, on April 1st of each year, Corrections Workers are provided a designated paid holiday bank equivalent to the number of designated paid holidays for that year. Any unused hours from this bank are paid out at the end of each fiscal year.*
7. *Since the implementation of the Collective Agreement, the Employer has denied these requests when the Correction Worker making the request has already banked 75 hours, pursuant to Article 7*

*"Managerial Responsibilities" of the Collective Agreement, and
Section 609 of the GNWT Human Resources Manual.*

The relevant provisions of the Collective Agreement are as follows:

Article 7

7.01 *Except to the extent provided herein, this Agreement in no way restricts the Employer in the management and direction of the Public Service.*

Article 16.05

16.05 *When the Employer requires an employee to work on a Designated Paid Holiday as part of his/her regularly scheduled hours or as overtime when he/she is not scheduled to work he/she shall be paid in addition to the pay that he/she would have been granted had he/she not worked on the holiday:*

(a) *Twice (2) his/her hourly rate for all hours worked,*

Or

(b) *An equivalent combination of cash and a day of leave at a later date convenient to both the employee and the Employer.*

Article 23.05(b)

(b) *Overtime work shall be compensated as follows:*

(i) *at time and one-half (1 ½) for all hours except as provided in Clause 23.05 (b)(ii);*

(ii) *at double time (2) for all hours of overtime worked after the first four (4) consecutive hours of overtime and double time (2) for all hours worked on the second or subsequent day of rest, provided the days of rest are consecutive.*

...

(iii) *in lieu of (i) and (ii) above, the Employer may agree to grant equivalent leave with pay at the appropriate overtime rate to be*

taken at a time mutually agreeable to the Employer and the employee. Any unused equivalent leave may be carried over into the next fiscal year.

Appendix A2, Article A2.03 (e) (f) (g)

- (e) (i) *On April 1 of each year a full-time employee shall be entitled to a designated paid holiday bank equivalent to the number of designated paid holidays as specified in Article 16 in the current fiscal year multiplied by 7.5 hours.*
- (ii) *Banked hours shall be taken at a time mutually agreeable to the Employer and the employee. Any used banked hours shall be paid out at the end of the fiscal year.*
- (iii) *When more than one (1) employee requests time off with pay for these purposes and for operational reasons not all employees are granted the leave, length of service with the Employer shall be the sole deciding factor.*
- (iv) *When one employee(s) applies for annual leave and another employee(s) applies for banked hours off under this article, the request of the employee applying for annual leave shall receive first preference.*
- (f) *When an employee is required to work on a designated paid holiday as part of the employee's regularly scheduled hours of duty or as overtime when the employee is not scheduled to work, the employee shall be paid in addition to the hours the employee has banked had the employee not worked on the holiday twice (2) the employee's straight time rate for all hours worked.*
- (g) *An employee scheduled to work on a designated paid holiday shall be paid at the applicable overtime rate for all hours worked from 00:01 to 24:00 on the designated paid holiday.*

In addition, the parties referred to the Human Resources Lieu Time Directive (Human Resources Manual, section 609) which is attached as Schedule A to this Award. Relevant portions of that directive include the following:

Section 7

7. *The granting of lieu time is strictly at the discretion of management in a Department, Board or Agency.*

Section 10

10. *Employees may not accumulate more than 75 hours of lieu time per fiscal year (80 hours for employees who work eight hour days). This applies to all Departments, Boards and Agencies. This maximum is not a rolling refillable bank.*

Section 12

12. *A maximum of 37.5 hours (40 hours for individuals who work eight hour days) lieu time may be carried over from one fiscal year to the next. If lieu hours are carried over, they count as part of the new fiscal year's limit. For example, if an employee carries over 37.5 hours, he/she may only earn a maximum of 37.5 lieu hours in that new fiscal year.*

The Employer, for corrections officers, has created two banks of "lieu time". One is the Bank of Statutory Holidays, contemplated by Appendix A2.03 (e) of the Collective Agreement and the second consists of the "lieu time" provided for in Article 16.05 and Article 23.05 (b) of the Collective Agreement. The parties stated that the Policy Directive found in the Human Resources Manual, Section 609 applies to the second "bank" and not to the "bank" created by Appendix A2.03 (e).

The Union asserts that the Policy Directive violates Article 16.05 of the Collective Agreement. The Employer claims that the Policy Directive was a legitimate exercise of its management rights, preserved by Article 7 of the Collective Agreement.

II. UNION POSITION

The Union says that Article 16.05, by using the word "shall" (which, under the Collective Agreement, Article 2.01 (v) is defined as "imperative"), any discretion on the part of the

Employer to refuse an employee's request to exercise option (b) contained in that provision to be paid for work on a designated holiday "*an equivalent combination of cash and a day of leave at a later date convenient to both the employee and the Employer*" is eliminated. But the effect of the Policy Directive to cap in lieu time at 75 hours in fact results in a unilateral refusal to allow employees to exercise that option if such employees already have 75 hours banked.

The Union contrasted the wording of Article 16.05 with the wording of Article 23.05(b) (iii), which section specifically preserved the discretion of the Employer to grant lieu time in the case of overtime worked. Given the failure to include similar language in Article 16.05, it can only be concluded that there was no intention to preserve any such discretion in the case of work on statutory holidays.

The Union's interpretation of Article 16.05 does not impede or impact upon the Employer's right to schedule employees, as any time taken off is subject to both the employee's and the Employer's convenience. Moreover, any time not used of the banked statutory holiday time is paid out by March 31 in any given year, pursuant to Appendix A2.03 (e) (ii). However, the Employer's policy results in the Employer denying in lieu banking requested by an employee as expressly contemplated by Article 16.05 and therefore violates the Collective Agreement.

Corrections officers, notwithstanding the provision of Appendix A2.03 of the Collective Agreement respecting the banking of any pay for work on statutory holidays, are entitled to the benefit of Article 16.05 because it is not specifically included pursuant to Article A2.01 of Appendix A2.

In summary, the Union's position was that the Employer's policy directive respecting the capping of in lieu hours is a change in the structure of compensation for working on statutory holidays which is contrary to the Collective Agreement.

In support of its position, the Union referred to the cases of *Pinkerton's of Canada Ltd. And U.S.W.A. (Holiday Pay) (Re)*, 82 L.A.C. (4th) 108; *Re Lennox & Addington Community Health Services and Service Employees International Union, Local 663*, 51 L.A.C. (4th) 28; and *Government of Northwest Territories and the Union of Northern Workers – Casual Employees-Statutory Holiday Pay* (unreported) T. Jolliffe November 23, 2007, and Brown & Beatty, *Canadian Labour Arbitration* (4th Ed.) 8:1400.

III. EMPLOYER POSITION

The Employer submitted that the policy capping in lieu hours was a permitted exercise of management rights set out in Article 7 of the Collective Agreement. In the absence of the cap imposed by the Collective Agreement, the Employer faced scheduling problems, and budgeting issues. In the case of corrections officers, there are two banks, one pursuant to Appendix A2.03 (e)(i), and a second, for hours accrued pursuant to Articles 16.05 and 23.05(b) of the Collective Agreement. Only the second bank is affected by the capping directive. In reviewing the policy, it is clear that it is not arbitrary but was put in place for sound business reasons.

In support of its position, the Employer referred to the cases of *Re United Parcel Service Canada Ltd. and Teamsters Union, Local 141*, 29 L.A.C. (2d) 202 and *Edmonton (City) v. Edmonton (City) Police Association*, 142 L.A.C. (4th) 385.

IV. DECISION

I have carefully considered the submissions of the parties. At issue is the Employer's right to cap in lieu time with respect to work on statutory holidays. I would note that there was no evidence before me that the policy was unreasonable and I make no findings with respect to that matter.

In considering this matter, I have reviewed the provisions of the Collective Agreement. With respect to the Corrections Officers, there are two provisions relating to pay for work

on statutory holidays, Article 16.05 (which applies because it was not specifically excluded) and Articles A2.03(e)(f) and (g) of Appendix A2. These provisions create a certain difficulty of interpretation. Appendix A2.03(f) is essentially identical to Article 16.05(a), and but for the failure to include Article 16.05 in the list of excluded general articles of the Collective Agreement in Appendix A2.01, would appear to restrict the right of a corrections officer to additional pay, and not time in lieu for work on statutory holidays. There is no real explanation of why A2.03 (f) is in the Appendix, as it is not necessary if Article 16.05 applies to corrections officers, as it adds nothing to their entitlement and repeats part of the entitlement. The inclusion of Appendix A2.03 (f) only makes sense if Article 16.05 was intended to be identified as one of the articles not applicable to Corrections Officers. However, both Employer and Union counsel agreed that Article 16.05 applies to corrections officers, and provides an additional option which is to bank some of the hours worked (“an equivalent combination of cash and a day of leave at a later date”) pursuant to subsection (b) of Article 16.05.

That then leaves the issue of whether the Employer can peremptorily cap the time in lieu option for working on statutory holidays otherwise available to the employees pursuant to Article 16.05(b). I have considered the cases provided by the Employer and the Union. While they do provide some guidance on general principle, they are fact based and not of particularly great assistance in determining the issue before me. In summary terms, all of them reach the conclusion that the express words of the Collective Agreement are determinative in assessing whether the Employer’s actions are permissible.

In this case, the Employer says that the purpose of the policy – to permit efficient and effective scheduling, and avoid budgeting liabilities – is well within the rights of the Employer, provided by Article 7 of the Collective Agreement to manage the worksite. However, Article 7, Management Rights, is not unrestricted. It is subject to the specific provisions of the Collective Agreement. In this case, the Collective Agreement gives employees a specific option to choose either pay or pay and time in lieu for working on statutory holidays. In my view, the Employer’s policy of including time in lieu requested under this provision in the capping directive is not in compliance with Article 16.05. The

discretion provided to the Employer in Article 23.05(b) (iii) is simply absent from Article 16.05. Therefore, while the policy may be in compliance with Article 23.05(b) (iii) (and I make no finding in that regard as the banking of non-statutory holiday overtime is not before me) it is not in compliance with Article 16.05.

I note, in reaching this decision, that the Employer's right to schedule in accordance with the operational requirements of the worksite is not affected by the employee's ability to elect a combination of pay and time in lieu as taking of days of leave is subject to the convenience of the Employer. Based on the decision in *Re United Parcel Service Canada Ltd. and Teamsters Union, Local 141*, the language of this agreement would appear to allow an Employer significant discretion in determining whether and when time in lieu can actually be taken. Whether there are limits to that discretion is not the issue before me however, and I need not comment further.

I further note the issue of limits to accumulation. The Union submitted with respect to this issue that Appendix A2.03 (e) (ii) requires that any unused banked hours shall be paid out at the end of the fiscal year. This argument was implicitly in response to the Employer's concerns respecting continuing and growing liabilities for time in lieu accumulations – an issue that was one of the pressing concerns of the Employer in the *Edmonton (City) Police Association* case cited by the Employer. If one regards Article 16.05 and Appendix A2.03 (e)(f) and (g) as a complete code for dealing with designated paid holidays for corrections officers, then Appendix A2.03(e)(ii) would mandate a payout of all banked hours not taken at the end of the fiscal year, including any Article 16.05 hours. An alternate interpretation is that the clause only applies to the bank created pursuant to subsection (i) of Appendix A2.03 (e). It does appear that the clear intent with respect to the banking of time in lieu of statutory holidays is that it not be rolled over after the fiscal year. Moreover, Article 16.05 does not contain any language similar to that contained in Article 23.05(iii), which permits a roll-over of overtime time in lieu. In those circumstances, it appears to be a reasonable interpretation that no roll-over is permitted of any banked time in lieu of pay for working statutory holidays,

notwithstanding that the mandated payout provision is contained in a provision of Appendix A2 dealing with the annual bank established under Appendix A2.03 (e).

In the result, I find that the Employer, in adopting Human Resources Manual Section 609 which restricts the employees' ability to elect time in lieu under Article 16.05 (b), violated the Collective Agreement. I retain jurisdiction in the event that there are any other matters deriving from this award.

Dated this 27th day November, 2009.



Phyllis A. Smith Q.C., Sole Arbitrator



SCHEDULE A

Human Resources Manual - 609 - Lieu Time

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Human Resources

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Human Resources Manual - 609 - Lieu Time

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Introduction

1. To deliver programs effectively, Departments, Boards and Agencies may require employees to work outside of their regularly scheduled hours of work. Instead of paying overtime, Departments, Boards and Agencies may agree to grant employees equivalent leave with pay at the appropriate overtime rate (lieu time).

Application

2. These guidelines and procedures apply to all employees except senior management, relief workers, Northwest Territories Teachers' Association (NWTTA) members and those employed by the Northwest Territories (NWT) Power Corporation.

Definitions

3. **Employer** is the Government of the Northwest Territories (GNWT).
4. **Overtime** is work performed by an employee, at the request of the Employer, in excess of, or outside of the employee's regularly scheduled hours of work.
5. **Lieu time** is leave provided as compensation for overtime worked, instead of a cash payment.
6. **Relief Employee** is an employee appointed to a position for which there are no established hours on a daily, weekly or monthly basis and may be required to report to work on an as-and-when required basis for operations where services operate on a daily basis throughout the year.

Guidelines

7. The granting of lieu time is strictly at the discretion of management in a Department, Board or Agency.
8. Lieu time must be taken at a time agreeable to both the supervisor and the employee.
9. Relief workers are not eligible to accrue lieu time and will only receive cash payment for overtime.
10. Employees may not accumulate more than 75 hours of lieu time per fiscal year (80 hours for employees who work eight hour days). This applies to all Departments, Boards and Agencies. This maximum is not a rolling refillable bank.
11. If the employee has reached their maximum lieu time for the fiscal year, the employee will automatically be compensated for the overtime as a cash payment on his/her pay cheque.

- Online Manager's Toolkit
- Training Calendar
- GNWT Home
- GNWT Phone Book
- GNWT Ethics Counsellor

12. A maximum of 37.5 hours (40 hours for individuals who work eight hour days) lieu time may be carried over from one fiscal year to the next. If lieu hours are carried over, they count as part of the new fiscal year's limit. For example, if an employee carries over 37.5 hours, he/she may only earn a maximum of 37.5 lieu hours in that new fiscal year.
13. GNWT employees may only carry over 37.5 hours. All hours in excess of this limit shall be paid out.
14. Where employees are in a 40-hour per week position, the lieu time maximums are adjusted to 40 hours for carry-over and an annual maximum of 80 hours.
15. All overtime worked, including hours taken as lieu time, must be entered into PeopleSoft self-service or submitted on time sheets within four weeks from the date the overtime was worked. Hours entered after the four-week period will not be paid, except in exceptional circumstances (i.e., biologist in the field for more than a month at a time) with Deputy Head approval.
16. Lieu time is automatically paid out when an employee changes positions within the GNWT. This also applies when an employee accepts a transfer assignment.
17. Managers have the option of setting lower maximums for lieu time within their divisions. However, it then becomes the manager's responsibility to monitor any accumulation under the 75 hours maximum.
18. Managers will advise both their staff and the Department of Human Resources if they have set lower maximums for lieu time.
19. The following GNWT positions require employees to work unusual schedules involving a high number of overtime hours concentrated within a two or three month period each year and therefore different lieu maximums are allowed:

Department of Public Works and Services

PPD Operations Officers

Water Treatment Plant Operators (Behchoko)

Stanton Territorial Health Authority

Operating Room Nurses

Fort Smith Health and Social Services Authority

Fort Smith Health Centre Laboratory and X-ray employees.

20. The following GNWT positions are designated as winter work positions and will have lieu time balances in excess of the carry over amount paid out on October 1 each year rather than on April 1:

GNWT Wide

Financial positions responsible for year-end processing

Department of Industry, Tourism and Investment

Parks Officers

Department of Transportation

Airfield Maintenance Specialists

Procedures

21. A supervisor authorizes overtime either verbally or in writing prior to the employee undertaking the overtime. Eligible employees can ask to have the overtime provided as lieu time.

22. The employee records the lieu time hours in PeopleSoft self-service as per the instructions found on the Department of Human Resources Intranet. Employees not on PeopleSoft self-service record the actual hours of overtime worked on the time reporting form and, if interested, request the overtime be recorded as lieu. The form must include verification by the employee's supervisor that the overtime was worked and was previously approved.
23. To use accumulated lieu time, the employee requests lieu time through PeopleSoft self-service or on an application for leave form.
24. The Department of Human Resources will provide managers with quarterly information on employee lieu time accumulation.

Authorities and References

Public Service Regulations

Section 10, Overtime and Holidays

Main Collective Agreement with UNW

Article 23, Overtime

Article 31, Pay for Travel on Behalf of the Employer

Article 45, Duty Travel

Excluded Employees' Handbook

Overtime

Human Resource Manual

Section 608, Overtime

Last Updated: March 2009

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Last Updated: 2009-11-06 (Y/M/D)