

Crown Employees
**Grievance Settlement
Board**

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**Commission de
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*des employés de la
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GSB# 0352/01
UNION# 01U041

IN THE MATTER OF AN ARBITRATION

Under

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

Before

THE GRIEVANCE SETTLEMENT BOARD

BETWEEN

Ontario Public Service Employees Union
(Union Grievance)

Grievor

- and -

The Crown in Right of Ontario
(Ministry of Natural Resources)

Employer

BEFORE

Barry B. Fisher

Vice-Chair

FOR THE UNION

Eric O'Brien
Grievance Officer
Ontario Public Service Employees Union

FOR THE EMPLOYER

John Smith
Senior Counsel
Management Board Secretariat

HEARING

January 8, 2003

DECISION

FACTS

This case involves a review of the Ministry's application of the overtime provisions of the Collective Agreement.

The agreed to relevant facts are as follows:

1. This grievance concerns Conservation Officers (Classification RT4-CO) in Schedule 4.7. The Conservation Officers are located primarily in each of the Ministry's administrative district and area offices. All these grievors work within the District Structure.
2. The Ministry has established a practice of providing a certain number of minimal hours of paid authorized overtime for each Conservation Officer. These consist of a certain number of statutory holidays each year, for which the Conservation Officers are paid overtime.
3. The Ministry then lets the Conservation Officers self manage their work schedule, allowing them to work additional overtime on the strict understanding that any such overtime is to be taken as compensatory time off (CTO). Where Conservation Officers fail to use up this CTO so that their bank is reduced to zero by March 31st of the following year, the Ministry unilaterally schedules them off in accordance with Article ADM 8.4.
4. In some cases where Conservation Officers fail to take all their CTO by March 31st of the following year, the Ministry has directed Conservation Officers to carry the time over to the following year.
5. In two districts, the Ministry has developed an overtime agreement which is an agreement directly between the Conservation Officer and the Ministry. OPSEU is not a signatory to these agreements. Examples of these "agreements" are found as Schedule A and B to this Award.

COLLECTIVE AGREEMENT PROVISIONS

ARTICLE ADM8 – OVERTIME

- ADM8.1 The overtime rate for the purposes of this Agreement shall be one and one-half (1½) times the employee's basic hourly rate.
- ADM8.2 In the assignment of overtime, the Employer agrees to develop methods of distributing overtime at the local workplace that are fair and equitable after having ensured that all its operational requirements are met.
- ADM8.2.2 In this article, "overtime" means an authorized period of work calculated to the nearest half-hour and performed on a scheduled working day in addition to the regular working period, or performed on a scheduled day(s) off.
- ADM8.3.1 Employees in Schedules 3.7 and 4.7 who perform authorized work in excess of seven and one-quarter (7¼) hours or eight (8) hours as applicable, shall be paid at the overtime rate.
- ADM8.3.2 Overtime shall be paid within two (2) months of the pay period within which the overtime was actually worked.
- ADM8.4 Employees in Schedules 3 and 4 who perform authorized work in excess of seven and one-quarter (7¼) hours or eight (8) hours as applicable, shall receive compensating leave of one and one-half (1½) hours for each hour of overtime worked, at a time mutually agreed upon. Failing agreement, the ministry shall reasonably determine the time of the compensating leave.
- ADM8.5 Where there is mutual agreement, employees may receive compensating leave in lieu of pay at the overtime rate or may receive pay at the overtime rate in lieu of compensating leave.
- ADM8.6 Compensating leave accumulated in a calendar year which is not used before March 31 of the following year, shall be paid at the rate it was earned. The March 31 date may be extended by agreement at the local or ministry level.
- ADM8.7.1 Employees who are in classifications assigned to Schedule 6 and who are required to work on a day off, shall receive equivalent time off.
- ADM8.7.2 Notwithstanding Article ADM8.7.1 and Article ADM13.7 (Holiday Payment), employees who are in classifications assigned to Schedule 6 and who are assigned to forest fire fighting or related duties, shall be paid one and one-half (1½) times the employee's basic hourly rate, to be calculated on the basis of thirty-six and one-quarter (36¼) hours per week, for all such work after eight (8) hours in a 24-hour period.

ARGUMENT

The Employer's position is that because it has the employee's consent to both take the overtime as CTO and to carry forward the CTO to the next year, its practice is permitted under ADM8.5 and ADM8.6. In effect, the Ministry will only authorize overtime if the employee agrees ahead of time to:

- (a) Elect under ADM8.5 to receive CTO instead of overtime pay,
- (b) Elect under ADM8.6 to agree not to claim cash out the CTO on March 31st but either use it up or carry it over.

The Union's argument is that to require the Conservation Officer to elect ahead of time that he or she will not enforce certain Collective Agreement rights in order for him or her to receive authorization for overtime is a breach of Article ADM8.2.1, in that this practice constitutes an unfair and inequitable overtime distribution scheme.

DECISION

In my opinion the overtime provision is quite clear. In essence, Schedule 4.7 employees have a right to receive overtime pay, but, with the Ministry's consent, have the option of taking CTO. (ADM8.3.1)

On the other hand, Schedule 3 or 4 employees have the right to receive CTO, but, with the Ministry's consent, have the option to get paid overtime.

The requirement of the Ministry to "authorize overtime" under ADM8.2.2 must be based on principles that are not inconsistent with the Collective Agreement or applicable statutes. To take an extreme example, the Ministry obviously could not take gender or race into account in deciding whether or not to authorize overtime in a particular situation for to do so would offend both Article 3 – No Discrimination and the Ontario Human Rights Code.

Similarly, in this case, the Ministry has instituted a policy in which it will only authorize overtime if the employee consents ahead of time to making an election under the Collective Agreement as to how he or she wishes to be compensated. In other words, the Ministry determines how to distribute overtime based on whether or not an employee is prepared to give up a right under the Collective Agreement.

In my opinion, it is simply improper and contrary to the Collective Agreement that the Ministry in any way considers the issue of how the employee may or may not elect to be paid in determining whether or not to authorize overtime, for to do so punishes the employee who wishes to exercise his or her contractual rights under the Collective Agreement. The parties very carefully have negotiated a fair and balanced process whereby, depending on which Schedule an employee is put, the employee either has a right to be paid one way and only with the consent of the Ministry, an option to be paid another way. The Ministry practice seeks to have it both ways, so that for all intent and purposes, the Ministry has tried to turn Schedule 4.7 employees into Schedule 3 or 4 employees.

This entire practice is wrong and must cease immediately.

I therefore issue the following declaratory relief:

- A. It is a breach of the overtime provisions throughout the Collective Agreement for the Ministry, when deciding whether or not to authorize overtime, to in any way consider or take into account the issue as to whether an employee may or may not exercise his or her right to be paid for overtime or request CTO. As an example, any of the following practices would be in breach of the Collective Agreement.
- (1) Asking the employee, before giving authorization for overtime, whether or not he or she is going to ask for CTO, take existing CTO or ask for an extension of CTO to the next year.
 - (2) Reviewing the employee's past CTO elections, usage or carry over as part of the decision making process to decide whether or not to authorize overtime.
 - (3) Requiring the employee to make any election under ADM8.5 or ADM8.6 or their equivalents before authorizing the overtime.
 - (4) Imposing a maximum amount that an employee may have in his or her CTO bank.
 - (5) Scheduling CTO for an employee without his or her consent.

This list is not intended to be exhaustive, merely illustrative of the guiding principle, which is it is improper for the Ministry, when deciding whether or not to authorize overtime, to in any way consider how the employee may choose to exercise his or her rights under the Collective Agreement regarding how that employee will be compensated.

- B. It is for the employee, not the Ministry, to consider whether or not he or she wants to use up their CTO by March 31st or to be paid out their CTO. Therefore any forms that the Ministry

utilizes to determine the employee's wishes must clearly state that the employee has a right to be paid out. Similarly, an employee cannot be required to carry over the CTO to the next year, as the right to receive pay out always remains with the employee.

- C. Any so called "agreements" like those found in Schedule A or B are null and void. If the parties to the Collective Agreement, namely, MBS and OPSEU, wish to make special arrangements, that is fine, but there cannot be "agreements" between an employer and individual employees which contradict the Collective Agreement.

Dated at Toronto, this 14th day of January, 2003.

A handwritten signature in black ink, appearing to be "Barry B. Fisher", written over a horizontal line. The signature is stylized and cursive.

Barry B. Fisher

Vice-Chair

SCHEDULE "A"

Compensating Time Self-Management Agreement
Conservation Officers – Thunder Bay District Enforcement Section

The Collective Agreement between OPSEU and Management Board states that no overtime may be worked unless authorized by the Supervisor. The agreement referred to below is intended to allow Conservation Officers the flexibility to react to unexpected enforcement events and is not meant to interfere with nor alter the Collective Agreement. This document deals only with those circumstances wherein the officers choose to work and does not affect their options if they are directed or scheduled to work overtime.

Compensation for overtime worked pursuant to this agreement will be for compensating time off.

By signing this agreement, I understand that I may work overtime on my regular scheduled work days at my discretion and when appropriate without any additional approval from my supervisor. I understand that this self-managed overtime may be worked only if it does not interfere with the activities of the other Conservation Officers or Enforcement Section activities. I further understand that this agreement does not apply to, nor authorize self-managed overtime to be worked on a scheduled day off.

If I wish to work overtime on a scheduled day off, I will contact my supervisor and obtain approval in advance of working the overtime. If I cannot contact my supervisor, I understand that **in exceptional or emergency circumstances**, I may, at my own discretion, decide to work overtime on a scheduled day off. I agree that overtime worked in these circumstances will be for compensating time off.

I agree to record and manage my overtime throughout the year so that the balance of my total accrued compensating time never exceeds fifty (50) hours. If a balance of 50 hours compensating time is accrued, I understand that no further overtime may be worked unless specifically approved in advance by the District Enforcement Supervisor or the District Manager. I will manage my compensating time balance so that all compensating time accrued in each fiscal year will be used prior to March 31 of that same fiscal year.

All reasonable effort will be made to allow requested compensating days off while ensuring that Enforcement Section activities and coverage are maintained.

This agreement may be cancelled by either myself or my supervisor with thirty (30) days notice.

Date _____

Officer _____

Supervisor _____

Signature _____

Signature _____

SCHEDULE "B"

**COMPENSATING TIME AGREEMENT
SAULT STE. MARIE DISTRICT – CONSERVATION OFFICERS**

I, the undersigned employee, hereby agree to work overtime, as authorized by the Enforcement Supervisor, for compensating time in lieu of payment for a maximum of 200 hours with one statutory holiday for payment. Compensating time off must be used by March 31, 2000, and all over time must be pre-approved and will be limited to address the following situations:

In General:

- 1) Life threatening or potentially life threatening situations for a member of the public or a fellow employee (eg. Officer backup for violations in progress, bear complaints).
- 2) Occurrences where a failure to act at the moment could result in the loss or destruction of an endangered species or its habitat, or loss of a key habitat (eg. Class 1 wetlands, deer yards, shore-lands, etc. where inaction could result in the immediate loss of an important resource or the long term loss of the sites' ability to produce future resources).
- 3) A verifiable unlawful action in progress where an immediate response could result in either the prevention of the activity and/or the apprehension of the violator(s) to avoid the need for a lengthy "cold start" investigation at a later date.
- 4) a situation where a failure to act could result in the loss of future support from a solid source/key informant.
- 5) A high profile issue where the failure to be seen to take action may result in an increase in unlawful activity, and/or a decrease in the amount of voluntary compliance from the general public.
- 6) Work in excess of the employee's regular shift to complete a serious investigation in process, or work performed on the employee's scheduled day OFF where authorized by the Enforcement Supervisor, and meeting the above criteria.

This agreement will be valid from April 1, 1999 until March 31, 2000.

Conservation Officer

Date

Enforcement Supervisor

Date

District Manager

Date