

BEFORE CHARLES W. KOHLER, ARBITRATOR

In the Matter of Arbitration Between:

State of Ohio, Unit 2 Association

and

State of Ohio (Casino Control Commission)

Grievance Numbers :

CAC-2024-00905-02

CAC-2024-01847-02

CAC-2024-02652-02

CAC-2024-02664-02

CAC-2024-02918-02

CAC-2024-03667-02

Issue: Use of Compensatory Time

Place of Hearings: Columbus, Ohio

Dates of Hearings: June 24 and 25, 2025

Date of Award: September 30, 2025

Employer Representative: Keith O'Korn

Union Representative: Kimberly A. Rutowski

AWARD OF THE ARBITRATOR

INTRODUCTION

The State of Ohio, Unit 2 Association (“Association” or “Union”) and the State of Ohio are parties to a collective bargaining agreement, effective September 22, 2021, through June 30, 2024. The Association represents Gaming Enforcement Agents (“Agents”) employed by the Ohio Casino Control Commission (“Commission” or “Employer”). Agents Thomas Baracskai, Matthew Bush, Benjamin Douglas, Gary Fossaceca, George Huffman, and Robert Workman filed individual grievances alleging a violation of Section 22.07 of the collective bargaining agreement. In addition to Section 22.07, one grievance alleges a violation of Article 4, and two grievances allege a violation of the Fair Labor Standards Act (“FLSA”). Two grievances were filed as class grievances. The Employer denied the grievances. The Association advanced the grievances to arbitration. The parties agreed to consolidate the individual grievances for hearing. (Joint Ex. 1 and 2(A)-(F))

The parties selected me as the Arbitrator. Evidentiary hearings were conducted on June 24 and 25, 2025, in Columbus, Ohio. At the hearing, the parties agreed on the statement of the issue, and there were no objections to arbitrability. The parties had an unlimited opportunity to present documentary evidence and testimony, as well as to cross-examine opposing witnesses. The parties submitted post-hearing briefs to me on August 1, 2025. The matter is now before me for a final and binding decision.

BACKGROUND

The Commission is statutorily authorized to ensure the integrity of casino gaming in the State of Ohio. R.C. 3772.03. To that end,

(E) The Commission shall employ and assign gaming agents as necessary to assist the Commission in carrying out the duties of this chapter...

(F) The Commission, as a law enforcement agency, and its gaming agents, as law enforcement officers...shall have the authority with regard to the detection and investigation of, the seizure of evidence allegedly relating to, and the apprehension and arrest of persons allegedly committing violations of this chapter or gambling offenses...or violations of any other law of this state that may affect the integrity of casino gaming, the operation of skill-based amusement machines, or the operation of sports gaming, and shall have access to casino facilities, skill-based amusement machine facilities, and sports gaming facilities to carry out the requirements of this chapter...

R.C. 3772.03. (Employer Ex. 8)

The Commission's Enforcement and Operations Divisions employ agents at each of four licensed casinos in Cincinnati, Cleveland, Columbus, and Toledo. Three of the casinos have twelve agents, including one investigator. The Cleveland casino has thirteen agents, including an investigator.

Per the Commission job description and supporting witness testimony, the Gaming Enforcement Agent:

[M]onitors gaming floor activities, conducts criminal investigations to include both overt & covert investigations as needed: independently investigates gaming & nongaming crimes (e.g., cheating, collusion, theft, robberies, etc.). Assumes total case responsibility for collection & preservation of evidence; locates & interviews witnesses, suspects & other knowledgeable persons, monitors &/or reviews surveillance records, prepares & submits investigative reports to supervisor for criminal &/or regulatory actions, documents & tracks investigations, confers as needed with superiors on decisions as to further action to be taken on criminal investigations, etc. Apprehends suspects & makes arrests as necessary, takes confessions; reviews reports of other agents, checks technical evidence for court submission; confers with supervisors, other Enforcement staff, etc., testifies in

court. Responds to calls for assistance, reviews & completes Voluntary Exclusion Program (VEP) applications with program applicants, performs other regulatory functions on behalf of the casino (e.g., takes delivery of table games & slot machines, performs slot machine verification & authentication, etc.)

(Employer Ex. 6)

Deputy Director of Enforcement Lloyd Zoellner testified that the Commission is responsible for determining operational needs and efficiency. Agents support uniformed officers in critical incidents that occur in and around the casino. Agents also provide plainclothes undercover surveillance on the gaming floor.

The Commission's policy is to have the same Agents working together to become familiar with the casino staff (dealers, waiters, etc.) who work at the same time as the Agents.

The job description includes the Agent's duty to:

interact daily with casino staff (e.g., security, surveillance personnel, etc.) to ensure meaningful communication & information sharing and [serving] as a liaison to ... all other levels of other law enforcement agencies ... and [fostering] a positive cohesive working relationship with other law enforcement entities." (Employer Ex. 6)

The Supervisor at each office creates the work schedule to ensure 24-hour coverage. Agents work four 10-hour shifts each week. Six Agents are scheduled Sunday through Wednesday, and six Agents are scheduled Wednesday through Saturday. Approximately every 14 weeks, the Agents rotate to work the opposite daily shift schedule.

Agents bid on shifts each year. Agents are scheduled over three shifts. The day and afternoon shifts have a one-hour overlap. The day shift is 6:00 a.m. to 4:00 p.m. The afternoon shift is from 3:00 p.m. to 1:00 a.m. Two Agents are scheduled each day and afternoon shift. The night shift is a split shift and overlaps the afternoon shift. One night shift agent is scheduled to work from 8:00 p.m. to 6:00 a.m., and another agent is

scheduled from 10:00 p.m. to 8:00 a.m. Overtime shifts for the following month are scheduled on the second Wednesday of each month. (Employer Ex. 22)

The Sunday to Wednesday schedule overlaps the Wednesday to Saturday schedule. Therefore, on Wednesdays, more than two Agents are scheduled for each shift. Undercover operations, raids, and the serving of warrants are conducted on Wednesdays. These activities are scheduled 28 days in advance. (Employer Ex. 22)

EMPLOYER'S STAFFING PRACTICES AND POLICIES

The Commission's Time and Attendance Policy states, "Gaming Agent coverage means that there will be a minimum of two agents, who shall be available to respond to a call for service in a reasonable amount of time." (Employer Ex. 7) Under the policy, the Commission schedules at least two agents per shift.

In August 2019, the Commission and the Association executed a Letter of Agreement ("LOA") to address the standardization and equalization of overtime hours for Agents. The LOA was "non-precedent-setting," and it provided that it was in effect until the expiration of the 2018-2021 collective bargaining agreement. (Union Ex. 1 and 2)

In February 2020, the LOA was modified. The modification provided that the Commission would approve leave for the first agent on a shift who submits a leave request. If another agent was scheduled to work with an agent who has been approved for leave, the request of the second requesting agent was not initially approved, but was "posted, pending coverage." The Commission then posted the shift as a voluntary overtime opportunity. If

no one volunteered for the overtime within 72 hours of the start of the leave request, the Commission denied the leave request.

The LOA expired on June 30, 2021, coinciding with the expiration of the 2018-2021 collective bargaining agreement. Even though the LOA had expired, the Commission continued to follow the practice established by the LOA. Later, the Commission voluntarily modified the “posted, pending coverage” practice and began to mandate overtime, to allow a second requesting agent on a shift to use vacation time or compensatory time. One reason for the modification was the lingering effect of the COVID 19 pandemic.

On March 1, 2024, Director of Enforcement Mike Masterson sent an email to the Enforcement Division establishing a policy that only one Agent per shift would be granted leave to ensure meeting the two Agent minimum staffing requirement. The email states, in part:

[E]ffective April 1, 2024 leave requests will be granted to one agent per shift, as had been the Division’s practice previously. In instances where more than two agents are working, leave requests will be considered for approval until the shift is reduced to the minimum staffing level of two agents.

(Union Ex. 3)

Deputy Director Zoellner testified that a minimum of two Agents is required for officer and public safety. Zoellner testified that no law enforcement agency would allow an entire shift to be off on leave. He testified that the “posted, pending coverage” practice was time-consuming, and supervisors had to spend an excessive amount of time arranging overtime schedules. Zoellner testified that mandatory overtime lowered Agent morale.

GRIEVANCES

Grievants Matthew Bush and Ben Douglas are assigned to the Toledo office. Supervisor Robert Myerholtz prepares the schedule at the Toledo office. Grievants Thomas Baracskai, Gary Fossaceca, George Huffman, and Robert Workman are assigned to the Cleveland office. Supervisor Mark Carpentiere prepares the schedule at the Cleveland office. The Grievants allege their compensatory time leave requests were not given reasonable consideration and were unreasonably and/or arbitrarily denied.

Agent Matthew Bush

Agent Bush submitted a compensatory leave request on August 21, 2024, for time off on September 30, 2024, more than five weeks in advance. An overtime shift was not posted. The compensatory leave request was denied the next day because Bush's shift partner was on scheduled vacation leave on September 30. Agent Bush then submitted a personal leave request for five hours' leave on September 30, and it was granted. Agent Bush filed a grievance on September 5, 2024. (Joint Ex. 2B)

On cross-examination, Agent Bush testified he knew his shift partner was on scheduled vacation leave when he made the request to use compensatory time. Bush did not attempt a shift trade with another Agent.

Agent Ben Douglas

Agent Douglas submitted a compensatory leave request on June 5, 2024, for time off on July 26, 2024, seven weeks in advance. The next day, his request was denied because his shift partner was on scheduled vacation leave. The stated reason for the denial was

“operational needs.” Agent Douglas submitted a request for personal leave on July 26, 2024, and it was granted.

Agent Douglas filed a grievance on June 23, 2024. (Joint Ex. 2C).

Agent Thomas Baracskai

Agent Baracksai submitted a compensatory time leave request on November 15, 2024, for 10 hours on December 7, 2024. The same day as the request, Supervisor Mark Carpentiere informed Agent Baracksai that his request had been denied due to operational needs. Another agent on the shift was on vacation leave. Agent Baracksai requested the reason for the denial in writing but was not provided with a written response.

(Employer Ex. 4)

He worked his scheduled shift on December 7. Agent Baracksai testified that he did not request personal leave, reasoning that if there was an operational need to deny compensatory leave, then the same operational need would exist to deny his personal leave request. Like compensatory leave, Agent Baracksai testified, personal leave may also be denied for operational needs. Agent Baracksai filed a grievance on November 27, requesting 10 hours’ overtime pay. (Joint Ex. 2A)

Judith Schember, the Commission’s Operations Supervisor and Office Manager for the Toledo office, processes employee payroll for the entire Commission. Schember testified that Agent Baracskai was paid 10 hours of compensatory time after his request was denied. (Employer Ex. 12)

Agent Gary Fossaceca

Agent Fossaceca submitted a compensatory leave request on September 12, 2024, for November 9, 2024. An overtime shift was not posted for bid. The same day as his request, the Supervisor denied his request for operational needs. Agent Fossaceca's shift partner was on scheduled vacation leave on November 9. The other agent's day off created a mandatory overtime shift on the second shift. On September 16, Agent Fossaceca requested a personal day on November 9. The request was granted, and overtime was posted. Agent Fossaceca testified he did not want to use a personal day. (Employer Ex. 1)

On September 26, Agent Fossaceca filed a grievance over the denial of compensatory time. Agent Fossaceca interpreted Director Masterson's email to permit two agents to use leave on the same day by posting the open shifts for overtime to satisfy minimum staffing levels. Agent Fossaceca requests that his personal leave bank be restored with no deduction from his compensatory time bank. (Joint Ex. 2F)

Agent George Huffman

Agent Huffman submitted a compensatory time request on March 26, 2024, for leave on June 23, 2024. Agent Huffman's shift partner was on scheduled vacation leave. The request was denied the same day because his shift partner was on scheduled leave, and the shift was at minimum staffing. Agent Huffman requested personal leave for the same shift, and it was granted.

Agent Huffman filed a grievance on March 26, 2024. Agent Huffman requested his personal leave bank be restored with no deduction from his compensatory time bank. (Joint Ex. 2E)

Agent Robert Workman

Agent Workman requested vacation leave from October 31 through November 14, 2024. He was denied leave on October 31 and granted leave for November 1 through 14. Agent Workman's shift partner was on scheduled leave on October 31, creating a mandatory overtime shift. Agent Workman requested compensatory leave for October 31, and his request was immediately denied. Agent Workman then requested personal leave for October 31, and his request was granted. Agent Workman filed a grievance on September 5, 2024. (Joint Ex. 2D)

Agent Workman testified that his shift partner had scheduled leave every Thursday from May through November. Agent Workman testified that he was prevented from scheduling vacation leave at any time from May through November. Agent Workman requests personal leave credit for the time he used, after being denied compensatory time leave, with no deduction from his compensatory time accrual.

LEAVE ACCRUAL AND USAGE

Commission witnesses testified that the denial of compensatory time leave is not a budgetary issue but a matter of operational need and efficiency. The Grievants assert that compensatory time leave is being denied to avoid paying overtime.

Agent Baracska was on scheduled vacation leave from June 23 through June 25, 2024. (Employer Ex. 19)

In 2024, Agent Huffman used compensatory time leave on June 2, 8, 9, 15, 22, 29, 30, and July 5. He was approved for personal leave on June 21 and 23 and vacation leave on June 7, 14, 28, and July 6, 7, 12, and 13. (Employer Ex. 19, 20)

Agent Fossaceca earned two hours of compensatory time on October 9, 2024, and used ten hours of compensatory time on October 10, 2024. He was approved for sick leave on November 20, 2024, and compensatory time leave on November 22, 2024. (Employer Ex. 2)

Operations Supervisor Schember compiled payroll reports for the period between April 1, 2024, and May 31, 2025.

There were 917 instances of compensatory time use, totaling 4261 hours of compensatory time used. (Employer Exhibit 9)

There were 851 instances of compensatory time accrual. Agents earned a total of 5573.45 hours of compensatory time. (Employer Exhibit 10)

There were 1090 instances of Agents and Investigators electing to be paid for working overtime. The Commission paid \$4,391.70 overtime. (Employer Exhibit 11)

The Employer presented the grievants' overtime and compensatory time records for the same period, between April 1, 2024, and May 31, 2025:

Name	O/T Hrs. Pd.	Hrs. of Compensatory Time Earned	Hrs. of Compensatory Time Used	Hrs. of Compensatory Time Paid	Number of instances of Compensatory Time Usage
Fossaceca	0	88.5	80.00	0	8
Bush	103.10	93.0	76.2	0	21
Workman	54.3	79.5	71.5	0	9
Douglas	134.2	91.25	54.3	0	15
Hoffman	0	288.95	275	0	31
Baracskai	36.5	75.9	45.9	10.0	12

(Employer Ex. 3, 12-18)

ISSUE

The parties agreed that the following issue was before the arbitrator:

Did the Employer violate Article 4 and/or Section 22.07 of the collective bargaining agreement? If so, what shall the remedy be?

RELEVANT PROVISIONS OF THE LABOR AGREEMENT

ARTICLE 4

EFFECT OF AGREEMENT

Total Agreement

This Agreement represents the entire agreement between the Employer and the Union and unless specifically and expressly set forth in the express written provisions of this Agreement, all rules, regulations, practices and benefits previously and presently in effect, may be modified or discontinued at the sole discretion of the Employer. This section alone shall not operate to void any existing or future Ohio Revised Code (ORC) statutes or rules of the Ohio Administrative Code (OAC) and applicable federal law.

ARTICLE 22

HOURS OF WORK AND OVERTIME

22.02 – Posting of Work Schedules

It is understood that the Employer reserves the right to limit the number of persons to be scheduled off work at any one time. Work schedules will be posted for a work period of four (4) weeks or greater and shall be posted for a minimum of four (4) weeks in advance. Work schedules shall not be established solely to avoid overtime but for efficient operations. After the schedule has been posted it will remain in effect for the duration of the posted period and may be changed only with four (4) weeks' notice of a date or less notice in emergency situations (e.g. natural or man-made disasters, demonstrations, protests, or riots, etc.), employer-required training provided by non-departmental personnel, or any other time mutually agreed to by the employee and Employer. . . .

22.07 - Overtime and Compensatory Time

Because of the unique nature of the duties and emergency response obligations of members of this unit, management reserves the right to assign employees to work overtime as needed.

1. Any member who is in active pay status more than forty (40) hours in one week shall be paid one and one-half (1.5) times his/ her regular rate of pay...All overtime must be authorized by an administrative authority. Schedules will not be changed solely to avoid the payment of overtime.
2. The employee may elect to take compensatory time off in lieu of cash overtime payment for hours in an active pay status more than forty (40) hours in any calendar week.] Such compensatory time shall be granted on a time-and-a-half (1.5) basis. A bargaining unit member shall be paid for unused compensatory time only upon termination of employment and under the terms of paragraph 8, hereunder. (The Employer shall not substitute compensatory time in lieu of cash payment should the maximum accrual for compensatory time allowed by the Fair Labor Standards Act, as amended, be reached.)
3. [E]ffective at the beginning of the pay period that includes December 1, 2020, the employee may choose to accrue compensatory time only to a maximum of 360 hours...
4. When the maximum hours of compensatory time accrual is rendered, payment for overtime work must be made in cash.
5. Upon termination of employment an employee shall be paid for all unused compensatory time...
8. Compensatory time off shall be granted at the discretion of the Employer in accordance with operational requirements of the facility. If such use is denied, the compensatory time requested shall be paid to the employee, at his/her option, to a maximum of eighty (80) hours in any pay period.
9. Requests for compensatory time off may be submitted within twenty-four (24) hours in advance of the anticipated time off. Such request shall be given every reasonable consideration....

ARTICLE 37

VACATION ALLOWANCE

37.04 Vacation Leave

Vacation leave shall be taken only at times mutually agreed to by the Employer and the employee. The Employer may establish minimum staffing levels for a facility work location which could restrict the number of concurrent vacation leave requests which may be granted for that work location.

The Employer shall grant first priority to vacation leave requests received at least six (6) months, but not more than one year, prior to the commencement of the requested vacation leave period. . . .

4. All other requests for vacation leave shall be made at least 28 days prior to the commencement of the requested vacation leave period. Requests made less than twenty-eight (28) days prior to the commencement of the vacation leave period may be considered by the Employer but need not be approved, regardless of staffing needs. . . .

ARTICLE 39

PERSONAL LEAVE

39.01 Eligibility for Personal Leave

Permanent employees shall be eligible for personal leave at his/her regular rate of pay.

All employees shall accrue personal leave at the rate of one and twenty-three hundredths (1.23) hours per pay period, not to exceed thirty-two (32) hours in one

year, for each eighty hours in active pay status, excluding overtime hours (.015 hours per hour of non-overtime work.).

39.04 Notification and Approval of Use of Personal Leave

Requests for personal leave should be in writing and, when possible, shall be made within a reasonable time in advance of the date or dates requested for use, unless the use is for an emergency situation. Personal leave shall not be unreasonably denied.

The Employer shall grant personal leave requests of eight (8) hours or less, in accordance with Section 39.01, received prior to the posting of a work schedule, pursuant to Section 22.02. The Employer may designate certain peak times during the year and/or minimum staffing requirements when operational needs preclude the use of personal leave, however, personal leave requests shall be approved during these peak times if the request is for a personal emergency. At non-peak times or when minimum staffing levels are met, requests for personal leave of eight (8) hours or less received with at least forty-eight (48) hours' notice shall not be unreasonably denied.

The Employer may restrict the number of concurrent leave requests granted at a work location. In determining which concurrent request(s) to approve, the Employer may consider the nature of the employee's personal need and the timing of the request(s).

39.07 Conversion or Carry Forward of Personal Leave Credit At Year's End

Personal leave not used may be carried forward or paid at the employee's option with payment to be made in the first pay period in December. Maximum accrual of personal leave shall be forty (40) hours. When the maximum accrual has been reached the employee shall receive payment for those hours in excess of the maximum accrual.

(Joint Ex. 1)

RELEVANT STATUTES AND REGULATIONS

Fair Labor Standards Act, § 207(o)

(5) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency—
(A) who has accrued compensatory time off authorized to be provided under paragraph (1), and
(B) who has requested the use of such compensatory time,

Shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of compensatory time does not unduly disrupt the operations of a public agency.

29 CFR § 553.25 Conditions for use of compensatory leave (“reasonable period”, “unduly disrupt”).

(d) Unduly disrupt. When an employer receives a request for compensatory time off, it shall be honored unless to do so would be “unduly disruptive” to the agency’s operations. Mere inconvenience to the employer is an insufficient basis for denial of a request for compensatory time off. (See H. Rep. 99-331, p. 23.) For an agency to turn down a request from an employee for compensatory time off requires that it should reasonably and in good faith anticipate that it would impose an unreasonable burden on the agency’s ability to provide services of acceptable quality and quantity for the public during the time requested without the use of the employee’s services.

(Union Ex. 11)

POSITIONS OF THE PARTIES

Position of the Union

The Employer’s actions violated Article 4 and Section 22.07 of the collective bargaining agreement. Article 4 requires the Employer to follow federal law. The Union contends the Employer violated the FLSA.

The FLSA prohibits the Employer's denial of compensatory time requests to avoid paying overtime. The Union cites Beck v. City of Cleveland, 390 F.3d 912 (6th Cir. 2004). The Court interpreted the "unduly disrupt" standard to require an employer to grant compensatory leave requests absent clear and affirmative evidence of an undue disruption. In this case, the Union argues the Employer failed to prove an undue disruption or operational need justifying the denial of Grievants' compensatory time requests. The Union contends that the Employer's grant of personal leave and ability to cover the shifts proves the Employer lacked undue disruption.

The Union submits that there is a contractual conflict between "operational needs" and "reasonable consideration" in the context of compensatory leave requests. Section 22.07(8) of the collective bargaining agreement grants the Employer discretion to deny compensatory time requests in accordance with the operational needs of the facility. Section 22.07(9) requires the Employer to give "every reasonable consideration" for compensatory leave requests. The Union offers an objective and a subjective interpretation of the collective bargaining agreement in support of the grievances.

Before 2019, when a second agent requested compensatory leave, an overtime request was posted for voluntary sign-up. If an agent volunteered for the overtime, the second agent's compensatory time request was granted. Due to issues of overtime equalization across the state, the parties negotiated a memorandum of understanding. According to the LOA, the Employer was required to post the overtime opportunity for a period of seven days. If no one volunteered, an agent would be mandated to work the overtime.

A second LOA was negotiated to supersede the first LOA. The second LOA added the "posted-pending coverage" practice and minimum staffing requirements. This scheduling

practice continued after the expiration of the LOA and the 2019-2021 collective bargaining agreement. There was no operational need to deny an agent's compensatory leave request when another agent on the shift was on approved leave.

Director Masterson's March 1, 2024, email prohibited agents from using leave if it would result in a shift with fewer than two agents for minimum staffing. The Union contends that because the shift is scheduled at minimum staffing, granting an agent any form of leave would result in the shift being below minimum staffing.

The Union anticipates the Employer's argument that the past practice is inefficient and conflicts with a mandatory minimum policy. The Union contends the Commission has not previously communicated frustration or inability to conform with a practice that had been in place for over ten years.

The Employer failed to prove that mandatory overtime resulted from the "pending coverage" practice. In 2024, the Cleveland office had 1040.5 overtime hours worked, and only 73 were mandated. The Union argues that agents often volunteer to work overtime for each other. In the Cleveland office, the supervisor created leave restriction days to limit the use of leave on specific dates. The Employer was operating under the Union's interpretation of Section 22.07 as recently as two months before Director Masterson's email.

The Union contends that the Employer's approval of requests for personal leave shows that minimum staffing is not an issue. Despite personal leave being a form of discretionary leave, the Employer permitted shifts with fewer than two agents when an agent requested personal leave, but not when an agent requested compensatory leave. The Union cited nine instances in 2025 when two agents on the same shift were on leave the same day.

There were 21 instances from April 3, 2024, to June 28, 2025. In at least one instance, the agent used compensatory time. There were five instances when both agents used compensatory time on the same shift.

The Union contends the Employer is not giving compensatory time leave requests reasonable consideration. The majority of Grievants' requests were denied within 24 hours. Agent Huffman's request was denied before the shift was posted for overtime. Agent Douglas' request was denied one day after it was submitted. Agent Workman's request was denied minutes after it was submitted, and the shift was not posted for overtime. Agent Bush's request was denied one day after it was submitted, and the shift was not posted. Agent Fossaceca's and Agent Baracskai's requests were denied the same day, and their shifts were not posted for overtime. The Union contends that Director Masterson implemented a blanket ban on compensatory time use, in violation of Section 22.07(9) of the collective bargaining agreement.

Under a subjective approach, the Union contends that its interpretation should be adopted. The Union interprets Section 22.07(9) to mean that an agent may request compensatory time leave with more than twenty-four hours' notice. The Union contends that if the request is made more than twenty-four hours in advance, the Employer shall give every reasonable consideration to the compensatory time request. The Union contends that "every reasonable consideration" includes the Employer's requirement to post the shift as overtime, pending coverage.

The Union urges that the grievances be sustained. The Union requests an award requiring the Employer to (1) give every reasonable consideration by posting timely compensatory time requests, pending coverage, (2) reinstate any personal leave to

Grievants who were forced to use personal leave, and (3) recoup Grievants' compensatory time consistent with section 22.07(8).

Position of the Employer

The Commission requests that the Union's grievances be denied. The Commission contends it has the contractual right to determine and meet its operational requirements. The Commission denied the Grievants' compensatory leave request because one agent assigned to the same shift was using permissive leave.

In an email dated March 1, 2024, Director Masterson referenced a practice that had been occurring since the expiration of the LOA in 2021 until March 2024. The Commission had been approving leave that reduced staffing below the minimum. The Employer contends agents were using compensatory time leave whenever they wanted, including when their partner was on vacation or compensatory time leave. The Commission was mandating two agents to work overtime to cover the shift. The Commission argues it could no longer meet its operational needs.

The Commission contends it could no longer honor requests by an entire shift to use permissive leave. The Commission maintains that there is a benefit to having at least one agent on duty who is familiar with the casino staff. Supervisors became overburdened with the administrative task of scheduling coverage for compensatory leave requests under either the posted-pending or compensatory-on-demand procedures. Agents are not guaranteed to have their scheduled days off when mandatory overtime is required to maintain the minimum staffing level.

There has been a long-standing minimum staffing requirement of two agents at each casino. The Employer's operational need to deny compensatory time leave is based on maintaining a minimum of two agents at each casino 24 hours a day. The staffing minimum is included in the Commission's time and attendance policy. The Commission argues that the plain language of the collective bargaining agreement gives the Commission control over setting its operational needs and determining how to meet those needs.

The Employer relies on Article 4 for the authority to modify or discontinue any rule or practice, previously and presently in effect. Section 22.07(8) grants the Commission the authority to grant compensatory time at its discretion, in accordance with the operational requirements of the facility. The Commission contends that Article 6 of the collective bargaining agreement reserves to the Employer the right to make rules and regulations in the operation of its work.

The Commission argues that on March 1, 2024, it exercised its contractual right to change the scheduling practice of compensatory and vacation leave. The Commission gave the Association 30 days' notice of its reasonable rules governing the use of leave. Since April 1, 2024, one agent can use any type of leave to request time off, and if the second agent needs to use leave, they can only use personal or sick leave.

The Commission submits that its rules are more generous than those outlined in the collective bargaining agreement. The Commission does not deny any request for personal or sick leave and mandates coverage to meet the staffing minimum. Vacation leave is permissive leave and can only be taken at times mutually agreed upon between the Employer and the employee. If two agents are scheduled for a shift and neither agent

is using leave, an agent who submits a timely request to use vacation leave will be approved, and the Commission will ensure shift coverage.

The Commission contends compensatory time is permissive leave, granted at the Employer's discretion in accordance with the operational requirements of the facility. If compensatory time is denied, the employee has the option to receive payment. Earned compensatory time maintains its cash value if the leave is not used. Agents have the benefit of shift trades, as outlined in Article 24. Shift trades cannot create overtime and cannot be unreasonably denied.

The Commission argues that the alleged FLSA is not an issue in this arbitration hearing. The FLSA is not contained in the collective bargaining agreement, and violations of the FLSA are not subject to the grievance arbitration process.

Nonetheless, the Commission argues the Union failed to prove that granting compensatory time leave is a "mere inconvenience" to the Commission, citing 29 C.F.R. 553.25(d). The Commission submits, the FLSA permits the denial of compensatory time if its use unduly disrupts the operations of the public agency. 29 U.S.C. 207(o)(5).

DISCUSSION AND CONCLUSIONS

At issue in this case is the Employer's right to restrict requests for compensatory time. Management contends that it has the authority to impose limits on employees' use of compensatory time. The Union argues that management is violating the collective bargaining agreement by imposing restrictions on the use of compensatory time that are contrary to the terms of the agreement.

The collective bargaining agreement determines the rights of the Employer and the restrictions on managerial authority. The primary function of the arbitrator is to interpret the language that the parties negotiated into the collective bargaining agreement. An arbitrator has no authority to amend or modify contract language. A fundamental rule of contract interpretation is that all parties to a contract adopt language that expresses their intent. In any case involving contract interpretation, the arbitrator's task is to determine the parties' intent by examining the words used in the agreement.

Under Article 6 of the agreement, management has the right and power to control the operation of the business. Specifically, Article 6 provides that the Employer retains the right to "make any and all rules and regulations," and "determine the work assignments of its employees." Management's right to control operations is not limited by the specific rights contained in the collective bargaining agreement. Management has the right to make decisions unless the right is restricted under the terms of the collective bargaining agreement. Thus, when a Union challenges a management decision, arbitrators will uphold the decision unless the Union can demonstrate that the decision violated a specific provision of the labor agreement or was unreasonable, arbitrary, or capricious.

The tension between management rights and the limits on those rights is at the heart of this arbitration. In Article 22.02 of the collective bargaining agreement, the parties agreed that "the Employer reserves the right to limit the number of persons to be scheduled off work at any one time." The section also provides that "Work schedules shall not be established solely to avoid overtime but for efficient operations."

Under the collective bargaining agreement, Agents are entitled to various types of leave. The collective bargaining agreement defines the purpose for which each type of leave

can be used. The collective bargaining agreement also outlines the requirements for using each type of leave.

The amount of annual vacation leave that agents receive is based on their length of service. Vacation leave requests made at least six months in advance are given priority. If an employee requests vacation leave fewer than 28 days in advance, the Employer has the right to deny the leave “regardless of staffing needs.”

Article 37.04 allows the Commission to establish minimum staffing levels and provides that maintaining these minimum levels may restrict the number of concurrent vacation leave requests that can be granted.

Article 39 provides for personal leave. All agents are entitled to a maximum of 32 hours of personal leave each year. They may accumulate a maximum of 40 hours of personal leave. Any additional personal leave is paid to the agent.

Article 39.03 defines the purposes for which personal leave may be used. It specifically provides that personal leave is to be used “to address issues of a personal nature [and] is not intended to be used by an employee in place of vacation leave.”

Article 39.04 provides that “[p]ersonal leave shall not be unreasonably denied.” However, the Commission may restrict the number of employees on personal leave at the same time. Further, the collective bargaining agreement allows the Employer to designate “peak times... when operational needs preclude the use of personal time.”

Employees are entitled to use personal leave for certain specific reasons, including mandatory court appearances, legal and business matters, family emergencies, medical examinations, weddings, religious holidays, and “any other manner of a personal nature.”

However, the Commission does not require employees to specify the reason when requesting personal leave. Instead, it presumes that an employee making a request for personal leave is acting in good faith and is requesting leave for a purpose specified in the collective bargaining agreement.

Several grievances involve situations where the Commission denied a request for compensatory time. After the denial, the agent made a request for personal leave for the same time, which was approved.

The Union asserts that personal leave is a form of discretionary leave and that the Commission is acting inconsistently because it permits a shift to drop below two agents when an agent requests personal leave, but not when an agent requests compensatory leave.

However, the collective bargaining agreement provides a clear distinction between the Employer's right to deny personal leave and its right to deny compensatory leave. The Commission has decided to approve all requests for personal leave, despite having the contractual right to deny requests under certain circumstances. The fact that the Commission routinely approves requests for personal leave but restricts the use of compensatory leave does not violate the collective bargaining. It is a reasonable exercise of managerial discretion.

Compared with personal leave, the Employer has more discretion in determining whether a request for compensatory leave should be granted. Article 22.07 (8) sets forth that "Compensatory time off shall be granted at the discretion of the Employer in accordance with the operational requirements of the facility."

Article 22.07 (9) of the collective bargaining agreement states that a request for compensatory time “shall be given every reasonable consideration.” The Union argues that imposing a requirement that restricts the use of compensatory leave when another agent on the same shift has been approved for leave violates Article 22.07 (9).

Where two provisions in a section of the collective bargaining agreement appear to conflict, arbitrators strive to harmonize the two provisions to give effect to both provisions. This is based on the principle that parties intend that every word in a contract is intended to have meaning. Parties do not negotiate superfluous provisions into collective bargaining agreements.

One contract interpretation principle used by arbitrators provides that specific language prevails over more general language whenever an express or apparent inconsistency exists. In this case, the collective bargaining agreement requires the Commission to give “every reasonable consideration” to requests for personal leave. In another part of the same section, the language gives the Employer the right to exercise discretion “in accordance with operational needs of the facility.”

“Reasonable consideration” is a general term that is difficult to define. It is difficult to determine what “reasonable consideration” means under various circumstances. Clearly, the term prohibits the Employer from acting in a capricious manner. However, the obligation of the Employer to provide “every reasonable consideration” is more general than the provision giving the Employer the right to exercise discretion “in accordance with the operational requirements of the facility.” The specific provision giving the Employer discretion qualifies the more general term requiring reasonable consideration. Thus, if the

Employer's exercise of discretion is based upon operational requirements, it must be deemed to be reasonable.

A provision in a contract granting an employer discretion means that the employer has the right to make decisions, provided that such decisions are not an abuse of discretion. Stated another way, when parties agree to give the employer discretion, management's exercise of the discretion does not violate the contract so long as it is not unreasonable, arbitrary, or capricious. Restrictions on the Employer's discretion must be negotiated rather than obtained through arbitration.

The Union argues that Director Masterson's March 1, 2024, email implemented a blanket ban on the use of compensatory time, in violation of Article 22.07(9) of the collective bargaining agreement. However, the directive in the email is permitted by Article 22.02, which provides that "the Employer reserves the right to limit the number of persons to be scheduled off work at any one time."

According to the Union, the fact that the Commission often denies requests for compensatory leave within 24 hours of receipt is evidence that the Employer is not giving such requests "reasonable consideration." When an agent submits a request to use compensatory leave, the Employer determines whether granting the request would result in all regularly scheduled agents being off duty. If granting the request would mean that all regularly scheduled agents on shift would be off work, the request is denied. Before denying a request for compensatory leave, the Employer determines whether granting the request would be consistent with established policy. Under this procedure, the Employer can quickly respond to requests for compensatory leave. The fact that the

Employer promptly responds to a request does not mean that the Employer is failing to reasonably consider the request.

During negotiations, the parties contemplated that requests for compensatory leave would be denied. This is evidenced by the language in Article 22.07(8) of the collective bargaining agreement, which grants the employee the right to request payment when a request for compensatory leave is denied. The employee is entitled to receive payment for the denied compensatory leave. By adopting this language, the parties negotiated a solution when compensatory time requests are denied.

While the Union argues that the Employer is acting unreasonably by denying requests for compensatory leave, the evidence proves that the Employer routinely grants all requests for compensatory leave unless it has already approved leave for another employee on the same shift. Further, if the Employer were unreasonably denying requests for compensatory leave, there would be evidence that agents were accumulating excessive amounts of unused compensatory time. In this case, the records indicate that agents effectively utilized most of the compensatory time they earned.

The Commission presented evidence to show that it is not acting unreasonably in denying requests for compensatory leave. The compensatory time records for April 1, 2024, to May 31, 2025, (Employer Ex. 3, 12-18) show that the grievants earned a total of 717.10 hours of compensatory time and used 602.9 hours of compensatory leave. Thus, the grievants used 84 percent of the compensatory time that they earned.

The data does not show the number of hours of compensatory time that were requested but denied. However, during the period specified above, only one of the grievants requested payment for denied compensatory time. There is no evidence concerning the

reasons that the grievants did not use all their compensatory time leave. However, a usage rate of 84 percent suggests that the Commission is not abusing its discretion in approving requests for compensatory leave.

In this case, the Commission determined that, if it had already approved a leave request for one of the two agents on a shift, the right of the second agent on the shift to use compensatory or vacation leave would be restricted. According to the Employer, it is not efficient if all agents on a shift are not regularly assigned to the shift. In such a case, none of the agents may be familiar with the casino employees on that shift. Furthermore, testimony established that the nature of the activities and the composition of the clientele vary depending on the time of day. The position description for agents requires them to become familiar with the personnel regularly assigned to their shift. Thus, it is reasonable and proper for the Employer to implement schedules that ensure at least one Agent on duty is familiar with the personnel and activities normally occurring during the shift.

There is no evidence showing that this policy was established “solely to avoid overtime.” Witnesses for the Commission testified that they do not consider the impact of overtime on the budget. They testified that requests for compensatory and vacation time are only denied for operational reasons. The Employer’s policies that resulted in the denial of requests for compensatory leave were not intended to avoid paying overtime. Thus, there is no evidence that the Employer’s actions were contrary to the ruling in Beck v. City of Cleveland, 390 F.3d 912 (6th Cir. 2004).

The Union has identified certain times when both agents on the shift were on leave. However, the fact that, in certain situations, the Commission has allowed both agents on

the shift to be on leave at the same time does not mean that the Employer must adopt this situation as a normal practice.

Deputy Director of Enforcement Lloyd Zoellner was a former Detective with the Hamilton County Sheriff's Office. He testified that no law enforcement agency would allow all officers on a shift to be on leave simultaneously. This supports the Employer's argument that it has the managerial right to avoid situations when both employees on a shift are permitted to be on leave simultaneously.

The Union has not articulated any specific objection to the Commission's policy of maintaining a two-agent minimum. The Union has not suggested that the two-agent minimum is an unnecessary policy. It has provided anecdotal evidence that there are certain times when only one agent will be on duty. For example, one agent may be temporarily away from the casino to accompany an arrestee either to jail or, in at least one case, to a hospital. However, the Union did not dispute the Employer's claim that the safety of agents is enhanced by scheduling at least two agents at all times. Furthermore, the Union does not dispute the assertion that it is prudent to have at least two agents on duty to provide backup and support for one another.

The Union asserts that the policy that was in place before Masterson's April 1, 2024, email allowed agents more flexibility in taking compensatory time without negatively affecting operations. That policy was set forth in the February 2020 LOA (Union Exhibit 2). The Commission routinely granted the leave request of the first employee on a shift. A leave request by an employee working concurrently with the first employee was not initially approved. It was considered a request "Pending Coverage" and would only be approved

if another agent volunteered to work overtime or if the employee was able to arrange a shift trade.

According to the Commission, administering the “Pending Coverage” policy was time-consuming and burdensome on supervisors. Administering the policy took time away from the regular duties of supervisors. Furthermore, leave was being approved, which resulted in only one agent being on duty. Additionally, the Commission had to assign an excessive number of employees to work overtime. The Commission argues that the “Pending Coverage” policy impaired its ability to meet operational needs.

The Arbitrator concludes that the Commission has proven that there was a rational and valid business reason for changing the “Pending Coverage” policy. The policy that became effective on April 1, 2024, constituted a valid exercise of management rights and did not violate the collective bargaining agreement.

The Union also asserts that the Commission violated the FLSA because it denied requests for compensatory leave, even though granting the request would not “unduly disrupt” the operations of the Commission. The collective bargaining agreement does not grant an arbitrator the authority to determine whether the Commission has violated the FLSA. Article 20.09 of the collective bargaining agreement specifically provides that “only disputes involving the interpretation, application or alleged violation of the provision of this Agreement shall be subject to arbitration.” Further, the agreed-upon issue in this matter is whether the Commission violated the collective bargaining agreement. Nevertheless, after examining the evidentiary record, reviewing the cited court cases, and considering the arguments in the briefs, the Arbitrator concludes that there was no violation of the FLSA.

AWARD

The grievances are denied.

/s/ Charles W. Kohler

Charles W. Kohler, Arbitrator