# FIREHOUSE LAWYER

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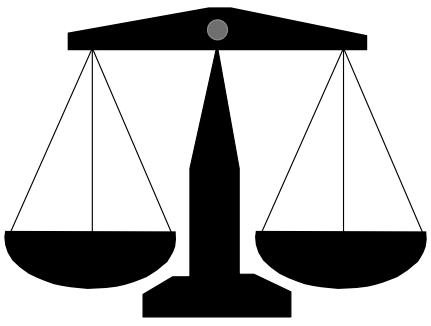
## Comp Time – Use It or Lose It

As many readers know, public employers can utilize compensatory time (hereinafter "comp time") instead of paying overtime under the Fair Labor Standards Act, within certain limitations, and if there is a written agreement in place by collective bargaining agreement or otherwise.

In a case decided on August 24, 1999, the Ninth Circuit ruled that an employer did not violate the FLSA by requiring employees to use some of their comp time as they approach the agreed cap on comp time hours. *See Collins v. Lobdell*, 9th U.S. Circuit Court of Appeals, #98-35655.



The comp time arrangement, established by collective bargaining agreement, was between the Spokane Valley Fire District and the local firefighters' union. Under the agreement, the firefighters could accumulate no more than 144 comp time hours. After that the workers were entitled to be paid cash for their overtime, at time and a half.

Obviously, the comp time must also be credited at time and a half for every hour worked. This applies whether the employees are 40-hour per week employees or whether they may be eligible for 207(k) treatment as firefighters. Under that section of the FLSA, firefighters and law enforcement officers who qualify for the exemption may utilize a work period between 7 and 28 days, rather than a 40-hour work week, thus essentially increasing the amount of hours that may be worked before time and a half payment is necessary.

In the *Collins* case, the firefighters did not use their accrued comp time. When their accrued leave began to approach 144 hours, the fire district instructed them to use their comp time so it could avoid paying the cash overtime. The plaintiffs reluctantly agreed, even though they did not want to use the comp time, because of the negotiated 144 hour threshold. The plaintiffs sued the employer, claiming that the employer's actions with regard to comp time violated the FLSA, in spite of the negotiated cap in the contract.

In addition to the other FLSA requirements, alluded to above, the FLSA itself sets a cap on the number of comp time hours an employee can accrue. For most employees that cap is 240 hours, but for public safety and

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emergency response employees the cap is 480 hours. After that threshold is reached, the employee must be paid cash overtime at time and a half rates. But the FLSA does not prohibit the establishment of a lower comp time cap by employer-employee agreement, as in this case. The FLSA also contains a provision stating that an employee who has requested use of his or her comp time must be permitted to use that time within a reasonable period after making a request if the use of the comp time does not unduly disrupt the operations of the public agency. Effectively, it was this clause, contrasted with the right of the parties to agree to a cap, that created the issue.

Did the employer violate the FLSA by compelling the firefighters to take their comp time? The court looked at two prior cases on the subject, neither of which were Ninth Circuit cases. In the first case, *Heaton v. Moore*, 43 F.3d 1176 (8th Cir., 1994), that Circuit Court of Appeals dealt with an employer which required its employees to use their comp time after accruing 180 hours. The 8th Circuit Court of Appeals ruled the employer did not have the right to require them to use their comp time, finding that comp time "essentially is the property of the employee" who earns it and may be used at the employee's discretion. The *Heaton* court said the only right of the employer springs from the language about unduly disrupting the employer's operations.

The Ninth Circuit in *Collins* also looked at the case of *Moreau v. Harris County*, 158 F.3, 241 (5th Cir., 1998), in which a contracting result was reached. In *Moreau*, the employer also required its workers to keep their comp time hours below predetermined levels. But the *Moreau* court found there was no property right in comp time. The court found that the language regarding undue disruption of operations was relevant only when the employee requested use of their accrued comp time. It did not address whether a public employer might control the employees' use of comp time. The fact that an employee can choose to use his or her accrued comp time does not mean that an employer can never require an employee to use such time, the *Moreau* court found.

In the *Collins* case, after considering and comparing the two above decisions, the Ninth Circuit chose to follow the reasoning of *Moreau*. The court said that the plain language of the FLSA did not specifically prohibit public employers from requiring employees to use comp time. The fact that the FLSA requires the employer to allow use of comp time does not mean that employees have absolute discretion over the use of comp time, the Ninth Circuit Court said. The court said the issue was not whether employees had the right to use comp time as that is undisputed. Instead the question was whether employers can require employees to use it, and the plain language of the FLSA did not address that question.

The Ninth Circuit Court also reasoned that Congress' purpose in enacting the comp time provisions was to ease the financial burden of complying with the FLSA on states and municipalities by providing an alternative to paying overtime wages in cash. Unlike private employers, public employers cannot pass on the operating costs associated with overtime pay to their consumers. If employees could "stockpile" comp time and eventually force public employers to pay cash overtime, the employees could essentially remove that alternative and nullify the amendment. The court found that the drafters of the FLSA did not want to eliminate employer flexibility altogether and did not give employees the right of absolute control over the use of comp time. Therefore the Ninth Circuit Court of Appeals held that the Spokane Valley Fire District did not violate the FLSA.

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## Lose It (Continued)

The reasoning of the Ninth Circuit Court and the *Moreau* court may seem somewhat less than logical. Obviously, if the employer may require employees to use comp time so they do not reach the agreed cap, obviously in that instance the language about the employee having the right to use the comp time as they see fit (absent undue disruption of operations) is a somewhat hollow provision. Nonetheless, the reasoning of the Ninth Circuit with respect to the purpose of the comp time exception does seem to be compelling. Moreover, the *Collins* and *Moreau* courts both made a valid point in noting that employer-employee agreements on the subject are important and should be given effect as well. As the *Moreau* court said, this allowance of agreements as to the use of comp time is merely an application of the general principle that an employer can set workplace rules in the absence of a negotiated agreement to the contrary.

Since there is a split of authority, at least in these three circuits, on the precise question presented, it is possible that the U.S. Supreme Court could be called upon to resolve that conflict. It may well be that we have not seen the end of this argument. In the meantime, public employers are cautioned to allow employees generally to use their comp time unless it would disrupt operations unduly. Moreover, if a cap on comp time is agreed to, the employer should be very vigilant about notifying employees who approach the cap, so that there are no surprises.

# Court Did Not Find Oral Contract

In a decision filed October 29, 1999, Division II of the Court of Appeals of Washington ruled that the Port of Chehalis did not award an oral contract to an unsuccessful bidder. The court affirmed a summary judgment entered by the trial court.

While the case, *Hadaller Construction Company v. Port of Chehalis*, Cause No. 24167-6-II does not break new ground, the decision does effectively provide a vehicle for review of some basic principles applicable to public entities subject to Washington law with respect to public works projects.

Hadaller bid on a construction project for the Port of Chehalis. Its executive director notified Hadaller and two other contractors that they were the three apparent low bidders. In accordance with the project specifications, the Port then had to determine the lowest qualified bidder. Each contractor was asked to submit additional information so the Port could determine the lowest qualified bidder. The requested information included a contractor's qualification statement and performance record, a list of work to be performed by the general contractor, a list of products, manufacturers and supplies, a list of subcontractors, a schedule of values including description of work and cost of each division and finally, letters of recommendation. Hadaller completed those documents and submitted them. Next, the project architect notified the court that Hadaller was the lowest qualified bidder. A pre-contract meeting was scheduled. Next, the executive director told the Port Commission that the three lowest bids had been reviewed by the architect, attorney and federal officials and had been deemed responsive bids. The contract qualifications of the three low bidders had been reviewed. The minutes reflected that the apparent low bidder was Hadaller and the contract "will be ready to award after the lease for the building has been signed". The commissioners then approved the award of the bid to Hadaller and the U.S. Department of Agriculture also wrote that they had reviewed the

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matter and concurred in the contract award to Hadaller. After the commission voted, Hadaller and the subs met with the architect and the Port director and were told they had been awarded the bid. Next the architect requested three items of additional information concerning the metal building systems involved. That included a ten-year list of satisfactory installations from the subcontractor, a certification for the metal building manufacturer, and a 20-year manufacturer's warranty. That same day, the Port notified one of the contractors who bid against Hadaller that they had awarded the bid to Hadaller and were returning the bid bond.

Although it seems almost everything necessary to be completed to form a contract to do the work had been, there were still some loose ends. Apparently, Hadaller never submitted in satisfactory fashion the remaining items with respect to the metal building systems. Ultimately, the architect concluded that the subcontractor could not meet the requirements for ten-years of installing steel structures and that a substitution of contractors would violate the bid specifications. At that point the Port Commission voted to reject the bid as being "not responsible". The same day the Port Commission voted to award the bid to another company subject to the architect's approval. The Port later signed a contract with that company.

At no time did Hadaller attempt to enjoin the award of contract to the other company, but after that contract had been signed Hadaller sued for damages for breach of contract. Now for the review of basic principles.

Citing several cases, the Court of Appeals stated that an invitation to bid on a public contract is not an offer to contract but a solicitation of an offer. The contractor's bid is the offer to contract. To form a contract the parties must mutually assent to the agreement. In looking for mutual assent, the court does not consider the parties' subjective intent, instead gleaning intent from the objective manifestations such as each party's statements and conduct.

The statements and conduct in the *Hadaller* case consisted of the bid instructions and the representations made to Hadaller. Article VI of the Bid Instructions spoke to post-bid information and submissions required. For example, it mentioned that a list of the names of the subcontractors would be required and that the bidder would be required to establish to the satisfaction of the architect and the owner the reliability and responsibility of the proposed subcontractors. Also, the specifications stated that the architect would notify the bidder in writing if either the owner or the architect, after due investigation, had reasonable objection to any person or entity proposed by the bidder.

Effectively, the Bid Instructions contemplated a three-stage process: (1) selection of the low bidder for award of the contract, followed by (2) further investigation of the bidder and its subs, followed by (3) formation of the contract. In light of that three-stage process, any reasonable fact finder could conclude only that no binding contract could be formed until the Port's investigation under Article VI was completed.

Alternatively, if a contract was formed by that selection procedure, the Port could be excused from performance of the contract because the other provisions of Article VI authorize investigation and rejection of the contractor or its subs. The non-occurrence of a condition precedent to making a contract excuses the promisee's performance under the contract. In other words, the providing of a responsible and acceptable subcontractor was a condition precedent to the Port's obligation to perform. Since Hadaller did not establish to the Port's

## Court Did Not Find Oral Contract (Continued)

satisfaction the reliability and responsibility of its subcontractor, there was no enforceable contract.

The court also said the Port did not waive the provisions of Article VI at any time. Hadaller also argued that the Port did not follow the section concerning "reasonable objection". The main instructions did say that, at the bidder's option, it could withdraw the bid or submit an acceptable substitute person or entity. The architect really did not give them that opportunity, the Port argued. However, with respect to this issue, the court pointed out that a bidder on a public contract does not have an action for damages against the public agency for alleged irregularities in the bid process. Rather, such a bidder's remedies are limited to seeking an injunction before the contract is awarded to a different contractor. Thus, if the architect erred procedurally by not giving them an opportunity to submit an acceptable substitute contractor, that did not necessarily lead to a claim for damages, and it should have sought an injunction which they did not do.

While the Port failed to follow its own bid instructions under Section 6.1.3 of the contract, such a claim based upon an allegation of bid irregularity, is strictly procedural, and does not give rise to an action for damages but only injunctive relief. Because Hadaller failed to seek an injunction between the time between its rejection and the signing of the contract with another bidder, this claim for damages is barred.

As stated above, while this court decision does not break new ground, in our opinion, it does serve as a good review for many of our clients.

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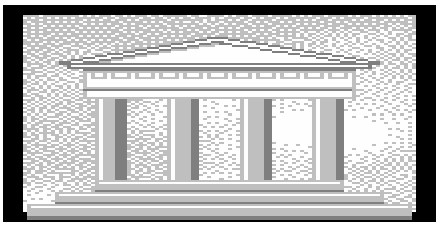

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