STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LABOR ASSOCIATION OF WISCONSIN, INC., For And On Behalf Of The RIVER FALLS POLICE DEPARTMENT EMPLOYEES ASSOCIATION, And PATROL OFFICER CAROLYN KELLY, Complainants, vs. CITY OF RIVER FALLS, Respondent.	Case 27 No. 51305 MP-2917 Decision No. 28554-A

Appearances:

Mr. Thomas A. Bauer, Labor Consultant, Labor Association of Wisconsin, Inc. 206 South Arlington Street, Appleton, Wisconsin 54915, on behalf of the Complainants.

Mr. Cyrus F. Smythe, Consultant, Labor Relations Associates, Inc., 7501 Golden Valley Road, Golden Valley, Minnesota 55427, on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

On July 11, 1994, Labor Association of Wisconsin, Inc., filed a complaint of prohibited practice with the Wisconsin Employment Relations Commission on behalf of the River Falls Police Department Employees Association and Carolyn Kelly, alleging that the City of River Falls had violated Sec. 111.70(3)(a)5, Stats., by refusing to accept the terms of an arbitration award. The Commission appointed a member of its staff, David E. Shaw, as Examiner to make and issue Findings of Fact, Conclusions of Law and Order in the matter. The matter was subsequently held in abeyance due to the injury of Complainant Carolyn Kelly until her recovery. On November 9, 1995, the City of River Falls filed an answer asserting that it had complied with the arbitration award and denying that it had committed a prohibited practice. Hearing in the matter was held before the Examiner in River Falls, Wisconsin on December 12,

1995. A stenographic transcript was made of the hearing and the parties submitted post-hearing briefs by February 26, 1996. Having considered the evidence and the arguments of the parties, the Examiner now makes and issues the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. The Labor Association of Wisconsin, Inc., hereinafter the Association, is a labor organization having its primary offices located at 2825 North Mayfair Road, Wauwatosa, Wisconsin 53222. At all times material herein, the Association has been the exclusive bargaining representative for all full-time sworn police officers of the City of River Falls, excluding managerial, confidential and supervisory employes. At all times material herein, Thomas Bauer has held the position of Labor Consultant with the Association and has represented the River Falls Police Department Employees Association in collective bargaining and contract administration with the City of River Falls. Patrol Officer Carolyn Kelly has, at all times material herein, been employed by the City of River Falls Police Department and is in the bargaining unit of law enforcement officers represented by the Association.

2. The City of River Falls, Wisconsin is a municipal employer with its offices located at 111 North Second Street, River Falls, Wisconsin 54022. At all times material herein, the City Administrator for the City has been Neil Ruddy and the Chief of Police for the City of River Falls has been Chief Roger Leque.

3. At all times material herein, the River Falls Police Department Employees' Association and the City were party to a collective bargaining agreement covering the period of January 1, 1992 through December 31, 1993. Said agreement, in relevant part, contained the following provisions:

> ARTICLE V. EMPLOYER RIGHTS-GRIEVANCE PROCEDURE
>
> 5.1 Definition of a Grievance: A grievance is defined as a dispute or disagreement as to the interpretation or application of the specific terms and conditions of this AGREEMENT.
>
> . . .
>
> 5.5 Arbitrator Authority:
>
> A. The arbitrator shall have no right to amend, modify, nullify, ignore, add to, or subtract from the terms and conditions of this AGREEMENT. The arbitrator shall consider and decide only the specific issue(s)

submitted in writing by the EMPLOYER and the ASSOCIATION, and shall have no authority to make a decision on any other issue not so submitted.

B. The arbitrator shall be without power to make decisions contrary to, or inconsistent with, or modify or vary in any way the application of laws, rules, or regulations having the force and effect of law. The arbitrator's decision shall be submitted in writing within thirty (30) days following the close of the hearing or the submission of briefs by the parties, whichever be later, unless the parties agree to an extension. The decision shall be binding on both the EMPLOYER and the ASSOCIATION and shall be based solely on the arbitrator's interpretation or application of the express terms of this AGREEMENT and to the facts of the grievance presented.

. . .

ARTICLE XVIII. HOURS OF WORK

The regular/normal work day shall consist of eight and one-half (8-1/2) consecutive hours within which time shall be included a thirty (30) minute lunch break. The work schedule shall average two thousand eighty (2080) hours per year.

ARTICLE XIX. OVERTIME AND COMPENSATORY TIME

. . .

19.2 Work done in excess of the normally scheduled work day or work week other than in case of sudden serious emergencies, shall be compensated for by either compensatory time or paid overtime. If the EMPLOYER requires that the employee take compensatory time, such time off shall be granted at the rate of time and one-half (1-1/2) for the excess hours worked. If compensatory time is voluntarily chosen by the employee, such time shall be granted at the rate of time and one-half (1-1/2) for time spent in such excess work. If the EMPLOYER does not require the employee to take compensatory time and

the employee elects to be paid in cash, compensation shall be at the rate of one and one-half (1-1/2) times the employee's regular rate of pay. Employees may maintain a compensatory balance of not more than forty-eight (48) hours that may be taken at the employee's discretion, either in whole or in part, subject to approval by the department head. Time accumulated in excess of forty-eight (48) hours shall be paid on the next pay period.

19.3 Any balance of compensatory time remaining upon the retirement or separation of the employee shall be paid in cash calculated at the rate of pay based on the salary schedule in effect at the time. Employee initiated changes of shifts do not qualify an employee for overtime under this article.

ARTICLE XX. CALL-IN TIME AND COURT APPEARANCES

An employee called to duty or to appear in court outside of his or her regularly scheduled shift shall be paid for a minimum of two (2) hours at time and one-half (1-1/2). Extensions of a regularly scheduled shift shall be compensated in accordance with the overtime provisions as set forth herein.

4. In 1992, Officer Kelly was involved in the arrest of a suspect wanted for attempted murder in Las Vegas, Nevada. Thereafter, she was subpoenaed to appear as a witness in the trial of that arrested subject in the week of January 16, 1993. Officer Kelly was working a six days on, three days off, schedule at the time, and during the week of January 16, Kelly's off days were scheduled to be January 18, 19 and 20. Kelly was scheduled to meet with the District Attorney in Las Vegas on January 18 and to testify on January 19th. Prior to leaving, Kelly arranged with Chief Leque to change January 18 and 19, two of her three scheduled days off, to work days in exchange for changing two of her scheduled work days, January 16 and 17, to days off. Kelly flew to Las Vegas on January 17, 1993, did not work on January 18, 1993, met with the District Attorney's office, and was present in court on January 19, 1993, met with the District Attorney's office and was present in court and spent some time in contact with the District Attorney's office from her hotel room on January 20, 1993, met with the District Attorney's office and was present at the courthouse on January 21, 1993, and returned to River Falls from Las Vegas on January 22, 1993. Shortly after returning from Las Vegas, Kelly submitted a claim for eight and one half hours of overtime for work on her scheduled day off of January 20, 1993. Kelly's request for overtime for January 20, 1993 was rejected and a dispute developed with regard to the number of hours that Kelly had actually worked during the time period of January 16 through January 22, 1993, as well as what exactly had been agreed to between the Chief and Kelly with regard to rearranging her schedule. Kelly was also advised by the Chief that she still owed the City $50 for the witness fees she had

been paid for her appearance in Las Vegas.

5. Kelly submitted the following memorandum dated February 3, 1993 to Chief Leque regarding her claim for overtime for January 20, 1993:

> Chief Leque,
>
> Capt. Schrank has instructed me to contact you reference to overtime submitted, for time spent in Las Vegas, Nevada.
>
> I am submitting for eight and one-half hours overtime for my scheduled day-off of 1-20-93. I had previously offered to trade the day for a different day. You declined to do so.
>
> I have consulted our state union representative on this matter and explained the situation to him. He has advised I am entitled to eight and one-half hour overtime on my scheduled day off. This is based on the fact that I was in Las Vegas, NV as a work assignment and I was in fact involved in court on 1-20-93.
>
> If you have any further questions on this matter you may contact my residence and leave a message because I will not be available for a return call until after 1400 hrs. Or you may contact Tom Bauer of L.A.W. Inc.
>
> Submitted by
> Carolyn Kelly /s/

Also on February 3, 1993, Chief Leque discussed the situation with Kelly. During the course of that conversation, Kelly advised the Chief that she would pay the amount she owed for witness fees after the grievance was settled. Kelly paid $75 of the $125 she had received for witness fees to the City on February 4, 1993 and paid the remaining $50 of witness fees she had received on March 1, 1993.

6. On March 2, 1993, Kelly submitted a formal written grievance to Chief Leque regarding her claim for 8.5 hours of overtime for January 20, 1993.

Chief Leque responded to Kelly's grievance by the following memorandum of March 12, 1993 which read, in relevant part, as follows:

MEMORANDUM

TO: President Michael Reardon
River Falls Police Association

FROM: Roger D. Leque

RE: Grievance 93-23

DATE: March 12, 1993

Please be advised that I am in receipt of Grievance 93-23 which you handed me on March 2, 1993 on behalf of the River Falls Police Association.

The grievance alleges the employer had violated Article XVIII -- Hours of Work and Article XIX -- Overtime and Compensatory Time of the River Falls Police Association Labor Agreement.

. . .

Officer Kelly was paid for 80 hours of work for the pay period ending January 20, 1993. She was also paid for 80 hours of regular time for the pay period ending February 3, 1993.

It is the police department's contention that Officer Kelly has not accounted for all of her regularly scheduled hours during these pay periods and hereby requests a full and complete written account of all of her hours spent in court and in travel due to her court appearance in Las Vegas, NV. The City of River Falls hereby requests that Officer Kelly submit a detailed account of these hours immediately.

It is the City of River Falls position that it has not violated any Article of the River Falls Police Association Labor Agreement and hereby denies the grievance.

. . .

7. In response to Chief Leque's request for a detailed account of her hours while she was in Las Vegas, or travelling to or from that location, Kelly submitted the following account of her hours to the Chief on April 1, 1993:

Time Sheet for Carolyn Kelly for LasVegas Court Appearance

Time Zone			
Cen.	01/17/93	0930 hrs.	left my home for Mnpls/St. Paul Airport
		1630 hrs.	arrived in motel room in LasVegas
Pac.	01/18/93	Legal Holiday	
Pac.	01/19/93	0900-1200	Victim/Witness and District Attorney's office.
		1300-1330	Courthouse
Pac.	01/20/93	0900-1200	District Attorney's office and Courthouse
		1330-1415	Courthouse
		2030-2045	Hotel room to contact District Attorney
Pac.	01/21/93	0930-1200	District Attorney's office and Courthouse
		1330-1545	Courthouse
Cen.	01/22/93	0800	left hotel in LasVegas
		1500	arrival to River Falls

8. The City and the Association were unable to resolve the dispute over Officer Kelly's claim for overtime regarding January 20, 1993, and proceeded to arbitration on her grievance on December 6, 1993, before Arbitrator William Petrie. At that hearing before Arbitrator Petrie, the Association revised its claim to five hours of overtime pay for January 20, 1993. The parties were unable to stipulate on the issue to be submitted for decision. The Association stated the issue as follows:

> Did the Employer violate the express and implied terms and conditions of the 1992/1993 collective bargaining agreement when the Employer refused to compensate the grievant for 5 hours of pay at the grievant's overtime rate of pay (7.5 regular hours of pay) for time spent in court?
>
> If so, what is the appropriate remedy?

The City stated the issue as follows:

> Does the grievant owe the City seven and three quarters (7 3/4) hours of straight time work without pay based on the grievant's work obligations under the Agreement?

The parties agreed at the arbitration hearing that Arbitrator Petrie would frame the issue to be decided. At the arbitration, the City presented evidence as to the hours Kelly had reported she worked during the week of January 16, 1993, as well as evidence with regard to her regular work schedule. The City also presented evidence that indicated Kelly had reimbursed the City for all of the witness fees she had been paid, but only after it had informed Kelly that she had still owed the City $50.00.

The City's brief submitted to Arbitrator Petrie on Kelly's grievance, stated, in relevant part:

> B. POSITION OF THE CITY OF RIVER FALLS
>
> The grievant owes the City of River Falls seven and three quarters (7 & 3/4) hours of work without pay based on the grievant's obligations under the Labor Agreement. The grievant's trip to Las Vegas, Nev. to testify in court failed to generate sufficient hours of work, as reported to the City by the grievant, to fulfill the grievant's obligations under the Agreement.
>
> . . .
>
> D. UNDISPUTED FACTS
>
> . . .
>
> 5. The grievant's regularly scheduled shifts during the time frame in question in this grievance was (see City Exhibit Nos. 3 & 5):

January	Sat	Sun	Mon	Tue	Wed	Thr	Fri
Grievant's schedule in hrs.	16 8.5	17 8.5	18 off	19 off	20 off	21 8.5	22 8.5

> . . .

9. The grievant reported hours worked during the week of January 16, 1993 to the City (see Joint Exhibit No. 3 and City No. 11). The hours reported as worked by the grievant were (see City No. 3):

January	16	17	18	19	20	21	22
actual hours reported by grievant-Joint	0	7 travel	0	3.5 court	4 court	4.75 court	7 travel

The grievant reported a different number of hours worked in her grievance (Joint Exhibit No. 2) filed with the City. In her Grievance she reported:

January	16	17	18	19	20	21	22
hours reported in grievance	0	0	8.5	8.5	8.5	8.5	8.5

The grievant has thus reported two different totals of hours to the City for the week of January 16, 1993. The total number of hours claimed by the grievant as worked/travel to the City for the week of January 16th in her report "Time Sheet for Carolyn Kelly for Las Vegas Court Appearance" (Joint Exhibit No. 3) was 26.25 hours. The total number of hours claimed by the grievant in her grievance to the City for the week of January 16th (Joint Exhibit No. 2) was 34 hours at straight time and 8.5 hours of overtime.

10. The difference in the number of hours between the "Chief's understanding" and the hours reported worked by the grievant is 7.75 hours (see City Exhibit No. 3). This amount is claimed by the City as owed to the City by the grievant.

. . .

15. The grievant did not notify the City of all the witness fees paid to her and reimburse the City of River Falls until requested to do so by the Chief of Police (City Exhibits Nos. 10, 12, 13, 15, 16, 17, 18).

. . .

F. ARGUMENT

The City has no overtime obligation in this case. Rather the City is owed work hours from the grievant based on the grievant's own reports to the City of time worked and the facts developed in this case. The grievant's claim in her grievance ((Joint Exhibit No. 2) for overtime compensation on Wednesday for 8.5 hours is flawed based on the following:

1. The grievant proposes that the arbitrator declare that January 18, 1993 is a "paid holiday" under the Labor Agreement despite the fact that the Labor Agreement does not recognize any holidays. The Labor Agreement only stipulates that employees will receive "credit" for nine (9) holidays to be scheduled as "leave" or taken as extra pay. The grievant thus cannot claim January 18 as a "paid work day" when the grievant admits that she performed no work and was not in court on January 18th (see Joint Exhibit No. 3).

2. The grievant proposes that the arbitrator ignore:

. . .

c. the grievant reported fewer hours of work and travel time needed to justify the grievant's pay during the week of January 16, 1993 creating a deficit in hours and time owed to the City.

d. the grievant has submitted different and inconsistent reports accounting for her time during the week of January 16, 1993.

e. the grievant failed to give the City monies owed to the City which the grievant received from Las Vegas and only paid the monies due to the City after the City informed the grievant that she had not reported and paid to the City all witness fees received by the grievant as required by City policy (City Exhibit No. 18). Such failure on the part of the grievant to fully and accurately report to the City monies received casts further doubt on the accuracy of the grievant's

reports of time spent in court and travel during the Las Vegas trip.

The facts show that the grievant requested and received a change in her "normally scheduled work week" for the week of January 16, 1993 so that the grievant could have some more time in Las Vegas where she was to appear in court. By asking for and receiving such a change in her work schedule, she lost her eligibility for overtime pay to which she might have been entitled under Article XIX, Section 19.2 because of the exception for employee initiated work schedule changes stated in Article XIX, Section 19.3. The grievant was further not entitled to take credit for January 18, 1993 as a work day (paid day) when she did not perform any work or appear in court on that day. January 18, 1993 should have been shown in the grievant's grievance as a non-work day rather than a paid "work day" entitling the grievant to 8.5 hours of pay.

An accounting of the time worked in court/traveling by the grievant during the week of January 16, 1993 clearly indicates that the grievant owes the City 7.75 hours of unpaid work time.

G. CONCLUSIONS

The grievant is not owed any additional compensation for the week of January 16, 1993. Rather the grievant owes the City of River Falls 7.75 hours of work time based on the employees accounting of time spent during the week of January 16, 1993. The City asks the arbitrator to so award.

In its brief to Arbitrator Petrie in the Kelly grievance, the Association made the following arguments, in relevant part:

A. The Grievant Was Called Into Court To Testify On Her Regularly Scheduled Day Off, And, Therefore, Should Have Been Paid At Her Overtime Rate Of Pay For All Hours Actually Worked In Compliance With The Provisions Of Article XIX And XX.

. . .

January 20, 1993, was Officer Kelly's regularly scheduled day off, however, as a result of the need for her further testimony,

she had to appear for approximately five (5) hours, as indicated in the Time Sheet **(Jt. Exh. 3/City Exh. 11)** which was prepared by Officer Kelly for the Chief of Police on April 1, 1993. The Time Sheet indicates that on January 20, 1993, Officer Kelly met with the District Attorney from 0900 hours to 1200 hours (3 hours), from 1200 hours to 1330 hours (1-1/2 hours) lunch/travel to/from courthouse, from 1330 hours to 1415 hours (45 minutes) Officer Kelly was at the courthouse for testimony, and, finally, from 2030 hours to 2045 hours (15 minutes), for a total of 5.5 hours. Deducting the 1/2 hour for lunch, Officer Kelly performed work and/or was standing-by to be called for testimony for a total of **5 hours.** Officer Kelly had no control over the District Attorney's request for her to remain available for further rebuttal testimony. Officer Kelly complied with the order of the subpoena, as any good police officer knows that they must do.

The time spent at court was on her regularly scheduled day off, and, therefore, the provisions of *Article XX* - **Call-In Time and Court Appearances** would apply which require that Officer Kelly should have received compensated *"in accordance with the overtime provisions"* of the contract, i.e., 5 hours pay at her overtime rate of pay (*$16.32/hour X 1.5 = $24.48 X 5 Hours* = **$122.40 total overtime compensation)**.

. . .

D. The City's Contention That Officer Kelly Owes The City 7-3/4 Hours Of Work Without Pay Is Absurd And Should Not Be Given Credence By The Arbitrator

The City argues that Officer Kelly owes the City of River Falls 7-3/4 hours of work without pay due to the fact that Officer Kelly's trip to Las Vegas, Nevada did not generate sufficient hours of work is ridiculous, and lacks merit.

The facts of this case clearly show that Officer Kelly performed her duties as an officer for the River Falls Police Department in an exemplary fashion, and that part of those duties were to attend a court hearing in Las Vegas, Nevada, as a result of Officer Kelly's participation in the arrest of a felon. It appears to be the City's contention that Officer Kelly was not working the entire time that she was in Las Vegas, Nevada, and, further, that Officer

Kelly's appearance in the Clark County Court was not work authorized by the City of River Falls, and should not be compensated. The City attempts to convince the Arbitrator that Officer Kelly now owes the City 7-3/4 hours of work, which is patently absurd, and should not be upheld by the Arbitrator.

4. Conclusion

Therefore, the Association contends that the instant grievance should be sustained by the Arbitrator. The City of River Falls blatantly disregarded the terms of the collective bargaining agreement when they denied Officer Kelly 5 hours of overtime pay for time spent on January 20, 1993. The City's unreasonable exercise of management rights in this instant case must be abated to maintain the integrity of the collective bargaining agreement.

Accordingly, the Association respectfully requests that the Arbitrator conclude that the contractual language is clear and unequivocal on its face, and find that the City of River Falls did violate the collective bargaining agreement.

The Association asks that the Arbitrator find in favor of the Officer Kelly, and award the grievant overtime compensation in the amount of $122.40 for the time (5 hours) that Officer Kelly was required to be in court on January 20, 1993.

. . .

9. On April 1, 1994, Arbitrator Petrie issued his Award in the Kelly grievance arbitration. In said Award, Arbitrator Petrie framed the issues to be decided as follows:

(1) Did the Employer violate the collective bargaining agreement when it failed to properly pay the Grievant for her court related activities in Las Vegas, Nevada on January 20, 1993?

(2) If so, what is the appropriate remedy?

In summarizing the position of the City, Arbitrator Petrie stated, in relevant part, as follows:

POSITION OF THE CITY

In support of its contention that the underlying grievance lacks merit and should be denied and dismissed, and its additional request that the Grievant be directed to reimburse the City for a total of 7-3/4 hours allegedly overpaid for the week of January 16, 1993, the Employer emphasized the following principal considerations and arguments.

(1) That the positions of the two parties may be summarized as follows.

(a) The Employer submits that the Grievant owes the City of River Falls 7-3/4 hours of work without pay, in that her trip to Las Vegas, Nevada to testify in court failed to generate sufficient hours of work, as reported to the City, to fulfill her obligations under the labor agreement.

. . .

(2) That the following facts are material and relevant to the outcome of these proceedings.

. . .

(g) That there are certain discrepancies and/or a lack of full accounting in the time sheets submitted by the Grievant for her Las Vegas appearance, which factors were referenced in the Chief's reply to the Association on March 12, 1993.

(h) That the Grievant did not promptly notify the City of all of the witness fees paid to her.

. . .

(4) That the City principally argues that it has no overtime obligation in this case, and, rather, that it is owed work hours from the Grievant based on her own reports to the City of time worked, and the facts developed in this case.

(a) Contrary to the argument of the Grievant, that Monday, January 18, 1993 was not a "paid" holiday under the agreement. That the agreement does not recognize any paid holidays, but merely provides that employees will receive "credit" for nine (9) holidays to be scheduled as "leave" or taken as extra pay. That Officer Kelly cannot claim this day as a paid holiday, in that she performed no work and was not in court on this day.

(b) That the Grievant is actually proposing that the Arbitrator ignore the following considerations.

. . .

(iii) The Grievant reported fewer hours of work and travel time needed to justify her pay during the week of January 16, 1993, thus creating a deficit in the hours and time owed to the City.

(iv) The Grievant has submitted different and inconsistent reports accounting for her time during the week of January 16, 1993.

(v) The Grievant failed to promptly give the City monies owed to it which she received from Las Vegas, which casts doubt upon the accuracy of her reports on time spent in court and travel during her Las Vegas trip.

(c) That the facts show that the Grievant requested and received a change in her "normally scheduled work week" for the week of January 16, 1993 so that she could have more time in Las Vegas where she was to appear in court.

(iii) That an accounting of her time worked/in court/traveling by the Grievant during the week of January 16, 1993, clearly indicates that she owes the City 7.75 hours of unpaid work time.

In summary, that the Grievant owes the City 7.75 hours and the Arbitrator should so award.

. . .

In the portion of his Award entitled "FINDINGS AND CONCLUSIONS", Arbitrator Petrie stated the following with regard to what he characterized as the City's "counterclaim" against the Grievant:

> Prior to considering these positions the Arbitrator will address the clear and unambiguous limitation upon arbitral authority which appears in Article V, Section 5.5(A), whereby the parties agree that "The Arbitrator shall consider and decide only the specific issue(s) submitted in writing by the EMPLOYER and the ASSOCIATION, and shall have no authority to make a decision on any other issue not so submitted." Since the parties did not agree upon a written submission agreement, the Arbitrator has extracted and framed the issue from the contract grievance documents, which until the arbitral hearing had essentially boiled down to the compensability of the time spent by the Grievant with the District Attorney, at the courthouse, and/or standing by on Wednesday, January 20, 1993, her scheduled day off. The same documents contain no clear reference to what amounts to a *counterclaim* urged by the Employer in these proceedings, and arbitral adoption of the Employer proposed issue would require ignoring the above referenced limitations on the scope of arbitral authority contained in Section 5.5(A). While both parties may introduce fresh *arguments* relating to the underlying dispute, neither has the unilateral right to present to an arbitrator any dispute other than the one or one(s) which were appropriately processed through the contract grievance procedure.

At pages 11 and 12 of his Award, Arbitrator Petrie again referred to the City's claim that Kelly owed the City 7.75 hours of work, rather than it owing her five hours of overtime pay:

The Position of the Employer With Respect to
Employee Requested Schedule Changes

What next of the City's arguments based upon Article XIX, Section 19.3 of the agreement, that employee initiated changes of shift do not qualify them for overtime under this article? In this connection, it submits that the Grievant should not have received overtime for her testimony on Wednesday, January 20, 1993, due to the fact that she had initiated the change in her work schedule on the week containing this day, for the purposes of facilitating certain personal activities with her husband in Las Vegas, Nevada, which were incidental to her appearance there to testify in the pending trial? Indeed, the Employer urges that this same section of the agreement deprives the Grievant of *any overtime* for the period in question, and submits that she should be required to reimburse the City of River Falls for 7.75 hours based upon her accounting of time spent during the week of January 16, 1993. 5/

. . .

5/ While the Employer cannot appropriately insist upon its *counterclaim* for 7.75 hours reimbursement defining the issue submitted to arbitration, it can properly advance the *argument* that any overpayment to the Grievant should be offset against the requested additional compensation for January 20, 1993.

At pages 15 and 16 of his Award, Arbitrator Petrie summarized his findings and stated his Award as follows:

On the basis of all of the above the Impartial Arbitrator has preliminarily concluded that the Grievant's activities on January 20, 1993, when considered in light of the requirements of Article XX, clearly support the conclusion that she was contractually entitled to be paid for five hours pay at time and one-half, for her court related activities in Las Vegas, Nevada, on January 20, 1993. Accordingly, the grievance will be granted and the Grievant made whole for the violation by being paid five hours at time and one-half for her activities on January 20, 1993, less any witness fees received for this

day.

AWARD

Based upon a careful consideration of all of the evidence and arguments advanced by the parties, it is the decision of the Impartial Arbitrator that:

(1) The Employer violated Article XX of the collective bargaining agreement when it failed to properly pay the Grievant for her court related activities in Las Vegas, Nevada on January 20, 1993.

(2) The Employer is directed to make the Grievant whole by reimbursing her for five hours pay at the appropriate time and one-half, for her court related activities on January 20, 1993, less any witness fees received by her for this day.

William W. Petrie /s/
WILLIAM W. PETRIE
Impartial Arbitrator

April 1, 1994

10. After receiving and reviewing Arbitrator Petrie's Award on the Kelly grievance, the City sent Kelly the following letter of April 28, 1994 advising her that it would not be paying her any additional compensation for the day of January 20, 1993:

April 28, 1994

Ms. Carolyn Kelly
River Falls Police Department
111 North Second Street
River Falls, WI 54022

Re: Arbitration Opinion and Award
WERC No. A/P M-93-406

Dear Ms. Kelly:

> The City of River Falls has reviewed the arbitration decision by Arbitrator William W. Petrie dated April 1, 1994. That arbitration decision awarded you five hours of overtime pay for court-related activities on January 20, 1993 less any witness fees received.
>
> However, on page 12 of the arbitrator's decision, footnote #5, Arbitrator Petrie wrote "While the Employer cannot appropriately insist upon its counterclaim for 7.75 hours reimbursement defining the issue submitted to arbitration, it can properly advance the argument that any overpayment to the Grievant should be offset against the requested additional compensation for January 20, 1993." Therefore, the City makes the argument that you were overpaid for the pay period of January 20 and February 3, 1993. This overpayment more than offsets the additional compensation granted you by Arbitrator Petrie's decision. Consistent with the arbitrator's decision, you will be paid no additional compensation for January 20, 1993.
>
> If you have questions, please contact me.
>
> Sincerely,
>
> Roger D. Leque /s/
> Roger D. Leque
> Chief of Police

11. The City has refused to pay Kelly the five hours of overtime pay since receiving Arbitrator Petrie's April 1, 1994 Award, based upon its interpretation of footnote 5 at page 12 of the Award.

12. By letter of June 6, 1994, the Association's Labor Consultant, Thomas Bauer, requested that Arbitrator Petrie clarify footnote 5, at page 12 of his Award, and enclosed Chief Leque's letter of April 28, 1994 to Kelly. By letter of June 8, 1994 to Bauer and Chief Leque, Arbitrator Petrie acknowledged Bauer's letter of June 6 and indicated that, absent mutual agreement of the parties, he lacked authority to interpret or clarify his Award, and offered to render such a clarification if the parties so agreed. By the following letter of June 16, 1994 to Arbitrator Petrie, Chief Leque declined the offer to clarify the Award:

> Dear Mr. Petrie:
>
> Thank you for your June 8 letter offering to clarify your arbitral

decision and award issued on April 1, 1994. It is the City of River Falls Police Department's position that your decision and award was clear, and it has been implemented. Therefore, we see no need to clarify or reconsider this matter.

Sincerely,

Roger D. Leque /s/
Roger D. Leque
Chief of Police

13. Arbitrator Petrie's Award of April 1, 1994, at page 12, footnote 5 of that Award, noted that the City could properly make the argument, as opposed to a counterclaim, that any overpayment to the Grievant, Kelly, should be offset against the additional compensation she requested for January 20, 1993, and did not authorize the City to make such an offset. Said Award does not address the City's claim that Kelly owed the City 7.75 hours for the pay period in question which should be applied as an offset against any additional compensation she might be awarded, but rather awards as an offset witness fees Kelly had received for January 20, 1993. The evidence presented to the Arbitrator indicated Kelly had already reimbursed the City for all of the witness fees she had been paid for appearing to testify in Las Vegas, Nevada and the City made no written claim or argument in the arbitration that Kelly still owed the City witness fees she had been paid to appear in Las Vegas. Said Award, therefore, is unclear as to what offset, if any, is to be applied against the five hours of overtime pay awarded Kelly.

Based upon the foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSION OF LAW

The Award of Arbitrator Petrie issued on April 1, 1994 with regard to a dispute between the River Falls Police Department Employees' Association and the City of River Falls is unclear as to what offset, if any, the City may apply against the five hours of overtime awarded to Officer Carolyn Kelly, and, therefore, it cannot be determined at this time whether Respondent City of River Falls has failed to accept the terms of the Award within the meaning of Sec. 111.70(3)(a)5, Stats.

Based upon the foregoing Findings of Fact and Conclusion of Law, the Examiner makes and issues the following

ORDER 1/

1. The question of what offset, if any, the City of River Falls may apply against the five hours of overtime pay for January 20, 1993, awarded to Officer Carolyn Kelly is remanded to Arbitrator Petrie for issuance of a supplemental award.

2. The instant proceeding shall be, and the same hereby is, held in abeyance until the Commission is notified that Arbitrator Petrie has issued his Supplemental Award, at which time, absent any issues as to compliance, the instant complaint will be dismissed.

Dated at Madison, Wisconsin, this 17th day of July, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By David E. Shaw /s/
David E. Shaw, Examiner

(Footnote 1/ appears on the next page.)

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

> (5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition

is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

This decision was placed in the mail on the date of issuance (i.e. the date appearing immediately above the Examiner's signature).

CITY OF RIVER FALLS (POLICE DEPARTMENT)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Association

The Association asserts that the issue in this case is simply one of clarification of Arbitrator Petrie's Award. The evidence presented to the Arbitrator established that Officer Kelly's normal work schedule for the period of January 12, 1993 through and including January 20, 1993, was six days on, followed by three days off (January 18, 19 and 20th). Upon being subpoenaed to be in Las Vegas, Nevada for a court appearance, Kelly requested, and Chief Leque granted, an exchange of Kelly's regularly-scheduled days off of January 18 and 19 for January 16 and 17, 1993. Due to that exchange, Kelly's scheduled work days were January 12, 13, 14 and 15, with January 16 and 17 now being days off, January 18 and 19 being work days and January 20 remaining a regular off day. Kelly was not originally scheduled to testify on January 20, 1993, but due to a need for further rebuttal testimony, she was required to appear on that date for approximately five hours, as indicated on the time sheet Kelly prepared at the Chief's request (Respondent Exhibit 11). The Association asserts that exhibit indicates that Kelly thus spent five hours of work time on January 20, 1993 in Las Vegas: from 9:00 a.m. until 12:00 p.m. at either the District Attorney's office or the Courthouse (three hours); from 12:00 Noon until 1:30 p.m. Kelly would have been at lunch for one-

half hour, which is non-work time, and standing by at the Courthouse for the remaining one hour (one hour); from 1:30 p.m. until 2:15 p.m. standing by at the Courthouse (45 minutes); and from 8:30 p.m. until 8:45 p.m. talking to the District Attorney on the telephone (15 minutes), for a total of five hours.

The Association contends that the City is attempting to persuade the Examiner that it did not authorize January 20, 1993 as a work day for Kelly, even though Kelly was under subpoena to appear and testify. There is no evidence to justify the City's argument that Kelly owes the City 7.75 hours of pay. Kelly was complying with the subpoena, which required her to make herself available for additional testimony, if needed, for January 20, 1993, as a direct result of her duties as a police officer with the River Falls Police Department. The Association notes that Article XX - Call-In Time and Court Appearances, in the parties' Collective Bargaining Agreement, states as follows:

> "An employee called to duty or to appear in court outside of his or her regularly scheduled shift shall be paid for a minimum of two (2) hours at time and one-half (1 1/2). Extensions of a regularly scheduled shift shall be compensated in accordance with the overtime provisions as set forth herein." (Emphasis added)

The time Kelly spent in Las Vegas on January 20, 1993 constituted an "extension of a regularly scheduled shift" and must be compensated "in accordance with the overtime provisions as set forth herein" the Agreement. Thus, the City owes Kelly five hours of pay at the overtime rate which it computes as follows: $16.32 x 1.5 x 5 hours = $122.40.

The Association asserts that Chief Leque testified that he reached his conclusion that the five hours awarded to Officer Kelly could be deducted from the 7.75 hours alleged overpayment due to the City, based upon assumptions he made solely from footnote 5 on page 12 of Arbitrator Petrie's Award. The Chief and the City ignored Arbitrator Petrie's preliminary Conclusion 4 on page 14 of the Award, wherein he stated:

> ". . .The language in Article XX of the agreement, as confirmed in a prior arbitration, clearly and persuasively favors the position of the Association. . ."
>
> . . .
>
> ". . .The Association has established a *prima facie case* which will result in a decision in its favor. . ." (Emphasis added).

Arbitrator Petrie was obviously referring to the Association's argument that the City owed Officer Kelly five hours pay at her overtime rate. In his Preliminary Conclusion 5, Arbitrator Petrie

stated that the City's argument that Kelly had forfeited her right to certain pay because of her "initiating *a change in working schedule* during the week in question must be rejected", and further stated at page 14, at the second sentence of the first paragraph, that "not only is it quite clear that the specific language of Section 19.3 does not support the position of the Employer, but its requested *forfeiture* of pay would normally be avoided by an arbitrator, in the absence of very strong evidence to the contrary, which evidence is not here present!" The Arbitrator's reference to "overpayment" in footnote 5 of the Award, refers to testimony at the arbitration hearing that there were outstanding subpoena fees still owed to the City by Officer Kelly. The Association asserts that the Arbitrator was alluding to those outstanding subpoena fees, since he was unaware that those fees were paid after the conclusion of the arbitration hearing. Those outstanding subpoena fees would have been the only issue which could have constituted an "overpayment" to Officer Kelly, since all the time spent by Kelly at court on January 20, 1993 was documented by the Association in the arbitration hearing to the satisfaction of Arbitrator Petrie. The City is attempting to retry its case before the Examiner and has advanced the same arguments that were rejected by Arbitrator Petrie in his Award.

As a remedy, the Association requests that the City be found to have committed a prohibited practice in violation of Sec. 111.70(3)(a)5, Stats. and that it be ordered to cease and desist from all further violations of that nature and to pay Officer Kelly five hours pay at her overtime rate ($122.40) for the time spent on her court appearance at Las Vegas, Nevada on January 20, 1993 pursuant to Arbitrator Petrie's April 1, 1994 Award, and to award the Complainant Association all appropriate fees and costs it has incurred as a result of the Respondent City's actions.

City

The City asserts that the issue in this case is to determine the validity of the Association's allegation that the City committed a prohibited practice by failing to pay the Grievant, Officer Kelly, for five hours of overtime pay awarded by the Arbitrator, less any witness fees she was paid. The City disputes the Association's assertion that the term "overpayment" used by the Arbitrator in footnote 5, page 12 of his Award should be interpreted to mean "witness fees" received by Officer Kelly, rather than the wage payments made by the City.

The City takes the position that it has abided by the Award by giving Kelly credit for the five hours of overtime pay awarded her against the 7.75 hours of time recognized by the Arbitrator as owed to the City by her; time the Arbitrator indicated "should be offset against the Grievant's requested additional compensation for January 20, 1993." (Emphasis added). The City asserts that it has demonstrated that the facts relative to the incident that gave rise to the grievance did not justify the Association's position. The Association initially demanded eight and one-half hours of overtime pay, but reduced its demand to five hours at the arbitration hearing. At that hearing the City indicated that the Grievant owed the City 7.75 hours of time for the pay period at issue and presented data to the Arbitrator showing that the Association's requested five hours of overtime was more than offset by the 7.75 hours owed to the City by Kelly. The City asserts that the Arbitrator

recognized the validity of its analysis and indicated at footnote 5, on page 12 of his Award, that any "overpayment" to Kelly should be offset against the Grievant's requested overtime compensation. The Arbitrator referenced the City's calculation of 7.75 hours of time owed it by Kelly, and specifically referred to any "overpayment. . .for January 20, 1993". The Arbitrator did not make reference to "witness fees" paid to the Grievant and clearly separated the issue of witness fees from the issue of time owed the City. The City asserts that it acted within the stipulations of the Award. The imposed overtime payment of five hours overtime was offset by the Arbitrator's statement that the City "should recover the overpayment of seven and three-quarters (7.75) hours."

The Association's argument that footnote 5, on page 12 of the Award, should be interpreted to mean "witness fees" rather than any "overpayment" by the City, is not supported by the evidence. The footnote and the Arbitrator's use of the term "overpayment" is made in reference to the City's evidence that it overpaid Kelly during the pay period in question by 7.75 hours. The Arbitrator's reference to witness fees is in another part of the Award, and is used in another context. The City asserts that the issue of witness fees was a separate matter and was treated as such by both the Grievant and the City. Since Kelly was paid her normal monthly salary, any compensation paid by Las Vegas as witness fees would have to be reimbursed to the City or deducted from her regular monthly salary. After some prodding, Kelly reimbursed the fees to the City. That transaction was apart from the issues of overtime compensation or pay for time not worked. Thus, the issue before the Arbitrator did not involve witness fees. Rather, the issue centered on the Association's claim of overtime pay and the City's claim for recovering pay for time not worked.

The City asserts that the facts it presented to Arbitrator Petrie indicated that Kelly only worked four hours on January 20, 1993, rather than the eight and one-half hours claimed by Kelly in her grievance. The exhibit presented to Arbitrator Petrie at the arbitration hearing (Respondent Exhibit 12), showed the total number of hours worked by Kelly during the time period in question versus her normal work week, and indicated that Kelly owed the City 7.75 hours of time during the week reported, rather than the City owing her any time, straight time or overtime. That exhibit demonstrated that neither the Association's original request for eight and one-half hours of overtime, nor its lowered request for five hours of overtime pay, could be supported. The exhibit did show, however, that Kelly owed the City 7.75 hours. The Arbitrator agreed with the City's calculation, and made note of Kelly's time owed liability, labelling it as an "overpayment" that should be offset against her requested additional compensation for January 20, 1993.

In its concluding arguments, the City asserts that it has complied with the Arbitrator's Award. It gave Kelly credit for the five hours of overtime pay awarded for work on January 20, 1993 against the 7.75 hours time owed the City by Kelly, time which the Arbitrator specifically stated could "offset" the additional compensation owed Kelly for the "requested additional compensation for January 20, 1993." Officer Kelly was awarded the equivalent of seven and one-half hours of pay, while the City was awarded an offset against that liability of seven and three-quarters hours. The question of witness fees was resolved by Kelly and the Chief when she reimbursed the City for the amount she had received as witness fees. The Association is attempting

to undo Arbitrator Petrie's Award, asking the Commission to delete from the Award the Arbitrator's notation that the City "should" "offset" the overtime awarded by the "overpayment" to Officer Kelly for January 20, 1993. The Association has attempted to confuse witness fees paid by the City of Las Vegas with compensation paid by the City of River Falls. However, the Arbitrator used the term "overcompensation" in conjunction with the terms "counterclaim for 7.75 hours" and did not use the term in reference to witness fees. Thus, the City concludes that it abided by the Arbitrator's Award by taking the offset of 7.75 hours overcompensation against the five hours of overtime pay awarded.

DISCUSSION

The complaint alleges that the City has failed to comply with Arbitrator Petrie's Award in violation of Sec. 111.70(3)(a)5, Stats. In his Award, Arbitrator Petrie directed the City

> "to make the Grievant whole by reimbursing her for five hours pay at the appropriate time and one-half, for her court related activities on January 20, 1993, less any witness fees received by her for this day."

The City did not pay the Grievant, Officer Kelly, five hours of overtime at time and one-half; rather, it applied that five hours of overtime awarded her against the 7.75 hours of work the City claimed she owed the City for that same pay period and called it even. In doing so, the City relied upon footnote 5 of the Award:

> 5/ While the Employer cannot appropriately insist upon its *counterclaim* for 7.75 hours reimbursement defining the issue submitted to arbitration, it can properly advance the *argument* that any overpayment to the Grievant should be offset against the requested additional compensation for January 20, 1993.

The Examiner does not interpret footnote 5 as authorizing any offset, rather it merely recognizes that the City may make the "argument", as opposed to a "counterclaim", that any overpayment should be offset against the requested additional compensation. This interpretation is supported by the Arbitrator's having placed those terms in italics to distinguish between making a counterclaim and making an argument. It is further supported by the absence of any mention of such an offset in the Award made by Arbitrator Petrie. The only reference made in the Award with regard to any offset refers to witness fees Kelly received for January 20, 1993. However, the conclusion that there is no express authorization in the Award for the offset claimed by the City does not necessarily result in a finding that the City has failed to comply with the Award.

While Arbitrator Petrie's Award appears on its face to be clear, it becomes less so when viewed in the context of the evidence and arguments the parties presented to the Arbitrator. The City repeatedly and strenuously argued to the Arbitrator that the Grievant, Officer Kelly, had not worked the required number of hours to justify her normal pay and still owed the City 7.75 hours of work for the pay period involved. Nowhere in his Award does Arbitrator Petrie specifically address the merits of the City's argument in that regard. Although an arbitrator's silence on such an argument may be construed as a rejection of the contention, 2/ the propriety of such a construction in this case is questionable. Although the Arbitrator expressly authorized an offset of any witness fees Kelly received for January 20th, the evidence, i.e., the City's arbitration brief and the Award, indicates the City did not claim that Kelly still owed the City witness fees she had received for appearing in Las Vegas. 3/ The City contended in its arbitration brief that Kelly had initially failed to report all of the fees she had been paid and that it was only after the City informed her of her failure to report and pay all of those fees that she paid them. Further, the evidence presented in the arbitration hearing indicated that Kelly had made full reimbursement of the witness fees prior to the arbitration hearing. Therefore, it appears there was some confusion on the part of the Arbitrator and it is not clear what he intended when he authorized the deduction of the witness fees Kelly had been paid from the five hours of overtime pay she was awarded.

2/ Automobile Mechanics Local 701, International Association of Machinists and Aerospace Workers, AFL-CIO v. Joe Mitchell Buick, Inc., 930 F 2d. 576 (7th Cir., 1991); Wisconsin State Employees Union v. W.E.R.C., 189 Wis. 2d. 406, 412 (Ct.App. 1994).

3/ The Association asserts that there was testimony at the arbitration in regard to such a claim, but there is no evidence of such testimony, nor is there mention of it by the Arbitrator in his Award.

For the foregoing reasons, the Examiner has concluded the Award is ambiguous and ordered that the matter be remanded to the Arbitrator for the purpose of deciding the question of what offset, if any, is authorized by his Award. 4/ As it is unclear from the record what the Arbitrator intended to authorize with regard to any offset, it cannot be determined at this point whether the City's application of 7.75 hours it claimed Kelly still owed the City against the five hours of overtime pay she was awarded constituted a refusal to comply with the Award and no finding has been made in that regard.

Dated at Madison, Wisconsin, this 17th day of July, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By David E. Shaw /s/
David E. Shaw, Examiner

4/ State of Wisconsin, Dec. No. 26959-B (WERC, 12/92), reversed, WSEU v. WERC, 189 Wis. 2d 406, 412 (Ct.App. 1994). The Court of Appeals disagreed with the Commission's finding that the award was ambiguous, but did not disagree that an ambiguous award should be remanded to the arbitrator for clarification:

> Courts do not interpret ambiguous arbitration awards. Those which are unclear should be remanded for clarification. *United Food & Commercial Workers Local 100A, AFL-CIO & CLC v. John Hofmeister and Son, Inc*., 950 F.2d 1340, 1345 (7th Cir. 1991). Nevertheless, the preferred method is to avoid a remand to the arbitrator when possible so as not to frustrate concerns for a prompt and final arbitration process. *Flender Corp. v. Techna-Quip Co*., 953 F.2d 273, 280 (7th Cir. 1992) (citations omitted). Thus, a court may interpret an ambiguous award if the record resolves the ambiguity. *Id.*