

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :  
 of a Dispute Between :  
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 SHEBOYGAN COUNTY :  
 :  
 and : Case 170  
 : No. 48017  
 SHEBOYGAN COUNTY SUPPORTIVE : MA-7479  
 SERVICES LOCAL 110, AFSCME, AFL-CIO :  
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Appearances:

Ms. Luella Conway, Personnel Director, Sheboygan County, on behalf of the Employer.  
Ms. Helen Isferding, Staff Representative, Wisconsin Council 40, AFSCME,

AFL-CIO

ARBITRATION AWARD

According to the terms of the 1989-91 collective bargaining agreement between Sheboygan County (hereafter County or Employer) and Sheboygan County Supportive Services Local 110, AFSCME, AFL-CIO (hereafter Union), the parties requested that the Wisconsin Employment Relations Commission appoint a member of its staff to act as impartial arbitrator of a dispute between them involving the County's refusal to grant Union steward Diane Schmahl time off to attend a meeting regarding employe M-S. The undersigned was designated arbitrator. Hearing was held on December 11, 1992 at Sheboygan, Wisconsin. No stenographic transcript of the proceedings was made. The parties submitted their post-hearing briefs by February 3, 1993 which the undersigned exchanged thereafter. The parties waived their right to file reply briefs herein.

ISSUES:

The parties were unable to stipulate to the issues to be decided in this case. The Union suggested the following issues:

- 1) Did the Employer violate the contract when it denied Diane Schmahl paid time as a Union steward to represent an employe?
- 2) If so, what is the appropriate remedy?

The County suggested the following issues:

- 3) Did the Employer violate the contract when it denied Diane Schmahl paid time as a Union steward to attend a performance evaluation of an employe?
- 4) If so, what is the appropriate remedy?

Based upon the relevant evidence and argument, I adopt the County's statement of the issues and those issues shall be determined herein.

STIPULATIONS OF THE PARTIES:

The parties entered into the following factual stipulations in this case.

- 1) That there are no timeliness problems herein;

- 2) That on May 13, 1992, Diane Schmahl requested one hour off in the morning to perform duties as a Union representative and the Employer denied this request.

RELEVANT CONTRACT PROVISIONS:

ARTICLE 6

UNION ACTIVITY

Where Conducted: The Union agrees to conduct its business off the job as much as possible. This article shall not operate as to prevent a steward from the proper conduct of any grievance in accordance with the procedures outlined in this Agreement nor to prevent certain routine business such as the posting of union notices and bulletins.

Presentation of Grievances: The Employer hereby agrees that time spent in the presentation of grievances shall not be deducted from the pay of the delegated employee representatives of the Union.

Agent's Contacts: The Union business representative may contact individual members at a reasonable time after first obtaining permission from the Department and the Employer agrees not to deduct such reasonable time from such employee's wages.

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ARTICLE 21

LEAVES OF ABSENCE

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## II. LEAVE FOR UNION BUSINESS

Union members designated to attend Union programs, but not limited to conventions, shall be granted time off for attendance at these programs. The employee may use vacation or holidays to attend these programs. Unpaid leaves may be requested from the Personnel Committee without loss of seniority . . . .

### FACTS:

The facts underlying this grievance are not in dispute. Diane Schmahl has been a County employe for five years. She has served as the Union's Chief steward (with five stewards under her direction) and as the Local Vice President of the Union for the past three years. Part of Schmahl's duties as Union steward include representing employes during the processing of grievances.

It is undisputed that it was Schmahl's practice to make written requests to her supervisor, Carol Hazlewood for paid time off to handle grievances (although Schmahl stated that she made these requests, at times, orally). The record showed, for example, that on or before February 10, 19, 21, 25, 27, and 28th and on or before March 18, 23, and April 1 and 2, 1992, Schmahl requested in writing that Hazlewood grant her (Schmahl) paid time off to conduct Union business. Each time Hazlewood granted Schmahl's requests. On each of these written requests, Schmahl specifically indicated that the reason for her requesting time off was to investigate, process or review a "grievance."

In mid-February, 1992, M-S, an employe of the Sheriff's Department 1/ received a 10-day suspension. At this time, M-S was also placed on a monthly evaluation schedule, to be continued until M-S's performance was satisfactory.

It is not clear on this record whether Schmahl was present at the meeting at which M-S received her suspension. 2/ However, it is undisputed that M-S requested Schmahl's presence and that Schmahl was present at M-S's March, 1992 and April, 1992 performance evaluation meetings with Sheriff Department management. Schmahl requested and received paid time off to "represent" M-S at these meetings.

On May 13, 1992, Schmahl submitted the following request for paid time off as a Union steward:

It will be necessary for me to excuse myself on Friday morning at 9:15 a.m. for the purpose of union representation for an employe receiving a performance evaluation.

Unlike her prior written requests for Union time off, Ms. Schmahl did not use the word "grievance" on her May 13th request for time off. On or about May 14th, supervisor Hazlewood informed Schmahl that she would not receive paid time off for attendance at a performance evaluation. Schmahl was "docked" for the one hour she spent (at M-S's request) at M-S's performance evaluation on May 15th, because Schmahl chose to use leave without pay rather than vacation

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1/ Non-sworn employes of the County Sheriff's Department have been represented by Local 110 since January 1, 1992

2/ I note that the copy of written notice of M-S's suspension submitted in evidence here, was not signed by a Union representative where indicated on the form.

or comp time (which she could have done) to attend M-S's performance review.

Schmahl apparently did not explain to Hazlewood the circumstances underlying M-S's request for representation. Thus, at the time Hazlewood denied Schmahl's request for paid union time off, Hazlewood was unaware that M-S had been placed on a program of monthly performance reviews as a result of or as part of the discipline M-S had received in mid-February, 1992, and that Schmahl had previously attended M-S's monthly performance evaluation meetings.

Hazlewood had consulted with her superiors before denying Schmahl's request. Schmahl filed the instant grievance on May 14, 1992.

Both the County and the Union proffered evidence regarding Union representatives having attended meetings at the request of employes who were not then being disciplined. This evidence showed that employe requests for Union representation were honored so long as a grievance on the matter was pending, or the County was seeking to obtain information regarding the employe's actions, or when the meeting was called by the County to problem-solve regarding an employe's performance problems. Schmahl also stated that she was unaware of any other Union steward (other than herself) who has attended an employe's performance evaluation meeting.

#### POSITIONS OF THE PARTIES:

##### Union:

The Union asserted that the past practice of the parties requires that Schmahl be paid for representing employe M-S on May 13, 1992. The Union observed that Schmahl had always been paid pursuant to Article 6 for time spent representing employes, including time she spent investigating and processing grievances as well as the time she spent in problem-solving meetings regarding employe performance and health problems and prior performance review meetings regarding M-S. The Union contended that the practice was as Schmahl described it - if a County-called meeting relating to an employe is during working hours, it is paid. The Union noted that the County has no contradictory rule or policy regarding paid time for Union representation.

The Union urged that the County has confused the contract provisions relating to leave time for Union business (which the Union admits is unpaid under Article 21) and paid time for Union representation activity which is conducted during work time. The latter time has always been paid, according to the Union, where, as here, the Union representative properly notified the County in advance of her request for paid Union activity time. The Union observed that the County has not argued that Schmahl requested an unpaid leave for Union business or that she failed to properly request paid time off for Union activity in this instance. Therefore, the Union sought an award sustaining the grievance and it sought backpay with interest thereon for Schmahl.

##### County:

The County argued that the language of Article 6 Union Activity, is clear and unambiguous, implying that evidence of a contrary past practice submitted by the Union should not be considered. The County urged that the facts of this case showed that Schmahl was not presenting a grievance when she requested to attend M-S's performance evaluation meeting and that there was no discipline involved in the evaluation of M-S. Therefore, in the County's view, the County's denial of paid time off to attend M-S's May 1992 performance evaluation was appropriate.

The County contended that Schmahl's pay was not docked but that she requested and received leave without pay to attend M-S's performance review.

The County argued that Schmahl had never been denied the right to perform Union representation duties. In addition, the County observed that Schmahl had requested and always received leave without pay for Union business not involving grievances on many occasions in the past. Finally, the hearsay evidence that other stewards have told Schmahl that they were paid for attendance at performance reviews, the County asserted, should be granted little weight. Therefore, the County urged that the grievance be denied and dismissed in its entirety.

DISCUSSION:

This case essentially involves the question whether Diane Schmahl's representation of M-S on May 15, 1992, at M-S's monthly performance evaluation constituted time spent in the "presentation" of a grievance, 3/ under Article 6 of the labor agreement. The County has argued that the one hour spent by Schmahl representing M-S on May 15th should be treated as an unpaid leave of absence for Union business pursuant to Article 21.

The undisputed facts of this case showed that M-S received discipline in mid-February, 1992; that M-S was then a member of the Union's bargaining unit; that at some time thereafter, M-S requested that Schmahl represent her; and that Schmahl attended a meeting on County-paid time at which M-S was informed that she would be placed on a monthly performance evaluation schedule. 4/ However, there is no evidence to show that Schmahl was present at the meeting at which M-S received her suspension.

The Union also failed to submit copies of any grievances filed by M-S over her suspension or over the imposition of the scheme of monthly evaluations. In addition, Schmahl never specifically stated that any such grievances were filed or contemplated by M-S during the time period relevant here. From this lack of evidence, one could reasonably infer that no grievances were ever filed or contemplated.

It is in this context that this case must be analyzed. Initially, I note that Article 6 contains the Union's express agreement ". . . to conduct its business off the job as much as possible." Article 6 then uses the term "presentation of grievances." In labor parlance, this term means those meetings which are necessary to process grievances through the steps of the grievance procedure. 5/

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3/ It is clear that the section relating to "agent's contacts" is not in issue in this case. This portion of Article 6 merely allows a "Union business representative" (emphasis supplied), namely Ms. Isferding of Council 40, to contact individual members of the Union at reasonable times and with the County's permission (in advance) and that when this occurs, the County has agreed not to dock the individual employe's pay for the reasonable time of the contact between the employe and Ms. Isferding. There is no allegation in this case that Ms. Schmahl or any other employe was docked for time spent in contact with Ms. Isferding. Therefore, this portion of Article 6 is not material to any issue in this case.

4/ It is undisputable that employes are normally evaluated annually by the County and that monthly evaluations are rare.

5/ Separate and distinct for the contractual right herein to payment for time spent processing grievances, are legal requirements that employes be afforded Union representation at conferences regarding wages, hours and working conditions but not at meetings to impose discipline where the

Based upon the record evidence in the instant case, by attending M-S's performance evaluation, Schmahl was clearly not involved in the "presentation of a grievance". Were the undersigned to sustain the grievance herein, the County could potentially be required to pay for the Union steward's time spent at any meeting at which an employe requested representation, whether or not the meeting involved the "presentation" of a grievance. This is certainly more than the parties contemplated when they agreed to the language contained in Article 6. 6/

The Union argued that the County denied Schmahl's May 13th request for paid Union activity time in an attempt to discriminate against Schmahl because of her Union activities. However, I note that the Union proffered no evidence of any County activity or any statements made by County managers which might be construed as threatening or coercive of Ms. Schmahl or of other employes. Similarly, no evidence was offered to show that County managers harbored any animus against Ms. Schmahl or other employes because Schmahl or others engaged in Union or other protected activities. Rather, it is clear that Hazlewood denied Schmahl's request for paid Union activity time after checking with her supervisors. Evidence relating to the Sheriff having restricted access to the jail complex in February, 1992, showed that this restriction was based on general concerns for the security of that facility and that, in any event, Schmahl's ability to handle grievances on behalf of Sheriff's Department employes was not hindered or affected in any way by the Sheriff's orders.

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decision to impose such discipline was made before the meeting occurred. Waukesha County, Dec. Nos. 14662-A (1978) and 18402-C (1982).

6/ I note that Article 21 clearly provides for unpaid leaves or leaves using "vacation or holidays" to be granted to employees " . . . to attend Union programs, but not limited to conventions . . ." (emphasis supplied). Schmahl's request to attend M-S's performance evaluation was properly treated by the County as a request for Article 21 leave.

Based upon the relevant evidence and argument herein 7/ and the above analysis, I therefore issue the following

AWARD

The Employer did not violate the contract when it denied Diane Schmahl paid time as a Union steward to attend a performance evaluation of an employe. The grievance is therefore denied and dismissed in its entirety.

Dated at Madison, Wisconsin this 19th day of February, 1993.

By \_\_\_\_\_  
Sharon A. Gallagher, Arbitrator

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7/ I need not and have not considered the evidence regarding other types of meetings which Schmahl and/or other Union representatives were paid to attend during work time in the past. Based upon the record evidence in this case, no grievance had been filed regarding M-S's situation. Therefore, under the clear language of the contract, Schmahl possessed no Article 6 right to paid time off to "represent" M-S.