

BEFORE THE ARBITRATOR

 In the Matter of the Arbitration :
 of a Dispute Between :
 : Case 228
 OSHKOSH PROFESSIONAL POLICEMEN'S : No. 51297
 ASSOCIATION : MA-8564
 :
 and :
 :
 CITY OF OSHKOSH :
 :

Appearances:

Mr. Frederick J. Mohr, on behalf of the Association.
Mr. Warren P. Kraft, City Attorney, on behalf of the City.

ARBITRATION AWARD

The above-entitled parties, herein "Association" and "City", are privy to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Oshkosh, Wisconsin, on October 7, 1994. The hearing was not transcribed and both parties filed briefs which were received by October 24, 1994.

Based on the entire record, I issue the following Award.

ISSUE

Did the City violate Article V of the contract when it refused to pay grievant Patricia Foust for her June 9, 1994, appearance at an equal rights' proceeding which she herself instituted and, if so, what is the appropriate remedy?

DISCUSSION

Grievant Foust, a police officer, filed an equal rights' complaint against the City which was heard in February and June, 1994. On June 8, 1994, she attended the hearing and received 8 hours pay after she filled out a vacation request for that day. For June 9, 1994, Foust was subpoenaed by her own attorney to attend the hearing that day. Other officers who were subpoenaed in that proceeding were paid by the City. Foust subsequently requested the City to pay her for her attendance under Article V of the contract, but it refused to do so.

In support of Foust's grievance, the Association argues that Article V is clear on its face in requiring payment to all officers subpoenaed for a court proceeding and that the contract language itself does not exclude complainants from receiving pay when they are subpoenaed under this contract language.

The Association cites In Re: Marriage of Levy v. Levy, 130 Wis. 2d. 523 (1986), and State v. Windom, 169 Wis. 2d. 341 (1992), in support of its claim that the City's interpretation improperly "requires that an exception be inserted into the language of this article".

The City, in turn, asserts "there is no language, nor past practice, that specifically requires the employer to pay an employee subpoenaed to testify on her own behalf in her own case against the employer" and that, furthermore, "common sense" dictates dismissal of the grievance, as it cites several arbitration cases as to why its position should be sustained; i.e., State of Ohio, 100 LA 126 (Graham, 1990), and Health Care Financing Administration, 89

LA 734 (Lubic, 1987). The City also contends that the word "Court" in Article V refers to judicial proceedings and not the kind of administrative hearing found here and that, moreover, the resolution of this issue can be better determined in the administrative hearing itself.

The resolution of this issue turns on Article V of the contract, entitled "Call In Time and Court Appearance", which provides:

An officer called to return to duty or appear in Court at some time other than his regular scheduled duty day shall receive three (3) hours pay for the call or appearance unless the call or appearance is cancelled by 7 p.m. of the day prior to the call or appearance. The officer, in addition, shall receive time and one-half for the time spent on the call or appearance. Volunteers shall not be paid the call-in pay.

Officers called or scheduled to appear in court during vacation shall be paid three (3) hours call-in pay plus time and one-half for time worked and, in addition thereto, shall receive an additional day of vacation returned. If notification of cancellation is given 24 hours prior to the start of vacation, no call pay is given. If cancellation occurs thereafter, a vacation day return shall be made. Vacation shall be defined to include off-days commencing on the officer's last day of work before the vacation and his first day of work after vacation. This provision shall apply only when vacation is taken in one week blocks. On trials lasting more than one day, no additional call-in pay shall be given after the first day.

A call is defined as a request to return to duty at some time other than the regularly scheduled time not scheduled at least twenty-four (24) hours in advance and not immediately following the officer's regularly scheduled shift.

No call or Court Appearance shall preclude an officer from working his regularly scheduled shift except by his request and upon approval of his department head. An officer called to return to duty and then called back and told not to return to duty is entitled to one (1) hour of call-in. If the officer returns to duty at the Police Department, he shall receive 3 hours call time. If the officer declines the call, no call-in is paid.

As the Association correctly points out, the face of this language does not provide for any exclusions, thereby indicating that all employes must be paid whenever they miss work because of their needed attendance in a court proceeding. To that extent, a literal reading of the contract supports the grievance.

However, a literal reading of the contract also supports the City's position since Article V on its face only covers "Court" proceedings. Hence, there is no reference in Article V to the kind of administrative proceeding attended to by Foust.

The contract therefore is not as clear and unambiguous as the Association

contends. 1/

Moreover, the contract does not expressly address what is to happen when an officer sues the City and becomes an essential party to a lawsuit, one whose attendance need not be compelled via the issuance of a subpoena.

A subpoena, after all, has one overriding purpose: to secure the attendance of someone at trial who otherwise might not be there. That is why the City is required to compensate officers who are essential witnesses in any proceeding instituted by the City. But, that policy does not come into play when an officer sues the City as a plaintiff or complaining party since that officer's presence is guaranteed by the fact that he/she is an essential party who has no choice but to show up so that his/her claim can go forward. That is why it is unnecessary to subpoena that person.

That also is why Article V is inapplicable to such situations. Hence, the City did not violate Article V when it refused to pay Foust for her attendance at the June 9, 1994, equal rights' hearing. 2/

It light of the above, it is my

1/ This is why - contrary to the Association's claim - In Re: Marriage of Levy v. Levy, supra, and State v. Windom, supra, are inapposite.

2/ Arbitrator Graham reached this same result in State of Ohio, supra, under slightly different facts which turned on bargaining history. Arbitrator Lubic reached a different result in Health Care Financing Administration, supra, because he found that the grievant "was not a party" to a criminal proceeding he helped institute. In doing so, however, he stated that he agreed with the proposition that "a party to a judicial proceeding is not entitled to Court leave. . ." 89 LA at 739.

AWARD

That the City did not violate Article V of the contract when it refused to pay grievant Patricia Foust for her June 9, 1994, appearance in an equal rights' proceeding which she herself instituted; the grievance is therefore denied.

Dated at Madison, Wisconsin this 16th day of November, 1994.

By Amedeo Greco /s/
Amedeo Greco, Arbitrator