BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between OSHKOSH PROFESSIONAL POLICEMEN'S ASSOCIATION and CITY OF OSHKOSH	Case 240 No. 51672 MA-8688

Appearances:

Mr. Frederick Mohr, Attorney at Law, appearing on behalf of the Association.
Mr. Bruce Patterson, Consultant, appearing on behalf of the City.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Association and City or Employer, respectively, were signatories to a collective bargaining agreement which provided for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to hear a grievance. A hearing was held on December 20, 1994, in Oshkosh, Wisconsin. The hearing was not transcribed. The parties filed briefs by December 30, 1994, whereupon the record was closed. Based on the entire record, the undersigned issues the following Award.

ISSUE

The parties stipulated to the following issue:

> When the City refused to pay the grievant for his attendance at a grievance hearing, did it violate the collective bargaining agreement? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 1993-1994 collective bargaining agreement contained the following pertinent provisions:

ARTICLE X

PREVIOUS BENEFITS

The employer agrees to maintain in substantially the same manner, all benefits, policies, and procedures related to wages, hours, and conditions of employment not specifically referred to or altered by this Agreement.

. . .

ARTICLE XVI

GRIEVANCE PROCEDURE

. . .

Expenses for the arbitrator's services and the proceedings shall be borne equally by the employer and the Association. However, each party shall be responsible for compensating its own representatives and witnesses.

. . .

FACTS

On September 14, 1994, there was a grievance arbitration hearing during the day at Oshkosh City Hall between the Association and the City. At the start of his day shift, Patrolman David Kumbier asked shift commander Lieutenant Eichman to release him from duty so that he could attend the arbitration hearing. Kumbier is an Association officer. Eichman then spoke with his supervisor, Captain Erickson, about Kumbier's request to be released from duty to attend the arbitration hearing. Erickson told Eichman that Kumbier could only be released from duty to attend the arbitration hearing if he used his compensatory time for same. Eichman, in turn, relayed this information to Kumbier. Kumbier attended the arbitration hearing that day for two hours. Afterwards, his compensatory time account was charged two hours for the time he was at the arbitration hearing. Kumbier grieved same. Specifically, he grieved the fact that he had to take compensatory time to attend the arbitration hearing.

The record indicates that for at least the last twelve years, on-duty Association officers have been released from duty to attend negotiations, grievance meetings and arbitration hearings on City time. Thus, Association officers who were on-duty attended those functions on City

time and were not required to use their compensatory time for attendance at same. Insofar as the record shows, the situation noted above with Kumbier was the first time an on-duty Association officer was required to use compensatory time for attending an arbitration hearing.

POSITIONS OF THE PARTIES

The Association contends the City violated the agreement when it forced the grievant to use compensatory time to attend a grievance arbitration hearing. To support this contention, the Association first asserts that the applicable contract language (namely the last sentence of Article XVI wherein it refers to "representatives") is ambiguous. Relying on this premise (i.e. that the language is ambiguous), it argues that a past practice exists which governs the interpretation of the contract language. According to the Association, the parties' longstanding past practice is that all on-duty Association officers who attended negotiations, grievance meetings and arbitration hearings did so on City time, not on their own time (via compensatory time). The Association asks the arbitrator to apply that practice to the situation involved here. The Association also notes that the contract contains a maintenance of standards clause (Article X) which obligates the City to continue "all benefits" in substantially the same manner as they previously existed. According to the Association, the City's failure to allow the grievant to attend the arbitration hearing on City time (as it did previously) is a change from a previous benefit. Thus, the Association also argues the City violated Article X when it forced the grievant to use compensatory time to attend the arbitration hearing. In order to remedy this contractual breach, the Association requests that the grievant be credited with the two hours of compensatory time he was required to utilize for attending the September 14, 1994 arbitration hearing.

The City contends it did not violate the agreement when it forced the grievant to use compensatory time to attend a grievance arbitration hearing. To support this contention it relies exclusively on the applicable contract language, namely the last sentence of Article XVI. According to the City, the meaning of this sentence is clear and unambiguous. In its view, the grievant was an Association "representative" on the day in question, so the City did not need to keep him on City time to attend the hearing; rather, he could do so on his own time (via compensatory time). The City contends that since the contract language is clear, there is no need for the arbitrator to even look at any past practice. However, if the arbitrator finds it necessary to do so, the City contends the Association failed to identify a consistent, long term, uniform and recurring practice of the City paying for Association officers' time in the grievance arbitration process. The City therefore requests that the grievance be denied.

DISCUSSION

What happened here is that the grievant, who is an Association officer, attended an

arbitration hearing at City Hall. The question that arose concerning his doing so was whether he was on City time or his own time while at the hearing. The City took the position that he was on his own time, not City time, while at the hearing. It therefore forced him to use compensatory time for the two hours involved. At issue here is whether this action complied with the contract or violated same.

In deciding this contract dispute, the undersigned will focus first on the applicable contract language. If that language does not resolve the matter, attention will be given to evidence external to the agreement, namely an alleged past practice.

Both sides agree that the contract language applicable here is the last sentence of Article XVI. That sentence provides as follows: "However, each party shall be responsible for compensating its own representatives and witnesses." The record indicates this language has been in the parties' labor agreement since the 1960's.

An analysis of the language follows. The sentence that precedes the one just noted deals with expenses for the arbitrator's services. It specifically provides that the "expenses for the arbitrator's services and the proceedings" will be "borne equally" by the parties. While this language is not in issue here, it is nevertheless cited because the very next sentence begins with the word "however." Oftentimes the word "however" is used to identify an exception to the topic or listing that just preceded it. Here, though, the next sentence does not deal with the topic of the arbitrator's services but rather deals with a completely different topic, namely the compensation of "representatives and witnesses." The sentence specifically provides that each party has to compensate "its own representatives and witnesses." In litigating their respective cases, each side focused their attention on the word "representatives." The undersigned will do likewise.

Typically, each side has several people present at an arbitration hearing. For example, on the union side, union officers and/or stewards are present. Generally speaking, these people are bargaining unit employes who, while at the arbitration hearing, wear the hat of being a union officer or steward. They oftentimes are called to testify as witnesses. Additionally, the union usually has its attorney, staff representative or consultant present at an arbitration hearing.

At issue is whether the word "representatives" in the last sentence of Article XVI applies to all of the people just noted or just some. In my view, the term can be read either way. On the one hand, the term "representatives" can be read broadly to cover literally all of the people just noted. If such a broad reading of the term were utilized, the grievant (who is an Association officer) would certainly be considered a "representative" within the meaning of the last sentence of Article XVI. On the other hand, the term "representatives" can also be read more narrowly than was just noted. For example, another interpretation is that the Association's "representative" would not be the bargaining unit employes who serve as Association officers (such as the grievant), but instead would be the Association's attorney, staff representative or

consultant (who in the instant case was Mohr). In the opinion of the undersigned, either of these interpretations of the word "representatives" is plausible. That being so, it is unclear who qualifies as a "representative" under the last sentence of Article XVI.

Inasmuch as an ambiguity exists concerning who qualifies as a "representative" under the last sentence of Article XVI, attention is now turned to the other evidence relied upon by the parties, namely an alleged past practice. Past practice is a form of evidence commonly used to cast light on ambiguous language. The rationale underlying its use is that the manner in which the parties have carried out the terms of their agreement in the past is indicative of the interpretation that should be given where the contract language is ambiguous. It is generally accepted by arbitrators that in order to be binding on both parties, an alleged past practice must be unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties.

The undersigned is satisfied that such a practice exists here. The record indicates that for at least the last dozen years, on-duty Association officers have been released from duty to attend negotiations, grievance meetings and arbitration hearings on City time. As a result, on-duty Association officers attended those functions on City time and were not required to use their compensatory time for attendance at same. This consistent and longstanding practice demonstrates the way the last sentence of Article XVI has come to be mutually interpreted, namely that those on-duty Association officers who attend negotiations, grievance meetings and arbitration hearings do so on City time--not on compensatory time.

Application of that practice here means that the grievant should have been allowed to attend the arbitration hearing on September 14, 1994, on City time. That did not happen. Instead, he was forced to use his own compensatory time to attend the hearing. This action violated the last sentence of Article XVI (as interpreted by the parties themselves via their past practice).

In summary then, it is held that the contract language is ambiguous concerning who qualifies as a "representative" under the last sentence of Article XVI; that a well-developed past practice has existed for many years concerning same; and that the practice is that on-duty Association officers attend negotiations, grievance meetings and arbitration hearings on City time, and are not required to utilize their compensatory time for attendance at same. This past practice establishes how the last sentence of Article XVI has come to be interpreted by the parties themselves. Applying that interpretation here, it has been held that the grievant (an Association officer who was on-duty at the time) did not have to utilize compensatory time to attend the September 14, 1994 arbitration hearing. 1/

1/ Given this finding, the Arbitrator believes it is unnecessary to address the Association's

In light of the above, it is my

AWARD

That when the City refused to pay the grievant for his attendance at a grievance hearing, it violated the collective bargaining agreement. In order to remedy this contractual breach, the grievant shall be credited with the two hours of compensatory time which he was required to utilize for attending the September 14, 1994 arbitration hearing.

Dated at Madison, Wisconsin, this 20th day of March, 1995.

By Raleigh Jones /s/
Raleigh Jones, Arbitrator

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contention concerning the maintenance of standards clause and its application here.