BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
WISCONSIN PROFESSIONAL POLICE ASSOCIATION/LAW ENFORCEMENT EMPLOYEE RELATIONS DIVISION	Case 83 No. 52737 MA-9086
and	
CITY OF TWO RIVERS (POLICE DEPARTMENT)	

Appearances:

Mr. Richard J. Daley, Business Agent, Wisconsin Professional Police Association/Law Enforcement Employee Relations Division, 3301 South Clay Street, Green Bay, Wisconsin, 54301, appearing on behalf of the Association.

Davis & Kuelthau, S.C., Attorneys at Law, by Mr. Mark L. Olson and Mr. Michael Aldana, 111 East Kilbourn Avenue, Suite 1400, Milwaukee, Wisconsin 53202-6613, appearing 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 on October 25, 1995, in Two Rivers, Wisconsin. The hearing was transcribed and the parties thereafter filed briefs and reply briefs which were received by January 31, 1996.

Based upon the entire record and the arguments of the parties, I issue the following Award.

ISSUE

Since the parties were unable to jointly agree upon the issue, I have framed it as follows:

> *Did the City violate the contract when it refused to grant a 30-minute paid lunch period to grievant Jerome E. McConnell when he was assigned to an out-of-town training class which did not require him to be on call?*

DISCUSSION

Grievant McConnell attended an April 15, 1995, 1/ training class on crowd control at the Point Beach Tower Plant/Two Creeks Town Hall. His total portal-to-portal time that day was 8.6 hours, exclusive of the 30-minute lunch break he received. The City paid McConnell time and a half for those 8.6 hours because it was McConnell's regularly-scheduled day off, but it refused to pay him for his lunch break hence leading to the instant grievance. Both parties have stipulated that there are no City documents which expressly state that employes will or will not be paid for their lunch breaks when they attend out-of-town training classes.

Former Police Officer Edward VanderBloomen testified that when he was a City Police Officer in the 1980's, he was paid for the 30 minutes lunch break "every time" when he was on training exercises. On cross-examination, he admitted that he was not paid for the study time he incurred in a 1983 training session and that he was unfamiliar with whether the City paid for training lunch breaks after he left City employment in 1986.

Grievant McConnell testified that he was always paid a full day's pay portal-to-portal pay when he attended training programs outside the City; that such pay covered lunch and coffee breaks; that he had a 30 minute lunch break on April 15; and that he was available and on call at that time, if needed. On cross-examination, McConnell testified that he possibly was not paid for a lunch break during a December 5, 1994, training class; that he assumed that he was paid for a lunch break during a February 8, 1993, training class; and that "it's possible" that he was not paid for lunch breaks during 1993 training at Lakeshore Technical College.

Former Sergeant Bernard Geigel testified on behalf of the Association that during his 28 years with the Police Department, he was always paid for lunch breaks during his in-service training. He did not specify, however, whether such in-service training was held in or out of the City. On cross-examination, he stated that he did not know whether other officers were paid and that he is unaware of what has happened regarding this issue since his 1993 retirement.

Police Chief Michael J. Lien testified that during his 9-year tenure, officers receive a 20-minute paid lunch break during which time they are on call; that there has not been a paid non-duty lunch period since at least 1984; that officers during out-of-town training are not on call during lunch and thus are not paid for lunch because "it is their time"; and that no officers have been called out on such lunch breaks during his tenure. He also said that the Association in past contract negotiations unsuccessfully tried to get contract language to lengthen the paid lunch break from 20 to 30 minutes and that he understood that the Association at those times also was trying to get such language to cover paid lunch breaks during training. He added that an April 12 memo directed to all personnel detailing the City's policy regarding this issue reflected the City's past practice; that no grievances have been filed over the City's past refusals to pay for lunch breaks during training classes; that it is possible that some officers have been paid for that time even

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1/ Unless otherwise stated, all dates hereinafter refer to 1995.

though he may be unaware of it; and that McConnell in 1994 was not paid for such a lunch break.

He further stated that McConnell was not on call during his April 15 lunch break and that Geigel was paid for lunch breaks during his training classes because he did not work in patrol and because certain training standards changed in 1993 so that officers now can eat outside when they are not on call. On cross-examination, he admitted that none of the Association's prior contract proposals ever specifically sought payment for lunch during training sessions.

Lieutenant Calvin Bebee testified that he in 1994 disapproved two requests for paid lunch breaks during training classes and that he himself was not paid for such breaks when he was an officer. On cross-examination, he stated that in "an extreme emergency" McConnell may have been called during his April 15 training session.

James A. Konicke - the co-instructor for the April 15 training class which McConnell attended - testified that the lunch break that day was 30 minutes and that attendees during lunch "could do whatever they wanted". On cross-examination, he added that telephones were present at the site and that McConnell could have been called over the telephone if necessary.

Captain Randall Ammerman testified that officers before 1983 were paid for lunch breaks during training classes; that the policy changed in 1984; and that officers since then are "not supposed to" be paid for their meal times.

In support of McConnell's grievance, the Association mainly argues that the contractual language is clear and unambiguous in providing for paid lunch breaks; that the contract must be read to avoid the forfeiture urged by the City; that the contract read as a whole supports the grievance; and that a well-developed past practice shows that officers always have been paid during their lunch breaks.

The City, in turn, asserts that a past practice supports its position; that the Association in past negotiations has been unsuccessful in obtaining the benefit it seeks here; and that the City's practice "is reasonable and consistent with arbitrable authority and federal law."

Turning first to the disputed contract language, Article XI of the contract, entitled "Pay Policy", provides in pertinent part:

> Training: The City agrees that it will provide training for employees in the bargaining unit under the guidance of qualified personnel. Each employee agrees to make a good faith effort to learn and know the material presented in training sessions. The employees understand the need to acquire the professional competence necessary to perform the work assigned and successful completion of said sessions shall be based upon reasonable tests

> and/or measures. Upon the successful completion of said training that is outside of the normal duty work day, employees shall be compensated for the time in said training at time and one-half (1 1/2) the regular hourly rate of the employee. If the employee fails to certify in firearms training, re-certification will be on the employee's own time. (Emphasis added)

The key phrase here is "employees shall be compensated for the time in said training at time and one-half (1 1/2) the regular hourly rate of the employee." While this language arguably can be read to cover paid lunch breaks, it does not clearly and unambiguously provide for that, as a good argument can be made that the phrase "in said training" refers only to the training itself, and not to any lunch breaks in the middle of such training. This language therefore is ambiguous.

Article X, entitled "Normal Work Week, Work Day, and Work Shift", states in pertinent part:

> "The established work day for the Police Department shall be eight (8) hours."
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> . . .
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> "Work in excess of eight (8) hours per day or in excess of the scheduled work days, including credit for days off with pay and sick leave days, will be compensated for at the rate of one and one-half (1 1/2) times the regular rate of pay. All work performed on revised schedules during the twenty-four (24) hour notice shall be compensated at one and one-half (1 1/2) times the normal rate of pay."
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> . . .

Again, it can be argued that the phrase "Work in excess of eight (8) hours per day. . ." covers out-of-town lunch breaks since they are part of such training. However, it just as easily can be argued that the word "Work" therein only refers to actual work - i.e., training - and not to lunch breaks since the latter normally do not constitute "work" as that term is commonly understood. Hence, this part of the contract also is ambiguous.

That takes us to parol evidence and bargaining history. Contrary to the City's claim, the record fails to establish that the Association in past negotiations ever specifically sought payment for out-of-town lunch breaks taken during training classes. For while Police Chief Lien initially testified that the Association had made such a proposal, he admitted on cross-examination that none of the Association's proposals ever specifically sought that benefit. Furthermore, none of the

Association's contract proposals - which have been received into the record - show that this particular benefit was being sought. As a result, no weight can be given to the Association's past contract proposals.

As for a past practice, both parties point to specific testimony to buttress their claims that their separate positions are supported by a past practice which is covered by Article 11 of the contract, entitled "Cooperation", which states in pertinent part:

> "The City agrees to maintain the amenities of work not specifically referred to in this Agreement. An amenity is defined as a routine practice which is mandatorily bargainable."

The strongest testimony for the Association is Geigel and VanderBloomen's testimony that they were always paid for such lunch breaks. Their testimony, however, was disputed by Chief Lien, Bebee and Ammerman who testified to the contrary.

Since VanderBloomen left his employment in the mid-1980's, his testimony is outdated. In addition, Geigel did not explain whether he was paid for out-of-town training classes or for those training classes held in the City when he was on call during his lunch breaks. Hence, it is entirely possible that he was only paid for training which occurred within the City, which is an issue the City does not dispute.

But even if they were paid, the record shows that those were isolated instances, rather than a clear, uniform policy covering all bargaining unit employes - which is an essential element of any binding past practice. This is shown by the fact that grievant McConnell was not paid for his lunch breaks during some of his prior out-of-town training classes. Had there been a clear uniform policy, he should have been able to identify all prior instances of where he was paid, which is something he did not do. Accordingly, the record establishes that there is, at best, a mixed practice over this issue which does not favor either party.

That being so, the City was not required to pay McConnell for his April 15 lunch break since neither the contract nor any binding past practice mandates such payment. For here, it was incumbent upon the Association to establish that the City over the years - through either contract language or a past practice - agreed to the economic benefit or "amenity" sought here. Having failed to do that, the Association now cannot obtain that benefit in arbitration. 2/

2/ This also is why there is no merit to the Association's claim that this benefit should not be forfeited. For in order to constitute a "forfeit", there must be something to forfeit. Here,

In light of the above, it is my

AWARD

That the City did not violate the contract when it refused to grant a 30-minute paid lunch break period to grievant Jerome E. McConnell when he was assigned to an out-of-town training class which did not require him to be on call.

Dated at Madison, Wisconsin, this 18th day of April, 1996.

By Amedeo Greco /s/
Amedeo Greco, Arbitrator

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there is none since the Association never secured this benefit or amenity in the first place.