BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between CITY OF MANITOWOC POLICE DEPARTMENT EMPLOYEES, LAW ENFORCEMENT EMPLOYEE RELATIONS DIVISION OF THE WISCONSIN PROFESSIONAL POLICE ASSOCIATION and CITY OF MANITOWOC	Case 111 No. 52435 MA-8972

Appearances:

Mr. Robert Pechanach, Bargaining Consultant, WPPA, 9730 West Bluemound Road, Wauwatosa, Wisconsin 53226, on behalf of the Local Union.

Mr. Patrick Willis, City Attorney, 817 Franklin Street, P.O. Box 1597, Manitowoc, Wisconsin 54221-1597, on behalf of the City.

ARBITRATION AWARD

According to the terms of the 1993-95 collective bargaining agreement between the City of Manitowoc (City) and City of Manitowoc Police Department Employees, Law Enforcement Employee Relations Division of WPPA (Union), the parties requested that the Wisconsin Employment Relations Commission designate a member of its staff to hear and resolve a dispute between them regarding call-in pay for court appearances. The case was originally assigned to WERC arbitrator James W. Engman on April 10, 1995. Mr. Engman was formally designated by the Commission as arbitrator and issued a notice of hearing on June 6, 1995, for a hearing to be held on June 21, 1995 at Manitowoc, Wisconsin. Thereafter, Mr. Engman resigned from the Commission and Sharon A. Gallagher was designated by the Commission to hear and resolve the instant case on January 29, 1996. The hearing in this matter was held before Arbitrator Gallagher on March 13, 1996 at Manitowoc, Wisconsin. No stenographic transcript of the proceedings was made. The parties agreed to submit their briefs on April 12, 1996, to be exchanged by the undersigned. The parties waived the right to file reply briefs.

ISSUE:

The parties stipulated that the following issue should be determined in this case.

> Did the Employer violate Article VIII Section 5, of the agreement when it denied the Grievant's request for two hours of court time pay?
>
> If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE:

> ARTICLE III
> MANAGEMENT RIGHTS
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> Except as provided in this Agreement, it is agreed that the management of the Manitowoc Police Force is vested exclusively in the Employer as follows:
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> > (a) To direct and supervise all operations of the Manitowoc Police Department.
> >
> > (b) To establish reasonable work rules and enforce said work rules.
>
> . . .
>
> The Association and the employees agree that they will not attempt to abridge these management rights and the City agrees that it will not use these management rights to interfere with rights established under this Agreement or for the purpose of undermining the Association or discriminating against any of its members.
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> . . .
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> ARTICLE VIII
> PAY POLICY
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> . . .
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> Section 5. Call-In Pay. In the event employees are recalled to work, assigned to Court outside the normal work hours, . . . they shall receive a minimum of two (2) hours of pay at time and

one-half (1 1/2) their regular rate of pay.

This provision includes assigned court appearances scheduled immediately prior to start of normal work hours.

. . .

In the event employees are scheduled for court and such court is canceled, such notice of cancellation shall be provided directly to the employee by the court in question or by the Police Department by the quickest available means. An employee scheduled for court shall call the office of the prosecuting attorney within twenty four (24) hours before the scheduled court appearance to determine whether the case remains scheduled. If the officer is then told by the office of the prosecuting attorney that the appearance is still scheduled, but the appearance is subsequently canceled, the employee shall receive three (3) hours pay. Calls for Monday trials shall be made by the employee the preceding Friday and calls for trials scheduled the day after a holiday shall be made on the last court work day preceding the holiday.

1994 Memo From The District Attorney's Office:

Witnesses MUST call the District Attorney's Office between 5:00 p.m. the day PRIOR to the hearing and 8:30 a.m. the day OF the hearing for a tape recorded message that will advise you as to whether or not the hearing is still on. Failure to phone in will result in a DENIAL of witness fees for those witnesses who appear on the day of a cancelled hearing. The number to call is: (414) 683-4070.

MEMO

TO: Law Enforcement Officers

RE: Officer Cancellation & Officer Vacation and Schooling

FROM: Brenda Guse, Victim/Witness Coordinator
c/o District Attorney's Office

This notice is being sent as a reminder to ALL law enforcement officers that the District Attorney's Office will continue to implement the current system for cancellation of officers. The current system began on June 1, 1991 and it is familiar to most

officers.

The District Attorney's Office is using an answering machine, with a cancellation message, which is used during the hours of 5:00 p.m. and 8:30 a.m. for cancellation of witnesses on all types of court proceedings. Officers may use the system by calling (414) 683-4070 during the above listed hours. Officers should NOT contact the receptionist during normal office hours as this is time consuming for the receptionist and often times inaccurate due to court calendar changes which can occur on a hourly basis.

We will continue to cancel officers by memo and by telephone when there is ample notice to do so, in ALL other instances the officers will need to call the answering machine for the next day's court cancellations.

As to officer training and officer vacation the District Attorney's Office would like to remind officers that our policy remains the same. Following are reminders to officers of the policy:

1) Your normal days off are NOT considered vacation and therefore days off are NOT exempt from subpoenas. When days off are run with vacation time or personal holidays the time IS considered vacation and IS marked off on the officers schedule so as not to interrupt the vacation time.

2) All officers should contact Brenda Guse at the District Attorney's Office with their respective training schedules and vacation times so as to avoid scheduling conflicts with court appearances. Adjournments will NOT be requested for officers who do not keep this office informed of vacation and training schedules. Court officers are NOT responsible for advising the District Attorney's Office of officer schedules - it is the individual officer's responsibility.

3) Officers with appearance problems should

> notify Brenda Guse at 683-4074 with problems involving subpoenas for criminal matters. Officers with appearance problems on traffic and juvenile matters should contact Lynn Schneider at 683-4072.
>
> As a further reminder: Adjournments are not granted by the District Attorney's Office, but by the Court. We monitor officer schedules and request adjournments when appropriate, however, officers should be aware of the fact that the final adjournment decision rests with the Court.
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> Please be advised that from the time that we type the request for an adjournment to the time of obtaining the judge's approval approximately 3-5 days have passed, therefore, it is important that officers provide several weeks notice, or more when possible, of school and vacation schedules.
>
> I would like to take this time to thank those officers who have cooperated with our policy in the past and to thank you in advance for your anticipated continuing cooperation. Please feel free to contact me with any questions you may have regarding the above matter or regarding any problems you may have with the answering machine.
>
> I wish you all a happy and healthy New Year and I look forward to working with all of you in 1994.

BACKGROUND:

The Grievant, James Schweigl, has been employed by the City as a Patrol Officer for approximately twelve and one-half years. Both Officer John Crabb (an 18-year veteran of the department) and the Grievant stated that the language of Article VIII, Section 5 was placed in the collective bargaining agreement for the first time in 1986. Officer Schweigl stated that each year since 1991, the District Attorney's Office has sent each employe of the City Police Department a copy of the Memo, quoted above. Schweigl stated that only one major change has been made in the Memo since 1991: Where the memo now states, "Witnesses MUST call the District Attorney's Office . . .", the Memo had previously stated "Witnesses MAY call . . .". Grievant Schweigl admitted that the District Attorney's Office Memo was posted on the department bulletin board where such documents as rules and regulations and new City ordinances are also posted. However, Schweigl stated that no one in command at the department ever went over the contents of the District Attorney's Memo or ordered employes to follow it. Schweigl stated that in his opinion, the department does not notify officers of departmental rules by posting them on the department bulletin board. Rather, as a general rule, departmental memos are put in employe

folders and shift supervisors normally talk to officers about their contents. 1/

Facts:

The facts giving rise to the instant grievance are essentially undisputed and are as follows. On Friday, November 4, 1994, Officer Schweigl called the District Attorney's Office at 10:30 a.m., in order to check whether the case for which he had been subpoenaed was still scheduled to be tried on November 7, 1994 at 9:00 a.m. Schweigl stated that he did not recall whether he spoke to Brenda Guse or another clerical employe in the District Attorney's Office that day. Schweigl stated that he was told by the person he spoke to that the trial for which he had been subpoenaed was still scheduled to be held on Monday, November 7, 1994. Schweigl stated that he did not recall if the person he spoke to at the District Attorney's Office told him to call back later.

1/ Initially, Schweigl stated that the District Attorney's Office Memo might have been posted on the departmental bulletin board. On cross-examination, Schweigl admitted that the memo was probably posted on the department bulletin board and that departmental rules and regulations are also posted on this board.

Schweigl was scheduled to work the second shift on November 4, 1994, and arrived at the department early, at approximately 2:45 p.m. At that time, Schweigl spoke to fellow Officer Bonin who told Schweigl that the trial scheduled for Monday, November 7, 1994 had been settled. 2/ Schweigl stated that after Officer Bonin told him that the trial had been cancelled, he (Schweigl) believed that the case had settled. Schweigl admitted that he then planned his weekend and the following Monday (November 7, 1994) as if he were not going to have to testify on November 7th.

Officer Schweigl stated that he did not call the District Attorney's telephone machine at or after 5:00 p.m. on Friday, November 4, 1994; that on or after November 4th, no one from the District Attorney's Office, the court, or the police department called him (Schweigl) to officially notify him that the case had been settled. In addition, Schweigl stated he did not call the District Attorney's telephone message machine on Sunday, November 6, 1994. Schweigl agreed that he could have but chose not to call the District Attorney's Office after 5:00 p.m. on Friday, November 4th.

Officer Schweigl stated that he has not followed the District Attorney's Memo since 1991 when making inquiries regarding whether cases he has been subpoenaed for have been settled or will be tried. Schweigl stated that he has always followed the collective bargaining agreement on these occasions. Officer Schweigl stated that because he followed the contractual procedure regarding court time pay, he should have been compensated for the minimum of two hours pay at the overtime rate.

Schweigl, Union Steward on the second shift, also stated that the identical situation (Monday trial canceling) has occurred perhaps six to ten times during the 1990's. Schweigl stated that in each situation, he has called the District Attorney's Office on a Friday according to the contract and that he has been paid court time pay whenever the case was settled or

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2/ Bonin had also been subpoenaed to testify at the November 7th trial. Officer Bonin's wife works at the courthouse. Bonin told Schweigl that his wife had given him this information.

canceled if he was originally told the trial was still on the docket. On cross-examination, however, Schweigl stated that probably only a few of these identical instances occurred during the 1990's.

Carol Peterson, head of payroll for the police department for the past twenty-six years, stated that it has been her responsibility to oversee the call-in pay for court cases where police officers have been subpoenaed. Peterson stated that she receives claims for such compensation from the Shift Commanders who collect the officers' original request slips,which must state the reason for the court time pay request. The shift commander turns these slips in to Peterson along with each officer's time card. Peterson stated that if a request appears normal, she okays it and puts it through for payment, but that if there is anything unusual about the request, she asks the Deputy Chief for his authorization or denial of payment. Peterson stated that she was unaware of any cases like Schweigl's where the trial had been called off on a Friday but the officer had nonetheless been paid court time pay. However, Peterson stated that it would be possible that payment might have occurred in prior cases where the City should have denied it if the officer's original request slip for payment contained insufficient facts to show that the officer had actually not called in properly (on Friday at 5:00 p.m. or thereafter).

After searching the departmental records during a break in the hearing in this case, Peterson resumed the stand and stated that she found one request slip by an Officer John Abler requesting court time pay for the same trial for which Schweigl had been subpoenaed (occurring November 7, 1994 at 9:00 a.m.) Peterson stated that initially, Abler was paid court time pay based upon his written request therefor.

> "two hours paid O.T. on 11-07-94. re: cancelled court case no. M94-04786".

Peterson stated that she recalled Abler brought it to her attention that he (Abler) had been paid in error because he knew that Schweigl had been denied court time for the same date and that a grievance had been filed thereon. On December 12, 1994, Ms. Peterson sent a memo to the Finance Office indicating that that office should deduct pay amounting to $47.43 from John Abler's paycheck. 3/

Schweigl stated that he always puts in detailed overtime or court time request slips and that he has never been denied compensation before the denial that gave rise to the instant case. Schweigl stated that he was aware that there were perhaps three other officers who had been

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3/ Officer Schweigl stated that in his capacity as Union Steward, he had advised Abler that his (Abler's) request for court pay should be withdrawn because he (Abler) had not followed a part of the contract and Schweigl had told him that he (Abler) was not entitled to the pay.

subpoenaed to testify in the same case on November 7th. It is undisputed that none of the other officers (except Abler) submitted a request for court time pay for November 7th, as Schweigl had done. 4/

Officer Schweigl submitted the following request for court time pay for the trial scheduled for November 7, 1994:

> On 11-7-94 I had court scheduled vs. Robert Romero at 9:00 a.m. On Friday 11-4-94 I called the DA's Office at 10:30 a.m. and was told the case was still on. It was cancelled due to a plea later in the day. I would like pay for the two hrs. overtime.

On November 14, 1994, Schweigl's request for court time pay was denied and Schweigl filed the instant grievance.

Positions of the Parties:

Union:

The Union argued that the language of Article VIII, Section 5 is clear and unambiguous; and that the District Attorney's Witness Policy conflicts with the relevant contract language. Therefore, the Union urged, the mutually agreed-upon contract language must supersede the unilaterally proposed and established District Attorney's Witness Policy.

In the instant case, the Union observed, Grievant Schweigl, followed the call-in requirements of the labor agreement by calling the District Attorney's Office on Friday, November 4th, prior to 5:00 p.m. At this time, Schweigl was told that the trial scheduled for Monday, November 7th at 9:00 a.m. was still on the docket. The Union stated in its brief:

> . . . Because the grievant had received no official cancellation notice

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4/ None of the other six officers (including Alber) who were subpoenaed to testify on November 7, 1994 appeared as witnesses in this case. The only Union witness (other than the Grievant) in this case was Officer Crabb. Crabb testified that on perhaps ten or twelve occasions since 1986, he was notified that cases for which he has been subpoenaed would occur, but later these cases were canceled. On each occasion, Crabb stated he was paid court time pay. Crabb could not recall when he called the District Attorney's Office to seek information regarding the scheduling of these cases and he could not recall any other specifics regarding the date or circumstances surrounding these occasions.

> from the District Attorney, he call (sic) the District Attorneys (sic) office on Sunday, November 6, 1994, sometime after 5:00 p.m. and was advised by a taped message that his case was no longer scheduled. . . ." 5/

In addition, the Union asserted that Officers Crabb and Schweigl's testimony demonstrated that both of these officers had been paid call-in court pay in other situations identical to the one in the instant case on from six to twelve occasions each since 1991. The Union argued that the District Attorney's Witness Policy should not be binding on unit employes, as it was neither promulgated nor treated by management as a departmental regulation or rule: Supervisors failed to review the Policy with officers and officers were never ordered by management to comply with the Policy.

The Union contended that the fact that five other officers who were also scheduled to testify on November 7th did not request court time pay does not require a ruling in favor of the City herein. The Union noted that no evidence was proffered regarding why these officers failed to request court time pay; and that a sixth officer, John Alber, was never actually denied court time pay for November 7th after he requested it. Rather, Abler withdrew his request for same, upon being advised by Schweigl (in his capacity as Union Steward), that in Schweigl's opinion, Abler had not followed the contract and was not entitled to court time pay.

The Union urged that because the City had failed to prove that the District Attorney's Witness Policy was a recognized departmental policy and because the department had also failed to prove why Schweigl's court time pay request was denied, the City should be ordered to pay Schweigl two hours' court time pay in this case.

City:

The City argued that Article VIII, Section 5 demonstrates the parties' intent to give employes court time pay if they follow the procedures of Section 5 and when the case is canceled on less that 24 hours' notice. The City asserted that Article VIII, Section 5 is ambiguous because

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5/ The Arbitrator has no recollection that Schweigl testified at the instant hearing regarding calling the District Attorney's tape machine on Sunday, November 6th. As there was no transcript taken herein, the Arbitrator's recollection must control on this point. The Arbitrator recalls that Schweigl stated that he was aware that he could have called the District Attorney's telephone message machine on Sunday, November 6th but that he (Schweigl) chose not to do so.

it does not state the time on Fridays that officers should call the District Attorney's Office regarding Monday trials. In this regard, the City noted that such calls cannot be made less than 24 hours before the scheduled trial because the District Attorney's Office is not open on Sundays and because a call at any time on Friday will be more than 24 hours before any Monday court appearance. Thus, the City contended, the District Attorney's Witness Policy fills in the specific calling time on Fridays for Monday court appearances which is not stated in Article VIII, Section 5 of the contract.

The City asserted that the undisputed evidence showed that the District Attorney's Witness Policy has been in effect since 1991, that it has been distributed each year to each officer, and that it has been and is posted on the departmental bulletin board where other departmental rules and regulations are posted. The City observed that the District Attorney's Policy has been accepted and followed by officers for years; and that Schweigl and Crabb's testimony regarding receiving court time pay for other previous allegedly identical occurrences neither contained specific facts to prove that the situations were in fact identical, nor did the proffered evidence clearly show that prior court time payments were actually requested and made after the initial establishment of the District Attorney's Policy in 1991.

Because the District Attorney's Witness Policy is consistent with the language as well as the spirit of Article VIII, Section 5 of the labor agreement and constitutes a reasonable work rule which has been accepted by the Union and employes in practice since 1991, the City sought denial and dismissal of the grievance in its entirety.

Discussion:

The proper interpretation of the last paragraph of Article VIII Section 5 is at the center of this dispute. The first sentence of this paragraph is not in issue here, as neither party has made any arguments regarding that language. It is the remainder of that last paragraph which the Union claims is clear and unambiguous, while the City claims this language is ambiguous and can only be understood in light of extrinsic evidence. In my view, the disputed portion of Article VIII Section 5 is ambiguous, as the City has argued.

Pursuant to sentence two of Section 5, the labor agreement mandates that employes scheduled to be in court "shall call" the office of the prosecuting attorney "within 24 hours before the scheduled court appearance." However, sentence four of Section 5 also states that calls for Monday trials "shall be made" by the employe "the preceding Friday." Thus, an employe who has a Monday trial cannot properly follow the requirements of sentence two of Section 5 unless he/she calls the D.A.'s Office on Sunday (within 24 hours before the scheduled court appearance). But this procedure conflicts with the mandatory language of sentence four of Section 5, which states that employes must call in on the Friday before the Monday trial. Given this conflict, it is reasonable and logical to conclude that sentence two of Section 5 was intended to apply to all trials except those scheduled on Mondays (and on the day after a holiday), and that sentence four of Section 5 was intended to apply only to Monday trials and trials occurring on the day after a holiday. 6/

6/ I note that Schweigl chose not to call the D.A.'s Office on Sunday within 24 hours of the November 7th trial so that this issue, whether court time pay would be due in this circumstance, is not before me.

As there is no time period stated in sentence four of Section 5 during which employes must call the prosecuting attorney's office regarding a possible trial cancellation, it is appropriate for the undersigned to consider extrinsic evidence which may fill in this gap in the labor agreement. I note in this regard that the Union failed to submit any substantive bargaining history evidence on this point. The City, however, submitted extrinsic evidence concerning the above-quoted D.A.'s Witness Cancellation Memo. The City asserted that the Memo constitutes a valid City rule or policy which should be read in conjunction with the labor agreement. I agree that the City's extrinsic evidence is relevant to this case.

Regarding the D.A.'s Memo, I note that it is undisputed that this Memo, addressing the subject of the proper time to call in regarding trial cancellations, has been in effect since June 1, 1991, four years prior to the filing of the instance grievance. In addition, the evidence clearly showed that this Memo has been posted on the departmental bulletin board in the same area as other department rules and regulations, and that the City has sent copies of the Memo (and its predecessors) to each officer annually. Furthermore, the Union failed to present any evidence to show that it had either complained or attempted to grieve the establishment of this cancellation calling system by the D.A.'s Office. In all of these circumstances and in light of the fact that Schweigl was the only witness herein who unequivocally asserted that he never followed the D.A.'s Memo, I find that the D.A.'s Witness Cancellation Memo constitutes a valid City rule or policy which must be considered in this case.

The Memo in effect at the time the instance grievance arose clearly states (in the first paragraph appearing above the body of the Memo) that officers/witnesses ". . . MUST call the D.A.'s Office between 5:00 p.m. the day prior to the hearing and 8:30 a.m. the day OF the hearing for a tape recorded message . . ." (emphasis in original). Part of this language conflicts with the parties' labor agreement at Article VIII Section 5, which requires employes scheduled to appear at Monday trials to call the prosecuting attorney's office the "preceding Friday." It is axiomatic in labor relations that where a conflict exists between a valid rule or policy and the effective labor agreement, the labor agreement must control, and the contract would therefore require that witness calls be made on the preceding Friday.

However, in the body of the D.A.'s Memo, some clarification is offered regarding when officers/witnesses are expected to call in regarding trial cancellations which does not conflict with the terms of the labor agreement. In the second paragraph of the D.A.'s Memo proper, it clearly states that witnesses should call the D.A.'s Office answering machine "during the hours of 5:00 p.m. to 8:30 a.m. for a cancellation of witnesses on <u>all types of court proceedings</u>. . . ." (emphasis supplied) and that "Officers should NOT contact the receptionist during normal office hours . . .". Thus, it is clear that Schweigl failed to follow City rules/policies when, on November 4th, he called the D.A.'s Office during normal business hours (10:30 a.m.) regarding the cancellation of the Monday, November 7th trial. Because I have found the D.A.'s Memo to be a valid City rule or policy, relevant and applicable to this case, and based upon the relevant evidence and argument herein, Schweigl is not entitled to court time pay in this case and I issue the following

AWARD 7/

The Employer did not violate Article VIII Section 5 of the agreement when it denied the Grievant's request for two hours of court time pay. The grievance is therefore denied and dismissed in its entirety.

Dated at Oshkosh, Wisconsin this 7th day of June, 1996.

By Sharon A. Gallagher /s/
Sharon A. Gallagher, Arbitrator

7/ It is disturbing that Schweigl pursued the instant grievance despite his admitted knowledge, gained through Officer Bonin at 2:45 p.m. on November 4th, that the November 7th trial had been cancelled. Although this notice was not gained strictly pursuant to the contract, common sense would move most employes to either accept this actual notice and not pursue a grievance, or to call the D.A.'s Office again to check the veracity of the information. Schweigl chose to take the path which lead him to the instant hearing, despite his admission that he had no reason to disbelieve Officer Bonin and that he then planned his weekend and off day as if he would not need to testify on November 7th.