BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

MILWAUKEE DISTRICT COUNCIL 48, AFSCME, AFL-CIO and its Affiliated Local 883

and

CITY OF SOUTH MILWAUKEE

Case 95
No. 54981
MA-9851

Appearances:

Podell, Ugent, Haney & Delery, S.C., Attorneys at Law, by Ms. Carolyn H. Delery, appearing on behalf of the Union.

Murphy & Leonard, Attorneys at Law, by Mr. Joseph G. Murphy, appearing on behalf of the City.

ARBITRATION AWARD

Milwaukee District Council 48, AFSCME, AFL-CIO and its affiliated Local 883, hereinafter referred to as the Union, and the City of South Milwaukee, hereinafter referred to as the City, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Union made a request, with the concurrence of the City, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over the meaning and application of the terms of the agreement. The undersigned was so designated. Hearing was held in South Milwaukee, Wisconsin, on May 15, 1997. The hearing was not transcribed and the parties filed post-hearing briefs which were exchanged on June 12, 1997. The parties reserved the right to file reply briefs one week after receipt of the opposing party's brief. Neither party filed a reply brief and the record was closed on June 21, 1997.

BACKGROUND:

The basic facts underlying the grievance are not in dispute. The grievants, David Navarre, Local 883 President and Mike Landgraf, a member of the Union's negotiating team, attended a meeting with the Union's attorney on November 12, 1996, at 1:00 p.m. The purpose of the meeting was to prepare the Union's final offer for interest arbitration. The grievants requested and were denied three paid hours for Union business but were given leave without pay. On December 2, 1996, the grievants filed the instant grievance seeking pay for time lost on November 12, 1996. The grievance was denied and processed through the grievance procedure to the instant arbitration.

ISSUE:

The Union states the issue as:

> Did the City of South Milwaukee violate the collective bargaining agreement and past practice when it unilaterally refused to pay the grievants for attending a meeting held for the purpose of preparing for arbitration?

The City views the issue as:

> Did the City violate the collective bargaining agreement when it refused to pay grievants David Navarre and Michael Landgraf for time spent during the work day consulting with the staff attorney of AFSCME at her office for the purpose of preparing the Union's final offer for interest arbitration on November 12, 1996. If so, what is the appropriate remedy?

The undersigned frames the issue as follows:

> Did the City violate the collective bargaining agreement and/or past practice when it refused to pay the grievants for time spent on November 12, 1996, attending a meeting of Union representatives for the purpose of formulating the Union's final offer for interest arbitration?
>
> If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS:

> ARTICLE III
>
> NEGOTIATIONS
>
> Either party may select for itself such negotiator or negotiators for purposes of carrying on conferences and negotiations under the provisions of Section 111.70, Wisconsin Statutes. No consent

from either party shall be required in order to name such negotiator or negotiators. The Municipality and Union shall notify each other of the name of the negotiators.

Meetings for collective bargaining shall involve the designated negotiators of the Union and the Municipality. Negotiators shall be released for such meetings without loss of pay when said meetings are scheduled during the involved negotiator's work day. Every effort will be made to schedule meetings at times other than the involved negotiator's work day. All meetings shall be scheduled by mutual consent.

. . .

ARTICLE V

UNION SECURITY

. . .

SECTION 3 - GRIEVANCE TIME

Grievants, witnesses, the Union President and one other Union officer as designated by the Union and the Departmental Steward shall be released with no loss in pay to participate in all steps of the grievance procedure, from the initiation step through arbitration. Such time off shall be permitted only upon notifying the Foreman and receiving permission which, unless an emergency situation exists, shall not be denied. For such purpose, he/she shall notify the Foreman in the other department of his/her presence and purpose before taking up the case with the employee or employees involved.

Those authorized Union Representatives who are not employees shall be permitted reasonable access to Municipality work areas in order to conduct legitimate business. Such representatives must secure permission from the Department Head or his/her representative in order to meet with the employee on Municipal time.

. . .

UNION'S POSITION:

The Union contends that the grievants should be released for Union business with no loss of pay for all preparation meetings. It cites arbitral authority regarding a course of conduct which becomes a binding past practice which are clarity and consistency, longevity and repetition and acceptability. It submits that the evidence establishes a past practice of paid leave time for a number of Union activities beyond those specified in the contract.

It observes that the City has always paid leave time for most Union activities including preparation for both arbitrations and negotiations and none of the Union witnesses could ever remember when requested paid leave time was not granted so there is clarity and consistency. The Union asserts that there is longevity and repetition. It points to the testimony of Duane DeBoer, a department head, that for the last twenty-seven years, employes have been paid leave time for preparation for both arbitrations and negotiations. It notes that this testimony was support by other witnesses.

The Union further argues that the practice has acceptability. It refers to the testimony of Jackie Johnson, a department head, that it was understood that Union members were paid for release time for Union business. It reiterates that not one Union witness could remember any denial of paid leave upon request.

It argues that even if the City claims it was lax in monitoring paid leave, this does not detract from a binding past practice. The Union insists that granting the grievance does not add to the contract as the City had the opportunity to eliminate the practice in collective bargaining which it failed to do. It suggests that the City's actions resemble an estoppel.

The Union maintains that under the doctrine of implied obligations, the City was required to maintain the established past practice which was in effect for at least 27 years and never revoked during negotiations. It alleges that the City is seeking that which it failed to get in negotiations.

The Union relies on Article V, Section 3 and past practice and asks that the grievance be sustained and employes made whole as well as an order for the City to cease and desist its violation of this practice.

CITY'S POSITION:

The City contends that the parties' collective bargaining agreement provides that, in certain described circumstances, employes shall be paid when away from work at certain functions, such as Article III which specifies the individuals who will be allowed to attend with pay. With respect to the November 12, 1996 meeting, the City submits the evidence establishes: 1) the meeting was not between Union and City negotiators but only the Union; 2) there was no evidence the meeting

was scheduled by mutual consent; 3) the timing of the meeting was determined by the Union; 4) no evidence was presented that "every effort" was made to schedule the meeting other than during the work day. The City concludes that this was not a meeting that the parties agreed in the contract would result in pay to attending employes. The City, noting that some employes were paid for attending this meeting, insist that some supervisors believed the meeting was with City negotiators or was a grievance meeting or preparation for a grievance meeting.

The City argues that the language of the contract is clear and unambiguous and past practice cannot be used to controvert clear terms of the contract. The City insists that the contract does not require payment to employes for circumstances other than those described and the November 12, 1996 meeting was not a meeting the parties had agreed would result in payment. The City relies on the principle of expressio unius est exclusio alterius which provides that where the contract expresses a matter, others are excluded.

The City seeks rejection of the Union's past practice claims because Article III is clear and ambiguous. It further maintains that the practice urged by the Union is without any reasonable control or limit as employes would get paid time for meeting on any "Union business" at their determination which would interfere with the City's ability to deliver services.

It points out that Article III and V define when employes get paid for attending certain meetings and nowhere in the contract have the parties agreed the employes will get paid for "union business" scheduled solely by Union members. The City claims that it properly refused to pay employes for attending a meeting with the Union attorney at her office to prepare the Union's final offer.

With respect to Article V, the City notes that the November 12, 1996 meeting was not for the purpose of preparing for a grievance hearing and was not involved with a grievance but rather related to negotiations and the preparation of the Union's final offer. It concludes that Article V, Section 3 is simply not applicable to this case. The City observes that the grievants in the instant case were not grievants or witnesses nor was the meeting within the scope of Article V, Section 3.

The City seeks denial of the grievance as nothing in the contract and/or practice requires the City to pay employes for Union business other than in those circumstances specifically described in the contract.

DISCUSSION:

Article V, Section 3 provides for release time with no loss in pay to participate in the steps of the grievance procedure. The meeting on November 12, 1996, had nothing to do with any grievance filed under Article V, hence Article V is not applicable to the instant case.

Article III provides that in negotiations, designated negotiators will be released without loss of pay for meetings scheduled in the work day. The November 12, 1996 meeting was for the Union to formulate its final offer in interest arbitration. Interest arbitration is arguably a continuation of the negotiation process, so Article III would apply to the meeting. However, Article III provides that all meetings will be scheduled by mutual consent and the evidence established that here there was no mutual consent, so Article III also has not been violated.

The Union's main argument is that the City violated past practice. Generally, evidence of past practice cannot be used where the contract language is clear and unambiguous. Here, the contractual provisions of Article III and V are clear. The evidence with respect to past practice in the instant case does nothing more than demonstrate that it is consistent with the contractual language. The City allowed employes time off with pay to process grievances under Article V. It also allowed employes to meet with bargaining representatives prior to meeting in negotiations with the City and this is provided under Article III where it is scheduled by mutual consent. There is no evidence that the City had a practice of allowing employes time off with pay to attend regular Union meetings or Union functions unrelated to bargaining sessions or grievances. The mere fact that the City mutually agreed to some meetings in the past does not require it to agree to any meetings in the future, especially meetings where the City is not involved and such meetings do not come within its obligation to bargain in good faith. The evidence here simply does not show any past practice that employes can go to meetings called by the Union and get paid absent mutual agreement by the City. In short, the contract language controls and past practice is consistent with the contractual language. As there was no mutual agreement for the November 12, 1996 meeting, the employes who attended it were not entitled to pay from the City.

Based on the above and foregoing, the record as a whole and the arguments of the parties, the undersigned issues the following

AWARD

The City did not violate the parties' collective bargaining agreement and/or past practice by refusing to pay the grievants for the time attending the November 12, 1996 meeting, the purpose of which was formulating the Union's final offer in interest arbitration, and therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 4th day of August, 1997.

By Lionel L. Crowley /s/
Lionel L. Crowley, Arbitrator

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