BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**GREEN BAY POLICE BARGAINING UNIT**

and

**CITY OF GREEN BAY**

Case 280
No. 56525
MA-10313

Appearances:

Parins Law Firm, S.C., by **Attorney Thomas J. Parins, Jr.**, appearing on behalf of the Union.

**Mr. James M. Kalny**, Human Resources Director, appearing on behalf of the City.

## ARBITRATION AWARD

Green Bay Police Bargaining Unit, hereinafter referred to as the Union, and the City of Green Bay, 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 Green Bay, Wisconsin, on October 27, 1998. The hearing was transcribed and the parties filed briefs and reply briefs, the last of which were exchanged on March 19, 1999.

## BACKGROUND

A grievance arbitration hearing involving the parties was held on February 19, 1998, referred to as the MDA grievance. Eight officers were subpoenaed by the Union to appear at the hearing. The officers appeared and then put in for overtime which was denied by the City (Exhibit 11). On March 3, 1998, a grievance was filed alleging the denial of overtime was a violation of Article 6 of the parties' agreement (Exhibit 11). On March 5, 1998, the grievance was denied and appealed to the instant arbitration (Exhibit 12).

## ISSUE

The parties were unable to agree on a statement of the issue. The Union states the issue as follows:

> Whether officers who are subpoenaed to appear before the Personnel Committee or at arbitration hearings would be paid overtime for their subpoena time; that this was by agreement and by past practice; and that officers who were subpoenaed should be paid pursuant to that agreement and past practice.

The City states the issue as follows:

> Is there a binding past practice between the parties that requires the City to pay all officers who are subpoenaed by the Union to testify in grievance arbitration matters?

The undersigned frames the issue as follows:

> Did the City violate Article 6 of the parties' collective bargaining agreement and/or past practice when it denied overtime to officers who were subpoenaed by the Union and appeared at the MDA grievance arbitration hearing on February 19, 1998?
>
> If so, what is the appropriate remedy?

## PERTINENT CONTRACTUAL PROVISIONS

ARTICLE 6

OVERTIME

. . .

6.05 COURT CANCELLATION PROCEDURE.

. . .

(3) Court shall include any time an officer is instructed by the Chief of Police or his designee or subpoenaed to appear in any Court, legal proceedings (including depositions), or before any governmental body or other person, tribunal or agency authorized by law to issue subpoenas, which appearance is related to or arises out of the officer's scope of employment. (The City and Bargaining Unit have disagreed as to whether there was a past practice for compensating offices who are subpoenaed or instructed to appear at arbitrations or grievance proceedings dealing with the administration of this labor agreement and the City had previously informed the Union of the discontinuance of this alleged past practice in a letter to the Union, dated August 27, 1986. The above language shall not apply to these situations.)

## UNION'S POSITION

The Union believes that there is a past practice and agreement to pay officers who are subpoenaed to testify at grievance or arbitration hearings. It asserts that practice and the City's agreement to it are evidenced by the transcript of the hearing in the Michael Nelson hearing on March 19, 1985. It insists that the past practice began in the 1970's and continues today. It alleges that the testimony establishes that if a witness was on duty or off duty and would not voluntarily appear, then the Chief would order them to come in and they would be paid pursuant to the contract. According to the Union, the City contravened this practice in the Nelson hearing in that it required the Union to subpoena an officer and at the hearing, it was agreed that if any officers were subpoenaed, they would be paid pursuant to the terms of the contract for Court appearances. It observes that the City's representatives apparently felt this was bad policy and in August, 1996, Attorney Rader sent a letter repudiating the past practice; however, the Union would not recognize the letter because the practice was part and parcel of the contract and could not be unilaterally repudiated but had to be negotiated, yet no proposal was ever made.

The Union insists that the past practice was unequivocal, clearly enunciated and acted upon, readily ascertainable over a reasonable time as fixed and accepted and agreed upon by both parties. It claims that this is supported by a memo from the City Attorney to the Police Chief (Exhibit 3). It maintains that the evidence establishes that there was a past practice, an agreement, and a common interpretation of the contract concerning paying officers who are subpoenaed to testify at the hearings pursuant to the Court payment procedures in the contract.

The Union contends that even if the past practice and agreement could be unilaterally repudiated, the terms of the contract should prevail and the officers paid because they were subpoenaed and their appearance is related to or arises out of their scope of employment. It points out that officers are paid in both civil and criminal matters and in all other administrative matters, so there is no reason why arbitration hearings should be excluded and it

should make no difference if it is the Union that subpoenas the officer. It observes that if the City subpoenas the officer to testify, the officer gets paid. It insists that it is troublesome and chilling that an officer testifying for the City gets paid but not if the testimony is for the Union and is not favorable to the City.

In conclusion, the Union reiterates that there was a past practice, an agreement and a common contract interpretation to pay officers who are subpoenaed to testify if their appearance is related to or arises out of their scope of employment. It also insists that the clear and unambiguous language of the contract calls for the same result. It seeks payment for the officers who were subpoenaed to testify at the Personnel Committee and the arbitration hearings.

## CITY'S POSITION

The City contends that the plain words of Section 6.05(3) of the contract prohibit the award the Union seeks. The City states that custom and practice are frequently used to establish the intent of ambiguous contract provisions but are not used to give meaning to a provision that is clear and unambiguous. The City insists that Section 6.05 (3) is clear and unambiguous and the first sentence in parentheses is in the past tense as there was a dispute whether there had been a past practice. The second sentence states that the language does not apply and that resolves the dispute. It contends the Union's attempt to gloss over this language and leave the impression that the parties had agreed to wait until the matter came up later is directly contrary to the express words. It states that acceptance of the Union's position requires changing the tense of the first sentence and ignoring the last. It maintains the language means what it says. The City argues that as the language is clear and unambiguous, there is no need to determine past practice and the grievance should be dismissed.

The City alleges that the Union failed to prove any past practice requiring the payment of overtime for officers subpoenaed by the Union to appear at arbitration hearings. It asserts that the Union has not attempted to argue that it has a contractual or legal entitlement to payment for attendance at arbitration matters and the City cites WALWORTH COUNTY, DEC. NO. 28681-A (GRECO, 9/96) AFF'D BY OPERATION OF LAW DEC. NO. 28681-B (WERC, 10/96) in support of its position. It states that there is no contractual provision dealing with the payment of overtime for off-duty officers who are subpoenaed to attend arbitration matters.

It submits that the Union has the burden of establishing a past practice which must be unequivocal, clearly enunciated and acted upon and readily ascertained over a reasonable period of time as a fixed and established practice. The City maintains the Union failed to prove any binding past practice. It asserts the testimony of the Union's business representative was nothing more than conclusory allegations of a "clear understanding" and no specific examples were given and no explanation as to the specific procedure giving rise to implementation of the practice. It notes there was testimony that the Union's representative

had no way of knowing if any officer was paid overtime and the evidence failed to show that the City was aware of the payment of overtime for officers prior to 1985. It concludes that no binding past practice has been proved.

The City also contends that the Union failed to prove that the alleged practice was "unequivocal," "clearly enunciated and acted upon" or "readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties."

It submits that there is no proof of the payment of overtime and it is possible some were denied or no claim was made for overtime so the alleged practice is not unequivocal. The City notes the record fails to establish any specific evidence that the practice was ever acted upon and the Union failed to produce a single person to give specific evidence of any specific instance when the benefit of this past practice was enjoyed. The City points out that since 1985, the practice was never utilized and the last time it could have been used was prior to 1981 or 1973, clearly too remote to be probative in establishing any past practice. The City insists that the practice was never accepted and strongly objected to in 1985. It argues that a finding of a past practice under the evidence produced would be patently unfair and create unsound precedent.

The City claims that it repudiated the past practice if one existed and the Union failed to negotiate the practice into the contract. It notes the contract references the repudiation and no reasonable argument can be made that Section 6.05(3) established the past practice as a contractual term. The City states there was no past practice and no agreement placed in the agreement so the grievance should be dismissed.

## UNION'S REPLY

The Union takes issue with the City's interpretation of the contract language. It asserts that the word "was" can be interpreted in several ways either as the City interprets it or the way the Union interprets it. The Union contends that the parties agreed to disagree and wait until the matter arose again. The Union argues that the City could have presented evidence that this interpretation was incorrect but did not, so the Union's interpretation is correct and the City's argument, unsupported by evidence, must fail.

As to the City's arguments on past practice, the Union contends that these arguments apply to a past practice by conduct where there is no agreement or common contract interpretation. It submits that this agreement cannot be repudiated and can only be changed at the bargaining table as an agreement on a common interpretation of the contract cannot be changed unilaterally.

The Union submits that there were later negotiations in an attempt to define Court call in and new language was inserted into the contract but the parties agreed to disagree on the language regarding subpoenas of the type at issue in this case. It notes the City failed to produce any evidence to dispute the Union's interpretation. The Union argues that WALWORTH, SUPRA, is not applicable here because there was an agreement between the City and Union on pay for subpoenaed officers and it reiterates the arguments to support its position that it made in its original brief. The Union objects to the City's argument that no records were produced to support the Union because the City had destroyed all the records prior to 1988. It asserts the City's past practice arguments are not applicable to this case and must fail.

The Union contends that the City's argument that the Union failed to negotiate the past practice into the agreement assumes there was no agreement on a common interpretation of the contract. The Union states that the parties agreed to the interpretation of the contract which was part and parcel of the contract and no proposals were made by either side to change this interpretation. It further argues that changes in the language did not change the substance but was only meant to clarify it until the matter came up again which is this case and the City produced no evidence to the contrary.

In conclusion, the Union claims the matter concerns a common interpretation of the contract and not the establishment of a past practice by conduct. This agreement, according to the Union, is still the common contract interpretation and although the City would like to change it, it cannot unilaterally repudiate it, otherwise the City could repudiate the entire contract. It reiterates its assertion that an officer should not be paid more to testify for the City than for the Union. It seeks payment for the officers subpoenaed to testify at the Personnel Committee and arbitration hearings.

## CITY'S REPLY

The City contends that the Union's first argument evidences that there was no unequivocal, affixed and consistent past practice. It observes that the Union stated two past practices, one where the Chief ordered officers in and a second where officers were subpoenaed. The City does not take issue with the first but denies the second as it permits the Union to order officers in and then expect overtime payment for them, but there is no contractual or other obligation for this. It argues that the Union believes the two practices constitute the same practice. Not so says the City and there was no evidence the City ever agreed to pay subpoenaed officers who were Union witnesses at arbitration hearings. The City claims that there is no proof of a practice that officers subpoenaed by the Union would be paid for appearance at arbitration matters.

The City points out that the Union tries to construct a practice based on an exchange between Mr. Parins and Mr. Warpinski. It insists that this is a long stretch and that Mr. Warpinski was not clear on who subpoenaed the officers and later gave his opinion that

the City ought not be in the business of compensating individuals in an activity dealing with Union business. It insists there is no unequivocal, mutually agreed-upon past practice. The City maintains the Union's evidence is too weak to establish a past practice.

The City claims that it properly repudiated any past practice and the Union's arguments to the contrary are disproved by the plain language of the contract which clearly provides that the parties did not intend that the general language concerning subpoenas to tribunals was to apply to officers subpoenaed to arbitration matters.

The City concludes that the Union failed to prove a past practice and the evidence established no use of it since 1985 and an alleged practice dormant for 13 years cannot be viewed as an integral part of the contract. The City asserts the plain language of Section 6.05(3) of the contract prohibits the payment of overtime to officers subpoenaed by the Union for arbitration matters and alternatively, there was no past practice and if there was, it was effectively repudiated.

## DISCUSSION

Section 6.05(3) of the parties' collective bargaining agreement states the following:

> (3) Court shall include any time an officer is instructed by the Chief of Police or his designee or subpoenaed to appear in any Court, legal proceedings (including depositions), or before any governmental body or other person, tribunal or agency authorized by law to issue subpoenas, which appearance is related to or arises out of the officer's scope of employment. (The City and Bargaining Unit have disagreed as to whether there was a past practice for compensating offices who are subpoenaed or instructed to appear at arbitrations or grievance proceedings dealing with the administration of this labor agreement and the City had previously informed the Union of the discontinuance of this alleged past practice in a letter to the Union, dated August 27, 1986. The above language shall not apply to these situations.)

This language first appeared in the 1987-88 collective bargaining agreement (Exhibit 9). The language is clear and unambiguous. The often quoted statement of Arbitrator Jules Justin is applicable here. He stated:

> Plain and unambiguous words are undisputed facts. The conduct of Parties may be used to fix a meaning to words and phrases of uncertain meaning. Prior acts cannot be used to change the explicit terms of a contract.

> An arbitrator's function is not to rewrite the Parties' contract. His function is limited to finding out what the Parties intended under a particular clause. The intent of the Parties is to be found in the words which they, themselves, employed to express their intent. When the language used is clear and explicit, the arbitrator is constrained to give effect to the thought expressed by the words used. PHELPS DODGE COPPER PRODS. CORP., 16 LA 229 AT 233 (1951).

Whether there was a past practice which was used to give meaning to ambiguous or general contract language or a past practice which became an implied term of the contract where the contract is silent cannot be used to modify the clear language of the contract. Additionally, a practice which has a basis in the contract language can be abrogated by a change in that language. In the instant case, the contract specifically states that the provisions related to officers subpoenaed to appear shall not apply to arbitrations or grievance proceedings. This language came after the 1985 Nelson hearing, thereby eliminating any consideration of past practice because the change in language meant any prior past practice based in contract language was no longer binding on the parties. There was no revival of the past practice as the evidence established that there was no application of any such past practice after this language was agreed to by the parties. Thus, the plain language must be given effect.

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

## AWARD

The grievance is denied in all respects.

Dated at Madison, Wisconsin, this 14th day of April, 1999.

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

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