

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**MENASHA PROFESSIONAL POLICE UNION,
LOCAL 603, AFSCME, AFL-CIO**

and

CITY OF MENASHA

Case 95
No. 56711
MA-10386

Appearances:

Mr. Richard C. Badger, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Godfrey & Kahn, S.C., by **Attorney James R. Macy**, appearing on behalf of the City.

ARBITRATION AWARD

Menasha Professional Police Union, Local 603, AFSCME, AFL-CIO, herein the Union, and the City of Menasha, herein the City, requested the Wisconsin Employment Relations Commission to designate the undersigned as an arbitrator to hear and to decide a dispute between the parties. The undersigned was designated as the arbitrator. Hearing was held in Menasha, Wisconsin, on May 12, 1999. A copy of a stenographic transcript of the hearing was received on June 1, 1999. Post-hearing briefs were exchanged on August 13, 1999.

ISSUES

The parties stipulated to the following issue:

Did the City violate Article IV, Section B, Paragraph 2, of the collective bargaining agreement when it paid officers grade 5 pay for vacation, sick, training and assessment center days during periods of a grade 6 assignment?

The City also raised the issue of whether the grievance was timely filed.

BACKGROUND

In 1982 the parties placed the following language in their collective bargaining agreement:

Qualified Patrol Officers when assigned to Investigator duties will receive grade 6 pay for the actual time on those duties.

Said language remained unchanged in successive contracts, including the 1995-1997 contract. Under that language for the period of 1982-1997, officers assigned to investigator duties were compensated at the grade 6 pay rate only for the hours actually spent working as an investigator and were compensated at the lower grade 5 pay rate for vacation, sick leave, training and assessment center days.

During the negotiations for the 1998-2000 contract, the Union proposed to modify Article IV by deleting references to sergeants and by adding school liaison and metropolitan enforcement group assignments to the grade 6 pay language. The City agreed to make those changes and proposed revised language, which, in the parts relevant herein, became Paragraph 2, Section B, Article IV in the current contract.

On February 13, 1998, the Union filed a grievance contending that the City was violating the new contract by continuing to pay officers performing grade 6 assignments in the same manner as it had done under the prior contract. The City denied the grievance as being both untimely and without merit.

POSITION OF THE UNION

The grievance was timely filed. None of the affected officers knew that they had cause to file a grievance until they saw their paychecks covering time worked under the new contract. It can take two to four weeks for payroll to completely reflect changes in a new contract. Under those circumstances, it appears very likely that the Union would not be aware of the pay problem until the end of January. Further, the dispute constitutes an on-going grievance. Thus, the timeliness issue can be resolved by limiting the back pay award to the date on which the grievance was filed.

The City knew or should have known that its proposed language would result in officers receiving grade 6 pay while so assigned and that the Union would give the language change such an interpretation. The Chief retains the right to assign or to remove any officer from an investigative assignment, but the new contract language means that grade 6 pay continues during the assignment when the officers are on paid leave. Because of the new language, the past practice of paying the officers during an investigative assignment is not relevant.

POSITION OF THE CITY

The grievance was untimely because it was not filed within fifteen calendar days after the officers knew the cause of the grievance. The officers knew they were receiving pay for actual time worked when they received their first check under the new agreement. The first check was received on January 15, 1998. However, the grievance was not filed until February 13, 1998.

The contract language is clear and unambiguous in stating that grade 6 pay is only provided for actual time worked. The phrase “actual time” was continued in the current agreement from the prior agreements. The language would have to be read as using the term “whole period” of the assignment in order for the Union’s interpretation to be adopted. The Union had knowledge of and accepted the phrase “actual time” and the binding past practice attached to it when it adopted the current contract. There was no negotiation in regards to changing the practice with respect to how officers are paid while on a grade 6 assignment. Neither did the City intend to change that practice.

If the contract language is found to be ambiguous, past practice mandates that officers working in a grade 6 temporary assignment receive grade 6 pay only for the time spent actually working in the grade 6 assignment and not for time spent on vacation, sick leave, training or assessment center days. For the foregoing reasons, the grievance should be denied.

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE IV – WAGES AND WAGE BENEFIT

...

B. Assignments

1. The Chief of Police may assign officers to serve as OIC’s, who will perform certain duties of a Supervisory Sergeant. These assignments are not permanent.

The selection and duration of such assignments are made at the discretion of the Chief of Police. When so assigned as OIC's, officers shall receive grade 6 pay for all hours worked as an OIC, but not less than two (2) hours for each assignment.

2. The Chief of Police may assign officers to various investigative assignments including criminal investigation, juvenile investigation, police school liaison, drug investigation (MEG) and crime reduction. These assignments are not permanent. The selection and duration of such assignments is made at the discretion of the Chief of Police. Patrol Officers so assigned shall receive grade 6 pay for the actual time spent in such assignment.

. . .

ARTICLE VII – GRIEVANCE PROCEDURE

. . .

B. Time Limitations

If it is impossible to comply with the time limits specified in the procedure because of work schedules, illness, vacations, etc., these limits may be extended by mutual consent in writing.

. . .

D. Steps in Procedure

Step 1

The grievant, either alone or with one (1) Union representative, shall present his/her grievance in writing to the Supervisory Sergeant or Lieutenant within fifteen (15) calendar days after he/she knew the cause of such grievance or the grievance shall be deemed to have been waived. In the event of a grievance the employee shall perform his/her assigned work task and grieve his/her complaint later. The Supervisory Sergeant or Lieutenant shall, within ten (10) calendar days, inform the employee, and the Union representative, where applicable, of his/her decision.

. . .

DISCUSSION

The City contends that the instant grievance was not filed in a timely manner because the employees had knowledge of the grievance by January 15, 1998. However, the grievance was not filed until February 13, 1998, which date exceeds the fifteen-day requirement in the contractual grievance procedure.

The record reflects that the employees were paid on the following dates: December 31, 1997, and January 15 and 29, 1998. As asserted by the City, for employees in grade 6 assignments, their paychecks on the above dates showed that those employees were receiving grade 6 pay only for the actual time they worked in the grade 6 assignment. The record also shows that it can take payroll up to four weeks to implement compensation changes. Thus, it is possible that, if the parties had agreed to change the method of compensating employees in grade 6 assignments effective January 1, 1998, such a change might have first appeared on the checks received on January 29, 1998. In that event, the grievance was filed on the fifteenth day after the cause of the grievance was discovered. However, the undersigned does not find it necessary to determine if the grievance exceeded the contractual time requirement, since the conduct prompting the grievance was recurring in nature. Each time an employee in a grade 6 assignment was paid at a grade 5 rate the basis for the grievance was renewed. Consequently, the alleged contract violation was continuing in nature and the grievance is found to have been timely filed. However, any backpay would commence on the date on which the grievance was filed.

The disputed language in Article IV, Section B(2) is not clear and unambiguous on its face. Rather, if read alone, the language could be given the interpretation advanced by either party. Therefore, it is necessary to look to the bargaining history and the past administration of the language in order to resolve the dispute.

The parties are in agreement that there was a consistent and long-standing past practice of administering the language as it existed in the 1995-1997 contract and in the prior contracts dating back to 1982. Under said practice officers working in a grade 6 assignment received grade 6 pay only for the hours they actually worked and did not receive grade 6 pay for other paid time, such as, vacation, sick leave, training or assessment center days. But the Union asserts that said practice is no longer relevant because of the changes in the language made during the negotiations culminating in the 1998-2000 contract.

During the negotiations for the current contract, the Union proposed to modify the then existing contract provision by adding certain assignments to those for which grade 6 pay is received and by removing references therein to the position of sergeant. The City drafted language incorporating those changes, which language was adopted, with only minor changes, as the relevant provision in the current contract.

The members of the Union's negotiating committee, who testified at the hearing, said they interpreted the new language to mean that officers would receive grade 6 pay for the entire time they spent in the grade 6 assignments, rather than only for actual hours worked during the assignment. Thus, the Union's bargaining committee members believed that the new language would result in officers to begin receiving grade 6 pay for vacation, sick leave, training and assessment center days, which time had been paid at the grade 5 rate under the prior contracts. However, the members of the Union's negotiating committee never conveyed such a belief or interpretation to the City. Neither did they ask the members of the City's negotiating committee what the City believed the new language meant. Such an unexpressed interpretation fails to support the concept that the revised language was mutually understood to result in the change seen therein by the Union. The City negotiators never expressed the belief that the revised language, which they drafted, would change the method of payment for hours paid but not worked during grade 6 assignments. Rather, the City believed it rewrote the language to incorporate the changes requested by the Union and to match the language to the current practice. The revised language retained the phrase "actual time." The continued use of said phrase should have alerted the Union to the fact that the City did not intend to have the revised language change the existing practice. The Union's interpretation of the change from "actual time on those duties" to "actual time spent in such assignment" is less reasonable than the City's interpretation, especially in light of the long-standing and consistent past practice of administering the contractual provision. The undersigned is persuaded that the revised language did not alter the past practice. Under the Union's interpretation, the Chief could make grade 6 assignments on a daily basis, which would allow the Chief to not assign an officer to grade 6 on days when the officer was on vacation, sick leave, etc. Such a result is not logical. The undersigned finds the City's interpretation to be more reasonable and rational and to be supported by both the past practice and the negotiations for the current contract. The retention of the phrase "actual time" is found to be limited to the actual time spent performing the grade 6 duties and does not include time spent in other pay status, such as vacation, sick leave, training or assessment center days, during a grade 6 assignment.

Based on the foregoing, the undersigned enters the following

AWARD

That the grievance was timely filed; that the City did not violate Article IV, Section B, Paragraph 2, of the collective bargaining agreement when it paid officers grade 5 pay for vacation, sick, training and assessment center days during periods of a grade 6 assignment; and, that the grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 16th day of November, 1999.

Douglas V. Knudson /s/

Douglas V. Knudson, Arbitrator