BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

APPLETON PROFESSIONAL POLICE ASSOCIATION

and

CITY OF APPLETON

Case 387
No. 57779
MA-10736

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Attorney Frederick Perillo**, appearing on behalf of the Union.

Mr. James P. Walsh, Deputy City Attorney, appearing on behalf of the City.

ARBITRATION AWARD

Appleton Professional Police Association, hereinafter referred to as the Union, and the City of Appleton, 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 Appleton, Wisconsin, on September 21, 1999. The hearing was not transcribed and the parties filed post-hearing briefs and reply briefs, the last of which were exchanged on November 23, 1999.

BACKGROUND

The grievance involves five police officers employed by the City. On June 27, 1996, four officers, Bredael, Daul, Nickels and Parker were called in while they were off duty to meet with an outside counsel hired by the City to defend it in a civil rights action which

resulted from a traffic stop. The meeting lasted from 9:00 a.m. to 11:45 a.m. On August 26, 1996, Sergeant Kramer was asked to meet with an Assistant City Attorney while he was off duty regarding a civil trial, and the meeting lasted from 1:00 p.m. to 1:20 p.m. All five officers put in for court call time which was denied by the City and grieved by the Union. The grievance involving the four officers meeting with outside counsel was responded to by Deputy Chief Kolpack on August 7, 1996. The parties agreed to hold the grievances in abeyance pending contract negotiations. The parties were unable to resolve the matter in negotiations and the Union asked the City for a response. On December 22, 1998, the City's Director of Human Resources sent a letter to the Union's president denying the grievance related to the four officers. The Union filed a request for arbitration on July 13, 1999.

ISSUES

The parties stipulated to the following issues:

1. Whether or not the grievance is timely?

2. Did the City violate Article 4 and past practice by failing to pay court call time to officers Bredael, Daul, Nickels and Parker on June 27, 1996, and Sergeant Kramer on August 26, 1996.

If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE 4 – OVERTIME

. . .

An officer recalled to work or required to appear in court shall receive three (3) hours call-in pay at his regular straight time rate plus pay for the actual hours worked at the rate of time and one-half (1 1/2). Call-in pay for an officer recalled to work shall not apply when the recall occurs within one-half (1/2) hour of the conclusion of the officer's scheduled shift. Call-in pay for court appearances shall not apply when such appearances are continuous with the start of the officer's scheduled shift or commenced within one-half (1/2) hour of the conclusion of the officer's scheduled shift.

Officers shall not be eligible for call-in pay when recalled or for court appearances occurring within one-half (1/2) hour of a prior recall or court appearance time if the officer received call-in pay. These recalls or court

appearances which would otherwise have been eligible for the three-hour payment shall be paid on the basis of actual time worked at the rate of time and one-half (1 1/2) or three hours straight time pay, whichever is greater.

. . .

ARTICLE 17 – GRIEVANCE PROCEDURE

Both the Association and City recognize that grievances and complaints should be settled promptly and at the earliest possible steps and that the grievance process must be initiated within twenty (20) days of the incident or within twenty (20) days of the Officer or Association learning of the incident. Any grievance not reported or filed within the time limits set forth above shall be invalid, provided however that the time limits may be extended by mutual consent of the parties.

Any grievance not reported or filed within the time limits set forth above, and any grievance not properly presented to the next step within the time limits set forth below, shall be invalid, provided however that the time limits may be extended by mutual agreement.

Any difference of opinion or misunderstanding as to the application or interpretation of the terms and conditions of this agreement shall be handled in the following manner:

. . .

E. If the grievance is not settled at the fourth step of the grievance procedure, the aggrieved party may within five (5) days submit the grievance to an arbitrator.

UNION'S POSITION

The Union contends that meetings for the purpose of trial preparation are call-ins under Article 4. It points out that Article 4 provides a call-in guarantee in two situations: When the officer is 1) recalled to work, or 2) required to appear in court, and these two types of call-in are in the disjunctive so the officer does not have to be recalled to work and appear in court. It observes that both "call-ins" are identical under the agreement except for the different treatment when call-in is continuous with the start of a regular shift as an officer is not eligible for court call-in if continuous with the commencement of his shift, but no such exclusion applies to the call-in that runs into a normal shift.

It notes that the grievants did not appear in court, but the City presented no argument why their trial preparation should not be treated as a ""recall." It submits that it is not disputed that the officers were working and they were called in for preparation for court. It asserts that trial preparation is part of a police officer's job and is "work," otherwise the City would not have paid overtime premium for the time spent preparing testimony. It argues that the contract uses the verb "recall" and also uses the term interchangeable with "call-in" and the call-ins here are covered by the "recall to work" clause of the contract. It submits that the officers were ordered to appear and did not have the option not to appear so each officer is entitled to three guaranteed hours of call-in pay in addition to overtime.

The Union argues that officers attending the preparatory meetings are guaranteed court call time pay by past practice. The Union points out that "court call time" does not appear in the contract but the City's voucher uses the phrase and the Union's and City's witnesses use the term as if it had contractual status. It claims that court call time is broader than the phrase "to appear in court" and includes any call-in related to court or preparation for court involving official police business. It argues that past practice can be used in the interpretation of contract language. The Union states that the criteria for a practice are longevity and repetition, clarity and consistency, mutuality and acceptance and consistent underlying circumstances, and a consistent pattern of behavior over a reasonable period of time becomes binding as if it were a contract term. It insists that the practice of the payment of a three-hour guarantee for court preparation easily meets this test going back at least 15 years and the practice has been to pay the guarantee for trial preparation and the practice is included in the term, court-call time, and officers have been paid just as if they had appeared in court. It insists that the City's assertion that payment was a series of mistakes over the years does not allow it to disavow the practice and court call time is a binding practice on the City.

The Union contends that the grievance is arbitrable. The Union notes the City raised as a defense the Union's failure to appeal the grievance to arbitration within five days. It maintains that this defense has no merit for several reasons including the parties have not strictly enforced the time limits in the past, the City had granted an open-end extension of time in this case and never rescinded it, the agreement does not cause forfeiture and a prior award eliminates this defense under the circumstances present in this case.

It states that its witnesses testified without contradiction that the parties have been lax in their enforcement of the time limits of the grievance procedure which is a waiver of the City's right to insist on strict enforcement without proper notice to the Union. It claims that the City induced delay by suggesting an open-ended extension to discuss the matter in negotiations and the City never notified the Union that it was reneging on its agreement to extend the time limits. It points out that the City's December 22, 1998 letter reiterated its position on the grievance but failed to state the extension was at an end and nothing in the letter suggests the City considered the appeal deadline to be running.

The Union argues that the language of Article 17 cannot be construed to require an appeal to arbitration within five days on pain of forfeiture as the arbitration clause follows Step 4 but is never referred to as a step and the language invalidates only grievances not appealed to the next "step." Also, it observes that each step uses the word "shall" and the arbitration clause uses the permissive word "may," indicating the time limit is directory only, so the forfeiture clause should not be presumed to apply.

The Union asserts that even if Article 17 imposes a strict appeal deadline, the City waived it by referring the matter to negotiations. It cites a prior arbitration, CITY OF APPLETON, CASE 335, NO. 47619, MA-7332 (MCLAUGHLIN, 5/93) where the City's attempted ploy to avoid arbitration was rejected. It submits that the City promised an open-ended extension and then reneged after the fact without clear notice that the extension was revoked and the McLaughlin Award settled this in favor of the Union. If the City wants to enforce the time limits strictly, it has to comply with the time limits itself and provide notice to the Union in advance so the Union can also comply.

In conclusion, the Union argues the grievances are arbitrable and the City is violating the plain language of the contract as well as past practice and the City should be ordered to pay each grievant the three-hour guarantee.

CITY'S POSITION

The City contends that the grievance is untimely. The City points out that Article 17 contains time limits for grievance steps and provides that the parties may waive the time limits by mutual agreement. It refers to the McLaughlin Award and distinguishes it because the facts in the instant case are clearly distinct from those before Arbitrator McLaughlin. It refers to the testimony of Attorney Dozer, who represented the Union during negotiations for the 1998-1999 contract, that Dozer, acting on behalf of the Union, pushed the City's Personnel Director, Sandy Neisen, into responding to the current grievances. It claims that Director Neisen responded on December 22, 1998, to the grievances at the insistence of the Union. It states that in the present case, the Union clearly indicated it wished to reinitiate the grievance procedure by requiring the City to respond to the grievance which it did, so it cannot now say that it should not be bound by the contractual time lines. It argues that the Union clearly reinitiated the process and because the request for arbitration was clearly beyond the five-day time period for requesting arbitration, the grievances should be denied as untimely.

As to the merits, the City argues that the meetings the grievants attended with City representatives were to prepare for civil litigation and none involved appearances in court. The City points out that the plain language of the contract indicates court call time will be paid to officers required to appear in court. It contends that the language of the contract is clear

and is for officers required to appear in court. The City agrees that officers are entitled to time and one-half for time spent at these meetings but not to the three-hour call-in pay for court appearances.

The City observes that officers appearing in court must wear their uniform and necessary equipment which require more effort than a meeting with no formal dress requirement. It insists that where language is unambiguous, the language must be enforced as written. It maintains that "court call time" is paid to officers required to appear in court and this language is subject to only one meaning. It insists that the Arbitrator cannot ignore clear-cut language. It points out that the matter was discussed in negotiations between the parties for the 1998-1999 collective bargaining agreement but no change was requested by the Union, so they should not get in arbitration what they failed to obtain in negotiations.

As far as past practice is concerned, the City claims that as the language of the contract is clear and unambiguous, there is no need to examine any perceived "past practice." It states that past practice must be unequivocal, clearly enunciated and acted upon and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. It submits that the evidence fails to support such a practice. It refers to the testimony of Officer Parker that he was paid court call time for five meetings in one week over 15 years ago and that he had never been denied a request for court call time, but a grievance from December 13, 1989, indicates that his recollection is incorrect. It also points out that Officer Parker could not recall a November 4, 1996 meeting concerning the same issue present here and to which he was a party. It refers to Sergeant Kramer's testimony of one incident four years ago and Officer Krsnich about an incident in the late 1980's or early 1990's, however, Deputy Chief Kavanaugh explained that due to a lack of information, mistakes occur and he had denied a request in the early 1980's which was not grieved. It concludes that the Union has failed to establish a past practice and the clear, unambiguous language of the contract controls.

In conclusion, the City states that the issue involving Officer Nickels was resolved because of the timing of the meeting in relation to his scheduled shift. The City believes the plain language of the contract requires a specific time limit to file for arbitration and the grievance was not filed within the time limit. It also argues that the clear language provides for court call time pay only for officers required to appear in court and such does not apply to meetings to discuss court appearances. It requests that the grievances be denied.

UNION'S REPLY

The Union contends that Article 4, paragraph 4 supports its position and the City failed to address it. It observes that the City's main argument is that "appear in court" must be literally construed and ignores the "call-in" language which provides the same three-hour guarantee as "court call time." It argues that the phrase "recalled to work" is unambiguous

and covers all police functions except training time and time while using unmarked cars. These exclusions, according to the Union, show that all other time including court preparation is intended to be covered by the call-in guarantee. The Union also asks why Deputy Chief Peterson's rationale for applying the guarantee to court appearances does not apply to the grievances at issue here as the inconvenience is the same and not as the City feebly suggests, donning the uniform. It cites arbitral authorities for its position that the guarantee is not triggered by the wearing of the uniform but loss of the officer's free time. It insists that Article 4 is clear and unambiguous and requires that the grievances be upheld.

The Union reiterates its prior arguments that there is a past practice of considering pre-trial preparation as court call time. It observes that an officer does not have to appear in court to get court call pay as Article 4, paragraph 11 provides for such pay in the event of cancellation on short notice. It argues that the phrase "appear in court" therefore contains a latent ambiguity which can be resolved by the use of past practice.

The Union disputes the City's assertion that the testimony of Krsnich, Kramer and Parker did not include specific instances. It insists that all the witnesses were telling the truth and the City's suggestion that because Parker could not recall receiving pay in November, 1996, his testimony was untrustworthy is unwarranted because the November, 1996 voucher supports the existence of the practice as Parker was paid for a meeting related to a court appearance. The Union maintains that the testimony of Krsnich, Kramer and Parker is not disputed by any countervailing evidence and they testified that the practice for 15 years or more was to pay court call time for trail preparation.

The Union asserts that the grievance is arbitrable. It notes that the City did not dispute that the parties have frequently ignored the time limits of the grievance procedure and did not respond to the Union's observation that the forfeiture clause does not even apply to appeals to arbitration, nor did it deny that it had agreed to an open-ended extension of time in these particular grievances. It submits that for these reasons, the grievance is arbitrable. The Union disagrees with the City's assertion that the Union lost the benefit of the extension by pushing the City to provide a formal fourth step answer and then chose not to pursue the case. It claims there was no testimony at the hearing, rather Dozer stated that the Union wanted some response to the grievance and not that the Union demanded a return to the formal four-step procedure. It claims that Dozer's request for a response must be understood in the context that nothing was proposed in negotiations and the Union wanted to know if the City was ready to deal with the matter and this cannot be interpreted as a demand to restart the formal grievance procedure. It refers to the City's response which does not state that the denial triggered the time limits anew and the Union did not request a return to the formal grievance procedure and had no reason to know that the City thought its December, 1998 letter effectuated a revival of the procedure. It claims a request to restart the grievance procedure only to terminate it in five days was not something the Union wished to do in the middle of negotiations. It states that the request to re-impose the time limits would come from the City, yet there is no evidence that

the City ever stated that the time limits were running again. It argues that the City's disingenuous response was a generic denial, and the tactic of inducing the other party to delay and then asserting a timeliness defense without fair warning was decried by Arbitrator McLaughlin in his award in a prior grievance between the parties. It claims that the City gave no fair warning and it cannot claim that it secretly terminated the extension of time without a word to that effect. It maintains that the City's argument is disingenuous in the extreme and constitutes little more than gamesmanship and the defense on this ploy should be denied. It concludes that nothing in the City's brief warrants denial of the grievance and the grievants should receive the court call time guarantee.

CITY'S REPLY

The City contends that it is necessary to state what the grievance is in this matter and that is the denial of court call time for a scheduled meeting. It asserts that this was the issue stated by the grievance, the issue the Union indicated at the hearing and testified to by the witnesses. It submits that if the Union seeks a decision on an entirely new argument, then perhaps the fact finding hearing needs to be reopened. It argues that the grievants had the opportunity on the overtime vouchers to indicate the purpose for the overtime and none claimed they were "called in." The City maintains that it is difficult to deny something that is never raised and it does not agree that officers are to be paid three (3) hours call in because they were "recalled to work," otherwise there would be no incident in which an officer is not entitled to a three (3) hour payment for work outside a regular shift but that is not what the parties bargained. It also notes that the court appearance language would be unnecessary and meaningless.

The City maintains that the witnesses who testified they were paid court call time for trial preparation involving no court appearance lacks specific details such as cases and dates and Deputy Chief Kavanaugh gave the specifics of a denial of court call time to an officer meeting with a prosecutor which establishes that there is no past practice.

The City states that the Union mischaracterized Attorney Dozer's testimony which was that officers were paid overtime but not how much and was told the overtime budget was high but was given no instructions as to how to address it and there was no testimony that assistant city attorneys were instructed to schedule meetings only during on-duty hours. It observes that the Union claims that despite these "instructions," such meetings occurred and the City paid the three (3) hours but no proof was introduced to support this claim. It terms the Union's claim that the City unilaterally implemented the items in the Kolpack letter of September 20, 1996, as incredible. It states that if the City had implemented those terms, the grievants would have been paid "court time" but the Union is ignoring what actually happened. It argues that the grievance indicates a request for court call time which was denied.

As to the issue of timeliness, the City contends that the filing of the Union's request for arbitration was not timely. It claims that Attorney Dozer testified that the Union pushed Director Neisen for a response to the grievance and thus it was the Union and not the City who reinitiated the grievance timetable. It denies there is any evidence that the City suggested discussing the issue in negotiations and alleges that all indications are that the Union failed to follow through on the contract time limits. The Union's assertion that Director Neisen's December 22, 1999 response was not a "final" answer, according to the City, does not make sense because the Union pushed for a response and the City gave it.

The City denies inducing the Union to do anything as it was the Union who sought a response and the Union had control over the request for arbitration and waited over six months to file the request. It contends that to say such a delay is not prohibited is to ignore the plain language of the contract. It argues that the Union mischaracterizes the meaning of the appeal to arbitration language. It submits an appeal is permissive with control vested in the grievant, that is, he may but is not required to appeal to arbitration but any appeal must be made within five days otherwise the five-day time limit would have no meaning and the permissive "may" does not apply to the five days but to the appeal to arbitration. It concludes that the time limit has not been met and the grievance is untimely. The City insists that the grievants are not entitled to court call time for a scheduled meeting and the grievance was not timely appealed to arbitration and it should be denied.

DISCUSSION

The first issue to be determined is whether the appeal to arbitration was timely filed. Article 17 of the parties' agreement provides that the parties recognize that grievances and complaints should be settled promptly. The language provides that any grievance not properly presented at the next step within the time limits set forth in the contract shall be invalid provided, however, the time limits may be extended by mutual consent. Article 17, Section E provides that if a grievance is not settled at the fourth step of the grievance procedure, the aggrieved party may within five (5) days submit the grievance to an arbitrator.

The Union has raised a number of issues why the grievance should be considered timely appealed to arbitration. It argues that the failure to appeal to arbitration does not cause a forfeiture because arbitration is not referred to as a step and only grievances not properly presented at the next step are invalid. This argument is not persuasive. Article 17 does not designate the steps but generally states that if a grievance is not resolved at the prior step, it may be taken to the next step. The reference in the general language refers to the next step. Section E states that if the grievance is not settled at the fourth step, arbitration may be invoked. It follows that after the fourth step, the next step is arbitration, and it has a five-day provision, thus the failure to proceed to this "next" step within the time limits would under the general language render the grievance invalid.

The Union refers to the word "may" in Section E and claims that it is not "shall" and thus is directory. It is noted that at the end of Section C it states:

> If the grievance is not resolved to the satisfaction of all parties within five (5) days (Saturdays, Sundays and holidays excluded), either party may proceed to the next Step.

Furthermore, the "may" simply gives the aggrieved party the choice to appeal to arbitration or not. It does not make the five-day limit permissive, otherwise as noted by the City, the five-day provision would have no meaning. Thus, the language of Article 17 must be read to apply a five-day appeal period of a grievance to arbitration.

The Union also contends that the time limits were extended by mutual agreement and never rescinded so the appeal is timely. The facts establish that the parties agreed to hold the grievance in abeyance to discuss the matter in negotiations. The Union's representative, Attorney Dozer, asked the City's Human Resources Director for a response to the grievance. The Union argues that this request was in the context of negotiations and not a request for a fourth step grievance response. Attorney Dozer testified that the parties went to interest arbitration for a successor contract in late 1998. He testified that the Union asked to get a response and Neisen testified that Dozer wanted a response because things were taking too long. It seems logical that if the parties were going to interest arbitration that negotiations were done and the Union then sought a response to the grievance to delay it no further. Thus, the Union's request was a withdrawal of its mutual agreement to extend the timelines. Unlike the prior arbitration between the parties, CITY OF APPLETON, CASE 335, NO. 47619, MA-7332 (MCLAUGHLIN, 5/93), the facts of the present case are different. In the case before Arbitrator McLaughlin, the City argued that the extension lapsed because the Union dropped its proposal to amend Article IV in negotiations. Arbitrator McLaughlin held that there must be a solid basis in fact or arbitral policy to imply termination of the agreement to hold the grievance in abeyance and he held that the termination lacked an immediately apparent factual basis and the dropping of a proposal, as a factual matter was too speculative to find that the extension of the grievance had ended. Here, the Union sought an answer to the grievance and the City gave them a response. The conduct of the parties is the most reliable guide to their intent. CITY OF APPLETON, SUPRA AT 11. Additionally, the response dated December 22, 1998, indicates that the matter was discussed in the negotiation process and no settlement was reached (Ex. 3). There is no evidence of any contact with the City to discuss, negotiate, or question the response. This does not appear to be a request to discuss things further. A request is made, a response is given and then silence thereafter by the party making the request hardly indicates a desire to continue discussions. A fair reading of the December 22, 1998 letter indicates it is a response to the grievance. Although it does not say that the timelines must be followed or are now running, given Attorney Dozer's request and the response by Neisen, it is concluded that

the mutual agreement to extend the time limits was ended and because the decision was not in favor of the grievants, it was incumbent on the Union to appeal to the next step which was arbitration. The time period for requesting arbitration commenced when the Union received the City's response to the grievance.

There was no appeal to arbitration until July, 1999. There was no evidence of any discussions during the period of December, 1998, to July, 1999. or reasons why the grievance was not appealed sooner. The parties have been less than strict in enforcing the grievance timelines; however, a six-month period of elapsed time when the contract states five (5) days without some explanation is simply too long a period of time for a delay in light of the first sentence of Article 17 that grievances should be settled promptly and promptness is an important aspect of grievance resolution. Even if there were no timelines, an appeal must be made within a reasonable period of time and given the Union's request for a response, a period of over six months to appeal to arbitration is simply not reasonable. Thus, it is concluded that the grievance is not timely and is invalid. Having so concluded, the undersigned lacks jurisdiction to determine the merits of the grievance.

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

AWARD

The grievance was not timely appealed to arbitration and is invalid and therefore it is denied.

Dated at Madison, Wisconsin, this 22nd day of December, 1999.

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

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