BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

BARGAINING UNIT OF THE GREEN BAY POLICE DEPARTMENT

and

CITY OF GREEN BAY

Case 339
No. 61609
MA-12006

Case 340
No. 61610
MA-12007

Appearances:

Mr. Thomas J. Parins, Jr., Parins Law Firm, S.C., Attorneys at Law, 422 Doty Street, P.O. Box 817, Green Bay, Wisconsin 54305, appearing on behalf of the Bargaining Unit of the Green Bay Police Department, referred to below as the Union.

Mr. Lanny M. Schimmel, Assistant City Attorney, City of Green Bay, Room 200, City Hall, 100 North Jefferson Street, Green Bay, Wisconsin 54301, appearing on behalf of City of Green Bay, referred to below as the City.

ARBITRATION AWARD

The Union and the City are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The Union requested and the City agreed that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a grievance filed on behalf of Jeremy Muraski and a grievance filed on behalf of Brian Stanton. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on January 23, 2003, in Green Bay, Wisconsin. The Union and the City agreed to consolidate the grievances. Carla Burns filed a transcript of the hearing with the Commission on February 18, 2003. The parties filed briefs and reply briefs by May 12, 2003.

ISSUES

The parties were unable to stipulate the issues for decision. I have determined the record poses the following issue:

> Did the City violate the Collective Bargaining Agreement when it refused to pay officers Stanton and Muraski three (3) hours of call-in time for reporting to court, under subpoena, during in-service training conducted by the City and successfully completed by Stanton and Muraski on January 9, 2002?

RELEVANT CONTRACT PROVISIONS

ARTICLE 1
RECOGNITION/MANAGEMENT RIGHTS

. . .

1.03 MANAGEMENT RIGHTS. The Union recognizes the prerogative of the City, subject to its duties to collectively bargain, to operate and manage its affairs in all respects in accordance with its responsibilities, and the powers and authority which the City has not abridged, delegated or modified by this Agreement, are retained by the City including the power . . . to determine reasonable schedules of work, to establish the methods and processes by which such work is performed. . . . The City agrees that it may not exercise the above rights, prerogatives, powers or authority in any manner which alters, changes or modifies any aspect of the wages, hours or conditions of employment of the Bargaining Unit, or the terms of this agreement, as administered, without first collectively bargaining the same or the effects thereof.

. . .

ARTICLE 4. HOURS

. . .

4.02 SHIFT EMPLOYEES.

(1) The work week for shift employees shall consist of five (5) duty days with three (3) days off in a repeating cycle. The work week for non-shift employees shall be five (5) duty days during the normal work week with weekends off, as modified by the schedule set forth in the departmental

reorganization of October, 1986 and shall be administered as to each employee as it now is.

(2) The normal tour of duty shall be 8½ hours including roll call time. However, officers may return to the station after 8¼ hours in order to submit all usual and required written reports and information and to ascertain that they have been properly and correctly submitted before leaving the premises. In no event shall the completion of a required report become a matter involving overtime except with approval or at direction of the officer's supervisor.

. . .

ARTICLE 6. OVERTIME

. . .

6.04. MINIMUM CALL-IN TIME. Employees will be compensated for a minimum of three (3) hours for any call-in time worked on a scheduled work day, a day on which an officer works a full 8 1/2 hour work day pursuant to posted shift overtime, or for a call-in while an officer is attending either a voluntary school or in-service training (an officer receiving call-in pay on a day attending school shall still be entitled to compensatory time as if no call-in occurred if the officer successfully completes the school in question, and if the school is not successfully completed, shall receive compensatory time for those hours in attendance). The department may engage police officers in police business on site during in-service training without paying call-in, provided such shall not jeopardize the officer receiving full credit for the class interrupted. Employees will be compensated for a minimum of six (6) hours for any call-in time on a day off or scheduled vacation. This call-in time shall be compensated at the base rate of pay.

ARTICLE 30. TRAINING

. . .

30.03 STATE CERTIFICATION TRAINING. As part of the 1964.5 hour work year each officer is required to report for annual training totaling 25.5 hours. This training shall occur on the officer's regular days off and will involve no additional compensation.

BACKGROUND

The Stanton and Muraski grievances concern a Departmental in-service conducted on January 9, 2002. The Department conducts in-service programs so that its officers can meet State of Wisconsin continuing education requirements necessary to their certification as law enforcement officers. The January 9 program was a refresher course on CPR.

Stanton has served the City for roughly eleven years, all on the night shift. January 9, 2002 was a scheduled day off for him. He reported to the Department at 8:00 a.m., the scheduled start of the in-service. He was also under a subpoena, issued by a prosecuting attorney, to appear at a preliminary hearing, set for 10:30 a.m., in Brown County Circuit Court. At roughly 10:15 a.m., Stanton left the in-service, changed into his uniform and walked the one and one-half blocks from the Department to the Circuit Court. Upon his arrival at the courthouse, the prosecuting attorney informed him that the defendant had waived the preliminary hearing. Stanton returned to the department, changed back into his civilian clothes and returned to the in-service, roughly one-half hour after he had left. He successfully completed the January 9 in-service, which ended at 4:30 p.m. He filed an overtime card for the appearance because he had been paid for such an appearance in 1999. He originally put in for six hours of overtime, but revised the card to seek three hours of overtime on the advice of his Union representative.

Muraski has served the City for roughly five years, and normally works the evening shift, from 7:00 p.m. through 3:30 a.m. He reported for work on January 9, 2002, at 8:00 a.m., to attend the CPR in-service. January 9 was a scheduled day off for him. Like Stanton, he was under subpoena to testify at a hearing in Circuit Court. Like Stanton, he left the in-service roughly fifteen minutes before his scheduled appearance in court, changed into his uniform and walked to the Circuit Court. Like Stanton, he learned that his testimony would not be necessary. He was gone for roughly forty-five minutes, but was able to successfully complete the in-service. He filed an overtime card for the appearance because another officer informed him that this was the practice in the Department.

Evidence Regarding Bargaining History

Thomas J. Parins, Sr., has represented the Union in collective bargaining and contract administration since 1973. He testified that the parties have significantly modified contractual call-in pay procedures relevant to the grievances on several occasions. The labor agreement originally called for a minimum of three hours of straight time pay for a call-in. The Union successfully modified the provision to raise it to six hours of straight time pay for a call in during an officer's scheduled day off. In the negotiations for a 1986 labor agreement, the parties agreed to move from a 5/2, 5/3 to a 5/3, 5/3 work schedule. The change was addressed in a Memorandum attached to the 1986 labor agreement. The Memorandum states:

> 1. The present work schedule will be changed to a continuous five day on - three day off work week consisting of 8 3/4 hours per day . . .
> 5. Officers will be required to attend mandatory in-service schooling on their off days, not to exceed four days per year. . . .

Section 1 underscores the change from the 5/2, 5/3 work schedule, in which an officer worked an 8 1/4 hour day. Section 5 sought to address the City's concern with paying overtime for in-service training due to the difficulty of manning the 5/2, 5/3 shifts while in-services took place. The Department reorganized its grouping of officers under the 5/3, 5/3 work schedule to permit greater flexibility scheduling in-services. Parins testified that the City made it clear that the City wanted the in-service training "at no cost to the city" (Tr. at 64). The parties had to make other alterations in the contract to implement the 5/3, 5/3 work schedule. For example, they modified Article VI to read thus:

> . . . For purposes of calculating overtime, compensation for the hourly rate shall be determined as though the workweek consisted of thirty-nine and one-quarter (39.25) hours.

This change stated a higher number of hours than an officer actually worked, on average, in a week. It reflected a compromise between the parties by which they sought to have work schedule changes be roughly neutral regarding overtime compensation under the 1986 agreement and its predecessor. Article IV of the 1986 agreement specified that for shift employees:

> The Shift Commander shall have the discretion to consider the last fifteen (15) minutes of work as "flex time" to hold officers up to fifteen (15) minutes beyond the eight and three quarters (8 3/4) hours to correct reports if necessary and the officer shall be released up to fifteen (15) minutes early if all usual and required reports and information are properly and correctly submitted.

Article IV set the work day for non-shift employees at 8 3/4 hours per day.

Parins testified that the second major revision to the labor agreement concerning the grievances occurred in the bargaining for a 1989-91 labor agreement. Article IV continued to set the work day for non-shift employees at 8 3/4 hours per day. The parties modified Article IV for shift employees to set a maximum work day at 8 3/4 hours, with a "normal tour of duty" set at 8 1/2 hours. The modification permitted employees to return to the station after 8 1/4 hours to complete reports. The parties altered Article 6 to read thus:

> (A) . . . Overtime shall commence after 8 1/2 hours on a regular work day . . . Overtime will not be paid for time spent correcting usual and required reports or information within the maximum work day of 8 3/4 hours. . . . For purposes of calculating overtime, compensation for the hourly rate shall be based on a bi-weekly schedule of 75.6 hours and an annual schedule of 1964.5 hours. . . .

The number of hours actually worked by an officer did not change. The parties also created Section 30(C), the text of which has not been changed except regarding its heading and its placement in the contract. The section now appears as Section 30.03, which is set forth above.

The next major revisions came with the negotiation of a 1996-98 labor agreement, and were prompted by two grievances. Parins testified that the grievances concerned two officers who were summoned from in-service training to perform traditional duties. The grievances were settled. Parins understood the City's initial position to be that such officers should not receive any call-in compensation. He understood them to take an alternative position that such officers should receive a three hour, not a six hour, call-in. He testified that the Union agreed that because the officer's personal time was not interrupted six hours was too much, and that the City could call an officer out of an in-service to work on-site. The City, in a letter to Parins dated June 5, 1996, proposed to codify the settlement in the labor agreement thus:

> Employees will be compensated for a minimum of three (3) hours for any call-in time worked on a scheduled day work day, a full posted overtime shift day, or a day on which an officer is attending either a voluntary school or in-service training. . .

After some discussions on the point, the parties agreed to modify the labor agreement to incorporate the grievance settlement. Parins, in a letter to the City dated July 2, 1996, stated the Union's objection to a City draft of the agreement regarding Section 6.04. His letter objects to the language quoted above, and asserts the parties had reached agreement on the following: "or for a call-in while an officer is attending either a voluntary school or in-service training." Parins testified that this language was incorporated into Section 6.04 of the 1996-98 labor agreement and remains unchanged.

The parties further modified the 1996-98 agreement by specifying in Article 4 that the work day for non-shift employees would be set at 8 1/2 hours, and by deleting the establishment of a maximum 8 3/4 hour day for non-shift employees. This change had no impact on the overtime calculation of Article 6 or the training specified in Section 30.03.

William Resch is the Union's President and has served the City as an officer for roughly twenty-two years. He participated in the bargaining that created the 5/3, 5/3 schedule. He understood the City's position to be that an officer would attend an in-service without pay.

James Lewis has served as the City's Chief of Police since 1995, and served on the City's bargaining team in the negotiations that produced the 1996-98 labor agreement. He testified that the bargaining changes that produced the 5/3, 5/3 work schedule of Article 4 and the training requirements of Article 30 rest on the definition of a work shift of 8 1/2 hours. This produces 42.5 hours during a normal five-day work cycle (5 x 8.5). There are 45.625 work cycles per year, which generates 1939 total work hours. To this must be added the 25.5 hours of state certification training, thus totaling the 1964.5 hours set forth in Article 30. The parties established these points in their creation of the 1996-98 labor agreement by eliminating the "15 minutes of floating time" (Tr. at 149), which clarified that the contract set an eight day rotation with 45.625 rotations in a 365-day work year, including three in-service days. These changes clarified that call-in pay is only afforded for periods of time that an officer is not performing work within the 1964.5 hour work year.

Evidence Regarding Practice

The Department maintains cards to record overtime worked. The Department receives roughly seven thousand overtime cards annually. An individual officer is to fill out the form, then submit it to a shift supervisor. The shift supervisor signs the card and turns it over to the City's Business Manager, who reviews it before sending it to the payroll department. Allen Timmerman is the Department's Commander of the Operations Division. He testified that a shift supervisor typically relies on the accuracy of the form submitted by an officer, but typically checks the dates and times listed. A shift supervisor may also check the duty roster to make sure an officer has accurately recorded whether the overtime occurred on an off day. The form, at all times relevant here, has tracked whether or not the overtime occurred on a day off by the following entry: "Day off: Y / N". The officer is expected to circle the appropriate entry to indicate whether the time occurred on a day off. The roster states an officer's scheduled days off, but not in-service days.

Stanton's revised overtime card for January 9 circled the "N" option for the "Day off" entry. He submitted an overtime card for September 9, 1999, in which he circled the "Y" option for Day off, and listed "circuit court" as the assignment. The City approved his claim for six hours pay.

Susan Bickett works the afternoon shift for the Department, and attended an in-service on January 11, 2002. She was under subpoena to testify in court that day, and spoke to the in-service coordinator to determine if she could reschedule the in-service. He informed her that she could not, but that she could attend the in-service on another day to make up for any time missed due to the court appearance. She left the January 11 in-service at 3:30 p.m., changed into her uniform and reported to court. She was not able to return to the in-service until 4:10 p.m., and completed the in-service on another day. She asked Timmerman whether she

should submit an overtime card, and was informed she was not eligible. On her next scheduled day of work, she spoke to a Union representative, who informed her that she should put in an overtime card. Lewis approved this card. He accounted for his approval thus:

> . . . because she had to leave that class, that meant she had to come back another day when the class was going on to catch that last hour. We owed her for call-out. She came in on an additional day above and beyond the other employees. It would have been unfair for me not to pay her. When the other employees came in for one day, she had to come in two. (Tr. at 165)

The City paid Bickett six hours for January 11. She circled "Y" on the Day off entry. Lewis did not know whether or not she attended the second in-service on a scheduled day off.

Resch testified that he searched the last three years of overtime cards submitted on days in which the City conducted in-service training. The results of his search can be summarized thus:

OFFICER	IN-SERVICE DATE	HOURS WORKED	OVERTIME PAID	DAY OFF ENTRY Y/N
Johnson	10/11/2000	0.1	6.0	Y
Engel	09/21/2000	1.0	6.0	Y
Allen	03/15/2001	0.0	6.0	Y
Lynch	01/16/2002	0.7	6.0	Y

Resch testified that each of these officers but Lynch left an in-service to appear in court. Lynch attended a voluntary school, and had to leave it to report for court.

Lewis testified that he denied a grievance in 1999 that is applicable to the grievances posed here. The grievance is set forth in a letter from Parins to Lewis, dated April 29, 1999, which states:

> The basis for the grievance is that on April 9, 1999, Officer Van Erem was assigned to a training school from 9:00 a.m. until 4:30 p.m. This was his duty assignment for the day. This was the second day of a two-day school. Prior to April 9, Officer Van Erem was given a court notice for . . . (a) trial which was for April 9, 1999. In addition to the court notice, Officer Van Erem was ordered to report to consult with (the) Assistant District Attorney . . . He

> was ordered to report to the Police Department at 8:00 a.m. on April 9. On April 9, Officer Van Erem reported promptly . . . and . . . met with (the) Assistant District Attorney. These meetings lasted until approximately 11:30 a.m. When Officer Van Erem finished his duties . . . he returned to the training session, completed the rest of the day, and received a Certificate of Training.
>
> Subsequently, Officer Van Erem turned in an overtime card for a call-in for the time period between 8:00 and 9:00 a.m. as this was the time that he was called in. The overtime card was subsequently denied . . .
>
> The section of the contract that is violated here is Section 6.04. . . .

Lewis denied the grievance in a letter dated April 30, 1999, which states:

> . . . You cite Section 6.04 of the contract as being violated. This section refers to the call in of an off duty officer. April 9, 1999 was a duty day for Officer Van Erem in which by contract he is required to work 8 1/2 hours. He was assigned to work from 8:00 a.m. to 4:30 p.m. which included dealing with a criminal case and attending school.
>
> There is no contractual language that would indicate that if an officer attends part of his/her work day in school, then they receive the rest of the day off and are entitled to additional pay for hours in which they are already being paid.
>
> I must reject your grievance . . .

The City denied the grievance throughout the steps of the grievance procedure and the Union did not appeal it to arbitration.

Further facts will be set forth in the **DISCUSSION** section below.

THE PARTIES' POSITIONS

The Union's Initial Brief

The Union states the issue for decision thus:

Did management violate Section 6.04 of the labor contract when it refused to pay officers Stanton and Muraski three (3) hours of call-in time when the officers were subpoenaed to appear in court during in-service training?

The Union contends that Section 6.04 "is very clear and unambiguous in regards to this case", demanding three hours of call-in pay if an officer "is engaged in police business, subject to certain exceptions, while . . . attending in-service training." Stanton and Muraski attended in-service training necessary to "maintain their State certification." This is the sole type of in-service training provided within the department, and none of the contractual exceptions apply. One exception permits an officer to perform work on-site if it does not jeopardize receipt of full credit for the class. It does not apply to a subpoena to give testimony in court. The second exception concerns schools, not in-house, in-service training.

Arbitral precedent places clear contract language beyond interpretation by an arbitrator. The Union could show prior instances of payment while the City could not. This effectively establishes that the City has offered this compensation in the past. Beyond this, adopting the City's interpretation would change "the contract language from what was negotiated to what the City had wanted in the first place." The City's initial proposal on this point would have precluded payment for cases such as Stanton's and Muraski's and the Union rejected the proposal, thus setting the stage for the creation of the language of Section 6.04. The City should not "be able to change the negotiated language without collective bargaining."

Nor do the provisions of Section 6.01 and 30.03 alter this conclusion. The statement of 1964.5 hours establishes "a fictitious number that was negotiated to set an overtime rate". The language of Section 6.01 confirms this, as does the fact that the number does not appear in Article 4, which establishes work hours. Section 30.03 does not apply because Stanton and Muraski are not demanding pay for attending the training, but for reporting to court to testify while training was in session.

Bargaining history evidence confirms this. From the 1986 contract in which the parties went onto a 5/3 work schedule, "the number of hours worked and the hours used for overtime calculation never coincided." Rather, the reference to 1964.5 hours came into the 1989-91 labor agreement, when officers were working 1996 hours per year, on an 8 3/4 hour work day. Nor did the 1964.5 reference change when the 1996-98 labor agreement changed the work day to 8 1/2 hours. Thus, the 1964.5 reference is no more than a base from which overtime is calculated. Section 30.03 places training on scheduled off days and denies additional pay for training. This undercuts the City's argument that in-service training is a regular work day.

The Union concludes that "Officers Stanton and Muraski must be paid the overtime as

submitted."

The City's Initial Brief

The City states the issue for decision thus:

> Does the Collective Bargaining Agreement require the payment of "call in" overtime for officers subpoenaed to attend court during a training session when the absence from the training session does not require the officers to repeat such training on another date?

The Union's claim for overtime presumes that the City called them in to testify, thus invoking Section 6.04. However, by "its plain language, this section is inapplicable to the situation grieved in this matter."

Underlying the Union's claim is that Stanton and Muraski were on an off day while training. Section 30.03 clearly puts training within an officer's work year. The evidence underscores this as a matter of fact. The department schedules training, disciplines officers who fail to attend and includes training within "the 1964.5 annual hours that form the basis of an officer's salary."

Nor does the subpoenaed court appearance manifest the known attributes of a call-in. Arbitral precedent underscores that call-in is a specific type of compensation for a disruption of an officer's personal life. Neither Stanton nor Muraski had their personal schedules disrupted, since they had reported to the station for training. Rather, their court appearances "are identical to an officer who must appear in court while performing his or her normal patrol duties." Any other conclusion ignores that "call-in" pay "has an established and plain meaning for the purposes of collective bargaining agreements."

Nor has the Union proven a binding practice. As a threshold matter, such proof is irrelevant since the governing contractual language is clear and unambiguous. Beyond this, a binding practice must be "(1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties", citing CELANESE CORP. OF AMERICA, 24 LA 168, 172 (Justin, 1954). The Union's proof meets none of these standards. The examples cited by the Union are either six hour overtime matters rather than the three hour claim advanced here, or do not involve state certification training on the day in which "call-in" pay was requested. Beyond this, none of the cited examples include "any evidence that management was aware of and accepted this practice." Nor can the practice be observed over time. Rather, the cited examples reflect an infinitesimal amount of overtime cards, and if anything, afford stronger proof of payment in error than of a mutually accepted practice. In fact, the City offered proof that it has denied

overtime requests similar to those advanced by Stanton and Muraski. The

sole exception involves Bickett, who "was unable to complete state certification training on her originally-scheduled date and was required to return on a second day off to complete the training."

The City concludes that "the grievances should be denied."

The Union's Reply Brief

Department schedules and the testimony of officers establish that a training day is an off day. Section 30.03 underscores this by placing training on a regular day off. Bargaining history evidence underscores that officers will not be paid overtime for attending training. The grievance, however, does not seek overtime for the training but for the call-in to testify. The contractual reference to 1964.5 hours cannot persuasively be linked to work time. Rather, it is a statement of a base on which overtime payment is made.

The City's citation of general considerations governing the meaning of "call-in" ignores that Section 6.04 specifically addresses the point. It demands payment for a call-in unless the call-in meets the requirements of a stated exception. That exception demands that police business be conducted on-site during the training and that the work not jeopardize an officer's receipt of credit for the training. The subpoenaed testimony clearly does not fall within the exception. That the City thinks it should ignores that the City tried, but failed to secure language in bargaining to bring about the result it seeks in arbitration.

The language is clear and unambiguous, but past "practice can . . . be used to show how the parties have interpreted the language." Here, the evidence establishes consistent payment for court appearances that take an officer from in-service training. Evidence that the City made the payment in error "cannot be believed."

The City's Reply Brief

The assertion that Section 6.04 is a specific exception to the normal requirements of a call-in ignores Section 30.03, which makes in-service training "part of an officer's normal hours." Nor will Section 6.04 read as a whole or sentence-by-sentence support the Union's view. Bargaining history evidence establishes the section was inserted to address a specific situation that arose well before the grievances. Beyond this, the evidence affirms that call-in pay is offered to officers whose personal schedules are disrupted by a call to work. Attendance at in-service training places an officer at work.

The "on-site" reference in Section 6.04 reflects that the language addressed "a specific

situation involving officers attending Municipal Court during in-service training." At the time

Municipal Court was in the same building as the Police Department. To adopt the Union's view would lead "to an irrational result." If the in-service takes place in the same building in which the officer testifies, then no call-in results. However, if an officer dresses in the department, then crosses a parking lot to testify, call-in pay results. The evidence fails to show that "the parties intended to make such an irrational distinction when they drafted the language."

The City contends that "the language referred to by the Association as an 'exception' is more appropriately described as an example of a situation where call-in pay does not apply." An analysis of the evidence establishes that "the situation in these grievances falls within the intent of the 'exception' example provided in Section 6.04 of the Agreement."

The past practice and bargaining history evidence produced by the Union is "confusing and unclear." It is unhelpful to resolution of the grievances since the language of Section 6.01 and Section 30.03 is clear and unambiguous.

DISCUSSION

I have framed the issue by drawing from, without adopting, each party's statement of the issue. The Union's focus on Section 6.04 is appropriate, since the provision governs call-in during an in-service. However, this focus ignores the integral relationship of the section with Section 30.03. The City's catches the broader contractual reach of the grievances, but asserts the contractual issue needs no factual focus. This obscures that the contract provisions demand a factual context for interpretation. At least theoretically, an officer could complete an in-service on a day when the officer had already worked a normal or an overtime shift. That situation is factually and contractually distinguishable from these grievances.

Each party contends clear language supports their interpretation, but the record will not support the contention. Section 30.03 governs State Certification Training, and is arguably clear. However, it cannot be read without reference to Section 6.04, which governs call-ins. The relationship between these sections arguably calls Article 4 into play and cannot be considered clear, since the parties dispute whether a subpoena to testify during in-service scheduled on an off day can be considered a call-in. Nor can the terms of Section 6.04 be considered clear and unambiguous. The parties agree that an officer called from a normally scheduled shift does not receive call-in for the testimony even though Section 6.04 states: "Employees will be compensated . . . for any call-in time worked on a scheduled work day". In short, Section 6.04 presumes the existence of a call-in without defining it. This makes Section 6.04 and its relationship to Section 30.03 ambiguous.

In my view, bargaining history and past practice are the most persuasive guides to

clarify ambiguous language, since each focuses on the conduct of the parties whose intent is

the source and the goal of contract interpretation. The persuasive force of each guide is rooted in the agreement manifested by the bargaining parties' conduct. In this case, each guide affords something other than determinative guidance.

The persuasive force of the Union's practice argument is muted by a number of factors. As the City points out, the number of instances spread across the number of overtime cards make it difficult to conclude the City approved the six-hour call-ins knowing that the subpoenas pulled the officer from an in-service. The time cards note "Y" for the "Day off" entry, and it must be inferred, without direct supporting evidence, that the approving supervisors knew the "Day off" was an in-service. Parins' testimony concerning the settlement of the two grievances that prompted some of the revisions to the 1996-98 labor agreement affords the strongest support for the asserted practice. Two considerations, however, undercut the force of this testimony. First, the evidence is not clear on the factual background of the grievances. The second is Lewis' denial of the VanErem grievance. Further considerations mute the force of the asserted practice. Stanton, an eleven year employee, originally filed an overtime card seeking six hours. Muraski, a five year employee, filed an overtime card because another officer informed him he should. Bickett sought supervisory opinions on whether she should file an overtime card. None of these officers' conduct binds the Union, but it is evident the "practice" is something less than clearly defined and well-known. On balance, it appears that overtime such as that questioned by the grievances is not a frequent occurrence. What evidence there is of practice manifests something other than agreement that time spent off-site from an in-service in response to a subpoena constitutes a call-in.

As noted above, bargaining history is tied to the asserted practice. Here too, the evidence affords less than definitive guidance. Lewis' testimony regarding the parties' understanding of the "1964.5" reference ignores that the reference preceded his involvement in bargaining, and that the reference survived a number of alterations to Article 4, including the change from a maximum 8 3/4 hour day to the current 8 1/2 hour day. Parins' testimony on the various changes spans more of the parties' history. However, the testimony falls short of establishing that the City seeks through arbitration a result it never secured in bargaining. Rather, bargaining history evidence, like the past practice evidence, is murky. Parins' testimony regarding the two grievances that prompted the changes to the 1996-98 agreement establishes something less than City agreement on call-ins during an in-service. The facts of those grievances are unclear, as are the changes to the 1996-98 agreement. The language of Section 6.04 of the 1996-98 agreement (Union Exhibit 5) does not mirror the language of the 1999-2001 agreement (Joint Exhibit 1) or of Parins' July 2, 1996 letter even though that letter mirrors the language of the 1999-2001 agreement. Even ignoring this minor uncertainty, it is not clear that the Union successfully denied in bargaining the position the City asserts here.

More significantly, Parins' bargaining history testimony fails to establish that the definition of a 1964.5 hour work year is irrelevant to determining whether an officer is in pay status during in-service training. The creation of a work cycle and the definition of straight-time or overtime pay status are distinguishable points. It is impossible to reconcile an eight day work cycle to a seven day calendar week, or a sixteen day work cycle to a fourteen calendar day, bi-weekly cycle. There is no evidence on the City's payroll system. However, in a system that equalizes pay over twenty-six payroll periods, an employee's check would reflect the same pay for calendar periods that encompass varying numbers of days actually worked. The definition of pay status is, then, distinguishable from the definition of the work cycle. This does not make Parins' testimony irrelevant. Rather, it underscores its scope. The testimony establishes that the 1964.5 hour work year reference has survived various ways of defining the work day. This means that it may not definitively establish the pay status of the in-service hours. However, it highlights, rather than resolves, the interpretive dispute regarding what the reference means when applied to Section 6.04.

This leaves the language of the Sections 6.04 and 30.03 as the sole interpretive guide. The strength of the Union's case is that Section 30.03 acknowledges that in-service training occurs "on the officer's regular days off", which bargaining history and past practice demonstrate involve uncompensated days. As noted above, bargaining history and past practice afford some support for this argument, but fall short of establishing it.

More significantly here, the language of Section 30.03 cannot be squared to the Union's position. The section provides that in-service training shall take place on a regular day off, "and will involve no additional compensation." The use of "additional" confirms that an officer is compensated for the day of an in-service, even though it takes place on a regular day off. Any other conclusion effectively renders the term meaningless. The Union's contention that it denies overtime for the day cannot be accepted without unduly complicating the application of overtime. Reading the sentence as a ban of overtime would be difficult to square with other agreement provisions, For example, an in-service that extended beyond the "scheduled work day or work week" would, under Section 6.01, appear to call for overtime.

The reference to "regular days off" highlights that in-service training is designed to take place on other than a normal duty day. The language does not specify the days beyond that reference to permit the flexibility in scheduling noted in witness testimony. The first sentence of the provision underscores that the parties created a 1964.5 hour work year that includes 25.5 hours of other than normal duty time that will be devoted to in-service training. The second sentence does not deny pay for the training time, but incorporates it into the biweekly "salary" of an officer. The Union's bargaining history evidence is complicated and tortuous in its analysis of these references. The City's is simpler. 365 calendar days, broken

into 8 day cycles yields 46.25 cycles per year. 5 shifts at 8.5 hours per shift yields 1939 work

hours per year. Adding 25.5 hours of State Certification Training totals the 1964.5 hour work year. The City's view strains the terms of Section 30.03 less than the Union's.

Beyond this, the Union's reading of Section 30.03 demands the fundamentally troublesome conclusion that the parties agreed to the creation of time in which represented employees donate their labor to the City. Evidence of bargaining history or past practice fall short of establishing this. The evidence undercuts it. The parties agree that the City can compel attendance at an in-service and has a disciplinary interest in its successful conclusion or the officer's return to the in-service after release from the subpoena. "Regular days off" is broad enough to incorporate the Union's view. However, it is difficult to conclude that an officer who injured his back fishing on a regular day off is on the same footing regarding being in pay status as an officer who injured his back during an in-service on self-defense on a regular day off. This underscores that the Union's reading of Section 30.03 strains its terms.

Nor do the terms of Section 6.04 demand a contrary conclusion. The strength of the Union's interpretation of this section is that the first sentence clearly demands call-in pay "for a call-in while an officer is attending either a voluntary school or in-service training." The same sentence just as clearly demands call-in pay for "for any call-in time worked on a scheduled work day." This is not reconcilable to the parties' agreement that an officer on normal patrol duties is not entitled to call-in pay if a subpoena temporarily pulls the officer from patrol. This inconsistency remains under the Union's interpretation. Under the City's, no inconsistency results because in each case the officer is in regular pay status.

The Union's view has support in the second sentence of Section 6.04, which permits the City certain assignment rights if the assignment is "on site" and "provided" the assignment does not jeopardize full credit for "the class interrupted." The force of this view must be acknowledged, particularly in light of Parins' testimony on bargaining history. However, the force of this view assumes a call-in has occurred. As noted above, this assumption cannot be made without introducing inconsistency into the section.

That the first sentence fails to establish a clear entitlement undercuts the Union's reading of the second sentence, which seeks to turn a "proviso" sentence into an "entitlement" sentence. The Union is correct that the sentence can be read to demand payment for work "off-site." However, this falls short of establishing an entitlement. The sentence can be read in a variety of ways other than to make moving from the department to the courthouse a call-in. The sentence may not have been addressed to the type of assignment at issue here. Under a subpoena, a court directs the appearance, and the sentence may be addressed to assignments under departmental direction. The sentence can also be read to underscore that if an officer fails to receive credit, the officer cannot be expected to complete the in-service training on

another day without compensation. Under Section 30.03, compensation for the balance of the

in-service will not involve overtime. However, if the completion of the in-service takes the officer outside of the 25.5 hours allowed, then overtime or call-in payment would appear inevitable. In sum, the Union's reading of Section 6.04 has persuasive force. Adopting it, however, introduces inconsistencies into the relationship of Section 30.03 and 6.04 which erode the force of the Union's position.

Resolution of the Bickett grievance affords no guidance to the resolution of the grievances. It is consistent with the conclusion stated above, provided Bickett received payment for the follow-up day necessary to complete the in-service. As the Union points out, it is not clear if this is how the City compensated Bickett, and it may be inconsistent with the conclusions stated above if Bickett was compensated for a call-in on the day of the in-service. The evidence is not clear on the point, and thus the resolution affords no persuasive guidance. As with the evidence of past practice and bargaining history, it underscores the parties' dispute rather than pointing out a basis of agreement.

In sum, the language of Section 30.03 makes 25.5 hours of State Certification Training part of an officer's 1964.5 hour work year, thus making such training part of an officer's normal compensation. This means that Stanton and Muraski, on January 9, 2002, were not subject to a call-in for the time they spent responding to a subpoena during the course of the CPR refresher in-service training that they successfully completed.

AWARD

The City did not violate the Collective Bargaining Agreement when it refused to pay officers Stanton and Muraski three (3) hours of call-in time for reporting to court, under subpoena, during in-service training conducted by the City and successfully completed by Stanton and Muraski on January 9, 2002.

The grievances are, therefore, denied.

Dated at Madison, Wisconsin, this 30th day of July, 2003.

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator

RBM/gjc

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