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 341
No. 61611
MA-12008

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 Scott Schuetze, who is referred to below as the Grievant. 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 issues:

> Did the City violate Section 6.04(2) of the collective bargaining agreement when it refused to pay the Grievant continuous pay for May 7, 2002, when the Grievant had been summoned to testify, under two subpoenas, one demanding his appearance at 8:30 a.m. and the other at 3:00 p.m.?
>
> If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

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.

. . .

(2) Continuous Duty: In the event an officer is called in for more than one (1) call in any given day, that officer shall not receive two call ins, but shall be paid continuous pay at the overtime rate of time and one-half from the beginning of the first call in to the end of the second call in; excepting that if the call ins in question are for specialized units established and existing for the purpose of being called in for special problems or occurrences, such as SWAT,

K-9, the contemplated Bomb Squad, or the like, the continuous duty rule shall not apply to more than one call in of such nature, but rather each call in shall be a separate call in.

. . .

6.05 COURT CANCELLATION PROCEDURE. The afternoon shift commander will be notified of any court cancellations. It then becomes the responsibility of the officer to call the shift commander after 5:00 p.m. on the day prior to the scheduled court date as to whether or not the court appearance has been canceled.

(1) The shift commander will record all such calls by date and time in a log book; that is, if an officer appears at court and the case has been canceled, he/she will receive the minimum call-in pay only if he/she had called in after 5:00 p.m. the prior day and was not notified of the cancellation. If the officer had not called in the prior day, he/she will not receive the pay.

(2) On those occasions when court appearances are canceled after 5:00 p.m., the shift commander will attempt to contact the officer with the cancellation, if the officer had already called in. If the officer is contacted twelve (12) hours before the scheduled court appearance, the officer will not receive call-in pay.

BACKGROUND

The City did not put on any witnesses after the Union rested its case on this grievance. Thus, the background to the grievance is best set forth as an overview of witness testimony.

The Grievant

The Grievant has served the City as a police officer for thirteen years. At the time of the grievance, he worked in the traffic unit, from 7:00 p.m. to 3:30 a.m. His shift hours mean that court appearances occur in his off time.

He received a subpoena to testify for the prosecution at a jury trial in a criminal proceeding at Brown County Circuit Court. The subpoena demanded his appearance on May 7, 2002 at 8:30 a.m. Subsequently, he received a subpoena from the defense attorney in the same matter, which demanded his appearance on May 7, 2002 at 3:00 p.m., and at 8:30 a.m. on May 8. Schuetze received the defense subpoena on the evening of May 6. The receipt of a subpoena that close to the start of a trial typically indicates the trial will go forward. The

Grievant called in after 5:00 p.m. on May 6 to check the court book, and determined that the matter had not been cancelled. He then made child care arrangements to testify the following day.

He reported for work on May 6, got into his uniform and reported to the Circuit Court by 8:30 a.m. On his way to the courtroom, he met a police lieutenant who informed him "that the case was canceled" (Tr. at 182). The Grievant took this to mean that he was not needed by the prosecution, and returned to the department. He prepared and submitted an overtime card to a day shift Captain, who approved it. The Grievant then spoke to Ann Anderson, who is in charge of the processing of subpoenas. He asked her to check if he was still needed by the defense, and to call him at home if he did not need to report for work prior to his shift that evening. He then went home, and went back to sleep.

Sometime after falling asleep, Anderson phoned to inform him that the entire proceeding had been cancelled and that he need not report to testify. He reported for work at the scheduled start of his shift on May 7. He discussed the overtime with Captain Sterr. They looked at the labor agreement, and the Grievant understood her direction to be that he should submit another overtime card seeking continuous pay for the subpoenaed appearances. He then prepared another overtime card, and Sterr inserted a notation "2 notices, same day, continuous pay." The Grievant entered the following notation: "Assignment: Jury trial . . . Both canceled 8:31 am 05-07-02."

On May 8, the Grievant received a handwritten memo from Sterr that states:

> I spoke with Comm. Timmerman. Please resubmit two separate cards. One for the 8:30 notice, and the 2nd for the 3:00 notice. You'll receive 2 -- 3 hr pays.
>
> If you would have had to show at 3:00 then it would have been continuous, but since it was all the same case, it will be treated as two notices, since it was all cancelled at the 8:30 time.
>
> Leave the cards for me to sign . . . On the 3:00p card write "cancelled at 8:30 am in the assignment space . . .

The Grievant responded by filling out two overtime cards on May 8, one that stated "Actual Time: From 8:30 am . . . To 8:35 am" and one that stated "Actual Time: From 3:00 pm . . . To 3:01 pm". The City approved these cards.

The Grievant testified that he filled out the overtime cards as he always had, by entering the appearance time set by the subpoena. He added that he has been paid call-in for subpoenaed testimony on several occasions in which he did not have to testify. In each case, the payment

turned not on whether he appeared at the department, but on whether or not the procedures of Section 6.05 had been satisfied. He also noted that in his experience, it was unusual to receive call-in pay for two different appearances to testify. Typically, such appearances or cancellations are for time so close together that the payment of a single call-in covers them.

Keith Selissen

Selissen is a member of the Union's Board of Directors and has served as a City police officer for over twenty years. In researching the grievance, he discovered two instances in which officers who testified at two different times on the same day received continuous pay. Each occurred on June 19, 2002. In each case, the subpoenaed officer did testify. Selissen added that in his own experience he has received call-in pay for subpoenaed testimony even when he did not appear, if the procedures of Section 6.05 were satisfied. In such cases, he filled out the overtime card by listing the time of the subpoena and a minute later as the "From" and "To" responses to the "Actual Time" entry. He has made two court appearances on the same day, but has not received continuous pay because the appearances were so close together that a single call-in covered them. Like the Grievant, Selissen did not assume that the cancellation of a subpoena from a prosecutor necessarily means a defense subpoena in the same matter is also cancelled.

William Resch

Resch is a Canine Officer and a member of the SWAT Team. He has served as a City police officer for twenty-two years. He noted that an officer need not appear in court to receive call-in pay for subpoenaed testimony if the procedures of Section 6.05 are satisfied. The payment reflects the inconvenience to an officer who must rearrange their schedule on off time to make a court appearance.

Resch understood the City's position in the grievance procedure to be that an officer called to testify at multiple times on the same day should seek a separate call-in for each appearance. This reflects the contract language for Canine Officers and members of the SWAT Team, and the way the contract once handled call-ins for all officers. The Union altered the contract in response to the City's contention that multiple call-ins produced excessive costs. From his perspective, changing the contract worked in the City's favor, since multiple court appearances are usually grouped together so that a single call-in payment can cover them. The grievance reflects exceptional facts in which the officer benefits from the change.

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(2) of the labor contract when it refused to pay Officer Schuetze continuous duty pay when the officer was subpoenaed to appear in court two times in one day?

The Union contends that the language of "Section 6.04(2) of the contract is very clear and unambiguous in regards to this case." More specifically, the Union argues that the section entitles the Grievant to "continuous duty pay if he receives more than one call-in on any given day." None of the contractual exceptions apply to the grievance.

The Grievant was under subpoena to testify at 8:30 a.m. and at 3:00 p.m., appeared for the first subpoena and was told his testimony for the later time was unnecessary. He submitted two overtime cards, which were approved and paid as two call-ins.

The Union, unlike the City, demonstrated that the City has paid officers called to testify on multiple times on the same day "continuous pay rather than a call-in for each appearance." The City could not counter this evidence because no countering evidence exists. Beyond this, undisputed evidence establishes that an officer need not appear in court to receive "the call-in pay." Since more than one call-in occurred on the same day, Section 6.04(2) demands continuous pay. This conclusion is underscored by Section 6.05(1), which demands a minimum call-in even if court is canceled. Typically, court is scheduled so that continuous pay favors the City, which is obligated to pay the minimum call-in. That the provision favors the Union in this case cannot be held against the Union unless the City is to be permitted "to have its cake and eat it too."

Arbitral precedent underscores that clear language is not subject to arbitral interpretation. The City's failure to offer contrary evidence establishes that the grievance has merit, and may imply that "the City is only attempting to make the bargaining unit spend time and money on an issue for which they have no legitimate defense".

The Union concludes that the Grievant should "be paid continuous duty pay from 8:30 am to 3:00 pm."

The City's Initial Brief

The City states the issue for decision thus:

> What is the 'end of the second call in' for the purposes of determining continuous duty time under Section 6.04(2) of the collective bargaining agreement?

The City contends that Section 6.04(2) governs the grievance and clearly and unambiguously demands that it be denied. That the City originally paid him two call-ins was an error on the City's part. The City does not contest that the Grievant is entitled to a three hour call-in.

The determinative issue is "when the second 'call in' ended." The plain language of Section 6.04(2) demands payment "only until such time as the officer is released from the obligation to appear as subpoenaed." This demands determining when the Grievant knew or should have known that he had been released from the second subpoena." An examination of the evidence establishes that the Grievant took no action to determine if the cancellation of his first subpoena affected the second, in spite of the fact that both attorneys, the judge and judicial staff were available to answer any inquiry. That he chose not to inquire, but to return to the department and ask a clerk to determine the answer for him should not warrant continuous pay. His testimony on confusion on the point is contradicted by his overtime card that states that "both" subpoenas were cancelled at "8:31 a.m." Thus, the evidence establishes that his "continuous duty would have ended at 8:31 A.M." Any other conclusion improperly rewards an officer for failing to discharge "a minimal duty to reasonably inquire in the need to appear and/or remain available." That the City had no control over the subpoenas establishes that the Union's attempt to impose a liability on it is misplaced.

Section 6.04(2) provides that "the officer will receive pay only until that time they are actually completed with their duty, as is indicated in the title of that section." Once an officer knows, or should know, that the subpoena is cancelled, the disruption to the officer's off day ends, and the officer can return to his personal activities. That disruption is the purpose of call-in pay, or in this case, continuous pay traceable to multiple call-ins. Since the Grievant was under no obligation after 8:31 a.m., there is no basis for the application of continuous pay beyond that time. Any other conclusion rewards the Grievant for failing to take the minimal steps necessary to determine the need for his testimony, and places the burden on the City, which is in a less advantageous position to determine the point.

The evidence will not support the Union's attempt to establish a binding past practice. That Section 6.04(2) is clear and unambiguous makes practice irrelevant. The section grants continuous pay "only until such time as the second appearance ends" and the two subpoenas at issue here were cancelled at the same time. Even if practice was relevant, the Union's evidence cannot meet the standards set in CELANESE CORP. OF AMERICA, 24 LA 168, 172 (Justin, 1954), which demands proof of a practice that is "(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". Here, the Union's examples involve cases in which an officer actually appeared at separate times.

Viewing the record as a whole, the City concludes that "the grievance must be denied."

The Union's Reply Brief

The Union contends that the "City is attempting to change its whole argument and reason for denial . . . after the hearing." Throughout the processing of the grievance, including the arbitration hearing, the City took the position that continuous pay did not apply, even though it had paid the Grievant for two call-ins. As with the two other grievances heard with this, the City is attempting to "change its position" using "(m)istake and error" as its excuse.

The City's assertion that "the call-in ends when the officer knew or should have known when the second call-in ended" flies in the face of departmental practice. Testimony establishes that "the time for the overtime as submitted on overtime cards is the time stated on the subpoena." This conclusion rests on twenty years of practice. The City's arguments against practice ignore Resch's unrebutted testimony. Even if the Grievant should have made the inquiries the City attempts to impose on him, "the result would have been the same based upon how the section has been administered in the past." Beyond this, Section 6.01 will not permit the City to change the amount of overtime submitted on the overtime card.

Nor will the contract support the duty the City seeks to impose on the Grievant. Section 6.05 places no duty on him other than "to call in after 5:00 pm the evening before, which he did." Even if it assumed he had a duty to inquire on the day of the hearing, there is no evidence anyone was available to answer him. In fact, the evidence establishes that the Grievant made the reasonable effort to speak with the clerk who handles subpoenas for the department. Nor should the City's assertions regarding the Grievant's inconvenience be accepted. The existence of the call-in accounts for the inconvenience, since the "officer is still inconvenienced by having to cancel any plans that they would have had for the day". The presence of two call-ins means the inconvenience is greater, for the officer cannot make any plans for the day.

The evidence establishes "a clear past practice" that "the officer is paid from the beginning of the first call-in, and when the second call-in is cancelled, to the time the second call-in was scheduled." The City offered no rebuttal. Beyond this, testimony establishes that for over twenty years "officers would put the time the court appearance was scheduled as the time of the overtime card, rather than the time they were notified of the cancellation." That the City approved the Grievant's overtime card underscores the strength of the practice.

The Union concludes that Section 6.04(2) demands that the Grievant "must be paid continuous pay from 8:30 am to 3:00 pm for the call-ins on May 7, 2002."

The City's Reply Brief

The City notes that it "finds itself in rare agreement" with the Union "with respect to several issues arising in this grievance." They agree Section 6.04(2) unambiguously governs the grievance, and does not demand recourse to past practice. The Union, however, glosses over the terms that set the measure of continuous duty pay, and obscures the application of the section by asserting an officer can be on duty beyond the time a subpoena is cancelled.

The Union's view belies the plain language of Section 6.04(2). The Union, in effect, argues that the City must pay "the equivalent of more than three call ins." Even if the terms establishing the beginning and the end of continuous duty is unclear, then the City's interpretation should be favored, for it does not produce a windfall. Beyond this, the Union seeks to imply into the language of the section a requirement that "an officer is paid until 'the end of the second call in **or the scheduled time of the second call in, whichever is later.**" If the parties intended this construction, they would have used the bolded terms.

The title of the section also undercuts the Union's position, by focusing on "continuous duty", which "can only be interpreted to mean that the officer is to be paid for that amount of time he or she is on duty continuously." The reference underscores that the pay is to compensate an officer for inconvenience actually experienced due to subpoenaed testimony. Examples of practice turning on cancellations occurring less than twelve hours before scheduled appearance time have no bearing on the grievance.

The City concludes that the Grievant "was not entitled to the payment of 6.5 hours at the overtime rate for May 7, 2002."

DISCUSSION

My statement of the issue on the merits adds the factual context prompting the grievance that is lacking from each party's. The separate statement of the remedial issue addresses the City's statement of the issue, which is focused on the merits but has remedial implications since it questions the measure of continuous pay. The parties agree that Section 6.04(2) governs the grievance. The issue highlights that the events of May 7, 2002, are at issue, since the Grievant complied with the provisions of Section 6.05(1), and since the City did not give him notice within the meaning of Section 6.05(2) of the cancellation of the subpoenas regarding the testimony set for May 7. The cancellation of the testimony for May 8 was effective under Section 6.05(2) no matter what view is taken of the precise time the Grievant learned of the cancellation of the defense subpoena.

Each party contends that the language of Section 6.04(2) is clear and unambiguous, but the evidence will not support the contention. Neither Subsection (1) nor (2) of Section 6.04 define a call-in. Rather, each presumes its existence and specifies the appropriate pay. Section 6.04(1) refers to "call-in time worked" but each party agrees that call-in pay can apply to compulsion to testify under a subpoena even if the testimony does not take place and even if an officer does not report to court.

There is no evidence of bargaining history to address this ambiguity. Evidence of past practice affords limited guidance. The City persuasively contends that past practice evidence fails to support the Union's view, since the specific instances of continuous pay cited involve officers who actually gave testimony at two different times on the same day. There is, however, no dispute that the City pays call-in pay to an officer who has been subpoenaed to testify even if the matter is cancelled, provided the officer has complied with Section 6.05(1) and the City has not been able to afford notice satisfying 6.05(2). This fact does have a direct bearing on the interpretation of Section 6.04(2).

Under Section 6.04(2), continuous pay is available to "an officer is called in for more than one (1) call in any given day". Thus, the factual dispute is whether the Grievant can be considered to have received two call-ins on May 7, since the matter had been cancelled, under the City's view, at 8:30 a.m. The record is clear on this point. It is undisputed that the Grievant's appearance for the prosecution's subpoena on May 7 constituted a call-in, even though he did not have to testify. There is no basis to question that his appearance for the defense constituted a separate call-in, since if it had been the sole subpoenaed appearance, it would have constituted a separate call-in because the Grievant complied with Section 6.05(1) and the City did not notify him, under any view of the facts, in a fashion that complies with Section 6.05(2). Against this background, there is no evident basis to conclude that the Grievant received anything other than "more than one (1) call" on May 7. Even if the Lieutenant had advised the Grievant at 8:30 a.m. that the entire matter had been cancelled, this would not have occurred within "twelve (12) hours before the scheduled court appearance" as specified by Section 6.05(2). Thus, the Grievant was subject to "more than one call in" under the terms of Section 6.04(2) and thus the Grievant was entitled to continuous pay.

The City's direction that the Grievant fill out two overtime cards confirms this fundamental fact. Its payment of two call-ins instead of continuous pay thus has no contractual basis. Section 6.04(2) mandates that an officer who receives more than one call on any given day "shall not receive two call ins, but shall be paid continuous pay."

The City's contention that the measure of continuous pay dictates the payment of a three hour call-in poses a remedial issue that is addressed below. As preface, it is appropriate to tie the conclusion stated above more closely to the parties' arguments. The City's assertion that the Union in effect seeks to alter the contract to demand the payment of the greater of a call-in or

continuous duty measured by the time set in the subpoena for the second appearance has persuasive force. That force is, however, undercut by its own actions. Timmerman's direction to Sterr to have the Grievant submit two overtime cards sought to have the City pay the lesser of two call-ins or continuous pay. These arguments underscore that the parties agree that some action must be taken to reconcile call-in under Section 6.04 with continuous pay under Section 6.04(2). The issue is what type of action, and that issue highlights the remedial issue.

The City's contention that the title of Section 6.04(2) belies the grievance affords no guidance to interpreting the contract. The City asserts the Grievant could not have been on "continuous duty" since the proceeding underlying the subpoenas cancelled at 8:30 a.m. This ignores that the parties do not dispute that an officer who complies with Section 6.05 can receive pay under Section 6.04 for "call-in time worked" even if the officer does not report to court. It ignores that the mutually understood purpose of the provision is to compensate an officer for the inconvenience to the officer's private life of a court appearance during off duty hours. It also ignores the unique nature of law enforcement work. An officer is, for certain purposes, never "off duty." An officer who was pulled over for erratic driving in his own car is ill-advised to display his badge and seek to have a fellow officer look the other way because he is not "on duty."

The City asserts that the Grievant was under a duty to determine whether he had to report back for the defense subpoena. This argument cannot be credited without reading Section 6.05(2) out of existence. Whether or not he should have made inquiries, the City could not have complied with the twelve hour notice requirement. Nor is it evident the Grievant did anything improper that affects the operation of the contract. There is no testimony to rebut the Grievant's and Selissen's testimony that the cancellation of the prosecution's subpoena did not necessarily cancel the defense's. If the Grievant was attempting to mislead the City, he did a lousy job. He put the facts of his situation in front of a Captain before claiming continuous pay.

This turns the matter to the issue of remedy. The City contends that the cancellation of the entire criminal proceeding at roughly 8:30 a.m. demands the conclusion that the "beginning of the first call in to the end of the second call in" is effectively 8:30 a.m. This means that the application of continuous pay is pointless, and that the call-in provisions of Section 6.04 must be applied. Whatever practical force this argument has comes at too great a cost to the governing language. The presence of more than one call-in dictates the need to apply Section 6.04(2). To read "the beginning of the first call in to the end of the second call in" reference as the City does eliminates the notice provisions of Section 6.05(2) and upsets the undisputed practice of treating compulsion to appear under a subpoena as a call-in even if testimony is unnecessary. Beyond this, accepting the City's view reads the Grievant's situation as if he was a "specialized units" member, which is the sole express exception to the operation of the application of continuous pay to more than one call-in on the same day. The Grievant cannot fall within the exception without being a "specialized units" member. This damage to the contractual language precludes

acceptance of the City's position, which turns the remedial issue into a denial of the grievance on its merits.

On balance, the Union's requested remedy best fits this record, and is adopted below. Whatever the appropriate scope of the City's practices regarding overtime cards, it is evident that the use of the time of a subpoenaed appearance as set forth on the subpoena is routine in the application of call-in pay. Its application here is not meant to establish anything more than a means of measuring the violation of the labor agreement on the facts of this grievance. The use of 3:00 p.m. as the "end of the second call in" makes it possible to apply the agreement without reading Section 6.05(2) out of existence and without disrupting the undisputed practice of treating compulsion to appear under a subpoena as a call-in even if testimony is unnecessary.

AWARD

The City did violate Section 6.04(2) of the collective bargaining agreement when it refused to pay the Grievant continuous pay for May 7, 2002, when the Grievant had been summoned to testify, under two subpoenas, one demanding his appearance at 8:30 a.m. and the other at 3:00 p.m.

As the appropriate remedy, the City shall pay the Grievant the difference between the amount already paid him for his response to two subpoenas on May 7, 2002, and the amount it would have paid had he been paid continuous pay from 8:30 a.m. until 3:00 p.m. on May 7, 2002.

Dated at Madison, Wisconsin, this 4th day of August, 2003.

Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator

RBM/gjc
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