BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

COLUMBIA COUNTY (HIGHWAY DEPARTMENT)

and

COLUMBIA COUNTY EMPLOYEES UNION LOCAL 995, AFSCME, AFL-CIO

Case 225
No. 62300
MA-12229

Appearances:

David White, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Madison, Wisconsin 53717-1903, appearing on behalf of the Union.

Davis & Kuelthau, S.C., Attorneys at Law, 219 Washington Avenue, Oshkosh, Wisconsin 54903-1278, by **James R. Macy**, appearing on behalf of the County.

ARBITRATION AWARD

Columbia County, hereafter County or Employer, and Columbia County Employees Union Local 995, AFSCME, AFL-CIO, hereafter Union, are parties to a collective bargaining agreement that provides for the final and binding arbitration of grievances. The Union, with the concurrence of the County, requested the Wisconsin Employment Relations Commission to appoint a member of its staff to hear and decide the instant grievance. Coleen A. Burns was so appointed on May 22, 2003. A hearing was held on September 3, 2003, in Wyocena, Wisconsin. The hearing was transcribed. The record was closed on January 8, 2004, upon receipt of post-hearing written argument.

ISSUES

The parties were unable to stipulate to a statement of the issues. The Union frames the issue as follows:

Did the Employer violate the collective bargaining agreement and/or practices of the parties when it required employees who had been subpoenaed for an Equal Rights hearing to work from 7:00 a.m. to 8:00 a.m. on December 16, 2002?

If so, what is the appropriate remedy?

The County frames the issue as follows:

Did the County violate Section 12.01 of the collective bargaining agreement when it had employees report to work prior to a hearing under subpoena on December 16, 2002?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

Article 3 – Management Rights

3.01 The management of the Highway Department and direction of the working forces is vested exclusively in the Employer, including, but not limited to, the right to hire, suspend, or demote, discipline or discharge for just cause, to transfer or lay off because of lack of work or other legitimate reasons, to subcontract for economic reasons, to determine any type, kind, and quality of service to be rendered to the citizenry, to determine the location, operation and type of the physical structures, facilities, or equipment of the Highway Department, to plan and schedule service and work, to plan and schedule any training programs, to create, promulgate and enforce reasonable work rules, to determine what constitutes good and efficient County service and all other functions of management and direction not expressly limited by the terms of this Agreement. The Union expressly recognizes the prerogative of the Employer to operate and manage its affairs in all respects with its responsibilities.

. . .

Article 12 – Leaves of Absence

12.01 Jury Duty, Subpoena Duty. Employees called for jury or subpoena duty shall continue to receive their regular pay, but will endorse over to the County the amount received for such duty, excluding mileage allowance for the time they have served such duty. If such an employee is released from jury or subpoena duty prior to the end of the normal workday, he/she will contact the

Operations Manager or designee for instructions. It is understood that such employees will not normally be required to return to work if less than two (2) hours remain in the normal workday. Employees who are not instructed to return to work will suffer no loss of pay.

. . .

Article 14 – Miscellaneous Provisions

14.05 Entire Agreement. This Agreement constitutes the entire agreement between the parties and no verbal statements shall supersede any of its provisions. Any amendment supplemental hereto shall not be binding upon either party unless executed in writing by the parties hereto.

RELEVANT BACKGROUND

Five employees of the Columbia County Highway Department were subpoenaed to appear before the State of Wisconsin Equal Rights Division for a hearing in the Columbia County Courthouse in Portage, Wisconsin. The subpoenaed employees, *i.e.*, Tom Borgkvist, Anne Deich, Richard Klaila, Mike Calkins, and Glenn Fisher, were subpoenaed to appear at 9:00 a.m.

In response to inquiries from employees regarding what they should do about the subpoena, Columbia County Highway Commissioner Kurt Dey issued the following memo:

MEMORANDUM

December 11, 2002

To: Employees Subpoenaed for December 16, 2002
From: Kurt W. Dey
CC: Corporation Counsel
Re: Work Schedule

Employees required to attend the court hearing on December 16, 2002 are expected to be at Wyocena on December 16, 2002 at 7:00 a.m. Employees required to be at the courthouse at 9:00 a.m. will be able to leave work at 8:00 a.m. if time is needed to change clothes prior to the hearing. After you have testified and are released by Counsel you are expected to return to work (Wyocena) to complete your work shift if prior to 3:30.

Each employee should use his or her own transportation to the courthouse.

Payments received directly to appear in Court are required to be paid to Columbia County less your mileage expense.

If you have any questions please call.

Thereafter, Union President Tom Borgkvist asked Dey why the employees were being required to report to work first because employees had not previously been required to report to work first. Dey responded that he was not aware of this.

Thereafter, a grievance was filed alleging that the County violated Article 12- Leaves of Absence, Section 12.01 Jury Duty, Subpoena Duty when all affected employees "were instructed to report to work at 7:00 a.m." The grievance was processed through the grievance arbitration procedure and submitted to arbitration.

POSITIONS OF THE PARTIES

Union 1/

1/ The arbitrator rejects the County's argument that the arbitrator should not consider the Union's brief because it was not filed in a timely manner.

As Union President Tom Borgkvist testified, the Union proposed the language that changed the "Jury Duty, Subpoena Duty" language, but that this proposal was in response to an idea raised by Highway Commissioner Kurt Dey. This proposed language relates to matters not at issue in this hearing, *i.e.*, returning to work following the release from subpoena duty.

With respect to the issue raised in this hearing, *i.e.*, reporting to work prior to reporting to subpoena duty, there is a long-standing practice in which employees have not been required to report to work prior to hearings to which they have been subpoenaed. This practice supports the Union's contention. The County's reliance on the grievance hearing practices of the parties is irrelevant because such practices do not involve subpoenas.

The silence of Section 12.01 with respect to whether or not employees should report to work prior to commencing jury or subpoena service renders the provision ambiguous. The ambiguity of Section 12.01 is not removed by reference to the broad generalizations contained in Management Rights, Section 3.01. Rather, it is the pattern of conduct between the parties that gives insight into the intended meaning of Section 12.01.

The County's assertion that employees first make a request of the Department and then receive approval is contrary to the evidence. Rather, the evidence indicates that, when employees received notice of jury duty or subpoena duty, they simply informed their respective supervisors or the "Operations Managers" of this fact and the supervisor responded by immediately adjusting the work schedule, without any prior discussion with the Highway Commissioner. The County's reliance on the Highway Commissioner's understanding of "practice" ignores the fact that he was not present when the employees informed their supervisor or the Operations Manager of jury or subpoena duty.

During the discussions in 1997, the Highway Commissioner never stated that he would "schedule employees as he deemed efficient." Inasmuch as the employee at issue received a full day's pay, there was no reason to grieve anything.

The Union's position does not lead to an absurd result. The examples of jury and subpoena duty offered at hearing, spanning many years, involve hearings that started at 9:00 a.m. or 10:00 a.m. Hearings that start at 1:00 p.m. or later are not what this case is about and practice is not established with respect to afternoon hearings.

The grievance should be sustained. The County should be ordered to cease and desist from deviating from the binding practices of the parties in the future, and the Arbitrator should order any additional remedy that she may find appropriate.

County

Section 3.01 of the collective bargaining agreement clearly and unambiguously reserves to the County the right to schedule and assign employees and the right to run an efficient operation. It is also very clear that all County rights exist unless specifically taken away in another part of the contract. There is no contract provision that limits the County's right to schedule work for employees prior to their commitment to jury or subpoena duty.

Historically, employees would notify the Highway Department of jury duty or subpoena duty and Highway Department management would then approve the need for leave. Prior to 1997, the Highway Commissioner was not aware that employees had been available for work prior to reporting to jury or subpoena duty, or after being released from jury duty. When the Highway Commissioner became aware that an employee had been excused from jury duty about mid-day, but had not returned to work, the Highway Commissioner met with the Union President and informed him that, despite any past history, the Department would not routinely approve such leave and that employees would be required to be at work when it was not necessary to be on leave for the jury duty or subpoena.

In response to this notice, the Union made a bargaining proposal that requested that the language be changed to note that an employee would not normally be expected to return to work if less than two (2) hours remained in the workday. Subsequently, the parties agreed upon the language found in Section 12.01 of the collective bargaining agreement, which language does not restrict the County from scheduling work for employees prior to reporting for jury or subpoena duty. In addition, the language that "normally" employees need not report back to work if less than two (2) hours remain in the workday, recognizes that it is not mandated that employees have a right to leave if less than two (2) hours exist. The Union had the opportunity to address the issue of reporting to work prior to subpoena or jury duty at bargaining, but did not do so.

Based upon his determination of efficiencies and his understanding that jury duty generally began early in the morning, the Highway Commissioner generally has not required employees to report to work first. However, if, in his judgment, sufficient time were available in the beginning of the day for work prior to jury duty or subpoena duty, he may require employees to report to work first and, if sufficient time remained at the end of the day, he could require employees to return to work. At no time has the County ever considered it a right for an employee not to be at work prior to, or after, jury duty or subpoena duty.

Historically, the Union and the County have had grievance hearings during the workday. The County has not put the Union to the trouble of serving subpoenas, but rather, has required employees to report to work first and then come to the grievance hearing to give testimony. The Union has provided a list of employees that would otherwise be subpoenaed and called to the grievance arbitration hearing. The lack of a formal subpoena does not distinguish this case from any other.

At hearing, Union President Tom Borgkvist acknowledged that Article 12 does not address the issue of scheduling of employees prior to jury or subpoena duty. If the contract language is ambiguous with respect to this issue, it should be construed against the Union as the drafter of the language. Borgkvist also acknowledged that the County retains the right to determine whether employees should report back to work after subpoena or jury duty, even with less than two (2) hours remaining in the day. Borgkvist's testimony is consistent with the understanding of the Highway Commissioner, *i.e.*, that the contract language provides management with the discretion to schedule employees. Had there been a clear contractual right to not work, the subpoenaed employees would not have asked what to do.

Article 14.05 supports the County's interpretation of the clear contract language. As noted within the section, no verbal statements supersede any of the provisions of the contract and any amendments must be in writing between the parties.

The Highway Commissioner evaluated the situation of December 16, 2002 and decided that, in the interests of County efficiency, employees should first report to the highway office in Wyocena. Work was performed that day by all subpoenaed employees and all reported in a timely manner to the Courthouse for testimony. The Highway Commissioner has exercised the County's contractual rights, as expressed in the contract, and consistent with the evidence of bargaining history and the prior conduct of the parties. The grievance should be dismissed.

DISCUSSION

Issues

Given the fact that not all practices of the parties are binding upon the parties and the grievance, as filed, alleges a violation of Article 12, the undersigned considers the County's statement of the issues to be more appropriate than that of the Union. The County's statements of the issues is as follows:

> Did the County violate Section 12.01 of the collective bargaining agreement when it had employees report to work prior to a hearing under subpoena on December 16, 2002?
>
> If so, what is the appropriate remedy?

Merits

As the County argues, Section 3.01 of the parties' collective bargaining agreement provides the County with certain enumerated and reserved rights. Standing alone, this Section would provide the County with the right to require employees "called for jury or subpoena duty" to report to work except as the employee's absence is required to meet the requirements of the "jury or subpoena duty." Section 3.01, however, does not stand alone. Rather, the rights granted to the County in Section 3.01 are subject to limitation by other provisions of the labor contract.

The Union relies upon Section 12.01 to argue that there is a contractual limitation upon the County's right to require employees to report to work prior to reporting to subpoena or jury duty. The first sentence of Section 12.01 of the parties' collective bargaining agreement provides employees "called for jury or subpoena duty" with the right to receive their regular pay for serving such duty. The second and third sentence of Section 12.01 modifies this right by recognizing that an employee released from jury or subpoena duty prior to the end of the employee's normal workday may receive regular pay for the remainder of the workday if, after contacting the Operations Manager or designee, the employee is not instructed to return to work. Management's discretion to instruct the employee to return to work is limited by the caveat that "employees will not normally be required to return to work if less than two (2) hours remain in the normal workday."

As the Union President acknowledged at hearing, and both parties recognize, the language of Section 12.01 does not expressly address the issue of scheduling employees to work prior to the employee reporting for jury or subpoena duty. However, under the contract construction principle that the expression of one thing is the exclusion of another, the expression of the requirement that employees contact the Operations Manager or designee upon release from "jury or subpoena duty" to determine if the employee is required to return to work implies that there is no requirement to consult with management regarding the need to work prior to being released from "jury or subpoena duty."

Neither the fact that employees questioned supervisors about what they should do when they received the December 16, 2002 subpoena, nor the failure of employees to immediately grieve the Highway Commissioner's memo of December 11, 2002, provides a reasonable basis to conclude that Section 12.01 does not provide a right to not report to work prior to reporting to "jury or subpoena duty."

In summary, the most reasonable construction of the plain language of Section 12.01 is that it limits management's Section 3.01 right to schedule employees on "jury or subpoena duty" both prior to and after being released from "jury or subpoena duty." The prohibitions contained in Article 14.05 do not preclude an arbitrator from considering evidence of the parties' bargaining history or prior conduct when interpreting Section 12.01. Thus, the undersigned reviews such evidence to determine whether or not it indicates the parties' mutual intent with respect to the language of Section 12.01.

The evidence of bargaining history establishes that, upon expiration of the 1997 collective bargaining agreement, the language governing "Jury Duty, Subpoena Duty" was contained in Article 7.03, which stated as follows:

> 7.03 Jury Duty, Subpoena Duty. Employees called for jury or subpoena duty shall continue to receive their regular pay, but will endorse over to the County the amount received for such duty, excluding mileage allowance for the time they have served such duty.

It is undisputed that, in 1997, an employee had been released from jury duty at approximately 10:30 a.m. and then went home. Although the employee was paid for the day, Highway Commissioner Dey had a conversation with Union President Borgkvist concerning this employee. As the arguments of the parties reveal, there is much dispute over what was said during this conversation.

A fair reading of the record, establishes that Dey was concerned with and discussed with Borgkvist only one issue, *i.e.*, the return to work of employees who are released from jury or subpoena duty. With respect to this issue, Dey told Borgkvist that he had a problem

with people going home after being released from jury duty and that this was going to stop because it was not efficient. It is not evident that Dey addressed any other use of Section 12.01 leave, or placed the Union on notice that all Section 12.01 leave would be scheduled as the County deemed efficient. To the extent that Dey's statements to Borgkvist repudiated a practice, the repudiation would be limited to the practice of employee's not returning to work after being released from jury or subpoena duty.

Borgkvist did not respond by telling Dey that the Union would eliminate "any practice." Rather, the most reasonable conclusion to be drawn from the record is that Borgkvist agreed to work with Dey to change the language or practice with respect to the issue under discussion, *i.e.*, employees who were released from jury or subpoena duty.

Following this discussion, the Union drafted language that the Union President believed would be acceptable to Dey and included this language in the Union's initial bargaining proposals on the 1998 contract. The County accepted the language that had been drafted by the Union, without any apparent discussion. This language, which addresses only the issue of employees released from jury or subpoena duty, is the language that is found in the last three sentences of Section 12.01 of the current contract. Construed within context, the evidence of Union conduct during the 1997 discussions with Dey and at the 1998 bargaining table, including the Union's failure to grieve Dey's statement that Dey was going to stop allowing people to return home after being released from jury duty, provides no reasonable basis to infer that the Union acknowledged any County right other than the rights that reasonably flow from the language that was agreed upon in the 1998 contract negotiations.

In summary, the most reasonable conclusion to be drawn from the evidence of the 1998 bargaining history is that the County did not repudiate any practice other than the one relating to employees released from jury or subpoena duty and that the parties did not reach any new understandings other than that reflected by the addition of the new language. As discussed above, the new language most reasonably leads to the conclusion that there is no requirement to consult with management regarding the need to work prior to being released from "jury or subpoena duty."

The County argues that the incidents of past conduct that occurred prior to the time that the parties agreed upon the language of Section 12.01 is not relevant "past practice" evidence. As a general rule, the County is correct. However, given the fact that the parties kept the language of Section 7.03 intact and added language that addresses only the rights of employees who have been released from jury or subpoena duty, the evidence of past conduct with respect to employees who were not yet released from jury or subpoena duty provides evidence of a mutual intent.

As the Union argues, prior to the instant grievance, no employee who had been "called for subpoena or jury duty" was required to report to work prior to reporting to subpoena or jury duty. Contrary to the argument of the County, it is not evident that, prior to the instant grievance, Dey ever evaluated any request for subpoena or jury duty leave prior to the employee taking such leave or that Dey approved or disapproved such leave for any reason, including efficiency of the Department.

As the Union argues, the record demonstrates that, prior to the instant case, it was the employee's supervisor or the Operations Manager that handled leave for subpoena or jury duty. The evidence of the communications between the employee and Management indicates that the employee reported that he/she had received a subpoena to the employee's supervisor, or the Operations Manager, and the supervisor or the Operations Manager responded by noting the employee's absence in the schedule and/or making a statement such as "OK", "Fine" or "Go ahead". At no time did the supervisor or the Operations Manager express any expectation that the employee report to work prior to reporting to subpoena or jury duty, or question the employee as to when the employee was required to appear for subpoena or jury duty. This conduct of the supervisors supports the conclusion that prior approval of jury and subpoena duty leave has been pro forma and not based upon the evaluation of efficiency, or any other Department need. Although the County argues that it is absurd to restrict the County's right to schedule employees who may be "called for subpoena or jury duty" at 1:00 p.m., the record provides no evidence that any employee has been "called for jury duty or subpoena duty" later than 10:00 a.m.

The record demonstrates that, when employees are required to testify in grievance arbitration hearings involving the parties, the employees have not been subpoenaed, but rather, such employees have worked their normal work schedule, except as needed to testify at the grievance arbitration hearing. Given the absence of a subpoena, this practice does not provide a reasonable basis to infer any mutual understanding with respect to employees who are "called for subpoena or jury duty."

The County argues that, with respect to the issue in dispute, the language of Section 12.01 is ambiguous and, thus, must be construed against the drafter of the language, *i.e.*, the Union. It is not evident, however, that the Union drafted the entire provision. Moreover, to the extent that the language drafted by the Union is ambiguous, the evidence of bargaining history and practice provide a more reliable indicator of the parties' mutual intent.

Conclusion

As the Union argues, there is no practice with respect to employees "called for jury or subpoena duty" after 10:00 a.m. However, the evidence of the practice with respect to employees "called for jury or subpoena duty" at 10:00 a.m. or before is sufficient to demonstrate a mutual understanding, *i.e.*, such employees are not required to report to work

prior to reporting to "jury or subpoena duty." Inasmuch as this mutual understanding is consistent with the mutual understanding reflected in the plain language of Section 12.01, the undersigned concludes that, by requiring employees to report to work prior to reporting for subpoena duty at 9:00 a.m. on December 16, 2002, the County has violated Section 12.01 of the parties' collective bargaining agreement.

The appropriate remedy is to order the County to cease and desist from requiring employees who are "called for jury or subpoena duty" at 10:00 a.m. or before to report to work prior to reporting to jury or subpoena duty. This cease and desist order does not apply to employees who may be subpoenaed to appear at an arbitration hearing between the parties because the evidence before this arbitrator suggests that such appearances may be governed by "past practices" of the parties which are not controlling in this case. Accordingly, this arbitrator makes no determination with respect to the rights of employees who are subpoenaed to appear in arbitration hearings between the parties.

Based upon the above and foregoing and the record as a whole, the undersigned issues the following

AWARD

1. The County violated Section 12.01 of the collective bargaining agreement when it had employees report to work prior to a hearing under subpoena on December 16, 2002.

2. The County is to immediately cease and desist from requiring employees who are required to report to jury or subpoena duty on or before 10:00 a.m. to report to work prior to reporting to jury or subpoena duty.

Dated at Madison, Wisconsin, this 9th day of June, 2004.

Coleen A. Burns /s/
Coleen A. Burns, Arbitrator

CAB/gjc
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