

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
APPLETON PROFESSIONAL POLICE ASSOCIATION

and

CITY OF APPLETON

Case 440
No. 63338
MA-12551

(Court Appearance Grievance)

Appearances:

Mr. Frederick Perillo, Attorney, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Suite 202, 1555 North RiverCenter Drive, Suite 202, Milwaukee, Wisconsin, appearing on behalf of the Appleton Professional Police Association.

Ms. Ellen Totzke, Deputy City Attorney, City of Appleton, Wisconsin, appearing on behalf of the City of Appleton.

ARBITRATION AWARD

Appleton Professional Police Association, hereinafter "Association," requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Association and the City of Appleton, hereinafter "City," in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. Lauri A. Millot, of the Commission's staff, was designated to arbitrate the dispute. The hearing was held before the undersigned on May 25, 2004, in Appleton, Wisconsin. The hearing was transcribed. The parties submitted post-hearing briefs, the last of which was received on July 15, 2004, at which time the record was closed. Based upon the evidence and arguments of the parties, the Undersigned makes and issues the following Award.

ISSUES

The parties stipulated that there were no procedural issues in dispute and agreed to the following substantive issue:

Did the City violate Article 4 of the collective bargaining agreement by denying the overtime slips of Officers Gross, Green, Pieper and Parker when they appeared at the Police and Fire Commission hearing on November 17, 2003? If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE 4 – OVERTIME

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The following definitions shall apply to determine payment:

1. Court: Court shall include any time an officer is instructed by the Chief or designee or subpoenaed (including City of Appleton court notices) to appear in person, or through telephonic communication, in any court, legal proceedings (including depositions), preparatory meetings with District Attorney's, City Attorney's and other appointed counsel which appearance is related to or arises out of the officer's scope of employment.

. . .

Court pay shall be three (3) hours straight time plus time and one-half for time worked.

. . .

An officer recalled to work or required to appear in court shall receive three (3) hours call-in pay at their regular straight time rate plus pay for the actual hours worked at the rate of time and one-half (1 ½). Call-in pay for an officer recalled to work shall be apply when the recall occurs within one-half (1/2) hour of the conclusion of the officer's scheduled shift. Call-in pay for court appearance shall not apply when such appearances are continuous with the start of the officer's scheduled shift or commenced within one-half (1/2) hour of the conclusion of the officer's scheduled shift.

. . .

BACKGROUND AND FACTS

The Grievants, Officers Jeff Gross, Brian Green, Greg Pieper and Michael Parker (hereinafter "Grievants" or referred to by name) were issued subpoenas on November 11, 2003, by the Chairman of the City of Appleton Police and Fire Commission. The subpoenas required them to appear at 9:00 a.m. on November 17, 2003, for the disciplinary hearing of fellow officer Darryn Davidson conducted pursuant to Sec. 62.13, Wis. Stats. Officer Davidson requested the subpoenas be issued to the Grievants. At approximately 9:15 a.m., in advance of the Grievants testifying, the subpoenas for the Grievants were quashed. Pieper, Green and Parker remained at the hearing following the quashing of the subpoenas. Gross reported for his scheduled shift. On the day of the hearing, November 17, 2003, Pieper was scheduled off; Parker and Green were scheduled to work later in the day, and Gross's shift began immediately following the quashing of the subpoena. Gross was the only Grievant that testified.

The Grievants each submitted a Voucher for Overtime Worked for their appearance at the disciplinary hearing. All Grievants indicated that the type of activity was "Court" and explained that they were subpoenaed for the PFC hearing. All overtime vouchers were denied on or about November 26, 2003. No officer submitted a claim for pay for any time following the quashing of the subpoenas.

The Association filed a grievance on December 17, 2003, seeking subpoenaed court appearance compensation for Gross, Green, Pieper and Parker consistent with Article 4 of the Labor Agreement. The grievance was denied on December 23, 2003, by Deputy Chief Peterson and by Chief Myers on January 14, 2004, on the basis that the "testimony proffered by the officers under subpoena was not arising out of or relating to the scope of their employment." The Departmental denial was upheld by the Human Resources department on February 6, 2004.

Grievant Michael Parker, a 29-year veteran officer for the City, was subpoenaed but did not testify at Davidson's PFC hearing. Parker stated that he expected to testify regarding the use of Code 9802, which is a Federal Bureau of Investigation reporting code for public assistance responses by law enforcement officers. Parker has trained other City police officers on the use of Code 9802, although he did not train Davidson. Parker had no personal knowledge or involvement in the five instances that were the subject of Davidson's discipline. Parker stated he has been subpoenaed "probably hundreds" of times to appear and give testimony for criminal matters in circuit court, depositions when he was the arresting or investigating officer, parole board and at least one instance in which he was not the arresting or investigating officer where he testified as a character witness. Parker received subpoena pay for all of these instances.

Grievant Pieper, a five-year City officer, was subpoenaed but did not testify at Davidson's PFC hearing. Pieper stated that he was not personally involved in any of the five instances that were the basis for discipline of Davidson. Pieper is not an Association board member nor did he train Davidson on the use of Code 9802.

Officer Marcus Novy, a six-year Patrol Officer with the City currently assigned to a school liason position. Novy did not recall whether he was subpoenaed to testify at Davidson's PFC hearing. Novy is president of the Association. Novy, as a result of his Association position, represented Davidson for his internal affairs investigation and was present and provided assistance to Davidson at the PFC hearing. Novy's regular work hours are 7:00 a.m. to 3:30 p.m. Novy was present at the hearing from 8:00 a.m. until the end of the hearing, which went beyond Novy's duty day. Novy received eight hours regular pay and did not submit an overtime request for the time that went beyond his normal work hours. Novy testified at the PFC hearing regarding inappropriate treatment, discrimination, retaliation-type complaints, his knowledge and the history of Code 9802, police procedure and the way he cleared calls. Novy in the past has been subpoenaed and has received subpoena pay for circuit court and probation revocation matters.

Richard Myers, City Police Chief, testified that he is ultimately responsible for all Police Department policies and procedures. Myers filed charges pursuant to Section 62.13, Wis. Stats. against Davidson after Davidson did not voluntarily accept discipline meted out by Myers. Myers was present at Davidson's November 17, 2003 PFC hearing and observed Novy and Gross testify. Myers does not believe Novy or Gross's testimony at the PFC hearing arose out of the scope of their employment. Myers believed that the Grievant officers were going to give "some opinions on - examples of cases that they may have used 9802" which Myers determined were not relevant to Davidson's case.

Further facts, as relevant, shall be included in the DISCUSSION.

POSITIONS OF THE PARTIES

Association

The City violated the labor agreement when it refused to pay court call time for four officers subpoenaed to appear at a police and fire commission hearing of a fellow officer. The Grievants' are entitled pursuant to Article 4 to court call time and overtime. Article 4 established three eligibility requirements: 1) the officer must be subpoenaed to appear in person; 2) at a legal proceeding; and 3) the appearance must be related to or arising out of the officer's scope of employment. The Grievants met these criteria and are entitled to compensation.

The City has not disputed the first two requirements. Chief Myers testified that the Grievants' "had no choice" (Assoc. Br. p. 9, Tr. p. 70) but to appear consistent with the subpoenas. A PFC hearing is a legal proceeding. *DURKIN V. BOARD OF POLICE & FIRE COMM'RS*, 48 WIS.2D 112, 122 (1970). Accord *SLAWINSKI V. MILWAUKEE CITY FIRE & POLICE COMM'N*, 212 WIS.2D 777, 815 (WIS. CT. APP 1997). As to the third criteria, everyone admits that the officers either testified or were anticipating to testify concerning their

knowledge of police procedure specific to the City. This type of testimony is generally considered within the scope of employment for police officers. CHARLEROI BOROUGH, 119 LA 385, 389 (DISSEN, 2003).

Regardless of whether the Grievants were the most appropriate witnesses to testify, Davidson sought and obtained a subpoena for their attendance. Article 4 of the labor agreement is designed to compensate police officers for the inconvenience of appearing for work when off-duty. The labor agreement does not allow the City to determine whose testimony is relevant.

Article 4 fails to require that the officer be the arresting officer or personally involved in the matter in order to be eligible for compensation. Such a requirement has not been enforced in the past since Parker testified that he has been compensated when called by an opposing party when he was not the arresting officer or personally involved in the case.

The City's position is inconsistent with its treatment of on-duty officers at the same hearing. The on-duty officers were not docked or ordered away from the PFC hearing. Either the City admits that the on-duty officers presence was within the scope of their duties or it admits that it paid employees for time not spent performing duties for the City and taxpayers.

Finally, the City investigated Sgt. Gross regarding his conduct while testifying for Davidson. Given the investigatory limitations set forth in *ODDSEN V. BOARD OF FIRE & POLICE COMM'RS*, 108 WIS.2D 143 (1982), which deny employers the right to question officers regarding their non-job related activities it can be concluded that Gross' testimony was *de facto* within the scope of his employment.

For the above reasons, the grievance should be sustained.

City

No violation of the labor agreement has occurred. The City's decision to deny the Grievant's overtime and/or call time was consistent with the agreement and the grievance should be denied. The Grievants were subpoenaed by Davidson, not the City, to appear at a Police Fire Commission hearing. This is not a court appearance related to or arising out of the officer's scope of employment. The Grievants were going to testify regarding the manner in which they use Code 9802. None of the officers were involved in, nor did they have any personal knowledge of any of the incidents that gave rise to Davidson's discipline. It is preposterous for the City to pay officers to speculate as to how they would deal with a situation when they have no personal knowledge of the situation. This is nothing more than a show of support for a union brother.

It would set a dangerous precedent for the Arbitrator to rule that the City is obligated to pay officers for testifying in out-of-court hearings concerning situations in which they have taken no official action or have not been personally involved in an incident or investigation. If that were the case, every officer who felt unjustly disciplined could parade a string of their supporters to a PFC hearing with the City footing the bill.

There is no past practice with regard to officer subpoenaed attendance at PFC hearings. No officer testified that they had ever been paid by the City for being subpoenaed to testify concerning an incident in which they had not been involved. Although there was mention of parole hearings, this involves an individual that the officer had previously arrested.

With regard to the officers who were working, testified and their pay was not docked, the City was generous. This is an attempt by the Association to obtain extra pay for the attendance of these officers.

There is no difference between these officers seeking compensation for their attendance at the PFC hearing and the actions of the officers in WALWORTH COUNTY, DEC. NO. 28681-A (GRECO, 9/96) wherein the hearing examiner concluded that employees subpoenaed to testify at the unit clarification hearing were seeking a benefit to which they were not entitled.

As to the Association's bootstrapping of the charges pending against Sgt. Gross to the case, it is misplaced. Gross's charge of misconduct has no bearing on his attendance at the Davidson hearing.

The City respectfully requests that the grievance be denied.

DISCUSSION

The issue in this case is whether the Grievants were entitled to overtime pay as a result of receiving a subpoena to appear at a PFC hearing. The Union asserts the contract language is clear and unambiguous and entitles the Grievants to overtime compensation while the City asserts that the Grievants are "attempting to stretch their interpretation of Article 4 of the Collective Bargaining Agreement to the breaking point." City Br. p. 8. The first issue, therefore, to address is the language of Article 4, sub-section 1.

Article 4 of the labor agreement provides officers overtime compensation in multiple circumstances. The provision relevant to this case is sub-section 1 regarding "Court" which states:

Court shall include any time an officer is instructed by the Chief or designee or subpoenaed (including City of Appleton court notices) to appear in person, or through telephonic communication, in any court, legal proceedings (including

depositions), preparatory meetings with District Attorney's, City Attorney's and other appointed counsel which appearance is related to or arises out of the officer's scope of employment.

There are four separate qualifying criteria: 1) the officer must be directed by the Chief or subpoenaed; 2) to appear, either telephonically or in person; 3) in any court or legal proceeding; and 4) the appearance is related to or arising out of the scope of the officer's employment.

As to criteria one, the Grievants received subpoenas to appear at the PFC hearing. The subpoenas were issued consistent with Section 62.13 Wis. Stats. and were valid when issued. Although the subpoenas were eventually quashed, Chief Myers testified that the Grievants were not at liberty to defy the subpoenas without subjecting themselves to legal ramifications. The City has not challenged the issuance of the subpoenas. The Grievants, therefore, met criteria one.

As to criteria two, the subpoenas obligated each officer to appear at the PFC hearing. The evidence establishes that each of the Grievants appeared as directed. The Grievants were not in scheduled on-duty status at 8:00 a.m. which was the designated time of the appearance. The Grievants met criteria two.

Criteria three requires that the appearance must be for a court or legal proceeding. The City asserts the PFC is neither a legal proceeding or a court hearing. I disagree. PFC's are viewed as administrative agencies obligated to administer statutory provisions. *CONWAY V. BOARD OF POLICE AND FIRE COMM'N*, 256 WIS.2D 163, 647 N.W. 291 (2002) citing, *STATE EX REL. SMITS V. CITY OF DEPERE*, 104 WIS.2D 26, 37, 310 N.W.2d 607 (1981). PFC's conduct public evidentiary hearings when discipline is not accepted by a subordinate officer. See Sec. 62.13(5), Wis. Stats. Hearings before administrative agencies are governed by Chapter 227 and these are clearly legal proceedings. Moreover, the Chairman of the City's Police and Fire Commission issued the Grievants' subpoenas pursuant to Sec. 885.01(4), Wis. Stats. which authorizes the issuance of the subpoenas "in any matter, proceeding or examination authorized by law." Finally, Chief Myers did not dispute that a Police and Fire Commission hearing is a legal proceeding. Tr. p. 74. The Grievants met this criteria.

Criteria four requires that the officers testimony must be "related to or arise out of his employment." The City challenges the content of the officers' testimony characterizing it as "preposterousness" for the City to "pay officers to speculate as to how they would have dealt with situations of which they have no personal knowledge." Although I understand with the City's concern, I do not find that the language of the labor agreement allows the City to deny the Grievants overtime compensation for their subpoenaed appearance.

Officer Davidson was disciplined as a result of five instances in which Chief Myers determined that he had acted inappropriately. Davidson did not believe the discipline was warranted and therefore requested a PFC hearing. The purpose of the hearing was to

determine whether Chief Myers had met the just cause requirements of Sec. 63.13 when he imposed the discipline. Some or all of the instances involved the subjective determination by Davidson that the calls were Code 9802. Officer Gross testified as to his knowledge and use of 9802 clearance codes by officers and supervisors at the Appleton Police Department. Tr. p. 46. The Grievants that did not testify understood that they were going to testify regarding Code 9802 procedure. The subpoenaed testimony, in order to comply with Article 4 must arise out of the scope of the employee's employment. Code 9802 is a law enforcement code. Non-law enforcement personnel would generally not have a working knowledge of this code and non-City of Appleton law enforcement officers would not have a working knowledge of the method and use of Code 9802 in the City. Although I agree with the City that since the Chief of Police creates the policies and procedures for the City he is the best witness to explain the rationale and basis for the policy or procedure, I also understand that policies and procedures are not always implemented consistent with the intent of management.

The testimony that was offered is consistent with a just cause analysis. Inherent in the statutory just cause analysis for Police and Fire Commission hearings are general fairness considerations and specifically, a determination as to whether the rule or order was applied fairly and without discrimination. Sec. 62.13(5)(em)1-7, Wis. Stats., and specifically, Sec. 62.13(5)(em)6 Wis. Stats. One method utilized to determine whether a rule has been uniformly applied is to obtain the testimony of colleague employees who describe how they respond or react in a similar situation and whether they have been disciplined for the same behavior. This allows the tribunal the opportunity to compare and contrast the circumstances and the reactions of similarly situated employees when put side by side with the behavior of the charged employee. Ultimately, the tribunal reaches a conclusion as to whether there has been a uniform enforcement of the rule or order. Officer Gross's testimony provided the tribunal this opportunity and had the other Grievants' testified, the tribunal would have had additional relevant evidence to consider.

The City did not dock the pay of the on-duty officers that testified at the PFC hearing. This included Officer Gross. It is reasonable to conclude that the failure of the City to dock the on-duty officers pay is further evidence that their testimony was related to their employment since it would be inappropriate to pay the officers for non-work related activities during working hours.

Given the facts that the Grievants' testimony related to law enforcement and City of Appleton specific policy, procedure and practice; that this type of evidence is relevant to the Police and Fire Commission statutory just cause analysis contained in Sec. 62.13(5)(em), Stats.; and that the City approved payment for similar testimony by on-duty officers, I conclude that the Grievant Gross's testimony and the anticipated testimony of Officers Green, Parker and Pieper arose out of scope of their employment with the City.

The City relies on Examiner Greco's decision in WALWORTH COUNTY, ID. in support of the proposition that the Grievants' have not lost pay in this instance, but rather are looking for extra pay not provided for in the labor agreement. WALWORTH COUNTY, ID. is

distinguishable. There is clear language in the Section 4 of parties' agreement that provides for compensating officers when served a subpoena to appear in court or a legal proceeding whereas there was no such language in WALWORTH COUNTY, ID.

AWARD

1. Yes, the City violated Article 4 of the collective bargaining agreement by denying the overtime slips of Officers Gross, Green, Pieper and Parker when they appeared at the Police and Fire Commission hearing on November 17, 2003.

2. The remedy shall be for the City to pay Officers Green, Pieper and Parker court call-in pay and overtime and to pay Officer Gross for overtime per their overtime slips in compliance with Article 4, sub-section 1 for their subpoenaed appearance on November 17, 2003.

Dated in Rhinelander, Wisconsin, this 8th day of November, 2004.

Lauri A. Millot /s/

Lauri A. Millot, Arbitrator