

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**COLUMBIA COUNTY**

and

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

Case 283

No. 68497

MA-14252

(Subpoena Leave Grievance)

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**Appearances:**

**Joseph Ruf, III**, Columbia County Corporation Counsel and Human Resources Director, 120 W. Conant Street, P.O. Box 63, Portage, WI 53901, appeared on behalf of Columbia County.

**Neil Rainford**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, WI 53717-2900, appeared on behalf of Columbia County Employees Local 995 and Grievant Timothy Fisher.

**ARBITRATION AWARD**

Columbia County, herein the County, and Columbia County Employees, Local 995, AFSCME, AFL-CIO, herein the Union, are parties to a collective bargaining agreement which provides for the final and binding arbitration of certain disputes. The Union filed a Request to Initiate Grievance Arbitration with the Wisconsin Employment Relations Commission for arbitration of a grievance filed by the Union on behalf of one of its members, Timothy Fisher, herein Fisher or Grievant, concerning the County's denial of Grievant's request for payment for subpoena leave and related matters. Commissioner Paul Gordon was designated as the arbitrator. Hearing on the matter was held on February 20, 2009 in Wyocena, Wisconsin. A transcript was prepared. The parties filed written briefs and reply briefs and the record was closed on May 7, 2009.

**ISSUES**

The parties did not stipulate to a statement of the issues. The Union states the issues as:

Whether the Employer violated the collective bargaining agreement when it refused to pay the Grievant, Tim Fisher, during an absence required by a subpoena and when it refused to allow him to return to work and when it extracted vacation leave to cover his absence?

If so, what is the appropriate remedy?

The County states the issues as:

Did the Employer violate the Subpoena Leave portion of section 12.01 of the collective bargaining agreement by denying Fisher paid leave on June 12, 2008?

If yes, what is the remedy?

The undersigned states the issues reflected by the record as:

Did the County violate the collective bargaining agreement as it pertains to subpoena leave, vacation, or return to work provisions for Grievant's absences on June 12, 2008?

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, too 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.

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#### **ARTICLE 7 - HOURS OF WORK**

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7.03 4-10 Schedule. The parties agree that a modified work week consisting of four (4) ten (10) hour days (hereafter referred to as the "4-10 schedule") will be implemented on a seasonal bases, according to the following conditions:

a. Term: The term of the 4-10 schedule shall be from the third Monday in April through the last Thursday in September.

b. Participation: During the 4-10 schedule period, all employees in the bargaining unit shall be subject to the 4-10 schedule, except ferry operators, ferry mechanic, and any dispatching positions.

c. Work Day. During the term of the 4-10 schedule, the normal work day shall commence at 6:00 a.m. and shall conclude at 4:00 p.m. with a fifteen (15) minute aid morning break and a fifteen (15) minute aid lunch break.

d. Work Week: During the term of the 4-10 schedule, the normal workweek shall be Monday through Thursday.

e. Overtime: the Highway Commissioner or his/her representative shall authorize all overtime. All employees shall be paid time and one-half (1½) for all hours worked in excess of ten (10) hours per day and for all hours worked in excess of forty (40) hours per week. All time paid shall be considered time worked. Under no circumstances shall overtime be paid twice for the same hours.

f. Holiday: During the term of the 4-10 schedule, whenever a paid holiday occurs, employees will work 3-10 hour days and receive ten (10) hours holiday pay. If a holiday falls on Friday or Saturday, the previous Thursday shall be treated as the holiday. If a holiday falls on a Sunday, the following Monday shall be treated as the holiday.

g. Sick Leave: During any 4-10 schedule period, sick leave shall continue to accrue at the rate of eight (8) hours per month. When an employee uses sick leave, he/she shall be paid for the time lost, up to a maximum of ten (10) hours per day. The time used shall be deducted from the employee's sick leave accumulation.

h. Vacation: Each employee shall have his/her available vacation converted to hours, such that each week of vacation is converted to forty (40) hours. Vacation time used during the 4-10 schedule period shall be deducted from the employee's accumulation, not to exceed ten (10) hours per workday. The maximum vacation paid in one week shall be forty (40) hours. Vacation may be used in increments of four (4) hours, except that at the end of the day, vacation may be used in increments of two (2) hours.

i. Bereavement Leave, Jury Duty, Subpoena Duty: In the event that Leave under Sections 12.01 or 12.02 of this Agreement is required by any employee during a 4-10 schedule period, the employee shall be paid for time missed from work due to such absences, not to exceed ten (10) hours in one work day.

j. Floating Holiday: Employees may use personal holidays during a 4-10 schedule period. Employees who use a personal holiday will receive eight (8) hours of pay for the personal holiday and will be required to use two (2) hours of vacation pay.

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ARTICLE 10 – VACATION

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10.06 USE: Employees are urged to schedule their vacations at the earliest possible date but not less than ten (10) days written notice to the office shall be required, unless prior approval of the Supervisor is secured, in the Supervisor's sole discretion, for leaves of less than ten (10) days notice. Applications for vacations shall be obtained from management, and all requests shall be approved by the Highway Commissioner or person he/she may designate and a written permit shall be issued to the employee. Vacation may be used in increments of four hours, except that at the end of the day, vacation may be used in increments of two (2) hours.

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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.

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ARTICLE 14 – MISCELLANEOUS PROVISIONS

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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.

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BACKGROUND AND FACTS

Grievant is employed in the Columbia County Highway Department and is in the Union bargaining unit. He is a general equipment operator holding the position of patrolman. At all relevant times Grievant was on a 4-10 schedule, 6:00 a.m. to 4:00 p.m. as set out in Article 7, Section 7.03 of the collective bargaining agreement. Grievant received a subpoena duces tecum, dated May 30, 2008 and signed by his spouse's attorney, commanding his appearance and that he bring documents relating to his income, including lawn mowing jobs and other side jobs, at a hearing concerning his pending divorce. The hearing was scheduled

in the subpoena for June 12, 2008 starting at 10:00 a.m. in Portage, Wisconsin. He did not know that he was going to receive a subpoena until he got it. He and his attorney in the divorce action had also received a Notice of Hearing for the same hearing which stated, among other things: "All parties and counsel shall be personally present." Grievant had previously been served with, among other things, an Order to Show Cause for a previous hearing in the divorce action. He had also received at least one other Notice of Hearing for a status conference in the divorce action stating that he, or counsel (if retained) must be personally present. He did not personally attend all the Noticed court status conferences because his attorney attended for him. The subpoena for the June 12<sup>th</sup> hearing was the only subpoena he had received in the divorce action up to that time. He was not paid a witness fee or mileage from his wife's attorney's office or anyone else for the June 12<sup>th</sup> court appearance. June 12<sup>th</sup> was a scheduled work day for him.

Grievant told his Local Union president and the Shop Operations Manager for the Highway Department about the subpoena about a week before the hearing date. At that time there was some brief discussion about what leave, including subpoena leave, might apply to the situation. After that discussion Grievant was not sure how the leave would be handled and management had indicated it would not be covered under subpoena leave.

On June 12<sup>th</sup> Grievant worked from 6:00 a.m. to 9:30 a.m. and then used 30 minutes of sick leave to attend a chiropractic appointment, after which he attended his 10:00 a.m. court hearing. His court hearing started shortly after 10:00 a.m. and lasted about 40 minutes. After that he returned to work and reported in at the County shop operations building in Wyocena between 11:30 a.m. and 12:00 p.m., wanting to work. He first spoke with Norm Dahl there about returning to work that day. A question arose about his ability to return to work that day and what the leave provisions required or allowed. T.O. Boge, the Assistant Highway Commissioner, whose office is across the street from the shop operations building, was then contacted by Dahl about the matter. Boge had had a telephone conversation with Grievant that day around noon wherein Boge told Grievant to take vacation and not come in. When he got the call from Dahl, Boge then spoke with the Office Manager in the Highway Office about the matter and went across the street and spoke with Grievant about subpoena leave and vacation leave. This conversation took place sometime between noon and 12:30 p.m. Grievant was not in his work clothes, but had his work clothes available. Grievant was told that the subpoena leave was not available to him because the subpoena for the divorce case was not work related. He was also told that under the collective bargaining agreement he could not return to work and use vacation time for the hearing time because it occurred in the middle of the day, Grievant having worked earlier that morning. He was told he could not return to work and that he would have to use vacation for the balance of the day's time after the sick leave. The County has a work rule that provided under a vacation, an employee can take four hours at the start of the day and at the end of the day they can take two hours or they can use six hours. They cannot use a four-hour at the end of the day.

Grievant then went home using six (6) hours of vacation for that day. He was called back to work at 4:30 p.m. that day due to the amount of work needed to be done as a result of severe storms.

In 2007 a bargaining unit member, Mike Arndt, was subpoenaed by the Sauk County District Attorney to appear and testify as a witness on behalf of Sauk County in a court hearing concerning a different individual's traffic matter in that county. The employee had presented the subpoena to management for leave under the subpoena duty provisions of the collective bargaining agreement and the County initially denied the request because the subpoena was not for a matter that involved Columbia County or the employee's employment with the County. The employee was required to take vacation time for the time at the hearing. At about the same time another bargaining unit member, Patrick Cadigan, had been subpoenaed by the Marquette County District Attorney to appear and testify as a witness on behalf of Marquette County in a court hearing in a criminal prosecution matter concerning a different individual. The County also initially declined to allow that employee to use subpoena leave. These two subpoena matters were the subjects of a combined grievance filed by the two employees over the denial of subpoena leave. That combined grievance was settled by the parties, facilitated by Arbitrator Stuart Levitan, with subpoena leave being paid to them.

Prior to Grievant's matter the County has allowed subpoena leave and pay for employees who were subpoenaed for matters directly related to their work or employment with the County. There have not been many requests for subpoena pay for matters not related to County employment. For approximately the last 21 years the County has not paid for subpoena leave under the collective bargaining agreement for subpoena duty for a personal matter up until the grievance of Arndt and Cadigan was resolved in March of 2008. Since then neither the County nor the Union proposed any changes in the language of Section 12.01 in the bargaining sessions which later ensued for a successor contract which would narrow the instances in which an employee who was subpoenaed into a hearing would be paid.

Grievant filed a grievance contending essentially that when he was subpoenaed into court the County forced him to take vacation in violation of Article 12.01 Jury Duty, Subpoena Duty, of the collective bargaining agreement. The grievance was denied by the County which led to this arbitration.

Further facts appear as are in the discussion.

### **POSITIONS OF THE PARTIES**

#### **Union**

In summary, the Union argues that the agreement provides for regular compensation of employees who are called for subpoena duty. Section 12.01 of the collective bargaining agreement clearly requires that the employer "continue the regular pay" of employees called away from work as a result of a subpoena. Grievant received a subpoena requiring his attendance on June 12, at 10:00 a.m., commanding him to appear before the Family Court Commissioner. There can be no claim that Grievant is not willing to endorse over to the County any amount received for his appearance. When the County refused to continue his regular pay for the period that he was absent from work in response to the subpoena, the County violated the clear language in the first sentence of Section 12.01.

The Union argues that the agreement provides for no loss of pay of employees who are instructed not to return to work. Section 12.01 also clearly requires that employees who are released for subpoena duty before the end of the day and who contact the Operations Manager

or designee for reporting instructions, will either be returned to work or they will suffer no loss of pay if they are instructed not to return to work. Grievant satisfied the requirement of contacting the Operations Manager when he returned to the Highway Department following his hearing and requesting an assignment. When the County refused to assign him work and required him to use vacation in lieu of what would otherwise result in a loss of pay, the County violated the clear language of the second and third sentences of Section 12.01.

In reply to the County's arguments, the Union argues that there is no explanation for the County's leap of restricting subpoena duty to the service of citizens who are not a party to the case in which they serve, other than its location in the same article of the agreement as Jury Duty. This would make non-sense of any collective bargaining agreement. This would be like applying principles of dental insurance to vision, life and health insurance because they are in the same article governing different type of insurance. The County's attempt to pick out random characteristics of jury duty and apply them to subpoena duty carries no weight.

The Union argues the statutory floor argued by the County makes no sense. The parties would not have drafted and included Section 12.01 if there were already statutory guarantees of the same benefit. The County argument is contrary to the principal of contract construction requiring meaning to all provisions of the agreement. It is clear that the parties included Section 12.01 precisely because employees may be called away from the workplace involuntarily through jury notices and subpoenas, and that they were to be paid in such instances. The language is clear and wide open. The County wants to restrict the provisions for only some kinds of subpoenas. Instead of bargaining a restriction, the County ignored the clear language of the agreement. Failure to correct the County would be harmful to labor relations.

The Union also argues that the Burns arbitration decision is limited because Grievant here worked the morning of the incident. The Levitan grievance settlement demonstrates the County was making the same claim regarding the limited instances in which an employee would be paid that it is attempting to make here. The County advocate had taken the position that employees do not receive paid time off to testify in matters that do not involve Columbia County. The County conceded and signed the precedential settlement agreement, and also conceded its ability to successfully raise the same claim in the instant dispute.

The Union further argues the County's reliance on a work rule makes no sense because it admitted it deviated from its own "rule" when it allowed Grievant to use vacation in the middle of the day to respond to a subpoena. The argument has no force because it is predicated on the failed claim that Section 12.01 did not apply to the Grievant. The County further violated the agreement when it sent the Grievant home and took his vacation benefits to cover the remainder of the work day at the time he reported back to the work site. By sending him home the County took on the additional liability of the remainder of the work day which it must restore to Grievant's vacation bank.

The Union argues what the Grievant knew or did not know about benefits provided by the contract is irrelevant when he attended other hearings without complaint. The crucial difference between the hearings is that here he was subpoenaed to attend and complained about

not being paid to attend after he had received a subpoena. Receipt of a subpoena triggers the paid leave benefit in Section 12.01. It is as simple as that. For the other hearings he was notified for he could send his attorney. For the hearing he received the subpoena for, he was required to attend, bring documents and answer questions under oath. His attorney could not do that for him. Grievant was required to attend and under the agreement the employee shall continue to receive their regular pay.

The Union also argues that the County's claim that the remedy is limited to the period after Grievant returned from the hearing is disingenuous and without merit. The statement of issues determines the nature and scope of the dispute and remedy. The County attempt to take a portion of the testimony out of context and use it to limit the scope of the proceeding is beyond the pale and disrespectful.

### County

In summary, the County argues that neither the plain language of Section 12.01, nor any reasonable interpretation of the Subpoena Duty provision of that section required the County to provide paid leave to Grievant to attend a hearing in his own divorce. The Section states that a paid leave benefit is provided to employees for subpoena duty. Section 12.01 does not include the same benefit for any employee who receives a subpoena regardless of the type of case or the employee's status as a party in a case. The Union's reading of Section 12.01 would expand the subpoena duty benefit in a manner wholly inconsistent with the rest of Section 12.01. Section 12.01 provides the same benefit for both jury duty and subpoena duty. Jury duty is generally understood a compulsory civic duty in which the government requires a qualified citizen to participate in the judicial process. An essential component of jury duty requires jurors, in order to be impartial, have no interest in or knowledge of a case in which they are to serve as jurors. Neither jury duty nor subpoena duty are defined in Section 12.01, but guidance is found by the principle of *noscitur a sociis*, meaning that an unclear word or phrase should be determined by the words in the rest of the section. Since jury duty involves participation in a case in which the employee is not a party, subpoena duty has a similar meaning. Section 12.01 only confers a benefit when the employee subpoenaed is not involved in the case and in which the employee is certainly not an interested party. Along those lines, both jury duty and subpoena duty must also be seen to contain the common element of a public or civic duty rather than a matter of personal interest.

The County argues that Wisconsin statutes governing subpoenas do not require the County to provide paid leave to an employee to attend hearings in non-work related cases or in which an employee is a party. Wisconsin law requires an employer to grant an employee a leave of absence for jury, but does not require that the leave necessarily be in a paid status, citing Sec. 756.255, Wis. Stats. Wisconsin law requires that an employer allow an employee to be absent from work only in cases pertaining to a crime or a juvenile proceeding, citing Sec. 103.87, Wis. Stats. And that section specifically provides that an employer must pay an employee for an absence to testify under a subpoena only in cases that involve a crime against the employer or an incident involving the employee during the course of the employee's employment. Wisconsin law does not require paid leave for an employee required to testify for any reason, including a case in which the employee is an interested party. Section 12.01 provides a paid leave for jury duty, which is not at issue here. Section 12.01 similarly



provides a paid leave for subpoena duty as required in those situations described in Section 103.87, Wis. Stats., but neither Wisconsin law nor Sec. 12.01 requires or provides paid leave for an employee who receives a subpoena in any case, regardless of the type of case or the employee's personal interest in that case.

The County also argues that prior WERC cases in which the County and the Union asked the WERC to resolve disputes concerning Section 12.01 do not require the County to provide paid leave to an employee to attend hearings in non-work related cases in which the employee is a party. In COLUMBIA COUNTY HIGHWAY DEPARTMENT AND AFSCME LOCAL 995, Case 225, No. 62300, MA-12229 (BURNS, 6/9/04) all the employees were subpoenaed to attend a hearing in a case that was directly related to their employment with the County. In that case the arbitrator was asked to rule on the issue of whether the County could require employees to report to work at 7:00 a.m. prior to reporting to testify under subpoena at 10:00 a.m. The arbitrator ruled that the County could not require employees to report to work prior to being required to serve jury duty or subpoena duty at or before 10:00 a.m. In that case the arbitrator never had to reach the question of whether an employee should be paid to attend a hearing in a case in which the employee is a party. The only other WERC case involving Section 12.01 was a grievance arbitration in which the parties ultimately agreed that employees who were subpoenaed in criminal cases would receive paid leave for the time spent in court, a result that is consistent with Section 103.87, Wis. Stats. No other WERC cases involving Section 12.01 were found. At the hearing in the instant case neither party could point to any case where an employee had received paid leave to attend a hearing in a non-criminal, non-work related matter.

The County further argues that the County reasonably exercised its management rights and a well-established work rule when it declined Grievant's offer to return to work for the last few hours of the workday on June 12, 2008. The employees were working a four (4) ten (10) hour day schedule. Grievant worked from 6:00 a.m. to 9:30 a.m. and used thirty (30) minutes of sick leave. Between 10:00 a.m. and 12:00 p.m., or 1:00 p.m. or 1:30 p.m. Grievant attended the hearing and returned to the Highway Shop and asked to work until the end of the normal work day. This is a total of only 3.5 or at most 4 hours, but was told by management to use vacation for the rest of the day. Both the Article 10 eight (8) hour day vacation benefit and the Article 7 ten (10) hour day vacation provision contain limits on how an employee may use vacation. These limits are additionally covered by the Article 3 Management Rights provision. Management has established a work rule that prohibits employees from using vacation in the middle of the day. Grievant was aware of the work rule. Management has the Article 3 right to determine that at the last part of a workday, returning an employee to a work site would be neither efficient nor required. The County deviated from its normal vacation use rule and permitted Grievant to use sick leave and vacation time starting at 9:30 a.m. because the County recognized that Grievant had to attend a court hearing in his own divorce. However, just as the County was not required to provide Grievant with paid leave to attend that divorce hearing, the County was also not required to permit him to return to work after the divorce hearing for the last few hours of the work day on June 12<sup>th</sup>.

The County argues that Grievant knew that he had to attend one or more hearings in his own divorce and only felt aggrieved by not being permitted to return to work on the afternoon of June 12, 2008. It is understandable that Grievant may have a less than perfect recollection

of the dates of various notices and court hearings in the divorce case. Still, the record shows that he first received notice of a November 28, 2007 Order to Show Cause Hearing on November 14, 2008. He received a notice dated March 27, 2008 of a May 2, 2008 status conference. That notice provided that he or counsel (if retained) must attend and Grievant hired an attorney to represent him. A May 6, 2008 Notice of a June 12, 2008 Order to Show Cause Hearing was sent to Grievant's attorney and required Grievant to attend. Yet, at the hearing in this arbitration Grievant only recalled the subpoena duces tecum from his ex-wife's attorney and couldn't remember whether his own attorney ever told him about the June 12<sup>th</sup> hearing. A final Hearing Notice dated June 9, 2008 for a September 2, 2008 final hearing was sent to Grievant's attorney. Grievant only remembered attending two (2) hearings, but none of the specifics. The Record and notices of hearings and the fact that Grievant was represented by an attorney in the divorce do not support the contention that Grievant had no notice of the June 12<sup>th</sup> 2008 hearing prior to receiving the subpoena duces tecum from his wife's attorney. The real purpose of the subpoena duces tecum as shown in its text was to require Grievant to bring records of County wages, lawn mowing and side work to the June 12<sup>th</sup> hearing that grievant was already supposed to attend. In any event, Grievant made it clear at the arbitration hearing that in his view, the grievance was limited to the County decision not to allow him to return to work at some point between 12:00 p.m. and 1:30 p.m. on the afternoon of June 12, 2008. As a result, the relief that he seeks should the arbitrator sustain the grievance is limited to crediting him with three and one half (3.5) or at most four (4) hours of vacation time that he was required to use on the afternoon of June 12<sup>th</sup>. The County continues to maintain that no relief is required because no violation of Section 12.01 occurred. The return to work and paid leave status of Section 12.01 did not apply because Grievant's absence was caused by an appearance in his own divorce case and not as a result of subpoena duty where an employee is required to perform a civic duty by testifying in a criminal or work related case as provided in Section 103.87, Wis. Stats.

In reply to the arguments of the Union, the County argues that subpoena duty, as that phrase is used in Section 12.01, does not mean any subpoena in any case. If Section 12.01 was intended to provide employees with paid leave any time that an employee received a subpoena, then the language of Section 12.01 would have been drafted that way, which it was not. Instead, it addressed both jury duty and subpoena duty in the same section and provides an identical benefit for both situations. It is reasonable to conclude that subpoena duty, like jury duty, must also contain the common element of public or civic duty as opposed to involvement in a matter of purely personal interest. The subpoena here requiring Grievant bring documents to a previously noticed hearing in his divorce does not qualify as subpoena duty under Section 12.01. Neither Wisconsin statutes, past WERC cases, nor any past practice between the parties would provide the benefit claimed by the Union in this case. And, in order for the return to work language of Section 12.01 to apply, an employee must fall within either the jury duty or subpoena duty requirements. As noted, subpoena duty does not mean anytime an employee receives a subpoena the employee is entitled to paid time off. Since the June 12, 2008 subpoena for a hearing in his own divorce did not qualify as Section 12.01 subpoena duty, Grievant did not qualify for the return to work benefit of Section 12.01. Grievant's conscientiousness in returning to the Highway Shop after court was commendable and his interest in trying to limit the amount of vacation that he had to use was certainly understandable. However, under Article 3 of the collective bargaining agreement and the well-established management practices of the Department, the County was not required to permit

him to return to work for the last few hours of June 12, 2008. Management is empowered under Article 3 to make decisions concerning the efficient use of staff and resources. On June 12<sup>th</sup> management slightly deviated from the normal work rule which does not permit employees to take time off in the middle of the day, and allowed Grievant to work 3.5 hours before going to a 30 minute chiropractic appointment and then attending his own divorce hearing. That he was allowed to work a few hours in the morning did not create a requirement that Grievant be permitted to return to work for a few hours at the end of the day or be provided with paid leave because the County declined his offer of work. Finally, the Union's desired remedy of reinstating 6 hours of vacation time is not an accurate application of the return to work provision of Section 12.01. There was at most 3.5 to 4 hours of work time remaining until normal end time. It is unlikely Grievant would not have accomplished much more than changing into work clothes, traveling to a job site, perhaps performing a few minutes of work and then driving back to the Highway Shop to end the work day. Therefore, any remedy should be reasonably limited to 3.5 or at most 4 hours. He is not entitled to a remedy because the County did not violate Section 12.01 and management was not obligated to accept his offer to return to work or provide him with paid leave for the remainder of the day.

### DISCUSSION

The issues to be decided center around whether Grievant is entitled under Article 12, Section 12.01 of the collective bargaining agreement to paid subpoena leave for attending a court hearing in his divorce proceedings after his wife's attorney subpoenaed Grievant for a hearing starting at 10:00 a.m. on a day he was scheduled to work. Grievant had known about the upcoming hearing from a Notice of Hearing, but had not known he was going to be subpoenaed to the hearing until he actually received the subpoena duces tecum. Grievant worked 3.5 hours the morning of June 12, 2008. He then used 30 minutes of sick leave to go to a chiropractic appointment on his way to the court hearing, which he attended. After the court hearing grievant went back to the County Highway Department in Wyocena by noon and requested to go back to work. The request was denied and he was told by management that he had to take six hours vacation time, which covered the time between the court hearing and the end of the regularly scheduled work day. Grievant filled out his time card that way and went home.

Article 12.01 of the collective bargaining agreement states:

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.

Jury duty and subpoena duty are also referenced in Article 7 – Hours of Work, Section i.:

- i. Bereavement Leave, Jury Duty, Subpoena Duty: In the event that Leave under Sections 12.01 or 12.02 of this Agreement is required by any employee during a 4-10 schedule period, the employee shall be paid for time missed from work due to such absences, not to exceed ten (10) hours in one work day.

Article 7, Section H also provides for vacation and, among other things, states: “Vacation may be used in increments of four (4) hours, except that at the end of the day, vacation may be used in increments of two (2) hours.”

Grievant received a subpoena and complied with its commands and requirements. He was legally required to do so. Section 12.01 states that employees called for subpoena duty shall continue to receive their regular pay. This is clear, unambiguous language. Grievant was subpoenaed and the collective bargaining agreement provides for regular pay. Whether such an employee actually works or not after release from the subpoena is largely a matter of discretion with the County under Section 12.01. But the language as to “shall continue to receive their regular pay” is not discretionary. Grievant was not instructed to return to work when he asked to go back to work. Again, the operative language of Section 12.01 is not discretionary. “Employees who are not instructed to return to work will suffer no loss in pay.” And, the language in Article 7, Section I, which references subpoena duty is just as straight forward: “. . . the employee shall be paid for time missed from work due to such absences. . .” On the face of this language, the result is, as argued by the Union, simple. Grievant is entitled to receive his regular pay and suffer no loss of pay. Here, he suffered a loss of six hours because he was required to use vacation leave instead of receiving pay under Section 12.01.

The County centers its arguments on the fact that the subpoena was for a court matter personal to Grievant. The County argues that such a personal matter does not make this a civic duty for which Section 12.01 is meant to apply. The County reasons that subpoena duty and jury duty are in the same paragraph and have the same benefit therefore, subpoena duty must carry with it the same civic duty associated with jury duty. Jury duty implies an impartial, non-interested person as the subject of the duty, and that same impartiality or disinterestedness must apply to both types of duty. Therefore, subpoena duty cannot mean to be subpoenaed for a personal matter. However, what the County argues is not what Section 12.01 says. It does not define subpoena duty or jury duty. It does not eliminate a subpoena for a personal matter. There is no language that states or implies such a limitation or condition on the nature of the proceedings underlying the subpoena. To make that a requirement in the interpretation of the language of Section 12.01 would be to add a condition to the clear language of the collective bargaining agreement. This an arbitrator cannot do.<sup>1</sup>

The County’s civic duty argument is based on the premise that jury duty requires an unbiased person. However, one called, at least initially, for jury duty is also subject to voir dire and other matters of qualification to determine if the person is, indeed, unbiased or is

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<sup>1</sup> See, e.g., HOWARD-SUAMICO SCHOOL DISTRICT BOARD OF EDUCATION AND HOWARD-SUAMICO EDUCATION ASSOCIATION, Case 100, No. 67149, MA-13775 (Gordon, 8/8/2008).

to be excused for cause. And, one may be subpoenaed into a court hearing that involves even the County or a County work related matter and not be at all unbiased. Further, when one is subpoenaed by another party, even if the subject of the hearing does not involve the County or even enforcement of a criminal matter, there is still an element of civic duty because anyone, interested or not, can subpoena the other party into court as part of that person's right to do so. Honoring that subpoena, which still carries with it the force of law like any other subpoena, is still required; and honoring that legal duty is also meeting a civic duty. The County's civic duty argument is not persuasive.

The County argues that placing subpoena duty in the same paragraph as jury duty, and providing for the same benefits, shows that they should be treated similarly. But, beside what was stated above, there is also Article 7, Section i, which refers not only to jury duty and subpoena duty, but also to bereavement duty. That section requires employee shall be paid for such absences. Bereavement leave is qualitatively different than jury duty or subpoena duty. Yet, all three are dealt with in the same paragraph. Rather than limiting the availability of subpoena pay by virtue of its conjunction with jury duty in Section 12.01, Article 7 Section i would expand the availability of subpoena pay by virtue of being placed in a broader pantheon of benefits.

The County argues that the nature of proceedings that would provide the subpoena duty benefit are limited to cases where the County is a party, where a County work related matter is at issue, or where a law enforcement action by a District Attorney is involved. But again, such language and such limitations are not in Section 12.01. And the fact that there may have been a settlement, facilitated by Arbitrator Levitan, in the Arndt and Cadigan grievance does not indicate that there is a limit on what subpoena leave applies to. It indicates that in that case it was applied, apparently for the first time, to subpoenas in criminal matters. This indicates a more expansive application than to matters directly related to the Columbia County or a County work related matter. Beyond that, not a great deal of weight can be placed on the Arndt and Cadigan settlement. Parties settle grievances for any number of reasons which may or may not even concern the merits of the particular grievance. And, this single settlement cannot fairly be viewed as a practice, given the settlement is only one incident, or at most two, and nothing longstanding. No language changes were proposed in bargaining after that settlement. Similarly, there is nothing in the bargaining history that suggests the parties intended any different meaning. The only evidence of bargaining history for Section 12.01 had to do with reporting after release from jury or subpoena duty, not with what type of case the duty applied to. There is no evidence that the parties intended any special meaning other than the plain language of Section 12.01.

The County is right that the case COLUMBIA COUNTY AND COLUMBIA COUNTY EMPLOYEES UNION LOCAL 995, AFSCME, AFL-CIO, Case 22, No. 62300, MA-12229 (Burns, 6/9/2004) does not address the issues in this case and does not expand the availability of subpoena duty pay. That case dealt with an issue of whether the County violated Section 12.01 when it had employee report to work prior to a hearing under subpoena. Here, Grievant wanted to and was allowed to work from 6:00 a.m. to 9:30 a.m. after having notified management about a week earlier of the 10:00 a.m. court hearing. He did not grieve working that morning. His payment for those three hours, and his 30 minute sick leave, are not at issue here. Because the Burns arbitration award does not reach the issue of what subpoena leave is

used for, that award neither expands nor limits the availability of subpoena leave depending on the nature of the underlying case.

The County is correct in that Wisconsin statutes do not require payment for subpoena leave in this case. But the Union is also correct in that the grievance is based on the language of the collective bargaining agreement, not on a statute. Many things are included in collective bargaining agreements that are not contained in statutes. In this case, no statute prohibits or requires payment for the subpoena duty. It is a collective bargaining agreement that is being interpreted. While some subpoena duty and payment must be honored for certain types of cases as specified by statute, no statute has been cited which relieves a party from providing subpoena leave or payment for subpoena duty that is otherwise bargained into an agreement. Thus, the County's argument is not persuasive.

The County is correct that Grievant knew of his Court hearing on June 12<sup>th</sup> because of the Notice of Hearing, as opposed to the subpoena duces tecum. The Notice entered as an exhibit established that. However, even if Grievant knew in advance that there was a hearing scheduled that he was to attend, it was not until he actually received the subpoena duces tecum that he knew he had been subpoenaed into court. A notice of hearing provided to a litigant and his counsel is something that those two can determine, to some extent (perhaps in consultation with the opposing party) whether the litigant's appearance is required. But a subpoena is different and requires an appearance unless it is relieved or released. Grievant and his attorney were not free to make that determination themselves. The fact that Grievant may have known about the hearing before he was subpoenaed has no bearing on the compulsory nature of the subpoena. It also has no bearing on the language of Section 12.01, which is not limited by any language precluding the benefit to those who may have otherwise known they had to go to court.

The simple language of Section 12.01 requires that Grievant be paid his regular time for the time under subpoena. The language of the agreement does not exclude the benefit because the hearing concerned a personal matter. There is no evidence or even the slightest suggestion that the use of a subpoena was instigated or orchestrated by Grievant as a way to access the benefit. Grievant had raised the prospect of subpoena duty leave a week before the hearing, there was some discussion around noon on June 12<sup>th</sup> of the issue of subpoena duty availability as evidenced by both Grievant's and Boge's testimony, and his grievance alleged a violation of Section 12.01. The undersigned is persuaded that the subpoena leave issue was sufficiently raised to support Grievant's claim that it should cover from 10:00 a.m. to 4:00 p.m.

There is somewhat of a dispute as to when Grievant returned to the Highway Offices in Wycocena. Grievant testifies it was between 11:30 a.m. and noon. T.O. Boge, the Assistant Highway Commissioner, testified it was around noon, perhaps 12:30 p.m. Both versions allow for Grievant to have been back before noon. Boge did testify that he got a call from Grievant after the hearing about going back to work, and Boge did have a telephone conversation and then a conversation with the office manager before coming across the street to talk to Grievant. This allows for some time to have expired. The undersigned is persuaded that Grievant was at the work site and made his request to work before noon. He had his work clothes available and the evidence established that he went directly from the court hearing to

the Department buildings in Wyocena. Once he was released from the subpoena he did contact management for instructions as required by section 12.01. There were more than two hours remaining in the normal workday. However, Section 12.01 and the management rights clause of the collective bargaining agreement give the County the prerogative to determine if he would be instructed to work or not instructed to return to work. Either way, the employee will suffer no loss of pay for the time not worked after reporting. Given Boge's testimony that Grievant called after being released from the subpoena after the hearing, and the fact that Grievant went straight to the Department buildings, there is no gap between the time he was under subpoena, 10:00 a.m., and when he then contacted management after release for instructions. Section 12.01 requires that he be paid for the time under subpoena and suffer no loss of pay if not instructed to return to work. His normal schedule that day had an ending time of 4:00 p.m. Thus, it was a full six hours that he was required to take as vacation when the full six hours should have been covered by subpoena duty. It is not necessary to determine if the vacation provisions of the collective bargaining agreement were violated because the subpoena duty provisions resolve the matter.

Grievant did not receive any fees for attending the court hearing, so there is nothing for him to endorse over to the County as a condition of receiving payment under Section 12.01.

The County should have paid Grievant continued pay under section 12.01 rather than requiring him to take vacation time for six (6) hours on June 12, 2008. The County violated Section 12.01. Accordingly, based on the evidence and arguments of the parties, I make the following

**AWARD**

1. The grievance is sustained.
2. Grievant shall be made whole by having six (6) hours of vacation time restored to him.

Dated at Madison, Wisconsin, this 13<sup>th</sup> day of July, 2009.

Paul Gordon /s/

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Paul Gordon, Arbitrator