BEFORE THE ARBITRATOR

In the Matter of a Dispute Between

WISCONSIN PROFESSIONAL POLICE ASSOCIATION

and

VILLAGE OF JACKSON

Case ID: 503.0000
Case Type: MA

AWARD NO. 7936

Appearances:

Andrew Schauer, Staff Attorney, Wisconsin Professional Police Association, 660 John Nolen Drive, Suite 300, Madison, Wisconsin, appeared on behalf of the Association.

Jonathan Swain, Attorney, Lindner and Marsack, 411 East Wisconsin Avenue, Suite 1800, Milwaukee, Wisconsin, appeared on behalf of the Village.

ARBITRATION AWARD

The Wisconsin Professional Police Association (hereinafter referred to as WPPA or Association) and the Village of Jackson (hereinafter referred to as the Village or Employer) are parties to a collective bargaining agreement (hereinafter referred to as the CBA) that provides for final and binding arbitration of unresolved grievances. Pursuant to the parties' request, the Wisconsin Employment Relations Commission appointed the undersigned to decide the instant grievance. A hearing on that grievance was held in Jackson, Wisconsin, on September 1, 2016. The hearing was transcribed. The parties filed briefs and reply briefs, whereupon the record was closed on November 16, 2016. Having considered the evidence, the arguments of the parties, and the record as a whole, the undersigned issues the following award.

ISSUE

The parties were unable to stipulate to the issue to be decided in this case. The Association framed the issue as follows:

> Did the Village violate Section 8.07 of the CBA with regard to Officers Gerke's and Borkowski's involvement in a court trial scheduled for February 1 – 3, 2016? If so, what is the remedy?

The Village framed the issue as follows:

> Where the CBA does not provide for on call or standby pay, does Section 8.7, Court Pay, require minimum two hours payment to the officers where they are on call or on standby and told not to appear, but rather to be available by phone to be summoned to appear within a reasonable time period?

I have adopted the Association's wording of the issue. Thus, the Association's wording of the issue will be decided herein.

PERTINENT CONTRACT PROVISION

The parties' 2016 – 2018 CBA contains the following pertinent provision:

Article VIII – OVERTIME

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> Section 8.07: Court Pay: All employees who report for court duty during off-duty hours shall be compensated at the rate of one and one-half (1.5) times the employee's hourly rate, the minimum of which shall be two (2) hours at time and one-half (1.5). Any employee receiving notification of cancellation less than twenty-four (24) hours in advance shall receive the two (2) hours minimum call-in pay.

BACKGROUND

The Village operates a police department. The Association represents the Village's nine police officers and detectives.

The Village and the Association have been parties to a series of CBAs since 1995. The parties first CBA had a provision entitled "Court Pay." It provided thus:

> Section 8.07: Court Pay: All employees who report for court duty during off-duty hours, shall be compensated at the rate of one and one-half (1 and ½) times the employee's hourly rate, the minimum of which shall be two (2) hours at time and one-half (1 and ½). Any employee receiving notification of cancellation less than twenty–four (24) hours in advance shall receive the two (2) hours minimum call-in pay.

Over the next 20 years, this provision remained essentially unchanged. The only change which occurred was that the phrase "1 and ½" in two sets of parenthesis was changed to "1.5." That change did not modify its meaning. As a result, the court pay provision in the parties' current CBA is essentially the same as the court pay provision in their first CBA.

* * *

The record shows that the parties have never bargained over the topic of an officer being on-call or on standby status. As a result, the current CBA does not reference the status of being on call or on standby, nor does it provide extra pay for being on-call or on standby status. Thus, there is not an on-call or standby provision in the CBA.

As will be noted below, what happened here is that two employees were put on standby or on-call status. That had never happened before.

* * *

When the local District Attorney's office wants an officer to appear in court to testify, it sends the officer what is called a Notice of Officer Appearance form. As the name implies, this form is a directive to the officer that they are to appear in court and testify on a particular date at a particular time. When an officer gets a Notice of Officer Appearance form from the District Attorney, they are expected to comply with it even if they are off duty. If they don't, they could conceivably face discipline. These Notice of Officer Appearance notifications are routinely changed and/or canceled (via word of mouth, text message, or by email). These oral, text, or email changes and/or cancellations to the notices are not accompanied by or followed up by a revised official Notice of Officer Appearance. If the cancellation happens within 24 hours of the scheduled court appearance, the officer gets paid court pay of two hours at time and one-half.

It is set against this background that the following occurred.

FACTS

On November 11, 2015, seven officers in the police department, including Jennifer Gerke and Kathy Borkowski, were notified by the Washington County District Attorney's office that they were needed to testify in a trial on February 1 – 3, 2016. Those dates were a Monday, Tuesday, and Wednesday. The Notice of Officer Appearance document indicated that a jury trial was scheduled for 8:15 a.m. on those dates and that the officers were to appear one-half hour before the scheduled court time.

All of the officers except Gerke and Borkowski were subsequently notified they would not need to appear at the jury trial scheduled for February 1 – 3, 2016.[1] Thus, Gerke and Borkowski remained subject to the Notice of Officer Appearance directive for those three days.

On January 26, the Tuesday prior to the trial dates of February 1 – 3, the District Attorney's office notified Gerke and Borkowski that they were not to report to court on February 1 – 3, but were on call for those dates and were to be available to appear if called. On Friday, January 29, Gerke and Borkowski were again notified that they were not to report to court on February 1 – 3, but were on call for those dates and were to be available to appear if called.

Insofar as the record shows, this was the first time the District Attorney's office said it wanted an officer to be on call, or on standby, for the entire time of the trial.

On Friday, January 29, Gerke contacted the District Attorney's office directly to find out what being "on call" meant. In response to her inquiry, she was told that she (1) had to be available by phone on February 1, 2, and 3; and (2) had to be able to respond to the courthouse in a timely manner if directed to do so.

About the same time, Gerke spoke to Police Chief Jed Dolnick and asked him if she would receive court pay under Section 8.07 if she was subsequently not called to testify at the trial. Dolnick replied in the negative because it was his view that Section 8.07 did not apply to an on-call situation.

Over the weekend of January 30 and 31, Gerke exchanged several emails with Dolnick regarding the matter. At one point, Gerke told Dolnick she was going to go to court on Monday, February 1. Dolnick responded by telling her not to do that.

On Sunday, January 31, Dolnick came into work and posted a memo to all officers that dealt with court appearances. The directive said that officers were not to appear in court unless specifically instructed to do so by the District Attorney's office.

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[1] Hereinafter, all dates refer to 2016.

* * *

Ultimately though, neither Gerke nor Borkowski were called to testify in court on February 1 – 3. Here is how that unfolded for each officer.

On the morning of February 1, the department's administrative assistant told Gerke that she would not be needed that morning at the trial. Later that day, Gerke was notified that she would not be needed that afternoon at the trial.

On Tuesday, February 2, at 8:15 a.m., Gerke received a text message from the department's administrative assistant letting her know that she would not be needed in court either that day (Tuesday, February 2) or Wednesday, February 3.

On the morning of February 1, Borkowski contacted the department's administrative assistant and asked whether she needed to testify in court that day. The administrative assistant said that Borkowski would not be needed at the trial that morning, but she still needed to remain available for the afternoon. Borkowski then called the District Attorney's office in the afternoon and the District Attorney's receptionist told her that both she and Gerke would not be needed in the afternoon.

On Tuesday, February 2, at 8:15 a.m., Borkowski called the department's administrative assistant and asked whether she needed to testify in court that day. The administrative assistant said that she had not learned anything about Borkowski's status. That same day around lunchtime, Borkowski called the District Attorney's office and was told that the parties were going to start closing arguments after lunch. At that point, Borkowski considered herself canceled for Tuesday afternoon and all of Wednesday.

* * *

The Village subsequently did not pay either Gerke or Borkowski any court pay for the trial scheduled for February 1 – 3. The Association subsequently filed a grievance challenging that action. The grievance was appealed to arbitration.

DISCUSSION

My discussion begins with the following preliminary comments.

I view this as a contract interpretation case. The record shows that the contract language at issue herein has existed essentially unchanged for twenty years. It can fairly be surmised that during that time period, it has been applied many times. However, insofar as the record shows, this contract language has not been the subject of previous grievances or

been interpreted by an arbitrator. That being so, the undersigned is tasked with supplying an arbitral interpretation to contract language that has existed for twenty years and has not required arbitral interpretation until now.

* * *

The focus now turns to that task. The parties agree that the only contract provision applicable here is Section 8.07 which is entitled "Court Pay." It provides thus:

> All employees who report for court during off-duty hours shall be compensated at the rate of one and one-half (1.5) times the employee's hourly rate, the minimum of which shall be two (2) hours at time and one-half (1.5). Any employee receiving notification of cancellation less than twenty-four (24) hours in advance shall receive the two (2) hours minimum call-in pay.

I'm going to start with a broad overview of this language. First, it applies to those officers who are directed to report to court while they are off duty. Simply put, if an officer is directed to appear in court they must do so unless the directive is canceled. Second, this provision is designed to compensate employees for the inconvenience of accommodating working when they are off duty only to be canceled on short notice. What's inherent in an inconvenience pay provision – such as this one – is the idea that if the inconvenience exists, the pay must be given. Third, this provision addresses how an officer who appears in court during their normal off-duty hours is to be paid (namely, at time and one-half with a two-hour minimum).

Having given that overview, here's a detailed review of the two-sentence provision. The first sentence says that officers who actually appear in court while on their off-duty time get paid at time and one half, with a two hour minimum. The second sentence says that an off-duty officer who is told to appear in court but the appearance is later canceled with less than 24 hours' notice will be paid two hours pay at time and one-half. Neither of these sentences identifies how officers are called into court or how they are canceled.

In my view, Section 8.07 can be likened to a power switch that has two settings: "on" and "off." There is no third setting. The provision is turned "on," so to speak, and becomes applicable when an officer is directed to appear in court to testify in a trial. As long as that directive is not countermanded, the officer has to assume they are going to court. To effectuate that, they have to make whatever arrangements are needed to appear in court and testify even though the officer is off duty from their position with the Village. This obligation to appear in court is considered to be active – and still "on" – until the obligation is canceled. A cancellation effectively throws the so-called power switch to the "off" position. Still another way of saying it is that the court pay provision has just two settings: "must come to court" and "canceled."

That said, the real question in this case is not what Section 8.07 means. Instead, the question is whether it applies to the particular factual situation involved here. As the Employer sees it, Section 8.07 does not apply to this case because the two officers received "notification of cancellation" of their court date on January 26 when they were placed on call. Building on that premise, the Employer asserts that this is really an on-call case and that Section 8.07 – which deals with court pay – does not apply to on-call status. The Association disagrees.

I'm going to begin my discussion about being "on-call" or "standby" status by noting that initially it was not the Employer or the police chief that used those phrases to describe Gerke's and Borkowski's status on February 1 – 3. It was the District Attorney's office that initially use those terms. Dolnick simply adopted those phrases as the matter progressed.

The Association argues that Dolnick was not unilaterally empowered to put Gerke and Borkowski in on-call status. I disagree. Just because on-call or standby status is not mentioned in the CBA, and there is no contract provision that supplies on-call or standby pay, that does not preclude Dolnick from putting an employee in on-call or standby status. If the Association wants to impose limitations on same or wants officers to be paid when they are placed in on-call or standby status, then it can negotiate with the Employer over that. Until that happens, the Employer can designate employees as being in on-call or standby status at its discretion.

However, just because the Employer has the unilateral right to put an officer in on-call or standby status (what the Employer contends it did here), that does not make Section 8.07 inapplicable to such a situation. That's because Section 8.07 can still be applicable to a situation where an officer is placed in on-call or standby status if the officer's obligation to appear in court is not canceled within the timeframe referenced in Section 8.07. As previously noted, the timeframe is 24 hours before the officer is to appear in court. If the officer's obligation to appear in court is canceled less than 24 hours before he/she is to appear in court, then the Employer is on the hook, so to speak, to pay the officer the agreed-upon amount. Conversely, if the officer's obligation to appear in court is canceled more than 24 hours before he/she is to appear in court, then the Employer is not on the hook, so to speak, to pay the officer anything. Another way of saying this is that in the former situation (where the officer does not get timely notice of cancellation) Section 8.07 is still "on," whereas in the latter situation (where the employee gets timely notice of cancellation) Section 8.07 is effectively turned "off."

Notwithstanding the Employer's contention to the contrary, I'm persuaded that the crux of this case involves determining when the two officers had their court appearances on February 1 – 3 canceled. That is to say, when were they relieved from the possibility that they needed to appear in court on February 1 – 3?

Before I delve into that question though, I'm first going to address the following point. According to the Association, the parties have a past practice regarding what it means to be "canceled" under the court pay provision. The Employer disputes that contention. While there are some cases where I delve deep into the alleged past practice before deciding whether there is or is not an applicable past practice, I'm not going to do that here. Simply put, I don't think it's necessary to do so in this case. Instead, it suffices to say that I concur with the Employer that there is no past practice on what it means to be "canceled" under Section 8.07. Consequently, I'm not going to base my decision on an alleged past practice. Instead, I'm simply going to review the record facts and use them to determine when Gerke and Borkowski had their commitment to appear in court canceled.

As already noted, it's the Employer's view that both officers were canceled on January 26. That's when both officers were initially notified that they were not to report to court for the trial on February 1 – 3, but were on call for those dates and were to be available to appear if called.

There's a fundamental problem with the Employer's contention that Gerke and Borkowski had their court appearance of February 1 – 3 canceled on January 26. It's this: the two officers did not have their court appearance on February 1 – 3 totally and completely canceled on that date. Even Dolnick never told the two officers that there was no chance that their appearance in court on those days would be necessary. That being so, the two officers were still on the hook, so to speak, to possibly go to court on February 1 – 3. The Employer did this by telling the two officers they were on call for those three days. In its brief, the Employer describes the officers' status on February 1 – 3 thus: they "were free to pursue any and all personal matters during the days of February 1 and 2, limited only by the requirement of absolute sobriety and the need to respond within a timely manner, a couple of hours, if called." While the Employer's implication is that these restrictions were just minor inconveniences, the fact of the matter is that on February 1 – 3, Gerke and Borkowski (who were off duty on all three days) were not "free to pursue any and all personal matters" as the Employer contends. To prove that point, one need look no further than they were not free to travel nor were they free to make any other plans where their presence would actually be needed by others (such as babysitting and the like). The bottom line is that on February 1 – 3, the two officers' time was not entirely their own, and they were not free to use their off-duty time as they pleased.

As was previously noted, the court pay provision essentially has two settings: "must come to court" and "canceled." The following facts conclusively show that Gerke and Borkowski were not totally and completely "canceled" until the following times when they conclusively knew that their appearance in court on February 1 – 3 was unnecessary. It was at that point that their court appearance was "canceled" within the meaning of the second sentence of Section 8.07.

On Monday morning, February 1, Gerke was told by the department's administrative assistant that she would not be needed to testify in the morning court session. That was the first indication that Gerke received that she would not be needed for court on that morning. Later in the afternoon, Gerke received notification that she would not be needed for court in the afternoon.

The next day – Tuesday, February 2 – Gerke received a text message from the department's administrative assistant at 8:15 a.m. that notified her that she would not be needed for court either that day (February 2) or Wednesday, February 3. It was at that point that Gerke was totally and completely relieved from the possibility that she would need to appear in court on Tuesday or Wednesday and that's when she was "canceled" within the meaning of the second sentence of Section 8.07.

These facts establish that Gerke was canceled on Monday morning for Monday's scheduled court appearance, and she was canceled on Tuesday morning for Tuesday's and Wednesday's scheduled court appearances. The Association acknowledges that Gerke was canceled with more than 24 hours' notice for the court appearance scheduled for Wednesday. That was not true of her appearances scheduled for Monday and Tuesday though, so Gerke is therefore owed four hours of court pay at time and one-half.

On Monday morning, February 1, Borkowski was told by the department's administrative assistant that she would not be needed to testify in the morning session, but that she still might be needed to testify in the afternoon session. About 2:00 p.m. that day, Borkowski called the District Attorney's office and was told that she and Gerke were released for the rest of that day.

The next day – Tuesday, February 2 – Borkowski called the department's administrative assistant at 8:15 a.m. and asked if she was needed to testify in court. The administrative assistant said she had not heard anything about Borkowski's status. About noon that day, Borkowski called the District Attorney's office and inquired whether she was needed to testify. Borkowski was told that closing arguments were going to be made after lunch. It was at that point that Borkowski was totally and completely relieved from the possibility that she would need to appear in court on Tuesday or Wednesday and that's when she was "canceled" within the meaning of the second sentence of Section 8.07.

These facts establish that Borkowski was canceled on Monday morning for Monday's scheduled court appearance, and she was canceled on Tuesday afternoon for Tuesday and Wednesday's scheduled court appearances. Since Borkowski had her court appearances for February 1, 2, and 3 canceled with less than 24 hours' notice, she is owed six hours of court pay at time and one-half.

In sum then, Gerke had her obligation to be ready to go to court at 8:15 a.m. on February 1 and 2 canceled with less than 24 hours' notice, and Borkowski had her obligation

to be ready to go to court at 8:15 a.m. on February 1, 2, and 3 canceled with less than 24 hours' notice. As a result, they are to be compensated in the manner agreed upon by the parties in Section 8.07.

In light of the above, it is my

AWARD

1. That the Village violated Section 8.07 of the CBA with regard to Officer Gerke's and Officer Borkowski's involvement in a court trial scheduled for February 1 – 3, 2016; and

2. That in order to remedy this contract violation, the Employer shall pay Gerke four hours of court pay at time and one-half and Borkowski six hours of court pay at time and one-half.

Dated at Madison, Wisconsin, this 11th day of January 2017.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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Raleigh Jones, Arbitrator