#335

CONTRACTUAL GRIEVANCE PROCEEDINGS
ARBITRATION OPINION AND AWARD

In The Matter of Arbitration Between:	*	
THE STATE OF OHIO Department of Public Safety State Highway Patrol	*	Grievance Number 87-1222
-and-	*	
THE FRATERNAL ORDER OF POLICE Ohio Labor Council, Inc. State Unit I	*	Decision Issued November 13, 1989

APPEARANCES

FOR THE STATE

Captain John M. Demaree	Patrol Advocate
Lieutenant D. L. Anderson	Management Representative
Captain C. E. Ireland	Commander, Findlay, Ohio
Sergeant T. L. Ritter	Toledo, Ohio Post Officer

FOR THE FOP

Deborah L. Bukovan	FOP/OLC Legal Counsel
James A. Budzik	FOP/OLC Legal Counsel
Edward F. Baker	Staff Representative
Trooper J. P. Czerniakowski	Grievant

ISSUE: Article 61, §61.06 -- Applicability of Court Pay to court appearances which are not job-related.

Jonathan Dworkin, Arbitrator
P.O. Box 236 - 9461 Vermilion Road
Amherst, Ohio 44001

SUMMARY OF DISPUTE

The grievance, a "class action," protests the Employer's denial of three applications for court pay. At issue is the following language of Article 61 of the 1986-1988 Agreement:

ARTICLE 61 - OVERTIME

* * *

§61.06 Court Appearance

> Members of the bargaining unit who are required to appear in court during their off duty hours shall be guaranteed a minimum of two (2) hours pay or actual hours worked, whichever is greater. The Employer shall not change an employee's schedule or scheduled shift in order [to] avoid payment for court time incurred during off duty hours without the consent of the employee involved. Payment shall be made in cash or compensatory time at the discretion of the employee. Employees shall notify their immediate supervisor when they are required to appear in court.

The representative grievants were subpoenaed to appear in federal district court as character witnesses for a municipal police officer who had been removed from her job. They were to testify concerning their observations of the officer's work performance. The case was civil, not criminal; it was substantively unrelated to

the mission of the Ohio State Highway Patrol or grievants' duties as State Troopers. The Patrol was not a party to the action. The connection, if there was any, was peripheral and slight -- the information grievants had concerning the officer's performance was obtained through official, on-duty interactions.

Grievants responded to the subpoenas. Their appearances happened to be when they were scheduled to be off-duty. Therefore, they submitted applications for court pay. The applications were turned down. It was the Employer's contention that the benefit provided by Article 61, §61.06 was meant to apply only to job-related court appearances. The Union disputed the argument, pointing out that §61.06 contained no language restricting the allowance to job-related subpoenas. In the Union's judgment, the provision is clear, unambiguous, and needs no arbitral interpretation. It means what it says -- that a wage benefit is payable to "members of the bargaining unit who are required to appear in court during their off duty hours." According to the Union, grievants met the contractual conditions when they complied with subpoenas requiring them to appear in court while off duty.

Neither party changed its position in the preliminary grievance steps, and the controversy was appealed to arbitration. It was heard in Columbus, Ohio. At the outset, the Employer and the Union joined in stipulations. The following are pertinent:

1. The grievants were subpoenaed to appear in Federal District Court relative to testifying in a civil case.

2. Testimony concerned observations of plaintiff during her on-duty time as a police officer.

3. Grievant[s] appeared in court during [their] off-duty time.

. . .

5. All court appearances were during non-scheduled work time (off-duty).

6. Issue in the case at hand will be confined to Article 61, Section 61.06 (Court Appearance) of the collective bargaining agreement.

. . .

The parties also stipulated that the Arbitrator had authority to issue a conclusive award on the question of whether or not the denial of court pay to grievants violated §61.06. It should be observed that arbitral jurisdiction is more specifically defined and limited by Article 20, §20.07 of the Agreement:

> 6. Arbitrator Limitations
>
> Only disputes involving the interpretation, application or alleged violation of a provision of this Agreement shall be subject to arbitration. The arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall the arbitrator impose on either party a limita-

> tion or obligation not specifically required by the language of this Agreement.

When the hearing ended, the Representatives of the parties obtained additional time for briefs.

ADDITIONAL FACTS AND CONTENTIONS

As can be readily observed, §61.06 does not contain words setting forth a job-related limitation on court pay. Nevertheless, the Patrol maintains that the limitations were in the minds of the negotiators when they signed off on the item. They knew that the purpose of the benefit was to compensate employees for unscheduled work, and that meant wages for off-duty court appearances connected to their work as Ohio State Troopers. To support this contention, the Employer introduced the Union's own bargaining-table proposal on court pay. Although the proposal was not adopted, it does reflect the thinking and the understandings of the Union's negotiators. The proposal states in part:

> E. Court Time
>
> Members will be paid at one and one-half times their regular rate of pay for any job-related court appearance while off-duty for time actually worked. For each such appearance, members will receive a minimum of four hours' pay at one and one-half times their regular rate of pay. [Emphasis added.]

After the proposal was advanced, bargaining focused only on the amount of the allowance. There was no discussion whatsoever concerning entitling prerequisites. Both parties knew what they were and what they were expected to be. Negotiators on both sides of the table understood that court pay was meant to compensate for job-related activities; it was not a windfall for Troopers required to make court appearances as private citizens -- in civil actions unconnected to their work as state police officers.

Ultimately, the court-pay issue went to fact-finding. As in initial bargaining, neither party attempted to expand the benefit beyond its recognized purpose; the single question placed before the Fact-Finder was how generous the allowance should be. He responded only to that question, stating:

> Pay for court time is normally found in agreements dealing with law enforcement personnel. It is recommended that court time be provided to employees of the Highway Patrol. Two hours of such pay is appropriate. [Fact-Finding Report, 67.]

The parties adopted the Fact-Finder's recommendation and ratified the language which became §61.06. As it turned out, the wording of the Section may have been incomplete. It did not specify the job-related context of the benefit. According to the Patrol, how-

ever, the intention was clear; the limitation was implicit in the provision; and everyone recognized that it existed. In the Employer's view, this grievance is an attempt by the Union to exploit the imperfections in the contractual language and gain an advantage which it never even sought in bargaining.

The Employer's conclusion is that an arbitrator should not prioritize inexact contractual language to the detriment of clear-cut contractual intent. The intent of the court-pay provision was known to both parties; neither had a broader expectation than that the benefit was for Patrol-related court appearances. In its post-hearing brief, the Employer summarizes its theory of the case:

> This case is a prime example where the intent of specific contractual language during pre-contract negotiations serves as a valuable aid in the interpretation of said provisions. To overlook this intent, as the Union would like for the arbitrator to do, would be contrary to the intent manifested by the parties during negotiations and only serve to further the Union's continued efforts to gain through arbitration what they failed to achieve during negotiations. [Patrol brief, 10.]

The Union makes several alternative arguments in support of its position (including a somewhat tortured contention that grievants' court appearances were actually job-related). Its main thrust, however, is that the language of §61.06 is direct, uncompli-

cated, and means precisely what it says. It establishes a benefit and all its conditions. Notably absent from the Section is any statement of the restriction the Patrol seeks to engraft on court pay. While the Union acknowledges that arbitral examination of bargaining intent is sometimes appropriate, it urges that it is unwarranted in this case. Bargaining intent is meaningful when resolving contractual ambiguities, according to the Union, but it is precluded when the contract is not ambiguous. And the Union insists there is no ambiguity at issue here. The Union makes its point in its brief:

> The first sentence of Section 61.06 states that when a bargaining unit member is required to appear in court during their off hours, he shall be guaranteed a minimum of two (2) hours' pay or actual hours worked, whichever is greater. In this case, the grievant was required to appear in a federal district court during his off duty hours pursuant to legal and properly issued subpoenas. The language in this section is subject to but one interpretation. If an employee is required to attend a court appearance, he receives a minimum of two hours' pay, or hours actually worked.
>
> Arbitral authority establishes that when language is clear and unambiguous, the arbitrator is to apply the ordinary meaning of the language without resort to technical rules of interpretation. Therefore, where the contract provision is clear and unambiguous, evidence as to the parties' application or practice with regard to that language is irrelevant. An arbitrator is bound to apply the clear provisions of the collective bargaining agreement, even though the parties disagree as to its meaning. [Union brief, 3-4. Emphasis from original; citations omitted.]

In the Union's judgment, the Patrol is seeking to recapture in arbitration what it ceded in negotiations. The attempt should not succeed, because it is beyond the Arbitrator's authority to add substance to the words of §61.06. The FOP calls particular attention to the first paragraph of Article 2 of the Agreement and contends that it forecloses the Patrol's arguments. Article 2 states:

> ARTICLE 2 - EFFECT OF AGREEMENT - PAST PRACTICE
>
> This Agreement is a final and complete agreement of all negotiated items that are in effect throughout the term of the Agreement. No verbal statements shall supersede any provisions of this Agreement. [Emphasis added.]

The Union argues that Article 2 binds the Patrol and the FOP to the language they mutually adopted. It does not permit either party to tinker with that language in order to achieve advantages which do not appear in the Agreement. Likewise, Article 20, Section 20.07, Subsection 6 prohibits an arbitrator from improving the Agreement on behalf of either party. It provides with absolute clarity that no arbitrator may add to, subtract from, or otherwise alter the contractual terms.

In conclusion, the Union maintains that the Arbitrator's task is really a very simple one. All he needs or is permitted to do is

read and apply §61.06 as it is. When he does, it is argued, he will have no alternative but to sustain the grievances.

OPINION

The Arbitrator does not concur with the Union's contention that seemingly unambiguous language is immune from interpretation, or that bargaining intent is irrelevant in this controversy. While that position is consistent with a great many arbitral and judicial pronouncements, it is not totally persuasive. The essence of any contract is the "meeting of minds" -- the negotiated intent. Language is no more than an imperfect means for communicating that intent. It reflects the meeting of minds, but hardly ever duplicates it. It is not unusual for the words of a collective bargaining agreement to fall short of expressing purpose in full measure. Sometimes uncertainties, equivocalities, and mutual mistakes infect provisions; sometimes the drafters write more or less than the negotiators meant. In such circumstances, an arbitrator should not slavishly apply words. S/he is obligated to interpret -- to ascertain and apply the aims of the negotiators. There are occasions when an arbitrator is required to reform an agreement to preserve those aims.

These comments should not be read as justification for an arbitrator to easily disregard what a contract says. The words of

an agreement, imperfect though they may be, are entitled to the strongest presumption of regularity. They may not be ignored. In most instances, language is determinant.

It is only in rare circumstance that intent will supercede written provisions. The party seeking such an award revising contractual language to comply with alleged contractual intent is charged with an exacting evidentiary burden. That burden applies in this dispute. The language of §61.06 favors the Union's position. The provision does not seem ambiguous. It does not express the limitation which the Employer maintains was intended. Accordingly, the Patrol was required to produce evidence sufficient to overcome the presumption and prove that the language was flawed.

The only concrete evidence introduced on the subject was the Union's bargaining-table submission which proposed that court pay would be limited to "job-related court appearances." Curiously, the Employer's counter-offer did not contain the same restriction. The omission is puzzling. Why did the Union's voluntary curtailment of the benefit not appear in the final provision? Perhaps, às the Patrol suggests, there was a drafting error. It is also conceivable that the Union accepted the diminished wage allowance in exchange for a broader basis. It should be recalled that the Union requested a minimum four hours' premium wages for off-duty court appearances. It settled for the Employer's offer of two hours' straight-time

wages. The Employer's offer did not include the job-related restriction. Did the Union retreat from its original demand in exchange for what it regarded as a more comprehensive allowance?

The Arbitrator suspects that the Employer's position is correct -- that a mistake occurred and that the intent of the parties is incompletely disclosed in §61.06. But suspicion is not enough. In order to obtain an award reforming the provision by adding conditions not expressed, the Patrol had to produce convincing evidence. The evidence it did produce was persuasive, but not compelling. The grievances will be sustained.

* * *

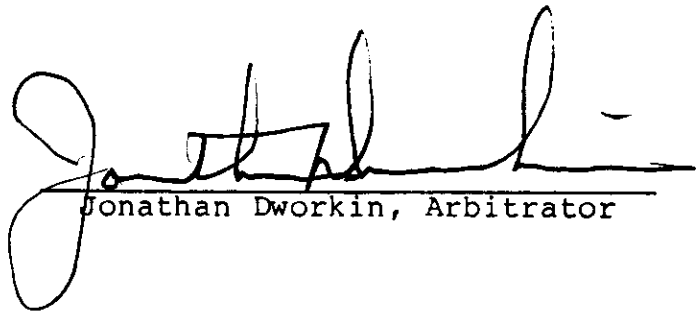
One of the Employer's arguments has been ignored in the foregoing analysis. The last sentence of the court-pay provision sets forth a condition which grievants did not meet. It states, "Employees shall notify their immediate supervisor when they are required to appear in court." None of the Troopers gave advance notice to their supervisor(s), and the Patrol contends that they should be held to have forfeited court pay even if they were otherwise contractually entitled to it. The argument may have merit, but it is not properly at issue. It was not asserted in the Employer's pre-arbitration response to the grievance, and was apparently an afterthought raised for the first time at the arbitration hearing. The

Arbitrator finds that the defense was waived by the Employer and declines to rule on it.

AWARD

The grievances are sustained. The Employer is directed to compensate grievants for their off-duty court appearances at the wage rates in effect when the appearances were made. The compensations required by this Award shall be reduced by the witness fees paid to grievants.

Decision Issued:
November 13, 1989



Jonathan Dworkin, Arbitrator