Antoine #5

VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of the Arbitration between

EMPLOYER,

-and-

UNION

Grievance: Union Release Time

OPINION AND AWARD

BEFORE:

Theodore J. St. Antoine, Arbitrator, University of Michigan Law School, Ann Arbor MI.

FACTS

The Employer and the Union were in the process of negotiating a new collective bargaining agreement in the summer of 2005. The Union's bargaining team consisted of the four executive officers, at that time President Person 1, Vice President Person 2, Secretary Person 3, and Treasurer Person 4, along with Person 5 and Person 6. The Employer's team was composed of Person 7 and Person 8 of Labor Relations; Fire Chief Person 9, the Employer Finance Director, and at times Employer Manager Person 10 and the Deputy Fire Chiefs.

One Employer proposal was to have the dispatching of fire fighting personnel, previously handled by Union bargaining unit members called Fire Alarm Operators (FAOs), performed instead by Emergency Communication Operators (ECOs), who the Employer wished to have dispatch both police and fire personnel. The Parties were able to conclude a tentative four-year agreement in June 2004 covering 2003-07 that apparently resolved all the issues except the dispatch question. Discussions continued on that issue but no agreement was reached. The

Employer then indicated its intention to implement its plan to utilize dual-trained dispatchers for police and fire services, beginning in April 2005 (C-3, p. 2).

On January 25, 2005 the Union filed a petition under Michigan Public Act 312 of 1969, requesting binding arbitration of the dispatch question. The Union stated the issue to be: "Fire Alarm/Dispatch (decision to centralize and/or civilianize, and/or to remove bargaining unit work, as well as all related impact issues)" (C-3, p. 2). The Employer sought to have the Michigan Employment Relations Commission (MERC) dismiss the petition on the grounds the dispatch issue was not a mandatory subject of bargaining and was thus not subject to the jurisdiction of an Act 312 panel. MERC concluded the jurisdictional question should first be addressed by the panel. Hearings were held before a tripartite panel chaired by Arbitrator Jerold Lax on July 1, 8, 19, and 22, 2005. The panel later ruled that the dispatch issue was a mandatory subject and it had jurisdiction, but that on the merits the Employer could transfer the work from the FAOs to the ECOs (C-3, pp. 8-12).

Meanwhile, the Union had filed a complaint in Kent County Circuit Court on May 27, 2005, seeking to enjoin the Employer's implementation of its proposed ECO dispatch system (J-3). The court set a hearing on the injunction for July 1, 2005 at 8:00 a.m. (J-4). Various members of the Union and Employer bargaining teams wished to attend. Union President Person 1 and Vice President Person 2 were not scheduled to work that day and thus had no trouble going to court. Employer representatives on hand included Person 7 front Labor Relations, Employer Manager Person 10, Fire Chief Person 9, and others.

According to Union Vice President Person 2, the Parties did not appear before the Judge on July 1, 2005. Instead, there were talks between the Employer representatives and Union President Person 1, in consultation with the Union bargaining team. Discussions went on from

about 8:30 a.m. until noon. The result was an Interim Agreement, signed by Person 7 and Person 1, authorizing the Employer to begin using ECOs at the fire console with FAO assistance in their training, but without prejudice to the Union's rights in the Act 312 proceedings (J-5). Person 2 observed that Union President Person 1 had no authority to sign without the approval of the Executive Board, and he obtained that.

Union Secretary Person 3 and Treasurer Person 4 were scheduled to work on July 1, 2005. Person 3 testified that he had earlier requested time off for the court hearing through the Union and expected to receive permission for paid release time for meeting with Employer representatives. When he arrived at work, however, he was told, apparently by some supervisor other than the Chief, that he could be released only if he found someone to relieve him or if he took vacation time. Person 3 did neither and worked his regular shift, receiving his usual pay for it. During the shift he had a telephone call from Person 5 and Person 4, who said the Union had reached a proposed interim settlement with the Employer and wanted his input. After some discussion Person 3 gave his approval. He added that he doubted that he could have been reached if had been on a fire run.

Person 4 stated that on July 1, 2005 he went to the Union Hall for a meeting with the bargaining team and then directly to the Court House for the hearing. President Person 1 had been on the phone with Person 7 of Labor Relations, and Person 1 told Person 4 that he was being released but the issue of pay would have to be worked out. Person 4 seems to have been informed that as of that day, he was on regular leave, not paid leave. He said no one ever advised him that he could have used vacation time. In any event, Person 4 never received pay for his four hours at the Court House.

There is some discrepancy between the accounts of Person 7 and President Person 1

regarding the type of leave Person 1 sought in this instance. Person 7 described it as initially being in the category of conferences or conventions. Person 1 could not recall that. In any event, Person 7 seemed prepared to deny any type of paid release time to attend what he considered a court hearing on an injunction request. He believed this was not a negotiation session with Employer representatives or any other type of activity covered by the paid leave time provisions of the Parties' Agreement.

Union witnesses, most particularly Vice President Person 2, testified that the Employer has always paid Union release time for a variety of meetings with Employer officials, not only bargaining, mediation, or grievance sessions, but also Act 312 hearings, "retreats" and other meetings to discuss Department policies and labor relations generally. Person 2 added that he could not recall a meeting with management officials which was not compensated. Former President Person 1 stated that he needed Person 3 and Person 4 at the Court House meeting because they were familiar with the history of the of the dispatch issue. He also cited a prior instance when Union officers were paid for going to City A to deal with a discrimination case pending before MERC.

Person 7, now the Employer's Labor Relations Manager, testified that the July 1, 2005 meeting at the Court House was not arranged as a bargaining session but as a court hearing. He insisted that any negotiations that took place were primarily between Person 11, counsel for the Union, and Person 12, counsel for the Employer. Person 7 regarded the Union-Employer contacts on this occasion as neither "negotiations with Management" nor a "special meeting" as those terms are used in the provisions of the Parties' Agreement dealing with payments for lost time. When Union President Person 1 called asking about leave on July 1, Person 7 said that leave with pay would be granted for the afternoon Act 312 hearing but not for the court hearing

in the morning. Person 7 so notified Fire Chief Person 9.

On cross-examination, Person 7 conceded that the Employer pays for attendance at Act 312 proceedings because they are an extension of collective negotiations, even though they are not specifically covered by the Parties' Agreement. On the other hand, he felt that a suit bringing the Employer into court is not an extension of bargaining. Person 7 had no knowledge of the incident cited by the Union concerning an unfair labor practice charge before MERC. But he knew of no past practice that would support a payment in the present situation.

Fire Chief Person 9 testified that the Union put in a request via Telestaff, the Department's internal staffing system, for leave only for Treasurer Person 4, and said nothing about pay. The Chief e had no request from the Union regarding Secretary Person 3. But in the morning of July 1 both Person 4 and Person 3 were authorized to take unpaid leave to attend the court hearing. Person 3 elected to stay at work. Person 9 said it was Person 7 who made the decision that the attendance at court should be without pay.

Deputy Chief Person 13 testified that the four principal Union officers were in court concerning an injunction in 1993 and none was paid. But Person 13 conceded that no Act 312 proceeding was pending and he could not recall whether any or all of the officers were scheduled to work.

The Union filed a grievance on July 15, 2005, alleging violations of the Parties' Agreement granting paid release time to attend a court hearing on an injunction complaint and alleging a further violation of the contract's Maintenance of Standards provision. An arbitration was conducted before the undersigned on October 26, 2006. All parties were present, examined and cross-examined witnesses, and submitted other evidence. Both the Union and the Employer filed post hearing briefs and these have been duly considered.

ISSUE

The Parties did not stipulate to a specific issue in this case. The Union would phrase the issue broadly, dealing with the right of Union officers to receive paid release time to attend a court proceeding for an injunction. The Employer would couch the question in more fact-specific terms for each officer, namely, regarding the time spent in court by Treasurer Person 4 and the denial of Secretary Person 3's right to attend that session. To avoid any ruling regarding larger questions not actually before us, for example, paid release time for attendance at any court proceeding for an injunction, I shall state the issue as follows:

> Under the particular facts of this case, did the Employer violate the Parties' 2003-07 Agreement when it denied Union Secretary Person 3 and Treasurer Person 4 paid release time to be present at the Court House on July 1, 2005? If so, what shall the remedy be?

POSITIONS OF THE PARTIES

The Union argues that the past practice of the Parties establishes a broad scope to the contractual provision authorizing lost time payments for "time spent in negotiations with Management." According to the Union, that has covered mediation sessions and Act 312 interest arbitration hearings since those are simply an extension of the negotiation process. The Union points out that the injunction complaint was filed while Act 312 proceedings were pending, and was based in part on the Act 312 prohibition of unilateral changes in employment conditions during the pendency of such proceedings.

As it turned out, the Union goes on, the Parties never appeared before the Court on July 1, 2005 but instead worked out an "Interim Agreement" that obviated the need for any injunction. Alternatively, the Union claims it should prevail on the basis of a contract provision

granting release time to enable Union officials "to fulfill his/her Union responsibilities in the administration and enforcement of this Agreement." As a remedy, the Union urges that Treasurer Person 4 should receive the amount of pay withheld from him for the morning of July 1, 2005, with 5% interest, and Secretary Person 3 should receive a half-rate of pay, amounting to overtime pay, since he was in effect denied the right to attend the court proceedings, also with 5% interest.

The Employer counters that the provision granting release time to fulfill Union responsibilities in contract administration does not call for paid release time, and that should end the Union's case. In any event, Secretary Person 3 has no claim because he never submitted a request to the Fire Chief to be released. Moreover, the Employer insists that the contractual provision regarding paid release time for negotiating sessions does not apply to this case because the court appearance was not scheduled as a collective bargaining session.

Furthermore, says the Employer, the Union has not been able to prove an applicable past practice, since the only instance of a court appearance for a hearing on an injunction resulted in no payments to the Union officers in attendance. The Employer recognizes that that one instance does not establish a past practice in its favor, but at least it is no basis for the claim of a past practice favoring the Union. The Employer also stresses that the Union is not entitled to rely on any contract provisions that it did not cite in its grievance.

DISCUSSION

The 2003-07 Agreement between the Employer and the Union, which both Parties treated as applicable to this case, reads in pertinent part as follows (J-1, pp. 3, 5, 37):

ARTICLE 5. UNION BARGAINING COMMITTEE

SECTION 3. NO LOST TIME

Employee members of the bargaining committee will be paid by Management for time spent in negotiations with Management, but only for the straight time hours they would otherwise have worked on the regular work schedule. For the purpose of computing overtime, time spent in negotiations shall be considered as hours worked to the extent of the regular work schedule hours which otherwise would have been worked by the committee person.

ARTICLE 7. UNION STEWARDS AND OFFICIALS

SECTION 4. UNION OFFICER RIGHTS

The President, Vice-President, Secretary, Safety Committee Chairperson, Treasurer, and Pension Board Representative of the Union shall be allowed reasonable time during working hours to fulfill his/her Union responsibilities in the administration and enforcement of the Agreement and to attend safety matters, upon notification and approval of the Fire Chief.

ARTICLE 30. MAINTENANCE OF STANDARDS

Management agrees that all conditions of employment not otherwise provided for herein relating to wages, hours of work, overtime differentials and general working conditions shall be maintained at the standards in effect at the time of the signing of this Agreement, and the conditions of employment shall be improved wherever specific provisions for improvement are made elsewhere in this Agreement.

Section 13 of Act 312 reads as follows:

During the pendency of proceedings before the arbitration panel, existing wages, hours and other conditions of employment shall not be changed by action of either party without the consent of the other but a party may so consent without prejudice to his rights or position under this act.

As arbitrator I have an advantage enjoyed by neither the Employer nor the Union on July 1, 2005, when the session at the Court House occurred. I have the benefit of knowing the decision of the Act 312 panel in this case was that the dispatch question was a mandatory subject of bargaining. Section 13 of the Act would presumably apply, in the absence of a reversal of the panel by the courts. The Employer's announced plan to change a "[mandatory] condition of

employment ... [Owing the pendency of proceedings before the arbitration panel" would thus be subject to the requirement that the status quo be maintained. Although the Employer at the time may have considered the Union's resort to the courts as a far cry from the more amicable process of collective bargaining, that action can now be seen as an effort to bring the issue back to the bargaining table or, more precisely, to the Act 312 procedure that the Employer has recognized in the past as an extension of Union-Management negotiations. Under these circumstances, the mere effort by the Union to seek the injunction might well be regarded as part and parcel of the bargaining process. But that effort in itself could have been handled entirely by Union counsel, without the involvement of the respective bargaining committees. That is not what happened here, however, and I need not rest my analysis on the broader question of attendance at a court hearing on an injunction based in part on Section 13 of Act 312.

Regardless of what went on between the lawyers, the documentary evidence and the essentially uncontradicted testimony of the Union witnesses make clear that at some point during the morning of July 1, the employee members of the bargaining committee were drawn into the process. Person 1 and Person 5 talked with Employer representatives and the Union bargaining committee discussed the matter among themselves. There was even a telephone call to Secretary Person 3 while he was on duty to obtain his approval. President Person 1 signed the Interim Agreement on behalf of the Union and Manager Person 7 signed it on behalf of the Employer. Person 1 needed the Union Executive Committee's authorization for his action and he secured it. I am satisfied that within the letter and spirit of Article 5, Section 3 of the Parties' Agreement, there was "time spent in negotiations with Management" by the Union bargaining committee at the Court House on July 1, 2005.

What are the consequences for the claims of Union Secretary Person 3 and Treasurer

Person 4 ? Person 4's case is relatively easy. He spent the morning of July 1 at the Court House and lost pay "for the straight time hours [he] would otherwise have worked on the regular work schedule" (J-1, p. 3, Art. 5, Sec. 3). He was part of the bargaining committee that spent time in negotiations with Management. It is immaterial whether he personally was in contact with Employer officials. Often the most meaningful portions of collective negotiations are conducted by the principal spokespersons one-on-one, but with frequent reports back to the rest of the bargaining team for their comments, ideas, and ultimate approval or acquiescence. From all the evidence, at least that occurred here. Treasurer Person 4 is entitled to be made whole for his losses.

Secretary Person 3's case is different, both in terms of the contract and in terms of the equities of the situation. Under a literal reading of Article 5, Section 3 of the Parties' Agreement, Person 3 lost no pay because he worked his regular schedule. In certain circumstances I might be receptive to the argument that he was improperly denied paid release time but several factors militate against that in this instance. First, the notion that the Union's effort to secure an injunction was an implementation of Section 13 of Act 312, and thus an "extension" of negotiations, seems dependent on the conclusion that the dispatch issue was a mandatory subject of collective bargaining. Neither the Employer nor the Union could be sure of the answer at the time, but in such cases one may be required to act in reliance on one's position in order to make legal claims later. Second, the Fire Chief stated that both Person 4 and Person 3 were authorized to take unpaid leave on July 1. Person 3 apparently denied that he knew he had this option, but I am not persuaded he pursued that question with sufficient diligence. Person 3 should have brought the pay issue to a head, as did Person 4, by taking the leave the Employer was prepared to offer him and then grieving the denial of pay.

Third, at the time the Employer denied paid leave to Person 3, it was not known that the negotiations which took place at the Court House would occur. It was possible that the bargaining committee would only have been spectators at, or at most witnesses in, a purely legal proceeding, instead of participating in negotiations that led to the Interim Agreement.* It is true that Person 3 himself received a telephone call at work to obtain his approval of that partial settlement. But the time consumed for that must have been *de minimis* – a trifle not worth considering. It was not like the whole morning of lost pay suffered by Person 4. Fourth, nothing in the past practice of the Parties is sufficiently specific to establish a pattern regarding court appearances under Article 30, the Maintenance of Standards provision of the Parties' Agreement (J-1, p. 37). Finally, Fire Chief Person 9 stated that the only request for leave he received from the Union concerned Person 4, not Person 3, and I do not find this directly refuted by any other witness. Person 3 could have been a good deal more attentive in looking out for his interests. Under all these circumstances, there has not been proven any compensable wrong against Secretary Person 3.

The Union asserts that interest should be awarded on the monetary recovery due Person 4. I find economic merit in this position; one can argue persuasively that an employee deprived of a certain amount of pay in the past is not made whole by simply providing him or her the identical amount at present. The wrongdoer rather than the victim has had the use of that money in the interim. But despite some arbitral rulings to the contrary, there is a long tradition of not awarding interest in labor arbitration cases, at least absent bad faith or malice or egregious misconduct. The Parties could always have changed that result through collective bargaining and

* I am treating this as only one factor among several. Negotiations leading to settlement "at the court house steps" are not uncommon, and in some situations it might be shown that the likelihood of such a development is sufficiently great that paid release time for bargaining committee members would be in order from the outset.

they have not done so. This was not a case of bad faith or other egregious misconduct. At the time of the Employer's decision, there were good legal and contractual arguments for its position. I conclude I should not intervene where the Parties themselves have not acted. Interest will not be awarded.

AWARD

1. The grievance is sustained in part and denied in part. The Employer violated the Parties' Agreement by not paying Union Treasurer Person 4 for his lost time during the morning of July 1, 2005. He shall be made whole for his losses, but without interest. Under the particular circumstances here, the Employer did not commit any compensable wrong against Union Secretary Person 3.
2. The arbitrator retains jurisdiction for the sole purpose of clarifying this Award in the event of any dispute concerning its interpretation or implementation.

THEODORE J. ST. ANTOINE

Arbitrator

January 9, 2007