

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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RACINE COUNTY DEPUTY :
  
SHERIFF'S ASSOCIATION, :
  
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Complainant, : Case 147
  
: No. 49591 MP-2763
  
vs. : Decision No. 27984-A
  
:
  
RACINE COUNTY, :
  
:
  
Respondent. :
  
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Appearances:

Hanson, Gasiorkiewicz & Weber, S.C., Attorneys at Law, by Mr. Robert K. Weber, 514 Wisconsin Avenue, Racine, Wisconsin 53403, appearing on behalf of the Racine County Deputy Sheriff's Association.  
Long & Halsey Associates, Inc., by Mr. William R. Halsey, 8338 Corporate Drive, Suite 500, Racine, Wisconsin 53406, appearing on behalf of Racine County.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Racine County Deputy Sheriff's Association filed a complaint with the Wisconsin Employment Relations Commission on July 20, 1993, alleging that Racine County had committed prohibited practices within the meaning of Sections 111.70(3)(a)4 and 5 of the Municipal Employment Relations Act. On March 8, 1994, the Commission appointed Lionel L. Crowley, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5), Stats. The parties waived hearing on the matter and the parties filed briefs which were exchanged on April 22, 1994. Although the parties reserved the right to file a reply brief, neither did so. The Examiner, having considered the evidence and the arguments of counsel, makes and issues the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. Racine County Deputy Sheriff's Association, hereinafter referred to as the Association, is a labor organization within the meaning of Section 111.70(1)(h), Stats., and is the certified exclusive collective bargaining representative for all regular Deputy Sheriffs in Racine County, excluding the Sheriff, Chief Deputy, Captains, Lieutenants, Sergeants, Jail Corporals and civil employes, and its principal offices are: c/o Jeff Jones, 4208 South Beaumont, Kansasville, Wisconsin 53139.

2. Racine County, hereinafter referred to as the County, is a municipal employer within the meaning of Section 111.70(1)(j), Stats., and its principal offices are located at 730 Washington Avenue, Racine, Wisconsin 53403.

3. At all times material herein, the County and Association have been parties to a collective bargaining agreement which contains the following provisions:

ARTICLE I

1.01 Racine County recognizes the Association as the sole and exclusive bargaining representative for all regular Deputy Sheriffs in the Sheriffs Department, Racine County, Wisconsin, excluding the Sheriff, Chief Deputy, Captains, Lieutenants, Sergeants, Jail Corporals, and civilian employees.

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ARTICLE V

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5.02 A probationary employee has no seniority rights, except when layoffs occur. Their retention as an employee is entirely within the discretion of the County.

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ARTICLE XX  
GRIEVANCE PROCEDURE

20.01 A grievance is a difference of opinion between a Deputy or Deputies and the Management, or between the Association and the Management, concerning the meaning and application of the terms of this Agreement. It is agreed that grievances should be filed promptly and therefore any grievance must be presented within twenty-one (21) days after the known occurrence of the event giving rise to the grievance.

20.02 The following procedure shall be used for the adjustment of grievances:

STEP 1 Any grievance arising in the bargaining unit shall be reduced to writing and presented to the sheriff or his/her designee by the Deputy affected and his/her Association representative. A meeting between the Sheriff or his/her designee, the grievant, and the grievance committee representative will be held within five (5) working days from the date of the presentation of the written grievance. The Sheriff or his/her

designee shall give a written answer to the grievance within five (5) working days from the date of the meeting.

STEP 2 If the grievance is not satisfactorily resolved in Step 1 above, the Association may appeal the grievance further to the Labor Negotiator. Such an appeal must be made in writing within five (5) working days of the date of receipt of the written answer in Step 2 above. A meeting will then be held between the parties in an attempt to resolve the grievance. Such a meeting will be held within five (5) working days of the date of appeal of the grievance. The Labor Negotiator shall give a written answer to the grievance within five (5) working days from the day of the meeting.

STEP 3 If the grievance is not satisfactorily resolved in Step 2 above, the Union may appeal the grievance further to the Personnel & Community Services Committee. Such an appeal must be made within seven (7) working days of the date of receipt of the written answer in Step 2 above. A meeting will then be held between the parties in an attempt to resolve the grievance. Such a meeting will be held within fifteen (15) working days of the date of appeal of the grievance. The Personnel & Community Service Committee shall give a written answer to the grievance within fifteen (15) working days from the date of the meeting.

STEP 4 If the answer of the Personnel & Community Services Committee still does not satisfactorily resolve the grievance, prior to the Union appealing the grievance to arbitration, the Union shall within fifteen (15) days following receipt of the answer from the Personnel & Community Services Committee request the WERC to designate Steve Schoenfeld of its staff to serve as a mediator. Such request shall be identified to the WERC as a joint request. If the WERC does not designate Steve Schoenfeld as the mediator, the parties shall then agree on an alternate and joint request shall be filed with the WERC requesting that staff person.

STEP 5 If Step 4 set forth above does not satisfactorily resolve the grievance, the Union may appeal the grievance to further arbitration. Such intent by the Union to arbitrate the

grievance must be filed with the Labor Negotiator no later than twenty (20) days following the date of the WERC mediation service.

20.03 If a grievance is not answered within the time limits specified at any step of the procedure, the grievance will automatically advance to the next step. However, the parties may extend the time limits contained in this procedure by mutual agreement.

20.04 The Arbitrator shall be selected from a list of five (5) names obtained from the Wisconsin Employment Relations Commission (WERC), each party alternately striking names until there is but one left.

20.05 The decision of the Arbitrator shall be binding upon the parties. The costs of the Arbitrator shall be shared equally by the parties.

20.06 Any Deputy who attends any of the grievance meetings, set forth above, excluding arbitration proceedings, during his/her normal working hours shall receive pay therefore at his/her straight time rate of pay.

20.07 The Association may file a policy grievance on behalf of a group of Deputies or where a policy is affected.

6. On or about April 7, 1993, the County's Sheriff terminated Deputy Wayne T. Kraft, a probationary employe. On or about April 12, 1993, the Association filed a grievance on behalf of Deputy Kraft alleging a violation of all contract provisions dealing with discipline for just cause and alleging that Kraft was terminated without just cause; procedural due process violations; substantive just cause violation; and excessive penalty. The grievance was denied by the County on the basis that as Deputy Kraft was a probationary employe, his retention was solely within the County's discretion.

7. On or about June 9, 1993, the Association filed for an arbitration panel with the Wisconsin Employment Relations Commission. On or about June 17, 1993, the Commission forwarded a list of arbitrators to the parties. The County refused to proceed to arbitration on the basis that a probationary employe has no right under the contract to challenge a termination.

8. On or about September 3, 1993, the Association by letter added the following to the grievance:

The Association and the individual grievant respectfully assert that sec. 5.02 of the collective bargaining agreement is modified by sec. 15.02 of the Agreement, and was tacitly acknowledged by the County in this situation insofar as the County followed the provisions of the Deputies' Bill of Rights as set out in Article 29 of the contract, during the course of its investigation. Further, even if probationary employes are ruled not to be subject to the just cause provisions of the Agreement, they are entitled to certain due process and equal protection rights, including proper notification of the reasons for dismissal.

The County has maintained that the grievance is not arbitrable.

9. The grievance as amended by the Association alleging the application of Sec. 5.02 of the agreement to the termination of Deputy Kraft raises a claim that comes within the definition of a grievance under Sec. 20.01 of the parties' agreement.

Upon the basis of the above and foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSION OF LAW

Racine County, by refusing to strike arbitrators and to submit the grievance as amended relating to Deputy Kraft's termination to arbitration, has violated the terms of the collective bargaining agreement and by this action has violated Section 111.70(3)(a)5, Stats.

Upon the basis of the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes the following

ORDER 2/

IT IS ORDERED that Racine County, its officers and agents shall immediately:

1. Cease and desist from refusing to strike arbitrators and submitting the Deputy Kraft grievance, as amended, to binding arbitration.

2. Take the following affirmative actions which the Examiner finds will effectuate the policies of MERA:

a. Strike arbitrators and submit the Deputy Kraft grievance as amended to binding arbitration before the arbitrator selected.

b. Notify the Commission within twenty (20) days of the date of this Order, in writing, of what steps have been taken to comply with this Order.

Dated at Madison, Wisconsin, this 20th day of May, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley /s/  
Lionel L. Crowley, Examiner

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1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the

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2/ See footnote on Page 6.

findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

**This decision was placed in the mail on the date of issuance (i.e. the date app**

RACINE COUNTY (SHERIFF'S DEPARTMENT)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,  
CONCLUSION OF LAW AND ORDER

In its complaint initiating these proceedings, the Association alleged that the County had committed prohibited practices by its refusal to proceed to arbitration on the termination of Deputy Kraft, a probationary employe. The District denied that the grievance was arbitrable and asked that the complaint be dismissed.

POSITIONS OF THE PARTIES

Association's Position

The Association contends that several issues raised in the grievance are arbitrable under the contractual grievance procedure. The Association argues that the Sheriff's refusal to notify Deputy Kraft of the reasons for his discharge is an unreasonable exercise of the Sheriff's rights and a violation of due process; the Sheriff followed the Bill of Rights up to the point of discharge so he is estopped on the theory of waiver and must follow the just cause provisions; and the recognition clause does not exclude probationary employes. The Association, contrary to the County's assertion that Sec. 5.02 is controlling, asserts that where one party believes a contract is susceptible to only one interpretation, the dispositive issue is whether the contested action is clearly exempt from the grievance and arbitration procedure. The Association claims that the grievance was modified to include the claim that Sec. 5.02 is modified by Sec. 15.02 of the agreement, and even if probationary employes are not subject to the just cause provisions, they are entitled to certain due process and equal protection rights. It submits that the termination was conducted pursuant to Article XXIX and the County waived its Sec. 5.02 rights and it is required to follow the just cause provisions of Sec. 15.02.

The Association maintains that Sec. 1.01 of the agreement does not exclude probationary employes. The Association cites arbitration decisions that conclude that an employer's right to terminate probationary employes is subject to the test of fairness and reasonableness and the employer must advise the grievant and Union of the reasons for the termination.

The Association submits that the outcome of the issue at bar is not clear and the arbitration clause covers any "difference of opinion between a Deputy or Deputies and the Management, or between the Association and the Management, concerning the meaning and application of the terms of the agreement."

The Association insists that the County's defense is clearly one of arbitrability and in determining whether the arbitration clause is not susceptible of an interpretation that covers the asserted dispute, the Examiner must give the benefit of the doubt to the grievant and must presume

arbitrability. The Association contends that issues of arbitrability are for the Arbitrator and the County should be ordered to assert its defense at the arbitration hearing.

#### County's Position

The County contends that the decision to discharge a probationary employe is not subject to arbitration and the complaint should be dismissed. It cites Milwaukee Police Association v. City of Milwaukee, 113 Wis.2d 192, 335 N.W.2d 417 (CtApp, 1983) in support of its position which held that the discharge of probationary police officers is not subject to arbitration because it would inappropriately transfer the discretion given to the police chief to an arbitrator.

The County relies on Sec. 5.02 of the agreement which it asserts gives the County total discretion as to the retention decision on probationary employes. It claims that if the decision is subject to arbitration, this language, which gives the County unlimited discretion, is rendered meaningless. It questions what is there for the arbitrator to review except to impose his/her discretion instead of the contractually agreed to terms.

The County submits that the contract must be read as a whole in determining rights and responsibilities. It refers to Sec. 1.01, the recognition clause, which applies to "all regular Deputy Sheriffs" and notes that this phrase is not defined in the contract and it would suggest that the meaning would be the same as "permanent" deputies which means the parties intended to exclude probationary employes. It claims that this intent is even clearer when read in light of Sec. 5.02 which gives the County absolute discretion on the retention decision for probationary employes.

The County argues that allowing the discharge to be arbitrated would result in a new standard being imposed on the County and this should be done at the bargaining table.

The County further suggests that permitting arbitration would unduly limit the constitutional power of the Sheriff as set forth in Manitowoc County v. Local 986B, AFSCME, AFL-CIO, 168 Wis.2d 819, 484 N.W.2d 534 (1992). It asserts that substituting the rationale of an arbitrator for that of the Sheriff in retention decisions for probationary deputies would illegally interfere with the historical duties of the Sheriff. It asks that the complaint be dismissed on its merits.



## DISCUSSION

The issue presented in this case is whether the grievance is arbitrable. In determining arbitrability, the Commission has consistently applied the law enunciated by the U. S. Supreme Court in the Steelworkers 3/ trilogy and applied to the Municipal Employment Relations Act by the Wisconsin Supreme Court in Jt. School Dist. No. 10 v. Jefferson Ed. Assoc., 78 Wis.2d 94, 253 N.W.2d 536 (1977). The Court held that in determining arbitrability, the Court's function is limited to a determination whether there is a construction of the arbitration clause that would cover the grievance on its face and whether any other provision of the contract specifically excludes it. 4/ The Commission has held that a party has a right to proceed to arbitration when it makes a claim which on its face is governed by the collective bargaining agreement. 5/

The County has not cited any specific provision in the collective bargaining agreement which excludes grievances by probationary employes. In Kaiser v. Board of Police & Fire Commrs., 104 Wis.2d 488, 311 N.W.2d 646 (1981), the Wisconsin Supreme Court held that a probationary police officer had neither a constitutional nor a statutory right to a hearing or to a statement of specifications where the officer was not retained. Article IV of the collective bargaining agreement stated, "No claim or grievance shall be made by the NSU or the employee with respect to layoff or discharge of the employee during such period of probation." The probationary employe clearly was excluded from filing a grievance under this contract. The instant contract has no such language.

In Milwaukee Police Assn. v. City of Milwaukee, 113 Wis.2d 192, 335 N.W.2d 417 (CtApp, 1983), the Court of Appeals held that the termination of a probationary employe was not arbitrable under the collective bargaining agreement. The language of the contract relied on by the Association was very general involving differences over the interpretation, application or enforcement of the provisions of the agreement and the Court held that a general contract term does not govern an express statutory power and without any such express term, the chief's discretion could not be transferred to an arbitrator. For a similar conclusion, see City of New London (Police Department), Dec. No. 27139-A (Honeyman, 7/92).

These cases hold that without some express contract provision, the statutory provisions make it clear that the general arbitration clause would not cover a grievance on the termination of a probationary employe.

The only clause in the instant case that contains an express reference to probationary employes is Article V which provides that the retention of a probationary employe is entirely within the discretion of the County. Both parties have made reference to Sec. 5.02 and both rely on it. The County asserts this clause gives it absolute and unlimited discretion to terminate probationary employes. The Association's argument that Sec. 5.02 is modified by Sec. 15.02 and the County has waived its Sec. 5.02 rights is not persuasive and is not a basis for finding the grievance arbitrable. The Association also cites Sec. 5.02 for the proposition that the County's discretion is not without

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3/ United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); and United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

4/ Jt. School District No. 10, at 111.

5/ State of Wisconsin, Dec. No. 18012-C (WERC, 11/81).

limits but the County must act in a fair and reasonable manner. How this particular section should be interpreted is for an arbitrator to decide and is the basis for finding the grievance as amended arbitrable.

The original grievance as submitted related to just cause and if the grievance had remained as originally submitted, it seems clear under the above cited cases, the grievance would not be arbitrable. However, the grievance was amended such that an interpretation of Sec. 5.02 is called into play. The County may be correct that Sec. 5.02 gives it complete and absolute discretion on probationary terminations. On the other hand, as argued by the Association, there may be a requirement that the County's exercise of discretion in Sec. 5.02 cannot be arbitrary, capricious or unreasonable. The parties bargained for an arbitrator to decide such an issue and the undersigned therefore finds that this issue is arbitrable.

The County has raised two additional arguments that will be addressed. It cites the recognition clause as referring to "regular" Deputy Sheriffs and posits that this means "permanent". The general meaning of the term regular in the recognition clause is the frequency of hours worked and casual or temporary employes who do not work on a regular basis are generally excluded from "regular" units but probationary employes who are regular as opposed to casual or temporary are included in the unit. 6/

The County's reliance on Manitowoc County, 7/ supra, with respect to the constitutional authority of the Sheriff, is misplaced. The Sheriff's constitutional power is not unlimited, otherwise carried to its logical extension, a just cause provision for permanent employes would conflict with the Sheriff's constitutional authority. The Sheriff's termination of an employe, including a probationary employe, may be limited by a collective bargaining agreement and such limitation does not run afoul of the Sheriff's constitutional authority and power.

The instant case is a close one and is limited to the interpretation of Sec. 5.02. The U.S. Supreme Court has held that

in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims. Whether 'arguable' or not, indeed even if it appears to the court to

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6/ City of Phillips (Police Department), Dec. No. 26151 (WERC, 9/89).

7/ 168 Wis. 2d 819, 484 N.W.2d 534 (1992)

be frivolous, the union's claim that the employer violated the collective-bargaining agreement is to be decided, not by the court asked to order arbitration, but as the parties have agreed, by the arbitrator. . . . 8/

Inasmuch as the County has refused to proceed to arbitration on the amended grievance involving the interpretation of Sec. 5.02 as applied to probationary employees, the County has been found to have violated Sec. 111.70(3)(a)5, Stats., and has been directed to proceed to arbitration on the amended grievance.

Dated at Madison, Wisconsin, this 20th day of May, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley /s/  
Lionel L. Crowley, Examiner

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8/ AT&T Technologies, Inc. v. Communication Workers of America, 475 U.S. 643, 1121 LRRM 3329 (1986).