STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

GENERAL TEAMSTERS UNION, LOCAL NO. 662, Complainant,

vs.

CLARK COUNTY, Respondent.

Case 101
No. 54769
MP-3260

Decision No. 29091-B

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Attorney Naomi E. Soldon**, 1555 North RiverCenter Drive, Suite 202, P. O. Box 12993, Milwaukee, Wisconsin 53212, appearing on behalf of General Teamsters Union, Local No. 662.

Weld, Riley, Prenn & Ricci, S.C., by **Attorney Kathryn J. Prenn**, 4330 Golf Terrace, Suite 105, P. O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of Clark County.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

General Teamsters Union, Local No. 662 filed a complaint with the Wisconsin Employment Relations Commission on January 7, 1997, alleging that Clark County had committed prohibited practices in violation of Secs. 111.70(3)(a)1, 3, 4 and 5, Stats. On May 6, 1997, 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 Sec. 111.07(5), Stats. Hearing on the complaint was held on February 24, 1998, in Neillsville, Wisconsin. The parties filed briefs and reply briefs, the last of which were exchanged on July 13, 1998. The Examiner, having considered the evidence and arguments of counsel, makes and issues the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. General Teamsters Union, Local No. 662, hereinafter referred to as the Union, is a labor organization within the meaning of Sec. 111.70(l)(h), Stats., and at all times material herein is the exclusive bargaining representative of all regular full-time employes with the power of arrest in the Clark County Sheriff's Department. The Union maintains its principal offices at 119 West Madison Street, Eau Claire, Wisconsin 54702-0086.

2. Clark County, hereinafter referred to as the County, is a municipal employer within the meaning of Sec. 111.70(l)(j), Stats., and maintains its principal offices at 517 Court Street, Neillsville, Wisconsin 54456-0111. At all times material herein, Dale Olson was the Clark County Sheriff and acted on behalf of the County.

3. At all times material herein, the Union and the County have been parties to collective bargaining agreements covering the bargaining unit represented by the Union. The first such relevant agreement (hereinafter "1994-1995 Agreement") was in effect from January 1, 1994 through December 31, 1995. The "1994-1995 Agreement" contained, in pertinent part, the following provisions:

ARTICLE 5 – GRIEVANCE PROCEDURE

Section 1. Grievance. A grievance is defined to be a controversy between the Union and the Employer, or between any employee or employees and the Employer as to:

A. A matter involving the interpretation of this Agreement;

B. Any matter involving alleged violation of this Agreement in which an employee, or group of employees, or the Employer maintains that any of their rights or privileges have been impaired in violation of this Agreement; and

C. Any matter involving working conditions.

. . .

Section 4. Arbitration

. . .

C. The written decision of the arbitrator shall be final and binding upon both parties.

. . .

ARTICLE 6 – DISCIPLINE

Section 1. The parties recognize the principle of progressive discipline. No disciplinary action shall be taken against employees except for just cause.

4. The Union and the County entered into a successor agreement to the 1994-1995 Agreement, from January 1, 1996, through December 31, 1997 (hereinafter "1996-1997 Agreement").

5. During negotiations for the 1996-1997 Agreement, the County proposed the following addition to Article 5 – Grievance Procedure:

Section 8: Add A New Section read as follows:

> For grievances involving the review of a suspension, a demotion or a dismissal, the employee shall have the option of having the disciplinary action reviewed under the procedures set forth in Sec. 59.21., Wis. Stats., but such actions shall not be subject to review under the grievance procedures set forth in this Article.

The proposal was dropped during negotiations and the contract language under Article 5 remained unchanged.

6. On November 30, 1994, Clark County charged Arthur Edwards (hereinafter "Edwards"), a Deputy Sheriff employed by Clark County under the 1994-1995 Agreement, with the misdemeanor offense of resisting or obstructing an officer.

7. On December 12, 1994, Sheriff Dale Olson filed a complaint against Clark County Deputy Sheriff Edwards, pursuant to Sec. 59.21(8)(b), Wis. Stats. The Sheriff suspended Edwards pending a hearing before the Clark County Grievance Committee, in which the Sheriff planned to recommend that Edwards' employment be terminated.

8. On December 20, 1994, the Union wrote a letter in which it put the County "(o)n notice that any grievance committee hearings and/or actions taken by the County . . . do not supersede any rights held by Mr. Edwards under the collective bargaining agreement. Deputy Edwards will have full recourse to pursue any action taken against him pursuant to the contract."

9. On or about January 27, 1995, the Clark County Grievance Committee denied the Sheriff's complaint. Consequently, Edwards was reinstated to employment.

10. On May 1, 1996, a judgment of conviction was filed against Edwards for the misdemeanor offense of resisting or obstructing an officer in Clark County Circuit Court. Edwards appealed this decision to the Wisconsin Court of Appeals.

11. On May 8, 1996, Sheriff Olson filed a complaint against Clark County Deputy Sheriff Edwards with the Clark County Grievance Committee pursuant to Sec. 59.21(8)(b), Stats., recommending that Edwards be terminated for violating the law as evidenced by his conviction. The Sheriff suspended Edwards with pay pending hearing before the Committee.

12. On May 14, 1996, the Union advised the Sheriff that Edwards and the Union "(R)eserve any and all rights under the collective bargaining agreement between the County and the Union to challenge any adverse actions which may be taken against him as a result of the statutory proceedings."

13. On or about May 29, 1996, the Clark County Grievance Committee sustained the Sheriff's complaint, thereby discharging Edwards.

14. On May 30, 1996, pursuant to the 1996-1997 Agreement, Edwards filed a grievance against Clark County for his "termination of employment without just cause."

15. In a June 7, 1996 letter, Edwards informed the County that, pursuant to Sec. 59.21(8)(b)6, Wis. Stats., he was appealing the Clark County Grievance Committee's findings and conclusions to the Circuit Court for Clark County.

16. The County's Personnel Coordinator sent the Union a letter dated June 19, 1996, which stated as follows:

> This is to inform you that the Personnel Committee has agreed to Arthur Edwards' request that the grievance hearing before that Committee be waived and that, at his discretion, the issue of his termination be referred directly to the arbitration process.

17. On July 12, 1996, the County's attorney sent a letter to the Union which stated, in part, as follows:

> Regarding Mr. Edwards' discharge, the County would note that Mr. Edwards has appealed his discharge to the Circuit Court pursuant to Sec. 59.21(8)6, Wis. Stats., which provides that the Court's decision shall be final and conclusive. The County does not believe, therefore, that grievance arbitration is available to Mr. Edwards in this matter.

Thereafter, Clark County has continued to refuse the Union's request to arbitrate the May 30, 1996 grievance protesting Edwards' discharge.

18. On or about January 24, 1997, the Circuit Court for Clark County denied Edwards' appeal and sustained the findings and decision entered by Clark County's Grievance Committee on or about May 30, 1996.

19. On or about April 10, 1997, the State of Wisconsin Court of Appeals District IV reversed Edwards' conviction for misdemeanor obstruction of justice and remanded for a new trial. Subsequent to the Court of Appeals decision reversing Edwards' conviction, a motion for relief was timely filed with Judge Curtin requesting reversal of the Order, which was denied.

20. After the receipt of the Court of Appeals decision reversing Edwards' conviction, the Union again protested Edwards' termination. Arthur Edwards remains terminated. He has not been reinstated to employment.

21. Edwards was not retried; rather he entered into a deferred prosecution agreement. He successfully complied with the terms of said agreement and the case was dismissed with prejudice on January 28, 1998.

22. On November 5, 1991, the Clark County Law Enforcement Committee issued Deputy Toni Karl, a dispatcher, a ten-day suspension without pay. The suspension was appealed to arbitration. A hearing was held before Arbitrator Mueller on April 8, 1992, at the Clark County Courthouse. During the course of the hearing, the parties reached a voluntary settlement of the dispute.

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

CONCLUSION OF LAW

The County was not required to arbitrate the County's Grievance Committee's discharge of the grievant under the parties' collective bargaining agreement's grievance procedure or any other agreement to arbitrate said discharge because the grievant chose to appeal his discharge by the Grievance Committee to the Circuit Court pursuant to Sec. 59.26(8)(b)6 (formerly Sec. 59.21(8)(b)6.), Stats., and therefore the County did not commit any prohibited practice in violation of Secs. 111.70(3)(a)1, 3, 4 or 5, Stats.

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

ORDER

IT IS ORDERED that the complaint be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin, this 31st day of August, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

CLARK COUNTY

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

In its complaint, the Union alleged that the County violated Secs. 111.70(3)(a)1, 3, 4 and 5, Stats., by refusing to arbitrate the grievance over Edwards' discharge. The District answered the complaint denying that it violated Sec. 111.70(3)(a), Stats., by refusing to proceed to arbitration.

UNION'S POSITION

The Union contends that the clear and unambiguous language of the parties' agreement provides that a discharge grievance is arbitrable. It refers to the 1994-95 and 1996-97 agreements which contain no language excluding discharge or suspension grievances from arbitration. Is submits that the 1994-95 agreement defines a grievance which encompasses discharge grievances. It observes that the County attempted but failed to exclude disciplinary grievances in negotiations for the 1996-97 agreement. It insists that the unambiguous contract language must be enforced and the Edwards grievance is arbitrable.

The Union alleges that past practice supports its interpretation. It refers to the 1991 suspension of Deputy Toni Karl whose grievance proceeded to arbitration and was settled during the hearing before the arbitrator. It also claims that the suspension of Deputy Dennis Soik was resolved through the grievance procedure and the County has never before refused to arbitrate a disciplinary grievance. It further contends that bargaining history supports it in that the County unsuccessfully proposed a change to the grievance procedure which would have taken away employes' rights to have disciplinary action subject to review under the grievance procedure. It insists that the County's proposal was not merely a clarification of existing contract language but was a new change and the County is seeking to impose on Edwards the very restrictions it could not obtain in bargaining.

The Union asserts that the County agreed to arbitrate the Edwards grievance. It alleges that in the County's June 19, 1996 letter to the Union, the County agreed to waive the initial steps of the grievance procedure and stated that Edwards could proceed directly to arbitration. It argues that the County reneged on its agreement in a July 12, 1996 letter to the Union stating that Edwards' grievance was not arbitrable because he appealed the Grievance Committee's decision to Circuit Court as provided in Sec. 59.21(8)(b)6, Stats. It notes that the County was aware that Edwards had appealed to Circuit Court before the County agreed to arbitrate and such warrants an order requiring the County to satisfy its agreement to arbitrate.

The Union takes the position that the agreement does not conflict with the statute. It claims that the Wisconsin Supreme Court has determined that Sec. 59.21(8)(b) neither conflicts with nor prohibits arbitration agreements covering discipline of deputy sheriffs and the parties may negotiate contract terms that permit the option of appealing disciplinary action to neutral arbitration.

It contends that the collective bargaining agreement contains an arbitration provision which permits Edwards to appeal his discipline to an impartial arbitrator. It insists that the statutory right of appeal to circuit court does not disrupt the harmony of Sec. 59.21(8)(b) with a collectively bargained arbitration procedure. The Union maintains that the law of Wisconsin favors resolution of labor disputes through grievance and arbitration procedures. It recognizes that the WERC must strive to reconcile the provisions of MERA with any seemingly conflicting provisions of other statutes. It observes that the statutory establishment of committee review does not negate or interfere with the parties' obligations under the arbitration provision.

The Union claims it is entitled to reasonable attorney fees incurred in bringing this action on the grounds that the County has acted in bad faith in refusing to arbitrate Edwards' grievance.

The Union concludes that the statutory procedure set forth in Sec. 59.21(8)(b) is in harmony with the Agreement's grievance procedure and the County's position that the statute precludes appeal of the Grievance Committee's decision to a neutral arbitrator conflicts with the clear language of the agreement, bargaining history and past practice. It argues that the County should be ordered to arbitrate Edwards' termination and make the Union whole.

COUNTY'S POSITION

The County contends that there was no agreement to submit Edwards' termination to arbitration, and even if there was, it would be void as a matter of law. The County argues that the Union's assertion that the letter of June 19, 1996, was an agreement to arbitrate is erroneous. It states that the record establishes the County was not by the letter expressing an intent to arbitrate; it simply agreed to waive the grievance steps and Edwards, at his discretion, could refer the matter directly to the arbitration process but the County was not agreeing to arbitrate the dispute nor waiving any challenges should Edwards decide to pursue arbitration. It claims that the Union chose to ignore the history behind and the rationale for the County's proposal in the 1996-97 bargaining. The County asserts that the County understood that a discharged officer had to choose between appealing to arbitration or to court, but could not do both. It asserts the County recently has taken the position that the officer's only appeal is to court and the proposal was intended to clarify the statute versus the grievance procedure. It submits the County's July 12, 1996 letter is consistent with its understanding that because Edwards appealed his discharge to circuit court, he could not proceed to arbitration. It contends that this is consistent with past practice in that Deputy Toni Karl did not appeal to circuit court so her discipline was properly appealed to arbitration. The County concludes that there was no unconditional agreement by it to arbitrate Edwards' discharge and assuming it agreed under the "one or the other but not both" theory, Edwards' appeal to circuit court, as stated in the County's July 12, 1996 letter, meant that grievance arbitration was no longer available.

The County alleges that the Commission lacks authority to order the County to proceed to arbitration over the decision to discharge Edwards. It notes that the discharge of a deputy

sheriff is regulated by Sec. 59.26, Stats., formerly Sec. 59.21, Stats. The County observes that the Grievance Committee's decision is subject to review by the circuit court and Sec. 59.26(8)(b)6, Stats., provides that if the order of the committee is sustained, it shall be final and conclusive. It notes that this parallels Sec. 62.13, Stats., for city police and fire departments and it points out that the relevant language related to circuit court review between the statutes is identical. The County claims that the two statutory provision create an irreconcilable conflict with the grievance procedure. It observes that this conflict was recognized and addressed by the Commission nearly fifteen years ago in CITY OF DEPERE, DEC. NO. 19703-B (WERC, 12/83). It asserts that early Commission case law allowed the "one or the other" approach and here Edwards' having appealed to circuit court, an order to proceed to arbitration would impermissibly contradict the provision of Sec. 59.26 that the decision of the circuit court shall be final and conclusive.

The County argues that the Court of Appeals in CITY OF JANESVILLE, 193 WIS.2D 492 (CT.APP., 1995) determined that a contract provision which would allow an officer to appeal his disciplinary action to arbitration rather than to circuit court was prohibited because it ran counter to an express statutory command and was an unlawful transfer of authority. The County asserts that the CITY OF JANESVILLE, SUPRA, provides strong precedent for the position that the Commission lacks authority to order the County to proceed to arbitration because to do so would create an irreconcilable conflict with the express provisions of Sec. 59.26(8)(b)6, Stats. It notes that Edwards has appealed to the circuit court twice and is now seeking a third bite of the apple which is not permissible and is an unlawful transfer of authority to an arbitrator. The County contends that "final and conclusive" is meant to be final and conclusive and even appellate courts have no jurisdiction to review the circuit court's decision and certainly there is no statutory authority to transfer appellate review to an arbitrator. The County believes that the Commission lacks the authority to order to the County to proceed to arbitration over the discharge of Edwards and it requests that the complaint be dismissed.

UNION'S REPLY

The Union contends that the County's two arguments do not provide a sufficient basis for denying Edwards' right to arbitration. It asserts that the County disingenuously denies it agreed to arbitrate Edwards' grievance despite clear evidence of its agreement. The Union states that the County relies on decisions under the wrong statutory provisions to show an irreconcilable conflict between the agreement and Sec. 59.21(8)(b), Stats. The Union argues that the Supreme Court's decision in BROWN COUNTY SHERIFF'S DEPARTMENT V. EMPLOYEES ASSOCIATION, 194 WIS.2D 265, 533 N.W. 2D 766 (1995) requires enforcement of the parties' agreement to arbitrate. It claims that the CITY OF JANESVILLE, SUPRA, as well as CITY OF DEPERE, SUPRA, are inapplicable because BROWN COUNTY, SUPRA, was decided later and arbitration clauses are enforceable which is different than whether arbitration clauses are mandatory subjects of bargaining. It also points out that JANESVILLE, SUPRA, interprets Sec. 62.13, Stats., as opposed to Sec. 59.21, Stats. The Union also submits that equity mandates arbitration as Edwards' discharge was based on a conviction that no longer exists.

The Union insists that the County agreed to arbitrate Edwards' grievance in its June 19, 1996 letter. It maintains that the testimony that this was not the intent of the County was revisionist and self-serving.

In conclusion, the Union takes the position that the County failed to show an inherent conflict between the parties' agreement and Sec. 59.21 (8)(b), Stats., justifying its refusal to arbitrate. It submits that the County should be made to honor its agreement to arbitrate and make the Union whole for its unlawful refusal to arbitrate.

COUNTY'S REPLY

The County contends that a review of the Union's arguments reveals that it has chosen to ignore recent case law and express statutory provisions which the County believes prohibit access to arbitration for disciplinary decisions involving law enforcement officers. The County point out that Edwards appealed his discharge to Circuit Court which distinguishes his case from those of Karl and Soik.

The County agrees that, in general, Wisconsin labor relations policy favors arbitration to resolve labor disputes but there is an exception and that is if the court sustains the Committee's order, it shall be final and conclusive. The County believes that after JANESVILLE, SUPRA, Sec. 59.26(8)(b)6, Stats., controls and is the sole appeal of discipline and arbitration is not available because it would be an unlawful transfer of authority to an arbitrator. The County maintains that the Union's reliance on BROWN COUNTY, SUPRA, is misplaced, as it had nothing to do with the transfer of authority from the circuit court to an arbitrator. It submits that the issue was whether the sheriff's powers are subject to or limited by a collective bargaining agreement.

The County observes that the issue of whether a deputy sheriff's sole remedy of discipline is review by the circuit court has not yet been addressed by the Supreme Court and it cites MILAS V. LABOR ASSOCIATION OF WISCONSIN, INC. 214 WIS.2D 1 (1997) where a County was estopped from challenging an arbitrator's award on a sheriff's deputy's dismissal where no challenge was made to arbitration until after the arbitrator issued his award. It notes that it has objected to the arbitration of Edwards' discharge and it is Edwards who is seeking "two bites of the apple" by seeking two appeal routes.

As to the Union's request for attorneys' fees, the County contends that the Union has failed to meet the Commission's standard for awarding attorneys' fees. It requests dismissal of the Complaint in its entirety.

DISCUSSION

The County has argued that the only appeal available to Edwards is to the circuit court pursuant to Sec. 59.26(8)(b)6, Stats. The County has acknowledged that the Wisconsin Supreme Court has not determined whether a deputy sheriff's sole and exclusive appeal of the Grievance Committee's decision is to the circuit court. MILAS V. LABOR ASSOCIATION OF

WISCONSIN, 214 WIS.2D 1 (1997). The undersigned also finds that it is unnecessary to make that determination. The parties' collective bargaining agreement contains a grievance procedure that culminates in final and binding arbitration. Article 6 of this agreement provides that no disciplinary action shall be taken against employes except for just cause. Thus, it would appear that the arbitration clause covers the issue of whether there was just cause for Edwards' termination. The Commission in DODGE COUNTY, DEC. NO. 21574 (WERC, 4/84) held that an employe under similar language has the right to appeal through the grievance procedure under the just cause requirement. However, the Commission went on to state that the grievance procedure is an available forum in which to challenge a Grievance Committee disciplinary action only so long as the employe has not filed a Sec. 59.21(8)(b)6., Stats., appeal to circuit court. The rationale for this is that Sec. 59.21(8)(b)6, Stats., provides that if the circuit court upholds the decision, it is "final and conclusive." An agreement to arbitrate cannot be interpreted to challenge the same disciplinary action dealt with in the circuit court because to do so would contradict the statutory provision that the decision, if upheld by the circuit court, is "final and conclusive."

In the instant case, Edwards appealed to circuit court which upheld the County's Grievance Committee's decision to discharge Edwards and that decision by statute became final and conclusive, so the grievance procedure's arbitration provision cannot be invoked because it would impermissably contradict the statutory provision. Thus, arbitration is not available to Edwards. All the examples of past practice and other cases cited by the Union are not on point because none involved a case where the discharged or disciplined employe went to circuit court and after receiving an adverse decision, then attempted to proceed to arbitration on the same discipline. In DEPERE, supra, a police officer attempted to appeal a disciplinary action previously appealed to circuit court and the Commission held that the City's refusal to proceed to arbitration did not constitute a prohibited practice.

The Union has argued that the County's June 19, 1996 letter constitutes a separate agreement to arbitrate the Edwards discharge. It is noted that the letter refers to the words, "at his discretion," meaning that it was Edwards' choice to appeal to arbitration and that parallels the Declaratory Ruling in DODGE COUNTY, SUPRA, where the Commission stated that it is "at the employe's option," to proceed to arbitration as long as there is no appeal to circuit court. Edwards had appealed to circuit court and the record is not clear whether the author of the letter knew this or not but Edwards could have dropped his court appeal and proceeded to arbitration, so it would appear that this was not a separate agreement by the County to arbitrate his discharge. But even if it were, it entails the same exclusion as the regular contractual agreement to arbitrate. No arbitration agreement can contradict the statute and the circuit court's order that the Committee's decision is final and conclusive precludes any agreement to arbitrate whether in the contract or by the letter of June 19, 1996.

Finally, the instant case is the reverse side of MILAS, SUPRA. In MILAS, the parties went to arbitration over the dismissal of a sheriff's deputy and after the arbitrator's award, the County sought to set aside the arbitration award, claiming the statutory appeal to circuit court was exclusive. The Court concluded that the doctrine of equitable estoppel applied and ordered the arbitrator's award reinstated. Here, Edwards went through the statutory appeal

process in Sec. 59.26(8)(b)6, Stats., and now seeks arbitration because he is not satisfied with the circuit court's decision. Here too, Edwards is estopped. To paraphrase the Court, permitting Edwards to question the circuit court's decision after he chose that venue and participated in that proceeding would give Edwards "two bites at the apple," arbitration and litigation, to obtain a favorable outcome. Edwards elected, at his option, to appeal to circuit court and having done so, he is estopped from seeking arbitration, and is bound by the court's order that the Committee's decision is final and conclusive. Therefore, there is no violation of Secs. 111.70(3)(a) 1, 3, 4 or 5, Stats., and the complaint has been dismissed in its entirety.

Dated at Madison, Wisconsin, this 31st day of August, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Lionel L. Crowley, Examiner

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