STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ROLLING HILLS EMPLOYEES' LOCAL 1947, AFSCME, AFL-CIO, Complainant,

vs.

MONROE COUNTY, Respondent.

Case 175
No. 64512
MP-4131

Decision No. 31346-A

Appearances:

Daniel R. Pfeifer, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 18990 Ibsen Road, Sparta, Wisconsin 54656, appearing on behalf of the Union.

Kenneth Kittleson, Personnel Director, Monroe County, 14345 County Highway "B", Sparta, Wisconsin 54656-4509, appearing on behalf of the County.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On February 15, 2005, Rolling Hills Employees' Local 1947, AFSCME, AFL-CIO, filed a complaint against Monroe County, alleging that the County had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1 and 111.70(3)(a)5, Wisconsin Statutes by refusing to arbitrate a grievance concerning the payment of death benefits for a deceased employee, Heather Schmitz. On May 31, 2005, the Commission appointed John Emery, a member of its staff, as Examiner to issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.07 and 111.70(4)(a), Wis. Stats. On June 8, 2005, the County filed an Answer to the Complaint. On June 15, 2005, a hearing was conducted in Sparta, Wisconsin. The proceedings were transcribed and the transcript was filed on June 22, 2005. The parties filed their briefs on July 22, 2005 and the record was thereupon closed.

The Examiner, having considered the evidence, the applicable law and the arguments of the parties and being advised in the premises, hereby makes and issues the following

FINDINGS OF FACT

1. Rolling Hills Employees' Local 1947, AFSCME, AFL-CIO, the Complainant herein, is a labor organization maintaining its principal place of business at 18990 Ibsen Road, Sparta, Wisconsin.

2. Monroe County, the Respondent herein, is a municipal employer maintaining its principal place of business at 14345 County Highway "B", Sparta, Wisconsin.

3. At all times pertinent hereto a collective bargaining agreement existed between the parties, which recognized Local 1947 as "…the exclusive bargaining agent for all Monroe County Rolling Hills employees, except those who were excluded by the WERC, in their direction of election, for the purpose of bargaining collectively on all matters pertaining to wages, hours, and working conditions of employment."

4. The parties' collective bargaining agreement contains a grievance procedure, which is set forth in Article 4, as follows:

ARTICLE 4 – GRIEVANCE PROCEDURE

Section 1. Definition of Grievance: A grievance shall mean a dispute concerning the interpretation or application of this Agreement.

Section 2. Subject Matter: Only one subject mater shall be covered in any one grievance. A written grievance shall contain the name and position of the grievant, a clear and concise statement of the grievance, the issue involved, the relief sought, the date the incident or violation took place, the specific Section of the Agreement alleged to have been violated and the signature of the grievant and the date.

Section 3. Time Limitations: If it is impossible to comply with the time limits specified in the procedure because of work schedules, illness, vacations, or other acceptable reasons, these limits may be extended by mutual consent in writing.

Section 4. Settlement of Grievance: Any grievance shall be considered settled at the completion of any step in the procedure, if all parties concerned are mutually satisfied. Dissatisfaction is implied in recourse from one step to the next.

Section 5. All employee grievances must be filed by the aggrieved employee or the president of the Union, in writing, to the Union Grievance Committee, and a copy must be filed with the Administrator by the employee or Union representative no later than thirty (30) calendar days after thee employee knew

> or should have known of the cause of such grievance. The Union Grievance Committee shall try to settle the grievance with the Administrator. The Administrator shall have ten (10) calendar days to settle the grievance, in writing. If the grievance is not settled at this level, the Grievance Committee shall have fifteen (15) calendar days from the receipt of the Administrator's answer to submit the grievance to the Rolling Hills Committee in writing. The Grievance Committee shall present the grievance to the Rolling Hills Committee at its next regular meeting and the Rolling Hills Committee shall answer within ten (10) calendar days in writing. If the grievance remains unresolved, the Union shall have fifteen (15) calendar days from the receipt of the Rolling Hills Committee's answer to submit the grievance to the Personnel and Bargaining Committee in writing. The Grievance Committee shall present the grievance to the Personnel and Bargaining Committee at its next regular meeting and the Personnel and Bargaining Committee shall answer within ten (10) calendar days in writing. If the grievance is not settled at this step, the Union shall have fifteen (15) calendar days from the receipt of the Personnel and Bargaining Committee's decision to present the grievance for arbitration.
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> <u>Section 6.</u> The County and Union representatives shall attempt to select a mutually agreeable arbitrator from the Wisconsin Employment Relations Commission (WERC). If a mutually agreed selection cannot be achieved, the WERC shall appoint an arbitrator. The arbitrator shall make his/her findings known in writing simultaneously to the County Personnel Director and the Union, and this decision shall be final and binding on both parties. Disputes or differences regarding bargainable issues are expressly not subject to arbitration of any kind, notwithstanding any other provisions herein contained. The arbitrator shall have no right to amend, nullify, modify, ignore, or add to the provisions of the Agreement. His/her authority shall be limited to the extent that he/she should only consider and decide the particular issue or issues presented to him/her in writing by the Employer or the Union, and his/her interpretation of the meaning or application of the language of the Agreement. The party filing the grievance with the Wisconsin Employment Relations Commission shall be responsible for initial payment of the filing fee. The losing party shall assume the cost of the filing fee and reimburse the filing party, if appropriate, within thirty (30) days of receipt of the arbitrator's decision.
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> <u>Section 7.</u> The Union Steward or his/her alternate Steward shall be allowed to visit any employee or department at any reasonable time for the purpose of inspecting working conditions and settling grievances and shall not lose pay in conducting such visits. Representatives must have received a written grievance and must notify the Administrator of the leaving of work.

5. In March 2004, the Union filed a grievance with the County concerning a claim for death benefits for a deceased bargaining unit member. The County denied the grievance and the grievance thereafter proceeded through the steps of the contractual procedure.

6. On May 13, 2004, Ken Kittleson, the County Personnel Director, sent an e-mail to Union Representative Dan Pfeifer, advising him that the Personnel Committee had denied the grievance, pursuant to Step 3 of the contractual grievance procedure.

7. On or about May 13, 2004, Pfeifer responded to Kittleson via e-mail to the effect that the Union intended to arbitrate the grievance. Kittleson did not receive the e-mail due to problems with the County's computer system.

8. On June 14, 2004, Pfeifer sent an e-mail to Kittleson asking his preference for an arbitrator to hear the grievance. Kittleson responded suggesting Arbitrator Richard McLaughlin.

9. On August 12, 2004, Pfeifer forwarded a Request to Initiate Grievance Arbitration to the Wisconsin Employment Relations Commission, along with the Union's share of the filing fee. Subsequently, the County submitted its share of the filing fee, as well.

10. On August 26, 2004, Kittleson contacted Arbitrator McLaughlin and informed him that the County challenged the arbitrator's jurisdiction and refused to arbitrate the grievance on the basis that the request to arbitrate was untimely under the deadlines established in the collective bargaining agreement.

11. On September 2, 2004, McLaughlin notified the parties that he was closing the file and reimbursed the filing fees to the parties.

12. The County's refusal to arbitrate the Heather Schmitz grievance violated its contractual obligation to arbitrate disputes concerning the interpretation or application of the collective bargaining agreement.

Based upon the foregoing Findings of Fact, the Examiner herewith makes and issues the following

CONCLUSION OF LAW

The County's refusal to arbitrate the Heather Schmitz grievance constitutes a prohibited practice, contrary to Sec. 111.70(3)(a)5, Wis. Stats.

Based upon the foregoing Findings of Fact and Conclusion of Law, the Examiner herewith makes and issues the following

ORDER

The County is hereby ordered to cease and desist from refusing to arbitrate the underlying grievance and, upon resubmission of the appropriate filing fee by the parties, shall submit to arbitration of the issue.

Dated at Fond du Lac, Wisconsin this 23rd day of September, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

John R. Emery /s/
John R. Emery, Examiner

MONROE COUNTY

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

The Complaint arises out of grievance filed by Rolling Hills Employees' Local 1947, AFSCME, AFL-CIO against Monroe County regarding life insurance benefits the Union claimed were owed to the estate of a deceased bargaining unit member. The grievance proceeded through the contractual steps and was denied at each level. Ultimately, the Union indicated to the County via email that it intended to file for arbitration, but the communication was not received by the County due to a problem with its computer system. Nevertheless, communication was ultimately restored and the parties mutually agreed on an arbitrator. Approximately two months later, the Union filed a request for arbitration with the Wisconsin Employment Relations Commission and the parties each submitted their respective shares of the filing fee. Subsequently, however, the County changed its position and informed the arbitrator that it was refusing to arbitrate the grievance because the Union's request for arbitration was untimely. The arbitrator notified the parties that he was refunding the filing fee due to the County's refusal to arbitrate and the arbitration file was closed. The Union thereafter filed this action, claiming that the County's refusal to arbitrate was a violation of Secs. 111.70(3)(a)1 & 5, Wisconsin Statutes.

POSITIONS OF THE PARTIES

The Complainant

The Union asserts that there are two issues to be addressed. The first is whether the Union notified the County in a timely fashion that it intended to arbitrate and the second is whether the contract requires the Union to actually file for arbitration within the specified time period or only notify the County that it intends to do so.

On the first issue, the Union notes that it received notification via e-mail from County's Personnel Director Ken Kittleson that the County Personnel Committee had denied the grievance at Step 3. Union Representative Daniel Pfeifer testified that he knew the local wanted to arbitrate the grievance if denied, so upon receiving the e-mail he immediately responded to Kittleson to that effect. On June 14, Pfeifer e-mailed Kittleson to discuss selection of an arbitrator and Kittleson replied suggesting Arbitrator Richard McLaughlin. This suggests that the County was already aware of the Union's intent to arbitrate and agreed to it. The Union filed the Request for Grievance Arbitration with the WERC on August 12 and only became aware in early September that the County was refusing to arbitrate

Upon learning of the County's timeliness complaint, Pfeifer looked through his e-mail records to determine when he had e-mailed Kittleson, but the relevant e-mails had been deleted. He contacted Kittleson to obtain copies. Kittleson was only able to provide his initial e-mail notifying the Union of the denial of the grievance and the exchange regarding the selection of an arbitrator. At that point Pfeifer conducted an investigation and discovered that certain e-mails were being blocked by the County's server if they contained the word "insurance" in the subject line. The Union asserts that this explains why Kittleson was not receiving some of Pfeifer's e-mails, which the County does not dispute.

The Union asserts that the County initiated the process of communication by e-mail and that the Union replied in a timely fashion. The Union should not be penalized by the fact that the County's computer system filtered out its replies.

As to the second issue, the contract states that "…the Union shall have fifteen (15) calendar days to present the grievance for arbitration…" Over the course of 26 years representing the local, Pfeifer's experience has been that the language meant the Union had to notify the County within fifteen days of its intent to arbitrate, not actually file the Request with the WERC. Union Exhibits 2 & 3 are examples of where the Request to Arbitrate has been filed after the fifteen day period without objection by the County.

The County argues that the language requires filing of the request within fifteen days. This would contradict other contract language which requires the parties to seek a mutually agreeable arbitrator. If the Union had to immediately file for arbitration after Step 3 it would not be possible for the parties to select an arbitrator.

It is true, as the County states, that in the past extensions have been given, but those extension were to give the Union time decide if it wanted to arbitrate, not to file for arbitration. It is also true that at times the Union has filed for arbitration within fifteen days. The fact that it has done so, however, does not mean that it is required to do so. The County is seeking a dismissal of the Complaint, which would have the effect of changing a long-standing practice between the parties. It agreed to a specified arbitrator and paid its share of the filing fee without objecting to timeliness. It should not now be able to avoid having to defend the grievance based on such an assertion.

It should also be noted that timeliness is less of a concern in this case, because the Union is seeking a fixed life insurance benefit for its deceased member. There is, therefore, no additional accrual of damages due to the extra passing of time. Thus, one of the principal equitable arguments for timeliness is not an issue here.

The Respondent

The County maintains that the contract language is clear that the Union must file for arbitration within fifteen days of receiving notice of denial of the grievance at Step 3. Where the contract language is clear and unambiguous there is no need for reference to past practice

and the plan language of the contract should control. The plain meaning of the phrase "…present the grievance for arbitration…" is to file a request for arbitration with the Wisconsin Employment Relations Commission. Otherwise, a grievant could simply notify the County and then put off filing for arbitration indefinitely, which would defeat the purpose of the time requirement. Therefore, it is irrelevant whether the Union communication to the County of its intentions was or was not received due to computer problems, since the requirement is not that the Union notify the County, but that it file with the WERC.

Article 4, Section 3 of the contract states that if it is impossible to meet the time requirements, the time limits may be extended by mutual agreement in writing. Employer Exhibit #1 reflects just such a circumstance, where the County extended the time limits from fifteen days to thirty upon the Union's request. Employer Exhibit #2 indicates another instance where the Union complied with the fifteen day filing deadline. Thus, the limitations are established and if the Union wishes to change them it must do so in bargaining.

The County argues that a decision in favor of the Union would have the effect of nullifying the contract language regarding time limitations and would mean that grievances could be held in abeyance indefinitely. The time limits were negotiated in good faith and should not be nullified by the Examiner.

DISCUSSION

Sec. 111.70(3)(a)5, Wis. Stats., makes it a prohibited practice for a municipal employer to "…violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employees, including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement…" The Union contends that the County's refusal to arbitrate the underlying grievance in this case constitutes a prohibited practice under this statute.

In this case, the grievance was filed in a timely manner and, likewise, was processed through the contractual steps within the specified time limits up to the point of the County's Step 3 response via e-mail on May 13, 2004. At that point, according to the Union, Union Representative Pfeifer immediately replied to the effect that the Union intended to arbitrate the grievance, which, in the Union's view, complied with the contractual language of Article 4, Section 5, requiring the Union to present the grievance for arbitration within fifteen days of the County's Step 3 response. The reply e-mail was never received due to problems with the County's computer system, but the issue is moot because the County's defense is not based on the Union's failure to respond in a timely fashion, but rather on its position that the plain language of the contract requires the Union to file a Request for Arbitration with the Wisconsin Employment Relations Commission within fifteen days of receiving the Step 3 response, which the Union concedes it did not do.

Article 4, Section 5, of the contract sets forth the steps for advancing a grievance and establishes time limitations for the submissions of the grievance and corresponding responses at each level. It is undisputed that, after a denial by the County at Step 3, the Union has fifteen days to present the grievance for arbitration. What is disputed is whether the language requires the Union to actually request arbitration from the WERC within that period, or whether it must merely notify the County of its intent to arbitrate. The County maintains that the language clearly requires filing with the WERC because, otherwise, once the County is notified a grievance could be held open indefinitely before arbitration was actually requested, which would defeat the purpose of the time limitation. The County also points out that Section 3 specifies that the time limits may be extended by mutual consent in writing and offered exhibits to show that this has been done by the parties in the past. No such agreement was made here.

In my view, the language of the contract is not as clear and unambiguous as the County contends. In the first place, whereas in each previous step a specific person or body is identified to whom the grievance is to be addressed, the language is silent as to whom the grievance is to be presented for arbitration. The County maintains that it is obvious that presentation is to be to the WERC, but it does not seem so obvious to me, especially since other language in the Article requires the parties to attempt to agree on an arbitrator, presumably before the request is made to the WERC. The County's point regarding the need for closure is well taken and militates for an interpretation that the grievance should be presented to the WERC. Nevertheless, it appears from the testimony and documentary evidence that at least occasionally the parties have not interpreted the language in this way and that notice has, in fact, been given the County and deemed acceptable. Furthermore, as noted above, Article 4, Section 6 states that the parties "…shall attempt to select a mutually agreeable arbitrator…" and, typically, where the parties jointly request an arbitrator from the WERC they have agreed on the arbitrator prior to the filing of the request for arbitration. This would suppose that the County must be put on notice that the Union intends to arbitrate before the request is filed. It is at least arguable, therefore, that the presentation of the grievance for arbitration is intended to be to the County and thereafter the parties are to attempt to select an arbitrator, whereupon the request would then be sent to the WERC.

Having determined that the language is ambiguous, it is necessary to look at past practice to see if the parties have established an interpretation which may be determined by how the parties have applied the language over time. Unfortunately, the testimony of the witnesses and documentary evidence do not establish a clear practice in this area. On some occasions requests have been filed with the WERC within the fifteen days and on some occasions not. On other occasions extensions have been agreed to in writing and on still others the requests have been filed after the fifteen days with no written extensions having been given. In short, there is no clearly established pattern over the course of time which is dispositive of this issue.

What is clear, however, is that in this instance the County did proceed, at least initially, as if the Union had properly advanced the grievance and only changed its position after both parties had agreed to an arbitrator, the request for arbitration had been filed and both parties had paid their portion of the filing fees. The Step 3 denial notice was sent to the Union on May 13, 2004. According to the County's interpretation of the contract language, the request for arbitration should then have been sent to the WERC by May 28. It was not, but nevertheless when Pfeifer contacted Kittleson on June 14 about choosing an arbitrator, Kittleson responded by suggesting Arbitrator Richard McLaughlin and did not raise a timeliness objection. This could reasonably be construed to mean that he consented to proceed to arbitration, despite the fact that it was 32 days after the Step 3 denial had been issued and no request for arbitration had been made. Again, when the Union finally filed its request for arbitration on August 12, the County's initial response was to tender its share of the filing fee, despite the fact that 91 days had passed since transmission of the Step 3 denial. It was only two weeks later that Kittleson notified the arbitrator that the County was challenging the arbitrator's jurisdiction due to the Union's failure to observe the contractual time limitations.

There is no question that it is problematic if the contract language is interpreted as to not require filing for arbitration by a date certain, so that grievances may linger in limbo for extended periods. It is further true that the contract does specify that extensions of filing deadlines are to be mutually agreed in writing. Nevertheless, there is well-established arbitral precedent that the parties, by their actions, may waive time limitations even where there is no written agreement to do so. [Cf., MILWAUKEE AREA TECHNICAL COLLEGE, WERC Case 476, No. 61194, MA-11843 (Gallagher, 10/25/02); BROWN COUNTY, WERC Case 483, No. 48441, MA-7602 (Shaw, 6/30/93)] It is my conclusion that the County's actions in this case constituted such a waiver. The parties selected an arbitrator and the request was filed and the fee paid without any assertion made by the County that the Union had violated the contractual timelines. Under the circumstances, the Union was entitled to infer that the County had no such objection. It may be that from an objective standpoint 91 days is an excessive amount of time within which to request arbitration, but the record indicates that at least as of the time it sent in its share of the filing fee the County thought it was reasonable (or, at least, had not indicated otherwise) and only repented as an afterthought. On these facts, therefore, I find that the County waived any objection it had to the timeliness of the Union's filing for arbitration. Thus, its subsequent refusal to arbitrate on those grounds was a prohibited practice, contrary to Secs. 111.70(3)(a)5, Wis. Stats. This is not to say that either party's interpretation of the contract language in question is right or wrong with respect to when and how grievances must be submitted for arbitration and to whom. However, there is a significant presumption against

forfeiture in arbitration, so where, as here, the parties have apparently applied the language a number of different ways over the course of time, if they wish to strictly enforce the provision it is incumbent upon them to so indicate early and clearly to protect their interests.

Dated at Fond du Lac, Wisconsin this 23rd day of September, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

John R. Emery /s/

John R. Emery, Examiner

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