

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE POLICE ASSOCIATION, Complainant,

vs.

CITY OF MILWAUKEE, Respondent.

Case ID: 251.0039
Case Type: COMP_MP

DECISION NO. 38287-A

Appearances:

Brendan P. Matthews, Cermele & Matthews, S.C., 6310 West Bluemound Road, Milwaukee, Wisconsin, appearing on behalf of the Milwaukee Police Association.

Benjamin J. Roovers, Assistant City Attorney, 200 East Wells Street, Room 800, Milwaukee, Wisconsin, appearing on behalf of the City of Milwaukee.

FINDINGS OF FACT, CONCLUSION OF LAW, AND ORDER

On August 26, 2019, Sean M. Lesnjak filed a complaint with the Wisconsin Employment Relations Commission alleging that the City of Milwaukee had committed a prohibited practice within the meaning of the Municipal Employment Relations Act by refusing to arbitrate a suspension grievance. On November 4, 2019, the City filed a motion to dismiss and Lesnjak filed a response on December 4, 2019.

On December 10, 2019, Peter G. Davis was appointed as the examiner in the matter. On December 20, 2019, Davis wrote the Milwaukee Board of Fire and Police Commissioners (FPC) and asked if the Commission wished to intervene as a party in the matter and/or take a position on the legal issue presented. On January 28, 2020, the FPC advised that it did not want to intervene or take a legal position and would abide by whatever decision is reached. On January 29, 2020, an amended complaint was filed identifying the Milwaukee Police Association as the Complainant and specifying that a violation of § 111.70(3)(a) 5, Stats., is being alleged. The record was supplemented on February 3, 2020.

Having considered the matter and being fully advised in the premises, I make and issue the following:

FINDINGS OF FACT

1. The City of Milwaukee, herein the City, is a municipal employer with a Police Department that provides public safety services to its citizens.
2. The Milwaukee Police Association, herein the Union, is a labor organization that serves as the collective bargaining representative of certain public safety employees of the City including Sean Lesnjak.
3. Article 7 of the 2018-2019 collective bargaining agreement between the City and the Union provides that grievance arbitration is not contractually available as to discipline which is “subject to appeal to the Board of Fire and Police Commissioners.”
4. Sean Lesnjak received a five-day suspension and a two-day suspension for separate alleged violations of the Police Department’s Code of Conduct arising out of related set of events on June 29, 2017. Pursuant to its obligations under § 62.50 (13), Stats. as interpreted by the Court of Appeals in *Parker v Jones*, 226 Wis. 2d 310 (Ct. App. 1999), the City provided notice to the Board of Fire and Police Commissioners that Lesnjak had been suspended for seven days. Lesnjak did not file an appeal with the Commissioners. He did file a contractual grievance as to the five-day suspension.
5. The Union seeks to arbitrate the five-day suspension and the City refuses to do so.

Based on the above and foregoing Findings of Fact, I make and issue the following:

CONCLUSION OF LAW

1. Because the aggregated total of the suspensions received by Sean Lesnjak were “for a period exceeding 5 days” with the meaning of § 62.50(13), Stats., both the five-day and the two-day disciplinary suspensions were “subject to appeal to the Board of Fire and Police Commissioners.”
2. Because both the five-day and the two-day disciplinary suspensions were “subject to appeal to the Board of Fire and Police Commissioners”, the five-day suspension has been contractually excluded from the definition of a “grievance” that can proceed to arbitration.
3. By refusing to arbitrate the Lesnjak five-day suspension, the City of Milwaukee did not commit a prohibited practice within the meaning of § 111.70(3)(a) 5, Stats.

ORDER

The complaint is dismissed.

Dated at Madison, Wisconsin, this 10th day of February, 2020.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Peter G. Davis, Examiner

**MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSION OF LAW, AND ORDER**

Where, as here, there is a dispute as to whether the parties to a collective bargaining agreement have agreed that grievance can substantively proceed to arbitration, the threshold legal analysis "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". *School District No. 10 v. Jefferson Education Association*, 78 Wis. 2d 94, 111 (1977).

In Article 7 of their 2018-2019 collective bargaining agreement, the City of Milwaukee and the Milwaukee Police Association have agreed that "matters of departmental discipline involving the application of the rules or regulations of the Chief of Police which are subject to appeal to the Board of Fire and Police Commissioners shall not constitute a grievance". In that same Article, the parties have agreed that access to arbitration is limited to matters that have been defined as a "grievance". Therefore, the parties have specifically agreed that discipline which could be appealed to the Board of Fire and Police Commissioners cannot proceed to grievance arbitration.

The Court of Appeals in *Parker v Jones*, 226 Wis. 2d 310 (Ct. App. 1999), held that the City was statutorily obligated to aggregate suspensions arising out of what the Court deemed a "single transaction or set of events" for the purpose of determining whether the suspensions were "for a period exceeding 5 days" thereby triggering Board of Fire and Police Commissioners jurisdiction under § 62.50(13), Stats. The City followed the holding of *Parker v Jones* when it aggregated Lesnjak's two-day and five-day suspensions and advised the Commissioners that Lesnjak had been suspended for seven days. The Commissioners then had jurisdiction over both the two-day and the five-day suspensions and Lesnjak had the right to file an appeal with the Commissioners. Because both suspensions were "subject to appeal" within the plain meaning of Article 7, the suspensions are excluded from the scope of the contractual grievance arbitration process even though Lesnjak only wants to dispute one of the two suspensions.

Given the foregoing, it is concluded that the City did not commit a prohibited practice within the meaning of §. 111.70(3)(a) 5, Stats. by refusing to arbitrate Lesnjak's five-day suspension. Therefore, the complaint is dismissed.

Dated at Madison, Wisconsin, this 10th day of February, 2020.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Peter G. Davis, Examiner