

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 MONROE COUNTY HIGHWAY EMPLOYEES :
 LOCAL 2470, AFSCME, AFL-CIO :
 :
 and : Case 88
 : No. 43556
 : MA-5999
 MONROE COUNTY (HIGHWAY DEPARTMENT) :
 :

Appearances:

Mr. Daniel R. Pfeifer, Staff Representative, appearing on behalf of the
Mr. Edward G. Staats, Personnel Director, appearing on behalf of the

Union.
 Employ

ARBITRATION AWARD

The Employer and the Union above are parties to a 1987-88 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve the probation and discharge grievances of Jeffrey Thurston.

The parties agreed that the initial hearing would be limited to the question of timeliness of both grievances, and a hearing on arbitrability was held in Sparta, Wisconsin on May 22, 1990, at which time the parties were given full opportunity to present their evidence and arguments. No transcript was made, both parties filed briefs, and the record was closed on July 18, 1990.

STIPULATED ISSUES:

1. Is Grievance No. 89-4 timely?
2. Is Grievance No. 89-5 timely?

RELEVANT CONTRACTUAL PROVISIONS:

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Article 4 - GRIEVANCE AND ARBITRATION PROCEDURE

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

Section 2. Subject Matter: Only one subject matter 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 that 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, etc., 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.

Step 5. Steps in the Procedure:

Step 1: 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 further be filed with the Highway Commissioner by the employee or Union representative no later than thirty (30) calendar days after the grievance. The Union Grievance Committee shall try to settle the grievance with the Highway Commissioner. The Highway Commissioner shall have eight (8) days to meet with the Union Grievance Committee. Following this meeting, the Commissioner shall have two (2) days to respond to the grievance. If unsuccessful, it shall be submitted to the County Personnel Committee who shall have ten (10) days to meet with the Union Grievance Committee. Following this meeting the Personnel Committee shall

have ten (10) days to respond to the Union Grievance Committee. If the grievance is not settled at this step, the union shall have thirty (30) days from the receipt of the Personnel Committee's decision to present the grievance for arbitration.

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DISCUSSION:

As in Case 87 of the same title, issued separately, the parties agreed in this matter that arbitrability was a threshold issue and the record herein is limited to evidence as to the timeliness of the two grievances involved.

Grievant Jeffrey Thurston was hired June 17, 1988 by the Highway Department, and four weeks later suffered a work related injury which caused him to be on worker's compensation for the ensuing five months. Management thereupon extended his six month probationary period, giving him credit for the first four weeks of working time but otherwise considering that period to have begun when he returned to work in December, 1988. On or about May 12, 1989 the County determined that Thurston had not performed satisfactorily on probation, and discharged him. On or about the same date, Paul Geier, the newly elected local president, filed Grievance No. 89-4, protesting the extension of Thurston's probationary period 1/, and Grievance No. 89-5, protesting the discharge. He gave copies to Highway Commissioner George Baker, and sent copies to Personnel Committee Chairman Henry Laufenberg and to Personnel Director Ed Staats. On May 23, Baker replied by letter to Geier concerning Grievance 89-5, contending that the grievant did not successfully complete his probationary period and that under Article 13 he had no right to appeal the discharge. On May 25, Baker replied to Grievance 89-4, contending that the probationary period was not "extended", on the ground that Article 13 explicitly stated that an employe on probation shall "work in such position" for the probationary period. Baker contended that rather than being an extension of the grievant's probationary period, the period was terminated when he left work because of injury, and a new probationary period began when he returned to work on December 19, 1988. Baker stated that even with credit granted for the four weeks that the Grievant had worked in June-July, 1988, he was not entitled to representation as to his discharge because he was properly considered a probationary employe when discharged.

Geier testified that he sent the grievance on to Laufenberg when he received Baker's denial in each case, and that he got no response and then sent a copy to Staats. Geier stated that two days later the Highway Committee called the Grievance committee of the Union to appear at a meeting, and that at this meeting the Committees discussed these two grievances. Geier placed this meeting a month or two after Thurston's termination. Geier stated that only the termination was discussed at this meeting, because the Union was "basically ready to give up on the probationary period and just trying to get Thurston's job back". There is no dispute that at the conclusion of this meeting, the parties agreed that Geier would take the matter back to a discussion of the Union membership as to whether to proceed further with the grievance, and that the membership subsequently instructed Geier to proceed. Baker, however, testified that the import of the discussion was that the grievance would then be filed with the Highway Committee if the Union wished to pursue it. He testified that the Highway Committee, however, did answer Grievance 89-4 at the June 29, 1989 meeting with the Union, by saying they agreed with Baker. Both Baker and Highway Committee member Loren Pierce contended that Grievance 89-4 was discussed at that meeting, and neither recalled discussion of Grievance 89-5. 2/ Baker and Pierce testified that no subsequent grievance was submitted to the Personnel Committee to their knowledge, but Pierce admitted that he was not aware that Geier had forwarded a copy of the grievance to Staats.

It is apparent that about October 17, Pfeifer contacted Staats to ask about the status of the Thurston grievances. As in Case 87, Staats replied on October 20 by letter that the Personnel Committee "reaffirmed" their August 15 denial of the grievances on various grounds including timeliness. 3/ On

1/ The record does not reveal whether the Union was aware, prior to the discharge, that management still considered the grievant to be a probationary employe.

2/ It appears to me that the parties have confused the numbering of these grievances on more than one occasion. Pfeifer gave testimony at the hearing that in a subsequent letter of his to Staats, identified in the record as Jt. Exhibit 10, he notified Staats that the Union was appealing Grievance "89-4", and that this was a misprint intended to represent Grievance 89-5. On the basis of the testimony at the hearing, I conclude that no party was actually in doubt as to what subject matter was protested by the Union, and that it was clear to all concerned that the Union was fundamentally protesting the discharge.

3/ The August 15 denial referred to was a letter from Staats to Pfeifer which merely stated that the Personnel Committee had determined that the

November 7, Pfeifer wrote back to Staats [the letter referred to above as Jt. Exhibit 10], in which he stated that:

"Representatives of Local 2470, therefore, submitted the grievances to the County to be heard by the Personnel Committee, but the Personnel Committee has refused to meet with the Union representatives.

Based on the County's action, Local 2470 has no alternative but to submit the above captioned grievances to arbitration. This letter will serve as official notice that Local 2470 intends to arbitrate the above captioned grievances."

On November 14, the Highway Committee replied to Pfeifer contending that the Union's processing of Grievance "89-4" was improper and in bad faith. The Union's subsequent request to the WERC to commence arbitration in Grievances 89-4 and 89-5 was dated January 26, 1990.

The parties' contentions are fundamentally similar to those detailed separately in the award in Case 87. The Union contends that Grievance 89-5 was submitted by Geier to Staats for forwarding to the Personnel Committee on a timely basis, and that it was timely filed at the original step. The Union contends that any delay in the processing of the grievance through the steps must be laid at the door of the Highway Committee and Personnel Committee rather than being the Union's fault, and that it acted properly in accordance with general labor relations practice in processing the grievances to the next step when it failed to receive an answer from the Employer at the prior step. The Union requests that both grievance be found timely.

The County contends that the Union attempted to obtain answers from the Personnel Committee without previously proceeding to the Highway Committee, and that this was improper. The County further contends that the Union had never forwarded Grievance 89-4 to the Highway Committee properly, nor had the Union properly referred 89-4 or 89-5 to the Personnel Committee. The County also argues that the Union contended that 89-4 was the grievance being submitted to arbitration in its November 7, 1990 letter. The County contends that the overall conduct of the Union demonstrates lateness at four separate occasions in the grievance procedure, and that there is no evidence that any mutual consent in writing, as required by Section 3 of Article 4, was ever given. The County contends that it would have violated the "open meetings" statute had it proceeded to discuss grievances in the fashion presented by the Union, and that ample evidence has been presented to demonstrate that the Union was untimely with these grievances on numerous occasions.

Even granting the Union's contention that the confusion between Grievance No. 89-4 and Grievance No. 89-5 was an innocent error which did not prejudice the Employer, I cannot find either of these grievances to be timely filed by the end of the grievance procedure. It requires a considerable stretch to conclude that the Union acted properly in its manner of forwarding the grievances to the Personnel Committee, even if it is assumed that the meeting held on June 29, 1989 was in fact the proper Highway Committee stage of the grievance procedure; the evidence conflicts as to whether the grievances were submitted to the Personnel Committee before or after that step. But even assuming that management has been excessively punctilious in its insistence on the Union following management's interpretation of the contractual procedure, two facts stand out. One is that there is nothing in the record to justify any belief on the Union's part that mutual consent had been granted, in writing or even otherwise, to any extensions of time on processing of Grievance No. 89-4 and 89-5. The other is that the Union clearly and unambiguously terminated, by its own interpretation, the pre-arbitration stages of the grievance procedure when it notified the Employer on November 7, 1989 that it was proceeding to arbitration based on its interpretation that it was the County that had failed to observe the prior stages of the procedure.

The Union subsequently took until January 26, 1990 to actually mail its request for arbitration, almost three times the length of time provided for from the Personnel Committee's answer. Since the Union, by sending the November 7 letter, by its own terms substituted its conclusion that arbitration was now appropriate for a clear answer from the Personnel Committee, it thereby triggered the thirty-day time limit for filing for arbitration. There is no way that the subsequent two-and-a-half-month delay in filing for arbitration can be found consistent with the 30 days allowed by Section 5 of Article 4 for that step. Thus even if the Union were given the benefit of the doubt as to timeliness in each and every prior stage of processing for both of these grievances, the grievances must be found untimely at the arbitration stage, for this reason alone.

For the foregoing reasons, and based on the record as a whole, it is my decision and

grievance had not been properly appealed from the Highway Committee, and demanding that the Union first appeal to the Highway Committee.

AWARD

1. That Grievances No. 89-4 and 89-5 were untimely filed for arbitration, and are therefore not arbitrable.

2. That the grievances are denied.

Dated at Madison, Wisconsin this 6th day of September, 1990.

By _____
Christopher Honeyman, Arbitrator