BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
ASHWAUBENON PUBLIC SAFETY OFFICERS ASSOCIATION	
	Case 26
	No. 45736
and	MA-6728
VILLAGE OF ASHWAUBENON	

Appearances:
Lawton & Cates, S.C., by Mr. Richard V. Graylow, appearing on behalf of the Un
Davis & Kuelthau, S.C., by Mr. Mark F. Vetter, and Ms. Jane M. Knasinski, appearing on behalf of the Village.

ARBITRATION AWARD

The Employer and Union above are parties to a 1989 collective bargaining agreement which provides for final and binding arbitration of certain disputes. In settlement of a prohibited practice proceeding, the parties requested that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve the "training opportunities" grievance of Tim David, and stipulated that the first issue to be addressed would be arbitrability.

The undersigned was appointed, but pursuant to the parties' agreement no hearing was held. Instead, a stipulation of issue and facts was filed, and the parties filed briefs and reply briefs concerning the arbitrability issue. The record was closed on October 24, 1991.

STIPULATED ISSUE:

> Is the July 30, 1990 grievance involving Tim David arbitrable under Article XXXIV - Grievance Procedure of the January 1, 1989 through December 31, 1989 labor agreement?

RELEVANT CONTRACTUAL PROCEDURES:

ARTICLE VI

MANAGEMENT RIGHTS

> The Association recognizes that, except as otherwise provided in this Agreement or as may affect the wages, hours and working conditions of the members of the Association, the management of the Village and its business and the discretion of its work force is vested exclusively in the Village in that all powers, rights, authority, duties and responsibilities which the Village had prior to the execution of this Agreement customarily executed by management or conferred upon and vested in it by applicable rules, regulations and laws, and not the subject of collective bargaining under the Wisconsin law, are hereby retained. Such rights include, but are not limited to, the following:

A. To direct and supervise the work of its employees;

B. To hire, promote and transfer employees;

C. To lay off employees for lack of funds or other legitimate reasons;

D. To discipline or discharge employees for just cause;

E. To plan, direct and control operations;

F. To determine the amount and quality of work needed;

G. To determine to what extent any process, service or activity shall be added, modified or eliminated;

H. To introduce new or improved methods or facilities;

I. To schedule the hours of work;

J. To assign duties;

K. To issue and amend reasonable work rules;

L. To require the working of overtime hours when necessary in the performance of Village business.

. . .

ARTICLE XXVIII

EDUCATION

Employees shall be allowed to attend educational courses that the Director has given prior approval to and deems are in the best interest of the Department. The amount of reimbursement for such courses are subject to the Director's approval.

A. DEFINITIONS.

1. Conferences or Seminars.

Any training or update program in which no certification is obtained and has no mandatory attendance requirement.

Conferences will be attended at the discretion of the Director. Tuition and expenses will be paid according to reimbursement section of this policy.

2. Mandatory School

Mandatory school is any school which an officer is required to attend as determined by the Director. Mandatory schools will maintain a compensation rate of time and one-half for each hour of classroom attendance beyond normally scheduled work hours. Travel time is included for schools outside of Brown County.

. . .

ARTICLE XXXIV

GRIEVANCE PROCEDURE

Purpose. The purpose of this procedure is to provide an orderly method of resolving differences.

Definition. A grievance is defined as any complaint by an employee involving interpretation, application or alleged violation of a specific provision of this Agreement, or where a policy or practice relating to wages, hours or conditions of employment is considered improper or unfair, or where there has been a deviation from or the misinterpretation of or misapplication of a policy or practice relating to wages, hours or conditions of employment.

Procedure: Step 1. All complaints shall be submitted in writing to the Director, with a copy going to the Village President, within ten (10) days after the occurrence giving rise to the grievance. Action shall be taken by the Director within ten (10) days of submission.

Step 2. If the complaint is not satisfactorily resolved at Step 1 above, the employee shall then submit the complaint in writing to the Village President, with a copy to the Chairman of the Finance, Personnel and Welfare Committee, within ten (10) days of the decision of the Director. Action shall be taken by the Village President within ten (10) days.

Step 3. If the complaint is not satisfactorily resolved at Step 2, the employee shall submit the complaint to the Finance, Personnel and Welfare Committee within ten (10) days of the decision at Step 2. The Committee will make a recommendation for response to the Village Board within ten (10) days of the submission at Step 3 and the Board shall issue a written decision within ten (10) days of receipt of the Committee's recommendations.

Step 4. If the complaint is not satisfactorily resolved at Step 3, either party may request arbitration within ten (10) days after receipt of the decision at Step 3. Said party shall file a request to

arbitrate with the Wisconsin Employment Relations Commission (WERC). The WERC shall appoint an arbitrator from its staff to hear the difference of the parties and make an ultimate and binding decision regarding the interpretation or application of a specific provision of the Agreement. The party so petitioning shall send a copy of the request to arbitrate to the other party at the time said request is sent to the WERC.

. . .

STIPULATED FACTS:

. . .

1. Phase I of the arbitration shall be limited to the procedural arbitrability of the grievance involving Tim David (Exhibit A). If the arbitrator decides that the grievance is arbitrable, then the parties will proceed to Phase II and arbitrate the substantive merits of the grievance. If the arbitrator decides that the grievance is not arbitrable, the grievance will be withdrawn by the Association.

2. The issue of arbitrability will be submitted to the arbitrator without a hearing and based on this stipulation and briefs.

3. The issue to be decided at Phase I of the arbitration is as follows:

   Is the July 30, 1990 grievance involving Tim David arbitrable under Article XXXIV - Grievance Procedure of the January 1, 1989 through December 31, 1989 Labor Agreement (Exhibit B)?

4. At all times material hereto the parties were operating pursuant to the terms and conditions of Exhibit B.

5. Prior to July 30, 1990, the Director of the Ashwaubenon Public Safety Department, John Konopacki, selected certain Department employees to attend paramedic school.

6. Employees less senior than Tim David were selected by Director Konopacki to attend and did in fact attend the paramedic school.

7. The grievance identified as Exhibit A was filed on or about July 30, 1990.

The grievance states in relevant part as follows:

> In reference to your selection of candidates for the upcoming Paramedic School. Officer David and the Association object to your naming two candidates with less seniority than Officer David and are filing a

grievance.

The basis for this grievance are as follows:

> The assignment to Paramedic School is accompanied by a raise in salary upon completion. For the Department to pay one member more than the other has to be based on a seniority basis if its to occur within the Association.
>
> In the past it has been the practice of this Department to inquire who is interested. Of those who were interested the most senior have always been sent.
>
> Officer David has received no written notification at any time during the past few years of the Department's dissatisfaction with his performance. Furthermore, if the Department has a problem with Officer David's performance they have made no effort to correct any underlying problem, i.e. through extra training or disciplinary action, so it must be assumed he is qualified to attend this school. He also has more practical experience than the two candidates with less seniority.

The Association also requests that the standard grievance procedure be waived in this matter and an arbitration date be set. The Union bases this request on the following:

. . .

> 2. Director Konopacki was asked several times in the past few months about who the candidates for the school would be. It is the Association's feeling that the Director was intentionally vague about who would be sent when asked by Union officers. We feel this was done to inhibit our ability to challenge this matter and intentionally deprive Officer David of the opportunity to attend this school.

. . .

THE UNION'S POSITION:

The Union contends in its reply brief that under the "Steelworkers' Trilogy" and other well-established precedent, arbitration clauses are to be construed broadly, and that grievances are generally presumed arbitrable unless there is clear evidence to the contrary. The Union argues that Article VI, the Management Rights clause and Article XXVIII, the Education clause, both govern the merits of the grievance, and the grievance is therefore cognizable under the contract. The Union also argues that the grievance procedure clause defines a grievance as including "where a policy or practice relating to wages, hours or conditions of employment is considered improper or unfair", and that

the original grievance alleged that the refusal to give Tim David the training opportunity in question was improper and unfair. The Union also notes language in the grievance procedure referring to "deviation from or misinterpretation or misapplication" of a policy or practice, and argues that the original grievance alleged misapplication of a policy or practice relating to Tim David. The Union argued in its original brief, at some length, the merits of the grievance, but these arguments are not germane to the present stage of this proceeding and will not be addressed.

THE EMPLOYER'S POSITION:

The Employer contends that an arbitrator's authority is derived solely from the express language of the parties' collective bargaining agreement, and that Article XXXIV here limits the Arbitrator's authority as being "to make an ultimate and binding decision regarding the interpretation or the application of a specific provision of the Agreement". The Employer argues that the Union cites absolutely no contractual provision in support of its grievance, and filed the grievance based solely on a seniority argument not present in any language in the contract. The Employer argues that the clause governing this stage of the proceeding is a "narrow" arbitration clause, and that a dispute may be held non-arbitrable under such a clause unless it involves rights traceable to the Agreement, citing various decisions to that effect. In this respect, the Employer notes, the arbitration section of the grievance procedure is narrower in scope than the earlier steps of the grievance procedure, which covered numerous topics. The Employer also argues that the Union has improperly addressed itself to the merits of the grievance rather than its arbitrability.

DISCUSSION:

The parties to this dispute are obviously familiar with the general tenets of both legal and arbitral holdings concerning arbitrability, and a discussion on these general principles is therefore unnecessary here. I find that this case turns on two questions: first, whether it is an absolute requirement of a grievance filed at the first stage that it contain a written reference to a specific clause of the Agreement; and second, whether there is conclusive evidence before me that this grievance cannot relate to any subject manner treated under the Agreement. In both respects, I am both guided and limited by the fact that this case was tried on a stipulation of facts and briefs, and that no witnesses have been heard from.

Initially, I must note that there is no contract language in the grievance procedure which expressly requires the citation in the initial grievance of specific contract language or section numbers, as is sometimes found under other agreements. Moreover, even where such a requirement does exist in the specific language of an agreement, it is not generally held to be an absolute. To make it so would cause the initial stage of the grievance procedure, at which grievances are most apt to be ill-defined or prepared by non-professionals, to turn into the kind of "trap for the unwary" which reduces a grievance procedure to a technical exercise and denies it the ability to address many real problems. That approach has been widely condemned in discussions of arbitrability questions, and this Agreement provides implicit force to that argument by not requiring the citation of a contract clause at the outset. Indeed, this Agreement goes the other way, if anything, by identifying as a grievance a "policy or practice" which is "considered improper or unfair", or a "deviation . . . misinterpretation . . . or misapplication of a policy or practice". These are broad definitions, and are clearly intended to be inclusive rather than exclusive.

The requirement that a grievance involve a violation of the collective bargaining agreement in order for arbitral relief to be obtained, however,

does, as the Employer contends, narrow the scope of the proceedings at that point. Here, the Employer is arguing essentially that the grievance, as presented, violates no clause of the Agreement. This, however, is not an argument on arbitrability exclusively, but an argument on the merits as well. In this context it becomes significant that the parties have by stipulation declined to present evidence as to the merits at this time. While, like other arbitrators, I have often encountered cases in which the facts on arbitrability were inextricably interwoven with the facts that governed the merits, here the issue on arbitrability must be decided based on what is before me. That means that if any contract clause could be read as governing this grievance, the grievance must be found arbitrable. 1/

The Union has cited (in its reply brief) two potentially relevant clauses, the Managements Rights clause and the Education clause. Both provide for the chief to have substantial discretion, and the Village apparently assumes that no meritorious grievance could therefore be brought under these clauses. There have been many arbitration cases, however, holding that where management has rights or discretion reserved to it, these may not be exercised in an arbitrary, capricious or discriminatory fashion. Under this line of cases the arbitrators involved have essentially held that any definition of rights carries with it an implication that such rights may be abused, and that an arbitrator may have jurisdiction to determine whether such abuse has occurred. Without agreeing with or denying the Union's contention that the Employer's decisions under these two clauses must in addition be consistent with the parties' past practice, the history of rulings that such decisions may not be arbitrary, capricious or discriminatory is sufficient to render it possible that Mr. David's grievance, on its face, could come within one of the cited clauses of the Agreement. In the absence of any evidence demonstrating that this is not the case, I must therefore find the grievance arbitrable.

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

AWARD

That the grievance is arbitrable.

Dated at Madison, Wisconsin this 23rd day of December, 1991.

By _____
Christopher Honeyman, Arbitrator

1/ The operative principle here is the same as that which arose in the legal context in United Steelworkers of America vs. Warrior and Gulf Navigation Co., 34 LA 559, when the Supreme Court stated: "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."