BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
LOCAL 133, DISTRICT COUNCIL 48, AFSCME, AFL-CIO	Case 92 No. 46208
and	MA-6909
CITY OF OAK CREEK	

Appearances:

Podell, Ugent & Cross, S.C., Attorneys at Law, by Ms. Monica M. Murphy, appearing on behalf of the Union.

Davis & Kuelthau, S.C., Attorneys at Law, by Mr. Robert H. Buikema, appearing on behalf of the City.

ARBITRATION AWARD

Local 133, District Council 48, AFSCME, AFL-CIO, hereinafter referred to as the Union, and the City of Oak Creek, hereinafter referred to as the City, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The parties entered into a settlement agreement that an overtime grievance would be submitted to arbitration in a bifurcated proceeding with the procedural issues heard and decided prior to the hearing of the substantive issues in the case and requested the Wisconsin Employment Relations Commission to designate a member of its staff to act as arbitrator. The undersigned was so designated. Hearing was held in Oak Creek, Wisconsin on November 21, 1991. The hearing was not transcribed and the parties filed post hearing briefs which were exchanged on December 30, 1991. The parties reserved the right to file reply briefs and the City filed a reply brief and the Union indicated that it would not file a reply brief. The City's reply brief was exchanged on January 27, 1992 and the hearing was closed.

BACKGROUND

The basic facts underlying the grievance are not in dispute. On January 17, 1990, the Union filed a grievance over the discontinuance of overtime which was processed through Step 3 of the grievance procedure. On April 4, 1990, the Union timely notified the City of its intent to arbitrate three grievances, one of which was the discontinuance of overtime grievance. On January 18, 1991, the Union filed a request with the Wisconsin Employment Relations Commission to appoint an arbitrator to hear the discontinuance of overtime grievance. The City objected to that request on the grounds it was not timely. The parties later agreed to proceed to arbitration on the issue of timeliness.

ISSUE:

The parties were unable to agree on a statement of the issues.

The Union states the issue as follows:

> Did the City, by its actions in continuing to negotiate the resolution of the grievance waive its right to object to its timeliness?

The City states the issue as follows:

> Whether the grievance should be dismissed in light of the failure of the Union to follow the timelines contained in the parties' 1988-90 Collective Bargaining Agreement, Article 8, Section 6, Paragraph A and in light of the consequences of failure to follow the timelines as contained in Article 8, Sections 3 and 4?

The undersigned frames the issue as follows:

> Is the grievance timely?

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE 8 - GRIEVANCE PROCEDURE

. . .

Section 3. Time Limitations: All time limits referred to in a grievance and arbitration procedure are to be expressed in working days, which shall be exclusive of Saturdays, Sundays, and holidays. If it is impossible to comply with the time limits specified in this procedure, these limits may be extended by mutual consent confirmed in writing.

Section 4. Settlement of Grievance: Any grievance shall be considered settled upon mutual agreement of the parties upon completion of any step in the procedure or if the Union fails to appeal to the next step in a timely fashion, the grievance will be deemed resolved. If the employer fails to answer the grievance in a timely fashion, the Union has the right to proceed to the next step of the grievance procedure.

. . .

Section 6. Final and Binding Arbitration:

(A) If the grievance is not resolved at Step 3, then arbitration may be initiated by the Union within thirty (30) working days of receipt of Step 3, answer by notifying the Personnel Committee of the Union's intention to proceed to arbitration. Such notice shall identify the grievance and the employee involved. Within ten (10) working days of the notice of intent to arbitrate, either party may request the Wisconsin Employment Relations Commission's arbitration service

provided in Section 788.01 of the State Statutes. The initiating party shall pay the WERC filing fee for the grievance.

UNION'S POSITION

The Union contends that the language of Article 8, Section 6 contains both mandatory and permissive terms. To illustrate this, it points out the use of the word "shall" to identify the grievance and to pay the filing fee and the use of the word "may" to request the appointment of the arbitrator. It submits that the ordinary meaning should be given to the word "may" as nothing in Section 6 indicates otherwise, and as the word "may" is permissive, it was not mandatory for the Union to request appointment of the arbitrator, thus, the Union is not barred from proceeding on the merits of the grievance.

The Union claims that many arbitrators have found that doubts about arbitrability should be resolved in favor of arbitrability as work place disagreements are best resolved on the merits. It urges that the preference for resolving disputes on the merits requires that any ambiguity in language should be resolved in favor of arbitrability.

The Union maintains that the City waived any right to object to the timeliness of the grievance by its actions in discussing with the Union its desire and intent to resolve outstanding grievances as part of the negotiations for a successor agreement. It refers to the April 4, 1990 notice of intent to arbitrate three grievances and to the May 31, 1990 bargaining session, at which the check cashing policy grievance was resolved without regard to the fact that more than 10 days has passed and no request for an arbitrator had been made. It further points out that in mediation, the parties continued to attempt to resolve outstanding grievances without regard to time limits. It notes that the overtime grievance was discussed in a meeting between the parties on December 20, 1990. It was only after no resolution was reached that in January 1991, the Union requested an arbitrator and on January 29, 1991, the City, for the first time, raised its contention that the grievance was not arbitrable. The Union submits that the third grievance, the Carpenter Shop grievance was resolved by the parties on February 8, 1991. The Union submits that arbitrators have held that continued discussion regarding a grievance and a lax approach to enforcing time limits can result in a party's waiver of timeliness contentions. It claims that the City and the Union have a practice of laxness in observing time limits and have resolved grievances long after the time limits have run without either party raising any objection. It maintains that at no time did the City put the Union on notice that it would change this practice and insist that the time limits be followed. It argues that the City's continued willingness to resolve grievances that have been pending for months and even years infers that the opposite is true.

The Union further contends that the underlying grievance is continuing in nature and another grievance could be filed on this same issue and the whole process started over again. It insists that the interests of efficiency and judicial economy would be served by hearing the original grievance on the merits. It concludes that the grievance must be found to be timely and therefore arbitrable.

CITY'S POSITION

The City contends that the overtime discontinuation grievance was not filed in a timely fashion. It points out that Article 8, Section 6 provides that either party within ten (10) working days of the notice of intent to arbitrate may request the Wisconsin Employment Relations Commission to appoint an arbitrator. It also refers to Section 4 which provides that if the Union

fails to appeal to the next step, the grievance will be deemed resolved. It submits that both provisions are clear and unambiguous and the language is directory and does not leave any discretion to the arbitrator if the requirements set forth therein are not satisfied. It asserts that the arbitrator's authority is derived solely from the express language of the agreement and where the agreement fails to give the arbitrator authority over the subject matter, the case is not arbitrable. It submits that the parties agreed that when the Union fails to meet the timelines, the grievance is not arbitrable.

The City points out that the Union's notice of intent to arbitrate was made in a letter dated April 4, 1990 but the request for arbitration was not made until the letter of January 18, 1991, almost ten months later. It submits that the evidence establishes that the grievance was not timely filed. It claims that there was no agreement either verbal or written to extend the timelines to request an arbitrator from the Wisconsin Employment Relations Commission.

The City maintains that arbitral precedent supports its position. It argues that when the agreement contains clear time limits for filing and prosecuting grievances, a failure to observe such time limits will generally result in the dismissal of the grievance. It insists that the request for an arbitrator to the Wisconsin Employment Relations Commission is jurisdictional and not merely technical and the arbitrator lacks jurisdiction to hear the merits of the grievance. The City claims that it will suffer significant economic harm should the grievance be held timely because 10 additional months of potential damages exist for the City in the event of an unfavorable outcome and this could have been prevented by a timely submission to arbitration. The City submits that the delay of almost 10 months, where the contractual timelines provides for ten (10) working days, is an unreasonable period of time to wait before processing the grievance to arbitration. The City maintains that the Union has followed the timelines in the past and therefore understood its obligations under the contract.

The City contends that the Union's argument that the timelines language is permissive is unfounded. It notes that the use of the word "may" only applies to either allowing the Union or City to file the request to the Wisconsin Employment Relations Commission but does not make the 10 day requirement permissive and applying discretion to the timelines renders any timelines in the contract meaningless. It suggests that if the timelines were permissive the Union could take a case to arbitration no matter how long a delay had occurred which makes a mockery of the contractual timelines. It submits that Article 8, Section 6 is clear and mandatory, but even if it isn't, the Union is still subject to the general standard of reasonableness in processing the grievance. It claims that the 10 month delay is not reasonable.

The City alleges that by its willingness to continue to negotiate settlement of the grievance, it did not waive its objection to its timeliness. It submits that the City's failure to actively prosecute the grievance does not constitute any waiver of its rights as it is the Union's duty to prosecute the matter. The City submits that the agreement provides for an extension of the timelines only "in writing" and this was not done. The City asserts that the Carpenter Shop grievance settlement expressly provided that it could not be used as a precedent and the Union cannot use it in any way in this case.

The City points out that the time period between December 20, 1990, when impasse was reached and January 18, 1991, is more than ten (10) working days. It submits that nothing after December 20, 1990 supports a theory of waiver and even giving the Union the benefit of the doubt, the grievance was not timely

appealed and is not arbitrable.

The City submits that the Union has failed to produce any evidence to support its argument that there has been lax enforcement of the time limits set forth in the grievance procedure. It notes that all the cases cited by the Union were voluntary settlements where the parties never completed the contractual arbitration process. The City, contrary to the Union's position, states that the written and oral evidence supports the conclusion that the time limits have been followed. It concludes that the Union's laxity argument is false and unproven.

The City insists that in order to waive timeliness, a party must have affirmatively acted and there is no evidence the City ever affirmatively acted to waive the contractual time limits. The City argues that the instant case does not involve a "Continuing Violation" as this ignores the facts presented in evidence that prejudice to the City would exist.

In conclusion, the City submits the grievance is not timely and not appropriate for arbitration.

DISCUSSION

The sole issue to be determined is whether the grievance is timely. The Union correctly states that there exists a presumption in favor of arbitrability of a grievance. The presumption is based on the policy that disputes between the parties are best resolved on the merits rather than dismissal based on a technicality. This presumption can be overcome by proof of a lack of arbitrability. The presumption favoring arbitration places the burden on the City to demonstrate that the grievance should be dismissed on the basis that it is time-barred. Article 8, Section 6, Subsection (A) states:

> (A) If the grievance is not resolved at Step 3, then arbitration may be initiated by the Union within thirty (30) working days of receipt of Step 3, answer by notifying the Personnel Committee of the Union's intention to proceed to arbitration. Such notice shall identify the grievance and the employee involved. Within ten (10) working days of the notice of intent to arbitrate, either party may request the Wisconsin Employment Relations Commission's arbitration service provided in Section 788.01 of the State Statutes.

It is undisputed that the Union timely notified the Personnel Committee of its intent to proceed to arbitration but did not make a request to the Commission to appoint an arbitrator within the ten (10) working days set forth in Subsection (A). The Union argued that the request to the WERC was permissive because of the use of the word "may." The undersigned does not find this argument persuasive. The first sentence states that arbitration "may" be initiated by the Union giving thirty days notice of its intent to arbitrate. The use of the word "may" is not permissive in this sentence but states how arbitration is to be initiated. Generally, the use of the same word in the same paragraph should have the same meaning unless the context indicates otherwise. The word "may" in the third sentence of Subsection "A" does not by context have a different meaning. It simply states how the arbitrator will be appointed. There is nothing in Subsection (A) that either expressly or implicitly indicates that the timelines are permissive merely because of the use of the word "may." The Union's reliance on Continental Oil Co., 22 LA 880 (Reynard, 1954) is misplaced because while the contract stated that the grievant may present a written grievance to the superintendent, it was held that word "may" allowed the grievant to present it by mail rather than in

person. There the context was entirely different and there was no mandatory condition of presenting the grievance in person. Here, the term "may" is used in the contract such that, if the next step is to be invoked, it is to be done in a certain way as spelled out in Subsection (A), but this does not make compliance with the timelines permissible. Thus, the assertion that the timelines are permissive is rejected.

Having concluded that the timelines are not permissive, it is necessary to determine whether the circumstances present in this case constituted a waiver of strict adherence to the timelines. A number of factors may be considered to determine waiver. For example, where the parties have been lax in complying with the technical requirements of the grievance procedure, strict enforcement of such a requirement cannot be insisted on absent a showing that clear notice was given that strict enforcement would be required for all future grievances. 1/ Lax enforcement, extenuating circumstances for the delay, the length of the delay and prejudice to the other party are all factors to be considered.

The undersigned credits the testimony of Darlene Wegner and James Burnham that the Union and the City were interested in resolving grievances as part of the negotiation process as it would be beneficial to both sides to resolve these in negotiations rather than in arbitration. It must be noted that the City never indicated that it considered the grievances to be untimely, and despite its position that they were untimely, it would still negotiate over them. At no time did the City take the position that it would insist on the timelines being strictly adhered to in this case. In Gilman Paper Co., 47 LA 563 (Tatum, 1966), cited by the City, the employer raised its timeliness objection at Step 1 and again at Step 3 and never abandoned it. The arbitrator held that the employer's subsequent discussion on the merits in an attempt to settle the matter did not constitute a waiver of its objection on the basis of timeliness and held the matter untimely. In the instant case, there is no evidence that the City raised the issue of timeliness before agreeing to discuss the matter in negotiations. On the contrary, it appears there was an implied agreement to discuss the matter in negotiations without an objection on timeliness. Although there was no express verbal or written waiver of the timelines, there appears to be a tacit understanding that these matters would be held in abeyance pending negotiations to resolve them. The City could have insisted the grievances were untimely and subsequent discussions in negotiations would not be a waiver of timeliness. The evidence does not establish that this was what occurred. The City's explanation that despite the lack of timeliness, they wanted to work out a settlement of certain grievances in negotiations, so they settled these after the timelines had expired, is an admission that there was laxness in strict adherence to the timelines. The undersigned finds that there was a laxness on the processing of this grievance and the timelines cannot now be strictly enforced to foreclose a hearing on its merits. This case is not a situation where the Union did nothing for ten months and then sought arbitration. This would violate the clear terms of the agreement and be unreasonable. Rather, the Union and the City were actively pursuing settlement discussions on the merits without an objection to timeliness throughout this period. With respect to the delay in requesting an arbitrator, both parties must be considered as being responsible for the delay. Finally, while there may be prejudice to the City by this delay should it lose on the merits, any prejudice can be minimized by determining the appropriate remedy.

1/ Elkouri and Elkouri, How Arbitration Works, (4th Ed., 1985) at 160.

Although the Union asserted the grievance was continuous, in light of the above, it is not necessary to determine whether it is or is not.

In conclusion, based on the facts and circumstances present in the instant case, including the lax enforcement of the timelines, the extenuating circumstances in this case, the dual responsibility for the delay and the ability to mitigate or eliminate any prejudice to the City due to the delay by an appropriate remedy, the undersigned finds that the grievance is timely.

Based on the above and foregoing, the record as a whole and the arguments of the parties, the undersigned issues the following

AWARD

The grievance is timely and is therefore arbitrable on its merits.

Dated at Madison, Wisconsin this 3rd day of March, 1992.

By _____
Lionel L. Crowley, Arbitrator