

## BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

BROWN COUNTY SHERIFF'S DEPARTMENT  
NON-SUPERVISORY EMPLOYEES  
ASSOCIATION

and

BROWN COUNTY

Case 479  
No. 48180  
MA-7533

### Appearances:

Mr. Frederick J. Mohr, Attorney at Law, appearing on behalf of the Association.

Mr. Kenneth J. Bukowski, Corporation Counsel, appearing on behalf of the County.

### ARBITRATION AWARD

Brown County Sheriff's Department Non-Supervisory Employees Association, hereinafter referred to as the Association, and Brown County, hereinafter referred to as the County, as parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Association made a request, with the concurrence of the County, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over the meaning and application of the terms of the agreement. The undersigned was so designated. Hearing was held in Green Bay, Wisconsin, on February 15, 1993. The hearing was not transcribed. Subsequent to the hearing, the parties agreed to brief the timeliness issue, and if the matter was found timely, then briefs would be submitted on the merits. Initial briefs were received on February 22, 1993, and the County submitted a reply brief on February 26, 1993.

### BACKGROUND:

Effective January 2, 1991, the County hired Christopher Knurr, Kevin Wickman and Scott Simoens as patrol officers in the Sheriff's Department. Each of the three had prior experience in another law enforcement agency. Prior to his hire, Knurr spoke with Captain Gerend about his starting rate of pay which would be lower than the pay he was presently receiving. Captain Gerend stated that the contract provided for a higher rate of pay based on prior work experience. Knurr testified that Captain Gerend assured him that he would get the higher

rate and accepted the job. Captain Gerend testified that he did not assure anyone that he would be hired at the higher rate of pay and no promise of a higher rate was made by

him. Captain Gerend indicated that he informed the new officers that he would make a request that the employees start at the 18 month rate based on their prior experience. Prior to their starting date each employee was sent a letter by the Personnel Department confirming his employment as a Patrol Officer with the County at a salary at the beginning rate, not at the 18 month rate. 1/ On or about January 10, 1991, the Sheriff, by Captain Gerend, made a request to the Personnel Department that Knurr, Wickman and Simoens be started at the 18 month rate. 2/ Sometime after the employees started work on January 2, 1991, they went to Captain Gerend's office and discussed their pay rate. At this meeting Captain Gerend informed the officers that the request of January 10, 1991, had been made but no response had yet been received. By a memo dated January 23, 1991, the Personnel Department informed Captain Gerend that it was denying his request and the three officers would not be paid at the 18 month rate but would be paid the starting salary. 3/ Shortly thereafter, Officers Knurr, Wickman and Simoens again went to Captain Gerend and asked about the pay increase. Captain Gerend told them at that time that the request was denied and they would not be paid at the 18 month rate.

On August 24, 1992, Officers Knurr, Wickman and Simoens filed grievances alleging that the County violated Article 25 by not placing them at the 18 month rate on January 2, 1991. 4/ A grievance hearing was held on or about September 17, 1992, and the Sheriff agreed that the officers were eligible for payment at the 18 month level and should be granted back pay. 5/ By a letter dated October 12, 1992, the Personnel Director informed the officers that the grievance was untimely and invalid and as such, there was no grievance and no retroactive pay would be given. 6/ The grievances were then appealed to the instant arbitration.

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1/ Ex. 4.

2/ Ex. 6.

3/ Ex. 7.

4/ Ex. 2.

5/ Ex. 3.

6/ Ex. 5.

ISSUE:

Were the grievances timely filed?

PERTINENT CONTRACTUAL PROVISIONS:

Article 25. TOP GRADE STEP PROGRAM

All starting patrolmen shall attain the maximum step at the completion of three and one-half (3 1/2) years of service on a five step plan, with a step at the termination of six months, and a one step increment on each one year anniversary date thereafter. Employees hired with prior experience in another law enforcement agency may be started in the pay scale up to the 18 month level at the discretion of the Employer.

. . .

Article 46. GRIEVANCE PROCEDURE

Both the bargaining unit and the County recognize that grievances and complaints should be settled promptly and at the earliest possible stage, and that the grievance process must be initiated within fifteen (15) days of the incident or of learning of such. Any grievance not reported or filed within fifteen (15) days shall be invalid.

Any difference of opinion or misunderstanding which may arise between the County and the bargaining unit shall be handled in the following manner:

1. The aggrieved employee shall present the grievance orally to his captain either alone or accompanied by a bargaining unit representative.
2. If the grievance is not settled at Step 1, it shall be reduced to writing and presented to the division head or their designee. Within ten (10) days (Saturday, Sunday and holidays excluded) the division head or their designee shall furnish the bargaining unit and the employee with a written answer to the grievance.
3. If the grievance is not settled at Step 2, the grievance shall be presented in writing to the Sheriff. The Sheriff, within ten (10) days (Saturday, Sunday and holidays excluded) shall hold an informal meeting with the aggrieved employee, Chief Deputy, and the bargaining unit representative. If the grievance is not

resolved to the satisfaction of all parties within ten (10) days (Saturday, Sunday and holidays excluded) either party may proceed to Step 4.

4. The grievance shall be presented in writing to the Personnel Director.

All other grievances relating to wages, hours and working conditions or any other matter under jurisdiction of the Sheriff shall be directed to the Sheriff and Personnel Director. The Personnel Director shall, within ten (10) days (Saturdays, Sundays and holidays excluded) hold an informal meeting with the aggrieved employee and bargaining unit representative. Within seven (7) days (Saturdays, Sundays and holidays excluded) after this meeting, the Personnel Director will make a determination in writing and forward copies to the grievant and bargaining unit representative.

If the employee's grievance is not settled at Step 4 and if the grieved party desires arbitration, he must notify the Personnel Director, in writing, of his intention to arbitrate the grievance; provided, however, that such written notice must be made within fifteen (15) days after receipt of the decision of the Director of Personnel. If such notice for arbitration is not presented within the specified time period, then the grievance shall be deemed concluded at Step 4.

The parties shall each select three (3) arbitrators from the Wisconsin Employment Relations Commission staff. From these six (6) arbitrators, five (5) names will be drawn. The parties shall then proceed to alternately strike names from that panel until the arbitrator is selected. The striking order shall be determined by a coin toss. The decision of the arbitrator will be final and binding on all parties except for judicial review. The cost of the arbitration will be borne equally by the County and the bargaining unit.

It is not the intention of the parties hereto to circumvent or contravene any County ordinance or State law. If there is any conflict or ambiguity insofar as any phrase, sentence or paragraph of this contract is concerned, then the ordinance or state law shall apply.

Nothing herein shall limit any employee from his rights to a hearing pursuant to Wisconsin Statutes in case formal charges are being filed against him.

#### ASSOCIATION'S POSITION:

The Association points out that Article 46 of the agreement provides that grievances must

be initiated within 15 days of the incident, and the grievant must present the grievance orally to his Captain. The Association submits that the grievants met with Captain Gerend on January 2, 1991, and initiated their grievances within 15 days of the incident. It notes that the second step of the grievance procedure requires the grievance be reduced to writing but does not specify a time limit to reduce the grievance to writing. The Association asserts that a strict construction of the agreement supports a finding that the grievances are timely. The Association alleges that the dispute was between the Sheriff's Department and the Personnel Department and so the grievants were not a party to any dispute, only to the result of the dispute. It submits that the grievants did not violate any time constraints.

The Association argues that the grievants' claim was a continuing claim and as such arose each work day, and they could enforce their claims at a later date.

The Association further asserts that historically the parties have not strictly adhered to the time limits set forth in the contract but have traditionally, uniformly and consistently failed to adhere to the contractual time limits. The Association insists that the parties have attempted to resolve their differences rather than force the issue by strict construction of time limits. The Association claims that there were ongoing discussions with the grievants and the Sheriff, and it would be patently unfair to disallow the grievances when the Sheriff's Department gave assurances to the grievants' detriment that it was working in their best interest to resolve the matter. It maintains that, in light of the past laxness in following timelines, strict adherence to the timelines without a prior notice that the County would, in the future, require strict adherence to the timelines allowed the grievants to rely on the past practice.

The Association submits that by holding the informal hearing and not raising the timeliness issue, the County waived this argument. The Association asserts that as the grievance involves money only, the County cannot argue prejudice by the delay. It concludes that for the reasons set out above, the County's timeliness argument must fail.

#### COUNTY'S POSITION:

The County contends that the plain language of the grievance procedure means exactly what it says. It points out that Article 46 provides that grievances should be settled promptly and at the earliest possible stage, and grievances must be initiated within 15 days of "the incident or of learning of the incident" or it will be invalid. It submits that this case illustrates the need for grievances to be timely filed as the financial relief exceeds \$50,000.00 and had the grievances been promptly filed, the County would have had the opportunity to timely review the matter and limit its financial liability.

The County claims that the uncontroverted evidence establishes that the employees did not wish to file a grievance during their probationary period because they might be let go and that

using prior experience as a negotiating tool to get the 18th month rate at the time of hire might result in not being hired.

The County claims that the date of the incident could be the letter of employment dated December 21, 1990, or the start date of January 2, 1991, or the January, 1991 meeting with Captain Gerend where they were told that the request for the higher rate had been denied. The County maintains that whichever date triggered the grievances, the August 24, 1992 filing date exceeded the time limits by almost 20 months. It submits that several of the witnesses could not recall the events of late 1990 and this is another prime example of why grievances must be timely filed. It requests that the grievances be found not timely under Article 46 and therefore invalid.

#### COUNTY'S REPLY:

The County takes exception to the Association claim that the grievants were unaware of the Personnel Department's letter of January 23, 1991, denying the request for pay at the 18 month rate. It submits that Officer Knurr testified that sometime in January, 1991, he and the other grievants met with Captain Gerend, and they were informed that the request to start at the 18 month rate was denied. The County also notes that the Association's inference is contrary to its assertion that the January meeting with Captain Gerend was the oral step of the grievance procedure. The County disputes that this meeting rose to the level of a grievance and even if it did, the employees were told that they would not receive the higher rate and the employees met with their labor representative, who said there was not much he could do. The County asserts that if a grievance was commenced, the Association had a duty and obligation to inform the members that the grievance could not be held in abeyance for in excess of a year and a half. It maintains that such dilatory behavior runs counter to the basic tenet to process grievances in an expeditious manner, and besides, Officer Knurr testified he had not filed a grievance before August 24, 1992.

With respect to the Association's claim that the grievance was a continuing one, the County contends that even if this is correct, the claim ceased when the officers achieved 18 months of employment and were paid at that rate, so the claims ceased as of July 1, 1992, yet no grievance was filed until August 24, 1992.

The County contends that there is no evidence in the record that the parties have consistently failed to adhere to contractual time limits, and there is no evidence in the record that the parties have not followed the strict construction of time limits. The County further notes that the record does not establish that the officers were assured that the Sheriff's Department was working in their best interest. Rather, the evidence establishes that it was the officers who opted not to pursue a grievance.

The County claims that the grievants should not be allowed to sit on their rights to the substantial financial detriment of the County and raise issues 20 months after they arise. It argues

that grievance procedures are designed to get employee concerns addressed and resolved as quickly as possible. It takes the position that the grievances were invalid from their very filing on August 24, 1992, since they were not timely. It asks that the grievances be dismissed.

#### DISCUSSION:

Article 46 of the parties' collective bargaining agreement states as follows:

Both the bargaining unit and the County recognize that grievances and complaints should be settled promptly and at the earliest possible stage, and that the grievance process must be initiated within fifteen (15) days of the incident or of learning of such. Any grievance not reported or filed within fifteen (15) days shall be invalid.

The subject of the three grievances is the County's failure to start the grievants' on January 2, 1991, with pay at the 18 month level as opposed to the starting rate specified in the contract. 7/ The grievants all started on January 2, 1991, and were not paid at the 18 month rate but at the starting rate. While there is some dispute about what assurances were made, the evidence establishes that no later than February 1, 1991, each of the grievants was informed by Captain Gerend that the Personnel Department had turned down the Sheriff's request that the grievants' starting pay be at the 18 month rate. 8/

This evidence establishes that the employees knew of the incident no later than February 1, 1991. They did not file any grievance within 15 days of February 1, 1991. Officer Knurr indicated that he felt that his choice was to wait out his probationary period, otherwise if a grievance was filed, he might be let go. It must be concluded that the officers were aware of the denial of the higher pay request but for reasons of their own, they did not file a grievance until August 24, 1992. This was clearly more than 15 days after they knew of the denial, and absent special circumstances, the grievances are clearly stale and not timely filed.

The Association asserted that the January, 1991 meeting was an oral grievance, and no time was specified for the written grievance to be filed. This argument runs counter to the language which states that grievances must be settled promptly and at the earliest stage. Even if there were no timelines to file a written grievance, such grievances must be filed within a

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7/ Ex. 2.

8/ Id.



reasonable time, and 18 months in this case would not be reasonable.

The Association has raised a number of circumstances which it claims constitutes a waiver of the timelines. The Association argues that the parties have been lax in complying with the technical requirements of the grievance procedure, and 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. 9/ This argument is not persuasive because there is nothing in the record to establish any laxness in enforcement of the timelines.

The Association also argued that the parties had continuing discussions of the situation, and the grievants were repeatedly assured that the Sheriff's Department's Administration was working to resolve the dispute. Again, there is nothing in the record to support this argument. The grievance statements fail to show any ongoing discussions nor was there any testimony to support this argument. 10/

The Association asserts that the Sheriff's response to the grievances fails to raise any issue with respect to timeliness, so the County had waived the timeliness issue. Article 46 states that "any grievance not reported or filed within fifteen (15) days is invalid." The grievances filed on August 24, 1992, were not filed within 15 days of the incident and were invalid, so the Sheriff's action or non-action on the timeliness of the grievances had no effect because the grievances were invalid and he could not validate them by inaction.

Finally, the Association has asserted that the grievances are continuing. Article 25 states, in part, as follows:

Employees hired with prior experience in another law enforcement agency may be started in the pay scale up to the 18 month level at the discretion of the Employer.  
(Emphasis added.)

The higher pay rate was clearly within the County's discretion and was not guaranteed by the terms of the contract. Had the contract provided for no discretion on the part of the County, then it may be a continuing grievance. Here, the starting pay rate was within the County's discretion and the denial was, therefore, a one-time decision and not continuing. This is analogous

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

10/ Ex. 2.

to the County's selection of an employee for a promotion. An employee not selected could not file a grievance 18 months after the promotion and assert the grievance was timely because it was continuing every day he was not promoted. In short, each is a one-time completed incident and is not a continuing grievance.

The grievants failed to file their grievances within 15 days of learning of the denial of the request to start at the 18 month rate, and the grievances are therefore not timely and invalid.

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

AWARD

The grievances are not timely, and therefore, are dismissed in their entirety.

Dated at Madison, Wisconsin this 24th day of March, 1993.

By Lionel L. Crowley /s/  
Lionel L. Crowley, Arbitrator