

BEFORE THE ARBITRATOR

In the Matter of the Arbitration	:
of a Dispute Between	:
	:
CHIPPEWA COUNTY DEPUTY SHERIFF'S	: Case 183
ASSOCIATION, WPPA/LEER DIVISION	: No. 49888
	: MA-8090
and	:
	:
CHIPPEWA COUNTY	:
	:

Appearances:

Mr. Steve Urso, Representative, Wisconsin Professional Police Association/LEER Division, appearing on behalf of the Association.
Ms. Margaret McCloskey, Chippewa County Personnel Director, appearing on behalf of the County.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Association and the County or Employer, respectively, are parties to a collective bargaining agreement providing for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to hear a grievance. A hearing, which was not transcribed, was held in Chippewa Falls, Wisconsin, on March 9, 1994. Afterwards, the parties filed briefs, whereupon the record was closed April 15, 1994. Based on the entire record, the undersigned issues the following Award.

ISSUES

The undersigned has framed the issues as follows:

1. Is the grievance procedurally arbitrable?
2. Did the County violate the collective bargaining agreement by not approving regular work time for Robert Sorensen to use for attendance at an Employee Trust Fund board appeal hearing? If so, what is the appropriate remedy? 1/

1/ The Employer proposed this wording of the substantive issue at the hearing but the Association would not agree to same and proposed slightly different wording. In its brief though, the Association adopted the wording proposed by the Employer and abandoned their previous wording of the substantive issue.

RELEVANT CONTRACT PROVISIONS

The parties' 1992-1994 collective bargaining agreement contains the following pertinent provisions:

ARTICLE 4 - GRIEVANCE PROCEDURE

. . .

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 issues involved, the relief sought, the date 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 5 - Steps in Procedure:

1. The grievance will be orally discussed between the grievant and the immediate supervisor and if not resolved, the employee shall prepare and file a written grievance on the forms provided by the County with the Department Head within ten (10) calendar days after he/she knew or should have known about the event giving rise to the grievance. The Department Head will further investigate the grievance and submit his/her decision to the employee within seven (7) calendar days after receiving written notice of the grievance. In the event of a grievance, the employee shall perform his/her assigned task and grieve his/her complaint later.

2. If the grievance is not settled at the first step, the employee and his/her representative shall present a written complaint to the Personnel Director within seven (7) calendar days after receipt of the written decision of the Department Head. The Personnel Director will further investigate the complaint and submit his/her decision to the employee and his/her representative in writing within seven (7) calendar days after receiving notice of complaint.

. . .

FACTS

A legal proceeding is currently ongoing over the status of Deputy Sheriff Robert Sorensen's retirement fund designation. This proceeding is before the Wisconsin Department of Employee Trust Funds, hereinafter ETF. At issue is the level of retirement pay Sorensen will receive after he retires. The initial ETF hearing was held some time in 1992. That hearing was conducted by a conference call which took 15 minutes. Sorensen was called at work while he was on duty. He did not have to take personal leave for the time he spent on the phone in that matter. On April 17, 1992, ETF issued a decision granting Sorensen protective status in the retirement system retroactive from March 10, 1984 through July 1, 1989. This decision meant that the County would have to pay about \$30,000 to the State on Sorensen's behalf. The County appealed the decision. Hearing on the appeal was set for August 6, 1993, 2/ in Madison.

After Sorensen received notice of the appeal hearing, he decided he wanted to attend. Through department channels, he requested that he be allowed to attend the hearing, which was on one of his regularly scheduled work days, on work time. About August 3, Sorensen's supervisor, Lieutenant Thoma, discussed Sorensen's request with the Sheriff who, in turn, discussed it with the County Personnel Director. The Personnel Director told the Sheriff that Sorensen could not use regular work time to attend the Madison hearing. The Sheriff then told Lieutenant Thoma that Sorensen could not attend the hearing on work time. Thoma, in turn, relayed this response to Sorensen.

Sorensen attended the appeal hearing in Madison on August 6 on his own volition. He was not required to attend the hearing nor was he subpoenaed to be there; instead, he chose to attend because of the financial stake he has in the outcome of the proceeding. While he was there he was called as a witness and he testified for about an hour.

Following the hearing, Sorensen applied for eight (8) hours of regular pay for the day of the hearing, even though he was absent from work for the entire eight (8) hour period. On August 18, the Sheriff sent Sorensen a memo wherein he indicated that he would not be paid regular pay for August 6. In this memo, the Sheriff told Sorensen he could use either vacation time or compensatory time for the day of the hearing. Sorensen subsequently opted to use vacation time for the day. As a result, he was paid eight (8) hours of vacation pay for August 6.

On August 26, WPPA/LEER Representative Steve Urso wrote County Personnel Director Margaret McCloskey a letter which he characterized as a grievance on Sorensen's behalf. McCloskey's written response to Urso's letter indicated, among other things, that the Association had not followed the contractual grievance procedure.

2/ All dates hereinafter refer to 1993.

On August 31, WPPA/LEER representatives met with the Sheriff regarding another matter involving Sorensen. During that meeting the Sheriff was asked what he was going to do about Sorensen's grievance. He replied that he had already given his response (i.e., referring to his August 18 memo).

POSITIONS OF THE PARTIES

The Association initially challenges the County's assertion that the grievance is procedurally defective. In its view, it substantially complied with the contractual grievance procedure. It asserts that the reason the grievance was not filed at Step 1 with the Sheriff was because it thought the Sheriff's August 18 memo to Sorensen was the Employer's first step response. It read the Sheriff's memo as preempting the need for Sorensen to file a grievance with him, so it went to the next step of the grievance process (i.e., to the Personnel Director). The Association contends it acted in a responsible, logical manner in doing so. The Association therefore contends the grievance is procedurally arbitrable and it requests that the arbitrator address the grievance on its merits. With regard to the merits, the Association's position is that the County violated the labor agreement by not approving regular work time for Sorensen to use to attend the hearing. The Association argues that the County's decision to deny Sorensen duty pay status for the day in question was arbitrary and capricious. The Association suggests that the County denied Sorensen's request (for on-duty pay status) because of the nature of the hearing. The Association notes in this regard that it was the County, not Sorensen, that stood to gain if it won the appeal. The Association also notes that while the County allowed Sorensen on-duty pay status for the first ETF hearing (which he participated in via a phone call), it would not extend him the same status for the appeal hearing. The Association argues this was unreasonable and discriminatory. It therefore requests that the grievance be sustained and Sorensen's vacation day be returned to his personal leave account. As part of the remedy the Association suggests that Sorensen be allowed to work an unpaid shift at some point in the future. The Association submits that under this arrangement the County would receive services equal to what it has paid for, and Sorensen would retain use of his vacation day at a date and time he chooses.

The County initially contends that the grievance is procedurally defective. It cites the following to support this proposition. First, it notes that the grievance was not filed on the specified grievance form. Second, it notes that the grievance was not filed by the grievant, but rather by Urso. Third, it notes that the Association filed their grievance letter directly with the Personnel Director, not with the Sheriff. Fourth, it contends that the grievance was untimely. The County asserts that each of the foregoing violates some aspect of the contractual grievance procedure. The County argues that since the Association failed to follow the contractual grievance procedure, the grievance should be dismissed on procedural grounds. With regard to the merits, the County's position is that it did not violate the labor agreement by not approving regular work time for Sorensen to use to attend the hearing. It makes the following arguments to support this proposition. First, it submits that

Sorensen chose to attend the hearing on his own volition. According to the County, he was not required to attend by either the County or ETF. That being so, the County contends this was personal business. The County argues it is not responsible for paying Sorensen to attend a hearing that involves personal business. Second, the County notes that it has negotiated provisions in most of its labor contracts that provide pay to employes for subpoenaed court appearances, and it notes that this language is not found in the contract involved here. The County contends that even if it were though, the employe would have to be subpoenaed and that did not happen here. Third, the County notes that it has also negotiated a provision in the instant labor contract that provides pay for a grievant to attend his/her own grievance hearing. The County contends this procedure is inapplicable to the ETF hearing because that hearing was not a grievance hearing. Finally, the County submits that although Sorensen was allowed to participate in the initial ETF hearing via a phone call without any deduction of pay, the Employer argues this did not create a precedent which is binding here. In the Employer's view, that previous matter is distinguishable from this one based on the facts. The County argues the Association has not shown a violation of the labor agreement. It therefore requests that the grievance be denied.

DISCUSSION

Procedural Arbitrability

Since the County contends that the grievance is procedurally defective, it follows that this is the threshold issue. Accordingly, attention is focused first on the question of whether the grievance is procedurally arbitrable.

The first step of the grievance procedure provides that "the grievance will be orally discussed between the grievant and the immediate supervisor and if not resolved, the employee shall prepare and file a written grievance on the forms provided by the County with the Department Head within ten (10) calendar days after he/she knew or should have known about the event giving rise to the grievance."

The facts pertinent in deciding whether the grievance is procedurally arbitrable are as follows. Association representative Urso filed the instant grievance; not Sorensen. This grievance, which was dated August 26, was typed in letter form; it was not typed on a grievance form provided by the County. This grievance was sent to County Personnel Director McCloskey; not to the Sheriff.

Applying the language to the facts yields the following results. First, although the language specifies that "the employee shall prepare and file a written grievance," that did not happen here because it was Urso, not Sorensen, who filed the grievance. Second, although the language specifies that the grievance shall be filed "on the forms provided by the County," that did not happen here because the grievance was typed in letter form and was not on a pre-

printed, County supplied grievance form. Third, the language specifies that the grievance be filed "with the Department Head." That did not happen here because Urso sent the grievance to the County Personnel Director; not the Sheriff (i.e., the Department Head). Finally, the language specifies that the grievance shall be filed "within ten (10) calendar days after he/she knew . . . about the event giving rise to the grievance." The question here is what occurrence triggered the running of the ten (10) day time limitation. For example, was the occurrence when Sorensen was told by Thoma on August 3 that he could not attend the hearing on work time, was it the day of the hearing itself (August 6), or was it on August 18 when the Sheriff sent Sorensen a memo indicating Sorensen would not be paid regular pay for the appeal hearing date.

In situations such as this where a party announces its intention to do a given act but does not do or culminate the act until a later date, arbitrators have held that the occurrence for purposes of applying contractual time limits is the later date. 3/ In accordance therewith, the undersigned concludes that the occurrence for purposes of applying the contractual time limits here is not August 3 (when Thoma told Sorensen what the Sheriff had said), or August 6 (the date of the appeal hearing). It was possible that the Sheriff and/or County could have changed its position concerning pay for August 6 after these dates.

That being so, the activity complained of (i.e., whether Sorensen could use regular work time to attend the appeal hearing) did not ripen or come to fruition until the Sheriff sent his written memo to Sorensen August 18 confirming his earlier position. Since the instant grievance was filed August 26, it was filed within the ten (10) calendar day time period. I therefore find that the grievance was timely filed.

The foregoing demonstrates that when the Association filed the instant grievance, it did not comply with several parts of the grievance procedure. First, Sorensen himself did not file the grievance; Urso did. Second, Urso did not file the grievance on the proper form. Third, the grievance was filed with the wrong person; it was sent to McCloskey instead of the Sheriff.

Having so found, the critical question becomes whether the Association's non-compliance with the literal language of Step 1 of the grievance procedure bars a review of the grievance on the merits. I find it does not for the following reasons. First and foremost, the grievance procedure does not provide an express penalty for noncompliance with various steps of that procedure. Second, with regard to the Association's filing the grievance with McCloskey rather than the Sheriff, it is noted that the Association read the Sheriff's memo of August 18 to be his final pronouncement and/or decision in the matter. From the Association's perspective, it would have served no practical purpose for the grievance to be filed with someone (i.e., the Sheriff) who had already made a decision in writing concerning the subject. Under these circumstances, it is understandable why the Association filed the grievance directly with McCloskey. Given the foregoing, the undersigned finds that the Association's noncompliance with Step 1 of the grievance procedure is not fatal. It is therefore held that the instant grievance is procedurally arbitrable and properly before the arbitrator.

Merits

Attention is now turned to the substantive merits of the grievance. The Association challenges the County's failure to approve regular work time for Sorensen to attend an ETF appeal hearing. The Association contends, contrary to the County, that regular work time should have been approved.

3/ Elkouri and Elkouri, How Arbitration Works, Fourth Edition, p. 196.

The problem with the Association's contention is that it has no contractual basis whatsoever. There is nothing in the contract that requires the Employer to pay employees who are absent from work under the circumstances involved here. While there are provisions in this labor agreement that provide that employees who are absent from work for certain reasons such as sickness or jury duty will be paid for the time they are absent, these provisions are inapplicable here because the grievant was neither sick nor on jury duty on the day in question. Instead, on that day Sorensen attended an ETF appeal hearing in Madison. Simply put, there is no contract provision that grants employees who attend such hearings on-duty pay status. As a result, there is nothing in the contract that requires the Employer to have considered the grievant to have been on-duty pay status that day.

The Association acknowledges the foregoing but nevertheless contends it was unreasonable, arbitrary and capricious for the Employer to not consider the grievant to be on-duty status that day. I disagree. To begin with, it has just been noted that there is nothing in the contract that requires the grievant to be paid under the circumstances involved here. That being so, it was justifiable for the Employer to not consider the grievant to be on-duty pay status that day. In fact, had the Employer done so, it would have created a precedent for absent employees to be paid under circumstances which, like this one, have no contractual basis. Second, while the Employer considered the grievant to have been on-duty when he participated in the initial ETF hearing, that situation is distinguishable on its facts. The initial hearing was conducted by phone and Sorensen was called at work while he was on duty. However, the appeal hearing was not conducted by phone; rather it was done in person in Madison. Also, the phone hearing lasted a mere 15 minutes. In contrast, when Sorensen went to Madison for the appeal hearing he missed his entire eight (8) hour shift and the Employer had to cover his absence with someone else. Given these factual differences, I find that the Employer's treating Sorensen as on-duty for the 15 minutes he participated in the initial ETF phone call hearing did not create a binding precedent that he was likewise on-duty when he attended the appeal hearing in Madison. In point of fact, he was not on-duty when he attended the appeal hearing in Madison. Finally, the Association emphasizes what the appeal hearing involved, namely Sorensen's retirement fund status. There is no question Sorensen had a great personal and monetary interest in the ETF decision. Be that as it may, he was neither required to be at the appeal hearing nor was he subpoenaed by either the County or ETF. That being the case, he attended the appeal hearing because he wanted to. The Employer never indicated though that Sorensen could not attend the appeal hearing. Instead, it indicated that if he did so, it would be on his time, not the County's time. Thus, the County viewed Sorensen's attending the appeal hearing as personal business. So do I. It is therefore held that the County's decision to not let Sorensen attend the appeal hearing on work time was reasonable and justifiable under the circumstances.

In summary then, it is held that no contractual violation has been found relating to the merits. In so finding, it was unnecessary to rely on those Employer arguments not addressed above. Consequently, no comment is made concerning same.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

1. That the grievance is procedurally arbitrable;
2. That the County did not violate the collective bargaining agreement by not approving regular work time for Robert Sorensen to use for attendance at an Employee Trust Fund board appeal hearing. Therefore, the grievance is

denied.

Dated at Madison, Wisconsin, this 29th day of June, 1994.

By Raleigh Jones /s/
Raleigh Jones, Arbitrator