BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

AFSCME LOCAL 2223

and

EAU CLAIRE COUNTY

Case 195
No. 55727
MA-10080

Appearances:

Mr. Steve Day, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Mr. Keith R. Zehms, Corporation Counsel, Eau Claire County, appearing on behalf of the County.

ARBITRATION AWARD

AFSCME Local 2223, herein the Union, and Eau Claire County, herein the County, jointly requested the Wisconsin Employment Relations Commission to designate the undersigned as an arbitrator to hear and to decide a dispute between the parties. The undersigned was so designated. Hearing was held in Eau Claire, Wisconsin, on January 21, 1998. The parties requested the undersigned to render a verbal decision at the close of the hearing. The undersigned gave a verbal decision at the close of the hearing on January 21, 1998, and agreed to issue a brief written statement of the decision.

ISSUES

The parties stipulated to the following issues:

Under the collective bargaining agreement, do Union employes have the right to grieve negative performance evaluations?

If so, was the grievance of Union employe Sharon Kinderman filed in a timely manner?

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 2
GRIEVANCE PROCEDURE

2.01 A. Definition. A grievance shall mean a dispute concerning the interpretation or alleged violation of this Agreement or any matters involving working conditions.

. . .

2.02

. . .

Step B. If the grievance is not settled at Step A, the written grievance shall be submitted to the Personnel Director within ten (10) working days of receipt of Step A response. The Personnel Director shall within ten (10) working days respond in writing to the grievant and the Union steward.

. . .

BACKGROUND AND DISCUSSION

The relevant facts are not in dispute. In 1993 Shirley Ives was discharged for poor work performance. Ives had not been disciplined prior to her discharge, although she had received three negative performance evaluations. Ives did not grieve those evaluations because it had been the Union's understanding and belief for many years that such evaluations were not subject to the grievance procedure. At the arbitration hearing involving the grievance contesting Ives' discharge, the County's Personnel Director testified that an employe could grieve a negative performance evaluation, even though the evaluation by itself was not a disciplinary action. The arbitrator's award, which issued on July 11, 1996, denied the grievance and upheld the discharge. In a letter dated July 25, 1996, the Union advised the County that it intended to post, on August 1, 1996, an enclosed notice informing the employes that negative performance evaluations now could be grieved. The notice was posted on August 2, 1996.

On June 6, 1996, the County discussed with Sharon Kinderman her performance evaluation, which evaluation rated her performance to be unsatisfactory primarily because of her absences from work. On August 9, 1996, Kinderman filed a grievance contesting her unsatisfactory performance evaluation. The County denied the grievance for being untimely filed. A special three-month evaluation was completed on September 11, 1996, which evaluation included a statement that Kinderman's attendance had improved and now was satisfactory. As of the hearing herein, Kinderman has not been disciplined for excessive absenteeism.

The contractual definition of a grievance includes matters involving working conditions. Kinderman's unsatisfactory performance evaluation in June of 1996 was based primarily on what the County perceived to be her excessive absences. The undersigned is persuaded that the County was using the evaluation to warn Kinderman that her employment status could be affected if her attendance failed to improve. Such a warning falls within the definition of a grievance, since a continued attendance problem could result in discipline and discipline certainly could impact on her wages, hours and/or working conditions. Section 1.06 of the contract sets forth specific rights of the County, including the rights to establish reasonable work rules and to discipline employes for just cause. An unsatisfactory performance evaluation due to excessive absences clearly relates to both of those contractual provisions. Further, the foregoing conclusion is supported by the testimony of the County's Personnel Director at the Ives hearing, wherein he stated that he believed an employe could grieve a performance evaluation. Thus, it is concluded that an employe can grieve an unsatisfactory, or negative, performance evaluation.

Since it has been concluded that a negative, or an unsatisfactory, performance evaluation can be grieved, then it is necessary to determine whether Kinderman filed her grievance in a timely manner.

The contract requires that a grievance be filed within twenty days of the date the grievance occurred or was known or reasonably ought to have been known by the grievant. The Union argues that the twenty day filing period commenced on August 2, 1996, which is the date when the Union posted a notice informing employes that, based on the arbitration award in the Ives case, they now had the right to grieve negative performance evaluations, even though prior to said award, the Union had understood that negative performance evaluations could not be grieved. The County believes that the twenty day filing period commenced on June 6, 1996, the day on which Kinderman was made aware of the unsatisfactory performance evaluation. The County asserts the Union knew from the testimony at the hearing in the Ives arbitration case of the County's belief that unsatisfactory performance evaluations could be grieved. Rather than waiting for the arbitration award in said matter, the Union could have posted a notice informing employes of their right to grieve an unsatisfactory performance evaluation at any time subsequent to the hearing.

The undersigned understands that the Union did not immediately act on the testimony of the County's Personnel Director because of its long-standing belief that unsatisfactory performance evaluations could not be grieved and its anticipation that the arbitrator would uphold its belief in the award. However, such a delay cannot be the basis for making the filing of Kinderman's grievance timely. If the twenty day filing period was found to have commenced on August 2, 1996, instead of June 6, 1996, then any employe could have grieved a prior unsatisfactory performance evaluation, regardless of the length of time between said evaluation and August 2, 1996. Rather, the Union could have issued its notice advising employes that they now had the right to grieve negative performance evaluations right after the hearing in the Ives case. Even without such a notice to the employes by the Union, Kinderman could have filed a timely grievance to contest the evaluation discussed with her on June 6, 1996. Such a filing

would have required the County to take a position on the question of whether a negative performance evaluation could be grieved. The undersigned concludes that Kinderman's grievance was not filed in a timely manner.

Based on the foregoing, the undersigned enters the following

AWARD

That, under the collective bargaining agreement, Union employes do have the right to grieve negative performance evaluations; that the grievance of Sharon Kinderman was not filed in a timely manner; and, that the grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 10th day of April, 1998.

Douglas V. Knudson /s
Douglas V. Knudson, Arbitrator

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