BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

DOUGLAS COUNTY PROFESSIONAL HUMAN SERVICES EMPLOYEES UNION, LOCAL 2375, AFSCME, AFL-CIO

and

DOUGLAS COUNTY

Case 230
No. 55366
MA-9996

(Grievance of Mark Rooney)

Appearances:

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

Mr. Stephen Weld, Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, appearing on behalf of the County.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and the County or Employer, respectively, were signatories to a collective bargaining agreement which provided 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 was held on February 10, 1998 in Superior, Wisconsin. The hearing was not transcribed. At the hearing, the parties decided to bifurcate an arbitrability issue from the merits of the grievance. Accordingly, they filed briefs on the arbitrability issue which were received by March 11, 1998. Having considered the record evidence and the arguments of the parties, I hereby render the following Award on the arbitrability issue.

ISSUE

Is the Rooney reclassification grievance arbitrable?

PERTINENT CONTRACT PROVISIONS

The parties 1996-1997 collective bargaining agreement contained the following pertinent provisions:

ARTICLE 6.

GRIEVANCE PROCEDURE

Section 5. A. Step Four: The Union may within ten (10) working days following the receipt of the response from the Personnel Director, petition the Wisconsin Employment Relations Commission (WERC) to appoint an impartial arbitrator from its staff to conduct a hearing and issue a written decision on the matter which shall be final and binding on the parties. The Union shall provide the County with a copy of the petition for arbitration at the same time the Union files the petition with the Wisconsin Employment Relations Commission (WERC).

B. Arbitration Costs: The cost of the WERC filing fee shall be paid by the party requesting arbitration unless otherwise mandated by state statute. Each party shall be responsible for the costs it incurs through arbitration.

C. Role of Arbitrator: The Arbitrator shall not add to, subtract from, or vary the terms of this Agreement. All decisions must be rendered in accordance with the language of this Agreement.

FACTS

As part of its governmental functions, the County operates a Department of Human Services. The Union is the exclusive bargaining representative for the professional employes in that department. The County and the Union have been parties to a series of collective bargaining agreements, the most recent being the 1996-1997 agreement. That agreement was in effect from January 1, 1996 through December 31, 1997.

Mark Rooney is a social worker employed by the County's Department of Human Services. As such, he is in the bargaining unit referenced above. In May, 1997, Rooney sought to be reclassified from a Social Worker III position to a Social Worker V position. The request was denied and he grieved. Rooney's grievance was processed through the contractual grievance procedure and appealed to arbitration. An arbitration hearing was ultimately scheduled on the grievance for October 29, 1997. On October 14, 1997, the parties mutually requested a postponement of the arbitration hearing so that the underlying issue could be addressed in contract negotiations. Pursuant to that request, the arbitration hearing was cancelled.

In the fall of 1997, the parties commenced negotiations for a successor labor agreement to their 1996-97 agreement. One issue which was scheduled to be addressed in those negotiations was reclassification (i.e. how one moves from one social worker classification to another) and another was the number of social worker classifications in the department. The parties were still negotiating the terms for a successor agreement on the hearing date (February 10, 1998).

In December, 1997, the instant grievance was rescheduled for hearing. As was just noted, the arbitration hearing was held February 10, 1998. At that hearing, the County contended that the grievance was not arbitrable because the parties' 1996-97 contract had expired on December 31, 1997 and the arbitration clause had evaporated as of that date. The parties decided to bifurcate this arbitrability issue from the merits.

POSITIONS OF THE PARTIES

The Union's position is that the grievance is arbitrable. It makes the following arguments to support this contention. First, the Union avers that the County never raised the issue of arbitrability before the date of the arbitration hearing. It cites numerous arbitration awards for the proposition that when an employer raises arbitrability for the first time at the arbitration hearing, it has not preserved that defense and has waived it. Second, the Union relies on the contractual arbitration clause itself. According to the Union, the intent of that provision is to give the Union its "day in court", and that intent should be honored by arbitrating the instant grievance. Third, the Union asserts that it has the fundamental right to arbitrate grievances during a hiatus between labor agreements because of the presumption of arbitrability. To support this proposition, it cites several private and public sector arbitration awards which have held that arbitration can proceed during a contract hiatus. The Union argues that if it could not arbitrate during a contract hiatus, this would upset the parties' *status quo*. Finally, the Union contends that there was no agreement among the parties in their contract negotiations to bar this particular grievance from going to arbitration. It therefore requests that the grievance be found arbitrable.

The County's position is that the grievance is not arbitrable. It makes the following arguments to support this contention. First, the County argues that the arbitration clause in the parties' 1996-97 agreement evaporated after that agreement expired. To support this premise, it cites the Commission's GREENFIELD SCHOOL DISTRICT decision 1/ for the premise that:

1/ DEC. NO. 14026-A (Greco, 10/76), aff'd (WERC, 11/77).

> the contractual right to arbitrate should not be extended past a contract's termination date, unless the parties mutually agree to do so. To hold otherwise would turn a voluntary process into an involuntary one and it would be a direct repudiation of the well established concept that arbitration is a completely voluntary process and that it rests upon a contractual basis.

Second, the County argues that nothing in the contract entitles the grievant to a reclassification. In its view, the grievant does not have a vested, accrued right to a reclassification under the expired collective bargaining agreement. Based on the foregoing, the County requests that the grievance be found not arbitrable.

DISCUSSION

At the hearing, the County asserted that there was an agreement by the parties to hold this grievance in abeyance until the contract negotiations for a 1998-99 collective bargaining agreement were finished, and that the Union reneged on that agreement. The Union disputed these assertions. Since it was the County who asserted the existence of such an agreement, it had the burden of showing its existence. I find it did not do so. Additionally, it is noted that after raising this contention at the hearing, the County did not even address it in their brief. That being the case, it is held that no agreement is documented in the record which precludes the arbitration of this grievance.

Having so found, attention is turned to the question of whether the grievance is arbitrable. Based on the rationale which follows, I find that it is. It is noted at the outset that the action which led to the grievance (i.e. Rooney requested a reclassification which was denied), as well as the processing of the grievance through the grievance procedure, occurred in 1997. Thus, all the foregoing events occurred during the term of the parties' 1996-97 collective bargaining agreement. In fact, even the arbitration hearing was originally scheduled to be held in 1997 (specifically, October, 1997), but that hearing date was cancelled at the parties' mutual request. The hearing date was later rescheduled to February, 1998. The arbitration hearing date is the only event in this case which occurred in 1998. Every other date relative to the grievance and its processing occurred prior to December 31, 1997 (i.e. the date when the parties' 1996-97 agreement expired). Since the Rooney grievance arose and was processed during the term of the parties' 1996-97 agreement, I believe it (i.e. the Rooney grievance) can fairly be characterized as a pre-expiration grievance.

The Wisconsin public sector case law concerning an employer's obligation to arbitrate pre-expiration grievances after a contract expires is quite clear. It was stated as follows in RACINE SCHOOL DISTRICT, DEC. NO. 24272-B (WERC, 3/88) at page 7:

> [A]n agreement to arbitrate is not extinguished – as regards a grievance concerning pre-expiration events – by the fact that the agreement expired before the grievance was initiated and/or fully processed through the grievance and arbitration procedures. In other words, the fact that a grievance arising prior to expiration has not been initiated or fully processed through contractual grievance and arbitration procedures by the time of expiration does not, alone, extinguish the contractual duty to complete those processes as to such grievances. See, e.g., ALMA CENTER SCHOOLS, DEC. NO. 11628 (WERC, 7/73) ("The fact that the 1971-72 agreement has expired does not excuse Respondents from arbitrating a dispute which arose during the term of said agreement." Id. at 8); and ABBOTSFORD SCHOOLS, DEC. NO. 11202-A (3/73) ("The fact that the agreement has now expired does not excuse the Respondents from their duty to remedy any breaches of the agreement arising during the term of the agreement." Id. at 8.), aff'd by operation of law, DEC. NO. 11202-B (WERC, 5/73).

The County urges the Arbitrator to rely instead on the Commission's GREENFIELD decision. 2/ In that case, it was held that the Employer was not required to arbitrate a grievance after a contract's termination. That case dealt with a grievance which arose after the parties' collective bargaining agreement expired. In other words, it involved a post-expiration grievance – not a pre-expiration grievance as did the cases noted in the preceding paragraph. The following sentence from GREENFIELD shows this:

2/ Supra, footnote 1/.

> Accordingly, based upon the above noted considerations, the District here was not required to arbitrate a grievance which was filed and which arose over a fact that occurred after the contract's termination. 21/
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> Footnote 21/ provides as follows:
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> 21/ This ruling, which is limited to the facts herein, does not conflict with the well established principle that an employer must arbitrate a grievance which arises before a contract's termination, irrespective of whether the contract terminates by the time that the grievance is ripe for arbitration. See, for example, ABBOTSFORD PUBLIC SCHOOLS JT. SCHOOL DISTRICT NO. 1, DECISION NO. 11202-A (3/73).

The case law quoted above establishes that an Employer's obligation to arbitrate grievances after a contract expires depends on whether the grievance is a pre-expiration or a post-expiration grievance. If it is the former (i.e. pre-expiration) the grievance is arbitrable, while if it is the latter (i.e. post-expiration) the grievance is not arbitrable. It has previously been found that the Rooney grievance is a pre-expiration grievance, so it follows that it is arbitrable even though the parties' 1996-97 agreement has expired.

Having reached the conclusion that the Rooney grievance is arbitrable, it is unnecessary to address the Union's argument that the County did not raise the arbitrability issue until the hearing. Accordingly, no comment is made concerning same. No comment is also made on the Employer's contention that nothing in the contract entitles Rooney to a reclassification. That argument deals with the merits and will be addressed in a subsequent decision.

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

AWARD

The Rooney reclassification grievance is arbitrable.

Dated at the City of Madison, Wisconsin this 5th day of June, 1998.

Raleigh Jones, Arbitrator

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