

BEFORE THE ARBITRATOR

---

In the Matter of the Arbitration of a Dispute Between

**MILWAUKEE DEPUTY SHERIFFS' ASSOCIATION**

and

**MILWAUKEE COUNTY (SHERIFF'S DEPARTMENT)**

Case 446  
No. 55978  
MA-10137

---

Appearances:

Gimbel, Reilly, Guerin & Brown, by **Attorney Franklyn M. Gimbel**, 2400 Milwaukee Center, 111 East Kilbourn Avenue, Milwaukee, Wisconsin 53202, appearing on behalf of the Association.

**Mr. Timothy R. Schoewe**, Deputy Corporation Counsel, Milwaukee County, Milwaukee County Courthouse, Room 303, 901 North Ninth Street, Milwaukee, Wisconsin 53233, appearing on behalf of the County.

**ARBITRATION AWARD**

Pursuant to a request by Milwaukee Deputy Sheriffs' Association, herein "Association," and the subsequent concurrence by Milwaukee County, herein "County," the undersigned was appointed arbitrator by the Wisconsin Employment Relations Commission on February 24, 1998, pursuant to the procedure contained in the grievance-arbitration provisions of the parties' collective bargaining agreement, to hear and decide a dispute as specified below. A hearing was conducted by the undersigned on March 13, 1998, at Milwaukee, Wisconsin. The hearing was not transcribed. The parties completed their briefing schedule on May 5, 1998.

After considering the entire record, I issue the following decision and Award.

**ISSUES**

The County initially raises a procedural objection that the instant grievance was not filed in a timely manner.

The second issue is substantive:



Did the County violate the Memorandum of Agreement when it did not pay the Grievant the \$500.00 opt out award in 1996 and 1997? If so, what is the appropriate remedy?

### **FACTUAL BACKGROUND**

Gil Pagan, hereinafter the Grievant, is a Detective in the Drug Enforcement Unit of the Milwaukee County Sheriff's Department. The Grievant filed a written application for the \$500 opt out payments for waiving medical coverage for both 1994 and 1995. To do this he had to complete an application form and show proof of other insurance coverage. In his application dated December 12, 1994, there was a provision advising applicants that an application must be filed each year.

The Grievant subsequently received opt out payments in 1994 and 1995.

Sometime in 1996, the Grievant called the benefits office and spoke with an unidentified woman who told him that the opt out checks "were in the mail." Nancy Gall, the employe who handles these matters, has no recollection of a call. No record exists of an inquiry from the Grievant on this matter in 1996. The Grievant "took it for granted that he received the check" and took no further action on the matter.

The Grievant did not make an application for the opt out payments in either 1996 or 1997, nor did he receive same. For both years the Grievant received the open enrollment materials for health insurance which included letters informing employes of the application requirement for the \$500 opt out payment

On September 15, 1997, Pagan, with Union Representative Jerry Rieder, initiated a grievance complaining that the Grievant did not receive the opt out payment in either of the above years.

In her November 15, 1997 decision following a second step grievance hearing, Milwaukee County Human Resources Manager Minnie Linyear stated:

The Contract is silent on the specific steps to follow. However, each year Milwaukee County Department of Human Resources mails a benefit booklet to the home of County employees in the fall. The benefits booklet contains a section titled "Plan Selections You Can Make." This section lists the opt-out of medical coverage for the applicable calendar year and also states an application is required each year.

Linyear added:

The grievant's Union Representative was told to remind the grievant to contact the Department of Human Resources when he received his 1998 benefits booklet if he wished to sign a waiver for medical coverage for 1998.

Linyear concluded by noting:

The grievant did not receive the \$500.00 waiver in 1996 or 1997 but it appears the County did give adequate notice and other employees did submit applications. This misunderstanding or oversight on the part of the grievant is unfortunate but the required procedure was not followed. The grievant is not eligible to receive the award for 1996 or 1997.

Pagan's third step grievance hearing was conducted by Assistant Director Thomas M. Taylor on December 3, 1997. In his December 23, 1997 decision, Taylor quoted Section 3.11(16) of the Agreement, emphasizing language in the third paragraph of that section requiring annual payment of the \$500 by April 1 of any given year to qualified employees "who comply with the guidelines established by the County." Taylor concluded that the Grievant did not comply with the County's guidelines "in order for an employee to become eligible for the \$500 award," and denied the grievance.

In November, 1997, the Grievant applied for the opt out payment and submitted evidence of his wife's insurance coverage and subsequently received the \$500 payment for 1998.

### **PERTINENT CONTRACTUAL PROVISIONS**

#### **1994-1996**

(16) Milwaukee County shall pay \$500 to any Milwaukee County employe eligible for health insurance who chooses to dis-enroll or not to enroll in his/her coverage. Any employe who is hired after January 1, 1994 and who would be eligible to enroll in health insurance under the present County guidelines who chooses to not enroll in a Milwaukee County health plan shall also receive \$500. Proof of coverage in a health insurance plan must be provided in order to qualify for the \$500 award. Such proof shall consist of a current health enrollment card.

The \$500 shall be paid on an after-tax basis. When administratively possible, the County may convert the \$500 award to a pre-tax credit which the employe may use as credit towards any employe benefit available within a flexible benefits plan.

The \$500 award shall be paid on an annual basis by payroll check no later than April 1<sup>st</sup> of any given year to employees of record as of January 1<sup>st</sup>.

Should an employe lose health insurance coverage, then the employe may elect to re-join the Milwaukee County Conventional Health Plan. The employe would not be able to re-join an HMO until the next open enrollment period. The \$500 award must be repaid in full to the County prior to coverage commencing. Should an employe re-join a health plan, he/she would not be eligible to opt out of the plan in a subsequent calendar year.

### **1997 Comparison Copy**

...

(16) Each year Milwaukee County shall pay \$500 to any ~~Milwaukee County~~ employe eligible for health insurance who chooses to dis-enroll or not to enroll in his/her coverage. Any employe who is hired after January 1, 1994 and who would be eligible to enroll in health insurance under the present County guidelines who chooses to not enroll in a Milwaukee County health plan shall also receive \$500. Proof of coverage in a non-Milwaukee County group health insurance plan must be provided in order to qualify for the \$500 award. Such proof shall consist of a current health enrollment card.

The \$500 shall be paid on an after-tax basis. When administratively possible, the County may convert the \$500 award to a pre-tax credit which the employe may use as credit towards any employe benefit available within a flexible benefits plan.

The \$500 award shall be paid on an annual basis by payroll check no later than April 1<sup>st</sup> of any given year to qualified employees of record on the County payroll as of January 1<sup>st</sup> who comply with the guidelines established by the County. An individual must be on the County payroll to be eligible for the provisions of this section.

...

(9) No grievance shall be initiated after the expiration of ~~90~~ (60) calendar days from the date of the grievable event, or the date on which the employe becomes aware, or should have become aware, that a grievable event occurred, whichever is later. This clause shall not limit retroactive payment of economic benefits for which it has been determined the County is liable nor would it prohibit a prospective adjustment of an ongoing situation.

## **PARTIES' POSITIONS**

### **Association's Position**

The Association initially argues that the County waived its statute of limitations defense by failing to raise the matter prior to the arbitration hearing. The Association adds that it was reasonable for the Grievant to believe that he remained on the opt out list until he received information to the contrary based on the County's failure to enforce time lines against the Grievant in the past. The Association concludes that the County cannot lull the Grievant into a false sense of security based on its conduct and then be permitted to plead a defense based on the Grievant's failure to act.

Regarding the merits of the dispute, the Association argues that the unambiguous language of the 1994-96 agreement mandates the opt out award, and such payment is not limited or conditioned upon a deputy's submission of any application or form to the County. The Association maintains that the new language contained in the 1997 agreement providing annual payment of the \$500 award by April 1 of any given year to qualified employees "who comply with the guidelines established by the County" had no force and effect herein because it was not ratified until June, 1997, "two months after the second payment was due." The Association concludes that the only contractual requirement to opt out is proof of other insurance and the County had same on file for the Grievant.

Finally, the Association argues that because the Grievant's "other coverage saved the County \$11,000 in the last two years" the County should pay the Grievant the opt out payments in dispute.

Based on the record evidence and arguments, the Association requests that the Arbitrator require the County to fulfill its contractual obligations to the Grievant and pay him the opt out payments in question.

### **County's Position**

The County first argues that Pagan's grievance is not arbitrable because it was filed outside the timelines mutually agreed to by the parties in their collective bargaining agreement.

The County next argues that the Grievant is not entitled to the \$500 per year award because he did not complete an opt out application form supplied by the County, and show proof of other insurance coverage. The County maintains that the 1997 contract and other communications from the County made it clear that any employee who desired the opt out payment had to take certain steps. The County points out that the Grievant did nothing to comply with these requirements and offered no "reasoned explanation" for his failure to act.

Based on all of the foregoing, the County requests that the grievance be denied and the matter be dismissed.

## DISCUSSION

### Timeliness Issue

A threshold issue in this case is whether the grievance is procedurally defective. In this regard, the County argues that the grievance is untimely filed while the Association takes the position that the County has waived this argument.

The record is undisputed that the grievance is not timely filed. The Grievant makes no persuasive claim of hardship, excuse, negligence or mitigating circumstances for his failure to file a grievance on a timely basis. The Association, however, argues that the County waived its timeliness objection by failing to raise the matter prior to the arbitration hearing.

It is true, as pointed out by the County, that the clear and unambiguous language of the collective bargaining agreement provides a specific timeline for filing grievances (60 calendar days from the date of the grievable event, or the date on which the employe becomes aware, or should have become aware, that a grievable event occurred, whichever is later). It is also true that affirmative defenses may be waived by failing to plead same. *ANDERSON V. CITY OF MILWAUKEE*, 208 Wis.2d 18, 21, 559 N.W.2d 563 (1997); *COUNTY OF MILWAUKEE V. LABOR AND INDUSTRY REVIEW COMMISSION*, 113 Wis.2d 199, 206, 335 N.W.2d 412, 416 (CTAPP 1983). However, while a number of arbitrators find that arbitration is not the place to raise a timeliness issue for the first time, Elkouri and Elkouri, *How Arbitration Works*, Fifth Edition, pages 224, 234, 278 (1997), a majority of arbitrators will enforce clear time limits for filing and prosecuting grievances; and failure to observe them will result in dismissal of the grievance if the failure is protested. Elkouri and Elkouri, *supra*, pages 276-277. In the instant case, the parties changed the timelines for filing a grievance in the 1997 agreement from ninety (90) to sixty (60) calendar days. Since the parties were agreeing to a shorter time line for filing grievances, this action should have placed the Association on notice that the County was interested in the timely filing of grievances, and the enforcement of time lines. Based on same, and all of the foregoing, as well as the lack of any evidence that the County failed to enforce the grievance time lines in the past, or that the County agreed to extend said time limits, or that the County expressly waived same herein, or that the agreement provided some leeway in the enforcement of grievance time lines, the Arbitrator finds that the instant grievance is not timely filed, and that said grievance is not procedurally arbitrable. Because the grievance is not arbitrable, the Arbitrator is precluded from exercising his jurisdiction to decide the merits of the grievance challenging the County's refusal to pay the Grievant the \$500.00 opt out award in 1996 and 1997.

In reaching the above conclusion, the Arbitrator has addressed the major arguments of the Association relating to the arbitrability issue. All other arguments, although not specifically discussed above, have been considered in reaching the Arbitrator's decision.

In light of all of the foregoing, it is my

**AWARD**

That the grievance first presented to the County on September 15, 1997, protesting the County's failure to pay the Grievant the \$500.00 opt out payment in 1996 and 1997 is hereby denied and the matter is dismissed.

Dated at Madison, Wisconsin, this 17<sup>th</sup> day of June, 1998.

Dennis P. McGilligan /s/

---

Dennis P. McGilligan, Arbitrator