BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

GREEN BAY POLICE BARGAINING UNIT

and

CITY OF GREEN BAY

Case 287
No. 57288
MA-10578

Appearances:

Mr. Thomas J. Parins, Parins Law Firm, 125 South Jefferson Street, Suite 201, P.O. Box 1626, Green Bay, Wisconsin 54305, appearing on behalf of the Bargaining Unit/Union.

Mr. Daniel M. Olson, Assistant City Attorney, City of Green Bay, 100 North Jefferson Street, Room 200, Green Bay, Wisconsin 54301-5026, appearing on behalf of the City of Green Bay.

ARBITRATION AWARD

The above-captioned parties, hereinafter referred to as the Union and the City respectively, were parties 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 decide a grievance. A hearing, which was transcribed, was held on May 27, 1999, in Green Bay, Wisconsin. Afterwards the parties filed briefs and reply briefs, whereupon the record was closed on September 28, 1999. Based on the entire record, the undersigned issues the following Award.

ISSUES

The parties were unable to stipulate to the issues to be decided in this case. The Union framed the issues as follows:

1. Was the grievance timely filed and advanced pursuant to the grievance procedure set forth in the current contract?

2. Were the assignments which are the subject of this grievance proper under the conditions as set forth in Section 5.04 of the current contract?

The City framed the issues as follows:

1. Whether the Union's two-year delay in advancing this grievance to the Personnel Committee is unreasonable and should be deemed a waiver of the grievance?

2. Whether wiretap duties have historically or normally been assigned to or performed by some segment of the Union?

Having reviewed the record and arguments in this case, the undersigned finds the following issues appropriate for purposes of deciding this dispute:

1. Was the two-year delay in advancing the grievance to Step Three of the grievance procedure reasonable under the circumstances?

2. If so, did the confidential work assignment in question violate the CBA?

3. If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 1996-1998 collective bargaining agreement contained the following pertinent provisions:

ARTICLE 1

RECOGNITION/MANAGEMENT RIGHTS

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1.03 MANAGEMENT RIGHTS. The Union recognizes the prerogative of the City, subject to its duties to collectively bargain, to operate and manage its affairs in all respects in accordance with its responsibilities, and the power and authority which the City has not abridged, deleted or modified by this Agreement, are retained by the City, including the power of establishing policy

to hire all employees, to determine qualifications and conditions of continued employment, to dismiss, demote, and discipline for just cause, to determine reasonable schedules of work, to establish the methods and processes by which such work is performed. The City further has the right to establish reasonable work rules, to delete positions from the Table of Organization due to lack of work, lack of funds, or any other legitimate reasons, to determine the kinds and amounts of services to be performed such as pertains to City government and the number and kinds of classifications to perform such services, to change existing methods or facilities, and to determine the methods, means and personnel by which City operations are to be conducted. The City agrees that it may not exercise the above rights, prerogatives, powers or authority in any manner which alters, changes or modifies any aspect of the wages, hours or conditions of employment of the Bargaining Unit, or the terms of this agreement, as administered without first collectively bargaining the same or the effects thereof.

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ARTICLE 3

GRIEVANCE PROCEDURES AND DISCIPLINARY PROCEEDINGS

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3.04 COMPUTATION OF TIME. The days indicated at each step should be considered a maximum. Days shall mean working days Monday through Friday, excluding holidays. The failure of the party to file or appeal the grievance in a timely fashion as provided herein shall be deemed a waiver of the grievance. The party who fails to reply in a timely fashion shall have the right to automatically proceed to the next step of the grievance procedure. The time limits may be extended by mutual consent.

3.05 WAIVER OF STEPS. Steps in the procedure may be waived by mutual agreement of the parties.

3.06 STEPS AND PROCEDURE.

(1) STEP ONE. The grievant or a Union representative on his/her behalf shall have the right to present the grievance in writing to the Chief within fifteen (15) working days after he/she or the Union knew or should have known

of the event giving rise to such grievance. The Chief shall furnish the grievant and the Union representative an answer within five (5) working days after receiving the grievance.

(2) STEP TWO. If the grievance is not satisfactorily resolved at the first step, the grievant or the Union representative shall prepare a written grievance and present it to the Personnel Director within ten (10) working days of the Chief's response. The Personnel Director shall review the grievance and respond in writing within five (5) calendar days of his receipt of the written grievance.

(3) STEP THREE. If the grievance is not resolved at the second step, the grievant or the Union representative shall present the written grievance to the Personnel Committee within five (5) working days of the Personnel Director's response. The Personnel Committee shall review the grievance and respond in writing within five (5) days after their decision which shall be made at the next regularly scheduled Personnel Committee meeting. In reaching their decision, the Personnel Committee may hold a fact-finding hearing after having received a written statement of fact and position by each party. The grievant and the Union shall be given a five (5) day notice of said hearing.

(4) STEP FOUR. If no agreement is reached in step 3, the dispute may be referred to arbitration. The party desiring arbitration shall, within fifteen (15) days of receiving the Personnel Committee decision, petition the Wisconsin Employment Relations Commission for arbitration with a copy of such petition sent to the other party.

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ARTICLE 5

SHIFT ASSIGNMENTS

5.01 ASSIGNMENTS IN GENERAL. Assignments to shift positions shall be by seniority among those persons possessing the qualifications for the position to be filled. Assignments shall be made and persons with appropriate qualifications and seniority may bid for shift positions only when a vacancy exists in such position. In the case of Detective Sergeants, seniority shall mean seniority in rank.

. . .

> 5.04 TEMPORARY ASSIGNMENTS. The Chief may, upon written notice to the Bargaining Unit, temporarily assign officers to special duties or projects for a period of up to 30 days; provided however that no officer may be temporarily assigned to any duties or projects which have historically been or normally are performed by or assigned to Bargaining Unit members as part of their job duties. If the assignment is voluntary, no premium pay shall be earned by the officer. An officer's performance of any temporary assignment shall not impact on promotion (excepting that such might increase the officer's personal knowledge or experience), and shall not become part of the officer's personnel file or work record for promotional purposes.

FACTS

Among its many governmental functions, the City operates a police department. The Union is the collective bargaining representative for the City's non-supervisory police officers. The Union and the City have been parties to a series of collective bargaining agreements (hereinafter CBA). The parties' most recent CBA contained, among its provisions, a grievance procedure culminating in arbitration and a provision dealing with temporary assignments.

This case involves a temporary work assignment for a confidential investigation which was conducted in October, 1996.

In early October, 1996, the Department was working with the Drug Enforcement Administration (DEA) on a drug investigation. What made this particular investigation very unique for the Department is that it involved a wiretap. Wiretaps are rarely performed by members of the Green Bay Police Department. According to the record evidence, the Department has conducted three wiretaps in the last 28 years. This figure includes the wiretap involved here.

The DEA asked the Department to supply personnel to help conduct this wiretap on the suspects, and the Department agreed to provide five employes. The Department's Police Chief, James Lewis, selected Detectives Massey and Molliter and Officers Trimberger, Thomas and Kraus for this assignment. Four of these five employes are not the most senior employes in the Department. The employes selected for this assignment were not selected because of their seniority. Lewis testified he selected these five employes for this particular assignment because they had a working knowledge of the people being investigated.

On October 9, 1996, the Department's Commander of Operations, Captain Boncher, notified the Department's Shift Commanders via a written memo that officers Arts, Thomas, Trimberger and Kraus were having their shifts changed due to a "temporary 30-day assignment."

The above-referenced memo was also addressed to the Union. Rick Demro, who was the Association's President at the time, testified that while he was orally apprised of the confidential investigation and the temporary assignments, he did not receive a copy of the October 9, 1996 memo. Attorney Tom Parins testified that this memo did not arrive at the Parins Law Firm and that neither he nor his father, Attorney Tom Parins, Sr., received a copy of same.

On October 14, 1996, Attorney Tom Parins, Sr., wrote a letter to Police Chief Lewis wherein he grieved the above-referenced temporary assignments on behalf of the Union. The grievance contended that the temporary assignments should have been posted pursuant to Sec. 5.10 of the CBA.

On October 16, 1996, Lewis responded in writing to the grievance. He essentially denied it. In doing so, he raised two defenses: one was that the union president had been apprised of the assignments in question and the other was that the assignments were proper under Section 5.04 of the CBA.

On October 23, 1996, Parins appealed the grievance to the City's Personnel Director, Alex Little. Little did not respond to this grievance in writing within five calendar days as specified in Step Two of the contractual grievance procedure.

That same day (October 23, 1996), then-Assistant City Attorney Judith Schmidt-Lehman sent a letter to Attorney Tom Parins, Sr., wherein she indicated that several recent grievances had been presented "outside the time constraints found in Sec. 3.06(1)" of the CBA. She then went on to notify him "and the Union that, absent unusual circumstances, the City intends to strictly rely upon the time constraints found in Section 3.06 of that Agreement," and that said time constraints "will not be ignored by the City in the future."

On October 31, 1996, the parties met to discuss several outstanding grievances. The instant grievance was one of the grievances that was discussed. It is undisputed that in that meeting, the parties mutually agreed to hold the instant grievance in abeyance for a period of time because of the sensitive nature of the investigation. It is disputed though how long the grievance was to be held in abeyance. According to the City, it was to be held in abeyance until the temporary assignment ended. According to the Union, the grievance was to be held in abeyance until the confidential investigation ended.

Pursuant to a provision in the CBA (specifically Sec. 5.04), the longest that a temporary assignment can last is 30 days. The temporary assignment involved herein lasted 30 days. Chief Lewis testified that the confidential investigation involved herein lasted "just short of 30 days." Thus, both the temporary assignment and the confidential investigation ended by early to mid-November, 1996.

Shortly after this grievance was filed, Little resigned as personnel director. After he left, the City's personnel function was shared for about six months between Green Bay Mayor Paul Jadin and Brown County Personnel Director James Kalny. The City's personnel functions were then consolidated with the County. While this consolidation occurred, Kathy Koehler was the City's interim personnel director. Insofar as the record shows, Koehler did not request of the Union that the instant grievance be delayed, or continue to be held in abeyance. Koehler never responded in writing to the instant grievance. After the consolidation of the City/County personnel functions was completed, Kalny became head of the department. The consolidation of the two departments was effective January 1, 1998.

In November, 1997, the Union raised the instant grievance with Kalny. This was the first time he (Kalny) had heard of it. When the Union raised it, Kalny did not request an extension of time from the Union to research it, to "get up to speed with this grievance", or to give a response to same. Instead, he verbally advised the Union that he considered the grievance "stale", and would not discuss it. Kalny considered the grievance "stale" because nothing had happened on it in a year. Kalny never responded in writing to the grievance.

In mid-1998, the Union advised the City that it wanted to discuss a large number of grievances. The City considered some of these grievances to be inactive, while the Union considered them to be active. The instant grievance was one of the grievances which the City considered inactive. The parties subsequently met and discussed some of these grievances. The instant grievance was discussed, but was not resolved.

In July, 1998, the parties agreed to mediate about two dozen grievances. As part of their mediation agreement, they prepared a document which listed the grievances to be mediated. The instant grievance was one of the grievances on this list. In agreeing to mediate these grievances, the City specifically noted that it was reserving its procedural and substantive defenses for all of the grievances on the list.

A grievance mediation session was held in November, 1998. The instant grievance was discussed at that session, but was not resolved.

On December 1, 1998, the Union advanced the instant grievance to the City's Personnel Committee, which is the third step of the contractual grievance procedure. The Personnel Committee denied the grievance on January 25, 1999.

The Union then appealed the instant grievance to arbitration.

POSITIONS OF THE PARTIES

Union

The Union initially addresses the City's argument that the Union has waived its right to to a decision on the merits. For background purposes, it notes that the City's waiver argument is based on the premise that the Union's delay in processing the grievance from the second step to the third step of the grievance procedure should bar a review of the merits. The Union obviously disagrees. In its view, the delay was understandable given the following circumstances.

First, the Union cites the fact that on October 31, 1996, the parties agreed to hold the grievance in abeyance. According to the Union, the parties agreed to hold it in abeyance until the duties of the investigative assignment could be discussed. The Union submits this meant the end of the investigation. Although the Union does not identify a time period when it believes the investigation was completed, it claims that the investigation took longer than the assignment did.

Second, the Union avers that once the confidential investigation was completed, the grievance was reactivated to active status. To support this premise, it cites the fact that it had several meetings with the City "regarding the settlement of this and other grievances." It calls particular attention to the fact that when the parties went to grievance mediation in November, 1998, the instant grievance was one of the grievances which was discussed at that mediation.

Third, the Union calls attention to the fact that in the years that this grievance was pending (1996-98), there were three different personnel directors in the City: Little, Koehler and Kalny. According to the Union, the Personnel Department was in "turmoil" during this period (particularly 1997) and each time a new personnel director came on board, the City requested that the Union allow them "to get up to speed" on this grievance. The Union implies that the delay in the processing of this grievance was attributable to this "turmoil".

The Union believes that the foregoing points prove that it made a good faith effort to move this grievance forward with what it characterizes as "all due speed". According to the Union, it "did not sit back and deliberately allow this grievance to go stale." Instead, as the Union sees it, it diligently pursued the grievance. The Union therefore argues that the delay involved here was reasonable under the circumstances, and should not bar a review of the merits.

With regard to the merits, the Union asks "the Arbitrator to find that the officers were improperly assigned to a temporary thirty (30) day assignment in contravention to the provisions of the contract, specifically Section 5.04". The Union therefore argues that Sec. 5.04 does not apply to the assignment at issue, and the City's assertion to the contrary should fail.

This contention is premised on the Union's reading of Sec. 5.04. The Union begins its argument about that section by giving an overview of same. It notes that Sec. 5.04 allows the Chief to temporarily reassign officers to special duties or projects for up to thirty (30) days. It further notes that this section sets forth specific procedures which need to be followed prior to making such an assignment, and also limits the types of duties or projects that can be the subject of such a reassignment. According to the Union, the City failed to follow the required procedures to initiate a temporary assignment. The Union also contends that the City should have been prohibited from making the temporary assignment in this matter because the temporary assignments that were made do not fit those allowed in the section. It elaborates on these arguments as follows.

First, the Union contends that the written notice requirement of Sec. 5.04 was not followed here. It acknowledges in this regard that Demro was verbally apprised by Captain Boncher that a temporary assignment was going to be made. The Union submits that the notice referenced in Sec. 5.04 cannot be verbal though – it must be in writing. The Union implies that the October 9, 1996 memo concerning the temporary assignment would qualify as written notice for purposes of Sec. 5.04 if it had received same. However, the Union contends it never received that memo. To support this premise, the Union cites the testimony of Demro and Parins that they never received a copy of that memo. The Union believes that on that basis alone, the City failed to comply with Sec. 5.04.

Next, even if it is found that the City did substantially comply with the notice provision set forth in Sec. 5.04, the Union argues that the assignment involved here was not a "special duty or project" within the meaning of Sec. 5.04. According to the Union, the duty in question was a surveillance, and surveillance duties have historically and normally been assigned to, and performed by, bargaining unit employes as part of their job duties. The Union maintains that the City tries to dress up this particular surveillance by calling it a "wiretap". In the Union's view, though, a wiretap is just another name for surveillance. The Union therefore argues that the job duties that were being done here were that of a surveillance, and no evidence was presented by the City that this particular surveillance required any special job duties or qualifications to perform. The Union claims that if the City is allowed to use Section 5.04 for projects which they create different names for, but the duties are the same as duties historically performed by members of the bargaining unit, then this will make other provisions in Article 5 useless. The Union asserts that could not have been the

parties intent in drafting Sec. 5.04. The Union therefore seeks a finding that Sec. 5.04 does not apply to the assignment involved herein.

In order to remedy this contractual breach, the Union asks that the Arbitrator direct the City to pay four unspecified officers (presumably the four senior employes in the Department) 170 hours of overtime each. Under this theory, the Union seeks $5,440 for each of the four unspecified employes. This claim for overtime is based on the Union's assertion that had the Chief not assigned this particular assignment to the employes he selected, the work done on this investigation would have been done as overtime and been paid as such to the senior employes. If the Arbitrator does not believe that overtime is warranted under this theory, the Union seeks overtime pay on an alternate basis. The alternate basis is this: the Union avers that all five of the employes who worked on the confidential investigation worked outside their normally scheduled shifts. As the Union sees it, all five employes should therefore be paid at the overtime rate for all of the hours they worked outside their normally scheduled shift (which the Union once again calculates at 170 hours per employe). Under this theory, the Union seeks $5,440 for each of the five employes who worked on the confidential investigation.

City

The City initially contends that the Arbitrator should not address the merits of the grievance because the Union failed to process it to the third step of the contractual grievance procedure in a timely fashion. As the City sees it, this untimely appeal has caused the Union to waive its right to a decision on the merits.

The City's waiver argument is based on the length of time it took the Union to take this grievance from the second step to the third step of the grievance procedure (i.e. over two years). The City notes at the outset that the grievance procedure contains what it characterizes as a "default advancement right clause" (Sec. 3.04), which allows either side to advance a grievance to the next step without a written response from the other side. The City further notes that that clause does not impose a specific time limit on a party's exercise of its default advancement right. The City argues that although no specific time limit is contained therein, a reasonableness standard is implicit. As the City sees it, such a construction would not give an advantage to either party, and would support the underlying policies and purposes of arbitration. The City also maintains that waiting to advance a grievance can impair the resolution of the grievance due to memory lapses and changes in personnel.

Building on the premise that a reasonableness standard is implicit, the City believes that the question herein is whether the delay involved in this particular case was reasonable. The City answers that question in the negative. In its view, the two-year delay which occurred here between the second and third steps was unreasonable.

The City makes the following arguments to support its contention that the Union's delay was unreasonable. First, it avers that the "delay in this case has had a significant adverse effect on the resolution of this grievance." To support this premise, it cites what it calls the "equivocation by witnesses" at the hearing concerning pertinent facts. The City maintains that "it must be recognized that the two-and-one-half-years that has elapsed between the event giving rise to this grievance and the date witnesses were required to recall what happened has rendered all testimony less reliable and accordingly harmed the grievance decision process." Second, the City submits that it put the Union on notice, via Assistant City Attorney Schmidt-Lehman's letter of October 16, 1996, that the City intended to strictly adhere to the time requirements in the CBA. Third, the City believes that the parties' abeyance period ended when the temporary assignment ended in November, 1996. The City contends that what happened thereafter was that the Union simply unilaterally extended this abeyance period without the City's consent. Fourth, the City asserts that after the abeyance period ended in November, 1996, absolutely nothing happened on the grievance until November, 1997 (one year later), when the Union raised it with Kalny for the first time. The City notes that when the Union raised it, Kalny told the Union that he believed the grievance was stale. As the City sees it, Kalny's response put the Union on notice that it could not resolve the grievance informally. The City argues that given Kalny's response, the Union could have appealed the grievance to the Personnel Committee pursuant to the default advancement right clause in Sec. 3.04. It notes however that that did not happen until one year later. The City believes there are no compelling reasons for the Union's delay in advancing the grievance, so this delay cannot be justified. The City therefore asks that the grievance be deemed waived for failure to be advanced in a timely fashion and dismissed.

In the event that the Arbitrator finds that the grievance is not waived, and addresses the merits, the City argues that the Chief's assignment of the employes to the wiretap assignment in question did not violate the CBA. It relies on two contract provisions to support this contention: the management rights clause (Sec. 1.03) and the temporary assignments clause (Sec. 5.04). It cites the former clause for the proposition that it has the right to assign duties and make work assignments in general, and the latter clause for the proposition that it had the right to make the temporary assignment at issue here.

The City elaborates on this latter point as follows. With regard to the notice requirement contained in Sec. 5.04, the City avers that there is "sufficient direct and circumstantial record evidence to find that the City gave written notice of the temporary assignment at issue" in accordance with Sec. 5.04. Aside from that, the City contends that even if it did not provide the required written notice, the Union did not suffer any harm as a result. To support this premise, it notes that the Union was able to submit a timely grievance to Chief Lewis.

The City argues that the real issue regarding Sec. 5.04 in this arbitration is whether wiretap duties were historically or normally performed by, or assigned to, bargaining unit employes as part of their job duties. The City answers that question in the negative. To support this premise, the City notes that the Department has only been involved in three wiretaps during the last 28 years. As the City sees it, the fact that there are so few wiretaps establishes, notwithstanding the Union's contention to the contrary, that wiretaps are different from normal surveillance. The City contends that the record evidence establishes that wiretaps have not historically or normally been performed by bargaining unit employes as part of their job duties. The City therefore argues that Sec. 5.04 gave the Chief the right to make the temporary assignment which is the subject of the instant grievance.

In the event that the Arbitrator addresses the merits of the grievance and finds that the wiretap assignment in question violated Sec. 5.04, the City argues that the Union's requested remedy is inappropriate. For background purposes, it notes that the Union seeks 170 hours of overtime (i.e., $5,440) for each of the employes who were assigned outside of seniority to the confidential investigation. The City contends there is no record evidence to support either the Union's claim for overtime pay in general, or the number of hours claimed. The City asserts that the only record evidence concerning whether the wiretap assignments would have been as overtime, as the Union assumes, is Chief Lewis' testimony. The City calls attention to the fact that he testified that in the absence of a Sec. 5.04 assignment, he would have made the wiretap assignments in accordance with the regular schedules of the detectives and there would not have been any overtime. The City further notes that he testified that no overtime was necessary for the investigation, and if it was, no department personnel would have been involved because the department would not have done the wiretap. The City maintains that in light of Chief Lewis' testimony, it simply cannot be assumed that the wiretap assignments would have been conducted on overtime. The City also believes there is no record evidence to support the Union's alternate remedy theory that the assigned officers were "ordered" by Chief Lewis to work outside their normally scheduled shifts, suggesting that the assignments were involuntary. The City notes in this regard that the Chief may utilize Sec. 5.04 only for special projects and duties. In the City's opinion, it would be inconsistent with this purpose and poor management for the Chief to force an unwilling officer to perform such projects or duties. The City therefore asserts that it cannot be assumed that the exercise of Sec. 5.04 authority by the Chief is inherently involuntary, or in fact was an involuntary assignment in this case as suggested by the Union. According to the City, the Union must prove the assignment was involuntary to establish their claim for an overtime pay remedy for hours worked outside of normally scheduled shifts, and it has not done so. The City therefore requests that the grievance and the requested remedy be denied.

DISCUSSION

Since the City has raised a procedural objection to the arbitrability of the instant grievance, that claim will be addressed prior to a consideration of the merits of the grievance. The City's procedural objection is this: the City asserts that the Union has waived its right to a decision on the merits because of the delay which occurred in the processing of this grievance. The procedural arbitrability claim is the threshold issue herein.

My discussion on this point begins with an overview of the part of the contractual grievance procedure which is pertinent here. Like most grievance procedures, the grievance procedure involved herein contains guidelines for filing grievances and processing them through the lower steps up to arbitration. Timelines are typically included in grievance procedures to assure expeditious handling of grievances. In this CBA, the timelines are found in Sec. 3.06 and are as follows. Step One covers the filing of the grievance and the Chief's response. It specifies that either the grievant or the Union has 15 working days to file a grievance to which the Chief is to file an answer within five days thereafter. Step Two covers the appeal to the City's Personnel Director. It specifies that if the grievance is not resolved at Step One, the grievance is to be appealed to the Personnel Director within ten working days of the Chief's response, to which the Personnel Director is to file a written response within five days thereafter. Step Three covers the appeal to the City's Personnel Committee. It specifies that if the grievance is not resolved at Step Two, the grievance is to be appealed to the Personnel Committee within five working days of the Personnel Director's response, to which the Personnel Committee is to file a written response within five days after their next scheduled meeting. Sections 3.04 and 3.05 provide that the timelines and steps contained in Section 3.06 may be extended and/or waived by mutual agreement. Section 3.04 also provides that a failure to appeal a grievance in a timely fashion results in the waiver of that grievance. Another part of Section 3.04 provides that if a party fails to reply in a timely fashion, the other side can automatically proceed to the next step. This sentence, which the City characterizes as a "default advancement right clause", allows either side to advance a grievance to the next step without a written response from the other side. Sometimes, clauses of this type cut against one side or the other. For example, some "failure to appeal" clauses state that the union's failure to appeal results in the forfeiture of the grievance. Conversely, some "failure to reply" clauses state that the employer's failure to reply results in the granting of the grievance. The language here, though, does not cut against either the Union or the City. Instead, it is neutral, and simply provides that when one side fails to respond, the other side can automatically advance the grievance to the next step of the grievance procedure. While the grievance steps already reviewed in Section 3.06 contain express timelines, Section 3.04 does not contain any timelines whatsoever concerning this automatic advancement to the next step. Thus, Section 3.04 does not impose a specific time limit on a party's exercise of its default advancement right. When CBAs do not impose an express time limitation, arbitrators routinely apply a reasonableness standard. In doing so, they sometimes note that the accumulation of grievances that are filed

but become inactive can disrupt labor-management relations. Additionally, they sometimes note that there can be practical difficulties with preparing and presenting cases after witnesses have drifted away, evidence has dried up, and recollections have grown dim. In accordance with this generally accepted view, the undersigned will likewise apply a reasonableness standard to the advancement right clause. Application of a reasonableness standard to Section 3.04 does not give an advantage to either side. Moreover, it supports the underlying purpose of a grievance procedure which is to process and resolve grievances expeditiously.

Having reviewed the contract language, the focus turns to a review of the following pertinent facts. The grievance was timely filed with the Chief on October 14, 1996, who timely answered it two days later. The Union then timely appealed it to Personnel Director Little on October 23, 1996. Little did not respond in writing within five days as specified in Step Two. None of Little's successors as Personnel Director ever responded in writing to the grievance either. The grievance officially stayed at Step Two for the next two years. On December 1, 1998, the Union advanced the grievance to Step Three by appealing to the Personnel Committee.

It is apparent from the foregoing facts that the "wheels came off" the grievance at Step Two. Two things happened at that step that are problematic: first, Little did not respond in writing to the grievance within five days of receiving it, and second, the grievance was not appealed from Step Two to Step Three for two years. Suffice it to say here that fault for the former is assessed to the City, and fault for the latter is assessed to the Union.

Both sides dropped the proverbial ball at Step Two in the following respect. Little failed to respond to the grievance in writing and the Union failed to appeal it. While both sides failed to do something they should have done in processing this grievance, this is not a situation where, in football parlance, the penalties will be offsetting. The following shows why.

When Little did not respond to the grievance as he should have, the Union was contractually authorized by Sec. 3.04 to sidestep him and advance the grievance to the Personnel Committee as of October 29, 1996. While the Union eventually did just that, the problem is the length of time it took the Union to do so. Specifically, it took the Union over two years to appeal to the Personnel Committee.

Recognizing that two years is an inordinately long period of time, the Union offers a number of reasons which it believes should excuse the delay. In the Union's view, these reasons establish that the delay which occurred here between Steps Two and Three was reasonable under the circumstances. I disagree. Based on the rationale which follows, I conclude that the two-year delay which occurred here was unreasonable under the circumstances.

The Union's first reason is that the grievance was held in abeyance for a period of time after it was filed. It is common in labor relations, indeed routine, for grievances to be held in abeyance after they are filed. Here, the parties agreed to hold the grievance in abeyance for a period of time. This agreement certainly explains part of the delay which occurred here. However, the parties did not agree, as is sometimes the case, to hold the grievance in abeyance indefinitely. Instead, they specifically put a cap on when the abeyance period expired. The parties dispute though when the cap expired: the City believes it was when the temporary assignment ended, while the Union believes it was when the confidential investigation ended. For purposes of this discussion, it does not matter which one it was. The reason is this: both the temporary assignment and the confidential investigation lasted just 30 days. Since both the temporary assignment and the confidential investigation ended by early to mid-November, 1996, the abeyance period for this grievance ended at that time (i.e. mid-November, 1996). It would be one thing if the Union had then sought and obtained an extension of the abeyance period from the City. However, that did not happen. In point of fact, after the abeyance period ended in November, 1996, the Union did not seek an extension of the abeyance period and the City did not implicitly or explicitly grant one. Since the City did not agree to continue to hold the grievance in abeyance past mid-November, 1996, it was up to the Union to move the grievance forward pursuant to Sec. 3.04 if it wanted the grievance to remain active. In the absence of an agreement with the City to continue to hold the grievance in abeyance, the Union was not authorized to extend the abeyance period unilaterally. What the Union essentially asks the undersigned to do here is sanction its unilateral and unauthorized two-year extension of the abeyance period. The undersigned declines to do so.

Second, the Union places blame for the delay in the processing of the grievance on the City's Personnel office. The Union asserts that each time a new personnel director came on board, the City requested that the Union allow them "to get up to speed" on this grievance. Since there were three different personnel directors in the City between 1996 and 1998 (i.e., Little, Koehler and Kalny), the Union is asserting this request was made either by, or on behalf of, all three. That assertion is not supported by the record evidence. While Little may have requested that the then pending grievances be held in abeyance to allow him "to get up to speed", neither Koehler nor Kalny made such a request. Aside from that, even if Little did make such a request of the Union for the then-pending grievances, that was before this grievance was filed because Little left the City shortly after this grievance was filed.

Third, the Union avers that once the confidential investigation was completed, the grievance was reactivated from inactive to active status. To support this assertion, the Union cites the fact that the grievance was discussed at several grievance meetings. In the Union's view, these discussions essentially reactivated the grievance from inactive to active status. The record indicates that the Union and Chief Lewis discussed this grievance (and apparently dozens of others) during several grievance meetings in mid-1997. Then, in November, 1997, the Union raised the instant grievance with Kalny. This was the first time that he (Kalny) had

heard of it. When the Union raised it with Kalny, he told the Union that he considered the grievance stale and would not discuss it. In characterizing the grievance as stale, Kalny was obviously raising a procedural defense to the grievance. If the Union was under the impression at that point that this grievance was still being held in abeyance, Kalny's response disabused it of that notion. Additionally, Kalny's response put the Union on notice that it could not resolve the grievance informally. It would be one thing if the Union had appealed the grievance to the Personnel Committee immediately after Kalny gave his response in November, 1997. However, that did not happen. In point of fact, the Union did not appeal for another year. The Union notes that during 1998, it again discussed the grievance with the City on two separate occasions. However, the fact that the City discussed the grievance on its merits on two occasions in 1998 with the Union did not somehow reactivate this grievance from inactive status to active status. Here's why. As previously noted, Kalny raised a procedural objection/defense to the grievance in November, 1997. When he agreed to discuss this grievance and other inactive grievances with the Union in 1998, he made it clear to the Union that the City was reserving its procedural and substantive defenses to same. That being the case, the City did not waive its procedural objection/defense to this grievance by discussing it with the Union in 1998. A contrary holding would penalize the City for simply attempting to resolve a grievance which, after all, is the very purpose of the grievance procedure.

Having reviewed the Union's proffered reasons for the two-year delay which occurred here and found them wanting, it is concluded that the Union's delay in advancing this grievance to the Personnel Committee was unreasonable under the circumstances. While I am convinced the Union did not deliberately allow the grievance to go stale, this was nonetheless what happened. The grievance is therefore not procedurally arbitrable and is deemed waived pursuant to Sec. 3.04.

Having just found that the grievance is not procedurally arbitrable and is deemed waived, I am precluded from considering the merits of the instant grievance.

In light of the above, it is my

AWARD

That the two-year delay in advancing the grievance to Step Three of the grievance procedure was unreasonable under the circumstances. Pursuant to Sec. 3.04, the Union has waived its right to an arbitral determination of the merits. The grievance is therefore not procedurally arbitrable and is hereby dismissed.

Dated at Madison, Wisconsin this 9th day of December, 1999.

Raleigh Jones /s/

Raleigh Jones, Arbitrator

REJ/gjc
5985