BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MILWAUKEE AREA TECHNICAL COLLEGE

and

LOCAL 587, MILWAUKEE DISTRICT COUNCIL 48, AFSCME, AFL-CIO

Case 476
No. 61194
MA-11843

Appearances:

Attorney Robert E. Haney, Podell, Ugent, Haney & Miszewski, S.C., 611 North Broadway Street, Suite 200, Milwaukee, Wisconsin 53202-5004, on behalf of Local 587 and Milwaukee District Council 48.

Attorney Eric Rumbaugh, Michael, Best & Friedrich, 100 East Wisconsin Avenue, Suite 3300, Milwaukee, Wisconsin 53202-4108, on behalf of MATC.

SUMMARY AWARD

On October 8, 2002, the undersigned conducted a hearing in the captioned case, regarding the sole issue of the timeliness of the referenced grievance. The parties requested that the Arbitrator issue her award regarding timeliness as soon as possible and they asked that the Arbitrator would issue her timeliness award on Tuesday, October 15, following the parties' briefing of the issue, to be received by the Arbitrator on October 14, 2002 by fax. 1/ The Arbitrator agreed, assuming clerical support would be available, to issue the Award as described above.

1/ The Union requested that pages 6 through 13 of MATC's brief be stricken as exceeding the Arbitrator's suggested brief length. Although MATC's brief was longer than requested, the Arbitrator has considered all arguments therein. The Union's request is denied.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

DISCUSSION

The effective labor agreement, in Article V, Section 1, defines a grievance as ". . . any matter which involves a violation of one or more specific provisions of this agreement" (emphasis added). Nothing in Article V, Section 1, requires a grievance form to list the specific sections of the contract the Union alleges have been violated because of the use of the verb "involves". Nor is there any verbiage in Step 1 or 2 of the Article V grievance procedure that requires such specificity. If the parties had intended to require the Union to list specifically each and every provision violated by the actions of MATC, they could have easily written such language into the agreement to meet their needs. They did not do so. Therefore, I do not find that the Union was required, as MATC argued, to include specifically each and every provision of the labor agreement the Union asserted was violated in this case.

Thus, the Arbitrator finds that the Union's description of the situation or action about which the Union had a grievance, was clear enough for MATC to fully understand the nature of the grievance. Thus, I note that Local 587 indicated that "employees taking voluntary demotions are not being placed at the appropriate wage. Class and Step of jobs are not properly defined, i.e.; (sic) steps do not represent years of service. . . ." The Union also indicated in the remedy section of the grievance form, that "employees should be made whole and . . . transfers and demotions should be handled in the same manner." This description, although imperfect, put MATC on notice regarding the nature of the grievance and the remedy that the Union was seeking. Indeed, MATC never objected that the grievance was unclear or indefinite.

Step 1 of Article V states that the Union Steward or officer ". . . shall take up the grievance verbally with the employee's immediate supervisor within twenty-five (25) working days of its occurrence. . . ." or if the officer is "unaware of the grievance" he/she must take it up with the immediate supervisor within twenty-five days "of his/her knowledge of the occurrence." (emphasis added). MATC argued that because the contract requires that grievances be filed in writing within 35 working days after they occur (or the Union is made aware of them), the Union's failure to file a written grievance herein within this time frame requires denial of the grievance. Here, MATC urged, the Union should have filed its

grievance in September, 2000 after Sujecki first refused to change Ms. Regal's compensation. 2/

2/ The grievance documents list Laura Regal; the parties referred to her as Laura Rangel on the record herein.

The Union does not seriously dispute here that it failed to formally take up Regal's grievance with Regal's immediate supervisor within twenty-five days of its occurrence or the Union's knowledge thereof. In addition, the Union does not contest that it failed to "present" Regal's grievance "in writing . . . to the employee's immediate supervisor within seven (7) working days after the supervisor's verbal response was due." (It should be noted that the supervisor's verbal response was due three working days before the written grievance needed to be filed.) Rather, the Union asserted herein that it discussed the Regal situation with various MATC managers (including all those listed in Article V) at various times including during consensus bargaining, in an attempt to settle the matter, following Regal's call to the Union on or about September 5, 2000, wherein she complained that she was not being paid at the proper rate following her voluntary demotion.

The Union has asserted that because of the approach MATC took in the Regal case, by attempting to settle Regal's issue without clearly objecting to timeliness, MATC led the Union to believe that MATC had waived Steps 1 through 3 regarding timeliness and had agreed to begin processing the grievance at Step 4 when the Union filed its written grievance on the matter on July 26, 2001. In contrast, MATC argued herein that although MATC processed the Regal grievance on the merits, it never waived its right to raise the lack of timely filing of that grievance. MATC argued that no evidence was proffered to show that the Union had ever requested or secured a waiver of time limits in this case. Indeed, the subject of waiver never came up until Sujecki's August 15, 2001 letter wherein he stated (in non-specific terms) that he was reserving his right to assert any and all defenses of MATC in the case. MATC contended that because a waiver of time limits must be written pursuant to the contract, no waiver can be found based on MATC's actions herein.

Yet well-accepted arbitral case law indicates that even where the contract expressly requires time limit waivers to be in writing, the parties' actions may result in a waiver without a writing based upon equitable considerations. Thus, one parties' recognizing and negotiating concerning a grievance over a lengthy period of time without making a clear and timely objection to procedural irregularities can constitute a waiver thereof. Elkouri and Elkouri, *How Arbitration Works*, BNA (Fifth Ed., 1997), p. 278 and cases cited. In the Arbitrator's view, the evidence in this case indicates that a reasonable person would have concluded that by its words and actions from September, 2000 through July 26, 2001, MATC managers had agreed to waive timeliness objections to the Regal grievance.

Here, all witnesses who testified regarding the issue of timeliness stated that discussions on the instant grievance were periodic and on-going from September, 2000 through July 26, 2001. It is also undisputed that on September 26, 2000, H.R. Director Michael Sujecki responded on the merits of the grievance to his supervisor, Mr. Lester Ingram by e-mail and Sujecki never mentioned the issue of timeliness therein. 3/ No settlement resulted from the on-going discussions regarding the Regal matter during this time period.

3/ Union representatives asserted that in September of 2000 they believed that they had an agreement regarding the Regal voluntary demotion pay issue but that that agreement was never finalized. The parties then continued to talk regarding the Regal matter through ongoing meetings they were having regarding consensus bargaining. Whether or not Noth and Haglund were correct about MATC manager Lester Ingram's position on the Regal case, I note that MATC never took any action to correct Noth and Haglund's impressions that Ingram agreed with the Union.

On July 26, 2001 the parties met regarding a grievance involving Sue Horton. 4/ After settling the Horton grievance, the parties discussed the Regal situation. At this time, District Council 48 representative Malou Noth, told H.R. Director Sujecki that given the parties' failure to settle the Regal situation, the Union would file for immediate arbitration of the Regal matter (thereby skipping Steps 1 through 3 of Article V). Sujecki admittedly responded "fine." (Tr. 97); "go ahead and file for arbitration" and "I agree" (Tr. 113). However, Sujecki also stated to Noth at this time that he had not seen a grievance on the matter.

Sujecki admitted herein that it is unusual for a grievance to go immediately to arbitration; but that by agreeing to take the Regal matter to immediate arbitration he did not believe he had waived MATC's right to object to the timeliness of the filing of the grievance. Sujecki stated that he did not raise timeliness with the Union on July 26, 2001 or previously because he believed timeliness would be later decided by the Arbitrator. Sujecki also admitted herein that he never asked the Union why the Regal matter kept arising in discussions between the parties from September, 2000 until July 26, 2001, when he believed the case had settled. In these circumstances, the Arbitrator finds that Union representatives reasonably concluded that timelines would not be a problem in this case. In fairness, Sujecki should have raised timeliness as an issue at the latest when Noth made the above-described comments on July 26, 2001.

4/ The Union asserted that shortly before the meeting of July 26, 2001, Vice President for Human Resources, Vivian Joyner told the Union that she would get back to the Union with a decision regarding the Regal/demotion pay issue. District Council 48 representative Noth stated that Joyner never got back to her or the Union with a decision. On this basis, the Union argued that the verbal step of the grievance was never completed by the employer and that the Union's filing of the grievance in written form on July 26, 2001 was supported by all of the evidence and discussions of the parties that had occurred prior to July 26, 2001. As Joyner did not testify herein, Noth must be credited on this point.

Following the July 26, 2001 discussions regarding the Regal matter, District representative Noth sent Sujecki the following letter dated July 31, 2001 regarding the Regal voluntary demotion matter:

. . .

> On behalf of Local 587 and per our conversation of July 26, 2001, it is my understanding that we have mutually agreed to proceed to arbitration on the above-noted grievance.
>
> This decision was based on the fact hat discussions have been held on this subject numerous times and with various parties, all whom preside over each step of the grievance process, and we are still unable to come to a resolve.
>
> If this is not your understanding, please let me know as soon as possible.

. . .

On August 15, 2001, Sujecki responded to Noth's letter as follows:

. . .

> In response to your letter of July 31, 2001, it is agreed that discussions have been held on this matter at the request of Local 587. It is the position of the District, however, that it has complied with the requirements of Article XVIII, Section 1, of the Local 587 Agreement, in the placement of those employees accepting voluntary demotions. The District does not share the union's view that the District has violated any provision of the Labor Agreement. Therefore, the District reserves the right to raise any and all defenses available to it regarding this matter.

Following her receipt of Sujecki's August 15, 2001 letter, an angry Noth confronted Sujecki and asserted that Sujecki knew what Noth meant by moving the case immediately to arbitration and accused Sujecki of lying to her.

In addition, on September 13, 2001, Sujecki requested that the grievance regarding Regal be held "in abeyance" without mentioning timeliness, and on October 18, 2001, Sujecki responded by memo to the Local 587 bargaining committee regarding the demotion pay issue, suggesting a formal resolution of the merits of that case, again without raising timeliness. In addition, on October 31, 2001, Sujecki executed the following formal agreement in this case which the Union Vice President had executed on October 30, 2001:

WAIVER OF CONTRACTUAL TIMEFRAME FOR GRIEVANCES

PER ARTICLE V "GRIEVANCE AND COMPLAINT PROCEUDRE."

BETWEEN MILSAUKEE AREA TECHNICAL COLLEGE AND LOCAL 587

It is hereby agreed that the contractual time frame for grievance # 01-04 (voluntary demotion) is mutually held in abeyance until Local 587's Executive Board Meeting, November 7, 2001 for decision to accept/reject proposal from MATC (Demotion Language) presented on October 17, 2001.

This waiver is not to be interpreted as a precedent by either party or as a waiver to any other step of the said procedure except as designated above.

. . .

It was not until on February 21, 2002 that the College issued its answer to the instant grievance. That answer read, in relevant part, as follows:

. . .

2. What is your decision?

The grievance is denied.

3. What is the basis of your decision? (Why have you reached the particular decision state din item 2?)

The Union filed this grievance at Step 4. Prior to the hearing, this response was issued. The grievance is denied on the following grounds:

1. It was not filed in accordance with Article V, the Grievance and Complaint Procedure. The grievance states that the violation occurred on September 5, 2000. The grievance is dated August 27, 2001. Therefore, it was not filed timely as required by Article V.

2. Article V states that "a grievance is any matter which involves a violation of one or more specific provisions of this Agreement." The union has failed to identify what provision of the contract has been violated.

. . .

This is the first formal response the Union received regarding the instant grievance and it is the first time MATC argued that the grievance was untimely filed. Thus, between July 26, 2001 and February 21, 2002, MATC failed to raise the issue of the timeliness of this grievance.

Given all of the facts enumerated above, it is clear to the Arbitrator that the manner in which MATC processed the instant grievance would have led a reasonable person to believe that MATC had waived time limits regarding the case. It was the Employer's responsibility to make it clear as early on as possible in the processing of the matter, that MATC would be objecting to timeliness in this case. Whether or not MATC actually intended to do so, its words and actions essentially lulled the Union into a sense of false security regarding the timeliness issue. In this regard, I note that Sujecki had a number of opportunities to make it clear to Local 587 and District Council 48 that he was going to object to the timeliness of the filing and processing of the instant grievance. Sujecki did not utilize these opportunities. Sujecki's assertion that timeliness is an argument that should properly be placed before an Arbitrator is insufficient basis to allow MATC to avoid addressing the merits of the Regal grievance and to deny the Union its "day in court" on the merits of the Regal grievance, given all of the circumstances here.

Based on the above analysis, I issue the following

AWARD

The grievance was timely filed and processed.

Dated at Oshkosh, Wisconsin, this 25th day of October, 2002.

Sharon A. Gallagher /s/
Sharon A. Gallagher, Arbitrator

SAG/gjc
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