

BEFORE THE ARBITRATOR

In the Matter of a Dispute Between

**MANITOWOC PUBLIC EMPLOYEES (CLERICAL UNIT), LOCAL 731, AFSCME,
AFL-CIO**

and

MANITOWOC PUBLIC SCHOOL DISTRICT

Case 59

No. 63496

MA-12606

(Wage Rate Grievance)

Appearances:

Mr. Neil Rainford, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1311 Michigan Avenue, Manitowoc, Wisconsin 54220, on behalf of the Union.

Davis & Kuelthau, S.C., by **Attorney Paul C. Hemmer**, 605 North Eighth Street, Suite 610, Sheboygan, Wisconsin 53081, on behalf of the District.

ARBITRATION AWARD

Manitowoc Public Employees (Clerical Unit), Local 731, AFSCME, AFL-CIO (herein the Union) represents a bargaining unit within the Manitowoc Public School District (herein the District) consisting of all regular full-time and regular part-time Manitowoc Public School District employees, except supervisory, managerial, confidential, professional, buildings and grounds employees and teacher aides. The Union and the District were parties to a collective bargaining agreement covering the period July 1, 2000, to June 30, 2003, which had expired at the time the events herein occurred and a successor agreement had not yet been ratified. The contract provided for binding arbitration of certain disputes between the parties. On March 24, 2004, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration regarding the wage rate paid to a newly hired employee in comparison to other bargaining unit members. The Undersigned was designated by the Commission to arbitrate the issue. The District contended that the grievance was untimely and disputed the arbitrability of the case. The parties agreed to bifurcate the hearing and have the issue of arbitrability dealt with initially. A hearing was held on July 7, 2004, and the proceedings were not transcribed. The parties filed their briefs on September 20, 2004, and their reply briefs on October 19, 2004, whereupon the record was closed.

ISSUE

For this phase of the proceeding, the parties stipulated to the following framing of the issue:

Is the Arbitrator without jurisdiction in this case because the grievance was not initially timely filed?

PERTINENT CONTRACT LANGUAGE

. . .

The District reserves the right to start [sic] an employee above the minimum wage rate based on qualifications, prior experience, and job market availability provided, however, that the wage rate paid to the employee hired does not exceed the wage rate paid to an [sic] existing employee in the same job classification with equivalent qualifications and years of experience.

. . .

ARTICLE V – GRIEVANCE PROCEDURE

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- C. Time Limitations: If the grievance is not processed by the Union and the grievant within the time limits at any level of the grievance procedure, it shall be considered resolved by the previous disposition without establishing a precedent. If the District Representative does not respond to the grievance in a timely manner, the grievance may be appealed to the next step. Time limits may be extended by mutual agreement in writing. The Union may withdraw the grievance in writing without establishing a precedent at any time and at any level of the grievance procedure. Any initiated grievance may be carried over the summer by the mutual consent of the parties.
- D. Definition of Days: Days as used in this Article shall be defined as Monday through Friday excluding holidays as defined in this contract.
- E. Procedural Steps:
 - Step1: The grievance shall be presented orally to the immediate supervisor within fifteen (15) days of the date the grieving party knew or should have known of the alleged violation(s) of the collective bargaining

agreement. The immediate supervisor shall inform the grievant(s) of his/her decision within ten (10) days of the date the grievance was presented.

Step 2: If the grievance is not resolved in Step 1, the grievance shall be reduced in writing and submitted to the Superintendent or designee within ten (10) days of the immediate supervisor's response. A copy of the grievance appealed to the Superintendent or designee shall simultaneously be sent to the employee's immediate supervisor. The Superintendent or designee shall respond in writing with his/her decision within ten (10) days of said written grievance.

Step 3: If the grievance is not resolved in Step 2, the grievance shall be submitted to the Board within ten (10) days of receipt of the Superintendent's or designee's response. A copy of the grievance appealed to the Board shall be simultaneously be sent to the Superintendent or designee. The Board's Policy and Procedure Committee will schedule the grievance meeting withing [sic] twenty (20) days of the Union's appeal to the Board. The Board shall respond in writing with its decision within ten (10) days of the conclusion of the meeting.

Step 4: If a satisfactory settlement is not reached as outlined in Step 3, the Union may submit the grievance to arbitration by filing notice of its intent to arbitrate the matter with the Board of Education within twenty (20) days following the receipt of the Step 3 answer.

. . .

BACKGROUND

The Union and the District bargained a clause into the wage appendix to the collective bargaining agreement allowing the District flexibility in hiring support staff. Specifically, the language permits the District to hire above the minimum contractual rate, but not at a rate higher than that of existing bargaining unit members in the same classification who have equivalent qualifications and experience.

On June 13, 2003, the District posted an opening for the position of Secretary to the Director of Business Services and Purchasing Secretary at a wage rate of \$10.04 per hour, which was the minimum rate for a Classification II position. There were no internal applicants for the position, which led the District to post the position externally. Rita Greening applied for the job, but was unwilling to accept the position at the offered wage rate. After some negotiation, the District offered Ms. Greening the position at a rate of \$11.25 per hour, which she accepted.

On August 21, 2003, the District provided a New Hire/Transfer form to Union Steward Cindi Schroeder, which indicated the hire of Ms. Greening and her agreed rate of pay. (Jt. Ex. 4) Ms. Greening commenced working for the District on September 18, 2003. That information was subsequently shared with the bargaining unit. In November, 2003, Barbara Augustenborg, one of the Grievants herein, raised a concern over the fact that Ms. Greening had been hired at above the minimum wage rate and requested information regarding her credentials. On November 24, 2003, Union Representative Neil Rainford wrote to Robert Huston, the District's Director of Human Resources, requesting the information for the purposes of comparison with existing unit members to determine if the contract had been violated. (Jt. Ex. 5) On November 25, 2003, Huston responded to Rainford and provided the requested information, which Rainford shared with the Union leadership.

On February 4, 2004, a meeting was held between Cindi Schroeder and bargaining unit members Barbara Augustenborg, Linda Brown, Kim Cayemberg, Mary Jo Deubler and Patricia Heidorf to discuss Greening's comparative qualifications. The five women compared Greening's qualifications to their own and determined that they wanted to grieve her hire rate based on the language of the wage appendix. At the time of Greening's hire, all were Class II employees who were making less than the \$11.25 per hour being paid to Greening. Their grievances were filed on February 10, 2004. The District denied the grievances on the basis that they were not timely and that there was no underlying violation of the contract. The grievances then advanced through the steps of the contractual grievance procedure to arbitration. Additional facts will be referenced, as necessary, in the discussion section of this award.

POSITIONS OF THE PARTIES

The Union

The Union denies that it has violated the time requirements of the contract in filing the grievances. The language of Article V, Section C, states that a grievance is deemed resolved if not pursued by the Union within the time limits at any stage of the grievance procedure. Each pay period represents a new violation, so the Grievants may pursue any grievance as to payments made after the grievance is filed. They are only limited in that they may not recover for pay periods preceding the grievances.

According to Elkouri and Elkouri, How Arbitration Works, 4th Edition, p. 197 (1985), many arbitrators have held that continuing violations give rise to continuing grievances and thus can be grieved at any time. This view has also been adopted by WERC arbitrators. [See: VILLAGE OF ASHWAUBENON, CASE 31, No. 46345, MA-6953, (HONEYMAN, 4/9/92), DODGE COUNTY, CASE 174, No. 47972, MA-7454 (HONEYMAN, 5/13/93), KENOSHA SCHOOL DISTRICT, CASE 130, No. 46185, MA-6902 (MAWHINNEY, 5/11/92), SHEBOYGAN COUNTY, CASE 118, No. 42173, MA-5595 (LEVITAN, 11/6/89)]. Further, there is precedent for the

proposition that suspicion is not knowledge and that the Union is not required to go forward until it has a factual basis supporting a grievance. HURLEY SCHOOL DISTRICT, CASE 25, NO. 47634, MA-7339 (YEAGER, 10/2793). This is a fledgling bargaining unit that wanted to be sure it was on solid ground before proceeding so as not to waste the District's resources or its own on meritless grievances. It should not be penalized for using caution in evaluating the Grievants' claims before proceeding.

Assuming that this is not a continuing violation case, the grievances were still timely. The contract requires that the grievance be filed within 15 days of the time the Grievants knew or should have known of the event giving rise to the grievances. Although Greening was hired in August, it was not until the meeting in February that the Union Steward knew that her qualifications did not exceed those of the Grievants and, thus, that a grievance was warranted. The grievances were filed immediately thereafter.

There is no merit to the District's argument that it was in any way prejudiced by the delay in bringing the grievances. The District considered the risk when it made its hiring decision and the evidence indicates that it would have made the same decision regardless of the Union's position. It cannot credibly argue, therefore, that the timing of the grievances was in any way prejudicial.

These grievances are not about the date of hire and the District misperceives the issue by focusing on the hire date as being in any way relevant. It was the first date upon which a calculable loss occurred, but has no bearing on the timeliness of the grievances. Further, the District's argument suggests that the only remedy is to terminate Greening or reduce her wages, but the actual and appropriate remedy sought is to elevate the wages of the Grievants commensurately, as provided by the contract.

The District

The District asserts that the grievances should be dismissed because they weren't filed within the contractual time requirements. Rita Greening was hired on August 5, 2003, and the Union was given notice of her hire and wage rate on August 21. The information was shared with members of the bargaining unit and no grievance was filed within the 15 days required by the contract. Only in November did Barbara Augustenborg raise an objection to Greening's wage rate, leading the Union, on November 24, to request information about Greening's qualifications from the District. The information was provided on November 25. Again, no grievance was filed within 15 days. The Union did not convene a meeting to consider filing a grievance for another two months. The grievance should have been filed in September according to the contract and, because it was not, the case should be dismissed.

Many arbitrators have held that contractual time requirements must be strictly observed. [See: NICOLET AREA TECHNICAL COLLEGE, MA-10341 (HEMPE, 4/19/99); WYNN OIL CO, 70 LA 52 (1978); NICHOLSON CLEVELAND TERMINAL CO., 51 LA 837 (1968);

GENERAL TELEPHONE CO., 70 LA 904 (1978); GILLMAN PAPER CO., 47 LA 563 (1966). By ignoring the requirements, the Union acceded to the *status quo*. Further, the District in no way waived the time requirements of the contract. In the Step 2 response, the Interim Administrator identified the timelines issue in rejecting the grievances and this was a basis for denial at every subsequent level.

There is also no merit to the Union argument that there is a continuing violation of the contract. The Union agreed that the District has the right to compensate new employees at above the minimum rate for a position. Based on the contract, the District decided to offer Rita Greening \$11.15 per hour. The grievances must be premised, therefore, on an alleged violation of the Wage Appendix. This was a single act, not an ongoing sequence of actions, as the Union asserts. Thus, it does not involve a violation every time a biweekly payroll is issued. Even assuming a continuing violation, however, the grievance must still be filed in a timely fashion once the Grievants know of a potential claim. MONROE COUNTY, DEC. NO. 54086, (YEAGER, 8/12/97) JUNEAU COUNTY, DEC. NO. 56300 (HOULIHAN, 6/29/00). To hold otherwise would allow the Union to file a grievance whenever it wanted. Here, the Union had notice of hire on August 21, 2003, and all relevant information about the employee on November 25, yet waited until February to file the grievances. This should preclude the Union from maintaining its grievance at this late date.

It should also be noted that the contract language does not provide for raising the Grievants' wages as a potential remedy in this case. Because the language is phrased in terms of the new employee's wages, the only alternative is to reduce her wages or terminate her if the grievances are sustained. Had the grievances been brought promptly, the District could have dealt with the matter expeditiously. Due to the delay, if the District is required to now lower Ms. Greening's rate, or terminate her, it will cause a serious personnel problem for the District. This prejudicial circumstance is another factor in favor of denying the grievances.

The Union in Reply

The Union reasserts the arguments in its initial brief in support of the grievances. The Union further protests the appropriateness of the District's arguments regarding the appropriate remedy in this case. The parties agreed to bifurcate the proceeding and address only the timeliness of the grievances in the initial phase. The Union has not presented evidence or arguments regarding the merits of the case and any such from the District must be disregarded.

The District in Reply

The District states that the Union mischaracterizes the contract in arguing that new hires can be paid above minimum as long as all equally qualified employees are paid the same or higher wages. There is no reference to raising the wages of other employees. The sole available remedy is to lower Greening's wages.

The Union acknowledges at page 12 that this case grows out of a single event. This is inconsistent with its claim of continuing violations. There have been no recurring events and, as set forth above, the Grievants have not suffered losses with each recurring pay period. The Union's continuing violation argument, therefore, has no merit.

The cases cited by the Union do not support its position. VILLAGE OF ASHWAUBENON did not involve timeliness, which this one does. DODGE COUNTY dealt with the compensation of the grievants, which is not the case here. KENOSHA SCHOOL DISTRICT also involved actual pay loss to the grievants. SHEBOYGAN COUNTY actually supports the District's case because the Arbitrator found that once the Union has actual knowledge of violation it must file a timely grievance. IRON COUNTY also dealt with a situation where the Union did not have actual knowledge in advance, unlike the case here. Thus, all these cases are distinguishable.

There is no evidence supporting the Union's assertions about concerns regarding time spent or costs involved in the processing of grievances. Any such arguments are immaterial and should be discounted. What is material is the Union's casual attitude toward processing the grievances. The contract has strict timelines and do not permit the Union to investigate and file grievances at its leisure. Grievances must be filed within 15 days of the grievable event, which did not occur. Once the Union had a suspicion, it was under a duty to investigate promptly. The Union should have convened a pre-grievance meeting within 15 days of receiving the information from the District on November 25. It did not do so and thereby violated the contract requirements.

The District rejects the Union's assertions regarding the District's calculation of liability. There was no such calculation because there was no liability. As previously stated, under the contract, the Grievants here are not entitled to a wage increase even if they prevail. All they can achieve is the lowering of Greening's wages. Because of the passage of time, Greening in all likelihood could not now return to her former position should that occur. Nonetheless, the potential problem caused by the Union's delay has prejudiced the District and should be taken into account in deciding the case.

Also, as previously asserted, notwithstanding the Union's assertion of continuing violation, the Union must bring its grievances once it has knowledge of potential violation. Given the Union's failure to honor the contractual requirements, the ambiguity surrounding its requested remedy and its neglect to follow up and pursue these grievances in a timely fashion, the grievances should be denied.

DISCUSSION

At this phase of the proceeding, the only issue to be addressed is whether the grievances were filed and processed in a timely fashion. Where the parties have included fixed timelines in their grievance procedure, the general rule is to require strict observance of all

deadlines. Failure to do so may result in the dismissal of the grievance and, thus, the loss of opportunity to have the merits of the matter considered. Inasmuch as this is such a harsh result, however, arbitrators often will not impose it where there are extenuating circumstances to justify mitigating the penalty. Here, if the grievances were timely, additional proceedings will address the merits of the case. If they were not, the grievances will be summarily dismissed for lack of jurisdiction. No consideration of the merits or the remedy will be considered at this point.

The contractual grievance procedure states that at Step 1, a grievance is to “. . . be presented orally to the Grievant’s immediate supervisor within fifteen days of the date the grieving party knew or should have known of the event giving rise to the grievance.” (Jt. Ex. 1, p. 7) A grievance not processed in a timely fashion at any Step is deemed resolved by the previous disposition. (Jt. Ex. 1, p. 6) Where the untimely action occurs at Step 1, there has been no previous disposition, *per se*, but the concept of acquiescence still applies. Thus, if a grievance is initially untimely, the Grievant is deemed to have waived the right to grieve.

Here, the District maintains that the time period for filing began running once the Union was notified of Rita Greening’s hire and her wage rate on August 21, 2003. As a fallback position, the District asserts that the time period began running at the point when the District provided the Union with Greening’s qualifications on November 25, 2003. In either case, the filing date of February 10 would not comply with the contract. The Union, on the other hand, takes the position that each pay period constitutes a new violation, so the February 10 filing date was in compliance and that the only effect of the late filing is to limit the application of the award to the time after the filing. In the alternative, the Union asserts it did not have actual knowledge of the violation until the pre-grievance meeting on February 4, so the February 10 filing date did meet the contractual requirements.

The Union’s theory of continuing violation has basis in arbitral precedent, as revealed in the cases it cites in its brief. Thus, where a violation is a repeated event, rather than an isolated occurrence, each event represents a new violation for purposes of tolling the grievance timelines. Thus, in such cases, once a grievance is filed the only impairment to the grievant is that the remedy cannot be applied to previous occurrences retroactive to the filing. For the reasons set forth below, however, I do not find that this principle avails the Grievants herein.

The continuing violation doctrine limits the harshness of grievance procedure timelines by allowing claims to be dated from any of a series of wrongful events, not just the first. Thus, if a grievant discovers a violation after the third or fourth occurrence, the time begins to run from the date of discovery, not from the date of the first occurrence. This does not mitigate the requirement that a grievant or union use due diligence in pursuing the claims. Thus, even where the doctrine of continuing violation applies, it does not permit a grievant to wait an indefinite period of time after discovery to file his or her claim. Whether or not there is a continuing violation, once the grievant has knowledge of the violation, the contractual timelines control the filing of the grievance. MONROE COUNTY, CASE 131, NO. 54061,

MA-9536 (YAEGER, 8/12/97); JUNEAU COUNTY, CASE 125, NO. 56300, MA-10231 (HOULIHAN, 6/29/00) Thus, once the Grievants here were aware of the factual basis for their claims, they were under a contractual obligation to file their grievances within 15 days.

I do not accept the District's position that the provision to the Union of the notice of hire for Rita Greening on August 21 triggered the grievance filing period. While the notice did indicate that she was being hired at a rate above the minimum for Class II employees and above that of the Grievants, it did not reveal her qualifications and experience. Thus, the Grievants and Union were unable to evaluate at that point whether there was a violation. This information was provided in November, in response to the Union's request. At that point, as of November 25, 2003, the Union was in possession of all the information necessary to evaluate whether there was a meritorious claim and at that point the contractual clock began to run. Therefore, by contract, the grievances needed to be filed by December 16, 2003, to comply with the contractual requirements. 1/

1/ The contract, in Article V, Section D, defines "days" as Monday through Friday, excluding holidays.

The Union's argument that the appropriate date for tolling the grievance period is February 4, 2004, is unpersuasive. It was on this date that the Union and the Grievants met to review the comparative qualifications of Greening and the Grievants and to decide whether to grieve the terms of Greening's hire. Nonetheless, regardless of whether that was the time the Union and Grievant's met, it was not the time that they were put on notice of the alleged violation. That occurred the day they had access to all the information necessary to evaluate the claim, not the day they chose to evaluate it. The Grievants certainly had knowledge of their own qualifications as of November 25 and, as of that date, they had knowledge of Greening's, as well. Whether the Union was in possession of the Grievants' specific information on that date is unknown, but is also immaterial. For purposes of timeliness, substantive knowledge by the Grievants of the basis for the claim is imputed to the Union and, since the inquiry was precipitated by a request from the Grievants, one may assume they were prepared to make a comparison once they had the relevant information. Thus, as of November 25, the Grievants and Union were in possession of the necessary information to support the filing of the grievance and the time period began running as of that date. 2/ As stated before, absent mitigating circumstances, the contractual guidelines must be strictly adhered to. I do not find adequate mitigating circumstances here to justify departing from the contractual requirements.

2/ The Union argued in its brief that the intervening period between November 25 and February 4 was a reasonable time for the scheduling of a pre-grievance meeting, but that is not the operative point. The determinant is the date that the Grievants and/or Union had the necessary information to make a decision. Further, there is no explanation in the record for the delay.

For the reasons set forth above, and based upon the record as a whole, I hereby enter the following:

AWARD

The grievance in this matter was not initially timely filed. Therefore, the Arbitrator is without jurisdiction in this case and the grievance is dismissed.

Dated at Fond du Lac, Wisconsin, this 1st day of March, 2005.

John R. Emery /s/

John R. Emery, Arbitrator