BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute between

MARATHON COUNTY

and

MARATHON COUNTY HIGHWAY EMPLOYEES, LOCAL 326, AFSCME, AFL-CIO

Case 316
No. 64670
MA-12970

(Safe Work Place Grievance)

Appearances:

Philip Salamone, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 7111 Wall Street, Schofield, Wisconsin, appeared on behalf of Local 326.

Frank Matel, Employer Resources Director, 212 River Drive, Wausau, Wisconsin, appeared on behalf of Marathon County.

ARBITRATION AWARD

The County and the Union are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding which provides for the final and binding arbitration of certain disputes. The Union filed a Request to Initiate Grievance Arbitration with the Wisconsin Employment Relations Commission on April 4, 2005, relating to a dispute relating to an alleged violation of the collective bargaining agreement. The County contends that the dispute is not arbitrable. The Commission appointed Paul Gordon, Commissioner, to serve as the Arbitrator. Hearing on the matter was held on May 10, 2005 at the Marathon County Building, 212 River Drive, Wausau, Wisconsin. The parties agreed to a bifurcated hearing process wherein the issue of arbirtability would be decided first. The decision of that issue would determine if a further hearing on the merits of the grievance would be needed. No transcript was prepared. The parties stipulated to the entry of joint exhibits into the record and stipulated to other fact matters. The parties set forth verbally their positions on arbitrability. The parties each waived the right or opportunity to file written arguments and briefs on the issue of arbirtability, and requested an expedited decision on that issue. The record was closed on May 10, 2005.

ISSUE

The parties agreed that the issue to be decided was the arbitrability of the underlying grievance. The parties did not agree to the underlying grievance issue to be decided.

The Union would phrase the issue:

> Whether the following issue is arbitrable: Did the employer violate the collective bargaining agreement in the manner it disciplined a management employee, and if so, what is the appropriate remedy?

The County would phrase the issue:

> Is the grievance subject to the procedure outlined in the labor agreement because it deals with the way management dealt with another management employee, which is outside the employer-employee relationship that is outlined in the contract?

The Unions' phrasing of the issue is selected.

RELEVANT CONTRACT PROVISIONS

(Preamble)
This agreement made and entered into by and between the County of Marathon, a municipal corporation in the State of Wisconsin, hereinafter referred to as the County, Department or Employer, and the Marathon County Highway Employees, Local 326, American Federation of State, County, and Municipal Employees, AFL-CIO, hereinafter referred to as the Union, is as follows:

Article 1 – Recognition

The County recognizes the Union as the exclusive bargaining representative for all regular full-time and regular part-time employees of the Marathon County Highway Department excluding supervisory, professional and office personnel, the commissioner, assistant director, senior engineering specialist, equipment and facilities supervisor, operations superintendent, assistant superintendent, operations supervisor, and purchasing agent for the purposes of conferences and negotiations with the employer or its authorized representative on questions of wages, hours and other conditions of employment.

Article 2 – Management Rights

Public Policy and the law dictate clearly the Department's primary responsibility to the community as being that of managing the affairs efficiently and in the best interest of our clients, our employees, and the community. The employer's rights include, but are not limited to, the following, but such rights must be exercised consistent with the provisions of this contract.

1. To utilize personnel, methods and means in the most appropriate and efficient manner possible.
2. To manage and direct the employees of the department.
3. To hire, promote, transfer, assign, or retain employees in positions within the department.
4. To establish reasonable work rules and rules of conduct.
5. To suspend, demote, discharge, or take other appropriate disciplinary action against employees for just cause.

. . .

Any unreasonable application of the management rights shall be appealable by the Union through the grievance and arbitration procedure.

Article 3 – Grievance Procedure

1. Definition of a Grievance: A grievance shall mean a dispute concerning the interpretation or application of this contract.

2. Subject Matter: Only one subject matter shall be covered in any one grievance. A written grievance shall contain the name and position of the grievant, a clear and concise statement of the grievance, the issue involved, the relief sought, the date the incident or violation took place, the specific section of the Agreement alleged to have been violated, the signature of the grievant and the date.

. . .

6. Arbitration:

A. General: If the grievance is not settled at the fourth step the Union may proceed to arbitration by informing the Employee Resources Director in writing within ten (10) working days that they intend to do so.

. . .

C. Arbitration Hearing: The arbitrator shall meet with the parties at a mutually agreeable date to review the evidence and hear testimony relating to the grievance.

Upon completion of this review and hearing, the arbitrator shall render a written decision to both the County and the Union which shall be final and binding upon both parties.

. . .

F. Decision of the Arbitrator: The arbitrator shall not modify, add to or delete from the express terms of the agreement.

7. General Provisions:

. . .

B. Union Grievances: The Union shall have the right to process grievances regarding provisions of this agreement in matters involving one or more employees.

BACKGROUND AND FACTS

The grievance filed in this case involved an incident whereby a management employee (a non-bargaining unit County employee) allegedly shoved a bargaining unit employee. The County conducted an investigation, interviewed people, felt the results were somewhat inconclusive, and took what it felt was an appropriate action based on that investigation. The Union felt that some of the statements made during the investigation were less than truthful, and did not believe that the discipline was as harsh as it should have been.

The alleged incident occurred on December 1, 2004 in a County building during work times.

The Union filed its grievance with the County on December 16, 2004. Rather than listing an employee's name, it stated it was a "Union Grievance". The statement of grievance was in the form of an attachment signed by Dave Kottman which stated as follows:

Today I went into Jeff's office, to ask him if I could have off 12/29 and 12/30, he wasn't there, so I went into Ed's office to see if he had seen Jeff. He said, he thought he just saw him go out the door, when I was leaving Ed's office I stopped to say Goodbye to Gary because he is quiting Feb. 2 we talked for a few minutes then I asked Ed when he was retiring, he said maybe 2 more years, then Jay came in grabbed me, pulling me our of the office into the hallway, and

> told me I had ½ hour before my break get back to work. Later that day I was looking for Jeff again to ask him for time off. He wasn't in the office so I want into Ed's office to ask him if he had seen Jeff then Jay paged me to the stockroom but wasn't there, basically just to get me our of Ed's office.

The written grievance contention of what did management do wrong stated:

> Union employees should have a safe work place. Union employees should be free from physical and mental abuse.

The written grievance did not state or refer to an Article or section of the contract alleged to be violated. No Article or section of the contract was identified by the Union at the hearing.

The written grievance request for settlement or corrective action desired stated:

> Some type of disciplinary action be taken equally to any given out to union employees for same offense.

The written grievance was signed by the Local Union President.

All of the individuals mentioned in the statement of grievance attachment, except Kottman, are management employees and are not in the bargaining unit. Jay is the Assistant Commissioner. Kottman is an employee in the bargaining unit.

The County and the Highway Department have work rules, core value statements, and work policies and procedures that apply to both bargaining unit employees and non-bargaining unit employees, which address the type of conduct alleged to have occurred, and contain progressive discipline measures.

THE PARTIES' POSITIONS

Neither party submitted written arguments or briefs. The County maintains that the grievance is not arbitrable because the way it deals with a management employee is outside of the labor contract and is not subject to the procedures in the labor contract. The Union maintains that the grievance is arbitrable because the employees should have a safe work place, as set out in the written grievance, that some of the people interviewed by the County in its investigation were less than truthful, and that the discipline of the management employee was not as harsh as it should have been.

DISCUSSION

There is procedural arbitrability and substantive arbitrabililty. Procedural arbitrability concerns questions such as timeliness of seeking arbitration or whether conditions precedent to arbitration, such as the actual filing of a grievance, have been met. Those types of issues are not involved in this case. Substantive arbitrability concerns whether the arbitration clause in the collective bargaining agreement is susceptible to an interpretation that covers the asserted dispute. This case presents an issue of substantive arbitrability.

The initial issue for decision is whether the grievance can be considered substantively arbitrable. The standards governing the enforcement of an agreement to arbitrate date back to the Steelworkers Trilogy. UNITED STEEL WORKERS V. AMERICAN MFG. CO., 363 US 564 (1960); UNITED STEELWORKERS V. WARRIOR & GULF NAVIGATION CO., 363 US 574 (1960); UNITED STEELWORKERS V. ENTERPRISE WHEEL 7 CAR CORP., 363 US 593 (1960). THE WISCONSIN SUPREME COURT INCORPORATED, FROM THE TRILOGY, THE TEACHING OF THE LIMITED FUNCTION SERVED BY THE REVIEWING AUTHORITY IN ADDRESSING ARBIRTRABILITY ISSUES. DENHART V. WAUKESHA BREWING CO., INC., 17 WIS.2D 11 (1962). The Court, in Jt. School Dist. No. 10 v. Jefferson Ed. Asso., stated this "limited function" thus:

> The court's function is limited to a determination whether there is a construction of the arbitration clause that would cover the grievance on its face and whether any other provision of the contract specifically excludes it. 78 WIS.2D 94, 111 (1977).

The JEFFERSON Court held that unless it can "be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute" the grievance must be considered arbitrable. 78 WIS.2D AT 113.

Applying these standards to this case, JEFFERSON requires that the arbitration clause in the contract be first considered. In JEFFERSON the court was considering an arbitration clause that required the party invoking arbitration to point to specific contract language that arguably expressly covered the subject of the grievance. In this case, simply put, Article 3 Section 6.A provides for arbitration of grievances that are not settled in the grievance procedure. The arbitration clause is part of the grievance procedure in Article 3. A grievance is defined in section 1. as "a dispute concerning the interpretation or application of this contract". It is the contract itself that must be looked at to identify a grievable - and thus arbitrable- dispute. The contract also provides in Article 2 that any unreasonable application of the management rights shall be appealable by the Union through the grievance and arbitration procedure. The grievance and arbitration procedure, at Section 2, requires, among other things, that the written grievance contain the specific section of the agreement alleged to have been violated. This is similar to JEFFERSON. In this case, the written grievance did not identify the specific section of the agreement alleged to have been violated. At the hearing the Union was given a specific opportunity to identify what section of the agreement it was alleging was violated and

the Union did not identify any section. There is nothing on the face of this contract that covers the discipline of a management employee. This is a strong indication that the subject matter of the grievance is not contained in the agreement and thus would not be arbitrable. It remains to yet determine whether the contract is susceptible of an interpretation that covers the asserted dispute.

As the Union itself would phrase the issue, the essence of the grievance concerns the discipline of a management employee – not a bargaining unit employee. The agreement is between the County and the Union, and the recognition clause, Article 1, excludes supervisory personnel from the bargaining unit represented by the Union. That exclusion covers the Assistant Commissioner, Jay, who is the person alleged to have done the shoving and the subject of potential discipline. The discipline clause, Article 2 – Management Rights, Section 5, covers disciplinary action against employees for just cause. In the context of the recognition clause, the reference in Article 2, Section 5 to employees is a reference to bargaining unit employees, not the excluded supervisory employees. Accordingly, the disciplinary language in the agreement does not apply to the Assistant Commissioner. There is nothing in the agreement which covers the discipline of management employees. That is addressed by County and Department work rules and core values. The agreement itself is not susceptible to an interpretation that it covers the discipline of management employees.

This conclusion is consistent with that found by Arbitrator McGilligan in KOHLER SCHOOL DISTRICT, WERC, MA-9785 (MCGILLIGAN, 12-30-97) where he looked to the exclusions in a recognition clause as concerned the treatment of two teachers. He found in pertinent part:

> [T]he grievance is not substantively arbitrable because the grievants, as long-term substitute teachers, are not covered by the terms of the recognition clause of the parties' agreement.

The written grievance contends that the Union employees should have a safe work place and be free from physical and mental abuse. That is certainly true. Sometimes additional legal protections are negotiated into a labor agreement, such as non-discrimination measures, sexual harassment, or federal or state Family Medical Leave Act provisions. See, generally, *Fairweather's PRACTICE AND PROCEDURE IN LABOR ARBITRATION, Chapter 19, ARBITRATION AND THE ENFORCEMENT OF STATUTORY RIGHTS, THIRD EDITION, 1991*. And the agreement here in Article 3 Section 6.F prevents the arbitrator from modifying, adding to or deleting from the express terms of the agreement. Here, the parties have not negotiated into their agreement any additional legal protections that are susceptible of an interpretation that covers the asserted dispute. To construe the phrase "conditions of employment" to cover conditions or circumstances not identified in the agreement would be to open the agreement and its arbitration clause to any condition the Union might be able to articulate. That would eviscerate the agreement, forcing the County to arbitrate things it never intended or agreed to.

The ability of the Union to challenge the truthfulness of those interviewed in the discipline of a management employee and the level of discipline, if any, given to a management employee are not matters that are contained within the arbitration clause or the agreement generally.

The second element in JEFFERSON is whether any other provision of the contract specifically excludes the grievance. There is nothing in the labor agreement which specifically refers to the discipline of management employees or a safe work place. Although there is no provision which specifically excludes the grievance, the only reasonable construction of the agreement would be to exclude this grievance. That is reflected in the exclusion of supervisory personnel and others in the recognition clause and the reservation of management rights with the County. While the agreement does provide for arbitration concerning the reasonable application of management rights, that is an application of management rights to the employees covered by the agreement. Those are the bargaining unit employees and not the managerial employees. Although not specifically excluded, the clear implication in the labor agreement is that it excludes grievances concerning the discipline of management personnel.

Because the first element of the JEFFERSON standard shows there is no construction of the arbitration clause that would cover the grievance on its face, because the arbitration clause is not susceptible of an interpretation that covers the asserted dispute, and because, under JEFFERSON, any reasonable reading of the other provisions of the agreement could only exclude the grievance from arbitration, with positive assurance the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.

Accordingly, based upon the evidence and arguments in this case I issue the following

AWARD

The grievance is not arbitrable. The grievance is denied and the matter is dismissed.

Dated at Madison, Wisconsin, this 13th day of May, 2005.

Paul Gordon /s/
Paul Gordon, Commissioner

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