

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**CITY OF HORICON**

and

**HORICON POLICE DEPARTMENT EMPLOYEES, LOCAL 1323D**

Case 34  
No. 64764  
MA-13005

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**Appearances:**

**Mr. Alan M. Levy**, Lindner & Marsack, S.C., Attorneys at Law, 411 East Wisconsin Avenue, Suite 1800, Milwaukee, WI 53202, on behalf of the City.

**Mr. Thomas Wishman**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 2236, Fond du Lac, WI 54936-2236, on behalf of Local 1323D.

**SUMMARY OF BENCH AWARD**

According to the terms of the 2004-05 labor agreement between the parties listed above, the Wisconsin Employment Relations Commission assigned Arbitrator Sharon A. Gallagher to hear and resolve a dispute between them regarding whether the City's demand that former employee Ryan Borchardt reimburse it for certain training costs it incurred was appropriate under the terms of the 2004-05 labor agreement. The City insisted and the Union agreed that the Arbitrator should first address the narrow question whether the underlying grievance was timely brought forward to arbitration by the Union before reaching the merits of the grievance.

Hearing on the timeliness issue was scheduled and held at Horicon, Wisconsin, on August 30, 2005, at which time the parties had a full opportunity to submit evidence and argument regarding the timeliness issue. No stenographic transcript of the proceedings was made in the case. The parties chose not to call any witnesses, submitting only Joint Exhibits 1 through 19, their explanations thereof, as well as their oral argument thereon. The parties jointly requested that the Arbitrator issue a bench ruling on the question of timeliness, which she agreed to do on August 30, 2005. The Arbitrator also agreed to issue a Summary of her verbal ruling.

After hearing the parties' explanations and oral arguments and studying all of the documentary evidence in the case, the Arbitrator gave the parties a detailed verbal bench award which can be summarized as follows:

1. Article 9, Sections 9.02 and 9.03 control the dispute between the parties.
2. Section 9.02 contains no time limit for the initial presentation of a grievance. The Borchardt grievance was timely filed by the Union on November 15, 2004, and it was timely answered by the Chief at Step 1 "within ten (10) days from the receipt of the grievance."
3. In his response, the Chief specifically declined to skip any steps of the grievance procedure, putting the Union on notice thereof.
4. The Union timely appealed the grievance to the Personnel and Finance Committee (hereafter P&FC) on December 2, 2004.
5. Some time between December 2, 2004, and January 17, 2005, Alderman Neitzel received the Union's verbal waiver of its right to insist that the P&FC "confer with the aggrieved employee and/or his representative within twenty (20) workdays from the receipt of the grievance."
6. The Step 2A P&FC meeting occurred on January 17, 2005, and the P&FC dated its written Step 2A response January 31, 2005. January 31, 2005, was technically "the date of the final decision" described in Step 3 of Section 9.02. However, the Union did not receive the P&FC's final decision until on or after February 2, 2005.
7. The Union never notified "the Mayor, in writing" that it wished to submit the Borchardt grievance to arbitration as required by the clear language of Step 3. It is significant that this clear language is reiterated in Section 9.03 of the labor agreement.
8. The City's representative for many years has been Attorney Alan Levy. Mr. Levy was involved in the underlying grievance from early July, 2004, and continuing throughout its processing. The Mayor was never copied on any of the documents sent by the City or the Union in this case.
9. No evidence was proffered to show under what circumstances or for what reasons the language including the Mayor in the grievance procedure was inserted into the labor agreement. No evidence was offered to show how, if at all, the parties had dealt with the issues of timeliness and the interpretation/application of Sections 9.02 and 9.03 to disputes which arose between them in the past.

10. Section 9.03 (b) reads as follows:

Decision. The arbitrator shall render a decision within thirty (30) days of the hearing. The decision of the arbitrator shall be final and binding. The Arbitrator shall have no right to amend, modify, nullify, ignore, or add to the provisions of this Agreement.

11. It is axiomatic in cases such as this that the arbitrator should liberally construe contract language so as to avoid the forfeiture of rights. However, where, as here, the Union failed (at any time) to notify the Mayor in writing of its intention to take the Borchardt grievance to arbitration, as clearly and unequivocally required by Step 3 and Section 9.03, the Union thereby failed to bring the grievance timely and properly forward to arbitration.

12. Were the Arbitrator to rule otherwise in this case, she would violate the structures of Section 9.03(b), quoted above.

13. The Kolb Award is factually distinguishable and therefore not relevant to this case.

14. There is no provision of the labor agreement which states a time limit for the Union to file its petition for arbitration with the WERC.

Based upon the relevant evidence and argument as well as her verbal bench award made to the parties on August 30, 2005, and the above summary, the Arbitrator is constrained to issue the following

### **AWARD**

The grievance was not timely processed as required by the clear language of Step 3 of Section 9.02 and Section 9.03. The Borchardt grievance is therefore denied and dismissed in its entirety.

Dated at Oshkosh, Wisconsin, this 16<sup>th</sup> day of September, 2005.

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

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