BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TOWN OF SOMERS

and

TOWN OF SOMERS EMPLOYEES, LOCAL 71, AFL-CIO

Case 6
No. 65497
MA-13234

(Benefit Elimination Grievance)

ORDER DETERMINING ARBITRABILITY

Appearances:

Thomas G. Berger, District Representative, Wisconsin Council 40 AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, Wisconsin 53717-1903, for Town of Somers Employees, Local 71, AFL-CIO.

Jeffrey J. Davison, Attorney, Davison & Mulligan, Ltd., 1207 55th Street, Kenosha, Wisconsin 53140, for the Town of Somers.

INTRODUCTION

The Town and the Union are parties to a collective bargaining agreement which provides for the final and binding arbitration of certain disputes. On January 18, 2006, the Union filed with the Wisconsin Employment Relations Commission a Request to Initiate Grievance Arbitration alleging: Contract violation unilateral benefit elimination. This has to do with accident and sickness benefits. The Commission designated Paul Gordon, Commissioner, to serve as the Arbitrator. At a scheduling conference the Town raised issues of arbitrability of the dispute, and the parties agreed to have the issues of arbitrability decided on written submissions. The Parties made their submission by March 14, 2006. On April 24, 2006 the Arbitrator requested, by e-mail, that the parties identify in the collective bargaining agreement the location of certain language referenced in the Town's submission. The Union responded on April 27, 2006, with its position as to the Arbitrator's inquiry. As of this writing the Town has not responded.

ISSUES

The Town submits three jurisdictional reasons why the grievance is not arbitrable. It contends that the subject of the grievance is not an issue involving the interpretation of the contract, that any grievance which could have been filed should have been filed within 10 working days of November 12, 2002, and that the request for arbitration which was filed was well beyond the time limitations contained in Article 13 of the collective bargaining agreement, as well as defective in failing to provide notice to the Town.

BACKGROUND

The accident and sickness policy which forms the basis of the grievance was enacted by the Town Board in 2000 and repealed by the Town Board on August 27, 2002. The action taken by the Town is reflected in the minutes of the Town Board as:

> **Employee Manual for Represent. Employees**
> Sup. Wienke moved to approve the Employee Manual for Represented Employees with corrections. Motion seconded by Sup. Scheidt and passed unanimously.

The collective bargaining agreement for the period January 1, 2002 through December 31, 2004, retroactive to January 1, 2002, was ratified and adopted on November12, 2002 and signed on November14, 2002 by the Union and on November 19, 2002 by the Town. The Union represents that an employee manual (manual or handbook, herein) dated September 4, 2002 was attached to the labor agreement executed by the parties. That agreement contains the following provisions in pertinent part:

> **Article 7 – Types of Employees.**
>
> **(A)** **Regular, Full-time**. Any employee who has been hired into a permanent, full-time position and who works a shift of eight (8) hours per day, five (5) days per week. This type of employee is entitled to all the usual and normal town benefits.
>
> . . .
>
> **Article 11 – Employee Insurance, Wages and Pension Benefits**
>
> **(A)** **Health, Dental and Life Insurance**
>
> (1) Full time employees are eligible to receive family coverage benefits the first of the month following completion of one (1) month of employment. The Town shall maintain all existing insurance benefits other than health insurance. . . .

Article 13 – Grievance Procedure

(A) **Definition of a Grievance.** Should a difference arise between the Town and the Union or an employee concerning the interpretation, application, or compliance with this Agreement; or the reasonableness of disciplinary action taken against any employee or employees; such difference shall be deemed to be a grievance and shall be handled according to the provisions herein set forth.

. . .

(C) **Time Limitations.** The failure of either party to file, appeal or process a grievance in a timely fashion as provided herein shall be deemed a settlement in favor of the other party. However, if it is impossible to comply with the time limits specified in the procedure because of work schedule, illness, vacation, etc., these limits may be extended by mutual consent confirmed in writing.

(1) **Step 1.** The employee, with his/her department steward (or alternate if the department steward is unavailable due to illness or vacation), shall reduce his/her grievance to writing on an approved form and shall present it to the employee's immediate supervisor within ten (10) working days after he/she knew or should have known of the cause of such grievance. The immediate supervisor may confer with the grievant and his/her department steward (or an alternate if the department steward is unavailable due to illness or vacation) before preparing the Step 1 answer.

The employee's immediate supervisor shall, within ten (10) working days of receipt of the grievance, inform the employee and his h/her department steward (or his/her alternate) in writing, of his/her decision.

(2) **Step 2.** If the grievance is not settled at the first step, the Union may appeal to the Town Chair by delivery of two (2) written copies of the appeal within five (5) working days after the date of delivery of the Step 1 answer.

The Town Chair shall meet with the grievant, his/her department steward (or an alternate if the department steward is unavailable due to illness or vacation) prior to preparing the Step 2 answer.

The Town Chair shall deliver the written Step 2 answer to the grievant and his/her department steward (or alternate) within ten (10) working days of receipt of the Step 2 appeal.

(E) **Arbitration.** If the grievance is not settled at the second step, the grievance shall be submitted to arbitration upon request of the aggrieved party within thirty (30) calendar days of receipt of the Step 2 answer.

(F) **Selection of Arbitrator.** In the event any grievance remains unresolved after exhausting the grievance procedure, the aggrieved party may request the Wisconsin Employment Relations Commission (with a copy of the request to the other party) to appoint a WERC representative to resolve the dispute. In any event, the parties may attempt to mutually select a member of the WERC staff.

(G) **Arbitration Hearing.** The arbitrator shall use his best efforts to mediate the grievance before the final arbitration hearing. The parties shall agree in advance upon procedures to be used at the hearing and the hearing shall follow a quasi-judicial format. The arbitrator selected shall meet with the parties as soon as a mutually agreeable date can be set 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 as soon as possible to both the Town and the Union, which shall be final and binding upon both parties.

. . .

Article 16 – Miscellaneous

(F) **Modification and Execution in Counterparts**

. . . furthermore, no modification of this agreement may take place unless it is in writing and approved under the same standards as was required for the approval by the principals to this agreement of the original agreement.

Neither party has submitted a copy of the manual or any parts of any employee manual. There is a copy of the 2002–2004 agreement submitted, but that does not have any employee manual attached to it.

After both parties ratified the 2002–2004 agreement in November of 2002, each of the members of the bargaining unit signed, on December 4 or 5, 2002, a document prepared by the Town which states in pertinent part:

> I HAVE READ, UNDERSTAND AND UNCONDITIONALLY AGREE TO COMPLY WITH ALL OF THE PROVISIONS OF THE TOWN OF SOMERS EMPLOYEE AND PROCEDURES MANUAL. I UNDERSTAND THAT ANY VIOLATION OF THIS POLICY SHALL BE GROUNDS FOR DISCIPLINE, INCLUDING, WITHOUT LIMITATION, REVOCATION OF ACCESS PRIVILEGES, DISMISSAL AND POSSIBLE LEGAL ACTION.

Each such document contains a handwritten statement near the employee signature portion which states substantially as follows:

I acknowledge receipt but reserve my right to agree.

At least one such document has parts of the above capitalized verbiage, particularly the word "AGREE", crossed out. The manual referenced in the document was adopted by the Town on August 27, 2002, prior to the ratification of the agreement. This manual does not contain the accident and sickness benefit in question, which was repealed by the Town on August 27, 2002. The Town's prior manual did contain the accident and sickness benefit in question.

No benefits have been paid under the accident and sickness policy since August 27, 2002. The last time benefits were paid to a bargaining unit employee under the policy was on or about July of 2002. No claims for accident and sickness have been made since then.

Nothing contained in either parties' submissions indicate that the August 27, 2002 Town action in eliminating the accident and sickness benefit was discussed with or negotiated by the parties at any time prior to the agreement being signed. The Union contends it became actually aware of the difference in the manuals (and presumably their differing provisions on the subject) during contract negotiations in May of 2005. The Town contends the Union was aware of the difference before that. After making some attempt to negotiate with the Town on the issue, the Union filed within 10 days of such attempt the grievance at the first step of the grievance process. That grievance was filed on May 19, 2005. The alleged infraction date is: 5/19/06/continuous. The grievance process was then followed through steps 1 and 2 without resolution of the matter. By letter of June 7, 2005 the Town provided its written answer to the step 2 appeal. By memo of June 15th the Union wrote to the Town with its request for arbitration. The memo is in re: appeal for arbitration. The memo contains the following statement:

> Therefore, pursuant to Article 13 subsection (F) I am submitting a copy of the unions request for arbitration and I am also providing Thomas G Berger's phone number pursuant to Article 13 subsection (G) for pre-arrangement's.

The Town did not react to or reply to the June 15th Union memo.

By letter on November 30, 2005 AFSCME Council 40 District Representative Thomas G. Berger wrote to the Town. He referred to the June 15th memo. Among other things the letter states that: . . . it is our intent to take this grievance to the final step of the grievance procedure. This is our second NOTICE to the Town of Somers to that effect". The Town replied by letter of December 7th. Therein it stated the Town has never received notice from the bargaining unit that it (the union) had requested that the Wisconsin Employment Relations Commission appoint an arbitrator pursuant to subsection (F) of Article 13 of the Collective Bargaining Agreement. The Town's letter also raised a timeliness issue as to Article 13 subsection (E), stating that such a request by the union to the WERC must take place within 30 days of receipt of the Step 2 response from the Town – in this case on or before July 8, 2005. The Town's letter further restated its earlier position that because of the nature of the grievance the actual time for filing the original grievance had expired on November 12, 2002. The Town stated that it has yet to receive any notification from the bargaining unit that it has notified the WERC of its intention to seek arbitration. The Town also stated the time for pursuing this grievance has long since expired.

The Union then filed its Request to Initiate Grievance Arbitration with the Wisconsin Employment Relations Commission on January 18, 2006. In responding to that request the Town raised the issues of the subject of the grievance, the timeliness of filing the grievance more that 10 days after November 12, 2002, the timeliness of the request for arbitration, and failing to provide notice to the Town as to filing for arbitration.

Other matters appear as in the discussion.

DISCUSSION

This matter presents issues of both substantive arbitrability and procedural arbitrability. Substantive arbitrability concerns whether the arbitration clause in the collective bargaining agreement is susceptible to an interpretation that covers the asserted dispute. 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.

The Town argues that the accident and sickness provisions cannot be arbitrated under this collective bargaining agreement because those benefits were eliminated by the Town before the agreement was ratified and adopted by the parties. The accident and sickness benefits were contained in prior Town policies and were contained in an employee manual that was changed and replaced by the Town after its August 27, 2002 Town Board action. The Town argues that the ratification of the collective bargaining agreement incorporated by reference those benefits included in the employee handbook, not some benefits that were in existence at some prior time in the Town's history. The Union argues that the Town never notified the Union of either its intent to or the completion of the elimination of the accident and sickness benefit.

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.

The JEFFERSON standards are applied by arbitrators in determining substantive arbitrability. 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. Similar requirements exist here in the Article 13 grievance procedure of the agreement. The agreement defines a grievance: Should a difference arise between the Town and the Union or an employee concerning the interpretation, application or compliance with this Agreement . . . such difference shall be deemed to be a grievance and shall be handled according to the provisions herein set forth. The agreement also provides for the subject matter of a grievance, and states: A written grievance shall contain a clear and concise statement of the grievance and indicate the issue involved, relief sought, the date of the incident and/or violation taken place and the specific section of the Agreement involved. The arbitration clause in the agreement provides that if the grievance is not settled at the second step, the grievance shall be submitted to arbitration upon request of the aggrieved party within thirty (30) calendar days of receipt of the Sep 2 answer. Clearly the arbitration clause covers grievances.

Examining the definition, a grievance concerns the interpretation, application, or compliance with the agreement. The Union grievance referred to Article 7(A), Article 11(A), and Article 16(F). It contends that the Town of Somers changed/deleted an accident and sickness benefit without bargaining the effects of such change/deletion with the union. The grievance requests reinstatement of the benefit that was removed without union approval. Benefits are part of the subject matter of the agreement. Article 7(A) contains language that states: “This type of employee is entitled to all the usual and normal Town benefits”. Thus,

the language in the agreement, what is or is not a usual and normal Town benefit, becomes determinative. The question is, does Article 7(A) of this agreement provide for accident and sickness benefits. It may or may not. The answer to that question requires the interpretation of the agreement, its application and compliance. This in turn may very well depend upon whether the manual is part of the agreement, what, if any, past practice may have been involved, whether there was an effective renunciation of any past practice, what bargaining history exists, if any, as to the elimination of the benefit, what the actual manuals or handbooks might actually say, what the Union knew and when did it know it. Another question may be whether there are Town benefits which are not listed in either the agreement or the manual. Whether the agreement applies or not to the accident and sickness benefit can be answered by the interpretation and application of the agreement. Conversely, there is nothing in the agreement which specifically exclude this issue from the grievance and arbitration procedure. It cannot be said with positive assurance that the arbitration clause in this agreement is not susceptible of an interpretation that covers the asserted dispute.

Similarly, the grievance refers to Article 11(A), which contains the provision: "The Town shall maintain all existing insurance benefits other than health insurance". The application or interpretation of the agreement to the accident and sickness policy can determine if the policy was one of insurance which existed at the operative time and must be maintained or not. Again the arbitration clause does not exclude it.

The same holds for the Union grievance referencing Article 16(F), which provides that ". . . no modification of this agreement may take place unless it is in writing and approved under the same standards as was required for the approval by the principals to this agreement of the original agreement". This clearly has to do with the manner and the timing of the elimination of the benefit. This may also be impacted by the retroactive effect of the contract back to a time predating the elimination of the benefit. Whether that complied with the agreement is a matter that is covered by the arbitration clause. And it is not eliminated or excluded by the agreement.

Simply put, does the agreement include the benefits? The arbitration clause in this agreement is susceptible to an interpretation which covers the grievance that raises that question. The grievance is arbitrable and the Town's objection is denied.

The Town raises two procedural arbitrability issues, both concerning timeliness.

The Town argues that the grievance is not timely because it should have been filed within 10 days of December 12, 2002. The agreement was ratified and approved by the Union and the Town on December 12, 2002. The grievance procedure in Article 13(C)(1) has a ten (10) working day time limitation to present a grievance after the grievant knew or should have known of the cause of such grievance. In support of this contention the Town argues:

> (3) The Collective Bargaining Agreement which incorporated by reference the then-existing policies of the Town (i.e. the Employee Manual adopted August 27, 2002) was ratified by the Union and approved by the Town on November 12, 2002. A photocopy of the signature page of the Collective Bargaining Agreement indicating the date of final approval is attached hereto as Exhibit "12".

The Town makes a similar statement (in its argument on the substantive arbitrability issue) as to reference to the manual:

> . . . The ratification of the Collective Bargaining agreement incorporated by reference those benefits included in the Employee Handbook, not benefits which were in existence at some prior time in the Town's history. . . .

The Town maintains that the grievance would have to have been made within ten (10) working days after approval of the collective bargaining agreement by the Town – i.e. within ten (10) working days of November 12, 2002. And even if a proper subject for the grievance procedure, it is 2 1/2 years late.

The Towns argument is factually and legally dependent upon the terms of the manual having been incorporated into the collective bargaining agreement signed by the parties. This presupposes that both parties knew what was in the manual when the agreement was signed. However, the collective bargaining agreement does not make any reference to the employee manual, let alone specifically incorporate it by reference. It is not clear if all or only some of the Town's benefits are contained in the employee manual. Other than FMLA, there are only two statements in the agreement that mention other benefits or insurance not otherwise contained in the agreement itself:

> This type of employee is entitled to all the usual and normal Town benefits. A7 (A).

and,

> The Town shall maintain all other existing insurance benefits other than health insurance.A11 (A) (1).

Neither of these statements references the employee manual. The reference to all the usual and normal Town benefits is not the same as referencing, in similarly generic terms, the then-existing policies of the Town or the employee manual itself as argued by the Town. The inquiry of the arbitrator referred to in the introduction had to do with the incorporation by reference argument of the Town and asked both parties:

> Could each of you point out to me where in the agreement is the incorporation by reference to the policies or manual? If you could point out the Article and Section that would be helpful.

The Union responded to the effect that there is no mention in the labor agreement of policy manuals. The Town has not pointed out where the manual is mentioned or referenced in the agreement. Even if there was an employee manual attached to the agreement, without some clear statement in the agreement that it is incorporated into the agreement it is not yet known or determined what effect is to be given to it. There is a wage schedule called Exhibit A attached to the agreement after the signature page. This is referred to in the Agreement at Article 11(B) with the following language: "Wages shall be paid in accordance with the attached Exhibit "A" which is incorporated herein by reference". Also, there is a grievance form attached to the agreement in the form used by the instant grievance. The contents of the form appear to comply with and exceed the agreement's requirements for a written grievance under Article 13(B). The agreement at Article 13(C)(1) requires a grievance to be on an approved form. There is also an Exhibit "B" attached to the agreement behind the signature page. This appears to list requirements for becoming or advancing to either a Public Works I or II employee, and those two classifications are contained on the Exhibit A wage schedule. However, there does not appear to be any reference in the agreement itself to an Exhibit "B". It thus appears that if the parties want to specifically incorporate a document by reference they know how to do it. On the other hand, some things are left for inference, such as the applicability of Exhibit B, which does have some tie in to Exhibit A, and the grievance form which actually contains more information than the agreement requires.

It is not clear if the manual dated September 4, 2002 and purportedly attached to the agreement is the same employee manual as that acknowledged as received in December of 2002. It seems likely that it would be. Similarly, there has been no demonstration by either party that the Union was present at the August 27th Town meeting to hear any possible discussion of the actual content of the "corrections" to the manual, that corrections meant changing benefits reflected in the manual, or that changes were discussed or negotiated with the Union. And, significantly, the receipts signed by the Union members are dated December 4 and 5, 2002. This is well beyond the ten (10) working days the Town argues for filing the grievance. Thus if those receipts are of any consequence, any incorporation of the manual by reference, had there been such reference, could not have occurred until after the agreement was signed. Not only is this not logical, it would also be impossible for the Union to file a grievance within the time argued by the Town.

Whether attached to the agreement when signed or not, there is no incorporation by reference of the manual into the agreement because the parties knew how to do that and they did not. The Union contends it did not know of the changes in the manual or policy when the agreement was signed. Absent the Union reviewing the policy for that it is reasonable that the Union would not have known this, given there is no indication of notice of repudiation, notice of what corrections the Town made to the policy, and a lack of bargaining over this before signing.

That leaves the question of whether the Union should have known about the change in the policy and manual as of the time of signing the agreement in that there was a copy of manual attached to it. The argument presumably is that they should have read it and discovered the change before signing. Given that it is the provisions of the agreement which the Union is charged with knowledge of, an incorporation by reference to the manual was not made, there being no specific mention or negotiation between the parties on the matter before signing, and, no claims for the benefits were filed so as to bring the matter to the attention of the Union, nothing would alert the Union to the change. Under all these circumstances it is reasonable for the Union to have understood that all prior benefits would continue so that they need not have perused any attached manual to check for any change. Had there been a specific incorporation by reference things may be different. Nothing demonstrated that the Union, as grievant, knew or should have known that the accident and sickness policies were no longer part of the manual or collective bargaining agreement so as to be the cause of a grievance as of November 12, 2002. Thus, the Town's objection to timeliness is denied.

A second procedural arbitrability issue raised by the Town also goes to timeliness. The Town asserts that after the Step 2 response from the Town was received by the Union on June 7, 2005, Article 13 requires any request for arbitration must occur within 30 days of the Step 2 answer. The Town argues that any appeal from the Step 2 response which was given to the Union would have to have been made to the WERC no later than July 8, 2005. Nothing was filed with the WERC until January 18, 2006, well beyond the 30 day jurisdictional time limit provided for by Article 13.

When the Union received the Town Step 2 denial on June 7, 2005, the Union gave the Town a written memo of June 15, 2005, referencing appeal for arbitration and the Union's request for arbitration. Article 13(E) requires that the grievance be submitted to arbitration upon request of the aggrieved party within the thirty (30) calendar days. There are two things involved here. One is a submission to arbitration and the other is a request of the aggrieved party. The Union did submit a request for arbitration to the Town within that time period. Article 13(E) provides that the grievance shall be submitted to arbitration upon request. It does not say who submits the grievance to arbitration by the WERC or to anyplace else. It is the following subsection, Article 13(F), which provides for selection of the arbitrator and provides that the aggrieved party may request the WERC to appoint a representative to resolve the dispute. This is the section which specifies where and how the arbitrator is selected pursuant to the request for arbitration in subsection (E). Subsection (F) does not have a time limit on it for requesting the WERC to appoint a representative or to send a copy of the request to the other party. To read a thirty (30) day time limit into Article 13 (F) would be to add something to the agreement which is not there. The arbitration clause prohibits that. And, to place the Thirty (30) day filing requirement with the WERC into Article 13(E) would be to render most, if not all, of Article 13 (F) meaningless. Here, the Union met the time limits in the grievance and arbitration process when it provided its request for arbitration to the Town within the thirty (30) calendar days. The Union may still owe the Town a copy of the WERC filing, but the agreement sets no time limit for that to occur. Therefore, the Town's objection to timelines is denied.

The grievance is substantively and procedurally arbitrable.

ORDER

Based upon the foregoing, it is ordered that the objections to arbitrability are denied. The case will proceed to a hearing on the merits after affording the parties an opportunity to mediate as provided in the collective bargaining agreement.

Dated at Madison, Wisconsin, this 17th day of May, 2006.

Paul Gordon /s/
Paul Gordon, Arbitrator

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