

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 7

No. 65498

MA-13235

(Management/Bargaining Unit Work 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 Overtime signup/Reduction Bargaining Unit Work. This has to do with a grievance alleging management performing bargaining unit work. 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.

ISSUES

The Town submits two jurisdictional reasons why the grievance is not arbitrable. The Town submits that the Union failed to conform to the contractually imposed statute of limitations of filing with the WERC no later than December 18, 2006, and also in contravention of Article 13(F) of the agreement which requires a copy of the request filed with the WERC be provided to the other party – in this case the Town.

BACKGROUND

On October 31, 2005, the grievant filed the grievance involved herein with the Town. On November 2, 2005 a Step 1 response was delivered by the Town to the Grievant. On November 11, 2005 a Step 2 appeal was delivered by the grievant to the Town. A Step 2 answer of the Town was delivered to the Grievant on November 17, 2005. Shortly after November 30, 2005, and within 30 calendar days of the Step 2 answer being received by grievant, the Union filed with the Town a letter dated November 30, 2005 from Thomas G. Berger, District Representative, on behalf of the Union regarding the grievance. The letter stated in pertinent part:

The above mentioned grievance has been forwarded to me to take this grievance to the next step of the grievance procedure. . . .

Please be advised that now that a successor labor agreement has been ratified by the members of Local 71 which again allows the Union to petition to arbitration, it is our intent to take this grievance to the final step of the grievance procedure. This is our notice to the Town of Somers to that effect.

By letter of December 7, 2005, The Town responded to Berger with the following letter:

I am in receipt of your letter dated November 30, 2005, pertaining to the above matter. I am of the impression that you do not agree with the management position in this matter. Please be mindful that in the event that if you wish to pursue this matter further, the unit must contact the Wisconsin Employment Relations Commission to appoint an arbitrator pursuant to subsection (F) of Article 13 of the Collective Bargaining Agreement which was in effect at the time of the action which is complained of by the Union. Once the Town has been contacted by the WERC that such a request has been made, the Town will proceed to the arbitrator's directives.

Also by letter of December 7, 2005, the Town wrote to Berger concerning a different grievance filed by the Union, grievance 71-01, which grievance is also the subject of a grievance arbitration before the arbitrator in Case 6, No. 65497, MA-13235. That arbitration has essentially the same arbitrability issue, among others, as the instant case. That December 7th letter from the Town to the Union raised the issue of the Union not having filed a request for arbitration with the Wisconsin Employment Relations Commission within 30 calendar days of the Union's receipt of the Town's Step 2 answer in that grievance as well as the issue of presenting a copy of such request to the Town within that time period.

As to the instant grievance, on January 18, 2006 the Union filed for grievance arbitration with the Wisconsin Employment Relations Commission. The Commission sent the Town a filing fee invoice dated 1/18/2006. The Union has not yet sent the Town a copy of the appeal or request for grievance arbitration filed with the Wisconsin Employment Relations Commission on January 18, 2006.

The collective bargaining agreement contains the following pertinent provisions:

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/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.

Other matters appear as in the discussion.

DISCUSSION

The Town's jurisdictional objections present issues of procedural arbitrability, as opposed to substantive arbitrability. 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 contends that the Union, in order to comply with the time requirements in the grievance procedure set out in Article 13, must file its request for grievance arbitration with the Wisconsin Employment Relations Commission within thirty (30) calendar days of the Union receipt of the Step 2 answer. The Town further contends that the Union must provide a copy of that filing to the Town. Here, the Town's Step 2 answer was on November 17, 2005. The Town contends that the filing with the WERC must occur within thirty (30) calendar days of that date, which is December 18, 2005. The Union filed on January 18, 2006, thirty-one (31) days late. And, no copy of the filing was provided by the Union to the Township. The Town notes that this should have been clear to the Union given the language of the collective bargaining agreement and the written communications between the parties, including the writings in the other mentioned grievance.

The resolution of the issues is essentially the same as the resolution on the other mentioned grievance arbitration as to the issue of arbitrability.

When the Union received the Town Step 2 denial on November 17, 2005, the Union gave the Town a written letter of November 30, 2005 which was in regard to the Town Response to grievance #71-U10. The letter mentioned the next step of the grievance procedure, the petition to arbitration, and the Union's intent to take the grievance to the final step of the grievance procedure. The letter was the Union's notice to the Town to that effect. It was the next part of the grievance process after the Step 2 answer, which is in Article 13(E) of the collective bargaining agreement. 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 when it provided the letter of November 30, 2005. It was a notice to the Town of the Union's intent to petition to arbitration, which is the final step in the grievance procedure. 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 any place 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. Conversely, 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. The Town responded to the November 30th Union letter by its letter of December 7, 2005. That letter referred to Article 13(F) in pursuing the matter further. That makes sense in that the previous procedure is Article 13(E), which provides for the request for arbitration within 30 days of the Step 2 answer, and not the filing with the WERC as provided in the next subsection, Article 13(F). The fact that the Town sent the Union a different letter in a different grievance concerning different dates is not dispositive. It may have related to how the Town interpreted the same

procedural step, but the two letters are not the same and neither can be considered binding on the other. Moreover, as determined in the companion Order in that matter, the resolution on that point also provided a finding that there is no timeliness bar to arbitrability in that case. 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. It was not bound by a time limit after that for filing with the WERC. 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 jurisdictional objections to timelines and arbitrability are denied.

The grievance is 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 called for in the collective bargaining agreement.

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

Paul Gordon /s/

Paul Gordon, Arbitrator