

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
MILWAUKEE DEPUTY SHERIFFS' ASSOCIATION

and

MILWAUKEE COUNTY

Case 560
No. 64539
MA-12930

*(James Fuerst Grievance
re: Deputies LaMothe and Stowers)*

Appearances:

Eggert & Cermele, S.C., Attorneys at Law, by **Rachel L. Pings**, on behalf of the Milwaukee Deputy Sheriffs' Association.

Timothy R. Schoewe, Deputy Corporation Counsel, on behalf of Milwaukee County.

ARBITRATION AWARD

The Milwaukee Deputy Sheriffs' Association, hereinafter the Association, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Association and Milwaukee County, hereinafter the County, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The County subsequently concurred in the request and the undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate in the dispute. A hearing was held before the undersigned on September 1, 2005, in Milwaukee, Wisconsin. There was no stenographic transcript made of the hearing and the parties submitted post-hearing briefs in the matter by October 21, 2005. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The County raised a procedural issue as to arbitrability and the parties stipulated to a statement of the substantive issue. The issues to be decided are:

- (1) Is the grievance arbitrable?

If so,

- (2) Did Milwaukee County violate Section 3.31 of the collective bargaining agreement by not paying the attorney's bill submitted by the Grievant, James Fuerst? If so, what is the remedy?

CONTRACT PROVISIONS

The following provisions of the parties' Agreement are cited, in relevant part:

3.31 LIABILITY INDEMNIFICATION

Every employee covered by this Agreement shall be saved harmless from any and all liability, which may arise against him or her during the good faith performance of such employee's duties for false arrests, erroneous service of civil process, false imprisonment and other hazards that law enforcement officers are traditionally confronted with. In the event that any employee is confronted with the situation where it becomes necessary for him to defend himself against such charges as those enumerated herein above, he shall have the services of the Milwaukee County Corporation Counsel's office made available to him which shall undertake the defense of such charges. Costs of the trial or other costs connected with the defense of charges made against the employee shall be reimbursed by Milwaukee County to the employee. The employee will be compensated at his regular rate of pay for any time which is required of him to be away from his employment duties for depositions, trial or other hearings necessary in connection with his defense of such charges as referred to herein above. A judgment for money damages, costs, and attorney's fees of a plaintiff or claimant in such a matter will be paid for by Milwaukee County without the employee being in peril of having his property subject to execution or other collection device.

...

PART 5
5.01 GRIEVANCE PROCEDURE

. . .

(6)

. . .

(c) Procedure To Be Followed When Initiating A Written
Grievance:

1. The employe alone or with his/her Association Representative shall cite the precise rule, regulation or contract provision that was alleged to have been violated at the first step of the grievance procedure.

2. The employe alone or with his/her Association Representative shall in writing provide his/her immediate supervisor designated to hear grievances an explanation as to when, where, what, who, and why the employe believes that his/her contractual rights have allegedly been violated. The written Grievance Initiation Form shall contain the date or time that the employe alleges that his/her contractual rights have been violated.

3. The employe alone or with his/her Association Representative shall detail, in writing, the relief the employe is requesting.

. . .

5. The Grievance Initiation Form shall be prepared by the employe or with his/her Association Representative in a manner that is neat, clear, and discernible. The grievant(s) must sign the grievance. Failure of the grievant(s) to sign the grievance shall bar the grievance from being processed.

6. If the employee alone or with his/her Association Representative fails to follow section 5.01(6)(c)1, 2, 3, 4 or 5, the employee's immediate supervisor designated to hear grievances may return the Grievance Initiation Form to the employee for corrections. If the employee fails to make the corrections within 15 days of such return, the grievance shall be barred.

. . .

(10) Representation at hearings on group grievances shall be limited to two (2) employees from among the group, except in those cases where the Association and the department involved agree that the circumstances of the grievance are such as would justify participation by a larger number. One employee of the group shall be designated as the grievant to whom the Grievance Disposition Forms shall be forwarded.

. . .

BACKGROUND

The facts for the most part are not in dispute. Deputies LaMothe and Stowers were involved in an on-duty incident at the Milwaukee County Jail on May 16, 2003, during which they were required to use force to subdue an unruly inmate. The inmate filed a complaint against the deputies. In the past, when such inmate complaints were filed, the immediate supervisor of the employee involved reviewed the allegations to determine whether the Department needed to proceed to a criminal investigation. However, the Sheriff had come out with a new directive that if a complaint was filed that could result in criminal charges, it would be investigated by the Department's Bureau of Internal Affairs and the Milwaukee County District Attorney's office.

Rather than rely on the County's Corporation Counsel's office to represent the two deputies, the Association voted to have Attorney Cermele, from the law firm that represents the Association, represent the Deputies in the investigation, on the basis that there would be a conflict of interest on the part of the Corporation Counsel's office. Attorney Cermele represented the deputies in the investigation and when it was completed, submitted his bill for legal services to the County on behalf of Deputies LaMothe and Stowers. The County subsequently declined to pay the attorney's fees by letter of May 12, 2004.

The parties also stipulated to the following:

- 1) The deputies were in good faith performance of their duties on May 16, 2003 and the duties they were performing were hazards that law enforcement officers (Milwaukee County Deputy Sheriffs) are traditionally confronted with.
- 2) The deputies were investigated by the Milwaukee County District Attorney's office.
- 3) No criminal charges were brought. (See Joint Exhibit 4 - Letter of June 12, 2003 from Assistant District Attorney Zimmer).
- 4) James Fuerst was the person who signed the grievance form and was the Association President at the time.
- 5) Enclosed with Joint Exhibit 6 were Joint Exhibit 4 and Joint Exhibit 5 (Attorney Cermele's August 14, 2003 itemized bill for professional services rendered on behalf of Deputies LaMothe and Stowers in regards to the May 16, 2003 incident).
- 6) Joint Exhibit 6 represents that the bill was submitted to the County. ¹

On June 8, 2004, a grievance was filed by James Fuerst, which stated, in relevant part:

What happened to cause your Grievance? (Please give details as to Date, Where, Who was involved.)

A claim was made by the Association law firm, Eggert & Cermele, for the payment of their services in representing Deputy Thomas LaMothe and Deputy Charles Stowers. (See attached materials).

What Rule, Regulation, Contract Provision, etc. was violated?

See Sec. 3.31 of the 2001-2003 Agreement Between County of Milwaukee and Milwaukee Deputy Sheriffs' Association.

What specific relief do you want?

Payment of bill.

¹ Joint Exhibit 6 is the August 19, 2003 claim filed with the County Clerk under Sec. 893.80, Stats., by Attorney Cermele on behalf of Deputies LaMothe and Stowers.

Fuerst signed his name where the grievance form asked for the "Signature of the Grievant".

The grievance was subsequently denied by the following letter of February 10, 2005, which reads, in relevant part:

Dear Mr. Felber:

The following grievance did not have a step-one or step-two hearing and has not had a formal appeal filed moving the grievance to step three as provided for in the Milwaukee Deputy Sheriffs' Association memorandum of agreement. The following disposition is provided on a non-precedent setting basis and is summarized as follows:

Grievant: James Fuerst **Grievance #** 39950 **Appeal #:** DSA-149

Subject: Attorneys Fees

Disposition: Grievance Denied.

Please circle your answer to the disposition of the grievance, sign, date, and return the original to Labor Relations.

Sincerely,

Approved NOT Approved

Troy M. Hamblin /s/
Troy M. Hamblin, Director
Labor Relations

Roy Felber, President Date
Milwaukee Deputy Sheriffs' Assn.

The parties proceeded to arbitration of their dispute before the undersigned. At hearing, the County raised the threshold issue of the arbitrability of this grievance.

POSITIONS OF THE PARTIES

Arbitrability Issue

County

The County asserts it questioned the arbitrability of this matter from the outset. The Association President, James Fuerst, initiated this grievance, but no grievable event happened

to Fuerst; rather, he acted as a surrogate for the individuals who should have been grieving. Nothing in the Agreement allows for this. Those individuals never followed the procedures which are set forth in clear and unambiguous terms. The individual with the grievable interest must initiate the grievance, not another party, and certainly not in the name of the other party.

The County cites a 1975 award by Arbitrator Frank Zeidler involving another bargaining unit wherein it was held that under the language of the relevant agreement, “the employee who is actually aggrieved is to initiate the grievance”, and the grievance filed and signed by the union steward for the aggrieved employees was found to not be arbitrable. The County asserts that even though the award involves a different bargaining unit, it dealt with the same grievance initiation language present in this case and reflects a long-standing practice of not recognizing such a thing as a “union grievance”.

In its reply brief, the County asserts that the grievance was brought in Fuerst’s name and was never posed as a “group grievance”. Even if it had been, the clear language of the Agreement requires that the grieving employees sign the form. LaMothe and Stowers did not sign the grievance and nothing in the Agreement excused them from that obligation.

Association

The Association asserts the County’s argument that the grievance is not arbitrable fails for three reasons. First, Section 5.01(6)(c)5 merely requires that “The grievant(s) must sign the grievance.” This is undoubtedly to prevent unsigned grievances from being processed. Here, Fuerst signed the grievance and there is no evidence to demonstrate Fuerst was not the appropriate “grievant”. The Agreement does not define “grievant”, and Fuerst was as appropriate a grievant as LaMothe and Stowers, as he was aware of the circumstances surrounding the incident and the one to actually authorize advance payment of Attorney Cermele’s bill from Association funds. Further, Deputies LaMothe and Stowers were named in the grievance. Second, Section 5.01(6)(c)6 puts the onus on the County to return the grievance form to the employee for corrections, if he fails to follow Secs. 5.01(6)(c)1, 2, 3, 4 or 5. Thus, if the County felt the form was incorrectly signed by Fuerst, it should have returned it to him so the alleged error could be corrected, rather than claim it is procedurally deficient a year later. Third, Section 5.01(10) provides for “group” grievances and this grievance has obvious Association-wide importance, such that the then Association President pursued the issue as the named grievant on behalf of the Association as a “group”.

In its reply brief, the Association asserts that rather than relying on contract language to support its position, the County relies on an umpire’s ruling from 1975 involving a different union, arguing it constitutes a “long standing practice”. While there may not have been such a thing as a “union grievance” for that union at that time, that does not control the issue in this case. The parties, the contract language, and the facts are different here, and there is no

evidence the ruling should apply. Significant differences are the definition of a grievance and the existence of Secs. 5.01(6)(c)6 and 5.01(10). Further, the ruling acknowledges that other facts or other contract language could warrant a different outcome. Other than this ruling, the County has provided no evidence as to why Fuerst was not properly designated as the grievant for a group grievance under Sec. 5.01(10). If there was a long-standing practice of no group grievances, why would the Agreement specifically provide for them? Last, the County also fails to explain why, if it felt the grievance was deficient, it did not return the grievance to be corrected, as provided for in Sec. 5.01(6)(c)6.

DISCUSSION

While it does not appear that the County raised the issue of the arbitrability of this grievance, based upon who filed and signed the grievance, prior to the arbitration hearing, arbitrators have generally found the failure to raise the issue previously does not waive the right to contest arbitrability before the arbitrator.²

The Association argues that Sec. 5.01(6)(c)6, of the Agreement, requires management to return the grievance form to the employee for corrections, and that failure to do so effectively precludes the County from later asserting the grievance is procedurally deficient. However, that provision states the employee's supervisor "may return" the grievance form to the employee for corrections, making it discretionary on management's part. Further, Sec. 5.01(6)(c)5 sets forth the consequences for not complying with the requirement that the grievant sign the grievance, independent of Sec. 5.01(6)(c)6, which sets forth the consequences of not making the corrections in the grievance form within 15 days, if the grievance form had been returned to the employee for corrections. Thus, the requirement of Sec. 5.01(6)(c)5 that the grievance be signed by the grievant is separately enforceable from Sec. 5.01(6)(c)6, of the Agreement.

The Association next argues that it was appropriate for Fuerst to sign the grievance as the grievant on the basis that the grievance can be considered a "group" grievance on behalf of the Association, or that Fuerst was himself aggrieved, both as a member of the Association that paid for the legal services that the County should pay for and as the individual that authorized such payment with the expectation of being reimbursed by the County. Neither basis the Association offers is persuasive for a number of reasons. First and foremost, the grievance does not purport to be a "group" grievance or a grievance on behalf of the Association; rather, the grievance references the claim for payment of the bill from the Association's law firm for representing Deputies LaMothe and Stowers. Similarly, the law

² "The right to contest arbitrability before the arbitrator is usually held not waived merely by failing to raise the issue of arbitrability until the arbitration hearing." Elkouri and Elkouri, *How Arbitration Works* (Sixth Edition), citing numerous cases. At p. 290.

firm's claim filed with the County by Attorney Cermele indicates it was filed "on behalf of Milwaukee County Sheriff's Deputies Thomas LaMothe and Charles Stowers. . ." Further, Deputy LaMothe testified he was told that if the County did not pay the law firm's bill, he would be responsible for doing so. Last, the rights being asserted in this grievance under Section 3.31 attach to the individual employee, rather than to the Association.

While the contract language involved in the two cases differ somewhat, for much the same reasons as Arbitrator Zeidler, the undersigned finds that the wording of the parties' grievance procedure requires the conclusion that the grievance must be signed by the employee who is actually aggrieved by the County's actions. Section 5.01(6)(c) of the Agreement sets forth the "Procedure To Be Followed When Initiating A Written Grievance" and the steps to be followed. Those steps refer to "The employee alone or with his/her Association Representative. . ." Steps 2 and 3 also reference "the date or time that the employee alleges that his/her contractual rights have been violated" and "the relief the employee is requesting", respectively. The implication is that it is the employee who is the grievant, as he/she may proceed through these steps alone or with an Association representative, and it is the employee's contractual rights that are in issue. Section 5.01(6)(c)5 then states, "The grievant(s) must sign the grievance." It does not state that the employee or his/her representative may sign the grievance. By necessary implication, it is the aggrieved employee who must sign the grievance. In this case, that must be the employee who would be responsible for paying the law firm's bill, if the County does not, i.e., Deputies LaMothe and Stowers.

It is not clear why the Deputies chose not to sign the grievance, but it is clear what the consequence is of their not doing so. Section 5.01(6)(c)5, of the Agreement expressly states that, "Failure of the grievant(s) to sign the grievance shall bar the grievance from being processed." As noted previously, this consequence is independent of the time bar set for making corrections set forth in Sec. 5.01(6)(c)6. Having not signed the grievance, the grievance is barred by operation of Sec. 5.01(6)(c)5, of the Agreement.

Based upon the foregoing, the evidence, and the arguments of the parties, the undersigned makes and issues the following

AWARD

The grievance is not arbitrable.

Dated at Madison, Wisconsin, this 31st day of May, 2006.

David E. Shaw /s/

David E. Shaw, Arbitrator

DES/gjc
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