

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

THE MADISON PROFESSIONAL POLICE OFFICERS ASSOCIATION

and

CITY OF MADISON

Case 259

No. 66183

MA-13451

Appearances:

Attorney Larry W. O'Brien, Assistant City Attorney, City of Madison, 210 Martin Luther King, Jr. Boulevard, Room 401, Madison, Wisconsin 53703-3345, appearing on behalf of the City

Cullen, Weston, Pines & Bach, LLP, by **Attorney Nicholas Fairweather**, 122 West Washington Avenue, Suite 900, Madison, Wisconsin 53703, appearing on behalf of the Union

ARBITRATION AWARD

The Madison Professional Police Officers Association herein referred to as the "Association," and City of Madison, herein referred to as the "City," jointly selected the undersigned from a panel of arbitrators from the staff of the Wisconsin Employment Relations Commission as the impartial arbitrator to hear and decide the dispute specified below. The undersigned held a hearing on November 8, 2006, in Madison, Wisconsin, during the course of which the parties stipulated to all relevant facts. Each party filed post-hearing briefs, the last of which was received February 6, 2007. ¹

¹ The parties stipulated that I could reserve jurisdiction over the calculation of attorneys' fees, if any, if either party requested in writing that I do so, copy to opposing party, within sixty (60) days of the date the award is issued.

ISSUE

The parties disagreed as to the statement of the issues, but they agreed that I might state them. I state them as follows:

The substantive issues presented in this case are:

1. Did the City violate Article XVII when it refused to pay the legal fees Officer Berkovitz incurred as a result of City's prosecution of citation number F7573112?
2. If so, what is the appropriate remedy?
3. Did the Association waive Officer Berkovitz's individual right under Sec. 895.46, Stats, to seek reimbursement of the disputed legal fees through proceedings other than the grievance procedure of this agreement?

FACTS

The City is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats. It operates a police department employing, among others, sworn police officers. The Association is a labor organization within the meaning of Sec. 111.70(1)(h), Stats. The Association has been the collective bargaining representative of the sworn police officers of the City, including Grievant, Alexander Berkovitz, at all relevant times. The parties have had many consecutive collective bargaining agreements. The terms of Article XVII, Legal Protection, have been substantively unchanged for at least the last five agreements between the parties. The Association did not seek any substantive change in that provision in negotiations leading to those agreements.

The City issued citation number F7573112 (CITY OF MADISON, Case No. 06-14062) to Officer Berkovitz on February 7, 2006. The incident underlying the citation occurred during Officer Berkovitz's City work hours and involved actions which were within the course of his employment.

Officer Berkovitz tendered his legal defense to the City. The City declined to represent him. Officer Berkovitz obtained private legal counsel who represented him in the defense of the citation. The citation was dismissed. Officer Berkovitz submitted a request that the City pay the legal fees he incurred in the defense of the citation. The City refused by letter dated June 20, 2006. The letter states in relevant part:

The Agreement explicitly precludes provision of a legal defense or payment of legal fees where the 'action or special proceeding is brought by the City against the employee.' The City is not authorized to provide or pay for legal representation for Officer Berkovitz in defense of the City-issued citation. . . ."

The Association properly pursued a grievance seeking reimbursement of those fees under Article XVII of the agreement through all of the steps of the grievance procedure to arbitration.

RELEVANT AGREEMENT PROVISIONS

ARTICLE I CONSIDERATION

. . .

G. COMPLIANCE WITH TERMS:

It is agreed that all expenditures or compensation to be paid employees in accordance with this Contract must first meet the requirements and procedures required by law under the provisions of the Wisconsin Statutes and the Madison General Ordinances.

. . .

ARTICLE V EMPLOYER RIGHTS

A. The rights and responsibilities of the Employer shall include, but are not limited to, the following:

1. To hire, promote, transfer, assign and utilize employees.
2. To suspend, discipline, demote, discharge or lay off employees in accordance with the provisions of Wisconsin Statutes Sec. 62.13.

. . .

B. The rights and authority which the Employer has not officially abridged, delegated or modified by the terms of this Contract are retained by the Employer.

...

ARTICLE VI
GRIEVANCE PROCEDURE

A. DEFINITION:

A grievance shall be defined as a dispute or disagreement as to the interpretation, application or enforcement of any term(s) specifically expressed in this Contract.

...

5. Items exempt from consideration for processing under this grievance procedure shall include, but not necessarily be limited to, the following: all disciplinary matters involving the Police and Fire Commission.

...

D. DUTIES OF ARBITRATOR

The arbitrator shall have no right to amend, modify, nullify, ignore, add to, or subtract from the provisions of this Contract. He shall consider and decide only the specific issues submitted to him/her in writing by the Employer and the Association, and shall have no authority to make a decision on any issue not so submitted to him/her. The arbitrator shall submit in writing his/her decision within thirty (30) calendar days following the close of the hearing or the submission of briefs by the parties, whichever is later, unless the parties agree to an extension thereof. The decision shall be based solely upon his/her interpretation of the meaning and application of the express terms of this Contract. The decision of the arbitrator shall be final and binding on both the Employer and the Association. No award of any arbitrator may be retroactive for a period greater than thirty (30) calendar days prior to the presentation of the grievance in Step One.

...

ARTICLE XIV
AID TO CONSTRUCTION OF PROVISIONS OF CONTRACT

It is intended by the parties hereto that the provisions of this Contract shall be in harmony with the duties, obligations and responsibilities which by law devolve upon the Common Council and these provisions shall be applied in such manner as to preclude a construction thereof which will result in an unlawful delegation of powers unilaterally devolving upon the Common Council.

ARTICLE XV
SAVINGS CLAUSE

If any article or section of this Contract, or any addenda thereto, shall be held invalid by operation of law or by a tribunal of competent jurisdiction, or if compliance with or enforcement of any Article or section should be restrained by such tribunal, the remainder of this Contract and addenda shall not be affected thereby and the parties shall enter into immediate collective bargaining negotiations for the purpose of negotiating a substitute clause for such Article or section.

ARTICLE XVI
OTHER RIGHTS RESERVED

Notwithstanding any other provisions of this Contract to the contrary, the City and the Association reserve the right to enforce any other legal rights to which they are entitled.

ARTICLE XVII
LEGAL PROTECTION

A. ATTORNEY FEES

1. In the event an employee is proceeded against or is the defendant in an action or special proceeding in his/her official capacity, or arising out of his/her employment by the City, the City agrees to pay all reasonable attorney's fees required by the provisions of Sec. 62.115, 895.46 and/or 895.35 of the Wisconsin Statutes governing the obligations by the City to such employee, except in the

event the action or special proceeding is brought by the City against the employee, and provided, however, in any event, the City Attorney shall determine whether legal counsel shall be furnished to such employee by the City Attorney or his/her designee.

2. In the event an action or special proceeding is prosecuted by a third party before the Police and Fire Commission, the City agrees to pay reasonable attorneys' fees provided the employee is found by the Police and Fire Commission to have acted within the scope of his/her employment and the employee is exonerated by the Police and Fire Commission of all charges or the charges are otherwise dismissed or withdrawn.

RELEVANT STATUTORY PROVISIONS

895.46 State and political subdivisions thereof to pay judgments taken against officers. (1) (a) If the defendant in any action or special proceeding is a public officer or employee and is proceeded against in an official capacity or is proceeded against as an individual because of acts committed while carrying out duties as an officer or employee and the jury or the court finds that the defendant was acting within the scope of employment, the judgment as to damages and costs entered against the officer or employee in excess of any insurance applicable to the officer or employee shall be paid by the state or political subdivision of which the defendant is an officer or employee. Agents of any department of the state shall be covered by this section while acting within the scope of their agency. Regardless of the results of the litigation the governmental unit, if it does not provide legal counsel to the defendant officer or employee, shall pay reasonable attorney fees and costs of defending the action, unless it is found by the court or jury that the defendant officer or employee did not act within the scope of employment. The duty of a governmental unit to provide or pay for the provision of legal representation does not apply to the extent that applicable insurance provides that representation. If the employing state agency or the attorney general denies that the state officer, employee or agent was doing any act growing out of or committed in the course of the discharge of his or her duties, the attorney general may appear on behalf of the state to contest that issue without waiving the state's sovereign immunity to suit. Failure by the officer or employee to give notice to his or her department head or an action or special proceeding

commenced against the defendant officer or employee as soon as reasonably possible is a bar to recovery by the officer or employee from the state or political subdivision of reasonable attorney fees and costs of defending the action. The attorney fees and expenses shall not be recoverable if the state or political subdivision offers the officer or employee legal counsel and the offer is refused by the defendant officer or employee. If the officer, employee or agent of the state refuses to cooperate in the defense of the litigation, the officer, employee or agent is not eligible for any indemnification or for the provision of legal counsel by the governmental unit under this section.

POSITIONS OF THE PARTIES

City

The grievance filed in this case is not arbitrable. The Grievant is seeking attorney's fees in an action commenced by the City against him. Article XVII, Legal Protection, has a specific exception to the general obligation to provide legal fees. It provides "except in the event the action or special proceeding is brought by the City against the employee." There is no dispute in this case that the action was brought by the Employer against the employee and, therefore, the grievance is not arbitrable.

In reply, the City argues the Union has waived any statutory protection which the Grievant has under Sec. 895.46(1)(a), Stats. The parties have waived this right by repeated inclusion of Article XVII's exclusion provision in their last five agreements. The arbitrator must enforce the parties bargain according to its plain language. The arbitrator lacks authority to determine the legality of Article XVI.

Union

This grievance is arbitrable. The parties have specifically authorized the arbitrator to apply Sections 62.115, 895.46 and 895.35, Stats. The arbitrator has the authority to determine a dispute which is on its face governed by the collective bargaining agreement and this dispute is covered on the face of the agreement. The mandate of the statute is clear in this case. It requires that the City pay Grievant's legal fees in an unsuccessful action brought by the City against him arising out of his duties as a police officer for the City. The exception contravenes the statute and does not apply. The exception provided in Article XVII A. 1. is an unenforceable attempt to regulate, through bargaining, a matter which is regulated by controlling statute.

Even if the arbitrator does not determine that the exception is illegal, it is superseded by the statute. Article I states that it supersedes “ordinances and resolutions wherein there is a conflict with the terms of this Contract.” Ordinances and resolutions are legislation enacted by one of the parties to the agreement, the City. The Wisconsin Statutes do not fall into that category. The agreement itself recognizes its limitations; it cannot supersede state law. That fact, in addition to the parties’ recognition that “there be no abrogation of the duties, obligation, or responsibilities of any agency or department of City government which is not expressly provided for respectively either by: State Statutes, Ordinances and Resolutions of the City of Madison expect as expressly limited herein . . .” compels the arbitrator to recognize that the statutes supersedes Article XVII’s exception. The Association asks the arbitrator to sustain the grievance and order the City to pay Officer Berkovitz for his legal expenses incurred in the defense of Citation no. F7573112.

In reply, the Association agrees that the arbitrator is limited to interpreting the agreement, but argues that since the parties expressly incorporated the authority to interpret the applicable statutes, the arbitrator has the authority to interpret and apply the statutes in question.

DISCUSSION

I. Arbitrability and Statement of the Issues

The parties disagreed as to the statement of the issues in this case. The essence of the City's position is 1) that the exception clause of Article XVII (“ . . . except in the event the action or special proceeding is brought by the City against the employee”) excludes issues of the collection of fees and issues concerning the interpretation of that provision from arbitration and 2) in any event, the legality of that exclusion clause is not subject to arbitration. I conclude that the interpretation of the exclusion clause and its enforcement are subject to arbitration even though the collection of the legal fees which are the subject of this grievance is not permitted through the grievance procedure.

Where the parties submit the issue of arbitrability, but reserve the right to challenge that determination, the arbitrator is authorized to make an initial determination of arbitrability. A matter is arbitrable unless it can be said with positive assurance that the agreement is not susceptible of an interpretation that covered the dispute.² Article VI defines a grievance as “a dispute or disagreement as to the interpretation, application or enforcement of any term(s)

² JOINT. SCHOOL DISTRICT NO. 10, CITY OF JEFFERSON V. JEFFERSON EDUCATION ASSOCIATION, 78 Wis.2D 94, 106107, 111 (1977); MADISON TEACHERS V. MADISON METROPOLITAN SCHOOL DISTRICT, 271 Wis.2D 697, 707 (Ct. App., 2003)²

specifically expressed in this contract.” [Emphasis supplied.] Step 4 of the grievance procedure provides that if the parties cannot settle a grievance, the “Association and/or City may submit the issue(s) in dispute to [arbitration] . . .” The exclusion clause of Article VI is not a provision excluding a subject from arbitration.³ It is a provision limiting the scope of the coverage of the benefit conferred. It is itself a term of the collective bargaining agreement. The City seeks to “enforce” the exclusion and the Association seeks to have it not enforced. This is a dispute about the enforcement of the exclusion provision. A dispute about the enforcement of a provision of the agreement is no less a dispute under the agreement because the provision is unambiguous and the result clear. The City also takes the position that the exclusion clause should be “interpreted” as a waiver by the Association of the individual officer’s right to institute ordinary civil proceedings to collect the legal fees under Sec. 895.46, Stats. This is a dispute between the Association and the City about the interpretation of the exclusion clause. It is subject to arbitration.

The City challenges the arbitrability of the Association’s legal challenge to the exclusion clause. Arbitrators may consider the outside legal issues when the parties have expressly authorized it, in determining issues concerning ambiguity, and in attempting to meet their obligation to render awards which are enforceable insofar as possible. Article VI denies the arbitrator the authority to “amend, . . . nullify, ignore . . . or subtract from the provisions of this contract.” Article XVII give the arbitrator authority to determine the “requirements” of Sec. 895.46, Stats. Under some circumstances, a specific command of Sec. 895.46, Stats, could create a latent ambiguity in Article XVII, where unintended circumstances arise. The arbitrator has authority to make a preliminary determination as to whether a provision of the statute creates a latent ambiguity. I have made the preliminary determination below that no latent ambiguity is created. I have phrased the issues as stated above.

II. Enforcement of Exclusion Clause

The Association’s argument that the exclusion clause violates Sec. 895.46, Stats, is without merit. Nothing in the statute requires that parties to a collective bargaining agreement to include a provision concerning recovery of legal fees. The statute is a statute creating an individual right of the police officer to recovery of the legal fees. It does not state any obligations to create collective bargaining agreement provisions on the subject. Nothing in the statute makes civil proceedings the exclusive means for vindicating the statutory rights. Accordingly, nothing in the statute prevents the parties hereto from creating a separate procedure for vindicating the statutory rights. I find no reason why collective bargaining parties may make the enforcement of only a subset of those rights subject to grievance and

³ Compare it to Section VIB.5 which exempts certain disciplinary matters from the grievance procedure.

arbitration under their agreement, provided that they do not impair the employee's right to institute civil proceedings as to the remaining rights.

There is no dispute that the fees in this case are subject to exclusion clause of Article XVII. The exclusion clause is clear and unambiguous as it relates to this case. It is enforced. Accordingly, Article XVII does not provide for the collection of the fees which are the subject of this case and the grievance must be denied.

III. Waiver of Individual Right to Proceed

The exclusion clause of Article XVII is subject to two possible interpretations. It can be construed as merely limiting the benefit permitted under Article XVII or it can be construed as waiving Officer Berkovitz's individual right to seek reimbursement of his legal fees under Sec. 895.46, Stats, through civil proceedings. When language of an agreement is ambiguous, it is the responsibility of the arbitrator to determine what the parties intended. I use the maxims of contract interpretation ordinarily used by arbitrators and the courts to do so. These include, but are not limited to, giving effect to all of the words, avoidance of harsh, absurd, or nonsensical results, and interpreting the provision in the light of its purpose. I conclude that Article XVII's exclusion clause is not intended as a waiver of Officer Berkovitz's individual right to pursue reimbursement of his legal fees under Sec. 895.46, Stats, through the courts.

I question whether the Association has the legal authority to waive Officer Berkovitz's individual right to receive the disputed attorney's fees. Even if it could waive those rights, the better view of this provision is that it has not done so.

Ordinarily, a waiver of a statutory right must be clear and unmistakable.⁴ Nothing in Article XVII purports to preclude an employee from exercising his right to proceed under the statute. This is not a clear and unmistakable waiver.

The purpose of this provision is to make it easier for police officers to recover their attorneys' fees without having to expend more of their personal funds for an attorney to collect them through civil proceedings. It also makes it easier for the City to resolve issues with respect to those fees without further civil proceedings. While the City has agreed to make it easier, it makes perfect sense why it would not want to make it easier to collect them against itself. It is consistent with this purpose that the exclusion provision merely requires the employee to take the more onerous route of civil proceeding to collect the attorney fees against the City.

⁴ See, for example, WRIGHT V. UNIVERSAL MARITIME SERVICE CORP., 525 US 70 (1998); WSEIU V. STATE OF WISCONSIN, WERC DEC. NO. 31193-A (Shaw, 2/2006) and cases cited therein at page 18.

In any event, the City's construction is highly strained. It is highly unlikely that any experienced union-side negotiator would agree to attempt to waive the employees' individual statutory right. There is no evidence in Article XVII of any consideration for the waiver of those rights. The City has not offered any evidence whether in the form of bargaining history or otherwise which would suggest there was any consideration for the waiver of those rights. The result contemplated by the City is particularly harsh upon its own employees. It is not clear whether that result is even in its interest. I conclude that Article XVII does not waive an individual employee's right to seek reimbursement of his or her attorneys' fees under Sec. 895.46, Stats, through civil proceedings.

Accordingly, the grievance is denied, but the employee is not precluded by this award from seeking his legal fees through civil proceedings.

AWARD

That since the City did not violate Article XVII by refusing to pay the legal fees which are the subject of this grievance, the grievance is denied, without prejudice to the employee's right to proceed civilly to collect them.

Dated at Madison, Wisconsin, this 9th day of May, 2007.

Stanley H. Michelstetter II /s/

Stanley H. Michelstetter II, Arbitrator

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