BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

FAMILY HERITAGE CARE CENTER/PARKSIDE RESIDENCE

and

LOCAL 621 WCCME, AFSCME, AFL-CIO

Case 2
No. 66819
A-6281

Appearances:

Stephen L. Weld, Weld, Riley, Prenn & Ricci, S.C., 3624 Oakwood Hills Pkwy., P.O. Box 1030, Eau Claire, WI, 54702-1030, appearing on behalf of Family Heritage Care Center/Parkside Residence.

Daniel R. Pfeifer, Staff Representative, Wisconsin Council 40, AFSCME, 18990 Ibsen Rd., Sparta, WI, 54656-3755, appearing on behalf of Local 1621, WCCME, AFSCME, AFL-CIO.

ARBITRATION AWARD

Family Heritage Care Center/Parkside Residence, hereinafter Family Heritage or Employer, and Local 1621 WCCME, AFSCME, AFL-CIO, hereinafter Union, are parties to a collective bargaining agreement that provides for the final and binding arbitration of grievances. The Union, with the concurrence of the County, requested the Wisconsin Employment Relations Commission to appoint a WERC Commissioner or staff member to serve as the sole arbitrator of the instant disputes. Commissioner Susan J.M. Bauman was so appointed. A hearing was scheduled for May 31, 2007 in Black River Falls, Wisconsin.

Prior to the scheduled hearing, the Employer moved to dismiss the grievances as being untimely. The parties developed a joint stipulation of facts that was filed by the Employer on May 21, 2007. Each party had the opportunity to file written arguments on this procedural question, the last of which was received on May 22, 2007.

Having considered the evidence, the arguments of the parties, the relevant contract language, and the record as a whole, the Undersigned makes the following Award.

ISSUE

The Parties stipulated to the following issue:

Are the two (2) Shana Olson grievances subject to arbitration?

STIPULATED FACTS

1. Ms. Shana[1] Olson was a regular non-probationary employee.

2. On August 24, 2006, Ms. Olson was given a written warning for an alleged no-call/no-show. A grievance was filed on August 25, 2006. The grievance was denied at all steps of the grievance procedure. The Union notified the Employer of its intent to arbitrate the grievance on September 19, 2006 (Attachment A):

   From: Dan Pfeifer[2]
   Sent: Tuesday, September 19, 2006 12:01 PM
   To: 'Wally Apland III'
   Cc: Chris Sperle
   Subject: Grievances

   Wally,
   It appears that you have reduced one of the written warnings to a verbal warning and are maintaining the other one as a written warning. The Union is unclear as to which one is which. Will you enlighten me please?

   In addition, the Union wants to proceed to arbitration on the one that was not reduced to a verbal warning. Do you want to agree to any particular WERC arbitrator to hear the case? I will e-mail you the list.

   Please let me know.

   Thanks,

   Dan

[1] The parties have variously referred to the Grievant as Shana, Shauna and Shawna Olson. Other than in quoted materials, she will be referred to as Ms. Olson or Olson.

[2] E-mail addresses have been deleted from the quoted attachments.

The notice to the Employer was e-mailed within the within the [sic] ten (10) day time limit as set forth in the collective bargaining agreement. Subsequently, the Employer offered to reduce the written warning to a verbal warning (Attachment B):

In reviewing this specific matter the Employer has agreed to amend the previous determination and reduce the written warning to a verbal warning.

However the employer reserves the right to recognize this occurrence as a "no call no show". If the employee has another "no call no show" the disciplinary action taken may result in termination. (Section 6.03 – D)

The action of the employer does not set future precedent nor shall it be interpreted that the sequence is necessary to all cases as the type of discipline will depend on the severity of the offense.

Employer:
/s/ Wallace L. Apland III
Administrator
Family Heritage Care Center
Parkside Resident

The Union objected to the language of Attachment B and Ms. Olson's employment was terminated before this issue could be resolved.

3. On October 9, 2006, Ms. Olson's employment was terminated for another alleged no-call/no-show. A grievance was filed on October 10, 2006. The grievance was denied at all steps of the grievance procedure. The Union notified the Employer of its intent to arbitrate the grievance on November 15, 2006 (Attachment C):

From: Dan Pfeifer
Sent: Wedneday, November 15, 2006 1:39 PM
To: 'Wally Apland III'
Cc: 'Chris Sperle'
Subject: Shawna Olson

Wally,

I received your letter informing the Union that the Employer was not in agreement with the Union's proposed settlement of the Olson grievance.

The Union intends to proceed to arbitration. Do you want to stipulate to any particular WERC arbitrator?

In addition, we do not have a signed agreement regarding the previous Olson discipline. When I reviewed the settlement document, it contained a provisions [sic] that read "the employer reserves the right to recognize this occurrence as a "no call no show". The Union did not agree to this.

The Union intends to address both disciplinary issues at the arbitration hearing.

Dan

The notice to the Employer was e-mailed within the within the [sic] ten (10) day time limit as set forth in the collective bargaining agreement.

4. Prior to the submission of the grievance to an arbitrator, the Union made an offer to withdraw the two (2) grievances if the Employer agreed not to contest Unemployment Compensation at the appeal hearing. The parties had an agreement via e-mail to this effect (Attachment D):

From: Wally Apland III
Sent: Friday, December 01, 2006 4:55 PM
To: 'Dan Pfeifer'
Subject: RE: Shawna Olson

Dan,

I just made the call to my UC Rep. We will not contest and not appear at the hearing.

Wally

From: Dan Pfeifer
Sent: Friday, December 01, 2006 3:47 PM
To: 'Wally Apland III'
Subject: RE: Shawna Olson

Talked with Shawna. She is agreeable. She is filing the appeal on Monday.

That means, once you get the appeal notice, you will contact UC and tell them you are not contesting and will not appear at the hearing?

Thanks,

Dan

From: Wally Apland III
Sent: Friday, December 01, 2006 3:31 PM
To: 'Dan Pfeifer'
Subject: RE: Shawna Olson

Dan,

The employer agrees to this.

We will not contest the unemployment hearing and I will indicate in her paperwork that she resigned.

If you send me a formal letter I will sign it.

Be Well,

Wally

From: Dan Pfeifer
Sent: Friday, December 01, 2006 2:05 PM
To: 'Wally Apland III'
Subject: Shawna Olson

Wally,

Before I send in the paperwork and money for the hearing, I thought I'd give it one more shot to settle. How about if she agrees to resign and the Employer does not contest Unemployment Compensation?

Thanks,

Dan

However, prior to the agreement being formally drafted and signed, Ms. Olson notified the Union that she had received notice that her appeal to the Unemployment Compensation denial was not filed in a timely manner and the appeal request was denied. Ms. Olson notified the Union that she desired to proceed to arbitration on the two (2) grievances.

5. On January 9, 2006, the Union notified the Employer of its intent to arbitrate the two (2) Shana Olson grievances and the Employer responded that it had procedural objections (Attachment E):

From: Wally Apland III
Sent: Monday, January 15, 2007 11:09 AM
To: 'Dan Pfeifer'
Cc: Ed Knetter
Subject: RE: Grievances

Dan,

Re: Shauna Olson – According to our email transcripts, the Olson matter was mutually agreed upon by all parties on December 1, 2006. No extensions to any timelines were agreed upon. Over 30 days have passed since the employer agreed to the settlement proposed by the Union. The employer considers this matter dropped by the union per the contract.

Re: Patty Skorstad – According to our email transcript the employer agreed to proceed to arbitration on December 6th 2006. No extensions of any timelines were ever agreed upon. Over 30 days have passed since the employer indicated our willingness to proceed to arbitration. The employer considers this matter dropped by the union per the contract.

Wally

From: Dan Pfeifer
Sent: Tuesday, January 09, 2007 2:55 PM
To: 'Wally Apland III'
Cc: Chris Sperle
Subject: Grievances

Wally,

I had previously notified you that the Union intended to take both the Skorstad and Olson grievances to arbitration, however, I did not file the requests with the WERC because of settlement discussions.

I believe that I told you that Ms. Olson missed the time limit on appealing the Unemployment Compensation decision; therefore, I do not believe that our proposed settlement can be achieved.

Before I file the request for arbitration (with a cost of $250 for each party for each grievance) I thought that I would contact you to see if there is any offer that the Employer has to settle these grievances.

Please let me know one way or the other.

Thanks,

Dan

6. The Union mailed the Request to Initiate Grievance Arbitration, to the WERC, on March 12, 2007.

7. ISSUE: Are the two (2) Shana Olson grievances subject to arbitration?

RELEVANT CONTRACT PROVISIONS

ARTICLE IV –GRIEVANCE PROCEDURE

Section 4.01. For the purpose of this Agreement, the term "grievance" means any dispute between the Employer and any employee concerning the interpretation, application, or enforcement of a specific provision of this Agreement. For the purpose of this article, the term "days" shall mean calendar days.

Section 4.02. Any such grievance shall be settled in accordance with the following grievance procedure:

Step 1: An earnest effort shall first be made to settle this matter informally. If the matter is not resolved, the grievance shall be presented in writing by the employee or at the employee's request, the Steward to the department head within ten (10) calendar days after the event upon which the grievance is based occurs. The department head shall give his/her written answer within ten (10) days of the time the grievance was presented to him/her in writing.

Step 2: If not settled in Step 1, the grievant or, at the employee's request, the Steward may within ten (10) days submit the matter in writing to the Administrator. The Administrator shall talk to the employee and, at the employee's request, the Steward and the Administrator shall otherwise investigate the complaint. The Administrator shall issue him[sic]/her written decision within ten (10) days from the date of the meeting.

Step 3: Grievances not settled in Step 2 of the grievance procedure may be appealed to arbitration with a written notice to the Administrator within ten (10) days of receipt of his/her answer at Step 2. The above stated timelines (Step 1 through 3) may be extended and/or modified by mutual agreement to extend and/or modify the timelines, any grievance not processed within the stated timelines shall be considered dropped and any grievances not processed by the Employer within the stated timelines shall be considered awarded.

Section 4.03. In the event of a disciplinary suspension or discharge, the parties agree that Step 1 above shall be waived, and the grievant or, at the employee's request, the Steward may present the grievance directly to the Administrator. By mutual agreement of the parties, Step 2 may also be waived and the parties may proceed directly to Step 3.

Section 4.04. Upon receipt of a written notice of a request for arbitration, the parties shall attempt to select a mutually agreeable arbitrator. If the parties are unable to agree on the arbitrator within ten (10) days, either party may file a written request with the Wisconsin Employment Relations Commission to provide a slate of arbitrators from which the parties shall strike names alternately, with the grievant striking first, until one arbitrator remains. That person shall be jointly advised by the parties of his/her appointment as arbitrator. The decision of the arbitrator shall be final and binding on both parties. It is understood that the function of the arbitrator shall be to interpret and apply specific terms of this Agreement. The arbitrator shall have no power to add to, subtract from, modify or amend any terms of this Agreement.

. . .

POSITIONS OF THE PARTIES

The Employer contends that on December 1, 2006, the Employer and the Union reached a settlement: the grievances would be withdrawn, the Employer would not contest Olson's appeal of her unemployment compensation benefits claim, and the Employer would amend the employee's personnel file to reflect a resignation. At the time of entering into this settlement, the parties were under the impression that the Grievant would appeal the UC determination on Monday, December 4, 2006.

Family Heritage met its obligations under the terms of the settlement. Its obligations were triggered when it received a notice of the appeal of the Division's determination. However, that notice never came.

It was not until January 15, 2007 that the Union notified the Employer that the Olson grievances were being appealed. In response, Family Heritage advised that it considered the grievances to have been dropped since there had been no mutual agreement to extend the timelines. The Employer reiterated this belief on January 25, 2007.

Still, the Union waited until March 12, 2007, to file a Petition for Arbitration with the WERC. Family Heritage believes that the grievances are untimely and requests that the Arbitrator dismiss them with prejudice.

It is the position of the Union that the two grievances are arbitrable. Attachments A and C demonstrate that the Union notified the Employer of its intent to arbitrate within the contractual time constraints. The delay in filing with the WERC was due to the settlement discussions that were taking place, Attachments B and D. Settlement discussions for the written warning grievance were not completed when Ms. Olson was terminated.

The Employer objects to the arbitration because "30 days have passed since the employer indicated its willingness to proceed to arbitration", but there is no 30 day limitation in the grievance procedure which has no additional time limits after the Step 3 notification to the Administrator of intent to arbitrate.

As to the verbal/e-mail agreement for the Union to withdraw the grievances if the Employer agreed not to contest Unemployment Compensation at the appeals hearing, there is no question that the Union made the offer and the Employer accepted it. However, as seen in Attachment D, this was to be reduced to writing and signed by the parties. This never occurred as Ms. Olson was notified that her Unemployment Compensation Appeal was untimely. Accordingly, the deal was never consummated. The Employer should not be able to have the grievances dismissed without Ms. Olson's receipt of "consideration" for withdrawing the grievances.

DISCUSSION

The collective bargaining agreement contains timelines for the filing of grievances: within ten calendar days of the event upon which the grievance is based. The agreement also requires that the grievance be forwarded to Step 2 of the grievance procedure, the Administrator level, within 10 days of the department head's response if the matter is not settled. The final step of the grievance procedure, Step 3, provides that grievances not settled at Step 2 may be appealed to arbitration with a written notice to the Administrator within ten days of receipt of the Step 2 answer. The parties have stipulated that these time lines were met by the Union with respect to both of the Olson grievances.

The collective bargaining agreement does not specify when a notice must be sent to the WERC requesting the appointment of an arbitrator. Section 4.04 of the collective bargaining agreement only requires that the request must be sent within ten days of being unable to agree on a mutually agreeable arbitrator. The stipulated facts include evidence that the Union asked the Employer about stipulating to an arbitrator, but do not include evidence as to the response.

There is also evidence that the parties made numerous attempts to settle the initial grievance, but that discussions with respect to that grievance stopped upon Ms. Olson's termination. The parties engaged in numerous discussions in attempts to resolve the termination grievance. They reached an understanding that the Employer would not appear at, or contest, Ms. Olson's unemployment compensation benefits at an appeal hearing, and that it would modify Ms. Olson's employment records to reflect a resignation rather than a termination. As Attachment D clearly states, this was to be reduced to writing: "If you send me a formal letter I will sign it."

Unfortunately, Ms. Olson's appeal of the denial of her unemployment compensation benefits was not timely. Thus, she did not receive unemployment compensation benefits. No written agreement reflecting the proposed settlement was ever drafted or signed by the parties. The grievance was never formally withdrawn. There is no evidence that Ms. Olson's employment record was modified to reflect a resignation rather than a termination, also a component of the proposed settlement.

While there is no question that the better course of action on the part of the Union would have been to immediately notify the Employer that the proposed settlement was no longer an option[3], that it still wished to enter into settlement discussions, and to file the notice with the WERC as soon as it was aware it wished to proceed to arbitration, there is nothing in the collective bargaining agreement that requires the action be taken any sooner than it was.

The Employer is not prejudiced by the delay that has occurred. Certainly, the Employer was aware that there would be no unemployment compensation appeals hearing. The Employer argues, its "obligations under the settlement were triggered when Family Heritage received a notice of appeal of the Division's determination." "That notice never came." In fact, Attachment D demonstrates that the Employer was not waiting for such a notice. The Administrator had already contacted the UC Rep and was not going to contest or appear at the hearing. Unfortunately, that hearing never happened. The evidence is clear that the Employer was ready to act in accordance with the verbal/e-mail settlement agreement. However, there is no evidence that it has taken the other actions that are called for by the Agreement: modification of Ms. Olson's employment record.

In light of the fact that the terms of the Settlement Agreement were not reduced to writing nor consummated, the grievances remain active. They have not been withdrawn. They are arbitrable.

AWARD

The grievances are arbitrable and will be heard, in accordance with the previously agreed upon time and date: 10:30 am, May 31, 2007, at the offices of the Employer unless the parties mutually agree to another location and advise the undersigned of same.

Dated at Madison, Wisconsin, this 22nd day of May, 2007.

Susan J.M. Bauman /s/

Susan J.M. Bauman, Arbitrator

[3] The record is silent as to when the Union became aware of this or when the Employer was notified.

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