

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
**SERVICE EMPLOYEES INTERNATIONAL UNION HEALTHCARE,
LOCAL 150 WISCONSIN, CTW, CLC**

and

WAUKESHA SPRINGS HEALTH & REHABILITATION CENTER

Case 4
No. 67287
A-6306

Case 5
No. 67288
A-6307

Appearances:

YingTao Ho, Previant, Goldberg, Uelman, Gratz, Miller & Brueggeman, S.C., 1555 North RiverCenter Drive, Suite 202, P.O. Box 12993, Milwaukee, WI 53212, appearing on behalf of Service Employees International Union Local 150.

George J. Stunyo, President, Autumn Creek Consulting, P.O. Box 208, Grand Rapids, MN 55744, appearing on behalf of Waukesha Springs Health and Rehabilitation Center.

ARBITRATION AWARD

Waukesha Springs Health and Rehabilitation Center, hereinafter Waukesha Springs or Employer, and Service Employees International Union Local 150, hereinafter SEIU or 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 Employer, requested the Wisconsin Employment Relations Commission to provide a panel of five WERC Commissioners or staff members from which they could jointly select an arbitrator to hear and resolve a dispute between them regarding the instant grievances. Commissioner Susan J.M. Bauman was so selected. A hearing was held on December 14, 2007 in Waukesha, Wisconsin. The hearing was not transcribed. The record was closed on January 8, 2008, upon receipt of all post-hearing written argument relating to the question of arbitrability of the grievances.

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 that the issue to be decided is:

Are the grievances arbitrable?

BACKGROUND and FACTS

The underlying grievances involved the terminations of two employees, Elaina Galmore and Tureka Davis. At issue is whether the grievance and arbitration procedures of the collective bargaining agreement between the Union and the Employer were followed properly such that the questions of whether the employees were terminated for just cause can be presented to an impartial arbitrator.

The underlying incident involving Galmore occurred on September 28, 2006, and that involving Davis occurred on October 2, 2006. The Union filed a grievance on behalf of Galmore on October 9, 2006 and on behalf of Davis on October 13, 2006. The Employer denied the grievances, in writing, on October 10 and October 16, 2006, respectively. By e-mail dated October 23, 2006, Becky Kroll, now known as Becky Mrotek, the Administrative Organizer for SEIU Local 150 and the representative of the Union assigned to handle contract negotiations and administration for the Union, contacted Michael Libby, the Administrator for the Employer. The e-mail states:

Hello Michael-

I would like to set up a meeting(s) regarding the following grievances:

Galmore Termination

Love Discipline

Davis Termination

The dates I have available are: November 2 or 3.

Please respond if either of those dates works for you.

Thank you

Becky Kroll

SEIU Local 150

The following morning, Mr. Libby responded, via e-mail: "November 3 at 10:00am would e [sic] fine.

On the morning of November 2, Ms. Kroll again e-mailed Mr. Libby as follows:

Hi Michael-

I would like to re-schedule our meeting for tomorrow 11-3-06 for 11-17-2006 (same time). I have left you a voice mail message regarding this also. All time

line [sic] would then be extended until the 17th. Please let me know if this date works for you. Please call 414-588-1069.

Thank you

Becky Kroll
SEIU Local 150

Mr. Libby responded¹:

I do have a meeting at 10am that day and was wondering if another day or time would work with your schedule? Later that day works for me, if you are available.

Thanks
MJL

Libby and Kroll met on November 17, and reached an agreement with respect to the Love discipline. They were unable to reach resolution of either the Galmore or Davis terminations. Each of these grievances was discussed in separate meetings, but neither Libby nor Kroll recalls with certainty which grievance was discussed first. They agree that there was discussion at the end of the first meeting regarding the fact that arbitration was the next step, and for the need to contact the Wisconsin Employment Relations Commission (WERC) to obtain a list of names of arbitrators. After the meeting, Libby sent a letter to Kroll, by certified mail which was received by someone at the SEIU offices on November 24, 2006. Libby's letter reads as follows:

November 21, 2006

To: SEIU Local 150
From: Michael Libby, NHA
RE: Grievance Meeting held on 11/17/06
Tareka Davis, Elaina Galmore, Adrian Love

This letter is a formal response to our meeting on 11/17/06. The following statements are the facility's responses to our discussion:

For the grievance matter pertaining to Tureka Davis, grievance denied.

¹ Inasmuch as the Company only offered part of the message as part of Company Exhibit 6, Mr. Libby's response may not be present in its entirety.

For the grievance mater pertaining to Elaina Galmore, grievance denied.

For the grievance mater pertaining to Adrian Love, per our discussion, disciplinary action will be re-written as a Class I violation for “Not Reporting Inappropriate Employee Conduct to Administration.”

Respectfully Submitted by:

/s/

Michael Libby, NHA
Administrator

Apparently the Union and the Employer had not resolved the two remaining grievances, in part because the Union did not provide any new information at the November 17 meeting. There were, however, some statements that the Union agreed to provide to the Employer. Kroll and Libby had an e-mail discussion regarding these statements on November 27, 2006, in which Kroll indicated that the grievances were proceeding to arbitration:²

It is my understanding that we are proceeding to arbitration in these cases and that my providing you with more statements would not change your response, so the statements would be provided at the next step. In order to build a working relationship I will provide the statements to you via certified mail as you have indicated in previous conversations that you do not wish to receive information by fax.

Libby responded within the hour:

Sending them via certified mail would be fine. The statements discussed in our previous meeting may be helpful in protecting our employees and ensuring that situations of this nature do not occur in the future. We need all possible statements to ensure we are working with any information that is available regarding these situations. I am sure you agree that our residents and employees deserve the maximum level of diligence on our part regarding collecting of information, and if you have information surrounding these matters I ask that you share that with us. Please continue to send the statement [sic] via certified mail as you discussed below.

² The Union originally sought to present Company Exhibit 6, Union Exhibit 3, and a number of other pages as Union Exhibit 2, a four-page e-mail exchange between Kroll and Libby. The Union withdrew Union 2 (and presented another document as Union 2). The Employer then submitted page 4 of that four page document as Company Exhibit 4, and the Union submitted page 1 of that four page document as Union Exhibit 3. As a result, the text quoted above is, to some extent, without context.

Consistent with her understanding that the parties were proceeding to arbitration regarding the Davis and Galmore grievances, on December 6, 2006, Kroll forwarded two (2) Request to Initiate Grievance Arbitration forms to the WERC, along with two (2) separate checks in the amount of \$250.00 as filing fees. On the same day, she forwarded copies of the Request to the Employer. On December 11, Waukesha Springs received invoices from the WERC for its half of the filing fees, prompting the following memo to the Union:

December 12, 2006

To: SEIU Local 150
From: Michael Libby, NHA
Re: Tureka Davis & Elaina Galmore Grievance/Arbitration

Per union contract Section 5.2, "The time limits in this Article and in the following Article are intended to be mandatory. Any failure by an employee or the union to abide by the time limits specified shall result in the grievance being considered settled."

Facility did not receive a written appeal notice for arbitration from the union within ten (10) working days after the receipt of the answer to Step 3 of the process; receipt was 11/24/2006 and no written appeal notice for arbitration has been received by the facility.

Facility did receive on 12/11/06 an arbitration filing fee invoice, but this is not an appeal for arbitration notice nor is it within the set-time frames written in the contract. Please see the union contract for clarification.

The union failed to follow the grievance steps outlined in the contract and thus this grievance is considered settled. Additionally, facility will not pay for any fees connected with the filing for arbitration.

Respectfully submitted by:

/s/

Michael Libby, NHA
Administrator

The Union responded to this letter, by letter dated January 26, 2007, sent via certified mail:

Dear Mr. Libby,

In response to you [sic] letter dated December 12, 2006, I would like to remind you that during our grievance meeting for the Galmore and Davis grievances you agreed to proceed to arbitration. Therefore you had notice that the Union would proceed to arbitration and no further notice need to be given. Please promptly pay the fees associated with the costs of arbitration.

If you have any questions concerning this notice please feel free to contact me at 414-355-5150 ex. 18.

Sincerely,

/s/

Becky Kroll
Administrative Organizer
SEIU Local 150

Libby responded by letter dated January 29, 2007:

To: SEIU Local 150
From: Michael Libby, NHA
RE: Tureka Davis & Elaina Galmore Grievances/Arbitration

During our meeting on November 17, 2006, you stated that SEIU was going to file for arbitration on behalf of these two employees. I acknowledged this statement, but was uncertain as to whether SEIU would follow-through on this statement. My acknowledgement was of understanding the steps to the grievance process, not of acceptance to move forward with arbitration. I did not waive the time limits nor did I waive the written requirements set-out in the collective bargaining agreement.

As a follow-up to the November 17th meeting, Waukesha Springs followed the proper steps to the grievance procedure by writing a formal response to our meeting and within the timelines stated in the bargaining agreement. I expected the process and the required timelines to be followed by the SEIU; thus expecting a written notice to be given within 10 working days of my letter. The formalized process and timelines eliminate the risk of false assumptions.

Additionally, you filed for arbitration 13 working days after our November 17th meeting date, which would have been outside the required timeline for filing for arbitration; assuming you in fact misunderstood my acknowledgement as an acceptance to proceed to arbitration. Once again, the contract requires this to occur within 10 working days from the acceptance to proceed to arbitration.

Lastly, your letter of January 26, 2007 was received over six weeks from the receipt of my last written notice to you, which is still not indicative of a desire to pursue this matter further.

Waukesha Springs continues to hold to the previous established position formally written in our December 21, 2006 letter. We consider this to have been dropped by the union.

Respectfully submitted by:

/s/

Michael Libby, NHA
Administrator

(emphasis in original)

In March 2007, Libby received another invoice from the WERC. He contacted the WERC offices and shortly thereafter he got a call back indicating the matter had been dropped. About three months after that, an unfair labor practice (ULP) charge was filed against the Employer regarding this matter. The ULP was settled, bringing the question of the arbitrability of the grievances before the undersigned.

Additional facts are included in the Discussion, below.

RELEVANT CONTRACT PROVISIONS

ARTICLE 5 GRIEVANCE-ARBITRATION PROCEDURES

Section 5.1 Definition of Grievance

- a. A grievance within the meaning of this Agreement is a claim by an employee or employees that the Employer has violated an express provision of this labor agreement. In the event of a grievance, the employee shall perform his/her assigned work task and grieve his/her complaint after completion of his/her duties. To be considered, any

grievance must be presented to the Employer within ten (10) working days (defined as Monday through Friday, excluding holidays as defined in Article 13) after the employee knew, should have known or became aware [sic] of the alleged violation or shall be deemed waived by the grievant and the Union.

- b. Only one subject matter shall be covered in any one grievance. A grievance shall contain a clear and concise statement of the grievance by indicating the issue involved, the relief sought, the date the incident or violation took place, and the specific section or sections of the Agreement involved.

Section 5.2 Settlement Procedure

Any grievance shall be considered settled at the completion of any step in the procedure if all parties concerned are mutually satisfied. Dissatisfaction is implied in recourse from one step to the next. The time limits in this Article and in the following Article are intended to be mandatory. Any failure by an employee or the Union to abide by the time limits specified shall result in the grievance being considered settled. The failure of the Employer to answer a grievance in the time specified shall authorize the grieving party to proceed to the next step of the procedure. The Employer, employee or the Union may request an extension on the time limits at any step of the grievance and arbitration procedure which shall be effective if mutually agreed in writing between the parties. All grievances shall be handled and adjusted in the following manner.

Step 1: The grieving employee, or the grieving employee and the Union Worksite Leader, shall present the grievance to the employee's immediate supervisor, who shall answer the grievance after a meeting within ten (10) working days.

Step 2: If the grievance is not settled in Step 1, the grievance may, within ten (10) working days after the answer in Step 1, be presented in Step 2. When a grievance is taken to Step 2, it shall be reduced to writing in accordance with Section 5.1(b), signed by the grievant or the grieving employee and the Union Worksite Leader and presented to the grievant [sic] department head or designee. The Department Head shall respond in writing after a meeting within ten (10) working days of receiving the second step appeal.

Step 3: If the grievance is not settled in Step 2, the grievance may, with ten (10) working days after the answer in Step 2, be presented in Step 3. A grievance shall be presented by the grievant or the grieving employee and the Union Worksite Leader to the Director of Human Resources. The Director of Human Resources shall respond in writing after a meeting within ten (10) working days after the presentation of the grievance in this step.

Step 4: If the grievance is not settled in Step 3, the grievance may, within ten (10) working days after the answer in Step 3, be presented in Step 4. A grievance shall be presented by the grievant or the grieving employee and the Union Worksite Leader, in this step in writing to the Administrator. The Administrator or designee shall respond in writing after a meeting within ten (10) days of receiving the third step appeal.

Step 5: A grievance which has been processed through, but not resolved by the grievance procedure detailed in this Agreement, may be appealed by the Union to arbitration by written notice addressed to the Director, Human Resources or designee. Such notice must be given within ten (10) working days after receipt of the answer at the fourth step of the grievance procedure. Such notice shall state the precise nature of the claim and the specific provision of the labor agreement allegedly violated and relied upon in support of the grievance.

Within ten (10) working days after receipt of such notice, the Employer and the Union, or their representative, shall jointly request the Wisconsin Employment Relations Commission (WERC) to supply a panel of outside, impartial, independent arbitrators. Upon receipt of such panel, the Employer and the Union, or their representatives, shall alternately strike names, the grieving party striking first, until only one (1) name remains. That person shall serve as the impartial arbitrator. The award of the arbitrator shall be final and binding upon the parties to this Agreement.

The jurisdiction and authority of the arbitrator shall be confined exclusively to the interpretation of the explicit provision(s) of the Agreement at issue between the Union and the Employer. The arbitrator shall not have the power to add to, ignore or modify any of the terms and conditions of this Agreement.

Only one (1) grievance shall be submitted to an arbitrator in any one (1) arbitration proceeding, provided, however, that the parties may, by mutual agreement, submit more than one (1) related grievance to the same arbitrator in the same arbitration proceeding.

The expenses of the arbitration (including the arbitrator and the

transcript) shall be borne equally by both parties.

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POSITIONS OF THE PARTIES

The Employer contends that this is an easy case in that the Union failed to comply with the terms of the collective bargaining agreement between the parties. The Union representative, Becky Mrotek, testified that she is familiar with the contract; that she has been the chief spokesperson for the Union in negotiating this contract; she understands that time limits are “mandatory”; that she understands that, in accordance with Article 5.2, any failure to abide by the time limits shall result in the grievance being considered settled; that she understood that she could request an extension of the time limits; that she was required to appeal Mr. Libby’s step 4 answer, in writing, within 10 days; and that she did not jointly request with the employer, an arbitration panel from the WERC. Mr. Libby’s testimony squares with Ms. Mrotek’s testimony: she did not request, nor did he give, an extension of the time limits on the step 4 answer; he didn’t receive the required written notice from Ms. Mrotek within 10 days; time lines for grievances are followed pursuant to the Labor Agreement between the parties.

The Employer argues that it followed the procedures spelled out in the contract whereas the Union substituted its judgment for that of the written contract: “...you agreed to proceed to arbitration. Therefore you had notice that the Union would proceed to arbitration and no further notice need be given.” (Company Exhibit 4) Further, the written notice, according to the collective bargaining agreement, requires that it state the precise nature of the claim and the specific provisions of the labor agreement allegedly violated. To this date, the Union has not supplied the Employer with this information.

The Employer also points to equity considerations in that it contacted the Union the day following receipt of an invoice from the WERC, whereas Ms. Mrotek did not respond until approximately seven (7) weeks later.

Waukesha Springs points out that the language in the Agreement is very proscriptive, intentionally. It contends that when people assume, instead of following the requirements of the Agreement, one or more parties may be harmed. In the case at bar, had the Union followed the provisions of the contract, the underlying matters most certainly would have been arbitrated or resolved by now. The Employer has been greatly prejudiced by the Union’s failure to follow the terms of the collective bargaining agreement.

Finally, the Employer points out that the jurisdiction and authority of the undersigned is confined to the explicit provisions of the collective bargaining agreement and as the arbitrator, the undersigned has no power to add to, ignore or modify any of the terms and conditions of the agreement.

Based on the evidence and testimony, it is the position of the Employer that the

grievances are not arbitrable and must be denied and dismissed.

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The Union points out that grievances are presumably arbitrable, and that arbitral law has a strong preference for resolving disputes on substantive rather than procedural grounds. Further, because of this presumption, the Employer bears the burden of proof that a grievance is not arbitrable. The implications of the presumption are that any credibility disputes must be resolved in favor of a conclusion that the grievances are arbitrable, and any ambiguous contract language must be resolved in favor of a finding of arbitrability.

In the case at bar, SEIU contends that the parties agreed to waive Step 5 of the grievance procedure such that the Union would make a unilateral request to the WERC for a panel of arbitrators. A party may manifest its agreement to such modification through its silence in response to a proposal, rather than through a verbal expression of assent. Silence as a method of acceptance is especially effective and enforceable when supported by the parties' prior course of conduct. Here, Administrator Libby was silent in the face of the e-mail request to extend deadlines for the Step 4 meeting and the waiver of the prior steps, as well as the bypassing of the Human Resources Director, just as he was when Ms. Mrotek discussed the manner of proceeding after the Step 4 grievance meetings regarding both Davis and Galmore.

The Union points to a long history of these parties agreeing to modifications to the grievance procedure wherein the other party accepts the proposed modification by not objecting to it. Based on the parties' prior course of conduct, Libby's silence in response to Mrotek's statement that the next step in the grievance procedure was the submission of arbitration requests to the WERC, confirmed his agreement with that manner of proceeding. Had he disagreed with this approach, the parties' prior course of dealing required that he affirmatively deny or correct Mrotek's statements. There was an agreement to modify the grievance procedure to eliminate the request to the Director of Human Resources step, and Local 150 sent its request to the WERC within 10 working days of receipt of Waukesha Spring's written step four answer. This is an enforceable agreement, regardless of whether Libby actually intended for his silence to signal agreement to such a waiver of the contractual language.

SEIU Local 150 also argues that Waukesha Springs is estopped from denying the arbitrability of the grievances since the law will not permit a party to take advantage of or profit from another party's mistake when the first party is aware that the other party is operating under a mistake. If Libby was not in agreement with Mrotek's proposed modification of the grievance procedure, he should have corrected Mrotek and advised her that the contractual provisions were to be followed. The absence of any denial from Libby as well as the presumption of arbitrability supports a finding that during the Galmore and Davis grievance meetings Libby understood the grievance procedure and intentionally failed to correct Mrotek's mistake. He then waited more than 10 working days after Local 150 received the fourth step denials before correcting the error. Waukesha Springs cannot be permitted to take advantage of Mrotek's mistake by claiming the grievances are not arbitrable. The same result would follow if Libby's failure to correct Mrotek's mistake was caused by his

misunderstanding of the grievance procedure, rather than his intent to take advantage of the error.

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Given the practice of accepting modifications to the grievance procedure through silence, rather than through written or verbal assent, Mrotek reasonably construed Libby's silence as an agreement with her statement. She reasonably relied on this agreement and proceeded accordingly.

Finally, SEIU Local 150 argues that Mrotek did comply with the time deadlines of the grievance procedure in that her e-mail to Libby of November 27, 2006 stated "it is my understanding that we are proceeding to arbitration on these cases" which clearly referred to the Galmore and Davis matters. The Employer has not contested that notice could go to Libby rather than the Human Resources Director and there is nothing in the collective bargaining agreement that requires the written notification to be by regular mail rather than e-mail.

The Union points out that failure to abide by strictures of the grievance procedure, other than time limits, does not, according to the collective bargaining agreement, result in forfeiture of the grievance. Thus, the fact that the request to the WERC was unilateral rather than bilateral does not affect the ability of the grievance to go forward.

For all these reasons, the Union contends that the grievances are arbitrable, that the undersigned should make such a finding, and that the grievances should be heard on their merits.

DISCUSSION

Waukesha Springs contends that the Galmore and Davis grievances are not arbitrable because SEIU Local 150 failed to follow the time limit provisions of Step 5 of the Grievance-Arbitration Procedures as set forth in Section 5.2 of the collective bargaining agreement between the parties. Although the Employer complains of various aspects of the grievance-arbitration procedure that the Union violated in the processing of the instant grievances, it recognizes that only the failure to abide by timelines is fatal to the continued processing of the grievances: "[a]ny failure by an employee or the Union to abide by the time limits specified shall result in the grievance being considered settled."

The parties agree that they have modified the steps of the grievance procedure by their mutual participation in a Step 4 meeting between Administrator Libby and Union Representative Mrotek without the grievances having been processed through all of Steps 1, 2 or 3 prior to their November 17 meeting. There is no question that Libby acquiesced, without comment, to Mrotek's comment in her November 2 e-mail asking to extend timelines for the next step of the process because the November meeting was delayed until November 17. In fact, the record is replete with mutually agreed upon, without written, or apparently verbal, acknowledgement that the grievance procedure, including time lines, was being modified. It is only after the Step 4 meeting that Waukesha Springs appears to be concerned about following

the “proscriptive” steps of the grievance and arbitration procedures contained in the collective bargaining agreement between the parties.

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There is a long standing presumption of arbitrability of grievances in this country. That presumption is, of course, present in the circumstances confronting this arbitrator. If there is evidence that the Union advised the Employer, in writing, of its intent to proceed to arbitrate within ten (10) working days of the November 17 meeting, the Galmore and Davis grievances will be found to be arbitrable. At issue is whether the Employer timely received notice of the Union’s intent to arbitrate. I find that this occurred, both at the end of the grievance meetings on November 17, and more specifically, and as required by the collective bargaining agreement, in Mrotek’s e-mail to Libby of November 27: “It is my understanding that we are proceeding to arbitration.” This e-mail was sent to Libby, and apparently received by him, well within the ten (10) working day period of the Union’s receipt of the Step 4 response, November 24, 2006.

The collective bargaining agreement does not expressly require the notice to be in some particular form or require the use of any particular terminology or technology. It requires the notice to be in writing, and the November 27 e-mail is a writing. Apparently the Employer wanted a letter sent by certified mail, but I will not demand form over substance, and I find that the e-mail message does comply with the requirements of Section 5.2.³

Libby’s silence in the face of this e-mail⁴ must be construed as acknowledgment of the fact that the parties were going to arbitration over the two grievances in the same manner as his failure to respond to Mrotek’s statement regarding the extension of the time lines between earlier steps of the grievance-arbitration procedure implied that he was in agreement with the extension.⁵ Had he responded that some other process was required to fulfill the obligations set forth in Step 5 of the grievance-arbitration procedure, Mrotek would have been on notice of the need to do something more. Had he responded that they should get together to file the joint request for a panel of arbitrators from the WERC, she would have been on notice that he expected to proceed in a different manner than they had discussed on November 17 when she had talked about obtaining a panel of arbitrators from the WERC. He did neither of these things, so she proceeded to file the Request to Initiate Arbitration with the WERC on December 6, 2006.⁶

³ See, Elkouri & Elkouri, HOW ARBITRATION WORKS (6th Ed), pp. 273-276 for a general discussion on the topic of notice of intent to arbitrate.

⁴ Libby did respond via e-mail to the other matter discussed in the e-mail, the mailing of statements to him rather than faxing them.

⁵ There is no question that Libby agreed to the extension.

⁶ The Employer’s arguments appear to suggest that the notice of appeal to arbitration being provided to the Employer implies that the Employer must agree to arbitration. The collective bargaining agreement does not

The collective bargaining agreement provides that the Request to Initiate Arbitration must be forwarded to the WERC within ten (10) working days after the Employer receives the notice of the Union's intent to proceed to arbitrate. The Employer received Mrotek's November 27 e-mail on November 27, as evidenced by Libby's response to part of her message on that date. December 6 is within that ten (10) day period. Further the contract does not say that the request must be received by the WERC⁷ within the ten (10) day period, but that the request must be made within that period.⁸

The Employer contends that it has been prejudiced by the failure of the Union to abide by the terms of the collective bargaining agreement. It is true that these cases could have been arbitrated or resolved by this time. That would have happened had the Employer chosen to be consistent in the manner in which it responded to the various modifications of the actual language of the grievance-arbitration procedure. The Employer cannot argue that it has been prejudiced when the Union reasonably relied on the Employer's silence in the face of skipping earlier steps as well as silence in response to a request for an extension of time. Mrotek reasonably construed Libby's response at the end of the Galmore and Davis grievance meetings to mean that she should go forward and make the requests for a panel of arbitrators from the WERC herself. Her e-mail complied with the written notice requirement. Libby never said anything to Mrotek to indicate that he needed, or expected, anything more. The Employer must be consistent in its behavior and cannot now be heard to complain that it has been prejudiced when its own actions caused the current situation. Additionally, inasmuch as procedural arbitrability is within the jurisdiction of arbitrators,⁹ the proper response of the Employer would have been to insist that the arbitrability be determined through the grievance arbitration process a year ago!

Upon receipt of the WERC invoice, Libby advised the Union, via certified mail, that this was unacceptable. Such notification to Mrotek was after she had fulfilled the requirements of the Agreement as she understood them to be modified by the parties at the November meeting. The Employer cannot wait until after the allotted time period had expired to tell the Union that it is not acting in conformity with the contract. Libby testified that the failure of Mrotek to respond immediately to his letter of December 12 was additional indication that the

provide for such "agreement." Such a concept flies in the face of the general presumption of arbitrability of contract disputes.

⁷ Although Mrotek testified that a copy of the Request was sent to the Employer, there is no record of when it was received. Libby testified that he became aware of the filing when he received an invoice from the WERC on December 11.

⁸ Although the WERC considers documents filed on the date they are received at the WERC office, the contract does not state that the request must be filed with the WERC within the ten (10) days, but rather that the request must be made.

⁹ Elkouri & Elkouri, *HOW ARBITRATION WORKS* (6th Ed.), pp. 286.

Employer didn't/couldn't know if the Union was really appealing to arbitration. That response is ingenuous. The Union had already forwarded two (2) checks in the amount of \$250 each to

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the WERC.¹⁰ What could be a stronger indication of a desire to proceed than "putting one's money where one's mouth (or e-mail message) is?"

The Employer also points out that the authority of the Arbitrator is limited to the explicit provisions of the collective bargaining agreement, without the power to add to, ignore or modify any of the terms and conditions of the agreement. Here, the Employer's argument seems to suggest that any finding in favor of arbitrability would be in violation of that provision. Such is clearly not the case inasmuch as I have specifically found that there was a written notification of intent to proceed to arbitration within ten (10) days of receipt of the Step 4 response as well as a filing of the Requests to Initiate Arbitration within the requisite time period. The fact that the filing was a unilateral, rather than a joint, request is not found to affect the ability of the matters to proceed to arbitration inasmuch as there was a mutual modification of that provision and the contract itself provides that only a violation of the time limits results in a grievance being forfeited.

Having found the grievances to be arbitrable, it is not necessary to address the additional arguments made by the Union.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

Yes, the grievances are arbitrable. The undersigned will be in contact with the parties in order to set a mutually acceptable date for hearing.

Dated at Madison, Wisconsin this 30th day of January, 2008.

¹⁰ It may well be that Mr. Libby is unfamiliar with the practices of the WERC in that a case is not filed with the Commission until such time as the filer's portion of the filing fee has been received. The other party is not invoiced until the matter has been filed, including the initial filing fee of the initiating party. Inasmuch as the instant matters are cases #4 and #5, it is clear that this Employer has not been involved in many cases involving the WERC.

Susan J.M. Bauman /s/

Susan J.M. Bauman, Arbitrator