

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
**LOCAL 79, AFSCME, AFL-CIO ONEIDA COUNTY
HIGHWAY EMPLOYEES**

and

ONEIDA COUNTY

Case 188
No. 68563
MA-14271

Appearances:

Mr. Dennis O'Brien, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 5590 Lassig Road, Rhinelander, Wisconsin 54501, appeared on behalf of Local 79, AFSCME, AFL-CIO Oneida County Highway Employees.

Mr. John Prentice, Petrie & Stocking, S.C., Attorneys at Law, Suite 1500, 111 East Wisconsin Avenue, Milwaukee, Wisconsin 53202, appeared on behalf of Oneida County.

INTERIM ARBITRATION AWARD DENYING MOTION TO DISMISS

Oneida County Highway Employees, herein referred to as the “Union,” and Oneida County, herein referred to as the “Employer,” jointly selected the undersigned from a panel of arbitrators from the staff of the Wisconsin Employment Relations Commission to serve as the impartial arbitrator to hear and decide the dispute concerning at least grievance number 08-004 which at least involves a grievance filed by Mike Bess seeking to bump into the Wastewater Department Lead Person position. The arbitrator held a hearing in Rhinelander, Wisconsin on July 30, 2009, which was adjourned by the arbitrator to allow the filing of the instant motion. The Employer filed its motion to dismiss together with supporting brief on August 6, 2009. The basis of the motion is that 1. Although the Union timely notified that Employer that it wished to appeal the Zdroik grievance to arbitration, it did not file a request with the Wisconsin Employment Relations Commission within the 10 working days as specified in Article 4. The parties each filed briefs in this matter, the last of which was received October 6, 2009

MOTION ISSUE

The issue raised by the motion herein is whether the Union timely filed a request for arbitration services with the WERC with respect to Zdroik grievance?

MOTION FACTS

The following are the facts stated by the parties. These facts are for the decision of this motion only. The Employer operates a Solid Waste Department. Grievant Mike Bess and Grievant Rudy Zdroik were employed as Land Fill Technicians at the land fill operated in that Department in a bargaining unit represented by the Union. There was a third Land Fill Technician, Wendler. The Department began a program of employing prisoners and individuals with disabilities. The Department received complaints from the referring agencies about misconduct of the prisoners and ultimately determined to create a fourth new bargaining unit position, Solid Waste Lead Person, the purpose of which was to supervise the prisoners. The Employer posted the new position for applications by unit employees in May, 2008. No unit employee applied. Mr Puza was ultimately selected for that position and remained in it at all material times. The Employer determined to eliminate the two Solid Waste Technician positions effective December 31, 2008. The Union contends the positions to be eliminated were those occupied by Windler and Zdroik. The Department contends that it was the positions occupied by Grievatns. Grievant Bess sought to use his seniority to bump into the position occupied by Mr. Puza who was then the least senior employee in the department. The Department denied that request and directed that Grievant Bess move into the position occupied by Wendler. The Union filed Grievance 08-004, on November 24, 2008, requesting that Grievant Bess be allowed to bump into the Solid Waste Lead Person occupied by Mr. Puza on the basis that most senior employees should be retained. The grievance was not resolved and the Union presented the grievance to the Employer's Labor Relations Employee Services committee on December 10, 2008. The Committee met on December 10, 2008. The minutes of that meeting state:

Dennis O'Brien presented Courthouse Association Grievance 08-004 to the committee regarding positions being eliminated at the Landfill. O'Brien state that it is the union's understanding that the senior qualified employee will be retained, as long as work can be performed.

Lisa Charbaneau informed the group that the grievant will be off work on a work related injury for several weeks beginning in January and due that time off, the LRES committee pulled the resolution eliminating the Solid Waste Technician at the December 9, 2008, County Board meeting.

. . .

Motion by Cushing, second by Holiewinski to deny Courthouse Union Grievance 08-004 regarding Bess, based on no elimination of his position. Motion carried; all ayes.

The Employer formally notified the Union of that decision on December 17, 2008. Bess went on leave and, therefore, Wendler retained his position. Bess applied for another position while he was on leave and was awarded that position. He remained in that position at all material times thereafter. Zdroik was laid off effective January 1, 2009.

On December 30, 2009, the Union filed a grievance on behalf of Grievant Zdroik, grievance no. 08-005 protesting that the Employer violated the seniority and layoff provisions of the agreement when it selected Grievant Zdroik for layoff when he was more senior to Mr. Puza and was qualified to fill the Solid Waste Lead Person position. The Employer denied the grievance and the Union appealed to the next step. The Union brought the grievance before the Labor Relations Employee Services Committee on January 14, 2009. The minutes state in relevant part:

Dennis O'Brien came before the committee to present Courthouse Association Grievance 08-005. O'Brien told the committee that the union believed the County did not apply the contract correctly when it laid off Rudy Zdroik. The union believes that Mr. Zdroik is qualified and has seniority over Phil Puza who is a Lead Solid Waste Technician.

Dennis O'Brien also suggested that he felt that he County would be denying this grievance as they had the previous similar grievance that the two could be combined and presented to the same arbitrator as both grievances are involving the same issue.

John Potters told O'Brien that the County would take that under advisement.

. . .

Motion by Cushing, second by Wickman to deny Courthouse Association Grievance 08-005. Roll call taken with all voting in the affirmative. Motion Carried.

On February 9, 2009, the Union timely notified that Employer that it wished to pursue grievance 08-005 to arbitration. On March 6, 2009, the Employer formally notified the Union of its action taken denying grievance 08-005 on January 14, 2009. On January 30, 2009, the Union filed a request to initiate grievance arbitration with the WERC stating that the matter involved 3 employees. The request enclosed grievance 08-004 and the Employer's denial of December 10, 2008. It did not include grievance 08-005. The Union did not file a separate request to arbitrate grievance 08-005

RELEVANT AGREEMENT PROVISIONS

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Article 4 Grievance Procedure

. . .

Section D

. . . . The Union must request a Staff Arbitrator from the WERC, or if mutually agreeable, a list of five arbitrators from the WERC within ten (10) working days from the date notice is given to the Labor Relations and Employees Services Committee of the Union’s intent to proceed to arbitration.

Section H

. . . . Failure by one of the parties to meet the timeframes established herein shall result in a favorable decision to the other party.”

. . . .”

POSITIONS OF THE PARTIES

Employer:

The Union did timely notify the Employer that it wished to arbitrate both grievances; however, the Union did not comply with the 10 day limit specified in Article 4, Section D for filing a request for arbitration services with the WERC. Although the Union sought to have the two grievances consolidated for hearing, the Employer never agreed to the same. Therefore, the Union was required to make two separate filings to the WERC. The Arbitrator must respect the parties’ time limits or the same would be meaningless. The Employer is prejudiced by the delay because Bart Sexton, the person who would have determined whether the grievant was qualified for the Lead Solid Waste Technician position, would have been available to the Employer. He has left employment and may not be available to testify for the Employer. Similarly, other witnesses may not have been available. While there were discussions involving the Bess case, the Employer made no effort to preserve relevant evidence. For these reasons, the grievance should be dismissed as not timely processed.

Union:

Arbitrators presume arbitrability. The Exchange of correspondence between the parties clearly indicates that the Employer was fully aware that the Union intended to pursue this dispute to arbitration. The Employer was not prejudiced. The facts should not be in dispute because Grievant Bess's position was not eliminated. He was forced to transfer to Wendler's position. In any event, the Employer's primary claim of prejudice was based upon Sexton leaving. However, Sexton left before the grievance was filed. Similarly, the presentation of a claim that Bess was not qualified for the position in dispute is new. The Employer has never made that argument before. It is possible that the Employer's attorney was unaware that the Union was seeking consolidation, but the County Coordinator was aware that the Union was seeking consolidation. This was done with Zdroik grievance on January 14, 2009. The Employer issued its answer to that grievance on March 6, 2009, which answer was late. Accordingly, the Zdroik grievance should be deemed granted under the terms of Section H.

DISCUSSION

The issue presented is whether the Union timely, if at all, filed a request for arbitration with the WERC. The determinative factor is whether the request for arbitration services filed by the Union in case No. 68563 was a request for arbitration in either Zdroik and/or Bess grievances. I conclude that it was a request of that nature. It is the WERC, ordinarily through its assigned staff member, who determines the scope of a request for arbitration services and not the opposing party. The gravamen of both grievances is a contract interpretation issue of whether a senior technician can exercise a right to bump up to a higher rated position in a layoff situation. There is only one position available. Therefore, only one of these two grievances can be successful. The choice of which one is likely to be a remedy issue only if the contract interpretation issue is decided in the Union's favor.

The Union notified the Employer in the January 14, 2008, grievance meeting that it was seeking to have the two grievances heard together. The Employer did not agree. The Union filed the solitary request for arbitration. As a practical matter, it does not make sense to require the Union to file two requests for arbitration when it either believes that the Employer has agreed to consolidate two grievances before one arbitrator or when it intends to make a motion to have two grievances heard by the same arbitrator. The request for arbitration attached only the Bess grievance, but it did state that the issue involved 3 employees. WERC rules and form require that the grievance be attached. The proper procedure in this case would have been to attach both grievances, even though the Union expected at the time of filing that only the Bess grievance would be presented. Nonetheless, the only way the Bess case could involve three employees is if both grievances were consolidated. Under the facts of this case, I conclude that the Union did file a request for arbitration for both grievances even though the Employer misunderstood it.

The Employer has alleged that the Union's actions have prejudiced it in that witnesses and evidence may not be available. As it pertains to the determination of the merits of this case, the issue of qualifications is most likely to relate to stated qualifications for the lead person position and the general qualifications for the technician position. If there is an issue relating to an individual person's training and or experience, that issue is likely to relate to the appropriate remedy should the Union succeed in its contract construction issue. Accordingly, if there is any prejudice to the Employer's position, it relates to the appropriate remedy and will be addressed should a remedy occur. The Employer's motion is hereby denied.

INTERIM AWARD

The motion filed herein is denied, with leave to raise issues of prejudice in the remedy phase of this grievance, if any.

Dated at Madison, Wisconsin, this 6th of October, 2009.

Stanley H. Michelstetter II /s/

Stanley H. Michelstetter II, Arbitrator