

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF OAK CREEK

and

**OAK CREEK PROFESSIONAL POLICE ASSOCIATION LOCAL 228,
THE LABOR ASSOCIATION OF WISCONSIN, INC.**

Case 148
No. 69064
MA-14461

(Drug Enforcement Unit Pay Grievance)

Appearances:

Joel S. Aziere and Brian J. Waterman, Attorneys, Davis & Kuelthau, S.C., 300 North Corporate Drive, Suite 150, Brookfield, WI 53045, appeared on behalf of the City of Oak Creek.

Benjamin M. Barth, Labor Consultant, N116 W16033 Main Street, Germantown, WI 53022, appeared on behalf of Oak Creek Professional Police Association Local 228 and The Labor Association of Wisconsin, Inc.

ARBITRATION AWARD

The City of Oak Creek, herein the City, and the Oak Creek Professional Police Association Local 228, The Labor Association of Wisconsin, Inc., herein the Association, are parties to a collective bargaining agreement which provides for the final and binding arbitration of certain disputes. The Association filed a Request to Initiate Grievance Arbitration with the Wisconsin Employment Relations Commission concerning the rate of pay for Drug Enforcement Unit members of the Association. The parties jointly requested that Paul Gordon, Commissioner, serve as arbitrator. Hearing was held in the matter on September 8, 2009, in Oak Creek, Wisconsin. At that time the parties reached a partial settlement of the grievance, with the matter of back pay remaining as an area of dispute. A transcript of the proceedings was made available to the parties, who filed briefs and reply briefs by January 12, 2010, when the record was closed.

ISSUES

The parties stipulated to a statement of the issues as:

Whether the City is obligated to provide back pay for any period prior to January 9, 2009, the date on which the Union presented the grievance in the instant case to the City?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

Article 3 Management and Employee Rights

The City retains and reserves the sole right to manage its affairs in accordance with the applicable laws, ordinances, and regulations and all management rights repose in it. Included in this responsibility, but not limited thereto, is the right to determine the kinds and numbers of services to be performed; the right to establish work rules, the reasonableness of which shall be subject to the grievance procedure; the right to determine the number of positions and the classifications thereof to perform such services; the right to direct, assign and schedule the work force; the right to establish qualifications for hire, to test and to hire, promote and retain employees; the right to transfer and assign employees subject to existing practices and the terms of this Agreement; the right, subject to Police and Fire Commission procedures and the terms of this Agreement relating thereto, to suspend, discharge, demote, or take other disciplinary action for just cause; the right to maintain efficiency of operations by determining the method and means and the personnel by which such operations are conducted and to take whatever actions are reasonable and necessary to carry out the duties imposed by law upon the City.

* * *

Article 8 Grievance Procedure

A. Definition of a Grievance: A grievance shall mean a dispute concerning the interpretation or application of this Contract.

B. Subject Matter: Only one subject matter shall be covered in any one grievance. A written grievance shall contain the name and position of the grievant, a clear and concise statement of the grievance, the issue involved, the relief sought, the date the incident or violation took place, the specific section of the Agreement alleged to have been violated, and the signature of the grievant and the date. All matters of discipline which are within the jurisdiction of the

Police and Fire Commission under Section 62.13, Stats., shall not be subject to the grievance and arbitration procedure of this Article; provided, however, disciplinary matters not covered under Section 62.13, Stats., shall be grievable and will commence at Step 3.

C. Time Limitations: If it is impossible to comply with the time limits specified in the procedure because of work schedules, illness, vacations, etc., these limits may be extended by mutual consent in writing. All days referred to in this article shall be defined as working days, Monday through Friday, and shall exclude Saturday, Sunday, and city holidays.

D. Steps in Procedure:

Step 1

If an employee has a grievance, the grievance shall be reduced to writing and signed by the employee and presented to the employee's immediate supervisor within ten (10) working days from the date the act or condition complained of occurred, or the employee with reasonable diligence could have known of the act or condition complained of. The immediate supervisor shall give his/her answer in writing within ten (10) working days from the receipt of the written grievance. In the event of a grievance, the employee shall perform his/her assigned work task and grieve his/her complaint later.

* * *

BACKGROUND AND FACTS

This matter started as a grievance over the rate of pay and benefits that should be provided to members working in the Police Department's Drug Enforcement Unit. At the hearing in this matter the parties settled the issues of pay and benefits, which settlement was that the members in the Unit would be compensated as Investigators. The parties did not agree or settle the remedial issue as to whether that rate should be provided to members retroactively for the period of time before the filing of the instant grievance. At the hearing in this matter the parties stipulated to several fact matters, and offered limited testimony in addition to that.

In 2004 the City Police Department created a Drug Enforcement Unit, herein the DEU. Officers going into and working in that Unit were paid at the rate of a Patrolman, rather than the higher rate of Investigator. In August of 2004 one of the members of the Association working in the DEU discussed the rate of pay with the Lieutenant in the Police Department, and whether the officers in the DEU should receive the higher pay and benefits of the Investigator position because the Association members felt the collective bargaining agreement provided that rate based on the duties of the DEU position. The Lieutenant responded to the effect that it was his and the Chief's vision that the DEU would be an investigator position shortly. The Association did not file a grievance over the matter at that time, feeling that if the Chief and Lieutenant already had that vision that they were already taking the proper steps to do so at the time. Prior to the settlement mentioned above, no member of the DEU was paid as an Investigator.

In or about October of 2006 before going into the DEU another Association member had a conversation with the Police Department Lieutenant about bringing the rate of pay in the DEU to an Investigator position. The Lieutenant responded to the effect that some in management had approved it as an investigator position, and that the Department wanted to pay it accordingly and make it that. After that conversation the position did not start receiving investigator pay, and the Association member noticed this on his paycheck. In August of 2008 the Association member again asked the Lieutenant about the Investigator pay for the Unit. The Lieutenant responded that he was not going to discuss it with the Chief of Police. Not hearing anything in response for approximately a month, the member met with the Chief directly, who said he would be approaching the City with that and was going to have a meeting with Mr. DeGrave, who is the City Administrator. In October 2008 the Chief responded that the City Administrator had not approved the change. The Chief asked for more time to discuss the matter and approach the City Personnel Committee. The Lieutenant and the Chief had both told the Association member that it would take time to make the arrangements. As of that December the Association had not heard back from the Chief or the City on the matter, and drafted the grievance which was filed on January 9, 2009. The Association had not filed any proposals during collective bargaining to address the issue, feeling it was in the contract already.

The parties stipulated to items 1 through 9 of the Facts alleged in the grievance:

1. That the City of Oak Creek and the Oak Creek Professional Police Officer's Association, Local 228 of the Labor Association of Wisconsin, Inc. have a collective bargaining agreement in full force and effect during all times pertinent to this grievance.
2. That the Grievant, J. B.,¹ is a member of the Association and is covered by the collective bargaining agreement referenced in paragraph one.
3. That members of the DEU are compensated at the rate of a Patrol Officer.
4. That the Department recognizes the classifications as Detective, Investigator, and Patrol Officer.
5. That the job duties and responsibilities of the SEU are more in-line with Investigators than Patrol Officers.
6. That members of the DEU are not allowed to sign up for patrol overtime.
7. That members of the DEU are required to carry their cell phones and to answer all work related phone calls. Lt. Edwards advised this requirement being specific to the Detective Bureau.
8. That members of the DEU have all been assigned to numerous large scale investigations.
9. That members of the DEU are supervised by the Lieutenant of Detectives.

¹ The initials of the names of the officers will be used in this Award as much as practicable due to the nature of their work.

The parties also stipulated that:

Below are dates Officers that were assigned to the Drug Enforcement Unit started and ended their time in the unit. Officers S and V dates are start dates only.

<u>Officer</u>	<u>Start Date</u>	<u>End Date</u>
R.C.	June 14, 2004	Oct. 15, 2006
B.M.	June 14, 2004	May 1, 2006
T.L.	May 1, 2006	May 1, 2009
D.S.	April 1, 2009	
M.V.	Sept. 21, 2009	

POSITIONS OF THE PARTIES

The Association

In summary, the Association argues that the City acted in bad faith when it failed to appropriately compensate members of the Department's Drug Enforcement Unit and should be required to pay Investigator pay for all time spent in the DEU.

The Association argues the intent of the Department was to use the Officers/Investigators and pay them Investigator pay while serving the DEU. In 2006 DEU members inquired as to receiving Investigator pay and the Lieutenant felt it would be appropriate. The City and the Chief knowingly acknowledged that the DEU were acting as Investigators, but failed to follow through on their requests for appropriate compensation in the higher position. In October of 2006 the Lieutenant stated he would be approaching the Chief to request the position be made an Investigator level position, but no action was taken or changes made to pay them at the Investigator rate. In May of 2008 when a DEU member requested of the Chief that the DEU position be made into an Investigator position, the Chief agreed. No response was ever received from the Chief. In August of 2008 a DEU member again met with the Lieutenant about the pay scale. The Lieutenant agreed it would be the appropriate classification. The member met with the Chief, who said he'd bring it to the City Administrator. After that there was no response from the Chief. A meeting was arranged for October 2008 with the DEU member and the Chief, when the Chief advised it was not approved. The Chief then wanted to bring the matter to the Personnel Committee. As of January 9, 2009, the DEU still had no response or further actions from the Chief or the City. At this point the grievance was filed, which had an issue of level of pay and appropriate remedy. The City later agreed to compensate all future DEU Officers at the Investigator pay grade.

The Association also argues that the City's reference to Lincoln County, Case 176, No. 55629, MA-10356, is similar in nature, but contains some major differences. That case involved the amount of time that back pay would be awarded, and is also similar to this case in that the grieved positions were already in the contract. But, that case is different than the one

here in that the Officer there waited to speak to his supervisors or request to receive a promotion, which is different than the instant case. Here, the DEU members met with their supervisors on numerous occasions. Both supervisors indicated their belief that the DEU was acting as an Investigator classification, and the DEU members requested Investigator compensation. Both supervisors repeatedly stated they would bring the matter to the City to have the DEU compensated at the Investigator pay grade. The members had believed that the City was acting in good faith to resolve the issue. However, it became apparent the Lieutenant and the Chief had not taken the steps to follow through with the DEU requests.

The Association argues that the remedy requested by the Association is reasonable and appropriate. The Association asks for compensation retroactive to June 14, 2004. The duties and responsibilities have only increased since 2004 and more closely resemble that of an Investigator than of a Patrol Officer. The members should not be penalized and should be awarded full back pay from their respective date of assignment to the DEU. They were told a number of times the appropriate rate was as an Investigator. They believed the Lieutenant and Chief were acting in good faith when making statements that they were following through with the City. The City should not be rewarded for its failure to respond to numerous DEU requests to be compensated at Investigator's wages while assigned to the DEU.

The City

In summary, the City argues that the City's liability for back pay extends only back to January 9, 2009, the date the grievance in the instant matter was filed. It is well established that grievants are not entitled to back pay for periods prior to the date a grievance is filed. This rule prevents exposure to liability when grievants are aware of a claim for several years, fail to assert it, and then eventually demand back pay for all the years they sat on their claim. Arbitral precedence in similar circumstances supports the City. The Association argument for back pay to the date of DEU assignment is because this is a continuing violation. But, even cases of a continuing violation limit back pay to the date of filing the grievance, citing arbitral authorities. Whether or not this is a continuing violation is irrelevant to how far back liability extends.

The City argues that apparently the Union is attempting to assert the Grievants were unfairly strung along by the City. It is absurd to accept that all Grievants would be so patient as to wait year after year for the City to act when they were shorted wages during that period. It is far fetched to believe the City could string them along for such a long time, even if it desired to do so. The Grievants knew for years they had a claim for unpaid wages, but sat on their claim and did absolutely nothing to pursue it, citing hearing testimony. The rule limiting back pay to the date the grievance was filed is designed to prevent exactly what occurred in the instant case. It is unreasonable for Grievants to have knowledge of a claim, fail to assert it for many years, and upon filing a grievance collect for the years they sat on their claim.

Association Reply

In summary, the Association replies that what the City did to the members of the Association more closely resembles that of bad faith rather than good faith, citing dictionary definitions. The City misled the DEU members when they were told the request would be taken to the City for resolution, which was never done. There is no written rule of the subject of award of back pay. The members did not simply sit on their claim, but discussed it with their chain of command on a number of occasions. The City admits there was a violation of the contract and their eleventh hour offer is a clear example of their bad faith perpetrated throughout the existence of the DEU. Beginning in 2006 the Lieutenant, who agree with paying an Investigator rate, said he would contact the Chief about Investigator pay, and a number of the same requests were made over the next two years with the same results. In May 2008 there was a conversation with the Chief and another request. Again, no response was received. In August 2008 another request was made, with the Lieutenant and Chief agreeing to Investigator classification and that it should go to the City. After not getting a response, a meeting was set in October 2008, when the members were told it was not approved by the City Administrator. Then the Chief wanted some time to take it to the Personnel Committee. As of January 9, 2009 there was still no response, and the grievance was filed. This history shows that the Association has constantly acted in good faith, but the same cannot be said for the City which failed to respond to numerous requests for Investigator pay. The City misled the members that this issue would be resolved. There was no recourse but to file a grievance. The appropriate thing for the City to do would have been to admit their mistake and award full back pay from the respective dates of assignment because of the City's continued bad faith.

The Association requests back pay from the respective dates of assignment to the DEU.

City Reply

In summary, the City replies that several of the Association's factual assertions were not raised at the hearing and are not in the record. The Association may not now introduce it and those assertions should be ignored.

The City argues that arbitral history recognizes that grievants are not entitled to back pay for periods prior to the date a grievance is filed. The Association has identified no authority to show an exception exists when an employer acts in bad faith. Rather than demonstrating bad faith, the record shows that the Grievants knew for years they were not receiving the appropriate wages, but failed to assert such a claim. Paycheck after paycheck and year after year then took no action under the grievance procedure. An Officer raised the issue in August 2004 and did not file a grievance, and never again raised the issue. The member thought the position could be eliminated, and that the Department was going to move to raise the rate. An Officer raised the issue in October 2006, saw no changes in pay for almost two years and raised the issue again in August 2008. It is absurd to believe the Grievants were so naive that they would wait for years for the City to correct the misclassification, and that they would sit idly by as they were shorted wages they believed they were due. It is simply inequitable for Grievants to wait a period of several years and then be awarded a windfall.

The City argues that the Association's distinguishing of arbitral precedent has no bearing on the general rule of limiting back pay to the date the grievance was filed. In this case the Grievants waited years, not months, to file a grievance, making their claim even less persuasive than in other cases. And an award of back pay here would be contrary to the grievance procedure in the collective bargaining agreement. The Article 8(D) grievance procedure in the agreement has a ten (10) working day limit from the date the act or condition occurred or the employee could have known of. Here the Grievants knew the acts occurred years ago. Back pay for prior to the grievance would be contrary to the contractual requirements, even if this were a continuing violation, citing arbitral authority.

The City requests that it be liable for back pay only from the date the grievance was filed.

DISCUSSION

The issue in the case concerns whether the remedy of back pay should extend to the time period prior to the filing of the grievance, which was January 9, 2009.² The parties settled the merits of the grievance as to the rate of pay, with the Investigator rate being agreed upon.

The Association contends that the remedy should include the entire time of the respective dates of assignments of Officers to the DEU. This would be, collectively, from the establishment of the DEU in 2004 and thereafter. It argues that the Department originally intended the DEU to be paid at the Investigator rate, and that the Lieutenant and Chief had agreed in 2004, 2006 and 2008 with paying the Investigator rate. The Association argues that including the time prior to filing the grievance is appropriate because the DEU members in good faith kept requesting the pay adjustment to the Investigator rate, and the City, in bad faith, misled the members to believe that the matter would be taken care of and did not make the adjustment until settling the rate matter in this grievance process. The City argues that back pay is only required, and is only appropriate, from the date the grievance was filed. The Officers knew they were not being paid at the Investigator rate for years after their requests were made. It argues that the grievance process in the collective bargaining agreement has a ten working day limit to present a grievance once its grounds are known or should have been known. It contends the Association should not be allowed to knowingly wait to file a grievance and then receive a windfall. And, the general rule, even if a continuing violation, is to limit back pay to the date of filing of a grievance.

² The Association's written briefs contain certain factual assertions that were not stipulated to and for which there was no hearing testimony or other hearing evidence. The City objects to the inclusion of those assertions into the record. Without stating those matters here with specificity, the undersigned has not considered those factual assertions in making this Award. Such assertions are not part of the evidentiary record and the City has not had an evidentiary opportunity to cross examine or otherwise contest those factual assertions.

The general rule is as the City notes. Back pay is usually limited to the time period after the filing of a grievance, even in situations of a continuing violation. See, Hill & Sinicropi, Remedies in Arbitration (2nd Ed.) pp. 235–238; Elkouri & Elkouri, How Arbitration Works, (6th Ed.) pp. 218, 219. See also, LINCOLN COUNTY, DEC. NO 56629 (JONES, 1999), VILLAGE OF ASHWAUBENON, DEC. NO. 46354 (HONEYMAN, 1992). This would limit the Association's claim here to the time period after it filed the grievance on January 9, 2009.

The Association distinguished this case from LINCOLN COUNTY in that the grievant there waited to make his request for a higher title and pay grade until he was off probation for the position and at no time did he speak to his supervisors or make a request before then. Contrasted with this case, the DUE members made several requests over several years for the higher rate and thought the City was acting on that request. The Association is advocating, in essence, that the general rule not be applied here because the City acted in bad faith by the City, through the Lieutenant and Chief, first indicating they agreed the rate should be as an Investigator, but then not following through with securing that rate from the City. The undersigned does not find this difference to be determinative. LINCOLN COUNTY is but one case and one factual setting in which the general rule was applied among the myriad of cases supporting the general rule as referred to in the above authorities. The LINCOLN COUNTY case does have a different factual background than the instant case. That does not automatically mean that the general rule should not be applied. It does beg the question of whether the general rule should be applied in this case.

The Association bases its claim on the argument that the City was acting in bad faith by not taking action to change to DEU position to that of an Investigator after initially indicating that was the appropriate classification. It argues that the intent in developing the DEU was that the members be paid at the Investigator rate. It bases this on the Lieutenant and Chief agreeing early on that the position should be at the Investigator classification, and their belief that the change was in process. That is why the grievance was not filed earlier. The facts show that the Association members knew from the time the DEU was first developed that the pay rate and classification was not at what they felt it should be under the collective bargaining agreement. They made several requests for a change over approximately four and one-half years, all the while knowing that the rate change had not been made. While there is no reason to doubt the Association's good faith and sincerity in believing the Lieutenant and Chief would seek to have the rate changed, the record does not show that the Lieutenant, Chief or the City generally acted in bad faith. There may have been plenty of inertia and lack of follow through, but that does not amount to bad faith, deceit or intentionally misleading the Association. The Association cites a dictionary definition of "bad faith" which reads:

intentional dishonest act by not fulfilling legal or contractual obligations, misleading another, entering into an agreement without the intention or means to fulfill it, or violating basic standards of honesty in dealing with others.

The Association emphasizes that part of the definition that refers to “misleading another.” The undersigned is not persuaded by this claim. The Association had the ability to ask more frequently than it did as to where the request was in the process. Clearly it knew that the rate had not been changed. No reason has been presented as to why they could not have inquired of the City Administrator or the Personnel Committee if the matter had been presented to them. It would be a different matter if the Lieutenant or Chief had told the Association that they in fact had taken the matter to the Administrator or Personnel Committee but in reality had not. Similarly, there is no evidence that either the Lieutenant or the Chief did not intend to pursue the change despite telling the Association they agreed with it and would seek the change. There is no evidence that the City knowingly designed or schemed to create the DEU and have the DEU members do Investigator work but only want to pay them the Patrol Officer rate. There is no evidence of malfeasance here to suggest that the Lieutenant or Chief, or anyone else for that matter, was acting in bad faith.

The Association argues that the intent in developing the DEU was to have it filled at the Investigator classification. That may very well be true. But the point remains that from its inception, everyone knew that it in fact was not being paid at the Investigator rate. The fact that the Association knew that the Chief was going to seek to have the rate changed underscores the point that everyone knew that some further action on the part of the City was needed to change the rate. To have the intent to raise the rate, at least at the Lieutenant and Chief level, is inconsistent with a bad faith effort to delay changing the rate.

The Association cites Article 3 Management and Employee Rights clause of the collective bargaining agreement. Management rights clauses are viewed as needing to be applied in a reasonable manner consistent with the other terms of the collective bargaining agreement. Here, the City has not been shown to have acted in bad faith, even though it did not act promptly. The Association has not demonstrated that the City violated the management rights clause, or that any rights of employees under that clause were violated.

It is understandable, and commendable, that the Association would first speak with Management in the Police Department about changing the rate. Likewise, that it would be patient while a change would work its way through the system. But the lack of rate change itself also made it clear to the Association that the request had not been followed through. While the Association’s patience early on is understandable, by the same token its lack of insistence at a resolution of the matter for four and one-half years undermines the strength of its reliance argument. The Association did not push the matter very hard until the fall of 2008. It may not have sat by completely idle, but it was pretty idle for long periods of time. Members made their inquiries roughly every two years until 2008. The prompt resolution of issues with or without the use of the grievance process is also a commendable goal in labor relations. Waiting a considerable time to file a grievance while knowing that there has been little, if any, other progress on the issue does not add to the weight of the Association’s argument here. To be sure, it may be a difficult judgment call for the Association to decide to be patient and work through the process of administrative changes to a position, or when to file a grievance and force the issue. But there is no indication that any rate change at an earlier

time would have been retroactive to the start of the DEU assignments. The record does not reflect that that retroactive action was requested even in 2008 before the grievance was filed.

There is also the consideration of the language of the collective bargaining agreement that is to be considered. As the City points out, Article 8 (D) contains a ten (10) working day limit within which to file a grievance from the time the employee knew or should have known of the act or condition complained of. Here, the Association knew of the rate condition for four and one-half years. The implication of Article 8 (D) is that the grievable event or condition, and thus by implication the remedy for that event or condition, is within ten (10) working days. That suggests a remedial limitation to the filing of the grievance or ten (10) days prior to that. This is also consistent with the general rule.

Because the undersigned is not persuaded the City acted in bad faith, and because of the considerable length of time the Association did wait before feeling it needed to formally use the grievance procedure, the argument for an award of back pay retroactive to before the filing of the grievance is not compelling. The ten (10) day limit for filing a grievance under the collective bargaining agreement adds a contractual basis to the same conclusion. The undersigned is not persuaded that this case presents an exception for applying the general rule that back pay be limited to the date the grievance was filed. The City is not obligated to pay back pay for any period prior to January 9, 2009, the date the grievance was filed.

Based upon the evidence and arguments in this case, I issue the following

AWARD

1. The grievance concerning the remedy in this case is denied and dismissed. The Remedy of back pay is limited to the period of time starting January 9, 2009, and thereafter.

Dated at Madison, Wisconsin this 14th day of April, 2010.

Paul Gordon /s/

Paul Gordon, Arbitrator