

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
CITY OF FOND DU LAC EMPLOYEES' LOCAL 1366
AFSCME, AFL-CIO

and

CITY OF FOND DU LAC

Case 203
No. 69271
MA-14548

(Stoffel Grievance)

Appearances:

Hawks Quindel, S.C. by **Attorney Aaron N. Halstead**, 222 West Washington Avenue, Suite 450, Madison, Wisconsin 53701 for the Union

Davis & Kuelthau, S.C., by **William G Bracken**, Labor Relations Coordinator, 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin 54903-1278, for the City.

ARBITRATION AWARD

City of Fond du Lac Employees' Local 1366, AFSCME, AFL-CIO (herein the Union) and the City of Fond du Lac (herein the City) are parties to a collective bargaining relationship. At the time of the events that are the subject of the grievance herein the parties were operating under a collective bargaining agreement dated November 9, 2006 and covering the period from January 1, 2006 through December 31, 2007. Subsequent to the filing of the grievance, but prior to the filing of the request for arbitration, the parties entered into a successor agreement covering the period from January 1, 2008 through December 31, 2009. Both contracts provide for final and binding arbitration of disputes arising thereunder. On October 28, 2009, the Union filed a request to arbitrate a grievance concerning the discharge of Mike Stoffel. The undersigned was appointed to arbitrate the matter. The parties agreed to bifurcate the issues and address the arbitrability issue in the initial phase. A hearing was held on January 13, 2010, in Fond du Lac, Wisconsin. The hearing was transcribed. The parties filed initial briefs by March 29, 2010 and replies by April 12, 2010, whereupon the record was closed.

ISSUES

The parties did not agree to a statement of the issue in this matter. The City would frame the issue as follows:

Is the grievance procedurally arbitrable under the 2008-2009 contract?

The Union would frame the issue as follows:

Is the grievance procedurally arbitrable?

The Arbitrator adopts the issue as framed by the Union.

PERTINENT CONTRACT PROVISIONS

ARTICLE XXV - GRIEVANCE PROCEDURE (2006-07)

- A. Grievances to be processed within the grievance procedure shall involve only matters of interpretation, application, or enforcement of the terms of this Agreement and, as such, only those items may be processed under the grievance procedure.
- B. The grievance process must be initiated within ten (10) working days of the alleged incident or within ten (10) working days of the aggrieved being aware of such incident. Any grievance not reported or filed within the time limits set forth above shall be invalid.
- C. Any employee or the Union may process a grievance as outlined in this Article. An employee shall have the right to representation by the Union in conference with the City. Further, the Union shall have the right to be present at all such conferences.
- D. Grievances which may arise shall be processed in the following manner:
 - Step 1** - The aggrieved employee and/or the steward shall present the grievance orally to the employee's immediate management supervisor. The aggrieved employee must accompany the steward if the immediate supervisor so requests. The steward and/or the aggrieved shall attempt to resolve the grievance with the immediate management supervisor. If the grievance is not resolved within **five (5)** working days at this level, the grievance may be processed as outlined in Step 2.

Step 2 - The aggrieved employee and/or the steward or grievance committee and/or the business agent shall request, within five working days of the completion of Step one, a meeting with the division head prior to the reduction of the grievance in writing in an attempt to resolve the grievance. If the grievance is not resolved within five workdays at this step, the grievance may then be processed as outlined in Step 3.

Step 3 - The grievance shall be presented in writing by the employee and/or steward or business agent to the Human Resources Director within **ten (10)** working days of the completion of Step 2 and, if not resolved within ten (10) working days at this level, the Human Resources Director shall note his statement on the grievance form and it shall be processed as outlined in Step 4.

Step 4 - Within thirty (30) calendar days of completion of Step 3, the grievance may be submitted to arbitration. Selection of an arbitrator by the Wisconsin Employment Relations Commission may be requested by either party. The arbitrator in arriving at his determination shall rule only on matters of application and interpretation of this Agreement. The findings of the arbitrator shall be final and binding on both parties. In the event an arbitrator loses jurisdiction, the parties shall select another arbitrator in accordance with the provisions of this section. Costs of the arbitration shall be borne equally by both parties.

E. General

- (1) Time limits set forth in the grievance procedure may be extended by mutual Agreement.
- (2) In the interest of expediting the grievance process, either party may request a meeting to permit oral discussion of the grievance prior to the instigation of arbitration proceedings.

...

ARTICLE XXV - GRIEVANCE PROCEDURE (2008-09)

...

E. General

1. In the interest of expediting the grievance process, either party may request a meeting to permit oral discussion of the grievance prior to the instigation of arbitration proceedings.
2. Time limits set forth in the grievance procedure may be extended by mutual Agreement.
3. Requests from either side for a meeting at the next step shall constitute an appeal to the next step of the procedure.
4. Failure of the employer to respond within the contractually required time limits constitutes an automatic appeal of the grievance to the next step and the timelines apply.
5. If the employee or the union fails to advance the grievance to the next step within the time limits, the grievance shall be deemed dropped.

(All other provisions of Article XXV remained the same in the 2008-09 Agreement)

BACKGROUND

Mike Stoffel was a long-term seasonal employee for the City of Fond du Lac and, at all pertinent times, was a member of Local 1366, AFSCME, AFL-CIO. On August 1, 2006, Stoffel's employment was terminated. Upon learning of Stoffel's termination, the Local contacted its bargaining agent, Tom Wishman, a Staff Representative for Wisconsin Council 40, AFSCME, AFL-CIO, with which Local 1366 was affiliated, and requested that he file a grievance over the termination. Wishman did so on August 15, 2006, in accordance with the provisions of Article XXV, Section B. of the parties' collective bargaining agreement. On August 22, 2006, the City denied the grievance. On September 12, 2006, the Local met and decided to arbitrate the grievance, whereupon it issued a check to the Wisconsin Employment Relations Commission (WERC) for the filing fee, which it delivered to Wishman and instructed him to file a request for arbitration. In December 2007, Wishman advised the Local that he had personally paid the filing fee to the WERC, whereupon the Local voided its September 12, 2006 check and issued a new check to Wishman personally to reimburse him for the filing fee. Thereafter, the Stoffel grievance was reflected on Local 1366's Grievance Log, which was periodically updated and shared with the City, as awaiting arbitration. As of the July 2008 update, the Grievance Log indicated the Stoffel matter was scheduled to be heard in October 2008.

At some point, the Local inquired of Wishman as to why the case was taking so long to schedule and he informed them that the delay was due to a backlog at the WERC due to the

fact that there had been several staff retirements and newly hired staff members were slowly being assigned caseload responsibility. On October 14, 2008, Wishman sent an email to the Local 1366 leadership wherein he stated, in pertinent part:

“Lastly, let me talk about the backlog of cases at the WERC. As I have indicated to you at our last couple of meetings, the commission has added significant new staff in the past couple of months and as those folks are brought up to speed we are seeing the logjam break up a bit. It is also clear that in an attempt to not exacerbate the problem further, they are (in many instances) assigning new cases that are being filed within a reasonable time frame while they continue to work on the backlog at more of a “steady pace.” The idea, as explained to me is to not let the backlog get any worse. So, in other words, my understanding is that things may not necessarily be handled on a first come first serve basis. I mention this only so that if a more recently filed case comes to hearing before an older one you will know the reason why.”

The Local was apparently satisfied with Wishman’s response and let the matter rest at that point. At no time during this process did the City apparently inquire as to the status of the arbitration request.

In January 2009, Council 40 received a complaint from another local assigned to Wishman in Waupun, Wisconsin. The local indicated that it had issued several checks to the WERC through Wishman in recent years to commence arbitration proceedings, but that the WERC had not scheduled any of the cases for hearing. The local made inquiries with the WERC and was informed that it had not received any requests for arbitration on the matters in question. Council 40 immediately conducted an investigation and determined that there were numerous cases within Wishman’s District where checks had been issued to instigate arbitration proceedings, but the cases were not processed.

On January 16, 2009, Council 40 fired Wishman. Ultimately, it was determined that he had misappropriated over \$25,000.00 from the locals in his District and the matter was referred to the Fond du Lac County District Attorney’s Office for prosecution. Council 40 then hired former Council 40 Staff Representative Dan Pfeifer to serve temporarily as the Fond du Lac District Representative. Among other things, Pfeifer was tasked to go through Wishman’s files and determine the status of all cases pending in the District, which was complicated by the fact that Wishman had erased most of his computer files concerning District business. With the assistance of Local 1366 members, Pfeifer ultimately determined that Wishman had received filing fees to request arbitration for 10-12 grievances, including the Stoffel matter, which were never filed. Pfeifer did eventually discover in Wishman’s files an unfiled arbitration request form for the Stoffel matter dated September 14, 2006. In February 2009, Pfeifer emailed the City’s Human Resources Director, Rodney Pasch, to inquire as to the City’s understanding of the status of the Stoffel matter and was told that the City’s only knowledge was the information contained in the Local’s Grievance Log. Pfeiffer continued to serve as the Staff Representative for the Fond du Lac District until June 15, 2009. During that time he negotiated settlements

with the City for most of the outstanding grievances, but the parties were unable to resolve the Stoffel matter.

Commencing in September 2007, while Wishman was still serving as Staff Representative, the parties also began negotiations over a successor collective bargaining agreement, which process continued until August 2009. During those negotiations the parties agreed to additional language in Article XXV which would deem any grievance not advanced to arbitration within 30 days of a denial at Step 3 as having been dropped. In a letter to WERC Staff Mediator Richard McLaughlin on August 15, 2008, which was copied to Wishman, the City's counsel noted that the parties had agreed to new language in Article XXV and stated that the City's position going forward would be that any existing grievances not processed to arbitration within thirty days after a Step 3 denial would be deemed inarbitrable. The parties initially reached a tentative agreement on the 2008-10 contract on November 20, 2008. On February 4, 2009, Pasch wrote to Pfeifer confirming the tentative agreement and confirming, as well, that as part of the agreement the Union was withdrawing all outstanding grievances with the exception of the Stoffel grievance, but that the City reserved the right to argue timeliness as an affirmative defense in that matter. Due to concerns within the Local regarding several provisions apparently agreed to by Wishman, but not cleared with the Local, the tentative agreement was not ratified, and the successor agreement was not ultimately completed until August 13, 2009.

On October 28, 2009 the Union filed a request for arbitration of the Stoffel grievance with the WERC. The parties agreed to bifurcate the issues and address arbitrability separately. That matter was heard on January 13, 2010. Additional facts will be referenced, as necessary, in the DISCUSSION section of the award.

PARTIES' POSITIONS

The City

The City asserts that this matter is controlled by the provisions of the parties' 2008-10 contract because, even though the grievance was filed in 2006, the request for arbitration was filed in October 2008, after the current agreement had been ratified. Further, during negotiations over the 2008-10 agreement, the parties discussed outstanding grievances. The Union agreed to drop all outstanding grievances except the Stoffel matter, to which the City agreed, but reserved the right to challenge timeliness. By including the grievance in the contract negotiations, the parties made it subject to the terms of the successor agreement. That agreement includes new language in Article XXV that states that any grievance not moved to arbitration within thirty calendar days of a Step 3 denial is deemed to be dropped. Hence, since the Stoffel grievance was not moved to arbitration within thirty calendar days after the Step 3 denial it is untimely and should be dismissed.

Even if the 2006-08 agreement is held to apply, the grievance should still be dismissed. Article XXV of the predecessor agreement set forth timelines for the advancement of

grievances to provide an orderly, timely mechanism for the resolution of disputes. That agreement, likewise provided that grievances must be submitted to arbitration within thirty calendar days of a Step 3 denial, along with other deadlines for advancing grievances through the preliminary steps. These timelines provide for an expedient means of resolving disputes that benefits both parties because disputes that are allowed to linger are detrimental to the employer/employee relationship. Here, the grievance was not moved to arbitration for over three years after the Step 3 denial, which is an unreasonable and exorbitant amount of time. Such a delay prejudices the City because some witnesses necessary to the case may now be unavailable or their recollection of events may be impaired by the passage of time. The Union and employee have responsibility to make sure the grievance is moved forward in a timely fashion and did not do so. Therefore, it should be dismissed.

This arbitrator has held that grievances that are untimely are to be dismissed. [Cf., SCHOOL DISTRICT OF NEILLSVILLE, MA-13384 (9/06/07); WAUPACA COUNTY, MA-11384 (10/28/02)] In NEILLSVILLE SCHOOL DISTRICT, the contract specified that a request for arbitration must be filed within ten days of a denial at the final step. The Union actually filed the request thirty-six days after the denial, which the arbitrator held was untimely and dismissed the grievance. In Waupaca County, the grievance procedure required the grievance to be orally presented within seven days of the time the Grievant knew or should have known of the basis for the grievance. The grievance was actually presented approximately five weeks after the Grievant was aware of the circumstances and the arbitrator dismissed it as untimely. Where contract language is clear and unequivocal, it should be enforced according to its terms. NATIONAL LINEN SERVICE, 95 LA 829, 834 (Abrams, 1990) The language should also be interpreted in the context of the contract as a whole. RILEY STOKER CORP., 7 LA 764, 767 (Platt, 1947) These rules of construction also apply to provisions setting time limits for the enforcement of rights and remedies. BALDWINVILLE CENTER SCHOOL DISTRICT, 100 LA 1076 (Wesman, 1993); PAINESVILLE TOWNSHIP LOCAL SCHOOLS, 108 LA 333 (Oderbank, 1997), and others. The delay in this case was more severe than in the cited precedents. Fundamental fairness dictates, therefore, that it should be dismissed.

The Union's defense is based on the criminal conduct of its bargaining representative, Tom Wishman, which resulted in his not filing the request for arbitration after the Union instructed him to do so. Nevertheless, the Union learned of Wishman's misconduct in January 2009, while negotiations over the 2008-10 agreement were still being concluded. The tentative agreement was not completed until June 8, 2009 and the contract was not finalized until August 13. On August 15, the Union was notified that the City would not agree to process stale grievances. Wishman's misconduct does not explain the Union's failure to request arbitration for nine months after it learned of his wrongdoing. At any time during that period the Grievant, the bargaining representative, or any Union official could have filed for arbitration, but they failed to do so. It is the Union's and employee's responsibility to make sure the grievance is properly processed, not the City's, and the Union failed to meet its obligations. The cutoff date for requesting arbitration was September 22, 2006. The Union missed this deadline by more than three years and the grievance should, therefore, be dismissed.

The Union

The Union asserts that, under the unique facts of this case, the grievance is procedurally arbitrable. The Union took every reasonable step to assure that the grievance was moved to arbitration in a timely fashion, but could not have foreseen Wishman's criminal misconduct, which prevented the request for arbitration from being forwarded to the WERC. Unlike a case of negligence by a Union official, which is properly attributable to the Union, where the Union official engaged in criminal misconduct the Union should be absolved of responsibility if it otherwise acted diligently and in good faith. Further, an insistence on timeliness in advancing a grievance to arbitration cannot be inferred from the controlling contract language.

The 2006-08 contract imposes strict timelines for filing grievances, but not for advancing them to arbitration. Article XXV, Section B. states, in pertinent part:

“Any grievance not reported or filed within the time limits set forth above shall be invalid.”

On the other hand, in Section B., Step 4, it states:

“Within thirty (30) calendar days of completion of Step 3, the grievance may be submitted to arbitration. Selection of an arbitrator by the Wisconsin Employment Relations Commission may be requested by either party...”

The principle of *inclusio unius est exclusio alterius* assists here because it holds that when the parties include one thing in a provision, all other unexpressed things are to be excluded from the provision. Elkouri and Elkouri, *How Arbitration Works* (4th Ed. 1979) Applying that rule to the case at hand, it can be seen that, while the parties intended to bar grievances that are not timely filed, they did not intend the same consequence for grievances that are not submitted to arbitration within thirty calendar days of the Step 3 denial. This is reasonable, because timely filing of the grievance puts the employer on fair notice of the claim so that it can begin to prepare and gather information. There is not the same potential for prejudice, however, where a request for arbitration is not immediately submitted.

Further, the City's silence in the face of the Union's clear belief that the grievance was awaiting arbitration constitutes a waiver of its right to claim untimeliness at a later date. It is undisputed that during the three years that the grievance was pending the Union continually updated the City on its status and advised the City that the matter was awaiting arbitration. During that time, the City never informed the Union that it did not believe the matter had been submitted to arbitration and was, therefore, barred. The City only made that known to Wishman, whose own interests caused him to withhold that information from the Local. The City merely waited to see whether the Local would discover that the request had never been filed. This constituted what is termed in arbitration acquiescence on the part of the City and should be considered a waiver of its untimeliness defense. Elkouri and Elkouri, *supra*, at 575-79.

Even if the arbitrator finds that the grievance would normally be time barred, however, he should still find the grievance to be arbitrable due to Wishman's intervening criminal conduct. The Union has been unable to find any case on point where an arbitrator has ruled on the arbitrability of a grievance under these circumstances. The Union submits, however, that the intervening criminal conduct of the Union representative, which thwarted the Union's good faith efforts to represent its members, should result in a finding of arbitrability. After Stoffel was fired the Union timely filed a grievance and Wishman properly advanced it through the contractual grievance steps. After the grievance was denied at Step 3, the Union instructed Wishman to file for arbitration, which it had no reason to assume he did not. The Union did not usually receive copies of requests for arbitration, so it was not unusual that none was received here. Wishman's later request for reimbursement for the filing fee confirmed for the Union that the request had been filed. Wishman continued to update the Union on the status of the grievance and suggested that the continuing delay was due to the case assignment and scheduling process within the WERC. This was reflected in the Union's grievance logs, which were shared with the City and which the City never questioned. Human Resources Director Pasch only raised the issue with Wishman, who, for his own purposes, never shared those communications with the Local. Once the Union became aware of Wishman's conduct in February 2009 it acted deliberately and responsibly to address the problem. Holding a Union responsible for the negligent acts of its agents serves the purpose of deterring careless and irresponsible conduct. No such purpose is served by penalizing the Union for its agents' criminal acts.

Another reason for finding this grievance to be arbitrable is that there is no evidence that the City would be prejudiced by doing so. The City offered no evidence that it would be in any way hampered by allowing the grievance to be arbitrated. The evidence shows that at all times the City was aware that the Union intended to arbitrate the Stoffel matter and it had the ability and opportunity throughout to preserve any evidence necessary to support its case. Since there is no evidence that the City's ability to offer a defense would be in any way impaired by the delay, the arbitrator should find the grievance to be arbitrable.

City Reply

The City reasserts its position that the arbitrator should not find the grievance to be arbitrable based on Wishman's wrongful conduct. First, the Union was in a better position than the City to prevent Wishman's acts and so should bear the consequences for failing to do so. Further, even after Wishman's actions were discovered the Local officers, the new Union representative, Dan Pfeiffer, or the Grievant, himself, could have submitted a request for arbitration and yet failed to do so for several months. It is understandable that the Local initially relied on Wishman to file the request, but at some point that reliance became unreasonable and the Local and the Grievant should have followed up at that point, which they failed to do. Three years is too long to wait to pursue a Step 3 denial and the Union's internal problems should not excuse its inaction and thereby place the onus on the City.

Even if Wishman's actions did excuse the Union's failure to file the request during his tenure, the Union still had ample opportunity to file the request after Wishman was fired and failed to do so. Its failure contradicts its claim that it acted "diligently and in good faith." It had several opportunities to file the request after Wishman's actions were discovered in January 2009, but did not do so until October 2009, eight months later. Pfeiffer discovered documents regarding Stoffel's grievance in Wishman's files in February 2009 and was on notice that the City had not received formal notification of the filing of the request. During contract negotiations the City informed the Union that it would object to the timeliness of the Stoffel grievance. A tentative agreement was reached on June 8, 2009 and the contract was signed on August 13, yet the Union still delayed on filing the request for another 75 days.

The City could find no authority on which contract controls under these circumstances, but Arbitrator Richard McLaughlin has held that the merits of a grievance occurring during a contract hiatus are controlled by the predecessor agreement, while the procedure for filing for arbitration are controlled by the successor agreement. GREEN BAY AREA PUBLIC SCHOOL DISTRICT, MA-9394, MA-9395, (McLaughlin, 4/3/96) Applying McLaughlin's reasoning, and giving the Union every benefit of the doubt, the arbitrator should find the submission of the request to be untimely. Here, the new contract language required a request for arbitration to be filed within 30 days of the Step 3 denial or the grievance would be deemed to be dropped. Even assuming the time period for doing so did not begin to run until the contract was signed, filing the request 75 days later failed to meet the contract requirements. Again, this delay contradicts the Union's argument that "deliberate good faith efforts to rectify the problems occurred." The contract clearly and unambiguously set forth the timelines for submitting a grievance to arbitration, therefore, the Union's failure to process the grievance until October 27, 2009, constituted negligence.

The arbitrator should reject the argument that the City waived its right to contest the timeliness of the request for arbitration. The City never expressly or implicitly waived this right. The Union's listing of the grievance on its Grievance Logs may have indicated its intent to arbitrate, but the contract requires that the grievance actually be submitted to arbitration within 30 days. The City had no obligation to make sure the Union followed through. Further, testimony on Linda Baxter indicated that a reference to arbitration in the Grievance Logs did not necessarily mean the grievance would end up in arbitration, so the City could not be expected to automatically draw that inference. Once the City became aware that the Union intended to arbitrate the Stoffel grievance it informed the Union that it would contest timeliness on August 15, 2008. This was reasserted to Pfeiffer by HR Director Pasch after a tentative agreement was reached on February 4, 2009. Clearly, the City put the Union on notice of its position and did not waive its right to contest timeliness. City Exhibits 9 and 11 also reveal that the Union leadership, not Wishman alone, knew of the City's position, but did not follow up to check on the grievance's status. It was not the City's responsibility to inform the Union that it had not received notice from the WERC of the filing of an arbitration request.

The Union's argument that the 2006-08 contract did not require strict adherence to the timelines for requesting arbitration also has no merit. The deadline for filing a grievance, if not

met, prevents a grievance from being valid. Failure to timely file for arbitration does not invalidate a grievance, but merely makes it ineligible for arbitration, an entirely different concept. The Union's reliance on the doctrine of *inclusio unius est exclusio alterius* fails to consider this distinction. It also violates the rule of interpretation holding that all clauses and words of a contract should be given effect, in that it would render the reference to timelines in Steps 1-4 meaningless, as well as the language providing for the extension of timelines by mutual agreement. This provision makes it clear that the parties considered the timelines in the Article to be binding. The arbitrator is required to rule "only on matters of application and interpretation of this agreement." Accepting the Union's argument would require him to ignore clear, unambiguous language, thereby exceeding his authority.

It should also be remembered that the 2008-10 contract, not the 2006-08 contract, controls the processing of this grievance. The grievance was submitted to arbitration after the 2008-10 contract took effect and should control. The 2006-08 contract had expired and is not applicable. The language of the 2008-10 contract makes it clear that if a grievance is not submitted to arbitration within thirty days of a Step 3 denial it is deemed to be dropped. The parties agreed to the inclusion of that language in the contract and it should control here.

The City also maintains that it is, in fact, prejudiced by the Union's failure to request arbitration for over three years. This is a termination case. As such, the City bears the heavy burden of establishing just cause for the dismissal. Over the course of three years witnesses recollections may be less reliable and some witnesses may no longer work for the City and would be harder to procure. Further, while many documents and records have been preserved, there is no guarantee that some may not have been lost or destroyed over the course of time. The City is also prejudiced by the extended delay in that, should the arbitrator uphold the grievance, the City may now be to a potential liability of nearly four years of back pay. This is an unreasonable burden to place on the City as a result of the Union's failure to request arbitration in a timely fashion. There is, therefore, demonstrable prejudice to the City if this matter is allowed to go forward and the matter should be dismissed.

Union Reply

The Union asserts that the arbitrator should apply the terms of the 2006-08 contract in addressing this matter. The Grievant was terminated on August 1, 2006 for conduct which allegedly occurred on July 31, 2006. The grievance was filed on August 15, 2006 and was based on alleged violations of the 2006-07 contract in issuing the termination. The Local voted to arbitrate the matter in September 2006 and issued a check at that time to its bargaining representative, Tom Wishman, to cover the cost of filing the request for arbitration with the WERC. All of these events occurred while the 2006-07 contract was in effect. The City has asserted that this matter should be governed by the terms of the 2008-09 contract, but has cited no authority in support of its position. The Union has also been unable to locate any such authority.

If the grievance were to proceed to a hearing on the merits, the decision would undoubtedly be based on the facts and circumstances at the time of the termination, which would include the applicable provisions of the 2006-07 contract. The Grievant was terminated for allegedly creating a hostile work environment, combined with his past disciplinary record. The grievance, if upheld, would establish a violation of Article XXVII of the 2006-07 contract, which gives management the right to terminate an employee for proper cause. Adopting the City's position, therefore, would place the arbitrator in the position of deciding the merits of the grievance based on the terms of the 2006-07 contract, while at the same time ruling on the procedural aspects of the grievance according to the terms of the 2008-09 contract. There is no authority of which the Union is aware that allows for deciding a grievance based on the terms of two different collective bargaining agreements and the arbitrator should not do so here.

Under the unique circumstances of this case it is reasonable for the arbitrator to allow the grievance to proceed to a hearing on the merits, despite the lengthy delay. The Union agrees that ordinarily a grievance would be dismissed for such a lengthy delay, but this is not an ordinary case. Wishman's criminal conduct takes the grievance out of the realm of the ordinary and into the unforeseeable. Under such circumstances, ordinary considerations of timeliness should not apply.

The Union also rejects the City's claim that it would be prejudiced by the delay in that it would be difficult to gather witnesses and evidence after such a long period of time. The grounds for termination were based on a fairly narrow set of facts and the City, in fact, offered no evidence that its ability to defend the termination decision would be hampered if it were to proceed at this time. As to the City's concerns about its potential exposure to a significant back pay award, the Union notes that it is within the arbitrator's authority to fashion an appropriate award based on all the facts and circumstances.

The Union also reasserts that there is a clear distinction in the contract between a grievance being deemed invalid if not filed within 10 days and the consequences for failure to timely file a request for arbitration. In short, the contract does not establish a penalty for failure to file a request to arbitrate within thirty days, a key distinction that the City fails to reconcile. The Union also rejects the argument that the grievance should be denied because the Union did not file a request to arbitrate as soon as it learned of Wishman's misconduct. The record reveals that, after taking Wishman's position, Dan Pfeiffer discovered 10-12 grievances in Local 1366 that Wishman had not advanced. Additionally, he discovered the same situation throughout the District, which includes about 30 other bargaining units. To assert that Pfeiffer should have immediately filed a request to arbitrate the Stoffel matter, therefore, oversimplifies the problems he faced. Further, the City was well aware from the Grievance Logs of the Union's intent to arbitrate the grievance. Pfeiffer worked to resolve as many of the outstanding Wishman era grievances as he could, but was unable to settle the Stoffel matter. The City agrees that it was aware throughout the negotiations over the 2008-09 contract that the Stoffel grievance was unresolved and that the Union intended to arbitrate it. The eventual filing of the request, therefore, was a mere formality. For all the foregoing reasons, the arbitrator should rule that the grievance is arbitrable and proceed to a hearing on the merits.

DISCUSSION

This case presents a unique set of circumstances. In effect, in September of 2006, the Union grieved the termination of its member, Mike Stoffel, in a timely fashion and, after the grievance was denied, instructed its bargaining agent, Tom Wishman, to file for arbitration. Instead of doing so, Wishman illegally converted the filing fee, which he had apparently been doing with numerous cases for locals he was representing. To cover his misconduct, Wishman told the Local the request had been filed and explained the scheduling delay as being due to a case backlog at the WERC. Thus, going forward the grievance was listed on the Local's Grievance Log as awaiting arbitration. To further cover his tracks, Wishman failed to inform the Local of communications from the City informing him that it would challenge the arbitrability of any grievances which were not timely filed for arbitration. Because the Local had no reason to distrust Wishman, and was not privy to his communications with the City, it was not aware of his actions until Council 40 discovered his misconduct in another local in January of 2009 and conducted an investigation into his handling of cases for all the locals he represented. After January 2009, the Local worked with another Council 40 Staff Representative, Dan Pfeifer, to handle its ongoing labor relations, including negotiations over its 2008-09 collective bargaining agreement, as well as in resolving the outstanding grievance cases filed by Wishman, but not forwarded for arbitration. Pfeifer resolved most of the outstanding grievances, but was not able to resolve the Stoffel matter, which the City agreed to arbitrate with the proviso that it could argue timeliness as a defense. Ultimately, a request for arbitration was filed on October 28, 2009.

The Union asserts that this case is governed procedurally by the terms of the parties' 2006-08 contract, under which the grievance was initially filed. It maintains, variously, that the contract does not make time "of the essence" as to the filing of a request for arbitration, that Wishman's criminal conduct was an intervening cause, over which it had no control, which should make the grievance arbitrable and that the City was aware that the Union intended to arbitrate the grievance and by its silence waived any defense as to timeliness. The City argues that the grievance is governed by the parties' 2008-09 contract which declares any grievance dropped if arbitration is not requested within thirty days of a Step 3 denial. It further asserts that Wishman's conduct does not excuse the Union for not timely filing the request, that even if such were the case, the Union unduly delayed filing after Wishman's misconduct was discovered and that it did not acquiesce in the untimely filing of the request.

At the outset, it is necessary to make a determination as to which collective bargaining agreement applies for purposes of determining the timeliness of the arbitration request. At the time the grievance was filed, the parties were still operating under their 2006-07 collective bargaining agreement, which did not expire until December 31, 2007 and during that time the Union's understanding was that the request for arbitration had been timely filed in September of 2006. Wishman's explanations as to why scheduling the arbitration was delayed were at least facially reasonable and the City did not raise concerns about timeliness with anyone other than Wishman, who withheld that information from the Local. Wishman's conduct was clearly and intentionally contrary to the best interest of the bargaining unit and was wholly inconsistent

with his fiduciary responsibilities as its Union representative. One cannot, in my view, hold the Local responsible for his misconduct, nor can the Local be faulted for its failure to discover his wrongdoing earlier than it did. The fact remains, however, that no request was filed while that contract was in effect.

After the expiration of the 2006-07 contract the parties were in a hiatus period until the successor agreement was finally signed on August 13, 2009. Under prevailing Wisconsin law at the time, the agreement to arbitrate was a creature of contract, which was not subject to the dynamic status quo applicable to other provisions dealing with wages, hours and conditions of employment. GREENFIELD SCHOOLS, DEC. NO. 14026-B (WERC, 11/77) Thus, as of January 1, 2008, the City was not under a requirement to honor a request to arbitrate and the Union was unable to compel it to do so. ST. CROIX FALLS SCHOOL DISTRICT, DEC. NO. 27215-D (WERC, 7/93) This did not change until the new contract took effect on August 13, 2009. During the hiatus the Union could have filed a prohibited practice complaint over Stoffel's termination under Sec. 111.70(3)(a)5, Wis. Stats., but it is highly questionable that such an action would have been sustainable, given the one year statute of limitations imposed by the statute and the fact that the termination occurred while the predecessor agreement was in effect.

As previously noted, the 2008-09 contract took effect on August 13, 2009. The City cites GREEN BAY AREA PUBLIC SCHOOL DISTRICT, MA-9394, MA-9395 (McLaughlin, 4/3/96) for the proposition that the successor agreement controls with the respect to the procedural requirements for advancing the grievance to arbitration. In that case, the grievances arose during a contractual hiatus and were advanced through the grievance process contained in the predecessor agreement. Because the contract had expired, however, arbitration was not available during the hiatus and, therefore, no request was filed. After the successor agreement took effect the Union filed a request for arbitration. The Employer challenged the timeliness of the request. The arbitrator found that the grievances were arbitrable because the successor contract had retroactive effect covering the period within which the grievances arose. He further found that for purposes of filing the request the timeliness requirements of the successor agreement controlled, but held that the time for filing the request began to run at the time the successor agreement was signed.

This case is distinguishable on its facts from GREEN BAY AREA PUBLIC SCHOOL DISTRICT in that here the event giving rise to the grievance occurred while the predecessor agreement was in effect and the Union had access to arbitration. In GREEN BAY AREA PUBLIC SCHOOL DISTRICT, Arbitrator McLaughlin noted that under JT. SCHOOL DISTRICT NO. 10, CITY OF JEFFERSON ET AL., 78 WIS. 2D 94 (1977), the Wisconsin Supreme Court, in establishing a test for arbitrability stated, as follows:

“The court’s function is limited to a determination whether there is a construction of the arbitration clause that would cover the grievance on its face and whether any other provision of the contract specifically excludes it.”

Here, both contracts contain the same language governing the processing of grievances, contained in Article XXV, Sec. A.:

“Grievances to be processed within the grievance procedure shall involve only matters of interpretation, application, or enforcement of the terms of this Agreement and, as such, only those items may be processed under the grievance procedure.”

Indisputably, the Stoffel grievance arose under the terms of the 2006-07 contract. Because each contract limits access to the grievance procedure to only matters that arise under the existing agreement, therefore, the Stoffel grievance is precluded by the language of the 2008-09 contract and could only be advanced under the 2006-07 contract, which specifically covers matters arising within the dates it was in effect. Having determined that the language of the 2006-07 contract controls the issues of timeliness, the question that remains is whether the request for arbitration was, in fact, timely.

As noted above, while the 2006-07 contract was in effect Wishman was engaging in illegal conduct specifically designed to interfere with the Local's ability to advance the grievance to arbitration and also to prevent the Local from discovering his misconduct. The City notes that this was not the City's fault, that, whatever the reason, no timely request for arbitration was filed and asserts, therefore, that the City should not be required to arbitrate the grievance. There is a certain element of justice to this position, nevertheless one must also weigh into the equation that the Local had taken all necessary steps to advance the grievance to arbitration and reasonably believed, based on Wishman's representations, that arbitration was pending. Had the Local failed in some way to take reasonable steps to ascertain the truth of Wishman's assertions the City's position would be stronger, but there is no evidence that the Local had any reason to believe that Wishman's assertions were untrue, such that it should have conducted an independent investigation prior to the discovery of Wishman's misconduct in January 2009. Admittedly, the delay was lengthy, which Wishman explained, but other than that there were apparently no "red flags" to warn the Local that something was amiss. By January 2009, the 2006-07 contract had expired and the Local was precluded from requesting arbitration during the hiatus. The hiatus remained in effect until the successor agreement took effect on August 13, 2009. The City notes that, under either contract, the request for arbitration could have been filed by the Grievant or a Union officer. This is true, but it is also true that this responsibility usually falls to the Union's professional staff representative and, since there was no initial reason to doubt that Wishman had done so, there was no immediate reason for either the Local or the Grievant to take action. I find, therefore, that the Local's failure to request arbitration prior to August 13, 2009 was mitigated by Wishman's willful misconduct and extended by the effect of the rules precluding arbitration during a contract hiatus. Once the 2008-09 contract was signed, the time period for requesting arbitration of this grievance began to run and the question remaining is whether the Union's subsequent filing of an arbitration request on October 28, 2009 was timely.

The operative language of the 2006-07 agreement, as set forth in Article XXV, Section D, Step 4, states, as follows:

“Within thirty (30) days of completion of Step 3, the grievance may be submitted to arbitration.”

The Union asserts that this language should be interpreted to mean that, while arbitration may be requested within thirty days, it is not required. It bases this assertion on the fact that the word “may” should be distinguished from the word “must” which is used in conjunction with the requirement for timely filing of grievances set forth in Article XXV, Section B. For a variety of reasons, I disagree.

Fundamentally, the purpose of the grievance procedure is to ensure the orderly and timely submission and consideration of contractual disputes in order to bring about their proper resolution and advance the interests of labor peace. This goal is thwarted if the process is open-ended and is capable of manipulation, such that disputes may be extended indefinitely by treating time limits as permissive rather than mandatory. Stated another way, if the provision for submission to arbitration has no ascertainably fixed end point, there is no means of assuring that any grievance will be brought to conclusion within a reasonable time. If that be so, the City’s concerns regarding the availability of witnesses, preservation of relevant evidence and the potential cost of a remedy after a protracted delay take on greater significance. To read the language of Article XXV, Section D, Step 4 as merely allowing the Union to request arbitration within thirty days, without requiring it to do so, therefore, would give rise to potential for mischief and misuse.

If one were to read the language as permissive, in my view the equities still are with the City. Reading the language as permissive would still mean that any delay in filing beyond thirty days would have to be reasonable. From the Union’s standpoint, having had the grievance already delayed for more than two and one-half years, another seventy-six day delay in filing a request for arbitration might have seemed reasonable in the totality of the length of time involved. All the circumstances included in the delay must also be considered, however. These include multiple warnings by the City that it would challenge the timeliness of the request, and new language in the contract specifically stating that grievances not processed to arbitration within thirty days of a Step 3 denial would be deemed dropped. The Union had no way of knowing at the time whether that new language would be applied to this grievance. Under those circumstances, for the Union to delay filing its request for additional seventy-six days after the contract was signed was unreasonable.

I note further, that Article XXV, Section E, subparagraph 1. clearly states:

“Time limits set forth in the grievance procedure may be extended by mutual Agreement.”

Subparagraph 1 specifically refers to time limits set forth in the grievance procedure. This is stated in plural and so must be read to cover all time limits contained within the grievance procedure. The only time limits set forth in the grievance procedure, other than the ten day requirement for initially commencing a grievance in Sec. B, are those that refer to advancing grievances to successive steps once they have been filed, which all use the word “may” also used within Step 4. It is clear, therefore, that in order to extend any of the contractual timelines mutual agreement is necessary. It is undisputed that there never was a mutual agreement between the City and the Union throughout the processing of this grievance to extend the time periods. In fact, the City put the Union on notice that it would challenge the timeliness of the grievance and this was made known to the Union after the discovery of Wishman’s misconduct and his termination. (Employer Ex. #11). Accordingly, without mutual agreement of the City, the Union had thirty days from August 13, 2009 to file a request for arbitration of the Stoffel grievance in order for it to be considered timely. The deadline for doing so, therefore, was September 12, 2009. The request was filed on October 27, 2009, forty-five days after the deadline had passed. The arbitration request was, therefore, untimely.

I note the Union’s assertion that the City’s failure to object to the timeliness of the arbitration request should be regarded as acquiescence, such that the City should be deemed to have waived the timeliness objection. There is no evidence in the record, however, suggesting that the City was aware that the request had not been filed prior to the discovery of Wishman’s misconduct by the Union. The Union also cites no authority to the effect that the City had an affirmative duty to investigate and determine for itself whether the request had been timely filed. I find, therefore, that the City was entitled to rely on Wishman’s representations up to the point the non-filing of the request was discovered and disclosed, and that shortly thereafter it put the Union on notice that it would object to the timeliness of the arbitration request. I find, therefore, that the City did not waive its right to object to the timeliness of the arbitration request.

For the reasons set forth above, therefore, and based upon the record as a whole, I hereby issue the following

AWARD

The grievance is not procedurally arbitrable and is dismissed.

Dated at Fond du Lac, Wisconsin, this 21st day of June, 2010.

John R. Emery /s/

John R. Emery, Arbitrator

JRE/gjc
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