

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF RIVER FALLS

and

LOCAL 556-A, WISCONSIN COUNCIL 40, AFSCME, AFL-CIO

Case 46
No. 69762
MA-14729

Appearances:

Steve Hartmann, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 364, Menomonee, Wisconsin, appeared on behalf of the Union.

Stephen L. Weld, Weld, Riley, Prenn & Ricci, S.C., 3624 Oakwood Hills Parkway, Eau Claire, Wisconsin, appeared on behalf of the Employer

INTERIM ARBITRATION AWARD

Local 556-A, Wisconsin Council 40, AFSCME, AFL-CIO, herein referred to as the "Union," and City of River Falls, 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 specified below. The arbitrator held a hearing in River Falls, Wisconsin, on July 13, 2010. The parties agreed to bi-furcate the proceeding to address the procedural arbitrability issue first. The parties made oral argument at hearing.

ISSUES

The parties disagreed as to the statement of the issues. They agreed that I might state them. I state them as follows:

Was the Step 3 appeal timely filed?

RELEVANT AGREEMENT PROVISIONS

“ . . .

ARTICLE V - EMPLOYEE RIGHTS - GRIEVANCE PROCEDURE

5.1 DEFINITION OF A GRIEVANCE

A grievance is defined as a dispute or disagreement as to the interpretation or application of the specific terms and conditions of this Agreement.

5.2 UNION REPRESENTATIVES

The Employer will recognize representatives designated by the Union as the grievance representatives of the bargaining unit having the duties and responsibilities established by this Article. The Union shall notify the Employer in writing of the names of such Union representatives and of their successors when so designated.

5.3 PROCEDURE

Grievances, as defined by Section 5.1, shall be resolved in conformance with the following procedure:

STEP 1. An employee claiming a violation concerning the interpretation or application of this Agreement shall, within fourteen (14) calendar days after such alleged violation has occurred, present such grievance to the employee's supervisor as designated by the Employer. Upon written request by the Union, a fourteen (14) day extension of time may be granted. The Employer-designated representative will discuss and give an answer to such Step 1 grievance within ten (10) calendar days after receipt. A grievance not resolved in Step 1 and appealed to Step 2 shall be placed in writing setting forth the nature of the grievance, the facts on which it is based, the provision or provisions of the Agreement allegedly violated, and the request for settlement or corrective action desired and shall be appealed to Step 2 within ten (10) calendar days after the Employer-designated representative's final answer in Step 1. Any grievance not appealed in writing to Step 2 by the Union within ten (10) calendar days shall be considered waived.

STEP 2. If appealed, the written grievance shall be presented by the Union and discussed with the Employer-designated Step 2 representative. The Employer-designated representative shall give the Union the Employer's Step 2 answer in writing within ten (10) calendar days after receipt of such Step 2 grievance. A grievance not resolved in Step 2 may

be appealed to Step 3 within ten (10) calendar days following the Employer-designated representative's final Step 2 answer. Any grievance not appealed in writing to Step 3 by the Union within ten (10) calendar days shall be considered waived.

STEP 3. A grievance unresolved in Step 2 and appealed to Step 3 shall be submitted to the Wisconsin Employment Relations Commission for a list of arbitrators.

5.4 **GRIEVANCE ARBITRATION**

- a). The Arbitrator shall have no right to modify, nullify, ignore, add to, or delete from the express terms of the Agreement, and the decision of the Arbitrator shall be limited to the subject matter of the grievance and be based solely upon the Arbitrator's interpretation of the express language of the Agreement.
- b). Each party shall bear its own costs incurred in the preparation and the presentation of any arbitration case, including attorney's fees.

5.5 **WAIVER**

If a grievance is not presented within the time limits set forth above, it shall be considered "waived". If a grievance is not appealed to the next step within the specified time limit or any agreed extension thereof, it shall be considered settled on the basis of the Employer's last answer. If the Employer does not answer a grievance or an appeal thereof within the specified time limits, the Union may elect to treat the grievance as denied at that step and immediately appeal the grievance to the next step. The time limit in each step may be extended by mutual Agreement of the Employer and the Union.

... ”

FACTS

The Employer is a Wisconsin city. The Union is the certified representative of all of its rank and file employees. The Grievant, Molly McLagan is an employee represented by the Union. She was employed by the Employer, but currently on layoff. David Hovel is the local union President and also an employee of the Employer. Steven Hartmann is employed by the Union as its Staff Representative assigned to provide services to this local. He is not an employee of the Employer.

The Union filed a grievance protesting the failure of the Employer to select her to fill a Library Aide position with the Employer dated February 19, 2010, and received by the Employer February 22, 2010. The grievance was properly processed through the steps of the grievance procedure until the issue involved in this matter occurring at the appeal to the third step stage.

City Administrator Scott Simpson acting on behalf of the Employer met with Hovel on March 10, 2010 to have the second step discussion of this grievance. There is a dispute as to the exact date, but either on that date or the following day, March 11, Simpson hand delivered his second step answer to Hovel, but did not provide a copy to Staff Representative Hartmann. Providing a copy is not required by the grievance procedure.

Hovel forwarded the answer by e-mail to Hartmann on March 12. Hartmann had been on vacation and had returned on March 10. He actually viewed the e-mail for the first time on March 14. Hartmann's next communication concerning this matter was to Simpson by e-mail sent and received March 23, 2010, which referenced the grievance in dispute and stated in the body: "Who will be representing the City in the above captioned matter." This was more than ten days after March 11 and even more than ten days after March 12.

POSITIONS OF THE PARTIES

The Employer takes the position that the grievance was not timely appealed to the third step. It is therefore waived under the provisions of the grievance procedure.

The Union takes the position that the 10 day time limit should commence from Hartmann's receipt.

DISCUSSION

Section 5.3, Step 2 is clear and unambiguous that the grievance must be appealed within ten days of the Employer's answer and not from when the staff representative receives it. There is some more ambiguity in the provision as to who must receive the Employer's answer. Section 5.2 requires the Union to name its representatives and there is no dispute that Hovel was the appropriate Step 2 Union representative. There is nothing in this record or the procedure which suggests that the Employer had a responsibility to deliver the response to Hartmann. Under these circumstances, the time limit began when Hovel received the answer. The appeal took place more than ten days after the answer was received at its latest. The appeal is untimely and the grievance is dismissed.

AWARD

That since the grievance was not timely appealed to step 3, it is dismissed.

Dated at Madison, Wisconsin, this 21st day of July, 2010.

Stanley H. Michelstetter II /s/

Stanley H. Michelstetter II, Arbitrator