

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

FLORENCE COUNTY

and

**FLORENCE COUNTY HUMAN SERVICE EMPLOYEES ASSOCIATION, LOCAL 605
OF THE LABOR ASSOCIATION OF WISCONSIN**

Case 63
No. 69141
MA-14498

Appearances:

Robert W. Burns, Davis & Kuelthau, S.C., 318 South Washington Street, Green Bay, Wisconsin, 54301, appearing on behalf of Florence County.

Benjamin M. Barth and **Dan Kraschnewski**, Labor Association of Wisconsin, Inc., N116 W16033 Main Street, Germantown, Wisconsin, 53022, appearing on behalf of the Florence County Human Service Employees Association, Local 605 of the Labor Association of Wisconsin.

ARBITRATION AWARD

Florence County (“County”) and the Florence County Human Service Employees Association, Local 605 of the Labor Association of Wisconsin (“Association”) are parties to a collective bargaining agreement that provides for final and binding arbitration of disputes arising thereunder. On August 28, 2009, the Association filed a request with the Wisconsin Employment Relations Commission to initiate grievance arbitration concerning the discharge of John LeClair, a member of the bargaining unit represented by the Association. At the parties’ request, the Commission provided a panel of five WERC-employed arbitrators, and the parties thereafter selected the undersigned to serve as arbitrator in this matter. A hearing was held on January 14, 2010, in Florence, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, and arguments as were relevant. A stenographic transcript of the proceeding was made. Each party submitted initial and reply post-hearing briefs, the last of which was received on April 15, 2010, whereupon the record was closed.

Now, having considered the record as a whole, the undersigned makes and issues the following award.

ISSUE

The parties agreed to allow the undersigned to frame the statement of the issue to be heard. The County proposes the following statement of the issue:

Was the Grievant probationary at the time of discharge? If so, the grievance is not arbitrable. If not, did the Employer violate the Collective Bargaining Agreement when it terminated the Grievant's employment when he failed to meet the qualifications for the position within the allotted time period? If so, what is the appropriate remedy?

The Association proposes the following statement of the issue:

Was there just cause to terminate John LeClair effective May 3, 2009? If not, what is the correct remedy?

The undersigned adopts the following statement of the issue:

Is the grievance arbitrable? If the grievance is arbitrable, did the County have just cause to terminate the Grievant's employment. If the County did not have just cause to terminate the Grievant's employment, what is the appropriate remedy?

REVELANT PROVISIONS

The collective bargaining agreement between the County and the Association dated January 1, 2008, through December 31, 2008, contains the following relevant provision:

ARTICLE VI
Seniority

. . .

Section G: Bargaining unit employees shall be considered as probationary employees for the first six (6) months of their employment. When an employee completes the probationary period by accumulating six (6) months of employment, they shall be entered on the seniority list of the Association, and shall rank for seniority from their date of hire. Employees shall serve only one six (6) month probationary period when moving from one position within the bargaining unit to another position within the bargaining unit. All probationary employees shall be subject to discipline and/or discharge without recourse to the grievance procedure hereinafter outlined. Continued employment beyond the probationary period is hereby defined to be satisfactory completion of probation.

...

The collective bargaining agreement between the County and the Association dated January 1, 2009, through December 31, 2010, contains the following relevant provision:

ARTICLE VI
Seniority

...

Section G: Bargaining unit employees shall be considered as probationary employees for the first twelve (12) months of their employment. When an employee completes the probationary period by accumulating twelve (12) months of employment, they shall be entered on the seniority list of the Association, and shall rank for seniority from their date of hire. Employees shall serve only one twelve (12) month probationary period when moving from one position within the bargaining unit to another position within the bargaining unit. All probationary employees shall be subject to discipline and/or discharge without recourse to the grievance procedure hereinafter outlined. Continued employment beyond the probationary period is hereby defined to be satisfactory completion of probation.

...

BACKGROUND

This case involves the hiring and firing of the Grievant, John LeClair, as a social worker for the Florence County Human Services Department, and LeClair's efforts, during the course of his employment, to obtain a social work license.

To obtain a social work license in the State of Wisconsin, several requirements must be met. First, a licensee must have completed a certain course of college study. Either a Bachelor of Social Work or a Master of Social Work degree from an accredited college qualifies an individual for a social work license. Alternatively, an individual can be qualified by possessing an "equivalent" degree, in sociology for example. In the case where a licensee has an equivalent degree, the State of Wisconsin Department of Regulation and Licensing will issue a two-year "training" certificate. After such a certificate has been issued, the State will review the licensee's college transcripts to determine how much of the coursework that led to the degree is equivalent to social work coursework. If the State determines that certain necessary coursework is lacking, it will provide to the licensee a list of courses that need to be completed during the two-year training certificate period. Also, within those two years, the State requires the completion of either a human services internship or 400 hours of face-to-face contact time

in a licensee's employment area. Further, a licensee is required to complete two exams. One is an open book, state-specific exam that tests a licensee on applicable state statutes. This exam is done on-line and can be completed at any time. The other is a closed book, national exam. The national exam is offered at various times and locations each month. A licensee must pay a fee to sit for these exams.

At the time when he was seeking employment with the County, the Grievant did not have a State of Wisconsin social work license. After the Grievant was offered and accepted the social worker position with the County, a letter of employment was sent to him on February 14, 2008, which stated the following:

Because there is a requirement of being or becoming a Wisconsin certified social worker, it is understood that you have up to twelve (12) months from your official start date to obtain this certification. All fees and documentation requirements are your responsibility. You will remain on probationary status until you have obtained your permanent licensure. Should you not receive this certification twelve (12) months from your date of hire; [*sic*] your employment will be terminated.

Working under a temporary, training certificate, the Grievant's employment with the County began on March 3, 2008. The position description for the social worker position held by the Grievant provided, in part, as follows:

Prior to the completion of probation, the successful candidate must meet the Wisconsin Social Work Certification requirements and obtain a Wisconsin Social Work Certification. During employment, this certification must be continuously maintained.¹

Approximately two months after the Grievant began working for the County, the State Department of Regulation and Licensing contacted the County and indicated that it had reviewed LeClair's college transcripts and determined that he would need to complete three courses to become eligible for permanent licensure as a social worker. The grievant testified at hearing that he thought, based on his conversations with Steber and Kelley, that his educational credentials were sufficient, and he was surprised to learn that he needed to take more courses. The courses were scheduled to run from September of 2008 until March of 2009. It became apparent based on this calendar that the Grievant would not finish his classes and be able to obtain licensure by early March of 2009, which was the end of the twelve-month probationary period that had been established in the Grievant's letter of employment. Based on this

¹ The position description submitted by the County into evidence at hearing is dated July 22, 2008, which is after the Grievant began his employment. Through testimony it was established that the position description for the Grievant's position that was in place when the Grievant was hired contained the same provision set forth here. Further, it was established that the qualifications for the position did not change during the course of the Grievant's employment with the County.

timeframe, the director of the Human Services Department, Jen Steber, met with the County Human Services Board in July of 2008, seeking to extend the Grievant's deadline for obtaining a license. The Board granted an extension, giving the Grievant until May 3, 2009, to become licensed. On July 28, 2008, Steber sent correspondence to Association representative Thomas Bauer, which stated the following:

On March 3, 2008, Mr. John LeClair was hired with the Florence County Human Services Department as a Social Worker I-Step I.

As stated in the original offer of employment letter and job description, John's probationary status will be extended until he obtains his Wisconsin social work license. The license exam must be completed twelve months from the date of hire. Successful completion and documentations is required by fourteen months or May 3, 2009. John will remain at Social Worker-Step I until the agency is in receipt of his official Wisconsin social work license. John will receive vacation and other County benefits as stated in the contract. (See attached employment letter and job description).

If you have questions or require further clarification, please feel free to contact me at 715-528-3296 extension 166 or by email at jsteber@co.florence.wi.us.

This letter was copied to the Grievant, to D'Nelle Kelley who was the Grievant's immediate supervisor, and to Association president Janet Nanninga. It also was placed in the Grievant's personnel file. Nanninga acknowledged to Steber having received the letter. There was no contention from the Association that Bauer did not receive the letter. The Grievant, however, denies having received the letter. Thus, the Grievant asserts that, although he knew his timeframe for obtaining his license had been extended, he never came to know the exact deadline that had been established. He never asked Steber, Kelley, or anyone else what the new deadline was.

Between July of 2008 and May of 2009, the Grievant had periodic conversations with Steber and Kelley as to the status of his coursework and licensure efforts. During that time, Kelley indicated to the Grievant that he should keep Steber informed and let her know if he needed extra time, so they could seek another extension from the Board if necessary. At no point did the Grievant indicate to Steber or Kelley that he was not going to be able to meet the deadline for obtaining licensure. The Grievant testified that it was difficult to keep Steber and Kelley informed during this period of time, as they were both out on extended medical leaves. The Grievant also testified that they were very busy in the office around this time, and he did not perceive Kelley as being overly concerned about the national test that he still needed to take before he could get a license. He also indicated to Kelley a few times that the fee associated with the national exam presented a hardship to him.

The Grievant finished his coursework on February 28, 2009. In early April of 2009, Kelley asked the Grievant if had heard anything from the State about the national exam. The Grievant indicated to Kelley that had not heard anything. In response, Kelley sent an e-mail inquiry to the Department of Regulation and Licensing. The Department's response to Kelley indicated that a letter had gone to LeClair dated April 7, 2009, stating that he was eligible to call and schedule the exam and giving him instructions as to how to do so. Kelley gave the Grievant a copy of the letter on April 16, 2009. She indicated at hearing that, when she gave the letter to the Grievant, she strongly advised him to call and schedule his examination right away. At that point, Kelley also notified Steber that the Grievant had not scheduled his exam yet and that Kelley had obtained and provided to the Grievant a copy of the letter instructing him how to do so.

Around the last week of April, Steber confirmed with Kelley that the Grievant still had not taken his exam. Steber determined that she needed to schedule a special meeting with the Human Services Board to report that it was anticipated that the Grievant was not going to meet the requirements set out for him by the May 3, 2009 deadline. The Board then met and voted to authorize Steber to discharge the Grievant effective May 3, 2009, if the licensure had not been obtained by that day. Steber subsequently met with the Grievant on the morning of April 28, indicating to him that, because he had not become licensed, his last day of employment with the County would be May 3, 2009. During this meeting, LeClair indicated that he had not yet scheduled his exam.

The Grievant testified that, prior to April 28, he sent several e-mail messages to Steber indicating that his deadline for obtaining licensure would have to be extended. He states that he repeatedly received out-of-office responses, because Steber was on medical leave. None of these e-mail messages were submitted as documentary evidence at hearing. The Grievant further testified that, on the very same morning when Steber met with him to inform him of his impending discharge, he was going to contact Steber and indicate to her that he needed to have another extension on his deadline because he had not had time to schedule the test.

On May 3, 2009, Steber sent correspondence to the Grievant, which stated the following:

This will confirm our discussion earlier this week to the effect that your employment with Florence County is terminated effective this date due to your failure to satisfactorily complete your extended probationary period, including, but not limited to, your failure to become qualified for the position by licensure within the specified period. Please contact me if you have any further question [*sic*] with respect to this determination.

The Association subsequently grieved the Grievant's discharge.

DISCUSSION

As a threshold matter, it is necessary to address the County's contention that the Grievant was a probationary employee at the time of his discharge and this case, therefore, is not arbitrable. There were two collective bargaining agreements in effect during the course of the Grievant's employment with the County. Both of those agreements provide, at Article VI(G), the following with regard to probationary employees:

All probationary employees shall be subject to discipline and/or discharge without recourse to the grievance procedure hereinafter outlined.

This language expressly, unambiguously excludes from the grievance process any grievance relating to the discipline and discharge of a bargaining unit employee who is in the probationary phase of employment. If it is true, as the County asserts, that the Grievant was a probationary employee at the time of his discharge, I am without jurisdiction to decide this case.

In its post-hearing arguments, the Association asserts that the Grievant was not a probationary employee. Its support for this contention is that the Grievant did not know that his probation had been extended and continued on the date of his discharge. This argument is consistent with the Grievant's testimony under cross-examination at hearing:

- Q: ... you knew that your probation had been extended, correct?
A: I did not know my probation had been extended.
Q: Well, you were still working after six months of employment with the County, correct?
A: I thought I had completed my probation.
Q: Did anyone tell you that?
A: The contract.
Q: Well, let's look at Joint Exhibit 4[, the February 14, 2008, letter of employment], which you've testified you did receive. And in the second paragraph of that letter, it states, quote, "You will remain on probationary status until you have obtained your permanent licensure (period)," close quote. Did I read that correctly?
A: That is what that says.
Q: So, that's not consistent with what you just said, that you thought you were off probation after six months, is it?
A: Well, that's what the contract says.

The Association contends that the County did not provide any evidence showing that the Grievant was aware of the extension of his probationary period. It asserts that, although Kelley and the Grievant spoke about extending the time frame for him to receive his license, Kelley did not advise the Grievant that his probationary period was also extended.

Contrary to this claim, the record indicates that both the Grievant and other Association representatives were on actual notice that the Grievant would be on probation until he had obtained his social work license and, therefore, was still on probation at the time of his discharge.² The letter of employment provided to the Grievant in February of 2008 stated, unequivocally, “[y]ou will remain on probationary status until you have obtained your permanent licensure”. The correspondence sent to Association representative Thomas Bauer in July of 2008 reiterated that point, stating, “John’s probationary status will be extended until he obtains his Wisconsin social work license”. Although the Grievant denied having received the July 2008 correspondence, that claim is difficult to credit and it is apparent, at least, that Association representatives received the letter. These letters explicitly established that the Grievant’s ability to end his probationary period was contingent upon his ability to obtain licensure. There is simply no indication that the Grievant or any Association representative was ever given reason to believe that these events were not inextricably linked. Thus, given the fact that he had not obtained his license at the time of his discharge, there should have been no question that the Grievant was also still a probationary employee.

The Grievant claims to have relied strictly on the six-month probationary period set forth in the 2008 agreement. The fact that the Grievant’s twelve-month probationary period and, later, fourteen-month probationary period were inconsistent with the express terms of that agreement does not render them somehow void. The apparent effect of the letters sent to the Grievant and Bauer was to amend, in the Grievant’s case, the applicable probationary period. Notably, there is no evidence that the Grievant or the Association ever objected to any such amendment in the Grievant’s case, presumably because the Grievant benefitted from an extended probationary period, as it gave him a longer period of time to perform the significant tasks necessary to obtain a license. This lack of objection can be fairly understood as the Association’s acquiescence in the extended probationary period as it applied to the Grievant.

The Association’s brief also suggests, in the introductory “background” section, that because this grievance was processed through the contractual grievance procedure and no procedural challenges were raised, this matter is properly before the arbitrator. The result in this case is merely an application of the plain words of the applicable collective bargaining agreements, which prohibit probationary employees from challenging disciplines and discharges through the grievance process. There is nothing in those agreements indicating that a failure to invoke that provision during the grievance process or prior to an arbitration hearing will cause it to be waived or unenforceable.

² As a point of clarification, it is appropriate to note that, as set forth above in the relevant provisions section, the 2008 collective bargaining agreement between the parties, which agreement was in place at the time of the Grievant’s hire, provides for a six-month probationary period for bargaining unit employees. The subsequent, 2009-2010 collective bargaining agreement between the parties sets forth a twelve-month probationary period. Although the Association’s brief quotes the latter agreement, with the twelve-month language, it is clear that the Grievant is referring to the former agreement, with the six-month language, in the course of his testimony.

Given the conclusion that the Grievant was a probationary employee at the time of his discharge and, therefore, did not have access to the grievance process, it is my

AWARD

That the grievance is DENIED.

Dated at Madison, Wisconsin, this 2nd day of August, 2010.

Danielle L. Carne /s/

Danielle L. Carne, Arbitrator