

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
MILWAUKEE DEPUTY SHERIFFS' ASSOCIATION

and

MILWAUKEE COUNTY

Case 714
No. 69600
MA-14668

Appearances:

Graham P. Wiemer, MacGillis Wiemer, LLC, Attorneys at Law, 2360 North 124th Street, Suite 200, Wauwatosa, Wisconsin 53226, for the labor organization.

Roy L. Williams, Principal Assistant Corporation Counsel, Milwaukee County, Milwaukee County Courthouse, Room 303, 901 North Ninth Street, Milwaukee, Wisconsin 53233, for the municipal employer.

ARBITRATION AWARD

The Milwaukee Deputy Sheriffs' Association and Milwaukee County are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising there-under. The Association made a request, in which the County concurred, for the Wisconsin Employment Relations Commission to designate a member of its staff to hear and decide a grievance concerning the meaning and application of the terms of the agreement relating to the grievance procedure. The Commission appointed Stuart D. Levitan to serve as the impartial arbitrator. Hearing in the matter was held in Milwaukee, Wisconsin, on May 13, 2010. The parties filed written arguments by November 2, 2010, and waived their right to file replies.

ISSUE

The parties stipulated to the following issue: "Did the County violate the collective bargaining agreement when it denied the grievants a Step 2 hearing on the grievances they filed May 21, 2007 and June 12, 2007? If so, what is the appropriate remedy?"

RELEVANT CONTRACTUAL LANGUAGE

Section 5.01

(6) (c) Procedure To Be Followed When Initiating A Written Grievance:

1. The employee alone or with his/her Association Representative shall cite the precise rule, regulation or contract provision that was alleged to have been violated at the first step of the grievance procedure.
2. The employee alone or with his/her Association Representative shall in writing provide his/her immediate supervisor designated to hear grievances an explanation as to when, where, what, who, and why the employee believes that his/her contractual rights have allegedly been violated. The written Grievance Initiation Form shall contain the date or time that the employee alleges that his/her contractual rights have been violated.
3. The employee alone or with his/her Association Representative shall detail, in writing, the relief the employee is requesting.
4. If more space is required than is provided for on the Grievance Initiation Form in order to comply with the provisions of this section, the employee shall be permitted to submit written attachments to said form.
5. The Grievance Initiation Form shall be prepared by the employee or with his/her Association Representative in a manner that is neat, clear, and discernible. The grievant(s) must sign the grievance. Failure of the grievant(s) to sign the grievance shall bar the grievance from being processed.
6. If the employee alone or with his/her Association Representative fails to follow section 5.01(6)(c) 1, 2, 3, 4, or 5, the employee's immediate supervisor designated to hear grievances may return the Grievance Initiation Form to the employee for corrections. If this employee fails to make the corrections within 15 days of such return, the grievance shall be barred.
7. The procedure outlined in 5.01(6)(c) 1, 2, 3, 4, 5 and 6 is to clarify the procedure to be followed. These procedures are to assist the employee, the Association and management in the resolution of grievances at their lowest level of the grievance procedure.

(7) STEPS IN THE PROCEDURE

(a) STEP 1

1. The employee alone or with his/her representative shall explain the grievance verbally to the person designated to respond to employee grievances in his/her department.
2. The person designated in Par. 1. shall within three (3) working days verbally inform the employee of his/her decision on the grievance presented.
3. If the supervisor's decision resolves the grievance, the grievance shall be reduced to writing on a Grievance Disposition Form within five (5) working days from the date of the verbal decision and a copy of said disposition shall be immediately forwarded to the Director of Labor Relations.

(b) STEP 2

1. If the grievance is not settled at the first step, the employee alone or with his/her representative shall prepare the grievance in writing on the Grievance Initiation Form and shall present such form to the person designated in Step 1 to initial as confirmation of his/her verbal response. The employee alone or with his/her representative shall fill out the Grievance Initiation Form pursuant to Section 5.01 (6)(c) 1, 2, 3, 4, 5, 6, 7, of this Agreement.
2. The employee or his/her representative after receiving confirmation shall forward the grievance to his/her appointing authority or the person designated by him/her to receive grievances within fifteen (15) working days of the verbal decision. Failure of the person designated or the appointing authority to provide confirmation shall not impede the timeliness of the appeal.
3. The person designated in Step 2, paragraph 2, will schedule a hearing with the person concerned and within fifteen (15) working days from date of service of the Grievance Initiation Form, the Hearing Officer shall inform the aggrieved employee, the Director of Labor

Relations, and the Association in writing of his/her decision.

4. Those grievances, which would become moot if unanswered before the expiration of the established time limits will be answered as soon as possible after the conclusion of the hearing.
5. The second step of the grievance procedure may be waived by mutual consent of the Association and the Director of Labor Relations. If the grievance is not resolved at Step 2 as provided, the Association shall appeal such grievance within thirty (30) working days from the date of the second step grievance disposition to Step 3.

(c) STEP 3

1. The Director of Labor Relations or his/her designee shall attempt to resolve all grievances timely appealed to the third step. The Director of Labor Relations or his/her designee shall respond in writing to the Association within thirty (30) working days from the date of receipt by the Director of Labor Relations of the Step 2 appeal.
2. In the event the Director of Labor Relations or his/her designee and the appropriate Association representative mutually agree to a resolve of the dispute it shall be reduced to writing and binding upon all parties and shall serve as a bar to further appeal.
3. The Step 3 of the grievance procedure shall be limited to the Director of Labor Relations or his/her designee and the appropriate Association representative and one of his/her designee, an Attorney for the Association and representatives of the Sheriff designated to respond to employee grievances. The number of representatives at any Step 3 hearing may be modified by mutual consent of the parties.
4. The first and second step hearing officers shall forward a copy of the disposition to the Department of Labor Relations at the same time they notify grievants of their disposition.

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BACKGROUND

This case concerns the processing of two grievances which members of the Association filed in 2007.

On May 21, 2007, Deputy Neal T. Conley filed Grievance No. 48755, requesting that he be paid three hours of overtime for an incident that occurred May 4. On June 12, Deputy Terry A. Schmit filed Grievance No. 48732, requesting that he have eight hours of personal time returned following an event (his wedding) on May 27.

The Milwaukee County Grievance Initiation Form has spaces at the top of the page for Date of Initiation, Date of Verbal Decision and Name and Initials of Immediate Supervisor. Conley's grievance form had the crossed-out date 5/10/07 for the "date of initiation," had no date for "date of verbal decision" and the name "Sgt. Coleman," written by the same person who filled out the rest of the form, for "name and initials of immediate supervisor." Schmit's form had the date 5/24/07 for "date of initiation," the date 5/31/07 for "date of verbal decision," and "Lt. James Novotny," written by the same person who filled out the rest of the form, for "name and initials of immediate supervisor."

On June 5 and June 25, respectively, Conley and Schmit filed grievances 48790 and 48845, each of which stated:

I was refused a hearing for Step 2 of the Grievance Procedure. We were unable to present our case before the grievance was denied on [June 5] [June 25], 2007. Step 2 can only be waived by mutual consent of the Association and the Director of Labor Relations, pursuant to 5.01(7)(b)(5) and it was not waived.

As remedy, each grievance sought the granting of the underlying grievance (nos. 48755 and 48732).

On October 4, 2007, Sheriff's Office Human Resources Manager Marlo Knox wrote identical letters to Conley and Schmit, as follows:

I received the above grievance. Per the contract language, 5.01(7)(a)(1) "The employee alone or with his/her representative shall explain the grievance verbally to the person designated to respond to employee grievances in his/her department." Your grievance did not indicate that you attempted to resolve the issue at "Step 1" of the grievance process. For that reason, I am returning the grievance to you. You must first attempt to resolve the issue with either your Lieutenant or Captain. If you receive no response, then you may file a grievance.

On October 16, 2008, MDSA president Roy Felber wrote to HR Manager Knox, listing 35 outstanding grievances which the Association “would like ... moved on to the Labor Relations step of the grievance procedure.” The Schmit and Conley grievances, with the corresponding dates of 7/17/07 and 8/8/07, were on the list.

On February 1, 2010, Milwaukee County Labor Relations Analyst Michael W. Bickerstaff, wrote to Felber as follows:

Dear Mr. Felber:

The disposition for the following grievances from the January 20,2010, grievance appeal hearing between Milwaukee County Labor Relations, the Office of the Sheriff and the Milwaukee Deputy Sheriffs’ Association is summarized as follows:

Grievant:	Neal Conley	Grievance#: 48970	Appeal#: DSA-249
	Terry Schmidt	48845	DSA-267

Subject: Grievance Procedure/Waivers

Disposition: Section 5.01(7)(a)1. of the MOA states “The employee alone or with his/her representative shall explain the grievance verbally to the person designated to respond to employee grievances in his/her department.” It is not unreasonable to request members to follow the steps of the grievance process, and the Association cannot unilaterally attempt to remove the first step of the grievance process.

Grievance denied.

Please circle your answer to the disposition of the grievance, sign, date and return the original to our office.

Felber circled the disposition “**NOT Approved.**” He did not date the document.

POSITIONS OF THE PARTIES

In support of its position that the grievance should be sustained, the association asserts and avers as follows:

Both deputies followed the process for submitting grievances. But despite the clear language of the agreement, HR Manager Knox unilaterally added requirements to the procedure. The agreement does not provide Knox with the unilateral authority to take the actions she did. She is not intended as a gatekeeper for Association grievances. Step 2 of the grievance procedure

required her to schedule hearings within fifteen days of service of the grievance forms, but she did not do so.

The agreement does allow the Department to not process a grievance if the grievant fails to sign the form. Here, both deputies signed the form, and their grievances should have been processed.

The county cannot add requirements to section 5.01, which does actually require that the grievant's immediate supervisor initial the form – only that the grievant present the form to the supervisor to initial. But even if 5.01 did contain the requirements alleged by the county, Knox's actions would still be outside the agreement. She is not the one that determines whether a grievance should be processed –her task is to hold the Step 2 hearing. If she were uncertain if the process had been properly followed, she could have held the Step 2 hearing, as required by the agreement, and determine the answer for herself. Instead, she unilaterally denied Conley and Schmit their Step 2 hearings without any further investigation. She did not even offer the grievants an opportunity to be heard on the alleged violation.

As remedy, an award should issue granting the underlying grievances, and ordering the county to strictly abide by the grievance procedure in the future.

In support of its position that the grievance should be denied, the county asserts and avers as follows:

Both of the grievance forms were returned to the deputies because the forms failed to comply with section 5.01(7)(a)(1) of the parties' 2007-2008 agreement, which lays out as the procedure for Step 1 that "the employee alone or with his/her representative shall explain the grievance verbally to the person designated to respond to employee grievances in his/her department." The grievances filed by Conley and Schmit failed to indicate that attempts had been made to resolve the issue at Step 1 of the grievance process before applying for a Step 2 hearing. If Step 1 of the grievance process is not correctly completed, a grievant will not be allowed to move the hearing in Step 2 of the process.

Specifically, both deputies failed to comply with the requirements of Section 5.01(7)(b)(1), which states that "if the grievance is not settled at the first step, the employee alone or with his representative shall prepare the grievance in writing on the Grievance Initiation Form and *shall present such form to the person designated in Step 1 to initial as confirmation of his/her verbal response.*" The grievances filed by Conley and Schmit lacked the required date of the verbal decision in Step 1, which is required as part of the form. The forms lacked the date of the verbal decision, this indicated to Human Resources Manager Marlo Knox that no verbal decision had been made as required by Step 1. Therefore, the grievances were properly denied.

Deputies Conley and Schmit failed to follow the required procedures associated with the grievance process. It is respectfully requested that the denial of the Step 2 hearing be sustained.

DISCUSSION

The county does not deny that Knox refused to schedule a Step 2 hearing, but contends her course was justified because the union failed to comply with the terms of Sections 5.01(7)(a)(1) and 5.01(7)(b)(1) of the parties' collective bargaining agreement.

Section (7)(a) contains three elements: that the employee, alone or with a representative, explain the grievance verbally to the person the department has designated to respond to grievances; that the person so designated give a verbal response within three days; and that if the decision resolves the grievance, the decision be reduced to writing on a Grievance Disposition Form within five days and forwarded to the Director of Labor Relations. Section (7)(b) contains these elements: that when grievances are not settled at the first step (i.e., (7)(a)(1)), the employee, alone or with a representative, shall prepare a written Grievance Initiation Form, "and shall present such form to the person designated in Step 1 to initial as confirmation of his/her verbal response;" that the employee/representative forward the grievance to the appointing authority or designee within 15 days of the verbal decision; that the designee "will schedule a hearing" with the grievant and within 15 working days from service of the Form shall issue a written decision; that grievances for which time is of the essence shall be processed promptly; that (b)(1) may be waived by mutual consent, and that the Association may appeal unresolved grievances to Step 3 within 30 working days from the date of Step 2 disposition.

On its face, the record does establish that the two grievances each failed to comply with (7)(b)(1), which requires that the Grievance Initiation Form be presented to the person designated to respond to employee grievances to initial as confirmation of the verbal response. I reject the association's argument that the contract merely requires the form to be presented to the designee to initial, and not that the designee actually initial it. I think that is reading the terms of the agreement with a literalness that exceeds common understanding. As noted above, neither of the Grievance Initiation Forms that Conley and Schmit submitted bore the initials of their immediate supervisor attesting to the date the grievance had been verbally presented. The conclusion is inescapable that the grievants failed to comply with section 5.01(7)(b)(1.)

That does not mean, however, that Knox was necessarily right in refusing to schedule a Step 2 hearing. The collective bargaining agreement, at section 5.01(6)(c)6., states explicitly when a grievance is barred from further consideration – namely, when the grievance fails to comply with section 5.01(6)(c)1-5. Those clauses mandate that the grievance cite the precise rule, regulation or contract alleged to have been violated; that the grievance give written notice to the immediate supervisor designated to hear grievances an explanation of the basic facts, and the relief requested; that the grievance be neat, clear and discernible, and signed by the grievant. If the grievance fails to comply with these terms, the employee's immediate

supervisor designated to hear grievances may return the Grievance Initiation Form for corrections; if the employee “fails to make the corrections with 15 days of such return, the grievance shall be barred.”

The collective bargaining agreement thus explicitly states the circumstances under which a grievance may be barred – failure to comply with section 5.01(6)(c) 1-5, provided that the employee shall be given 15 days to make the necessary corrections.

I am a firm believe in the analytical concept of “*inclusio unius est exclusio alterius*,” or “the inclusion of one is the exclusion of another.” Here, the parties have clearly stated the condition under which a grievance may become procedurally barred, namely non-compliance with sec. 5.01(6)(c)1-5. The fact that the parties have explicitly included these grounds barring further consideration means they have excluded all other grounds; there are no grounds, other than those stated in 5.01(6)(c)6., to summarily bar a grievance from further consideration.

Failure to present the Grievance Initiation Form to the supervisor to be initialed does not constitute non-compliance with 5.01(6)(c)1-5, but rather non-compliance with 5.01(7)(b)1. The labor agreement does not establish non-compliance with (7)(b)1 as grounds for the responsible county official to deny a Step 2 hearing. Non-compliance with (7)(b)1 does not provide a basis for the employer to refuse to process the grievance further. Therefore, by refusing to hold a Step 2 hearing for Grievances 48732 and 48755, HR Manager Knox violated section 5.01(7)(b)3.

The Association seeks as remedy the granting of the underlying grievances. While the employer’s violation of the labor agreement does call for some sanction, the fact remains that it was Conley and Schmit who committed the first failure to comply with the labor agreement, when they failed to present their Grievance Initiation Forms to their supervisors to initial. Although their non-compliance was minor and correctible, they are thus not entirely without blame, and do not come before me with completely clean hands.

I believe the most appropriate remedy would be to put the parties back where they would have been had Knox not responded to the minor, and correctible, non-compliance by Conley and Schmit by refusing to schedule the Step 2 hearing.

Accordingly, on the basis of the collective bargaining agreement, the record evidence and the arguments of the parties,

It is my

AWARD

That the grievance is sustained. Within 15 days of the date of this award, the Sheriff's Office shall conduct a hearing as provided for in section 5.01(7)(b)3., unless the parties mutually agree to an alternate schedule.

Dated at Madison, Wisconsin, this 19th day of January, 2011.

Stuart D. Levitan /s/

Stuart D. Levitan, Arbitrator

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