

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WINNEBAGO COUNTY

and

WINNEBAGO COUNTY DEPUTIES' ASSOCIATION

Case 434

No. 70008

MA-14835

Appearances:

Anna M. Pepelnjak, Attorney at Law, Weiss Berzowski Brady LLP, 700 North Water Street, Suite 1400, Milwaukee, Wisconsin 53202, appearing on behalf of Winnebago County.

Benjamin M. Barth, Labor Consultant, The Labor Association of Wisconsin, Inc., N116 W16033 Main Street, Germantown, Wisconsin 53022, appearing on behalf of Winnebago County Deputies' Association.

ARBITRATION AWARD

Winnebago County (County) and Winnebago County Deputies' Association (Association) are parties to a collective bargaining agreement covering contract years 2007-2009 (Contract). By its terms, the Contract remains in effect as the Parties negotiate a successor Contract. The Contract provides for final and binding arbitration of grievances arising under the Contract. On July 15, 2010, the Association filed a Request to Initiate Grievance Arbitration with the Wisconsin Employment Relations Commission (WERC) regarding the County's decision to deny Grievant's request to take vacation on March 19, 2010. The Association further requested a panel of five WERC staff members and Commissioners from which the Parties could select an arbitrator. The undersigned was selected and a hearing date of October 14, 2010 was established.

In a letter dated September 23, 2010, the County informed the Association and arbitrator that it intended to challenge the arbitrability of the grievance because "[t]he subject matter of this grievance is not covered by any provision in the collective bargaining agreement." Further, the County requested that "the issue of arbitrability be litigated before the hearing on the merits of this grievance occurs." During a pre-hearing conference call held on October 12, 2010, the Parties agreed to proceed with the arbitration hearing on October 14, 2010 and to allow the undersigned to decide the arbitrability issue with both Parties reserving

the right to obtain de novo judicial review as to the arbitrability decision. Hearing was held on the grievance on October 14, 2010 in Oshkosh, Wisconsin and was transcribed by a court reporter. Evidence was presented on both the arbitrability of the grievance and the merits of the grievance. The Parties then submitted post-hearing written arguments in support of their positions on both issues, the last of which was received on December 13, 2010, closing the record in the matter.

Now, having considered the record as a whole, I make and issue the following award.

ISSUE

At the hearing, the Parties stipulated to the following issues:

1. Is the grievance substantively arbitrable?
2. Did the Winnebago County Sheriff's Office violate any provision of the Collective Bargaining Agreement between Winnebago County and the Winnebago County Deputies' Association by refusing to permit Officer Sadowska a day off on March 19, 2010?

RELEVANT CONTRACTUAL AND POLICY PROVISIONS

ARTICLE 2 MANAGEMENT RIGHTS

Except to the extent expressly abridged by a specific provision of this Agreement, the County reserves and retains, solely and exclusively, all of its Common Law, statutory, and inherent rights to manage its own affairs, as such rights existed prior to the execution of this or any other previous Agreement with the Association. Nothing contained herein shall divest the Association from any of its rights under Wisconsin Statutes, Section 111.70.

ARTICLE 5 GRIEVANCE PROCEDURE

Grievances within the meaning of the Grievance Procedure shall consist only of disputes about the interpretation or application of particular clauses of this Agreement and items concerning wages, hours and conditions of employment, and about alleged violations of this Agreement.

. . .

Step 3. If the grievance is not settled at Step 2, the Association shall present a written notice of intent to arbitrate to the Director of Human Resources within ten (10) workdays (holidays and weekends not to be construed as workdays) after the issuance of the Director of Human Resources written response at Step 2.

. . .

The decision of the arbitrator shall be binding upon the parties except for judicial review.

. . .

**ARTICLE 34
RULES, REGULATIONS, POLICIES AND PROCEDURES**

The Employer has the right to promulgate reasonable rules and regulations and shall make available to all employees a copy of the rules, regulations, policies and procedures as soon as reasonably possible. The employees are expected to review and follow the rules, regulations, policies and procedures.

**WINNEBAGO COUNTY SHERIFF'S DEPARTMENT
STANDARD OPERATIONAL PROCEDURE [RC.03-S04]**

. . .

STAFFING REQUIREMENTS

Vacation and time off will be granted according to staffing requirements.

A maximum of 5 officers may be off per day for vacation, paid holiday, comp time, sick, or special assignments. This includes school/training, and military leave. No more than two officers may be off on any shift per day. No more than one shift supervisor may be off per shift.

. . .

Any exceptions to this S.O.P. will be at the sole discretion of the Jail Captain or designee.

BACKGROUND

Many of the relevant facts in this matter are not contested. The County has promulgated a standard operating procedure for the purpose of establishing “uniform guidelines for requesting and granting time off” (SOP). As is relevant to this matter, the SOP provides that no more than five officers may take time off per day, that no more than two officers can be off per shift, and that no more than one shift supervisor may be off per shift. Further, the SOP provides the Jail Captain or designee the discretion to grant exceptions to these staffing requirements.

Grievant is a non-supervisory officer and was scheduled to work third shift on March 19, 2010. On February 19, 2010, he submitted a request to use paid time off on March 19, 2010. At the time he submitted the request, two supervisory employees on third shift had already been approved to take time off on March 19, 2010. The supervisors had submitted request to take the shift off on January 19, 2010 and January 20, 2010, nearly a month before the Grievant made his request. The approvals had already been noted on the calendar at the time the Grievant submitted his request. Although he was aware that the maximum number of officers was already scheduled to be off on third shift on March 19, 2010, he submitted his request with the understanding that exceptions to the SOP had been made on “numerous occasions” in the past at management’s discretion. On this occasion however, the Jail Captain’s designee denied the request, writing “2 off on 3rd” on the time off request slip as the reason for the denial.

Following the denial, Grievant worked third shift on March 19, 2010 as scheduled and then filed the grievance at issue here. The grievance alleges that the County violated the SOP by allowing two supervisors to be off on third shift on March 19, 2010 and that the County acted unreasonably in denying the Grievant’s request for time off on that shift. The County denied the grievance at the earlier steps of the grievance procedure, resulting in this arbitration proceeding.

DISCUSSION

I conclude that the grievance is substantively arbitrable because the contractual definition of a grievance is broad enough to encompass the violation alleged in the grievance and the contractual arbitration clause does not limit the type of grievance that can proceed to arbitration. I further conclude that the County did not violate the Contract by denying the Grievant’s time off request because the County expressly reserved discretion to make exceptions to the SOP and did not do so in an arbitrary, capricious or discriminatory manner.

Substantive Arbitrability

Because issues of substantive arbitrability are legal in nature, I will apply the analysis developed by Wisconsin courts when determining whether an issue is substantively arbitrable. Both Parties cite an examiner decision in a WERC declaratory ruling proceeding involving the same Parties and the same grievance procedure language that are involved in this matter. In that case, Examiner McLaughlin summarized the legal standard established by the Wisconsin Supreme Court as follows:

The standards governing the enforcement of an agreement to arbitrate date back to the Steelworkers' Trilogy. The Wisconsin Supreme Court incorporated, from the Trilogy, the teaching of the limited function served by a court or an administrative body in addressing arbitrability issues. The Court stated this "limited function" thus:

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.

The Jefferson Court held that unless it can "be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute" the grievance must be considered arbitrable.

The first element of the Jefferson analysis focuses on the arbitration clause. The first paragraph of Article 5 defines a grievance, and does so broadly. Two of the areas of dispute pulled within the definition of a grievance focus narrowly on the application of agreement terms to alleged agreement violations. However, one of the areas of dispute is not so narrowly defined, referring expansively to "items concerning wages, hours and conditions of employment."

WINNEBAGO COUNTY (SHERIFF'S DEPARTMENT), DEC. NO. 27798-A (McLaughlin, 3/94), aff'd Dec. No. 27798-B (WERC, 8/94), and Dec. No. 27798-B (Cir. Ct., 5/95) (citing JT. SCHOOL DIST. NO. 10 V. JEFFERSON ED. ASS'N., 78 Wis.2d 94, 111 (1977)).

In this case, application of the same expansive definition of a grievance compels the conclusion that the grievance procedure encompasses the grievance at issue here. The grievance procedure identifies three categories of grievances: 1) the interpretation or application of particular clauses of the Contract, 2) items concerning wages, hours and conditions of employment and 3) alleged violations of the Contract. Because the grievance does not allege a specific contractual basis, it must concern "wages, hours and conditions of employment" in order to be arbitrable. I find that issues related to granting or denying time off requests concern conditions of employment.¹

¹ Because I find that the grievance concerns conditions of employment, I do not find it necessary to decide whether it might also concern wages or hours.

Further, the grievance arbitration procedure does not include language limiting the type or subject matter of grievances that can proceed to arbitration. Therefore, by the terms of the Parties' Contract, this grievance is arbitrable.

The County argues that the grievance is not substantively arbitrable because it is premised on a violation of a standard operational procedure that was unilaterally implemented by the County pursuant to its authority under the Contract. As such, the County contends that none of the express terms of the Contract address its authority to deny the Grievant's time off request, that this was a "pure administrative decision," and that an award on the merits of the grievance "will be made entirely without resort to the contract." The County further argues that although the term "conditions of employment" is broader than the express terms of the Contract, it is not so broad as to encompass all aspects of the "employment experience." The County reduces the grievance to its "essence" and concludes that it "questions management's decision" to deny the Grievant's time off request – an administrative decision within management's judgment. Under this view, the County concludes that the decision involved in this grievance is outside the ambit of conditions of employment and therefore also outside the scope of grievance procedure.

While the County is undoubtedly correct that there are limits on the scope of issues that can be considered "conditions of employment" I find that time off requests and denials are unquestionably conditions of employment. As such, the issue presented here is encompassed by and arbitrable under the contractual arbitration procedure.

Merits

As noted above, the grievance does not allege a violation of a specific Contract provision, but rather a violation of the SOP. Although the SOP reserves management discretion to make exceptions, such "discretion must be exercised reasonably and discretionary management decisions will be reviewed to determine if they were arbitrary, capricious, or discriminatory." ELKOURI & ELKOURI, *HOW ARBITRATION WORKS*, 6TH EDITION AT PAGE 480 (CITATIONS OMITTED).

I find nothing in the record to indicate that the County acted arbitrarily, capriciously or discriminatorily in denying the request. In adopting SOP, the County retained discretion to make exceptions to the terms of the SOP. Evidence was presented that exceptions had been made in the past to allow multiple supervisors off on the same shift for various reasons. In this case, the County exercised its discretion to permit two supervisors to take time off on the same shift. Nearly a month after it made that decision, the Grievant submitted his request to take the same day off. The record shows that when the Grievant's request was received, the County evaluated the staffing needs for the shift, determined that the maximum number of officers were off on the shift in question, and denied the Grievant's request based on that evaluation.

The Association interprets the SOP to provide that, once one supervisor on a shift has time off approved, then non-supervisory officers on the same shift have a superior right to have their time off request for that shift approved over subsequent supervisor requests. Given the timeline in this matter, I find this interpretation unworkable and inequitable. Nearly a month before the Grievant made his request, the County had already made the decision to make an exception to the SOP by letting the second supervisor off for the shift. The Association's interpretation would require the County to go back and revoke the approval for the second supervisor's time off request, grant the Grievant's request, and then decide whether to make an exception to the SOP and grant the second supervisor's request. It would be inequitable to require the County to revoke time off authorizations once they have been granted simply because another employee makes a later request that, if made prior to the earlier authorization, could have been approved consistently with the SOP.

The Association also contends that the County is required to follow the terms of the SOP before making any discretionary exceptions. I find this argument unpersuasive. First, the language of the SOP does not provide for such a condition precedent to making an exception. Further, such a reading would essentially nullify the language reserving the County's discretion to make exceptions.

AWARD

For the foregoing reasons, I conclude that the County did not violate the Contract when it denied Grievant's request to use time off on March 19, 2010. The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 5th day of April, 2011.

Matthew Greer /s/

Matthew Greer, Arbitrator

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