BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MILWAUKEE DEPUTY SHERIFFS' ASSOCIATION

and

MILWAUKEE COUNTY

Case 769
No. 70878
MA-15071

(Grievance No. 51467; Back Vacation Time Grievance)

Appearances:

Graham Wiemer, MacGillis Wiemer, Attorneys at Law, 2360 North 124th Street, Suite 200, Wauwatosa, Wisconsin 53226, appearing on behalf of Milwaukee Deputy Sheriffs' Association.

Roy Williams, Principal Assistant Corporation Counsel, Milwaukee County, Room 303, 901 North Ninth Street, Milwaukee, Wisconsin 53233, appearing on behalf of Milwaukee County.

ARBITRATION AWARD

The Milwaukee Deputy Sheriffs' Association, hereinafter referred to as the Association, and Milwaukee County, hereinafter referred to as the County or the Employer, were parties to a collective bargaining agreement which provided for final and binding arbitration of all disputes arising thereunder. The Association made a request, with the concurrence of the County, that the Wisconsin Employment Relations Commission designate a member of its staff to hear and decide a grievance which the parties denominated as Grievance No. 51467. That grievance also came to be known as the back vacation time grievance. The undersigned was so designated. The matter was then scheduled for hearing five different times. Ultimately, though, no hearing was held in this case. Instead, in lieu of a hearing, the parties filed a stipulation with the undersigned on June 20, 2012. The stipulation covered the following: exhibits, issue and factual record. Thereafter, the parties filed briefs, whereupon the record was closed on July 9, 2012. Based upon the stipulations just referenced and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUE

The parties stipulated to the following issue:

Does Section 5.01(9) of the parties' collective bargaining agreement prevent the MDSA from proceeding with this grievance arbitration?

PERTINENT CONTRACT PROVISIONS

The parties' 2007-08 collective bargaining agreement contained the following pertinent provisions:

Section 3.14 – Vacation

(1) Employees shall receive annual leave with pay to serve as vacation in accordance with the following schedule, based upon years of continuous service.

. . .

Section 5.01 – Grievance Procedure

(9) No grievance shall be initiated after the expiration of sixty (60) calendar days from the date of the grievable event, or the date on which the employee becomes aware, or should have become aware, that a grievable event occurred, whichever is later. This clause shall not limit retroactive payment of economic benefits for which it has been determined the County is liable nor would it prohibit a prospective adjustment of an ongoing situation.

. . .

Section 6.01 – Entire Agreement

. . .All existing ordinances and resolutions of the Milwaukee County Board of Supervisors affecting wages, hours and conditions of employment not inconsistent with this Agreement are incorporated herein by reference as though fully set forth. To the extent that the provisions of this Agreement are in conflict with existing ordinances or resolutions, such ordinances and resolutions shall be modified to reflect the agreements herein contained.

BACKGROUND

The County operates a Sheriff's Department. The Association is the exclusive bargaining representative for a bargaining unit which includes Deputy Sheriffs and Deputy

Sheriff Sergeants in the Milwaukee County Sheriff's Department (hereinafter referred to as the Sheriff's Office).

As will be noted below, a question arose concerning whether certain employees in the bargaining unit were entitled to additional vacation time. The Association filed a grievance concerning that matter. The substantive merits of the grievance are not going to be resolved herein. Instead, per the parties' agreement, the question to be resolved herein is whether that grievance can proceed further.

. . .

The parties stipulated to the following factual record:

STIPULATED FACTS

The MDSA is the exclusive bargaining representative for the Deputy Sheriffs and Deputy Sheriff Sergeants in the Milwaukee County Sheriff's Office. Thirty-three members of the MDSA were employed by other departments in Milwaukee County, other municipalities in Wisconsin municipalities, or the State of Wisconsin government prior to their employment with the Sheriff's Office. [Note: Those 33 MDSA members are listed on the second page of Grievance Reference No. 51467].

The MDSA and Milwaukee County have negotiated a series of collective bargaining agreements. The agreement in force at the filing of this grievance was the 2007-2008 Agreement between Milwaukee County and the Milwaukee Deputy Sheriffs' Association. The provisions of the Agreement pertinent to this grievance arbitration include sections 3.14 – Vacation, 5.01 – Grievance Procedure, and 6.01 – Entire Agreement:

Section 3.14 of the Agreement, governing vacation benefits, provides in pertinent part:

> (1) Employees shall receive annual leave with pay to serve as vacation in accordance with the following schedule, based upon years of continuous service.

Section 5.01(9) governs the time requirements [for] processing contract violation allegations brought under the Agreement. Section 5.01(9) provides in its entirety:

> (9) No grievance shall be initiated after the expiration of sixty (60) calendar days from the date of the grievable event, or the date on which the employee becomes aware, or should have become aware, that a grievable event occurred, whichever is later. This clause shall not limit retroactive payment of economic benefits for which it has been determined the County is liable nor would it prohibit a prospective adjustment of an ongoing situation.

Section 6.01 of the Agreement is an integration clause, providing in pertinent part:

> . . .All existing ordinances and resolutions of the Milwaukee County Board of Supervisors affecting wages, hours and conditions of employment not inconsistent with this Agreement are incorporated herein by reference as though fully set forth. To the extent that the provisions of this Agreement are in conflict with existing ordinances or resolutions, such ordinances and resolutions shall be modified to reflect the agreements herein contained.

"Years of continuous service" referred to in Section 3.14 – Vacation is not defined in the Agreement, but it is defined by Milwaukee County General Ordinance (hereinafter MCGO) § 17.17(1), which states: "[y]ears of service shall include any creditable pension service earned with Milwaukee County, the State of Wisconsin or any municipality within the State of Wisconsin" when calculating leave due Milwaukee County employees based on their years of service. This definition was added to MCGO § 17.17(1) by Milwaukee County on March 21, 1996.

The additional language added to MCGO § 17.17(1) by the Milwaukee County Board of Supervisors has been the subject of other grievances. In 2002, Milwaukee AFSCME District Council 48 grieved the issue of creditable service computations for vacation entitlement on behalf of its member, Betty Linder. Arbitrator Sherwood Malamud upheld the grievance, determining Milwaukee County had failed to include creditable prior service in computing her vacation benefits. Despite Arbitrator Malamud's decision, Milwaukee County declined to apply this award to its other bargaining units.

The Milwaukee Building and Construction Trades Council then filed a grievance on behalf of John Brillowski also concerning the computation of creditable prior service under MCGO § 17.17(1). This grievance was sustained by Milwaukee County in the Trade Council's favor prior to arbitration. Pursuant to the grievance disposition, Mr. Brillowski was awarded vacation benefits from 2002 forward, while other Trades Council members were awarded vacation benefits in 2007 and forward.

Following the resolution of the Brillowski grievance, Milwaukee County prospectively applied that disposition to other affected individuals, including members of the MDSA. Each MDSA member affected by the Brillowski decision was notified by mail on October 18, 2007 of additional vacation benefits due him/her under MCGO § 17.17(1). These additional vacation benefits notices indicated to the MDSA members that the adjustment to their vacation benefit date (the date from which vacation benefits are calculated), and the additional vacation benefits they would receive in 2007 based on their prior creditable service under MCGO § 17.17(1).

The 33 members of the MDSA were not awarded retroactive vacation benefits from 1996 through 2006. In response, the MDSA filed Grievance No. 51467 on May 26, 2009 challenging Milwaukee County's denial of vacation benefits from 1996 through 2006 for its 33 members. That grievance worked its way through the grievance procedure in Section 5.01,

and the MDSA timely appealed Labor Relations' denial of this grievance to the Wisconsin Employment Relations Commission on February 10, 2010, pursuant to Section 5.01(8).

On March 26, 2010, after receiving notice of the MDSA's Request to Initiate Grievance Arbitration from the WERC, Milwaukee County declined to arbitrate Grievance No. 51467. Based on Milwaukee County's position, the WERC did not process the MDSA's petition for arbitration. In response, the MDSA filed a prohibited practice complaint with the WERC, alleging that Milwaukee County violated Wis. Stat. §111.70(3)(a)5. That complaint was docketed as Case 736, No. 69799, MP-4585.

Thereafter, as settlement to Case 736, the MDSA and Milwaukee County agreed to arbitrate the underlying grievance. Milwaukee County further agreed that it would not challenge any timeliness issues relative to Grievance No. 51467, except as it relates to its position that the MDSA's grievance is untimely under Section 5.01(9).

. . .

The parties also stipulated to the following joint exhibits:

JOINT EXHIBITS

1. Exhibit #1 for the purposes of this arbitration shall be the parties' 2007-2008 Collective Bargaining Agreement, which was in effect at the time of the filing of this grievance.

2. Exhibit #2 for the purposes of this arbitration shall be Grievance Reference No. 51467.

3. Exhibit #3 for the purposes of this arbitration shall be the September 27, 2002 decision from Arbitrator Sherwood Malamud in the grievance arbitration between Milwaukee County and Milwaukee District Council 48 concerning grievant Betty Linder.

4. Exhibit #4 for the purposes of this arbitration shall be the August 8, 2007 letter from Gregory L. Gracz to Lyle A. Balistreri, President of the Milwaukee Building & Construction Trade Council regarding the Brillowski grievance settlement.

5. Exhibit #5 for the purposes of this arbitration are three examples of the notifications sent to MDSA Deputy Sheriffs regarding additional vacation based on pension service.

6. Exhibit #6 for the purposes of this arbitration is the February 1, 2010 letter from Michael W. Bickerstaff of the Milwaukee County Department of Labor Relations to the MDSA denying Grievance Reference No. 51467 at Step 3 of the grievance procedure.

POSITIONS OF THE PARTIES

Association

It's the Association's view that the grievance was timely filed and that nothing in Sec. 5.01(9) prevents this grievance from proceeding to the merits. It elaborates as follows.

The Association argues that the second sentence in Sec. 5.01(9) – upon which it relies – is clear and unambiguous in its meaning. According to the Association, its meaning is this: the 60-day time limitation to file a grievance referenced in the first sentence does not apply "when Milwaukee County is liable for retroactive payment of an economic benefit." It avers that not a single word in that second sentence is ambiguous, and it means exactly what it says, namely that the 60-day time limitation for filing a grievance referenced in the first sentence does not apply "when it has been determined that Milwaukee County is liable for retroactive payment of an economic benefit."

Next, building on that last point, the Association contends that the 60-day time limitation referenced in the first sentence of Sec. 5.01(9) "only applies when Milwaukee County is not liable for retroactive payment of an economic benefit." It asserts that here, though, it has already been determined that Milwaukee County is liable for retroactive payment of an economic benefit. It cites the following to support that proposition. First, it cites the 2002 Arbitration Award where Arbitrator Sherwood Malamud found that grievant Betty Linder was entitled to an increased amount of vacation time. Second, it cites the 2009 Brillowski grievance in the Building Trades bargaining unit where the County's Labor Relations Director sustained a similar grievance and found that Grievant Brillowski was entitled to an increased amount of vacation time. The Association notes that in both cases, the determination was that the County had incorrectly calculated the vacation time owed to the grievants therein. The remedy which was awarded in both cases (i.e. an increased vacation time to the grievant) was awarded both prospectively and retroactively. Additionally, the Association notes that on October 18, 2007 the County applied that same disposition prospectively to each of the 33 affected MDSA members involved herein. After citing the foregoing, it's the Association's view that the County has admitted that it was "liable for retroactive payment of an economic benefit" (with the increased vacation time being the economic benefit).

The Association contends that if the arbitrator finds that the grievance is untimely – and that the County's reading of the Agreement is correct – then 33 MDSA members will lose "several" years of retroactive vacation pay that the Association believes is owed to them. The Association implies that the arbitrator should not let that happen.

County

It's the County's view that the grievance is untimely and that the first sentence in Section 5.01(9) of the Agreement prevents the Association from proceeding any further on this grievance.

The County relies exclusively on the first sentence in Section 5.01(9) to support its position. That sentence sets a timetable that grievances are to be filed 60 days after the "grievable event". According to the County, the "grievable event" upon which this grievance is based occurred on March 21, 1996 when the Milwaukee County Board of Supervisors amended Milwaukee County General Ordinance 17.17(1) to include "any credible pension service earned with Milwaukee County, the State of Wisconsin, or any municipality within the state of Wisconsin when calculating vacation leave due to Milwaukee County employees based on their years of service." The County avers that for reasons not specified in the stipulated record, a grievance was not filed until May 26, 2009. As the County sees it, the Association now "seeks to be heard" on the issue which it should have raised 13 years prior to filing its grievance. Next, as another part of its timeliness argument, the County acknowledges that the grievance which was filed in this matter states that the Association did not become aware of the amendment to the ordinance until October 17, 2007. The County maintains that if that was so, then the Association "failed to be vigilant for 11 years". Finally, the County points out that even after the Association became aware of the amendment in 2007, the Association inexplicably failed to file a grievance until about two years later (namely, on May 26, 2009). The County characterizes the Association as an "aggressive and professional" union that knows how to file timely grievances. It asserts that here, though, for unknown reasons the Association did not file its grievance in a timely fashion. The County argues that the explicit language in the first sentence of Section 5.01(9) requires the dismissal of the grievance.

Next, the County notes that as part of its argument in this case, the Association relies on an arbitration award and a grievance settlement which occurred in other bargaining units. According to the County, the Association "generally avoids" doing that (i.e. citing arbitration awards and grievance settlements from other bargaining units) unless it has no support for its position. The County maintains that's the situation here, so the arbitration award and grievance settlement which the Association relies upon should not be used as a basis for somehow finding this grievance timely.

The County makes no argument at all about the second sentence in Section 5.01(9) (i.e. the sentence which the Association relies on). As previously noted, the County's position is that the first sentence in that section should control the outcome of this case and result in a finding that the grievance was untimely filed.

DISCUSSION

The parties agree that before the merits of this grievance can be addressed, there's a timeliness question which needs to be resolved.

Timeliness questions are governed, of course, by the contract language dealing with grievance timelines. Before I look at that contract language though, I'm going to start by reviewing the following background. That background will give some context to the discussion which follows.

In August, 2007, the County settled a grievance in its building trades bargaining unit. In that settlement, the County admitted that it had miscalculated the grievant's vacation entitlement. After it did so, the County decided to apply that disposition to other similarly-situated County employees. In other words, it decided to adjust the vacation benefit date (i.e. the date from which vacation benefits are calculated) for other similarly-situated County employees. In the MDSA bargaining unit, 33 employees were similarly-situated. On October 18, 2007, the County sent letters to each of the 33 similarly-situated MDSA employees notifying them of their increased vacation time going forward. While this letter did not say so explicitly, it was implicit that the County was applying this change prospectively only (meaning from 2007 forward), and not retroactively.

On May 26, 2009, the Association filed the instant grievance. In that grievance, the Association asserted that it did not become aware of the County's modification to Ordinance 17.17(1) until October 17, 2007. The grievance then went on to allege that when the County made the vacation benefit change prospectively on October 18, 2007 for the 33 MDSA employees, it should have done so retroactively as well. The grievance seeks to have the County make a retroactive payment for those employees for a ten-year period between 1996 and 2006.

Having reviewed that factual background, the focus now turns to the grievance timeline language. It's found in Sec. 5.01(9). That section consists of two sentences.

I'm first going to look at the first sentence. It sets a timeline for filing grievances. Such language is commonly found in contractual grievance procedures. The timeline specified in the first sentence is 60 calendar days from the date of the "grievable event".

The focus now turns to determining – in the context of this case – what date qualifies as the "grievable event". The County contends that it's when the County amended Ordinance 17.17(1). That occurred in 1996. I'm not going to rely on that date. Here's why. The grievance asserts that the Association didn't become aware of the change to Ordinance 17.17(1) until October 17, 2007. The next day (October 18, 2007), the County notified the 33 MDSA employees involved herein that it was changing their vacation date, and that it was making this change prospectively only. In my view, either of these dates can fairly be characterized as the "grievable event". While there are some cases where further discussion would be needed to explain which date is considered the "grievable event", and why, this is not that case. That's because it doesn't matter in this case whether October 17 or October 18, 2007 is considered the "grievable event". Either date is way outside the timeline specified in the first sentence. Once again, the grievance was filed May 26, 2009. That's way more than 60 days after either of the October, 2007 dates. In fact, it's close to two years later. Given the foregoing, my preliminary finding is that if just the first sentence in Sec. 5.01(9) is considered, then the instant grievance was untimely filed. In the next paragraph, I'll explain why I used the word "preliminary" in the previous sentence.

The County asks me to base my decision solely on the first sentence just reviewed. However, as was noted earlier, there's a second sentence in Sec. 5.01(9). The Association hangs its proverbial hat, so to speak, on that second sentence. While the Employer had to know that when it filed its brief, it made no argument whatsoever about the second sentence. By doing that, the Employer implicitly asks me to just ignore the second sentence and not review it. I can't do that, because if I did I wouldn't even address the Association's argument about the second sentence and its application here. At a minimum, it's my job as arbitrator to consider all the contract language argued to me and sort through it. Thus, I'm going to address the second sentence in Sec. 5.01(9).

As noted above, the Association was the only party that opined as to the meaning of the second sentence. Additionally, there is nothing in the stipulated record that could assist the arbitrator in interpreting that sentence such as bargaining history or how the language has previously been applied. Those are traditional components which arbitrators use to help them interpret contract language. Given that lack of evidence, what the parties are going to get here – for better or worse – is simply my interpretation of what I think that sentence means.

The second sentence in Sec. 5.01(9) reads as follows:

> This clause shall not limit retroactive payment of economic benefits for which it has been determined the County is liable nor would it prohibit a prospective adjustment of an ongoing situation.

Before I opine on what I think the sentence means, I'm first going to address what the Association thinks it means. According to the Association, it means that the 60-day time limitation to file a grievance referenced in the first sentence does not apply "when Milwaukee County is liable for retroactive payment of an economic benefit." Then, the Association avers that in this case, it has already been determined that Milwaukee County "is liable for retroactive payment of an economic benefit." Notwithstanding the Association's contention that the County has already "admitted" that it is "liable for" the retroactive payment of increased vacation time, the record facts show otherwise. Here's why. There's no question that the County has admitted that it made an error in calculating the vacation entitlement for County employees. Said another way, it admitted to a contract violation. It acknowledged this miscalculation in 2007 when it settled the Brillowski grievance in the building trades bargaining unit. When an employer admits to a contract violation, a question that is often related thereto is what is the remedy for the contract violation and when does it (i.e. the remedy) go into effect? For example, does it go into effect both retroactively and prospectively, or just prospectively? In the Brillowski settlement, the County specifically said that the grievant in that case, Brillowski, was the only employee who was to get that change retroactively. The retroactivity went back to 2002 because that was when Brillowski filed his grievance. That grievance settlement then went on to specifically state that everybody else in that bargaining unit just got the change in their vacation entitlement prospectively (not retroactively). Not surprisingly, the County took the same position in the MDSA bargaining unit when it notified 33 similarly-situated employees that they too would be getting a change in

their vacation entitlement, but that this change was prospective only (not retroactive). These facts demonstrate that while the County has "admitted" that it miscalculated employee vacation time and that it was therefore "liable for" increased vacation time, it has never "admitted" that the remedy for that miscalculation had to be applied retroactively for all employees, and particularly back to 1996 (when Ordinance 17.17(1) was modified). That being so, the Association's assertion that the County has admitted it is liable for a retroactive vacation payment is just plain wrong. It has not done so.

Having so found, the focus now turns to my view of what the second sentence means. I begin my discussion by noting that sometimes, when the parties create a hard and fast rule, they also create some type of exception. That, of course, is what the Association contends the parties did here. As the Association sees it, the second sentence creates an exception to the 60-day timeline established in the first sentence. I disagree, and find that the second sentence does not create an exception that allows some untimely grievances to still go forward. Here's why. The second sentence does not deal with grievance timelines at all. Instead, it deals with a completely different topic, namely an arbitrator's authority to fashion a remedy when he finds a contract violation. While the topic of an arbitrator's authority is addressed in Sec. 5.02(4), the parties chose to place a sentence dealing with that very topic (i.e. an arbitrator's authority to fashion remedies) in a section immediately following a sentence which deals with grievance timelines. While that's odd, it's not unheard of. Such things happen. In any event, the second sentence in Sec. 5.01(9) tells an arbitrator that when he finds that "the County is liable" for a contract violation, "this clause" (meaning the first sentence which imposes the timelines for filing a grievance) "shall not limit retroactive payment of economic benefits" for which he (i.e. the arbitrator) has determined "the County is liable." In other words, the arbitrator can award a remedy that goes back past the date that the grievance was filed. Thus, in such a case, the arbitrator decides how far back the retroactivity will go – not the first sentence of Sec. 5.01(9).

In my view, the second sentence assumes that a grievance is properly before the arbitrator (meaning there are no timeliness problems) and that the arbitrator is deciding the merits. That's not the case here, so the second sentence is inapplicable. What the Association cleverly tries to do here is shoehorn the instant grievance into the second sentence so as to make an untimely grievance into a timely one. That attempt is unsuccessful.

As previously noted, my "preliminary" finding – before I addressed the second sentence – was that the grievance was untimely filed. That "preliminary" finding has not been altered as a result of my discussion of the second sentence, so it therefore becomes my final finding. While the contract does not specifically say that untimely grievances are to be dismissed, I find that in this case - where the instant grievance was filed almost two years late - dismissal of the grievance is warranted.

In light of the above, it is my

AWARD

That since the instant grievance was untimely filed, Section 5.01(9) of the parties' collective bargaining agreement prevents the MDSA from proceeding with this grievance arbitration.

Dated at Madison, Wisconsin, this 2nd day of October, 2012.

Raleigh Jones /s/
Raleigh Jones, Arbitrator

REJ/gjc
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