BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

EXTENDICARE WILLOWS NURSING AND REHABILITATION CENTER

and

SERVICE EMPLOYEES INTERNATIONAL UNION HEALTHCARE WISCONSIN

Case 9
No. 71281
A-6497

(Burchette – Procedural)

Appearances:

Attorney Daniel Finerty, Lindner & Marsack, S.C., 411 East Wisconsin Avenue, Suite 180, Milwaukee, Wisconsin, 53202-4498, appearing on behalf of Extendicare Willows Nursing and Rehabilitation Center.

Attorney Barbara Quindel, Hawks Quindel, S.C., 222 East Erie Street, Suite 210, Post Office Box 442, Milwaukee, Wisconsin, 53201-0042, appearing on behalf of Service Employees International Union Healthcare Wisconsin.

INTRODUCTION

Extendicare Willows Nursing and Rehabilitation Center ("Employer") and the Service Employees International Union Healthcare Wisconsin ("Union") are parties to a collective bargaining agreement ("Agreement") that provides for final and binding arbitration of disputes arising thereunder. On December 16, 2011, the Union filed a Request to Initiate Grievance Arbitration with the Wisconsin Employment Relations Commission ("WERC"), concerning the Employer's discharge of Alicia Burchette. The filing requested that the WERC appoint a commissioner or staff member to serve as sole arbitrator, and the undersigned was so appointed.

The arbitrator contacted the parties and established a date, time, and location for a hearing in this matter. Thereafter, on February 24, 2012, the Employer submitted correspondence to the undersigned, asserting that the arbitration should not proceed based on a

timeliness defect. To address the matter of the Employer's procedural challenge, the undersigned held a conference call on March 28, 2012. During the conference, the parties entered into a stipulation bifurcating this case, to allow the procedural challenge to be addressed first. The parties further stipulated to having the procedural matter decided on the basis of written arguments and affidavits. The Employer made the initial submission on April 12, 2012; the Union filed a responsive submission on April 20, 2012; and the Employer filed a reply on May 7, 2012, at which point the record in this matter was closed.

On August 6, 2012, the undersigned sent correspondence to the parties indicating that, after review and consideration, the conclusion had been reached that certain deficiencies in the record prevented the issuance of an award and warranted another conference call. During that call, the decision was made to hold a hearing with regard to the procedural issue. The record was reopened, and hearing was held in Sun Prairie, Wisconsin, on September 25, 2012, at which time the parties were afforded the 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 briefs, the last of which was received by the undersigned on November 2, 2012, at which point the record was again closed.

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

ISSUE

At hearing, the parties entered into a stipulation allowing the undersigned to frame the statement of the issue. The Employer proposed the following statement of the issue:

> Did the union's grievance regarding Alicia Burchette follow Steps 3 and 4 outlined in the parties' grievance and arbitration procedure on pages 3 and 4 of the collective bargaining agreement? If not, is it deemed settled by virtue of Section 4.5 of the parties' collective bargaining agreement?

The Union proposed the following statement of the issue:

> Did the Union comply with the contract in processing the grievance? If not, should the grievance be forfeited?

Having considered the proposals of the parties and the record before me, the undersigned frames the statement of the issue as follows:

> Was the grievance timely filed, and is it arbitrable?

RELEVANT CONTRACT PROVISIONS

ARTICLE III [*sic*] [1] – GRIEVANCE AND ARBITRATION

Section 4.1 – The Employer agrees to meet with duly accredited officers and committees of the Union upon grievances pertaining to meaning or application of the Agreement, in accordance with the procedure provided below. A grievance, subject to the following procedure, shall include any and all disciplinary actions taken by the Employer, and all questions and disputes involving contract interpretations and any and all questions and disputes involving conditions of employment.

Step 1. The employee or the Union shall discuss the grievance with the immediate supervisor within seven (7) working days of the event which is the source of the grievance provided, however, any grievance relating to a discharge from employment shall commence at Step 2 below.

If the employee so desires, a Union Work Site Leader may be present at said meeting. If a satisfactory settlement is not reached orally, the Work Site Leader or the Union shall, within seven (7) working days, set forth the grievance in writing, date it, sign it in duplicate form, and present it to the department head for investigation and written disposition within seven (7) working days. Saturdays, Sundays, and holidays shall not be considered working days for the purposes of this Article.

Step 2. If there is failure to resolve at Step 1, the grievance must be presented, within seven (7) working days from the failure to resolve in Step 1, to the Administrator or his/her representative, for investigation. The Administrator will provide for a meeting of representatives of the Union and the Employer for negotiation purposes within seven (7) working days of receipt of the Step 2 grievance. The Employer shall provide written disposition within seven (7) working days of the meeting. Failure of the Union to go to Step 2 within seven working days of the response of Step 1 of the grievance bars further action by the Union or the employee.

Step 3. If the grievance is not settled in Step 2., the grievance may, within seven (7) working days after the answer in Step 2., be presented in Step 3. A grievance will be presented in this Step to the Corporate Director of Labor Relations, or his/her designee; and that person will render a decision in writing within seven (7) working days after the

[1] The contract reads "Article III", but the Grievance and Arbitration provision is actually at Article IV, as the Section numbers indicate.

> presentation of the grievance in this Step. If there is a failure to resolve at this Step, either party may file an appeal to arbitration within seven (7) working days.
>
> Step 4. If the grievance is not settled in Step 3, the Union will notify the Employer's Area Director of Human Resources, in writing, of its intention to submit any grievance to arbitration. The arbitrator will be selected by and from the staff of the Wisconsin Employment Relations Commission. The decision of the arbitrator will be final and binding on both parties to this Agreement.

. . .

BACKGROUND

On July 13, 2011, for reasons not reflected on the record, Alicia Burchette was discharged from her nursing aide position with the Employer. At the time of her discharge, Burchette had been a member of the collective bargaining unit represented by the Union. On July 14, 2011, Bonnie Strauss ("Strauss"), who at all relevant times was the SEIU Healthcare Wisconsin representative handling the Burchette grievance, provided the grievance contesting Burchette's discharge to Michael Libby ("Libby"), the Employer's Administrator.

Because the Burchette grievance addressed a discharge, it was initiated at Step 2 of the grievance process, as required under Article IV of the Agreement. Under the timeline set forth in the grievance procedure, the Employer was to provide its Step 2 response to the Burchette grievance within 7 working days. The communication Strauss sent to Libby enclosing the grievance, however, noted that the parties already had an August 4, 2011 meeting set up and indicated that the Union would be willing to extend the Step 2 deadline to allow the Burchette grievance also to be addressed during that meeting.[2]

The parties attended the August 4 meeting, and the Burchette grievance was discussed at that meeting. On August 12, 2011, Libby sent an email to Strauss denying the grievance. On August 19, 2011, Strauss presented the Step 3 Burchette grievance to Dave Keating ("Keating"), the Employer's Deputy General Counsel. Pursuant to the timeline set forth in the grievance procedure, the Employer again had 7 working days to provide its Step 3 response. In her email message attaching the Step 3 grievance, however, Strauss again offered to extend the timeline until a meeting could occur. Strauss testified at hearing in this matter that she had offered to extend the grievance timelines because she knew Keating had a busy schedule due to a lot of travel. Indeed, Keating had been sufficiently busy that Chris Archambault ("Archambault"), the Employer's Area Director of Human Resources, had been assisting him

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[2] The parties acknowledged at hearing that, while grievance meetings technically are not required under the terms of the Agreement, they typically meet to discuss grievances anyway.

with the grievances; and then, around this time, Archambault assumed primary responsibility for processing grievances on behalf of the Employer.

Archambault and Strauss met for a Step 3 grievance meeting regarding the Burchette matter on the 5th or 6th of September, 2011. Then, on September 9, 2011, Archambault sent an email message to Strauss indicating that he was not prepared to provide a response on the Burchette grievance but that he would update her in the next week. On September 10, Strauss indicated that the Union would extend the Employer's Step 3 deadline for responding to the grievance while Archambault was considering his response.

In October, Archambault and Strauss had discussions regarding the possibility of settling the Burchette grievance. The record indicates that during this time Archambault expressed concern to Strauss regarding the possibility that there were some out-of-state charges that would prevent Burchette from returning to her CNA position with the Employer. On November 7, 2011, Strauss sent a message to Archambault indicating that she was gathering documentation related to the out-of-state charges and asking him if he wanted to provide a response to the grievance. On November 8, Archambault sent a message to Strauss denying the Burchette grievance. The next day, on November 9, Strauss sent an e-mail message to Archambault, which stated the following:

> Our Union will arbitrate this grievance regarding Alica [*sic*] Burchette's termination.

Strauss testified that she understood, even after she had sent a message to the Employer indicating that the Union would arbitrate the Burchette grievance, that the parties were still engaged in settlement discussions. Archambault had asked for documentation relating to any out-of-state charges for Burchette, and Strauss was attempting to gather that documentation. Subsequently, on November 18, 2011, Strauss again wrote to Archambault regarding the Burchette matter:

> We are prepared to arbitrate this grievance as we informed you earlier. In our prior discussions, you indicated some willingness to take her back but you were concerned about some prior court issues that may preclude her from working as a CAN. We have done an exhaustive search and have found that all cases have been closed by the courts. Apparently, the State of Wisconsin also believes these cases closed and not a problem as she is currently active on the registry and able to work as a CAN. If you have information to the contrary, please provide the court of jurisdiction and the case numbers and any documentation that you have regarding her.
>
> So do you want to give her former position back to her with full backpay and benefits? Please let me know. Thanks.

Strauss testified at hearing that after waiting for a period of time to receive a response from Archambault, and after receiving no such response, Strauss ultimately filed a Request to Initiate Grievance Arbitration with the Wisconsin Employment Relations Commission ("WERC Request") on December 16, 2011. The WERC Request was copied to the Employer, and the record shows that the Employer received the documents sometime the next week.

The undersigned subsequently was appointed by the WERC to serve as Arbitrator in this matter. On January 24, 2012, the Arbitrator contacted Strauss indicating that she had encountered some difficulty contacting the Employer representative identified in the WERC Request and asking Strauss for contact information for the Employer. Strauss copied Archambault on her response to that message, thereby providing the Arbitrator with the Employer's contact information. On that same date, and in response to that message, Archambault copied Attorney Daniel Finerty ("Finerty") and indicated to the Arbitrator that Finerty would represent the Employer in the Burchette matter. Finerty then asked the Arbitrator to forward potential dates for an arbitration hearing, so he could consider them with his client. Between February 3, 2011 and February 8, 2011, the Arbitrator, Finerty, and Strauss engaged in an exchange that resulted in arrangements for a hearing to take place on April 10, 2012. Subsequently, on February 15, 2011, Finerty asked the Arbitrator for a copy of all the Union's filings with the WERC in the Burchette case. The materials were forwarded to Finerty on February 21, 2012.

On February 24, 2012, Finerty raised a procedural objection to the processing of the Burchette case. Specifically, the objection asserted that the Agreement required the Union to file the WERC Request within 7 working days of the Employer's Step 3 denial, and the Union had failed to do so.

The record indicates that the collective bargaining relationship between the Union and the Employer was relatively new at this time. The Union had become the collective bargaining representative of nine Extendicare facilities, including Willows where Burchette was employed, in April of 2010. The predecessor collective bargaining agreement had been with another bargaining agent. The collective bargaining agreements between the Union and the Employer for all nine of the Employer's facilities were negotiated together in 2010, and with the exception of one Extendicare facility they all contain the same grievance arbitration procedure as the one that is the focus of this case. During the 2010 negotiations, the parties did not renegotiate this grievance procedure. It was simply carried over from the predecessor collective bargaining agreement.

In addition to the Burchette grievance, the record contains evidence regarding other grievances that have been processed since 2010 under the grievance language at issue here. In the "Kuchenberg" case the WERC Request was filed in November of 2011, nearly 1 month after the Step 3 denial; in the "Bauer" case, the Union filed the WERC Request also in November of 2011, approximately 2 months after the Step 3 denial; and in the "Riddle" case, the Union filed the WERC Request in February of 2012, 10 months after the Step 3 denial. In each of these cases, the Union had communicated to the Employer, within 7 working days of

the Step 3 denial, that it would be arbitrating the grievance. On February 24, 2012, the Employer sent notices to the WERC with regard to each of these three cases (as well as the present case), indicating that the arbitrability of each case was being challenged under the theory that the WERC Requests had not been filed within 7 working days of the Step 3 denial and the case, therefore, was untimely. At the time that these objections were filed, hearing in the Kuchenberg case already had occurred, hearing was 4 days away in the Bauer case, and the WERC Request had only been filed at the WERC 2 days prior to the objection in the Riddle case.

The record also references approximately two dozen other cases the parties have processed through the grievance procedure, for which WERC Requests have not been filed. On February 21, 2012, Strauss wrote to Archambault and Keating expressing frustration that she had not been able to schedule meetings with the Employer regarding these pending grievances. Keating replied to Strauss' message with a message with the following:

> Please set forth in specificity which grievances. Without waiving any timeliness defense, I will assume arbitration.
>
> Since we are on record, this is notice that any notices of arbitration filed prior to this date are withdrawn, but for those you identified in the next 72 hours.
>
> I look forward to seeing you, or outside counsel, in arbitration.

Later on February 21, Strauss responded to Keating, copying Archambault, attaching a list of twenty-four grievances the Union asserted were still pending.[3] The list was entitled "SEIU Healthcare Wisconsin Pending Extendicare Grievances at Arbitration Step". The list set out, in columns, a number for each grievance, a name, a description of the subject, and a final column with the heading "Date Filed to Arbitration". The record shows that the dates under this column were the dates on which the Employer had received communication from the Union regarding its decision to arbitrate the grievances. A few days later, on the morning of February 24, 2012, Strauss had a conversation with Keating in which Keating informed her that the Employer was taking the position that all of the grievances were untimely because the Union had yet to file WERC Requests for any of them and more than 7 working days had passed since the Employer's Step 3 denial for all of them.

"Contreras" is one additional grievance referenced on the record. In that case, the WERC Request was filed in August of 2012, within 7 working days of the Employer's Step 3 denial.

[3] One of the 24 is Riddle, so this list really only contains 23 grievances in addition to the ones that already have been discussed here.

DISCUSSION

Each party here asserts that the "plain" language of the disputed provision clearly supports its own position, yet the two positions are radically different from each other. The main focus of this procedural dispute is the Step 3 paragraph of the grievance and arbitration procedure in Article IV of the Agreement, which provides that if a grievance is not resolved at Step 3, "either party may file an appeal to arbitration within seven (7) working days".

The Employer contends that when a grievance is denied at Step 3, two obligations arise under Article IV. These obligations are set forth separately, the Employer argues, in Step 3 and Step 4 of that grievance provision. The first obligation, which rises from the Step 3 paragraph, requires the filing of an appeal to arbitration. The second obligation, which rises from the Step 4 paragraph, requires notification to the Employer of the intention to submit a grievance to arbitration. The Employer's position here is that these two, distinct obligations – to file and to provide notice – could not possibly have been accomplished in this case with the single email message Strauss sent to Archambault on November 9, 2011, indicating the Union's decision to arbitrate the Burchette grievance. The Employer takes the position that Strauss' message satisfied the notice obligation, but not the filing obligation. It reads the filing obligation set forth at the end of the Step 3 paragraph to have required the Union to file a WERC Request within 7 working days of the Employer's Step 3 denial of the Burchette grievance. It is undisputed that the Union did not file the WERC Request on the Burchette grievance until 27 working days after the Employer issued its Step 3 denial. Thus, the Employer takes the position that, because the WERC Request was untimely, the grievance was deemed settled with the Step 3 response from the Employer, pursuant to Section 4.5 of the Agreement, and there is no jurisdiction under which its merits may be considered in arbitration.

The Union reads the provision quite differently. Under its interpretation, the last sentence of the Step 3 paragraph provides the timeline for filing an appeal to arbitration (7 working days); the first line of the Step 4 paragraph provides the procedure for filing the appeal (in writing, with the Employer's Area Director of Human Resources); and the remainder of Step 4 addresses how the arbitrator will be selected and the weight of the arbitrator decision. It is the Union's position that the need to "file an appeal to arbitration" within 7 working days, in writing, with the Employer's Area Director of Human Resources, was accomplished when Strauss notified Archambault that the Union had decided to arbitrate the Burchette grievance. As to the subsequent filing of the WERC Request, the Union takes the position that the Agreement does not provide a timeframe in which this task must be accomplished. It acknowledges, however, that arbitral principles would likely require such a filing to occur within a "reasonable" time period.

It is well-established that time limits set forth in contractual grievance procedures are to be strictly enforced, and untimely grievances will be refused a hearing. Elkouri & Elkouri, *How Arbitration Works*, 6th Edition (hereafter, "Elkouri"), at 217. Moreover, it is patent in

the Agreement between the Employer and the Union in the present case that the parties have agreed that the time limits set forth therein are to be taken seriously:

> Section 4.5 – The time limits specified in this Article are intended to be maximum time limits and are to be construed as being binding on the Union, employee(s) and the Employer Grievances not processed within the time limits specified herein will be deemed to have been settled consistent with the last response of the Employer. Time limits specified in this Article may be extended through mutual agreement between the parties. …

Although the last sentence of Section 4.5 allows for extensions, although the record suggests that it is not uncommon in the relationship between the Union and the Employer to grant extensions when processing grievances, and although it is even reflected on the record that extensions were granted in the earlier stages of the Burchette grievance, it is undisputed that the 7-working-day time limit set forth at the last sentence of the Step 3 paragraph was neither waived nor extended in this case.

Having said that, arbitral doctrine abhors a forfeiture. Elkouri at 482. A general presumption exists that favors arbitration over dismissal of grievances on technical grounds. Id. at 206. For this reason, an agreement must contain clear time limits. Id. at 220-221. Where there are ambiguities in the wording of contractual time limits, all doubts are to be resolved against forfeiture of the right to process a grievance to arbitration. Id. at 220-221. The Employer's written arguments in this case reinforce the importance of clear language, relying on quotations regarding dismissal for untimeliness that consistently incorporate some reference to "clear and unambiguous" language. The Employer sets forth, for instance, the following from Michigan Dept. of Soc. Servs. 82 LA 114, 116 (Fieger, 1983):

> Where parties have conditioned the right to arbitration, and signaled an intention to be governed by those conditions, an arbitrator called upon to determine arbitrability is similarly governed by *clear* language of qualification. [Emphasis added.]

And the following, from American Red Cross, 126 LA 925, 929 (Henderson, 2008):

> Not only is it axiomatic that the *clear, unambiguous* language of the agreement must be honored, but here the contract in exact terms forbids the arbitrator from ignoring "in any way," the specific provisions of the contract nor giving, to either party, rights which were not "obtained in a negotiating process." [Emphasis added.]

Even arguments in the Employer's own words contain implicit recognition of the need for unambiguous language:

> When interpreting contractual language, arbitrators must keep several overriding issues in mind that exist at the very core of labor relations. One such rule is that an arbitrator is duty-bound to both honor and apply a contract's *clear and unambiguous* contract language. It is axiomatic that *clear, unambiguous* contract language must be applied as written." [Emphasis added.]

Post-Hearing Brief, page 2.

The decision in this case turns on the ambiguity that plagues the grievance provision in the Agreement, and particularly the last sentence of the Step 3 paragraph. The Employer's basic premise here is that the "appeal" that must be "filed", pursuant to the last sentence of the Step 3 paragraph, must be directed to the WERC. The first problem with this assertion is that the person or entity with whom the filing is supposed to be made is not specified at all, either in the disputed sentence or anywhere else in the Step 3 paragraph. The paragraph is silent with regard to that point. The WERC is never mentioned until the middle of the Step 4 paragraph, which states that "[t]he arbitrator will be selected by and from the staff of the Wisconsin Employment Relations Commission", and which contains no time limit at all.

The Employer argues that the absence of a direct reference to the WERC in the Step 3 paragraph does not create ambiguity. Relying on definitions extracted from Black's Law Dictionary, the Employer takes the position that the terms "file" and "appeal" would only be used to refer to the act of turning a grievance over to a third party, and the WERC is the only third party involved in the grievance arbitration process set forth in the Agreement. Although I do not take issue with the legal definitions cited by the Employer, I am not persuaded by its argument. In the more specific parlance of labor relations, these two terms very often are used to refer to the direct interactions between the two parties to an agreement as grievances are advanced from one stage of the grievance procedure to another, prior to any third party involvement. *See, e.g.,* Elkouri at 204-218. Thus, the use of the terms "file" and "appeal" in the disputed sentence does not necessarily contemplate WERC involvement.

The Employer contends that its position – that being that Steps 3 and 4 of the grievance procedure contain two distinct obligations, one to file and one to provide notice – is supported by the structure of the provision. The Employer's view is that the Step 3 and 4 provisions are separate because they carry separate obligations. It argues that if the parties had wanted them to be read as a single obligation, as the Union contends, the provisions would have been written as one. Admittedly, the structure of a provision often is a reliable guide when attempting to interpret its meaning. Here, however, an examination of the structure of the paragraphs does not eliminate the ambiguity. One obstacle to believing that these paragraphs express separate obligations, as the Employer contends, is that they would be expressing them in reverse order. Step 3 pertains to filing an appeal to arbitration, and Step 4 pertains to providing "notice" of the "intention" to go to arbitration. If these paragraphs were meant to express separate obligations, it would make much more sense for the obligations to have been listed in chronological order where the Union first would notify the Employer of the intention to go to arbitration and *then* file an appeal to arbitration. The Union's interpretation of the

provision, on the other hand, which provides that the last sentence of Step 3 states that either party may appeal and the first sentence of Step 4 describes how to do it, eliminates this sequencing issue.

The Union's interpretation of the Agreement also seems to achieve more consistency than the Employer's interpretation. Under the Employer's interpretation, for example, there is no time limit attached to what the Employer identifies as the Union's separate and distinct obligation to provide notice regarding arbitration to the Employer. This is inconsistent with the rest of the grievance procedure, which applies 7-working-day time limits for every other internal communication between the Employer and the Union. The Union's interpretation allows for the 7-working-day time limit to apply to the communication regarding arbitration between the Employer and the Union, just as it applies to other such communications. This makes more sense than the Employer's interpretation, which allows for 7-working-day deadlines for every other internal communication, no deadline at all for communicating to the Employer the decision to go to arbitration, and then a 7-working-day deadline again for engaging in the external communication of submitting materials to the WERC to initiate arbitration proceedings.

The Employer asserts that to find that the Union satisfied its obligations under the grievance procedure, one would have to read language into the contract. It contends that the Union's position requires taking "file an appeal to arbitration" and adding the words "with the Employer". What the Employer fails to acknowledge, however, is that its own position also requires the addition of words. To find for the Employer, I would have to take "file an appeal to arbitration" and add the words "with the WERC".

If an agreement is susceptible of two constructions, one of which would work a forfeiture and one of which would not, an arbitrator will be inclined to adopt the interpretation that will prevent the forfeiture. Elkouri at 482. The grievance procedure here does not clearly require filing the WERC Request within 7 working days. Although the provision is sufficiently ambiguous that it also does not clearly support the Union's interpretation, the Union's explanation here for how the provision works is no less feasible than the Employer's. Thus, because it does not result in a forfeiture of the grievance, the Union's interpretation of the language must be viewed as preferable.

Having concluded that the language of the grievance arbitration provision is ambiguous, I also have considered the extraneous, parole evidence in the record, but find that it does not add clarity in any way that supports the Employer's position that the parties intended and that the language establishes that WERC Requests must to be filed within 7 working days of Step 3 denials. If anything, the parole evidence appears to support the Union's contrary reading of the provision.

The record shows that before February 24, 2012, the Employer never raised the timeliness objection at issue in this case, even though its interpretation of the 7-working-day deadline for filing WERC Requests clearly and consistently was not being followed in some 30

cases. By the time the February 24, 2012 objection was raised in the Riddle case, 10 months had passed since the Employer's Step 3 denial. In the Burchette case, 3 months had passed since the Step 3 denial, the Union had continued to discuss settlement with the Employer and had sent a message to the Employer expressly anticipating arbitration after the 7-working-day period had expired, and the case had been scheduled for hearing. In the Bauer case, 5 months had passed since the Employer's Step 3 denial, and the parties were 4 days from an arbitration hearing. In the Kuchenberg case, 4 months had passed since the Step 3 denial, and the arbitration hearing already had occurred. There also apparently were nearly two dozen other grievances pending in which the 7 working days had passed since the Step 3 denial, and the Employer had raised no immediate objection when the Union presented a list of those grievances which included a heading that indicated that all of the grievances had been "appealed to arbitration" as of the date on which the Union had communicated to the Employer that arbitration would be pursued. On the contrary, Keating wrote a message to Strauss regarding those grievances stating that he looked forward to seeing Strauss or outside counsel in arbitration.[4]

The recitation of these facts is not intended to suggest that the Employer waived the ability to make a timeliness objection. The point rather is that, where there is a history in which many grievances are being processed over a period of time in a way that is inconsistent with the Employer's current interpretation and absolutely no objection is raised until objections are raised in every case in the course of a single day, that history supports the conclusion that the interpretation on which the timeliness objection is based is not so clearly supported by the language of the grievance provision and not so clearly reflective of the intent of the parties. Presumably if the provision was as clear and unambiguous as the Employer argues here, it would have jumped out at Libby or Keating or Archambault, and it would have occurred to one of these Employer representatives, all of whom had a role in handling grievances, to object to the Union's repeated and absolutely consistent failure to adhere the time restriction. The fact that it did not occur to any of these Employer representatives to react in the face of such consistent behavior suggests that it was not really the underlying intent of the drafters to this Agreement to impose a 7-working-day time limit on WERC Request filings.

The Employer has argued that it would be problematic to find in favor of an interpretation that imposes no time limit in which the WERC Request must filed. I also reject this assertion, for several reasons. First, as the Union has shown with citations to several cases, a finding for the absence of a timeline for completing the grievance arbitration step at which an arbitrator is chosen is not unheard of. See, e;g., Trumbell Cty Dept. of Human Services, 90 LA 1267 (Curry Jr., 1988), Kankakee County, 120 LA 1353 (Cox, 2004), City of Oregon, 99 LA 431 (Stieber, 1988), Maclin Co., 52 LA 805 (Koven, 1969). Second, the

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[4] The evidence presented at hearing concerning the Contreras case, in which the Union filed the WERC Request within 7 working days of the Step 3 denial, is not persuasive here. That filing occurred *after* the date on which a timeliness objection had been raised by the Employer in all the other cases. The Union's cautiousness in filing within 7 working days of the Step 3 denial in Contreras, presumably to avoid any additional problems while the timeliness dispute was ongoing, is not something I am willing to hold against it as an indication that the Union agrees with the Employer's interpretation of the grievance provision.

absence of a deadline is not as dangerously unfettered as the Employer has suggested. A requirement for filing grievances within a reasonable time is often inferred from the establishment of a grievance procedure.[5] Elkouri at 218. Moreover, pursuant to the terms of the grievance process, there appears to be nothing that prevents the Employer from taking the step of initiating proceedings with the WERC.

The Employer also highlights two other aspects of the record that it claims underscore the unreasonableness of an interpretation that does not include a specific deadline for filing WERC Requests. Specifically, it points to the 10 months that passed before the Union filed a WERC Request in the Riddle case, as well as the sizeable backlog of 23 grievances that might be eligible for arbitration if the Union prevails here. Particularly accounting for the fact that the record contains uncontroverted explanations for the timeframe involved in the Riddle grievance (that there was delay related to the need to gather information regarding the state registry and Riddle's eligibility to work) and for the grievance backlog (that there had been an unusual situation in which many grievances had emerged from a single "flow sheets" issue), nothing here persuades me that a 7-working-day time restriction not clearly provided for in the Agreement should be nevertheless imposed. The Employer bears the burden in this case, and it has failed to meet this burden by showing that the provision at issue here unambiguously requires a deadline that should cause the Burchette grievance to be dismissed.

AWARD

The grievance was processed in a timely fashion, and it is arbitrable.

Dated at Madison, Wisconsin, this 15th day of April, 2013.

Danielle L. Carne /s/
Danielle L. Carne, Arbitrator

[5] The Employer has not taken the alternative position in this case that the time it took for the Union to file the WERC Request for the Burchette grievance was unreasonable.

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