

BEFORE THE ARBITRATOR

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In the Matter of a Dispute Between

CURTIS BECK

and

CITY OF FOND DU LAC

Case ID: 13.0001

Case Type: MA

AWARD NO. 7900

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**Appearances:**

Attorney Daniel Kaminsky, for Curtis Beck.

Attorney Chad P. Wade, for the City of Fond du Lac.

**ARBITRATION AWARD**

Curtis Beck and the City of Fond du Lac selected the undersigned to serve as an arbitrator pursuant to the terms of a last chance agreement between the parties. The City filed a motion to dismiss the proceedings and the parties thereafter filed written argument, the last of which was received November 22, 2014.

In April 2014, Beck (a police officer), the City, and the Fond du Lac Professional Police Association entered into a “DISCIPLINE AND LAST CHANCE AGREEMENT” (herein LCA). Paragraph 3 of the LCA specifies that should Beck “be found to have engaged” in certain types of conduct, “such conduct shall be ‘cause’ for immediate discharge pursuant to any collectively bargained agreement between the City and the Association or otherwise.” The LCA also provides that:

... should the City exercise its rights under this Paragraph 3, such disciplinary action shall not subject to any grievance procedure or statutorily prescribed procedure for challenging discipline whether part of a collectively bargained agreement between the City and Association or not. However, said waiver does not preclude the Association or Beck from challenging the accuracy of factual findings from the investigation with the Wisconsin Employment

Relations Commission.

By their conduct in this matter, the parties have agreed that this arbitration proceeding falls within the meaning of the “Wisconsin Employment Relations Commission” as that term is used in the LCA. However, the parties disagree as to whether Beck has the right to challenge the “accuracy of factual findings” under the LCA. The City contends that Beck resigned to avoid being discharged and thus that the LCA cannot be invoked. Beck asserts that he was constructively discharged by the City and thus can exercise his rights under the LCA.

During oral argument with the parties, I advised them of my understanding (which I continue to hold) that Wisconsin law only allows a Police and Fire Commission (PFC) to discharge a police officer for a disciplinary matter. Thus, it can be argued that the LCA is a nullity because it includes a premise (that the City can independently discharge an officer without invoking the jurisdiction of the PFC) that is at odds with the law. I decline to reach this conclusion because Beck would be unfairly advantaged by such a resolution. Beck received the benefit of the LCA as to his January / February 2014 conduct when the City agreed not to seek his discharge before the PFC. I also note that the LCA provides him with a potential advantage (the review of the “accuracy of factual findings”) if the City “exercises its rights” under Paragraph 3 of the LCA. Therefore, given the foregoing, I interpret the intent of the parties to the LCA to be that review of the “accuracy of factual findings” is available to Beck if the City did what I believe it legally could do to discharge Beck in response to his alleged misconduct (i.e. file charges with the PFC).

It is apparent that the City did not file charges with the PFC (or summarily discharge him if it thought it had the legal authority to do so). Thus, it can be argued that the inquiry ends there – the City did not exercise any rights under “Paragraph 3” and therefore Beck has no right to a review of the “accuracy of factual findings” under the LCA. However, such a simplistic analysis would improperly and unfairly deprive Beck of consideration of his essential claim in this matter – that his resignation should be viewed as a constructive discharge which, in turn, allows him to obtain the “accuracy of factual findings.” Therefore, I turn to a consideration of the constructive discharge issue.

Among other matters, Beck argues that the unemployment compensation examiner’s determination that Beck was discharged should be binding in this proceeding. I conclude otherwise based on § 108.101(1), Stats., which provides that:

- (1) No finding of fact or law, determination, decision or judgment made with respect to rights or liabilities under this chapter is admissible or binding in any action or administrative or judicial proceeding in law or in equity not arising under this chapter, unless the department is a party or has an interest in the action or proceeding because of the discharge of its duties under this chapter.

To the extent Beck contends that the City should be held accountable for taking

inconsistent positions as to how Beck's employment ended, I reject that contention as being contrary to the documentary evidence before me.

As to the merits of the resignation versus constructive discharge issue, I have previously noted that, as a matter of law, Beck actually faced a choice of resigning or having charges filed with the PFC. Clearly, the filing of charges may or may not have ultimately produced Beck's discharge. Therefore, as a matter of law, Beck was never confronted with a resign or be discharged choice – a choice which he asserts Wisconsin law may in some circumstances view as a constructive discharge. If the record supported even a reasonable inference that the City knowingly misled Beck into believing that summary discharge (without PFC involvement) was the alternative to resigning, a hearing would be in order as to that inference. However, there is no such reasonable inference present here. Rather, there was a mutual mistake when the LCA was created (as Beck himself acknowledges) as to the disciplinary rights of the City. Given the mutuality of that mistake and the nature of the legal choice confronting Beck (resign or face charges), I conclude that there is no persuasive basis for viewing Beck's resignation as a constructive discharge. Therefore, I further conclude that under the LCA, Beck does not have a right to obtain a review of the "accuracy of factual findings" produced by the City's investigation of his alleged misconduct. Thus, I lack jurisdiction to proceed any further in this matter.

Dated at Madison, Wisconsin, this 4th day of December 2014.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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Peter G. Davis, Arbitrator