

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

JEFFREY G. BRANN

and

CITY OF GREEN BAY

Case ID: 284.0029

Case Type: MA

AWARD NO. 7962

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**Appearances:**

Carly N. Windorff, Windorff Law LLC, P.O. Box 222, Kaukauna, Wisconsin, appearing on behalf of Officer Jeffrey G. Brann.

Geoffrey A. Lacy, Strang Pattenon, Renning, Lewis & Lacy, S.C., 205 Doty Street, Suite 201, Green Bay, Wisconsin, appearing on behalf of the City of Green Bay.

**ARBITRATION AWARD**

Pursuant to the terms of the 2016-2019 Collective Bargaining Agreement, on January 21, 2020, Officer Jeffrey G. Brann requested that the Wisconsin Employment Relations Commission assign an arbitrator as to a grievance between Officer Brann and the City of Green Bay. I was so assigned.

Discussion was had and an agreement made by the parties that the arbitration would be bifurcated, with the issue on whether Officer Brann's grievance was properly before the arbitrator to be decided and, if it was found to be so in a proper manner, only then would the parties go forward to argue whether just cause existed for the discipline imposed. On March 9, 2020, the parties exchanged written argument as to the issue at hand. On March 16, 2020, Officer Brann filed a rebuttal brief which was held until March 17, 2020, when the City of Green Bay filed their rebuttal brief and an exchange was then made. No hearing or additional argument was necessary.

### **ISSUE**

The Parties agreed that the issue to be decided by this Award is:

Is the grievance filed by Officer Brann subject to arbitration?

### **DISCUSSION**

The City argues that Officer Brann is prohibited from pursuing this grievance as the Collective Bargaining Agreement (CBA) clearly states deadlines for appeals and Brann was untimely in such and now cannot pursue arbitration. The City further argues that Brann had already settled this matter barring further review. Brann argues that equitable tolling should be in effect and grant him an extended period in which to assert his rights. Brann further argues that the settlement was done by the Union and without his knowledge or consent.

A timeline of the events is useful for consideration of this matter:

- December 17, 2018: Brann was issued a written warning based on four policy violations.
- January 21, 2019: On behalf of Brann, the Green Bay Professional Police Association (GBPPA) grieved the discipline.
- February 4, 2019: Chief Smith denied Brann's Step 1 grievance.
- March 22, 2019: A meeting between the City and GBPPA representatives reached an agreement to reduce the warning from 4 violations to 2. An amended written warning was placed in Brann's file.
- April 5, 2019: Brann appealed his grievance to Step 2.
- April 25, 2019: The City denies Brann's grievance as untimely and because it was already settled.
- January 3, 2020: The City's Personnel Committee dismissed Brann's grievance.

The following sections of the CBA provide guidance on this matter:

**ARTICLE 3**  
**GRIEVANCE PROCEDURES AND DISCIPLINARY PROCEEDINGS**

3.4 COMPUTATION OF TIME. The days indicated at each step should be considered a maximum. Working days as used in this article shall mean Monday through Friday, excluding holidays. The failure of the party to file or appeal the grievance in a timely fashion as provided herein shall be deemed a waiver of the grievance. The party who fails to receive a reply in a timely fashion shall have the right to automatically proceed to the next step of the grievance procedure. The time limits may be extended by mutual consent.

3.8 STEPS AND PROCEDURE.

3.8.1 STEP ONE. The grievant or a Union representative on the grievant's behalf shall have the right to present the grievance in writing to the Chief of Police within 25-working days after the employee or the Union knew or should have known of the event giving rise to such grievance. The Chief of Police shall furnish the grievant and the Union representative and answer within 15-working days after receiving the grievance.

3.8.2 STEP TWO. If the grievance is not satisfactorily resolved at the first step, the grievant or the Union representative shall prepare a written grievance and present it to the Human Resources Director within 15-working days of the Chief of Police's response. The Human Resources Director shall review the grievance and shall respond in writing within 15-working days after receipt of the written grievance.

3.8.3 STEP THREE. If grievance is not resolved at the second step, the grievant or the Union representative shall present the written grievance to the Personnel Committee within 15-working days of the Human Resources

Director's response. The Personnel Committee shall review the grievance and respond in writing within 10-working days after their decision, which shall be made at the next regularly scheduled Personnel Committee meeting. In reaching their decision the Personnel Committee may hold a fact-finding hearing after having received a written statement of fact and position by each party. The grievant and the Union shall be given a 10-working day notice of said hearing.

Brann's Step 1 grievance was denied on February 4, 2020, which he filed an appeal of (Step 2) on April 5, 2020. The CBA creates unambiguous language allowing 15 days for such a filing, but in this case, it took approximately 45 days for the Step 2 grievance to be filed. Brann missed this deadline and as such the subject matter of the grievance is not allowed to be arbitrated per Article 3.4 of the CBA.

While Brann argues that the timeline should be tolled there is not a basis for doing so. Brann's arguments are that the City consented to the extension of the deadline to file by continuing negotiations and that Brann never authorized the GBPPA to settle the matter on his behalf.

Brann's first argument is reliant on the City and GBPPA having expressly agreed to waive/extend the Step 2 time-limits in order to negotiate a settlement. The negotiations took place sometime between the February 4 issuing of the denial of Brann's Step 1 grievance and the settlement that took place on March 22. Brann argues that because the negotiations continued during this period it constitutes an extension of time in which to file a Step 2 grievance, and that the Arbitrator should toll such to "start the clock" on March 22. The continuation of negotiations is not an explicit extension of the time requirements mandated in the CBA. Negotiations are entirely separate from the procedural elements prescribed in the CBA and may continue on a separate track from such. It is often the case that negotiations begin at a case's inception and continue up to (and sometimes during) trial. Engaging in such does not restructure what other procedural requirements are in place.

Equitable tolling may sometimes be appropriate. The general rule is that a court may use equitable remedies when there is an element of fairness that has been deprived to a party. Clearly if there was a demonstration of bad faith by the City it would suggest strong consideration of such an argument. In this matter that does not seem to be the case, at least in relation to the City's actions in how they handled this grievance. Article 3.8.1 of the CBA clearly indicates that the Chief of Police shall furnish the Union and the grievant with a copy of their decision as to the Step 1 grievance. No argument has been presented that Brann was not aware of the status of his Step 1

grievance and that it had been denied. Brann knew the result and was also constructively aware of the 15-day requirement to file the Step 2 challenge. Brann did not do so and participating in settlement negotiations did not alleviate his procedural requirement to file a Step 2 grievance in the prescribed 15-day period.

Brann's second argument that he had not given the consent to the GBPPA to settle his grievance under the terms that were ultimately agreed to is immaterial so far as to provide a basis for equitable tolling.

By the terms of the CBA, I am not empowered to allow this matter to go forward to make a determination on the merits. The matter fails to demonstrate that it is procedurally arbitrable.

Issued at the City of Madison, Wisconsin, this 8<sup>th</sup> of June, 2020

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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James J. Daley, Arbitrator