

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
MILWAUKEE DEPUTY SHERIFFS' ASSOCIATION
and
MILWAUKEE COUNTY

Case ID: 161.0031
Award No. 7963

(Grievance No. 61077 Annual Retirement Contribution Grievance)

Appearances:

Graham Wiemer, MacGillis Wiemer, Attorneys at Law, 11040 W. Bluemound Road, Suite 100, Milwaukee, Wisconsin, appearing on behalf of Milwaukee Deputy Sheriffs' Association.

Melinda Lawrence, Assistant Corporation Counsel, Milwaukee County, 901 North Ninth Street, Room 303, Milwaukee, Wisconsin, 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. In April 2017, 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. 61077. That grievance also came to be known as the Annual Retirement Contribution grievance. The undersigned was so designated. The matter was then scheduled, and postponed, four different times. No hearing has been held in this case. In February 2020, the Association asked the arbitrator to set the matter for hearing and the County objected to that request. On June 9, 2020, the parties filed briefs. Based upon the arguments of the parties and their submissions, the undersigned makes and issues the following Award.

ISSUE

The undersigned frames the issue as follows:

Should the County's procedural objection to hearing this grievance on the grounds of undue delay be sustained?

PERTINENT CONTRACT PROVISIONS

The parties' 2014 collective bargaining agreement (hereinafter CBA) contained the following pertinent provisions:

Section 5.01 – **Grievance Procedure**

(1) APPLICATION: . . . Any disputes that arise between the Association and the County including employee grievances shall be resolved under this section.

. . . .

(8) Grievances designated for arbitration shall be appealed to the Wisconsin Employment Relations Commission within thirty (30) calendar days of the date of the written response from Step 3.

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.

As will be noted below, in 2017 the Association filed a grievance that came to be known as the Annual Retirement Contribution grievance. The substantive merits of the grievance are not going to be resolved herein. Instead, the question to be resolved herein is whether an arbitration hearing on that grievance will be scheduled.

. . .

On February 8, 2017, the Association filed Grievance No. 61077 which came to be captioned as the Annual Retirement Contribution grievance. The County provided a Step 2 response to the grievance on March 7, 2017 and a Step 3 response on March 23, 2017. The Association appealed the grievance to arbitration on April 3, 2017. An arbitration hearing was initially set for July 21, 2017. On July 11, 2017, the parties mutually requested that the matter be rescheduled. The arbitrator granted that request and cancelled the hearing set for July 21, 2017. The hearing was subsequently rescheduled for August 9, 2017. On August 1, 2017, the parties mutually requested that the hearing set for August 9, 2017, be cancelled. The arbitrator granted that request and cancelled the hearing set for August 9, 2017. The case was then dormant for eight

months until April 9, 2018, when the Association's counsel notified the parties that he wanted to reschedule the matter for hearing. The hearing was subsequently rescheduled for June 19, 2018. On June 15, 2018, the Association's counsel notified the arbitrator that the parties were "getting close to a potential resolution" but were not likely to have it finalized by June 19, so the parties were jointly requesting that the hearing set for June 19, 2018 be cancelled. The arbitrator granted that request and cancelled the hearing set for June 19, 2018. The hearing was subsequently rescheduled for August 10, 2018. On August 7, 2018, the Association's counsel notified the arbitrator that settlement discussions with the County were ongoing and, as a result, the hearing set for August 10, 2018 could be cancelled. After the County's counsel concurred with same, the arbitrator cancelled the hearing set for August 10, 2018. The case was then dormant for one calendar year. On August 12, 2019, the arbitrator sent an email to the Association's counsel which provided in pertinent part:

I have been directed to close out 3 old – but still pending – grievances. They are the following cases:

2. Grievance No. 61077 – Annual Retirement Contribution grievance. It was appealed to the WERC on April 3, 2017. It has been scheduled and postponed numerous times. It is WERC No. 161.0031.

...

Can these 3 files be closed?

There was no reply to the above email. Six months later, on February 11, 2020, the arbitrator sent another email to the Association's counsel which asked if the grievances referenced in his August 12, 2019 email could be closed. On February 14, 2020, the Association's counsel responded that with regard to this grievance (i.e. Grievance No. 61077 - Annual Retirement Contribution grievance) "it needs to be set for hearing; MDSA intends to move forward with this grievance arbitration." On March 9, 2020, the County objected to the Association's request to reactivate the grievance and schedule a hearing "on procedural grounds of considerable delay".

DISCUSSION

At issue here is whether this grievance - which was dormant for a year and a half until the Association unilaterally resurrected it - should be scheduled for hearing or dismissed. Based on the following rationale, I find that the latter (i.e. dismissal) is appropriate under the circumstances.

I'm going to start by reviewing the following background. That background will give some context to the discussion which follows.

This grievance was appealed to arbitration over three years ago. After it was appealed to arbitration, it was scheduled and postponed four times. Two of the scheduled hearing dates were in 2017 and two were in 2018. While scheduling and postponing a case four times is not the norm, it has happened in other cases that the undersigned has done with the instant parties over the years.¹ Because of that, the Association cannot be faulted for its actions in this matter up until August of 2018. (Note: That was when this matter was scheduled for the fourth time). However, after that hearing was postponed, the case was dormant for the next year and a half.

Fault for that can fairly be ascribed to the Association. Here's why. During that time period, there was no communication between the parties regarding this matter, let alone settlement discussions. After the matter had been dormant for one calendar year, the arbitrator sent an email to the Association's counsel asking if the matter could be dismissed. There was no response from the Association to that email. Six months later, the arbitrator sent a second status email. The Association responded to that email asking that the case be reactivated. I find that the Association can fairly be faulted for not doing anything to move this matter along, particularly after the arbitrator asked about the status of the case.

While this arbitrator has had other cases with the instant parties where a dormant grievance was unilaterally reactivated by the Association, in those cases the County did not object to that happening. Here, though, it does.

I find that the County's objection to reactivating this old grievance has a legitimate factual basis. It is this. The County employees who knew what this grievance was about, and who responded to the initial grievance as the County's representatives, Luis Padilla, Jr. and Mary Dutkiewicz, are no longer employees of the County. Additionally, the Assistant Corporation Counsel who represented the County in this matter through 2018, James Carroll, is no longer a County employee. The County's current representative in this matter avers that she conducted an extensive investigation into the background of this grievance, and after doing so, was unable to locate a single County employee who had information about this grievance or its procedural history. She further avers that certain items pertaining to this grievance are missing from County files, to wit: the initial request for arbitration and all communications about scheduling, rescheduling or cancelling hearings on this matter. She further avers that during the year and a half time period that the grievance was dormant, there was no communication between the Association and the County regarding this grievance. The foregoing satisfies me that if this case were to be reactivated and moved forward to arbitration, the County would be prejudiced by this loss of evidence, and at a substantial disadvantage. That being so, the equitable considerations in this matter favor the County.

In so finding, I am aware that there is no provision in the contractual grievance procedure that sets a time limit on the amount of time that may pass between a request for arbitration and a request to set a date for hearing. Thus, the contract does not specifically preclude a grievance from being dormant at the arbitration step for a year and a half (as happened here). Nonetheless, I find

¹Later in this Award, a prior Arbitration Award with the instant parties will be cited. In that Award, in the prefatory paragraph, it indicates that the matter was scheduled and postponed five times.

that in this case, dismissal of the grievance is warranted for the reasons noted above. Additionally, it is noted that over the last two decades, I've heard and decided dozens of cases with the instant parties. In the overwhelming majority of those cases, I issued a decision on the merits (as opposed to dismissing it on procedural grounds). One case where I did the latter though was Grievance No. 51467 (which the parties had identified as the "Back Vacation Time Grievance"). In that case, the issue was whether the grievance was timely filed. I found it was not. After reaching that conclusion, I then opined:

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.

WERC Arbitration Award No. 7828, page 10 (October 2, 2012).

Consistent with that precedent, I reach the same conclusion here. The grievance is therefore dismissed.

In light of the above, it is my

AWARD

The County's procedural objection to hearing this grievance on the grounds of undue delay is sustained. The grievance is therefore dismissed.

Issued at Madison, Wisconsin, this 30th day of July, 2020.

Raleigh Jones, Arbitrator