

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
BROOKFIELD PROFESSIONAL POLICE ASSOCIATION
and
CITY OF BROOKFIELD

Case ID: 644.0003
Case Type: MA

AWARD NO. 7997

Appearances:

Brendan P. Matthews, MacGillis Wiemer LLC, 11040 W. Bluemound Rod., Ste. 100, Milwaukee, Wisconsin, appearing on behalf of the Brookfield Professional Police Association.

Ryan P. Heiden, von Briesen & Roper, S.C., 411 East Wisconsin Avenue, Suite 1000, Milwaukee, Wisconsin, appearing on behalf of the City of Brookfield.

ARBITRATION AWARD

Pursuant to the terms of the current Collective Bargaining Agreement (CBA), on a date in dispute sometime between April 6th and April 12th, 2024, the Brookfield Professional Police Association (BPPA) requested that the Wisconsin Employment Relations Commission assign an arbitrator in the above matter. Subsequently the parties agreed, pursuant to their CBA, that I would serve in that capacity.

Discussion was had and an agreement made by the parties that the arbitration would be bifurcated with the issue on whether BPPA's grievance was properly before the arbitrator to be decided. If it was found to be submitted in a procedurally proper manner, only then would the parties go forward to argue on the merits. A hearing was held on June 27, 2024 and transcribed. Thereafter the parties agreed on a briefing exchange which occurred as follows: On August 4, 2024, the City of Brookfield (City) provided their post-hearing brief. On August 25th, BPPA filed their reply brief. On September 8, 2024, the City submitted a subsequent reply brief. On September 30, 2024, the Arbitrator reached out to the parties to ask when the current CBA had been agreed to, and response was given.

ISSUE

BPPA states the issue to be determined is whether the grievance was timely and is allowed to go forward on the merits.

The City states the issue to be determined is:

- 1) Is the Grievance timely?
- 2) Is the appeal of the Grievance to arbitration timely?
- 3) Is there a proper grievant?

I frame the issue as follows: Is the grievance filed by BPPA procedurally permissible to proceed to arbitration on the merits?

DISCUSSION

The City has three arguments and opine that if any of the three arguments are found to have merit, the grievance must be dismissed on procedural grounds. Those arguments are, generally speaking: 1) Was the grievance process begun in a timely manner consistent with the terms of the CBA; 2) Was the grievance presented to WERC in a timely manner consistent with the terms of the CBA; and 3) Was the named grievant proper given the terms of the CBA. The City's position is that a failure of any of the above must result in dismissal of the grievance prior to any discussion on the merits.

BPPA argues that it has met the requirements of the CBA in all regards. If, however, a finding in the award were to show otherwise, that the infraction(s) are slight in nature, not prejudicial to the City, and that the nature of arbitration should allow such imperfections in light of the much more important ability of the parties to reach a decision on the merits of the grievance itself versus the dispatch of a disagreement on a mere technicality.

A) Was the Grievance Process Timely?

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

December 13, 2021: Chief of Police Adlam (Chief) distributes a Department-wide memorandum announcing a new assignment to the Special Investigations Group (SIG) entitled "Special Investigations: Drug & Human Trafficking".

- February 24, 2022: Chief issues a second Department-wide memorandum announcing the appointment of Officer Samantha Blank and Officer Angel Robles to the SIG assignment.
- May 16, 2022: Officers Blank and Robles start the SIG assignments full time, working a 5-2 work cycle, an 8-hour shift time of 10:00 a.m. to 6:00 p.m.
- May 22, 2022: Officers Blank and Robles accrue sick, vacation, and holiday leave at increments of 8.5 hours and used sick, vacation, and holiday leave at increments of 8 hours.
- November 2022: Officer Robles leaves the SIG assignment. Officer Blank continues to hold the assignment.
- 2022-May 2023: The Parties engage in bargaining over the successor CBA.
- 2022-May 2023: Though the date is unclear, testimony during the hearing indicates that during the CBA negotiations BPPA became aware of the upcoming January 9th postings.
- June 26, 2023: The Parties reach agreement on the successor CBA.
- August 16, 2023: BPPA reaches out to the City via email requesting to negotiate regarding the three new expected positions.
- January 9, 2024: Chief issues three Department-wide memoranda announcing three assignments, one of which is a SIG assignment. The SIG assignment did not disrupt Officer Blank's continued functioning in that role but was posted to find a partner for her on the assignment, likely replacing the vacancy created by Robles' departure.
- January 15, 2024: BPPA notified Chief and City of concerns relating to the three assignment postings, stating these were mandatory subjects of bargaining, and beginning the grievance process.

Next, we must turn to the CBA sections which are related to determining this issue:

Section 20.02: All written grievances and grievance appeals shall set forth the provisions of this Agreement under which the grievance was filed and no grievance may be made unless it is founded upon alleged breach of the terms and conditions of this Agreement. **All appeals of duly filed grievances not submitted by the grievant or representative within the time limit specified shall be termed abandoned grievances and as such shall be considered as being resolved in favor of the City.** (Emphasis added).

Section 20.03: All grievances must be in writing and cite the provision of this Agreement relied upon. A written grievance shall be presented to the Chief of Police or his or her designee **withing ten (10) calendar days of the incident leading to the grievance....** (Emphasis added).

The question therefore becomes twofold: When was the incident leading to the grievance and was it presented to the Chief within 10 calendar days. In making this determination, I will be looking at this issue in the light most favorable to the responding party, BPPA.

BPPA argues that the creation of the SIG position(s) was at first temporary and that the nature of the position changed from the May 2022 start date and the January 2024 job posting. Additionally, BPPA argues that the rate of leave accrual (a contentious issue) was not readily available to BPPA during the interim between these two dates. And lastly, BPPA argues that the date they “found out” about the issue is the important date and when the clock should start ticking in relation to procedural mandates. BPPA therefore rejects the City’s argument that the clock started ticking in May 2022 (the date the first SIG position was filled) and instead argues that they became “aware” of the issue on January 9, 2024, when the latest job postings occurred.

Even by agreeing in full with the framework of BPPA’s argument in the above, and in its most favorable light, BPPA was not in compliance with the CBA’s requirement of ten days to present the grievance to the Chief by their own admission.

Testimony provided by BPPA witness Detective Richard Tank stated the following under direct examination:

Q: You heard testimony that the Union failed to bargain and you’ve read the documents that state that, right?

A: Correct.

- Q: Did the Union try to bargain over the new positions?
- A: We entered into dialogue and discussion with Assistant Chief Garcia and Captain Gatlin.
- Q: So first question is, the new postings came out January 9, 2024, right?
- A: Yes.
- Q: And then the e-mail, which is Exhibit 7 from my office, requested to bargain over those positions, right—
- A: Correct
- Q: —on January 15, 2024?
- Prior to those positions being posted, were there discussions between the Association and the City about these new positions?
- A: Yes.
- Q: And were those discussions led by Assistant Chief Garcia?
- A: Yes, sir.
- Q: And did Assistant Chief Garcia tell you that he didn't want the issue brought up during negotiations of the CBA?
- A: Correct. During our negotiations with the City, it started off to a rough start in regards to our healthcare benefits. We had our first meeting with the City with Mr. Zwerlein present, Attorney Heiden, Police Chief Adlam, Assistant Chief Garcia, and then Director Robert Scott. From there moving forward, we did have issues, we did not come to a current agreement. During the process and during our negotiations with the City, myself and other board members were approached by Assistant Chief Garcia numerous times advising that they were interested and wanted to discuss language in regards to the community services officer position, the training officer position, and the SIG position. He advised that he did not want bring this up during negotiations and muddy the water because negotiations was very tense and a troubling time for both sides, I believe.

Therefore, during CBA negotiations (i.e. sometime during or before May of 2023), BPPA acknowledges, through the testimony of Detective Tank, that they had knowledge of the postings that were going to be posted and had the opportunity to bargain for those positions during those very same negotiations. They choose not to pursue bargaining over those positions at that time, though they clearly were “aware” of their existence and/or creation.

BPPA may argue that coercion from Assistant Chief Garcia is a reason to create equitable tolling of the timeline requirements contained in the CBA. However, even if such an argument were successful, the CBA was agreed to in June of 2023. Any equitable tolling could only extend until the CBA was finalized, if it were to be implemented at all.

Additionally, Respondent's Exhibit 1 is an email from Anthony Kader to Assistant Chief Garcia dated August 16, 2023, after the CBA had been agreed upon. Copied on the email are several BPPA members as well as BPPA's counsel and representative. The email is as follows:

Subject: New Department Position Negotiations

Sir,

In regards, to the meeting you requested yesterday revolving around the departments desire to add additional positions specifically for CRO, Sig and training, please have HR contact our Attorney Chris MacGillis to proceed with the negotiations for those positions.

Respectfully,
A. Kader

While BPPA argues they became aware of the new positions on January 9, 2024, and thus started the clock at that time, the discussions during CBA negotiations admitted to by Detective Tank and the email of Anthony Kader with Counsel included clearly demonstrate that BPPA was aware of, and wished to bargain, over these positions much sooner than January 15, 2024, when BPPA sent their demand letter and started the grievance process.

Therefore, under the most liberally applied calendar I can create to benefit BPPA's time of "becoming aware" of the situation, if I were to apply the date of the August 16, 2023 email, which is clear of any pressure of ongoing negotiations, inferred coercion, and inclusive of BPPA's Counsel, BPPA would have had until August 26, 2023 to begin their grievance procedure. BPPA did not start that process until January 15, 2024. BPPA failed to start the grievance process within the ten days required by Section 20:03 of the CBA.

B) Award

BPPA somewhat persuasively argues for leniency in a strict enforcement of technical provisions, citing *Howards Grove School District*, WERC MA-5651 (Mawhinney, 01-10-90) citing *Seaboard Allied Milling Corp.*, 82-1 CCH ARB Para. 8393, (Madden, 1982):

It is consensus among arbitrators – and a view shared by this Arbitrator – that the long range interests of the parties to a collective bargaining agreement are better served when disputes are resolved upon their merits rather than upon technical grounds. That is not to say that procedural requirements will not be enforced. What is meant is that such provisions will be strictly construed and, where reasonable

doubts exist, they will generally be resolved in favor of finding the issues to be arbitrable.

However, the City rightly points out that the CBA at issue in *Howards Grove School District* is distinct in its language and not analogous to the current CBA between the City and BPPA.

Section 20.03 in the CBA states, in relevant part that “[t]he arbitrator shall have no authority to add to or detract or deviate from the provisions of this Agreement, but shall in all respects be bound by it.”

The City goes on to quote *Madison Area Technical College*, A/P M-93-92 (Vernon 1/94):

Perhaps the procedural requirements are annoying and cumbersome. However, the important point is that they are the procedures agreed to by the parties. These are contractual requirements and regardless of the Arbitrator’s personal feelings and regardless of the local Union’s feelings about the provisions, they must be enforced as written.

Section 20:02 in the CBA between the City and BPPA is unambiguous. “All appeals of duly filed grievances not submitted by the grievant or representative within the time limit specified shall be termed abandoned grievances and as such shall be considered as being resolved in favor of the City.” Having made the determination that BPPA had become aware of the new positions they wished to bargain for at the latest in August of 2023, they were late in their initiation of the grievance procedure and, based on the strict language of the CBA, I have no authority beyond enforcement of the prescribed remedy for such a defect.

Given the finding on the first matter, the subsequent matters regarding whether the notice to WERC was timely or whether the named grievant was correct pursuant to the requirements of the CBA become moot.¹

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.

¹ Given the alleged ambiguity and arguments raised on these issues by both parties, it may benefit all to work on language that both sides can create a meeting of the minds as to what procedural obligations exist (or are excluded) in future negotiations.

Issued at the City of Madison, Wisconsin, this 1st of October 2024.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Arbitrator