BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

BROOKFIELD PROFESSIONAL POLICE ASSOCIATION

and

CITY OF BROOKFIELD

Case ID: 644.0004
Case ID: 644.0005
Case ID: 644.0006
Case Type: MA

AWARD NO. 7999

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 July 26, 2024, the Brookfield Professional Police Association (BPPA) requested that the Wisconsin Employment Relations Commission assign an arbitrator in the above matters. 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 arbitrations 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 March 5, 2025, and transcribed. Thereafter the parties agreed on a briefing exchange which occurred as follows: On April 4, 2025, the City of Brookfield (City) provided their post-hearing brief. On April 25, 2025, BPPA filed their reply brief. On May 9, 2025, the City submitted a subsequent reply brief.

ISSUE

The parties agree to the following statement of issue:

Are the grievances procedurally arbitrable?

The City carries the burden of proof in this matter.

APPLICABLE CONTRACT LANGAGUE FROM THE PARTIES COLLECTIVE BARGANING AGREEMENT

ARTICLE XX – GRIEVANCE AND ARBITRATON PROCEDURE

Section 20.02: All written 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 shall be termed abandoned grievances and as such shall be considered as being resolved In favor of the City.

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 within ten (10) calendar days of the incident leading to the grievance . . . . The 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 . . . .

BACKGROUND

The Union filed three separate grievances regarding members Community Service Officer Mork, Special Investigative Officer Blank, and a separate grievance involving Officers Mork and White. All grievances relate to the computation of overtime and leave accrual and allege a breach of the CBA's terms in how the City is computing overtime for these Officers. All three grievances involve patrol officers who were reassigned from regular patrol shifts with a 4-2, 4-2, 8.5 hour shift to a 5-2, 8 hour shift.

As this pre-award is based strictly on the question of arbitrability, the arguments of the parties as to the merits will be ignored and pointed out when there may be some confusion in the matter.

A) The Blank Overtime Grievance

After Officer Blank has worked in the Special Investigative Group (SIG) for over two years, the SIG position has been viewed as a "temporary assignment" by the City since its inception in 2021. Blank transferred from an 8.5 hour shift to an 8 hour shift when she had her initial transfer to the assignment in 2021, but after this scheduling change maintained the leave accrual and overtime based on having worked am 8.5 hour shift. Blank filed her grievance on April 4, 2024, referencing a specific March 27, 2024, instance of overtime accrual claiming she should have

accrued 3.5 hours of overtime for hours worked over 8.5 rather than the 4 hours of overtime she actually received for working over 8 hours.

B) The Mork Overtime Grievance

The Mork Grievance is factually akin to the Blank Grievance, with the nuance that Mork was assigned as a Community Service Officer (CSO). The CSO assignment, and working conditions, have been incorporated in the parties CBA since 1995-1996, and the work cycle is explicitly set forth in the CBA. Mork's first day as a CSO was April 30, 2024. Mork's grievance was filed on May 22, 2024, regarding overtime accrual.

C) The White/Mork Leave Accrual and Usage Grievance

On January 9, 2024, the City announced an additional SIG position to augment Officer Blank's efforts and give her a partner. White was chosen for this position and began the new assignment on April 30, 2024 (the same day as Mork began). On June 5, 2024, a grievance was filed regarding both White and Mork's leave accrual and usage, stating both were receiving the benefits of an 8.5 hour officer while only working 8 hours from an incident on May 27, 2024.

The City's Argument

The City places reliance on their interpretation of Article XX, stating that the grievance procedure is unambiguous in barring this matter from proceeding on the merits.

A. Ten Days From Incident

The City points to the exact language of the CBA, stating that the Association has ten days from the incident to file a grievance and any filing after the expiration of ten days bars the grievant from the grievance procedure, arguing that allowing the matter(s) to move forward on the merits undermines the essence of the parties' agreed upon and prior bargained grievance procedure, making it difficult for either the City or Association to reliably interpret and apply timelines in the future.

The City cites that this formula for overtime and leave accumulation has been the norm within the department's historical interpretation for decades specific to CSO and SIG assignments. As part of the first step dismissals of the grievances internally, grievants were told that this has been the policy since at least 2015, or in the case of the CSO, 1995.

There is no room for interpretation or tolling based on the City's arguments:

> The parties structured Section 20.03 to be narrow in nature and to only permit grievances filed within 10 calendar days of the actual incident leading to the grievance. There is no alternate timeline available for when a grievant "should have known" of the incident. The parties' drafting of Section 20.03 was intentional and

> the parties have historically respected and adhered to the strict filing timeline. The Department has a decades-long history of assigning officers to 5-2, 8-hour/day temporary assignments and, since at least 2015, such officers accrued and used overtime and leave time as previously described. In light of this, the grievances, to be considered timely, should have been filed years ago. They are not procedurally arbitrable because they were not submitted with the required 10 calendar days of the triggering incident. Resp. Brief, pg. 8.

B. The Prior Grievance

The City argues that the October 1, 2024, Award of this same Arbitrator specific to Officer Blank addressing the identical 5-2, 8-hour shifts was held to not be arbitrable as the grievances submitted were untimely filed and, as such, (by inference) the Association is re-litigating a prior grievance that has already been determined. The City argues that the rationale supporting that decision has applicability to the other matters now before us and should be dispositive towards a similar finding that the cases are not procedurally available to move to a merit based decision.

The Association's Argument

A. The Grievance Was Timely

The Association argues that the language within the CBA is clear, and agrees that the grievant has 10 (ten) days to file a grievance from the incident leading to the grievance. Whereas the City's position is that once there is an alleged infraction, the clock starts at that moment and all future remedy is barred after the expiration of ten days absent a grievance being filed in that ten day period, the Association argues that this is a "continuous violation", meaning that each and every day there is an occurrence, a "new and distinct" violation of the CBA has taken place. As such, the tolling period can stem from any alleged violation once it occurs.

DISCUSSION

A. Were the grievances correctly filed within the ten days required?

First, I turn to the City's position regarding the long-standing practice, i.e. "past practice" established at hearing and in the record that this has been the case for how the City has managed leave accrual and overtime for periods ranging from either 1995 or 2015, or both. These arguments are likely strong as to the merits of the City's defense, but not to the issue of whether the matter is procedurally arbitrable. So all such claims, while likely to resurface as the hearing moves on to the merits, have no persuasiveness for the matter in front of us now.

Secondly is the issue of whether the language "ten days from the incident" is meant to be draconian and harsh to the point of barring further proceedings and creating certainty or allows the issue to proceed on the merits. The City, in their response brief, notes the following footnote:

> The intentionality of the parties' narrow grievance procedure timeliness is demonstrated by the collective bargaining agreement between the City and its fire union, which contains a grievance procedure with the "should have known" or "Could have known" standard the Association seeks to inappropriately apply in this case. Although the Association may wish it had similar contractional language to that contained in the Fire Union's Collective Bargaining Agreement, the Association must operate under the language it agreed to. City's Response Brief, pg. 14 FN7.

The internally comparable CBA of the City's firefighters does give more meaning to the restrictive nature of the language bargained over in the Association's CBA, but to a point. Given the City's position, taken to an extreme, the City could violate the CBA, and once that violation occurred the clock starts without exception. If the Association member became aware of the violation on the 11th day, they would be barred from relief through arbitration, whereas the City's firefighter would preserve that right. I believe that is the practical effect of the different language present.

What it does not address is an alleged continuous violation. In the example above, while the firefighter would still have a window to grieve, the City's position is that the police officer would forever be barred from ever seeking any relief. To give an absurdist example, by the City's argument, if an Association member did not get added to the City offered Health Care Plan which the CBA guaranteed they be given coverage under, the member finds out about this on the 11th day after being removed, the City would, by their standard, never have to cover health insurance again for that individual. Ever. While I believe the City would do right by the member in this absurd circumstance, I don't feel the City feels they would be obligated to do so based on their arguments and reasoning. I therefore find that can not have been a mirror understanding and agreement between the parties of what that section of the CBA specific to the ten-day limit was meant to accomplish, and leaves an opening for a continuous violation grievance. However, due to the language that is in the contract, any remedy would be limited to ten days prior to the filing of the grievance, as the language clearly bars any alleged behavior prior to the triggering incident that caused the filing within ten days of said incident. This is another important distinction shown by the language in the firefighters CBA. For the firefighters, remedy could arguably go back to the date of first occurrence even if the date of discovery of the incident or condition (which would trigger the ten-day period for filing the grievance) was months after the triggering incident occurred. So the difference in language between the parties does have an effect, just not to the extent the City argues presently.

Lastly, there are limitations on the ability to deploy the continuous violation exception as the City argues that has inherit limits as well and does not create a blank check. The City quotes:

> The continuing violation doctrine does not give grievants discretion to file grievances whenever they choose. Rather, they are required to exercise due diligence in the assertion of their rights and to file their grievances in a timely fashion once the facts upon which the grievances are based become known. City's Response Brief, pg. 6, quoting Sawyer County, MA-13034 (Emery, 2009).

I agree that a clock can not be used in a discretionary manner but requires due diligence of the grievant in their assertion of their rights in a timely manner.

Blank was in her position for over two years and, throughout this time, benefited from the overtime and leave policies at issue before us throughout those two years. As a result, WERC Case MA 644.0005, the "Blank" grievance, was not filed in a timely manner and losses its ability to benefit from the continuation of the violation due to a lack of due diligence being demonstrated by Blank and the Association by not filing a grievance in a more timely manner.

B. The Prior Decision

The prior hearing was the beneficiary of different arguments than those which were presented in this case. Since it was also a pre-hearing on arbitrability, the record created, and decision rendered, didn't include several key components that make this decision come out differently. Examples include:

1) The file was opened with WERC stating the nature of the grievance related to "TRO, CSO, TIG Assignment – Grievance". Specifics were not included as to conditions of employment, benefits, or other matters initially, and only on the peripheral during the hearing. That hearing focused on the date the Association became aware of the positions being posted and whether they had the ability to bargain over certain conditions relating to those assignments.

2) There was no argument made regarding "continuous violation".

3) There was an argument made by the City that the Association was barred from filing a grievance on behalf of its membership, which did not resurface in the present matter.

4) Both parties focused on the dates of awareness by the parties as to the position(s) becoming available and there was no discussion relating to any specifics that would allow for a continuous violation argument or rebuttal.

5) In the sense that this could be considered a re-litigation of the Blank matter, that has already been separately disposed of (see above and below).

In sum, the records of the two hearings diverge significantly to the point that the prior decision can not be in good faith relied upon in the present matter.

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 such language allows for (and does not specifically prohibit) a grievance of a continuous violation, so long as such is done in a timely fashion in accordance with principles of due diligence, BPPA has the procedural right to move forward on the matters identified in WERC Case MA 644.0004 and WERC Case MA 644.0006,

but is only limited to remedies that would start from the date of incident that starts the 10 day clock running as well as prospective remedies. However, due to the language, the Association is barred from remedy going back further than the day of the reporting incident.

However, due to the lack of due diligence demonstrated by the Association and Officer Blank, who had served in her position for over three years under the disputed leave and overtime accrual practices at issue before us, I find that grievance WERC Case MA 644.0005 is barred from proceeding based on the merits and not qualifying for a continuous violation, and hereby declare that her grievance is not procedurally arbitrable.

Issued at the City of Madison, Wisconsin, this 20th of May 2025.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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James J. Daley, Arbitrator