

**IN THE MATTER OF ARBITRATION  
BETWEEN**

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**MINNESOTA GOVERNMENT  
ENGINEERS COUNCIL,**

**Union,**

**and**

**STATE OF MINNESOTA, DEPARTMENT  
OF TRANSPORTATION,**

**Employer**

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**ARBITRATION DECISION  
JURISDICTION**

(Grievant)

Arbitrator: Andrea Mitau Kircher

Date and Place of Hearing: January 9, 2009

Date Record Closed: January 9, 2009

Date of Decision: January 16, 2009

**APPEARANCES**

For the Union:

Dana Wheeler  
MGEC Executive Director  
475 Etna Street, Suite 11  
St. Paul, MN 55106-5845

For the Employer:

James Jorstad  
Labor Relations Representative  
Department of Finance and Employee  
Relations  
658 Cedar Street  
St. Paul, MN 55155-1603

**INTRODUCTION**

The State of Minnesota (“Employer”) and the Minnesota Government Engineers Council (“Union” or “Council”) are signatories to a collective bargaining agreement (“Contract”) that covers certain employees employed by the Minnesota Department of Transportation

("MNDOT"), including the Grievant. MNDOT disciplined and discharged the Grievant during November and December 2007 as set out below. The Union grieved these disciplinary actions.

On November 21, 2008, at the request of the parties, I conducted a telephone pre-hearing conference. The Employer essentially moved to dismiss for lack of jurisdiction, claiming that the Union had failed to grieve these disciplinary actions as required by the Contract. The Union claimed that it had met the timelines of the Contract. The Union preferred to have one evidentiary hearing on both the question of arbitrability and the merits of the case, previously scheduled for January 22 and 23, 2009, the Employer desired bifurcation.

At the prehearing conference, I learned that there are three outstanding grievances: a five-day suspension, a discharge, and a progression increase dispute. I was selected as the arbitrator to hear the disciplinary suspension and the discharge grievances. The parties agreed that the progression increase dispute would be resolved after the two disciplinary matters are heard and decided.

The parties further agreed that the question of arbitrability required an evidentiary hearing in addition to argument, because the relevant facts are disputed. I notified the parties that I would schedule a half-day hearing and prepare an expedited decision on the Employer's request to dismiss for lack of jurisdiction so that, if necessary, the cases could still be heard on the merits on January 22 and 23, 2009. On January 9, 2009, the parties and their witnesses participated in an evidentiary hearing at the Arden Hills Training Center of the Minnesota Department of Transportation ("MDOT" or "Agency"). During the hearing, the Arbitrator received exhibits, and witnesses testified under oath, subject to cross-examination. Each party provided me with a written statement of the issue and a two-page post hearing letter brief setting

out their arguments. The hearing convened at 9:00 a.m. and concluded at 1:00 p.m., and the record was closed.

## ISSUE

Are the grievances timely and properly before the arbitrator for decision on the merits?

## RELEVANT CONTRACTURAL PROVISIONS

### Article 15, Section 1.

**Step 1.** The Grievance shall be reduced to writing on forms provided by the Council setting forth the nature of the grievance, the facts upon which it is based, the section or sections of the Agreement alleged to have been violated, and the relief requested and shall be presented to the grievant's immediate supervisor or other representative of the Agency by a Council Representative. Any alleged violation not processed to this step within twenty (20) working days after the grievant, through the use of reasonable diligence should have had knowledge of the first occurrence of the event giving rise to the grievance, shall be considered waived. Within twenty (20) working days after receiving the written grievance, the grievant's immediate supervisor or other designated representative of the Agency and the Council Representative shall schedule a time to meet with or without the grievant, in an attempt to resolve the grievance. If the grievance remains unresolved after this meeting, the written answer of the immediate supervisor or other designated representative of the Agency to the grievance shall be given to the Council Representative within twenty (20) working days of this meeting. The Council may appeal the grievance to Step 2 within twenty (20) working days of the receipt of the answer of the immediate supervisor or other designated representative of the Agency or the grievance shall be considered waived. (Emphasis supplied.)

**Step 2.** Within ten (10) working days after receiving the Council's appeal, the Agency or designee and the appropriate Council Representative shall schedule a meeting to attempt to resolve the grievance. The meeting may be held with or without the employee present. If, as a result of this meeting, the grievance remains unresolved, the Agency or designee shall give his/her written answer to the Council Representative within ten (10) working days following this meeting. The Council may refer the grievance in writing to Step 3 within twenty (20) working days after receipt of the Agency's or designee's written answer. Any grievances not so appealed to the next step shall be considered waived. The parties may consider attempting to resolve the grievance through mediation or other dispute resolution process prior to grievance arbitration. (Emphasis supplied.)

**Step 3.** Within twenty (20) working days following receipt of the Agency's or designee's written response, the Council may refer the grievance to Arbitration if the grievance remains unresolved and does not involve the dismissal or non-certification of a probationary employee. Any grievance not referred in writing by the Council to Step 3 within twenty (20)

working days following the receipt of the answer of the Agency or designee, shall be considered waived. ...  
(Emphasis supplied.)

**Section 2. Time Limits.** If a grievance was not presented within the time limits set forth above, it shall be considered “waived”. If a grievance is not appealed to the next step within the specified time limit or any agreed extension thereof, it shall be considered settled on the basis of the Agency’s or designee’s last answer. If the Agency or designee does not answer a grievance or an appeal thereof within the specified time limits, the Council may elect to treat the grievance as denied at that step and immediately appeal the grievance to the next step. The time limit in each step may be extended by mutual written agreement of the Agency or designee and the Council at each step. The parties may waive Steps 1 and/or 2 by mutual written agreement of the Agency or designee and the Council.

## FACTS

On or about November 29, 2007, Glenn Ellis, District Design Engineer sent a letter to the Grievant notifying him that the Agency intended to impose a five-day suspension. The letter listed a variety of alleged performance deficiencies and conduct problems. It also listed a number of previous attempts to correct the Grievant’s actions, through coaching and disciplinary actions. The Agency scheduled a meeting on November 30 with the Grievant so that he could present his side of the story, and advised him that he could have an MGEC representative at the meeting. The Council filed a grievance by sending it to Mr. Ellis on November 30. (Employer’s Exhibit 3.)

It appears that the Grievant refused to attend the meeting. The Employer alleges in its notice of intent to discharge dated December 26, 2007 that Mr. Ellis directed him to attend the meeting and that in response, the Grievant behaved in a disruptive, loud and angry manner. The December 26 letter of intent to discharge, signed by MDOT employee, Susan Mulvihill, advised the Grievant that his inappropriate behavior would no longer be tolerated, and scheduled a meeting to discuss the discharge with an MGEC representative in attendance. By a letter of

December 28, 2007, the Council filed a grievance about the discharge and sought a meeting with the Employer at its earliest convenience.

Thereafter, Dana Wheeler, Executive Director of the Council, had discussions with several Employer representatives. He testified that he believed that the parties had agreed orally to bypass contract grievance steps one and two and go directly to arbitration. Nothing in writing confirms that the Employer had agreed to this procedure, and Tony Brown, a Labor Relations Negotiator at the then Department of Employee Relations, (“DOER”) whose job included handling arbitrations for MDOT when necessary, denied agreeing to this procedure. Mr. Brown stated that when he agreed in December 2007 to select arbitrators for the arbitrations, he and Mr. Wheeler had this discussion at the State Capitol. At the time, Mr. Brown did not know that the case was still in the hands of MNDOT and not yet been sent to DOER. Mr. Brown did not intend to skip the MNDOT steps in the procedure and came to believe he had been “duped” by Mr. Wheeler.

In the meantime, Mr. Wheeler and Mary Skarda, Labor Relations Representative for MDOT, began settlement discussion on this matter. Ms. Skarda drafted a proposed settlement agreement and sent it to Mr. Wheeler in February 2008. In May 2008, she learned that the Grievant would not sign the settlement and preferred to go to arbitration. Mr. Brown also learned of this by e-mail from Mr. Wheeler. Mr. Brown responded by e-mailing MDOT labor relations personnel with a copy to Carolyn Trevis, Assistant State Negotiator. In this communication, Mr. Brown, who was in the process of leaving his long-term employment with the state of Minnesota, complains that the matter was never formally appealed to arbitration, that he has not heard anything from MDOT about whether a second step meeting was held, and that he thought the Skarda settlement offer was rather generous:

DOER and DOT have been more than accommodating over the years to the Grievant. He could have been gone several years ago, but we worked out one more settlement to give him one more chance. We offered him a pretty good settlement this time and he didn't take it. The MGEC Executive Director has done this before more than once where we work out a settlement and then he backs out of it..." (Employer's Exhibit 12.)

After Mr. Brown left DOER, Ms. Trevis took responsibility for the matter. She began an extensive effort to communicate with Mr. Wheeler about a resolution. After an internal meeting with her division to decide on an appropriate course of action, she wrote a letter to Mr. Wheeler setting out the DOER position. In that letter, dated June 23, 2008, Ms. Trevis states that the two disciplinary grievances are not arbitrable because the Council has not met the Contract timelines. She states that she has no copy of the grievance for the discharge dispute, that Mr. Wheeler sought arbitration without following the procedures in the contract and there has been no written request for extension of the timelines. She explains that the Agency has never had a second step hearing on the matter, and that the Contract embodies the collective bargaining theory that cases should be resolved at the lowest step possible.

Finally, Ms. Trevis proposes the following to Mr. Wheeler:

I suggest that you contact MnDOT representatives immediately to schedule a grievance meeting on the suspension and discharge grievances. Although you may think that such a meeting will be unproductive, I believe that the agency must hear these grievances at Step 2 before you refer them in writing to arbitration under Step 3 of your Grievance Procedure. Step 1 and/or Step 2 may only be waived by "mutual agreement" of the parties. It is our position that you cannot unilaterally waive either of these steps.

Mary Skarda held a grievance hearing on the Grievant's five-day suspension and his discharge on July 25, 2008, and sent a written answer to Mr. Wheeler dated August 8, 2008. (Employer Exhibit 18.) On August 19, 2008, Mr. Wheeler sent a written appeal of the decision to Mr. Jim Jorstad, who was at that time the DOER (then renamed DFER) labor relations professional responsible for the matter. Mr. Wheeler sought arbitration on all three grievances. (Employer Ex. 19.)

## DECISION

This is a Contract interpretation case. Arbitrators typically resolve disputes concerning the interpretation of a collective bargaining agreement by using a sequential analysis to ascertain the intent of the parties. First, the arbitrator looks to the language of the Contract. If it is clear and unambiguous, that language should control. If that is not the case, the arbitrator should look to other indicia of the parties' intent. Among the relevant indices are bargaining history and past practice. See Elkouri & Elkouri, How Arbitration Works Ch. 9 (5<sup>th</sup> ed. 1997). In this case, the language of the Contract is relatively clear, and neither party claims that its meaning has been amended because of past practice or bargaining history.

The Employer is not arguing that the Council failed to file a written grievance in time. It is claiming that a later step, the written appeal to arbitration (called a referral to arbitration) was not timely in either case.

The Contract provides in Step 1 that the Agency hold a meeting to resolve the grievance within 20 working days after receiving a written grievance. If unresolved, a written answer must be given the Council. The Council "may appeal the grievance to Step 2 within twenty (20) working days of the receipt" of the written answer. This means that the Council's duty to appeal the grievance to Step 2 does not arise until a "meeting" occurs and the Employer sends the Council a written answer. There is no evidence of a Step 1 meeting or a written Employer answer to the grievance. Step 2 similarly requires an Agency meeting, a written Employer conclusion following the meeting, and provides that the Council's duty to appeal in writing arises upon receiving the Employer's written answer.

Section 2 of the Grievance procedure provides that if the Employer does not provide a written answer to a grievance, the Council may treat the grievance as denied and “immediately” appeal the grievance to the next Step. In these cases, there was not only no written answer, but also, no hearing.

Ms. Travis’ June 23 letter to Mr. Wheeler provides that a Step 2 meeting should be held by the Agency. She acknowledges that the agency “must hear these grievances at Step 2 before you [Mr. Wheeler] refer them in writing to arbitration under Step 3 of your Grievance Procedure.” This is a correct reading of the Contract requirements. Step 3 specifically states:

Within twenty (20) working days following receipt of the Agency’s ...written response, the Council may refer the grievance to Arbitration...Any grievance not referred in writing by the Council to Step 3 within twenty (20) working days following the receipt of the answer of the Agency or designee, shall be considered waived.  
(Emphasis provided.)

Each of the grievance steps states that the Council will be deemed to have waived the grievance if it does not respond in writing within a certain period, but the time does not begin to run until the Council receives a written response from the Employer. The first such written response from the Employer was on August 8, 2008, when Mary Skarda wrote to Dana Wheeler denying the grievance after she conducted an agency hearing July 25. Mr. Wheeler’s appeal to arbitration dated August 19, 2008 was within 20 working days of August 8 and it was timely within the meaning of the Contract.

The Employer’s perception that the Council was untimely was not surprising, since the series of Employer labor relations professionals assigned to this case had to deal with confusing facts. At one point, it was not clear that grievances had been timely filed in the first place. In addition, Mr. Wheeler appears to have jumped the gun by seeking an arbitrator before the preliminary grievance steps had been exhausted. The Employer apparently takes the position

that Article 15, Section 2 provides that it may avoid having any agency hearing or writing any Agency answer to the Council's Grievance, then claim that the Council missed its deadlines and waived arbitration. This is certainly not the expected outcome of the grievance procedure set out above. Although Article 15, Section 2 provides a fallback for the situation where an agency does not write a timely answer after its hearing, it does not cover situations where no hearing occurs and the Employer provides no answer to the Council's grievance.

Instead, the Council's time to appeal to arbitration began to run from the day it received the Employer's written answer after the Agency hearing in July, since no hearings were held nor answers received before then. (Article 15, Section 1, Step 3.) This complies with the parties' intent to provide a hearing, an answer, and if unresolved, a hearing before a neutral arbitrator to assure that employees covered by this agreement will not be discharged except for just cause.

### **CONCLUSION**

The Council's appeal to arbitration was timely under the facts of this case. A hearing on the merits will proceed as scheduled on January 22 and 23, 2009.

Dated: January 16, 2009

s/s Andrea Mitau Kircher  
Andrea Mitau Kircher  
Arbitrator