

IN THE MATTER OF ARBITRATION BETWEEN

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LAW ENFORCEMENT LABOR SERVICES, INC.,)	ARBITRATION AWARD
)	
)	
and)	SKWIRA
)	SUSPENSION
)	GRIEVANCE
)	
COUNTY OF BENTON)	
)	BMS CASE NO. 09-PA-0415
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Arbitrator: Stephen F. Befort

Hearing Date: September 24, 2009

Date post-hearing briefs received: October 12, 2009

Date of decision: October 23, 2009

APPEARANCES

For the Union: Brooke Bass

For the Employer: Terrance Foy

INTRODUCTION

Law Enforcement Labor Services, Inc. (Union) is the exclusive representative of a unit of deputy sheriffs employed by the County of Benton (Employer). The Union claims that the County violated the parties' collective bargaining agreement by imposing a one-day suspension on Deputy Peter Skwira without just cause. The grievance proceeded to an arbitration hearing at which the parties were afforded the opportunity to present evidence through the testimony of witnesses and the introduction of exhibits.

ISSUES

- 1) Is the grievance arbitrable under the parties' collective bargaining agreement?
- 2) If arbitrable, did the Employer violate the parties' agreement by suspending the grievant for one day?
- 3) If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE VIII – EMPLOYEE RIGHTS – GRIEVANCE PROCEDURE

8.4 PROCEDURE

Grievances, as defined by Section 8.1, shall be resolved in conformance with the following procedure:

Step 4 A grievance unresolved in Step 3 and appealed to Step 4 by the Union shall be submitted to binding arbitration subject to the provisions of the Public Employment Labor Relations Act of 1971, as amended. Absent any factors beyond the control of the Union or the Employer, the Union and the Employer shall by mutual agreement select an arbitrator within 90 calendar days from the date the Union appeals the grievance to Step 4 of the grievance procedure. If no selection is made within this 90-day timeframe, the grievance shall be considered waived. The selection of an arbitrator shall be in accordance with the "Rules Governing the Arbitration of Grievances" as established by the Bureau of Mediation Services.

8.5 WAIVER

If a grievance is 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 Employer's last answer. If the Employer does not answer a grievance or an appeal thereof within the specified time limits, the Union 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 Employer and the Union in each step.

ARTICLE X – DISCIPLINE

- 10.1 The Employer will discipline permanent employees for just cause only. Discipline will be in one or more of the following forms: (a) discharge (b) demotion (c) suspension (d) written reprimand (e) oral reprimand.

FACTUAL BACKGROUND

Deputy Peter Skwira has worked for the Benton County Sheriff's Office since 1993. He currently serves as a deputy sheriff with a general patrol assignment. Among other duties, Deputy Skwira is responsible for serving arrest and detention warrants.

Mary Sobania is a resident of Benton County who lives with her family on a farm near Rice, Minnesota. During 2008, a warrant was issued for Ms. Sobania's failure to report to jail following a conviction for driving a motor vehicle after a license revocation. Sheriff's Office deputies attempted to serve the warrant on several occasions during June and early July of 2008, but failed to find Ms. Sobania at home on each of those occasions.

On July 12, 2008, Deputy Skwira learned from a neighbor that a large party was being held on the Sobania farm. Deputy Skwira decided that the party presented a good opportunity to serve Ms. Sobania with the warrant, and he drove to the farm. When he arrived, he found approximately 40 people participating in an all-day graduation/birthday party in and around a garage on the farm.

When Ms. Sobania noticed Deputy Skwira's arrival at the party, she ran behind the garage. Deputy Skwira called for her to halt and then gave chase. Ms. Sobania did not stop, but continued to run toward some hog barns situated to the south of the garage. Deputy Skwira attempted to follow, but he soon ran short of breath due to an asthma attack.

At about this time, Deputy Skwira observed a woman and a boy riding nearby on a four-wheel ATV machine. Deputy Skwira yelled for them to “get off,” and he commandeered the ATV and renewed his pursuit of Ms. Sobania. After a turn or two around the hog barn, Ms. Sobania ceased running, and Deputy Skwira hopped off the vehicle and attempted to apprehend Ms. Sobania. After a brief struggle, Deputy Skwira was able to subdue Ms. Sobania and place her in custody in his squad car.

By this time, the crowd was jeering Deputy Skwira and yelling obscenities. Sergeant John Cruze arrived on the scene in response to Deputy Skwira’s call for back-up assistance. After determining that the warrant was valid, Sergeant Cruze directed Deputy Skwira to transport Ms. Sobania to the county detention center. Sergeant Cruze, meanwhile, stayed for a period of time at the farm to discuss the incident with the angry bystanders. He learned that the crowd was upset with Deputy Skwira for a variety of reasons including the following: 1) Deputy Skwira’s decision to serve the warrant during a family celebration, 2) his commandeering of an ATV machine without the consent of the vehicle owner, and 3) his driving of the ATV vehicle in a manner that potentially endangered children who were present at the event.

Sarah Kuhlman, Ms. Sobania’s daughter, subsequently filed a complaint with the Sheriff’s Office concerning Deputy Skwira’s behavior. Detective Sergeant Neil Jacobson conducted an investigation, and he concluded that Deputy Skwira’s conduct violated office policies with respect to engaging in conduct unbecoming an officer and exceeding limits of authority. Benton County Sheriff Bradley Bennett reviewed the investigatory report and issued discipline in the form of a one-day suspension. Sheriff Bennett testified that he decided upon this level of discipline as a matter of progressive discipline based

upon a number of prior incidents in which oral and written reprimands had been issued to Deputy Skwira.

The Union responded by filing a grievance on behalf of Deputy Skwira under the parties' collective bargaining agreement. The Employer denied the grievance at each step of the grievance procedure, and, on November 19, 2008, the Union noticed its intent to proceed to arbitration as the agreement's fourth and final step and requested a list of arbitrators from the Bureau of Mediation of Services. Neither party took any further action with respect to the grievance over the next several months. On March 11, 2009, County Human Resources Director Tammy Bigelow sent a notice to the Union indicating that the County considered the grievance waived pursuant to Section 8.4 of the parties' agreement. Following the Union's protest of that position, the County agreed to proceed to arbitration while preserving its objection to the procedural arbitrability of this grievance. The parties struck names to select an arbitrator sometime in June 2009.

DISCUSSION AND OPINION

Arbitrability

The issue of arbitrability is a matter governed by the parties' contractual agreement. While the Supreme Court has counseled that a finding of arbitrability generally is favored, United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960), the parties are free to withhold matters from arbitration by the terms of their contractual arrangement.

In this case, the Employer contends that it negotiated a clause in the parties' current collective bargaining agreement that limits the scope of procedural arbitrability. Because the Union did not process Deputy Skwira's grievance within the time limits

specified in the contractual provision, the Employer argues that the grievance is waived and that the arbitrator is without jurisdiction to reach the merits of this controversy.

Human Resources Director Bigelow testified that several grievances filed by the Union over the last few years have not been processed in a timely manner upon reaching the arbitration step of the grievance procedure. In order to facilitate a more expeditious process, the Employer proposed during negotiations for the current 2008-09 agreement that the selection of an arbitrator must occur within 60 days from the date that the Union appeals a grievance to arbitration. The Union countered with a 90 day time limit proposal, and the county agreed. As a result, Section 8.4 now reads as follows with respect to Step 4 of the grievance procedure:

Step 4 A grievance unresolved in Step 3 and appealed to Step 4 by the Union shall be submitted to binding arbitration subject to the provisions of the Public Employment Labor Relations Act of 1971, as amended. Absent any factors beyond the control of the Union or the Employer, the Union and the Employer shall by mutual agreement select an arbitrator within 90 calendar days from the date the Union appeals the grievance to Step 4 of the grievance procedure. If no selection is made within this 90-day timeframe, the grievance shall be considered waived. The selection of an arbitrator shall be in accordance with the “Rules Governing the Arbitration of Grievances” as established by the Bureau of Mediation Services.

The Employer maintains that the Union has waived the right to pursue the present grievance in arbitration by virtue of its failure to adhere to the time limits specified in the revised version of Section 8.4. The Employer points out that the Union appealed the grievance to arbitration on November 19, 2008 when it requested a list of arbitrators from the Bureau of Mediation Services, but that the Union took no action to select an arbitrator until sometime in June 2009. Since more than 90 days elapsed from the Union’s appeal without the selection of an arbitrator, the Employer argues that the grievance is now waived by operation of Section 8.4.

The Union objects to this contention for two principal reasons. First, the Union elicited testimony from Union Steward Brent Fair who testified that the Employer sought the new time limits in Section 8.4 so as to prevent either party from delaying or manipulating the arbitration process. The Union argues that this purpose is not offended in the instant matter since the failure to select an arbitrator within the 90-day period was the result of the parties' mutual inaction rather than the Union's unilateral attempt to delay the arbitration process. Since the resulting delay was not caused solely by the Union, the Union argues that it should not incur a sanction that only punishes the Union by disqualifying its grievance.

Second, the Union contends that Section 8.4 exempts delay due to "factors beyond control of the Union or the Employer." In this regard, the Union points out that Deputy Skwira had two other grievances pending arbitration at the time that the present grievance was filed, and that the latter of these grievances was not decided until December 11, 2008. The Union maintains that these other grievances legitimately delayed the Union in processing the grievance at issue in this proceeding.

The Employer has the better of this debate. The plain language of Section 8.4 provides that "if no selection [of an arbitrator] is made within this 90-day timeframe [from the Union's appeal to arbitration], the grievance shall be considered waived." This language specifically places the risk of sanction on the party bearing the duty to go forward. This is the usual impact of a statute of limitations or other procedural requirement. As the leading treatise on labor arbitration states, "if the agreement does contain clear time limits for filing and prosecuting grievances, failure to observe them generally will result in dismissal of the grievance if the failure is protested." ELKOURI &

ELKOURI, HOW ARBITRATION WORKS 220 (6th ed. 2003). The Minnesota Court of Appeals similarly has ruled that a union's failure to comply with explicit time limits set out in a collective bargaining agreement for the processing of grievances may deprive an arbitrator of jurisdiction. *See Independent School Dist. No. 1 v. Education Minnesota - Aitkin*, 2006 WL 618919 (unpublished Minn. App.).

The Union's alternative argument also is unpersuasive. The fact that the grievant may have been involved in two other arbitration proceedings did not impair the Union's ability to select an arbitrator for a third grievance, particularly when the prior proceedings would not have had a progressive discipline impact on the third grievance. In any event, the prior grievances were resolved by December 11, 2008, and the Union took no steps to select an arbitrator for the present grievance during the 90 days following that point in time.

Based upon the plain language of Section 8.4 and the circumstances of this case, the Union's failure to process this grievance within the timelines specified in the parties' agreement compels a finding that this matter is not procedurally arbitrable.

The Merits

Because this grievance is not arbitrable, the arbitrator has no jurisdiction to address the merits of the underlying grievance.

AWARD

The grievance is denied.

Dated: October 23, 2009

Stephen F. Befort
Arbitrator