

IN THE MATTER OF ARBITRATION BETWEEN

MINNEAPOLIS PARK & RECREATION BOARD)	BMS Case No. 10-PA-1475
)	
("Employer" or "Board"))	Issue: Arbitrability
)	
and)	Hearing Date: December 9, 2010
)	
Minnesota Teamsters Public & Law Enforcement Employees' Union, Local No. 320)	Award Date: January 7, 2011
)	
("Union" or "Local 320"))	Hearing Site: Minneapolis, MN
)	Arbitrator: Mario F. Bognanno

JURISDICTION

The Board and Local 320 are parties to a Labor Agreement ("LA") with an effective date of January 1, 2008. (Employer Exhibit 1) Article 4 in the LA sets forth the parties negotiated grievance procedure. In a letter dated December 28, 2009, Local 320 unit member James Mayer was asked to attend a pre-determination meeting at which he would be given the opportunity to respond to allegations of substandard performance and misconduct. (Union Exhibit 1) In a letter dated January 7, 2010, Mr. Mayer was informed that effective on January 7, 2010 his employment with the Board was terminated. (Employer Exhibit 2 and Union Exhibit 2) Pursuant to Article 4, on January 7, 2010, the Union filed a grievance with the Board, alleging that Mr. Mayer's discharge was not for just cause and that he should be "made whole." (Employer Exhibit 10 and Union Exhibit 3) On January 13, 2010, Local 320 Business Agent, Michael J. O'Donnell, requested of Michael P. Schmidt, Assistant Superintendent, Operations, that the instant grievance be initiated at Step 3 of the grievance procedure; he also requested available dates/times to meet. (Employer Exhibit 3 and Union Exhibit 4)

The parties held a Step 3 grievance meeting on February 10, 2010. Pursuant to Article 4, §4.03, Mr. Schmidt provided Mr. O'Donnell with the Board's written, Step 3 answer on February 12, 2010. In relevant part, Mr. Schmidt's answer states, "By this email, on behalf of the MPRB, we decline to settle the grievance at Step 3." (Employer Exhibit 4 and Union Exhibit 5)

Three months later a disagreement arose over the Union's processing of the grievance. Specifically, the Employer alleged that Local 320 failed to follow the LA's time lines and the requisite steps of the grievance procedure. (Employer Exhibit 9) The parties were not able to settle either procedural issue. Thus, at the hearing on December 9, 2010, the Employer's procedural arbitrability challenges were heard, with the understanding that should it be determined that the grievance is arbitrable then the merits would be heard on February 25, 2011.

At the hearing each party was given a full and fair opportunity to present its case. Appearing through their designated representatives, the parties waived Article 4, §4.03, which requires a decision within 10 days of the close of the record. Witness testimony was sworn and subject to cross-examination. Exhibits were introduced into the record. At the conclusion of the evidentiary part of the hearing, each party presented closing remarks. Thereafter, the record was closed and the undersigned took the matter under advisement.

APPEARANCES

For the Employer:

Karin E. Peterson

Attorney at Law

Michael P. Schmidt

Assistant Superintendent, Operations

For the Union:

Kevin M. Beck

Attorney at Law

Michael O' Donnell

Local 320 Business Agent

James Mayer

Grievant

I. ISSUE STATEMENT

The parties stipulated to the following phrasing of the issue:

“Whether the grievance is procedurally arbitral?”

II. RELEVANT MOA LANGUAGE

Article 4 – GRIEVANCE PROCEDURE

* * *

Section 4.03 Steps in Grievance Procedure

* * *

A grievance shall be resolved in the following manner:

* * *

Step 3: If a grievance is not resolved in Step 2 and the Union wishes to continue the grievance, the Union shall, within seven (7) calendar days after receipt of the supervisor's answer, present the written grievance and reply to the General Manager for Operations or this person's designee. The General Manager shall give the Union and the employee the Board's written answer within seven (7) calendar days after receipt of the grievance.

Step 4: If the grievance is not resolved in Step 3 and the Union wishes to continue the grievance, the Union shall, within seven (7) calendar days after receipt of the General Manager's answer, present the written grievance and replies to the Board's Superintendent or this person's designee who shall consider the grievance and shall give the Union the Board's written answer fourteen (14) calendar days after receipt of the grievance.

Step 5: if the grievance is not resolved in Step 4 and the Union wishes to continue the grievance, the Union may, within seven (7) calendar days after receipt of the answer of the Superintendent or this person's designee, refer the written grievance and replies to arbitration. The parties shall attempt to agree upon an arbitrator within seven (7) calendar days after receipt of notice of referral; and in the event the parties are unable to agree upon an arbitrator within said seven (7)

calendar day period, either party may request the Bureau of Mediation Services to submit a panel of seven (7) arbitrators. Both the Board and the Union shall have the right to alternatively strike two (2) names from the panel. In the event the parties cannot agree on the party striking the first name, the decision will be decided by a flip of a coin. The remaining person shall be the arbitrator. The arbitrator shall be notified by a joint letter from the Board and the Union requesting that the arbitrator set a time and a place, subject to the availability of the Board and Union representatives.

The arbitrator shall have no right to amend, modify, ignore, add to or subtract from the provision of the Agreement. The Arbitrator shall be limited to only the specific written grievance submitted by the Board and the Union, and shall have no authority to make a decision on any issue not so submitted. The arbitrator shall submit a decision in writing within ten (10) days following the close of the hearing or the submission of briefs by the parties, whichever is the later, unless the parties agree to an extension thereof. The decision shall be based solely up to the arbitrator's interpretation of the meaning or application of the facts of the grievance presented. The decision of the arbitrator shall be final and binding.

The fee and expenses of the arbitrator shall be divided equally between the Board and the Union; provided, however, that each party shall be responsible for compensating its own representative and witnesses.

Section 4.04 Exclusive Method of Resolving Grievances

The Board and the Union agree that the grievance and arbitration procedures contained in the Agreement are the sole and exclusive means of resolving all grievances arising under this Agreement. At any stage of the proceeding, however, representatives of the Board and Union may meet and resolve the dispute without further formal action.

Section 4.05 Extension of Time Lines

The time limits established in this Article may be extended by mutual written consent of the Board, the employee, and the Union.

Section 4.06 Missing Time Lines

If the grievance is not timely pursued within the prescribed time limits, said grievance shall be considered resolved on the basis of the last answer provided, and there shall be no further appeal or review. Should the Board not respond within the prescribed time limits, the grievance will proceed the next step.

* * *

(Employer Exhibit 1)

III. FACTS AND BACKGROUND

The essential facts of the case are undisputed. In a letter dated January 7, 2010, Mr. Mayer's employment was terminated. (Employer Exhibit 2 and Union Exhibit 2) On this same date, the Union grieved the Employer's discharge action. (Employer Exhibit 10 and Union Exhibit 3) On January 13, 2010, *via* U.S. Mail, the Union requested to initiate the grievance at Step 3. (Employer Exhibit 3 and Union Exhibit 4) By return mail and facsimile the Board responded in the affirmative and, on February 10, 2010, the parties held their Step 3 grievance meeting. (Employer Exhibits 3 & 14 and Union Exhibit 4) On February 12, 2010, Mr. Schmidt sent an email to Mr. O'Donnell, pronouncing the Board's Step 3 response, which was that Mr. Mayer's discharge would stand. (Employer Exhibit 4 and Union Exhibit 5)

The record suggests that subsequent to February 12, 2010, the parties had no further oral or written communications on this matter until the following May, when on May 12, 2010, Messrs. Schmidt and O'Donnell met. Mr. Schmidt testified that, until this date, he assumed that the grievance had been settled; whereas, Mr. O'Donnell testified that he considered the matter to be in continuance, since he had not received Mr. Schmidt's February 12, 2010 email. Mr. O'Donnell also testified that the parties customarily exchanged written communications using U.S. Mail or facsimile and that they always followed-up email messages with a mailed or faxed hard copy of same. This testimony rings true for the following reasons: first, Mr. Schmidt did not dispute it, indicating that during his 30 years with the Employer, the February 12, 2010 email was the only piece of grievance-related correspondence that he emailed to the Union without also having mailed

or faxed same to the Union; second, Mr. O'Donnell credibly testified that, throughout his 9 years as a Business Agent, he has never relied on email as a medium for conducting written business correspondence and his office's email software is often inoperable; third, Mr. O'Donnell's testimony regarding the parties "hard copy" past practice is corroborated by his unrequited testimony that he neither received nor replied to emailed correspondence from Board employee Debra L. Pilger, identified in the record as Employer Exhibit 13; and fourth, with the exception of Ms. Pilger's emails and Mr. Schmidt's February 12, 2010 email, all of the other written correspondence exchanged between the parties that is in evidence was conveyed *via* U.S. Mail and facsimile. (See Union Exhibits 6 –12)

Either during or shortly after their May 12, 2010 meeting, Mr. Schmidt provided Mr. O'Donnell with a copy of his February 12, 2010 email. Mr. O'Donnell also testified that after that meeting he moved Mr. Mayer's grievance to Step 4 and Step 5, Arbitration, in the grievance procedure. On May 13, 2010, Mr. O'Donnell mailed a letter to the MN Bureau of Mediation Services with a faxed copy to Mr. Schmidt, requesting an arbitration panel. (Employer Exhibit 5 and Union Exhibits 6) On May 14, 2010, Mr. O'Donnell mailed a letter to Jon Gurban, Parks Superintendent, appealing Mr. Mayer's grievance to Step 4, having learned on May 12, 2010 the Board's intent to stand by its discharge decision. (Employer Exhibit 6 and Union Exhibit 7)

In a letter dated May 18, 2010, addressed to Mr. O'Donnell, the Board announced that it had turned the matter over to Karin E. Peterson, Esquire. (Employer Exhibit 7) Also, the Board rejected the Union's request for a Step 4

grievance meeting, as recounted in Mr. O'Donnell's letter to Mr. Schmidt dated June 9, 2010. (Union Exhibit 8) Finally, in a letter dated June 22, 2010, Ms. Peterson advised Local 320 that the Union was in violation of the grievance procedure's time lines and conditional precedent requirements. (Employer Exhibit 9)

The record evidence also established that Messrs. Schmidt and O'Donnell have processed grievances jointly for about 8 years, handling 2 or 3 grievances annually. (Employer Exhibits 12 & 13 and Union Exhibits 9 –12)

IV. BOARD'S POSITION

The Board maintains that the Union violated the Article 4 of the LA when it failed to process Mr. Mayer's grievance within 7 calendar days after receiving the Board's February 12, 2010 Step 3 written response and when, on May 13, 2010, it skipped Step 4 of the grievance procedure, advancing the grievance to Step 5, Arbitration. Moreover, the Board argues, Article 4 of the LA is comprehensive and unambiguous. Thus, if its language "means anything," the instant grievance is not arbitrable, and, the Board points out, Article 4, §4.03 states, in part, that the arbitrator "...has no right to ... ignore..." the parties' bargain. (Employer Exhibit 1)

More specifically, the Board argues as follows: First, from Article 4, §4.04, "Exclusive Method of Resolving Grievances," it should be unambiguously clear that the parties intended Article 4, §4.03 to be the "...sole and exclusive means of resolving all grievances arising under this Agreement." Further, in Article 4. §4.03, "Steps in Grievance Procedure," provides, in part, that if the Union wishes to continue the grievance beyond Step 3 then it must do so "... within seven (7)

calendar days after receipt of the General Manager's answer." During all times relevant to this matter, Mr. Schmidt was the then "General Manager" in question. The parties held their Step 3 grievance meeting on February 10, 2010, and Mr. Schmidt issued his Step 3 answer on February 12, 2010. Mr. Schmidt did not hear back from the Union "...within seven (7) calendar days," rather he heard from the Union three months later, on May 12, 2010.

Second, the Board argues, the Union's contention that it did not receive Mr. Schmidt's Step 3 reply is "bogus." The LA requires that said reply must be in "writing;" it does require that the reply also must be "mailed" or "faxed" in lieu of being exchanged *via* "email." Further, even if Mr. O'Donnell did not receive Mr. Schmidt's Step 3 reply, Article 4, §4.06 provides, in part, "Should the Board not reply within the prescribed time limits, the grievance will be processed to the next step." Accordingly, the Board argues, since the Union maintained that it did not hear back from the Employer within 7 calendar days of the parties' Step 3 grievance meeting of February 10, 2010, then, per Article 4, §4.06, the Union should have filed a Step 4 appeal by on or about February 24, 2010, which is within 7 calendar days following the last date on which the General Manager's written answer was to have been issued.

Third, the Board points out that Article 4, §4.05, "Extension of Time Limits," states that "The time limits in this Article may be extended by mutual written consent of the Board, the employee, and the Union." There is no evidence that the Union filed a written request to place the instant grievance in abeyance, as it has done in the past. (See, for example, Employer Exhibit 11)

Fourth, the Board contends that the Union's untimely Step 4 appeal of May 14, 2010, followed its Step 5, Arbitration, appeal of May 13, 2010, which amounts to skipping Step 4, another violation of the LA.

Finally, the Employer urges that for the above reasons the grievance in question is not arbitrable.

IV. LOCAL 320'S POSITION

The Union initially argues that the instant matter is layered with considerations that mitigate against a finding that would amount to forfeiture of Mr. Mayer's Article 4 right to have his grievance heard at arbitration. In support of this stance, the Union points out that the parties have a long history of cooperative industrial relations; have been lax in the strict enforcements of Article 4's time limits; a long, consistent and uniform practice of exchanging grievance-based memoranda *via* the U.S. Mail or facsimiles and not *via* email, unless a hard copy of each memorandum is mailed or faxed after having been emailed. Regarding this latter point, the Union observes that Mr. Schmidt admitted that his Step 3 answer of February 12, 2010 was the first that he ever emailed, without a hard copy follow-up, in 30 years.

Next, the Union maintains that although Article 4, §4.03 requires the Employer to provide the Union with "written answers," it does not define how said answers are to be delivered. However, this "gap" in language, the Union continues, has been filled *via* the practice of using the U.S. Mail or by sending the opposite party a copy of written correspondence *via* facsimiles.

Further, the Union contends that Mr. O'Donnell learned about the Board's February 12, 2010 letter rejecting Mr. Mayer's grievance on May 12, 2010, and that immediately thereafter, within 7 calendar days, it requested both a Step 4 meeting and Step 5, Arbitration.

Still further, although incorrect in his perception, the Union points to Mr. O'Donnell's testimony wherein he maintained that he was not surprised that Mr. Schmidt had not made a written reply within 7 calendar days of their Step 3 grievance meeting on February 10, 2010 because he believed there were "issues" related to the anticipated departure of the Superintendent who represents the Board in Step 4 of the grievance procedure. He also testified that when he left the February 10, 2010 grievance meeting with Mr. Schmidt, he believed that the matter was not "closed."

Finally, for the above reasons, the Union urges that Mr. Mayer's grievance is arbitrable.

VI. DISCUSSION AND OPINION

The Board raised the instant procedural arbitrability question and, in pre-hearing correspondence with the parties, it was agreed that this question would be the sole question before the arbitrator and, if the grievance is found to be arbitrable, the undersigned would then hear the grievance on the merits at a later date. In this case, the Employer maintains that Mr. Mayer's discharge is not arbitrable for two reasons: first, because the Union failed to process the grievance in a timely manner; and second, because the Union failed to exhaust the

preliminary step, Step 4, of the grievance procedure prior to moving the grievance to arbitration, Step 5.

Before examining the record evidence it is instructive to recognize that arbitrators tend to enforce the contract's time limits and the contractual requirement that the grievance be processed through the grievance procedure's series of steps, particularly under the following conditions: first, the parties have consistently enforced such requirements; second, the party alleging a time limit and/or skipped step violation does so in a timely manner; and third, the parties must not have mutually waived either the time limit(s) in question and/or the step(s) of the grievance procedure. The evidence unequivocally shows that the second and third of these conditions hold in the instant matter, but there is equivocation regarding the first condition, namely, that the parties' enforcement of Article 4's procedural requirements have been lax). However, by the preponderance of evidence, the undersigned concludes that the parties herein do tend to consistently comply with the Article 4's expressed provisions.

The undersigned considered the Board position, examining each of its arguments, which are well taken. Yet, for two reasons, the Board failed to meet its burden of proving that Union violated the LA, as alleged. First, the LA imposes specific time limits within which the Union must grieve an issue and move said grievance from step-to-step in the grievance procedure, and it imposes specific time limits within which the Board must provide the Union with written answers to the grievance. Specifically, the Board was to provide the Union with its Step 3 answer to the instant grievance within 7 calendar days of the parties' Step 3

grievance meeting. It is clear from the record that the Board met this requirement. The Step 3 meeting was held on February 10, 2010, and it issued its Step 3 answer on February 12, 2010. By the same token, there is credible evidence that Union did not receive said answer. First, there is substantial, uncontroverted evidence that for several years the parties' past practice has been to exchange grievance-related memoranda by U.S. Mail or facsimile and, in this instance the Employer emailed its Step 3 answer. In this regard, Mr. Schmidt acknowledged that except for his emailed February 12, 2010, Step 3 answer, all of his other grievance answers were delivered in hard copy form by mail or fax.

Second, email is not a reliable means of communicating with Mr. O'Donnell, who credibly testified that he does not rely on email to conduct written business communications. Finally, as Mr. O'Donnell testified, the electronic mail system installed at his office is often in disrepair. For these reasons, the undersigned concludes that Mr. O'Donnell did not receive the Board's Step 3 written answer.

Nevertheless, the LA provides for instances where the Board may choose not to or where the Board fails to issue a written answer within the relevant time limit, as the Union mistakenly believed happened in this case. Under such circumstances, the Board points to Article 4, §4.06, which provides,

Should the Board not respond within the prescribed time limits, the grievance will proceed to the next step.

(Employer Exhibit 1) The Board interprets this phrase to mean that the Union is and was, in this case, contractually required to move the grievance from Step 3 to Step 4 within 7 calendar days from the date the Employer should have issued its

Step 3 answer, which was on or about February 24, 2010, and not on May 14, 2010. However, the undersigned's interpretation of Article 4, §4.06 differs from the Board's. Consider the following analysis:

1. The language states, in relevant part, "...the grievance will proceed to the next step." It does not state that "...the grievance will proceed to the next step within 7 calendar days..."
2. Moreover, this language does not state that "...the grievance will proceed to the next step within 7 calendar days, if the Union wishes to continue the grievance..."
3. Article 4, §4.06 means exactly what it says, namely, that "...the grievance will proceed to the next step."

With respect to point 3, neither the Union nor the Employer is somehow required to move the grievance to the next step within a specific time period since, by contract, this is the *automatic* consequence of the following bargain:

Should the Board not respond within the prescribed time limits, the grievance will proceed to the next step.

(Employer Exhibit 1)

Based on this analysis, between February 24, 2010 and May 14, 2010, the grievance languished in Step 4. Of course, neither party was aware of this fact, because the Union had not responded to the Board's Step 3 answer within the appropriate time window and because the Employer did not know that the Union had not received its Step 3 answer. However, in the final analysis, the Union did not violate the Article 4, §4.03, Step 4, timing requirement, as alleged. Finally, It was important to note that the undersigned did examine the record for evidence of

previous instances where the Employer and/or the parties may have previously interpreted or applied Article 4, §4.06. Finding none, apparently this is a case of first impression.

Second, Mr. O'Donnell explained that he allowed Mr. Mayer's grievance to languish for 3 months following his Step 3 meeting with Mr. Schmidt because his (i.e., the Union's) Step 4 counterpart, the then Board Superintendent, was in the process of leaving his position. This explanation, absent further amplification not in the record, is unsatisfactory. Conversely, however, given the above-stated interpretation of Article 4, §4.06, Mr. O'Donnell was under no contractual mandate to move the grievance from Step 3 to Step 4 within any particular timeline.

Third, the Employer charges the Union with failing to have exhausted the preliminary step, Step 4, of the grievance procedure prior to moving the grievance to Arbitration, Step 5. Specifically, on May 13, 2010, the Union requested of the Minnesota Bureau of Mediation Services a Step 5 list of arbitrators (Employer Exhibit 5 and Union Exhibit 6) and, then, on the next day, May 14, 2010, the Union requested a Step 4 meeting to discuss Mr. Mayer's grievance (Employer Exhibit 6 and Union Exhibit 7). Contractually speaking, these requests occurred in the wrong order, implying a conditional precedent failure on the Union's part.

However, as Mr. O'Donnell testified, he learned about the Board's February 12, 2010 grievance answer on May 12, 2010 and, immediately thereafter, he prepared the two letters in question and mailed them. He further admitted that the Step 4 letter should have been dated earlier than the Step 5 letter. However, he testified, at the time, his main concern was to continue with

the processing of Mr. Mayer's grievance and to do so within 7 calendar days of his May 12, 2010 meeting with Mr. Schmidt and upon receipt of a hard copy of the latter's February 12, 2010 letter.

Given the Arbitrator's conclusion that the grievance was already languishing in Step 4 as of May 12, 2010, the Union's May 14, 2010 request to move the grievance to Step 4 was a vacuous redundancy. That is, the grievance was already in Step 4 and, thus, the next level of grievance administration would have been Step 5, Arbitration, which is where Mr. O'Donnell wanted to move the matter with his May 13, 2010 letter. Nevertheless, since this was a case of first impression, both the Employer and the Union were in an ambiguous circumstance, neither knowing precisely how Mr. Mayer's grievance ought to be managed going forward.

VII. AWARD

The Union's grievance is procedurally arbitrable.

Issued and ordered from Tucson,
Arizona on this 7th day of January,
2011.

Mario F. Bognanno, Labor Arbitrator