

IN THE MATTER OF ARBITRATION BETWEEN

)	Issue: Procedural Arbitrability
)	
CITY OF MINNEAPOLIS, MINNEAPOLIS, MINNESOTA)	Hearing Site: St. Louis Park, MN
)	
(“Employer”))	
)	Hearing Date: September 26, 2014
&)	
)	
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL NO. 292, AFL-CIO)	Award Date: October 29, 2014
)	
(“Union”))	Arbitrator: Mario F. Bognanno
)	

I. BACKGROUND AND JURISDICTION

The Parties to the above-captioned matter are the City of Minneapolis, Minneapolis, MN (the “Employer” herein) and the International Brotherhood of Electrical Workers, Local No. 292, AFL-CIO (the “Union”). The City and Union are signatories to a Collective Bargaining Agreement (“CBA” or “Agreement”) with the effective dates May 1, 2013 through April 30, 2015. (Jt. Ex. 1)

William Robert McGie and Allen David Brown (the “Grievants”) were hired by the Employer as Temporary Electricians until January 4, 2014: the date on which their employment was effectively terminated. (Jt. Exs. 4 and 5) The last day of work for Messrs. McGie and Brown was January 3, 2014 and December 27, 2013, respectively. (Jt. Exs. 3 and 6)

On February 3, 2014, Roger M. Kretman, Business Manager, IBEW, Local 292, filed a written Step 2 grievance with the Employer in which he alleged that the Grievants’ employment was terminated for discriminatory reasons in violation of Article 19 of the CBA. To resolve the grievance, Mr. Kretman asked that Messrs. McGie and Brown be reinstated and “made whole.” (Jt. Ex. 2) More specifically, in his statement of the grievance Mr. Kretman claimed that: (1)

Messrs. McGie and Brown were not terminated for “lack of work;” (2) their employment was terminated because, as their supervisor allegedly expressed, they “... were too old and useless and should be sent back to the union hall;” and (3) said reason for terminating the Grievants’ employment violated Article 19 of the CBA, which explicitly proscribes any forms of illegal harassment and prohibited discrimination. (Jt. Ex. 2, p. 1)

In a letter dated March 3, 2014, Brette Hjelle, Director, Administration Division, denied Mr. Kretman’s Step 2 grievance. Pertaining to the Union’s charge of harassment and discrimination, Mr. Hjelle stated that the City’s Human Relations Department (“HRD”) was investigating the claim and that the Public Works Department would take appropriate actions based on the HRD’s findings. Concerning the Grievants’ termination, Mr. Hjelle wrote: (1) Temporary Electricians are covered by the CBA’s “Attachment ‘B,’ Letter of Agreement: Employment of Temporary Employees” and not by the CBA, *per se*, which covers Permanent Electricians; (2) the allegedly violated Article 19 is not contained in said Letter of Agreement; and (3) said Letter of Agreement states, in part, “... release of a temporary employee from employment shall not be subject to review under the grievance or arbitration provision of the Agreement ...” (Jt. Exs. 1 and 2, p.2)

On March 14, 2014, Mr. Kretman filed a written Step 3 “Notice of Intent to Arbitrate.” Therein, he stated that the grievance is about the City’s alleged “discriminatory treatment of the members named in the grievance.” Moreover, Mr. Kretman rebutted Mr. Hjelle’s reasons for denying the Step 2 grievance. (Jt. Ex. 2, p.3)

On April 9, 2014, representatives of the Employer and Union held a Step 3 meeting to discuss the grievance. On May 1, 2014, the Employer again denied the grievance. (Jt. Ex. 2, pp. 4

and 5) On June 16, 2014, the undersigned was informed of his selection as Arbitrator, and thereafter possible hearing dates were discussed. Ultimately, it was agreed that the matter would be heard on September 26, 2014. On September 24, 2014, the undersigned was informed that the Parties had agreed to limit the September 26, 2014 proceeding to a “question of arbitrability” that had newly surfaced.

The undersigned heard the arbitrability question on September 26, 2014 in St. Louis Park, MN. Appearing through their designated representatives, the Parties were given a full and fair hearing. Witness testimony was not aduced. Rather, the Parties introduced Joint Exhibits, jointly stipulated to relevant facts, and, thereafter, each Party proceeded to argue its case. The Parties stipulated that the matter was properly before the Arbitrator for a final and binding decision, and they waived the provision in Article 4 §4.03 of the Agreement that required an Award within thirty (30) days of the close of the record. The record was closed on September 26, 2014.

II. STATEMENT OF THE ISSUE

Whether the Union’s February 3, 2014, Step 2 Grievance is procedurally arbitrable?

III. APPEARANCES

For the City:

Michael B. Bloom
Jon Wertjes

Assistant City Attorney
Director, Traffic and Parking Services

For the IBEW:

Gregg M. Corwin
Keith M. Anderson
Peter Lindahl
William McGie
Allen Brown

Attorney-at-Law
Business Representative, IBEW, Local No. 292
Business Manager, IBEW, Local No. 292
Grievant
Grievant

IV. RELEVANT CBA PROVISIONS

ARTICLE 4 SETTLEMENT OF DISPUTES

Section 4.01 – Grievance Procedure

This grievance procedure has been established to resolve any specific dispute arising between the employee(s) covered by this Agreement and the Employer concerning, and limited to, the proper interpretation and application of the express terms and provisions of this Agreement. Such a dispute shall hereinafter be referred to as a *grievance* which shall be resolved in accordance with the provisions of this article. The Parties agree that this procedure is the sole and exclusive means of resolving all grievances arising under this Agreement. Grievances shall be resolved in the following manner:

Subd. 1. Step 1 (Informal)

Any employee who believes the provisions of this Agreement have been violated may discuss the matter with his/her immediate supervisor as designated by the Employer in an effort to avoid a grievance and/or resolve any dispute. ... [N]othing herein shall be construed as a limitation upon an employee or the employee's Union representative respecting the filing of grievances at Subd. 2 (Step 2) of the grievance procedure.

Subd. 2. Step 2 (Formal)

If the grievance has not been avoided and/or the dispute resolved by the operation of Step 1 and the employee or Union wishes to file a formal grievance, the employee, or the employee's Union representative on behalf of the employee, shall file a written grievance which has been signed by the employee with the employee's department head or with his/her designee. The grievance must be filed within twenty-one (21) calendar days of the event which gave rise to the grievance or within fourteen (14) calendar days of the time the employee reasonably should have knowledge of the occurrence of the event, whichever is later. ...

The department head shall respond in writing to the Union, the employee and the Employer's Director of Employee Services within thirty (30) calendar days after receipt of the grievance.

Subd. 3. Step 3 (Notice of Intent to Arbitrate)

If the grievance has not been resolved by the department head's response at Step 2 and the Union intends to continue to pursue the grievance, the Union

shall, within fourteen (14) calendar days after receipt of the department head's response, refer the grievance to arbitration by so notifying, in writing, the Employer's Director of Employee Services of its intent.

The Employer's Director of Employee Services or his/her designee and representatives of the Union shall meet within thirty (30) calendar days of the date the Union filed its *Notice of Intent to Arbitrate* in an attempt to resolve the grievance. The Employer's Director of Human Resources or his/her designee shall have the full authority of the City Council and the Mayor to resolve the grievance. If the Parties cannot resolve the grievance the Union may initiate arbitration process as provided for in Section 4.02 of this article.

Section 4.02. – Selection of the Arbitrator

...

Section 4.03 – Authority of Arbitrator

The Arbitrator shall have no authority to amend, modify, nullify, ignore, add to or subtract from the provisions of this Agreement. He/she shall be limited to only the specific written grievance submitted by the Employer and the Union, and shall have no authority to make a decision on any other issue not so submitted. The Arbitrator shall submit a written decision, opinion and/or award within thirty (30) calendar days, following the close of the hearing or the submission of briefs by the Parties, which is later, unless the Parties agree to an extension thereof. ...

Section 4.04 – Arbitrator Expenses

...

Section 4.05 – Time Limits, Waiver and Automatic Advacnement

The time limits established in this article may be extended by mutual written agreement between the Employer and the Union. If a grievance is not presented within the specified time limits, it shall be considered *waived*. ...

(Jt. Ex. 1; italics in the original)

IV. POSITIONS OF THE PARTIES, DISCUSSION AND OPINION

The Grievants' employment was effectively terminated on January 4, 2014. (Jt. Exs. 4 and 5) The Grievants' last day of work was a few days earlier. Mr. McGie's last day of work was

on January 3, 2014, and Mr. Brown's was on December 27, 2014. (Jt. Exs. 3 and 6) The Union challenged the reasons for the Grievants' terminations in a Step 2 letter dated February 3, 2014: a letter the Employer received on February 5, 2014. (Jt. Ex. 2) The "inclusive" number of calendar days from January 4, 2014 through February 5, 2014 is thirty-two (32), and from January 4, 2014 through February 3, 2014 is thirty (30). The corresponding "exclusive" number of calendar days is thirty (30) and twenty-eight (28), respectively. Regardless of how one counts calendar days, more than twenty-one (21) calendar days had elapsed between the date of the event which gave rise to the grievance and the date the Union filed its Step 2 grievance.

Based on the foregoing, the Employer contended that the February 3, 2014 grievance was not timely because Article 4 §4.01, Subd. 2 in the Agreement states: "The grievance must be filed within twenty-one (21) calendar days of the event which gave rise to the grievance ..." (Jt. Ex. 1) Moreover, the Employer argued, while the twenty-one (21) calendar day time limit might have been extended, as provided in Article 4 §4.05 of the CBA, it was not. Hence, the Employer noted, Article 4 §4.05 goes on to state: "If a grievance is not presented within the specified time limits, it shall be considered *waived*." (Jt. Ex. 1; italicized in the original) For these contract-based reasons, the Employer concluded, the grievance was not timely-filed, was waived and is not arbitrable.

The Employer's procedural objection to arbitrating the grievance was made known to the Union on the Monday – September 22, 2014 – that proceeded the already scheduled Friday – September 26, 2014 – date on which the merits of the grievance initially were to be heard. Additionally, the Union pointed out, from February 3, 2014 to September 22, 2014, the Parties had followed the remaining pre-arbitration steps of the negotiated grievance and arbitration

procedure, and during this time period the Employer did not so much as hint that a latter-day timeliness objection would be forthcoming. For two (2) reasons, the Union argued, the Employer's eleventh (11th) hour timeliness objection should be repudiated; first, because the Employer "implicitly waived" the Agreement's twenty-one (21) calendar day limitation by proceeding to consider the grievance for several months before raising the timeliness challenge; and second, it is unfair to deny the Grievants' "industrial justice" after the Employer had engaged in pre-arbitration grievance-settlement deliberations for such a long period of time. Regarding the latter point, it is important to recognize that after months of failed grievance negotiations, the Grievants had come to expect an arbitration hearing on the merits of their grievance. For these reasons, the Union urged, the Arbitrator should grant the Grievants "equitable relief" and he should bar the Employer's attempt at denying same.

The Employer rejected the Union's analysis, arguing that while the doctrines of "equitable relief" and "collateral estoppel" are useful legal constructs, they are not applicable in the present matter. Neither construct is expressed, implicitly or explicitly, in the Agreement. Whereas, the time-limiting language in Article 4 §4.01, Subd. 2, and Article 4 §4.05 of the Agreement is expressed in plain and unambiguous terms. In addition, Article 4, §4.03 clearly states that the Arbitrator is not authorized to "... amend, modify, nullify, ignore, add to or subtract from ..." the provisions the Parties' negotiated into their CBA.

The definition of a "grievance," as set forth in Article 4 §4.01 of the Agreement, is that it is a dispute between the Parties over "... the proper interpretation or application of the expressed terms of this Agreement." Article 4 §4.01 further state that the steps of the grievance and arbitration procedure of Article 4 are the sole means of resolving such disputes

under the Agreement. Integral to Article 4's grievance resolution procedure is that a Step 2 "... grievance must be filed within twenty-one (21) calendar days of the event which gave rise to the grievance ...," as specified in Article 4 §4.01, Subd. 2. In the present matter, the grievance was not filed within the Agreement's twenty-one (21) calendar day window. Article 4 §4.05 states that this and the other time limits set forth in Article 4 of the Agreement may be extended by mutual agreement, however, it provides that "If a grievance is not presented within the specified time limits, it shall be considered *waived*." In the present matter, the Parties did not mutually agree to extend the twenty-one (21) calendar day time limit.

When interpreting contract language, arbitrators: (1) follow the "plain meaning" rule; (2) give effect to all of the contract's terms, rendering none "meaningless;" and (3) avoid interpretations that yield "nonsensical" results. The plain meaning of Article 4 §4.01, Subd. 2 coupled with the Agreement's Article 4 §4.05 is that if a grievance is not filed in writing within twenty-one (21) days of the aggrieved event and if this limitation is not extended by mutual agreement, then the grievance is *waived*. An alternative interpretation of these combined provisions would render them "meaningless," which is to imply that the Union's grievance is not arbitrable.

However, there are exceptions to the "plain meaning" rule. First, illness, injury or Acts of God might explain the untimely filing of a grievance. In such a circumstance, the arbitrator might conclude that the contracting parties intended that tardy grievance filings for reasons like these should be excused. In the present matter, the record does not explain why the Union or the Grievants failed to file the grievance within the contracted twenty-one (21) calendar days. Second, occasionally the parties, either implicitly or explicitly, agree to deviate from unambiguously clear contracted procedures. However, the record evidence does not suggest that, as a matter of past practice, the Parties have liberally construed Article 4's time limits. Finally, if the grievance in question were continuous or recurring in nature, then the above-discussed application of the "plain meaning" rule would be different.

For example, if the present case involved an employee who was being paid an incorrect wage rate, then the event giving rise to the employee's prospective grievance would recur with each successive payday, implying that the contract's period within which a wage rate grievance must be filed would reset each successive payday. *Methodist Hospital and Hospital and Nursing Home Employees Union, SEIU, Local No. 113*, 94 LA 616 (Bognanno, 1990) The facts of the instant case do not fit this scenario.

Based on the foregoing analysis, the undersigned concludes that the grievance, by contract, was *waived*. Read together, the plain meaning of Article 4 §4.01, Subd. 2 and Article 4 §4.05 is that if a grievance is not filed in writing within twenty-one (21) days of the aggrieved event and if this limitation is not extended by mutual agreement, then the grievance is *waived*. Further, the undersigned is mindful of the fact that in Article 4 §4.03 of the Agreement, the Parties remind him that his task is to read the contract's expressed terms and not to "... amend, modify, nullify, ignore,..." them by inventing interpretations that are not expressed.

Based on his reading of Article 4 in its totality, it is reasonable to conclude that the Parties' intent was to require bargaining unit members and the Union to *promptly* file perceived grievances. Corroborating this conclusion is Article 4's: (1) twenty-one (21) calendar day time limit language; (2) requirement that said time-limiting language may only be extended through "mutual written agreement;" and (3) *waived* language.

In the final analysis, the Arbitrator is not persuaded by the Union's "equitable relief" and "collateral estoppel" argument. Article 4 of the Agreement includes six (6) parts, covering approximately two (2) pages of text. The text is very detailed and, as already observed, the Parties' intended policy is to have grievance filed *promptly*. To allow untimely grievances to be arbitrated is to subvert the policy's intent. Moreover, as detailed as is the language in Article 4, the Parties, nevertheless, did not elect to contractually limit or revoke the Employer's right to enforce its time-limiting language specifically because the Employer entertained the merits of an untimely grievance without first identifying it as

being untimely. To conclude that the grievance is arbitrable would be to both ignore and render meaningless the clear language in Article 4 of the CBA, and to subvert the Parties' policy objective of having perceived grievances filed *promptly*.

V. AWARD

For the reasons discussed above, the Union's February 3, 2014, Step 2 Grievance is not procedurally arbitrable.

Issued and Ordered on the 29th day of October, 2014 from
Tucson, Arizona.

Mario F. Bognanno, Labor Arbitrator & Professor Emeritus