

BEFORE THE ARBITRATOR

In the Matter of the Arbitration	:	
of a Dispute Between	:	
	:	
SOUTH MILWAUKEE	:	Case 68
PROFESSIONAL POLICE ASSOCIATION	:	No. 45960
	:	MA-6821
and	:	
	:	
CITY OF SOUTH MILWAUKEE	:	
	:	

Appearances:

Mr. Patrick J. Coraggio, Labor Consultant, Labor Association of Wisconsin, Inc., 2825 North Mayfair Road, Wauwatosa, Wisconsin 53222, for the Association.

Mr. Joseph G. Murphy, City Attorney, City of South Milwaukee, 1334 Milwaukee Avenue, P.O. Box 308, South Milwaukee, Wisconsin 53172, for the City.

ARBITRATION AWARD

South Milwaukee Professional Police Association and City of South Milwaukee are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant to the parties' request for the appointment of an arbitrator, the Wisconsin Employment Relations Commission appointed Jane B. Buffett, a member of its staff, to hear and decide a dispute regarding the interpretation and application of the Agreement. Hearing was held in South Milwaukee, Wisconsin on October 1, 1991. No transcript was taken. The parties filed briefs, the last of which was received November 25, 1991.

ISSUE

Since the parties were unable to stipulate to a statement of the issues, the Arbitrator states the issues as follows:

1. Is the grievance arbitrable?
2. Did the City violate the Collective Bargaining Agreement by advising the grievant that he would have to pay for health insurance, dental insurance, and life insurance premiums and that he would lose sick leave, vacation leave, seniority accrual, longevity and all other leaves while on a ninety-day suspension ordered by the Police and Fire Commission? If so what is the appropriate remedy?

BACKGROUND

Grievant Kenneth Stephany is a police officer with the City's Police Department. For reasons irrelevant to this case, the Police and Fire Commission issued him a 90-day suspension on December 14, 1990. Grievant did not challenge the Order and began the suspension on that day. On January 18, 1991 the City Clerk wrote Grievant indicating that if he wished to continue his health, dental and life insurance coverage during the suspension, he would have to pay the full premium for the months of January and February, which amounted to \$814.94. On February 6, 1991 Grievant filed a grievance regarding the

premium payments. On April 4, 1991 there was a Step III grievance meeting at which time Grievant was informed that there were additional benefits he would lose as a result of the suspension. Those additional benefits, detailed in a letter from the Chairperson of the Wages, Salary and Welfare Committee were: holiday pay, vacation leave, sick leave, seniority accrual, longevity and "all other miscellaneous leaves." The Association contends Grievant is entitled to all these benefits except holiday pay. 1/

RELEVANT COLLECTIVE BARGAINING AGREEMENT PROVISIONS

ARTICLE XIV - GRIEVANCE PROCEDURE

Section 14.01 - Matters Subject to Grievance Procedures:

Only matters involving interpretation, application or enforcement of the terms of this Agreement shall constitute a grievance under the provisions set forth below. Should differences arise between the Municipality and the Association or any employee, an earnest effort shall be made to settle such differences promptly at the lowest step. Matters pertaining to discharge and disciplinary action imposing suspension of time or wages pursuant to 62.13, Wis. Statutes are excluded from the grievance procedure and the employee who is disciplined may appeal the discipline through the City of South Milwaukee Police and Fire Commission pursuant to Sec. 62.13 of the Wisconsin Statutes. Provided, however, if the Police and Fire Commission refuses to hear an appeal of a written reprimand such reprimand shall be grievable.

. . . .

Section 14.03 - Final and Binding Arbitration:

If the grievance is not satisfactorily settled under Step III, it may be submitted to arbitration by either party serving written notice on the other within ten (10) days after the decision of the Wages, Salaries and Welfare Committee of the Common Council.

POSITIONS OF THE PARTIES

The Association

The Union asserts that by participating in the grievance procedure without challenging arbitrability, the City has waived its right to raise such an argument before the arbitrator. Additionally, it argues that the arbitrator has jurisdiction to determine arbitrability.

As to the merits, the Association contends that the Police and Fire Commission does not have authority under Sec. 62.13, Wis. Stats., to deny Grievant fringe benefits during the suspension. Finally, the Association maintains that by removing additional benefits after the Police and Fire Commission had imposed the suspension, the City subjected Grievant to double

1/ The exception of the holiday pay is not a waiver, but an acknowledgement that holiday pay is received for time worked on a holiday, which Grievant could not do during his suspension.

jeopardy and therefore violated his rights to due process.

The City

The City asserts that the arbitrator lacks jurisdiction to decide this dispute since under Section 14.01 of the Collective Bargaining Agreement, disciplinary suspensions are excluded from the grievance procedure.

DISCUSSION

The threshold issue in this dispute is the question of arbitrability. The Association argues that since the City did not raise this challenge prior to the hearing, it has waived its right to make the assertion at this point in the proceedings.

The Association's argument, however, overlooks the source of the parties' obligation to proceed to arbitration. The duty to submit a dispute to arbitration is an obligation which the parties themselves create by their own voluntary agreement when they execute a collective bargaining agreement containing an arbitration provision. There is no other source of this duty.

The parties' self-imposed duty can only be expanded by their affirmative action in agreeing to enlarge the scope of the arbitration coverage. It cannot be expanded by one party's inaction in failing to raise objections to arbitrability prior to the hearing. This reasoning is the source of the rule that a challenge to substantive arbitrability will not be deemed waived even if it is not raised until late in the proceedings. 2/

Similarly, the City's concurrence with the appointment of an arbitrator merely indicated its intent to submit the dispute, including, in this case, the dispute regarding arbitrability, to an arbitrator.

The undersigned now turns to consider the merits of the argument that the instant dispute is not subject to arbitration. The City's position is based on its reading of Section 14.01 of the agreement (set forth above), which defines the coverage of the grievance procedure. That provision explicitly excludes from the grievance procedure two areas of dispute: discharge and disciplinary suspension of time or wages pursuant to Sec. 62.13, Wis. Stats. Moreover, exclusion as to those disputes is quite broad, covering not only the discharge or disciplinary suspension itself, but, as well, "matters pertaining to" (those actions). Since this dispute arises from a question whether the removal of the benefits during the time of suspension was included in the Police and Fire Commission's December 14, 1990 Order that Grievant be suspended "without pay," this dispute calls for a clarification and interpretation of the Order. Such a clarification clearly is "A matter pertaining" to an action explicitly excluded from the grievance procedure.

Since the grievance is a matter pertaining to a disciplinary suspension pursuant to Sec. 62.13, Wis. Stats., the undersigned has no authority under the collective bargaining agreement to decide the merits of the dispute and must therefore dismiss the grievance.

In the light of the record and the above discussion, the arbitrator issues the following

2/ If a party were surprised by such an argument, it could move to have additional time to respond to the argument.

AWARD

1. The grievance is not arbitrable.

2. The grievance is dismissed.

Dated at Madison, Wisconsin this 5th day of March, 1992.

By Jane B. Buffett /s/
Jane B. Buffett, Arbitrator