

Frankland #5

FEDERAL MEDIATION AND CONCILIATION SERVICES

In the Matter of the Arbitration Between:

Union

-and-

Employer

Gr: Overtime/Employee 1

OPINION AND AWARD

The undersigned, Kenneth P. Frankland, was mutually selected by the parties to render an Opinion and Award in the above captioned grievance, FMCS # 00-000. Hearing was held at Employer's Office, City A, Michigan, on January 24, 2008. The Sheriff raised the issue of arbitrability and the parties offered factual context, testimony, introduced exhibits, and filed briefs on the arbitrability issue on or before February 29, 2008 and thereafter the record was closed.

ISSUES:

1. Is this Grievance subject to arbitration pursuant to Section 5.9?

PERTINENT CONTRACT PROVISIONS:

Article IV, Section 4.1

Article V, Section 5.1

Article V, Section 5.2 A, Step1

Article V, Section 5.2 B, Step 2

Table of Exhibits

- Joint 1. Contract
- Joint 2. Grievance chain
- Joint 3. Prior Arbitration Award
- Joint 4. Circuit Court Complaint
- Joint 5. Notice of Special Assignment
- Joint 6. Employee 1 Overtime sign-up sheets

Factual Background

The relevant facts are not disputed. On April 19, 2006, Deputy Sheriff Employee 1 was terminated by the Sheriff. A grievance was filed and the matter went to arbitration. On February 23, 2007, Arbitrator E. Frank Cornelius rendered an Opinion and Award, Joint Exhibit 3, holding, “the Employer failed to prove by a preponderance of the evidence that it discharged Grievant for just cause” Arbitrator Cornelius, among other remedies stated, “Grievant is to be put back on the payroll forthwith.”

Employee 1 was reinstated by the Sheriff, however, he was not delegated law enforcement powers and duties. The Union filed a “Complaint for Enforcement of Arbitration Award and Costs” in Employer Circuit Court on November 9, 2007. Joint Ex. 4. When Employee 1 was reinstated, he was assigned to the complaint desk. While on this assignment, Employee 1, through his Union representative signed several overtime sign-in sheets for scheduled overtime on patrol shifts. He was denied all patrol overtime by the Sheriff as unqualified, not having law enforcement powers. The instant grievance was filed contesting the denial of overtime.

UNION POSITION

The Contract (J-1) provides for a dispute resolution mechanism for interpretation of the Agreement as written. The issue of overtime is covered under Article VII. The Union has the burden of proof but is being prevented from going forward by the issue of arbitrability. The Union has met all time limits and the Grievance is arbitrable. The subject matter is within the Arbitrator's jurisdiction. The Arbitrator is justified in ruling upon the merits where a plausible solution is available within the general framework of the Agreement.

Election of remedies in Article V, Section 5.7 does not apply. The Circuit Court complaint does not address the Grievant's right to overtime, the subject matter of this grievance. If the employer asserts that the constitutional powers of the sheriff prevent the merits of this grievance going forward, the courts have ruled that the sheriff's power is not unlimited. The legislature has limited the discretionary authority of the sheriff as to employment practices. In *National Union of Police Officers v Wayne County Board of Commissioners*, the Court of Appeals enumerated three principles in the application of PERA to sheriffs and their employees. In one, the power to hire, fire and discipline is not absolute and is limited by PERA. All terms and conditions of employment are subject to bargaining unless they infringe upon matters which are placed within the power of the sheriff by the Constitution. Third, the matter of deputies' delegation of the powers of law enforcement entrusted to him by the Constitution is a matter exclusively within his discretion and inherent in the nature of the office.

The Union is not seeking deputy law enforcement powers from this grievance and the Sheriff cannot bootstrap a constitutional argument to every economic condition in a CBA.

COUNTY POSITION

The only way a person can work road patrol overtime is if he is a deputy with law enforcement powers. Employee 1 does not have those powers. In essence the Grievance asks the Arbitrator to order the Sheriff to delegate law enforcement powers to Employee 1 and this he cannot do as such delegation is solely the constitutional prerogative of the Sheriff. *National Union of Police Officers v Wayne County Board of Commissioners* is controlling law.

The contract has an election of remedies provision. The circuit court lawsuit filed by the Union forecloses this arbitration as it seeks to order the Sheriff to delegate law enforcement powers to Employee 1, the same remedy that is the obvious purpose of this grievance.

DISCUSSION

The County raised the procedural issue at the hearing challenging the arbitrability of the case. Generally, such challenges may be addressed immediately at a hearing or by briefs so that evidence on the merits need not be presented should the challenge have merit. Alternatively, parties often place the issue(s) before the arbitrator and take proofs so that they need not return in the event the challenge is not sustained. The parties allow the arbitrator to rule in the Opinion and either grant the challenge and dismiss per contractual necessity or deny and proceed to a ruling on the merits. Here, the contract controls the procedure. J-1, Section 5.9 requires that a claim of arbitrability be decided before hearing the case on the merits and after the opportunity to file briefs. That has occurred and the positions of the parties has been submitted in briefs and summarized above.

A. Statutory Powers of the Sheriff

The nub of the issue in this case flows from the aftermath of the Cornelius arbitration

Opinion and Award (J-3). Therein, a remedy was, “Grievant is to be put on the payroll forthwith.” The Award also required a “fitness evaluation”. The latter was completed after much consternation and Employee 1 was deemed fit for duty. Employee 1 was returned to work on August 22, 2007 but the Sheriff did not delegate law enforcement duties to Employee 1 but instead assigned him to the complaint desk. On November 9, 2007, the Union filed a “Complaint for Enforcement of Arbitration Award and Costs” in the Circuit Court for the County of Leelanau and the matter is pending in that jurisdiction.

The instant Grievance was filed on September 7, 2007 within three working days of the termination of a posting for overtime. All steps were timely and as the Union points out the Employer has not contested timeliness. Since the Grievance alleges a violation of the contract, the Union claims it is arbitrable, especially since the subject matter, overt-time, is not part of the Circuit Court case and the grievance was filed well before the lawsuit, thus no election of remedies problem. The Union asserts that the arbitrator is justified in ruling on the merits where “a plausible solution is available within the general framework of the Agreement.”

The County replies to all this that Michigan law is well settled that the sheriff retains the exclusive right to assign law enforcement powers and duties citing *National Union*. The Sheriff position is created by Mich Const 1963, Art VII, § 4, an elected office and § 4 further states, “whose duties and powers shall be provided by law.” The Legislature has proscribed those powers and duties in MCL 51.70 (R.S. 1846, ch 14, § 70). Specifically, “Each sheriff may appoint 1 or more deputy sheriffs at the sheriff’s pleasure, and may revoke those appointments at any time.”

A review of *National Union* case suggests many parallels with this grievance. There was a transfer to a division where the deputy was without law enforcement powers, the Union

grieved, an arbitrator ordered the deputy returned to the former law enforcement position, the sheriff refused and the circuit court case followed and the court denied enforcement of the arbitration award. This was sustained by the Court of Appeals. 93 Mich App 76 (1979).

“We, therefore, conclude that the legislative delegation of the executive police power to the sheriff may not be limited by a collective bargaining agreement as authorized by PERA, but remains vested exclusively in the sheriff.”

I find this decision to be very persuasive to resolve this matter but first I need to address an arbitrator's use of external sources outside the contract itself, specifically whether an arbitrator would have recourse to substantive law and to decisions of the highest court of the state when determining a specific Grievance. The extent to which an arbitrator may consider factors not enumerated in the collective bargaining agreement generally depend upon how the parties may have restricted the arbitrator in the interpretation and application of their agreement.

The fundamental question is whether an arbitrator is constrained by the very terms of the collective bargaining agreement or may consider substantive law including case law. Some arbitrators believe the parties have asked the arbitrator to construe their agreement rather than apply external law and feel the arbitrator is constrained to ignore external law and only consider the words in the contract.

Conversely, other arbitrators accept the position espoused by arbitrator Robert G. Howlett, that arbitrators are bound and subject to law, whether constitutional or statutory, and that all contracts are subject to statutes and common law, and each contract includes all applicable law. Those arbitrators who believe the contract is subject to external substantive law argue that the “law” includes judicial precedents and most particularly, if that judicial precedent is the highest court of that state. Under this view, such court decisions are certainly of signifi-

cant value in guiding the arbitrator in a decision and assuming such court decision is the final authoritative ruling on a particular issue it ought to be followed. Just as lower courts of the State would be mandated to follow precedents established by the highest court of the state, in this view so should arbitrators.

In resolving this dilemma, I have carefully read the contract that outlines the grievance steps and most particularly discusses the role of the arbitrator. I do not see any language in the contract that specifically limits the arbitrator from utilizing external substantive law in deciding a case. And I do not believe that by applying substantive law to the facts of this case, that the arbitrator would be amending, modifying, nullifying or ignoring the agreement and by applying such substantive law would not be granting any privileges which were not obtained in the negotiation process. It is this writer's belief, that an arbitrator would have the inherent authority to consider substantive law, including case law when deciding a case in which an allegation has been raised that Michigan case law might be controlling. Accordingly, I believe that this arbitrator may consider substantive law including case law in deciding this case. I find that this Michigan Appeals Court decision is applicable to the arbitrability issue in this case. It is the highest court decision and note no Supreme court case was cited by either party.

Since I believe *National Union* controls, I would have no power to order the sheriff to give law enforcement powers to Employee 1. Since the grievance requests that Employee 1 be given overtime and he cannot earn overtime in the absence of law enforcement powers, a condition precedent to road patrol duties, and since I can't order the sheriff to give him law enforcement powers, there is nothing that can be accomplished by hearing the grievance. Although the Union says it is not seeking law enforcement powers as a resolution of the grievance, that is really the only way to give any remedy because of the analysis above. While

the Union at p. 11 of Brief states I am justified in ruling on the merits where a “plausible solution is available within the general framework of the Agreement”. I am not direct to any provisions of the Agreement or any suggestion as to what the “plausible solution” may be. I cannot divine a solution and indeed, I see no plausible solution given the controlling *National Union* case.

Further support for this position is *FOP v Bensinger*, 122 Mich App 437, *lv den* 418 Mich 853 (1983). The deputy was discharged, an arbitration award ordered reinstatement with law enforcement powers, the Sheriff refused, and the circuit court ordered reinstatement but the sheriff was not required to confer law enforcement powers. The *Bensinger* court cited *National Union*. I note the Supreme Court denied leave so *Bensinger* and *National Union* are the highest court rulings on the issue. Since the essence of the grievance is to obtain law enforcement overtime and as I stated that is not possible without law enforcement powers and I cannot order the sheriff to do so, the grievance is without remedy even if meritorious.

Accordingly, I find this grievance is not arbitrable.

B. Election of Remedies

Article V, Section 5.17 states, “The Union agrees to limit its representation of employees, covered by this Agreement, in matters involving grievances, to one proceeding related to each such grievance, whether that proceeding involves a grievance arbitration, which the Union shall determine in its sole discretion, veteran’s preference hearing, civil rights claim, or other claim before another tribunal or court.....”

The Union points out that the grievance was filed before the lawsuit and the subject matter of the grievance is not a subject matter in the lawsuit. On these limited facts, I do not see a technical violation of Article V, Section 5.17. The Employer claims the Union is pursuing the same claim in each forum but concedes the claim to compel the Sheriff to delegate law enforce-

ment duties to Employee 1 is “indirect” in the grievance. On the surface, the overtime matter is different, requesting an interpretation of the contract; however, as I have noted it fails arbitrability because of the inability to fashion an arbitration remedy. It is not necessarily foreclosed per se by Article V, Section 5.17. I do believe that the proper forum to challenge the delegation or lack thereof of law enforcement duties on the facts presented in this case is the circuit court by way of enforcement of the prior arbitration award or raising other jurisdictional basis in the circuit court but not in this proposed arbitration.

Award

The grievance is denied.

Kenneth P. Frankland

Arbitrator

Dated: March 6, 2008