WERC Invalidated Collective Bargaining Agreement Language that Preserved Circuit Court Review as the Appeal Procedure of Police and Fire Commission Discipline Decisions

Dec 07 2009

Posted By: Kyle J. Gulya

Practice Area: Labor and Employment & County and Municipal Governance

In a decision issued on December 1, 2009 involving the City of Menasha, the Wisconsin Employment Relations Commission ("WERC") held that a proposal by the City to "maintain language from the 2007–2008 Agreement which required that the appeal procedures contained in Section 62.13, Stats. be utilized by a union-represented employee who wished to challenge discipline imposed pursuant to that statutory provision" constituted a prohibited subject of bargaining and was invalid. WERC's decision in this case was very narrow and was by no means earth-shattering. WERC simply held that a municipal employer may not make a bargaining proposal that "prohibits access to arbitration" pursuant to Section 111.70(4)(mc), Stats. Of significant and notable importance, WERC did not invalidate existing collective bargaining agreement language that is present in a current collective bargaining agreement. Nor did WERC invalidate language that is agreed to by the municipal employer and Union where the parties agree to use the circuit court as the appeal choice for review of PFC discipline decisions.

WERC's narrow decision should not come as a surprise to municipal employers, as this decision sustains the language in Section 111.70(4)(mc)1, Wis. Stats. But unfortunately, a lot of confusion and concern has resulted from the *City of Menasha* decision. The purpose of this *Legal Update* is to alleviate those concerns and to reaffirm the strong position that all municipal employers are in to combat any assault against the authority of their PFCs.

First and foremost, WERC's decision does not change the advice we have given regarding properly negotiating contract language involving arbitration of appeals of PFC discipline decisions. If anything, WERC's decision should serve as a very important reminder that municipal employers must continue to aggressively negotiate against these detrimental proposals designed to strip the municipality and PFC of its management rights. If municipal employers choose to negotiate such language regarding using arbitration as an appeal mechanism of PFC discipline decisions, then they should continue to follow these basic principles:

- **Preserve the Powers of the PFC.** Management's proposal should never "replace the PFC" as a decision maker with arbitration.
- **Avoid deviating from the Status Quo.** Management's proposal should closely mirror the statutory appeal framework followed by the circuit court under Section 62.13(5), Wis. Stats., and this type of proposal could be treated as closest to the status quo before an interest arbitrator.
- **Arbitration is Negotiable.** Management must remember that arbitration is not what the union says it is—instead it is a process that is agreed to by the parties. The parties can propose an agreed upon Arbitrator rather than selecting an ad hoc Arbitrator from outside their community.
- **No new hearing or no separate hearing should be conducted by the Arbitrator.** The circuit court does not conduct a new hearing on an appeal of a PFC decision. Therefore, no new hearing should occur before the Arbitrator, nor is there any reasonable basis for a new hearing to be conducted before the Arbitrator. The Arbitrator should only review the record of the PFC decision, and the Arbitrator should remand to the PFC for the taking of additional facts for consideration by the Arbitrator on appeal.
- **Negotiate specific and narrow jurisdictional requirements.** First, the employee subject to discipline should only get one choice of forum for appeal—either the circuit court or arbitration—not both. Second, the arbitrator must not conduct a "de novo" review of the PFC's decision. Due weight, respect and authority must be given by the Arbitrator to the decision of the PFC.
- **The Union or Employee pays**. The Union or the employee should bear the full costs of paying for the Arbitrator's services, just as they would for the circuit court.
- **Be Unequivocal on Discipline.** Management should also aggressively implement and reinforce the importance of rules of conduct. Employees should understand that suspension or termination of employment is reasonable and should be expected if the employee engages in certain acts of misconduct. Arbitrators support management's reasonable rules and penalties if the Employee is aware of the consequences.

A well-crafted management proposal can be found in the City of West Allis Fire Department collective bargaining agreement, a copy of which is attached.

WERC's decision does not stop municipal employers from taking aggressive negotiation strategies to encourage a contract settlement without language allowing for arbitration of PFC discipline decisions. Of significant importance, management must remember that just because the union wants to bargain over arbitration as an appeal mechanism of a PFC discipline decision, the municipal employer is not required to voluntarily agree to any union proposal. Nor does it mean the Union will carry its proposal through to its final offer at interest arbitration. In many cases, Unions routinely drop these proposals early on in negotiations. Furthermore, many municipal employers have successfully negotiated successor agreements where the Union dropped its proposal, or management developed proposals that made arbitration a very undesirable option for the union to accept.

Municipal employers should also be aware of potential union strategies following *City of Menasha* decision. Specifically, unions may notify municipal employers that contractual language relating to the circuit court appeals of PFC discipline decisions should be "evaporated" from the collective bargaining agreement upon its expiration. In the event that unions attempt to "evaporate" this type of language from an expiring collective bargaining agreement, then municipal employers must be ready to aggressively respond and consider evaporating all nonmandatory language from the collective bargaining agreement (particularly since it is the union that generally reaps the benefits of nonmandatory language). Certainly, from a strategic standpoint, the union must then evaluate whether it is willing to negotiate the successor collective bargaining agreement and keep the current language mandating circuit court review of PFC discipline decisions, or whether the Union is willing to give up all the other permissive language that it has negotiated into the collective bargaining agreement and "go for it" with its arbitration proposal.

Finally, while this is a decision by the WERC, it is very important to remember the WERC is only passing along the message sent to municipal employers by Governor Doyle and the State Legislature. It is Governor Doyle and the State Legislature who are to blame for this extremely poor demonstration of public policy. Attention and frustration related to this change in the law should be strategically focused by managing this issue at the bargaining table and lobbying the Legislature to change this poorly drafted and secretly created statute.

SECTION 4. To the extent permitted by law, a Police and Fire Commission order may be appealed to Arbitration as follows:

(a) Any person suspended, reduced, suspended and reduced, or removed by the Commission, as a result of a charge filed in accordance with the procedures set forth in §62.13 (5) Wis. Stats., may, as an alternative to a circuit court appeal under §62.13 (5)(i) or pursuant to a writ of certiorari, appeal the order of the Commission to arbitration by serving written notice of the appeal to arbitration on the Chief and Board of Police and Fire Commissioners within ten (10) days after the order is filed with the secretary of the Commission. An appeal of the Commission's order to arbitration shall preclude a party from appealing to the circuit court under §62.13 (5)(i) or pursuant to a writ of certiorari, just as an appeal of the Commission's order to the circuit court under §62.13 (5)(i) or pursuant to a writ of certiorari shall preclude a party from appealing to arbitration. Both the Association and the accused will execute a waiver to that effect as a condition of proceeding to either arbitration or the circuit court.

(b) Absent a mutual agreement as to the selection of an arbitrator, the Association shall make a written request to the Federal Mediation and Conciliation Service (FMCS) to provide a panel of five (5) arbitrators all of whom shall be Wisconsin residents and members of the National Academy of Arbitrators. This request must be made within ten (10) calendar days after the date of the written notice of appeal of the Commission's decision.

(c) Upon receipt of the panel of arbitrators from the FMCS, the City and the Association, or their designated representative, shall select an arbitrator by the process of elimination. The City and the Association shall have the right to delete two (2) names from the panel, each in alternate strikes, with the remaining person being the selected arbitrator. The party to strike first shall be determined by a form of chance to be agreed to by the parties.

(d) Within twenty (20) days of selection of the arbitrator, the Commission shall certify the record of its proceedings to him or her, including all documents, testimony, minutes and the transcript. The arbitrator may conduct a hearing upon return of the Commission, provided that either party demonstrates that the additional evidence or testimony to be offered was not available, with the exercise of due diligence, at the time of the Commission hearing or that the Commission committed procedural error preventing the admission of material and relevant testimony or evidence. The arbitrator shall establish the briefing schedule for the parties.

(e) The question to be determined by the arbitrator shall be: Upon the evidence is there just cause, as described under Sec. 62.13(5)(em) Wis. Stats., to sustain the charges against the accused? The arbitrator shall give due weight or due deference to the judgment of the Commission in determining what penalty the good of the service requires. The arbitrator shall issue a decision within thirty (30) calendar days after receipt of the final brief as established by the briefing schedule. The arbitrator must issue a decision within 180 days of the close of the Commission hearing. The arbitrator, in arriving at a decision, shall not add to, detract from, nor modify the language of this Agreement or departmental rules, regulations and procedures."

(f) No costs shall be allowed either party and payment of the arbitrator's and FMCS's fees shall be borne equally by the parties. If the order of the Commission is reversed, the accused shall be forthwith reinstated and entitled to pay as though in continuous service. If the order of the Commission is sustained, it shall be final and conclusive.

(g)The failure to comply with the time limits described in paragraphs (a) and (b) above shall be deemed a waiver of the right to appeal the matter to arbitration. Having so waived the right to arbitrate the matter, the party shall remain precluded from appealing the order to circuit court under §62.13 (5)(i) or pursuant to a writ of certiorari. Any time limits prescribed in this section may be extended by the mutual written consent of the parties.
