In the Matter of ESSEX COUNTY SHERIFF'S DEPARTMENT

and

R-27, I.B.C.O.

Case Nos. RBA-01-151 and RBA-01-152

62.	***Discharge and Discipline—Just Cause***
62.42	***demotion***
62.6	***misconduct***
91.11	***statute of limitations***
91.5	***sufficiency of charge***
94.	***Arbitration Under Chapter 150E Section 8***

October 10, 2002
Helen A. Moreschi, Chairwoman
Mark A. Preble, Commissioner

Philip Collins, Esq.	*Representing the Essex County*
Richard K. Jeffery, Esq.	*Sheriff's Department*
Michael Williams, Esq.	*Representing R-27, I.B.C.O*

RULING ON REQUEST FOR BINDING ARBITRATION

Statement of the Case

On December 19, 2001, the International Brotherhood of Correctional Officers, Local R-27 (the Union) filed two Requests for Binding Arbitration (Requests) pursuant to Section 8 of Massachusetts General Laws, Chapter 150E (the Law).[1] On February 7, 2002, the Employer filed an Opposition to the Union's Requests pursuant to 456 CMR 16.02(5). The Employer's February 7, 2002 Opposition is substantially similar to its October 5, 2002 Opposition, except, as more fully discussed below, the Employer additionally argues that the Request in Case No. RBA-01-152 is untimely and that the discharge dispute (Case No. RBA-01-151) is subject to a statutory procedure that culminates in a District Court review, rather than arbitration.

The parties' submissions reveal that the Union and the Employer are parties to a collective bargaining agreement covering the period July 1, 2000 through June 30, 2002.[2] The agreement does not contain a grievance/arbitration or a "just cause" provision. Rather, Article II of the parties' agreement states:

> It is recognized that the Employer has and will continue to retain, whether exercised or not, the sole and unquestioned right, responsibility and prerogative to direct, manage and control all aspects of the operation of all correctional facilities in Essex County. Nothing in this Agreement shall limit the Employer in the exercise of its rights to direct, manage, supervise and control the operation of said correctional facilities except where the exercise of such rights is expressly prohibited by the terms of this Agreement.
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> Unless an express, specific provision of this Agreement clearly provides otherwise, the Employer, acting through its duly elected Sheriff, or such other appropriate officials as may be authorized to act on its or their behalf, retains all rights and prerogatives it had prior to the signing of this Agreement by law; custom, practice, usage or precedent to direct, manage and control the Sheriffs Department.
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> The Employer also reserves the right to decide whether, when and how to exercise its rights and prerogatives, whether or not emulated in this Agreement. Accordingly, the failure to exercise any right shall not be deemed a waiver. Except as expressly provided by a specific provision of this Agreement, the exercise of the aforementioned rights, as well as any matter dealing with the administration of the Sheriff's Department, shall be final and binding and shall not be subject to the grievance provisions of this Agreement.
>
> [Zipper Clause]
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> This contract represents a complete and full agreement between the Employer and the Union in respect to rates of pay, wages, hours of employment and other conditions of employment that shall prevail during the term of this contract, and any matters or other subjects not covered specifically in this contract have been satisfactorily adjusted, compromised or waived by the parties for the life of this contract.

Until September 10, 2001, Richard Mendes (Mendes) was employed by the Employer as an assistant superintendent and, until his discharge on October 10, 2001, was a member of the bargaining unit represented by the Union. On September 10, 2001, following an investigation into alleged sexual harassment and retaliation, the Employer transferred and demoted Mendes. On October 10, 2001, the Employer discharged Mendes for conduct relating to his performance in his new assignment.

On December 18, 2001, the Union filed two grievances on Mendes's behalf alleging that the Employer had: 1) demoted, transferred, and otherwise disciplined; and 2) discharged Mendes "without just cause or justification, in violation of Articles II, V, VII, XX, XXVI, and other relevant articles of the parties' Collective Bargaining Agreement."[3] There is nothing in the record concerning when or if the Employer ever responded to the grievances.

1. Some time prior to October 5, 2001, the Union filed a letter with the Commission requesting that the Commission order binding arbitration pursuant to M.G.L. c.150E, §8 in a dispute with the Essex County Sheriff's Department (the Employer). Because the request was not in compliance with the Commission's Rules, the Commission returned the letter with a copy of a Request for Binding Arbitration form. On October 5, 2001, the Employer responded to the Union's letter, arguing that the letter did not comply with the Commission's Rules, and that the dispute was not subject to arbitration. In a letter dated October 16, 2001, the Commission acknowledged the Employer's opposition, but informed the parties that the Commission had not yet received a valid Request for Binding Arbitration. On December 19, 2001, the Union filed requests that were in compliance with the Commission's rules.

2. There is some confusion about the applicable collective bargaining agreement. Although the Union did not submit a copy of the applicable agreement with its Requests, the Employer submitted an agreement covering the period 2000-2002 with its Opposition. The Employer points out that the Articles cited by the Union on the grievance form and on the Request forms that were allegedly violated by the Employer appear to be incorrect or do not exist. The Union did not respond to the Employer's Opposition. However, although the Union did not furnish a copy of the applicable collective bargaining agreement, there is no dispute that the Union and the Employer are parties to a collective bargaining agreement that, as more fully discussed below, contains neither a grievance procedure that culminates in binding arbitration nor a "just cause" provision.

3. As discussed in note 2, above, the references to specific articles in the parties' collective bargaining agreement appear to be incorrect.

Opinion

Section 8 of the Law authorizes the Commission to order final and binding arbitration where: (1) there is a written collective bargaining agreement in effect at the time of the alleged event; (2) there is a dispute over the interpretation or application of the written agreement; and (3) the agreement does not provide for final and binding arbitration. *Town of Sharon*, 22 MLC 1695 (1996); *Sturbridge School Committee*, 21 MLC 1233 (1994). Here, all three conditions are present. However, the Employer raises several issues in its Opposition. We address each of the Employer's arguments below.

The Employer first argues that we should dismiss the Requests on the ground that they are "substantially lacking in the specific information necessary to respond or rule." Specifically, the Employer points out that the Union did not submit a copy of the collective bargaining agreement and failed to provide a clear and concise statement of the dispute concerning the interpretation or application of the written agreement. 456 CMR 16.02 states, in part:

> (1) When a party requests the Commission to order binding arbitration, as provided in M.G.L. c. 150E, s. 8, the party so requesting shall provide the Commission the following information in writing:
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> * * *
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> (b) A clear and concise statement of the dispute concerning the interpretation or application of such written agreement. A copy of the grievance for which arbitration is requested must be submitted with the request, along with the date and disposition of the last step of the grievance procedure at which the grievance has been considered.
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> (c) A specific reference to the particular part or parts of the written agreement causing the dispute. A copy of the entire written agreement must be submitted with the request.

The Request forms include the following statement, which is essentially the same on both forms: "Employer [disciplined] Richard Mendes in violation of Articles II, V, VI, VII, XX, XXIV, and other relevant articles of the collective bargaining agreement..." The Union also submitted copies of the grievance forms. However, the Union did not submit a copy of the collective bargaining agreement or the date or disposition of the last step of the grievance procedure at which the grievances were considered.

456 CMR 16.02(6) states that:

> Upon receipt of the submissions of the parties referenced [in 456 CMR 16.02(1)-(5)], the Commission may conduct such further investigation as it deems necessary and may issue an order directing the parties to submit the grievance to binding arbitration, may dismiss the request for an order directing binding arbitration, or may authorize such other disposition of the matter as may effectuate the purposes of M.G.L. c. 150E.

In *Board of Trustees, State Colleges*, 2 MLC 1344 (1976), the petitioner filed a Request for Binding Arbitration that was neither sworn nor indicated that the request was subject to the penalties of perjury as required by the Commission's Rules. In rejecting the employer's argument that the request should be dismissed, the Commission stated:

> [The regulation] was not intended to create a technical defense to meritorious applications for relief. Where, as here, the facts upon which the requests are based are not in dispute, the purpose of the regulations is satisfied.

2 MLC at 1344. Here, although the Union did not submit all of the information required by the 456 CMR 16.02(1), the disputes are clear and concise: whether the employer had just cause to first demote and then to discharge Mendes.[4] Further, because there is no specific just cause provision in the agreement, the agreement would be of little probative value. Moreover, the Union could not have provided the date and disposition of the last step of the grievance procedure at which the grievance was considered because the Employer was not contractually required to and apparently did not consider the grievances.[5] Therefore, although the Union was less than meticulous when drafting the grievances and filing its Requests, the Commission has the information necessary to consider the matter on its merits. Accordingly, we decline to dismiss the matter on the ground that the Union's Requests do not technically comply with the Commission's regulations.

The Employer next argues that the Request concerning the September 10, 2001 demotion (Case No. RBA-01-152) should be dismissed as untimely. The Employer points out that the Union initially filed a non-conforming request for binding arbitration and then re-filed the Request on December 19, 2001, about forty to sixty days late. 456 CMR 16.02(2) states: "Except for good cause shown, no request for binding arbitration shall be entertained by the Commission more than 60 days after exhaustion of the contractual grievance procedure, if any." However, the regulation provides that the Request must be filed within 60 days "after exhaustion of the contractual grievance procedure, *if any*." (emphasis supplied) Here, there is no contractual grievance procedure to trigger the start of the 60-day period.[6] Further, the Union submitted a grievance on December 18, 2001—one day before filing its Request. Whether an arbitrator would determine that the grievance was untimely filed is a matter of procedural arbitrability. As more fully discussed below, matters of arbitrability are properly left to an arbitrator.

The Employer next argues that the disputes are not subject to arbitration in the absence of contract language on the subject matter. The Employer points out that there is no provision in agreement providing for a just cause discipline standard. The Employer cites *Essex County*, 20 MLC 1519 (1994), where the Commission dis-

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4. The Employer acknowledges that the Union's difficulty in citing the exact Article that is alleged to have been violated is due, in part, to the fact there is no Article providing for just cause.

5. The Union filed its Requests on December 19, 2001—one day after it submitted the grievances. However, the Employer filed its Opposition on February 7, 2002 and did not mention any response.

6. In *Town of Sterling*, 12 MLC 1415, 1417 (1985) the Commission held that "[T]he existence or non-existence of a grievance procedure is not the relevant inquiry in determining whether Section 8 of the Law applies. Instead, [the Commission looks] to whether the parties have agreed that grievances may be resolved through final and binding arbitration."

missed a request for binding arbitration on the ground that there was no language in the agreement that rendered the dispute "arguably arbitrable." In that case, the dispute concerned the employer's alleged refusal to pay overtime, night shift differentials, and clothing allowance. The Commission dismissed the matter on the ground that there were no contract provisions concerning those matters. However, the Commission has treated just cause issues differently. In *Massachusetts Coalition of Police*, 16 MLC 1630 (1990), a union filed a request for binding arbitration where the dispute concerned whether the grievant was reprimanded without just cause. In rejecting the employer's defense that the applicable agreement did not contain a just cause standard for discipline, the Commission stated:

> The Town's arguments concerning arbitrability of the grievance, however, constitute a dispute between the parties over the interpretation or application of the terms of the collective bargaining Agreement. Moreover, the issue of whether the collective bargaining agreement contains a just cause provision is an issue of contract interpretation and application that should be decided by an arbitrator.

16 MLC at 1632 (citation omitted). *See generally, Elkouri & Elkouri: How Arbitration Works* 886 (Marlin M. Volts and Edward P. Goggin, eds. 5th ed.1997)(even in the absence of a specific just cause provision, "many arbitrators would imply a just cause limitation in any collective agreement").

The Employer also cites to the "zipper clause" contained in the Management Rights provision and offers an affidavit from the sheriff alleging that, although the Union proposed to include a just cause provision during the last two rounds of negotiation, the sheriff rejected the proposals and the Union withdrew them. The Employer argues that it is clear that the Union's "failure to negotiate to limit the Sheriff's power to discharge is and was a conscious choice to leave such decisions to the Sheriff in consideration of pay and other benefits in the agreement." However, whether the management rights clause (or any other clause) does or does not limit the Employer's right to discipline or discharge employees is also a matter of contract interpretation, properly left to an arbitrator.

The Employer also argues that the demotion discharge is not arbitrable as a matter of Law. M.G.L. c.126, §8A states: "The superintendent, *and any deputy superintendents*, shall be appointed by the sheriff ..., and shall serve at his pleasure." (emphasis supplied). The Employer argues that, because Mendes was an assistant superintendent, he served at the pleasure of the sheriff and, because M.G.L. c.126 is not among those statutes listed in c.150E, §7(d), the matter cannot be superceded by a collective bargaining agreement. The Employer further cites *Massachusetts Coalition of Police, Local 165* v. *Town of Northborough*, 416 Mass. 252 (1993) for the proposition that the decision not to reappoint a police officer is a non-delegable management prerogative and argues that the authority under M.G.L. c.126, §8A is even greater than the authority under M.G.L. c.41, §97A, which is the statute involved in that case. In *Massachusetts Coalition of Police*, an employer chose not to reappoint a police officer who had been appointed pursuant to M.G.L. c.41, §97A[7] and the union filed a grievance alleging that the police officer had been terminated without just cause. The employer refused to arbitrate and the Union filed an action pursuant to M.G.L. c.150C to compel arbitration. In determining that the matter was not arbitrable, the SJC held:

> We have said and we say again, that, unless there is positive assurance that an arbitration clause is not susceptible to an interpretation that covers the asserted dispute, or unless no lawful relief conceivably can be awarded by the arbitrator, an order to arbitrate should not be denied. Here, however, it may be said with positive assurance that the arbitration clause of the collective bargaining agreement is not susceptible to an interpretation that covers the asserted dispute, which is solely about whether [the police officer] should have been reappointed. Furthermore, no lawful relief could conceivably be awarded by an arbitrator in this case.

416 Mass. at 256.

Here, prior to his demotion in September 2001, Mendes served as an assistant superintendent. Although c.126, §8A provides that "deputy superintendent" serve at the pleasure of the Sheriff, it makes no mention of "assistant superintendents," and there is nothing in the file about whether the two titles are the same.[8] Further, in determining whether to order binding arbitration, the Commission performs only a limited review of the merits of a grievance to ensure that it is at least "arguably arbitrable." *Town of Shrewsbury*, 4 MLC 1441, 1445 (1977). Limiting that review to whether the contract arguably covers the dispute and leaving questions concerning whether arbitration on the subject is contrary to law or public policy to the courts is the proper balance of the respective roles of the Commission and the Courts. Accordingly, we reject the Employer's argument that the matter is not arbitrable as a matter of law.

Finally, the Employer argues that the discharge dispute is subject to the procedure contained in M.G.L. c.35, §51, which culminates in a review by the District Court, not an arbitrator. However, that statute does not provide that that procedure is the exclusive procedure for seeking review of a discharge, or that the Employer otherwise complied with the procedures contained in that statute.

Conclusion

For the reasons set forth above, we conclude that arguably arbitrable disputes over the interpretation or application of a written collective bargaining agreement exists between the Union and the Employer, and that the Agreement does not provide for final and binding arbitration.

WHEREFORE, by virtue of the power vested in it by Section 8 of the Law, the Commission HEREBY ORDERS:

1. That the disputes raised by the Union's requests for binding arbitration be promptly submitted to binding arbitration;

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7. M.G.L. c.41, §97A states, in part:: "[appointments of police officers] shall be made annually or for a term of years not exceeding three years...and the selectmen may remove the...officers for cause at any time after a hearing."

8. After his demotion, Mendes was an assistant deputy superintendent.

2. That within thirty (30) days of the date of service of this decision the parties shall inform the Commission of the arbitrator selected. If the parties do not agree on an arbitrator, they shall submit the dispute for arbitration before the Board of Conciliation and Arbitration.

SO ORDERED.

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