STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 150, SEIU, AFL-CIO, Complainant, vs. MT. CARMEL NURSING HOME, Respondent.	:	Case VI No. 14916 Ce-1363 Decision No. 10505-A

Appearances:
Mr. William Smith, Representative, appearing on behalf of the Complainant.
Levin, Blumenthal, Herz & Levin, Attorneys at Law, by Mr. Gary B. Simon, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Local 150, SEIU, AFL-CIO, having on August 26, 1971, filed a complaint with the Wisconsin Employment Relations Commission, wherein it alleged that Mt. Carmel Nursing Home, had committed unfair labor practices within the meaning of the Wisconsin Employment Peace Act; and the Commission having appointed Marvin L. Schurke, a member of the Commission's staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Section 111.07(5) of the Wisconsin Employment Peace Act; and pursuant to notice issued by the Examiner on September 27, 1971, hearing on said complaint having been held at Milwaukee, Wisconsin, on October 8, 1971 before the Examiner; and the Examiner having considered the evidence, arguments and being fully advised in the premises makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That Local 150, SEIU, AFL-CIO, hereinafter referred to as the Complainant, is a labor organization having its principal offices at 135 W. Wells Street, Milwaukee, Wisconsin.

2. That Mt. Carmel Nursing Home, hereinafter referred to as the Respondent, is a corporation having its principal offices at 6400 South 60th Street, Milwaukee, Wisconsin and is engaged in a business affecting interstate commerce within the meaning of the Labor Management Relations Act as amended.

3. That at all times pertinent hereto the Respondent has recognized the Complainant as the exclusive collective bargaining representative of certain of its employes employed in its facilities at Milwaukee, Wisconsin; and that the Complainant and Respondent are parties to a collective bargaining agreement entered into and effective for the period from January 1, 1971 through and including December 31, 1972.

4. That the collective bargaining agreement in effect between the parties contains the following provisions material herein:

"ARTICLE VIII
Leave of Absence

Section 1. Requests for leaves of absence shall be in writing. Any grant of leave shall be in writing.

Section 2. Any regular employee who has been continuously employed for six (6) months may be entitled to a leave of absence upon proof of his physical disability, and that said leave of absence is necessary because of said physical condition. Such leave shall not be more than ninety (90) days. The Employer may require reasonable proof of physical disability and reasonable proof that the employee will be able to return to duty within the time for which leave is requested.

Section 3. If the reason for any leave of absence is granted by Employer no longer exists, then the employee shall immediately notify Employer and if requested by Employer, return to work within seventy-two (72) hours.

Section 4. Leaves of absence for other reasons shall be considered.

Section 5. By reason of such leave of absence as under Section 6, the employee shall not forfeit any accrued rights under this agreement, but likewise, he shall not accrue any rights during such leave.

Section 6. Maternity leave of up to six (6) months may be granted to employees with one (1) year or more of continuous service.

Section 7. When pregnancy is known, the employee will report her condition to her supervisor. The employee will be given a copy of Employee Permit to Work and will be required to have this completed and signed by her personal physician. If pregnancy is suspected and not reported, the employee may be required by her immediate supervisor to furnish a medical evaluation.

Section 8. 'Employee Permit to Work', signed by the personal physician, will be returned promptly to the supervisor before the completion of the third month of pregnancy or as soon as practical thereafter.

Section 9. Employees shall be required to start maternity leave at the end of six (6) months pregnancy. The Employer may request a Doctor's certificate as proof of number of months involved.

Section 10. The employee may return to work no sooner than six (6) weeks following the date of delivery and may extend to thirteen (13) weeks. Signed permission for return to duty must be given by the attending physician. A return-to-work date will be established when the employee presents the signed permission from her physician to her supervisor.

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ARTICLE X
Sick Leave

Section 1. Full-time employees shall accumulate sick leave as follows:

a. Six (6) days sick leave (1/2 day per month) during their first year of employment.

b. Eight (8) days sick leave 2/3 day per month during their second year of employment.

c. Twelve (12) days sick leave (1 day per month) during their third year of employment and thereafter for each year of employment.

Sick leave may be accumulated to forty-two (42) days. Compensation shall start on the first day of illness. Regular part-time employees shall receive one-half the sick leave benefit paid full-time employees and shall receive compensation per scheduled hours.

Section 2. Employees who are prevented by sickness from reporting to work must notify their supervisor, and in all cases, at least one (1) hour before the shift begins. If the sickness continues, the employee shall call in daily to keep the supervisor informed. If the sickness exceeds eight days, the Home will require at least one week's notice of return to work.

Section 3. After three (3) days of illness, the employee will be required to provide written proof of illness from a physician, and shall provide such proof of illness thereafter as the Home may require. Falsification of sick leave information is dishonesty. When there is indication of abuse for less then (sic) three (3) days, the employee will be required to furnish proof of illness.

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ARTICLE XVII
General Provisions

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Section 6. The Employer may discharge or suspend an employee for just cause, but in respect to discharge, shall give a warning of the complaint against said employee.

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ARTICLE XVIII
Stewards, Grievances and Arbitration

Section 1. A current list of authorized Union Stewards shall be presented to the Home by the Union. Authorized stewards shall have the authority to gather pertinent facts, assist employees in the processing of grievances in accordance with the terms, procedures, and limitations provided in this Agreement when requested by the employee who initiates the grievance.

The Home shall permit a steward a reasonable amount of time on regular duty status to process grievances and to consult with appropriate supervisors and management officials. They must ask for and receive permission from their immediate supervisor before leaving their job.

Section 2. The Home agrees to meet with duly accredited officers and committees of the Union upon grievances pertaining to meaning of application of the Agreement in accordance with the procedure provided below.

Step 1. The employee with a grievance shall discuss his grievance orally with his immediate supervisor, and may request, if he so desires, a steward to be present.

Step 2. If the grievance is not satisfied by Step 1, the employee shall immediately set forth his grievance in writing, date it, sign it, in duplicate form, to his department head for investigation and written disposal within three working days; and may request, if he desires, a steward to assist him.

Step 3. If there is failure to resolve at this step, the grievance is then presented to administration for investigation. If the employee has requested the Union to be involved, administration will provide for a meeting of Union and Home representatives for negotiation purposes within five working days. The Home shall provide written disposition within three working days of the meeting. If there is failure to resolve at this step, either party may file an appeal to arbitration within five working days.

Step 4. The Home and Union will agree upon an impartial Arbitrator. In the absence of agreement, the Wisconsin Employment Relations Commission shall be requested to appoint an arbitrator. Decision of the arbitrator shall be binding on both parties.

. . ."

5. That Mrs. Janice Fojut was an employe of the Respondent employed within the bargaining unit represented by the Complainant and covered by the collective bargaining agreement between the parties; that Mrs. Janice Fojut was placed on a leave of absence; that, by lette dated March 16, 1971, Lawrence R. Cotton, Administrator of the Nursing Home operated by the Respondent, advised Mrs. Fojut that her request for a leave of absence through May 15, 1971, was denied; that by letter dated May 13, 1971, Mrs. Janice Fojut advised Cotton that she was able to return to work and perform her usual duties; and that the employment of Mrs. Janice Fojut has been terminated by the Respondent.

6. That a dispute has arisen between the Complainant and the Respondent as to whether the termination of the employment of Mrs. Fojut was proper under the collective bargaining agreement; that on its face such dispute constitutes a dispute concerning the application

of time after leaving the employment of the Respondent during which a person has the benefits of the collective bargaining agreement; and that such dispute appears on its face to constitute a dispute concerning the application and interpretation of said collective bargaining agreement.

7. That the Complainant requested the appointment of an arbitrator to hear and determine the dispute existing between the parties concerning the termination of the employment of Mrs. Janice Fojut; and that the Respondent at all times subsequent to such request has refused and continues to refuse to concur in proceeding to arbitration on any of the issues arising out of or in connection with the grievances of Mrs. Janice Fojut.

Upon the basis of the above and foregoing Findings of Fact, the Examiner makes the following

CONCLUSION OF LAW

1. That Mt. Carmel Nursing Home, by refusing to concur in the appointment of an arbitrator and by refusing to proceed to arbitration on the issues arising out of and in connection with the grievance of Mrs. Janice Fojut, violated and continues to violate the terms of the collective bargaining agreement between it and Local 150, SEIU, AFL-CIO, and by such violations Mt. Carmel Nursing Home, has committed and is committing unfair labor practices within the meaning of Section 111.06 of the Wisconsin Employment Peace Act.

Upon the basis of the above and foregoing Findings of Fact, Conclusion of Law, the Examiner makes the following

Order

1. That Mt. Carmel Nursing Home immediately cease and desist from refusing to submit the grievance of Mrs. Janice Fojut to arbitration.

2. That Mt. Carmel Nursing Home take the following affirmative action which will effectuate the policies of the Wisconsin Employment Peace Act.

a. Notify Local 150, SEIU, AFL-CIO, of its concurrence in the appointment of an arbitrator to hear and determine the issues existing between the parties arising out of and in connection with the grievance of Mrs. Janice Fojut and proceed to arbitration on such grievances.

b. Notify the Wisconsin Employment Relations Commission in writing within twenty (20) of the date of this Order as to what steps it has taken to comply therewith.

Dated at Madison, Wisconsin, this 14th day of February, 1972.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Marvin L. Schurke, Examiner

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

On August 26, 1971 the Union filed a complaint with the Commission alleging that Mt. Carmel Nursing Home committed unfair labor practices within the meaning of Section 111.06(1) of the Wisconsin Statutes by refusing to proceed to arbitration pursuant to an arbitration provision contained in a collective bargaining agreement existing between the parties. Respondent filed an answer alleging that it had not failed to comply with the labor management agreement regarding the discharge of Mrs. Janice Fojut in that Mrs. Fojut was not entitled to the benefits of the labor management agreement. Hearing was held in said matter on October 8, 1971, in Milwaukee, Wisconsin, at which time the parties stipulated as to all of the material facts involved in the dispute before the Examiner. The parties indicated their desire to file briefs two weeks after receipt of the transcript. The transcript was mailed on December 22, 1971, and the brief of the Respondent was received on December 29, 1971. On January 28, 1972, the Complainant advised the Examiner that it waived the filing of a brief.

Positions of the Parties

The Union takes the position that the Employer is obligated by the collective bargaining agreement to arbitrate all of the issues arising out of or in connection with the termination of the employment of Mrs. Janice Fojut.

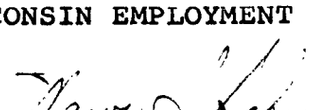
The Employer takes the position that, at some point in time following the Employer's alleged discharge of an employe, the employe no longer has the benefits of the collective bargaining agreement. The Employer urges that it is necessary as part of these proceedings to determine the date on which the employe was allegedly discharged and to determine whether or not the subsequent time at which the employe attempted to take benefit of the grievances and arbitration provisions of the contract was reasonable. The Employer relies primarily on the Cutler-Hammer Inc. (1476) 1/47, and, Nekoosa-Edwards Paper Company (2371) 4/50, decisions of the Commission. The employers in those cases were found not to have committed unfair labor practices by refusing to arbitrate certain questions.

Discussion

It is clear by a long line of decisions that the Commission has consistently refused to assert its jurisdiction to decide complaints that one party violated the terms of a collective bargaining agreement where the agreement provides for the final disposition of such questions. 1/ This policy is consistent with the body of law which has been applied in the Federal courts under Section 301 of the Labor Management Relations Act. 2/ The only defenses raised by the Respondent herein for its refusal to proceed to arbitration are questions which require determination of procedural arbitrability and interpretation of the provisions of the collective bargaining agreement. In John Wiley and Sons, Inc. v. Livingston the United State Supreme Court declared as federal labor policy, "once it is determined . . . that the parties are obligated to submit the subject matter of a dispute to arbitration, procedural questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator." The Examiner regards all of the questions raised by the Respondent with respect to any delay between the date on which Mrs. Fojut was advised of the termination of her employment and the date on which she filed the grievance under the labor contract as procedural questions within the purview of the arbitrator. It will also be the obligation of the arbitrator to determine the substantive question of whether the collective bargaining agreement between the parties provided protection for Mrs. Fojut and whether the specific protection provided for employes under the collective bargaining agreement would result in the re-employment of Mrs. Fojut. The Employer in essence requests the Commission to deviate from the policy expressed in Seaman-Andwall Corporation (5901) 1/62, wherein the Commission ordered an employer to proceed to arbitration on procedural issues arising in connection with a grievance filed under a collective bargaining agreement as well as on substantive issues raised by the grievance, and to determine these procedural issues on their merits. Any attempt to determine the procedural questions which are raised by the Employer in this proceeding would invade the authority and jurisdiction of the arbitrator as established by both state and federal labor policy. The cases relied on by the Respondent have been overruled by the Wiley and Seaman-Andwall cases cited herein. The Union is entitled to an order requiring the Employer to proceed to arbitration. The Union has already made a unilateral request to the Commission for the appointment of an arbitrator. The Respondent is therefore ordered to notify the Complainant of its concurrence as well as to notify the Commission of its concurrence in the selection of an arbitrator. The Respondent is also ordered to submit its defenses to the arbitrator appointed pursuant to the contractual procedures.

Dated at Madison, Wisconsin, this 14th day of February, 1972.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Marvin L. Schurke, Examiner

1/ River Falls Coop Creamery (2311) 1/50; Hurlburst Co. (4121) 12/55; Pierce Auto Body Works (6635) 2/64; American Motors Corp. (7488) 2/66; Allen Bradley Co. (7659) 7/66; Rodman Industries (9650-A) 9/70.

2/ Cf. Drake Bakeries Inc. v. Local 50 American Bakery & Confectionary Workers 50 LRRM 2440 (U.S. Sup. Ct. 1962).