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-B

ORDER AMENDING EXAMINER'S FINDINGS OF FACT, AFFIRMING EXAMINER'S CONCLUSION OF LAW AND ORDER AND AMENDING MEMORANDUM ACCOMPANYING SAME

Examiner Marvin L. Schurke having on February 14, 1972, issued his Findings of Fact, Conclusion of Law and Order, as well as Memorandum accompanying same, in the above entitled matter; and the Wisconsin Employment Relations Commission, pursuant to Section 111.07(5) of the Wisconsin Employment Peace Act, having reviewed the decision of the Examiner and being satisfied that the Findings of Fact as reflected in the Examiner's decision, as well as his Memorandum accompanying same, be amended, however that the Examiner's Conclusion of Law and Order be affirmed.

NOW, THEREFORE, it is

ORDERED

1. That paragraph 5 of the Examiner's Findings of Fact be amended to read as follows:

> 5. That Mrs. Janice Fojut, an employe of the Respondent occupying a position covered by the aforesaid collective bargaining agreement, was, on November 16, 1970, granted a leave of absence by the Respondent for a period commencing on the latter date and continuing through January 15, 1971; that subsequently the Respondent extended such leave period to March 15, 1971; that prior to the expiration of said granted leave, Mrs. Fojut requested an extension of such leave through May 1971; that the Respondent, in a letter dated March 16, 1971, advised Mrs. Fojut that the Respondent was denying her request to extend her leave through May 1971; and that by letter dated May 13, 1971, Mrs. Fojut advised the Respondent that she was able to return to work and perform her duties; and that, however, the Respondent refused to return Mrs. Fojut to employment considering her to be constructively terminated on March 15, 1971, the expiration date of her extended leave of absence.

2. That the Conclusion of Law and Order issued by the Examiner be, and the same hereby are, sustained.

3. That the Memorandum, accompanying the Findings of Fact, Conclusion of Law and Order issued by the Examiner, relating to "Positions of the Parties" and "Discussion" be amended to read as follows:

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 contends that since Mrs. Fojut had been terminated from employment and waited in excess of two and one-half months to claim that the agreement had been violated with respect to her termination is a valid defense in support of its determination not to proceed to arbitration. Furthermore, it contends that since the collective bargaining agreement does not require the Employer to grant a leave of absence, there is nothing to arbitrate. The Employer relies primarily on Commission decisions rendered in Cutler-Hammer Inc. (1487) 1/47, and, Nekoosa-Edwards Paper Company (2371) 4/50. The employers in those cases were found not to have committed unfair labor practices by refusing to arbitrate certain questions.

The Employer also contends, in effect, that there is nothing to arbitrate since Mrs. Fojut, as a result of the termination of her employment, is no longer an employe covered by the collective bargaining agreement under which arbitration is sought herein.

Discussion

Mrs. Fojut was an employe when the leave of absence was initially granted and was considered in the employment of the Employer at least during the continuance of her granted leave of absence up to and including March 15, 1971, a date falling within the term of the existing collective bargaining agreement. An examination of the "Leave of Absence" provision contains no language with respect to the effect of not returning to work upon the termination of a granted leave of absence. Section 6 of Article XVII provides that "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." The mere fact that Mrs. Fojut was not employed on the date arbitration was requested does not constitute a valid defense of the Employer's refusal to proceed to arbitration. The primary issued involved in the grievance is whether the termination of Mrs. Fojut constituted a violation of the collective

bargaining agreement. Prior to her termination and during the existence of the collective bargaining agreement, albeit, on leave of absence, Mrs. Fojut was an employe at least until March 15, 1971. The termination of Mrs. Fojut's employment does not deprive her or the Union of the right to protest her termination, in accordance with the grievance and arbitration provision of the agreement.

If we adopted the Employer's argument as a defense, no employe discharged under the agreement would be entitled to grieve and/or arbitrate such discharge.

The cases relied upon by the Employer in support of its position that it need not proceed to arbitration were issued by the Commission in January of 1947 and April 1950. Said decisions expressed a policy of the Commission existing at the time; however, the Commission subsequently, in January 1962, adopted a new policy in that regard, namely, to the effect that in an unfair labor practice proceeding to enforce agreements to arbitrate, the Commission will order arbitration where the party seeking arbitration, is making claim, which on its face, is covered by the agreement, and the Commission will resolve doubts in favor of coverages. 1/ The Commission has continued to enforce said policy. 2/

With respect to the Employer's contention that under the collective bargaining agreement the Employer is not obligated to grant a leave of absence, and, therefore, there is nothing to arbitrate, the fact remains that the Employer did grant the leave of absence and the primary issue herein requires a determination as to whether the employe was, in fact, terminated for cause. Such matter is for the arbitrator to decide since it involves a dispute concerning the application, interpretation or violation of the agreement. 3/ 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

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1/ Edward Hines Lumber Company (5854-A) 1/62; Seaman-Andwall Corporation (5910) 1/62.

2/ Rodman Industries (9650-A) 11/70.

3/ Dunphy Boat Corporation, 267 Wis. 316; St. Mary's Hospital (8675-A) 1/69.

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. 4/

Given under our hands and seal at the City of Madison, Wisconsin, this 23rd day of February, 1972.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

_____
Zel S. Rice II, Commissioner

_____
Jos. B. Kerkman, Commissioner

4/ The Commission's Order is not intended to overrule the rationale expressed by the Examiner in his Memorandum. We do not believe it necessary in this proceeding to emphasize the federal law in the matter since the instant proceeding was initiated and involved provisions of the Wisconsin Employment Peace Act. The Examiner's reference to the policy expressed in John Wiley and Sons, Inc. v. Livingston, a decision rendered by the U.S. Supreme Court in 1964 (55 LRRM 2769) was expressed by the Wisconsin Supreme Court in the Dunphy Boat Corpoartion case issued approximately ten years earlier.