STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

TEAMSTERS LOCAL 563, Complainant, vs. CITY OF NEENAH, Respondent.	:	Case X No. 15211 MP-108 Decision No. 10716-A

Appearances:
Goldberg, Previant & Uelmen, Attorneys at Law, by Mr. David Loeffler, for the Complainant.
Mr. Duane G. Philis, for the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Teamsters Local 563 having on January 7, 1972 filed a complaint with the Wisconsin Employment Relations Commission wherein it alleged that the City of Neenah had committed prohibited practices within the meaning of the Wisconsin Municipal Employment Relations Act, by refusing to comply with an arbitration award where previously the parties had agreed to accept such award as final and binding upon them; and the Commission having appointed Marvin L. Schurke, a member of the Commission's staff, to act as an 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 February 8, 1972, hearing on said complaint having been held at Neenah, Wisconsin, on March 8, 1972 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, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Teamsters Local 563, hereinafter referred to as the Complainant, is a labor organization having its principal offices at 1366 Appleton Road, Menasha, Wisconsin.

2. That the City of Neenah, hereinafter referred to as the Respondent, is a municipal employer with offices at the City Hall, Neenah, Wisconsin.

3. That at all times pertinent hereto the Respondent has recognized the Complainant as the exclusive collective bargaining representative in a bargaining unit including employes of the Street and Sanitation Department of the City of Neenah; and that the Complainant and Respondent are parties to a collective bargaining agreement effective for the period January 1, 1969 to and including December 31, 1970, which among its several provisions contains the following which are material herein:

"ARTICLE 11 - DISCHARGE OR SUSPENSION

The Employer shall not discharge or suspend any employee without just cause and shall give at least one warning notice of the complaint against such employee to the employee in writing and a copy of same to the Union except that no warning notice need be given to an employe before his discharge if the cause of such discharge is dishonesty, drunkenness, or drinking while on duty, recklessness, endangering others while on duty, or the carrying of unauthorized passengers in city-owned vehicles while on duty. The warning notice as herein provided shall not remain in effect for more than one-hundred and eighty (180) days from date of issuance.

Discharge or suspension of an employee must be by proper written notice, registered mail, return receipt, sent to the last known address of the employee with a copy to the Union. Any employee may request an investigation as to his discharge. Should such investigation prove that an injustice has been done, the employee shall be reinstated and compensated at his usual rate of pay while he has been out of work.

Appeal from discharge must be taken within five (5) days by written notice to the Superintendent of the Department and a meeting held between the Employer and the Union within fifteen (15) days after the appeal is filed. A decision must be reached within five (5) days from the date of this meeting.

The employee may be reinstated under other conditions agreed upon by the Employer and the Union or pursuant to the terms of an arbitration award. Failure to agree shall be cause for the matter to be submitted to arbitration as provided in Article 15 of this Agreement.

. . .

ARTICLE 15 - ARBITRATION

Section A.

Any grievance relative to the interpretation or application of this Agreement, which cannot be adjusted by conciliation between the parties, may be referred by either party hereto, within five (5) days to the Wisconsin Employment Relations Commission for the appointment of an arbitrator from its staff.

Section B.

The arbitrator shall, in so far as possible, within five (5) days of his appointment conduct hearings and receive testimony relating to the grievance and shall submit his findings and decisions. The decision of the arbitrator shall be final and binding on both parties to this Agreement.

Section C.

The expense of the arbitrator shall be divided equally between the parties to this Agreement.

Section D.

It is understood that the arbitrator shall not have the authority to change, alter or modify any of the terms or provisions of this Agreement.

. . ."

4. That Robert Robbins was employed by the Respondent in April, 1967, as a garbage man in the Street and Sanitation Department; that in September 1970 Robbins moved to Menasha, Wisconsin; that on October 27, 1970 the Respondent notified Robbins and the Complainant, by letter, that Robbins' residence outside of the City of Neenah was in violation of the Neenah Code of Ordinances, Section 2.05(12), which states:

"2.05 CONDITIONS OF EMPLOYMENT.

. . .

(12) RESIDENCE OF EMPLOYEES. As a resident of Neenah will normally have more interest is his job and City than will a non-resident, it is expected that all employees of the City of Neenah live in the City. Any exceptions to the following controls require the authorization of the Finance Committee. The following controls shall be practiced:

(a) The City Clerk-Comptroller shall be kept informed of the address of all City employees. Changes in address should be reported promptly.

(b) Employees living outside of the City of Neenah at the time of hire who do not reside in the City limits one year from their date of hire shall be removed from the payroll.

(c) Employees moving out of the City limits shall be removed from the payroll.";

that Robbins was advised in the aforementioned letter that if he wished to remain an employe of the Respondent he would have to establish residency within the City of Neenah by December 31, 1970; that on December 23, 1970 the Respondent notified the Complainant and Robbins that Robbins' employment would be terminated as of December 31, 1970 because of failure or refusal to comply with the aforesaid City ordinances; that Robbins' employment was terminated on December 31, 1970.

5. That the Complainant filed a written grievance alleging that the Respondent violated the collective bargaining agreement by its discharge of Robbins; that, pursuant to Article 15 of the collective bargaining agreement, the parties submitted the grievance to Arbitrator John T. Coughlin for a final and binding decision; and that on December 9, 1971 Arbitrator Coughlin entered an award on said grievance, with accompanying opinion, which award reads as follows:

"AWARD

For the aforementioned reasons, the arbitrator concludes that the City of Neenah violated the Grievant's

right to procedural due process as guaranteed by the 14th Amendment of the United States Constitution and by so doing unjustly discharged the Grievant thereby violating Section 11 of the collective bargaining agreement and that therefore the following affirmative actions be undertaken by the Employer:

(1) Reinstate the Grievant with full back pay and seniority from the time of his discharge to the receipt of this award.

(2) That if the Employer determines that it intends to terminate the Grievant because of his failure to comply with Section 2.05(12)(c) of the City of Neenah ordinances that the following procedures be followed:

(a) A statement of the reasons why the Employer intends to terminate the Grievant be given to said Grievant.

(b) A reasonable time be provided during which the Grievant would have an opportunity to comply with the Employer's request to adhere to the aforementioned ordinance.

(c) Notify the Grievant in writing that a hearing is to be held at which time he may respond to the stated reasons for his pending termination.

(d) A hearing be scheduled concerning the Grievant's termination and the possibility, if any, that he may be exempted from the ordinance's residency requirement.

(e) That such a hearing be in fact held if the Grievant appears at the appointed time and place and that at said hearing the Grievant be given reasonable opportunity to submit evidence concerning his discharge or potential exemption from the ordinance requirement in question.

. . ."

6. That the Respondent refused and continues to refuse to implement the decision and award of Arbitrator Coughlin.

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

CONCLUSIONS OF LAW

1. That the award of Arbitrator John T. Coughlin which was entered on December 9, 1971 on the grievance of Robert Robbins is in excess of the powers conferred on the arbitrator under the terms of the collective bargaining agreement existing between the Complainant and the Respondent.

2. That the City of Neenah, by its refusal to comply with the award of Arbitrator John T. Coughlin within a reasonable time, has not violated, and is not violating, the collective bargaining agreement existing between the Complainant and the Respondent and has not

committed prohibited practices within the meaning of Section 111.70 (3)(a)(5), Wisconsin Statutes.

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

ORDER

IT IS ORDERED that the complaint of Teamsters Local 563 be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin, this 23rd day of May, 1972.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marvin L. Schurke
Marvin L. Schurke, Examiner

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On January 7, 1972 the Union filed a complaint with the Commission alleging that the City of Neenah had committed prohibited practices within the meaning of the Wisconsin Municipal Employment Relations Act, Section 111.70, Wisconsin Statutes, by refusing to accept and implement an arbitration award issued on December 9, 1971 pursuant to final and binding arbitration provisions of a collective bargaining agreement between the parties. On February 1, 1972 the City filed an answer in which it admitted refusal to accept and implement the arbitration award, but alleged, for various reasons, that the City was not obligated to accept or implement the award. Hearing in the matter was held on March 8, 1972 at Neenah, Wisconsin. Both parties filed briefs, the last of which was received on April 24, 1972.

THE POSITIONS OF THE PARTIES

The Union urges that in the instant case the Commission is to function as a judicial forum, enforcing the arbitration award and assessing remedies for non-compliance, "if the dispute is arbitrable, and if the decision is predicated on the evidence and a reasonable construction of the contract". Applying its formulation of the standard of review to the instant case, the Union contends that the discharge of Robbins was arbitrable under specific provisions of the collective bargaining agreement concerning discharge for just cause, that there was evidence before the arbitrator to support his findings of fact, and that the arbitrator made a reasonable interpretation of the agreement, so that the award should be enforced. In the alternative, the Union urges that the Commission could rely on other rationale or constitutional principles to arrive at the same result as the arbitrator did, so that the Commission should enforce the award even if it does not agree with the opinion accompanying the award.

The City filed a "Petition for Review" with the Commission on January 4, 1972, in which it alleged that the Arbitrator had added to the collective bargaining agreement between the parties, contrary to Article 15, Section D of that agreement, by providing for a hearing should the City discharge an employe, and requested the Commission to review the award of the Arbitrator. 1/ The City has maintained the same position in the instant proceeding. In addition, the City contends that the ordinance in question is not incorporated into the collective bargaining agreement, and that the Arbitrator had no authority to "arbitrate the ordinance"; that the grievance before the Arbitrator was not arbitrable; that the Arbitrator made incorrect findings and

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1/ Arbitrator Coughlin was appointed by the Commission. However, the Commission has no procedures for direct review of awards issued by the arbitrators it appoints, and no action was taken on the City's "Petition for Review".

conclusions; that the award was arbitrary and capricious; and that the Arbitrator has interferred with the City's right and authority to legislate concerning the requirement that its employes reside within the City. The City disputes certain of the facts alleged by the Union to have been in evidence before the Arbitrator, and also argues that the Arbitrator failed to give effect to certain procedural provisions of the collective bargaining agreement. On the basis of its various objections, the City contends that it was not obligated to give effect to the award.

THE STANDARD FOR COMMISSION REVIEW OF ARBITRATION AWARDS

The Union filed an extensive brief in which it attempts to formulate the role of the Commission in cases of the nature of the instant case and the standard to be applied by the Commission in determining the enforceability of arbitration awards. The Union bases its argument on the premise that the role of the Commission in cases of this type is the same as the role of the Courts when reviewing decisions of the Commission issued pursuant to Section 111.06 (1)(f) of the Wisconsin Employment Peace Act, which makes violation of a collective bargaining agreement an unfair labor practice. The Union has apparently not considered, and does not cite, numerous decisions of the Commission issued pursuant to the closing clause of Section 111.06(1)(f) and Section 111.06(1)(g), which make it an unfair labor practice to violate an agreement to accept an arbitration award. The cited provisions of the Wisconsin Employment Peace Act are as follows:

"111.06 What are unfair labor practices.

"(1) It shall be an unfair labor practice for an employer individually or in concert with others:

. . .

"(f) To violate the terms of a collective bargaining agreement (including an agreement to accept an arbitration award).

"(g) To refuse or fail to recognize or accept as conclusive of any issue in any controversy as to employment relations the final determination (after appeal, if any) of any tribunal having competent jurisdiction of the same or whose jurisdiction the employer accepted."

Previous to the enactment of Chapter 124, Laws of 1971, on November 11, 1971, the Commission did not have jurisdiction to determine or remedy violations of collective bargaining agreements or refusals to accept arbitration awards as prohibited practices in municipal employment. The instant case is governed by Section 111.70(3)(a)5 of the Municipal Employment Relations Act:

"111.70 MUNICIPAL EMPLOYMENT

. . .

"(3) PROHIBITED PRACTICES AND THEIR PREVENTION

"(a) It is a prohibited practice for a municipal employer individually or in concert with others:

. . .

> "5. To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employes, including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement or to accept the terms of such arbitration award, where previously the parties have agreed to accept such award as final and binding upon them."

With respect to the allegations of the Complainant herein, the type of conduct prohibited by Section 111.70(3)(a)5 is substantially the same as the type of conduct proscribed as unfair by Sections 111.06 (1)(f) and (g). The Commission established a substantial body of decisional law under Sections 111.06(1)(f) and (g) with respect to the enforcement of arbitration awards, and the Examiner has looked to those decisions for guidance as to the standards to be applied in this case. The Examiner therefore agrees with the Union that the role of the Commission in prohibited practice proceedings to enforce arbitration awards does not include a de novo determination of issues before the Arbitrator. However, the Examiner does not agree entirely with the Union as to the standard to be applied in determining the enforceability of an arbitration award.

Section 298.10(1), Wisconsin Statutes, sets out the following as being sufficient grounds to warrant the vacation of an arbitration award by the courts of Wisconsin:

> "(a) Where the award was procured by corruption, fraud or undue means;
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> (b) Where there was evident partiality or corruption on the part of the arbitrators, or either of them;
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> (c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced;
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> (d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made."

In several decisions in the private sector the Commission has expressed its intent to apply the same rules set forth in Section 298.10(1), Wisconsin Statutes, in cases where a party to an agreement to submit grievances to final and binding arbitration is seeking enforcement of an arbitration award issued pursuant to that agreement. 2/ The

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2/ Harker Heating and Sheet Metal, Inc., et al, (6704) 4/64; H. Froebel & Sons, (7804) 11/66; Research Products Corporation, (10223-A) (H.E. Dec.) 12/71; Aff'd WERC (10223-B) 1/72.

Commission has also made specific reference to Chapter 298 of the Wisconsin Statutes in its proposed Chapter ERB 16, rules governing the arbitration of labor disputes pursuant to Section 111.70(4)(c)(2), Wis. Stats. Neither party to the instant dispute has advanced any persuasive argument for the adoption of enforceability standards in municipal employment which are different from the standards utilized in private employment. The City would have the Examiner review the correctness of findings of fact and contract interpretations made by the Arbitrator and refuse enforcement of the award if the Examiner disagreed with the Arbitrator on those points. Such a review would clearly make a sham of the agreement that arbitration was to be final and binding, and would be contrary to well-established state 3/ and federal 4/ labor policy. The "substantial evidence" and "reasonable interpretation" tests proposed by the Union would allow an arbitrator more latitude than the de novo review sought by the City, but would nevertheless require the Examiner to look behind the Award and make his own interpretation of the evidence and the contract to determine whether or not the Arbitrator's interpretation was reasonable. Either standard would give the party refusing to accept an arbitration award "two bites at the apple" on the merits of the issues arbitrated, despite the previous agreement of the parties to make the arbitration proceeding final and binding.

Based on the foregoing, the Examiner has not made any determinations on the issue raised in this proceeding as to whether or not certain facts were in evidence before the Arbitrator. Further, no determination has been made herein as to whether or not economic reasons are a valid reason for moving out of the City of Neenah in the face of an ordinance to the contrary, or whether Mr. Robbins had a satisfactory employment record, all of which was or could have been raised before the Arbitrator. Those issues advanced by the City are beyond the scope of inquiry appropriate in this case. On the other hand, the Examiner has also made no determination herein as to whether a result similar to that reached by the Arbitrator could have been reached on other grounds, since such a determination would involve a relitigation of the merits of the grievance before the Arbitrator rather than a determination of the enforceability of the Award which has been issued.

APPLICATION OF SECTION 298.10 TO THE FACTS OF THIS CASE

There is no allegation or evidence whatever in the present record that the arbitration award in dispute is tainted in any way by corruption, fraud, undue means, partiality or misconduct on the part of the Arbitrator within the meaning of Sections 298.10(1)(a), (b) or (c), Wisconsin Statutes. The allegation made by the City during the hearing in this matter that enforcement of the arbitration award would be unfair to it because of the delay between the date of hearing and the issuance of the award is not supported by any evidence of misconduct on the part of the Arbitrator and is without merit as a basis for refusing enforcement of the award.

3/ Ibid.

4/ Enterprise Wheel and Car Corporation, 363 U.S. 593, 46 LRRM 2423 (1960).

Both of the parties have put the arbitrability of the Robbins grievance in issue in this proceeding, and a finding that the Arbitrator has jurisdiction over the subject matter determined in the award is a condition precedent to enforcement of the award. The collective bargaining agreement between the parties specifically provides that the City should not discharge or suspend any employe without just cause, and that unresolved disputes as to the discharge of any employe shall be submitted to arbitration. Robbins was an employe of the City in the bargaining unit covered by the collective bargaining agreement. It is clear that the City discharged Robbins and that an unresolved dispute remained between the parties concerning that discharge when the matter was submitted to arbitration. Interpreting the language of the collective bargaining agreement for the limited purpose of determining the subject matter jurisidiction of the Arbitrator, the Examiner finds no exceptions to the just cause standard and arbitrability provisions set forth in Article 11 of the agreement. The Arbitrator had jurisdiction over the subject matter of the grievance and there is no merit to the City's claim that the discharge was not arbitrable because it was made under the ordinance rather than under the agreement.

Arbitration is a consensual process through which the parties confer jurisdiction and authority on a neutral third party by agreement. Such a conferral of power differs signficantly from the situation of courts and administrative agencies, which are limited to the powers granted to them by constitution or statute and are further restricted by the doctrine of pre-emption, where applicable. Whereas the parties to a dispute cannot confer powers on a court or administrative agency by agreement where that forum has no power by law, or limit such powers by agreement where the forum has power by law, the parties to an arbitration agreement may confer on the arbitrator as much or as little power as they mutually wish to. In this case, the parties have conferred on the Arbitrator the broad authority which is inherent in the concept of "just cause", but they have also placed language in their agreement setting certain limits on the power of the arbitrators appointed pursuant to that agreement. The Arbitrator was aware of those limitations, as he included them among the provisions of the agreement set out in full in the award and made specific reference to them in his discussion on the question of whether he had the authority to take the ordinance into consideration in the determination of the just cause issue.

The City has objected specifically to the five step procedure for notice and hearing prior to discharge which is set out in the "Award" portion of the disputed arbitration award, contending that the imposition of such a procedure was beyond the power of the Arbitrator because it adds to the provisions of the collective bargaining agreement. There is no such procedure contained in the collective bargaining agreement. The notice and hearing procedure specified by the Arbitrator is directly related to other provisions of the "Award" section of the document and, at the same time, is a prospective order. Several decisions of the Commission under Sections 111.06(1)(f) and (g) establish the principle that an arbitration award issued in one case will be enforced by the Commission as binding on the same parties on a similar grievance under the same contract 5/ and even on a

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5/ Wisconsin Telephone Company (4471) 3/57; affirmed, Milwaukee Co. Cir. Ct. 4/58; Reversed on other grounds, Wis. Sup. Ct. 2/59. Wisconsin Gas Company (H.E. Dec.) (8118-C) 11/67 and (8118-E) 3/68; affirmed, WERC (8118-F) 4/68; Handcraft Company, Inc. (H.E. Dec.) (10300-A) 5/71; affirmed WERC (10300-B) 7/71.

similar grievance under a subsequent contract containing the same controlling language. 6/ Nothing in the Municipal Employment Relations Act indicates that any other policy should be adopted by the Commission in municipal employment and, under the policy established in those decisions, the disputed arbitration award, if enforced in this proceeding, could have prospective application far beyond the Robbins grievance. Looking to the collective bargaining agreement, again for the limited purpose of determining the extent of the powers conferred by the parties on the Arbitrator, the Examiner is persuaded that the City has not agreed to give an arbitrator all of the powers of a state or federal court. There is merit to the City's contention that the Arbitrator has exceeded the powers conferred by the agreement by adding to the collective bargaining agreement. Section 298.10(1)(d) makes such an unauthorized assumption of power a basis for a court to order vacation of an arbitration award and, in the context of this proceeding, is sufficient cause to deny enforcement of the arbitration award and find that the City has not committed a prohibited practice. The notice and hearing procedure set forth by the Arbitrator are not a part of his discussion, which might be ignored as dicta, but are an integral part of the award. To attempt to enforce one or two paragraphs of the Award while denying enforcement of the remaining portion of the Award would do violence to the process at hand by attempting to subdivide the product of the arbitration without regard to the interrelationship of the elements of the Award.

Dated at Madison, Wisconsin, this 23rd day of May, 1972.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marvin L. Schurke
Marvin L. Schurke, Examiner

6/ Pure Milk Association (6584) 12/63; affirmed, Dane Co. Cir. Ct. 10/64; remanded for further hearing 2/65; supplemental order of WERC (6584-B) 12/65.