STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

AFSCME, COUNCIL 24, WISCONSIN STATE EMPLOYEES UNION, AFL-CIO, Complainant, vs. STATE OF WISCONSIN, DEPARTMENT OF ADMINISTRATION, and its EMPLOYMENT RELATIONS SECTION, Respondent.	Case LXV No. 19084 PP(S)-31 Decision No. 13607-B

Appearances:
Lawton & Cates, Attorneys at Law, by Mr. Richard V. Graylow, appearing on behalf of the Complainant.
Mr. Lionel L. Crowley, Attorney at Law, Department of Administration, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

A complaint of unfair labor practices having been filed with the Wisconsin Employment Relations Commission in the above-entitled matter, and the Commission having appointed Thomas L. Yaeger, 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 Statutes; and hearing on said complaint having been held at Madison, Wisconsin on August 4, 1975, before the Examiner; and the Examiner having considered the evidence and 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 Complainant, AFSCME, Council 24, Wisconsin State Employees Union, AFL-CIO, herein Complainant or Union, is a labor organization within the meaning of Section 111.81(9) which represents for collective bargaining purposes certain security and public safety, blue collar and non-building trades, and technical employes of the State of Wisconsin.

2. The State of Wisconsin, herein Respondent, has its principal offices at Madison, Wisconsin.

3. That at all times material herein, Complainant and Respondent were parties to a collective bargaining agreement effective July 1, 1973 covering wages, hours and other conditions of employment of the aforesaid represented employes in the employ of Respondent; and that said collective bargaining agreement contained the following provisions which are relevant herein:

"ARTICLE IV
Grievance Procedure

Section 1 Definition.

A grievance is defined as, and limited to, a written complaint involving an alleged violation of a specific provision of this Agreement. [Emphasis added].

Only one subject matter shall be covered in any one grievance. A grievance shall contain a clear and concise statement of the grievance by indicating the issue involved, the relief sought, the date the incident or violation took place, and the specific section or sections of the Agreement involved. The grievance shall be presented to the designated supervisor involved in quadruplicate (on mutually agreed upon forms furnished by the Employer to the Union and any prospective grievant) and signed and dated by the employe(s) and/or Union representative.

An employe may choose to have his appropriate Union representative represent him at any step of the grievance procedure. An employe may also consult with his appropriate Union representative should any questions arise relating to the filing of a grievance. If an employe brings any grievance to the Employer's attention without first having notified the Union, the Employer representative to whom such grievance is brought shall immediately notify the appropriate Union representative and no further discussion shall be had on the matter until the appropriate Union representative has been given notice and an opportunity to be present. Individual employes or minority groups of employes shall have the right to present grievances in person or through other representatives of their own choosing at any step of the grievance procedure, provided that the appropriate Union representative has been afforded the opportunity to be present at any discussions and that any settlement reached is not inconsistent with the provisions of this Agreement.

All grievances must be presented promptly and no later than fourteen (14) calendar days from the date the grievant first became aware of, or should have become aware of with the exercise of reasonable dilligence, [sic] the cause of such grievance.

Section 2 Step One:

Within seven (7) calendar days of receipt of the written grievance from the employe(s) or his representative(s), the supervisor will schedule a meeting with the employe(s) and his representative(s) to hear the grievance and return a written decision to the employe(s) and his representative(s).

Step Two: If dissatisfied with the supervisor's answer in Step One, to be considered further, the grievance must be appealed to the designated agency representative within seven (7) calendar days from receipt of the answer in Step One. The appropriate agency representative(s) will meet with the employe(s) and his representative(s) and attempt to resolve the grievance. A written answer will be placed on the grievance following the meeting by the appropriate agency representative and returned to the employe(s) and his representative(s) within seven (7) calendar days from receipt of the appeal to the agency representative.

Step Three: If dissatisfied with the Employer's answer in Step Two, to be considered further, the grievance must be appealed to the designee of the appointing authority (i.e., Division Administrator, Bureau Director, or personnel office) within seven (7) calendar days from receipt of the answer in Step Two. Upon receipt of the grievance in Step Three, the department will provide copies of Steps 1 through 3 to the Employment Relations Section of the Department of Administration as soon as possible. The designated agency representative(s) will meet with the employe and his representative and a representative of Council 24 (as Council 24 may elect) to discuss and attempt to resolve the grievance. Following this meeting the written decision of the agency will be

placed on the grievance by the Appointing Authority of the agency and returned to the grievant, his representative, and Council 24 representative within twenty-one (21) calendar days from receipt of the appeal to Step Three.

Step Four: Grievances which have not been settled under the foregoing procedure may be appealed to arbitration by either party within fifteen (15) calendar days from the date of the agency's answer in Step Three, or the grievance will be considered ineligible for appeal to arbitration. If an unresolved grievance is not appealed to arbitration, it shall be considered terminated on the basis of the Third Step answers of the parties without prejudice or precedent in the resolution of future grievances. The issue as stated in the Third Step shall constitute the sole and entire subject matter to be heard by the arbitrator, unless the parties agree to modify the scope of the hearing.

For the purpose of selecting an impartial arbitrator, the parties will meet within seven (7) calendar days from the date of the written appeal of the grievance to arbitration. If the parties are unable to agree on an impartial arbitrator within the seven (7) calendar day period, the parties or party, acting jointly or separately, shall request the Wisconsin Employment Relations Commission to submit a panel of arbitrators for selection of an arbitrator by the parties in accordance with the procedures established by the Wisconsin Employment Relations Commission.

Where two or more grievances are appealed to arbitration, an effort will be made by the parties to agree upon the grievances to be heard by any one arbitrator. On the grievances where agreement is not reached, a separate arbitrator shall be appointed for each grievance. The cost of the arbitrator and expenses of the hearing, including a court reporter if requested by either party, will be shared equally by the parties. Except as provided in Section 9, each of the parties shall bear the cost of their own witnesses, including any lost wages that may be incurred. On grievances where the arbitrability of the subject matter is an issue, a separate arbitrator shall be appointed to determine the question of arbitrability unless the parties agree otherwise. Where the question of arbitrability is not an issue, the arbitrator shall only have authority to determine compliance with the provisions of this Agreement. The arbitrator shall not have jurisdiction or authority to add to, amend, modify, nullify, or ignore in any way the provisions of this Agreement and shall not make any award which in effect would grant the Union or the Employer any matters which were not obtained in the negotiation process. [Emphasis added]

The decision of the arbitrator will be final and binding on both parties of this Agreement.

. . .

Section 6 Exclusive Procedure.

The grievance procedure set out above shall be exclusive and shall replace any other grievance procedure for adjustment of any disputes arising from the application and interpretation of this Agreement."

4. That Albert J. Kwallek was employed by Respondent as a Conservation Warden at all times material herein and included within the bargaining unit covered by the aforesaid collective bargaining agreement; that on October 21, 1974 Kwallek filed the following request with L. P. Voight, Secretary of the Department of Natural Resources of the State of Wisconsin:

"I am requesting approval for personal use of fleet 3439 while on annual leave. I will be going to Northfield Minn. and north central Wis. Rice Lake area as I have in the past. Dates requested are from Dec. 9 1974 to Dec 15 1974.";

and on November 5, 1974, Kwallek received the following reply to his request:

"I am in receipt of your request of October 21, 1974 to use your personally assigned fleet car 3439 while on annual leave. It is my understanding you wish to take this car to Northfield, Minnesota and to north central Wisconsin as you have in the past.

I am sorry that I must reject your request due to the recent rules which have been imposed on the use of assigned cars while on annual leave."

5. That on November 13, 1974, Kwallek filed the following grievance on an Employee Contract Grievance Report form:

"As per agreement in 1963 with Gov. Gaylord Nelson and the then Conservation Comm Chairman on the practice of using the assigned state car such as on vacation was agreed upon. The only restriction being the payment to the state for personal miles driven. I feel that Manuel [sic] Code 9336.4 is invalid and in conflict with the original agrement. [sic]";

that on said grievance form wherein space is provided to identify the alleged article and section of the contract violated, Kwallek inserted "Departmental"; that the parties understand "departmental" to refer to departmental grievances as opposed to contractual grievances and as such are processed to the State Personnel Board as opposed to the arbitration procedures outlined in the agreement for contractual grievances; that Donald Frisch, AFSCME representative, signed said grievance prior to the statement of the grievance being typed on the form; and that said grievance was denied by a Warden Supervisor on November 13, 1974 on the following basis:

"Grievance denied. This is not a grievable item under the contract. If you wish, you may appeal this ruling pursuant to article IV section two, step two within seven calendar days."

6. Kwallek appealed said grievance on November 13, 1974 to Step Two of the grievance procedure after receiving the aforesaid denial of the grievance at Step One; and, that said grievance was denied by the District Director on November 15, 1974 on the following basis:

"Grievance denied. Not in my authority or possibly the Department's authority to grant the relief sought. The grievance and relief sought not a specific grievable item of the contract."

7. That on November 19, 1974, Kwallek appealed said grievance from Step Two to Step Three; that on November 21, 1974, said grievance was denied by Respondent Employment Relations Supervisor, Nelson, on the following basis:

"Grievance denied. This subject is bargainable under the provisions of the Wisconsin Statutes. There is no item in the employment relations agreement which grants you this benefit. Therefore, Manual Code 9336.4 is valid and not in conflict with the current agreement (which supercedes [sic] any other previous agreement which may have been arranged).";

and that shortly after being advised of the Employer's denial of the grievance at Step Three Kwallek appealed said grievance to Step Four (the arbitration step) of the procedure.

8. That no meetings were held on Kwallek's grievance between Respondent and Kwallek and representatives of Complainant at either Steps One, Two or Three of the grievance procedure; that Kwallek appealed the grievance on December 4, 1974 to the State Personnel Board; that on December 13, 1974 Lionel Crowley, attorney for Respondent, advised Frisch concerning the aforesaid Kwallek grievance as follows:

> "The above entitled matter is rejected because clearly as stated on the 3rd step this is a departmental grievance and not a grievance under the Agreement and therefore, the matter is not arbitrable."

9. That on January 21, 1975, William Grenier, Executive Secretary of the State Personnel Board, wrote to Kwallek advising him that in order to perfect his appeal of the aforesaid grievance, he must take certain action:

> "On December 12, 1974, the Secretary of this Board, Nancy Colehour, requested that you furnish copies of the grievance from the first three steps (copy of letter attached). To date we have not received a reply regarding the Board's request.
>
> If you do not wish to pursue your appeal, please advise me within ten days from the date you receive this notice of your intention. If you do not advise this Board within ten days of your interest to pursue this appeal, or if you do not comply with the Board's request for copies of the grievance, the Board will dismiss it.";

that in response to the Grenier letter, Kwallek supplied the State Personnel Board with the requested information; that on February 10, 1975, Crowley advised Frisch as follows:

> "After reviewing the above cited matter, it is clear that the subject being grieved; namely, the personal use of a state automobile is a benefit not granted by any provision of the Agreement between the parties. Therefore, this grievance is clearly not arbitrable and as such we are refusing to process this grievance to arbitration.";

and that since the aforesaid Crowley letter, Respondent has refused to submit the Kwallek grievance or any issue arising out of said grievance to arbitration.

10. That on March 28, 1975, Kwallek received a copy of the following letter which was sent by C. K. Wettengel, Director of the State Personnel Board to Percy Julian, Chairperson of said Board:

> "In a letter which I received March 10, 1975, the State Personnel Board remanded to me a copy of the appeal papers of Mr. Albert Kwallek. Mr. Kwallek was appealing the third-step determination of a grievance which he had filed with the Department of Natural Resources. The material was transmitted to me with the request that I conduct an investigation and submit a report regarding the action of the agency as prescribed in the Statewide Grievance Procedure.
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> A preliminary investigation reveals that Mr. Kwallek contended that the agency's decision to deny him the use of the state automobile assigned to him while he was on vacation is a violation of an agreement which was made between the former Governor Gaylord Nelson and the Conservation Commission Chairman in 1963. The

Appellant further contended that Manual Code 9336.4 containing rules for personal use of assigned cars is invalid because it conflicts with the original agreement referred to above. I have determined that the action grieved by Mr. Kwallek is not a proper subject for the unilateral grievance procedure because the use of assigned automobiles is a working condition and, as such, is an appropriate subject for bargaining. Based upon this fact, I have concluded that the relief sought by Mr. Kwallek should not be pursued via the unilateral grievance procedure.

I therefore recommend that the State Personnel Board take no action in regard to this grievance because to do so would violate the provisions of the entire subsection 111.80, Wis. Stats. I further recommend to the State Personnel Board that based upon the above-cited information the Board deny having jurisdiction in this action. A copy of the investigation report is enclosed for the Board's information."

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

CONCLUSION OF LAW

That the Respondent, State of Wisconsin, has violated, and continues to violate, the terms of the collective bargaining agreement existing between it and the Complainant, Wisconsin State Employees Union, AFSCME, Council 24, AFL-CIO, by refusing to submit to arbitration Albert J. Kwallek's grievance pertaining to personal use of a state-owned vehicle and by refusing to arbitrate said grievance has committed and is committing unfair labor practices within the meaning of Section 111.84(1)(e) of the State Employment Labor Relations Act.

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

ORDER

That the Respondent, State of Wisconsin, and its agents, shall immediately:

1. Cease and desist from refusing to submit the aforesaid grievance and issues related thereto to arbitration.

2. Take the following affirmative action which the Examiner finds will effectuate the policies of Section 111.80, Wisconsin Statutes:

   (a) Comply with the arbitration provisions of the collective bargaining agreement existing between it and the Wisconsin State Employees Union, AFSCME, Council 24, AFL-CIO, with respect to the aforesaid grievance.

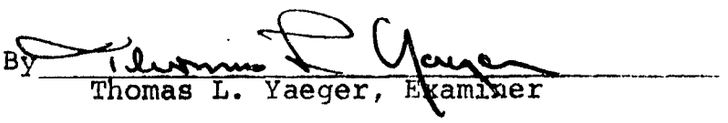
   (b) Notify the Wisconsin State Employees Union, AFSCME, Council 24, AFL-CIO, that it will proceed to arbitration on the issue of substantive arbitrability and if it is determined the grievance is substantively arbitrable then proceed to arbitrate said grievance all in accordance with the procedures established by the collective bargaining agreement; and, inform said labor organization that it is prepared to carry out the procedures set forth in the collective bargaining agreement for selecting an arbitrator.

   (c) Participate with the Wisconsin State Employees Union, AFSCME, Council 24, AFL-CIO, in the arbitration proceedings before the arbitrator(s) to resolve the grievance.

(d) Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days from receipt of a copy of this Order as to what steps it has taken to comply herewith.

Dated at Madison, Wisconsin this 21st day of January, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Thomas L. Yaeger, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

On April 24, 1975, the Complainant filed a complaint with the Commission alleging that the State of Wisconsin had committed unfair labor practices within the meaning of Sections 111.84(1)(a) and (e) of the State Employment Labor Relations Act by refusing to proceed to arbitration on the grievance of Albert Kwallek in violation of Article IV of the collective bargaining agreement between the parties. Said grievance is concerned with the personal use by Kwallek of a state-owned car that had been assigned to him. Respondent, in its answer filed on June 30, 1975, denied that a grievance had been filed pursuant to Article IV of the agreement, admitted it refused to proceed to arbitration, denied it had any obligation to do so, and denied it had committed an unfair labor practice in violation of the SELRA.

The policy of the State Employment Labor Relations Act is to provide "orderly and constructive employment relations for state employes and the efficient administration of state government". To this end, the SELRA regulates activities leading to a collective bargaining relationship as well as certain activities of the parties after that relationship has been established. It is the latter activities which the complaint herein encompasses.

In order to implement the aforesaid policy, Section 111.84(1)(e) of the Act prohibits the employer from "violating any collective bargaining agreement, . . . including an agreement to arbitrate . . ." Also, in furtherance of said policy the SELRA, at Section 111.86, provides:

> "111.86 Arbitration in general. Parties to the dispute pertaining to the interpretation of a collective bargaining agreement may agree in writing to have the commission or any other appointing agency serve as arbitrator or may designate any other competent, impartial and disinterested persons to so serve. Such arbitration proceedings shall be governed by ch. 298."

Thus, it is clearly the policy of this State to encourage the use of arbitration as a means to settle disputes arising in state government between management and labor.

The Commission, in administering the Wisconsin Employment Peace Act and the Municipal Employment Relations Act, both of which contain provisions similar to Sections 111.80, 111.84(1)(e) and 111.86 of the SELRA, has developed a policy of dealing with questions of substantive and procedural arbitrability consistent with the federal substantive law as delineated in the Trilogy 1/cases, and John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 55 LRRM 2769 (1964). The Commission, in actions before it seeking enforcement of arbitration provisions contained in collective bargaining agreements, has said it will give such clauses their fullest meaning and restrict itself to a determination of whether the party seeking arbitration makes a claim

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1/ Steelworkers v. American Mfg. Co., 353 U.S. 564 (1960); Steelworkers v. Warrior & Gulf Navigation Co., 353 U.S. 574 (1960); Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

which on its face is governed by the contract. 2/ Furthermore, the Commission has taken the position that it will not make any determination which the language of the contract reserves to the arbitrator, 3/ and this includes procedural defenses to arbitrability. 4/

The Respondent contends that the mere allegation that a provision of the agreement has been violated is not sufficient to establish that the dispute is arbitrable. Furthermore, Respondent alleges that a review of the agreement reveals same to be silent on the issue of personal use of state-owned vehicles and, thus, the grievance fails to state a claim which is arbitrable on its face. On the other hand, Complainant argues that Article IV, Section 6 of the agreement requires that grievances giving rise to issues of subject matter arbitrability be submitted to a separate arbitrator appointed solely to deal with whether the grievance is substantively arbitrable.

The Examiner agrees with Complainant's contention that the contract provides for the appointment of an additional arbitrator, one who will not be called upon to decide the merits of the grievance, but only to determine whether the grievance presents a claim which on its face is arbitrable. Inasmuch as substantive arbitrability issues are reserved for an arbitrator the undersigned is persuaded that it would be inappropriate to rule on Respondent's defense that the grievance does not present a claim which on its face is arbitrable. The language of the contract clearly obligates the Employer to submit said defense to an arbitrator.

The Examiner also believes that an injustice would result were he not to comment further on Respondent's defense that the grievance is not substantively arbitrable. The undersigned perceives this as a specious argument. There is no doubt but that Respondent understands its defense as one involving subject matter jurisdiction or arbitrability. Thus, notwithstanding that Respondent may possess a good faith doubt as to the arbitrability of the instant grievance it is bound by a contractual procedure it agreed to for the resolution of such matters. Its refusal herein to participate in that procedure, short of an order to do so from this Commission, can only be viewed as an attempt to delay a final decision on the grievance and obfuscate the contractual procedures. At a time when expedious review of grievances is becoming more and more difficult to obtain, this type of conduct is reprehensible.

Respondent's defense that Complainant did not proceed in accordance with the grievance procedure goes to procedural arbitrability. As such, the defense is reserved to the arbitrator for determination and will not be dealt with by the Commission. 5/

Thus, because Respondent's refusal to arbitrate the Kwallek grievance is based on both substantive and procedural grounds, and inasmuch as the contract has an established procedure whereby an arbitrator is called

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2/ Cutler-Hammer, Inc., (1476) 11/47; Dunphy Boat Corp., (3588) 10/53; Seaman-Andwall Corp., (5910) 1/62; Oostburg Jt. School Dist., (11196-A) 10/72; Monona Grove Jt. School Dist., (11614-A) 7/73; Weyerhauser Jt. School Dist., (12984) 8/74.

3/ Seaman-Andwall, Corp., supra.

4/ Dunphy Boat Corp., supra; John Wiley & Sons, Inc. v. Livingston, supra.

5/ See footnote four, supra.

upon to decide the substantive arbitrability issues the Examiner has found that Respondent violated Section 111.84(1)(e) of the State Employment Labor Relations Act.

Dated at Madison, Wisconsin this 21st day of January, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Thomas L. Yaeger, Examiner