STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

AFSCME, COUNCIL 24, WISCONSIN STATE EMPLOYEES UNION, AFL-CIO, Complainant,	:	Case I No. 19085 PP(S)-32 Decision No. 13608-B
vs.	:	
STATE OF WISCONSIN, DEPARTMENT OF ADMINISTRATION, and its EMPLOYMENT RELATIONS SECTION, Respondent.	:	

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, Conclusion 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 the 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. That 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) claendar 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 Vincent Bianchi was employed by Respondent at the University of LaCrosse either as Patrolman or Security Officer (Lead) at all times

material herein and included within the bargaining unit to which the aforesaid collective bargaining agreement pertains; that prior to June 13, 1974 Bianchi filed the following grievance:

> "Appendix A. Reclassification and Re-allocation: Upon reclassification or re-allocation, the employe will receive a one step increase or an amount necessary to reach the new job rate for the class, whichever is greater.
>
> Upon being re-allocated from Patrolman 5-07 to Security Officer (Lead) 5-08, our pay was only increased by an amount necessary to reach the new job rate instead of by one step which is greater in accordance with the above quoted paragraph of the agreement dated July 1, 1973.
>
> Request my pay be increased by a one step increase in accordance with Appendix A, Reclassification and Re-allocation";

and, that prior to June 13, 1974 said grievance was denied by Respondent.

5. That on June 13, 1974 Bianchi appealed said grievance to Step Two of the grievance procedure; and, that said grievance was denied by Respondent on the following basis:

> "Grievance denied at the second step for the following reasons:
>
> 1. Appendixes to the agreement are for informational purposes only and they are non-bargainable.
>
> 2. Under Article 3, Management's Rights, Page 17 starting in the middle of the third paragraph from the bottom. 'Additionally it is recognized by parties that the employer is prohibited from bargaining on policies, practices, and procedures of the Civil Service Merit System relating to: (number 2) the job evaluations system specifically including position classification, position qualification standards, establishment and abolition of classifications, assignment and reassignment of classifications to salary ranges, allocation and reallocation of positions to classifications, and the determination of an incumbents status resulting from position reallocation.'
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> 3. Under Pers 5.03 (2)(b) 1a of the Wisconsin Administrative Code states as follows: Pay adjustments for regraded employees whose positions are reallocated pursuant to the Wisconsin Administrative Code, Sections Pers 3.05 (2) (a-f) shall be: (1) to PSICM (permanent status in class minimum) which is one step above minimum if the incumbent has permanent status in the class and is below this rate.
>
> In reference to your reallocation from Patrolman to Security Lead your salary was increased by less than one step because salary prior to reallocations was less than one step below the PSICM for the Security Lead classification."

6. That on June 28, 1974, Bianchi appealed his grievance to Step Three of the grievance procedure; and that on July 12, 1974, Thomas Moran, Associate Director for Personnel and Employee Relations, denied said grievance on the following basis:

"Grievance denied.

Appendix A is contained in the agreement for informational purposes only. The subject matter of the paragraph entitled, 'Reclassification and Re-allocation' is a non-bargainable subject as defined under Article III, 'Management Rights.'

The reference to a one-step increase upon 're-allocation' is an error and was not agreed to by the Employer either during the negotiating process or when the galley proofs of the negotiated agreement were approved by the Employer."

7. That on July 16, 1974, Donald Frisch, Complainant business representative, appealed Bianchi's grievance to arbitration:

"The appeal of Vincent Bianchi, relating to Employee Benefits, having been duly processed through Step No. Three (3) of the Grievance Procedure contained in Article IV of the Agreement between the parties hereto without being resolved to the satisfaction of the Union and Grievant herein, is herewith appealed to arbitration.

It is the position of the Union and Grievant that Management by its actions has violated Article(s) XIII and Appendix A of the Agreement between the parties hereto.

Said Union and Grievant request that the Employer be found in contractual violation as well as the granting of such further and other relief as the Arbitrator may deem just and proper.

Dated at Mount Horeb, Wisconsin, this 16th day of July, 1974.

AFSCME COUNCIL 24, WSEU AFL-CIO

By: Donald Frisch /s/";

that the aforesaid reference to Article XIII in the notice of appeal is a typographical error and should read Article XII; that said appeal was submitted to Gene Vernon, Respondent attorney in Employment Relations, that Vernon, on July 24, 1974, advised Frisch of the Respondent's refusal to arbitrate said grievance for the following reasons:

"Dear Mr. Frisch:

After reviewing the above cited matter, it is clear that the subject being grieved; namely, the pay increase upon a reclassification or reallocation is a nonbargainable item which is clearly set forth in both the law and Article III of this Agreement. Appendix A was put into the Agreement for informational purposes only and is clearly marked as such.

Therefore, we agree with the University's answer; namely, that this grievance is not arbitrable and as such we are refusing to process this grievance to arbitration.";

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

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 Vincent Bianchi's grievance pertaining to his alleged reallocation from Patrolman to Security Officer (Lead) 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 30th day of March, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Thomas L. Yaeger
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 Vincent Bianchi in violation of Article IV of the collective bargaining agreement between the parties. Said grievance is concerned with Bianchi's alleged reallocation from Patrolman to Security Officer (Lead). 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, the Municipal Employment Relations Act, and the State Employment Labor Relations Act, 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 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

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

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; State of Wisconsin (13607-B, C) 2/76.

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. Respondent also claims that the issue of reallocation that is involved in the Bianchi grievance is a non-bargainable subject under the SELRA and is so stated in Article III of the parties contract; and, therefore, any grievance challenging a reallocation does not state a claim which is "arbitrable on its face". Lastly, Respondent argues that it never agreed to the inclusion of the language of Appendix A in the parties agreement, relied upon by Bianchi in support of his grievance. On the other hand, Complainant argues that Bianchi's grievance does state a claim that is arbitrable on its face; and, furthermore, that the Respondent's defense that the subject of reallocation is non-bargainable is without merit, whereas the sufficiency of the other defense raised by Respondent are reserved for the arbitrator.

A review of the parties collective bargaining agreement reveals that it provides for the appointment of a separate arbitrator, one who will not be called upon to decide the merits of the grievance, to hear and determine issues surrounding the arbitrability of the subject matter of the grievance i.e., decide whether the grievance states 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. This conclusion applies with respect to the question of arbitrability of an issue involving an alleged illegal or non-bargainable subject as well as whether there was an agreement between the parties to include within their contract the disputed language appearing in Appendix A thereof.

Thus, because Respondent's refusal to arbitrate is based on its belief that Bianchi's grievance is not substantively arbitrable and because the parties collective bargaining agreement has an established procedure for resolving such issues, the undersigned is pursuaded that said refusal to arbitrate is a violation of Section 111.84(1)(e) of the State Employment Relations Act.

Dated at Madison, Wisconsin this 30th day of March, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Thomas L. Yaeger
Thomas L. Yaeger, Examiner

3/ Seaman-Andwall, Corp., supra.

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