

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 80 AFFILIATED WITH MILWAUKEE	:	
DISTRICT COUNCIL 48, AFSCME, AFL-CIO,	:	
	:	
Complainant,	:	
	:	Case XIX
vs.	:	No. 20730 MP-651
	:	Decision No. 14856-A
THE BOARD OF EDUCATION OF JOINT	:	
SCHOOL DISTRICT NO. 1 (WEST ALLIS,	:	
WEST MILWAUKEE, ET. AL.),	:	
	:	
Respondent.	:	
	:	

Appearances:

Earl L. Gregory, Staff Representative, for Complainant.
Foley & Lardner, Attorneys at Law, by Carolyn C. Burrell,
for Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Local 80 affiliated with Milwaukee District Council 48, AFSCME, AFL-CIO, herein referred to as Complainant, having filed a complaint on August 10, 1976 with the Wisconsin Employment Relations Commission, alleging that Board of Education of Joint School District No. 1 (West Allis, West Milwaukee, et. al.), herein referred to as Respondent, has committed prohibited practices within the meaning of Section 111.70 (3) of the Municipal Employment Relations Act; and the Commission having appointed Stanley H. Michelstetter II, a member of its staff, to act as examiner and to make and issue findings of fact, conclusions of law and orders as provided in Section 111.07 (5), Wisconsin Statutes; and hearing on said complaint having been held at Milwaukee, Wisconsin on September 15, 1976 before the examiner; and the examiner having considered the evidence and arguments of counsel makes and files the following findings of fact, conclusion of law and order.

FINDINGS OF FACT

1. Whereas Complainant is a labor organization with offices at 3427 West St. Paul Avenue, Milwaukee, Wisconsin.

2. Whereas Respondent is a municipal employer operating a school system with offices at 9333 West Lincoln Avenue, West Allis, Wisconsin.

3. Whereas at all relevant times Respondent has recognized Complainant as the representative of certain custodial and maintenance employes, truck drivers, storekeepers and cleaners; and that in that regard Complainant and Respondent have been party to a collective bargaining agreement, in effect at all relevant times, which provides in part as follows:

" . . .

ARTICLE V - Management Rights.

A. The Union recognizes the prerogatives of the Board to operate and manage its affairs in all respects in accordance with its responsibility, and the powers or authority which the Board has not specifically abridged, delegated or modified by other provisions of this Agreement are retained by the Board. Such powers and authority, in general, include but are not limited to, the following:

. . .

5. To suspend, demote or discharge employees for cause.

. . .

ARTICLE VII - Appointment and Promotion.

A. All employees except cleaners shall be under Civil Service and are subject to the general ordinances of the City of West Allis relating to the classified service and to all the rules and regulations of the Civil Service Commission. Appointments are made by the Board.

. . .

D. An employee is required to serve a probationary period of six (6) months from date of appointment to any position, provided that such period shall not include any time put in as a temporary employee. Such probationary period may be extended by the Civil Service Commission to one (1) year for cause.

ARTICLE VIII - Grievance Procedure.

A. If an employee has a grievance he shall first present the grievance orally to his immediate supervisor, either alone or accompanied by a Union representative. The supervisor will reach a decision and communicate it orally to the employee before the end of the next working day.

B. If the grievance is not settled at Step A, it shall be reduced to writing by the employee or his Union representative and presented to the Superintendent of Schools. Within two (2) working days the Superintendent of Schools shall furnish the employee and the Union with a written answer to the grievance.

C. If the grievance is not settled at Step B, the employee or the Union may appeal in writing to the Civil Service Commission within fifteen (15) working days. The

Commission shall schedule the matter for a hearing within ten (10) working days following the filing of the appeal. The failure of the employee or the Union to provide proper and timely notice shall be deemed a waiver of its right to a hearing. The Commission shall render a decision in writing within five (5) working days after hearing to the Superintendent, the employee and the Union.

ARTICLE IX - Disciplinary Action.

The procedure set forth in s. 2.47 of the Revised Municipal Code of the City of West Allis is applicable to any employee who has acted in such a manner as to show such employee to be incompetent or to have merited suspension, demotion or dismissal.

ARTICLE X - Arbitration.

A. Who May Invoke.

The Board or the Union may invoke the provisions of this section in the manner and at the times hereinafter set forth.

B. When Applicable.

The procedure hereinafter set forth shall be available as an alternative to the Board or the Union in cases involving suspension, demotion, discharge or discipline under Civil Service rules; in cases involving grievances at Step C and in cases involving the application, meaning or interpretation of this Agreement. Proceedings may be commenced by either party upon notice to the other in writing. In cases involving suspension, demotion, discharge or discipline such notice shall be given within ten (10) working days after the employee has been provided with a copy of the charges; and in cases arising at Step C of the grievance procedure such notice shall be given within fifteen (15) working days after the department head has rendered his decision. The failure of a party to provide a proper and timely notice shall be deemed a waiver of its right under this section. However, any time limit prescribed by this subsection may be extended by the mutual written consent of the parties.

C. Selection of Arbitrator.

Within seven (7) working days after receipt of the written notice, the Board and the Union shall meet to select an arbitrator. If the parties fail to select an arbitrator, the Wisconsin Employment Relations Board may be requested by either or both parties to provide a panel of five (5) arbitrators. Both the Board and the Union shall have the right to delete two (2) names from the panel each in alternate strikes with the remaining person becoming the arbitrator.

D. Hearings.

The arbitrator so selected shall hold a hearing at a time and place convenient to the parties, and he shall take such evidence as in his judgment is appropriate to the disposition of the dispute. The arbitrator shall have the authority to determine whether or not the dispute is arbitrable and once so determined he shall proceed to determine the merits of the dispute.

E. Cost of Arbitration.

Expenses for the arbitrator's services and the proceedings shall be borne equally by the Board and the Union. However, such parties shall be responsible for compensating their own representatives and witnesses. If either party desires a verbatim record of the proceedings, it may cause such a record to be made providing such party pays for the record. If both parties desire a verbatim record, such cost shall be borne equally.

F. Decision of Arbitrator.

The decision of the arbitrator shall be final and binding on the parties, and the arbitrator shall be requested to issue his decision within thirty (30) days after the conclusion of testimony and argument. The arbitrator in arriving at his decision shall be guided by the substantive content of applicable provisions of the Revised Municipal Code of the City of West Allis, the rules of the Civil Service Commission and resolutions of the Board.

G. Authority of Arbitrator.

In arriving at a determination of any issue the arbitrator shall neither add to, detract from, nor modify the language of the Agreement between the Board and the Union.

. . . "

4. Whereas at all relevant times Respondent employed Fred L. Wegehaupt as a Custodian I, a position in the bargaining unit described above, until it discharged him November 28, 1975.

5. Whereas by letter dated June 7, 1976 Fred L. Wegehaupt requested Respondent to reinstate him as a Custodian I on the basis that his probationary period had not been properly extended and his employment had been improperly terminated.

6. Whereas by letter dated June 24, 1976, a copy of which was received by Complainant, Respondent answered the aforementioned request as follows:

"Your letter of June 7, 1976, addressed to Mr. Aleckson, has been referred by Mr. Aleckson to me.

Mr. Aleckson states that he conferred yesterday with representatives of Local 80 of AFSCME and that the conversation has caused him to conclude your letter is to be considered a Step B grievance under Article VIII of the collective bargaining agreement between the Board and the Union. As such, it is a matter with which I am required to deal as

was properly extended under Article VII, D, of the collective bargaining agreement, and/or (b) in August of 1975 you in effect ratified the probationary extension. On either basis your termination of employment was proper.

If you agree with my disposition of the case I will appreciate your advising me at your earliest convenience. If I have not heard from you by 4:00 P.M. on Monday, June 28, 1976, I will assume that you wish to process the grievance further. In that event I will recommend to the Board of Education that it should invoke the arbitration alternative set forth in Article X, B, of the collective bargaining agreement. My recommendation will be presented at the meeting of the Board to be held in the evening of June 28, 1976, and if it is adopted I anticipate that official notice to arbitrate will be sent promptly thereafter to the Union, with a copy to you."

7. Whereas by letter dated July 1, 1976 Respondent notified Complainant that it had voted to invoke arbitration as the means of resolving the Wegehaupt grievance.

8. Whereas by letter dated July 6, 1976 Complainant responded to the letter specified in Finding of Fact 5 by appealing the decision therein indicating its intention to request a Civil Service Commission of the City of West Allis, herein Civil Service Commission, hearing and responding to the letter specified in Finding of Fact 6 by stating:

" . . .

In regards to the second letter dated July 1, 1976, Local 80 calls to your attention the second paragraph of Article X, Section B, which requires the School Board to notify the Union in writing within ten (10) working days after the employee has received notice of his discharge, that they intend to proceed to arbitration. It also states if you fail to comply it is deemed a waiver of your right under this section.

. . . "

9. Whereas by letter dated July 9, 1976 a copy of which was received by Complainant, Respondent requested the Wisconsin Employment Relations Commission to provide it with a panel of five arbitrators from which the parties could select an individual to arbitrate a matter in dispute.

10. Whereas by letter dated July 9, 1976 and received by the Civil Service Commission, Respondent acknowledged Complainant had previously by letter dated July 6, 1976, requested the Civil Service Commission to schedule a hearing with respect to the Wegehaupt grievance and objected thereto on the basis that the matter should be submitted to arbitration including the question of the appropriate forum to resolve the matter.

11. Whereas the Civil Service Commission addressed a letter dated July 15, 1976 to Complainant's representative Gregory with copies to Respondent's representatives, the body of which states:

"The Civil Service Commission, at a special meeting on July 14, 1976, considered your request of July 6, 1976 for a hearing on the discharge of Fred Wegehaupt by the School Board which was effective November 28, 1975. The Commission has also received a letter dated July 9, 1976 from the School Board which advises that it had already invoked the arbitration procedure on July 1, 1976 which is set forth in Article X of the current agreement with Local 80. We could find no applicable language in the agreement which would allow the Commission to grant the requested hearing after one of the parties had already invoked outside arbitration."

12. Whereas by letter dated July 13, 1976 Complainant notified the Wisconsin Employment Relations Commission that it objected to arbitration of the instant matter and would not participate therein.

13. Whereas by letter dated July 15, 1976, the Wisconsin Employment Relations Commission responded to the letter specified in Finding of Fact 10, and named a panel of five arbitrators; that Respondent refuses, and continues to refuse, to submit said matter to the Civil Service Commission.

On the basis of the above and foregoing Findings of Fact, the examiner makes and files, the following

CONCLUSION OF LAW

That since there exists a dispute between Respondent the Board of Education of Joint School District No. 1 (West Allis, West Milwaukee, et. al.) and Complainant Local 80 affiliated with Milwaukee District Council 48, AFSCME, AFL-CIO involving the interpretation of the grievance and arbitration provisions of their agreement as to whether Respondent properly elected to have the grievance of Fred L. Wegehaupt submitted to arbitration rather than processed before the Civil Service Commission which dispute is properly resolvable in arbitration under Article X thereof, the examiner refuses to assert the jurisdiction of the Wisconsin Employment Relations Commission to determine whether Respondent is committing a prohibited practice within the meaning of Section 111.70 (3) (a) 5 of the Municipal Employment Relations Act by refusing to process said grievance before the Civil Service Commission of the City of West Allis, until said procedural dispute is resolved.

On the basis of the above and foregoing Findings of Fact and Conclusion of Law, the examiner makes and files the following

ORDER

IT IS ORDERED, that the complaint filed in the instant matter be, and the same hereby is, dismissed.

Dated at Milwaukee, Wisconsin, this 3rd day of November 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stanley H. Michelstetter II
Stanley H. Michelstetter II
Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT
CONCLUSION OF LAW AND ORDER

Complainant seeks an order to compel Respondent to process Wegehaupt's grievance before the Civil Service Commission. While it admits the existence of mutually exclusive provisions for final and binding resolution of grievances by either the Civil Service Commission or arbitration, it asserts only the grieving party may elect arbitration. Alternatively, it denies Respondent's attempted election was timely under one of the time limits specified therefor.^{1/}

Respondent alleges it has the right to elect arbitration and has done so. It therefore denies any obligation to process this grievance before the Civil Service Commission. It asserts issues concerning timeliness of its election, and the failure to follow the correct procedure should be deferred to arbitration.

DISCUSSION

In actions to enforce agreements to "arbitrate" the Commission confines its function to determining the existence of an agreement to arbitrate^{2/} and whether the subject matter of the dispute is arguably subject to arbitration.^{3/} Complainant seeks to enforce one of two mutually exclusive procedures for "arbitration." In addition to the subject matter of the Wegehaupt grievance, the parties are in dispute as to:

1. Whether Respondent may elect to have an employe-filed grievance processed by arbitration rather than the Civil Service Commission.^{4/}

^{1/} To the extent paragraph 5 of the complaint alleges Respondent violated the agreement by merely asserting its position with respect to its asserted right to elect arbitration at the time it did, the examiner finds no provision limiting its right to assert its position in this forum or before an arbitrator. Paragraph 5 to this extent is therefore dismissed.

^{2/} Tiran Industrial Towels, Inc. (7430) 1/66.

^{3/} See case noted at 442.2.2 of digest of decisions under Wisconsin Employment Peace Act.

^{4/} ~~Complainant does not deny a general duty to arbitrate with~~
~~is limited to an allegation that Respondent may not, under these~~

2. If so, whether one of the time limits specified for the election applies to the instant grievance.
3. If so, whether Respondent complied therewith or should be excused from compliance therewith.^{5/}

The aforementioned issues constitute disputes concerning the interpretation of the parties' grievance procedure, Article VIII, and arbitration procedure, Article X. Both arbitration and the Civil Service Commission arguably have subject matter jurisdiction over said disputes. Were the commission to defer determination of the above-numbered disputes without determining to which procedure, the parties might still continue to disagree as to which is the appropriate forum for resolution of those issues. Each might then continue to refuse determination by the other's proposed forum.

The instant matter thus represents a breakdown of the parties' procedures for resolution of disputes. In such situations the commission has intervened in the merits of procedural matters.^{6/} The examiner is satisfied that the commission ought to intercede in this matter only to the limited extent of determining which method of final and binding resolution is appropriate for resolving the above-numbered procedural issues. Such limited approach accords with the underlying policy for not intervening in procedural matters.^{7/}

The parties concede that if properly selected, arbitration under Article X takes precedence over Civil Service Commission proceedings. Secondly, Article X specifically provides in relevant part:

"The arbitrator shall have the authority to determine whether or not the dispute is arbitrable and once so determined he shall proceed to determine the merits of the dispute."

The foregoing permits the arbitrator to determine procedural, as well as substantive arbitrability. No comparable provision exists for the Civil Service Commission. The examiner is satisfied that

^{5/} Respondent alleges the July 15 letter cited in Finding of Fact 11 from the Civil Service Commission is an award on the procedural matters. The letter itself implies no hearing was held pursuant to Article VIII, Section C to afford the parties a full opportunity to be heard. Further the status of said letter as an award has not been fully litigated in these proceedings.

^{6/} Milwaukee Board of School Directors (12028-A) 5/74, (12028-B) 9/75.

^{7/} John Wiley & Sons, Inc. vs. Livingston, 376 U.S. 543, 84 S. Ct. 909, 55 L.R.R.M. 2769, @ pp. 2775-6.

since arbitration is the preferred mechanism for resolution of disputes, including disputes concerning procedural arbitrability, the above-numbered procedural matters should be deferred to arbitration. Accordingly, the examiner has dismissed the instant Complaint for the purpose of deferral to arbitration.^{8/}

Dated at Milwaukee, Wisconsin, this 3rd day of November, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stanley H. Michelstetter II
Stanley H. Michelstetter II
Examiner

^{8/} Determination of the proper order to consider Complainant's procedural arguments, Respondent's procedural arguments and the merits is deferred to Article X arbitration.