

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RONALD F. PIENING,	:	
	:	
Complainant,	:	
	:	
vs.	:	Case XCII
	:	No. 20953 PP(S)-39
DEPARTMENT OF NATURAL RESOURCES FOR	:	Decision No. 15035-A
THE STATE OF WISCONSIN,	:	
	:	
Respondent.	:	
	:	

Appearances:

Jenswold, Studt, Hanson, Clark and Kaufman, Attorneys at Law,
 by Mr. Bruce K. Kaufman, appearing on behalf of Complainant.
 Mr. Robert C. Stone, Attorney at Law, Bureau of Collective
 Bargaining, Department of Administration, appearing on
 behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Ronald F. Piening, hereinafter Complainant, having filed a complaint of unfair labor practices on October 28, 1976 with the Wisconsin Employment Relations Commission, hereinafter the Commission, alleging that the Department of Natural Resources of the State of Wisconsin, hereinafter the Respondent, committed an unfair labor practice; and the Commission having appointed Sherwood Malamud, a member of its staff to act as Examiner to make and issue Findings of Fact, Conclusions of Law and Orders pursuant to Section 111.07(5) of the Wisconsin Employment Peace Act, as made applicable to state employment by Section 111.84(4) of the State Employment Labor Relations Act (SELRA); and hearing on said complaint having been held at Madison, Wisconsin on November 23, 1976; and the parties having submitted briefs by January 13, 1977; and the Examiner being fully advised in the premises makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That Ronald F. Piening, Complainant herein, is an individual and he is employed by the Department of Natural Resources of the State of Wisconsin as a Natural Resources Specialist IV, and that said position is included in the professional science bargaining unit represented by the Wisconsin Association of Science Professionals.
2. That the Department of Natural Resources is an agency of the State of Wisconsin with its principal offices located at Madison, Wisconsin, and it is an Employer as that term is defined in Section 111.81 (16) of SELRA.
3. That at all times material herein, Respondent and the Wisconsin Association of Science Professionals were parties to a collective bargaining agreement effective from December 14, 1975 through June 30, 1977, covering wages, hours and other conditions of employment of employes in the employ of Respondent in the Science Professional unit; and that said collective bargaining agreement contained the following provisions relevant herein:

"ARTICLE IV

Grievance Procedure

Section 1 General

A grievance is defined as, and limited to, a written complaint involving an alleged violation of a specific provision of this Agreement. However, nothing in this Article will preclude an employe from verbally discussing any problem with his supervisor.

. . .

Section 2 Procedure

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 on the grievance form to the employe(s) and his representative(s).

Step Two:

If dissatisfied with the supervisor's decision 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 decision 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 decision will be placed on the grievance form 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 decision in Step Two, to be considered further, the grievance must be appealed to the designee of the Employer (i.e., Division Administrator, Bureau Director, or personnel office) within seven (7) calendar days from receipt of the decision in Step Two. Upon receipt of the grievance in Step Three, the department will provide copies of Steps One through Three to the Bureau of Collective Bargaining of the Department of Administration as soon as possible. The designated agency representative(s) will meet with the employe(s) and his representative(s) to discuss and attempt to resolve the grievance. Following this meeting the written decision of the agency will be placed on the grievance form by the Employer or his designee and returned to the grievant(s) and his representative(s) within twenty-one (21) calendar days from the 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 thirty (30) calendar days from the date of the agency's decision in Step Three, except grievances involving discharge or claims filed under ss. 16.31 must be appealed within fifteen

(15) calendar days, 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.

. . .

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 Association or the Employer any matters which were not obtained in the negotiation process.

. . .

Section 3 Time Limits

Grievances not appealed within the designated time limits in any step of the grievance procedure will be considered as having been adjudicated on the basis of the last preceding Employer answer. Grievances not answered by the Employer within the designated time limits in any step of the grievance procedure may be appealed to the next step within seven (7) calendar days of the expiration of the designated time limits. The parties may, however, mutually agree in writing to extend the time limits in any step of the grievance procedure.

. . .

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.

. . .

Section 11 Discipline

The parties recognize the authority of the Employer to suspend, demote, discharge or take other appropriate disciplinary action against employes for just cause. An employe who alleges that such action was not based on just cause, may appeal a demotion, suspension, discharge or written reprimand taken by the Employer beginning with the Third Step of the grievance procedure except that written reprimands shall begin with the First Step of the grievance procedure.

. . ."

4. On October 8, 1976, Complainant filed a grievance on an "Employee Contract Grievance Report" form, which is the form designated for the purpose of filing grievances, which in material part stated as follows:

"The DNR is downgrading and advertising to fill the position I am presently seeking to return to in the Burlington office in a deliberate attempt to defeat my rights and make my prior grievance moot. I believe and am informed that once this position is filled for a brief period of time it will be upgraded to its prior level, thus totally circumventing the correct civil service procedure and my rights under it."

Complainant filed said grievance with Mr. Glenn L. Nelson, the Deputy Director of the Bureau of Personnel of the Department of Natural Resources, who is the Employer's designated representative at Step Three of the grievance procedure.

5. On October 18, 1976, Nelson directed the following letter to Complainant's attention, and said letter stated in material part that:

"The attached grievance form is being returned to you since it was not filed through proper procedure.

If the complaint were a proper grievance under the current employment relations agreement, it would be proper to file such complaint at Step 1 of the agreement procedure. Since the description on the complaint does not even appear to relate to a bargainable issue, the contract grievance procedure would appear to be improper.

In case my interpretation is considered to be in error, please contact me as soon as possible so we can assist you in proceeding [sic] through the proper channels with your complaint."

6. On October 22, 1976, Thomas Kissack, a law clerk for Complainant's attorney, Mr. Bruce Kaufman, attempted to serve the grievance described in Finding of Fact No. 4 on Nelson; however, Nelson refused service.

7. Complainant did not request Respondent to proceed to arbitration over any procedural issue which developed in the processing of Complainant's grievance or over the merits of the dispute.

8. That the grievance described in Finding of Fact No. 4 states a claim which on its face is covered by the collective bargaining agreement.

Based on the above Findings of Fact, the Examiner makes the following

CONCLUSION OF LAW

That since Piening's grievance states a claim which on its face is covered by the collective bargaining agreement and since Complainant Ronald F. Piening failed to exhaust the contractual grievance procedure, therefore, the Examiner will not exercise the jurisdiction of the Wisconsin Employment Relations Commission to determine either the procedural issues arising out of the processing of Complainant's grievance or the merits of the dispute; accordingly, the Examiner concludes that Respondent did not violate Section 111.84(1)(e) of SELRA.

Based on the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes the following

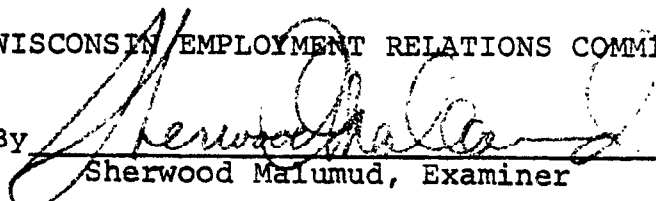
ORDER

That the complaint in the instant matter be, and the same hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin this 21st day of December, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By



Sherwood Malumud, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER

Complainant alleges that Respondent violated the collective bargaining agreement and Section 111.84(1)(e) when its agent refused to accept Piening's grievance. In its prayer for relief, Complainant seeks an order from the Commission directing Respondent to process Piening's grievance through the grievance procedure.

Respondent asserts that the determination of whether Nelson's letter of October 18 be considered a denial of the grievance or a refusal to process the grievance is for the arbitrator. By his failure to request arbitration, Respondent claims that Complainant failed to exhaust the contractual procedures agreed to by the Wisconsin Association of Science Professionals and Respondent.

First, both Complainant and Respondent assert that Piening's grievance contains subject matter and issues appropriate for determination by an arbitrator. Those issues are both procedural and substantive in nature.

It is well established that procedural and substantive defenses to a grievance are for the arbitrator. 1/ Accordingly, the construction of Nelson's letter as an answer to or as a rejection of or as a refusal to process the grievance, and the consideration of the legal consequences which may flow from such decision are for the determination of an arbitrator. The collective bargaining agreement provides the means for the resolution of the procedural dispute as to the appropriate step at which the grievance should be commenced. This is so especially in this case, where the collective bargaining agreement itself provides for the appointment of a separate arbitrator for the determination of all arbitrability questions. If Complainant had requested arbitration and Respondent had refused to proceed, it is at that point that the Commission may appropriately assert its jurisdiction. Complainant did not ask Respondent to proceed to arbitration, and as a result he failed to exhaust the contractual grievance procedure. 2/ Based on the above rationale, the Examiner dismissed the Complaint, in its entirety.

Dated at Madison, Wisconsin this 21st day of December, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Sherwood Malumud, Examiner

1/ State of Wisconsin, (13607-B, C) 1/76, 2/76, (13608-B, C) 3/76, 4/76; Oostburg Joint School District No. 14, (11196-A, B) 12/72, aff'd Sheboygan Co. Cir. Ct. 6/74; Seaman-Andwall Corp., (5910) 1/62.

2/ See City of St. Francis, (12097-A, D) 4/74, 10/74; where a union did not request arbitration and on that basis the Commission refused to assert its jurisdiction to grant the relief sought, i.e., an order directing the parties to arbitration. In State of Wisconsin, supra, Complainant asked the Respondent State to proceed to arbitration, which distinguishes that case from the instant matter.