

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 80, AFFILIATED WITH MILWAUKEE
DISTRICT COUNCIL 48, AFSCME, AFL-CIO,

Complainant,

vs.

CITY OF WEST ALLIS,

Respondent.

Case XLII
No. 21268 MP-712
Decision No. 15226-A

Appearances:

Podel and Ugent, Attorneys at Law, by Ms. Nola J. Hitchcock Cross,
on behalf of the Complainant
Mr. Stephen L. Weld, Assistant City Attorney, on behalf of
Respondent

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

AMEDEO GRECO, Hearing Examiner: This case was initialed by an amended complaint 1/ filed by Local 80, affiliated with Milwaukee District Council 48, AFSCME, AFL-CIO, herein Complainant, wherein it alleged that City of West Allis, herein Respondent, had violated Section 111.70(3)(a)5 of the Municipal Employment Relations Act, herein MERA, by refusing to proceed to arbitration. The Commission thereafter appointed the undersigned to make and issue Findings of Fact, Conclusion of Law and Order. In its answer, Respondent denied that it has acted unlawfully. Hearing was held in Milwaukee, Wisconsin on February 17, 1977. Respondent subsequently filed a brief. Having considered the evidence and brief, the Examiner makes the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. Complainant, a labor organization, represents certain full time and part time employees employed by Respondent.
2. Respondent, a municipal employer, operates and maintains various municipal services in West Allis, Wisconsin.
3. The parties were privy to a 1975-1976 collective bargaining agreement which provided for a grievance-arbitration procedure. Said agreement at Article IX, entitled "Grievance and Arbitration Procedure", provided in part:

"A. Grievance Procedure

1. Except as modified below, the Civil Service Commission is hereby designated as the official agency for the settlement of bargaining unit employee complaints or requests.

. . .

1/ The Complaint was amended at the hearing.

B. Steps in Grievance Procedure

1. Step 1. If an employee has a grievance, he shall first, either alone or accompanied by a union representative, present the grievance orally to his immediate supervisor. The supervisor will reach a decision and communicate it orally to the employee before the end of the next working day.

2. Step 2. If the grievance is not settled at Step 1, it shall be reduced to writing by the employee or his union representative and presented to the division head. Within two (2) working days, the division head shall furnish the employee and the union with a written answer to the grievance.

3. Step 3. If the grievance is not settled at Step 2, the Union or the employee may appeal in writing within ten (10) working days to the department head. The department head shall submit his decision in writing to the employee and the Union within five (5) working days after his receipt of the appeal.

4. Step 4. If the grievance is not settled at Step 3, 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 under this section. The Commission shall render a decision in writing within five (5) working days after hearing the department head, the employee and the Union.

5. Any time limit prescribed by this subsection may be extended at any step by the written mutual consent of the parties.

C. Arbitration

1. Who May Invoke

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

2. When Applicable

The procedure hereinafter set forth shall be available as an alternative to the City or the Union in cases: (1) involving suspension, demotion, discharge or discipline under Section 2.47; (2) in cases involving grievances at Step 4; and (3) in cases involving the application, meaning or interpretation of the labor agreement between the City and the Union. Proceedings may be commenced by either party upon notice to the other in writing. In cases arising under Section 2.47 (7) 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 out of grievances at Step 4 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 rights under this section. However, any time limit prescribed by this subsection may be extended by mutual written consent of the parties.

. . . "

4. On May 21, 1976, the Union filed a written grievance over Respondent's failure to grant a birthday holiday to employe Mike Nekich. By letter dated May 24, 1976, Respondent denied said grievance. After being processed through the initial steps of the grievance procedure, the Union finally submitted said grievance to Respondent's Civil Service Commission, in accordance with Step 4 of the contractual grievance procedure, supra. The Civil Service Commission, in turn, denied said grievance. Thereafter the Union requested that the grievance be submitted to arbitration. In response, the Respondent at all times material herein has refused to arbitrate said grievance.

5. Prior to the instant grievance, Complainant lost approximately 60 cases in the last ten years before the Civil Service Commission. Complainant never attempted to arbitrate said grievances, after they had been denied by the Civil Service Commission. By the same token, Respondent lost 30 or so grievances in the same time span before the Civil Service Commission. Again, Respondent never attempted to thereafter arbitrate any such adverse grievances. As a result, the instant grievance marks the first occasion in nearly ten years in which either party has attempted to arbitrate a matter which has been submitted to the Civil Service Commission.

On the basis of the above Findings of Fact, the Examiner makes the following

CONCLUSION OF LAW

Respondent's refusal to arbitrate the Nekich grievance was not violative of Section 111.70(3)(a)5 of MERA.

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

ORDER

IT IS ORDERED that the Complaint allegations be, and the same hereby are, dismissed in their entirety.

Dated at Madison, Wisconsin this 19th day of December, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco
Amedeo Greco, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER

This case turns on whether Respondent's admitted refusal to arbitrate the Nekich grievance was unlawful, with Complainant alleging, and Respondent denying, that such was the case.

On this point, it is well established that a party must arbitrate a dispute unless it can be shown on the face of the contract that the dispute is not arbitrable as a substantive matter. 2/

Here, the contract at Article IX, Section A(1), specifies that:

"Except as modified below, the Civil Service Commission is hereby designated as the official agency for the settlement of bargaining unit employee complaints or requests."

Going on, Section B(4) of Article IX states:

"If the grievance is not settled at Step 3, the employee or the Union may appeal in writing to the Civil Service Commission within fifteen (15) working days."

Section C(2) of Article IX then holds that:

"The procedure hereinafter set forth [i.e., final and binding arbitration] shall be available as an alternative to the City or the Union in cases: (1) involving suspension, demotion, discharge or discipline under Section 2.47; (2) in cases involving grievances at Step 4; and (3) in cases involving the application, meaning or interpretation of the labor agreement between the City and the Union. . ."

Framed in that way, it seems clear that Section C(2) on its face expressly provides that arbitration is not available to either party if the matter has already been submitted to Step 4, i.e., the Civil Service Commission.

That this is so is further reflected by the remainder of Section C(2) which provides that "in cases arising out of grievances at Step 4 such notice shall be given within fifteen (15) working days after the department head has rendered his decision." This latter clearly provides, then, that grievances which are otherwise eligible to go to Step 4, must be appealed within 15 days after the department head has acted at Step 3, thereby establishing that such matters cannot go to the Step 4 procedure spelled out in the contract.

Indeed, the record shows beyond any question that a well recognized past practice has arisen under which neither Complainant nor Respondent

2/ See, for example, Ashland Unified School Dist. No. 1, (12071-A, B) 3/75.

has ever attempted to arbitrate an adverse decision in the nearly 90 cases rendered by the Civil Service Commission 3/ over the last ten years.

Accordingly, as the foregoing shows that a party cannot proceed to arbitration if the matter has already been submitted to the Civil Service Commission, and as the Nekich grievance here was submitted to the Civil Service Commission, it follows that Respondent is not required to arbitrate said grievance. As a result, the complaint is hereby dismissed.

Dated at Madison, Wisconsin this 19th day of December, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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3/ Since neither party objected to the introduction of evidence bearing on said practice, and as that practice does not contradict the written provisions of the contract, it is proper to consider that evidence.