STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

| | |
|---|---|
| AFSCME, COUNCIL 24, WISCONSIN STATE EMPLOYEES UNION, AFL-CIO, and its appropriate affiliated LOCAL NO. 1, Complainants, vs. STATE OF WISCONSIN, DEPARTMENT OF ADMINISTRATION, and its EMPLOYMENT RELATIONS SECTION, Respondent. | Case LXII No. 19057 PP(S)-30 Decision No. 15261 |

Appearances:
Lawton & Cates, by Mr. Richard V. Graylow, for the Complainants.
Mr. Lionel L. Crowley, for the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The above-named complainants having filed a complaint with the Wisconsin Employment Relations Commission wherein it alleged that the above-named respondent had committed unfair labor practices within the meaning of sections 111.84(1)(a) and (c) of the State Employment Labor Relations Act; and hearing in the matter having been held before the full commission on June 23, 1975, during which the complainants amended their complaint to allege that the respondent had also committed an unfair labor practive in violation of section 111.84(1)(b) of said act; and the commission having considered the evidence, arguments and briefs of the parties, and being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. That AFSCME, Council 24, Wisconsin State Employees Union, and its appropriate affiliated Local No. 1, hereinafter referred to as the complainants, are labor organizations having offices in Madison, Wisconsin.

2. That the State of Wisconsin, Department of Administration, and its Employment Relations Section, hereinafter jointly referred to as the respondent, have their offices in Madison, Wisconsin.

3. That at all times material herein the complainants have been, and are, the collective bargaining representative of employes of the respondent who are employed in the appropriate collective bargaining unit statutorily defined as consisting of "blue collar and non-building trades" employes; that in said capacity complainants and respondent are parties to a collective bargaining agreement covering the wages, hours and working conditions of the employes in said collective bargaining unit; and that agreement contains among its provisions the following material herein:

"ARTICLE II
Recognition and Union Security

. . .

Section 11 Visitations

The Employer agrees that non-employe officers and representatives of the WSEU or of the International Union shall be admitted to the premises of the Employer during working hours upon 24 hour notice (if possible) to the appropriate Employer representative. Such visitations shall be for the purpose of ascertaining whether or not this Agreement is being observed by the parties and for the adjustment of grievances. The Union agrees that such activities shall not interfere with the normal work duties of employes. The Employer reserves the right to designate a meeting place or to provide a representative to accompany the Union officer where operational requirements do not permit unlimited access.

. . .

ARTICLE IV
Grievance Procedure

Section 1 Definition

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.

. . .

Section 2 . . .1/

Section 4 Representation

An employe may consult with his local Union representative during working hours relative to a grievance matter by first contacting his supervisor. The employe's supervisor will arrange a meeting to take place as soon as possible for the employe with his Union representative through the Union representative's supervisor.

. . .

Section 7 Number of Stewards

A. The Union will designate a total of up to 750 grievance representatives who are members of the bargaining unit for the bargaining unit.

The Union shall designate the jurisdictional areas for the grievance representatives.

The Employer will supply the local Union with a list of supervisors to contact on grievance matters.

B. In the event a steward in the handling of a grievance needs the advice of the chief steward in interpreting the Agreement, he will be permitted to phone the chief

---

1/ Section 2 of the grievance procedure sets forth four steps, the final step being final and binding arbitration.

steward using the phone facilities as authorized in this Agreement.

Chief stewards shall be allowed time off with pay to attend arbitration hearings where the grievant is represented by the chief steward's local union.

Section 8 Union Grievances

Union officers and stewards who are members of the bargaining unit shall have the right to file a grievance when any provision of this Agreement has been violated or when the Employer interpretation of the terms and provisions of this Agreement lead to a controversy with the Union over application of the terms or provisions of this Agreement.

Section 9 Processing Grievances

Local Union stewards and grievants will be permitted a reasonable amount of time to process grievances during their regularly scheduled hours of employment."

4. That, at least as of April 2, 1975, among the agents of the respondent were Norman Gugel, who was the immediate supervisor of employes Nancy Bruns and Andrew Jackson; George Lundeen, the superintendent of buildings and grounds at the employer's Hill Farms State Office Building and a supervisor of Gugel; Robert Shaw, deputy chief of the bureau of property management and Lundeen's supervisor; Patricia Kramer, a personnel officer within the department of administration; and James Kennedy, a uniformed police officer; and that Bruns, Jackson and Mabel Wake were employes within the collective bargaining unit represented by complainants; that Bruns was also a steward for complainants; and that Lumumba Kenyatta and Kevin Grittner at all material times herein were grievance representatives for complainants.

5. That in January 1975 the respondent did not refuse to process a grievance filed by Kenyatta on the ground that Kenyatta was not an appropriate representative of the complainants; and that in February 1975 respondent refused to permit Grittner to meet with Mabel Wake to discuss a grievance Wake was considering filing under the collective bargaining agreement then in effect between complainants and respondent, and refused to acknowledge and process a grievance filed by Grittner on Wake's behalf under said agreement; and that both refusals were made on the basis that, in the opinion of Kramer, Grittner was not an appropriate grievance representative.

6. That it is the policy of the respondent to permit appropriate grievance representatives of the complainants to meet with employes in the collective bargaining unit for the purpose of discussing grievances during the working hours of said employes for a period of fifteen to twenty minutes but not more than thirty minutes; that Bruns, however, in her capacity as a steward and grievance representative for the complainants had met with employes on two occasions for said purpose for periods longer than thirty minutes; and that said policy has been orally established by Kramer, but has not been disseminated in writing.

7. That on April 2, 1975, pursuant to instructions from Kramer, Gugel advised Kenyatta that he could meet for no more than thirty minutes with employes Bruns and Jackson for the purpose of discussing grievances; that Kenyatta refused to agree to the thirty-minute limitation; that after meeting with Bruns and Jackson on said date for about thirty minutes, Gugel and Kennedy directed Kenyatta to leave; that Kenyatta refused to leave despite the fact that Kennedy advised him

that his refusal would lead to his arrest; that Kennedy then arrested Kenyatta for disorderly conduct although Kenyatta offered some resistance, Kennedy handcuffed Kenyatta, placed him against a wall; that Kennedy had a hold of Kenyatta's leg for the purpose of effectuating the arrest causing him to lose his balance and stumble over chairs which were between him and the wall, but Kenyatta did not fall to the floor; that after the arrest, Kenyatta was released from custody and no criminal or civil charges were brought against him.

8. That complainants filed a grievance protesting respondent's refusal to so recognize Grittner for the purpose of filing said grievance; and that at the time of the hearing herein, said grievance had proceeded through the steps of the grievance procedure and had been submitted to final and binding arbitration pursuant to the contractual grievance procedure.

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

CONCLUSIONS OF LAW

1. That the respondent, by the conduct of its agents with respect to (a) limiting Lumumba Kenyatta, a grievance representative, of the complainants, to a thirty-minute meeting to discuss a possible grievance with employes Nancy Bruns and Andrew Jackson, and (b) the manner in which Police Officer Kennedy placed Kenyatta under arrest, did not interfere, restrain and/or coerce, or discriminate against, any of its employes in violation of sections 111.84(1)(a) or (c) of the State Employment Labor Relations Act.

2. That the respondent, by the conduct of its agents, in refusing to process the grievance filed by Lumumba Kenyatta, a field representative of the complainants, on behalf of employe Mabel Wake in January 1975, did not commit any unfair labor practice within the meaning of secs. 111.84(1)(a), (b), or (c) or any other section of the State Employment Labor Relations Act.

3. That the respondent's action by the conduct of its agents in refusing to permit Kevin Grittner, a grievance representative of the complainants, to meet and confer with employe Mabel Wake, and in refusing to acknowledge or process a grievance filed by Grittner on behalf of Wake, constitutes a dispute over the interpretation and application of the provisions of the collective bargaining agreement existing between the parties, specifically Article IV thereof, and that since the parties have proceeded to final and binding arbitration thereon, pursuant to the terms of said collective bargaining agreement the commission at this time will not assert its jurisdiction to determine whether the respondent has committed any unfair labor practice within the meaning of sec. 111.84(1)(a)(b) or (c) of SELRA as alleged and in said regard dismisses said allegations without prejudice to the complainants' right to refile a complaint 2/ in this regard if the arbitrator has not resolved the merits of this dispute or if the arbitrator resolved the dispute in a manner that is repugnant to the policies of SELRA.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the commission makes and issues the following

---

2/ The limitation on the filing of complaints set out in sec. 111.07 (14), Stats. shall be deemed to have been tolled during the pendency of the complaint herein.

## ORDER

IT IS ORDERED that the complaint filed herein be, and the same hereby is, dismissed, without prejudice to the right of the complainants to refile a complaint pursuant to conclusion of law number 3 above.

Given under our hands and seal at the City of Madison, Wisconsin this 13th day of January, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

_____
Herman Torosian, Commissioner

## MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

### BACKGROUND FACTS

This case concerns two different labor disputes between the state of Wisconsin in its employer capacity, and its department of administration, hereafter collectively referred to as the employer, 3/ and AFSCME Council 24, Wisconsin State Employees Union, AFL-CIO, and its local number 1, hereafter collectively referred to as the union.

The first dispute concerns the conduct of agents of the employer on April 2, 1975, in terminating a meeting between a union representative, Lumumba Kenyatta, his secretary and two bargaining unit employes, Nancy Bruns and Andrew Jackson. They were meeting on the employer's premises at the Hill Farms State Office Building i Madison after regular business hours but during the regular working hours of Bruns and Jackson. The purpose of the meeting was to discuss complaints of Bruns and Jackson and the possibility of filing formal grievances under the collective bargaining agreement. Kenyatta, who at the time was not an employe of the employer, refused the request of a representative of the employer to leave the premises after meeting with Bruns and Jackson for about thirty minutes. Thereupon, the employer's agent called upon the aid of a police officer, James Kennedy, who also was a member of the instant bargaining unit and an employe of the employer. Kennedy asked Kenyatta to leave and, on the latter's refusal, the officer took physical hold of Kenyatta. A scuffle ensued, Kenyatta was handcuffed, and was removed from the premises after being given an opportunity to consult his attorney.

Second, this case also concerns the employer's alleged refusal to recognize two individuals, Kenyatta and Kevin Grittner, as appropriate union representatives for purposes of grievance investigation and processing. The union grieved the refusal pertaining to Grittner under the collective bargaining agreement, and that grievance was pending before an arbitrator at the time of the hearing.

An evidentiary hearing was held before the full commission on June 23, 1975. 4/ The final brief was received October 30, 1975.

### POSITIONS OF THE PARTIES

The union argues:

1. Officer Kennedy committed an assault and battery on Kenyatta in forcibly removing him from the premises, and thereby interfered with, coerced and restrained employes in the exercise of their right in violation of sec. 111.84(1)(a)1, Stats.

---

3/ The complaint also included the employment relations section of the department as part of the respondent. No evidence, however, showed that said section was involved in the events of this case.

4/ Since the hearing herein Commissioner Bellman has left the commission and did not participate in this decision.

2. By refusing to recognize the representative status of Kenyatta and steward Kevin Grittner, on the ground that they were not appropriate union representatives, the employer interfered with the rights of employes, in violation of sec. 111.84(1)(a), Stats., interfered with the internal administration of the union and dominated the same in violation of sec. 111.84(1)(b), Stats.

3. The thirty-minute rule was imposed on Bruns, Jackson and Kenyatta only because Bruns and Jackson called on Kenyatta to be their grievance representative, and, therefore, the employer discriminated in violation of sec. 111.84(1)(c), Stats.

The employer argues:

1. Since the union's representatives have access to the employer's premises only by virtue of the terms of the collective bargaining agreement, the instant dispute relative to Kenyatta's removal is contractual in nature, resolvable only through arbitration, and the commission is without jurisdiction over the subject matter of the complaint.

2. In any event, the employer properly limited the meeting to thirty minutes.

3. Officer Kennedy's decision to arrest Kenyatta was not an act of the employer in its management capacity. Kennedy was performing his duty as an officer to enforce the law. In any event, the arrest was proper under the circumstances.

4. The recognition of appropriate grievance representatives is strictly contractual, resolvable only in arbitration, and the commission lacks subject matter jurisdiction. In any event, the employer did not refuse to recognize Kenyatta as a union representative.

5. Even if the commission has subject matter jurisdiction over the contractual issues, the commission should defer all these issues to the arbitral process.

DISCUSSION

The question of subject matter jurisdiction over arbitrable claims.

The employer argues that the commission lacks subject matter jurisdiction over the union's claims because they are wholly contractual in nature, and the collective bargaining agreement provides for a grievance and arbitration procedure as the exclusive remedy for such claims.

The union's claims are not wholly contractual. The same conduct may support an independent unfair labor practice finding as well as a breach of the collective bargaining agreement. Here, the union's interest and that of the employes it represents, in not having its representatives assaulted by employer representatives, does not hinge on contractual recognition of that interest. Even if an employer could refuse a union representative access to the working premises, having granted such access does not license the employer to violate statutes as otherwise may be applicable in respect to unlawful interference because of the manner in removing the representative or unlawful discrimination in establishing time limits on his presence. Finally, as explained more fully herein, an employer's duty to recognize the union's representatives' status is statutory, not contractual, in origin.

Accordingly, the commission has jurisdiction to adjudicate the instant complaint which alleges unfair labor practice violations

other than a breach of contract, although the facts also might support a breach of contract claim which is resolvable only through arbitration. 5/

The question of deferral.

The employer argues that even if the commission enjoys subject matter jurisdiction over the complaint, itshould defer to the arbitral process, citing Collyer Insulated Wire. 6/

Deferral of alleged statutory violations to arbitration is a discretionary act in which the commission abstains from adjudicating the statutory question. The United States Supreme Court has approved deferral on the ground that it harmonizes the objectives of administrative determinations of unfair labor practices with the equally important legislative objective to encourage parties to utilize their mutually agreed upon forum for the resolution of contractual questions. 7/ The decision to abstain from discharging the commission's statutory responsibility to adjudicate complaints in favor of the arbitral process will not be made lightly. The commission will abstain and defer only after it is satisfied that the legislature's goal to encourage the resolution of disputes through the method agreed to by the parties will be realized and that there are no superseding considerations in a particular case. Among the guiding criteria for deferral are these: First, the parties must be willing to arbitrate and renounce technical objections, such as timeliness under the contract and arbitrability, which would prevent a decision on the merits by the arbitrator. Otherwise, the commission would defer only to have the dispute go unresolved. Second, the collective bargaining agreement must clearly address itself to the dispute. 8/ The legislative objective to encourage the resolution of disputes through arbitration would not be realized where the parties have not bargained over the matter in dispute. Third, the dispute must not involve important issues of law. 9/ An arbitrator's award is final and ordinarily not subject to judicial review on questions of law. Further, questions of legislative policy and law are neither within the province nor the expertise of arbitrators. 10/ On the other

---

5/ See: Smith v. Evening News, 371 U.S. 195, 197, 83 S.Ct. 267, 9 L.Ed. 2d 246, 51 LRRM 2646, 46 Lab. Cas. par. 17, 962 (1962), and William E. Arnold Co. v. Carpenters District Council, 417 U.S. 12, 16, 94 S.Ct. 2069, 40 L.Ed. 2d 620, 86 LRRM 2212, 74 Lab. Cas. par. 10,032 (1974).

6/ 192 NLRB No. 50, 77 LRRM 1931, 1971 CCH par. 23,385 (1971).

7/ William E. Arnold Co., supra, 417 U.S. at 16-17.

8/ Compare Collyer, supra, where the board established its deferral policy and conditioned it on "a substantial claim of contractual privilege." Also see Peerless Pressed Metal Corp., 198 NLRB No. 5 80 LRRM 1708 (1972), where the board said Collyer meant that "the contract and its meaning [must] lie at the center of the dispute . . . ."

9/ Compare Hershey Foods Corporation, 208 NLRB No. 70, 85 LRRM 1312 (1974).

10/ The arbitrator is to construe the meaning of the contract even if it conflicts with legislative policy. See Alexander v. Gardner-Denver Company, 415 U.S. 36, 53-54, 57, 94 S.Ct. 1001, 29 L.Ed. 2d 147 (1974). While some arbitrators will rely on a statutory command as a tool of construction of a contract, Wisconsin law in respect to employer involvement in the selection of an appropriate grievance representative has not been defined with sufficient clarity that an arbitrator can be expected to give contractual language the correct legal gloss.

hand, the legislature has entrusted to the commission in the first instance the responsibility to resolve questions of law and legislative policy and has made commission decisions subject to further judicial review.

Applying these tests to the case at hand, we conclude as follows:

1) that deferral of the issues concerning the 30-minute rule imposed on Kenyatta and the issue concerning Kenyatta's representative status would be inappropriate; and

2) that deferral of the dispute over the employer's refusal to recognize Grittner as the appropriate grievance representative would be appropriate.

As to the dispute referred to in 1 above, the time limitations of the agreement have long passed, see Article IV of the agreement, and the employer gives no indication it would waive said limitations and proceed to arbitration. Therefore, there is no assurance that the matter would be resolved through arbitration and for said reason the commission will assert jurisdiction to determine whether a prohibited practice has been committed by the employer as alleged by the union.

As to the dispute concerning Grittner, however, there is no such procedural problem of proceeding before an arbitrator inasmuch as the parties indicated at the hearing that said dispute had already been presented to an arbitrator for determination. If for some reason the arbitrator has not, since the hearing herein, resolved the merits of that dispute, or if he has resolved it in a way that is repugnant to the policies of SELRA the complainants can refile their complaint.

The union takes the position, however that it is not alleging a contractual violation but solely seeks a statutory determination of the issue irrespective of the contract. Conversely, the employer does not dispute complainants' contention that the union has a statutory right to designate its own grievance representative, but contends the issue of appropriate grievance representative is a matter negotiated by the parties and covered by Article IV of the agreement.

In this regard it is well established that the choice of a grievance representative is exclusively the employes' and that of their collective bargaining representative, 11/ an employer has no right to determine who that grievance representative should be. 12/ It is clear however that a statutory violation cannot be found here without an interpretation of Article IV. The employer's obligation to recognize Grittner as a grievance representative depends on the interpretation and application of Article IV which addresses itself to all rights of employes to a representative, the designation of grievance representatives and union stewards; the number of union stewards; who may file grievances; the right to process grievances on State time; the pay status of those processing grievances; and the jurisdiction area of stewards. In light of Article IV, the commission concludes that the employer's contractual claim is not patently erroneous but based on a substantial claim of contractual privilege. Based on the above the commission

---

11/ Prudential Insurance Co. v. NLRB, 278 F.2d 181, 46 LRRM 2026, 40 Lab. Cas. par. 66,451 (3rd Cir. 1960), and NLRB v. Deena Artware, Inc., 198 F.2d 645, 30 LRRM 2479 (6th Cir. 1952), cert. denied, 345 U.S. 906, 73 S.Ct. 644.

12/ See Iron Castings, Inc., 114 NLRB No. 119, 37 LRRM 1030 (1955).

concludes that the policies of SELRA would best be effectuated by deferring the matter to arbitration.

The reasonableness of the thirty-minute rule and the alleged discrimination.

The union contends the thirty-minute rule was discriminatorily applied only because Kenyatta was the grievance representative of Bruns and Jackson. It notes that Bruns, in her capacity as a steward, twice has spent more than thirty minutes with grievants.

The evidence is insufficient to support a finding of discrimination. Patricia Kramer, a personnel officer for the department of administration, testified without contradiction that the department's guideline is to allow about twenty minutes for a meeting between a union representative and the employes during regular working hours, but that thirty minutes is allowed in cases of greater difficulty or complexity. This guideline is oral and not written, and has not been widely disseminated. It is not surprising, then, that Bruns' supervisor, Norman Gugel, has not imposed the thirty-minute rule on Bruns in her steward capacity. Further, Bruns testified that she exceeded thirty minutes only twice and that she has had no conversation with management as to the amount of time she was permitted. Bruns deals with her supervisor in arranging to meet with employes. Here, Kramer became involved in the arrangements for Kenyatta's meeting, and she allowed a maximum of thirty minutes. Thus, the imposition of the thirty-minute rule in Kenyatta's case resulted from Kramer's involvement in the arrangements, and not from any hostility toward Kenyatta or determination that a different rule should be applied because he was the grievance representative.

The union argues that a thirty-minute rule is unreasonable. As a general rule, however, working time is for work. The employer has waived any right to impose an absolute ban on grievance discussions during work time by virtue of Article IV, sec. 9, of the agreement, which provides:

> "Local Union stewards and grievants will be permitted a reasonable amount of time to process grievances during their regularly scheduled hours of employment." (Emphasis added.)

This waiver applies to stewards in the respondent's employ. Although Kenyatta was not in respondent's employ in April 1975, the parties nevertheless have applied this agreement to include representatives like Kenyatta. Since working time ordinarily is for work and since no exigent circumstances were shown, the extension of the contractual waiver to Kenyatta for a thirty-minute period was not unreasonable.

The union argues that, even if thirty minutes was not unreasonable, the guideline was applied with unreasonable inflexibility since Kenyatta needed only another ten minutes to complete his investigation. Kramer testified that the guideline has flexibility, and that Kenyatta could "conceivably have [had] more time" if he had requested it (Tr. 60). Gugel testified that he would have granted Kenyatta another two, three or even four minutes had it been requested, but that he felt the order given to him would not have allowed another ten minutes (Tr. 72). 13/

---

13/ The order originated in an oral conversation between Kramer and Robert Shaw, the deputy chief of the bureau of property management. Kramer testified that, though she did not think so, she may have told Shaw to impose a limit of thirty minutes on Kenyatta (Tr. 64). Shaw told George Lundeen, the superintendent of buildings, that

Kenyatta, however, did not ask for a few more minutes: he was claiming an unlimited time. Kenyatta testified that Gugel told him of the thirty-minute limit before the meeting began; that he (Kenyatta) said he did not agree to it; that after Gugel and the officer returned near the end of the meeting and said his time was up, he (Kenyatta) said he had not gathered all the facts and had not agreed to thirty minutes; and that no one asked how much time he needed and he did not say how much time he needed. Kenyatta further testified that Kennedy warned him that he would be arrested to which he (Kenyatta) replied that they then better get Dane County (Sheriffs). Gugel testified that on meeting Kenyatta at the door and telling him of the thirty-minute limit, Kenyatta said he would take all the time he needed; that he (Gugel) repeated the thirty-minute order as he left Kenyatta at the meeting; and that after the meeting Kenyatta made no request for additional time. In fact, according to Gugel, after the officer told Kenyatta to leave, Kenyatta said he would have to be arrested first; Kennedy said he would and gave him thirty seconds to leave; and Kenyatta said he was not leaving because he had not finished his business. Gugel further testified that Kenyatta also said he needed more time, that he (Gugel) should have asked how much more time he needed, but did not since Kenyatta had said he would take all the time he needed. Officer Kennedy testified that after Gugel had told Kenyatta his time was up, Kenyatta said he had not gotten all his facts yet; Kennedy said he must leave; Kenyatta said he would not and that he would have to be arrested; Kennedy said he would arrest him, and gave him thirty seconds to leave; Kenyatta said he would not leave; and Kennedy proceeded to arrest him for disorderly conduct under the state statute.

The employer cannot be held to have been unreasonably inflexible in these circumstances. Even though there are minor conflicts in testimony, it is clear Kenyatta was told of the thirty-minute limit; he claimed the right to take all the time he wanted; and, instead of asking for a few more minutes when told he should leave, he stated he would not leave and that it would be necessary to arrest him.

In disputes of this kind, the commission steadfastly has held that if the employer errs in imposing rules of conduct on employes or union representatives, the remedy is to utilize the grievance procedure rather than to exercise self-help to vindicate a claim of right. The failure of Kenyatta to obey and later grieve the wrong, if any, with the resultant scuffle with the officer, classically demonstrates the sad results which follow the failure to abide the orderly process for seeking a redress of grievances.

Accordingly, the commission believes that the thirty-minute rule was reasonable, was not discriminatorily applied, and was not applied with unreasonable inflexibility on the facts of this case.

The arrest and scuffle.

The union contends that Kennedy, although he was a police officer with arrest powers, 14/ committed an assault and battery against Kenyatta when physically apprehending him, which constituted an unlawful interference under sec. 111.84(1)(a), Stats. The employer

---

13/ (Continued)

Kramer had said to allow fifteen to twenty minutes, but thirty at the outside. Lundeen then wrote a note to Gugel which said (ex. 1): "Can have up to 30-minutes - no more. . . ."

14/ See sec. 16.84(2), Stats.

replies that Kennedy was only discharging his responsibility as a police officer to uphold the law, and in particular the law against disorderly conduct, 15/ and that he was a member of the bargaining unit.

The fact that Kennedy was a member of the bargaining unit does not preclude a finding that he acted as an agent of the employer during the events in question. The record is clear that he forcibly removed Kenyatta on the instructions of Norman Gugel, a supervisory employe of the employer.

The state of Wisconsin does not lose its right to arrest persons for disorderly conduct simply because the conduct occurs in the context of a labor dispute in which it is involved. It was not an unreasonable interpretation of the law for Officer Kennedy to believe that Kenyatta had violated the statute against disorderly conduct by refusing to leave the premises when ordered to do so. 16/ Since the employer properly could limit Kenyatta to thirty minutes, "[t]he State, no less than a private owner of property, ha[d] power to preserve the property under its control" by arresting him for refusing to leave when properly told to do so. 17/

The power to arrest a technical trespasser as a matter of criminal or civil law, however, does not mean the decision to exercise that power or the manner of its exercise will pass muster under a labor relations law. 18/ A line of accomodation must be drawn between the employer's rights over its property, on the one hand, and the employes' rights to engage in protected, concerted activity, on the other hand. 19/

The scuffle between Kennedy and Kenyatta occurred when Kennedy took hold of Kenyatta and both fell to the floor. The evidence is not clear whether the fall resulted from resistance from Kenyatta or from Kennedy's exuberance in taking a hold of Kenyatta or both. Kennedy promptly began handcuffing Kenyatta but was able to handcuff only one wrist of Kenyatta while they were scuffling on the floor. Kennedy then lifted Kenyatta and forced him against the wall causing Kenyatta's sunglasses to fall off. Kennedy had a hold of Kenyatta's leg causing him to lose his balance and stumble over chairs which were between him and the wall, but Kenyatta did not fall to the floor. Kennedy braced Kenyatta against the wall and finished handcuffing Kenyatta. Kennedy also frisked Kenyatta. Kenndey then escorted Kenyatta upstairs at which time the handcuffs were removed and he was allowed to leave the building.

Kenyatta testified that he offered no resistance throughout the incident. There is no doubt however that Kenyatta made it clear to Gugel and Kennedy that they would have to physically remove him

---

15/ Section 947.01, Stats.

16/ See State v. Elson, 60 Wis. 2d 54, 208 N.W. 2d 363 (1973).

17/ Adderley v. State of Florida, 385 U.S. 39, 47, 87 S.Ct. 242, 17 L.Ed. 2d 148 (1967).

18/ See NLRB v. Babcock & Wilcox, 351 U.S. 105, 76 S.Ct. 679, 100 L.Ed. 975, 38 LRRM 2001, 30 Lab. Cas. par. 69,911 (1956), and Hudgens v. NLRB, _____ U.S. _____, 96 S.Ct. 1029, ____ L.Ed. 2d ____ (1976).

19/ Babcock & Wilcox, supra, 351 U.S. at 112; Hudgens, supra, 96 S.Ct., at 1037.

from the premises. This was made clear by Kenyatta stating that he would take all the time needed to complete his meeting with Jackson and Bruns; by Kenyatta not requesting any specified additional time needed to complete his meeting in an attempt to avoid an obvious confrontation; by stating that he would have to be arrested when he was asked to leave; by challenging Kennedy's arrest authority and stating that if they intended to arrest him they better call the Dane County Sheriff's Department.

While in retrospect arguments can be made with regard to the soundness of the employer's judgement in deciding that its best course of action was to forcibly remove Kenyatta, the commission nevertheless cannot conclude that the employer in so deciding improperly determined that preservation of its control over its property warranted the decision to remove Kenyatta forcibly. The record evidence is clear that once the employer decided they wanted Kenyatta off the premises Kenyatta gave them no choice other than to forcibly remove him. As to the question concerning the amount of force necessary, the commission is not convinced by a satisfactory preponderance of the evidence that Kennedy used excessive force in removing Kenyatta. That is to say that once Kenyatta in essence required his own physical removal the fact that he and Kennedy scuffled on the floor and Kennedy at one point had a hold of Kenyatta's leg and caused him to stumble and caused his sunglasses to fall off, does not itself, lacking any other evidence, constitute excessive force when the record is not entirely clear as to the exact nature of Kenyatta's resistance.

The refusal to recognize Kenyatta as a union representative.

The union contends that the employer refused to recognize the representative status of Kenyatta in his attempt to process the grievance of Mabel Wake, and that such refusal constituted interference within the meaning of sec. 111.84(1)(a), Stats., and interference with the administration of a union and domination of a labor organization within the meaning of sec. 111.84(1)(b), Stats.

The union's contention as to Kenyatta fails for lack of proof. On December 27, 1974, Kramer advised the union in writing that the employer no longer regarded Kenyatta as a grievance representative due to his recent resignation as a state employe, but that he would be accorded access to state facilities in accord with the agreement if he were an employe of the union. On January 13, 1975, the union replied, in effect, that Kenyatta was a grievance representative. There is no evidence that the employer persisted in its belief that Kenyatta was not a grievance representative. While the employer refused to process Kenyatta's grievance on behalf of Wake, it did so on grounds other than his representative status. 20/ Finally, the

---

20/ Annexed to the complaint is what purports to be the grievance and the employer's response. The grounds for refusing to process the grievance are its vagueness, an error in the date and an error in the step of the grievance procedure at which it was filed. The only testimony, however, related to the error in the date and none related to Kenyatta's representative status.

employer did accord Kenyatta representative status when he sought to and did meet with Bruns and Jackson on April 2, 1975.

Dated at Madison, Wisconsin this 13th day of January, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

_____
Herman Torosian, Commissioner