STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, LOCAL 35,	:	
Complainant,	:	Case II No. 24291 Ce-1816
vs.	:	Decision No. 16926-B
THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY,	:	
Respondent.	:	

REVISED FINDINGS OF FACT, REVERSED CONCLUSION OF LAW, AND REVERSED ORDER

Examiner Douglas V. Knudson having issued Findings of Fact, Conclusions of Law and Order in the above entitled matter, wherein he concluded that the above named Respondent had committed an unfair labor practice in violation of the Wisconsin Employment Peace Act, by refusing to proceed to arbitration on a grievance involving an employe included in the bargaining unit represented by the above named Complainant, and wherein the Examiner ordered the Respondent to proceed to arbitration; and the Respondent having timely filed a petition requesting the Wisconsin Employment Relations Commission to review the Examiner's decision; and the Commission, having reviewed the petition for review, the Examiner's decision, and the briefs filed by the parties, makes and issues the following

REVISED FINDINGS OF FACT

1. That Office and Professional Employees International Union, Local 35, hereinafter referred to as the Complainant, is a labor organization having its offices in Milwaukee, Wisconsin.

2. That The Northwestern Mutual Life Insurance Company, hereinafter referred to as the Respondent, has its Home Office in Milwaukee, Wisconsin.

3. That at all times material herein the Complainant has been the collective bargaining representative of all permanent employes, with the exception of certain exclusions, employed by the Respondent at its Home Office; that in said capacity the Complainant has entered into collective bargaining agreements with the Respondent, covering the wages, hours and working conditions of said employes of the Respondent, and that in said regard the parties have been parties to the following collective bargaining agreements:

a. On August 5, 1976 the parties executed a collective bargaining agreement, effective, by its terms, from May 1, 1976 through April 30, 1978, and which was extended by the parties until they executed the successor agreement, containing the following provisions, which appear to be applicable to the issues arising in the instant proceeding:

ARTICLE IX

Promotions, Demotions, Transfers and New Positions

. . .

SECTION 2. In respect to all employees considered for or applying for promotions, length of service shall be determinative only when ability, qualifications, and experience are relatively equal.

The Company shall be the final judge of the ability, qualifications and experience of all employees.

. . .

ARTICLE XII

Complaints and Grievances

. . .

Step 2. . . .

Unless the grievance involves the interpretation or application of the terms of this Agreement or relates to a discharged regular employee, the action of the Office Committee shall be final. This fanality of action applies specifically to such matters as the determination of promotions and merit increases for individual employees and classification of jobs, except as otherwise agreed upon by the Company and the Union.

b. On September 21, 1978 the parties entered into an agreement to succeed the 1976-1978 agreement; that the succeeding agreement was retroactive to May 1, 1978, and was to continue in effect to at least April 30, 1980; that said agreement contained the following provisions, which appear applicable to the issues arising in the instant proceeding:

ARTICLE VII

Promotions, Demotions, Transfers and New Positions

. . .

SECTION 2. In respect to all employees considered for or applying for promotions, seniority shall be given significant consideration in appraising employees' ability, qualifications, and experience. Moreover, seniority shall be the determining factor when ability, qualifications, and experience

are relatively equal. Further, seniority shall be applied in the scheduling of interviews for promotions, so that applicants and candidates with the most seniority shall be interviewed first.

(Emphasis in original)

. . .

ARTICLE X

Complaints and Grievances

. . .

Step 2. . . .

Unless the grievance involves the interpretation or application of the terms of this Agreement or relates to a discharged regular employee, the action of the Office Committee shall be final. Such action applies specifically to such matters as the determination of promotions and merit increases for individual employees and classification of jobs, except as otherwise agreed upon by the Company and the Union. (Emphasis in original)

4. That both the 1976-1978 and 1978-1980 agreements contained the following identical provision with respect to "final and binding arbitration":

Step 3. If the grievance involves the interpretation or application of the terms of this Agreement or relates to a discharged regular employee, the Union within 10 working days after receiving the notice specified in Step 2 may notify the Secretary of the Office Committee in writing that it desires to have the matter heard by a grievance panel. Thereafter, within 10 working days, the Union and the Company shall each designate a representative for the grievance panel, and shall notify each other in writing of their selection. The failure of either party to designate a representative for the grievance panel within this period shall result in a forfeiture of its right to name a representative on said panel.

Within the same 10 working day period, the Union and the Company shall decide upon the selection of an Impartial Chairman. If the parties, within the 10 working day period and 5 additional working days, are unable to decide upon an Impartial Chairman, the party desiring arbitration shall notify the Federal Mediation and Conciliation Service, which shall submit a panel containing 5 names. Each party shall alternately strike one name until one name remains.

> The person whose name remains shall serve as the Impartial Chairman. The Impartial Chairman shall preside over the grievance panel and shall counsel with and assist the panel in reaching a decision. The Union and the Company shall share equally the expense of the Impartial Chairman.
>
> A majority vote of the panel shall decide any controversy submitted to it under this section. Any decision of the panel shall be in writing and shall be binding upon the employee, the Company, and the Union, to each of whom a copy shall be given.
>
> Except for its powers in discharge cases, the grievance panel shall only have power to interpret and apply the terms of this Agreement. The panel shall have no power to extend the duration of this Agreement, to add any terms or provisions, or to enlarge its jurisdiction, except by mutual consent of the Company and the Union.
>
> The references to the Office Committee in this section shall not prevent the Company from changing the name of said committee or assigning its functions under this section to a different committee.

5. That since June 25, 1974, and continuing at all times material herein, in addition to the material provisions in the various collective bargaining agreements between the parties since that date, there existed between the parties the following procedure, established by separate agreement, relating to grievances arising with respect to promotions, merit increases and job evaluations:

> If the Union is not satisfied with the decision of the Office Committee on any action of the Company regarding promotions, merit increases, and job evaluations, the Union may appeal to a Fact Finding Panel composed of an equal number of persons designated by the Union and the Company. This Panel will determine if there are any additional facts relevant to the question and report back to the Office Committee. The Office Committee will then reconsider the issue based on the recommendation of the Fact Finding Panel. In any such cases, the action of the Office Committee is final.

6. That the 1976-1978 collective bargaining agreement, by its terms, would have expired on April 30, 1978; that during the negotiations leading to the successor agreement the Complainant and Respondent agreed to extend the 1976-1978 agreement on a week to week basis; that the 1978-1980 agreement was ratified on July 28, 1978, and was executed on September 21, 1978; and that said agreement provided that it was to be retroactive to May 1, 1978.

7. That on July 17, 1978 the Complainant filed a grievance on behalf of Arlene Kubiak, contending that the Respondent violated Article IX, Section 2 of the 1976-1978 agreement by failing to promote Kubiak to a posted position; that in the first step of the grievance procedure, said grievance was denied by Kubiak's department head; that on July 31, 1978 the Complainant's Chief Steward, by letter, advised the Chairman of the Respondent's Office Committee that the Complainant desired to continue the grievance "under Step 2 of Article XII of the Collective Bargaining Agreement"; 1/ that following an investigation of the grievance, the Office Committee, on August 17, 1978, by letter, advised Kubiak and the Complainant's representative, that said committee was sustaining the foreman's decision, and the reason therefor; and that in a letter dated August 31, 1978, addressed to the Respondent's Assistant Manager-Industrial Relations, the Complainant's Chief Steward advised that the Complainant was "invoking the use of the fact finding panel as described in the letter of understanding," inasmuch as Kubiak and the Complainant were not satisfied with the disposition of Kubiak's grievance.

8. That following the Office Committee's decision, the Complainant requested that the Kubiak grievance be referred to a Fact Finding Panel, which fact finding had been agreed upon in the 1974 negotiations as a substitute for arbitration; that the Fact Finding Panel met on four occasions during October and November of 1978; that the panel reexamined the factual bases for the August decision of the Office Committee; that after finishing its deliberations the Fact Finding Panel presented their position that Kubiak should have received the promotion; that the Respondent members of the Fact Finding Panel presented their position that the employe selected for the promotion was far more qualified than Kubiak; and that after hearing from all the representatives of the Fact Finding Panel, the Office Committee decided that its original determination should be affirmed and such decision was communicated in writing to Kubiak on December 19, 1978.

9. That by letter dated January 2, 1979 Complainant advised Respondent that it desired to proceed to arbitration on the Kubiak grievance; that said letter, among other things, contained the following references to the 1978-1980 collective bargaining agreement:

> It is the union's position, the company mis-interpreted Article VII, Section 2 when the Office Committee unanimously voted that the original decision should be upheld.
>
> It is for this and other reasons I am requesting to have this matter heard by a grievance panel under Article X, Section 1, Step 3 of the Collective Bargaining Agreement.

10. That again on February 26, 1979, Complainant wrote Respondent requesting arbitration on the grievance, and therein again referred to Article X; and that the Respondent, by letter dated March 2, 1979, responded to such request as follows:

> The purpose of this letter is to advise you the Company will not proceed to arbitration regarding Arlene Kubiak's

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1/ An apparent reference to the 1976-1978 agreement.

grievance. As you know, Section 1 of Article X clearly states that the action of the Office Committee on determination of promotions is final.

The request of Ms. Kubiak for the particular run involved was carefully considered by the Office Committee, and in its judgment, she was not entitled to the run since she was not as well qualified as the employee selected.

With regard to "misinterpreting Article VII, Section 2" as suggested in your January 2, 1979 letter to Mr. Jacobson, we do not understand how there can be room for misinterpretation. Section 2 of Article VII means exactly what it says -- seniority will be given significant consideration in selecting employees for promotions (as was done in this case), but will not be the determining factor unless ability, qualifications and experience are relatively equal.

Once again we extend an offer for appropriate representatives of the Company and the Union to sit down and discuss this matter further in an attempt to cooperatively resolve our differences. However, be assured the Company will not agree to engage in arbitration over this matter.

REVERSED CONCLUSION OF LAW

That the Respondent, The Northwestern Mutual Life Insurance Company, by refusing to proceed to arbitration on the grievance of Arlene Kubiak, did not commit an unfair labor practice within the meaning of Sec. 111.06(1)(f), or any other provision, of the Wisconsin Employment Peace Act.

Upon the basis of the above and foregoing Revised Findings of Fact, and Reversed Conclusion of Law, the Commission makes and issues the following

REVERSED ORDER

IT IS ORDERED that the complaint filed herein be, and the same hereby is, dismissed.

Given under our hands and seal at the City of Madison, Wisconsin this 9th day of April, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

_____
Herman Torosian, Commissioner

_____
Gary L. Covelli, Commissioner

MEMORANDUM ACCOMPANYING REVISED FINDINGS OF FACT, REVERSED CONCLUSION OF LAW, AND REVERSED ORDER

The Examiner's Decision

The Examiner found that the Respondent, by refusing to proceed to arbitration, violated the provisions of an existing collective bargaining agreement between the Respondent and the Complainant, and he ordered the Respondent to proceed to arbitration to determine whether the Respondent violated said collective bargaining agreement in failing to promote an employe having more seniority than the employe who was promoted to the position involved. The Examiner concluded that under the pertinent provisions of the collective bargaining agreement the grievance involved "states a claim which on its face is arbitrable."

The Petition For Review

In its petition for review the Respondent contends that the Examiner erred with respect to his determination as to which of the two collective bargaining agreements were applicable to the matters in issue, and that therefore the Examiner erred in concluding that the Respondent had violated any contractual obligation to proceed to arbitration on the grievance involved.

More specifically, the Respondent argues that the grievance procedure specifically excludes determinations of promotions from final and binding arbitration and provides that the action of the Office Committee shall be final. Further, in support of its petition, the Respondent cites the fact that the parties, in their 1974 negotiations, reached an understanding that the Complainant could appeal promotion disputes to a fact finding panel and that the panel would report the findings of the Office Committee whose action would be final. The Respondent would have the Commission reverse the Examiner and dismiss the complaint.

The Complainant, in support of its position, argues that (1) there is an alleged violation of Article VII, Section 2, of the 1978-1980 agreement, and (2) that the grievance procedure specifically provides that the interpretation and application of the agreement are subject to final and binding arbitration. Further, in this regard the Complainant argues that it is significant that the second paragraph of Article IX (promotion clause) of the 1976-1978 agreement, which provides that "the company shall be the final judge of the ability, qualifications and experience of all employees" was deleted from the 1978-1980 agreement, which indicates that the Respondent's actions with regard to promotions are not final and binding, but instead subject to arbitration.

Discussion

The Commission has reviewed the record and the arguments of the parties, including those presented to the Examiner prior to his decision. There is no dispute as to the fact that the Respondent promoted a junior employe to a position desired by an employe, Kubiak, who has greater seniority than the employe who received the promotion. The primary issue requires a determination as to whether the Respondent is obligated to honor the request of the Complainant to proceed to arbitration on all issues involved, procedural and substantive. Contrary to the inference arising from the Examiner's decision, there are three documents which the Commission must consider in determining the primary issue herein. Said three documents are the 1976-1978 collective bargaining agreement, and 1978-1980 collective bargaining agreement, and the June 1974 "fact finding" agreement.

While it is clear that the grievance arose at a time when the 1976-1978 collective bargaining agreement was in effect, the record establishes that the parties deemed that the promotion provisions appearing in the 1978-1980 agreement were considered by both parties in the processing of the grievance. It is likewise clearly established that the parties utilized the existing fact finding procedure in the processing of the Kubiak grievance, which procedure was agreed to be in lieu of, and a substitute for final and binding arbitration. In light thereof and the fact that such procedure was utilized leads us to conclude that the grievance regarding the failure of the Respondent to grant the promotion involved to Kubiak, is not subject to final and binding arbitration.

Dated at Madison, Wisconsin this 9th day of April, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

_____
Herman Torosian, Commissioner

_____
Gary L. Covelli, Commissioner