STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

STATE OF WISCONSIN, DEPARTMENT OF EMPLOYMENT RELATIONS, Complainant, vs. WISCONSIN ASSOCIATION OF SCIENCE PROFESSIONALS, LOCAL 3732, WISCONSIN FEDERATION OF TEACHERS, AFL-CIO, Respondent.	Case CLII No. 26562 PP(S)-75 Decision No. 18012-B

Appearances:

Mr. Thomas E. Kwiatkowski, Attorney, Division of Collective Bargaining, Department of Employment Relations, 149 East Wilson Street, Madison, Wisconsin, 53702, on behalf of Complainant.

Habush, Gillick, Habush, Davis and Murphy, S.C., by Mr. John S. Williamson, Suite 2200, First Wisconsin Center, 777 East Wisconsin Avenue, Milwaukee, Wisconsin, 53202, on behalf of Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

AMEDEO GRECO, HEARING EXAMINER: The State of Wisconsin, Department of Employment Relations, herein Employer, filed an unfair labor practice complaint with the Wisconsin Employment Relations Commission, herein Commission, which alleged that the Wisconsin Association of Science Professionals, Local 3732, Wisconsin Federation of Teachers, AFL-CIO, herein Association, had committed an unfair labor practice within the meaning of Section 111.84 of the State Employment Labor Relations Act, herein SELRA. The Commission thereafter appointed the undersigned to act as Examiner to make and issue Findings of Fact, Conclusions of Law and Order, as provided for in Section 111.07(5), Stats. Prior to the scheduled hearing, the Employer filed with the Examiner a "Motion For Interlocutory Order to Stay Arbitration." Following the Association's response, the Examiner denied said Motion on November 5, 1980. Hearing was held on November 19, 1980, in Madison, Wisconsin. There, pursuant to Respondent's motion, the Examiner dismissed the complaint in its entirety. The Examiner therefore issues the following Findings of Fact, Conclusion of Law and Order to augment that oral decision.

FINDINGS OF FACT

1. The Employer is an employer as defined in Section 111.81(16) Stats. Its Department of Employment Relations represents the executive branch under Section 111.80 et. seq. The Employer's principal place of business is Madison, Wisconsin.

2. The Association, a labor organization within the meaning of Section 111.81(9) Stats. has its principal place of business at 2021 Atwood Avenue, Madison, Wisconsin, 53704.

3. The Association is the certified collective bargaining representative for the Professional Science bargaining unit.

4. The Employer and the Association are parties to a collective bargaining agreement which provides for final and binding arbitration in Article IV. Section I of Article IV states in part that: "A grievance is defined as, and limited to, a written complaint involving an alleged violation of a specific provision of this Agreement." Section II, Step 4, of said Article also provides in part:

> "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."

5. The Department of Administration's Division of Personnel undertook a survey of Natural Resources Specialist positions in the Department of Natural Resources (DNR) in 1976 and 1977. The State Personnel Board, on December 12, 1977, approved the Division of Personnel's recommendations with respect to that survey. The Division of Personnel, pursuant to its authority under Section 16.07(2), Stats. thereafter reallocated certain DNR positions formerly in the Professional Science bargaining unit to classifications outside said unit.

6. At all times material hereto, Article III of the contract between the parties provided:

> "it is recognized by the parties that the Employer is prohibited from bargaining on the policies, practices and procedures of the civil service merit system relating to . . . [t]he job evaluation system specifically including position classification, position qualification standards, establishment and abolition of classifications, assignment and reassignment of classifications to salary ranges, and allocation and reallocation of positions to classifications, and the determination of an incumbent's status resulting from position reallocation."

Article XIV, Section 1, of said contract also provided that the parties waived all rights to bargain during the term of the agreement. Said contract did not provide for an impartial hearing officer as authorized under Section 111.91(3), Stats.

7. The Association on May 5, 1978, filed a grievance alleging that the reallocation of the DNR positions out of the bargaining unit was in violation of the contract. On May 18, 1978, the Association appealed the grievance to arbitration. On July 3, 1978, the parties elected Robert J. Mueller as the arbitrator to hear said grievance. The parties ultimately agreed that the arbitration hearing would be held on October 10, 1979. The Employer on September 19, 1979 advised the Association and Arbitrator Mueller that it was electing under Article IV of the contract to have the issue of arbitrability treated separately at the October 10, 1979 hearing. On October 9, 1979, the Association, through Staff Representative, Margaret Liebig, requested an indefinite postponement of the October 10, 1979 arbitration hearing. The Employer agreed to the Association's request for an indefinite postponement. By letter dated February 26, 1980, the Association again demanded that the Employer arbitrate the grievance. By letter dated March 17, 1980, the Employer advised the Association and Mr. Mueller that it had reconsidered its position on the grievance and stated that it would refuse to submit the issue to Mr. Mueller for arbitration because

> "the subject matter involved in the above-captioned case is clearly and unambiguously not arbitrable under the express terms of the collective bargaining agreement . . . and under the State Employment Labor Relations Act, ss. 111.80 et seq.,"

On May 12, 1980, Mr. Mueller, in response to correspondence from the Association's attorney, John S. Williamson, and over the objections of the Employer, set a hearing date of July 2, 1980 for the grievance. Said hearing was thereafter rescheduled to November 20, 1980.

Upon the basis of the above Findings of Fact, the Examiner issues the following

CONCLUSION OF LAW

The Association, in seeking arbitration of the grievance herein, has not violated Section 111.84(2)(d), nor any other provisions, of SELRA.

Upon the basis of the above Findings of Fact and Conclusion of Law, the Examiner hereby enters the following

ORDER

IT IS ORDERED that the complaint be, and the same hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin this 24th day of February, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco
Amedeo Greco, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The Employer asserts that the Association acted unlawfully by requesting arbitration of its reclassification grievance. The Employer argues that Article III of its contract expressly acknowledges that the Employer need not bargain over such an issue and that, furthermore, said contractual prohibition tracks Section 111.91(2)(b)2 Stats. The only limited exception to the prohibition in Section 111.91(3), notes the Employer, is the provision for an hearing officer to hear such issues. Here, asserts the Employer, the parties have not agreed to have a hearing officer hear the matter, and that, as a result, the Union therefore has committed a prohibited practice by seeking arbitration over such prohibited subject of bargaining.

At the hearing the Employer was asked whether it had any case authority - be it from the Commission, the National Labor Relations Board, or other public sector agencies - to the effect that a union can be guilty of prohibited practice merely by requesting arbitration over a disputed issue. The Employer admitted that it lacked any such case authority.

That is not surprising, since the Employer's novel theory, if accepted, would be totally antithetical to the principles underlying a greivance-arbitration system. For, the basic tenet of that system is that parties are to resolve their contractual disputes through the agreed upon arbitration procedure, and not through any self-help measures. That principle was succintly stated by Arbitrator Harry Shulman in Ford Motor Co., 3 LA 779 (1944). There, the Arbitrator had to decide whether an employe could properly refuse to follow a reasonable work directive from his supervisor. Answering that question in the affirmative, Arbitrator Shulman ruled:

> "Some men apparently think that when a violation of contract seems clear, the employee may refuse to obey and thus resort to self-help rather than the grievance procedure. That is an erroneous point of view. In the first place, what appears to one party to be a clear violation may not seem so at all to the other party. Neither party can be the final judge as to whether the contract has been violated. The determination of that issue rests in collective negotiation through the grievance procedure. But in the second place and more important, the grievance procedure is prescribed in the contract precisely because the parties anticipated that there would be claims of violations which would require adjustment. That procedure is prescribed for all grievances not merely for doubtful ones. Nothing in the contract even suggests the idea that only doubtful violations need be processed through the grievance procedure and that clear violations can be resisted through individual self-help. The only difference between a "clear" violation and a "doubtful" one is that the former makes a clear grievance and the latter a doubtful one. But both must be handled in the regular prescribed manner. (Emphasis added.)

Since the parties here have also agreed to a contractual grievance/arbitration procedure, the Association is free to seek arbitration of its grievance, irrespective of the clear outcome which the Employer expects. The Employer, in turn, is free to assert at an arbitration hearing that the grievance is not arbitrable for the very same reasons it has advanced herein. Indeed, the Employer itself has

indicated that it would make such an arbitrability argument when it advised the Union on September 19, 1979, that, pursuant to Article IV of the contract, it wanted a separate arbitrator to hear its arbitrability claim. As a result, the Employer may well prevail on its arbitrability claim without the need of going to a hearing on the substantive merits of the grievance. Moreover, if the Employer believes that any subsequent aribitration decision contravenes applicable state statutes, it is, of course, free to seek review of such a decision.

In such circumstances, which show that the Employer has agreed to a grievance/arbitration procedure, and that the Employer does retain the right to have a review of any subsequent arbitration decision, it would be totally inappropriate for the Commission to interject itself into this contractual disagreement.at this stage. 1/ For, even if the Commission were to become so involved, there still would be no basis whatsoever for finding that the Association committed an unfair labor practice by requesting arbitration of the grievance herein.

For these reasons, the complaint is hereby denied in its entirety.

Dated at Madison, Wisconsin this 24th day of February, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By [signature]
Amedeo Greco, Examiner

1/ The instant complaint marks the second time that the Employer has attempted to have the Commission rule on the merits of the grievance. In State of Wisconsin, Department of Employment Relations, CXLVII, Decision No. 17954 (7/80), the Commission denied the Employer's request for a declaratory ruling on the same issue. Having been rebuffed by the Commission from coming in through the front door, there is no reason why this back door attempt should be allowed.