

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

UNITED PROFESSIONALS FOR QUALITY  
HEALTH CARE,

Complainant,

vs.

STATE OF WISCONSIN,

Respondent.

Case CLIV  
No. 26703 PP(S)-77  
Decision No. 18059-A

Appearances:

Mr. Lee Cullen, Cullen & Weston, Attorneys at Law, 20 North  
Carroll Street, Madison, WI 53703, appearing on behalf of  
the Complainant.

Mr. Thomas Kwiatkowski, Attorney at Law, Department of Employment  
Relations, 149 West Wilson Street, Madison, WI appearing on  
behalf of Respondent.

FINDINGS OF FACT, CONCLUSION OF  
LAW AND ORDER

James D. Lynch, Examiner: A complaint of unfair labor practices was filed by the Complainant with the Commission on August 25, 1980. On September 9, 1980, the Commission appointed James D. Lynch as Examiner to make and issue Findings of Fact, Conclusions of Law and Order in this matter. The matter was set for hearing upon due notice and was heard on October 5, 1980 at the Commission's office in Madison, Wisconsin. The parties waived post-hearing briefs and submitted the matter for decision on the basis of the evidence adduced and oral arguments made at hearing. The record was closed on November 3, 1980 upon receipt of an affidavit filed on the Complainant's behalf. And being fully advised in the premises, having considered the evidence and arguments of the parties, the Examiner hereby makes and issues the following

FINDINGS OF FACT

1. Complainant, United Professionals for Quality Health Care, is a labor organization existing for the purpose of representing employees through collective bargaining. Complainant represents certain employees in various classifications of the State of Wisconsin. Laurence Rodenstein is employed by Complainant as a field representative. Mr. Rodenstein has responsibility for contract administration and the processing of grievances to arbitration.

2. Respondent, State of Wisconsin, is a political entity employing, among others, individuals in various classifications who are represented for purposes of collective bargaining by Complainant. The State employs Alfred Hunsicker as an Employment Relations Specialist. Mr. Hunsicker has responsibility for contract administration and the processing of grievances to arbitration.

3. Complainant and Respondent are parties to a collective bargaining agreement providing for inter alia: (1) a grievance procedure culminating in a binding arbitration step for the resolution of unresolved grievances; (2) the appointment of a separate arbitrator to

determine the question of arbitrability where a party claims that arbitrability is at issue; and, (3) a wage increase to all employees in a classification whose pay rate is beneath that of a new hiring rate if such is approved by the Division of Personnel.

4. On May 27, 1980, Laurence Rodenstein filed an amended group grievance at step three of the grievance procedure alleging a violation of Article V, Section C of the collective bargaining agreement. The grievance was denied by the Employer on June 17, 1980.

5. On June 23, 1980, the Union appealed said grievance to arbitration.

6. On July 1, 1980, the Employer by Mr. Hunsicker refused to submit the grievance to arbitration contending that it was under no legal obligation to do so as it alleged the subject matter of the grievances constituted prohibited subjects of bargaining under the provisions of the State Employment Labor Relations Act. Further, the Employer refused to submit the matter to arbitration solely on the question of arbitrability. These refusals were confirmed in a letter sent to Mr. Rodenstein by Mr. Hunsicker dated July 1, 1980.

7. On or about July 1, 1980, the Union filed another grievance alleging a violation of Article 5, Section C of the collective bargaining agreement.

8. Said grievance was subsequently denied by the State and thereafter was appealed to arbitration by the Union.

9. Thereafter, the Employer refused to proceed to arbitration on the merits of the grievance or to submit the matter to arbitration on the sole question of arbitrability. These refusals to proceed were memorialized in a letter dated July 21, 1980 sent by Mr. Hunsicker to Mr. Rodenstein.

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

#### CONCLUSION OF LAW

Respondent, State of Wisconsin, has violated and continues to violate, the terms of the collective bargaining agreement existing between it and Complainant, United Professionals for Quality Health Care, by refusing to submit to arbitration the grievances alleging a violation of Article V, Section C of the collective bargaining agreement. By its refusal to arbitrate said grievances, Respondent has committed and is committing unfair labor practices within the meaning of Section 111.84(1)(e), Wis. Stats.

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

#### ORDER

Respondent, State of Wisconsin, and its agents shall immediately:

1. Cease and desist from refusing to submit aforesaid grievances and issues related thereto to arbitration.

2. Take the following affirmative action which the Examiner finds will effectuate the policies of Section 111.80, Wis. Stats.

(a) Comply with the arbitration provisions of the collective bargaining agreement existing between it and the United

Professionals for Quality Health Care with respect to the aforesaid grievances.

- (b) Notify the United Professionals for Quality Health Care that it will proceed to arbitration on the issue of arbitrability and if it is determined that the grievance is substantively arbitrable then proceed to arbitrate said grievances all in accordance with the procedures established by the collective bargaining agreement; and, inform said labor organization that it is prepared to carry out the procedures set forth in the collective bargaining agreement by selecting an arbitrator.
- (c) Participate with the United Professionals for Quality Health Care in the arbitration proceedings before the arbitrator(s) to resolve the grievances.
- (d) Make payment to United Professionals for Quality Health Care in the amount of four hundred thirty-seven dollars and fifty cents (\$437.50) for reasonable attorney fees directly attributable to the State's wrongful refusals herein.
- (e) Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days from receipt of a copy of this Order as to what steps it has taken to comply herewith.

Dated at Madison, Wisconsin this 26th day of November, 1930.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By \_\_\_\_\_  
James D. Lynch, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF  
FACT, CONCLUSION OF LAW AND ORDER

Factual Background

The instant unfair labor practice proceeding is concerned with the question of whether Respondent, State of Wisconsin, may lawfully refuse to proceed to arbitration on two grievances filed by Complainant, United Professionals for Quality Health Care. The grievances allege a violation of Article V, Section C of the parties' collective bargaining agreement. Article V, Section C states: "Should the Employer increase the hiring rate, the Employer will increase the wage of all employees in the classification, whose wage is below the hiring rate, to the new hiring rate, if and when approved by the Division of Personnel."

The collective bargaining agreement contains a grievance procedure which culminates in a binding arbitration step for unresolved contractual disputes. The arbitration step itself also provides for a bifurcated hearing before a separate impartial arbitrator to resolve disputes concerning challenges to the arbitrability of grievances.

Position of United Professionals

Complainant Union alleges that the State is contractually required to submit unresolved grievances to arbitration and by its refusal to do so with respect to the two subject grievances has committed unfair labor practices within the meaning of Section 111.84(1)(e), Wis. Stats. The Union denies that Article V, Section C of the agreement is a prohibited subject of bargaining. Further, it avers that such an allegation is not a defense to a complaint charging a refusal to proceed to arbitration wherein the inquiry is restricted to the question of whether the grievance states a claim which on its face is governed by the collective bargaining agreement.

Position of the State of Wisconsin

Respondent, State, admits that it refused to proceed to arbitration on the two subject grievances but alleges by way of affirmative defense that it is under no legal obligation to do so because "[t]he subject matter which the Complainant seeks to appeal to arbitration is a prohibited subject of bargaining under Section 111.91(2)(b), Wis. Stats." In this proceeding, the State contends that the Examiner must first decide whether Article V Section C is a prohibited subject of bargaining; then, assuming that question to be answered affirmatively, next to find that Respondent has not violated the law thereby in refusing to submit these grievances to arbitration.

Scope of Proceeding

The first question to be resolved is the proper scope of this proceeding. In this regard, the Commission has long held that:

"We shall give arbitration provisions in collective bargaining agreements their fullest meanings, and we shall confine our function in such cases to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. We will resolve doubts in favor of coverage. 1/

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1/ Seaman-Andwall Corp., No. 5910 (1/62); State of Wisconsin, Dept. of Administration, No. 13607-B (1/76), aff'd No. 13607-C (2/76).

Making reference to these grievances, the Examiner finds them to state claims which on their faces are governed by the collective bargaining agreement and, thus, to be substantively arbitrable.

The Examiner finds no merit to the State's contention that the contract language in question must be construed to be a prohibited subject of bargaining and, thus, exempt from the purview of the contract's arbitration procedure as is well-settled that such a claim is a procedural defense which is reserved to the arbitrator for decision. 2/ It is not a legally cognizable defense to a complaint charging refusal to proceed to arbitration. 3/ Indeed, the Commission has earlier rejected the State's argument that it is not required to submit to binding arbitration a grievance regarding a contractual provision which the State contended was an illegal and nonbargainable subject of bargaining under the State Employment Labor Relations Act. State of Wisconsin, Department of Administration and its Employment Relations Section, No. 13608-B (3/76), aff'd No. 13608-C (4/76). 4/ Therefore, by its refusal to submit the instant grievances to arbitration, the State has violated Section 111.84(1)(e), Wis. Stats.

#### Relief

In view of the Commission's long-standing and well-enunciated policy in these matters, the Examiner finds that the State has acted in bad faith and without legal justification. In such a case, an award of attorney's fees is part of the appropriate relief. 5/ The Examiner finds that Respondent's refusals have caused Complainant to expend four hundred thirty-seven dollars and fifty cents (\$437.50) in attorney's fees to prosecute this action and hereby orders Respondent to make payment to Complainant in that amount. Lastly, the Examiner hereby orders Respondent to submit these matters to arbitration in accordance with the terms of the Order entered herein.

Dated at Madison, Wisconsin this 26th day of November, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By \_\_\_\_\_  
James D. Lynch, Examiner

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- 2/ Oostburg Joint School District, No. 14, No. 11196-A (11/72) aff'd No. 11196-B (12/72). Further, the parties have accorded recognition to this principle in Article IV of the agreement which provides in pertinent 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."
- 3/ Spooner Joint School District No. 1, No. 14416-A (9/76) aff'd No. 14416-B (4/76); Milwaukee County, No. 16448-B (4/79).
- 4/ During the course of hearing, the State sought to introduce certain testimony relative to the merits of its affirmative defense urged herein. The Union moved to exclude such evidence on the grounds that it was irrelevant to this proceeding. The evidence was excluded as irrelevant for the reasons stated above. See Chapter 227.08, Wis. Stats., which provides in pertinent part: "The agency or hearing examiner shall admit all testimony having reasonable probative value, but shall exclude immaterial, irrelevant or unduly repetitious testimony."
- 5/ Madison Metropolitan School District, No. 17471-A (12/78).

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