STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

UNITED PROFESSIONALS FOR QUALITY HEALTH CARE,	:	
Complainant,	:	Case CLIV No. 26703 PP(S)-77 Decision No. 18059-B
vs.	:	
STATE OF WISCONSIN,	:	
Respondent.	:	

ORDER AMENDING EXAMINER'S FINDINGS OF FACT, AND CONCLUSION OF LAW AND ORDER

Examiner James D. Lynch having, on November 26, 1980, issued his Findings of Fact, Conclusion of Law and Order in the above-entitled matter, wherein he concluded that the State of Wisconsin had committed unfair labor practices within the meaning of the State Employment Labor Relations Act by refusing to proceed to arbitration with respect to two grievances as required in the collective bargaining agreement existing between it and the United Professionals for Quality Health Care, and wherein the Examiner ordered the State to proceed to arbitration, and to pay to said Union a sum certain as reasonable attorney fees in the matter; and the State having timely filed a petition requesting the Wisconsin Employment Relations Commission to review the Examiner's decision; and briefs having been filed by Counsel for the parties, in support of, and in opposition to, the petition for review; and the Commission, having reviewed the record, the Examiner's decision, and briefs of Counsel, and being satisfied that the Examiner's Findings of Fact, Conclusion of Law and Order should be amended;

NOW, THEREFORE, it is

ORDERED

A. That the Examiner's Findings of Fact be, and the same hereby are, amended as follows:

FINDINGS OF FACT

1. That United Professionals for Quality Health Care, hereinafter referred to as the Union, is a labor organization representing employes for the purposes of collective bargaining, and has its offices at 1244 South Park Street, Madison, Wisconsin.

2. That the State of Wisconsin, hereinafter referred to as the State, is a political entity, employing various employes in the operation of the State's business, and in that regard has entered into various collective bargaining agreements with various labor organizations, which are the exclusive collective bargaining representatives of various employes employed in appropriate collective bargaining units; that the Department of Employment Relations is the designated bargaining representative of the State, and its employes therein are charged with the responsibility of administering the collective bargaining agreements entered into by the State; and that the offices of said Department are located at 143 West Wilson Street, Madison, Wisconsin.

3. That at all times material herein the Union has been, and is, the certified exclusive collective bargaining representative of State employes included in the statutory collective bargaining unit consisting of professional "patient care" employes; that in said relationship the Union and the State, at all times material herein, have been, and are, parties to a collective bargaining agreement covering the wages, hours and conditions of employment of said "patient care" unit employes; and that said agreement contained the following provision:

ARTICLE V

Wages

Wage Adjustment

. . .

C. Should the Employer increase the hiring rate, the Employer will increase the wage of all employees in the classification, whose wage is below the new hiring rate, if and when approved by the Division of Personnel.

4. That said collective bargaining agreement also contained in Article IV, a grievance and arbitration procedure providing in material part as follows:

Section 1: General

A grievance is defined as, and limited to, a written complaint involving an alledged (sic) violation of a specific provision of the Agreement. Complaints relative to prohibited subjects of bargaining may be appealed via the Departmental Grievance Procedure (1/1/72) and/or to the Wisconsin Personnel Commission for resolution in accordance with the rules of the administrator, Division of Personnel. The grievance procedure as set forth below shall be the exclusive procedure for adjustment of disputes arising from the application and interpretation of the Agreement.

. . .

Step Four

. . . On grievances where the arbitrability of the subject matter is in issue, a separate arbitrator shall be appointed to determine the question of arbitrability unless the parties agree otherwise . . .

The decision of the arbitrator will be final and binding on both parties of this Agreement . . .

5. That on May 27, 1980 the Union filed a "group grievance", in the third step, wherein it alleged that the State had violated Article V, Section C of the collective bargaining agreement, as follows:

The State, as Employer, may utilize hiring above the minimum (HAM) when the qualifications of a potential candidate significantly exceed the qualifications of employees within the same classifications. The State has failed to provide any evidence that HAM-hired individual(s) is (are) superior to within-classification employees in terms of qualifications.

This grievance alleges that the State has used the HAM device to circumvent the chronic labor shortage of health care personnel. The State, we allege, used the HAM mechanism to attract scarce individuals into difficult to fill health care classifications. Employees similarily situated in the following health care classifications should be reasonably applied . . .

Relief Sought:

All similarly situated bargaining unit members affected shall be made whole and be provided full and appropriate back pay for all violations.

6. That the State, through its authorized representative, submitted its third step response to the grievance, on June 17, 1980, as follows:

> Article V Section C has not been violated. Management retains the right to determine when a raised hiring rate or hire above the minimum will be used. Additionally, management is not required to share evidence in regard to the superiority of HAM hired individuals. The relief you are seeking will not be granted. Grievance denied.

7. That on June 23, 1980, the Union, in a letter over the signature of its Field Representative Rodenstein, addressed to Al Hunsicker, Employment Relations Specialist in the State's Department of Employment Relations, advised that the Union was appealing the State's response to the above grievance to arbitration, and wherein Rodenstein stated in part, as follows:

> . . . for the purpose of clarification the Union is asserting in this grievance that the State raised the starting rate for the Nurse Consultant I in question without raising the wages of all other Nurse Consultant I's whose rate of pay would fall below this new starting rate. This is an issue that does not relate at all to the State's generic terminology for HAM or RHR, but an issue of violating the Above Article V, Section C language to which the parties agreed in negotiations . . .

8. That on July 1, 1980, Hunsicker, by letter responded to the above, stating in material part as follows:

> Hiring Above the Minimum is an authorized recruitment technique to hire individuals in specific situations above the minimum of the range for the classification. This is done only when requested and justified by the employing agency. These requests must be approved by the Division of Personnel within the hiring limits stated in the job announcement for the position. Justification for use of this recruitment technique is based on a need for specific qualifications above the minimum or demonstrated inability to recruit effectively at the minimum. Hiring above the minimum is used judiciously and applied on an individual basis.
>
> The language in the present agreement between the United Professionals and the State of Wisconsin in Article V, C. does not relate to this recruitment technique. The language in Article V, C. relates to a raised hiring rate, where hiring rates for all employes in a classification are authorized to be increased by the Division of Personnel.
>
> Management is specifically prohibited from bargaining on recruitment policies, practices, and procedures under the charge of the State Employment Labor Relations Act, 111.91 (2)(b) and in Article III of the present collective bargaining agreement.
>
> As this recruitment technique is not bargainable and not contained in Article V, C., we cannot take the grievance in question to arbitration.

9. That on July 9, 1980 the Department of Health and Social Services received a grievance, dated July 1, 1980, over the signature of Rodenstein, alleging a violation of Article V, Section C, as follows:

> The Employer has introduced a policy of hiring RN's above the starting minimum, who satisfy certain criteria. Indeed, one (1) RN (A.B.) was hired in May, 1980 at minimum RN II, she was thereupon terminated and rehired within a 24 hour period at approximately 10% above the minimum. The Union alleges that the Employer is attempting to circumvent Article V, Section C by this action.

Relief sought

All RN's in the P.P.C.U. currently earning less than the new "minimum" created through the Employer's action of increasing the starting wage rate for A.B. et. al. shall be raised to the highest new "minimum" in effect.

10. That the State denied the above grievance, and following the Union's request that the State proceed to arbitration with respect thereto, Hunsicker, in a letter to Rodenstein, dated September 9, 1980, confirmed a telephone conversation held between them the previous day, to the effect that the State would not proceed to arbitration on said grievance.

11. That, at all times following the requests of the Union that the State proceed to arbitration on the two aforementioned grievances, the State refused, and continues to refuse, to proceed to arbitration with respect to whether said grievances are "arbitrable" under the collective bargaining agreement existing between the parties, and with respect to the merits of said grievances.

B. That the Examiner's Conclusion of Law be, and the same hereby is, amended as follows:

CONCLUSION OF LAW

That the State of Wisconsin, by its duly authorized agents, by refusing to submit to arbitration any issue involving the grievances filed by United Professionals for Quality Health Care on May 27 and July 9, 1980, as set forth in paras. 5 and 9 of the Amended Findings of Fact, has violated, and continues to violate, the provisions of the collective bargaining agreement then in existence between said parties, and therefore, in said regard, the State of Wisconsin has committed, and is committing, unfair labor practices within the meaning of Sec. 111.84(1)(e) of the State Employment Labor Relations Act.

C. That the Examiner's Order be, and the same hereby is, amended as follows:

ORDER

That the State of Wisconsin, and its duly authorized agents, shall:

1. Immediately cease and desist from refusing to proceed to arbitration on all issues pertaining to the grievances involved herein, as required in the collective bargaining agreement existing between it and United Professionals for Quality Health Care.

2. Take the following affirmative action which the Commission finds will effectuate the polices set forth in the State Employment Labor Relations Act:

a. Immediately notify United Professionals for Quality Health Care, in writing, that it will comply with the provisions in the collective bargaining agreement which existed between it and said Union requiring it to proceed to arbitration with respect to any issue involving the grievances herein, and in that regard, upon the request of said Union, proceed to arbitration thereunder.

b. Notify the Wisconsin Employment Relations Commission in writing, within twenty (20) days from the receipt of a copy of this Order as to what steps it has taken to comply herewith.

Given under our hands and seal at the City of Madison, Wisconsin this 25th day of November, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Gary L. Covelli
Gary L. Covelli, Chairman

Morris Slavney, Commissioner

Herman Torosian, Commissioner

MEMORANDUM ACCOMPANYING ORDER AMENDING EXAMINER'S FINDINGS OF FACT, AND CONCLUSION OF LAW AND ORDER

The Pleadings

The instant complaint proceeding was initiated by a complaint and an amended complaint filed by the Union, alleging that the State committed unfair labor practices within the meaning of the State Employment Labor Relations Act (SELRA), by refusing to proceed to arbitration on two grievances as required in the then existing collective bargaining agreement between the parties. The Union further alleged that the State's refusal in said regard was not in good faith.

In its answer the State denied any violation of the collective bargaining agreement, contending that neither the agreement, nor the law, required that it should have proceeded to arbitration on the grievances, since the subject matter thereof "is a prohibited subject of bargaining under Section 111.91(2)(b) of SELRA."

The Examiner's Decision

Following a hearing, and the consideration of briefs filed by Counsel for the parties, the Examiner issued his decision on November 26, 1980, wherein he concluded that the State, by refusing to proceed to arbitration on the issues involved in said grievances (including a procedural issue as to whether said grievances involved a "prohibited" subject of bargaining), violated the contractual obligation to do so, and thus committed an unfair labor practice within the meaning of Sec. 111.84(1)(e) of SELRA. The Examiner ordered the State to cease and desist from such refusal, to notify the Union that it would proceed to arbitration, participate in such arbitration, and to pay the sum of $437.50 to the Union "for reasonable attorney fees directly attributable to the State's wrongful refusals" to proceed to arbitration in the matter.

The Petition for Review

The State timely filed a petition requesting the Commission to review the decision of the Examiner, contending that "substantial questions of law and administrative policy were raised by the Examiner's Conclusion of Law and Order", and further, the State requested the Commission to review a ruling made by the Examiner, during the course of the hearing before him, preventing the State from attempting to prove that the Union was attempting to grieve (and arbitrate) "certain personnel policies that are prohibited subjects of bargaining" under Sec. 111.91(2) of SELRA.

The State filed a brief in support of its petition and the Union filed a brief urging the Commission to affirm the Examiner's decision, and further the Union moved that the Commission expand the amount of attorney's fees ordered to be paid in the Examiner's decision to include additional fees incurred by the Union as the result of the Petition for Review.

The Position of the State

The State, as it did before the Examiner, contends that the grievances in issue here relate to prohibited subjects of bargaining under SELRA, and thus are not subject to the contractual grievance and arbitration procedure. The State characterizes the grievances involved as relating to the "state's practice of hiring certain individuals above the minimum under certain circumstances (see Pers. 5.02(1)(c), Wisconsin Administrative Code) and demanding relief under the grievance and arbitration procedure of the Agreement that the Employer raise the minimum (see Pers. 5.02(1)(b), Wisconsin Administrative Code) for all employes in the bargaining unit it represents." The State goes on to argue that it cannot submit to contractual arbitration policies, practices or procedures relating to prohibited subjects of bargaining such as "hiring above the minimum or raised hiring rates", and in that regard cites Secs. 111.91(1), (2) and (3) of SELRA, and Pers. 5.02 of the Wisconsin Administrative Code.

The State also takes issue with the ruling of the Examiner made during the course of the hearing which prevented the State from presenting evidence regarding the basis for its refusal to proceed to arbitration with respect to the grievances involved, despite the fact that the Examiner in his decision set forth that the Employer's affirmative defense "is not a legally cognizable defense to proceed to arbitration". The State requests the Commission to "recognize as valid the affirmative defense that policies, practices and procedures related to the prohibited subjects set forth in Sec. 111.91(2)(b), Wis. Stats., are not subject to a bargained arbitration procedure". The State contends in its brief in support of its petition that "the record supports such a determination on review" by the Commission, and in that regard urges the Commission to determine the procedural arbitrability issue - namely that the grievances involve prohibited subjects of bargaining.

The State also contends that the Examiner erred in ordering the State to pay attorney fees in the matter, contending that (at least as of the date on which its brief was filed) the Commission had not as yet formally determined the policy of granting attorney fees in complaint proceedings, and regardless, the State contends that its refusal to proceed to arbitration was not in bad faith and was not without legal justification.

The Position of the Union

The Union contends that the complaints filed herein concern whether the Union is seeking to proceed to arbitration on a claim which, on its face, is governed by the terms of the collective bargaining agreement between the parties. It argues that doubts are resolved in favor of coverage, and under Commission policy, the Commission does not make any determination which is reserved to the arbitrator by the agreement. Here, the Union contends, the grievances alleged a violation of the agreement by not raising the rates of existing employes to the level of an increase in the hiring rate for new employes, as required in the agreement. Further, the Union argues that the agreement itself specifically provides for the appointment of a separate arbitrator to determine any issue relating to substantive arbitrability before the merits of the grievance are arbitrable.

The Union, contrary to the State, supports the ruling of the Examiner in denying the admission of testimony or other evidence relating to the claim that the Union was attempting to grieve matters relating to prohibited subjects of bargaining, contending, in effect, that such a defense was for the initial arbitrator to consider. The Union would have the Commission affirm that portion of the Examiner's Order awarding attorney's fees, contending that the State's action in the matter lacked good faith and had no reasonable basis in law, and that in order to prevent abuse of the processes established under SELRA, the State should be required to pay reasonable attorney fees to the Union.

Discussion

We have reviewed the entire record, and the briefs filed with the Examiner, as well as those filed with the Commission, in support of, and in opposition to the petition for review. We have revised the Examiner's Findings of Fact to more fully describe the content of the grievances involved in this proceeding, as well as the responses of the agents of the State to said grievances, and to the request to proceed to arbitration thereon.

SELRA, like the Municipal Employment Relations Act (MERA) provides that it is an unfair labor practice to refuse to proceed to arbitration in violation of a contractual provision requiring arbitration with respect to grievances arising from the application or involving the interpretation of provisions contained in a collective bargaining agreement. The Commission, in cases too numerous to mention, has held that in complaints seeking to enforce arbitration provisions in collective bargaining agreements, the Commission will ascertain whether the party seeking arbitration is making a claim, which on its face, is governed by the collective bargaining agreement. Here the two grievances involved allege, on their face, that the State committed a violation of Article V, Section C of the collective bargaining agreement then in effect between the parties, by not adjusting the rates of employes covered thereby to the level of starting rates

paid to new employes. Thus it is apparent to the Commission that the claims set forth in said grievances, on their face, allege a violation of a particular and specific provision of the collective bargaining agreement. As long as the grievances filed by the Union make claims which on their face are covered by the collective bargaining agreement, the question of whether the State has a duty to arbitrate grievances which allegedly relate to a prohibited subject of bargaining is an issue for the arbitrator and not for the Commission to decide. 1/ Therefore, we affirm the Examiner's conclusion that the State's refusal to proceed to arbitration with respect to the two grievances constitutes a violation of SELRA.

As to the issue of attorney fees, we have not affirmed the Examiner's grant of such fees to the Union and hereby also deny the Union's request for the attorney fees it incurred as a result of the instant Petition for Review. As his memorandum indicates, the Examiner's grant of attorney fees was based upon his determination that the State acted "in bad faith and without legal justification" when it premised its refusal to arbitrate upon a procedural defense which the Commission had previously rejected. It is true that the Commission has long held that procedural defenses are reserved to the arbitrator and thus do not constitute valid bases for refusing to proceed to arbitration. However, at the time the Examiner issued the instant decision, the Commission, contrary to the Examiner's statement, had not previously addressed the merits of whether a claim that a grievance deals with a prohibited subject of bargaining is a procedural defense which is also for arbitral resolution. As the Examiner noted, Examiner Yaeger, in State of Wisconsin, Department of Administration and the Employment Relations Section 2/ rejected the defense made by the State herein. However, said decision was not appealed and thus became the Commission's decision solely by operation of Sec. 111.07(5) Stats. Given the absence of a prior Commission decision on the merits, the premise for the Examiner's finding of bad faith disappears and the finding itself must be discarded. It should also be noted that in Madison Metropolitan School District 3/ the Commission reaffirmed that its basic policy on the granting of attorney fees had been set forth in United Contractors, Inc. 4/ and that said policy did not include the granting of attorneys fees based upon the finding of bad faith. Thus assuming arguendo that bad faith existed herein, it would not have formed a basis for the grant of attorney fees.

Dated at Madison, Wisconsin this 25th day of November, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Gary L. Covelli, Chairman

_____
Morris Slavney, Commissioner

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Herman Torosian, Commissioner

1/ State of Wisconsin, Department of Employment Relations, Decision No. 18012-C (11/81).

2/ Decision No. 13608-B (3/76).

3/ Decision No. 16471-D (5/81).

4/ Decision No. 12053-A,B (7/74).