

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

No. 18457-A

MEMORANDUM ACCOMPANYING ORDER DENYING RESPONDENT'S MOTION
TO DISMISS FOR FAILURE TO EXHAUST CONTRACTUAL GRIEVANCE
PROCEDURE AND ORDER DEFERRING COMPLAINT TO ARBITRATION

On February 2, 1981, Complainants filed a complaint alleging that Respondents had violated Section 111.84(1)(e), of the State Employment Labor Relations Act. Complainants allege; inter alia:

- That on or about March 11, 1980, a DILHR employee named Violet Thompson filed a complaint with the agency against Complainant Tokus.
- That in response to that complaint on or about March 28, 1980, Respondent DILHR issued a letter of reprimand signed by Merry Tryon to Complainant Tokus.
- That on or about April 24, 1980, Complainant Tokus filed a grievance which stated: "I received a written reprimand without just cause. Further, this violates settlement to previous grievances."
- That this grievance was filed with the office of the Secretary of Respondent DILHR at the third step on or about April 15, 1980.
- That on or about April 28, 1980, Respondent agency DILHR issued a reply to said third step grievance which stated: "Letter will be removed from the personnel file and consequently cannot be referred to as a letter of reprimand now or in the future. The Department has the responsibility to enforce Work Rules equitably and reasonably for all employees."
- That Respondent DILHR's reply was signed by Donald Weinkauff, Personnel Manager for the agency.
- That on or about May 7, 1980, DILHR employee Violet Thompson again filed a complaint against Complainant Tokus.
- That on June 4, 1980 Respondent DILHR issued a letter signed by Thomas Dale and Merry Tryon suspending Respondent Tokus for alleged incident cited in Thompson's May 7 complaint.
- That the second paragraph of said letter of June 4, 1980, included information from the March 28, 1980 letter which Respondent DILHR had agreed to remove from Complainant Tokus's personnel file.
- That the inclusion of this information in the June 4, 1980 suspension letter and, thus, in Complainant Tokus personnel file is a violation of the April 28, 1980 grievance settlement and of Section 111.84(1)(e).

On March 18, 1981, Respondents filed a "Motion to Dismiss Said Complaint for Failure to Exhaust Contractual Grievance Procedure." In support of its motion, Respondents have submitted a notarized affidavit from Ms. Susan Sheeran, an Employment Relations Specialist with the Division of Collective Bargaining, Wisconsin Department of Employment Relations. In said affidavit, Sheeran swears that Complainant Tokus' June 4, 1980 suspension is presently being litigated before an arbitrator and that in Complainant Tokus' appeal to arbitration, it is claimed in part, that the suspension imposed on him was in "violation of a prior grievance settlement, the Employer incorporated in the suspension letter a matter which the parties had agreed was unfounded and was not to be used against Grievant Leonard A. Tokus." According to Sheeran's unrefuted affidavit, the appeal to arbitration also claims "the manner and means of discipline imposed violates the settlement of prior grievances."

Respondents contend that by alleging a violation of a grievance settlement pursuant to a contractual grievance procedure, Complainants are setting forth a grievance under Article IV of the labor agreement and therefore this matter is subject to the final, binding and exclusive grievance procedure set forth at Article IV. 1/ Respondents aver that Complainants have failed to exhaust the contractual grievance procedure and it is therefore inappropriate for the Commission to assert its jurisdiction over this matter.

It is well settled that a grievance settlement agreement reached between parties is itself a legally enforceable collective bargaining agreement and that the breach of same could constitute an unfair labor practice. 2/ Respondents fail to cite any persuasive authority for the proposition that the Commission should be denied jurisdiction over this matter on the basis that Complainants did not exhaust the contractual grievance procedure by failing to re-submit the alleged grievance settlement agreement through the grievance procedure. Consequently, Respondent's motion has been denied.

On the other hand, Respondent's motion has brought to the Examiner's attention that the matter related to the alleged violation of the April 28, 1980 grievance settlement agreement - which is the gravamen of the dispute involved herein - is presently one of several issues also being litigated before an arbitrator. As indicated above, the Commission certainly has jurisdiction to adjudicate cases where an alleged breach of a grievance settlement agreement is claimed. The issue before the Examiner is whether it would be appropriate to defer the above noted matter to the arbitrator.

The Commission, in Department of Administration No. 15261 (1/78) indicated that "Deferral of alleged statutory violations to arbitration is a discretionary act in which the Commission abstains from adjudicating the statutory question." In the aforesaid cases, the Commission enunciated the guidelines it would follow when considering whether a matter should be deferred and indicated: that the parties must be willing to arbitrate and renounce technical objection which would prevent a decision on the merits by the arbitrator; that the collective bargaining agreement must clearly address itself to the dispute; and, that the dispute must not involve important issues of law or policy. 3/

In the case at Bar, the parties have already submitted the issue concerning the alleged grievance settlement agreement before an arbitrator. Based upon the criteria set forth by the Commission in Department of Administration, supra, it appears that this is an appropriate matter to defer to the arbitrator inasmuch as the factual determinations under the arbitration and complaint proceedings could be substantially the same, and that the resolution of the arbitration question could resolve the areas of dispute before the Examiner and would therefore avoid duplicitious litigation in different forums.

Therefore, the Examiner will defer to the arbitration procedure, and if the arbitrator resolves the merits of the dispute raised in the unfair labor practice complaint, and said resolution isn't repugnant to the policies of the State Employment Labor Relations Act, the Examiner will at that time dismiss the complaint. On the other hand, because the legislative has entrusted the Commission with the responsibility

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- 1/ Article IV Section 1 of the parties labor agreement, in part, defines a grievance as a "written complaint involving an alleged violation or interpretation or implementation of a specific provision of the Agreement."
 - 2/ See, for example, Oneida County Employer Union Local 79 vs. Oneida County and Wallace Sommers No. 15374-B (12/77); aff'd. No. 15374-C (6/78); Wisconsin General and Industrial Workers Union Local 104, AFL-CIO, LDIU vs. Checker Taxi Co., Inc., 16752-A (10/79).
 - 3/ Also see Menomonie Education Association, No. 16724-B (1/81).

to resolve questions of law and legislative policy, if the arbitrator fails to resolve the merits of the dispute which is pending before the Examiner, or if, said resolution is repugnant to the policies of the State Employment Labor Relations Act, the Examiner would then schedule the matter for hearing. It is for the later reason that the Examiner has retained jurisdiction over the case.

Dated at Madison, Wisconsin this 1st day of May, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Examiner