STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

GENERAL DRIVERS, DAIRY EMPLOYEES AND HELPERS LOCAL 579, Complainant, vs. GREEN COUNTY HIGHWAY DEPARTMENT, Respondent.	Case LXI No. 29655 MP-1331 Decision No. 19629-A

Appearances:

Goldberg, Previant, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, by Ms. Marianne Goldstein Robbins, 788 North Jefferson Street, P. O. Box 92099, Milwaukee, Wisconsin 53202, appearing on behalf of the Complainant.

Melli, Shiels, Walker & Pease, S.C., Attorneys at Law, by Mr. Jack D. Walker, 119 Monona Avenue, P. O. Box 1664, Madison, Wisconsin 53701, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

General Drivers, Dairy Employees and Helpers, Local 579, filed a complaint of prohibited practices on April 26, 1982, with the Wisconsin Employment Relations Commission alleging that Green County violated its collective bargaining agreement and thereby violated Section 111.70(3)(a)5 of the Municipal Employment Relations Act (MERA); the Commission appointed Sherwood Malamud, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5), Wis. Stats., as made applicable to municipal employment by Section 111.70(4)(a), MERA; hearing on said complaint was held in Monroe, Wisconsin on July 14, 1982 before the Examiner; the parties filed post-hearing briefs by September 16, 1982; the Examiner having considered the evidence and arguments of the parties and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. General Drivers, Dairy Employees and Helpers Local 579, hereinafter the Union, is a labor organization and is the exclusive collective bargaining representative of certain employes of the Green County Highway Department. It maintains its offices at 2214 Center Avenue, Janesville, Wisconsin 53545.

2. Green County, hereinafter the County, is a municipal employer and it maintains its offices in the Green County Courthouse, 2813 Sixth Street, Monroe, Wisconsin 53566.

3. The Union and County are parties to a collective bargaining agreement effective January 1, 1980 - December 31, 1981 covering wages, hours and conditions of employment of certain Highway Department employes; and that said agreement provides, in pertinent part, as follows:

ARTICLE IV. SENIORITY

. . .

Section 3. In laying off employes because of a reduction in forces, the employees with the least seniority shall be laid off first provided that those remaining are capable of carrying on the Employer's usual operations effectively. In

re-employing those employees with the greatest length of service shall be called back first provided they are capable of performing the available work.

. . .

ARTICLE VIII. GRIEVANCE AND ARBITRATION

In case any dispute or misunderstanding relative to the provisions of this Agreement arise, it shall be handled in the following manner:

(a) An employee who has a grievance shall report such grievance to his proper supervisor, who shall thereupon make mutually satisfactory determination within a reasonable length of time, not, however, to exceed five working days.

(b) In the event that no mutually satisfactory decision has been reached in said period of time the employee shall then refer the grievance to the Union on a written form furnished by the Union. The Union shall thereupon bring the issue before the County Representative.

(c) If the County and the Union cannot reach a mutually satisfactory decision within ten (10) days, an arbitrator shall be selected on application to the Wisconsin Employment Relations Commission (WERC). If the Commission finds it necessary to appoint an arbitrator not a member of the Commission the parties shall equally share the expense of the arbitrator so appointed. The decision of the arbitrator shall be final and binding on both parties.

The provisions of this Article with respect to filing grievances shall be available to employees, to the Union, and to the County.

4. That on November 27, 1981 the County notified employes of a reduction in force effective as of said date and that on said date, the County laid off an employe, Gary Keegan, who is in the bargaining unit and subject to the terms of the collective bargaining agreement described in Finding of Fact No. 3, above.

5. The Union initiated a grievance alleging that the County had violated Article IV of the agreement in its implementation of the reduction in force on November 27, 1981 by laying off Highway Department employe Gary Keegan, while retaining a less senior employe; said grievance was submitted to the proper County representative on an official grievance form which bears two dates, December 30 and 31, 1981; the grievance was then processed through the grievance procedure up to arbitration, and that the County refused to proceed to arbitration on the Keegan grievance. The County, in part, defends its refusal to submit the Keegan grievance to arbitration on the grounds that said grievance was untimely filed.

6. That on April 26, 1982 the Union filed the instant complaint with the Commission alleging that the County committed a prohibited practice in violation of the Municipal Employment Relations Act by having refused to arbitrate the grievance referenced herein.

7. That the grievance filed by the Union alleging a violation of Article IV of the agreement raises a claim which, on its face, is governed by the collective bargaining agreement between the parties; that the issue of timeliness raises a question of procedural arbitrability which together with the merits of this dispute should be submitted to the Arbitrator.

8. That the County participated in an arbitration proceeding on the Gary Keegan grievance concurrent with the proceeding in this matter; and the Examiner sat as the Arbitrator in this matter. Should the Examiner find that the grievance is arbitrable, the parties agreed that the Examiner serve as the Arbitrator in this matter and issue an award based upon the record developed on July 14, 1982.

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

CONCLUSION OF LAW

1. That by refusing to submit to final and binding arbitration the grievance of Gary Keegan concerning the reduction in force implemented on November 27, 1981, along with the procedural arbitrability issue related thereto, and since said grievance states a claim which on its face is covered by the parties' agreement, Green County has violated the terms of a collective bargaining agreement, and has committed a prohibited practice within the meaning of Section 111.70 (3)(a)5 of MERA.

Upon the basis of the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes the following

ORDER 1/

That Green County has proceeded to arbitration, has concurred in the undersigned serving as the Arbitrator, and has participated in the arbitration proceeding on July 14, 1982, and on that basis no further order is required in this matter.

Dated at Madison, Wisconsin this 18th day of April, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Sherwood Malamud, Examiner

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

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

Introduction:

The Union filed a complaint with the Wisconsin Employment Relations Commission alleging that Green County refused to arbitrate the Gary Keegan grievance. The County answered the complaint and in effect put the Union to its proof on the issue of the County's alleged refusal to proceed to arbitration on the Keegan grievance. In its answer, the County set forth two affirmative defenses. In the first, it alleged that there was no agreement in effect requiring it to participate in an arbitration proceeding in the matter. In the second affirmative defense, the County alleged further that in the course of bargaining, the matter had been resolved.

At the hearing on this complaint, the County withdrew the two affirmative defenses relating to the existence of a contract which compels the County to participate in arbitration and relating to whether the grievance had been resolved in bargaining. Accordingly, the Examiner made no findings or conclusions concerning said defenses. As for the principle issue concerning the arbitrability of the Keegan grievance, both the Union and the County stipulated to the following procedure for the determination of this prohibited practice complaint, and if necessary, the resolution of the underlying grievance. The Examiner's summary of that stipulation appears at p. 3 of the transcript, as follows:

> . . . the parties have entered into a stipulation according to which the Examiner is to hear all matters in dispute concerning, No. 1, the arbitrability of the grievance as to whether it has been resolved or not in negotiations, and as well as hear the substance of the grievance, and then the Examiner will decide whether the matter has been resolved or not and issue an order accordingly. If the Examiner finds in favor of the Complainant, the Union, then he will order the Employer to proceed to arbitration which the Employer will have done today, and the Examiner will then become the arbitrator and determine the grievance -- the substantive grievance. If the Examiner finds on behalf of the Employer, Green County Highway Department, then he will dismiss the complaint and will not decide the greivance. That's my understanding of the parties' stipulation. Is that a correct understanding?
>
> MS. ROBBINS: That's correct.
>
> MR. WALKER: Yes.

Positions of the Parties:

The Union argues that the grievance is arbitrable. It cites John Wiley and Sons v. Livingston, 376 U.S. 543 (1964) and City of Racine, (17381) 10/79 in support of its position that a procedural arbitrability question such as the timely or untimely filing of a grievance is to be resolved by the Arbitrator.

The County's argument on this issue is contained in the following quotation excerpted from pages 9-10 of its brief:

> The issue of whether a prohibited practice has occurred under MERA is mooted by the fact that the County has herein agreed to arbitrate the dispute. Cf. General Motors Corp., 171 NLRB 666 (1968); NLRB v. Mackay Radio & Telegraph Co., 2 LRRM 610 (1938). Given the strong policy favoring arbitration as a peaceful manner of resolving labor disputes, it would not effectuate the Act to issue a finding of a prohibited practice in this case. Accordingly, our contentions herein shall be directed toward the merits of the grievance. We submit that the grievance should be denied.

Discussion:

At the hearing in this matter on July 14, 1982, the parties entered into a stipulation governing the manner in which this complaint and any arbitration proceeding on the underlying grievance were to be processed by the Examiner (Arbitrator). The parties agreed that in the complaint forum, the Examiner would first determine the arbitrability of the grievance, and issue a decision on the matter including an appropriate order. At the completion of the Examiner's opening remarks, the parties presented testimony and evidence on both the arbitrability issue which is the subject of this complaint and the underlying grievance. The County's participation in the arbitration hearing and presentation of evidence on the underlying grievance was done without prejudice to its position on the arbitrability matter. The County's argument that the matter is moot disregards the stipulated procedure referenced above. Furthermore, the County's participation in the "arbitration" procedure is premised on the Examiner issuing a decision on the threshold arbitrability issue. The Examiner finds the County's mootness argument has no merit. Accordingly, a determination of the arbitrability issue follows.

The Commission has consistently held in numerous cases that its inquiry into the arbitrability of a grievance is limited to a determination of whether the party seeking arbitration is making a claim, which on its face, is governed by the collective bargaining agreement. 2/ Procedural issues, such as the timeliness of a grievance, are subject to arbitral determination. 3/ The issue raised in the underlying grievance concerns layoff, a matter specifically referenced in Article IV, Sec. 3. A dispute over the application of this clause is not excluded from the definition of a grievance found in Article VIII of the agreement. Since timeliness issues are for the arbitrator and since the grievance states a claim which on its face is governed by the terms of the parties agreement, the Examiner concludes that the grievance is arbitrable. The Conclusion of Law reflects this determination.

The County participated in an arbitration proceeding on July 14, 1982 and pursuant to the agreement of the parties, the undersigned served as the Arbitrator. The Order issued herein reflects the participation of the County in this proceeding. The Examiner finds that no further order is required.

Dated at Madison, Wisconsin this 18th day of April, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Sherwood Malamud, Examiner

2/ The Commission's cases on point may be found under headnote M865. 3.1 in the Wisconsin Public Employment Digest; most recently this principle was expressed again in Appleton Area School District (19338-A,B) 5/82, 6/82.

3/ City of Racine (17348) 10/79; Milwaukee County (16448-B) 4/79; Sauk Prairie School District (15282-B) 7/78.