STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

TERRY FRANK, Complainant, vs. STATE OF WISCONSIN (DEPARTMENT OF HEALTH AND SOCIAL SERVICES), Respondent.	Case 190 No. 31647 PP(S)-97 Decision No. 20830-B

Appearances:

Brynelson, Herrick, Gehl & Bucaida, Attorneys at Law, by Mr. Steven J. Schooler, P. O. Box 1767, Madison, Wisconsin 53701-1767, appearing on behalf of the Complainant.

Mr. Edward A. Corcoran, Mr. Sanford Cogas and Mr. Thomas E. Kwiatkowski, Attorneys at Law, Department of Employment Relations, Division of Collective Bargaining, 149 East Wilson Street, P. O. Box 7855, Madison, Wisconsin 53707-7855, appearing on behalf of Respondent State.

ORDER MODIFYING EXAMINER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW AND AFFIRMING EXAMINER'S ORDER

Examiner Mary Jo Schiavoni having, on December 19, 1983, issued Findings of Fact, Conclusions of Law and Order, with Accompanying Memorandum, in the above-entitled proceeding, wherein she refused to assert the Commission's jurisdiction over a complaint alleging that the State of Wisconsin (Department of Health and Social Services) had violated a collective bargaining agreement and thereby committed unfair labor practices within the meaning of Sec. 111.84(1)(e), Stats.; and the Complainant having, on December 28, 1983, timely filed a petition for Commission review of said decision; and the parties having filed briefs in the matter, the last of which was received on February 28, 1984; and the Commission having reviewed the record in the matter, and being satisfied that the Examiner's Findings of Fact and Conclusions of Law should be modified, and the Examiner's Order should be affirmed;

NOW, THEREFORE, it is

ORDERED 1/

A. That the Examiner's Findings of Fact are hereby modified to read as set forth below, and as so modified are hereby adopted by the Commission:

1/ Pursuant to Sec. 227.11(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.12(1) and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats.

227.12 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025 (3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

(footnote continued on page 2)

FINDINGS OF FACT

1. That Terry Frank, hereinafter referred to as the Complainant or Frank, is an individual who resides at 1443 Williamson Street, Madison, Wisconsin.

2. That the State of Wisconsin, hereinafter referred to as the State or Respondent State, is an employer employing various employes in the performance of its various functions; that various classifications of its employes are included in various appropriate collective bargaining units and are represented by various labor organizations for purposes of collective bargaining pursuant to the State Employment Labor Relations Act; and that in performing the latter function, the State is represented by its Department of Employment Relations, which has its offices at 149 East Wilson Street, Madison, Wisconsin 53702.

2/ (continued)

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.12, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.11. If a rehearing is requested under s. 227.12, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.20 upon which petitioner contends that the decision should be reversed or modified.

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(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

3. That, at all time material herein, Wisconsin State Employees Union, AFSCME, Council 24, AFL-CIO, hereinafter referred to as WSEU, was the exclusive bargaining representative for certain State employes including the Complainant herein.

4. That the State and WSEU have been, and are, parties to collective bargaining agreements covering wages, hours and conditions of employment of employes in the technical bargaining unit which includes employes possessing the classification of Institution Aide in the Department of Health and Social Services; that these agreements, by their terms, were effective from November 9, 1979 to June 30, 1981, and from December 20, 1981 to June 30, 1983; that said agreements both contained, among their provisions, a grievance procedure applicable to all alleged violations of said agreement, culminating in final and binding arbitration of unresolved grievances; and the grievance procedures contained the following language material herein:

ARTICLE IV

Grievance Procedure

Section 1: Definition

41 A grievance is defined as, and limited to, a written complaint involving an alleged violation of a specific provision of this Agreement.

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43 An employe may choose to have his/her designated Union representative represent him/her at any step of the grievance procedure. If an employe brings any grievance to the Employer's attention without first having notified the Union, the Employer representative to whom such grievance is brought shall immediately notify the designated Union representative and no further discussion shall be had on the matter until the appropriate Union representative has been given notice and an opportunity to be present. Individual employes or groups of employes shall have the right to present grievances in person or through other representatives of their own choosing at any step of the grievance procedure, provided that the appropriate Union representative has been afforded the opportunity to be present at any discussions and that any settlement reached is not inconsistent with the provisions of this Agreement.

44 All grievances must be presented promptly and no later than thirty (30) calendar days from the date the grievant first became aware of, or should have become aware of with the exercise of reasonable dilligence (sic), the cause of such grievance.

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Section 5: Exclusive Procedure

60 The grievance procedure set out above shall be exclusive and shall replace any other grievance procedure for adjustment of any disputes arising from the application and interpretation of this Agreement.

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5. That on October 24, 1977, Complainant was employed by the State as an Institution Aide at the Central Wisconsin Center for the Developmentally Disabled; that on April 29, 1979, Complainant suffered a job related injury and was on paid leave status until August 31, 1979; and that thereafter the Complainant went on an unpaid leave until April 18, 1980, on which date she was terminated.

6. That the WSEU subsequently filed a grievance under the collective bargaining agreement between the State and WSEU prompted by the State's denial of a request by Complainant for reinstatement in April 1981. Said grievance alleged violation of the following contractual provisions:

ARTICLE IV

Grievance Procedure

. . .

Section 9: Discipline

73 The parties recognize the authority of the Employer to suspend, demote, discharge or take other appropriate disciplinary action against employes for just cause. An employe who alleges that such action was not based on just cause, may appeal a demotion, suspension, discharge, or written reprimand taken by the Employer beginning with the Third Step of the grievance procedure except that written reprimands shall begin with the First Step of the grievance procedure.

74 An employe shall be entitled to the presence of a designated grievance representative at an investigatory interview (including informal counseling) if he/she requests one and if the employe has reasonable grounds to believe that the interview may be used to support disciplinary action against him/her.

75 If any discipline is taken against an employe both the employe and Union will receive copies of this disciplinary action.

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ARTICLE XIII

Employe Benefits

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Section 16: Hazardous Employment Status

282 A. The Employer agrees to continue in effect the present provisions and administration of Section 230.36(1), (2) and (3), of the 1977 Wisconsin Statutes, which pertain to Employer payments to employes who suffer an injury while performing service fot eh Employer and incidental to his/her employment except that Drivers License Examiners and Analysts shall be covered employes while (1) seizing drivers licenses and/or plates on revocations, cancellations, and suspension matters, and (2) during investigations relating to possible violations of the law. In addition when an employe is responding to or going to the scene of a disturbance while in work status or on the Employer's premises, or when engaged in crowd control and riot training activities they shall be covered employes. It is expressly understood that bargaining unit employes not specifically listed in Section 230.36 who work at institutions in the Department of Health and Social Services are eligible for the benefits under this provision. For the purposes of this Section the provisions of ss. 230.36(4) of the 1977 Wisconsin Statutes, concerning appeals to the Administrator ot eh State Division of Personnel, shall not be applicable. The president of the local union shall be sent a copy of every injury report filed by an employe within seventy-two (72) hours after its completion.

283 B. Application for benefits under Section 230.36, Wis. Stats., shall be made by the employe or his/her representative to the appointing authority within 14 calendar days from the date of injury on forms provided by the Employer. While medical verification is required for final approval of a claim, failure by the physician to provide verification within the 14 days shall not be the basis for denial. In extenuating circumstances, the time limit for application for benefits may be waived. The application shall contain sufficient factual information to indicate the nature and extent of the injury or illness, the circumstances surrounding its occurrence and the qualifying duties on which the application is based.

284 C. Within 14 calendar days after receipt of the claim the appointing authority shall notify the employe and the president of the local union of his/her decision to authorize or deny the claim.

285 D. If an employe's claim for benefits under this Section is denied by the appointing authority, the employe may, within 30 calendar days, file an appeal at the third step of the grievance procedure provided under Article IV of this Agreement.

286 E. Approved payments under this Section shall continue from the date of inability to work until the date employe returns to work or until the employe's status is changed to Worker's Compensation, disability retirement, new assignment or other appropriate status. When the appointing authority takes action to change the employe's status the employe may file an appeal at the third step of the grievance procedure provided under Article IV of this Agreement. Employes on approved leave under this Section shall be entitled to full base pay plus any unitwide pay increases and personal holidays.

287 F. Employes on approved leave with pay under this Section, shall leave with pay for a maximum period of six months unless extended by the Employer. Employes shall be denied legal holiday credits for holidays which occur during the period of absence.

288 G. Concurrent benefits--except for payments specifically authorized under Chapter 102 Wis. Stats., pertaining to Worker's Compensation--under no circumstances shall an employe receive more than his/her basic rate of pay for the job in which he/she was performing at the time of injury.

289 H. Employes on leave with pay shall submit to such physical and/or medical examinations as may be required by the Employer to determine the extent of or continuation of disability and inability to work. Such examination(s) shall be at the expense of the Employer and performed by physicians selected by the Employer. A complete report indicating the nature and extent of disability and prognosis for a reasonable return to duty and an estimated date of such return shall be submitted to the Employer. Refusal by the employe to submit to examinations ordered by the Employer or medical treatment ordered by the examining physician shall constitute ground for disciplinary action. Based upon the information provided by the medical reports, the Employer shall determine the extent to which leave with pay shall be granted or take action to terminate employment. Upon return to full work status, an employe's benefits under this Section shall cease providing his/her attending physician has released him/her from further medical treatment. In the event that the employe is able to return to full work status but further medical treatment is

required for the sustained injury, benefits shall continue to be granted to cover the treatment time providing the attending physician has made a prior determination that such treatment is necessary for full recovery. When an employe suffers further aggravation of an injury for which benefits have ended, he/she may, upon recommendation of his/her attending physician, have such benefit resume for the period of treatment recommended, provided such aggravation meets the qualifying provisions of Section 230.36 Wis. Stats.

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Section 18. Administration of Worker's Compensation Benefits

305 A. In the administration of the Worker's Compensation Act as set forth in Chapter 102, Wisconsin Statutes, the management, shall make an initial determination as to whether the injury was job related; and if so, he/she may authorize payment for temporary total disability as specified in the Worker's Compensation Act for up to eight (8) weeks or until the Attorney General makes a decision, whichever is first.

305A B. In the event the Employer makes an initial determination that an injury is job related and authorizes payment for temporary total disability as specified in the Worker's Compensation Act for up to 8 weeks, or until the Attorney General makes a decision, whichever is first, the Employer shall continue to pay its share of Health Insurance premium as provided in Article XIII, Section 1 for the period of the temporary total disability.

305B C. In the event the Employer denies the employe's claim of worker compensable injury, and the employe's claim is later sustained, the Employer will reimburse the employe its proportionate share of the premium payment per Article XIII, Section 1, if the employe had continued paying the full cost of the Health Insurance premium payment during the period of worker's compensation claim pendency.

Section 19: Standby

306 When the Employer requires that an employe must be available for work and be able to report in less than one hour, the employe shall be compensated on the basis of a fee of $8.00 (eight dollars) for each on call eight hour period for which the employe is in standby status.

7. That the grievance was processed to final and binding arbitration under the collective bargaining agreement between the State and the WSEU; that before the Arbitrator the sole issue ultimately litigated by the WSEU was whether Complainant's termination in April 1980, violated the parties' contract; and that on November 24, 1982, the Arbitrator issued an Award concluding that the grievance was not filed in time to invoke the grievance procedure concerning the merits of the termination and thus denied the grievance for lack of procedural arbitrability.

8. That on May 26, 1983, Complainant filed an unfair labor practice complaint with the Commission alleging that the State's termination of Complainant and its subsequent refusal to reinstate her violated the collective bargaining agreement between the State and WSEU and thus violated Sec. 111.84(1)(e), Stats.

B. That the Examiner's Conclusions of Law are hereby modified to read as set forth below, and as so modified are hereby adopted by the Commission:

CONCLUSIONS OF LAW

1. That the Commission will not exercise its jurisdiction over the instant Sec. 111.84(1)(e) complaint allegation that the State of Wisconsin violated the collective bargaining agreement between the State and the Wisconsin State Employees Union by terminating Complainant because Complainant's collective bargaining representative pursued a contractual grievance challenging said termination on her behalf to a final and binding arbitration award, and there is no allegation of circumstances that would warrant assertion of jurisdiction.

2. That the Commission also will not exercise its jurisdiction over the instant Sec. 111.84(1)(e) complaint allegation that the State of Wisconsin violated the collective bargaining agreement between the State and the Wisconsin State Employees Union by refusing to reinstate Complainant because the collective bargaining agreement allegedly violated contains a grievance procedure culminating in final and binding arbitration which the parties have agreed is the exclusive mechanism for resolution of such disputes, and there is no allegation of circumstances that would warrant assertion of jurisdiction.

C. That the Examiner's Order shall be, and hereby is, affirmed and adopted as the Commission's.

Given under our hands and seal at the City of Madison, Wisconsin this 30th day of August, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Marshall L. Gratz, Commissioner

_____
Danae Davis Gordon, Commissioner

MEMORANDUM ACCOMPANYING ORDER MODIFYING EXAMINER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW AND AFFIRMING EXAMINER'S ORDER

Background

In her complaint initiating this proceeding, Complainant alleged that the State violated the terms of a collective bargaining agreement and thereby committed unfair labor practices within the meaning of Sec. 111.84(1)(e), Stats., by discharging her and refusing to reinstate her. The State denied that it had committed any unfair labor practices and asserted various affirmative defenses.

The Examiner's Decision

After rejecting the State's contention that the complaint was untimely, the Examiner concluded that she would not assert the Commission's jurisdiction over the alleged contractual violation relating to Complainant's discharge because said issue had been submitted to final and binding arbitration under the contract covering Complainant between the WSEU and the State where the resultant Arbitration Award was generated by fair and regular proceedings and was not repugnant to the rights of any party under SELRA. The Examiner rejected the Complainant's arguments that because she was not a witness at the arbitration hearing nor a party to the proceeding, the Award was not binding on her. The Examiner found that, in the absence of a claim of unfair representation by the WSEU in its handling of the arbitration, the Examiner would not allow Complainant to, in essence, collaterally attack the Award.

Turning to Complainant's allegations regarding denial of reinstatement, the Examiner concluded that the Commission had no subject matter jurisdiction over this claim. The Examiner therefore dismissed the complaint in its entirety.

Position of the Complainant

Citing Sec. 111.80(4), Stats., 2/ Complainant asserts that it is inconsistent with a fundamental policy of the State Employment Labor Relations Act to deny Complainant an opportunity for a hearing on the merits of her discharge where, as here, she was not a party to the Arbitration Award relied upon by the Examiner and where, as here, the State has engaged in misrepresentations which denied Complainant any reasonable opportunity to have a hearing in any other forum. Complainant denies that it is seeking to collaterally attack the Arbitration Award to acquire a second "bite of the apple." Complainant contends that it is simply seeking a single "bite" and that simple justice and fundamental fairness require that the Examiner's decision be overturned.

More specifically, Complainant asserts that the Examiner erred when finding that the Arbitration Award is res judicata as to the instant complaint. Complainant argues that the common identity of parties and claims necessary to support such a finding are not present. In this regard, the Complainant notes that the lack of identical parties produced the inconsistency between the Examiner's finding that Complainant knew or should have known of her termination in April 1981, and the Arbitrator's conclusion that an April 1981 grievance was untimely. Given the foregoing, Complainant asks that the Examiner's decision be overturned.

2/ "It is the policy of this state, in order to preserve and promote the interests of the public, the state employe and the state as employer alike, to encourage the practices and procedures of collective bargaining in state employment subject to the requirements of the public service and related laws, rules and policies governing state employment, by establishing standards of fair conduct in state employment relations and by providing a convenient, expeditious and impartial tribunal in which these interests may have their respective rights determined." (Emphasis supplied.)

Position of the State

The State contends that the Examiner's decision should be affirmed. In response to Complainant's argument regarding denial of a day in court, the State argues that the Examiner's Finding of Fact 7 establishes April 1981 as the date of Complainant's knowledge of her termination. Yet, the State points out the grievant has never filed a grievance or an appeal to the Personnel Commission concerning the State's actions. The State further alleges that Complainant's arguments that she was not a party to the arbitration ignore her right to participate in the arbitration proceeding, or to file a grievance on her own. It contends that her failure to do so does not allow her to now obtain a hearing before the Commission. It further posits that the Complainant's failure to resolve the matter using the contractual grievance procedure bars her from proceeding under Sec. 111.84(1), Stats.

Discussion

Where an exclusive collective bargaining representative of the employes has bargained an agreement with the employer which contains a procedure for final impartial resolution of disputes over contractual compliance, the Commission generally will not assert its statutory complaint jurisdiction over any breach of contract claims covered by the contractual procedure 3/ because of the presumed exclusivity of the contractual procedure and a desire to honor the parties' agreement. Mahnke v. WERC, 66 Wis.2d 524, 529-30 (1974); United States Motor Corp., Dec. No. 2067-A (WERB, 5/49); Harnischfeger Corp., Dec. No. 3899-B (WERB, 5/55); Melrose-Mindoro Joint School District No. 2, Dec. No. 11627 (WERC, 2/73); City of Menasha, Dec. No. 13283-A (WERC, 2/77); University of Wisconsin-Milwaukee, Dec. No. 11457-E (12/75), rev'd on other grounds, Dec. No. 11457-H (WERC, 5/84).

The Complainant asserts the State violated the contract between the State and the WSEU by terminating her without just cause and by subsequently refusing to reinstate her. The contract in question contains a grievance/arbitration procedure which is available to the employe and/or the WSEU for resolution of disputes over contractual compliance. The language quoted in our modified Finding of Fact 4 demonstrates the intent of the WSEU and the State that the grievance/arbitration procedure is the exclusive method for resolution of disputes over contractual compliance. Our review of the parties' agreement satisfies us the grievance/arbitration procedure was potentially available to Complainant and/or the WSEU to obtain final impartial resolution of any dispute over the Complainant's discharge and/or reinstatement right. 4/ Given the foregoing and the absence of any of the exceptions noted in footnote 3 to our policy of giving deference to the parties' process, we will not assert jurisdiction over Frank's breach of contract claims.

Because our refusal to assert jurisdiction hinges upon the potential availability of the agreed-upon dispute resolution process, the fact that the parties' grievance/arbitration process did not, in fact, address the question of violation of any contractual reinstatement rights does not provide a basis for

asserting jurisdiction. 5/ Similarly, the fact that the Arbitrator did not rule on the merits of the Complainant's discharge does not provide a basis for asserting jurisdiction over Complainant's contractual discharge claim. 6/ A contrary conclusion would render a nullity the contractual timeliness requirements contained in the parties' contract, which are obviously a part of the procedure to which we are giving deference. 7/

In summary, it is the need for honoring the exclusivity of the available contractual grievance/arbitration process bargained by the parties which warrants a decision not to assert our jurisdiction under Sec. 111.84(1)(e), Stats., to adjudicate Complainant's contractual claims. We have modified the Examiner's Conclusions of Law to reflect the rationale for our decision.

Dated at Madison, Wisconsin this 30th day of August, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Marshall L. Gratz, Commissioner

_____
Danae Davis Gordon, Commissioner

5/ While the State argued before the Arbitrator that issues as to reinstatement rights were not arbitrable, we note that the Arbitrator made no finding on the issue and that the State's argument on arbitrability seems to focus on the statutory reinstatement rights contained in Chap. 230, while Complainant's claim before us seems to generically pursue a reinstatement claim directly linked to the alleged impropriety of the discharge. Thus, there is no substantial basis on this record for concluding that the issue of reinstatement before us could not have been pursued through the contractual mechanism. Furthermore, even if the claim before us were found not to be substantively arbitrable, an issue would still remain as to whether we would assert jurisdiction. See, City of Wauwatosa, Dec. No. 19310 - 19312-C (WERC, 4/84), appeal pending (CirCt Milw.).

6/ We are aware of Complainant's argument to the effect that the Arbitrator might well have reached the merits of the discharge had the Complainant been called by the WSEU to testify about her receipt or non-receipt of a termination letter. However, because Complainant is not alleging that the WSEU breached its duty to fairly represent her (see footnote 3), the potential merit of Complainant's argument is irrelevant to our decision not to assert jurisdiction because of the exclusiveness of the contractual procedure. Thus, we modified the Examiner's Findings to eliminate any factual determinations which bore on Complainant's timeliness argument.

7/ Winter Joint School District No. 1, Dec. No. 17867-C (WERC, 5/81); Joint School District No. 3, Plum City et al., Dec. No. 15626-A (WERC, 4/78), aff'd Dec. No. 15626-B (WERC, 5/79).