STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, LOCAL 35, AFL-CIO-CLC,	:	
Complainant,	:	
vs.	:	Case 3 No. 34188 Ce-2013
NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY,	:	Decision No. 22366-A
Respondent.	:	

Appearances:

Zubrensky, Padden, Graf and Maloney, Attorneys at Law, by Mr. George F. Graf, 828 North Broadway, Suite 410, Milwaukee, WI 53202, appearing on behalf of the Complainant.

Foley and Lardner, Attorneys at Law, by Mr. John W. Brahm, 777 East Wisconsin Avenue, Suite 3800, Milwaukee, WI 53202-5367, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The above-named Complainant, Office and Professional Employees International Union, Local 35, AFL-CIO-CLC, having on November 29, 1984 filed a complaint with the Wisconsin Employment Relations Commission alleging that the Respondent, Northwestern Mutual Life Insurance Company, has committed an unfair labor practice within the meaning of Sec. 111.06(1)(f) of the Wisconsin Employment Peace Act; and the Respondent having on December 21, 1984 filed an answer wherein it denied having committed an unfair labor practice; and the Commission having appointed David E. Shaw, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order in the matter; and hearing on said complaint having been held on April 11, 1985 at Milwaukee, Wisconsin before the Examiner; and the parties having filed post-hearing briefs by July 16, 1985; and the Examiner having considered the evidence and the arguments of the parties, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That the Office and Professional Employees International Union, Local 35, AFL-CIO-CLC, hereinafter the Complainant or Union, is a labor organization located at 829 North Marshall, Milwaukee, Wisconsin, 53202; that at all times material herein the Complainant has been the exclusive collective bargaining representative of all permanent and long-term temporary employes in the Home Office of the Respondent with certain noted exclusions; and that at all times material herein Judy Burnick has been the Business Representative for the Complainant and Gwen Helm has been the Chief Steward for the Complainant.

2. That Northwestern Mutual Life Insurance Company, hereinafter the Respondent or Company, is an employer having its principle offices located at 720 East Wisconsin Avenue, Milwaukee, Wisconsin, 53202.

3. That the Complainant and the Respondent were party to a collective bargaining agreement dated July 28, 1982 covering the period from May 1, 1982 through April 30, 1984; and that said agreement contained, in relevant part, the following provisions:

ARTICLE I
Union Recognition: Union Membership

. . .

SECTION 2. The contracting parties agree that in carrying out this Agreement neither will unlawfully discriminate against any employee because of such employee's race, color, religion, sex, age, national origin, handicap, membership or nonmembership in the Union, or status as a disabled or Vietnam era veteran. The contracting parties also agree that neither will take any action that would be in conflict with executive Order 11246 and regulations issued pursuant thereto by the Office of Federal Contract Compliance Programs.

. . .

ARTICLE IV

Job Levels, Salaries
Promotional and Merit Increases

Section 3.

. . .

(b) Every employee is entitled to full information as to the Company's evaluation of his performance, including his rating. To this end, each employee shall have the opportunity for an annual interview with his supervisor. Such interview shall be held, if practicable, during the month prior to the anniversary month of his employment, but in any event no later than the date prescribed for the filing in the Personnel Department of the salary consideration form. The supervisor shall discuss with the employee his rating and the Company's evaluation of his performance, and shall furnish him with a copy of the office staff performance appraisal form.

. . .

ARTICLE VII

Promotions, Demotions, Transfers
and New Positions

. . .

SECTION 4. When any change of job level or classification occurs, an employee shall receive written notice through his supervisor.

. . .

ARTICLE X

Complaints and Grievances

SECTION 1. Each employee is entitled to receive a full explanation by his supervisor of any action which affects him adversely. The supervisor shall respond to any inquiry or complaint of an employee within 3 working days and shall notify the employee of any action taken. At the employee's request, a Union representative may be present during such explanation or notification. If such explanation or notification is given in writing, the Union president shall, at the employee's request, be given a copy thereof. If this does not satisfy the employee, the action of the supervisor may be reviewed as follows:

Step 1: Within 5 working days after receiving notice from the supervisor, the employee may put his grievance in writing and deliver it to the head of his department, to his supervisor, and to the Personnel Department employee designated to receive such grievances. The head of the department shall meet with the employee within 5 working days after the date on which the grievance was delivered to the head of his department, with or without his union representative as the employee desires. The head of the department shall act within 5 working days and shall notify the employee and the Union in writing of the action taken.

Step 2: If this does not satisfy the employee and he desires the Union to present the grievance to the Office Committee, the Union, within 10 working days after the employee has received the notice from his department head, may notify in writing the Personnel Department employee designated to receive such notices that the Union desires to meet with the Office Committee. Thereupon, the Office Committee or a subcommittee shall consider the grievance which shall be presented by the Union on behalf of the employee. If the grievance is considered by a subcommittee of the Office Committee, a Union representative may be present to present the Union's position and recommendation to the Office Committee at the same time that the subcommittee presents its position and recommendation to the Office Committee. The employee may also be present with the Union representative if either the Union or the Company believes that the employee's presence will be beneficial in the determination of the grievance. The Office Committee shall act within 10 working days and shall notify the employee and the Union in writing of the action taken.

Unless the grievance involves the interpretation or application of the terms of this Agreement or relates to a discharged regular employee, the action of the Office Committee shall be final. Such action applies specifically to such matters as the determination of promotions and merit increases for individual employees and classification of jobs, except as otherwise agreed upon by the Company and the Union.

Step 3: If the grievance involves the interpretation or application of the terms of this Agreement (except as provided in Section 3 of Article II) or relates to a discharged regular employee, the Union within 10 working days after receiving the notice specified in Step 2 may notify the Secretary of the Office Committee in writing that it desires to have the matter heard by a grievance panel. Thereafter, within 10 working days the Union and the Company shall each designate a representative for the grievance panel, and shall notify each other in writing of their selection. The failure of either party to designate a representative for the grievance panel within this period shall result in a forfeiture of its right to name a representative on said panel.

Within the same 10 working day period, the Union and the Company shall decide upon the selection of an Impartial Chairman. If the parties, within the 10 working day period and 5 additional working days, are unable to decide upon an Impartial Chairman, the party desiring arbitration shall notify the Federal Mediation and Conciliation Service, which shall submit a panel containing 5 names. Each party shall alternately strike one name until one name remains.

The person whose name remains shall serve as the Impartial Chairman. The Impartial Chairman shall preside over the grievance panel and shall counsel with and assist the panel in reaching a decision. The Union and the Company shall share equally the expense of the Impartial Chairman.

A majority vote of the panel shall decide any controversy submitted to it under this section. Any decision of the panel shall be in writing and shall be binding upon the employee, the Company, and the Union, to each of whom a copy shall be given.

Except for its powers in discharge cases, the grievance panel shall only have power to interpret and apply the terms of this Agreement. The panel shall have no power to extend the duration of this Agreement, to add any terms or provisions, or to enlarge its jurisdiction, except by mutual consent of the Company and the Union.

The references to the Office Committee in this section shall not prevent the Company from changing the name of said committee or assigning its functions under this section to a different committee.

SECTION 2. Should any differences arise between the Company and the Union which affect the Union as a whole or a substantial part of its membership, not all in the same department, the Union shall submit the controversy directly to the Office Committee or a subcommittee designated by it.

SECTION 3. In the interest of fostering good relations with employees, the Personnel Department of the Company shall be available at all times to employees or their representatives for the purpose of counseling.

4. That at all times material herein Maureen McNeil has been employed by the Respondent in the bargaining unit represented by the Complainant; that sometime in 1983 McNeil was promoted to an underwriter position with the Respondent and began serving a trial period in the position; that on March 7, 1984 McNeil was issued the following memo regarding her performance in the underwriter position:

TO: Maureen McNeil

FROM: Gloria Venski

DATE: March 7, 1984

RE: Your Performance in the Underwriter Job (Final Warning)

On December 8, 1983 you received a memo from your previous supervisor, Marge Winter. This memo discussed your progress as a No Range Underwriter, outlining areas needing development, specific expectations, with a 5 week deadline in which you were to realize a significant improvement in the identified areas.

On December 9 Marge departed from the division. You wrote a memo to Deborah Beck on December 27 relaying you (sic) concerns about Marge's memo. Deb responded by meeting with you at the end of December. A memo followed by her to you on January 3, 1984.

Deb extended your deadline to improve your performance to March 1, 1984. During the first week of January, I became your supervisor. I met with you to conduct your annual interview on January 16, 1984 to discuss your progress as I

saw it. At that time, after reviewing the January cases, I relayed to you serious concerns I had about the error rate on your cases. I told you the number of errors and types of errors were not acceptable for an underwriter with your experience.

I have since met three times (2-28-84, 3-1-84, and 3-6-84) with you and your union representative. We discussed some specific cases to which you took exception as errors. I listened to your concerns on these specific cases as well as your overall concerns on how you viewed your treatment and progress as an underwriter. Pat Westphal also met with us on one occasion to further explain our concerns about these cases.

Maureen, I have spent a considerable amount of time gathering the facts, personally reviewing the January and February cases and listening to your viewpoint. Based on my review, I must conclude that your progress to date has not been sufficient to warrant keeping you on this job.

I am willing to continue monitoring your work until March 31, 1984. You must show a significant improvement by that date or you will be returned to your previous job as a PHI Interviewer.

I do not feel your entering the Disability income training classes on March 12, 1984 is advisable. There needs to be a substantial improvement in your Life underwriting before this additional training can be taken on.

I would be agreeable to changing your referral person to Sue Hill or leaving the situation as is. The option is yours.

If you choose to remain in this job until March 31, 1984, I will place Marge's memo, Deb's memo, your two memos and this memo in your personnel file on March 9.

Maureen, I believe our attempts have been sincere in trying to help you succeed on this job. It is up to you to show a significant improvement by March 31, 1984.

If there is anything I can do for you, please let me know. I want to hear any concerns or suggestions you may have.

I have told you in the past that I feel you have a lot to offer NML. I want to see you have a successful career here.

that McNeil is a black woman; that on March 15, 1984 a written Step 1 grievance was filed by the Complainant's Chief Steward, Gwen Helm, on McNeil's behalf; that said grievance alleged the following:

> STATEMENT OF GRIEVANCE: On March 8, 1984 myself Gwen Helm and Gloria Venski met to discuss my final performance warning dated 3/7/84. I feel that unethical methods were used by my previous supervisor, Marge Winter, leading up to this warning. Due to all the things that have transpired in the last 5 months, I feel I have not been given an equal & fair opportunity to succeed in my current position. Some of the things which have transpired are: I did not see or sign any 6 mo. rating until my annual review and I was not notified of my probationary period extension. For these reasons I feel I have been discriminated against;

that said grievance alleged a violation of Article I, Section 2, Article IV, Section 3(b), Article VII, Section 4, and Article X, Section 1, of the 1982-84 labor agreement between the Complainant and Respondent in effect at that time; and that on March 30, 1984 McNeil was advised that she was being removed from the underwriter position and returned to her former position and rate of pay.

5. That by letter of March 29, 1984 to Complainant's President, the Respondent proposed the creation of a new subcommittee of the Office Committee, to be known as the "Grievance Committee," that would become a part of the grievance procedure and whose decision would be appealable to the Office Committee; and that on May 1, 1984, the Complainant's President, Michael Gorchanaz, agreed to the Respondent's proposal on behalf of the Complainant and indicated such agreement by signing the proposal.

6. That the parties agreed to a successor collective bargaining agreement covering the period from May 1, 1984 through April 30, 1986; that with the exception of Article IV, Section 3(b), the language of the contract provisions set forth in paragraph three of these Findings of Fact remained unchanged in the parties' 1984-86 agreement; and that Article IV, Section 3(b) of the 1984-86 agreement reads as follows:

> (b) Every employee is entitled to full information as to the Company's evaluation of his performance, including his rating. To this end, each employee shall have the opportunity for an annual interview with his supervisor. Such interview shall be held, if practicable, during the month prior to the anniversary month of his employment, but in any event no later than the date prescribed for the filing in the Personnel Department of the salary consideration form. The supervisor shall discuss with the employee his rating and the Company's evaluation of his performance, applicable training and development plans, if any, and shall furnish him with a copy of the office staff performance appraisal form. 1/

7. That since 1974 the parties have had an understanding regarding a "Fact Finding Panel," which understanding is set forth in the following letter of June 25, 1974 from James Ehrenstrom, then the Respondent Company's Manager of Compensation and Industrial Relations, to James Ruff, then President of Complainant:

> Mr. James Ruff
> President, Chapter 35
> AUA Local 500, OPEIU
> 720 East Wisconsin Avenue
> Milwaukee, Wisconsin 53202
>
> Dear Jim:
>
> The purpose of this letter is to clarify the understanding reached during negotiations regarding the use of a Fact Finding Panel to investigate questions arising with regard to promotions, merit increases, and job evaluations.
>
> If the Union is not satisfied with the decision of the Office Committee on any action of the Company regarding promotions, merit increases, and job evaluations, the Union may appeal to a Fact Finding Panel composed of an equal number of persons designated by the Union and the Company. This Panel will determine if there are any additional facts relevant to the question and report back to the Office Committee. The Office Committee will then reconsider the issue based on the recommendations of the Fact Finding Panel. In any such cases, the action of the Office Committee is final.
>
> As applying to questions involving job evaluation, the determination of job level shall be in accordance with the Rating Manual.
>
> Sincerely,
>
> James W. Ehrenstrom

1/ The change in the language is the addition of the underscored wording.

8. That McNeil's grievance was processed through the steps of the grievance procedure, through the newly created Grievance Committee, and to the Office Committee; that by Ehrenstrom's letter of August 19, 1984, the Respondent advised McNeil and the Complainant that the grievance was denied; and that by Burnick's following letter of August 28, 1984 to Ehrenstrom the Complainant advised the Respondent that it desired to proceed to arbitration on the McNeil grievance:

> In accordance with Article X, Section1 (sic), Step 3, the Union is requesting to proceed to arbitration in the matter of Maureen McNeal's (sic) grievance.
>
> It is the Union's position that Maureen was discriminated against and was not given a fair and equal opportunity to succeed in the Underwriter's position.
>
> Please contact me within the next ten working days to designate a representative to the grievance panel.

9. That by the following letter of August 30, 1984 from Ehrenstrom to Burnick, the Respondent advised the Complainant that it would not proceed to arbitration on McNeil's grievance:

> The purpose of this letter is to advise you that the Company will not proceed to arbitration in the matter of Maureen McNeil's grievance.
>
> Section 1 of Article X states in part as follows:
>
> > "Unless the grievance involves the interpretation or application of the terms of this Agreement or relates to a discharged regular employee, the action of the Office Committee shall be final. Such action applies specifically to such matters as the determination of promotions and merit increases for individual employees and classifications of jobs, except as otherwise agreed upon by the Company and the Union.
>
> Obviously this grievance does not involve the interpretation or application of the terms of the Agreement or relate to a discharged regular employee. It is strictly a factual issue as to whether or not Maureen McNeil was capable of performing at minimum standards in her underwriter position. This issue was fairly and exhaustively considered by the Grievance Committee and the Office Committee, and it was found that she was not only not discriminated against, but was instructed and assisted in a very supportive manner by her superiors and peers. In spite of their exhaustive efforts and bending over backward to try to help her achieve success in her position, she simply could not perform up to minimal standards and had to be demoted.
>
> Let me say that I and other appropriate Company representatives will be glad to sit down with you once again to discuss this matter further if you so desire, but be assured that the Company will not agree to engage in arbitration over this matter.
>
> Frankly, I believe that the Kubiak decision by the Wisconsin Employment Relations Commission several years ago put to rest the question of what is and what is not arbitrable under the terms of our Collective Bargaining Agreement. The Commission clearly said that factual issues are not arbitrable, and perhaps you will want to re-read that decision to refresh your recollection.

10. That by the following letter on September 7, 1984 from Burnick to Ehrenstrom the Complainant repeated its request to proceed to arbitration on the McNeil grievance:

> In response to your August 30, 1984 letter, I would like to once again reiterate the Union's position relative to Maureen McNeil's grievance.
>
> The Union and Maureen are contending a violation of Article I, Section 2, which states in part as follows:
>
> > "The contracting parties agree that in carrying out this Agreement neither will unlawfully discriminate against any employee because of such employees race, color, religion, sex, age, national origin, handicap, membership or nonmembership in the Union, or status as a disabled or Vietnam era veteran."
>
> It is our position that Maureen was discriminated against by her former supervisor Marge Winter. This is based on Ms. Winter's negligence in sharing with Maureen information that was vital to her success on the job and in the manner which Maureen was treated in comparison to other employees in the area.
>
> As the contract clearly states that the company will not discriminate against any employee because of the employee's race, color, etc., it is clear that Maureen's grievance is based on the interpretation and application of the contract. Such grievances are subject to the arbitration provisions of the Collective Barg. Agreement. Accordingly, I am again requesting to proceed to arbitration under Article X, Section 1, Step 3.
>
> Jim, if you wish to once again discuss Maureen's grievance, George Graf and I would be glad to do so. If not, we will continue to pursue Maureen's grievance to arbitration.

11. That the Respondent replied to the Complainant's continued request to arbitrate the McNeil grievance by Ehrenstrom's letter of September 11, 1984 to Burnick:

> In response to your September 7th letter, I am glad to see that you agree with our position that Article I, Section 2, of the Union Contract is perfectly clear; it specifically prohibits racial discrimination by the Company or the Union. Since we are in complete agreement on that issue, you should understand that there is no question of contract interpretation or application, i.e. no issue of what the contract language means. The only issue you raise in the grievance is whether or not there was in fact discrimination in the treatment of Ms. McNeil, and that clearly is not arbitrable. That was the issue which was decided with finality by the Office Committee, and in this case also is subject to a decision by the State Equal Rights Division.
>
> If your posture in this matter were correct, there would be no factual issues that would be subject to final decision by the Office Committee, and everything would be arbitrable.
>
> In summary, let me reiterate that we will not agree to violate the contract by taking to arbitration an issue which the contract states is not arbitrable.

12. That by the following letter of September 17, 1984, the Complainant reiterated its position regarding the McNeil grievance:

> I am in receipt of your September 11, 1984 letter concerning the Union's request to arbitrate Maureen McNeil's grievance.

It is the Union's position that the language in Article X, Section 1, Step 3 is explicitly clear. If the grievance involves the interpretation or application of the terms of the Collective Bargaining Agreement, the grievance is subject to arbitration. The issue at hand is specifically how the Company applied Article I, Section 2 in Maureen McNeil's case. It is the Union's contention that the Company did violate Article I, Section 2 by discriminating against Maureen McNeil. This matter is clearly subject to arbitration.

If you were correct in your statement that only issues of what the contract language means are subject to arbitration, only the word "interpretation" would appear in the first sentence of Step 3. I would point out that the language states both the words "interpretation and application" of the terms of the Collective Bargaining Agreement are subject to arbitration.

Jim, in an effort to resolve this dispute, I would submit that we request an arbitrator to rule first on the issue of arbitrability and secondly on the McNeil grievance if the arbitrator finds the grievance to be arbitrable. We are clearly in disagreement on the interpretation of Article X, Section 1, Step 3. By first submitting the question of arbitrability to the arbitrator for a ruling, we would obviously resolve the dispute one way or the other.

Please contact me within the next ten working days with the name of the Company panel member and to select an arbitrator.

13. That by Ehrenstrom's following letter of October 3, 1984, the Respondent restated its position with regard to the McNeil grievance:

In response to your September 17th letter, the Company will not agree to submit this grievance to an arbitrator to first determine the question of arbitrability. Such a procedure would not only be time consuming and expensive, but more importantly it could only lead to a determination that the matter is not arbitrable.

In addition to the reasons I pointed out in my previous letters to you, let me stress two additional reasons why the grievance is not arbitrable:

1. Ms. McNeil's promotion to underwriter was rescinded because she was found not to have the ability to handle that particular position, despite overwhelming and exhaustive efforts by her superiors and co-workers to help her succeed. The Office Committee found no discrimination in that action and upheld the retraction of the promotion. Section 1 of Article X specifically states that the finality of the Office Committee's decision " . . . applies specifically to such matters as the determination of promotions . . ."

   It seems to me that nothing could be clearer than that.

2. If the union and the grievant perceive this grievance as involving a disciplinary action on the part of the Company, then again there is no way that the matter can be arbitrable. All disciplinary actions (except where a discharge is involved) are outside the scope of arbitration, as are all other actions except those specifically referred to in Section 1 of Article X.

Again let me renew my offer to sit down with the grievant and the Union to discuss her career here at Northwestern and how she might succeed in developing a career path other than in the one where she was found to be mismatched.

14. That by the following letter of October 18, 1984 to the Respondent, the Complainant reiterated its position on arbitrating the McNeil grievance:

> In response to your October 3, 1984 letter regarding Maureen McNeil, it is still the Union's position that the Company is clearly required to arbitrate both the interpretation and application of the Collective Bargaining Agreement.
>
> Once again, the issue at hand is specificaly how the Company applied Article I, Section 2 to Maureen McNeil. It is the Union's position that the Company did discriminate against her.
>
> With regard to your reference concerning promotions, I am shocked that you would now attempt to raise a new issue at this time. I would point out that throughout the entire grievance procedure and the numerous meetings held, the Company never once raised the issue of promotions. In fact, in your September 11, 1984 letter to me, you point out that indeed we are in agreement on the issue of discrimination. Nothing could be clearer than that.
>
> For these reasons, the union will be seeking appropriate legal recourse.

15. That the Complainant has requested to proceed to arbitration on the McNeil grievance and has not sought to utilize the "Fact Finding Panel" on the grievance; that the Respondent has refused, and continues to refuse, to arbitrate the McNeil grievance; and that the McNeil grievance raises claims which, on their face, are covered by the terms of the parties' collective bargaining agreement that was in effect at the time the grievance arose and which are not specifically excluded from arbitration by said agreement.

Based upon the above Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. That the grievance of Maureen McNeil raises claims which, on their face, are covered by the 1982-1984 collective bargaining agreement between the Complainant, Office and Professional Employees International Union, Local 35, AFL-CIO-CLC and the Respondent, Northwestern Mutual Life Insurance Company, and which are not specifically excluded from arbitration by said agreement.

2. That by refusing to proceed to arbitration on the March 15, 1984 grievance of Maureen McNeil the Respondent, Northwestern Mutual Life Insurance Company, has violated, and continues to violate, Article X, Complaints and Grievances, of the parties' 1982-1984 collective bargaining agreement, and thereby Respondent Northwestern Mutual Life Insurance Company has committed, and continues to commit, an unfair labor practice within the meaning of Sec. 111.06(1)(f) of the Wisconsin Employment Peace Act.

Based upon the above Findings of Fact and Conclusions of Law, the Examiner makes the following

ORDER 2/

That the Respondent, Northwestern Mutual Life Insurance Company, and its agents, shall immediately:

1. Cease and desist from refusing to submit the McNeil grievance to arbitration.

2/ 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.

(Footnote 2 continued on Page 11)

(Footnote 2 continued)

(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.

2. Take the following affirmative action which the Examiner finds will effectuate the policies of the Wisconsin Employment Peace Act:

(a) Comply with the arbitration provision of the collective bargaining agreement existing between it and the Office and Professional Employees International Union, Local 35, AFL-CIO-CLC, with respect to the McNeil grievance.

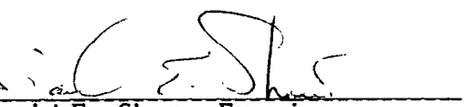
(b) Notify the Office and Professional Employees International Union, Local 35, AFL-CIO-CLC, that it will proceed to arbitration on the McNeil grievance.

(c) Participate with the Office and Professional Employees International Union, Local 35, AFL-CIO-CLC, in the arbitration proceedings before the arbitrator with respect to the McNeil grievance.

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

Dated at Madison, Wisconsin this 10th day of October, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
David E. Shaw, Examiner

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The instant complaint alleges that the Respondent Company has committed an unfair labor practice within the meaning of Sec. 111.06(1)(f), Stats., by refusing to proceed to arbitration on the McNeil grievance.

The Complainant cites the Steelworker's Trilogy 3/ and subsequent federal case law consistent with those cases for the principle that absent "positive assurance" that the parties intended to exempt the dispute from arbitration, all doubts should be resolved in favor of having the matter arbitrated. From this it is concluded that there are two issues that must be decided here: "(1) Whether there is in fact an arbitration agreement between the parties and (2) whether the particular dispute is referable (sic) to arbitration." According to the Complainant, "Under Federal law, arbitration clauses are to be construed liberally with all doubts as to coverage resolved in favor of arbitration. Hence, the Commission is bound to order arbitration 'unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute'." Citing (United Steelworkers of America v. Warrior and Gulf Navigation Co., supra, and Gateway Coal Company v. United Mine Workers, 414 U.S. 368, 380 (1974).

The Complainant next notes that these same parties were previously before the Commission on a similar issue in the Kubiak case; 4/ but asserts that the instant case is distinguishable from the prior case. The bases for the Complainant's distinction are that (1) the McNeil grievance does not involve a direct question of promotion, as did the earlier case, rather, it involves allegations of unfair discrimination and several procedural violations; and (2) in the earlier case the Commission found that the Union had opted to use the fact finding procedure, and that hence, it had waived its right to insist upon arbitration, whereas, here the Complainant continued to insist upon proceeding to arbitration rather than utilizing fact finding. It is alleged that the Respondent did not raise the claim that the case involved promotions until six and one-half months after the grievance was filed. As to the Commission's prior decision, it is contended that the facts differ in this case and that the Commission never indicated that it disagreed with the examiner's statement of the law, nor did it indicate that it disagreed that the grievance was arbitrable, but for the resort to fact finding in the prior case.

Lastly, the Complainant contends that the Respondent's exhibits as to past Union proposals and Company bargaining minutes of past negotiations demonstrate that it has consistently attempted to obtain a "standard" arbitration clause and that the Respondent has consistently resisted those efforts. It is asserted, however, that these exhibits show that the Complainant has stated its understanding that if it did not utilize fact finding, it retained its right to go to arbitration except as to specific areas it agreed to exclude. It is alleged that the letter of understanding regarding fact finding specifies the areas where it applies, i.e., promotions, merit increases and job evaluations, but, the Complainants assert, those areas are not involved in this case.

On the basis of the above, the Complainant asserts the Respondent must be required to proceed to arbitration on the McNeil grievance.

The Respondents also cite federal case law, and Wisconsin case law, but for the principle that "since arbitration is a matter of contract, 'a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.' " citing Warrior and Gulf Navigation Co., supra; International

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3/ United Steel Workers v. American Manufacturing Co., 363 U.S. 584 (1960); United Steel Workers v. Warrior and Gulf Navigation Co., 363 U.S. 574 (1960); United Steel Workers v. Enterprise Wheel and Car Corp., 363 U.S., 593 (1960).

4/ Dec. No. 16926-A (12/79), rev'd Dec. No. 16926-B (WERC, 4/80).

Union, United Automobile, Aerospace & Agricultural Workers of America, Local No. 577 v. Hamilton Beach Manufacturing Co., 40 Wis.2d 270, 282 (1969); Joint School District No. 10 v. Jefferson Education Association, 78 Wis.2d 94, 101 (1979). Citing Article X of the 1982-84 agreement, the Respondent asserts that the agreement contains a specific exclusion from arbitration where the dispute concerns "the determination of a promotion" and makes the Office Committee's action final on such matters. It is contended that the determination of a promotion is involved in this case, since McNeil was removed from her underwriter position during her trial period, and as the grievance was processed, it also involved her removal from the position. The Respondent argues that since a promotion could not be final until the trial period is completed, the removal of McNeil during her trial period must by definition constitute the determination of a promotion.

The Respondent cites two federal courts of appeals cases where the courts found that the contract excluded matters of promotions from arbitration on the basis of language allegedly similar to that in this case even though the contracts each contained a general arbitration clause.

It is next asserted by the Respondent that the Complainant's claim of arbitrability "flies in the face of a long and consistent contrary history." The Office Committee was created in 1919, and it is alleged that since that time the Office Committee has been adjudicating personnel claims of the type involved in this case. The Respondent contends that it has never allowed any of those claims to be submitted to an outside arbitrator.

The Respondent also relies on bargaining history to support its position. It is noted by the Respondent that the Office Committee has appeared in the labor agreements since 1938, and those agreements have allegedly indicated that the Committee's action in cases of this type is to be final and not subject to arbitration. According to the Respondent, this is verified by the Complainant's attempts in negotiations to eliminate the finality of the Office Committee and replace it with arbitration. The Respondent cites the minutes of past bargaining sessions as demonstrating how the Company has rejected those attempts and how cases such as this, i.e., "actual quality determinations" by management, have always been excluded from arbitration.

The Respondent also asserts that the fair and comprehensive nature of the process leading up to, and including, the Office Committee's determination support the Respondent's position that the process was intended "to supplant rather than supplement third party arbitration."

It is alleged by the Respondent that the International Union's representative admitted in the prior case that if the dispute was purely factual, the Office Committee's action would be final. Since the Respondent concedes the agreement requires it not to discriminate, the only dispute left is factual, i.e., whether McNeil was treated fairly and whether she demonstrated adequate qualifications. It is asserted that to hold that the dispute should be arbitrated would be to render the exclusionary language in the agreement meaningless, since no Office Committee decision on a failed promotion would ever be "final".

Regarding the Complainant's assertion that the dispute involves the interpretation or application of the non-discrimination provision, the Respondent contends that the argument misconstrues the words of the agreement and would allow the exception to swallow the rule. It is contended that the language in Article X does not limit the Office Committee's finality to matters other than those involving the interpretation or application of the Agreement, rather, it states that such final action specifically applies "to such matters as the determination of promotions . . .", even if it is alleged that they involve the interpretation or application of the contract. The Respondents cite Communication Workers of America v. New York Telephone Company, 327 F.2d 94, 96-99 (2nd Cir. 1964), for a similar interpretation by the Second Circuit Court of Appeals of allegedly similar language.

The Respondent argues that this dispute does not involve either the interpretation or the application of any provision of the agreement, since there is no dispute as to what the term "discrimination" means or as to whether the provision applies in this case.

According to the Respondent, the fact that the Complainant did not proceed to fact finding, as it had in the prior case, does not entitle it to arbitrate under the Commission's decision in the prior case. The Complainant's argument in that regard misconstrues the Commission's decision. The Respondent interprets that decision as saying only that the Union had gone to fact finding and that a specific agreement making that a final decision was controlling. The decision did not reach what would happen if fact finding was not used.

Finally, relative to any argument that the change in the seniority language in 1978 is relevant here, the Respondent asserts the language was deleted because it was redundant, and hence, the change was not meant to affect the finality of the Office Committee's decision.

DISCUSSION

Section 111.06(1)(f) of the Wisconsin Employment Peace Act (WEPA) provides that it is an unfair labor practice for an employer "to violate the terms of a collective bargaining agreement (including an agreement to accept an arbitration award)."

The McNeil grievance filed on March 15, 1984 alleges a number of actions by the Respondent's management as the basis for its claim that various cited provisions of the parties' collective bargaining agreement in effect at the time had been violated.

The Respondent has refused to proceed to arbitration on the grievance on the basis that the matter is specifically excluded from arbitration and, hence, it is not arbitrable.

The law in this area is clear and the Commission has long followed the policy expressed by the U.S. Supreme Court in the Steelworker's Trilogy cases of favoring the submission of grievances to arbitration. 5/ Adhering to the Court's holding in American Manufacturing Co., supra, the Commission has consistently held that if a grievance states a claim which on its face is governed by the parties' labor agreement, the grievance is arbitrable. 6/ This policy has been confirmed in this state by the Wisconsin Supreme Court in Joint School District No. 10, City of Jefferson, et al v. Jefferson Education Association, 78 Wis.2d 94 (1977); and Dehnart v. Waukesha Brewing Co., 17 Wis.2d 44 (1962).

In Warrior & Gulf Navigation Co., supra, the U.S. Supreme Court held that:

> Apart from matters that the parties specifically exclude, all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the collective bargaining agreement. (At 581).
>
> . . .
>
> An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage. (At 582-583).

It is noted that while the Commission rendered a decision on a similar issue in a previous case involving these parties, neither party asserts that the earlier decision is dispositive. The Examiner agrees since it appears that theCommission based its earlier decision on the Union's election, unlike here, to utilize the fact finding panel created by a side letter agreement that specified the Office Committee's decision would be final regardless of the panel's findings.

5/ Seaman-Andwall Corp., (5910) 1/62; Oostsburg Jt. School Dist. No. 14, (11196-A, B) 12/72, aff'd Sheboygan County Cir. Ct. 6/74; Portage Jt. School District No. 1 (12116-A, B), 11/74; Milwaukee Board of School Directors 14614-A, B) 2/77.

6/ City of St. Francis, (13182-B) 4/75; Oostburg Jt. School District No. 14, supra; Milwaukee Board of School Directors, supra.

Therefore, a determination as to whether the grievance in this case is substantively arbitrable must begin with a review of the parties' labor agreement. The key language of the Agreement is found in Article X, Complaints and Grievances, Section 1, Step 2, which provides in relevant part:

> Unless the grievance involves the interpretation or application of the terms of this Agreement or relates to a discharged regular employee, the action of the Office Committee shall be final. Such action applies specifically to such matters as the determination of promotions and merit increases for individual employees and classification of jobs, except as otherwise agreed upon by the Company and the Union.

The Respondent contends that the above language specifically excludes "the determination of promotions" from arbitration and makes the Office Committee's action in that area "final" regardless of whether the action involves the interpretation or application of terms of the agreement. The Respondent cites bargaining history, the comprehensive and fair nature of the process leading to a determination by the Office Committee and the Office Committee's history of making final determinations in this area for years, and over the span of many labor agreements, as demonstrating the parties' intent that the Office Committee's action be final when making a determination on a promotion. The problem with the Respondent's contention is that while the Company's determination of a promotion ultimately is involved here, the grievance filed on March 15, 1984 alleged violations of several provisions in the parties' agreement, including the allegation of discrimination, by management's actions during the grievant's probationary period. Contrary to the Respondent's contention, the cited language of Article X in the Agreement provides for a broad right to proceed to arbitration (as long as the grievance "involves the interpretation or application of the terms of this Agreement") and carves out a narrow area of exceptions, i.e., grievances not involving the interpretation or application of the terms of the agreement and grievances as to "the determination of promotions and merit increases for individual employes and classification of jobs . . ." Under the Respondent's interpretation its actions could violate various provisions of the agreement without being subject to arbitration so long as those actions were involved in its ultimately making a determination on a promotion. That would truly be a case of the exception overcoming the rule. Further, the Respondent's argument ignores the fact that the determination of the promotion is only a part of the grievance and does not address the additional allegations in the grievance.

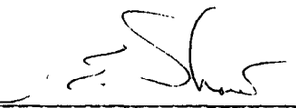
The Respondent has also contended that since there is no dispute that the Company may not discriminate, this case only involves a factual dispute and, hence, does not involve the interpretation or application of the terms of the Agreement. The Company relies on the testimony of the International Union's representative, Michael Walker, in the prior case before the Commission involving the Kubiak grievance, to support its position that the Office Committee makes the final determination in such a case. A review of the transcript in that case indicates, however, that Walker limited his agreement in that sense to a factual dispute as to whether qualifications were relatively equal between applicants for a position, and then only if the Office Committee's action did not impact on the interpretation or application of provisions of the agreement. (Respondent Exhibit No. 6, pp. 105-106). There is a factual dispute here as to what management did or did not do, as well as a dispute as to whether management's actions violated specific provisions of the agreement, and as to whether they constituted discrimination against the grievant. Besides ignoring the other alleged violations of the agreement and the factual dispute as to what management did, the Respondent's argument over simplifies the dispute in that it reduces the dispute to the broad question of whether or not management discriminated against the grievant, and claims the Office Committee's determination of that question is final under the exclusionary language in Article X. Moreover, there is no language in Article X, or elsewhere in the agreement, that expressly reserves final determinations on factual disputes to the Office Committee.

Given that doubts as to whether a claim is covered by the arbitration clause should be resolved in favor of coverage, and given that the grievance alleges violations of specified provisions of the parties' 1982-1984 agreement, and therefore raises issues involving the interpretation and/or application of the terms of that agreement, and despite the fact that the grievance, in part, involves the determination of a promotion, the grievance states claims which on

their face are governed by the terms of the agreement and which are not expressly excluded from arbitration. Therefore, it is concluded that the grievance is arbitrable and that the Respondent has violated Sec. 111.06(1)(f), Stats., by refusing to proceed to arbitration on the grievance. It should be noted, however, that this decision does not consitute a determination as to the merits of the claims or the possible remedies available.

Dated at Madison, Wisconsin this 10th day of October, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
David E. Shaw, Examiner