STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

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.

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

Examiner David E. Shaw having on October 10, 1985, issued Findings of Fact, Conclusions of Law and Order in the above-matter wherein he concluded that Respondent Northwestern Mutual Life Insurance Company had committed an unfair labor practice within the meaning of Sec. 111.06(1)(f), Stats., by refusing to proceed to arbitration on a contractual grievance; and the Examiner therefore having ordered Respondent to participate in arbitration proceedings as to said grievance; and Respondent having on on October 29, 1985, timely filed a petition with the Wisconsin Employment Relations Commission seeking Commission review of said decision pursuant to Sec. 111.07(5), Stats.; and the parties having filed briefs the last of which was received January 3, 1986; and the Commission having reviewed the record including the petition for review and the briefs filed in support of and in opposition thereto and being satisfied that the Examiner's Findings of Fact, Conclusions of Law and Order should be modified in certain respects.

NOW, THEREFORE, it is

ORDERED 1/

A. That the Examiner's Findings of Fact 1-14 are affirmed.

B. That the Examiner's Finding of Fact 15 is modified to read as follows:

> 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; and that the Respondent has refused, and continues to refuse, to arbitrate the McNeil grievance.

> 16. That the parties' collective bargaining agreement clearly excludes from arbitration disputes as to the "determination of promotions"; that the McNeil grievance states claims that the Company violated the following provisions of the parties' collective bargaining agreement:

1/ See Footnote 1 on Page 2.

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.

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.

. . .

(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.

Art. 1, Sec. 2, by allegedly unlawfully discriminating against the Grievant because of her race;

Art. IV, Sec. 3(b) e.g., by allegedly failing to provide the Grievant with full information as to the Company's evaluation of her performance as provided in that provision;

Art. VII, Sec. 4, by allegedly failing to provide written notice through her supervisor when a change of job level or classification allegedly occurred; and/or

Art. X, Sec. 1, by alleged failure of her supervisor to provide the Grievant with a full explanation of an alleged action which allegedly adversely affected her;

that none of the foregoing claims constitute disputes as to the "determination of promotions" within the meaning of the parties' collective bargaining agreement; and that the foregoing claims are covered by the terms of the parties' collective bargaining agreement that was in effect at the time the grievance arose and are not clearly excluded from arbitration by said agreement.

17. That as the term is used in the parties' collective bargaining agreement, disputes as to the "determination of promotion" would include, for example, claims:

that in respect to an employee considered for or applying for promotions, the Company misinterpreted or misapplied Art. VII, Sec. 2, by failing to give seniority significant consideration in appraising employees' ability, qualifications, and experience and/or by failing to use seniority as the determining factor when ability, qualifications, and experience were relatively equal; or

that the Company misinterpreted or misapplied Art. VII, Sec. 1, in determining that an employee had not "satisfactorily completed" a promotion trial period;

and that if the McNeil grievance states either of the above-noted claims, it is nonarbitrable to that extent.

C. That the Examiner's Conclusions of Law are modified to read as follows:

1. That by refusing to proceed to arbitration on the March 15, 1984 grievance of Maureen McNeil, insofar as it raises the claims noted in Finding 16 above, the Respondent, Northwestern Mutual Life Insurance Company, has violated, and continues to violate, Article X, Complaints and Grievances, of the parties' 1982-84 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.

2. That by refusing to proceed to arbitration on the March 15, 1984 grievance of Maureen McNeil, if and to the extent that it raises the claims noted in Finding 17 above, the Respondent, Northwestern Mutual Life Insurance Company, has not violated and is not continuing to violate Article X, Complaints and Grievances, of the parties' 1982-84 collective bargaining agreement, and has not committed and does not

continue to commit, an unfair labor practice within the meaning of Sec. 111.06(1)(f) of the Wisconsin Employment Peace Act.

D. That the Examiner's Order is modified to read as follows:

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

A. Cease and desist from refusing to submit the McNeil grievance to arbitration as regards the claims noted in Finding 16 above.

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

(1) Notify the Office and Professional Employees International Union, Local 35, AFL-CIO-CLC, that it will proceed to arbitration of the McNeil grievance as regards the claims noted in Finding 16 above.

(2) Participate as prescribed in the 1982-84 collective bargaining agreement in the arbitration proceedings regarding the claims noted in Finding 16 above, which are stated in the McNeil grievance.

(3) 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.

2. If and to the extent that the Complaint constitutes an allegation that Respondent has committed an unfair labor practice by refusing to arbitrate the claims described in Finding 17 to that extent the Complaint shall be and hereby is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin this 11th day of July, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

Marshall L. Gratz
Marshall L. Gratz, Commissioner

Danae Davis Gordon
Danae Davis Gordon, Commissioner

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

POSITIONS OF THE PARTIES

The Respondent

Respondent contends that the Examiner erred when concluding that Complainant established by clear and satisfactory preponderance of the evidence that the McNeil grievance is arbitrable under the parties' contract. It asserts that the Examiner made two basic errors by (1) determining that the grievance involved something more than the determination of a promotion and then (2) improperly refusing to recognize the specific contractual provision which bars arbitration of promotional issues.

Respondent argues that it is well settled that the obligation to arbitrate is limited to disputes which the parties have agreed should be resolved through that procedure. Respondent asserts that Article X specifically bars arbitration of any disputes related to promotions and contends that the grievant's recitation of various contract provisions allegedly violated by Respondent should not be allowed to serve as an effective disguise of the underlying promotion dispute. Respondent alleges that its position that the grievance raises issues which have been specifically excluded from the arbitration procedure is supported by remarkably similar cases which the Examiner failed to address. Communication Workers of America v. New York Telephone Company, 372 F.2d 94 (CA 2, 1964), Federation of Telephone Workers of Pennsylvania v. Bell Telephone Company of Pennsylvania, 466 F. Supp. 1201 (E.D. Pa., 1975), aff'd mem., 546 F.2d 415 (CA 3, 1976), cert denied, 430 U.S. 969 (1977).

Respondent further argues that the Examiner's decision is contrary to the lengthy bargaining history and past practice which underlies the narrow arbitration clause contained in existing contract language and also ignores the comprehensive nature of the procedures followed by the Office Committee when disposing of those grievances which have been contractually excluded from the arbitration procedure.

Respondent asserts that the Examiner's interpretation of Article X would allow the general language regarding "interpretation or application" to render meaningless the specific language in Article X regarding the finality of the Office Committee's decision as to promotion disputes and the resultant specific exclusion of such matters from arbitration. Even assuming arguendo that this is not a promotion dispute, Respondent contends that the grievance does not raise questions of the "interpretation or application" of the contract because Respondent admits both its obligation to honor the clear contractual provisions referenced in the grievance and the potential applicability of said provisions to the dispute.

Given the foregoing, the Respondent asks the Commission to reverse the Examiner's decision.

The Complainant

The Complainant argues that the Examiner properly applied applicable law and rightfully concluded that the parties' contract did not clearly exclude the McNeil grievance from the arbitration process. Complainant asserts that the Examiner correctly rejected Respondent's claims that the grievance is essentially a promotion dispute and that no issue regarding the "interpretation or application" of the contract has been raised. Complainant argues that the grievance essentially raises a claim of race discrimination which is not clearly excluded from arbitration under the parties' contract.

Complainant therefore asks the Commission to affirm the Examiner's decision.

DISCUSSION

While we agree with the Examiner's Findings, Conclusions and Order in most respects, we have modified them to differentiate between the McNeil grievance claims noted in modified Finding 16 and certain other claims noted in Finding 17. While we have concluded that the Company's refusal to arbitrate the claims noted in Finding 16 constitutes a violation of a collective bargaining agreement and hence an unfair labor practice, our rationale for so concluding departs somewhat from that of the Examiner. We predicate our Findings of Fact, Conclusions of Law and Order on the rationale set forth below, rather than on that set forth in the Examiner's Memorandum.

As a competent state tribunal having concurrent jurisdiction with the federal courts to enforce bargaining agreements covering employes in industry affecting commerce, the Commission must apply legal standards which are consistent with federal case law developed in Section 301 actions under the Labor Management Relations Act. Textile Workers Union v. Lehigh Mills, 353 U.S. 448 (1957); Local 174, Teamsters v. Lucas Flour, 369 U.S. 95 (1962); Dowd Box v. Courtney, 368 U.S. 52 (1962); Tecumseh Products Co. v. WERB, 23 Wis.2d 118 (1963); American Motors Corp. v. WERB, 32 Wis.2d 237 (1966). Thus, as both parties agree and the Examiner properly concluded, the Commission is obligated to follow the Steelworker's Trilogy and its progeny when determining whether the Examiner's decision should be upheld. 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).

The Examiner correctly cited the general law applicable to this dispute as:

> 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. Warrior and Gulf Navigation Co., supra, at 582.

Accord, A T & T Technologies, Inc., v. Communications Workers of America, ___, U.S. ___, ___, 121 LRRM 3329, 3332 (No. 84-1913, 4-21-86).

Here, Respondent asks that we overturn the Examiner and conclude that there is a clear exclusion of the issues raised in the grievance from those matters which are arbitrable under the contract. We find no merit in that request and contention as regards the claims identified in modified Finding 16, but we do find merit in it if and to the extent that the McNeil grievance states the additional claims noted in modified Finding 17. 2/

The instant grievance reads in part as follows:

> 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 and (sic) equal & fair opportunity to succeed in my current position. Some of the things which have transpirted (sic) are: I did not see or sign any 6 mo. rating until my annual review and I was not notified of mty (sic) probationary period extension. For these reasons I feel I have been discriminated against.

2/ As the Examiner noted, both parties agreed that the Commission's decision in Northwestern Mutual, Dec. No. 16926-B (WERC, 4/80) is essentially irrelevant to this case.

Under "REMEDY SOUGHT", the grievance specifies, "To create an environment where I would be given a fair and equal opportunity." Under "CONTRACT ARTICLE VIOLATED", the provisions listed below are specified, followed by "and all other applicable articles" printed on the form after the filled-in blanks:

> Art. 1, Sec. 2, (which states, in part, "the contracting parties agree that in carrying out this Agreement neither will unlawfully discriminate against any employee because of such employee's race . . .").
>
> Art. IV, Sec. 3(b), (which states, "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 interviee (sic) 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.")
>
> Art. VII, Sec. 4, (which states, "When any change of job level or classification occurs, an employee shall receive written notice through his supervisor.")
>
> Art. X, Sec. 1, (which states "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 employees' request, be given a copy thereof. If this does not satisfy the employee, the action of the supervisory (sic) may be reviewed as follows: . . .")

We will refer to the specific claims in the grievance that the Company violated the contract provisions listed above as "Finding 16 claims".

We reject the Company's contention that those claims do not involve the interpretation or application of the Agreement, for the reasons stated by the Examiner on that point in the last full paragraph on page 16 of his Memorandum where he stated:

> 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.

By way of comparison with the foregoing claims, a grievance could also state claims that the Company has violated:

> Art. VII, Sec. 1, which states, "When an employee is promoted to a higher job level, such promotion shall be considered conditional until such employee has satisfactorily completed a trial period (of defined duration). . . ." or
>
> Art. VII, Sec. 2, which defines seniority and states, "In respect to all employees considered for or applying for promotions, seniority shall be given significant consideration in appraising employees' ability, qualifications, and experience. Moreover, seniority shall be the determining factor when ability, qualifications, and experience are relatively equal. . . ." 3/

We will call those "Finding 17 claims". The McNeil grievance does not specifically state those claims, but it does make reference to "and all other applicable articles." We have included a reference to those claims in Finding 17 both to avoid any possibility that these claims are included within the grievance catch-all language noted above, and to clarify our interpretation of the term "determination of promotions" in the parties' collective bargaining agreement.

Article X, Sec. 1, of the Agreement provides in pertinent 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 classification of jobs, except as otherwise agreed upon by the Company and the Union. (emphasis ours).
>
> 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.

In our view, the language of Art. X, Sec. 1, clearly and unambiguously means that, absent mutual agreement of the parties, "such matters as the determination of promotions and merit increases for individual employes and classification of jobs" are matters on which "the action of the Office Committee shall be final." In our view it necessarily follows that such matters are not arbitrable notwithstanding the more general language of Step 2, Para. 2, "Unless the grievance involves the interpretation or application of the terms of this Agreement or relates to a discharged regular employee. . . ." and of Step 3, Para. 1, making final and binding grievance panel arbitration available "(i)f the grievance involves the interpretation or application of the terms of this

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3/ Article VII is entitled "Promotions, Demotions, Transfers and New Positions."

Agreement (except as provided in Section 3 of Article II.)". The specific provision for finality of Office Committee actions regarding "the determination of promotions . . ." supercedes general language to the contrary under established standards of contract interpretation.

Accordingly, the "determination of promotions" language in Art. X, Sec. 1, would make the Office Committee decision final (and arbitration unavailable absent mutual consent) as to Finding 17 claims, i.e., a grievance in which it is asserted:

> a. that in respect to an employee considered for or applying for promotions, the Company misinterpreted or misapplied Art. VII, Sec. 2, by failing to give seniority significant consideration in appraising employees' ability, qualifications, and experience and/or by failing to use seniority as the determining facor when ability, qualifications, and experience were relatively equal; or
>
> b. that the Company misinterpreted or misapplied Art. VII, Sec. 1, in determining that an employee had not "satisfactorily completed" a promotion trial period.

We could conclude with the requisite positive assurance that Finding 17 claims are not among those the parties agreed to subject to grievance panel arbitration absent a mutual agreement of the parties. Such a conclusion takes account both of the language of the agreement and the bargaining history evidence on which the Company relies, as well. If and to the extent that a Finding 17 claim is being pursued, e.g., under the "and all other applicable articles" catch-all in the grievance, we hold that such claims are matters expressly excluded from arbitration by the langauge of the Agreement.

On the other hand, we cannot conclude with the requisite positive assurance that the parties' agreement regarding "such matters as determination of promotions" applies as well to Finding 16 claims, i.e., those specifically advanced in the instant grievance. In other words, we cannot conclude with positive assurance that "such matters as determination of promotions" was intended to exclude from arbitration claims--even as regards an employe on a probation trial period--that the Company misinterpreted or misapplied:

> Art. 1, Sec. 2, by allegedly unlawfully discriminating against the Grievant because of her race;
>
> Art. IV, Sec. 3(b) e.g., by allegedly failing to provide the Grievant with full information as to the Company's evaluation of her performance as provided in that provision;
>
> Art. VII, Sec. 4, by allegedly failing to provide written notice through her supervisor when a change of job level or classification allegedly occurred; and/or
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> Art. X, Sec.1, by the alleged failure of her supervisor to provide the Grievant with a full explanation of an alleged action which allegedly adversely affected her.

The New York Telephone and Bell Telephone of Pennsylvania cases, supra, relied on heavily by the Company would provide persuasive support for our conclusion above that the Company cannot be required to arbitrate Finding 17 claims, but not for the further conclusion that the exclusion of "matters such as determination of promotions" from arbitration means that the Company cannot be required to arbitrate Finding 16 claims.

In the New York Telephone case, the grievance asserted that the Company was failing to apply the seniority language of Sec. 9.08 in temporary promotion situations, and the District Court and Court of Appeals agreed with the Company that such a claim was squarely within the express exclusion from arbitration of ". . . any grievance arising out of . . . Section 9.08." 51 LRRM at 2193-95, and 55 LRRM 2275 at 2277. In comparison, the relationship between the Finding 16 claims asserted in the McNeil grievance and the exclusion of "matters such as determination of promotions" is much less direct than the relationship of the claims asserted and the matters expressly excluded from arbitration in the New

York Telephone case. While a Finding 17 claim can be said with positive assurance to involve a "determination of promotions" matter, the Finding 16 claims cannot.

The same can be said of Bell Telephone Company of Pennsylvania, in which the contract "expressly excluded disputes about the terms of the promotions article, Article 22, from arbitration. Sec. 22.04." 91 LRRM 2714 at 2715, 2717, leading the Court to conclude that the arbitrator exceeded his authority by basing his assertion of jurisdiction to decide whether certain Company actions violated Art. 22 on a general provision for arbitration of disputes as to the "true intent and meaning" of the agreement. Unlike the instant situation, the language of the exclusion in that case referred directly and specifically to the article upon which the disputed portions of the award were expressly based. The Art. X, Step 2, Para. 1 exclusion language herein does not expressly exclude from arbitration the subject matters of the agreement provisions cited in the grievance. Again, while a Finding 17 claim can be said with positive assurance to involve a "determination of promotions" matter, the Finding 16 claims cannot.

Nor can we conclude with positive assurance that requiring the Company to submit the Finding 16 claims to arbitration would (as the Company asserts) afford Grievant McNeil or the generic "clever grievant" referred to by the Company an effective means of undermining the purpose of the parties' agreement that Office Committee action is final regarding matters involving "determination of promotions". For, the Company will be free to argue to the grievance panel that, properly interpreted and applied, Art. X, Sec. 1, Step 2, Para. 2, requires that the grievance panel limit its remedy for any violation of a Finding 16 claim found so as not to defeat the finality of Office Committee action on "such matters as determination of promotion." The Company would also have the right to seek post-arbitral review of the validity of an arbitration panel remedy that it considers in excess of the authority of the grievance panel to render under the Agreement. The merits of such Company arguments regarding remedy are for those forums and are not decided herein.

For the foregoing reasons, we have concluded that the Finding 16 claims specifically advanced in the McNeil grievance are claims which are subject to the "interpretation and application" jurisdiction of the grievance panel arbitration and which cannot be said with positive assurance to have been excluded from grievance arbitration by the language of the Agreement, whereas Finding 17 claims have been expressly excluded from arbitration by the Agreement. Our modified Conclusions of Law and Order flow directly from those basic conclusions.

Dated at Madison, Wisconsin this 11th day of July, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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Marshall L. Gratz, Commissioner

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Dahae Davis Gordon, Commissioner