STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DISTRICT COUNCIL 48, AFSCME, AFL-CIO and its affiliated LOCAL 609 Complainant, vs. VILLAGE OF GREENDALE Respondent.	Case 48 No. 36696 MP-1827 Decision No. 23788-A

Appearances:

Podell, Ugent & Cross, S.C., Attorneys at Law, by Ms. Nola J. Hitchcock Cross, 207 East Michigan Street, Milwaukee, WI 53202, appearing on behalf of Complainant.

Lindner and Marsack, S.C., Attorneys at Law, by Mr. Roger E. Walsh, 700 North Water Street, Milwaukee, WI 53202, appearing on behalf of Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The above-named Complainant filed a complaint with the Wisconsin Employment Relations Commission on March 18, 1986, alleging that the Village of Greendale had violated Secs. 111.70(3)(a)1 and 5 and (b) 1, 2 and 4, Wis. Stats., by refusing to process to arbitration a grievance concerning employes' rights to wash their cars. The Commission appointed Christopher Honeyman, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusion of Law and Order, as provided in Sec. 111.70(5), Wis. Stats. A hearing was held in Greendale, Wisconsin on July 30, 1986, at which time the parties were given full opportunity to present their evidence and arguments. Both parties filed briefs, and the record was closed on November 17, 1986. The Examiner, having considered the evidence and arguments and being fully advised in the premises, makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. District Council 48, AFSCME, AFL-CIO is a labor organization within the meaning of Sec. 111.70(1)(h), Wis. Stats., as is its affiliated Local 609. Their principal offices are located at 3427 West St. Paul Avenue, Milwaukee, Wisconsin 53208.

2. The Village of Greendale is a municipal employer within the meaning of Sec. 111.70(1)(j), Wis. Stats., and has its principal offices at the Village Hall, 6500 Northway, Greendale, Wisconsin 53129.

3. Complainant and Respondent are parties to 1984-85 and 1986-87 collective bargaining agreements which contain among their terms the following specific articles:

PREAMBLE

. . .

> Both of the parties to this Agreement are desirous of reaching an amicable understanding with respect to the employer-employee relationship which exists between them and to enter into a complete Agreement covering rates of pay, hours of work, and conditions of employment.

ARTICLE I - RECOGNITION

Section I. The village recognizes the Union as the sole and exclusive bargaining agent of all regular full-time employees employed in the Employer's Public Works and Public Utilities Departments and of the regular full-time clerical employees working at the Village Hall, excluding supervisory and professional employees, confidential, executive and managerial employees and all other employees, for purposes of negotiating on matters concerning wages, hours and conditions of employment. The Union recognizes its responsibility to cooperate with the Village to assure maximum service at minimum cost to the public consonant with its obligations to the employees it represents.

. . .

ARTICLE IV - GRIEVANCE PROCEDURE

Section 1. Step 1. Only matters involving the interpretation, application or enforcement of the terms of this Agreement shall constitute a grievance under the provisions set forth below. . .

. . .

Section 4. Final and Binding Arbitration. a) If the grievance is not settled at Step 3, the Union shall notify the Village Board in writing within ten (10) working days from the date of the Village Manager's decision or last date due, that the matter is to be submitted to arbitration and shall request the Wisconsin Employment Relations Commission to appoint an impartial referee who will arbitrate the grievance under the Wisconsin Employment Relations Commission's arbitration service provided in Section 298.01 of the State Statutes. . .

. . .

(c). . . In making his decision, the arbitrator shall neither add to, detract from nor modify the language of this agreement.

. . .

ARTICLE XVII - WORKING CONDITIONS

Section 1. The management and direction of the affairs and working force of the Village, including the right to hire, discipline, suspend, or discharge for just cause, and the right to transfer or layoff due to lack of work or other legitimate reason and in general all other functions of management are recognized as the inherent functions of the Village Board and Village Manager, and except as expressly limited by this Agreement, remain exclusively in the Village Board and the Village Manager.

. . .

ARTICLE XXIII - AMENDMENTS AND SAVINGS CLAUSE

Section 1. The parties to this Agreement agree that this Agreement may be amended by mutual consent of the parties. Such amendments shall be in writing.

. . .

4. The record shows that for at least sixteen years employes have from time to time washed their personal cars at the site and using the facilities of

Respondent's Public Works garage, and that this practice has been known to and unopposed by officials of Respondent including the Superintendent of Public Works. The record shows that this practice took place during the lunch breaks of the employes involved, until an incident on or about May 1, 1985 in which an employe washed his car on working time. On or about the same date Donald Fieldstad, Village Manager, ordered employes not to bring their cars into the building and canceled the prior practice of employes washing their cars on lunch breaks. The record shows that the collective bargaining agreements referred to above contain no clause specifically referring to this or other past practices.

5. On May 3, 1985 Complainant Local 609 filed a Step 2 grievance signed by fourteen employes, protesting the abolition of the practice of washing cars on lunch breaks. This grievance was processed through the grievance procedure, and the record shows that on August 13, 1985 Respondent refused to concur with Complainant's request to proceed to arbitration with the grievance.

6. The grievance referred to in Finding of Fact 5 above refers on its face to a unilateral change in a working condition and/or benefit, and on its face relates to the recognition and working conditions/management rights clauses of the collective bargaining agreements referred to above. It cannot be said with positive assurance that the collective bargaining agreement is not susceptible to an interpretation which covers the dispute.

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

CONCLUSION OF LAW

By refusing to submit to final and binding arbitration the grievance of Local 609 and fourteen employes concerning the abolition of the past pratice of washing employes' cars, since said grievance states a claim which on its face is covered by the parties' agreement and it cannot be said with positive assurance that the agreement is not susceptible to an interpretation which covers the dispute, the Village of Greendale has violated the terms of a collective bargaining agreement, and has committed a prohibited practice within the meaning of Sec. 111.70(3)(a)1 and 5, Wis. Stats.

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

ORDER 1/

1. That Respondent Village of Greendale, and its officers and agents, shall immediately:

   a. Cease and desist from refusing to submit the grievance identified in Finding of Fact 5 above to final and binding arbitration.

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

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for

(Footnote One Continued on Page 4)

b. Take the following affirmative action, which the Examiner finds will effectuate the policies of Sec. 111.70 of the Municipal Employment Relations Act:

1. Comply with the arbitration provision of the 1984-85 collective bargaining agreement between Respondent and Local 609, American Federation of State, County and Municipal Employes, AFL-CIO, with respect to the grievance identified in Finding of Fact 5 above.

2. Notify Local 609, AFSCME, AFL-CIO that it will proceed to arbitration on said grievance.

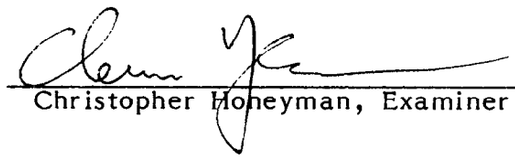
3. Participate with Local 609, AFSCME, AFL-CIO, in final and binding arbitration proceedings concerning the grievance identified in Finding of Fact 5 above, as set forth in the parties' 1984-85 collective bargaining agreement.

4. Notify all employes of its Department of Public Works, by posting in conspicuous places where said employes are employed, copies of the Notice attached hereto and marked "Appendix A." Said notice shall be signed by a duly authorized officer or agent of Respondent, shall be posted immediately upon receipt of a copy of this Order, and shall remain posted for a period of thirty days thereafter. Respondent shall take reasonable steps to insure that said notices are not altered, defaced, or covered by other material.

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

Dated at Madison, Wisconsin this 29th day of December, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Christopher Honeyman, Examiner

1/ (Continued)

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.

APPENDIX "A"

NOTICE TO ALL EMPLOYES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, we hereby notify our employes that:

1. We will immediately cease and desist from declining to submit the grievance relating to the washing of cars on employes' lunch breaks to final and binding arbitration.

2. We will comply with the arbitration provisions of the collective bargaining agreement with Local 609, AFSCME, AFL-CIO.

3. We will participate with Local 609, AFSCME, AFL-CIO in final and binding arbitration proceedings concerning the grievance referred to above as set forth in the parties' collective bargaining agreement.

VILLAGE OF GREENDALE

By _____

THIS NOTICE MUST BE POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL.

VILLAGE OF GREENDALE

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The complaint alleges that the Village violated Sec. 111.70(3)(a)1 and 5 and (b)1, 2 and 4, Stats., by refusing to proceed to arbitration over a grievance, involving the termination of the past practice of allowing employes to wash their cars on the Employer's premises during off-duty time.

BACKGROUND

The essential facts are undisputed, are stated in the Findings, and need not be repeated here. The Village presented no evidence to rebut the testimony adduced by Complainant's witness to the effect that the practice of allowing employes to wash their cars was of long standing, was known to management, and that management officials had themselves taken advantage of the facility. Also not rebutted was testimony that the occasion for the cancellation of this practice was an incident of apparent abuse by a single employe, who washed his car during time he was supposed to be working.

COMPLAINANT'S POSITION

Complainant argues that the car-washing constituted a fringe benefit and that the use of the facility (with the employe's own equipment and supplies except for water) was mutually understood and accepted for over a decade. Complainant contends that the reason the practice was abolished was in retaliation and as discipline for a single employe's abuse. Complainant argues that it is irrelevant whether the Commission would decide to the grievance favorably on the merits, because the instant proceeding focuses solely on the question of arbitrability, and that it is settled law that if the agreement arguably covers the claim, an employer violates Sec. 111.70(3)(a)(5) by refusing to arbitrate. Complainant alleges that this claim is arguably covered by the parties' collective bargaining agreement, because it is both a working condition and part of the wages of the employes. Complainant argues that working conditions are discussed in the Preamble and Article I of the agreement and that discipline is subject to a "just cause" standard under Article XVII of the agreement. For these reasons, the Union alleges, the claim is arguably covered by the collective bargaining agreement and arbitration is therefore required by the terms of that agreement.

RESPONDENT'S POSITION

Respondent contends that the agreement specifies a definition of a "grievance" and that the statement of the grievance in this case fails to meet that definition. Respondent argues that the term "past practice" appears nowhere in the agreement, even by indirect reference, while the agreement limits grievances to only matters involving "the terms of the Agreement." Respondent argues that the written terms of the agreement are the terms referred to and that therefore this matter is not a grievance, which puts it outside any interpretation of the agreement and makes it not arbitrable. Respondent argues that the Complainant must meet a burden of proof to show that it has stated a claim covered by the agreement. The Respondent contends that Complainant has failed to meet this burden.

Respondent further argues that in order to meet the test of arbitrability applied by the Commission and courts, the grievance itself must state a claim which on its face is governed by the terms of the agreement. Noting a number of cases in which arbitrability was affirmed based on the existence in the contract of a clause with specific reference to the grievance in question, Respondent compares those cases against the present one and argues that the fact of a narrow definition of a grievance, coupled with contractual silence concerning past practices, clearly puts the instant dispute outside the range of matters covered by the contract. Respondent contends, with respect to Complainant's citation of several contract clauses, that these were belated attempts to relate the grievance to applicable terms of the contract, and could not properly be cited without evidence that Complainant had raised these allegations in the grievance procedure. Respondent further argues that these clauses are totally inapplicable to this grievance. In that connection, Respondent notes specifically that arbitrators have declined to find specific rights to arise from the general

expressions contained in contract preambles, and argues that its use of its management rights was not in the direction of discipline but merely the exercise of "its inherent right to manage and direct." Respondent argues that this right is "exclusive" to the Village unless "expressly limited by this agreement", and that since there is no express limitation applicable to this case, arbitrability of this grievance is not shown.

DISCUSSION

The Commission has consistently held that in proceedings concerning enforcement of a collective bargaining agreement's arbitration clause, the scope of inquiry is limited to a determination of whether the party seeking arbitration has stated a claim which, on its face, is covered by the collective bargaining agreement. This policy is consistent with both federal substantive law and rulings of the Wisconsin Supreme Court. 2/

Limited as this inquiry is, it raises several distinct questions in the present context. One such issue is whether the Union's failure to articulate the grounds for its grievance during the grievance procedure, and relate them to a specific item of the contract, should bar arbitration on the merits. A second is whether the grievance concerns a matter of discipline or not; and a third is whether under any circumstances a past practice not specifically referred to in this agreement could yet be a subject of arbitration, under the relatively narrow definition of a grievance present here. Emphatically not an issue is whether or not the grievance has merit: All of the cases cited above stand for the proposition that this question is outside the scope of an inquiry into substantive arbitrability. As Respondent correctly notes in its brief, the Wisconsin Supreme Court in Jefferson 3/ confronted a restricted definition of arbitrable grievances but concluded that the grievance at hand was arbitrable, because the contract was suseptible of an interpretation that covered the asserted dispute and the union had pointed to specific contract language that arguably expressly covered the subject of the grievance. 4/ Provided the Union cites at least one contract clause which arguably expressly covers the asserted dispute, the matter accordingly must be found arbitrable unless it can be said with "positive assurance" that the arbitration clause is not susceptible to such an interpretation. (See Warrior and Gulf, Fn. 4 supra). In this respect it is necessary to note that Respondent's argument that the Union failed to cite specific contract language related to the grievance, during the earlier steps of the grievance procedure, is an argument of procedural arbitrability and not substantive arbitrability: If the substance of the dispute is susceptible to arbitral determination, it is settled law that the matter must be submitted to an arbitrator, and the U.S. Supreme Court has specifically ruled that questions of compliance with procedural requirements of the grievance procedure are not

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2/ The Commission first acknowledged its adherence to these policies in the administration of the Municipal Employment Relations Act in Oostburg Joint School District No. 14, Dec. No. 11196-A,B, 11/72, 12/73. The Commission had consistently applied the same policy for many years in the administration of the equivalent provision contained in the Wisconsin Employment Peace Act. See, for example, Dunphy Boat Corporation, Dec. No. 3588. Federal cases often cited by the Commission in support of this policy include: Steel Workers v. American Manufacturing Co., 353 U.S. 564 (1960); Steel Workers v. Warrior and Gulf Navigation Co., 353 U.S. 574 (1960); Steel Workers v. Enterprise Wheel and Car Corp., 353 U.S. 593 (1960); John Wiley & Sons, Inc., v. Livingston, 376 U.S. 543 (1964). Wisconsin Supreme Court decisions adopting federal substantive law relied upon by the Commission include Denhart v. Waukesha Brewing Co., Inc., 17 Wis.2d 44 (1962); Joint School District No. 10 v. Jefferson Education Association, 78 Wis.2d 94 (1976); Milwaukee Police Association v. City of Milwaukee, 92 Wis.2d 145 (1979).

3/ Supra.

4/ Jefferson, supra at 112, 113, citing Warrior and Gulf, supra at 582,583: "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."

appropriate for legal resolution. 5/ Whether or not the Union failed a significant requirement by not citing contract language applicable to this matter in the grievance procedure is a question which does not bear on the specific focus of this proceeding, which relates only to whether such language exists.

I conclude, upon review of the facts, that this dispute arguably relates to contractual provisions in two respects. First, Complainant asserts that this matter involves a type of discipline, subject to the contractual "just cause" standard. While in Jefferson the court noted that the mere assertion of a relationship to the discipline clause is not sufficient to compel arbitration, the undisputed facts in the record indicate that a long standing practice was abolished by Respondent on the occasion of a single employe's abuse of the practice. This suggests the nexus between employe misconduct and employer retribution characteristic of discipline. The fact that, if this was discipline, it mimics the theory of the decimation practiced as a disciplinary measure by the Roman Legions more than the individual discipline characteristic of American labor agreements relates to the merits of the grievance and not its arbitrability, and therefore cannot be considered here as a factor in deciding whether a disciplinary act was either the intent or the effect. As Respondent points out, this matter concerns only the question of arbitrability: Complainant has shown a sufficient relationship between the timing of the Employer's action and the timing of the employe's infraction that it cannot be stated with "positive assurance" that the discipline clause does not cover this dispute.

The second point is the relationship of this past practice to the agreement's recognition clause. While I might concede Respondent's contention that the reference to working conditions in the Preamble is not substantive, the contract's recognition clause explicitly identifies an obligation on the Employer to recognize the Union as "the sole and exclusive bargaining agent . . . for purposes of negotiations on matters concerning wages, hours and conditions of employment." Here the Employer is asserting that the recognition clause's reference to "conditions of employment" has no bearing on this case in view of the language of the working conditions clause, which reserves to management certain rights. Respondent specifically objects to the possibility that any implied term of the agreement might be found to exist, in view of the language of the management rights clause. But I note that the reservation of rights "except as expressly 6/ limited by this agreement" in the working conditions clause is not mirrored in the definition of a grievance, which merely refers to "the terms of this agreement." The arbitration clause therefore does not conclusively exclude the concept of an implied term of the agreement. Again, whether or not such an argument by the Union has merit is not the subject here; all that can or need be determined is whether it can be stated with "positive assurance" that the agreement is not susceptible of an interpretation covering this dispute. Respondent's assertion of its rights is a broad one, and I must note that opinions have differed among arbitrators for many years over precisely the question of whether, in the face of a contract clause limiting arbitration to "the terms of this agreement" or something similar, a contract may include implied terms or only written ones. I note that arbitrators described as believing in the concept of "reserved rights" have, as a group, accepted contentions similar to Respondent's here that management retains all of the rights it has not expressly given up. But there exists a sizable group of arbitrators who have held, in a nutshell, that not all of the myriad terms of employment can practicably be reduced to writing, and that under certain conditions these may be enforceable even when not written down as part of the collective bargaining agreement. 7/ Certainly the fact that the debate is of long standing shows that it cannot be stated with "positive assurance" that a contract like this one, which makes no express reference to limitation of the arbitration clause to the written terms of the agreement, must inevitably be given the more restrictive interpretation. In the event, it is clear that the relationship of this grievance to the terms of this agreement

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5/ Wiley, supra.

6/ Emphasis added.

7/ See Elkouri and Elkouri, How Arbitration Works, 4th Edition, BNA Books, 1952, 1985, Chapter 12, "Custom and Past Practice", pp. 437-456; Chapter 13, "Management Rights", pp. 460-461.

turns, in part, on whether implied terms of the agreement are found to exist, which itself is a question of interpretation of the written terms of the contract. These determinations, together with the determination of whether this is or is not a matter of discipline, plainly fall within the arbitrator's jurisdiction under the definition present in the grievance procedure. Accordingly, I find that this matter involves a claim which on its face is governed by the terms of the collective bargaining agreement, and which cannot be stated with positive assurance not to be susceptible to determination by interpreting the collective bargaining agreement. I therefore conclude that the grievance is arbitrable, and that Respondent violated the collective bargaining agreement and Sec. 111.70(3)(a)1 and 5 by refusing to proceed to arbitration.

Dated at Madison, Wisconsin this 29th day of December, 1986.

By _____
Christopher Honeyman, Examiner