

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DAVIS J. SZIBEL,	:	
	:	
Complainant,	:	
	:	
vs.	:	Case 12
	:	No. 38809 MP-1979
	:	Decision No. 24661-A
VILLAGE OF BUTLER, a municipal	:	
corporation/employer, and	:	
VILLAGE OF BUTLER POLICE	:	
DEPARTMENT,	:	
	:	
Respondent.	:	
	:	

Appearances:

Mr. James C. Wood, Attorney at Law, Suite 307, 704 West Wisconsin Avenue, Milwaukee, Wisconsin 53233, appearing on behalf of the Complainant.
De la Mora & De la Mora, Attorneys at Law, 15255 Watertown Plank Road, Elm Grove, Wisconsin 53122, by Mr. Hector De la Mora, appearing on behalf of Respondent.

FINDINGS OF FACT
CONCLUSIONS OF LAW AND ORDER

David J. Szibel, hereinafter Complainant, having on May 14, 1987, filed a complaint with the Wisconsin Employment Relations Commission, alleging that the Village of Butler and Village of Butler Police Department had committed prohibited practices within the meaning of the Municipal Employment Relations Act; and the Commission having appointed Coleen A. Burns, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Wis. Stats.; and hearing in the matter having been conducted in Milwaukee, Wisconsin on August 4, 1987; and the Examiner having closed the record on August 14, 1987, upon receipt of the transcript; and the Examiner having considered the record and arguments of the parties, and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That the Village of Butler is a "Municipal Employer" within the meaning of Sec. 111.70(1)(j), Stats. and has offices located at the Village Hall, 12621 W. Hampton Avenue, Butler, Wisconsin 53007.
2. That David J. Szibel, hereinafter Complainant, is a "Municipal Employee" within the meaning of Sec. 111.70(1)(i), Stats., and resides at 5606 Beaver court, Greendale, Wisconsin 53129.
3. That at all times material hereto, the Village of Butler has operated a Police Department; that at all times material hereto, Complainant has been employed as a Police Officer in the Village of Butler Police Department; that at all times material hereto, Complainant has been a member of a collective bargaining unit consisting of all employes of the Police Department, except the Chief of Police, Police Sergeant, Police clerical and meter persons, who have chosen the Union to represent them for the purpose of negotiating in relation to wages, hours and conditions of employment; and that at all times material hereto, the aforesaid collective bargaining unit has been represented by the Wisconsin Professional Police Association, Law Enforcement Employee Relations Division, and its affiliated Local, the Butler Police Association.
4. That the Wisconsin Professional Police Association, Law Enforcement Employee Relations Division (WPPA-LEER) and its affiliated Local, the Butler Police Association, hereinafter collectively known as the Union, are "labor organizations" within the meaning of Sec. 111.70(1)(h), Stats; and that the Union has offices located at 7 North Pinckney Street, Madison, Wisconsin 53703.

5. That the Union and the Village of Butler are signatories to a collective bargaining agreement, hereinafter the Agreement, which, by its terms, was in full force and effect from February 18, 1985 through December 31, 1986; that the Agreement contains, inter alia, the following provisions:

ARTICLE V - GRIEVANCE PROCEDURE

A. Purpose. The purpose of this grievance procedure is to provide a method for quick and binding final determination of every question of interpretation and application of the provisions of this agreement, thus preventing the protracted continuation of misunderstandings which may arise from time to time concerning such questions. The purpose of the complaint procedure is to provide a method for prompt and full discussion and consideration of matters of personal irritation and concern of any employee with some aspect of employment.

B. Definitions.

(1) A grievance is defined to be an issue concerning the interpretation or application of provisions of this agreement or compliance therewith.

(2) A complaint is any matter of dissatisfaction with any aspect of employment which does not involve any grievance as defined above. It may be processed through the application of the first three (3) steps of the grievance procedure. All complaints against police officers shall follow this procedure.

(3) There shall be no retroactivity prior to the date of the filing of the written grievance or complaint, if complainant is found guilty as charged, except that in the event of a payroll error not occurring as a result of employee negligence, corrected payment shall be made retroactive.

(4) No grievance shall be processed under Step No. 1 of this Article unless the employee filed a grievance within thirty (30) calendar days from the day the grievance first arose or that the employee should have had reason to know of such grievance.

C. Procedure.

(1) The employee and/or his or her Association representative shall attempt to settle the issue with his or her immediate supervisor.

(2) If a satisfactory settlement is not reached in Step No. 1 in seven (7) days, the employee and/or his or her Association representative shall attempt to settle the issue with the Chief of Police after the employee reduces the issue to writing and has it signed by the Chief of Police and Village Administrator. Such grievance or complaint should fully state the details. The Chief of Police shall indicate the disposition.

(3) The issue shall be considered settled in Step No. 2, unless within ten (10) days it is presented in writing to the Public Safety Committee who shall hear the issue at their earliest possible convenience. The Public Safety Committee shall render its decision within five (5) days from the time the issue was heard.

(4) If a grievance is not satisfactorily settled in Step No. 3, either party may request that the matter be submitted to arbitration. The party shall request the Wisconsin

Employment Relations Commission to name an arbitrator. The arbitrator shall make the decision on the grievance which shall be final and binding on both parties.

. . .

6. That on November 6, 1986, Raymond Thompson, Chief of Police, Village of Butler Police Department, issued an order suspending Complainant from work for a period of thirty (30) working days; that the suspension was a disciplinary suspension; and that at all times material hereto, Chief of Police Thompson was acting as an agent of the Village of Butler and the Village of Butler Police Department.

7. That the Union grieved Complainant's thirty day suspension; that the Union processed the grievance through the Third Step of the contractual grievance procedure; that the Union declined to arbitrate the grievance; and that the Union has refused to assign to the Complainant any right which the Union may have to arbitrate the grievance.

8. That on January 22, 1987, Chief of Police Thompson issued the following Decision and Suspension Order:

Pursuant to a hearing held December 30, 1986 and Village Board Action taken January 20, 1987 it is hereby determined that Officer David J. Szibel violated Police Department Rule 1.02, UNBECOMING CONDUCT and the following is hereby ordered:

1. That the suspension period to be served by Officer Szibel shall be reduced from a period of thirty (30) working days without pay to a period of nine (9) working days without pay to be served consecutively as scheduled by the Chief of Police, to begin on January 29, 1987 and to end on February 8, 1987.
2. That Officer Szibel shall utilize any or all avenues of the Employee Assistance Program available to him with confirmation of compliance to be submitted in a form acceptable to the Chief of Police to begin immediately after February 8, 1987.
3. That if Officer Szibel does not comply with the conditions set forth in (2) above, Officer Szibel shall be subject to an additional twenty-one (21) working day suspension without pay to be served consecutively.
4. That Officer Szibel shall not perform any type of work during his tour of duty that is not directly duty related, unless specific permission has been granted by the Chief of Police or his designated authority.
5. That this agreement shall be placed in Officer Szibel's personnel file and will remain in said file for a period of five (5) years from the date below. In the event that there are no further instances of this nature occurring within the five (5) year period, this agreement and any related materials or references shall be removed from Officer Szibel's file.

hereinafter Respondent. have refused Complainant's request to arbitrate the

3. Even if it is assumed that the request is being advanced by an appropriate party, the language of the collective bargaining agreement does not obligate the Village of Butler to agree to or participate in arbitration.

10. That on May 14, 1987, Complainant filed a complaint with the Wisconsin Employment Relations Commission in which Complainant alleged that Respondent has engaged in unfair labor practices contrary to the provisions of Chapter 111, Stats.; and that, at hearing on August 4, 1987, Complainant amended its complaint to allege that Respondent has violated Sec. 111.70(3)(a)5, Stats.

11. That Complainant has not filed a complaint of prohibited practices which names the Union as a Respondent, nor has Complainant alleged that the Union has violated its duty of fair representation.

12. That the grievance procedure set forth in Finding of Fact 5, supra, constitutes the exclusive remedy for a breach of the Agreement.

13. That where the Union has refused to process an employee's grievance to arbitration, the Agreement does not require Respondent to agree to the employee's request to arbitrate the grievance.

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

CONCLUSIONS OF LAW

1. That the Agreement does not provide individual employees, such as the Complainant, with an independent right to process grievances to arbitration.

2. That the Agreement does not require the Respondent to arbitrate Complainant's grievance.

3. That Respondent's refusal to arbitrate Complainant's grievance does not violate Sec. 111.70(3)(a)5 of the Municipal Employment Relations Act.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following:

ORDER 1/

IT IS ORDERED that the complaint in the above-entitled matter be, and hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin this 15th day of October, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By *Coleen A. Burns*
Coleen A. Burns, Examiner

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

Section 111.07(5), Stats.

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

(Footnote 1 Continued on Page 5)

(Footnote 1 Continued)

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.

VILLAGE OF BUTLER (POLICE DEPARTMENT)

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER.

INTRODUCTION

Complainant initiated the instant proceeding when, on May 14, 1987, Complainant filed a complaint with the Wisconsin Employment Relations Commission alleging that Respondent violated Sec. 111, Stats. At hearing, Complainant amended its complaint to allege a violation of Sec. 111.70(3)(a)5, Stats.

POSITIONS OF THE PARTIES

Complainant

Article V, Section C (4) 1 and 2 expressly provides employees with the right to process a grievance. Thus, the provision recognizes that the employee is a "party" to the grievance. Inasmuch as Article V, Section C (4) provides that either party may request that the grievance be submitted to arbitration, Complainant does have the right to appeal his grievance to arbitration. Respondent does not have discretion as to whether it will, or will not, proceed to arbitration. Respondent has violated Sec. 111.70(3)(a)5 by refusing to proceed to arbitration on Complainant's grievance.

Respondent

Section 111.07(2)(a), Stats., requires that the complaint refer to a specific statutory violation. The complaint, as filed, fails to allege any of the statutorily-defined unfair labor practices and, thus, the complaint must fail due to lack of jurisdiction on the part of the Wisconsin Employment Relations Commission.

Individuals, such as the Complainant, do not have a contractual right to appeal a grievance to arbitration. Rather, the right to appeal a grievance to arbitration is vested solely within the parties to the collective bargaining agreement, i.e., the Village of Butler and WPPA-LEER, acting upon behalf of the Butler Police Association. Inasmuch as WPPA-LEER has declined to proceed to arbitration, the Village of Butler does not have a contractual obligation to agree to Complainant's request to arbitrate.

Article V, Section C (4) of the collective bargaining agreement provides that either party may request that the matter be submitted to arbitration. The phrase "may request" is permissive and indicates that the decision to engage in arbitration is within the discretion of Respondent.

DISCUSSION

Jurisdiction

As Respondent argues, the complaint, as originally filed, failed to allege a specific statutory violation. This defect, however, was cured when, at commencement of hearing, Complainant amended the complaint to allege a violation of Sec. 111.70(3)(a)5. Inasmuch as ERB 12.02(5) permits Complainant to amend his complaint at any time prior to the issuance of a final order, the amendment is timely. The Commission does have jurisdiction to determine the merits of the alleged violation of Sec. 111.70(3)(a)5, Stats.

Merits

The sole issue to be determined herein is whether Respondent's refusal to arbitrate Complainant's grievance is a violation of Sec. 111.70(3)(a)5, Stats. Section 111.70(3)(a)5 provides that it is a prohibited practice for a municipal employer:

5. To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employes, including an agreement to arbitrate questions arising as to the meaning or application of the terms of a

collective bargaining agreement or to accept the terms of such arbitration award, where previously the parties have agreed to accept such award as final and binding upon them.

The function of the Commission in cases of an alleged refusal to arbitrate under a collective bargaining agreement arbitration provision is limited to the determination of substantive arbitrability, i.e., whether the collective bargaining agreement creates a duty to arbitrate the issue in dispute. In determining substantive arbitrability, the Commission, 2/ as well as the State of Wisconsin Supreme Court, 3/ applies the following principle enunciated by the United States Supreme Court:

"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." United Steelworkers of America v. Warrior & Gulf Navigation Co., 353 U.S. 574, 582, 583 (1960).

The record demonstrates that the Union processed Complainant's grievance through the first three steps of the grievance procedure. However, the Union declined to process the grievance to arbitration. Further, the Union declined to assign to Complainant any rights to proceed to arbitration which the Union enjoyed under the labor contract. At issue is whether the arbitration clause provides Complainant with the independent right to appeal his grievance to arbitration. 4/

The language in dispute is contained in Article V, C(4) and states as follows:

(4) If a grievance is not satisfactorily settled in Step No. 3, either party may request that the matter be submitted to arbitration. The party shall request the Wisconsin Employment Relations Commission to name an arbitrator. The arbitrator shall make the decision on the grievance which shall be final and binding on both parties.

Complainant, contrary to Respondent, maintains that the word "party" must be construed to include individual employes, such as Complainant.

The word "party" is not defined in Article V, C(4) nor is it defined in any other provision of Article V. One must conclude, therefore, that the word "party" was intended to be given its common and ordinary meaning. In the context of a collective bargaining agreement, the word "party" commonly and ordinarily means the signatories to the collective bargaining agreement, i.e., the union and the employer. In the present case, the signatories are the Union and the Respondent Village of Butler. The language of Article V, C (4), on its face, is not susceptible to an interpretation which provides individual employes, such as the Complainant, with an independent right to process grievances to arbitration. Rather, the right to process grievances to arbitration is expressly reserved to the Union and the Respondent Village of Butler.

A review of the other provisions of Article V buttresses the conclusion that individual employes, such as the Complainant, do not have an independent right to process grievances to arbitration. Article V of the collective bargaining agreement expressly provides "the employee and/or his or her Association representative" with the right to process a grievance at Step 1 and Step 2 of the

grievance procedure. By substituting the word "party" for the phrase "the employee and/or his or her Association representative", the parties have demonstrated that the right to process a grievance at Step 4 is a different right than that which is available at Step 1 and Step 2 of the grievance procedure.

For the reasons discussed supra, the Examiner is persuaded that Complainant does not have an independent right to arbitrate his grievance. Inasmuch as the Union has refused to process Complainant's grievance to arbitration, Respondent does not have the contractual duty to arbitrate Complainant's grievance. Accordingly, Respondent's refusal to arbitrate Complainant's grievance does not violate Sec. 111.70(3)(a)5.

Dated at Madison, Wisconsin this 15th day of October, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By *Coleen A. Burns*
Coleen A. Burns, Examiner