STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 1403, AFSCME, AFL-CIO,		
Complainant,		Case 120
vs.		No. 43590 MP-2320
		Decision No. 26370-A
LA CROSSE COUNTY,		
Respondent.		

Appearances:

Mr. Robert B. Taunt, County Personnel Director, 400 North Fourth Street, Room B-04, County Courthouse, La Crosse, Wisconsin 54601, appearing on behalf of the Respondent.

Mr. Daniel R. Pfeifer, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, Route 1, Sparta, Wisconsin 54656, appearing on behalf of the Complainant.

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Local 1403, AFSCME, AFL-CIO, having on February 2, 1990, filed a complaint with the Wisconsin Employment Relations Commission wherein it alleged that La Crosse County had committed a prohibited practice within the meaning of Sec. 111.70(3)(a)5, Wis. Stats., by refusing to arbitrate a grievance over the termination and/or disability layoff of an employe; and La Crosse County having on April 18, 1990 filed an answer wherein it denied it committed any prohibited practice; and the Commission having appointed Edmond J. Bielarczyk, Jr., 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. 111.70(5), Wis. Stats., and a hearing in the matter having been held in La Crosse, Wisconsin on May 3, 1990; and a stenographic transcript of the proceedings having been prepared and received by the Examiner on May 17, 1990; and the parties having filed post-hearing arguments by June 13, 1990; and the Examiner, having considered the evidence and arguments 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 Local 1403, AFSCME, AFL-CIO, hereinafter referred to as the Complainant, is a labor organization maintaining its offices at Route 1, Sparta, Wisconsin.

2. That La Crosse County, hereinafter referred to as the Respondent, is a municipal employer maintaining its principal offices at 400 North Fourth Street, La Crosse, Wisconsin; and, that amongst its various government functions the Respondent operates Lakeview Health Center, hereinafter referred to as the Center.

3. That commencing on September 15, 1975, the Respondent employed Helen Lewis as a Resident Aide; and, that said position requires the lifting of fifty (50) pounds or more.

4. That on August 12, 1987, Lewis was injured while in the performance of her duties; that during the healing period which followed Lewis was placed on light duty and restricted initially to "no lifting", then "no lifting over five (5) pounds", then "no lifting over twenty (20) pounds", and then "no lifting over twenty-five (25) pounds"; that on May 28, 1988 Lewis received from Jodi Rudd, D.C., a doctor's note stating. . . "no lifting over twenty-five (25) pounds indefinitely. I am anticipating a permanent, partial disability."; that in February, 1989, the Respondent was informed by its insurance company, Hartford Insurance, that Lewis had been paid a permanent partial disability settlement based upon a permanent disability rating of five (5) percent whole person relating to her injury with an established permanent lifting restriction of twenty-five (25) pounds; that on February 8, 1989, the Respondent terminated Lewis's employment; that on February 14, 1989, Lewis filed a grievance alleging her termination violated the just cause standard for discipline of the parties' collective bargaining agreement; that on May 5, 1989, the Respondent's Personnel Director, Robert B. Taunt, sent the following letter to Lewis' bargaining representative, Daniel Pfeifer:

Re: Helen Lewis Grievance

Dear Dan:

With regard to the Helen Lewis grievance, please be advised that the County will reject the matter as non-grievable. No violation of the contract has been cited as Article VI-Layoffs applies to layoff due to lack of work, economic cutbacks or reduction of forces and Article XVII-Hours applies to regular scheduling and has no bearing on Workers Compensation matters.

Let me reiterate that Helen Lewis has not been terminated but the report of Dr. Jean prevents us from using Helen as a Resident Aide because she is permanently restricted from using more than 25 pounds.

The County will continue to work through Crawford Rehabilitation Service which has been in contact with Helen and will continue to meet our statutory obligations under the Workers Compensation Act with regard to finding Helen a position within Lakeview Health Center that she is capable of doing within her qualifications and restrictions or to provide retraining to qualify her for employment elsewhere. The reason this was not followed through sooner was due to lack of communication from Hartford Insurance Company to the County. In the meantime, Helen is receiving Unemployment Compensation.

Sincerely,

Robert B. Taunt /s/

Robert B. Taunt
County Personnel Director;

that thereafter, on March 24, 1989, Pfeifer sent the following letter to Taunt:

Re: Lakeview - Helen Lewis Grievance

Dear Bob,

Ms. Lewis was informed that she had been terminated, therefore, the above captioned grievance cited a just cause violation. It was not until our March 2, 1989 meeting that the County informed Ms. Lewis that she was not terminated but was on what the County calls "disability lay-off".

The Union hereby amends the grievance to include violations ARTICLE VI - LAYOFFS, ARTICLE XVII - HOURS and any other Article that may be applicable.

The Union again expresses its desire to proceed to the next step of the grievance procedure and to present its case to the County Employment Relations Commission. If the County continues to refuse to process the grievance, the Union will petition for arbitration and if the County refuses to comply with the arbitration, the Union will have no alternative but to file a Prohibited Practices Complaint.

The Union takes the position that, if the County contends that the instant issue is not arbitrable, that issue should be determined by an arbitrator rather than a unilateral determination made by the Employer.

Please respond.

Sincerely,

Daniel R. Pfeifer /s/

Daniel R. Pfeifer
Staff Representative

cc: Eva Farris;

and, that the Respondent has refused to process said grievance to arbitration.

6. That the Complainant and the Respondent are parties to a collective bargaining agreement effective January 1, 1989 through December 31, 1990; that said agreement contains the following provisions pertinent hereto:

ARTICLE I

RECOGNITION

1.01 This Agreement is entered into by and between the County of La Crosse, Wisconsin, hereinafter referred to as "the County," and the American Federation of State, County and Municipal Employees AFL-CIO representing Local 1403, hereinafter referred to as "the Union."

ARTICLE VI

LAYOFFS

6.01 In the event of a layoff due to lack of work, or economic cutbacks, the reduction of forces is to be accomplished by: first, layoff of temporary and part-time employees; second, those regular part-time and full-time employees with the least amount of seniority, except those whose special skills cannot be replaced by a more senior employee. Senior employees subject to layoff may elect to displace a junior employee in another classification at the same or lower pay grade, with the same or less scheduled hours, providing that said senior employee has the training experience and ability to perform the work available. Notice of election to displace must be made within one (1) calendar week after notification of reduction in forces.

ARTICLE XIII

GRIEVANCE PROCEDURE AND ARBITRATION

12.01 The administrative procedure for discipline or discharge shall be as follows:

12.01.1 Supervisors shall present a warning in writing to an employee for any infraction or unacceptable behavior and shall indicate whether it be an oral or written warning. A copy of same to be submitted to the Steward or the Union's designated representative. This requirement would not necessarily apply for the following type of offenses:

(a) Patient abuse
(b) Theft of County or patient property
(c) Falsification of time records
(d) Assault and battery
(e) Gross insubordination

12.01.2 Written notice of discharge shall be presented to employee and Steward stating cause.

12.02 In the event of any disagreement concerning the meaning or application of any provision of this Agreement, such disagreement shall be resolved in the manner hereinafter set forth. It is further provided that grievances not involving the interpretation or application of this Agreement may be processed through Step 3 of this procedure.

The Union business representative may be present at any step in the grievance procedure.

12.02.1 The employee and the employee(s) Steward shall attempt to settle the issue with the immediate Supervisor within twenty (20) working days after occurrence of the alleged violation.

12.02.2 If no satisfactory settlement is reached within three (3) workdays after 12.02.1, the matter shall be reduced to writing and presented to the Department Head, i.e., Lakeview Institution Administrator. The Department Head and the County Personnel Director shall meet with the aggrieved employee (s) and the Union's Chief Steward and President, within five (5) workdays of receipt of the written grievance, and attempt to resolve the dispute.

12.02.3 If no satisfactory settlement is reached within ten (10) workdays after 12.02.2, the matter shall be referred to the County Employment Relations Commission, or Personnel Board. The Board shall review the facts. Officers of the Union as set forth in Step 2 will be allowed to present their case if they so desire. The Board shall render its written decision within fifteen (15) calendar days from the date of the meeting.

12.02.4 If no satisfactory settlement is reached in 12.03.3, either party may, in writing, appeal the matter to a Board of Arbitration by giving notice to either party within ten (10) workdays of receipt of the written decision provided for in 12.02.3.

12.02.5 The Board of Arbitration shall consist of three (3) members; one (1) to be chosen by the County and one (1) member to be chosen by the Union, said members shall be chosen within (5) days of the notice of appeal; the two (2) so selected, shall attempt to choose a third (3rd) member, who shall be chairman of the Board of Arbitration. If the two (2) members

so selected cannot agree within ten (10) calendar days of their appointment of the third (3rd) member, then either party, or the parties jointly, may request the Wisconsin Employment Relations Commission to provide a list of five (5) Arbitrators from which the parties shall alternately strike names, the petitioner striking first, until one (1) name remains who shall be Chairman of the Board of Arbitration. Each party will bears (sic) its own expenses for the witnesses and representatives, and both parties shall equally bear expenses of the third (3rd) party.

12.02.6 Grievances subject to this arbitration clause shall consist of disputes concerning the meaning and application of provisions of this Agreement. The reclassification of a position from one pay grade to another shall be outside the scope of the Arbitrator(s).

12.02.7 The vote of a majority of this Board shall be final and binding upon the parties and they shall render a decision within twenty (20) calendar days from the date of the hearing, unless an extension is approved jointly by the County and the Union.

7. That the Complainant acknowledges that the exclusive remedy for a work-related injury is under Worker's Compensation; that the Complainant acknowledges that Worker's Compensation is the remedy for the injury suffered by Helen Lewis; that the Complainant contends the question of what rights, if any, Lewis has to continued employment with the Respondent arises under the collective bargaining agreement between the Complainant and the Respondent; that the Complainant contends that the Respondent's actions are in effect a constructive discharge; that such actions are governed by the collective bargaining agreement between the Complainant and the Respondent; that the Complainant contends the Respondent does not have the authority to unilaterally determine whether an issue is or is not subject to grievance arbitration.

8. The Respondent contends that the grievance filed by Lewis is controlled by Sec. 102.03, (2) Wis. Stats., 1/ that the Respondent contends the issue of returning to work after a worker's compensation injury and loss of resulting pay and benefits are issues exclusively reserved to the worker's compensation statute; that Complainant contends Lewis is permanently restricted from performing her duties as a Resident Aide; that Lewis has received a permanent partial disability payment from Hartford Accident and Indemnity Company; that the proper agency for dealing with back pay and loss of benefits is said Company; that Complainant's placement of Lewis on light duty did not create permanent light duty employment; that Lewis' grievance does not concern a dispute concerning the meaning or application of provisions of the parties' collective bargaining agreement; and that if the Complainant were to prevail in arbitration, such an award would contravene the worker's compensation statutes.

1/ Sec. 102.03 states:

(2) Where such conditions exist the right to the recovery of compensation under this chapter shall be the exclusive remedy against the employer and the worker's compensation insurance carrier. This section does not limit the right of an employe to bring action against any co-employe for an assault intended to cause bodily harm, or against a co-employe for negligent operation of a motor vehicle not owned or leased by the employer, or against a co-employe of the same employer to the extent that there would be liability of a government unit to pay judgments against employes under a collective bargaining agreement or a local ordinance.

9. That Lewis' employment was terminated by the Respondent on February 8, 1989; that the grievance filed by Lewis raises a question concerning whether the Respondent had cause to discharge the grievant and involves the interpretation or application of the collective bargaining agreement between the Complainant and Respondent; that Respondent's actions of March 2, 1989 whereat it informed the Complainant Lewis was not terminated but placed on disability lay-off involves the interpretation or application of the collective bargaining agreement between the Respondent and the Complainant; and that Complainant is not seeking recovery of compensation for a worker's compensation injury but seeking to enforce the terms and conditions of employment contained in the collective bargaining agreement between the Complainant and Respondent.

10. That the Complainant and Respondent have agreed to resolve disputes concerning the meaning or application of said collective bargaining agreement through a grievance procedure which culminates in final and binding arbitration; that the discharge or disability lay-off of Helen Lewis involves the meaning or application of Article 6.01 or Article 12 of said agreement; and, that the Respondent refuses, and continues to refuse, to proceed to final and binding arbitration.

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

CONCLUSIONS OF LAW

1. That Sec. 102.03(2), Wis. Stats. does not preclude the Complainant from seeking to enforce provisions of the collective bargaining agreement in effect between the Respondent and Complainant.

2. That Respondent by its actions of refusing to proceed to final and binding arbitration of the grievance concerning the termination of employment and/or disability lay-off of Helen Lewis has committed a prohibited practice within the meaning of Sec. 111.70(3)(a)5, Wis. Stats.

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

ORDER 2/

Respondent, its officers and agents, shall immediately:

1. Cease and desist from refusing to proceed to final and binding arbitration of the grievance over the termination and/or disability lay-off of Helen Lewis.

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.

(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

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2. Take the following Affirmative Actions which the Examiner finds will further the purposes of the Municipal Employment Relations Act.

A. Cause the attached notice set forth in Appendix "A" to be signed by an authorized agent of the Respondent and posted in conspicuous places where notices to employes represented by the Complainant are usually posted for a period of not less than sixty (60) calendar days, taking responsible steps to ensure that said notice is not altered, defaced or covered by other material.

B. Cause its authorized agent to proceed to final and binding arbitration of the grievance over the termination and/or disability lay-off of Helen Lewis.

C. Notify the Wisconsin Employment Relations Commission within twenty (20) days of the date of this decision what steps it has taken to comply with this Order.

Dated at Madison, Wisconsin this 15th day of August, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Edmond J. Bielarczyk, Jr. /s/
Edmond J. Bielarczyk, Jr., Examiner

2/ Continued

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 of La Crosse County represented by Local 1403, AFSCME, AFL-CIO.

Pursuant to an order of a Wisconsin Employment Relations Commission Examiner, and in order to further the purposes of the Municipal Employment Relations Act, La Crosse County hereby notifies you that:

The County will not refuse to proceed to final and binding arbitration of the grievance over the termination and/or disability lay-off of an employe in accordance with the collective bargaining agreement with Local 1403, AFSCME, AFL-CIO.

Dated this _____ day of _____ ,1990.

LA CROSSE COUNTY

By _____

_____
Title

This Notice must be posted for sixty (60) days from the date hereof and must not be altered, defaced or covered by any material.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

On February 2, 1990, Complainant filed the instant matter with the Commission alleging that the Respondent had violated Sec. 111.70(3)(a)5, Stats., when it refused to proceed to final and binding arbitration relative to a grievance concerning the employment status of Helen Lewis. The relief requested by the Complainant was reinstatement of Lewis and a make whole remedy with interest, or, alternatively, an order directing the Respondent to proceed to arbitration.

The Respondent answered on April 18, 1990, admitting the facts alleged in the Complaint, denied it had committed any illegal activity, and affirmatively asserted that the Lewis grievance did not involve a dispute concerning the meaning or application of provisions of the collective bargaining agreement between the Respondent and Complainant. Respondent also asserted that the dispute raised by the Complainant involved a worker's compensation injury which Lewis had sustained, received a remedy under the Worker's Compensation Statute, and that Lewis was barred by the Statute from bringing any action against the Respondent. The Respondent further asserted that the subject matter of the grievance was not arbitrable under the terms of the collective bargaining agreement as it relates to a layoff due to a Worker's Compensation permanent disability, not the interpretation or application of a provision of the collective bargaining agreement.

POSITION OF THE COMPLAINANT

The Complainant acknowledges that the exclusive remedy for a work related injury is under the Worker's Compensation Statute. However, Complainant argues that the question of whether the Respondent can terminate Lewis' employment as the Respondent did on February 8, 1990 is a subject which involves the interpretation or application of the collective bargaining agreement, particularly Article 12. Complainant also points out the collective bargaining agreement contains a lay off provision and the question of whether the Respondent can place Lewis on a disability layoff, as the Respondent chose to redefine its actions on March 2, 1989, would involve the interpretation or application of the layoff provision. The Complainant also argues the Respondent does not have the authority to unilaterally determine whether an issue is subject to arbitration.

POSITION OF THE RESPONDENT

The Respondent contends Sec. 102.03(2) Stats. controls the issue of returning to work after a Worker's Compensation injury and loss of resulting pay and benefits are issues exclusively reserved to this Statute. The Respondent points out Lewis is permanently restricted from performing her duties as a Resident Aide and as a relief for this injury, she has already received payment. The Respondent argues any additional remedy Lewis may desire is controlled by the Worker's Compensation Statute and she must deal with the appropriate agency. The Respondent also asserts its creation of a light duty assignment for Lewis during her healing period did not create a permanent light duty position. The Respondent argues its actions did not create a dispute which would involve the interpretation of the meaning or application of the collective bargaining agreement. The Respondent further argues that if the dispute was submitted to an arbitrator, and the Complainant were to prevail, any remedy directed by the arbitrator would contravene the exclusivity of the Worker's Compensation Statute.

DISCUSSION

The Commission has held that a party cannot be required to submit to arbitration any dispute which it has not agreed to submit. Further, that the arbitration agreement enforcement forum's function is limited to a determination as to whether there is a construction of the arbitration clause that would cover the grievance on its face and whether there is a provision of the contract which specifically excludes it. 3/ Applying the above principle herein, the question is whether there is a construction of the parties' arbitration clause that would cover the issue of the grievance, and if so, whether there is a provision of the agreement that specifically excludes the issues of the grievance from arbitration.

3/ Joint School District No. 10 v. Jefferson Education Association, 78 Wis.2d 94, (1977).

The parties' grievance procedure limits disputes subject to arbitration to those ". . . concerning the meaning or applications of provisions of this Agreement. . ." Herein, the Complainant has grieved the termination of Lewis' employment. Clearly, the parties' arbitration clause can be interpreted as covering the question of whether the Respondent violated the collective bargaining agreement when the Respondent terminated Lewis' employment. Contrary to the Respondent's claim that Lewis was, in effect, placed on disability layoff and that disability layoffs are not covered by the collective bargaining agreement, ignores the Complainant's claim that layoffs are governed by Article 6. Here also, the parties' arbitration clause can be interpreted as covering the question of whether the Respondent's actions of placing Lewis on disability layoff are governed by Article 6. 4/ The issues raised by the Complainant are therefore arbitrable.

The Respondent has raised, as an affirmative defense, that the issues herein are in the exclusive purview of the Worker's Compensation Statutes. However, as the Complainant has acknowledged, the Complainant is not seeking additional compensation for the injury suffered by Lewis. The Complainant is seeking enforcement of the terms and conditions of employment it has bargained with the Respondent and a determination as to whether the bargaining agreement between the parties has been violated by the Respondent's actions. The parties' collective bargaining agreement does not expressly exclude questions concerning disability layoffs from the contractual obligation to arbitrate. Absent such a specific exclusion and given the Examiner's conclusion that the issues raised herein fall within the scope of the parties' arbitration provision, the Examiner has ordered the Respondent to proceed to arbitration.

It should be understood that the Examiner has not expressed an opinion herein as to the merits of the aspects of the grievance. Such a determination is for the arbitrator.

Dated at Madison, Wisconsin this 15th day of August, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Edmond J. Bielarczyk, Jr. /s/
Edmond J. Bielarczyk, Jr., Examiner

4/ The Respondent at the hearing raised an affirmative defense that the Complainant did not in a timely manner amend the grievance to cover the issue of a disability layoff. However, the failure to comply with time limits are procedural defenses to arbitrability reserved to the Arbitrator and are not a defense to a refusal to proceed to arbitration. Spooner Joint School District, Dec. No. 14416-A (Yaeger, 9/76).