STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RICHLAND CENTER EDUCATION ASSOCIATION and SYD SINCOCK, Complainants, vs. RICHLAND SCHOOL DISTRICT, Respondent.	Case 26 No. 47609 MP-2613 Decision No. 27425-A

Appearances:

Ms. Priscilla Ruth MacDougall, Staff Counsel, Wisconsin Education Association Council, 33 Nob Hill Drive, P.O. Box 8003, Madison, Wisconsin 53708-8003, appearing on behalf of the Complainants.

Godfrey & Kahn, S.C., Attorneys at Law, by Mr. Kirk D. Strang, 131 West Wilson Street, P.O. Box 1110, Madison, Wisconsin 53701-1110, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING MOTION TO DISMISS

Richland Center Education Association and Syd Sincock filed a complaint on June 19, 1992, with the Wisconsin Employment Relations Commission alleging that the Richland School District had committed prohibited practices within the meaning of Sec. 111.70(3)(a)5 of the Municipal Employment Relations Act, herein MERA. On October 16, 1992, the Commission appointed Lionel L. Crowley, 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), Stats. On November 25, 1992, Respondent, by Counsel, filed a Motion to Dismiss Complaint for Lack of Jurisdiction with supporting arguments. On January 15, 1992, Complainant, by Counsel, filed a response to the Motion to Dismiss along with supporting arguments. On January 21, 1991, Respondent submitted a reply to Complainant's arguments as well as a Motion to Strike. The Examiner having considered the pleadings and the Motion and the arguments of Counsel and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Richland Center Education Association, hereinafter referred to as the Association, is a labor organization and is the exclusive collective bargaining representative of all regular full-time and regular part-time certified teaching personnel including Chapter I teachers but excluding casual and/or temporary teachers, the school psychologist, the Chapter I Coordinator, principals and other supervisory, confidential, managerial, or executive personnel. Syd Sincock was employed as a teacher by the District and is a member of the bargaining unit described above. The Association's address is c/o Russell Meinen, 702 East Haselfire, Richland Center, Wisconsin 53581.

2. Richland School District, hereinafter referred to as the District, is a municipal employer and its offices are located at 125 South Central Avenue, Richland Center, Wisconsin 53581.

3. The Association and the District have been parties to a collective bargaining agreement which by its terms was effective from August 15, 1990 through August 14, 1992. The agreement contains the following provisions:

ARTICLE VI. DISCIPLINE PROCEDURE

A. Teachers will be suspended, nonrenewed, or disciplined for just cause only.

. . .

ARTICLE VIII. GRIEVANCE PROCEDURE

. . .

E. POWERS AND FUNCTIONS OF THE ARBITRATOR

4. If either party disputes the arbitrability of any grievance under the terms of this Agreement, the arbitrator shall have no jurisdiction to act until the matter has been determined by a court of competent jurisdiction. In the event that a case is appealed to an arbitrator over which he/she has no power to rule, said case shall be referred back to the parties without decision or recommendation.

4. On or about November 21, 1990, Sincock was suspended with pay pending an investigation of allegations of inappropriate use of force with a student. On or about January 17, 1991, Sincock was terminated for inappropriate use of force with a student. Sincock received notice of his termination in a letter dated January 28, 1991.

5. On or about February 11, 1991, the Association initiated a formal written grievance, on behalf of itself and Sincock, for dismissal without just cause. On or about February 12, 1991, the Association's grievance was denied by the District Administrator due to lack of merit and timeliness. On or abut February 18, 1991, the Association, on behalf of itself and Sincock, filed an appeal of the denial of its formal written grievance. On or about February 25, 1991, Respondent agreed to bypass the remaining steps of the grievance procedure and proceed to arbitration.

6. On or about March 26, 1991, Arbitrator Morris Slavney was advised that he had been selected as the arbitrator by the Association and the District. On or about October 17, 1991, the District sent a letter to Arbitrator Slavney disputing the arbitrability of the grievance under Article VIII, Section E.4 of the collective bargaining agreement.

7. On or about October 28, 1991, Arbitrator Slavney sent the parties' counsel the following:

> I have considered your exchange of correspondence re the scheduling of the hearing in the above matter.
>
> It is apparent therefrom that Attorney Strang is disputing the arbitrability of the grievance involved. The contractual provision involved, cited in Attorney MacDougall's letter of September 26th does not, in the opinion of the undersigned, constitute a waiver of the arbitrability issue by the party raising same, should the latter not initiate the court action to determine same.
>
> Therefore, I have no jurisdiction to act until the issue is determined in court, unless the parties agree that I should conduct the hearing, but withhold my award on the merits pending a court determination that I have jurisdiction. Otherwise the November 7 and 8 hearing dates are cancelled.

8. Neither the Association nor the District has initiated a court action over the arbitrability of said grievance.

9. On June 19, 1992, the Association filed the instant complaint alleging that the District committed prohibited practices by violating the collective bargaining agreement including the agreement to arbitrate disputes by contesting the arbitrability of a clearly arbitrable dispute.

10. On November 25, 1992, the District, by Counsel, moved to dismiss the complaint because it was not filed within one (1) year of the alleged prohibited practice and that the arbitrator selected by the parties has ruled that he has no jurisdiction over the grievance.

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

CONCLUSIONS OF LAW

1. The Respondent District has not violated the terms of the parties' collective bargaining agreement, including its agreement to arbitrate, inasmuch as the parties have selected an arbitrator who has ruled that under said collective bargaining agreement, he has no jurisdiction to act until the issue of arbitrability is determined in court, and therefore, the Respondent has not committed a prohibited practice in violation of Sec. 111.70(3)(a)5, Stats.

2. The Complainant has failed to demonstrate that Respondent has committed any prohibited practice by its failure to initiate a court action on the arbitrability as the arbitrator has held Respondent's failure to initiate a court action does not constitute a waiver to raise the arbitrability issue. The Complainants' assertion that the Respondent's arbitrability defense is frivolous is for the court to decide in accordance with the parties' agreement that arbitrability shall be determined by a court of competent jurisdiction. Thus, the Respondent has not violated the terms of the agreement by its raising the arbitrability of said grievance or by not proceeding to a court determination, and consequently, has not violated Sec. 111.70(3)(a)5, Stats.

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

ORDER 1/

The Complainants' complaint of prohibited practices be, and the same hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin this 29th day of January, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley /s/
Lionel L. Crowley, 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.

(footnote continued on Page 5)

1/ (footnote continued from Page 4)

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 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.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In its complaint initiating these proceedings, the Association alleged that the District has violated Sec. 111.70(3)(a)5, Stats., by violating the terms of the parties' collective bargaining agreement, including the agreement to arbitrate disputes arising thereunder, and that the District was contesting the arbitrability of a clearly arbitrable dispute. The District moved to dismiss the complaint on the grounds that the one year statute of limitations barred the complaint; that the arbitrator selected by the parties has ruled he had no jurisdiction to act on the grievance; and that the raising of an arbitrability defense does not violate Sec. 111.70(3)(a)5, Stats. The District also noted that the arbitrator ruled that the party raising arbitrability as a defense is not obligated to initiate court action on that issue.

DISCUSSION:

Where a motion to dismiss is filed, the complaint must be liberally construed in favor of the complainant because of the dramatic consequences of denying a hearing on the complaint and the motion will be granted only if under no interpretation of the facts alleged would the complainant be entitled to relief. 2/ The instant complaint alleges a violation of Sec. 111.70(3)(a)5, Stats., by the District's alleged refusal to arbitrate Sincock's grievance. Accepting the allegations of the complaint as true, the instant complaint must be dismissed.

Section 111.70(3)(a)5, Stats., makes it 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. . . .

Generally, the Commission will not exercise its jurisdiction to determine the merits of breach of contract allegations in violation of Sec. 111.70(3)(a)5, Stats., where the parties' collective bargaining agreement provides for a grievance procedure with final and binding arbitration. 3/ Additionally, the Commission has consistently held that questions of procedural arbitrability are for the arbitrator to decide. 4/

In the instant case, the operative facts are not in dispute. The Association and District are parties to a collective bargaining agreement which provides a grievance procedure culminating in binding arbitration. A grievance was filed over the termination of Syd Sincock. Arbitrator Slavney was selected to hear said grievance and the District interposed an objection to

2/ Racine Unified School District, Dec. No. 15915-B (Hoornstra, 12/77).

3/ Joint School District No. 1, City of Green Bay, et al., Dec. No. 16753-A,B (WERC, 12/79); Board of School Directors of Milwaukee, Dec. No. 15825-B (WERC, 6/79); Oostburg Joint School District, Dec. No. 11196-A,B (WERC, 12/79).

4/ Spooner Joint School District, Dec. No. 14416-A (Yaeger, 9/76) aff'd by operation of law, Dec. No. 14416-B (WERC, 10/76).

arbitrability on the grounds of a lack of timeliness. Arbitrator Slavney interpreted the contract, in particular, Article VIII, Section E.4. set forth in Finding of Fact 4, and determined he lacked jurisdiction to act until the arbitrability issue of timeliness was determined in court. These facts establish that there has been no refusal by the District to proceed to arbitration. They only demonstrate that the arbitrator interpreted the agreement and ruled that its terms preclude his taking jurisdiction over the merits until a court has determined whether or not the grievance is timely.

Timeliness is a classic procedural arbitrability question which is normally for an arbitrator to decide. In this case, Arbitrator Slavney found that the express language of the contract does not allow the arbitrator to decide. Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit and the question of arbitrability is undeniably an issue for judicial determination. 5/ The Wisconsin Supreme Court has applied the Steelworkers trilogy rationale to the Municipal Employment Relations Act. 6/ Inasmuch as the parties have a grievance procedure culminating in binding arbitration and the arbitrator has interpreted the agreement with respect to a procedural arbitration issue, the parties are bound by the arbitrator's decision.

The Association has asserted that the District was obligated to initiate the court action on the arbitrability issue but here again Arbitrator Slavney held otherwise, interpreting the contract to allow either party to initiate court action but not requiring either party to do so. It is for the arbitrator to decide these matters and he did so. The Commission will not exercise its jurisdiction to second guess the arbitrator and substitute its interpretation for that of the arbitrator because the parties bargained for an arbitrator's interpretation, and thus, it cannot be said that the District has refused to proceed to arbitration or violated Sec. 111.70(3)(a)5, Stats., set out above.

The Association has asserted that the arbitrability defense of timeliness is frivolous. The United States Supreme Court in discussing the Steelworkers trilogy stated as follows:

> The third principle derived from our prior cases is that, in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims. Whether 'arguable' or not, indeed even if it appears to the court to be frivolous, the union's claim that the employer violated the collective-bargaining agreement is to be decided, not by the court asked to order arbitration, but as the parties have agreed, by the arbitrator. . . . 7/

Here by analogy, the parties have agreed to have the court determine arbitrability and the defense, even if frivolous, is for the court to decide and not for the arbitrator. Thus, it cannot be held that the District is violating Sec. 111.70(3)(a)5, Stats., by raising the arbitrability defense. It should be understood that the Examiner has not expressed an opinion as to the merits of this arbitrability issue.

Inasmuch as the District has not refused to proceed to arbitration and

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5/ Steelworkers v. American Manufacturing Co., 363 U.S. 546, 46 LRRM 2412 (1960); Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 46 LRRM 2416 (1960); and Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 46 LRRM 2423 (1960).

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

7/ AT&T Technologies, Inc. v. Communication Workers of America, 475 U.S. 643, 1121 LRRM 3329 (1986).

the arbitrator has ruled on the issues raised before him, the District has not violated Sec. 111.70(3)(a)5, Stats., and the complaint is dismissed in its entirety. In light of this conclusion, it is unnecessary to rule on the District's Motion to Strike or to determine whether the one year statute of limitations applies to the complaint.

Dated at Madison, Wisconsin this 29th day of January, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley /s/
Lionel L. Crowley, Examiner