STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BROWN COUNTY SHELTER CARE EMPLOYEES, LOCAL 1901-F, AFSCME, AFL-CIO, Complainant, vs. BROWN COUNTY, Respondent.	Case 482 No. 48350 MP-2659 Decision No. 27553-B

Appearances:

Mr. James E. Miller, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 936 Pilgrim Way #6, Green Bay, Wisconsin 54304, appearing on behalf of Brown County Shelter Care Employees, Local 1901-F, AFSCME, AFL-CIO, referred to below as the Union.

Mr. John C. Jacques, Assistant Corporation Counsel, 305 East Walnut, P.O. Box 23600, Green Bay, Wisconsin 54305-3600, appearing on behalf of Brown County, referred to below as the County.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER REQUIRING FURTHER HEARING

On February 11, 1993, I issued an Order Denying Motion to Dismiss, with Accompanying Memorandum, which summarized the procedural background of this complaint up to that point in time. The County, on March 12, 1993, filed its answer to the Union's complaint. Hearing on the matter was set for April 27, 1993. In a letter filed April 5, 1993, the Union stated the following:

> This letter relates to the scope of the hearing which is scheduled in the matter referenced above.
>
> We intend that the hearing on April 27 will involve the full scope of the Union's complaint. In other words, the hearing will not be limited in scope to whether or not the County must process the Union's grievance involving the discharge of Ms. Sowers. In addition to presenting evidence relating to our allegation that the County has refused to process the Union's grievance relating to the discharge of Ms. Sowers, we intend to present evidence relating to our allegation that the County violated the parties' collective bargaining agreement and MERA when it discharged Ms. Sowers. It is our position, that even if the Commission were to find that the County was not obligated to process said grievance, the County violated the contract and law when it discharged Ms. Sowers.
>
> . . .

On April 8, 1993, the evidentiary hearing was postponed to June 29, 1993. The County responded to the Union's April 5, 1993 letter in a letter filed April

16, 1993, which reads thus:

> The letter indicates that the Union intends to request a hearing on the merits of the discharge of Ms. Sowers and not merely whether the grievance is arbitrable under the contract. It is Brown County's position that an examiner has no authority to hear evidence relating to the merits of the grievance, but only determines its jurisdiction and whether the grievance is arbitrable.
>
> I am enclosing a copy of a recent decision of the Commission . . . That case reaffirmed the long-standing policy of deferral of disputes to arbitration if there is substantive arbitrability. Please consider this a Motion in Limine as to evidence as to the merits set forth in the grievance document. The only evidence which is admissible relates to an interpretation of the contract as to whether or not the grievance is arbitrable.
>
> Please advise as to what the scope of the evidentiary hearing will be to enable the employer to prepare the case.

In a letter dated April 20, 1993, I asked the Union to respond to the County's April 16, 1993 letter by May 3, 1993. On April 30, 1993, a conference call was conducted to address the issues posed by the letters noted above. I summarized the result of that conference call thus:

> Mr. Miller indicated the Union wishes to present evidence on the merits of the Sowers' termination. Mr. Jacques indicated the County would object to the presentation of such evidence on the basis that the arbitrability of the grievance is the sole issue. Mr. Miller indicated even if the grievance is found not arbitrable, the Union believes Sowers may have legal rights, beyond the right to grieve, which should be heard at the June 29, 1993 hearing.
>
> I indicated initially that I could think of no precedent for Mr. Miller's position, but would not stop him from presenting evidence on the point to make a record for his arguments. I also indicated that I would not compel Mr. Jacques to present evidence until I had ruled on the merits of Mr. Miller's legal position. I also indicated I would not compel Mr. Miller to present evidence unless he wanted to.
>
> It became apparent that any presentation of evidence would cause more problems than it would solve. Thus, I indicated I would restrict evidence at the June 29, 1993 hearing to the issue of arbitrability and whatever evidence Mr. Miller needs to pose the legal issue of what, if any, legal rights under MERA Sowers may have beyond the right to grieve. This has the potential of bifurcating the hearing, but in light of the novelty of the legal theory posed, and in light of the fact that

> the complaint, if meritorious, will produce a bifurcated hearing anyway, I do not see any real economy in forcing all the evidence into a single hearing.
>
> Since the legal argument Mr. Miller wishes to assert can be made with limited evidence, it makes more sense to me to address that argument on its merits before forcing each of you to the added preparation and hearing time required to fully hear the merits of the underlying termination. If the grievance is arbitrable, the merits will be heard by an arbitrator. There is, then, little basis for prematurely forcing the matter into a single hearing.
>
> In sum, the June 29, 1993 hearing will be restricted to evidence on the arbitrability issue. Presumably, the same evidence will pose Mr. Miller's legal argument on any rights the Union or Sowers may possess beyond the right to grieve. Argument on both points can be taken, as is necessary.

Hearing was conducted in Green Bay, Wisconsin, on June 29, 1993. A transcript of that hearing was prepared and provided to the Commission on July 12, 1993. The parties filed briefs and reply briefs by October 15, 1993.

FINDINGS OF FACT

1. Brown County Shelter Care Employees, Local 1901-F, AFSCME, AFL-CIO, referred to as the Union, is a labor organization which maintains its offices in care of 5 Odana Court, Madison, Wisconsin 53719.

2. Brown County, referred to below as the County, is a municipal employer which maintains its offices at 305 East Walnut, P.O. Box 23600, Green Bay, Wisconsin 54305-3600.

3. Brown County, among its functions, operates Brown County Shelter Care, which is referred to below as BCSC. Among the services provided by BCSC is the provision of housing for youths requiring social services. The County staffs that housing on a seven day per week basis, using full-time, regular part-time and on-call employes to meet its staffing needs. The Commission conducted an election of the regular full-time and regular part-time employes of what was then referred to as the Brown County Youth Home, and certified the results of that election in Decision No. 20337, issued on April 21, 1983. On-call employes did not participate in that election.

4. The County and the Union are parties to a collective bargaining agreement which, by its terms, "shall become effective as of January 1, 1991, and remain in force and effect to and including December 31, 1992". Among the terms of that agreement are the following:

> Article 2. RECOGNITION AND UNIT REPRESENTATION
>
> The Employer recognizes the Union as the exclusive collective bargaining representative for the purposes of conferences and negotiations with the Employer, or its lawfully authorized representatives, on questions of wages, hours and conditions of employment for the unit of representation consisting of all employees of the Employer employed as follows:
>
> > All regular fulltime and regular part-time nonprofessional employees of the Brown County Shelter Care, excluding supervisors, confidential, managerial, executive, professional and probationary employees and all other employees of the Employer as certified by the Wisconsin Employment Relations Commission, dated April 21, 1983.
>
> . . .
>
> ARTICLE 25. GRIEVANCE PROCEDURE - DISCIPLINARY PROCEDURE
>
> Any grievance or misunderstanding which may arise between the Employer and an employee (or employees) or the Employer and the Union, shall be handled as follows:
>
> STEP ONE: The aggrieved employee, the Union Committee and/or the Union representative shall present the grievance within fourteen (14) calendar days of knowledge of occurrence to the Administrator.
> STEP TWO: If a satisfactory settlement is not reached as outlined in Step One within one (1) week, the Union Committee and/or the Union Representative shall present the grievance to the Personnel Director . . .
>
> STEP THREE: If a satisfactory settlement is not

> reached as outlined in Step Two, either party desiring arbitration must submit a request that the matter be submitted to arbitration . . .
>
> DISMISSAL: No employee shall be discharged except for just cause . . . Any employee who has been discharged may use the grievance procedure . . .

Attached to this collective bargaining agreement is a series of memoranda of understanding. One of those memoranda governs "On-Call Employees." That memorandum of understanding is referred to below as the Memorandum, and reads thus:

> The following agreement has been reached between AFSCME, AFL-CIO, representing Shelter Care employees, and Brown County. For the purposes of this memorandum of understanding, on-call employees shall be considered as a separate bargaining unit associated with Local 1901F.
>
> 1. DEFINITION:
>
> An on-call employee shall be defined as a qualified individual hired for the purpose of relief coverage (sick, vacation, personal leaves, etc.) of a regular fulltime or regular part-time position(s), or a temporary posting needed for special staffing requirements to meet facility needs.
>
> 2. PROBATIONARY PERIOD:
>
> A. An on-call employee shall serve a probationary period of 416 worked hours or 3 months (whichever is later) to be calculated from the date of hire or transfer to on-call status. Probationary period completion or a partially completed period in a regular fulltime or regular part-time posted position of Local 1901F shall be transferrable to meet this requirement.
>
> . . .

C. Currently employed individuals classified as on-call employee shall serve a probationary period of 416 worked hours commencing on date of hire.

. . .

3. SENIORITY:

An on-call employee shall accumulate temporary seniority according to actual hours worked per payroll period. The formula shall be:

. . .

4. BENEFITS:

Fringe benefits and/or other benefits not listed in this memorandum of understanding shall not be available to on-call employees.

5. WAGES:

It is understood that night shift differential and overtime pay are considered wages and therefore, on-call employees will receive night shift differential and overtime pay when they qualify under the labor agreement language.

6. TEMPORARY POSTINGS:

. . .

B. Temporary postings shall be awarded according to necessary qualifications and seniority in the following order:

1. Regular fulltime and part-time members of Local 1901-F

2. On-call employees

3. Individuals outside of the employment of the Facility

. . .

This memorandum of understanding has been agreed to in whole as a part of the bargaining process of the labor contract with Local 1901F.

Regular full-time and regular part-time BCSC employes receive, under Article 4 of the labor agreement wages based on three steps: "START"; "6 MONTHS"; and "1 YEAR." On-call employes are paid the start rate, but do not receive a six month or one year step increase.

5. On-call employes do not pay union dues, and the Union maintains no independent financial or administrative structure for a bargaining unit of BCSC on-call employes.

6. The Brown County Youth Home reopened as BCSC in 1988. A predecessor memorandum of understanding to the Memorandum was negotiated between the Union and the County and attached to the 1989-90 1901-F agreement. The predecessor to the Memorandum contained what appears as the prefatory paragraph, Sections 1 and 4 and the final paragraph of the Memorandum. In the bargaining for the initial memorandum covering on-call employes, the parties specifically addressed seniority and posting issues. At no time in the bargaining for the Memorandum or for its predecessor did the parties discuss access of on-call employes to the grievance procedure contained in the 1901-F agreement.

7. Since the predecessor to the Memorandum was executed, the Union has served in an advocacy role for on-call employes. In June of 1989, the then-incumbent Union representative, James W. Miller and the then-incumbent County Personnel Director, Gerald E. Lang, addressed the application of Section 4. James W. Miller stated the Union's position in a letter to Lang dated June 1, 1989, which reads thus:

> This letter will I think confirm our telephone conversation . . . Specifically, I questioned paragraph 4 entitled "Benefits", the question I posed whether or not wages, nightshift differential, and overtime where an exclusion under this particular article. It was understanding from our conversation that benefits were things such as vacation, holiday, sick leave, etc. but the Employee's would be paid the regular salary, overtime, and nightshift differential if warranted. If this is not your understanding of our discussion, would you please advise.

Lang responded in a letter dated June 12, 1989, which reads thus:

> Confirming our telephone conversation . . . regarding the Memorandum of Understanding regarding On-Call Employees . . . night shift differential and overtime pay are not considered "Benefits" referred to in Section 4 and, therefore, On-Call Employees will receive night shift differential and overtime pay when they qualify under the labor contract language. This is not currently the practice and will begin upon approval of the agreement by the Brown County Board.

James W. Miller and his successor James E. Miller have each served as the advocate of on-call employes. James W. Miller advocated the interests of Barbara McDaniel in 1989 concerning the seniority rights of on-call employes. The concerns then at issue ultimately resulted in a meeting between BCSC management and Union representatives at which an understanding of the seniority rights of on-call employes was reached. James E. Miller, in a September 16, 1992, meeting concerning the rights of a regular part-time employe who was considering moving to on-call status, indicated he was concerned about the issues posed in part because on-call employes could not assert their rights through the grievance procedure. James E. Miller serves as the spokesman for on-call employes in the negotiations for a successor to the Memorandum.

8. Julie Sowers has been employed by BCSC as an on-call employe. The County terminated her status as an on-call employe. The Union filed a grievance on that termination. The County responded to the grievance in a

letter dated October 30, 1992, from Wayne E. Pankratz, the County's Personnel Director, to James E. Miller. That letter reads thus:

> After having had an opportunity to read the portions of the agreement between Brown County and the Brown County Shelter Care employees, as well as reflecting on the information that was presented at our meeting on Thursday, October 29, 1992, I would like to state the County's position.
>
> First, we do not believe that the employee possesses any rights to the grievance procedure or any other provisions of the agreement. Therefore her grievance is not allowable or arbitrable under the agreement. It is our position that the memorandum of understanding that is attached to the agreement clearly reflects all of the provisions and benefits provided to on-call employees.
>
> . . .

The County has at all times relevant to this proceeding refused to arbitrate, or to further process, the grievance filed on Sowers' behalf.

9. The Memorandum is a collective bargaining agreement covering BCSC on-call employes.

CONCLUSIONS OF LAW

1. The Union is a "Labor organization" within the meaning of Sec. 111.70(1)(h), Stats.

2. The County is a "Municipal employer" within the meaning of Sec. 111.70(1)(j), Stats.

3. Sowers is, as an on-call employe of BCSC, a "Municipal employe", within the meaning of Sec. 111.70(1)(i), Stats.

4. Because Section 4 of the Memorandum denies access of on-call employes to the grievance procedure contained in the Local 1901-F agreement, Sec. 111.70(3)(a)5, Stats., is an available mechanism to enforce the terms of the Memorandum.

ORDER

The County and the Union shall participate in further hearing concerning the merits of the Sowers termination.

Dated at Madison, Wisconsin, this 8th day of December, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Examiner

BROWN COUNTY

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND
ORDER REQUIRING FURTHER HEARING

BACKGROUND

The complaint asserts County violations of Secs. 111.70(3)(a)1 and 5, Stats., but the parties' arguments focus on Sec. 111.70(3)(a)5, Stats. Any Sec. 111.70(3)(a)1, Stats., violation is derivative in nature. No evidence has been taken on the merits of the Sowers termination. If the County's position on the complaint is accepted, the complaint must be dismissed. If the Union's contention that the termination is arbitrable is accepted, an order requiring arbitration must be issued. If the Union's alternative argument is accepted, an order requiring further hearing must be issued.

THE PARTIES' POSITIONS

The Union's Initial Brief

After a review of the procedural background to this case and of the history of the BCSC, the Union notes that the case focuses, initially, on the three types of BCSC employes. Full-time and part-time staff were, the Union notes, included in the original certification of the BCSC unit. On-call employes were, however, "outside the perimeters" of the first two labor agreements. The Union notes that the status of on-call employes "did change with the negotiation of the 1989-90 labor agreement." The negotiation of the Memorandum fundamentally changed the status of on-call employes, and, the Union argues, forms the basis for its claim that Sowers has access to grievance arbitration.

The Union contends that an examination of the Memorandum and a similar memorandum negotiated for employes of the County Mental Health Care Center demonstrates that the Union has functioned as the advocate of the interests of on-call employes from at least 1989. Acknowledging that the Memorandum does not as unequivocally state the Union's interest in the BCSC as it does in the Mental Health Care Center, the Union concludes that the Memorandum clearly establishes that the Union bargained with the County regarding the BCSC unit. The Union asserts that its representation of employes in Local 1901-F has been continuous, and cites its representation of McDaniel, as well as its role in negotiating and in seeking to improve the terms of the Memorandum. That the Commission has not certified a unit of on-call employes of BCSC demonstrates, according to the Union, that it must be considered the representative of Local 1901-F as an adjunct of its duties as the certified representative of BCSC employes. That Local 1901-F has no independent financial status underscores this conclusion. The Union concludes there can be no doubt it functions as the representative of Sowers as an on-call employe of BCSC.

The Union's next major line of argument is that the Memorandum grants rights to Sowers under the grievance procedure. After an examination of the entire Memorandum, the Union asserts that Section 4 cannot be persuasively read to deny Sowers access to the grievance procedure. As background, the Union argues that Section 4 is silent on the point and that there is no helpful evidence of bargaining history. The Union asserts, however, that an examination of the Memorandum as a whole demonstrates that the Union bargained to change the status of on-call employes from at-will employes to something

more protected.

The level of protection bargained by the Union for on-call employes is, the Union asserts, the essential issue. The Union contends that the protection springs either from rights "specifically written into the contract through the memorandum" or from "those rights that are inferred from that contract language." Regarding the former rights, the Union contends that Section 4 does not specifically exclude on-call employes from access to the grievance procedure, since such access is not clearly a "benefit" within the meaning of that section. Regarding the latter rights, the Union contends that the other provisions of the Memorandum establish that the Union successfully made on-call employes something more than at-will employes. From this the Union concludes that on-call employes should be granted access to the grievance arbitration procedure. It follows, the Union concludes, that the County should be compelled to litigate the merits of the grievance before a grievance arbitrator. The Union then contends that if access is denied on-call employes to the grievance procedure, whatever rights those employes have must be asserted through the Commission under Sec. 111.70(3)(a)5, Stats.

The Union concludes that a prohibited practice has been proven, and that the County should be ordered to litigate the merits of the grievance either before a grievance arbitrator or before an examiner.

The County's Initial Brief

The County argues initially that the Union lacks standing to bring the complaint since it "is undisputed that Julie Sowers is not a member of the Complainant Union, is not an employee listed in the recognition clause at Article 2 of the labor agreement, does not pay union dues and cannot claim the rights and benefits of membership in the Union." Beyond this, the County argues that Section 4 of the Memorandum specifically excludes on-call employes from access to grievance arbitration. Contending that there has been no voluntary recognition or Commission certification of the Union as the representative of BCSC on-call employes, the County concludes the complaint "should be dismissed for lack of standing on the complainant's part. A contrary conclusion would, the County asserts, directly contradict established precedent on standing.

The County's next major line of argument is that the Union has acknowledged in past meetings that on-call employes do not have access to grievance arbitration, and that this acknowledgment estops the Union from asserting any right to use that procedure. Noting that the Union has utilized two different advocates in this case, and contending that the representations

of those advocates are contradictory regarding on-call employe access to grievance arbitration, the County concludes that the complaint "should be dismissed for failure to state a claim because of misrepresentations contained in the complaint and because the Complainant Union is estopped from claiming that on-call employees have contractual grievance rights."

The County's next major line of argument is that bargaining history unequivocally demonstrates that "on-call employees were not granted grievance rights." This is established, according to the County, by Lang's testimony and by correspondence between Lang and the then incumbent Union representative. That the Union failed to call that representative to testify underscores this conclusion, the County concludes.

The County argues that the record does not contain evidence establishing even a prima facie case, and concludes that the complaint must be dismissed.

The Union's Reply Brief

The Union challenges the County assertion that it has not demonstrated a contract violation. The Union asserts that it has demonstrated that it negotiated greater rights for on-call employes than those employes possessed prior to the Memorandum; that the Memorandum is ambiguous regarding access to grievance arbitration, thus refuting the County's assertion that the Memorandum clearly forbids such access; and that no employes prior to Sowers have tested the issue of access to arbitration.

The Union next contends that the record clearly establishes that it was the party which negotiated the Memorandum for on-call employes, and that it need prove no more to establish its standing to assert the complaint.

Beyond this, the Union contends that the County has unpersuasively attempted to stretch Lang's testimony that access to arbitration was not discussed in bargaining into a basis to conclude that the parties specifically discussed denying such access.

The Union denies that the County has made a persuasive case for estoppel, even given the "reasonably accurate" presentation of the relevant statements by the County. More specifically, the Union concludes that the statement was made without benefit of "any complete investigation or knowledge of the bargaining history" and was made in a context having nothing to do with the access of an existing on-call employe to grievance arbitration. Beyond this, the Union notes there is no evidence the County relied on the statements at issue.

That two representatives have handled this case is irrelevant here, according to the Union. The Union contends no misrepresentation has occurred, and that any contradiction between the statements of the two advocates is traceable to the investigation which preceded the filing of the complaint, but came after the statement the County seeks to base its estoppel argument upon.

The County's Reply Brief

The County contends initially that the Union cannot be considered to have standing to assert the complaint in the absence of a Commission certification or voluntary recognition.

Beyond this, the County contends that "(t)he Union failed to refute or even mention its representative's admissions against interest." More specifically, the County contends that Lang's testimony stands unrefuted, and the contradictory statements of the Union's two representatives in this case stand unexplained.

The County next contends that it is not a persuasive reading of the Memorandum to conclude its "ambiguity" somehow constitutes the grant of a right for on-call employes to use the grievance procedure. The County argues that the "evidence clearly established that it was never the intent of both parties to grant grievance rights to on-call employees."

The County emphasizes that Section 4 applies to "benefits not listed" and asserts that this reference clearly encompasses the right to grieve. The Memorandum is, according to the County, not ambiguous, and provides no persuasive basis for the Union to found "inferred" rights.

The County then specifically denies that Sowers can gain access to the rights of the non-Memorandum portions of the agreement through a Commission Examiner. Even if grievance arbitration is unavailable to Sowers, the County contends that the contract specifically denies her access to any of the labor agreement's provisions not mentioned in the Memorandum. Thus, there is no labor agreement for an Examiner to enforce for Sowers even if grievance arbitration is not available to her: "There can be no contract 'violation', if the contract provisions relied upon do not apply to on-call employees."

That Sowers did not post into a regular position establishes that she never became a "regular" employe, according to the County. It follows, the County contends, that the Union cannot persuasively claim Sowers had anything beyond "at-will" employment rights. Having not become a regular employe, Sowers cannot claim the rights of a regular employe, the County concludes.

The County's final line of argument is that established precedent requires an arbitrator to derive jurisdiction "exclusively from a written contract." In this case, no such contract has been proven. On-call employes do not fall within the recognition clause of the labor agreement, and thus, according to the County, do not fall within the scope of the grievance procedure. Because the Memorandum does not specify access for on-call employes to the grievance procedure, it necessarily follows, the County asserts, that no such access can be granted under Sec. 111.70(3)(a)5, Stats.

DISCUSSION

The County has renewed its challenge to the Union's standing to assert the complaint. No evidence adduced at hearing affords a persuasive basis to change the conclusions stated in Dec. No. 27553-A (McLaughlin, 2/93). As noted in that decision, the Municipal Employment Relations Act views standing expansively. Prohibited practice complaints are also contested cases under Chapter 227 of the Wisconsin Statutes. Sec. 227.42(1), Stats., underscores the expansive nature of the statutory background to the standing issue. Beyond this, the Commission has recognized the standing of an individual employe to

assert a claim under the MERA. 1/ Thus, the County's objection to the Union's standing raises at most a technical point, since Sowers could have asserted her own complaint, using the Union as her advocate. That the Union has chosen to name itself as a party does not, however, pose even a technical violation. The Union has actively advocated the interests of on-call employes since at least 1989, and is seeking to negotiate a successor to the Memorandum. The County has, since 1989, recognized the Union as the advocate of the interests of on-call employes. Whether or not this makes the Union the exclusive bargaining representative of on-call employes, and whether or not Sowers pays dues to the Union cannot obscure that the Union has served as the advocate of the interests of on-call employes. The Union is, then, a party in interest to this proceeding.

This focuses the dispute on the alleged violation of Sec. 111.70(3)(a)5, Stats. The Union has asserted two fundamental bases for the violation. The first is that it is entitled to arbitrate the Sowers grievance under the Memorandum read together with the 1901-F labor agreement. The second is that if it is not entitled to grievance arbitration, the existence of the Memorandum itself affords Sowers rights beyond that of an "at-will" employe.

The analysis appropriate to the Union's first claim was stated by the Wisconsin Supreme Court in Jt. School Dist. No. 10 v. Jefferson Education Association, 78 Wis.2d 94, 253 N.W.2d 536 (1977). The Jefferson Court stated that the enforcement of an agreement to arbitrate requires two findings. The first is "whether there is a construction of the arbitration clause which would cover the grievance on its face." The second is "whether any other provision of the contract specifically excludes it." 2/

Article 25 of the collective bargaining agreement unequivocally grants "(a)ny" discharged "employee" access to the grievance procedure. Thus, the arbitration clause "on its face" covers a grievance regarding a termination, if Sowers is an "employee" within the scope of that article.

Article 2 defines which BCSC employes are "employees" covered by the agreement. It is undisputed that the election incorporated in the recognition clause covered only regular part-time and full-time employes. On-call employes cannot, then, be considered to fall within the definition of the bargaining unit stated at Article 2. Access of the Union or of Sowers as an on-call employe is, then, governed by the Memorandum.

This conclusion is acknowledged in the Preamble to the Memorandum which treats on-call employes as "a separate bargaining unit associated with Local 1901F". By its terms, the Preamble supplements Article 2 of the underlying labor agreement, and does not modify the definition of which employes are covered by Article 2. The Memorandum cannot be read to modify that definition since Article 2 expressly incorporates a certification election which did not include on-call employes. To read Article 2, by its terms, to extend to on-call employes renders the incorporation of the certification election meaningless. In sum, Sowers and the Union gain access to the grievance procedure only if the Memorandum grants such access.

1/ City of New Berlin, Dec. No. 7293 (WERC, 3/66); Whitehall School District, Dec. No. 10268-A (Schurke, 8/71), aff'd in relevant part, Dec. No. 10268-B (WERC, 9/71); Weyauwega Joint School District, Dec. No. 14373-B (Henningsen, 6/77), aff'd in relevant part, Dec. No. 14373-D (WERC, 7/78).

2/ 78 Wis.2d at 111.

This focuses the Jefferson analysis on Section 4 of the Memorandum to determine whether this provision "specifically excludes" access of on-call employes to the grievance procedure. I cannot conceive of an interpretation of Section 4 which would not deny access of an on-call employe to Article 25. The Union has contended that Section 4 is ambiguous. That contention is not, however, persuasive. It is arguable that "fringe benefits" can be viewed as benefits having an immediate economic impact. The exclusion of Section 4 is not, however, restricted to fringe benefits. The section excludes, without exception, "other benefits not listed in this memorandum." There is no plausible interpretation of access to the grievance procedure which could deny that such access is a benefit. There is no provision in the Memorandum for grievance arbitration. By its terms, then, the Memorandum precludes access of on-call employes to the grievance procedure.

Even if Section 4 could be considered ambiguous, what evidence there is of bargaining history supports the conclusion noted above. The parties did not specifically discuss access to grievance arbitration when negotiating the predecessor to the Memorandum. The negotiations centered on providing access of on-call employes to a posting procedure. The County's representative drafted the language, and did so to clarify that on-call employes were to receive only those benefits specifically negotiated into the Memorandum. That the County granted on-call employes shift differential or overtime premium indicates no more than that the County considered these items wages, and not fringe benefits. It is apparent, then, that Section 4 was drafted broadly, to exclude on-call employe access to benefits not listed in the Memorandum.

Under the Jefferson analysis, Section 4 specifically excludes access of employes to Article 25. The Sowers grievance was not, therefore, arbitrable, and the County did not violate Sec. 111.70(3)(a)5, Stats., by refusing to arbitrate that grievance.

The Union's remaining arguments are more subtle. The Union notes that if it is denied access to the grievance procedure, then the terms of the Memorandum become enforceable through Sec. 111.70(3)(a)5, Stats., since the grievance arbitration forum is not an available enforcement mechanism.

The Union's argument that the terms of the Memorandum are enforceable must be granted. Where a collective bargaining agreement does not provide for grievance arbitration, the Commission, under Sec. 111.70(3)(a)5, Stats., is an

available enforcement mechanism, provided that procedures short of arbitration have been exhausted and that enforcement of the agreement under Sec. 111.70(3)(a)5, Stats., does not contradict the agreement's terms. 3/ The Commission has expansively defined what constitutes a collective bargaining agreement. It is, for example, settled law that the written settlement of a grievance is a collective bargaining agreement under Sec. 111.70(3)(a)5, Stats., 4/ and is enforceable under Sec. 111.70(3)(a)5, Stats., where it is not enforceable through grievance arbitration. 5/

As noted above, the Memorandum is distinguishable from the Local 1901-F agreement. The Preamble notes on-call employes "shall be considered a separate bargaining unit associated with Local 1901F." The final sentence of the Memorandum notes it "has been agreed to in whole as a part of the bargaining process of the labor contract with Local 1901F." By its terms, the Memorandum states rights which are distinguishable from the rights contained in the 1901-F agreement. Their codification in the Memorandum states a collective bargaining agreement. Since access to the arbitration process of Article 25 is precluded by Section 4 of the Memorandum, Sec. 111.70(3)(a)5, Stats., becomes an available enforcement mechanism.

The issue thus posed is what rights, if any, the Union can enforce regarding the Sowers' termination. The Memorandum does not state any provision specifically governing the termination of on-call employes. Since access to Sec. 111.70(3)(a)5, Stats., does not confer rights not contained in the underlying collective bargaining agreement, it is arguable the Union has no rights to enforce regarding the Sowers termination. That courts have established common-law exceptions to the employment at will doctrine does not necessarily afford a basis for an administrative agency to create common-law. 6/

The Union's contention that Sowers is more than an at-will employe must, however, be considered persuasive. The Memorandum provides for a probationary period for on-call employes. Typically, a probation period is considered a trial period during which an employe can be terminated without any stated reason. If Sowers has passed her probationary period, her employment status was in some sense changed, and presumably enhanced. If it did not change, the

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3/ See Monona Grove School District, Dec. No. 22414 (WERC, 3/85).

4/ See, for example, Joint School District No. 1 of Menomonie et al., Dec. No. 12385-B (Greco, 7/74), aff'd Dec. No. 12385-C (WERC, 9/74).

5/ See State of Wisconsin, Dec. No. 25281-C (WERC, 8/91).

6/ See Racine Policemen's Professional and Benevolent Corporation, Dec. No. 12637 (Fleischli, 4/74), aff'd by operation of law, Dec. 12637-A (WERC, 5/74); Milwaukee Public Schools, Dec. No. 20005-B (WERC, 2/84).

language concerning a probationary period is arguably rendered meaningless. The Memorandum does not, however, directly address how, if at all, her employment status changed.

This dilemma poses an interpretive issue regarding the terms of the Memorandum. That interpretive issue is not, however, posed in this litigation. The issues posed at this point are procedural, focusing on whether the Union is entitled to a hearing on the merits of the Sowers termination.

The terms of the Memorandum are, as noted above, enforceable under Sec. 111.70(3)(a)5, Stats., because Section 4 denies access to the grievance procedure stated at Article 25 of the Local 1901-F agreement. Since the existence of a probationary period in the Memorandum poses an interpretive issue regarding the termination of Sowers, the Union is entitled to a hearing on the merits of her termination.

The Conclusions of Law and Order stated above set the status of this matter. The County has not violated Sec. 111.70(3)(a)5, Stats., by refusing to process the grievance on the Sowers termination to arbitration. Because arbitration is not available to enforce the terms of the Memorandum, the Union can attempt to enforce the terms of the Memorandum through Sec. 111.70(3)(a)5, Stats. Accordingly, further hearing will be necessary, as noted in the Order. Evidence at the hearing can include the facts surrounding the termination, including whether or not Sowers completed a probationary period. If she had, the hearing can extend to the receipt of any relevant evidence which might clarify how, if at all, her completion of a probationary period enhanced her employment status under the Memorandum.

Dated at Madison, Wisconsin, this 8th day of December, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Examiner