STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 2494, AFSCME, AFL-CIO, Complainant, vs. WAUKESHA COUNTY, Respondent.	Case 139 No. 53236 MP-3093 Decision No. 28726-A

Appearances:

Mr. Bruce F. Ehlke, Shneidman, Myers, Dowling, Blumenfield, Ehlke, Hawks & Domer, Attorneys at Law, 217 South Hamilton, P.O. Box 2155, Madison, Wisconsin 53701-2155, for Local 2494, AFSCME, AFL-CIO, referred to below as the Union.

Mr. Marshall R. Berkoff, Michael, Best & Friedrich, Attorneys at Law, 100 East Wisconsin Avenue, Milwaukee, Wisconsin 53202-4108, for Waukesha County, referred to below as the County.

ORDER DENYING MOTION TO DEFER PENDING EVIDENTIARY HEARING

The Union, on October 24, 1995, filed a Complaint of Prohibited Practices, alleging that the County had violated Secs. 111.70(3)(a)1 and 5, Stats., by subcontracting certain custodial work in violation of a grievance arbitration award. On October 26, 1995, the Legal Counsel for the Commission issued a letter to the parties advising them of their statutory right to a hearing, and informing them that the matter would be held in abeyance pending informal settlement efforts unless either party requested a hearing. In a letter filed with the Commission on December 1, 1995, the County formally advised the Commission of its willingness to participate in informal settlement discussions and of its position "that this issue is grievable and arbitrable and as such the WERC should defer it to arbitration." Informal attempts to settle the complaint proved unsuccessful. On May 10, 1995, the Commission appointed Richard B. McLaughlin, a member of its staff, to act as Examiner to issue Findings of Fact, Conclusions of Law and Order, as provided in Secs. 111.70(4)(a) and 111.07, Stats. In a conference call,

the parties agreed to submit written argument on whether the complaint should be deferred to grievance arbitration. The last statement of the parties' positions was filed with the Commission on June 3, 1996.

ORDER

The County's Motion to Defer the complaint to grievance arbitration is denied, pending evidentiary hearing on whether claim preclusion applies to Grievance #2.

Dated at Madison, Wisconsin, this 22nd day of July, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

WAUKESHA COUNTY

MEMORANDUM ACCOMPANYING
ORDER DENYING MOTION TO DEFER
PENDING EVIDENTIARY HEARING

BACKGROUND

The complaint states, among other allegations, the following:

. . .

3. At all times material hereto there has been in force and effect a Labor Agreement between AFSCME Local 2494 and Waukesha County, which Agreement, among other things, provided for a Grievance Procedure. The final step in this Grievance Procedure was a hearing before a panel of three arbitrators, whose decision was to be "final and binding on both parties".

4. On April 7, 1995, following the grievance, by AFSCME Local 2494, and arbitration of a dispute concerning the County's subcontracting of custodial work, a panel of three arbitrators issued an Arbitration Award, interpreting and applying the applicable language of a side letter agreement appended to the aforesaid Labor Agreement, in pertinent part, as follows:

> "... the County cannot subcontract any custodial work if there are less than 28 full time custodial employees ....
>
> "....
>
> "... the County is free to subcontract custodial work only if the number of full-time employees in the bargaining unit remains the same and only if there is no reduction in their hours ..."

A copy of the said Arbitrator Award is attached to this Complaint of Prohibited Practices and by reference herein incorporated as Exhibit A.

> 5. Since the issuance of the aforesaid Arbitration Award, and notwithstanding the clear and unambiguous language of the same, Waukesha County has continued to subcontract custodial work, although the number of full-time employees in the bargaining unit has been reduced below the number of 28 employees. The County has taken the position that it is not bound by the Arbitration Award referred to at Paragraph 4 of this Complaint of Prohibited Practices.
>
> 6. The actions of Waukesha County set forth at Paragraph 5 of this Complaint of Prohibited Practices constitute a breach of the Labor Agreement between AFSCME Local 2494 and the County and a failure and refusal to accept the terms of an Arbitration Award, where the parties previously had agreed that such Arbitration Award would be final and binding upon them. Said actions constitute prohibited practices in violation of Secs. 111.70(3)(a)1 and 5, Wis. Stat.
>
> . . .

The award noted in Section 4 of the complaint is referred to below as the Award.

The County's motion notes that the Union has filed Grievance #2, which makes essentially the same allegations as those set forth in the complaint. The County contends that the Commission should defer processing the complaint to permit the grievance to go forward.

It is undisputed that grievance arbitration is available to the Union and that the County is willing to renounce any technical objection which could preclude access to arbitration.

THE PARTIES' POSITIONS

The County's Motion

The December 1, 1995 correspondence referred to above noted the County's position that the "Labor contract between the parties has established the grievance and arbitration procedure to resolve" issues concerning contract interpretation. The County noted its position that any issue raised by the complaint should be deferred to arbitration and that "the Union should (not) have a choice of forum since the matter is clearly grievable and arbitrable." Citing Waupun School

District, Dec. No. 22409 (WERC, 3/85) and Monona Grove School District, Dec. No. 22414 (WERC, 3/85), the County asserted that the Commission has "consistently held that, where an arbitration procedure exists, it will not assert its jurisdiction over the subject dispute because of the presumed exclusivity of the contractual procedure."

The County's Initial Brief

The County notes that it "does not intend to raise any procedural issue which would interfere with AFSCME's access to the grievance and arbitration process under our collective bargaining agreement." The "essence" of its answer to the grievance does not raise this point, and the County emphasizes that "we would not raise it now."

The County contends that the complaint assumes the authority of the Award, which interpreted a side letter to a 1992-93 labor agreement. The side letter expired and was replaced by a new side letter attached to a 1994-95 labor agreement. The complaint, according to the County, reads the Award to set a custodial staffing level of twenty-eight employes. The complaint asserts that since the County has not filled a vacancy and the staffing level has fallen to twenty-seven, the Award has been violated. This argument ignores, according to the County, that the complaint arises under the renegotiated side letter governing the 1994-95 labor agreement. Even if the Award could be read to establish a staffing level, it does not apply to the renegotiated side letter.

The County, citing the Commission case law noted above, argues that the Commission should not assert its jurisdiction over this arbitrable dispute. Beyond this, the County urges that Sauk County, 165 Wis.2d 406 (1991), constitutes persuasive authority that grievance arbitration is the appropriate forum for this dispute. That there "is no question that the letter attachment to the 1994-95 contract is a part of that agreement and is grievable and arbitrable" underscores this conclusion.

The facts placed before the arbitration panel regarding the 1992-93 side letter no longer existed at the time a dispute arose under the 1994-95 side letter. From this, the County concludes that the Award has no application to the current dispute. The County argues it necessarily follows that the dispute must be submitted to arbitration.

The Union's Initial Brief

The Union urges that the Award conditioned the County's right to subcontract on the presence of not less than 28 full-time custodial employees. The language which formed the basis for the Award was "carried forward into a very similar, almost identical, Letter of Agreement that was attached to the parties' 1994-95 Collective Bargaining Agreement." When the County reduced the number of its custodial employes to twenty-seven, it "failed to implement the Arbitration Award." The Union argues that it was thus compelled to file a prohibited practice complaint.

The requested deferral is, the Union asserts, actually an attempt to force the Union to "relitigate the very same issue, regarding the application of the very same contract language that was the subject of the Arbitration Award." The Commission's deferral policy cannot

persuasively be extended to this degree. Under the facts posed here, the Union concludes that it "should be entitled to have the original Arbitration Award enforced" rather than resubmitting the dispute to arbitration.

The County's Reply Brief

The County underscores that it fundamentally disputes any contention that the requested deferral calls for a relitigation of the same issue decided in the Award. The Award addressed whether the County's use of "an outside vendor in a new building . . . had violated the subcontracting letter of attachment in the old labor agreement." The issue posed under the 1994-95 agreement is not this type of subcontracting dispute. Rather, the latter issue addresses the "subject of the County's staffing levels." Whether the County can permit its staffing to fall to twenty-seven employes poses, the County urges, an entirely new issue for interpretation. Even if the two issues could be considered issues of subcontracting, the County emphasizes that the second issue arises under different language contained in a different side letter. That alone requires the submission of the second dispute to arbitration.

The County argues that Commission case law and any view of the facts require that the allegations of the complaint be deferred to arbitration.

The Union's Final Response

The Union notes that the parties fundamentally disagree on how this dispute should be characterized. Rejecting the assertion that the current dispute focuses on "staffing levels," the Union urges that the County in fact seeks "to pick and choose which parts of that Arbitration Award it will accept and implement, and those which it will refuse to accept as binding." Accepting the County's position arrogates to the County an improper forum choice, for the County's dissatisfaction with the Award should have been expressed in an appeal, not in a refusal to arbitrate.

The disagreement between the parties regarding the "issue presented" and "the relevant material facts" requires hearing. The Union concludes that the Motion to Defer must be denied.

DISCUSSION

The County's motion questions whether the complaint's allegations should be heard by an examiner or by an arbitrator. Under Commission case law, this question cannot be determined without an evidentiary hearing.

The complaint alleges County violations of Secs. 111.70(3)(a)1 and 5, Stats. Under

Commission case law, these allegations have different implications concerning a "deferral" to grievance arbitration. The allegation of a Sec. 111.70(3)(a)5, Stats., violation poses the difficulty of reconciling an arbitrator's contractual authority to interpret a labor agreement with the Commission's statutory authority to do so. As noted by the County, the Commission generally will decline to assert its authority under Sec. 111.70(3)(a)5, Stats., where a labor agreement contains a procedure for final and binding arbitration. 1/ The Commission does not view this refusal to assert its jurisdiction as a "deferral" to arbitration. 2/

The allegation of a Sec. 111.70(3)(a)1, Stats., violation poses what the Commission views as a typical deferral issue. The issue posed is whether referring the matter to grievance arbitration may address allegations of prohibited practices other than breach of contract.

A review of the parties' positions establishes that the motion does not pose a typical deferral issue. The alleged violation of Sec. 111.70(3)(a)1, Stats., appears to be derivative of the Sec. 111.70(3)(a)5, Stats., violation. There is, then, no significant non-breach of contract issue to defer. The fundamental dispute is whether the Award governs Grievance #2.

The difficulty posed by the parties' contentions is that if the Union's view is correct, the matter, under Commission case law, should be determined by an examiner. If the County's view is correct, under Commission case law, it should be determined by an arbitrator. Evidentiary hearing must be held to determine which party's view is correct.

The line of authority supporting the Union's view is longstanding, and has been applied by the Commission as a type of "res judicata" analysis. The Wisconsin Supreme Court has determined this doctrine is more aptly stated as "claim preclusion." 3/ The Commission has stated its view of claim preclusion thus:

1/ See Monona Grove School District, Dec. No. 22414 (WERC, 3/85) at 6-7.

2/ See State of Wisconsin, Dec. No. 25281-C (WERC, 8/91) at 12, Footnote 3/.

3/ Northern States Power Co. v. Bugher, 189 Wis.2d 541 (1994). Because this matter poses an identity of parties, it is treated as claim preclusion rather than "issue preclusion" or collateral estoppel. See 189 Wis.2d at 550-551.

> (T)he Commission has not exhibited any reluctance to make a determination as to whether a particular grievance or fact situation before it is governed by a prior arbitration award. In order to insure the viability of the arbitral process, it is necessary to grant res adjudicata effect to prior awards in appropriate cases. However, rigid standards will be invoked to guard against unwarranted invasion of the arbitrator's province of deciding the merits of a dispute that is arbitrable under the collective bargaining agreement.
>
> The Commission, has held that where the facts of a particular grievance are materially different from those material to a prior arbitration award, it will defer to the arbitrator for a decision on the merits of the grievance . . . However, where the Commission finds no material difference in fact, it will apply the principle of res judicata to the case before it. 4/

The Commission's use of this doctrine dates from at least 1957, 5/ and has been applied in cases arising under the Wisconsin Employment Peace Act, the Municipal Employment Relations Act 6/ and the State Employment Labor Relations Act. 7/

The Commission applies claim preclusion thus:

> (T)he dispute which was the subject of the award and the dispute for which the application of the res judicata principle is sought (must) share an identity of parties, issue and remedy. In addition, no material discrepancy of fact may exist between the dispute governed by the award and the subsequent dispute. 8/

4/ Wisconsin Public Service Corporation, Dec. No. 11954-D (WERC, 5/74) at 6.

5/ Wisconsin Telephone Company, Dec. No. 4471 (WERC, 3/57).

6/ See, for example, Moraine Park VTAE et. al., Dec. No. 22009-B (WERC, 11/85).

7/ See, for example, State of Wisconsin, Department of Employment Relations, Dec. No. 23885-D (WERC, 2/88).

8/ State of Wisconsin, Dec. No. 20145-A (Burns, 5/83) at 6, citations omitted; aff'd by operation of law, Dec. No. 20145-B (WERC, 6/83), and cited with approval at Dec. No. 22009-B at 8.

The complaint of prohibited practice states a contested case under Chapters 111 and 227. 9/ The facts underlying the parties' conflicting characterizations of the dispute must, then, be determined after evidentiary hearing.

The Commission's view of claim preclusion, however, potentially limits the scope of hearing. If, as the County asserts, there is no identity of fact, issue or remedy between the two grievances, the assertion of the Commission's authority under Sec. 111.70(3)(a)5, Stats., is inappropriate and the matter must be placed before an arbitrator.

In sum, hearing on the complaint is appropriate to determine if there is an identity of parties, issue, remedy and fact between the Award and Grievance #2. If claim preclusion is appropriate, the Award can be enforced under Sec. 111.70(3)(a)5, Stats. If claim preclusion is not appropriate, then Sec. 111.70(3)(a)5, Stats., is not available to enforce the Award, and the merits of Grievance #2 must be determined by a grievance arbitrator.

It is arguable that this is not the most efficient procedure to determine the merit of the parties' dispute. The Commission's use of claim preclusion seeks to enhance the finality of the arbitration process, but does so at the cost of limiting an arbitrator's discretion in determining the precedential value of prior awards. This may make sense where there is reason to believe a party is seeking to undermine the finality of the process. That conduct would, however, presumably be actionable as a prohibited practice without regard to the claim preclusion doctrine. The claim preclusion doctrine rests on the potential of abuse in enforcing awards. Where there is no evidence of abuse, it is not apparent why the agreed upon method of dispute resolution should not be deferred to.

9/ See, generally, Waupaca County, Dec. No. 28401-A (McLaughlin, 6/95).

This reservation serves as background to note that the parties have the ability to agree to submit the matter to arbitration. As in a standard deferral case, jurisdiction over the complaint could be retained to assure the matter was addressed in a fashion not repugnant to MERA. 10/ Similarly, the parties could agree to place both the claim preclusion issue and the issue of contract interpretation before the Commission. 11/ This would avoid two separate hearings if claim preclusion was found inappropriate. In the absence of that agreement, I read Commission case law to require an evidentiary hearing to determine if claim preclusion makes the Award enforceable under Sec. 111.70(3)(a)5, Stats. If claim preclusion does not make the Award enforceable, I read Commission case law to require that its Sec. 111.70(3)(a)5, Stats., authority not be asserted, thus leaving the matter for arbitration.

Dated at Madison, Wisconsin, this 22nd day of July, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

10/ See, for example, School District of Cadott Community, Dec. No. 27775-C (WERC, 6/94).

11/ See, for example, City of Madison (Fire Department), Dec. No. 27757-B (WERC, 10/94).