STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MARINETTE COUNTY COURTHOUSE EMPLOYEES UNION, LOCAL 1752, AFSCME, AFL-CIO, Complainant, vs. MARINETTE COUNTY (COURTHOUSE), Respondent.	Case 154 No. 53337 MP-3103 Decision No. 28783-B

Appearances:

Mr. David Campshure, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1566 Lynwood Lane, Green Bay, Wisconsin 54311, on behalf of Local 1752.

Mr. Chester Stauffacher, Corporation Counsel, 1926 Hall Avenue, P.O. Box 320, Marinette, Wisconsin 54143-0320, on behalf of the County.

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT AND CONCLUSION OF LAW AND AFFIRMING IN PART AND MODIFYING IN PART EXAMINER'S ORDER

On September 3, 1996, Examiner Sharon A. Gallagher issued Findings of Fact, Conclusion of Law and Order with Accompanying Memorandum in the above matter wherein she concluded that Respondent Marinette County had violated Secs. 111.70(3)(a)5 and 1, Stats., by refusing to arbitrate a grievance. She therefore ordered the County to proceed to arbitration.

On September 19, 1996, Respondent Marinette County timely filed a petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's decision pursuant to Secs. 111.70(4)(a) and 111.07(5), Stats.

The parties thereafter submitted written argument in support of and in opposition to the petition, the last of which was received October 21, 1996.

Having considered the matter, and being fully advised in the premises, the Commission makes and issues the following

No. 28783-B

ORDER 1/

A. The Examiner's Findings of Fact and Conclusion of Law are affirmed.

B. The Examiner's Order is affirmed as modified by deletion of Respondent County's obligation to pay $225 as a filing fee.

Given under our hands and seal at the City of Madison, Wisconsin, this 19th day of December, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By James R. Meier /s/
James R. Meier, Chairperson

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

1/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(Footnote 1/ continues on the next page.)

(Footnote 1/ continues from the previous page.)

> (a) Proceedings for review shall be instituted by serving a petition therefore personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.
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> (b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.
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> (c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

MARINETTE COUNTY (COURTHOUSE)

MEMORANDUM ACCOMPANYING
ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT
AND CONCLUSION OF LAW AND AFFIRMING IN PART
AND MODIFYING IN PART EXAMINER'S ORDER

In October, 1995, Complainant filed a grievance arbitration request with the Wisconsin Employment Relations Commission along with the then-appropriate $25 filing fee. Respondent County refused to proceed to grievance arbitration. On October 8, 1995, Complainant Union then filed a complaint with the Commission asserting that Respondent County's refusal to arbitrate the grievance violated Secs. 111.70(3)(a)5 and 1, Stats.

The Examiner's Decision

Applying Joint School District No. 10 v. Jefferson Education Association, 78 Wis. 2d 94 (1977), the Examiner concluded that the County was obligated to arbitrate the grievance. She reasoned that the contractual arbitration clause, on its face, covered the grievance in question and that there was no other provision in the contract which specifically excluded arbitration of the subject of the grievance. She determined that the various defenses raised by the County were relevant to the merits of the grievance but not to the question of whether the County was obligated to present those arguments to a grievance arbitrator.

The Examiner found the position advanced by the County to be "frivolous, devoid of merit and not debatable" and therefore ordered the County to pay a portion of the filing fee she believed to be applicable to the case.

DISCUSSION

In June, 1995, the Equal Employment Opportunity Commission (EEOC) and Respondent County entered into a Consent Decree and Order which settled a discrimination claim filed by certain female civilian corrections officers asserting that they had been paid less than certain male deputies who performed the same work. The female employes are in the collective bargaining unit represented by Complainant Union while the male deputies were in a bargaining unit represented by another labor organization.

The grievance at issue herein was filed by male civilian corrections officers asserting that the County was violating that portion of the 1995-97 contract which states the following:

> The parties to this Agreement agree that they shall not engage in any act of employment discrimination as specified in Wisconsin Statutes against any individual on the basis of age, race, creed, color,

> handicap, marital status, sex, national origin, ancestry, sexual orientation, arrest record or conviction record, and that such person shall receive the full protection of this Agreement.

The County argues that the claim advanced in the grievance does not raise a contractual issue. It contends the claim in question is a poorly-disguised effort by male civilian correctional officers to acquire the wage settlement received by their female counterparts. The County asserts that the EEOC settlement was not based on the collective bargaining agreement between the County and Complainant but rather on an interest in avoiding litigation over an alleged violation of federal law. The County further notes that the federal law claim was based upon asserted differences between male and female employes who were in different bargaining units. The County argues that unlike their female co-workers, male correctional employes have no discrimination claim 2/ based on pay received by male deputies in a different unit.

In our view, the Examiner correctly determined that all of the foregoing County arguments go to the merits of the grievance, not to the question of whether the County has contractually obligated itself to proceed to arbitration. The County may persuade the arbitrator that it is not violating the contractual prohibition against discrimination. But under Jefferson, supra., it is clear

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2/ With its petition for review, the Respondent County attached a document which it asserts is the dismissal of a State of Wisconsin Equal Rights complaint filed by the male correctional officers. Complainant Union argues the document is irrelevant and, in any event, that Respondent failed to establish good cause for reopening the record because Respondent could have, but did not, ask that the record before the Examiner be held open to receive any disposition of the Equal Rights complaint.

For the reason advanced by the Complainant Union, we conclude there is neither "good cause" to reopen the record under ERC. 10.19 nor a persuasive basis to view this as "newly" discovered evidence under Sec. 111.07(6), Stats. Thus, we exclude the document from the record without reaching the issue of its relevance.

the County has contractually obligated itself to make its case to an arbitrator and cannot rely upon what it believes to be its unassailable arguments as a valid basis to escape that obligation.

Jefferson tells us that our role in this case is limited to:

> . . . a determination whether there is a construction of the arbitration clause that would cover the grievance on its face and whether any other provision of the contract specifically excludes it.

and that:

> An order to arbitrate a particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

Here, the grievance alleges a violation of the Article 1.03 Equal Opportunity provision of the contract. The contract gives the parties the right to arbitrate "differences" between them. The grievance is a "difference" between the parties. There is no contractual restriction on the right to arbitrate "unresolved" differences. Jefferson compels us to conclude that given the foregoing contract provisions, the County has contractually obligated itself to arbitrate the grievance.

Given the foregoing, we have affirmed the Examiner except for that portion of her Order directing the County to pay $225 as its share of a grievance arbitration filing fee. 3/ When the Complainant Union originally sought to arbitrate this grievance, it paid the then-applicable filing fee of $25. Although WERC grievance arbitration filing fees are now at the $250 level, the increase occurred after the request for arbitration had been made in the instant matter. Accordingly, $25 remains the applicable fee in this case, and thus we set aside the Examiner's Order in this regard. 4/

3/ The filing fee for grievance arbitration requests increased on January 1, 1996 from $25 (payable by the initiating party) to $250 (split equally by the two parties to the contract).

4/ The Complainant Union believed the $250 filing fee to be applicable and sought County payment of $225 as part of the make-whole relief requested. The Complainant Union did not argue to the Examiner that it was entitled to payment of the fee because the County's litigation position before her was "frivolous". The Examiner nonetheless concluded that the County's litigation position was "frivolous" and directed payment of the $225 on that basis. Because the Union did not raise the legitimacy of the County's litigation position before her, the Examiner should have addressed the fee issue only from the perspective of whether fee payment was appropriate make-whole relief. Given the foregoing, and because we have concluded the $25 filing fee remains applicable, we need not, and do not, address the

Dated at Madison, Wisconsin this 19th day of December, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By James R. Meier /s/
James R. Meier, Chairperson

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

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question of whether the Respondent County's position is "frivolous" or whether the $225 payment was appropriate make-whole relief.