STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

FEDERATION OF NURSES & HEALTH PROFESSIONALS, LOCAL 5001, Complainant, vs. MILWAUKEE COUNTY, Respondent.	Case 428 No. 54375 MP-3208 Decision No. 28944-A

Appearances:

Ms. Carol Beckerleg, Field Representative, Federation of Nurses and Health Professionals, Local 5001, 9620 West Greenfield Avenue, Milwaukee, Wisconsin 53214, for the Complainant.

Mr. Timothy R. Schoewe, Deputy Corporation Counsel, Milwaukee County, Milwaukee County Courthouse, 901 North Ninth Street, Room 303, Milwaukee, Wisconsin 53233, for the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

On August 21, 1996, the Federation of Nurses & Health Professionals, Local 5001 ("the Union"), filed a complaint with the Wisconsin Employment Relations Commission alleging that Milwaukee County ("the County"), had violated Sec. 111.70(3)(a) 5, Wis. Stats., by refusing to arbitrate a question arising as to the meaning or application of the terms of a collective bargaining agreement between the parties. After efforts at conciliation proved unsuccessful, the Commission on December 12, 1996 authorized Stuart Levitan, a member of its staff, to conduct a hearing on said complaint and to make and issue Findings of Fact, Conclusions of Law and Order in the matter, as provided in Secs. 111.70(4)(a) and 111.07, Wis. Stats. Also on December 12, 1996, Examiner Levitan scheduled a hearing for February 18, 1997, and directed the County to file an answer to the complaint by January 15, 1997. The County filed its answer on February 6, 1997, in which it admitted that it had refused to arbitrate the underlying dispute, denied the Commission had jurisdiction over the subject matter, affirmatively alleged it had been relieved of any obligation to arbitrate, and sought dismissal of the complaint on the grounds that it had not been sworn to pursuant to ERB 12.02, W.A.C. On February 12, 1997, the Union

filed with the Examiner a sworn copy of its complaint. On February 18, 1997, the Examiner denied the County's motion to dismiss and conducted the hearing, at the close of which the Examiner placed on the record the parties' mutual agreement to exchange written arguments through the Examiner by March 26, 1997. A transcript of the hearing was prepared and available to the parties by March 3, 1997. The Union submitted its brief on March 27, 1997. On April 18, 1997, the Examiner wrote to the County's Deputy Corporation Counsel to remind him of the March 26 deadline and establish a new deadline of April 25, 1997. The County thereafter submitted written argument on April 24, 1997. The Examiner, having considered the evidence and the arguments of the parties, and being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. The Federation of Nurses & Health Professionals, Local 5001, hereafter referred to as the Union, is a labor organization with offices as 9620 West Greenfield Avenue, Milwaukee, Wisconsin.

2. Milwaukee County, hereafter referred to as the County, is a municipal employer with offices at 901 North Ninth Street, Milwaukee, Wisconsin.

3. The Union and the County are parties to a collective bargaining agreement called a Memorandum of Agreement covering the calendar years 1994-1996. The Agreement includes the following provisions:

> 1.02 BARGAINING UNIT DEFINED
>
> (1) Whenever the term "nurse" is used in this Memorandum of Agreement, it shall mean and include bargaining unit nurses of Milwaukee County in the following classifications: Nurse Anesthetist I, Registered Nurse I, Registered Nurse I (Mental Health), Regular Pool Nurse (MCMC), Regular Pool Nurse (Mental Health), Registered Nurse II (Sheriff's Department), Registered Nurse II (Nurse Recruiter), Registered Nurse II (School of Nursing), Registered Nurse II (Mental Health), Registered Nurse II (Mental Health) (Recruiter), Nurse Practitioner, Instructor (School of Nursing) and Assistant Instructor (School of Nursing), Professional Standards Review Supervisor, Educational Coordinator (School of Nurse Anesthesiology), Clinical Nurse Specialist (Mental Health) and Clinical Nurse Specialist. Whenever the term "employe" is used it shall mean in addition to those set forth above, the following bargaining unit classifications: Forensic Chemist.
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> . . .
>
> 2.21 VACATION

(1) Maximum vacation allowance shall be determined in accordance with the following formula based upon years of service measured from the most recent date of hire:

80 hours after one year;
120 hours after five years;
160 hours after ten years;
200 hours after twenty years.

(2) Employees shall accrue vacation based on the number of hours paid, including overtime which shall be counted as straight time hours for this purpose, not to exceed the maximum allowance provided in Par. (1) above. Accrual shall be based upon the following formula:

0 to 5 years = .0385 hours per hour paid;
5 to 10 years = .0577 hours per hour paid;
10 to 20 years = .0770 hours per hour paid;
After 20 years = .0962 hours per hour paid.

. . .

The additional vacation to which employes shall be eligible in the calendar year of their fifth, tenth, and twentieth year of continuous service shall be .0193 hours per hour paid in the previous payroll year and shall be liquidated after the employe's anniversary date.

(a) Vacation accrued during any given payroll year shall be liquidated during the following calendar year, except as noted in Par. (2)(c). The payroll year shall commence on the first day of the pay period of any calendar year, not necessarily the first calendar day of the year.

(b) After completing 6 months of service or after 6 months of changing from pool to regular status, employes shall be eligible to liquidate vacation equal to the amount accrued during such period. After completing the first year of service, employes

shall be eligible to liquidate vacation in that calendar year equal to the difference between the amount accrued during the first year of service and the amount liquidated during the same period. Thereafter, such employes shall be permitted to liquidate vacation which was accrued in the preceding payroll year.

(c) Employes may carry a maximum of 40 hours of accrued vacation from one calendar year to the next, said hours to be liquidated in accordance with existing vacation practices.

(d) After six months of service employes who terminate shall be compensated for any unliquidated vacation at the time of such termination.

(3) Employes may exhaust vacation in increments of not less than one-half hour, with the prior approval of the department head or designee.

(4) Part-time employes shall exhaust vacation over a period of time which shall not exceed the number of weeks to which a full time employe with the same length of service would be entitled to (two weeks after one year; three weeks after five years; four weeks after ten years; five weeks after twenty years). Employes, at the discretion of their appointing authority shall be allowed to utilize other paid time such as accrued holiday time, personal time or compensatory time during the liquidation of their paid vacation leave to cover unpaid time.

(5) In the selection of vacations, the employes shall not be required to compete with non-bargaining unit personnel in the exercise of their relative seniority for that purpose. Requests for January, February and March vacations shall be submitted by October 15th and approved by November 15th. If vacation requests of bargaining unit members are submitted prior to February 15th, such requests will be approved by March 15th. Vacation requests submitted after these dates will be granted on a first come first serve basis. Except for emergencies, vacation requests which have been approved shall not be changed without mutual agreement.

(6) Vacation requests are granted on the basis of seniority. Vacation weeks may be taken as individual weeks or

consecutive weeks except as indicated below during the months of June, July and August. Employes with more than two weeks vacation may select two available weeks during the above said months. After all employes with more than two weeks have selected, employes with two weeks vacation or less, may select one available week during the above said months. Any additional weeks during these months will be granted based on seniority. Carry-over vacation time may not be used in the computation of vacation weeks for this purpose.

2.22 PERSONAL DAYS

(1) All regular full time employes, subject to the provisions of par. 2.22(3), shall receive 3 days (24 hours) leave per year known as "personal days", in addition to earned leave by reason of vacation, accrued holidays, and compensatory time. Employes who work half time or more shall accrue personal days on a pro-rata basis. Proration shall be based on established work week.

(2) Employees shall accrue personal days during their first fractional calendar year of employment as follows:

	Days Accrued in Initial Fractional Calendar Year	
Date of Hire	Full Time	Half Time
On or before April 30	3 days (24 hours)	12 hours
May 1 to August 31	2 days (16 hours)	8 hours
September 1 and thereafter	1 day (8 hours)	4 hours

(3) Personal days may be taken at any time during the calendar year in which they are accrued, subject to the approval of the department head. Supervisory personnel shall make every reasonable effort to allow employes to make use of personal days as the employe sees fit, it being understood that the purpose of such leave is to permit the employe to be absent from duty for reasons which are not justification for absence under other existing rules relating to leave with pay.

(4) Employes are permitted but not required to schedule personal days in advance.

4.02 GRIEVANCE PROCEDURE

The County recognizes the right of an employe to file a

grievance and will not discriminate against any employe for having exercised her rights under this Section.

(1) APPLICATION

Only matters involving the interpretation, application or enforcement of the terms of this Agreement shall constitute a grievance.

A grievance shall mean a controversy which exists as a result of an unsatisfactory adjustment or failure to adjust a claim or dispute by an employe or group of employes concerning the application of wage schedules or provisions relating to hours of work or working conditions contained in or referenced to in this Agreement. The grievance procedure shall not be used to change existing wage schedules, hours of work, working conditions, fringe benefits and position classifications established by ordinances and rules which are matters processed under other existing procedures. Grievances filed under this grievance procedure shall not be resolved in a manner which conflicts with this Memorandum of Agreement, Civil Service Rules, Milwaukee County Government Ordinances and Resolutions, or binding past practices established by the parties unless such resolution is agreed upon by the Director of Labor Relations and the President of the Federation.

(2) REPRESENTATIVES

An employe may choose to be represented at any step in the procedure by representatives (not to exceed two) of the employe's choice. However, representative status shall be limited at all steps of the procedure to those persons officially identified as representatives of the Federation. The Federation shall maintain on file with the County a list of such representatives.

(3) TIME OF HANDLING

Whenever practical, grievances will be handled during the regularly scheduled working hours of the parties involved. The County agrees to provide at least 24 hours written notice of the time and place of the hearing to the grievant and the Federation.

(4) TIME LIMITATIONS

If it is impossible to comply with the time limits specified in

the procedure because of work schedules, illness, vacations, etc., these limits may be extended by mutual consent in writing (extension of grievance time limit Form #4894). If any extension is not agreed upon by the parties within the time limits herein provided or a reply to the grievance is not received within the time limits provided herein, the grievance may be appealed directly to the next step of the procedure.

(5) SETTLEMENT OF GRIEVANCES

Any grievance shall be considered settled at the completion of any step in the procedure if the president or their designee or the Federation and the director of Labor Relations, and the appointing authority or their designee are mutually satisfied. Dissatisfaction is implied in recourse from one step to the next.

(6) FORMS

There are 3 separate forms used in processing a grievance:

(a) Grievance Initiation Form;
(b) Grievance Disposition Form;
(c) Grievance Appeal Form;

All forms are to be copied in quadruplicate except at the County Institutions, where 5 copies are to be prepared. Two copies are to be retained by the person originating the form; the remaining copies shall be served upon the other person involved in the procedure at that step, who shall distribute them in such manner as the department head shall direct. The forms are available in the office of the Department of Human Resources and in any County department or institution, where they shall be readily available by all employes.

(d) Guidelines to be followed when initiating a written grievance:

(1) The employe alone or with the employe's steward shall cite the specific language of the rule, regulations or contract provision that was alleged to have been violated at the first step of the grievance procedure.

(2) The employe alone or with employe's steward shall in writing provide the employe's immediate supervisor

designated to hear grievances a detailed explanation as to when, where, what, who and why the employe believes that employe's contractual rights have allegedly been violated. The written Grievance Initiation Form shall contain the date or time that the employe alleges that employe's contractual rights have been violated.

(3) The employe alone or with the employe's steward shall specifically detail the relief the employe is requesting. The specific relief being requested shall be in writing. The requested relief at the written step of the grievance procedure shall remain the same through all steps of the grievance procedure.

(4) If more space is required than is provided for on the Grievance Initiation Form in order to comply with the provisions of this section, the employe shall be permitted to submit written attachments to said form.

(5) The Grievance Initiation shall be prepared by the employe or with the employe's steward in a manner that is neat, clear, and discernible to a third party.

(6) Failure on the part of the employe alone or with their steward to follow section 4.02(6)(d) 1, 2, 3, 4, or 5, shall make the Grievance Initiation Form null and void and the employe's immediate supervisor designated to hear grievances shall return the Grievance Initiation Form to the employe for corrections.

(7) The guidelines outlined in 4.02(6)(d), 1, 2, 3, 4, 5 and 6 are to clarify the grievance process. These guidelines shall not be used as a bar to the right of an employe to file a grievance. These guidelines are to assist the employe and management in the resolution of grievances at their lowest level of the grievance procedure. It is understood by the parties that should a dispute arise as to the intent of this section, the President or her designee and the Director of Labor Relations and/or his designee will meet to discuss the dispute and resolve it to the mutual satisfaction of both parties.

(7) STEPS IN THE PROCEDURE

(a) STEP 1

1. The employe alone or with employe's representative shall explain employe's grievance verbally to employe's supervisor designated to respond to employe grievances.

2. The supervisor designated in paragraph 1 shall within 3 working days verbally inform the employe of supervisor's decision on the grievance presented.

3. If the supervisor's decision resolves the grievance, the decision shall be reduced to writing on a Grievance Disposition Form within 5 working days from the date of the verbal decision.

(b) STEP 2

1. If the grievance is not settled at the first step, the employe or employe's representative shall prepare the grievance in writing on the Grievance Initiation Form and shall present such form to the supervisor designated in paragraph 1 to initial as confirmation of supervisor's verbal response.

(a) The employe alone or with employe's steward shall fill out the Grievance Initiation Form pursuant to Section 4.02 (6)(d), 1, 2, 3, 4, 5 and 6 of this Memorandum of Agreement.

2. The employe or employe's representative after receiving confirmation shall forward the grievance to employe's appointing authority or to the person designated by the appointing authority to receive grievances within 5 working days of the verbal decision.

3. The person designated in (7)(b) 2. above will schedule a hearing with the persons concerned and within 15 working days from date of service of the Grievance Initiation Form, the Hearing Officer shall inform the aggrieved employe in writing of the hearing officer's decision.

4. Those grievances which would become moot if unanswered before the expiration of the established time limits will be answered as soon as possible after the conclusion of the hearing.

If the grievance is not resolved at Step 2 as provided, the Federation shall refer such grievance within 15 working days to Step 3.

(c) STEP 3

1. For the purpose of discharging its responsibilities to administer collective agreements during their terms in accordance with Sec. 79.02, C.G.O., and in order to avoid unnecessary appeals, the Director of Labor Relations or designee shall attempt to mediate a resolution to such issues prior to arbitration and shall respond to the parties in writing within 30 days.

2. In the event the Director of Labor Relations or designee and the President or designee of the Federation mutually agree to a resolve of the dispute it shall be reduced to writing and binding upon all parties and shall serve as a bar to further appeal.

(d) STEP 4

1. If the grievance is not settled at Step 3, the Federation may refer such grievance to arbitration. Such reference shall be made within 45 days from the date of the conclusion of Step 3.

(8) No grievance shall be initiated after the expiration of 90 calendar days from the date of the grievable event, or the date on which the employe becomes aware, or should have become aware that a grievable event occurred, whichever is later. This clause shall not limit retroactive payment of economic benefits for which it has been determined the County is liable nor would it prohibit a prospective adjustment of an ongoing situation.

(9) Representation at hearings on group grievance, shall be limited to two aggrieved employes and Federation representatives, not to exceed two, except in those cases where the Federation and the Director of Labor Relations or designee agree that the circumstances of the grievance are such as would justify participation by a larger number. One employe shall be designated as the grievant to whom the grievance disposition forms shall be forwarded.

(10) At each successive step of the grievance procedure, the subject matter treated and the grievance disposition shall be limited to those issues arising out of the original grievance as filed.

(11) In those cases in which an employe elects not to be represented by a Federation representative, the grievance shall not be resolved in a manner inconsistent with the existing collective agreement. In such cases, the Office of the Federation shall be notified of such grievances and the hearing dates.

(12) A copy of all grievance dispositions shall be promptly forwarded to the aggrieved, a representative designated on the grievance form, and the office of the Federation.

4.03 SELECTION OF ARBITRATOR

(1) To assist in the resolution of disputes arising under the terms of the Agreement and in order to resolve such disputes, the parties agree to petition the Wisconsin Employment Relations

Commission to appoint a member of their staff to serve as arbitrator to resolve all grievances arising between the parties.

(2) HEARINGS

(a) The arbitrator shall have the authority upon referral of a grievance to investigate such grievance in such manner as in the arbitrator's judgment will apprise the arbitrator of all of the facts and circumstances giving rise to such grievance to enable the arbitrator to reach a decision. The arbitrator shall have the authority to conduct hearings and to request the presence of witnesses. At such hearings both the County and the Federation may be represented by counsel and may call witnesses to testify in their behalf. Either party may request that a transcript of the proceedings be made. Any expenses incurred for witness fees or for the cost of the reporter and the preparation of transcript shall be borne by the party requesting the same unless the parties by mutual agreement consent to share such costs. The fees of the arbitrator shall be divided equally between the parties. The arbitrator shall complete arbitrator's investigation within a reasonable period of time and file arbitrator's decision and the reasons therefore in writing with the Department of Labor Relations.

(b) The filing of such grievance shall not stay the effectiveness of any rule, directive or order which gave rise to such grievance and any such rule, directive or order shall remain in full force and effect unless rescinded or modified as a result of the arbitrator's award.

(c) Any time prior to the filing of the arbitrator's award with the Department of Labor Relations, either party may petition the arbitrator to reopen the record for the purpose of presenting additional evidence.

(3) INTERPRETATION OF MEMORANDUM OF AGREEMENT

Any dispute arising between the parties out of the interpretation of the provisions of the Memorandum of Agreement shall be discussed by the Federation with the Department of Labor Relations. If such dispute cannot be resolved between the parties in this manner, either party shall have the right to refer the dispute to arbitration in the manner prescribed in par. (1), except as hereinafter provided.

The parties may stipulate to the issues submitted to the arbitrator and shall present to such arbitrator either orally or in writing, their respective positions with regard to the issues in dispute. The arbitrator shall be limited in arbitrator's deliberations and decision to the issues so defined. The decision of the arbitrator shall be filed with the Department of Labor Relations.

(4) ARBITRATOR'S AUTHORITY

The arbitrator in all proceedings outlined above shall neither add to, detract from nor modify the language of any civil service rule or resolution or ordinance of the Milwaukee County Board of Supervisors, nor revise any language of this Memorandum of Agreement. The arbitrator shall confine himself/herself to the precise issue submitted.

(5) FINAL AND BINDING

The decision of the arbitrator when filed with the parties shall be binding on both parties.

4. Deborah Karis was a member of the bargaining unit referenced in Finding of Fact 3, employed at Doyne Hospital. Karis resigned from County service on November 19, 1995, receiving her last paycheck on or about November 30. On December 8, 1995, the County ceased operating Doyne Hospital as a County facility, after which time the Hospital no longer employed municipal employes or supervisory employes supervising them. Shortly after receiving her last paycheck, Karis expressed to the County's Department of Human Resources her belief that she had not received the full amount of vacation payout due and owing to her. When those expressions proved futile, Karis brought her concerns to her union representatives, at which time Union President Candice Owley also contacted the County's Department of Human Resources. Owley believed that Human Resources would approve the recalculation of vacation payout as sought by Karis if the County Department of Labor Relations would so authorize.

5. On February 12, 1996, Owley wrote to Henry Zielinski, Director of the Department of Labor Relations, as follows:

> **RE:** Debra Karis Vacation Payout
>
> I am requesting authorization for payment of accrued vacation for Debra Karis. Ms. Karis was a nurse at Doyne who switched from pool status to a regular RN I position in February, 1995. When Doyne closed, nurses received payment for accrued, unused vacation. Ms. Karis received payment only for hours accrued in her first six months following her RN I appointment. The contract only addresses how an employe liquidates accrued vacation, not what happens upon termination. It is the union's position that the vacation hours accrued after six months cannot be liquidated or taken as time off until after one year, but that it should be paid out at termination.
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> Employees who work in an RN I status in excess of one year (for example, 1.5 years) were paid out for time accrued, even though they would not have been able to liquidate such time until the next calendar year. I see no logic in treating those with .9 years different. Ms. Karis is the only individual in this situation and the amount of pay is minimal. I would greatly appreciate your support on this issue so that we may clear the books of items relating to former Doyne nurses.
>
> Ms. Karis has been round and round with Human Resources on this issue, so I would hope we could resolve it expeditiously. Mr. Dobbert indicates they will approve payment if you support my position.
>
> Thank you for your assistance. I look forward to hearing from you in the near future.

6. On February 13, 1996, Zielinski replied to Owley as follows:

> Dear Ms. Owley:
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> Re: Debra Karis Vacation Payout
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> You have requested payment of accrued vacation for Debra Karis who was an RN with pool status who switched to regular RN I status during February of 1995. It is my understanding that when Doyne Hospital closed, Ms. Karis received payment of forty hours vacation, in accordance with 2.21(2)(b) of the Memorandum of Agreement,

based on her completing six months as a regular status RN I.

You are, however, asking that Ms. Karis be paid vacation from the time she completed six months of service to the closing of Doyne. Since the previously cited section of the Memorandum of Agreement clearly states, "After completing the first year of service, employes shall be eligible to liquidate vacation in that calendar year equal to the difference between the amount accrued during the first year of service and the amount liquidated during the same period." Therefore, based on the above and based on the fact that Ms. Karis did not complete one year of service as a regular RN I, I cannot approve payment above that which has previously been issued.

If you have any questions regarding the above, feel free to contact my office at 278-4852.

Sincerely,

Henry H. Zielinski /s/
Henry H. Zielinski
Director

7. On February 20, 1996, Owley wrote again to Zielinski as follows:

RE: Debra Karis Vacation Payout

I have reviewed your response of February 13 regarding the above matter and ask that you reconsider. In your response you indicate support for denying her accrued vacation based on Section 2.21(2)(b) of the current contract. I agree with you that Ms. Karis could not liquidate the vacation she accrued between six months and one year, but that does not mean she cannot be paid for those hours. In addition to the language you referenced, the contract goes on to state, "Thereafter, such employes shall be permitted to liquidate vacation which was accrued in the preceding payroll year." Your interpretation would suggest employes would only be paid for accrued vacation from the previous year. In fact, employees, following the first year of service, are paid for vacation accrued in the previous year and the amount accrued to date in the current year in spite of the fact that they cannot liquidate the vacation accrued in the current year. My understanding of liquidate is to take vacation as paid time off.

In addition Section 2.21(2)(d) states, "After six months of service employees who terminate shall be compensated for any unliquidated vacation at the time of such termination." This language allows the payout, upon termination, of all accrued vacation even though vacation accrued in the current year cannot be liquidated.

Again I ask that you review this situation and authorize the payment of the unliquidated vacation still on the books for Ms. Karis.

Thank you for your assistance. I look forward to resolving this matter.

cc: Gary Dobbert, Director of Human Resources
Pat Ventura, Acting Chapter Chair
Debra Karis

8. On February 22, 1996, Zielinski replied as follows:

Dear Ms. Owley:

We have received your subsequent letter regarding the vacation payout to Ms. Debra Karis upon her termination from Doyne Hospital. It is the position of this department that Milwaukee County is, and always has been correctly administering the provisions of Section 2.21(2) of the current contract. Therefore, no additional vacation monies is owed Ms. Karis.

Should you have any questions regarding the above, feel free to contact this office.

Sincerely,

Henry H. Zielinski /s/
Henry H. Zielinski
Director

9. The Union neither sought nor received from the County's Department of Labor Relations an extension of the contractual time limits for filing the Karis grievance. On or about April 3-4, 1996, Karis signed a grievance initiation form which Union steward Barbara Kelsy prepared and submitted on her behalf. On May 20, 1996, Thomas Taylor, Assistant Director of the Department of Labor Relations, wrote to Owley as follows:

Dear Ms. Owley:

The Department of Labor Relations conducted a 2nd step hearing on May 7, 1996 and the disposition is as follows:

Name of Grievant: Deborah Karis
Grievance No.:31268
Issue: Vacation Entitlement

The instant and singular grievance of Deborah Karis #31268 is denied based on the rationale provided to the Federation in a letter from Henry Zielinski to Candice Owley, February 13, 1996.

There has been no violation of Section 2.21(2)(b) of the Memorandum of Agreement between Milwaukee County and the Federation of Nurses and Health Professionals, Local 5001, as it relates to the grievant's issues.

Grievance Denied.

Two copies of this letter are being sent to you. If you agree with the disposition, please sign the original and return to me retaining the copy for your files. If you disagree with the disposition, please outline same when returning the signed original to me.

Sincerely,

Thomas M. Taylor /s/
Thomas M. Taylor
Assistant Director

10. Following the Taylor letter of May 7, 1996, the Union sought arbitration of the Karis grievance. The County did not concur in the request, and refused to proceed to arbitration.

11. The Memorandum of Agreement between the parties is susceptible to an interpretation which would allow the submission of Deborah Karis' grievance concerning vacation payout to final and binding arbitration.

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

CONCLUSION OF LAW

Milwaukee County violated Sec. 111.70(3)(a)5, Wis. Stats., by its refusal to proceed to final and binding arbitration on the Karis grievance.

Based upon the foregoing Findings of Fact and Conclusion of Law, the Examiner makes and issues the following

ORDER 1/

Milwaukee County, its officers and agents, shall immediately:

1. Cease and desist from refusing to proceed to final and binding arbitration of the Deborah Karis grievance over the amount of vacation payout upon termination, and immediately proceed to arbitration on said grievance;

2. Take the following affirmative actions which the Examiner finds are necessary to further the purpose 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 vacation pay-out to Deborah Karis.

(Footnote 1/ appears on the next page.)

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 27th day of June, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stuart Levitan /s/
Stuart Levitan, 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.

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.

This decision was placed in the mail on the date of issuance (i.e. the date appearing immediately above the Examiner's signature).

MILWAUKEE COUNTY

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

POSITIONS OF THE PARTIES

In support of its position that the County violated Sec. 111.70(3)(a)5, the Union asserts and avers as follows:

> The most definitive case on the question of arbitrability is the *Steelworkers Trilogy*, wherein the courts ruled that arbitration is the method for resolving disputes (assuming the collective bargaining agreement provides for arbitration) if the issue to be resolved is governed by the contract. Doubts over arbitrability are to be resolved in the affirmative, with arbitration being compelled unless it can be said with positive assurances that the arbitration clause is not susceptible to an interpretation that covers the dispute. Here, Section 2.21(2) of the parties' Memorandum of Agreement governs vacation payout at termination; at issue in the grievance is the amount of such vacation payout the grievant is owed.
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> As numerous arbitrators have held, former employes are entitled to utilize the grievance procedure to resolve disputes over rights that have accrued or vested during employment. A ruling adverse to the Union would result in employes who resign being at the mercy of the employer to live up to its contractual obligations.
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> The County's additional arguments regarding procedural questions are properly resolved in arbitration, but no objection is made if the examiner determines the issues are within his authority.
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> In that the amount of pay was minimal and County Human Resources Department managers had indicated they would make the disputed payout if Labor Relations agreed, the Union attempted to resolve the matter without resorting to the formal grievance process. When that clearly failed on February 23 the Union promptly and timely filed its grievance. In that doubts as to timeliness should be resolved against the forfeiture of the right to process grievances, the circumstances of this case warrant a ruling that the grievance was timely filed.
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> That the grievance was not filed at the first and second step cannot be a bar, in that the closure of the hospital where the grievant worked eliminated all first and second step supervisors. Also, the

County never raised this objection in its grievance response.

> The issue involved rights covered by the collective bargaining agreement that vested in the grievant during her employment with the County.

In support of its position that the complaint should be dismissed and the Union required to pay costs including reasonable attorney fees, the County asserts and avers as follows:

> The County's refusal to arbitrate was based upon the facts that the grievant did not follow the required steps of the grievance process; the grievant was neither an employe nor an employe covered by the labor agreement when the grievance was initiated; the grievance was improperly processed by the Union, and the grievance was not timely brought. Absent reference to the labor agreement and satisfying its procedural requirements, no duty to arbitrate is imposed upon the County.
>
> The record is barren of any evidence from the Union demonstrating a factual or contractual basis at all requiring the County to arbitrate the grievance. Having failed in that regard, the complaint should be dismissed out of hand.
>
> Deborah Karis voluntarily resigned from the County's employment on November 19, 1995, and received her final paycheck on November 29. If there was a grievable event, this was it. Even assuming, arguendo, that Karis was eligible to have access to the grievance process, the grievable event of the last paycheck started the clock ticking on the timeliness issue.
>
> Karis and the Union knew of the vacation payout issue long before the grievance was initiated. Yet for reasons unknown, it was not until April 4, 1996 that Karis initiated the grievance process. There is no doubt that the grievance was initiated in an untimely basis, contrary to the strict time limitations of the agreement. The Union offered no reason why the grievance was not initiated timely. No extension had been granted, and no evidence exists that one was ever requested.
>
> A prior WERC arbitration award ruled a grievance not arbitrable because the employes were not covered by the terms of the agreement. Given that the grievant was not covered by the labor agreement, the grievant did not have access to the contractual grievance/arbitration process.

> The fact that the Union steward wrote the grievance and handled its processing, with Karis only signing the form, makes the processing flawed and the grievance null and void. It is the employe, or the employe with a steward, who is to do certain things in a certain time frame. As the record indicates, Karis did none of these things. Further, no step was ever made, or granted, to bypass the first two steps in the process.
>
> The complaint should be dismissed. The grievance was not timely filed. It is a dead issue by the unambiguous terms of the labor contract. The grievance initiation was flawed. The grievance was null and void. Karis was not even a person employed by the County and covered by the terms of the contract. No duty exists for Milwaukee County to be required to arbitrate the matter.
>
> Moreover, the Union's persistence in pursuing this baseless claim interferes with Milwaukee County's benefit of the bargain and should itself by regarded as a union prohibited practice.
>
> The complaint should be dismissed and an order entered affording Milwaukee County such other and further relief as may be appropriate, including reasonable attorney fees.

DISCUSSION

The County has given a number of reasons why its refusal to proceed to arbitration on the Deborah Karis grievance was not violative of Sec. 111.70(3)(a)5, Stats. To quote our Supreme Court's decision in the seminal state case on arbitrability, every one of the employer's positions "is untenable." 2/

Section 111.70(3)(a)5, Stats., makes it a prohibited practice for a municipal employer:

> 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 the collective bargaining agreement or to accept the terms of such arbitration award, where previously the parties have agreed to accept such award as final and binding upon them.

2/ Denhart v. Waukesha Brewing Co., 17 Wis. 2d 44, 50 (1962).

The County freely acknowledges that it has refused to proceed to arbitration on the Karis grievance, but claims a variety of defenses. As stated in its brief, the County explained its refusal on the grounds of four purported facts: that the grievant did not follow the required steps of the grievance process; that the grievant was neither an employe or an employe covered by the labor agreement when the grievance was initiated; that the grievance was improperly processed by the union, and that the grievance was brought in a timely manner.

The legal standard governing a Commission determination of whether or not a particular grievance is subject to a collective bargaining agreement's arbitration clause was forged in the Steelworkers Trilogy. 3/ As promptly adopted and applied by the Wisconsin Supreme Court, the function of the court – and thus, by extension, the function of the Examiner and the Commission – is "confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract." 4/

The broad public policy understanding that "the very purpose of grievance arbitration is to prevent individual problems from blossoming into labor disputes," stretches back a full 30 years. 5/ That the Steelworkers test furthers "the strong legislative policy in Wisconsin favoring arbitration in the municipal bargaining context as a means of settling disputes and preventing individual problems from growing into major labor disputes," has been reaffirmed as recently as last year. 6/

But while the public policy is broad, the test for determining arbitrability is "very limited and narrow." 7/ A party is entitled to arbitration "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." (emphasis added). 8/

In the case now before me, the grievant alleges that the County made improperly inadequate

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3/ Steelworkers v. American Manufacturing Co., 363 U.S. 546 (1960); Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

4/ Denhart v. Waukesha Brewing Co., 17 Wis. 2d at 51, citing Steelworkers v. American Manufacturing Co., 363 U.S. at 367.

5/ Local 1226 v. Rhinelander, 35 Wis. 2d 209, 216 (1967).

6/ County of LaCrosse v. WERC, 182 Wis. 2d 15, 43 (1996), citing Jefferson Jt. School Dist. No. 10 v. Jefferson Ed. Assn., 78 Wis. 2d 94, 112 (1977).

7/ Racine Education Ass'n v. Racine Unified School District, 176 Wis. 2d 272, 281 (Ct.App., 1993; pet. den.)

8/ Jt. School District No. 10 v. Jefferson Ed. Asso., 78 Wis. 2d at 112, citing Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. at 583.

vacation pay-out upon her termination. The Memorandum of Agreement between the parties has extensive language on vacation accrual and liquidation, and provides for a grievance and arbitration process. It is impossible to assert that the agreement's language is not susceptible of an interpretation that covers the asserted dispute.

Indeed, the majority of the County's claimed defenses are, in one form or another, essentially variants on a claim that procedural deficiencies – failure to prepare forms properly, failure to file with appropriate officials, failure to comply with time limits -- make the grievance non-arbitrable.

The County has explicitly relied on these arguments in this complaint proceeding, and the Union has stated its willingness to have me address these matters of procedural arbitrability. I do believe the record is sufficiently developed to demonstrate the lack of merit in the County's arguments.

Contrary to the County's assertion that it was "for reasons unknown" that the grievance was not filed until April 4, 1996, the reason was most definitely known, and entirely justified – the Union's efforts to resolve the matter short of a formalized, adversarial process. The cause of labor peace is advanced when the parties can resolve disputes informally and on the basis of mutual satisfaction. The efforts by Karis herself, and Union President Candice Owley on her behalf were taken in an attempt to solve this problem without resorting to the grievance process. It was only when it became clear that the County was resolute in its opposition that the Union filed its grievance, which it then did in a timely manner. The Union should not be penalized for its efforts on behalf of labor peace.

Nor should the Union be penalized because the County's decision to close Doyne Hospital prevented the grievance from being filed with Karis' supervisor. As noted, there being no more Doyne Hospital, there were no more supervisors with whom to file.

The County also argues that Karis further finds herself afoul of the grievance process because a union steward drafted the grievance, rather than Karis doing it herself. The agreement, and prevailing public sector labor law, clearly authorize the steward's participation in the preparation of the grievance.

The County has stressed its concerns for the procedural requirements of the Memorandum of Agreement, especially the provisions of 4.02(6)(d)(6). I note that while 4.02(6)(d)(6) states that "failure on the part of the employe alone or with their steward to follow section 4.02(6)(d) 1,2,3,4 or 5 shall make the Grievance Initiation Form null and void," section 4.02(6)(d)(7) states that "the guidelines outlined in 4.02(6)(d) 1,2,3,4,5 and 6 are to clarify the grievance process," and that these "guidelines shall not be used as a bar to the right of an employe to file a grievance."

As I have stated, I believe the record demonstrates the lack of merit in the County's

procedural arguments. However, a procedural defense "is certainly for the arbitrator to decide." 9/ I thus leave a formal determination on the issues of procedural arbitrability where it belongs, with the arbitrator.

One argument which is arguably substantive is the County's contention that Karis was not entitled to the grievance process because she was no longer an employe, having resigned prior to the closing of Doyne Hospital. But this argument is no more persuasive than the County's procedural defenses.

For public employes given tenure by operation of civil service regulations or laws, or collective bargaining agreements, "public employment is a property right." 10/ Deborah Karis was an employe of the County, in a bargaining unit covered by the Memorandum of Agreement. Her rights to the benefits of that Agreement vested; the termination of her employment did not destroy her right to receive the benefits to which she was due.

In its Answer, the County requested that it be awarded attorney fees and other costs associated with defending this action. In its written brief, it further stated that "the union's persistence in pursuing this baseless claim interferes with Milwaukee County's benefit of its bargain and should itself be regarded as a union prohibited practice."

The Commission has held that attorneys' fees and other costs are warranted only in exceptional cases where the allegations or defenses are frivolous as opposed to debatable. 11/ A party whose legal theory of a case runs directly counter to 35 years of precedent is ill-suited to attack the other party for being frivolous or acting in bad faith.

9/ City of Madison, Dec. No. 26486-A (Engmann, 1990).

10/ Vorwald v. School District of River Falls, 167 Wis. 2d 549, 557 (1992).

11/ Wisconsin Dells School District, Dec. No. 25997-C (WERC, 8/90), citing Madison Metropolitan School District, Dec. No. 16471-B (WERC, 5/81).

I make no determination on the question of whether or not Karis is due further benefits coming under the terms of that Agreement; it is for an arbitrator to decide the merits of that claim. But I have determined that an arbitrator will hear this case and make that decision.

Dated at Madison, Wisconsin, this 27th day of June, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stuart Levitan /s/
Stuart Levitan, Examiner

Appendix A

Notice to All Employes of Milwaukee County represented by the Federation of Nurses and Health Professionals, Local 5001, AFT, 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, Milwaukee County hereby notifies you that:

1. Milwaukee County will not violate the Memorandum of Agreement and thereby commit a violation of Sec. 111.70(3)(a)5, Stats., by refusing to proceed to final and binding arbitration of grievances arising under the Agreement.

2. Milwaukee County will immediately proceed to final and binding arbitration on a grievance over the vacation pay-out of a bargaining unit member formerly employed at Doyne Hospital.

Dated this _____ day of _____, 1997.

MILWAUKEE COUNTY

_____

By _____
Title