STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN PROFESSIONAL POLICE ASSOCIATION/LAW ENFORCEMENT EMPLOYEE RELATIONS DIVISION, Complainant,

vs.

CITY OF WHITEWATER, Respondent.

Case 53
No. 53185
MP-3081

Decision No. 28972-B

Appearances:

Cullen, Weston, Pines & Bach, by **Attorney Gordon E. McQuillen,** 20 North Carroll Street, Madison, Wisconsin 53703, appearing on behalf of Wisconsin Professional Police Association/Law Enforcement Employee Relations Division.

Lindner & Marsack, S.C., by **Attorney James R. Scott,** 411 East Wisconsin Avenue, Milwaukee, Wisconsin 53202, appearing on behalf of the City of Whitewater.

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW AND AFFIRMING AND MODIFYING EXAMINER'S ORDER

On August 22, 1997, Examiner Richard B. McLaughlin issued Findings of Fact, Conclusions of Law and Order in the above matter wherein he concluded Respondent City of Whitewater had committed prohibited practices within the meaning of Secs. 111.70(3)(a) 5 and 1, Stats., by refusing to arbitrate a grievance. He ordered Respondent to cease and desist from refusing to arbitrate the grievance and to affirmatively proceed to arbitration with Complainant Wisconsin Professional Police Association (WPPA).

Respondent 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 filed written argument in support of and in opposition to the petition, the last of which was received November 3, 1997. Having considered the matter and being fully advised in the premises, the Commission makes and issues the following

No. 28972-B

ORDER

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

The Examiner's Order is affirmed as modified to require the City of Whitewater to take the following action:

B. Notify all of its employes represented by Wisconsin Professional Police Association by posting, in conspicuous places on its premises where employes are employed, copies of the notice attached hereto and marked "Appendix A." The notice shall be signed by an official of the City and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken to ensure that said notices are not altered, defaced or covered by other material.

Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days following the date of this Order, as to what steps have been taken to comply herewith.

Given under our hands and seal at the City of Madison, Wisconsin this 23rd day of April, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

A. Henry Hempe /s/
Henry Hempe, Commissioner

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

"APPENDIX A"

NOTICE TO ALL EMPLOYES

Pursuant to an Order of the WisconsinEmployment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, we hereby notify our employes that:

WE WILL proceed to arbitration with the Wisconsin Professional Police Association of the March 30, 1995 grievance filed by Sergeant Grant.

_____ _____
City of Whitewater Date

THIS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL.

City of Whitewater

MEMORANDUM ACCOMPANYING ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW AND AFFIRMING AND MODIFYING EXAMINER'S ORDER

The Pleadings

In its complaint, WPPA contends that the Respondent City violated Secs. 111.70(3)(a)5 and 1, Stats., by refusing to arbitrate a grievance. WPPA asks that the City be ordered to proceed to arbitration, post appropriate notices and pay WPPA's attorneys fees. Respondent City denies that it violated the above-noted statutory provisions by refusing to arbitrate the grievance and asks that the complaint be dismissed.

The Examiner's Decision

The Examiner concluded that the City's refusal to arbitrate the grievance violated Secs. 111.70(3)(a)5 and 1, Stats. He reasoned as follows:

The Court stated this "limited function" thus:

> The court's function 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. JT. SCHOOL DIST. NO. 10 V. JEFFERSON ED. ASSO., 78 WIS.2D 94, 111 (1977).

The JEFFERSON Court held that unless it can "be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute" the grievance must be considered arbitrable. Ibid., at 113.

The first element of the JEFFERSON analysis focuses on the arbitration clause. Section 1 of Article VI defines "grievance" as "any dispute involving the meaning or interpretation of the terms and provisions of this agreement." The parties dispute whether Grievance No. 95-181 questions any "term" or "provision" of the labor agreement. More specifically, the City contends the grievance fails to question insurance coverage under Article XIX because it questions the eligibility of a specific treatment for reimbursement under the City's contract with Wausau. That dispute is not, according to the City, arbitrable, since a party can be compelled to arbitrate "only those issues the parties have agreed by contract to arbitrate." AT & T TECHNOLOGIES, INC. V. COMMUNICATIONS WORKERS OF AMERICA, 475 US 643, 121 LRRM 3329, 3331 (1986). Wausau's

unilateral right to determine "medical necessity" under its insurance agreement with the City is not arbitrable under the labor agreement between it and the Association.

The parties' dispute concerning the first element of the JEFFERSON analysis turns on a tension between the first and second sentences of Section 1 of Article XIX. During the term of the 1993-95 labor agreement, the City changed insurance carriers from WPS to Wausau. The Association contends that the "presently covered under a comprehensive health care plan" reference within the first sentence precludes an alteration in coverage due to a change of carriers. The City counters that the second sentence obligates the City to pay a premium, not to provide any specific benefit other than those established by its contract with its chosen insurance company. Since the contracts between the City and WPS and between the City and Wausau provide the insurer the authority to determine the "medical necessity" of a treatment, there has been no coverage change.

As preface to addressing this dispute, it is necessary to determine the scope of the dispute. The grievance does not challenge the City's authority to change carriers as shown in Pechanach's letter to Boden of January 10, 1994. Nor can the grievance be read to put the medical component of the "medical necessity" determination underlying the treatment of Grant's spouse before an arbitrator. The narrow issue is whether a specific treatment for Grant's spouse, having been approved by WPS, could be denied by Wausau without violating Section 1 of Article XIX.

On the stipulation of facts posed here, the second sentence obligates the City to do no more than pay a premium for single and family health insurance coverage. Standing alone, it does not necessarily pose an interpretive issue. The sentence does not, however, stand alone. The terms of the first sentence are arguably less than clear and unambiguous in themselves and in their relationship to the second sentence. The first sentence can plausibly be read, as the City asserts, to do no more than note the existence of a health insurance plan for which the City, in the second sentence, agrees to pay the premiums. However, it can also plausibly be read, as the Association asserts, to note the existence of "a comprehensive health care plan" which presumes the existence of a specific level of benefits. This view cannot be summarily dismissed. Boden's letter of July 19, 1995, asserts the Wausau plan "benefits and administration . . . are consistent with benefits previously established in the (WPS) Plan." If the level of benefits provided by the insurers must, under Section 1 of Article XIX, be consistent, it is less than self-evident how a treatment regimen approved by WPS can be denied by Wausau without raising an issue concerning a denial of coverage. This poses a dispute regarding the interpretation of Article XIX, and thus meets the first element of the JEFFERSON analysis.

Neither party asserts the agreement contains a provision specifically excluding arbitration of an issue of insurance coverage. Thus, the second element of the JEFFERSON analysis has been met and Grievance No. 95-181 must be considered

substantively arbitrable.

Before closing, it is necessary to tie this conclusion more tightly to the parties' arguments. The City's citation of DRESSER INDUSTRIES is not inappropriate. DRESSER INDUSTRIES is, however, persuasive authority. More significantly, its persuasive force is undercut by the stipulated facts underlying the complaint. The Association plausibly contends that Wausau has denied a medical treatment approved by WPS. While this can be characterized as a function of the "medical necessity" determination, it can also be characterized as a denial of coverage. Doubt on this point poses a factual issue and an interpretive issue regarding the scope of Article XIX. This precludes concluding with "positive assurance" that Article VI, Section 1 cannot be read to cover Grievance No. 95-181.

The DRESSER INDUSTRIES court distinguished its conclusion from LOCAL 232, ALLIED INDUSTRIAL WORKERS V. BRIGGS & STRATTON CORP., 837 F.2D 782, 127 LRRM 2451 (7TH CIR. 1988). In BRIGGS & STRATTON, the court determined a change affecting retired non-represented employes could be considered a change in the terms of a retirement plan also covering represented employes. This change could, the court reasoned, call into question a contract provision which stated that "the existing Retirement Plan as amended by this agreement will be maintained during the term of this agreement" (127 LRRM at 2452). The arguable impact on Article XIX, Section 1 of the change in carriers on a treatment regimen paid by one insurer but denied by its successor makes the complaint as analogous to BRIGGS & STRATTON as to DRESSER INDUSTRIES.

The City's admonition that labor arbitrators are dubiously equipped to venture into an insurer's determination of "medical necessity" has persuasive force. The issue raised by Grievance No. 95-181 does not, however, focus on the medical basis of Wausau's "medical necessity" determination. Rather, the focus is on Section 1 of Article XIX. If the parties intended that section to set a level of benefits, and if WPS payment for the claim Grant made on Wausau can be considered within that level of benefits, then Wausau's denial of the treatment could be considered a violation of Article XIX. The correspondence surrounding Grant's OCI claim may indicate the possibility of evidence of bargaining history which conceivably could assist in the determination of the parties' intent regarding Article XIX if the grievance arbitrator finds ambiguity in the governing language. This type of inquiry, as opposed to the medical basis of a "medical necessity" claim, is grist for the mill of labor arbitration.

Nothing stated above should be read to indicate how Article XIX should be applied to the grievance or to establish any fact relevant to that application.

That the parties assert plausible views of the labor agreement says nothing about the determination of which of those views is more persuasive. The issue posed here is whether that determination should be made by an arbitrator. Under JEFFERSON, it should.

POSITIONS OF THE PARTIES ON REVIEW

Respondent City

The City contends the Examiner erred when he concluded that the City had violated Secs.111.70(3)(a)5 and 1, Stats.

The City argues that the grievance does not raise a "dispute involving the meaning or interpretation of the terms and provisions of this Agreement" and thus is not arbitrable. The grievance does raise issues regarding what treatment is "medically necessary" and such issues are for the insurance carrier to resolve -- not an arbitrator. While the grievant can pursue an appeal of the carrier's decision to the Commissioner of Insurance, the City alleges that the contract does not provide for arbitration of such disputes. The City contends the decision of the Seventh Circuit Court of Appeals in IAM V. WAUKESHA ENGINE DIV. OF DRESSER INDUSTRIES, 17 F. 3D 196 (1996) is directly on point and that the Examiner's attempt to distinguish this case should be rejected.

The City further asserts that if the Examiner's reasoning is affirmed, the flood gates of frivolous litigation will be unwisely and improperly opened as to health insurance, workers compensation and retirement matters which are not controlled by the City but by third party entities.

Given the foregoing, the City asks that the Examiner be reversed and the complaint dismissed.

Complainant WPPA

WPPA asserts the Examiner properly concluded the City was obligated to arbitrate the parties' dispute over insurance coverage. WPPA contends that the City simply repeats the arguments properly rejected by the Examiner. WPPA asks that the Examiner be affirmed.

DISCUSSION

As recited by the Examiner, our Supreme Court concluded in JEFFERSON that when determining whether a grievance is substantively arbitrable, the issue is whether there is a construction of the contractual arbitration clause that would cover the grievance "on its face" and whether any other provision of the contract specifically excludes arbitration of such grievances. JEFFERSON further provides that unless it can "be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute" the grievance is arbitrable.

Our Court has also cautioned against examining the merits of a grievance when determining its arbitrability. Thus, in JEFFERSON, AT 78 WIS. 2D 111, the Court stated:

The court has no business weighing the merits of the grievance.

In reviewing this matter, we are persuaded that the parties and the Examiner got caught up in the merit or lack thereof of the grievance in question. Stepping back from any question of the merit of the grievance and applying the teachings of JEFFERSON, we conclude that the grievance is

substantively arbitrable and on that basis have affirmed the Examiner's Order that the City proceed to arbitration.

The "Grievance Arbitration" provision in the parties' bargaining agreement states in pertinent part:

ARTICLE VI - GRIEVANCE ARBITRATION

> The parties agree that grievances are to be resolved as soon as possible and in order to do so, establish this procedure:
>
> Section 1. Definition. A grievance is defined as any dispute involving the meaning or interpretation of the terms and provisions of this Agreement. . . .
>
> . . .
>
> The arbitrator shall have the authority to determine issues concerning the interpretation and application of all articles or sections of this Agreement. While he shall have no authority to change any part of this Agreement, he may make recommendations for such changes which, in his opinion, would add clarity or brevity or which might avoid future controversy. The determination of the arbitrator shall be binding upon both parties, but his recommendations shall not be.

The grievance states:

> BASIS FOR GRIEVANCE: Failure to provide health sinurance (sic) coverage as agreed to be (sic) the labor agreement.

Article XIX, Section 1 of the contract states:

> Section 1. The City of Whitewater is presently covered under a comprehensive health care plan. The City will continue to pay the premiums for both the single and family plans including any increase any (sic) in premiums during the life of this contract.

Applying JEFFERSON, we find the parties' to have agreed to a broad arbitration clause which obligates the City to arbitrate " issues concerning the interpretation and application of all articles or sections of this Agreement." "On its face," the grievance raises an issue regarding the scope of health insurance benefits available under the "Agreement." Article XIX speaks to the existence of a "comprehensive health care plan." There is no "other" provision in the contract which "specifically excludes" arbitration of issues regarding the scope of health insurance benefits available under the contract.

Under JEFFERSON, we think it clear that the grievance is substantively arbitrable.

We acknowledge that the DRESSER case can be read as being at odds with our result and that federal and state law are closely aligned in the area of determining substantive arbitrability. Nonetheless, when we apply the law of Wisconsin to this dispute, we conclude that this grievance is substantively arbitrable. In the words of JEFFERSON, we find no basis for saying "with positive assurance that the parties' arbitration clause is not susceptible of an interpretation that covers the asserted dispute."

As "we have no business weighing the merits of the grievance," we do not do so. However, when arguing that it has no obligation to arbitrate, we think it clear that the City has done so. Simply put, the fact that the City may be proven correct that it has no obligation to pay the insurance claim in question is irrelevant to the question of whether the City is obligated to arbitrate the grievance.

Given the foregoing, we have affirmed the Examiner's Order that the City proceed to arbitration. As requested by WPPA in its complaint, we have also ordered the City to post the standard notice. We have not granted WPPA's request for attorney's fees because the City's position in this litigation is not frivolous. WISCONSIN DELLS SCHOOL DISTRICT, DEC. NO. 25997-C (WERC, 8/90).

Dated at the City of Madison, Wisconsin this 23rd day of April, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

A. Henry Hempe /s/
Henry Hempe, Commissioner

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

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