STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

GENERAL TEAMSTERS UNION, LOCAL NO. 662, Complainant,

vs.

CLARK COUNTY, Respondent.

Case 101
No. 54769
MP-3260

Decision No. 29091-C

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Attorney Naomi E. Soldon,** 1555 North Rivercenter Drive, Suite 202. P. O. Box 12993, Milwaukee, Wisconsin 53212, appearing on behalf of General Teamsters Union, Local No. 662.

Weld, Riley, Prenn & Ricci, S.C., by **Attorney Kathryn J. Prenn,** 4330 Golf Terrace, Suite 205, P. O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of Clark County.

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

On August 31, 1998, Examiner Lionel L. Crowley issued Findings of Fact, Conclusion of Law and Order with Accompanying Memorandum in the above matter wherein he concluded that Respondent had not violated Secs. 111.70(3)(a) 1, 3, 4, or 5, Stats., by refusing to arbitrate a grievance. He therefore dismissed the complaint.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

Complainant timely filed a petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats. The parties thereafter filed written argument in support of and opposition to the petition, the last of which was received December 10, 1998.

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

ORDER

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

Given under our hands and seal at the City of Madison, Wisconsin this 14th day of January, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

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

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

MEMORANDUM ACCOMPANYING ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The Pleadings

In its complaint, Complainant alleges that Respondent violated Secs. 111.70(3)(a)1, 3, 4 and 5, Stats., by: (1) refusing to arbitrate a May 30, 1996 grievance over the discharge of Edwards pursuant to the grievance arbitration provision of an existing bargaining agreement; and (2) reneging on a June 19, 1996 agreement to arbitrate said grievance.

In its answer, the Respondent denies violating Secs. 111.70(3)(a) 1, 3, 4 or 5, Stats., and affirmatively asserts that: (1) it has no obligation to arbitrate the Edwards grievance inasmuch as Edwards previously exercised his appeal rights under Sec. 59.26, Stats., and (2) it did not agree to arbitrate the grievance.

The Examiner's Decision

The Examiner concluded that the Respondent was not required to arbitrate the Edwards grievance by either the contractual grievance arbitration clause or any independent agreement to arbitrate. He reasoned that where, as here, Edwards chose to exercise his statutory rights under Sec. 59.26, Stats., to appeal his discharge to circuit court, Edwards was estopped from seeking arbitration and was bound by the "final and conclusive" nature of the judicial review he elected to pursue. Therefore, he dismissed the complaint in its entirety.

The Examiner stated:

> The County has argued that the only appeal available to Edwards is to the circuit court pursuant to Sec. 59.26(8)(b)6, Stats. The County has acknowledged that the Wisconsin Supreme Court has not determined whether a deputy sheriff's sole and exclusive appeal of the Grievance Committee's decision is to the circuit court. MILAS V. LABOR ASSOCIATION OF WISCONSIN, 214 WIS.2D 1 (1997). The undersigned also finds that it is unnecessary to make that determination. The parties' collective bargaining agreement contains a grievance procedure that culminates in final and binding arbitration. Article 6 of this agreement provides that no disciplinary action shall be taken against employes except for just cause. Thus, it would appear that the arbitration clause covers the issue of whether there was just cause for Edwards' termination. The Commission in DODGE COUNTY, DEC. NO. 21574 (WERC, 4/84) held that an employe under similar language has the right to appeal through the grievance procedure under the just cause requirement. However, the Commission went on to state that the grievance procedure is an available forum in which to challenge

a Grievance Committee disciplinary action only so long as the employe has not filed a Sec. 59.21(8)(b)6., Stats., appeal to circuit court. The rationale for this is that Sec. 59.21(8)(b)6, Stats., provides that if the circuit court upholds the decision, it is "final and conclusive." An agreement to arbitrate cannot be interpreted to challenge the same disciplinary action dealt with in the circuit court because to do so would contradict the statutory provision that the decision, if upheld by the circuit court, is "final and conclusive."

In the instant case, Edwards appealed to circuit court which upheld the County's Grievance Committee's decision to discharge Edwards and that decision by statute became final and conclusive, so the grievance procedure's arbitration provision cannot be invoked because it would impermissibly contradict the statutory provision. Thus, arbitration is not available to Edwards. All the examples of past practice and other cases cited by the Union are not on point because none involved a case where the discharged or disciplined employe went to circuit court and after receiving an adverse decision, then attempted to proceed to arbitration on the same discipline. In DEPERE, supra, a police officer attempted to appeal a disciplinary action previously appealed to circuit court and the Commission held that the City's refusal to proceed to arbitration did not constitute a prohibited practice.

The Union has argued that the County's June 19, 1996 letter constitutes a separate agreement to arbitrate the Edwards discharge. It is noted that the letter refers to the words, "at his discretion," meaning that it was Edwards' choice to appeal to arbitration and that parallels the Declaratory Ruling in DODGE COUNTY, SUPRA, where the Commission stated that it is "at the employe's option," to proceed to arbitration as long as there is no appeal to circuit court. Edwards had appealed to circuit court and the record is not clear whether the author of the letter knew this or not but Edwards could have dropped his court appeal and proceeded to arbitration, so it would appear that this was not a separate agreement by the County to arbitrate his discharge. But even if it were, it entails the same exclusion as the regular contractual agreement to arbitrate. No arbitration agreement can contradict the statute and the circuit court's order that the Committee's decision is final and conclusive precludes any agreement to arbitrate whether in the contract or by the letter of June 19, 1996.

Finally, the instant case is the reverse side of MILAS, SUPRA. In MILAS, the parties went to arbitration over the dismissal of a sheriff's deputy and after the arbitrator's award, the County sought to set aside the arbitration award, claiming the statutory appeal to circuit court was exclusive. The Court concluded that the doctrine of equitable estoppel applied and ordered the arbitrator's award reinstated. Here, Edwards went through the statutory appeal process in Sec. 59.26(8)(b)6, Stats., and now seeks arbitration because he is not satisfied with the circuit court's decision. Here too, Edwards is estopped. To

paraphrase the Court, permitting Edwards to question the circuit court's decision after he chose that venue and participated in that proceeding would give Edwards "two bites at the apple," arbitration and litigation, to obtain a favorable outcome. Edwards elected, at his option, to appeal to circuit court and having done so, he is estopped from seeking arbitration, and is bound by the court's order that the Committee's decision is final and conclusive. Therefore, there is no violation of Secs. 111.70(3)(a) 1, 3, 4 or 5, Stats., and the complaint has been dismissed in its entirety.

POSITIONS OF THE PARTIES ON REVIEW

Complainant

Complainant contends the Examiner erred by: (1) holding that the Respondent's refusal to arbitrate did not violate Secs. 111.70(3)(a)1, 3, 4 or 5, Stats.; (2) holding that the Respondent did not agree to arbitrate the grievance through a June 19, 1996 letter; (3) failing to find that the Respondent violated the Municipal Employment Relations Act by refusing to arbitrate the Complainant's (as opposed to Edwards') April 17, 1997 grievance; and (4) declining to decide whether Sec. 59.26, Stats., is the exclusive mechanism for appeal of a discharge.

The Complainant contends that the Wisconsin Supreme Court's decisions in BROWN COUNTY SHERIFF'S DEPARTMENT V. BROWN COUNTY SHERIFF'S DEPARTMENT NON-SUPERVISORY EMPLOYEES ASSOCIATION, 194 WIS.2D 265 (1995) and HEITKEMPER V. WIRSING, 194 WIS.2D 182 (1995) mandate the determination that the Respondent was obligated to arbitrate the Edwards grievance. Complainant asserts these decisions establish that grievance arbitration is an available mechanism for the review of discipline imposed on a deputy sheriff. Complainant alleges that there is no question that the clear language of the parties' contract provides for arbitration of grievances over employe discipline.

Citing BLACKHAWK TEACHERS' FEDERATION V. WERC, 109 WIS.2D 415 (CT. APP. 1982), Complainant argues that the availability of an alternative judicial review forum does not invalidate the terms of the collectively bargained arbitration agreement. By failing to apply this precedent and instead relying on DODGE COUNTY, DEC. NO. 21574 (WERC, 4/84) and CITY OF DEPERE, DEC. NO. DEC. NO. 19703-B (WERC, 12/83), Complainant contends the Examiner erred.

Complainant further alleges that even assuming it is generally permissible for the Respondent to refuse to arbitrate, Respondent waived that right in this case by specifically agreeing to arbitrate the Edwards' grievance in a June 19, 1996 letter. Complainant contends that the Examiner wrongly concluded otherwise.

Complainant asserts that as the party to the collective bargaining agreement, it possesses an independent right to pursue arbitration of a discharge grievance even where the employe has elected to pursue his statutory appeal. Thus, it asserts that the Examiner should have but did not conclude that the Complainant's April 17, 1997 grievance was subject to arbitration. Complainant notes that there is no "final and conclusive order" as to this grievance and thus that the Examiner's rationale for upholding the refusal to arbitrate Edward's grievance is inapplicable to the refusal to arbitrate the Complainant's grievance.

Lastly, Complainant asserts the Examiner erred by failing to determine whether Sec. 59.26, Stats., is the exclusive mechanism for review of disciplinary decisions. Complainant argues that resolution of this issue is appropriate to provide the parties with guidance as to this important question.

Given all of the foregoing, Complainant asks that the Examiner be reversed.

Respondent

Respondent contends that the Examiner correctly applied the law to the facts of this case and asks that the decision be affirmed.

Respondent asserts that the Examiner properly relied on existing WERC precedent when he concluded that a discharge grievance is not arbitrable where a deputy has already exercised the statutory option of appealing the discharge to circuit court. In DODGE and DEPERE, the Commission concluded that a "one or the other" approach is the correct way to harmonize the statutory right to collective bargaining over discharge issues with the availability of the statutory appeal mechanism provided by Sec. 59.26, Stats.

Contrary to Complainant, Respondent argues that existing judicial precedent does not mandate arbitration is the instant case. Indeed, Respondent contends that application of the rationale of CITY OF JANESVILLE V. WERC, 193 WIS.2D 492 (1995) would suggest that Sec. 59.26, Stats., is the exclusive mechanism for review and that arbitration irreconcilably conflicts with the statutory procedure.

Respondent denies that the June 19, 1996 letter was an agreement to arbitrate the discharge. The letter simply conveyed Respondent's willingness to waive the grievance hearing. Even assuming the letter did express a willingness to arbitrate, Respondent argues that there was nothing inappropriate with the Respondent raising the issue of arbitrability one month later. Lastly, Respondent asserts that had it proceeded to arbitration, it would have been acting contrary to the "final and conclusive" option which Edwards selected.

As to the Complainant's contentions regarding the April 17, 1997 grievance, Respondent asserts that this grievance in effect challenges the very same discipline which has already been subjected to a "final and conclusive" review by the courts. Thus, the Complainant's contentions as to this grievance should be rejected.

Lastly, Respondent contends that the Examiner did not err by failing to decide whether Sec. 59.26, Stats., is the exclusive review mechanism. Should the Commission conclude otherwise, the Respondent alleges that the Commission should follow the lead of the court in JANESVILLE and conclude that there is an irreconcilable conflict between grievance arbitration and the existing statutory right of appeal.

DISCUSSION

We affirm the Examiner.

In DODGE COUNTY, DEC. NO. 21574 (WERC, 4/84), the Commission held that a contractual grievance arbitration procedure is not an available forum for review of sheriff deputy discipline where the employe has filed a Chapter 59 appeal to circuit court. The Commission reasoned that in such circumstances, there would be an irreconcilable conflict between arbitral review and the "final and conclusive" nature of circuit court review.

The holding and rationale of DODGE COUNTY are dispositive of the Complainant's arguments on review. The jurisdiction of the circuit court under Chapter 59 was accessed by employe Edwards as to his discharge. Where the "final and conclusive" jurisdiction of the circuit court has been accessed, arbitration of the same matter cannot proceed without an irreconcilable conflict. Any arbitration proceeding under such circumstances would be invalid.

Thus, even if it were held that the County letter of June 19, 1996 constituted an independent agreement to arbitrate, such an agreement is no more enforceable under the instant circumstances than is the arbitration provision in the parties' bargaining agreement.

Thus, even if it were held that the refusal to arbitrate the April 17, 1997 grievance falls within the scope of the prohibited practices alleged in the complaint, and even if it were held that the Complainant's April 17, 1997 grievance regarding the discipline should properly be viewed as separate and distinct from the employe's grievance regarding the discipline, and even if the Complainant's grievance is not fatally flawed as seeking "two bites of the apple" (SEE MILAS V. LABOR ASSOCIATION OF WISCONSIN, 214 WIS.2D 1, 15 (1997)), arbitration of a Complainant grievance over the same issue already subjected to the "final and conclusive" jurisdiction of the circuit court would be invalid.

Contrary to Complainant, BLACKHAWK does not provide a persuasive basis for concluding that arbitration should be ordered in this case. BLACKHAWK involved the general question of whether it is a mandatory subject of bargaining to propose that contractual arbitration be a forum for statutory or constitutional claims as to which there were already other forums in which to seek redress. BLACKHAWK does not address the question of whether arbitration is available where, as here, another forum has already been accessed. BLACKHAWK certainly does not address the availability of arbitration in a scenario in which the disposition of the dispute in the already accessed forum has been statutorily designated "final and conclusive."

Contrary to Complainant, neither BROWN nor HEITKEMPER conflict with DODGE COUNTY or mandate a result other than that reached by the Examiner. Neither decision involved the question of whether arbitration is available where the "final and conclusive" jurisdiction of the circuit court has already been accessed. Indeed, as reflected by the Supreme Court's opinion in MILAS, it is an open question in the Court's mind as to whether arbitration is even an available "either/or" alternative forum to Chapter 59. While Complainant urges us to reach that question here, we follow the wisdom of the Court (and our Examiner) in declining that opportunity inasmuch as that question need not be answered to dispose of the case before us. We do note that this issue is presently being briefed in pending Commission declaratory ruling cases (MARATHON COUNTY and OUTAGAMIE COUNTY) and thus will be decided in the relatively near future.

Given all of the foregoing, we have affirmed the Examiner. 1/

1/ Even if an improper refusal to arbitrate were to be found, only Secs. 111.70(3)(a)5 and, derivatively (3)(a)1, Stats., would have been violated. There is no persuasive evidence the refusal was motivated by illicit animus so as to implicate Sec. 111.70(3)(a)3, Stats., and there was no refusal to bargain which would implicate Sec. 111.70(3)(a)4, Stats.

Dated at Madison, Wisconsin this 14th day of January, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

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

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

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