STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

UNIVERSITY OF WISCONSIN HOSPITAL AND CLINICS BOARD

Requesting a Declaratory Ruling Pursuant to Section 227.41, Wis. Stats.,
Involving a Dispute Between Said Petitioner and

AFSCME, COUNCIL 24, WISCONSIN STATE EMPLOYEES UNION, AFL-CIO, LOCAL 1942, CERTAIN EMPLOYEES BELONGING THERETO, AND THEIR INDIVIDUAL REPRESENTATIVES

Case 7
No. 57941
DR(S)-5

Decision No. 29784-D

Appearances:

vonBriesen, Purtell & Roper, by **Attorney Doris E. Brosnan,** 411 Building Office, Suite 700, P.O. Box 3262, Milwaukee, Wisconsin 53201-3262, appearing on behalf of University of Wisconsin Hospital and Clinics Board.

Boushea, Segull & Joanis, by **Attorney Helen Marks Dicks,** 124 West Broadway, Suite 100, Monona, Wisconsin 53716-3902, appearing on behalf of Pamela Blankenheim.

Lawton & Cates, S.C., by **Attorney P. Scott Hassett,** Ten East Doty Street, Suite 400, P.O. Box 2965, Madison, Wisconsin 53701-2965, appearing on behalf of AFSCME Council 24, Wisconsin State Employees Union, AFL-CIO.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

On September 9, 1999, the University of Wisconsin Hospital and Clinics Board filed a petition with the Wisconsin Employment Relations Commission seeking a declaratory ruling pursuant to Sec. 227.41, Stats., regarding the Board's obligations when processing and arbitrating grievances under an existing collective bargaining agreement and the State Employment Labor Relations Act.

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

On December 7, 1999, the Commission issued an Order Asserting Jurisdiction and Denying Motion to Dismiss.

Hearings on the petition were held in Madison, Wisconsin on April 5, April 6 and May 1, 2000 before Commission Examiner Peter G. Davis. The parties filed post-hearing briefs -- the last of which was received August 28, 2000. 1/

1/ On May 1, 2000, Jennifer Peshut asked that she be allowed to file an amicus curiae brief in this matter. In considering her request, we are persuaded that the standards set forth by the Seventh Circuit Court of Appeals in RYAN V. COMMODITY FUTURES TRADING COMMISSION, 125 F.3D 1062 (1997) provide a sound basis for evaluating amicus curiae requests. The Court therein held that it would normally grant permission to file an amicus brief only when (1) a party is not represented competently or is not represented at all; (2) the amicus has an interest in some other case that may be affected by the present case; or (3) the amicus has unique information or a unique perspective that can help the decision-maker.

Because Peshut has cases pending before Examiner McLaughlin (UNIVERSITY OF WISCONSIN-MILWAUKEE, CASES 465 AND 466) which could be affected by the outcome of this case, we accept Peshut's amicus brief under criterion (2) above.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. The University of Wisconsin Hospital and Clinics Board, herein the Board, is the employer of certain employees in the classified service of the State of Wisconsin. The Board is located at 600 Highland Avenue, Madison, Wisconsin.

2. AFSCME Council 24, Wisconsin State Employees Union, AFL-CIO, herein Council 24, and affiliated Local 1942, are parties to a July 6, 1997 - June 30, 2000 collective bargaining agreement with the Board which establishes the wages, hours and conditions of employment for certain Board employees including Pamela Blankenheim, herein Blankenheim.

The 1997-2000 agreement contains the following provisions:

GRIEVANCE PROCEDURE

SECTION 1: Definition

. . .

4/1/3 An employee may choose to have his/her designated Union representative represent him/her at any step of the grievance procedure. If an employee brings any grievance to the Employer's attention without first having notified the Union, the Employer representative to whom such grievance is brought shall immediately notify the designated Union representative and no further discussion shall be had on the matter until the appropriate Union representative has been given notice and an opportunity to be present. Individual employees or groups of employees shall have the right to present grievances in person or through other representatives of their own choosing at any step of the grievance procedure, provided that the appropriate Union representative has been afforded the opportunity to be present at any discussions and that any settlement reached is not inconsistent with the provisions of this Agreement.

. . .

SECTION 2: Grievance Steps

4/21/1 The Employer representative at any step of the grievance procedure is the person responsible for that step of the procedure. However, the Employer may find it necessary to have an additional Employer representative present. The Union shall also be allowed to have one additional representative present in non-pay status. Only one person from each side shall be designated as the spokesperson. By mutual agreement, additional Employer and/or spokesperson. By mutual agreement, additional Employer and/or Union observers may be present.

4/2/2 Pre-Filing: When an employee(s) and his/her representative become aware of circumstances that may result in the filing of a Step One grievance, it is the intent of the parties that, prior to filing a grievance, the Union representative will contact the immediate supervisor of the employee regarding the matter in a mutual attempt to resolve it. The parties are encouraged to make this contact by telephone. The employers State Dain lines will be used whenever possible.

4/2/3 Step One: Within twenty-one (21) calendar days of receipt of the written grievance or within twenty-one (21) calendar days of the date of the supervisor contact provided for in 4/2/2, whichever is later, the designated employer representative will schedule a hearing and respond to the Step One grievance. If the designated employer representative determines that a contact with the immediate supervisor has not been made, the employer representative will notify the Union and may hold the grievance in abeyance until such contact is made. By mutual agreement of the parties, the parties are encouraged to hold grievance hearings by telephone or video conferencing. The State Dain phone lines will be used whenever possible.

4/2/4 Step Two: If dissatisfied with the Employers answer in Step One, to be considered further, the grievance must be appealed to the appointing authority or its designee within fourteen (14) calendar days from receipt of the answer in Step One. Upon receipt of the grievance in Step Two, the employer will provide copies of Step One and Step Two to the Council 24 field rep as soon as possible. Within twenty-one (21) calendar days of receipt of the written grievance, the employer representative(s) will schedule a hearing with the employee(s) and his/her representative(s) and a representative of Council 24 (as Council 24 may elect) and respond to the Step Two grievance, unless the time limits are mutually waived. By mutual agreement of the parties, the parties are encouraged to hold grievance hearings by telephone or video conferencing. The State Dain phone line facilities will be used whenever possible.

4/2/5 Step Three: Grievances which have not been settled under the foregoing procedure may be appealed to arbitration by either party within thirty (30) calendar days from the date of the employers answer in Step Two, or from the date of which the employers answer was due, whichever is earlier, except grievances involving discharge, which must be appealed within fifteen (15) calendar days from the employers (sic) answer in Step Two, or from the date on which the employers answer was due, whichever is earlier, or the grievance will be considered ineligible for appeal to arbitration. If an unresolved grievance is not appealed to arbitration, it shall be considered terminated on the basis of the Second Step answers without prejudice or precedent in the resolution of future grievances. The prejudice or precedent in the resolution of future grievances. The issue as stated in the Second Step shall constitute the sole and entire subject matter to be heard by the arbitrator, unless the parties agree to modify the scope of the hearing.

4/2/6 The provisions of 4/2/2, 4/2/3, 4/2/4 and 4/2/5 will expire at the conclusion of the 1997-2000 Master Agreement, unless the parties agree to the

continuation of these provisions for the succeeding Master Agreement. If these provisions expire, 4/2/2, 4/2/3, 4/2/4 and 4/2/5 will revert to the language of the 1993-1995 Master Agreement.

Time Limits

4/2/7 Grievances not appealed within the designated time limits in any step of the grievance procedure will be considered as having been adjudicated on the basis of the last preceding Employer answer. Grievance snot answered by the Employer within the designated time limits in any step of the grievance procedure may be appealed to the next step within the designated time limits of the appropriate step of the procedure. The parties may, however, mutually agree in writing to extend the time limits in any step of the grievance procedure.

4/2/8 If the Employer representative with whom a grievance appeal must be filed is located in a city other than that in which the grievance was processed in the preceding step, the mailing of the grievance appeal form shall constitute a timely appeal if it is postmarked within the appeal period. Likewise, when an Employer answer must be forwarded to a city other than that in which the Employer representative works, the mailing of the answer shall constitute a timely response if it is postmarked within the answer period. The Employer will make a good faith effort to insure confidentiality.

Based on the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSIONS OF LAW

1. Pursuant to the terms of the 1997-2000 collective bargaining agreement, employees have the right to process grievances on their own or with a representative of their own choosing through all steps of the grievance procedure except arbitration.

2. Pursuant to the terms of the 1997-2000 collective bargaining agreement, employees do not have the right to arbitrate grievances on their own or with a representative of their own choosing.

3. Pursuant to the terms of the 1997-2000 collective bargaining agreement, when an employee elects to process a grievance on their own or through a non-Council 24 representative, a Council 24 representative has a right to be present at any meeting in which the grievance is discussed.

4. Pursuant to the terms of the 1997-2000 collective bargaining agreement, any grievance settlement reached between the Board and an employee who elects to process a grievance on his/her own or through a non-Council 24 representative cannot be inconsistent with the terms of the collective bargaining agreement.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issue the following

DECLARATORY RULING

The contractual rights and obligations of the Board, employees and Council 24/ Local 1942 under the 1997-2000 collective bargaining agreement regarding the processing and arbitrating of grievances are as set forth in Conclusions of Law 1-4.

Given under our hands and seal at the City of Madison, Wisconsin this 14th day of November, 2000.

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

University of Wisconsin Hospital and Clinics Board

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

POSITIONS OF THE PARTIES

The Board

Through its petition, the Board seeks a ruling as to the following questions:

A. Does the Board have an obligation to process a grievance over the objection of an employees' chosen collective bargaining representative?

B. Does the Board have an obligation to process a grievance with an employee's representative other than the Union, in the face of a threatened prohibited practice complaint by the Union?

C. Is an individual Board employee entitled to his or her own interpretation of the parties' collective bargaining agreement, even if it is different or contrary to the interpretation of the Union and the employer, or of past arbitrators of the contract? In other words, is the contract susceptible to different outcomes, interpretations and remedies based on grievance brought by individual employees?

D. If the Board must arbitrate grievances with both Union and non-Union employee representatives, how should it proceed if the Union representative and the non-Union representative disagree as to the interpretation of the contract?

E. The contract at Section 4/1/3 states that individual employees or groups of employees shall have the right to present grievances in person or through other representatives of their own choosing at any step of the grievance procedure, provided that the appropriate Union representative has been afforded the opportunity to be "present" at any discussions. Does this mean that the Union always has a right to be a party to the grievance? Does the Board have to deal with both the Union and the non-Union representative?

F. If the Board must arbitrate grievances with both Union and non-Union employee representatives, can it settle a grievance with the Union over the objection of the non-Union employee representative? Conversely, can it settle a grievance with a non-Union employee representative over the objection of the Union?

The Board argues that Section 4/1/3 of the contract between the Board and WSEU gives WSEU control over the contractual grievance/arbitration procedure contained therein.

The Board contends that this conclusion is consistent both with (1) the general labor law principle that the collective bargaining representative controls access to the grievance/ arbitration process and (2) with the specific holding in UW Milwaukee (AKA GUTHRIE), DEC. NO. 11457-E (SHURKE,12/75) AFF'D DEC. NO. 11457-H (WERC, 5/84) that this contract language "does not provide a clear and unequivocal right for individuals to act on their own behalf . . ."

The Board asserts that Section 4/1/3 is only a contractual restatement of the Sec. 111.83, Stats., right to present "grievances" to the employer through representatives of the employee's choosing so long as the collective bargaining representative is given the opportunity to be present and so long as any "adjustment" is consistent with union/employer contract. If the Commission were to hold that Section 4/1/3 gives individual employees the right to utilize the contractual grievance/arbitration procedure over the objection of the collective bargaining representative, the Board contends the Commission would thereby be overturning existing Commission and judicial precedent and creating great difficulty in contract administration and enforcement.

The Board argues that the well-established principle that the union "owns" the grievance procedure cannot be abrogated without clear and concise contract language or strong evidence that the parties intended to so interpret their contract. Here, the Commission has already concluded that the contract language does not "provide a clear and unequivocal right for individuals to act on their own behalf" and the evidence of past practice indicates that non-WSEU representatives have used the contractual grievance procedure only with WSEU's permission. The Board further contends that the evidence of "bargaining history" presented by Local 1942 does not establish that individual employees can access the contractual grievance/arbitration process over WSEU's objection.

The Board asserts Judge O'Brien's interpretation of the disputed contract language in PRELLER V. LITSCHER, DANE CO. CIR. CT. CASE NO. 97-CV-729 has no binding effect on the Commission and is contrary to labor law precedent.

Given all of the foregoing, the Board asks that the Commission issue a decision that:

> . . . upholds orderly and uniform contract interpretation and grievance administration, recognizes that the parties never intended to allow litigation or settlement of grievances with outside attorneys, and upholds the well established principle that the union owns the collective bargaining contract.

Blankenheim

Blankenheim argues that the issue before the Commission is one of contract interpretation which should be resolved by first looking at the contract language and then, if necessary, any bargaining history or past practice.

Blankenheim asserts that if the words of the contract are given their common meaning, the Commission should conclude that employees have the right to the representative of their choice at any step of the grievance procedure.

If the Commission concludes that it is necessary to examine evidence of bargaining history, Blankenheim contends that the bargaining history surrounding the 1997-2000 contract is consistent with her position in this litigation. She argues that the unsuccessful effort of WSEU and the Board to remove the disputed contract language clearly supports the view of the Local 1942 bargaining that the existing language gives employees the right to select their own grievance representative.

If the Commission concludes that it is necessary to examine evidence of past practice, Blankenheim argues that past practice is also supportive of her position as to the meaning of the contract language. Blankenheim notes the evidence of past practice must be carefully examined to distinguish between circumstances in which an employee elects to have WSEU represent them and WSEU ultimately decides not to arbitrate the grievance (a scenario which Blankenheim does not challenge as contrary to the contract) and circumstances in which an employee elects to be represented by someone other than WSEU.

As to the impact of the Commission's 1974 GUTHRIE decision, Blankenheim alleges that GUTHRIE supports her position because WSEU therein agreed that the employee is entitled to represent him or herself. Further, Blankenheim argues that GUTHRIE has limited impact because, at that time, the grievance procedure was not an employee's exclusive means of seeking redress because employees had the option of proceeding before the Personnel Commission.

Given all of the foregoing, Blankenheim asks for a ruling that employees have the contractual right to be represented by individuals of their own choosing at all steps of the grievance procedure.

WSEU

WSEU contends that the disputed contract language does not give employees the right to be represented by individuals of the employee's choosing. Rather, WSEU asserts that under the contract, it "owns" any grievance.

WSEU argues that existing labor law precedent strongly favors an interpretation of the contract which gives the union -- not employees -- control over grievances. Further, WSEU contends the Commission's own precedent in GUTHRIE interprets this very same contract language as leaving ownership of grievances in the hands of WSEU.

WSEU alleges that the evidence of past practice strongly supports its position. Both WSEU and the Board presented testimony that the disputed language has always been understood and applied in a manner consistent with WSEU control of the grievance process. WSEU asserts that the evidence presented by Blankenheim falls far short of contradicting the unequivocal testimony of WSEU and Board witnesses.

As to bargaining history, WSEU disputes Blankenheim's contention that this evidence is contrary to a contractual interpretation that WSEU owns the grievance procedure. Particularly in light of Judge O'Brien's decision in PRELLER, WSEU contends that its interest in amending the disputed language was limited to clarifying the parties' existing intent that WSEU controls the grievance procedure.

WSEU asserts that Judge O'Brien's decision in PRELLER is not binding on the Commission in this proceeding and urges that O'Brien's interpretation of the contract language should be restricted in its application to the PRELLER case.

Given all of the foregoing, WSEU asks that the Commission issue a declaratory ruling that the contract gives WSEU control over the grievance procedure.

DISCUSSION

The disputed contract language is found in Article IV of the July 6, 1997-June 30, 2000 labor agreement. That agreement states on page 1 that it was entered into

. . . between the UWHC Authority Board (hereinafter referred to as the Employer), and AFSCME, Council 24, Wisconsin State Employees Union, AFL-CIO, and its appropriate affiliated local, (1942) (hereinafter referred to as the Union), as representative of employees employed by the UWHC Authority Board . . .

Article IV states in pertinent part:

GRIEVANCE PROCEDURE

SECTION 1: Definition

. . .

4/1/3 An employee may choose to have his/her designated Union representative represent him/her at any step of the grievance procedure. If an employee brings any grievance to the Employer's attention without first having notified the Union, the Employer representative to whom such grievance is brought shall immediately notify the designated Union representative and no further discussion shall be had on the matter until the appropriate Union representative has been given notice and an opportunity to be present. Individual employees or groups of employees shall have the right to present grievances in person or through other representatives of their own choosing at any step of the grievance procedure, provided that the appropriate Union representative has been afforded the opportunity to be present at any discussions and that any settlement reached is not inconsistent with the provisions of this Agreement.

. . . .

SECTION 2: Grievance Steps

4/2/1 The Employer representative at any step of the grievance procedure is the person responsible for that step of the procedure. However, the Employer may find it necessary to have an additional Employer representative present. The Union shall also be allowed to have one additional representative present in non-pay status. Only one person from each side shall be designated as the spokesperson. By mutual agreement, additional Employer and/or Union observers may be present.

4/2/2 Pre-Filing: When an employee(s) and his/her representative become aware of circumstances that may result in the filing of a Step One grievance, it is the intent of the parties that, prior to filing a grievance,

representative will contact the immediate supervisor of the employee regarding the matter in a mutual attempt to resolve it. The parties are encouraged to make this contact by telephone. The employers State Dain lines will be used whenever possible.

4/2/3 Step One: Within twenty-one (21) calendar days of receipt of the written grievance or within twenty-one (21) calendar days of the date of the supervisor contact provided for in 4/2/2, whichever is later, the designated employer representative will schedule a hearing and respond to the Step One grievance. If the designated employer representative determines that a contact with the immediate supervisor has not been made, the employer representative will notify the Union and may hold the grievance in abeyance until such contact is made. By mutual agreement of the parties, the parties are encouraged to hold grievance hearings by telephone or video conferencing. The State Dain phone lines will be used whenever possible.

4/2/4 Step Two: If dissatisfied with the Employers answer in Step One, to be considered further, the grievance must be appealed to the appointing authority or its designee within fourteen (14) calendar days from receipt of the answer in Step One. Upon receipt of the grievance in Step Two, the employer will provide copies of Step One and Step Two to the Council 24 field rep as soon as possible. Within twenty-one (21) calendar days of receipt of the written grievance, the employer representative(s) will schedule a hearing with the employee(s) and his/her representative(s) and a representative of Council 24 (as Council 24 may elect) and respond to the Step Two grievance, unless the time limits are mutually waived. By mutual agreement of the parties, the parties are encouraged to hold grievance hearings by telephone or video conferencing. The State Dain phone line facilities will be used whenever possible.

4/2/5 Step Three: Grievances which have not been settled under the foregoing procedure may be appealed to arbitration by either party within thirty (30) calendar days from the date of the employers answer in Step Two, or from the date of which the employers answer was due, whichever is earlier, except grievances involving discharge, which must be appealed within fifteen (15) calendar days from the employers (sic) answer in Step Two, or from the date on which the employers answer was due, whichever is earlier, or the grievance will be considered ineligible for appeal to arbitration. If an unresolved grievance is not appealed to arbitration, it shall be considered terminated on the basis of the Second Step answers without prejudice or precedent in the resolution of future grievances. The prejudice or precedent in the resolution of future grievances. The issue as stated in the Second Step shall constitute the sole and entire subject matter to be heard by the arbitrator, unless the parties agree to modify the scope

of the hearing.

4/2/6 The provisions of 4/2/2, 4/2/3, 4/2/4 and 4/2/5 will expire at the conclusion of the 1997-2000 Master Agreement, unless the parties agree to the continuation of these provisions for the succeeding Master Agreement. If these provisions expire, 4/2/2, 4/2/3, 4/2/4 and 4/2/5 will revert to the language of the 1993-1995 Master Agreement.

Time Limits

4/2/7 Grievances not appealed within the designated time limits in any step of the grievance procedure will be considered as having been adjudicated on the basis of the last preceding Employer answer. Grievance snot answered by the Employer within the designated time limits in any step of the grievance procedure may be appealed to the next step within the designated time limits of the appropriate step of the procedure. The parties may, however, mutually agree in writing to extend the time limits in any step of the grievance procedure.

4/2/8 If the Employer representative with whom a grievance appeal must be filed is located in a city other than that in which the grievance was processed in the preceding step, the mailing of the grievance appeal form shall constitute a timely appeal if it s postmarked within the appeal period. Likewise, when an Employer answer must be forwarded to a city other than that in which the Employer representative works, the mailing of the answer shall constitute a timely response if it is postmarked within the answer period. The Employer will make a good faith effort to insure confidentiality.

As all parties have noted, the Commission has previously interpreted essentially the same contract language in UW-MILWAUKEE, AKA GUTHRIE, DEC. NO. 11457-E (SCHURKE, 12/75) AFF'D DEC. NO. 11457-H (WERC, 5/84). In that litigation, in contrast to the instant proceeding, the State of Wisconsin (the predecessor employer to the Board) and Council 24 both argued that the disputed contract language gave an individual employee the independent right to grievance arbitration.

In his opinion, Examiner Schurke extensively analyzed the contractual language as follows:

Right to Arbitration Independent of the Union

The collective bargaining agreement at hand is a contract between two clearly identified parties, the State and the Union. However, the collective

bargaining agreement also provides, at paragraph 30, for the presentation of a

grievance by an individual employe without the assistance of the Union. The exercise of such individual rights is clearly conditioned by the requirement that the management take no action on a grievance so filed until the Union has had notice and an opportunity to be present. Step 1 of the grievance procedure contemplates that the management representative could receive the written grievance from either an employe or a representative of an employe. Steps 2 and 3 of the grievance procedure also provide for a meeting between the management, the employe and his representative. In support of the contention that the Complainant here could have appealed his discharge grievance to arbitration under the terms of the contract, independent of the Union, the Employer relies on the language of paragraph 47 of the contract, as follows:

> 47 Section 8. Individual employees or minority groups of employees shall have the right to present grievances in person or through other representatives of their own choosing at any step of the grievance procedure, provided that the appropriate Union representative has been afforded the opportunity to be present at any discussions and that any settlement reached is not inconsistent with the provisions of this Agreement.

The Union's position on this particular issue has been equivocal, with certain Union witnesses taking the position during the first day of hearing that an independent right to arbitration existed, with the Union joining the Complainant and the Commission in briefs to the Supreme Court on the argument that it is not clear that the employe can initiate and complete the arbitration without the controlling influence of the Union, and with the Union returning in final briefs before the Examiner to the position that the Complainant failed to exercise an available independent right to arbitration.

The Examiner's conclusion that the Complainant had no independent right to arbitration is premised on precedents which indicate the impossibility of fulfilling the conditions which would apply if the Employer's position were to be adopted, as well as on the language of the agreement itself.

The language of paragraph 47 of the agreement is obviously very similar to the "individual rights" language of Section 111.83(1) of the State Employment Labor Relations Act, as it existed when that contract was negotiated and as it exists now. Interpreting the similar language of Section 111.70(4)(d)1 of the Municipal Employment Relations Act, the Commission has held that such statutory provisions implement the statutory right of employes to refrain from engaging in concerted activity, and do not grant employes contractual rights with respect to the processing of grievances under

grievance procedures negotiated in a collective bargaining agreement

between a management and a union. MILWAUKEE BOARD OF SCHOOL DIRECTORS (11280-A, B) 12/72. The Commission there recognized, in essence, two different meanings of the word "grievance", one being as the word is used in the individual rights provisions of various labor relations statutes 8/ and the other being as the word is used in a collective bargaining agreement with reference to the resolution of disputes arising between the parties to such agreement as to its interpretation and application. Accord for that view is found in EMPORIUM CAPWELL CO. V. WESTERN ADDITION COMMUNITY ORGANIZATION, ____ U.S. ____, 88 LRRM 2660 (1975) AT 88 LRRM 2665, footnote 12, narrowly confining the rights accorded by the first proviso to Section 9(a) of the NLRA. Here, the Employer and the Union have included in their collective bargaining agreement a statement of rights which parallels those narrowly construed statutory provisions. While their inclusion in the collective bargaining agreement would give rise to some independent contractual rights for employes, it is not clear that the rights so granted would be as all-pervasive as the Employer would have us find. 9/

By contrast to the right provided by statute for the presentation of grievances, no provision of the statutes provides a right to final and binding arbitration. Although endorsed by the statutes, the Courts and the Commission as a preferable means for the resolution of contract disputes, the arbitration process is entirely a matter of contract between a union and a management. Paragraph 47 of the instant collective bargaining agreement does not specifically

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8/ See also: First proviso to Section 9(a), National Labor Relations Act; and Section 11.105(1) (proviso) of the Wisconsin Employment Peace Act.

9/ The prospect of free access for individual employes to the higher steps of a contractual grievance procedure was also looked upon with disfavor by the Supreme Court in VACA:

> If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined, thus destroying the employer's confidence in the union's authority and returning the individual grievant to the vagaries of independent and unsystematic negotiation. Moreover, under such a rule, a significantly greater number of grievances would proceed to arbitration. This would greatly increase the cost of the grievance machinery and could so overburden the arbitration process as to prevent it from functioning successfully." 64

state a right to "arbitration" and such a right would have to be inferred from the use of the terminology which permits individuals to present grievances "at any step of the grievance procedure". It is noted that the arbitration provisions of the instant collective bargaining agreement are to be found in Article IV of that agreement which is entitled "GRIEVANCE PROCEDURE," and that the time period for appeal of a grievance to arbitration is stated in paragraph 35 of the agreement, which is headed as "Step Four" of the grievance procedure. However, the mechanics for the selection of an arbitrator, the agreed upon arrangements for the conduct of the arbitration proceeding, the limitations on the jurisdiction of the arbitrator and the agreement to accept the decision of the arbitrator as final and binding are stated separately in paragraphs 36 through 38 of the collective bargaining agreement.

Paragraph 47 of the collective bargaining agreement, like the statutory provisions which it parallels, does not provide a clear and unequivocal right for the collective bargaining agreement and, as between the union and one of the employes covered by that agreement, controls its interpretation and enforcement. Any settlement reached must be consistent with the provisions of the agreement. Several decisions of the Commission under Sections 111.06(1)(f) and (g) of the Wisconsin Employment Peace Act establish the principle that an arbitration award interpreting a collective bargaining agreement in one case will be enforced by the Commission as binding on a similar grievance under the same contract, and even on a similar grievance under a subsequent contract containing the same controlling language. 10/ The arguments favoring a finding of an independent right to prosecute grievances fit comfortably within the limitations imposed in the last clause of paragraph 47 while the grievance is being processed in the first, second and third steps of the grievance procedure. There, the Union would be able to announce its disagreement with the interpretation espoused by the individual grievant or even its agreement with the position being taken by the Employer, and the Employer would be able to act accordingly in making any settlement of the individual claim. However, those arguments break down in the context of a final and binding arbitration proceeding, where the ultimate result of settlement is taken out of the hands of the immediate parties to the proceeding (and would be even farther out of the hands of the Union sitting in a third party capacity limited to

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10/ WISCONSIN TELEPHONE COMPANY (4471) 3/57; AFF. MILWAUKEE CO. CIR. CT. 4/58; REV. on other grounds 6 Wis. 2d 243 (1959). WISCONSIN GAS COMPANY (8118-C, E, F) 4/68. HANDCRAFT COMPANY, INC. (10300-A, B) 7/71. PURE MILK ASSOCIATION (6584) 12/63; AFF. DANE CO. CIR. CT. 10/64.

notice and an opportunity to be present) and placed in the hands of the impartial arbitrator. Thus, the logical extension of the argument asserted by the Employer here leads to the anomalous result that the Union could, by force of an arbitration award issued in a proceeding between the Employer and an individual employe, find itself in a situation in which its collective bargaining agreement has been interpreted in a manner with which it does not agree and on which it has not had its day in court. Under the cases cited, such an interpretation might live on to haunt the Union until the contract language could be changed through negotiations.

Interpretation of the "any step" language of paragraph 47 as giving individual employes the right to arbitrate grievances independent of the Union comes directly into conflict with the language of paragraphs 35 through 38 of the agreement. Unlike the paragraphs concerning the early steps of the grievance procedure, all of which make reference to both "employe" and "representative", the paragraphs of the agreement concerned with the arbitration process place that process in the hands of the "parties". The Complainant herein cannot, by any stretch of the imagination, be described as a "party" to this collective bargaining agreement.

The Examiner notes that the Supreme Court prefaced its decision in this case with a brief statement of facts, and that certain of those characterizations have become the basis for arguments here that the Supreme Court has already ruled on some point in favor of one party or the other. As it relates to the issue at hand, the Court stated at 65 WIS. 2D 627 that: "An employee can present his own grievances or he may choose to have his union represent him." It is essential to keep in mind that the Court also recognized that the order getting reviewed did not include findings of fact and did not rule on the validity of defenses being asserted. 65 WIS. 2D 624 AT 632. The issues before the Supreme Court involved administrative law and procedure, and the case clearly did not turn on the validity of defenses or findings of particular facts. For a judgment to operate as res judicata and be conclusive evidence of a fact sought to be established by it, it must appear that the fact was a material and essential one, and that the judgment could not have been rendered without deciding the matter. KELLER V. SCHUSTER 54 WIS.2D 738 (1972). The Supreme Court's recitation of facts could as easily have begun with the paragraph, also found at 65 Wis. 2d 627, in which the filing of the complaint and the disposition of preliminary motions are described, and the Examiner thus concludes that he is not bound here by any of the characterizations of facts made by the Court on the exhaustion of contract remedies, fair representation and just cause issues.

> Under MAHNKE, SUPRA, the burden of proof on exhaustion of contract remedies is on the employer. The Employer has not established, by a clear and satisfactory preponderance of the evidence, that the Complainant has a right to arbitrate his grievance under the instant collective bargaining agreement independent of (and, if the position of the Union Respondent here is to be accepted as to its analysis and determination on the facts, in opposition to) the desires of the Union party to that collective bargaining agreement.

On appeal, the Commission affirmed Examiner Schurke's interpretation of the contract and concluded that an employee has the contractual right to process a grievance through a representative of his/her own choosing but does not have an independent contractual right to arbitrate the grievance.

We continue to find our GUTHRIE case analysis of this contractual language to be persuasive. 2/ The language of Article 4/1/3 clearly states that:

> Individual employees or groups of employees shall have the right to present grievances in person or through other representatives of their own choosing . . .

Article 4/2/4 echoes this right to select a grievance representative other than the Union/Council 24 when it states:

> **4/2/4 Step Two:**
>
> . . .
>
> Within twenty-one (21) calendar days of receipt of the written grievance, the employer representative(s) will schedule a hearing with the employee(s) and his/her representative(s) and a representative of Council 24 . . .

2/ Blankenheim argues that the GUTHRIE analysis is not persuasive because Council 24 therein argued a position contrary to the position taken herein and because employees in the GUTHRIE era also had access to the then Personnel Board for certain types of grievances. However, neither of these factors played a role in the Examiner/Commission's GUTHRIE contractual analysis and thus the changes in circumstances noted by Blankenheim are not contractually relevant to our analysis.

However, the right to arbitrate is limited to a "party." Like Examiner Schurke and the Commission in GUTHRIE, we conclude an individual employee is not a "party" but rather that "party" status is limited to the parties who entered into the Agreement (i.e. the Union (Council 24 and Local 1942) and the Board). Therefore, the right to process grievances through a representative of the employee's choosing is limited to the steps of the grievance procedure which precede arbitration. An individual employee does not have a right to arbitrate a grievance on their own or with a representative of their own choosing.

Given the relative clarity of the contract language and our prior analysis of essentially the same contract language, we need not examine the evidence of bargaining history and past practice presented in this proceeding as further indications of the parties' intent.

To the extent the Board has expressed concern about how it can process a grievance when presented with potentially conflicting positions from the employee's chosen representative and the Council 24 representative, Examiner Schurke persuasively notes that:

> . . . the Union would be able to announce its disagreement with the interpretation espoused by the individual grievant or even its agreement with the position taken by the Employer, and the Employer would be able to act accordingly in making any settlement of the individual claim.

Further, as provided by the contact, any settlement reached cannot be inconsistent with the existing Agreement. When combined with the reality that the Board is under no obligation to settle a grievance if it does not wish to do so, we think it clear that the Board can function effectively within the contractual obligations it has imposed on itself by agreeing to the disputed contact language.

The Board also seeks guidance as to the interplay between its contractual rights and obligations and the requirements of Sec. 111.83, Stats. Section 111.83(1), Stats., provides in pertinent part:

> Any individual employee, or any minority group of employees in a collective bargaining unit, may present grievances to the employer in person, or through representatives of their own choosing, and the employer shall confer with said employee or group of employees in relation thereto if the majority representative has been afforded the opportunity to be present at the conference. Any adjustment resulting from such a conference may not be inconsistent with the conditions of employment established by the majority representative and the employer.

This same statutory language is found at Sec. 111.70(4)(d)1, Stats., in the Municipal Employment Relations Act (MERA). While the Commission has not extensively

discussed Sec. 111.83(1), Stats., in prior cases, we have a long standing interpretation of

Sec. 111.70(4)(d) 1, Stats. Given the parallel statutory language and the common policies behind both SELRA and MERA, we find the interpretation of Sec. 111.70(4)(d)1, to be instructive and applicable to the interpretation which should be given Sec. 111.83(1), Stats. STATE V. WERC, 122 WIS.2D 132 (1985).

In MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 11280-B (WERC, 12/72), we stated the following as to the relationship between a contractual grievance procedure and the above quoted statutory language:

> Said statutory provision merely requires the Municipal Employer to confer with an individual employe or minority group of employes on grievances presented to the municipal employer. The provision implements Section 111.70(2) granting a "right" to employes to refrain from engaging in concerted activity for the purpose of collective bargaining. The right to present grievances and the duty of the employer to confer on those grievances, as required in the above quoted provision, does not grant the grievant involved the grievance procedure negotiated in the collective bargaining agreement between the Union and the Municipal Employer.

As evidenced by the above-quoted portion of MILWAUKEE, the statutory opportunity for individual employees to meet directly with their employer is separate and distinct from any such contractually bargained opportunity. The statutory opportunity to meet directly with the employer cannot be limited by a collective bargaining agreement. However, a union and employer have no obligation to bargain a contract which will give individual employees the right to independently process contractual grievances. The employee's statutory opportunity to meet with the employer is separate and distinct from the question of whether the employee has a contractual opportunity to meet with an employer over contractual grievances.

Dated at Madison, Wisconsin this 14th day of November, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

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

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

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