

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

**CALUMET COUNTY COURTHOUSE EMPLOYEES UNIT
LOCAL 1362, AFSCME, AFL-CIO, Complainant,**

vs.

CALUMET COUNTY, Respondent.

Case 107
No. 58495
MP-3600

Decision No. 29887-B

CALUMET COUNTY, Complainant,

vs.

**CALUMET COUNTY COURTHOUSE EMPLOYEES UNIT,
LOCAL 1362, AFSCME, AFL-CIO, Respondent.**

Case 109
No. 58937
MP-3651

Decision No. 29944-C

Appearances:

Shneidman, Myers, Dowling, Blumenfield, Ehlke, Hawks & Domer, Attorneys at Law, 217 South Hamilton Street, Suite 400, P.O. Box 2155, Madison, Wisconsin 53701-2155, by **Mr. Bruce F. Ehlke**, appearing on behalf of Calumet County Courthouse Employees Unit, Local 1362, AFSCME, AFL-CIO.

Davis & Kuelthau, S.C., Attorneys at Law, 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin 54902-1278, by **Mr. James R. Macy** and **Mr. Tony J. Renning**, on behalf of Calumet County.

Dec. No. 29887-B
Dec. No. 29944-C

**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

On January 27, 2000, Calumet County Courthouse Employees Unit Local 1362, AFSCME, AFL-CIO, filed a complaint with the Wisconsin Employment Relations Commission alleging that Calumet County, John Keuler, Elizabeth Davey and Melody Buchinger had committed prohibited practices within the meaning of the Municipal Employment Relations Act by their actions in response to a grievance arbitration award which constituted a refusal to comply with the award (Case 107).

On June 6, 2000, Calumet County filed a cross-complaint with the Commission alleging that Calumet County Courthouse Employees Unit, Local 1362, AFSCME, AFL-CIO had committed prohibited practices within the meaning of the Municipal Employment Relations Act by refusing or otherwise failing to implement the grievance arbitration award. (Case 109).

On July 20, 2000, the Commission issued its Order appointing Examiner David E. Shaw and consolidating the cases for purposes of hearing. Also on July 20, 2000, the Examiner issued a Notice of Hearing on Complaints in the matters which also directed the respondents in the respective cases to file an answer, which was to be served on the Commission and the complainants on or before August 18, 2000. Calumet County filed its answer in Case 107 on July 28, 2000.

On August 1, 2000, a notice was issued by the Examiner postponing hearing in the cases.

On September 8, 2000, Calumet County filed a Motion To Deem Material Facts In Cross-Complaint Admitted And To Declare Hearing On Material Facts Waived in Case 109. In support of the Motion, it noted that Calumet County Courthouse Employees Unit, Local 1362, AFSCME, AFL-CIO, hereinafter Local 1362, had failed to timely file an answer in Case 109 as of September 6, 2000. By letter received by the Examiner on September 13, 2000, Local 1362's legal counsel advised the Examiner that Local 1362 opposed the motion and requested that it be given until the end of September to file its answer. On September 19, 2000, Local 1362 filed its answer in Case 109 with the Commission, wherein it denied certain material facts alleged in the complaint. On September 28, 2000, the Examiner issued his Order denying Calumet County's motion. On October 9, 2000, Calumet County filed a petition with the Commission seeking review of the Examiner's order. By its Order of November 14, 2000, the Commission denied Calumet County's petition for review.

Hearing on the matters was held before the Examiner on November 30 and December 1, 2000 in Chilton, Wisconsin. A stenographic transcript was made of the hearing and the parties submitted post-hearing briefs by March 13, 2001.

Having considered the evidence and the arguments of the parties, the Examiner makes and issues the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. Calumet County, hereinafter the County, is a municipal employer with its principal offices located at 206 Court Street, Chilton, Wisconsin. At all times material herein, John Keuler held the position of Administrative Coordinator for the County; from February of 1999 until June, 2000, Elizabeth Davey held the position of Personnel Manager for the County; and since May of 1998, Melody Buchinger has held the positions of both Corporation Counsel and Director of the County's Child Support Agency.

2. Calumet County Courthouse Employees Unit, Local 1362, AFSCME, AFL-CIO, hereinafter the Union, is a labor organization affiliated with Wisconsin Council 40, AFSCME, AFL-CIO, a labor organization with its principal offices located at 8033 Excelsior Drive, Suite "B", Madison, Wisconsin. At all times material herein, Helen Isferding has held the position of District Representative in the employ of Wisconsin Council 40 and has been responsible for servicing Local 1362 with regard to collective bargaining and contract administration. At all times material herein, the Union has been the exclusive collective bargaining representative for all regular clerical and maintenance employees of the County employed in the Calumet County Courthouse, but excluding supervisory, managerial and confidential employees.

3. Lisa Roberts (formerly Lisa Fox), was a member of the bargaining unit set forth above and employed by the County as a Child Support Specialist until being terminated from County employment on July 29, 1998. Roberts filed a grievance contesting her discharge, which grievance was ultimately processed to arbitration before Arbitrator Sharon Gallagher in January of 1999.

4. Following hearing on Roberts' grievance and the parties' submission of post-hearing briefs, Arbitrator Gallagher issued her award. In said Award, she stated, in relevant part:

I turn now to the appropriate level of punishment for Fox's breaches of confidentiality and her mistreatment of fellow employees. This Arbitrator has rarely disturbed an employer's determination, in its discretion, of the level of discipline to be meted out. However, in this case, where Fox's work record was clean and she had been employed for 13 years, I believe termination is too harsh a penalty even for the serious misconduct she engaged in. In my view, Fox deserves another chance, the chance the County should have given her, (similar to the chance it originally offered her, and which she rejected) to complete assessment and treatment for her problems with alcohol and to return to work. Given Fox's proven misconduct, however, I have not ordered any backpay and I have made the reinstatement conditional upon her completion of assessment for alcohol addiction. I have also made it clear in my Award that any further breach of confidentiality by Fox after her return to work can result in her immediate discharge. Furthermore, if Fox refuses to complete assessment and treatment for her problem with alcohol, the County need not reinstate her, as her reinstatement and continued employment are also expressly conditioned upon her completion of such assessment and all necessary treatment. This award represents a last chance for Ms. Fox.

Based upon the relevant evidence and argument herein, I issue the following

AWARD

The County violated the collective bargaining agreement when it terminated Lisa Fox. Fox shall be reinstated, without backpay but with full seniority, to her former position or a position substantially similar thereto conditioned upon her completion of assessment for alcoholism. Fox's reinstatement and continued employment after her return to work are also expressly conditioned upon Fox's successful completion of any recommended treatment for her problem with alcohol after her reinstatement. In addition, should Fox commit any breach of confidentiality after her return to work, the County may discharge her forthwith pursuant to this Award. If Fox refuses to agree to assessment and treatment, her discharge shall stand.

Dated at Oshkosh, Wisconsin this 20th day of August, 1999.

Sharon A. Gallagher /s/

Sharon A. Gallagher, Arbitrator

5. Following issuance of Arbitrator Gallagher's Award, disputes arose between the Union and the County with regard to implementing that portion of the Award dealing with the reinstatement of Roberts and the conditions of her reinstatement. The parties disagreed on what was permitted or required by the Award with regard to the conditions for Roberts' reinstatement and continued employment with the County and whether those conditions had been satisfied. During this time, Roberts underwent an alcohol assessment by an assessor arranged for by the County, which resulted in a diagnosis of alcohol abuse and recommendation she undergo treatment. Roberts underwent a second assessment by an assessor to whom she was referred by her personal physician, which resulted in no diagnosis of alcohol abuse or dependency and no recommendation of treatment. The parties have been unable to resolve those disputes and Roberts has not been reinstated to the County's employ.

6. On January 27, 2000, the Union filed a complaint of prohibited practices with the Commission wherein it alleged that the County, John Keuler, Elizabeth Davey and Melody Buchinger had refused or failed to implement Arbitrator Gallagher's Award in violation of Sec. 111.70(3)(a)1, 5 and 7, Stats. At hearing on said complaint, the Union amended its complaint to remove Davey as a named respondent.

On June 6, 2000, the County filed a cross-complaint of prohibited practices with the Commission wherein it alleged the Union refused to cooperate in Roberts' treatment and return to work, and thereby, refused or failed to implement Arbitrator Gallagher's Award in violation of Sec. 111.70(3)(b)3, 4 and 6, Stats.

7. Arbitrator Gallagher's Award is ambiguous as to the conditions of Roberts' reinstatement and continued employment with the County and is silent with respect to areas of dispute regarding the manner of implementation of those conditions.

Based on the foregoing Findings of Fact, the Examiner makes the following

CONCLUSION OF LAW

The Award of Arbitrator Gallagher issued on August 20, 1999, with regard to a dispute between Calumet County Courthouse Employees Unit, Local 1362, AFSCME, AFL-CIO, and Calumet County, is ambiguous as to the conditions for Lisa Roberts' reinstatement and continued employment with Calumet County and the manner of implementation of those conditions.

Upon the basis of the foregoing Findings of Fact and Conclusion of Law, the Examiner makes and issues the following

ORDER

1. The questions of the conditions for Lisa Roberts' reinstatement and continued employment with Calumet County and the manner of implementation of those conditions are remanded to Arbitrator Gallagher for the purpose of issuing a supplemental award resolving those questions, as well as determining whether the conditions for Lisa Roberts reinstatement and continued employment with Calumet County have been met. In the latter regard, the record in these proceedings will be made available to the Arbitrator and further hearing in the matter may be conducted, as she deems appropriate.

2. The proceedings in these matters will be held in abeyance until the Examiner is notified that Arbitrator Gallagher has issued her supplemental award, at which time, absent any issues as to compliance, the complaints will be dismissed.

Dated at Madison, Wisconsin this 4th day of May, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

David E. Shaw /s/

David E. Shaw, Examiner

CALUMET COUNTY and CALUMET COUNTY COURTHOUSE
EMPLOYEES UNIT, LOCAL 1362, AFSCME, AFL-CIO

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The Union and the County proceeded to final and binding arbitration before Arbitrator Sharon Gallagher of a grievance regarding the termination of a County employee, Lisa Fox (now Roberts). On August 20, 1999, Arbitrator Gallagher issued her Award in the matter wherein she directed that Roberts be reinstated to her former, or a similar, position with the County, but made such reinstatement conditional. Disputes subsequently arose between the Union and the County as to what those conditions were, how the conditions were to be implemented, and whether those conditions were satisfied. Those disputes led to the Union's filing a complaint with the Commission alleging that the County had committed prohibited practices by refusing or failing to implement the Award. The County subsequently filed a cross-complaint with the Commission alleging that it was the Union that failed to implement the Award.

Union

The Union asserts that the Award is clear that Roberts' reinstatement was conditioned only on her "completion of assessment for alcoholism" and that no other condition on her reinstatement was mentioned. Roberts underwent two assessments, and even though the first assessment was a sham, she satisfied the condition for reinstatement. The County imposed conditions on Roberts' reinstatement that were in addition to those established by the Arbitrator, and thereby failed to implement the Award. Further, the first assessment was based on a selective review of the testimony from the arbitration hearing, rather than on the SUDDS-IV schedule and DSM-IV criteria, and thus was not a medically-supportable basis for the diagnosis and recommended treatment. On the other hand, the second assessment was performed based upon the appropriate criteria and did not result in a finding of alcohol abuse or need for treatment, but was ignored by the County.

The County also imposed additional conditions to Roberts' reinstatement, requiring that she first complete five weeks of preliminary treatment and that she receive a favorable response from the State to the filing of a Computer Access Request, before she would be permitted to return to work. The County then insisted on submitting a copy of the Award along with the request in order to sabotage her ability to receive a positive response from the State.

In its reply brief, the Union disputes the County's factual assertions. Roberts and Isferding did not meet with the first assessor for the purpose of persuading her to change her assessment; rather, they went there to discuss the treatment and obtain a copy of the records that were used in doing the assessment. Also disputed is the assertion that Roberts had a right to appeal the first assessment, but elected not to, when Roberts was never informed she had such a right. The Union also disputes the assertion that the second assessment was less credible than the first and that the Union did not discuss the possibility of having a second assessment with the County's representatives prior to obtaining the results from the second assessment. Last, the Union denies that Roberts refused to participate in the treatment. Roberts' conduct and her efforts to reach agreement on the treatment and when she would participate in such treatment evidenced her willingness to cooperate.

The Union again asserts the first assessment was unreliable and that Roberts' behavior does not meet the established criteria for diagnosing alcohol abuse. Conversely, the assessment performed by the second assessor utilized those criteria and was valid, finding no diagnosis of alcohol abuse and that treatment was not warranted. Again, the County added conditions for Roberts' reinstatement beyond what the Arbitrator imposed.

The Union requests that the County be ordered to reinstate Roberts immediately and pay back wages, plus interest, from the date of her discharge (pursuant to the parties' Agreement) or in the alternative, from the date she completed the first assessment, to take all steps necessary to have Roberts' Computer Access Request approved by the State, and to accept the second assessment, or in the alternative, participate in good faith with the Union in selecting a third assessor to obtain a reliable "tie-breaker" assessment.

County

The County asserts that the Award clearly and unambiguously provides that Roberts must agree to an assessment and treatment as a condition precedent to her reinstatement. The Arbitrator expressly used the word "and", rather than "or", thus, a strong argument exists that Roberts was required to actually complete the "assessment and all necessary treatment" prior to being reinstated. However, after agreeing to, and undergoing, the first assessment, Roberts refused to accept the results and during the assessment itself, made clear to the assessor she would not attend any treatment. It is the Union and Roberts that have frustrated the County's efforts to implement the Award. Thus, the Union's complaint is without merit.

Next, the County asserts it did not violate Sec. 111.70(3)(a)1, Stats., by not returning Roberts to work, as she failed to comply with the conditions precedent to her return set forth in the Award. Further, even where employer action may have a tendency to interfere with an

employee's exercise of their rights under Sec. 111.70.02, Stats., the Commission has not found a violation where the action was based on a valid business reason. Here, the County's actions were based on the Award, which clearly constitutes a valid business reason.

The County also asserts it has not violated Secs. 111.70(3)(a)5 and 7, Stats., by not returning Roberts to work, again, because she failed to comply with the conditions set forth in the Award for her being returned to work. The Union has the burden of proving by a clear and satisfactory preponderance of the evidence that the County has failed to accept and implement Arbitrator Gallagher's Award in violation of Secs. 111.70(3)(a)5 and 7, Stats. 1/

1/ The Union alleges violations of both Secs. 111.70(3)(a)5 and 7, Stats. Similarly, the County alleges violations of both Secs. 111.70(3)(b)4 and 6, Stats. However, Sec. 111.70(3)(a)7, Stats. and 111.70(3)(b)6, Stats., pertain only to interest-arbitration awards issued pursuant to 111.70(4)(cm), Stats.

The Union failed to meet that burden. Upon receipt of the Award, the County immediately arranged for an assessment to be conducted. Neither the Union or Roberts objected to the assessor selected to do the assessment, nor to the results of the assessment. The County made every effort to ensure that the assessment was fair and objective and upon receipt of the results of the assessment, offered to reinstate Roberts contingent upon her agreeing to the initial steps of the recommended treatment (as required by the clear language of the Award) and her completing the application for the required security clearance in order to access the computer system.

It is the Union, not the County, that has refused to accept and implement the Award by its refusal to cooperate with the County as relates to Roberts' treatment and return to work. In that regard, Roberts refused to agree to any treatment and she and Isferding inappropriately attempted to persuade the person who had performed the assessment to change her assessment and recommended treatment. Further, Roberts failed to complete the application for security clearance to use the computer system, which is required in order to perform her job. Roberts also refused to authorize the County to submit a copy of the Award, as requested by the State agency responsible for granting the security clearance. Despite already having a credible assessment, and without discussions, negotiations or input from the County, Roberts sought and obtained a second assessment in an attempt to frustrate the County's attempts to implement the Award. Further, Roberts continues to abuse alcohol and convey confidential information to the public.

In its reply brief, the County first asserts that Davey and Buchinger should be dismissed as parties to the Union's complaint. The Union amended its complaint at hearing to remove Davey as a respondent. As to Buchinger, the evidence shows that she was, at all times, merely

acting as a representative of the County and there is no evidence to support the Union's allegations that she inappropriately attempted to influence the first assessment. The County reiterates its assertions that the Award clearly required Roberts to agree to both an alcohol assessment and treatment as a condition precedent to reinstatement and that Roberts refused to do so. Conversely, the County made a good faith effort to implement the Award.

With regard to the Union's requested relief, the County asserts that an award of backpay would be contrary to the Award. As to taking steps to ensure Roberts obtains the required security clearance, the County could not have done more than it did. Finally, the second assessment lacks credibility and the County need not accept it.

DISCUSSION

As is apparent from the parties' arguments set forth above, both are able to cite wording from the Award in support of their respective positions regarding the conditions Roberts was required to meet in order to be reinstated, and both assert that wording is clear and unambiguous. As there is language in both the "Discussion" section and the "Award" section of the Award that each party can rely on to support its position, the Award is ambiguous and indefinite as to the conditions Roberts must satisfy in order to be reinstated to her employ with the County.

A number of disputes have also arisen between the parties regarding the mechanics of implementing the conditions for Roberts' reinstatement and continued employment, e.g., how is the assessor to be selected, what happens if the parties disagree as to the validity of the assessment, etc. The Award is silent in those regards.

In such circumstances, where the arbitrator's intent cannot be gleaned from the award itself, it is appropriate and necessary to remand the matter to the arbitrator for clarification. STATE OF WISCONSIN, DEC. NO. 26959-C (WERC, 12/92); (reversed on other grounds) WSEU v. WERC, 189 WIS. 2D 406, 412 (Ct.App., 1994).

In order to expedite matters and avoid unnecessary duplication of efforts, the Examiner has ordered that the record in these proceedings be made available to Arbitrator Gallagher for her consideration in resolving the parties' remedial disputes, and that further hearing may be held in those regards, as she deems appropriate and necessary.

As the parties' disputes have been remanded to the Arbitrator for resolution, no findings have been made with regard to the alleged prohibited practices and the proceedings in these matters have been held in abeyance pending the issuance of a supplemental award.

Dated at Madison, Wisconsin this 4th day of May, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

David E. Shaw /s/

David E. Shaw, Examiner

