STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BROWN COUNTY MENTAL HEALTH CARE CENTER EMPLOYEES, LOCAL 1901, AFSCME, AFL-CIO, Complainant,

vs.

BROWN COUNTY, Respondent.

Case 649
No. 59279
MP-3688

Decision No. 30016-A

Appearances:

Mr. David Campshure, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1566 Lynwood Lane, Green Bay, WI 54311, on behalf of the Union.

Mr. John C. Jacques, Assistant Corporation Counsel, Brown County, 305 East Walnut Street, P.O. Box 23600, Green Bay, WI 54305-3600, on behalf of the County.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Brown County Mental Health Care Center Employees, Local 1901, AFSCME, AFL-CIO (Union or Complainant) filed a complaint with Wisconsin Employment Relations Commission on October 13, 2000, alleging that Brown County had committed prohibited practices in violation of Secs. 111.70(3)(a)1 and 5, Stats., by failing and refusing to process the grievance of Catherine Christensen to arbitration. On December 8, 2000, the Commission appointed Sharon A. Gallagher, a member of its staff as examiner to make and issue findings of fact, conclusions of law and order as provided in Sec. 111.07(5), Stats. Hearing on the complaint was held on January 22, 2001, at Green Bay, Wisconsin. A stenographic transcript of the proceedings was made and received by February 1, 2001. The parties' initial and reply briefs were received by April 12, 2001, whereupon the record herein was closed. The Examiner, having considered the evidence and arguments of Counsel, makes and issues the following Findings of Fact, Conclusion of Law and Order.

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.

FINDINGS OF FACT

1. Brown County Mental Health Care Center Employees, Local 1901, AFSCME, AFL-CIO (hereafter Union or Complainant) is a labor organization within the meaning of Sec. 111.70(1)(h), Stats., and at all times material herein has been the exclusive collective bargaining representative of

> . . . all regular full-time and regular part-time employees as certified by the Wisconsin Employment Relations Board on April 17, 1967, pursuant to an election conducted by the Board on April 6, 1967, and pursuant to subsequent W.E.R.C. rulings.

The Union's principle offices are located at 8033 Excelsior Drive, Suite B, Madison, Wisconsin 53717. The representative of the Union in this matter is David A. Campshure, Staff Representative, with a mailing address of 1566 Lynwood Lane, Green Bay, Wisconsin 54311.

2. Brown County (hereafter County) is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and maintains its principle offices at 305 East Walnut Street, P.O. Box 23600, Green Bay, Wisconsin 54305.

3. At all times material herein, the Union and the County have been party to a series of collective bargaining agreements. The 1997-99 collective bargaining agreement (relevant herein) contained, in pertinent part, the following provisions:

> ARTICLE 21. INSURANCE
>
> Hospital and Surgical Insurance
>
> The Employer shall provide a Hospital and Surgical Insurance Group Plan, with major medical, during the term of this Agreement. New employees will be eligible for insurance coverage the first of the month following thirty (30) days of employment. Premiums for said plan shall be paid for as follows:
>
> Single Plan: All of premium shall be paid by the County for the Basic Health Plan.

Family Plan: Ninety-five percent (95%) of premium shall be paid by the County, and remaining five percent (5%) of the premium shall be paid by the employee for the Basic Health Plan.

. . .

Any changes in policy must be negotiated by the parties.

. . .

ARTICLE 26. GRIEVANCE PROCEDURE – DISCIPLINARY PROCEDURE

The parties agree that prompt and just settlement of grievances is of mutual interest and concern. Employees are encouraged to orally discuss concerns which might lead to a grievance with their supervisor prior to filing a grievance.

. . .

Any grievance or misunderstanding which may arise between the Employer and an employee (or employees) or the Employer and the Union, shall be handled as follows:

Step 1. The aggrieved employee and/or the union steward or officer shall present the grievance, in writing, within fourteen (14) days of knowledge of occurrence to the immediate supervisor. A meeting will be held between the immediate supervisor, the grievant and a union representative within seven (7) days to discuss the grievance. The immediate supervisor will respond in writing within five (5) days of the meeting.

Step 2. If a satisfactory settlement is not reached in Step 1, the grievance may be presented, in writing, to the Human Services Director or designee with a copy to the Human Resources Department. A meeting will be held within seven (7) days with the grievant and the Human Services Director or designee. The Human Services Director or designee will respond within seven (7) days, in writing, from the date of the meeting with the grievant.

Step 3. If a satisfactory settlement is not reached as outlined in Step 2 within fourteen (14) days after the receipt of the Human Services Director or designee's decision, the Union Committee and/or union representative will present the grievance to the Director of Human Resources. Unless mutually agreed, a meeting will be held with the Brown County Director of Human Resources, the grievant, a designated union representative, union staff representative and the Human Services Director of designee within fourteen (14)

days of the receipt of the grievance appeal, to resolve the grievance. The Brown County Director of Human Resources shall provide his/her written decision within fifteen (15) days after the grievance meeting.

Step 4. If a satisfactory settlement is not reached as outlined in Step 3, either party desiring arbitration must submit a request to the Wisconsin Employment Relations Commission requesting a staff arbitrator be appointed. The request for arbitration must be submitted within twenty (20) days of receipt of the written response at Step 3. The parties shall split the cost of filing fees to be effective January 1, 1997. The party filing the complaint will pay the complaint fee. The cost of providing a transcript, if both parties order a copy of the transcript, or any other costs associated with the arbitration shall be borne equally by the parties. Each party shall be responsible for the costs of its own witnesses as well as any transcript costs should only one (1) party order a transcript. The requesting party will provide notification of the request to the other party. The Wisconsin Employment Relations Commission shall appoint an arbitrator from the following mutually approved list:

William Houlihan
Karen Mawhinney
Richard McLaughlin
Daniel Nielsen
David Shaw

The parties agree that the decision of the arbitrator shall be final and binding on both parties to the Agreement. The arbitrator shall not have the authority to add to, subtract from, change, alter, modify or delete any of the specific terms or provisions of this Agreement, and his/her ruling will be restricted to an interpretation of the contractual part of this Agreement only.

In order to encourage the prompt and peaceful adjustment of all grievances, Employer and Union representatives agree to make a good faith effort to find an acceptable resolution to any and all grievances at the earliest possible step of the of the grievance procedure.

. . .

4. For more than 15 years, the County has been self-funded for its insurance program with unit employees, offering the "Basic Plan" which included pre-admission certification and medical benefits including physician services, surgery, as well as chiropractic care among other items. The major medical benefit had a lifetime maximum listed and deductibles were effective for both single and family plans. In addition, the Basic Plan included a provision for an "80/20 co-pay after satisfaction of the deductible for the calendar year."

5. Based upon its self-funded status, the County entered into a Plan Supervisor Agreement for administrative services of the County's "Basic Plan" with Employers Health Insurance Company effective January 1, 1996. This agreement provided in relevant part as follows:

. . .

This Plan Supervisor Agreement for administrative services is made and entered into by and between **Employers Health Insurance Company**, a Wisconsin corporation with principal offices in Green Bay, Wisconsin, and **Brown County**, with principal offices in Green Bay, WI.

This Agreement is effective on January 1, 1996.

In consideration of the mutual promises and covenants contained in this Agreement, together with all exhibits, the Employer and the Plan Supervisor hereby agree as follows:

ARTICLE I
Definitions

1.1 Agreement means this Plan Supervisor Agreement for administrative services.

1.2 Client means Brown County, the employer who has established and who maintains the plan.

. . .

1.4 Participant means an employee or former employee of the Client who is or may become eligible to receive a benefit, or whose beneficiaries may be or become eligible to receive a benefit under the provisions of the Plan.

1.5 Plan means the plan (or plans) maintained by the Client, or portions of that plan (or plans), with respect to which administrative services are to be provided under this Agreement by the Plan Supervisor. . . .

1.6 Plan Administrator (or Administrator) means the person named in the documents describing the Plan as responsible for the operation and administration of the Plan. If no such person is identified, then the Client will be deemed to be the Plan Administrator.

1.7 Plan Supervisor means Employers Health Insurance Company, acting in accordance with this Agreement.

ARTICLE II
General Provisions

2.1 The Plan Supervisor agrees to act as a contract administrator with respect to those duties it is obligated to perform under this Agreement. Accordingly:

(a) The Plan Supervisor may perform specific actions or conduct specified transactions only as authorized or provided in this Agreement.

(b) The Plan supervisor employs routine operating procedures, practices and rules in performing administrative services of the type described in this Agreement. The Plan Supervisor will follow these normal procedures, practices and rules, which are the responsibility of the Plan Supervisor, unless they are inconsistent with Plan management policies or practices which may be established by the Plan Administrator.

2.2 The Plan Administrator and not the Plan Supervisor is responsible for the overall administration of the Plan, including responsibility for management of the assets of the Plan.

2.3 The Plan Supervisor is not a trustee or sponsor with respect to the Plan or assets of the Plan, and it will not exercise discretionary authority or control respecting the disposition or management of Plan assets. The Plan Supervisor in [sic] not financially responsible for funding of plan benefits under any circumstances.

2.4 The Plan Supervisor agrees to perform its duties under this agreement using the same degree of ordinary care, skill, prudence, and diligence that a reasonable provider of administrative services would use in similar circumstances. This includes making a prompt effort to correct any mistake or clerical error which may occur due to actions or inaction by the Plan Supervisor undertaken in good faith once the error or mistake is discovered.

ARTICLE III
Duties of the Client

3.1 The Client agrees to provide to the Plan Supervisor documents and information concerning the Plan necessary to enable the Plan Supervisor to perform its duties under this agreement, including:

(a) Copies of the documents describing the Plan along with other appropriate materials governing the administration of the Plan. These documents and materials may include employee booklets, summary descriptions, employee communications significantly affecting the Plan, and any amendments or revisions.

(b) Plan management policies and practices which may have been established by the Client or the Administrator (see section 2.1(b)) and interpretation of the benefit provisions of the Plan made by the Administrator.

(c) Amendments to the Plan or changes to relevant Plan management policies or practices or interpretations made by the Client or the Administrator.

3.2 The Client agrees to provide accurate information to the Plan Supervisor as to the number and names of persons covered by the Plan, which may take into account evaluations of medical evidence of individuals regarding their acceptability for coverage under the Plan which are made by the Plan Supervisor in accordance with section 4.6(d). The Client agrees that it will keep this information current on at least a monthly basis.

3.3 The Client agrees to appropriately distribute to all Participants information and documents describing the Plan, including the summary description of the Plan which will identify the source of funding for Plan benefits.

3.4 The Client agrees to make available sufficient funds, on a timely basis, to honor all claims reimbursements under the Plan. Upon notice from the Plan Supervisor that additional funds are required, the Client agrees to make adequate funds immediately available to finance payment of approved claims.

3.5 The Client is responsible for compliance with all applicable provisions of law addressing the Client's duties respecting the Plan. This includes compliance with all legal reporting and disclosure requirements and adoption and approval of all required documents respecting the Plan. Accordingly, the Client is responsible for selecting legal and/or tax counsel to provide advice to the Client about the law and the Plan. The Client acknowledges that the Plan Supervisor cannot provide professional tax or legal services to the Client.

3.6 The Client must make full payment for services rendered under this Agreement, as provided in Article VI. . . .

. . .

3.8 The Plan Administrator and the Plan Supervisor agree to mutually cooperate with respect to claims determination, upon the initiative or request of either of them as appropriate, inclusive of providing needed information and advice respecting the Plan, settling issues respecting interpretation of the benefit provisions of the Plan or the application of administrative rules or policies, and communicating pertinent issues associated with the collectively-bargained aspects of the Plan.

. . .

ARTICLE IV
Duties of the Plan Supervisor

4.1 The Plan Supervisor is authorized, as provided in this Agreement, to make determinations with respect to claims for benefit payments under the Plan and to make payments of benefits in accordance with the provisions of the Plan and related interpretations of the benefit provisions of the Plan made by the Administrator.

(a) The Plan Supervisor agrees to accept claims for benefits under the Plan which are made in accordance with procedures established in the Plan documents and submitted for payment during the term of this Agreement

(b) The Plan Supervisor agrees to process claims and promptly approve or deny claims submitted for payment in accordance with the provisions of the Plan which are in effect and which have been communicated to the Plan Supervisor by the Client at the time the services are provided.

(c) The Plan Supervisor agrees to provide the Participant with a written explanation of the reason for claims denials, and information as to what steps may be taken if the Participant wishes to appeal a denied claim.

(d) Appeals of denied claims will be processed in accordance with the applicable provisions of the Plan. The Client acknowledges that the Plan Supervisor shall have the responsibility and authority to make final determinations with respect to claims.

. . .

6. Over the years, the parties have bargained specific insurance changes and coverage changes in the Basic Plan. In the last round of negotiations, the County and Union agreed for the 2000-2002 contract to change the deductibles from $100 per individual up to a maximum of $300 per family, which would have affected chiropractic coverage. The parties' tentative agreement document stated "coverage shall be as outlined in the final document."

7. During the parties' long-term relationship, they never stated that insurance issues and benefit levels would be exempt from the grievance procedure. Indeed, the only item not subject to the grievance procedure is a grievance regarding the termination of a probationary employee, as covered under Article 3 Probationary Period:

> All newly hired regular full-time and regular part-time employees shall be considered probationary for the first ninety (90) calendar days from the outset of employment. A probationary employee may be terminated without recourse to the grievance procedure. Continued employment beyond the ninety (90) calendar days of employment shall be evidence of satisfactory completion of probation and such employee at that time shall be eligible for all accrued benefits. This agreement does not cover on-call employees. . . .

The parties have never negotiated any other exclusions from the grievance procedure. No denial of benefits has ever been arbitrated between the parties in at least the last 15 years. Although the Basic Plan incorporated by reference into the collective bargaining agreement between the parties, the Union does not fine the Basic Plan. There is no reference in the Basic Plan to the parties' contract or to the grievance arbitration procedure thereunder.

8. Approximately 15 years ago, an employee's child had to go to the emergency room for an asthma attack. The Plan Supervisor at that time found that this was not a true emergency and denied the claim and refused to pay for the emergency room visit. The employee filed a grievance and the County settled the case at Step 1 or 2 with the County reimbursing the employee for the emergency room charges. This case did not go to grievance arbitration.

9. Prior to October 29, 1999, Christensen made a series of chiropractic claims to the Plan Supervisor which were denied. Christensen then appealed all of her denied chiropractic claims associated with the underlying grievance in this case and those appeals were denied. Christensen then filed the underlying grievance on November 8, 1999, after having exhausted all of her remedies with the Plan Supervisor/Administrator. That grievance read in relevant part as follows:

> On 10-29-99 employee received denial of insurance coverage for chiropractic service. This was on an appeal. Since 1995 employee has had to appeal claims for chiropractic service to get them paid. They are denied based on medical necessity.

The grievance cited the contract as a whole and Article 21, the insurance benefits section of the contract as being violated and requested that the "County instruct insurance company to pay for chiropractic claims past and future" and that the "County review its insurance policy and update it."

10. On April 3, 2000, the County wrote the following letter to then-Union Representative Bob Baxter regarding Christensen's grievance:

. . .

> This matter involves an alleged ongoing violation of a determination of medical necessity in regard to chiropractic treatments under the County's Basic plan. The Union brings this matter forward based on the contract as a whole, Maintenance of Benefits and Article 21 Insurance.
>
> This is no dispute but that Ms. Christensen has a degenerative condition in her back. The Union submits that medical necessity should be determined in this case. The Union states that this treatment has been prescribed by her chiropractor as a medical care provider under the plan. Ms. Christensen also points out that the treatment is what has kept her at work.
>
> The County's response is that Ms. Christensen has reached a plateau of healing in some of these instances and that the treatments constitute maintenance, which clearly is not covered under the Basic plan.
>
> Additionally, the Union appears to object to the requirements of the plan for appeal on determinations of medical necessity. The Union points to the fact that on several occasions, Ms. Christensen's claims have initially been denied and have later been approved after appeal under the plan.
>
> While I must confess some regret and sincere admiration for Ms. Christensen in her continued dedication to the worksite, I must deny this grievance based on the working of the plan document and in the interest of consistency.
>
> The plan document provides, in general terms, that maintenance is not covered under the plan. Such coverage has never been negotiated and would greatly impact the cost of the plan for all participants. Ms. Christensen has, in the past, been able to effectively show that many of her treatments do not constitute maintenance. I would encourage her to continue the appeals process, if necessary.
>
> In addition, the County continues to take the position that actions such as these are not grievable. The determination of medical necessity under the labor

> agreement and insurance plan has been left to the insurer, on appeal, as part of the past practice between the parties. There is absolutely no interest on the County's part in changing this practice, which is supported by language within the insurance agreement.
>
> In regard to the Union's concern regarding the necessity of so many appeals, it should be noted that the insurance company has begun a conscientious review of all these claims after ten visits. It also should be noted that the Union, to some degree, has objected to this procedure as a change in the plan. While this clearly is not a change in the plan, merely a new review as part of the administration of the plan, it should also be noted that this review should serve the purpose of catching these issues and reviewing them before an appeal becomes necessary. That is to say that this review process should serve the purpose of avoiding the necessity for so many appeals.
>
> . . .

11. On April 19, 2000, the Union filed for arbitration with WERC and Arbitrator Karen Mawhinney was designated arbitrator, pursuant to Article 26 of the labor agreement. On August 17, 2000, Mawhinney wrote to the parties as follows:

> I was assigned to be the arbitrator in the above case regarding Catherine Christensen's claim for coverage for chiropractic service. During attempts to schedule this case for hearing, the County has advised me that it does not concur in proceeding to arbitration.
>
> Accordingly, I am closing this file and the WERC will be returning the Union's filing fee in the near future.

12. The Union took the position that because the County is self-funded it can order the Plan Supervisor to take claims that are disputed based upon review of benefit levels. Christensen has had to file claims with the Plan Supervisor in the past and appeal denials of chiropractic services for her back condition. The Plan Supervisor has denied these claims based upon medical necessity. Christensen believes the County has the right to instruct the Plan Supervisor to pay her claims. The County changed third-party Plan Supervisors from Employers Health Insurance Company (Humana) to PBA effective for the 2000-02 collective bargaining agreement.

13. In January, 2001, the County issued a basic medical benefits book which contained the following explanations in plain language which is undisputedly applicable to this case:

> The employer is responsible for administration of this Plan. The employer shall have discretion to construe and interpret the Plan, its terms, decide all questions of eligibility for entitlement to benefits and determine amount, manner and time of any benefit under the Plan.
>
> The Plan Supervisor has been delegated discretionary authority by the employer to make determinations with respect to claims appeals under the Plan.

Effective January 1, 2001, PBA took over as the Plan Supervisor for the employer's self-funded program. It is undisputed that the Plan Supervisor cannot change the health program benefits; and that the level of benefits is subject to labor negotiations between the parties.

14. A grievance was filed by Judith Pakanich which she later dropped in 1999. This case arose because Pakanich's appeal of a denial of benefits by the Plan Supervisor on the grounds of medical necessity was denied and Pakanich took the Plan Supervisor and/or the County to small claims court. The Court dismissed Pakanich's case and stated that Pakanich needed to proceed under her collective bargaining agreement and exhaust her remedies thereunder. The parties disputed whether the County brought up the arbitrability of the Pakanich grievance during the lower steps of the Pakanich grievance procedure.

15. The County continues to assert that the Christensen grievance is not arbitrable and that it is precluded from processing the grievance as the employee's sole remedy is through an appeal to the third-party Plan Supervisor through its agreement with the County. The County has refused to proceed to arbitration on Christensen's November 8, 1999 grievance.

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

CONCLUSION OF LAW

1. The County's refusal to process the Christensen grievance through final and binding arbitration constitutes a prohibited practice in violation of Sec. 111.70(3)(a)5, and derivatively Sec. 111.70(3)(a)1, Stats., and also constitutes a violation of the party's collective bargaining agreement.

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

ORDER

To remedy its violation of Sec. 111.70(3)(a)5 and derivatively Sec. 111.70(3)(a)1, Stats., Respondent Brown County, its officers and agents, shall immediately:

1) Cease and desist from refusing to process the November 8, 1999 Christensen grievance up to and including final and binding arbitration;

2) Take the following affirmative action which the Examiner finds will effectuate the policies of the Municipal Employment Relations Act;

(a) Process the Christensen grievance as provided in the contractual grievance procedure up to and including final and binding arbitration.

(b) Notify all of its employees represented by Brown County Mental Health Care Employees, Local 1901, AFSCME, AFL-CIO, by posting in conspicuous places on its premises where employees are employed, copies of the Notice attached hereto and marked as Appendix "A". The Notice shall be signed by an official of the County 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 insure that said Notice is not altered, defaced or covered by other material.

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

Dated at Oshkosh, Wisconsin, this 21st day of May, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Sharon A. Gallagher /s/
Sharon A. Gallagher, Examiner

APPENDIX A

NOTICE TO ALL EMPLOYEES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policy of the Municipal Employment Relations Act, we hereby notify our employees that:

WE WILL process the grievance filed on November 8, 1999, by Catherine Christensen, up to and including final and binding arbitration with Brown County Mental Health Center Employees, Local 1901, AFSCME, AFL-CIO.

By

_____
Brown County

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.

BROWN COUNTY

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

In its complaint, the Union alleged that the County violated Sec. 111.70(3)(a)1 and 5, Stats., by failing and refusing to process the Catherine Christensen grievance through the parties' contractual grievance procedure through final and binding arbitration, thereby violating the parties' collective bargaining agreement. At the hearing, Complainant argued that all it needed to prove is that the grievance is arbitrable on its face. Complainant also urged that the County's evidence and argument went far beyond arbitrability to the merits of grievance.

The County argued that the contractual grievance arbitration provisions of Article 26 have no applicability to a disputed health insurance claim; that an arbitrator has no power under Article 26 to add to or subject from any term of the labor contract; and that the alleged grievance is not a dispute within the meaning the collective bargaining agreement, but relates only to a "medical necessity" dispute under the group health insurance plan. Because the health insurance plan has contained a dispute resolution procedure since at least 1972 and as a past practice has arisen to accept the authority of the Plan Supervisor to resolve such medical necessity claims disputes under the mandatory procedures set forth in the health insurance plan, the County urged that no contractual violation has occurred and no violation of the statute has occurred.

During the hearing, after Complainant's case in chief, the County moved to dismiss the complaint based upon the Commission's having no statutory authority to issue the requested remedial relief, as the underlying grievance is not substantively arbitrable. The Examiner denied the County's motion and the County proceeded to defend the complaint.

POSITIONS OF THE PARTIES

The Complainant

The Union noted that Christensen's insurance claim appeals were denied finally October 29, 1999, and that the grievance was filed on November 8, 1999. The grievance began at Step 3 and the County's denial was received on April 3, 2000. On April 19, 2000, the Union sought arbitration and Karen Mawhinney was assigned according to the parties' collective bargaining agreement. Ms. Mawhinney closed her file on August 17, 2000, because the County refused to arbitrate the grievance.

The Union argued that the grievance is clearly arbitrable. Although precedent states that an employer cannot be forced to arbitrate a dispute it has not agreed to submit to arbitration, here, the County had settled similar cases in grievance processing, including a case

concerning the way in which the Plan Supervisor calculated usual, customary and reasonable. The Union noted that the instant grievance challenged the County's authority to pay claims, not the actions of the Plan Supervisor. Indeed, in the Union's view, the County's agreement with the Plan Supervisor should not override or trump the Union's contract on this point.

The Union strongly urged that the merits of the grievance are for the Arbitrator and not the Commission in this case. In this regard, that Union noted that the County's arguments essentially go only to the merits of the grievance. In a case such as this, the Commission should presume arbitrability and resolve doubts in favor of arbitration.

The Union noted that Article 26 contains a very broad grievance definition — covering "any grievance or misunderstanding" — and it provides for final and binding arbitration. So long as the arbitration clause covers the grievance on its face and there is no provision of the contract which specifically excludes the grievance from arbitration, the case law indicates that the grievance should be found arbitrable. JT. SCHOOL DISTRICT NO. 10 V. JEFFERSON EDUCATION ASSOCIATION, 778 WIS.2D 94 (1977). Also, the contract does not prohibit arbitration of insurance disputes. In this case, the grievance stated that the contract as a whole and Article 21 in particular were violated by the County. As Article 21 states "any changes in health insurance must be negotiated," the issue whether the level of benefits has been changed by the Plan Supervisor's denial of Christensen's claims is for the Arbitrator to decide and the Commission should order arbitration in this case.

The Grievant is not precluded from seeking a contractual remedy in this case. Here, Christensen has exhausted all appeals to the Plan Supervisor and she was convinced that there has been a change in benefit payments, therefore the Union and Christensen have a right to grieve this case and to have it processed through arbitration. The County is self-insured and has total control over the insurance provision and the County, not the Plan Supervisor, is responsible for the administration of the plan. The Union noted that Human Relations Director Kalny stated herein that the County has discussed with the Plan Supervisor how it should handle claims. It simply runs against legislative policy and the policy favoring grievance arbitration to find that the County can require employees to go to court to pursue small claims actions if their insurance claims are denied by the Plan Supervisor.

In addition, the documents of record do not state that the Plan Supervisor's appeals process is an exclusive remedy. In all the circumstances, the Complainant sought a finding that the County violated Sec. 111.70(3)(a)1 and 5, Stats., and an order that the County cease and desist from failing and refusing to go to arbitration in this case and an affirmative order that the County arbitrate the Christensen grievance.

The Respondent

The County noted that although the witnesses had differing opinions regarding past practice and bargaining history, as Article 26 is clear and unambiguous and restricts the arbitrator's jurisdiction "to an interpretation of the contractual part" to contract disputes only,

such differing opinions should not be relevant in this case. The County further noted that it is bound only to "provide" and "pay premiums" for health insurance benefits and that the contract states that "policy" coverage cannot be changed except by collective bargaining. The County noted that the parties did not agree to any changes in the health insurance plan during the last round of negotiations. Here, the Grievant does not claim a labor contract violation but rather alleges that the Plan Supervisor's failure to pay a benefit based on medical necessity was incorrect. Therefore, this is not a dispute as to the application of a specific provision of the collective bargaining agreement and the Grievant should have simply appealed the Plan Supervisor's decision further or taken the Plan Supervisor to court over the matter. This is not the type of dispute the County has agreed to arbitrate.

The grievance is meaningless in its reference to the contract as a whole, as it does not relate or refer to any specific contract language. Nor is the reference in the grievance to Article 21 specific enough, as Article 21 does not require payment of claims, only that the County pay premiums. The Union, therefore, is essentially seeking to change the Plan appeal process by its complaint herein. The County asserted that the Union and the County have assented to the pre-existing appeal provisions of the Plan; that the Plan Supervisor has expertise and is impartial in deciding claims; and that the County does not have ultimate authority over disputed claims — only the third-party Plan Supervisor does this. Thus, the Union is seeking to have the Arbitrator second guess the third-party Plan Supervisor's denial of claims. This would certainly be inappropriate in grievance arbitration. As the subject matter of the dispute is not arbitrable under the plain, limiting language of the arbitration clause in Article 26, the County urged that the complaint be dismissed in its entirety.

The County noted that there are arbitration cases which hold that the failure to pay specific benefits is not arbitrable. As the grievance here asks the Arbitrator to direct the County to pay Christensen's claims or to direct the Plan Supervisor to pay her claims, and there is no claim in the grievance that the level of benefits previously covered were reduced, the grievance is clearly not arbitrable in the County's view. The County noted that the labor agreement cannot override the Plan or the Plan Supervisor agreement.

As arbitration is available to the Union under the labor contract, yet only employees may appeal the denial of an insurance claim under the Plan and the Plan does not mention arbitration, the County urged that the grievance is not arbitrable and the Grievant should have pursued her claim either through the Plan or in court. Finally, the County noted that insurance law covers the issue as to what is "medically necessary" and whether an administrator has denied a benefit in bad faith or was otherwise arbitrary or capricious in its decision making. This type of dispute is for the Courts, not the Arbitrator, to determine.

The Complainant's Reply

The Union noted that in the past, Christensen had had claims denied and then after her appeal, the claims were paid. Here, all her claims were denied and then denied on appeal. Yet, similar claims had been paid previously. Therefore, the Union urged that there is reason

to believe that the County and/or the Plan Supervisor had changed the manner in which chiropractic benefits were applied and claims were paid. The Union noted that the insurance policy is incorporated into the contract by direct reference to the Basic Health Plan therein. Thus, the grievance on its face is covered by the parties' grievance procedure because Article 21 (cited in the grievance) states that the parties must negotiate changes in the policy. In addition, the Union noted that no contract provision specifically excludes arbitration of this grievance.

Despite the County's inappropriately argument regarding the merits of the grievance at the complaint hearing herein and in its brief, it is for the Arbitrator to determine the merits of the grievance. Although the insurance clause of the contract has not changed, if the County or the Plan Supervisor change the definition of medical necessity or of usual, customary and reasonable, then benefit levels would change. This is essentially what the Union has asserted occurred in the underlying grievance. The Union noted that arbitrators have found arbitrable insurance company's denials of benefits where the labor contract incorporates the insurance policy into the collective bargaining agreement by reference or the parties have agreed on the insurance in the contract. This has clearly occurred between the parties in this case and the grievance must be found arbitrable.

DISCUSSION

The complaint herein alleges that the County violated Sec. 111.70(3)(a)5 and derivatively, Sec. 111.70(3)(a)1, Stats., by failing and refusing to arbitrate Christensen's November 8, 1999, grievance. The statute makes it a prohibited practice for a municipal employer to "violate any collective bargaining agreement previously agreed upon by the parties . . . including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement . . . ."

For many years, Wisconsin courts have essentially followed the teachings of the United States Supreme Court in the Steelworkers Trilogy cases 1/ regarding the limited role of courts in determining arbitrability. DEHNART V. WAUKESHA BREWING CO., INC., 17 WIS.2d 44 (1962). In JT. SCHOOL DISTRICT NO. 10 V. JEFFERSON EDUCATION ASSOCIATION, 78 WIS.2D 94 (1977), the Wisconsin Supreme Court stated the limited function court (or an administrative body) could engage in in addressing arbitrability:

> 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.

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 found arbitrable. *Ibib*, at 113.

1/ UNITED STEELWORKERS v. AMERICAN MFG CO., 363 U.S. 564, 46 LRRM 2414 (1960); UNITED STEELWORKERS v. WARRIOR & GULF NAVIGATION CORP., 363 U.S. 574, 46 LRRM 2416 (1960); UNITED STATES STEELWORKERS v. ENTERPRISE WHEEL & CAR CORP., 363 U.S. 593, 46 LRRM 2423 (1960).

Here, the parties' grievance procedure, at Article 26, defines a grievance as

> Any grievance or misunderstanding which may arise between the Employer and an employee (or employees) or the Employer and the Union. . . .

Article 26 also states that the decision of the Arbitrator "shall be final and binding on both parties to the Agreement," and it summarizes the Arbitrator's authority as follows:

> The Arbitrator shall not have the authority to add to, subtract from, change, alter, modify or delete any of the specific terms or provisions of this Agreement, and his his/her ruling will be restricted to an interpretation of the contractual part of this Agreement only.

Christensen stated in her grievance the grounds upon which she grieved as follows:

> On 10-29-99 employee received denial of insurance coverage for chiropractic service. This was an appeal. Since 1995 employee has had to appeal claims for chiropractic service to get them paid. . . .

The grievance cited Article 21 and the contract as a whole as being violated. Article 21 of the effective labor agreement states:

> The Employer shall provide a Hospital and Surgical Insurance Group Plan, with major medical, during the term of this Agreement. . . Any changes in policy must be negotiated by the parties.

In addition, Article 21 specifically references the "Basic Health Plan" which is the insurance plan between the parties and states what portion of the premium, if any, will be paid by employees and what portion will be paid by the County.

Based upon the record evidence, it is clear that the parties have agreed to a very broad arbitration clause which includes not only any grievances but also any misunderstandings between the parties or between an employee or employees and the employer. On its face, therefore, the Christensen grievance raises a "grievance or misunderstanding." It is significant that no other definition of a grievance appears in the labor agreement and no reference is made in this definitional portion of Article 26 to violations of specific provisions of the labor agreement. 2/ As Article 21 specifically references the Basic Health Plan and there is no

other provision of the labor agreement which would "specifically exclude" grievances from arbitration which involve the scope of health insurance/chiropractic benefits under the contract, the JEFFERSON standards have been satisfied and the grievance is clearly substantively arbitrable. Put slightly differently, I cannot say "with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." JEFFERSON, 78 WIS.2D at 113.

2/ The County has cited, in its support, language contained in Step 4 of Article 26 which relates exclusively to the Arbitrator's authority and the proper scope of an arbitration award. In my view, this language does not qualify the definition of a grievance detailed several paragraph's above it in Article 26.

It is, therefore, unnecessary to address the many arguments made by the County herein (as well as some of the Union's) as they essentially go to the merits of the underlying grievance. Such arguments are for the Arbitrator. They are irrelevant to the question whether the County is required to arbitrate the instant grievance, which is the sole jurisdiction of the Examiner herein. See, JEFFERSON, SUPRA, 78 WIS.2D at 113; CITY OF WHITEWATER, DEC. NO. 28972-B (WERC, 4/98).

Based upon the record evidence as well as the relevant argument, I have found that the County violated the statute as alleged and I have ordered the County to arbitrate the underlying grievance and to post an appropriate Notice.

Dated at Oshkosh, Wisconsin, this 21st day of May, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Sharon A. Gallagher /s/
Sharon A. Gallagher, Examiner

SAG/ans
30016-A.doc