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-B

Appearances:

Shneidman, Hawks & Ehlke, S.C., by **Attorney Bruce F. Ehlke,** 217 South Hamilton, P.O. Box 2155, Madison, Wisconsin 53701-2155, appearing on behalf of Brown County Mental Health Care Center Employees, Local 1901, AFSCME, AFL-CIO.

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

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

On May 21, 2001, Examiner Sharon A. Gallagher issued Findings of Fact, Conclusion of Law and Order with Accompanying Memorandum in the above matter wherein she determined that Respondent Brown County had committed prohibited practices within the meaning of Secs. 111.70(3)(a)5 and 1, Stats., by refusing to arbitrate a grievance. She ordered Respondent to arbitrate the grievance and to post a notice to employees.

On May 29, 2001, Respondent filed a petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's decision pursuant to Secs. 111.70(4)(a) and 111.07(5), Stats.

The parties thereafter filed written argument in support of and in opposition to the petition, the last of which was received July 16, 2001.

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.

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

ORDER

A. Examiner Findings of Fact 1-2 are affirmed as modified to delete the underlined words and add the **bold** words:

> 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
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> > . . . 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 **principal** offices are located at 8033 Excelsior Drive, Suite B, Madison, Wisconsin 53717. The representative of the Union in this matter is David A. Campsure, Staff Representative, with a mailing address of 1566 Lynwood Lane, Green Bay, Wisconsin 54311.
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> 2. Brown County (hereafter County) is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and maintains its principle **principal** offices at 305 East Walnut Street, P.O. Box 23600, Green Bay, Wisconsin 54305.

B. Examiner Findings of Fact 3-5 are affirmed.

C. Examiner Findings of Fact 6-8 are set aside.

D. Examiner Findings of Fact 9-11 are renumbered Findings of Fact 6-8 and affirmed.

E. Examiner Findings of Fact 12-15 are set aside.

F. Examiner Conclusion of Law is affirmed as modified to delete the underlined words:

> 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.

G. Examiner Order is affirmed.

H. Examiner Appendix A is affirmed as modified below to add the date on which the Notice to All Employees is posted.

Given under our hands and seal at the City of Madison, Wisconsin this 27th day of November, 2001.

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

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 the Brown County Mental Health Center Employees, Local 1901, AFSCME, AFL-CIO.

By ______________________________ _______________
Brown County Date

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

Brown County

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

The Pleadings

In its complaint, Brown County Mental Health Care Center Employees, Local 1901, AFSCME, AFL-CIO, alleges that Brown County has violated Secs. 111.70(3)(a)5 and 1, Stats., by refusing to arbitrate a grievance. In its answer, Brown County asserts that the grievance is not substantively arbitrable and thus that it did not violate Secs. 111.70(3)(a)5 and 1, Stats., by refusing to arbitrate the grievance.

The Examiner's Decision

The Examiner concluded that the County's refusal to arbitrate the grievance did violate Secs. 111.70(3)(a)5 and 1, Stats. To remedy the violations, she ordered the County to arbitrate the grievance and to post a notice to employees. She reasoned as follows:

> 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. . . .
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> 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 (sic) addressing arbitrability:
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>> 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,* (sic) 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 (sic) 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.

POSITIONS OF THE PARTIES ON REVIEW

The County

The County argues that the Examiner erred and should be reversed.

The County contends that the grievance in question is not the type of dispute that the County has agreed to arbitrate under Article 26 of the bargaining agreement. The County asserts that under Article 26, only disputes that require interpretation of specific terms and provisions of the agreement are arbitrable. The County alleges that this dispute does not require such interpretation.

The County asserts that the Commission and the courts have previously accepted "the established legal principle that arbitrators do not resolve disputes relating to the medical necessity of health benefit claims." The County argues the grievance in question presents just such a medical necessity dispute. The County contends that there cannot be an arbitrable dispute under the bargaining agreement unless an allegation is made that the County hasn't paid the premium for the health plan coverage or that the County has changed the benefits previously provided. Neither allegation is present here.

The County further alleges that, in any event, Local 1901 lacks standing to arbitrate the Plan Supervisor's denial of the claim in question. It argues that only the affected employee can seek redress for the denial and that her forum for seeking such redress is not and cannot be grievance arbitration.

Local 1901

Local 1901 asserts the Examiner should be affirmed.

Local 1901 argues that the County's position in this litigation is that the grievance lacks merit. Whether the County is or is not correct about the ultimate merit of the grievance, Local 1901 contends that the grievance is arbitrable under the collective bargaining agreement.

DISCUSSION

It is important at the outset to state that the issue before us is limited to deciding whether these parties contractually agreed that arbitration can be used to decide the matter raised in the grievance. That issue will be decided based on the contract language these parties chose to use in their contract. Thus, contrary to the County's argument, there is no Wisconsin law that places disputes of the type raised by the grievance off limits to arbitration. Whether a particular type of dispute is or is not subject to the grievance arbitration process is for the parties to the contract to decide.

Both parties have correctly cited our decision in CITY OF WHITEWATER, DEC. NO. 28972-B (WERC, 4/98) as containing law relevant to the disposition of this case. We therein stated:

> As recited by the Examiner, our Supreme Court concluded in JEFFERSON that when determining whether a grievance is substantively arbitrable, the issue is whether there is a construction of the contractual arbitration clause that would cover the grievance "on its face" and whether any other provision of the contract specifically excludes arbitration of such grievances. JEFFERSON further provides that unless it can "be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute" the grievance is arbitrable.
>
> Our Court has also cautioned against examining the merits of a grievance when determining its arbitrability. Thus, in JEFFERSON, AT 78 WIS.2D 111, the Court stated:
>
>> The court has no business weighing the merits of the grievance.
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>> In reviewing this matter, we are persuaded that the parties and the Examiner got caught up in the merit or lack thereof of the grievance in question. Stepping back from any question of the merit of the grievance and applying the teachings of JEFFERSON, we conclude that the grievance is substantively arbitrable and on that basis have affirmed the Examiner's Order that the City proceed to arbitration.
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> . . .

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

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

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

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

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 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 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.

. . .

As reflected by the above quoted contractual language, these parties have agreed that "Any grievance or misunderstanding which may arise between the Employer and an employee (or employees) or the Employer and the Union . . ." is subject ultimately to arbitration.

The grievance filed states the following under the "Circumstances of (sic) Facts" section:

> 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 "Article or Section of contract which was violated if any" section of the grievance states:

> Local 1901 Contract as a whole.
> Insurance benefit.

The "Request for Settlement or corrective action desired" section of the grievance states:

> County instruct insurance company to pay for chiropractic claims past & future.
> County review its insurance policy and update.

We think it clear from the above-quoted text that it is a "grievance or misunderstanding . . . between the Employer and an employee . . ." Thus, as to the first part of the Wisconsin Supreme Court's JEFFERSON analysis, we conclude that there is a construction of the contractual arbitration clause that covers the grievance "on its face".

The JEFFERSON analysis next requires that we determine whether there is some provision of the contract that specifically excludes arbitration of this "grievance or misunderstanding". The County argues that there is such a specific exclusion in the contract -- citing the Article 26 language that provides:

> 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.

We do not find this County argument persuasive. The above quoted language establishes a restriction on the arbitrator's authority when ruling on the "grievance or misunderstanding" presented to the arbitrator but the language does not restrict the types of "grievances or misunderstandings" that can come before the arbitrator.

The contract reflects that these parties knew how to draft language that specifically excludes a type of "grievance or misunderstanding" from the scope of the grievance procedure. For example, Article 3 of the contract states "A probationary employee may be terminated without recourse to the grievance procedure." The contract does not contain a similar provisions as to denials of insurance coverage.

The County has also argued that this dispute cannot be arbitrated because it is between the employee and the County -- not Local 1901 and the County. As reflected in the above-quoted Article 26 contract language, the grievance arbitration procedure covers both types of disputes -- employee/County and Local 1901/County. Thus, whatever the appropriate configuration of this dispute may be, Article 26 allows either to proceed to arbitration. Thus, we reject this argument.

Given all of the foregoing, we affirm the Examiner's conclusion that the County has contractually agreed to arbitrate this grievance. In the words of JEFFERSON, we find no basis for saying "with positive assurance that the parties' arbitration clause is not susceptible of an interpretation that covers the asserted dispute."

In closing, as we stated in WHITEWATER, the merits of the grievance are not relevant to the question of whether the County has contractually agreed that the grievance can be pursued to arbitration. Thus, our decision in no way bears on the merits or lack thereof of the

grievance in question. That issue is for the arbitrator to decide. Consistent with the foregoing, we have set aside all Examiner Findings of Fact that could bear on the merits of the grievance.

Dated at Madison, Wisconsin this 27th day of November, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

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

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

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