STATE OF WISCONSIN | CIRCUIT COURT BRANCH III | BROWN COUNTY

BROWN COUNTY,

Petitioner,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION and LOCAL 1901, AFSCME, AFL-CIO,

Respondents.

Decision No. 30016-C

DECISION

Case No. 01-CV-1893

[NOTE: This document was re-keyed by WERC. Original pagination has been retained.]

Background

Petitioner Brown County (hereinafter "the County") has brought this case before the court pursuant to Wis. Stat. § 227.52, seeking review of a decision of the Wisconsin Employment Relations Commission (WERC). On November 27, 2001 the WERC affirmed the decision of one of its Hearing Examiners holding that the County had committed a prohibited practice under the Wisconsin Municipal Employment Relations Act (MERA)[1] by refusing to process an employee grievance through final and binding arbitration. The County argues that the grievance is not arbitrable because it is not a dispute that involves the interpretation of, or a change in, a clause of the collective bargaining agreement. Respondents argue that the grievance arbitration procedure provided for in the collective bargaining agreement is sufficiently broad to include the grievance in this case, and is therefore an arbitrable dispute. Because it cannot be said with "positive assurance" that Christensen's

[1] Wis. Stat. §§ 111.70-111.77.

grievance is of a type that is excluded from the arbitration procedure outlined in the agreement, **the decision of the WERC is affirmed**.

Facts

Brown County has established a Basic Health Plan (the Plan) for the benefit of its employees. Catherine Christensen (Christensen) is an employee of petitioner at its Mental Health facility. Christensen receives access to the Plan and its benefits through Article 21 of the collective bargaining agreement between Brown County and Brown County Mental Health Center Employees (the agreement).[2] Brown County Mental Health Center Employees are represented by Local 1901, AFSCME, AFL-CIO (the union), who join the WERC as respondents in this action. Petitioner self-funds the Plan, but at all relevant times Employers Health Insurance Company administered the Plan under contract.

Christensen suffers from a degenerative back condition and receives chiropractic treatments in order to alleviate its symptoms. Christensen had received reimbursement for these treatments through the Plan in the past. In October of 1999, her claims for reimbursement were denied on the grounds that the chiropractic treatments were not "medically necessary." The Plan provides a process through which benefit denials may be appealed. Christensen exhausted those appeals, receiving no relief from the initial decision.

Christensen then filed a grievance through the union in relation to the denial of the benefits. Article 26 of the agreement outlines its grievance procedure. It states that it is applicable to "any grievance or misunderstanding which may arise between the employer and

[2] The first sentence of the article states: "The Employer shall provide a Hospital and Surgical Insurance Group Plan, with major medical, during the term of this agreement."

an employee." The County refused to process the grievance through final and binding arbitration, citing its belief that the denial of Christensen's claim was not subject to the grievance procedure.

On October 13, 2000 the union filed a complaint with the WERC alleging that petitioner committed a prohibited practice under MERA by refusing to process Christensen's grievance.[3] A hearing was held in front of a WERC Hearing Examiner on January 22, 2001, and on May 21, 2001 the Hearing Examiner issued a decision agreeing that the County committed a prohibited practice by refusing to process the grievance, and ordered the dispute to arbitration. The County sought review of the Hearing Examiners' decision by filing a petition for review with the WERC on May 29, 2001. On November 27, 2001 the WERC affirmed the Hearing Examiner's decision.

The County now seeks review of the WERC decision in this court. It continues to argue that the grievance is not subject to the procedure outlined in the agreement. Respondents WERC and the union argue that the procedure is broad enough to encompass Christensen's grievance, and that the County has failed to overcome the presumption in favor of arbitrability, therefore, the WERC's decision should be affirmed.

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[3] MERA guides relations between County employers, employees, and their unions. It provides guidelines on negotiating and enforcing collective bargaining agreements. Wis. Stat. § 111.70 provides in pertinent part:

> (3)(a) It is a prohibited practice for a municipal employer individually or in concert with others:
>
> 4. To refuse to bargain collectively with a representative of a majority of its employees in an appropriate collective bargaining unit. Such refusal shall include…though not be limited thereby, to the refusal to execute a collective bargaining agreement previously agreed upon.

Analysis

A party may not be forced to arbitrate a dispute unless it has contracted to do so. Kimberly Area School District v. Zdanovec, 222 Wis. 2d 27, 39, 586 N.W.2d 41, 46 (Ct.App. 1998). Because the parties did not submit the issue of arbitrability to the arbitrator for a final and binding decision on the subject, I must interpret the contract to determine whether the dispute is arbitrable and whether the arbitrator has jurisdiction. Milwaukee District Council 48 American Federation of State County & Municipal Employees, AFL-CIO v. Milwaukee County, 131 Wis. 2d 557, 560, 388 MW.2d 630, 632 (Ct.App.1986); *citing* At& T Techs v. Communications Workers, 475 U.S. 643, 649 (1986)(unless the parties clearly and unmistakably provide for the decision to be made by the arbitrator, decisions on arbitrability are for the courts to decide). In making this inquiry, my functions are solely to determine: (1) whether there is a construction of the arbitration clause that would cover the grievance on its face; and (2) whether another provision specifically excludes it. Kimberly School, 222 Wis. 2d at 37. I may not examine the merits of the underlying claim. Id. at 39.

Determining arbitrability is a question of law, and while I may give due consideration to the decision of the WERC, I am not bound by their ruling. Joint School District 10 v. Jefferson Educ. Assn., 78 Wis. 2d 94, 106-7, 253 NW.2d 536, 542 (1977). Because the agreement in this case contains an arbitration clause, there is a presumption of arbitrability. Kimberly School, 222 Wis. 2d at 39. In deciding whether to affirm the decision to order the grievance to arbitration, I must consider the following general principle: "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted

dispute. Doubts should be resolved in favor of coverage." Milwaukee Police Association v. City of Milwaukee, 250 Wis.2d 676, 685, 641 N.W.2d 709, 713 (Ct.App.2002); *quoting* United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960).[4]

There is a construction of the arbitration clause that would govern the grievance on its face. The part of the clause defining what subject matters are proper for arbitration contains very broad language. It states that the grievance/arbitration procedure is applicable to "any grievance or misunderstanding that may arise between the Employer and an employee." This language can easily be interpreted to include a dispute over the denial of medical benefits through a health plan created and funded by the employer. Because there is a construction that indicates arbitrability, the next step is to examine the agreement to determine if are any other provisions that specifically exclude the subject matter from the arbitration procedure.

There is no other provision in the agreement that specifically excludes the subject matter from arbitration. The only provision of the agreement that specifically excludes any subject matter from the arbitration procedure is Article 3, which provides that a probationary employee may be terminated without recourse to the grievance procedure. Petitioner points to the language in Article 26 stating that the arbitrator's ruling shall be limited to an interpretation of the terms of the agreement. While this language may be limiting as to what the arbitrator may rule, it does not specifically limit the subject matter that he or she may rule upon. It is perfectly logical to read the clause as allowing the arbitrator to hear the grievance

[4] This case is one of what's known as the *Steelworker's Trilogy,* a series of cases decided by the United States Supreme Court that set forth the basic principles on the subject of arbitrability outlined here. *See* Kimberly, 222 Wis. 2d at 38-39. The teachings of these cases were adopted by the Wisconsin Supreme Court in Denhart v. Waukesha Brewing Co. Inc., 17 Wis. 2d 44, 115 N.W.2d 490 (1962).

in this case, and then make a ruling as to whether or not there has been a violation of the terms of the agreement. The clause does not specifically exclude the denial of medical benefits from the arbitration procedure. Therefore, the presumption in favor of arbitrability has not been overcome. *See* Racine Educational Association v. Racine Unified School District, 176 Wis. 2d 273, 284-85, 500 N.W.2d 379, 383-84 (Ct.App.1993).

The County cites International Association of Machinists and Aerospace Workers v. Waukesha Engine Division, Dresser Industries, 17 F. 3d 196 (7th Cir.1994) to bolster its argument that medical benefits disputes are not subject to arbitration under collective bargaining agreements. Although the facts of Waukesha Engine are quite similar to the facts of this case, I decline to follow the ruling of the 7th Circuit. As an initial matter, it is not "controlling precedent" as the County argues. Waukesha Engine made the arbitrability determination under Federal Law precedent. It did not attempt to interpret or apply Wisconsin Law.[5] Although the Wisconsin Supreme Court has adopted the basic principles set out by the U.S. Supreme Court on the subject, Wisconsin Courts have developed their own common law on arbitrability, and have not taken the position that Federal case law on the subject is controlling for Wisconsin courts.[6] Furthermore, even though the facts of Waukesha Engine are similar, they differ in some important respects.

In Waukesha Engine the 7th Circuit held that the terms of another, separate contract referred to by the collective bargaining agreement limited the scope of arbitrability in that

[5] Even if it did, it is a basic principle of *stare decisis* that Federal Court interpretations of State law are not controlling precedent on State Courts. 5 Am. Jur.2d *Appellate Review* § 604.

[6] An example of such a position would be the interpretation of Wisconsin's anti-trust statute, Wis. Stat. § 133.03. In part because Wis Stat. § 133.03 is nearly identical to the Federal anti-trust statute, 15 U.S.C.A. § 1, Federal case law on 15 U.S.C.A. § 1 controls Wisconsin Courts' interpretation of Wis. Stat. § 133.03. *See* Independent Milk Producers Co-Op v. Stoffel, 102 Wis.2d 1, 6 (Ct.App.1980).

case. Id. at 198. Such a reference does not exist here. This case is also distinguishable from Waukesha Engine in that the arbitration clause here is very broad, with the only limiting language referring to the scope of what the arbitrator may rule. In Waukesha Engine, the "authority" of the arbitrator was limited to construction of the terms of the agreement, implying that the arbitrator could only hear disputes over the terms of the agreement. Id. at 198. The language of the agreement here does not imply such a limitation. It lends itself to a construction that the arbitrator may hear "any grievance or dispute," but can only rule based upon the terms of the agreement.

The County makes many arguments that go to the validity of the grievance. Whether or not there has been any violation of the terms of the agreement is not for me to decide. My inquiry is limited to determining whether the arbitration clause of the agreement, taking into account any limiting provisions, lends itself to a construction that favors arbitrability of the dispute. Because the clause lends itself to such a construction, and it cannot be said with "positive assurance" that the terms of the agreement specifically exclude the subject matter of the grievance in this case from arbitrability, I affirm the ruling of the WERC.

For the aforementioned reasons, the Findings of Fact, Conclusion of Law and Order of the WERC are affirmed in all respects.

Dated at Green Bay, Wisconsin, this 12 day of September, 2002.

BY THE COURT:

Sue E. Bischel /s/

Honorable Sue E. Bischel
Circuit Court, Branch III