STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN COUNCIL 40, AFSCME, AFL-CIO, Complainant,

vs.

ONEIDA COUNTY, Respondent.

Case 146
No. 58851
MP-3645

Decision No. 30213-A

Appearances:

Mr. Mark DeLorme, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 2010 Memorial Drive, #206, Green Bay, WI 54303, appearing on behalf of the Complainant.

Mr. Carey L. Jackson, Personnel Director, Oneida County, Oneida County Courthouse, P.O. Box 400, Rhinelander, WI 54501-0400, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Wisconsin Council 40, AFSCME, AFL-CIO, filed a Complaint with the Wisconsin Employment Relations Commission on May 9, 2000, alleging that Oneida County had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1 and 5 of the Municipal Employment Relations Act by refusing to arbitrate grievance 8-99, dated April 28, 1999. The Commission appointed Stephen G. Bohrer, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusion of Law and Order in the matter. On March 1, 2001, the parties stipulated to the facts in the matter and thereafter filed briefs. There was no hearing. The parties' briefs were received on August 20, 2001, whereupon the record was closed. The parties waived reply briefs.

Based upon the record and the argument of the parties, the Examiner makes and issues the following

FINDINGS OF FACT

1. Oneida County Highway Employees, Local 79, AFSCME, AFL-CIO, hereinafter the Union, is a labor organization under Sec. 111.70(1)(h), Stats., and has its principal office c/o Mark DeLorme, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 2010 Memorial Drive, #206, Green Bay, WI 54303. At all times material hereto, the Union has been the exclusive representative for a bargaining unit consisting of all regular full-time, regular part-time and seasonal employees of the Oneida County Highway Department, excluding all managerial, supervisory, confidential, temporary and student personnel.

2. Oneida County, hereinafter the County, is a municipal employer under Sec. 111.70(1)(j), Stats., and has its principal office at Oneida County Courthouse, P.O. Box 400, Rhinelander, WI 54501-0400. At all times material hereto, the County has operated a Highway Department with offices in Rhinelander, Wisconsin.

3. The Union and the County are parties to a collective bargaining agreement from January 1, 1999, through December 31, 2001, hereinafter the Agreement. Addendum 1 of the Agreement states that the positions of Highway Maintenance Worker, Equipment Operator I, and Equipment Operator II are classification Grade Levels 11, 12 and 13, respectively. Grade Level 13 is paid the highest wages. The Agreement also provides, in pertinent part, as follows:

Article 5 – Promotions

> Section A – Opportunity for Advancement: Opportunity for advancement to higher classifications shall be provided for as follows: In the event of a permanent vacancy, or the creation of a new job classification, the Highway Commissioner shall cause to be posted on the main shop bulletin board and all outlying shop bulletin boards, a notice of such vacancy or new position. Said notice shall be posted for a five (5) day period. At the end of that five day period, the notice shall be removed and the position shall be filled within five (5) days.
>
> (1) Permanent vacancy defined: A "permanent vacancy" means a vacancy created in any salary range because of the death, retirement, or termination of employment of any employee; all other vacancies are "temporary."
>
> (2) The Commissioner shall have the right, without the requirement of posting, to shift employees into any lower or higher job classification or within any salary range where a temporary vacancy exists for the duration of the temporary vacancy.

. . .

Article 6 – Grievance Procedure

Section A – Right to File Grievance: Should differences arise between the employer and the Union as to the meaning and application of the provisions of this Agreement or as to any question relating to wages, hours of work, or other conditions of employment, or if any employee feels that his/her rights and privileges according to the terms of this Agreement have been violated, every reasonable effort shall be made to settle such differences under the provisions of this Article.

. . .

Section F – Selection of Arbitrator: If the grievance is processed to arbitration, the Union and County shall first attempt to voluntarily agree upon an Arbitrator. In the event they are unable to agree, the Arbitrator shall be selected as follows: The parties shall each select three (3) names from a panel of staff arbitrators from the Wisconsin Employment Relations Commission (WERC), and one (1) name shall be arbitrarily withdrawn leaving a panel of (5) names. The parties shall flip a coin to determine who goes first and alternately strike names until one (1) is left. The WERC staff arbitrator whose name remains shall be the arbitrator who settles the dispute.

Section G – Arbitration Hearing: The arbitrator shall meet with the parties at a mutually agreeable date to review the evidence and hear testimony relating to the grievance. Upon completion of this review and hearing, the arbitrator shall render a written decision to both the County and the Union which shall be final and binding upon both parties.

. . .

Article 12 – Vested Rights of Management

Section A – Management Rights: The right to employ, to promote, to transfer, to discipline and discharge employees and to establish work rules is reserved by and vested exclusively in the Oneida County Board through its duly elected Highway Committee and duly appointed Highway Commissioner. The reasonableness of the exercise of the aforementioned vested rights shall be subject to the grievance procedure.

. . .

Section C – Management Right Regarding Staffing Levels and Discipline: The Highway Commissioner, through authority vested in him/her by the Highway Committee of the County Board, shall have the right to determine how many

employees there will be employed or retained together with the right to exercise full control and discipline in the proper conduct of the Highway Department operation.

. . .

Section G – Determination of Hours/Changes in Employment Detail: The Board and/or its representatives have the exclusive right, subject only to the provisions of Article 17, to determine the hours of employment and the length of the work week and to make changes in the detail of employment of the various employees from time to time as it deems necessary for the efficient operation of the Oneida County Highway Department. The Union and its members agree to cooperate with the Board and/or its representatives in all respects to protect the safe and efficient operation of the Highway Department.

. . .

4. In the spring of 1999, David Richardson, an Equipment Operator II in the County's Highway Department, submitted a written notice of retirement, effective April 29, 1999. On April 20, 1999, the County acted by Resolution to eliminate Richardson's position and to create an entry-level Highway Maintenance Worker position, effective April 30, 1999. Sometime in late April, 1999, but before April 28, 1999, the County posted the Highway Maintenance Worker position.

5. On April 28, 1999, the Union filed Grievance 8-99 alleging that the County violated Article 5 of the Agreement when it posted the Highway Maintenance Worker position and when it failed to post the Equipment Operator II position to be vacated by Richardson. The parties advanced the grievance through the grievance procedure with the Union ultimately requesting that the matter be arbitrated. The County has taken the position that it is not required to arbitrate the matter and is continuing to refuse to arbitrate the matter.

6. The County's conduct in refusing to arbitrate Grievance 8-99, dated April 28, 1999, violated Article 6 of the parties' collective bargaining agreement from January 1, 1999, through December 31, 2001.

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

CONCLUSION OF LAW

Respondent Oneida County and its agents did commit a prohibited practice within the meaning of Sec. 111.70(3)(a)5 and Sec. 111.70(3)(a)1, derivatively, of the Municipal Employment Relations Act by refusing to arbitrate Grievance 8-99, dated April 28, 1999.

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

ORDER

IT IS ORDERED that Oneida County, and its agents, shall immediately:

1. Cease and desist from refusing to arbitrate Grievance 8-99, dated April 28, 1999.

2. Take the following affirmative action which the Examiner finds will effectuate the purposes and policies of the Municipal Employment Relations Act:

(a) Participate in an arbitration hearing concerning the resolution of Grievance 8-99, dated April 28, 1999.

(b) Notify all of its employees represented by AFSCME, Local 79, by posting, in conspicuous places on its premises where the employees are employed, copies of the Notice attached hereto and marked "Appendix A." That Notice shall be signed by an official of the Oneida County Board 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 ensure that said notices are not altered, defaced or covered by other material.

(c) Notify the Wisconsin Employment Relations Commission within twenty (20) days of the date of this Order as to what steps the County has taken to comply with this Order.

Dated at Eau Claire, Wisconsin, this 18th day of October, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stephen G. Bohrer /s/
Stephen G. Bohrer, Examiner

APPENDIX "A"

NOTICE TO ALL EMPLOYEES

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

WE WILL NOT refuse to arbitrate Grievance 8-99, dated April 28, 1999.

By _____
For the County

Date: _____

THIS NOTICE MUST BE POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF.

ONEIDA COUNTY

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

POSITIONS OF THE PARTIES

The Union

The County's refusal to arbitrate Grievance 8-99, dated April 28, 1999, is a violation of Secs. 111.70(3)(a)1 and 5, Stats.

The issue before the Examiner is whether the parties agreed to submit the underlying grievance to arbitration. An examiner's determination of arbitrability is limited and does not consider the merits of the underlying grievance dispute. Citing CITY OF WHITEWATER, DEC. NO. 28972-A (MCLAUGHLIN, 8/97), AFF'D IN RELEVANT PART, DEC. NO. 28972-B (WERC, 4/98).

A grievance is arbitrable if the arbitration clause covers the grievance on its face and if there are no other provisions in the parties' collective bargaining agreement which would exclude it from arbitration. Citing, e.g., JOINT SCHOOL DISTRICT 10 VS. JEFFERSON EDUCATION ASSOCIATION, 78 WIS.2D 94 (1977). When these criterion have been met, a refusal to arbitrate violates Sec. 111.70(3)(a)5, Stats. Citing, WINNEBAGO COUNTY, DEC. NO. 27798-A (MCLAUGHLIN, 3/94), AFF'D IN RELEVANT PART, DEC. NO. 27798-B (WERC, 8/94), AFF'D, CASE NO. 94-CV-728 (CIR. CT. WINNEBAGO, 5/95).

In this case, Article 6 of the Agreement states that there is a right to file a grievance:

> . . . Should differences arise between the employer and the Union as to the meaning and application of the provisions of this Agreement or as to any question relating to wages, hours of work, or other conditions of employment, or if any employee feels that his/her rights and privileges according to the terms of this Agreement have been violated, every reasonable effort shall be made to settle such differences under the provisions of this Article.

The procedure in Article 6 culminates in final and binding arbitration. Any assertion by the County that the instant grievance is not covered by this procedure is fallacious.

The instant grievance challenges the County's actions in relation to Article 5 of the Agreement. This challenge falls within the broad scope of the "Should differences arise" language in Article 6. Since there is no language in the Agreement precluding the grievance from going to arbitration, the grievance is arbitrable.

The County's refusal to submit the underlying grievance to arbitration fails to provide any contractual or legal basis. The County cannot refuse simply by expressing an unwillingness to do so.

The County

The County has not violated Secs. 111.70(3)(a)1 and 5, Stats., and the Complaint should be dismissed. In support of its position, the County makes three main arguments.

First, the County has certain rights, including the right to eliminate the Equipment Operator II position because it is related primarily to policy and the management and direction of the County's operation. Citing, OAK CREEK FRANKLIN JOINT SCHOOL DISTRICT, DEC. NO. 11827-D AND 11827-E (WERC, 9/74), AFF'D, CIR. CT. DANE, 11/75; MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 20093-A (WERC, 2/83); RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 25283-B (WERC, 5/89). The County also has the right to determine whether or not it wishes to fill a vacant position. Citing, ONEIDA COUNTY, WERC, MA-6385 (BURNS, 1991). Further, the posting requirements contained within the Article 5 of the Agreement does not limit the County's right to fill a vacancy. Citing, ID. at 6.

Article 12, Sections A, C and G, give the County the right to eliminate and create positions. This language provides the County with wide discretion in determining the level of positions that shall exist. Because there are no restrictions in the Agreement regarding the elimination or the creation of positions and because said actions pertain to the operation of the Highway Department, the County's determinations in this regard are a permissive subject of bargaining. Therefore, the County could not have committed a prohibited practice by refusing to arbitrate a permissive subject of bargaining.

Second, the doctrine of *res judicata* relieves the County of any obligation to arbitrate this grievance. Citing, MORAINE PARK VTAE DISTRICT, DEC. NO. 22009-A (SCHIAVONI, 3/85), AFF'D IN PART, REV'D IN PART, DEC. NO. 22009-B (WERC, 11/85). In this case, the issue of whether Article 5 requires the County to post Richardson's Equipment Operator II position has been decided. Citing, ONEIDA COUNTY, WERC, MA-9384 (CROWLEY, 8/96). In that case, Arbitrator Crowley determined that the County did not violate Article 5 when it did not post a position because there was no vacancy that required posting. Citing, ID. at 6; ONEIDA COUNTY, WERC, MA-6385 (BURNS, 6/91). Nothing has changed since the Crowley decision to alter the County's right to eliminate positions. Therefore, and in this instance, the Crowley decision conclusively resolves this matter and the County is not obligated arbitrate this grievance.

Third, the posting of a non-existent position is absurd and nonsensical. Such decisions are abhorrent to the courts and to the WERC. Citing, SQUARE D CO., 99 LA 879 (GOODSTEIN, 1992).

DISCUSSION

Any assertion by the County of its right to eliminate a position, to create a position, or to determine whether to fill a vacant position goes to the merits of the underlying grievance. I agree with the Union that the issue here is whether the parties contractually agreed to submit the underlying grievance dispute to arbitration and not whether the County properly exercised its contractual rights in eliminating and/or creating a position. I have no jurisdiction to determine the merits of the underlying grievance and the County's argument in this regard is more appropriately placed before an arbitrator.

The County's permissive subject argument is based upon a mistaken assertion that if a subject of bargaining is permissive it is not enforceable through grievance arbitration even when included in a collective bargaining agreement. On the contrary, once the parties have reached a collective bargaining agreement, the subjects contained therein are enforceable for the duration of that agreement regardless of the permissive or mandatory nature of those subjects. Thus, the County's argument in this regard is not persuasive.

In cases such as these, the Commission's limited function is to determine: (1) whether there is a construction of the arbitration clause in the collective bargaining agreement that would cover the grievance on its face; and (2) whether another provision specifically excludes it. CLARK COUNTY, DEC. NO. 29480-A (CROWLEY, 3/99), AFF'D BY OPERATION OF LAW, DEC. NO. 29480-B (WERC, 4/99). Further, 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 is arbitrable. ID., citing, JT. SCHOOL DIST. NO. 10 V. JEFFERSON ED. ASSOC., 78 WIS.2D 94 (1977).

Article 6, Section A, of the Agreement states that "[s]hould differences arise . . . as to the meaning and application of the provisions of this Agreement" or "as to any question relating to wages, hours of work, or other conditions of employment . . . ," then such differences shall be settled under the provisions of Article 6. In my opinion, this language is broad enough in scope to cover the underlying grievance "on its face." The parties' "differences" regarding eliminating a position, creating a position, and posting a vacant position all clearly fall within "any question relating to . . . conditions of employment" and there is no provision that would specifically exclude the underlying grievance from arbitration. Moreover, it cannot be said with positive assurance that Article 6 is not susceptible of an interpretation that covers the underlying grievance. Therefore, the underlying grievance appears to be arbitrable. However, before finding that the instant grievance is arbitrable, it is necessary to consider the County's argument regarding *res judicata*.

The County is correct that the Commission recognizes the doctrine of *res judicata* where there is an identity of parties, issues, and material facts. MORAINE PARK VTAE DISTRICT, DEC. NO. 22009-B (WERC, 11/85). Under those criteria, a prior arbitration award will be given *res judicata* effect and is a defense to an obligation to submit to a contractually

mandated grievance arbitration procedure. ID. Here, the County asserts that ONEIDA COUNTY, WERC, MA-9384 (CROWLEY, 8/96), hereinafter the Crowley decision, meets the *res judicata* doctrinal requirements. The County maintains that *res judicata* applies and is a basis for the County's refusal to arbitrate the underlying grievance.

The parties in the Crowley decision and the parties in the current grievance are the same. Likewise, pertinent language in the Crowley decision and the language in the underlying grievance is identical and it makes no difference that the language in the Crowley decision was from a predecessor agreement. MORAINE PARK VTAE DISTRICT, DEC. NO. 22009-A (SCHIAVONI, 3/85), citing PURE MILK ASSOCIATION, DEC. NO. 6584 (WERC, 12/63), AFF'D, DANE CO. CIR. CT. 10/64. In addition, an issue in the Crowley decision and the issue in the underlying grievance are arguably the same in that both examine whether the County violated Article 5 when it failed to post an eliminated position. However, *res judicata* does not apply in this instance because there are material differences of fact.

First, the facts in the Crowley decision are that the County eliminated a higher paid position (Leadman) and temporarily assigned, for three to four months and for a total of 103.75 hours, those Leadman classification duties to a lower paid classification employee and paid that employee the higher Leadman wages for that time period. In the instant case, the County eliminated a higher paid classification (Equipment Operator II/ Grade 13) position and created a permanent lower paid classification (Highway Maintenance Worker/ Grade 11) position. The difference is the permanency of the lower paid position. This difference is material because it affects whether Article 5 is applicable:

. . .

> . . . the assignment of work of a higher classification does not create a vacancy, either temporary or permanent so the provisions of Article 5 are not applicable. Article 5 is applicable to vacancies or new positions that the County is going to fill on a permanent or temporary basis. However, the assignment of work for one day of a higher classification does not create a vacancy as the performance of work does not create a position, just a right to higher pay. This is logical because by the time the matter was posted or someone selected, the work would have been done already and no further work being required, the position would evaporate. Furthermore, an employer is not required to create a new position year round or even for four months just because an employe occasionally does work of a higher classification.
>
> In other words, the mere fact that Miller occasionally worked in a higher classification, i.e., performed duties of a higher classification, did not create a position or vacancy, either permanent or temporary, that required the application of Article 5. There was no vacancy that required posting or assignment by seniority. Inasmuch as no posting was required, the County has not violated Articles 4 or 5.

. . .

ONEIDA COUNTY, WERC, MA-9384 (CROWLEY, 8/96), at 7.

Arbitrator Crowley found that where the nature of the work was occasional, there was no "vacancy" and Article 5 does not apply. However, and in this case, the nature of the work is permanent as the Highway Maintenance Worker position is a newly created position. This difference is material because an arbitrator may find that the duties of the higher paid classification (Equipment Operator II) position are being permanently shifted in some degree to the lower paid classification (Highway Maintenance Worker) position. This leaves open whether the County's act of eliminating a higher paid classification position and/or creating a permanent lower classification position means that there is a "vacancy" under Article 5 which would require the Equipment Operator II classification position to be posted. I cannot find that the Crowley decision resolves this point.

Second, the facts in the Crowley decision and the facts in underlying grievance differ in the reason why the employee in the higher paid position left that position. In the former set of facts, the employee left because of a promotion, while in the latter, the employee left due to a retirement. Article 5 states that a "permanent vacancy" includes a vacancy created because of a "retirement." This difference is material because an arbitrator may find that Richardson's retirement from the Equipment Operator II position creates a "permanent vacancy" and that Article 5 is applicable. Again, I cannot find that the Crowley decision resolves this distinction.

There are material differences of fact between the Crowley decision and the underlying grievance which precludes the County from relying upon *res judicata* as an argument to avoid an arbitration hearing on the underlying grievance. Because of these material differences of fact, *res judicata* is not a defense to the County's obligation to submit this dispute to arbitration. Contrary to the County's assertion, the Crowley decision does not resolve whether the County violated Article 5 when it failed to post the Equipment Operator II position previously occupied by Richardson and when the County created the entry-level Highway Maintenance Worker position and with regard to Grievance 8-99. Therefore, the underlying grievance is arbitrable.

With regard to any reliance by the County upon the decision in ONEIDA COUNTY, WERC, MA-6385 (BURNS, 6/91), that decision involves a different union. Therefore, it does not share an identity of parties and, consequently, cannot support an argument of *res judicata*. Any other reliance on that case by the County goes to the merits of the underlying grievance and I will not consider it.

Finally, the County's argument that the posting of a non-existent position is absurd and nonsensical may be an argument on the merits of the underlying grievance and not on the question of arbitrability. Thus, I will not address it.

In conclusion, the underlying grievance is arbitrable. The Union has proven by a clear and satisfactory preponderance that the County has violated Sec. 111.70(3)(a)5 and Sec. 111.70(3)(a)1, derivatively, by refusing to arbitrate Grievance 8-99, dated April 28, 1999. A conventional Order has been remedied.

Dated at Eau Claire, Wisconsin, this 18th day of October, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stephen G. Bohrer /s/
Stephen G. Bohrer, Examiner

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