

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

**TEACHING ASSISTANTS ASSOCIATION,
LOCAL 3220 OF THE WISCONSIN FEDERATION OF
TEACHERS, AFT, Complainant,**

vs.

**STATE OF WISCONSIN,
UNIVERSITY OF WISCONSIN-MADISON, Respondent.**

Case 530
No. 61638
PP(S)-329

Decision No. 30701-A

Appearances:

Shneidman, Hawks & Ehlke, S.C., by **Aaron N. Halstead** and **Kathleen M. Lounsbury**,
222 West Washington Avenue, Suite 705, P.O. Box 2155, Madison, Wisconsin 53701-2155,
on behalf of the Complainant.

David J. Vergeront, Chief Legal Counsel, Office of State Employment Relations, State of
Wisconsin, 345 West Washington Avenue, P.O. Box 7855, Madison, Wisconsin 53707-7855,
on behalf of Respondent.

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

On October 1, 2002, the Teaching Assistants Association, Local 3220 of the Wisconsin Federation of Teachers, AFT, hereinafter Complainant, filed a complaint with the Wisconsin Employment Relations Commission wherein it alleged that Respondent State of Wisconsin, through the actions of the University of Wisconsin-Madison, committed an unfair labor practice within the meaning of Sec. 111.84(1)(e), Stats., by refusing to arbitrate a grievance arising under the parties' collective bargaining agreement. Thereafter, in response to the defense raised by the Respondent that the individual that is the subject of the grievance is not

No. 30701-A

in the bargaining unit represented by Complainant, and that Complainant must therefore first seek and obtain a unit clarification from the Commission in that regard before it may proceed to arbitration, the parties entered into a stipulation that the issues raised in the complaint and by Respondent's defense would be addressed by the Examiner in this proceeding, and that if the Examiner determined a unit clarification was necessary, he would make that unit clarification determination by issuing a proposed decision in that regard. Respondent thereafter filed an answer wherein it denied it had violated the State Employment Relations Act (SELRA) and asserted certain affirmative defenses.

The Commission appointed David E. Shaw, a member of its staff, as Examiner to make and issue Findings of Fact, Conclusions of Law and Order in the matter. Hearing was held before the Examiner on November 18, 2003 in Madison, Wisconsin. The parties submitted post-hearing briefs, the last of which was received on February 18, 2004. On July 8, 2004, the parties stipulated to the admission of Pedroni's June 13, 2002 grievance into the record.

Having considered the evidence and the arguments of the parties, the Examiner now makes and issues the following

FINDINGS OF FACT

1. The Teaching Assistants Association, Local 3220, Wisconsin Federation of Teachers, AFT, hereinafter "Complainant" or "TAA", is a labor organization with its principal office located at 306 North Brooks Street, Madison, Wisconsin. At all times material herein, Complainant has been recognized as the exclusive collective bargaining representative for "all program, project and teaching assistants employed by the University of Wisconsin-Madison and the University of Wisconsin-Extension. . ."

2. The University of Wisconsin - Madison, hereinafter "Respondent" or "University", is an employer with its principal offices located at 500 Lincoln Drive, Madison, Wisconsin. Since 1987 Michael Rothstein has been employed by Respondent as the Contract Administrator for the collective bargaining agreement between the State of Wisconsin and Complainant.

3. At all times material herein, Complainant and Respondent have been parties to a collective bargaining agreement setting forth the wages, hours and conditions of employment for the employees in the bargaining unit represented by Complainant. Said agreement contains the following provisions, in relevant part:

ARTICLE II

Recognition and Union Security

Section 1. Union Recognition

The Employer recognizes the Teaching Assistants Association (TAA) as the exclusive collective bargaining agent for all program, project and teaching assistants employed by the University of Wisconsin-Madison and the University of Wisconsin-Extension. Nothing in this Agreement shall be construed as a grant by the Employer of exclusive jurisdiction over types of duties or work assignments to teaching, program or project assistants or to the Union.

Program assistant or project assistant (PA) means a graduate student enrolled in the University of Wisconsin system who is assigned to conduct research, training, administrative responsibilities or other academic or academic support projects or programs, except regular preparation of instructional materials for courses or manual or clerical assignments, under the supervision of a member of the faculty or academic staff, as defined in s. 36.05(1) or (8), Wis. Stats., primarily for the benefit of the University, faculty or academic staff supervisor or a granting agency. Project assistant or program assistant does not include a graduate student who does work which is primarily for the benefit of the student's own learning and research and which is independent or self-directed.

...

Should a dispute arise between the parties as to whether an employe(s)/position(s) is appropriately included in or excluded from the bargaining unit, the party raising the issue shall notify the other and a meeting will be scheduled within thirty (30) days in an attempt to reach agreement. If no agreement is reached, the exclusive remedy shall be that either party may request that the Wisconsin Employment Relations Commission to decide the appropriate bargaining unit status of the employe(s)/position(s) pursuant to Wisconsin Statutes.

...

ARTICLE IV

Grievance Procedure

Section 1. Definition and Procedure

A. A grievance is defined as, and limited to, a written complaint on forms described below in paragraph C involving an alleged violation of a specific provision of the Agreement and remedy sought.

...

Section 2. Grievance Steps

...

Step Four: Grievances which have not been settled under the foregoing procedure may be appealed to arbitration by either the Union or the Employer within twenty (20) days from the date of the answer in Step Three, or the grievance will be considered ineligible for appeal to arbitration.

...

On grievances where arbitrability is an issue, a separate arbitrator shall be appointed to determine the question of arbitrability unless the parties agree otherwise. Where the question of arbitrability is not an issue, the arbitrator shall only have authority to determine compliance with the provisions of this Agreement.

...

The decision of the Arbitrator will be final and binding on both parties to this Agreement. The decision of the Arbitrator will be rendered within thirty (30) days from receipt of the briefs from the parties or the transcript in the event briefs are not filed.

...

Section 10. Discipline

The parties recognize the authority of the Employer to suspend, discharge or take other appropriate disciplinary action against employes for just cause (See Negotiating Note #5).

. . .

The last paragraph of Article II, Section 1, set forth above, was included in the parties' 1987 agreement, and was initially proposed by the Respondent to ensure that the Wisconsin Employment Relations Commission, rather than arbitrators, would make determinations as to an employee's or a position's bargaining unit status.

4. Thomas Pedroni, hereinafter Pedroni, is an individual currently residing at 243 West 1140, North Logan, Utah. At all times material herein, Pedroni was enrolled as a graduate student at the University in its School of Education, Department of Curriculum and Instruction.

5. The University hires its students to work in various capacities in the various departments and research centers. Student employees fall into three categories: Teaching Assistants (TA's), Program or Project Assistants (PA's) and Student Hourly. TA's and PA's make up the bargaining unit represented by Complainant. Student Hourly employees are not included in the bargaining unit. TA's and PA's are issued a "letter of appointment" when they are hired which includes the stipend to be paid and the duties and responsibilities of the position. A "Person Appointment Request Form" is completed when a student is hired as a Student Hourly. While most PA's are given a stipend in the form of a salary, the collective bargaining agreement between the parties also provides for hourly paid Project Assistants.

6. On or about September 18, 2001, Pedroni was hired to do transcription work for Professor Sharon Derry at the School of Education's Wisconsin Center for Education Research (WCER) on the Secondary Teacher Education Project (STEP). On that date, Pedroni met with a PA on the STEP project, Youl-Kwan-Sung, and a "Person Appointment Request Form" was completed as part of his hiring. That completed form indicated he was being hired as a Student Hourly at \$16.00/hour, set forth a description of the duties to be performed, and stated the qualifications for the position.

Pedroni performed work for WCER on September 18 and 21, 2001, an additional 8 hours over a period from the Fall of 2001 until March of 2002, on April 15, 16, 22 and 25, 2002, and on May 2, 9 and 15, 2002.

7. On May 17, 2002, Pedroni was called at home by Andrew Garfield, Video Production Manager for Professor Derry at WCER and Pedroni's immediate supervisor at the time, and was told that he was terminated. Pedroni met briefly with Derry on May 21, 2002, and received an e-mail from Derry on May 23, 2002, upholding Garfield's decision to terminate him.

8. On May 24, 2002, Pedroni met with Jason Jankoski, assistant to Jerome Grossman, the Director of Business Services at WCER, to discuss his termination. In that meeting, Jankoski raised the issue of whether Pedroni was a Student Hourly or a PA, taking the position that Pedroni had been a Student Hourly and therefore not covered by the bargaining agreement that covers TA's and PA's. Pedroni met with Grossman in June of 2002 to discuss his termination and was informed that he did not have access to the grievance procedure in the TA's collective bargaining agreement because he had been in a Student Hourly position.

On June 13, 2002 the following second step grievance was filed on Pedroni's behalf, asserting, in relevant part:

Describe the grievance – state all facts, including time, place of incident, names of persons involved:

Mr. Pedroni was hired on April 9, 2002, by Mr. Garfield to do transcription work. He was inappropriately classified as a Student Hourly instead of a Project Assistant (Violation of Article II, Section 1.)

On May 17, 2002, Mr. Pedroni was terminated without just cause (Violation of Negotiating Note #5.)

Relief sought:

1. Reclassify position as Project Assistant.
2. Compensation for work hours lost due to termination.
3. Return to transcription job at same pay and hours.
4. Formal apology letter from WCER.

Pedroni and a representative from the TAA subsequently met with Grossman and Respondent's Contract Administrator for its agreement with the TAA, Michael Rothstein, to discuss his grievance. Rothstein informed Pedroni and his TAA representative that it was Respondent's view that Pedroni had been hired as a Student Hourly and therefore did not have access to the grievance procedure in the TAA agreement. Rothstein also took the position that Pedroni had waited too long to challenge whether his position should have been classified as a PA rather than a Student Hourly.

9. Rothstein subsequently confirmed that it was Respondent's position that Pedroni's termination is not grievable based on Pedroni's having been appropriately hired and classified as a Student Hourly, rather than as a PA, and that the exclusive procedure under the parties' collective bargaining agreement for resolving such a dispute is to request that the Wisconsin Employment Relations Commission decide the bargaining unit status of the employee. Thereafter, Respondent has refused to proceed to arbitration of Pedroni's grievance.

10. Complainant had not filed a unit clarification petition with the Commission regarding Pedroni's position at WCER prior to attempting to move Pedroni's grievance to arbitration, and disputes it is a condition precedent to arbitration of Pedroni's grievance.

11. A good faith dispute exists between the parties as to the bargaining unit status of Pedroni's position with WCER at the time he was terminated. The exclusive procedure under the parties' collective bargaining agreement for determining the bargaining unit status of an employee's position is that set forth in the last paragraph of Article II, Section 1, rather than submitting the dispute to final and binding grievance arbitration. That procedure requires that either party petition the Commission for a unit clarification determination. Complainant, not having first petitioned the Commission to determine the bargaining unit status of Pedroni's position at WCER, has not exhausted its contractual remedies in that regard.

12. Prior to hearing in this matter the parties entered into the following stipulation regarding the manner of proceeding in the case:

STIPULATION

WHEREAS, the Complainant, the Teaching Assistants Association, Local 3220, WFT, AFT (the "TAA"), has filed a complaint with the Commission, alleging that the Respondent, State of Wisconsin, UW-Madison (the "University"), engaged in prohibited practices by refusing to arbitrate a grievance alleging that Thomas Pedroni was fired without just cause, and

WHEREAS, the University alleges, in response to said Complaint, that the position in which Pedroni was employed at the time of his termination was not covered by the parties' collective bargaining agreement, and that said agreement requires that the TAA file a petition for unit clarification in order to resolve that issue before the parties proceed to grievance arbitration, and

WHEREAS, the TAA disputes that it is required to petition for unit clarification as a condition precedent to arbitrating Pedroni's discharge,

NOW THEREFORE, subject to the Commission's order approving same, the parties stipulate to have the Commission's Examiner, David Shaw, hear the TAA's prohibited practices complaint and the unit clarification issue in the same proceeding and, further, stipulate to have the Examiner issue a final decision on both issues, subject to any right to normal Commission review.

Dated this 13th day of May, 2003.

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Attorneys for Respondent

The Examiner modified the stipulation to provide for a "proposed decision" should he determine it was necessary to decide a unit clarification. Both parties subsequently assented to that change.

On October 14, 2003, Respondent filed its answer in this matter, wherein it asserted the following as affirmative defenses:

As and for a First Affirmative Defense, Respondent alleges that the TAA collective bargaining agreement provides that a unit clarification action before the WERC is the sole and exclusive remedy to challenge whether an employee's position is properly included or excluded from the TAA's bargaining unit. Complainant has not filed a unit clarification action before the WERC and as such, Complainant has failed to exhaust its sole and exclusive administrative remedy.

As and for a Second Affirmative Defense, Respondent affirmatively alleges that because Mr. Pedroni was hired as a student hourly employee, he has no rights under the collective bargaining agreement. As such, Mr. Pedroni can not bring a grievance under the TAA's collective bargaining agreement and Complainant has no standing to and can not bring an action pursuant to sec. 111.84(1)(e), Wis. Stats.

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

CONCLUSIONS OF LAW

1. The exclusive procedure under the parties' collective bargaining agreement for resolving a dispute as to the bargaining unit status of an employee's position is set forth in Article II, Section 1, of the agreement, and is to request that the Wisconsin Employment Relations Commission make that determination in a unit clarification proceeding, pursuant to Wisconsin Statutes. By not first requesting that the Commission make such a determination, the Complainant has failed to exhaust its contractual remedies with regard to that dispute. Such a determination is a condition precedent to proceeding to final and binding arbitration of Thomas Pedroni's grievance.

2. By refusing to proceed to final and binding arbitration of Thomas Pedroni's grievance, the Respondent, its officers and agents, did not violate an agreement to arbitrate within the meaning of Sect. 111.84(1)(e), Stats.

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

ORDER

The complaint filed herein is dismissed. 1/

1/ Pursuant to the parties' stipulation, having determined that a unit clarification is required, the Examiner has proceeded to determine the bargaining unit status of Thomas Pedroni's position at the Respondent's Wisconsin Center for Education Research in the form of proposed findings of fact, conclusions of law and order issued this same day.

Dated at Madison, Wisconsin, this 30th day of July, 2004.

David E. Shaw /s/

David E. Shaw, Examiner

STATE OF WISCONSIN
(UNIVERSITY OF WISCONSIN-MADISON)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The TAA filed a complaint wherein it alleged that the Respondent violated Sec. 111.84(1)(e), Stats., by refusing to proceed to final and binding arbitration of the grievance of Thomas Pedroni, which grievance disputed the classification of Pedroni's position at the WCER as a Student Hourly and that Respondent had just cause to terminate him from that position.

The Respondent filed an answer wherein it admitted it had refused to arbitrate the Pedroni grievance, and asserted as affirmative defenses: (1) that the exclusive remedy under the parties' collective bargaining agreement to challenge whether an employee's position is properly included or excluded from the bargaining unit is to request a unit clarification from the Commission, that Complainant has not done so, and that as such, Complainant has failed to exhaust its exclusive administrative remedy; and (2) that as Pedroni was hired as a Student Hourly, he has no rights under the parties' agreement, and therefore cannot bring a grievance under that agreement. Therefore, Complainant has no standing to bring an action pursuant to Sec. 111.84(1)(e), Stats.

Prior to proceeding to hearing on their dispute, the parties entered into a stipulation that the Examiner would decide the alleged unfair labor practice, and that if it was concluded that a unit clarification is required as a condition precedent to arbitration of Pedroni's grievance, the Examiner would make that determination in the form of proposed Findings of Fact, Conclusions of Law and Order, to which the parties would have the opportunity to respond before the Commission issues its final decision in the unit clarification.

Complainant

Complainant disagrees it must first obtain a determination from the Commission that Pedroni's position at WCER was a PA position, i.e., in the bargaining unit covered by the parties' agreement, before Pedroni's grievance can proceed under the agreement's grievance procedure. Complainant further disagrees that the disputed bargaining unit status of Pedroni's position must be decided in a unit clarification proceeding, rather than being decided as part of this unfair labor practice proceeding as a threshold issue in determining whether the Respondent's refusal to arbitrate the grievance violated Sec. 111.84(1)(e), Stats. However, Complainant appears to now dispute that this issue of the procedure to be followed is before the Examiner as part of this proceeding.

The Complainant asserts that the Respondent's allegation that "the parties have stipulated that the Examiner should decide whether the appropriate type of proceeding is a unit clarification or an unfair labor practice proceeding" is incorrect. The parties actually stipulated to "have the Commission's examiner, David Shaw, hear the TAA's prohibited practice complaint and the unit clarification issue in the same proceeding and, further, stipulated to have the examiner issue a final decision on both issues, subject to any right to normal Commission review." (Stipulation of May 13, 2003). The Examiner confirmed his understanding of the stipulation in a letter to the parties, which only slightly modified the basis on which the Commission had accepted the parties' stipulation.

Complainant asserts that Pedroni's position met the four criteria for a PA position set forth in Article II, Section 1, of the parties' agreement. Therefore, it requests that the Examiner find that Pedroni's position was within the bargaining unit it represents and further, that the Respondent committed an unfair labor practice when it refused to arbitrate Pedroni's grievance alleging he had been terminated without just cause.

Respondent

Respondent asserts that the last paragraph of Article II, Section 1, of the parties' agreement is unambiguous and specifically addresses the present situation. In this case, the issue is whether the duties assigned to Pedroni were those defined as PA or as a Student Hourly. If the former, Pedroni would be covered by the parties' agreement and entitled to challenge his termination via the contractual grievance procedure. Conversely, if the duties are not PA work, Pedroni is not entitled to the protection of the agreement. Clearly, whether Pedroni's position is included or excluded from the bargaining unit goes to the very heart of the parties' dispute. The language of the last paragraph of Article II, Section 1, unambiguously provides that a unit clarification, not an unfair labor practice proceeding, is the exclusive remedy where there is a dispute as to whether a position is to be included or excluded from the bargaining unit. Respondent cites a previous situation that involved a dispute between the parties as to whether "practicum students" were covered by the agreement, which was decided in a unit clarification proceeding before the Commission. DER (UNIVERSITY OF WISCONSIN-MADISON), DEC. NO. 24264-A (WERC, 2/01).

If the language of Article II, Section 1 is deemed to be ambiguous, then evidence as to the bargaining history of the language should be considered. Rothstein, who was at the bargaining table when the language was first included in the agreement some 17 years ago, testified that the language was included in the agreement at the Respondent's insistence and was meant to include situations like this one. Rothstein's uncontradicted testimony was that Respondent had employees who performed some of the same type of work as was performed by PA's, but were not entitled to be in the bargaining unit. It was understood that disputes such as this one would arise from time to time, and Rothstein did not want different arbitrators

deciding such disputes, and chose instead to have the Commission decide these disputes for “consistency in opinions”. The language has remained in the agreement all these years and reflects that the parties have agreed a unit clarification is the exclusive remedy in these situations. Any ambiguity in the language is resolved by Rothstein’s uncontradicted testimony.

Respondent concludes that since the ultimate issue is whether Pedroni’s assigned duties were PA work, it must be concluded that a unit clarification proceeding is the only remedy to resolve the dispute.

DISCUSSION

Although the parties entered into a stipulation as to the manner in which their dispute should proceed, there appears to be disagreement on Complainant’s part that the issue of whether a unit clarification determination is a condition precedent to proceeding with Pedroni’s grievance, as opposed to having the issue of Pedroni’s bargaining unit status decided as part of an unfair labor practice charge, is before the Examiner in this proceeding. However, based upon the wording of the parties’ stipulation, the pleadings of the parties, 2/ and the necessity of deciding that issue in order to decide the unfair labor practice charge, the inescapable conclusion is that the issue is squarely before the Examiner. If it is determined that a unit clarification determination by the Commission of the bargaining unit status of Pedroni’s position at WCER is required before the Respondent has a duty under the parties’ agreement to process Pedroni’s grievance, the Respondent did not violate Sec. 111.84(1)(e), Stats., by its

2/ The Respondent asserted the need for a unit clarification determining the bargaining unit status of Pedroni’s position before he could proceed with his grievance as an affirmative defense in its answer.

refusal to proceed to arbitration of Pedroni’s grievance in the absence of such a unit clarification. The purpose of the stipulation is to have the Examiner decide the bargaining unit status of Pedroni’s position in this proceeding, if it is determined a unit clarification determination is a condition precedent to proceeding with the grievance, rather than have the parties go through another separate proceeding.

Section 111.84(1)(e), Stats., provides as follows:

Sec. 111.84 Unfair labor practices. (1) It is an unfair labor practice for an employer individually or in concert with others:

...

(e) To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting employees, including an agreement to arbitrate or to accept the terms of an arbitration award where previously the parties have agreed to accept such award as final and binding upon them.

In its recent decision in *CITY OF MADISON v. WERC*, 261 Wis. 2d 423 (2003), the Wisconsin Supreme Court summarized the law in this State with respect to enforcing an agreement to arbitrate:

The determination of whether an employment dispute is subject to arbitration centers on the arbitration language in the parties' collective bargaining agreement. "An order to arbitrate [a] 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." *MILWAUKEE I*, 92 Wis. 2d at 152 (quoting *UNITED STEELWORKERS OF AMERICA v. WARRIOR & GULF NAVIGATION CO.*, 363 U.S. 574, 582-83 (1960)); "There is a broad presumption of arbitrability," and courts are limited to determining whether the arbitration language in the contract encompasses the grievance in question and whether any other provision of the contract excludes arbitration. *MILWAUKEE II*, 97 Wis. 2d at 22. "When the court determines arbitrability, it is limited to considering whether the arbitration clause can be construed to cover the grievance on its face and whether any other provision of the contract specifically excludes it." *Id.* (emphasis added) (citing *JOINT SCH. DIST. NO. 10*, 78 Wis. 2d at 111).

Thus, there are two relevant contractual inquiries in the analysis of arbitrability: 1) does the arbitration clause cover the grievance on its face; and 2) is there another provision of the collective bargaining agreement that specifically excludes arbitration? *MILWAUKEE II*, 97 Wis. 2d at 22; *MILWAUKEE I*, 92 Wis. 2d at 151; *JOINT SCH. DIST. NO. 10*, 78 Wis. 2d at 111. The fact that the arbitration clause covers the grievance on its face does not end the inquiry; if another provision of the contract specifically excludes arbitration of the relevant dispute, then arbitration is unavailable. *MILWAUKEE II*, 97 Wis. 2d at 22; *MILWAUKEE I*, 92 Wis. 2d at 151; *JOINT SCH. DIST. NO. 10*, 78 Wis. 2d at 111.

Pedroni's grievance raises two issues: (1) That Pedroni was hired to do transcription work and was "inappropriately classified as a student hourly instead of a project assistant (violation of Article II, Section 1);" and 2) that Pedroni "was terminated without just cause (violation of Negotiating Note #5)."

The first issue raised in Pedroni's grievance, i.e., that he was improperly classified as a Student Hourly when he was hired, was apparently raised in response to the Respondent's position that his position was not in the bargaining unit covered by the parties' agreement, and is, as the parties recognize, a threshold issue, as Pedroni has no rights to enforce under the parties' agreement, if his position is not in the bargaining unit covered by that agreement. 3/

3/ The Respondent does not dispute that if it is determined by the Commission that Pedroni's position was erroneously classified as Student Hourly and should have been a PA position, that the grievance as to his termination would be arbitrable and the Respondent would be obligated to proceed to arbitration.

The first inquiry, then, is whether the agreement's arbitration clause covers this issue on its face.

Article IV, Section 1, A, of the parties' agreement defines a grievance as "a written complaint. . .involving an alleged violation of a specific provision(s) of the Agreement and remedy sought." As Pedroni's grievance alleges that he was improperly classified as a Student Hourly when he was hired, rather than as a PA, and that this violated Article II, Section, 1, which defines what constitutes a PA position, it would fall within the contractual definition of a "grievance". The arbitration clause in Article IV, Section 2, Step 4, does not narrow that definition further. In addition, Step 4 provides that "On grievances where arbitrability is an issue, a separate arbitrator shall be appointed to determine the question of arbitrability unless the parties agree otherwise." Thus, inferring such issues will be left to an arbitrator to decide. Thus, the agreement's arbitration clause is deemed to be sufficiently broad to cover the grievance on its face.

However, the second inquiry in the analysis is whether there is another provision of the agreement that specifically excludes the issue from arbitration. It is in this respect that Respondent cites the last paragraph of Article II, Section 1, which provides, in relevant part:

Should a dispute arise between the parties as to whether an employe(s)/position(s) is appropriately included or excluded from the bargaining unit. . .the exclusive remedy shall be that either party may request the Wisconsin Employment Relations Commission to decide the appropriate bargaining unit status of the employe(s)/position(s) pursuant to Wisconsin Statutes.

Although this provision does not specifically state that a dispute as to the bargaining unit status of a position is excluded from final and binding arbitration, the wording is

sufficiently clear that the parties intended to limit the forum for resolving such a dispute

Page 15
Dec. No. 30701-A

exclusively to the Commission. Therefore, the Respondent was within its rights under the agreement to insist that such a determination be made by the Commission before proceeding to arbitration on Pedroni's grievance, rather than having that determination be made by an arbitrator. This is true both as to Respondent raising the issue as it did in this case, (as a basis for challenging Pedroni's right to proceed under the agreement) and as to the grievance itself raising the issue of the bargaining unit status of Pedroni's position.

However, the provision in question does not specify that the Commission's determination of a position's bargaining unit status must be made in a unit clarification proceeding. Such a determination could be made by the Commission in either a unit clarification proceeding or in the course of a complaint proceeding such as this, where Respondent has raised the bargaining unit status of the position as a defense to a refusal to arbitrate charge. However, while the wording of the provision is seemingly broad enough to encompass both types of proceedings, the Examiner concludes that the parties intended the provision to require that the bargaining unit status of a position be determined in a unit clarification proceeding, and as a condition precedent to arbitration where that issue arises as it did in this case. To find otherwise would lead to the anomalous situation of the Respondent rightfully insisting that the exclusive contractual procedure for resolving such a dispute be followed and, if the position is determined to be included in the bargaining unit, being found to have committed an unfair labor practice (refusal to arbitrate) for doing so. It seems unlikely that the parties intended such a result as a consequence of following their agreement's procedures.

Further, just as the Commission will generally defer to the parties' contractual grievance and arbitration procedures, rather than assert its jurisdiction to hear a breach of contract claim as a prohibited practice, it presumably will similarly defer to the parties' agreed-upon "exclusive" contractual procedure, which provides for an impartial resolution of their dispute, rather than assert its jurisdiction to hear the dispute in a prohibited practice proceeding. That would especially be the case where, as here, the contractual procedure provides that the exclusive remedy is for the Commission to determine the bargaining unit status of the position, and the Commission, by statute, has exclusive jurisdiction to make that determination. See, STATE OF WISCONSIN, DEC. NO. 27365-C (WERC, 8/94).

Thus, it has been concluded that when the issue of the bargaining unit status of Pedroni's position at WCER arose, either as an issue in his grievance, or as an issue raised by the Respondent with regard to Pedroni's right to proceed with the challenge of his termination under the parties' agreement, the exclusive procedure under the agreement for resolving that issue is to obtain a determination from the Commission in a unit clarification proceeding. Obtaining such a determination, in situations such as this, is a condition precedent to moving the grievance to arbitration. Hence, the Respondent did not violate Sec. 111.84(1)(e), Stats., when it refused to proceed to arbitration of Pedroni's grievance, without such a determination

having first been obtained from the Commission.

Page 16
Dec. No. 30701-A

Pursuant to the parties' stipulation, the Examiner has issued this same day a unit clarification in the form of a proposed decision with regard to the bargaining unit status of Pedroni's position at WCER, wherein he concluded that Pedroni's position was not properly included in the bargaining unit represented by the Complainant.

Dated at Madison, Wisconsin, this 30th day of July, 2004.

David E. Shaw /s/

David E. Shaw, Examiner

DES/gjc
30701-A

