STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ROLLING HILLS EMPLOYEES' LOCAL 1947, AFSCME, AFL-CIO, Complainant,

vs.

MONROE COUNTY, Respondent.

Case 175
No. 64512
MP-4131

Decision No. 31346-B

Appearances:

Daniel R. Pfeifer, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 18990 Ibsen Road, Sparta, Wisconsin 54656, appearing on behalf of Rolling Hills Employees' Local 1947, AFSCME, AFL-CIO.

Kenneth Kittleson, Personnel Director, Monroe County, 14345 County Highway "B", Sparta, Wisconsin 54656-4509, appearing on behalf of Monroe County.

ORDER ON REVIEW OF EXAMINER'S DECISION

On September 23, 2005, Examiner John Emery issued Findings of Fact, Conclusion of Law and Order in the above matter concluding that Monroe County had committed a prohibited practice within the meaning of Sec. 111.70(3)(a) 5, Stats. by refusing to arbitrate a grievance filed by Rolling Hills Employees' Local 1947, AFSCME, AFL-CIO. As part of his decision, the Examiner rejected the County's contention that Local 1947's request to arbitrate the grievance was untimely.

The County timely filed a petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats. The parties thereafter filed written argument in support of and in opposition to the petition and the record was closed December 5, 2005.

Having reviewed the record and being fully advised in the premises, we hold that the Examiner correctly concluded that the County's refusal to arbitrate the grievance violated

Sec. 111.70(3)(a) 5, Stats.. However, since the County's timeliness defense raises a question of procedural arbitrability, which should be decided by the arbitrator, we have vacated the Examiner's Order in that regard and direct the parties to proceed to arbitration.

Consistent with the foregoing, we issue the following

ORDER

A. The Examiner's Findings of Fact are affirmed.

B. The Examiner's Conclusion of Law is affirmed.

C. The Examiner's Order is modified as follows:

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

1. Cease and desist from violating Sec. 111.70(3)(a) 5, Stats., by refusing to arbitrate grievances where the County has no substantive arbitrability defense.

2. Take the following affirmative action that the Commission finds will effectuate the policies of the Municipal Employment Relations Act:

(a) Participate (including presentation of the timeliness defense) in grievance arbitration of the March 2004 grievance filed by Rolling Hills Employees' Local 1947, AFSCME, AFL-CIO.

(b) Notify all of the employees represented by Local 1947 by signing and posting the Notice attached to this order in conspicuous places where said employees are employed. The Notice shall remain posted for 30 days after the date on which it is signed and reasonable steps shall be taken to ensure that the Notice is not altered, defaced or covered by other material.

(c) Notify the Wisconsin Employment Relations Commission and Local 1947 in writing within 20 days of the date of this Order as to what action has been taken to comply herewith.

Given under our hands and seal at the City of Madison, Wisconsin, this 4th day of January, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

NOTICE TO ALL MONROE COUNTY EMPLOYEES
REPRESENTED BY ROLLING HILLS EMPLOYEES' LOCAL 1947, AFSCME

Pursuant to an Order of the Wisconsin Employment Relations Commission, Monroe County hereby notifies employees represented by Rolling Hills Employees' Local 1947, AFSCME, that:

WE WILL NOT violate the collective bargaining agreement between Local 1947 and the County by refusing to arbitrate grievances, where we have no legal basis for that refusal.

WE WILL arbitrate the March 2004 death benefits grievance filed by Local 1947.

MONROE COUNTY

By _____
Kenneth Kittleson
Personnel Director

Dated this _____day of _____, 2006

THIS NOTICE MUST REMAIN POSTED FOR 30 DAYS FROM THE DATE IT IS SIGNED AND POSTED AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL.

MONROE COUNTY

MEMORANDUM ACCOMPANYING ORDER ON REVIEW OF EXAMINER'S DECISION

As reflected in the Examiner's Findings of Fact, the County refused to arbitrate a death benefits grievance because the County believed Local 1947 had not timely submitted the grievance to arbitration. Local 1947 then filed a complaint with the Commission seeking an order that the County proceed to arbitration as required by the parties' collective bargaining agreement. At hearing, without objection from Local 1947, the parties litigated the merits of the County's timeliness defense.

Since 1954, it has been the law in Wisconsin that procedural defenses [1] such as the timeliness of the submission of a grievance to arbitration are to be litigated before the arbitrator and thus are not a legal basis for refusing to arbitrate a grievance. DUNPHY BOAT CORP. V. WIS. E.R.. BOARD, 267 Wis. 316, at 327 (1954). See also OOSTBURG JT. SCHOOL DISTRICT NO. 14 (WERC, 12/72). Thus, the County had no legal basis for refusing to arbitrate this grievance, including the procedural defense.

Given the law established by DUNPHY BOAT, once it became clear that the County's only defense to arbitration was procedural (i.e., timeliness), no further evidentiary hearing was appropriate. The Examiner properly should have ordered the County simply to proceed to arbitration As the Wisconsin Supreme Court held in DUNPHY BOAT at 327:

> If we were to hold otherwise, any party to a labor contract who wished to circumvent the arbitration procedure provided in such contract could come into court and assert its position in the dispute was legally correct, and have the court pass on the issue instead of the arbitrators.

Given the settled state of the law, we have modified the Examiner's decision to set aside his resolution of the merits of the timeliness defense and ordered the County to present any such defense as part of the proceedings before the grievance arbitrator. We also order the County post a standard Notice advising the employees that it will be proceeding to arbitration.

We acknowledge that our order potentially could impose some additional expense and delay upon the parties in this case and that the arbitrator potentially could reach a different

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[1] In contrast, where it is asserted that a grievance is not substantively arbitrable because the parties have not agreed in the contract to arbitrate the matter, the employer can insist that the merits of this type of defense be resolved by the Commission or the courts before it proceeds to arbitration. JT. SCHOOL DIST. NO. 10, CITY OF JEFFERSON V. JEFFERSON ED. ASSO. 78 Wis. 2D 94 (1977); MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 30590-B (WERC, 5/04).

conclusion than the Examiner did regarding the County's timeliness defense. [2] However, in the long run, the law is better served by adhering strictly to the principle that procedural defenses are for the arbitrator, since that principle itself is designed to avoid the delay and expense of litigation in an additional forum. [3]

Dated at Madison, Wisconsin, this 4th day of January, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

[2] We expressly decline to rule upon the merits of the County's timeliness defense and nothing in this decision should be interpreted to imply any Commission opinion on that subject.

[3] Indeed, the law is so clear and well founded that costs and attorneys fees will likely be awarded pursuant to Sec. 227.483 (b), Stats. in any future such case because as provided in that statutory provision:

> (b) . . . the party or the party's attorney knew, or should have known, that the . . . defense was without any reasonable basis in law or equity and could not be supported by a good faith argument for a . . . reversal of existing law.

Here, no costs or fees are appropriate because both Local 1947 and the Examiner acquiesced in litigating and deciding the procedural defense.

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