STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

THE WISCONSIN STATE EMPLOYEES UNION, AFSCME, COUNCIL 24, AFL-CIO, Complainant,

vs.

STATE OF WISCONSIN, Respondent.

Case 706
No. 65994
PP(S)-373

Decision No. 31865-A

Appearances:

Kurt Kobelt, Lawton & Cates, Attorneys at Law, P.O. Box 2965, Madison, Wisconsin 53701-2965, For the labor organization.

David J. Vergeront, Chief Legal Counsel, Office of State Employment Relations, 101 East Wilson Street, 4th Floor, P.O. Box 7855, Madison, Wisconsin 53707-7855, for the employer.

ORDER DENYING MOTION TO DECLINE JURISDICTION

On June 20, 2006, the Wisconsin State Employees Union, AFSCME, Council 24, AFL-CIO filed a complaint with the Wisconsin Employment Relations Commission alleging that the State of Wisconsin had committed unfair labor practices by failing and refusing to comply with certain grievance arbitration awards, in violation of Secs. 111.84(1)(a) and (e), Wis. Stats. On July 17, 2006, the State of Wisconsin filed a Notice of Motion and Motion for the Commission to decline jurisdiction. The Complainant filed a brief in opposition to the motion on August 11; the Respondent filed a brief in support of its motion on August 29, to which the Complainant responded on September 21. At the examiner's request, the Complainant on October 12 provided a complete copy of an arbitration award which it cited in its written arguments.

Where a collective bargaining agreement contains a procedure for final and binding arbitration of disputes arising thereunder, it is well-settled that the Commission generally will not assert its statutory complaint jurisdiction over any breach of contract claims covered

therein. UNITED STATES MOTOR CORP., DEC. NO. 2067-A (WERB, 5/49); HARNISCHFEGER CORP., DEC. NO. 3899-B (WERB, 5/55); MELROSE-MINDORO JOINT SCHOOL DISTRICT NO. 2, DEC. NO. 11627 (WERC, 2/73). Although there are exceptions to this policy in instances where the employee alleges a denial of fair representation, WONDER REST CORP., 275 Wis 273 (1957); where the parties have waived the arbitration provision, ALLIS-CHALMERS MFG. CO., Dec. No. 8227 (WERB, 10/67); or where the party who allegedly violated the contract ignores and rejects the arbitration provisions, MEWS READY-MIX CORP., 29 Wis. 2D 44 (1965), the need to honor the exclusivity of the available grievance/arbitration process which the parties bargained warrants a decision not to assert jurisdiction under Sec. 111.84 (1)(e), Stats., to adjudicate a complainant's contractual claim. STATE OF WISCONSIN (DEPARTMENT OF HEALTH AND SOCIAL SERVICES), DEC. NO. 20830-B (WERC, 8/85). The Master Agreement between the parties contains a grievance procedure which includes final and binding arbitration.

Pursuant to Section 111.84(1)(e), Stats., the State commits an unfair labor practice when it does not "accept the terms of an arbitration award, where previously the parties have agreed to accept such award as final and binding upon them." The Commission has interpreted this provision to mean that "an employer must comply with the resolution arbitrators have reached regarding the issues underlying an arbitration award, when the same issues arise subsequently between the same parties and no material facts have changed," and that the state would be "refusing to accept the terms" of an award if it continued to discipline "based upon a policy that the arbitrator had invalidated." STATE OF WISCONSIN (DEPARTMENT OF CORRECTIONS), Case 630, No. 63129, PP(S)-337 (WERC, 5/06).

The Master Agreement between the parties also contains Section 13/5/2A, which provides, in pertinent part, as follows:

> When an employee has been identified as a sick leave abuser by the Employer and required to obtain a medical doctor's statement for sick leave use, the notice of such requirement will be given to the employee and the Local Union in writing. If the medical certificate verifies that the employee was not abusing sick leave or is physically fit to report to work, the Employer shall pay the cost of the medical certificate.
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> To protect employee privacy, the parties shall make a good faith effort to maintain the confidentiality of personal medical information which is received by or disclosed to the Employer in the course of administering this section.

Pursuant to the contractual grievance arbitration procedure, Arbitrator Herman Torosian on December 4, 2004 issued an arbitration award interpreting and meaning and application of section 13/5/2A. In DEPARTMENT OF CORRECTIONS, OSER No. 19121, Torosian held that the employer had violation 13/5/2A "by not securing the grievants' consent before obtaining medical information regarding their medical bills," and ordered the State to "cease and desist from doing so in cases where employees have validated their absences under Section 13/5/2A and that any inquiry should be limited to determining the cost of the office visit and doctor's fee employees incur in obtaining a medical certificate."

On March 4, 2005, Arbitrator George Fleischli issued an arbitration award also interpreting the meaning and application of the same section. Denying two grievances and sustaining a third, Fleischli found the essence of this contractual provision in these principles:

> The employee who is subject to the "letter" [requiring verification of medical basis for absence] need not provide the Employer with detailed information, often of a very personal nature, to establish the medical basis for an absence. The employee's medical provider need only assure the Employer that absence from work was medically required. It provides the Employer with its needed assurance that the employee's absence was medically necessary. It protects the employee's privacy in that the details of a medical diagnosis are not revealed to the Employer. An employee may view the necessity of including the magic words, "medical illness" on a medical slip as formalistic. However, it is through the use of that phrase that a physician certifies to the Employer that an employee's absence was medically justified. An employee may choose to refrain from giving the Employer detailed information about the illness that prevented her from reporting to work. This is a contractually protected option open to her. However, given the limited information provided by the medical provider, what may seem to the employee as a formalistic requirement represents the central reason for the imposition of the "letter" requirements, to insure that the employee's absence on a particular day was medically required. The Employer clearly has the right to insist that the medical slip submitted contain the magic words.

Taken together, the Torosian and Fleischli awards clearly set forth what the employer can and cannot do; it may require employees who are "on the letter" to provide, in a timely manner, a slip from a medical doctor stating the time and date the employee was seen, that the employee was absent from work for a "medical illness," and the length of absence required. Employees "on the letter" who fail to comply are subject to a denial of sick leave and the imposition of discipline. But the employer cannot go beyond the "magic words" attesting to nature of the medical illness.

The complaint in this matter alleges that, notwithstanding the Torosian and Fleischli awards, the employer has either issued or not rescinded discipline to employees for failure to disclose the nature of the illnesses that prevented them from working. The disciplinary actions referenced in paragraph 6 of the complaint are clearly subject to final and binding arbitration (indeed, the union has grieved and appealed to arbitration at least one of the disciplines identified). However, the availability of grievance arbitration to address the alleged violations of section 13/5/2A does not preclude the union from filing a complaint alleging that the employer has violated sections 111.84(1)(e) and, derivatively, (a) as well. The disciplinary notices themselves are not in the record, so it is impossible for me to determine at this time whether the material facts are sufficiently similar to those in the Torosian and Fleischli awards for this case to come under their purview.

Accordingly, the motion for the Commission to Decline Jurisdiction is denied.

Dated at Madison, Wisconsin, this 16th day of October, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stuart D. Levitan /s/

Stuart D. Levitan, Examiner

SDL/gjc
31865-A