STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

AFSCME LOCAL 2771, Complainant,

vs.

WAUPACA COUNTY, Respondent.

Case 157
No. 66160
MP-4284

Decision No. 32001-A

Appearances:

Houston Parrish, Staff Representative, AFSCME Council 40, 1457 Somerset Drive, Stevens Point, Wisconsin 54481, appeared on behalf of the Complainant Union.

James Macy, Attorney, Davis & Kuelthau, S.C., 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin 54903-1278, appeared on behalf of the Respondent County.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On August 3, 2006, AFSCME, Local 2771 filed a prohibited practice complaint with the Wisconsin Employment Relations Commission against Waupaca County. The complaint alleged that the County "refus[ed] to participate in and abide by the grievance process set forth in the current labor agreement" on two grievances concerning Kathy Hobbs. The Union contended that this action, in turn, violated Sec. 111.70(3)(a)5, Stats. After the complaint was filed, it was held in abeyance pending efforts to resolve the dispute. Those efforts were unsuccessful. On January 24, 2007, the Commission appointed Raleigh Jones, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusions of Law and Order, as provided for in Secs. 111.07(5) and 111.70(4)(a), Stats. On February 27, 2007, the County filed an answer denying the allegations. Hearing on the complaint was held on March 8, 2007 in Waupaca, Wisconsin. Following the hearing, the parties filed briefs and reply briefs by June 25, 2007. Having considered the record evidence and arguments of the parties, I hereby make and file the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Waupaca County, hereinafter referred to as the County, is a municipal employer providing general government services to the people of Waupaca County, Wisconsin. Its offices are located at 811 Harding Street, Waupaca, Wisconsin 54981.

2. AFSCME, Local 2771, hereinafter referred to as the Union, is a labor organization which represents various courthouse, human services and sheriff's department employees in Waupaca County. Its mailing address is in care of Houston Parrish, Staff Representative, AFSCME Council 40, 1457 Somerset Drive, Stevens Point, Wisconsin 54481.

3. The County and the Union have been parties to a series of collective bargaining agreements which govern the wages, hours and working conditions of the employees in the bargaining unit referenced in Finding 2. The parties' most recent collective bargaining agreement is in effect from January 1, 2005 through December 31, 2007. The cover page of that agreement specifies that the agreement is between "Waupaca County, through its Agent, the Personnel Committee of the Waupaca County Board of Supervisors" and the Union. The only parties who are empowered to amend or modify that collective bargaining agreement are the Waupaca County Board of Supervisors and the Union.

4. The collective bargaining agreement contains a management rights clause in Article 2. It provides in pertinent part:

ARTICLE 2 – MANAGEMENT RIGHTS

2.01 The Employer possesses all management rights except as otherwise specifically provided in this agreement and applicable law. These rights include, but are not limited to the following:

. . .

(I) To determine the kinds and amounts of services to be performed as pertains to the operations and the number and kinds of classifications to perform such services;

. . .

5. The collective bargaining agreement contains a grievance procedure in Article 10. It provides as follows:

ARTICLE 10 – GRIEVANCE PROCEDURE

10.01 Definition of a Grievance. A grievance shall mean a dispute concerning the interpretation or application of this contract or a question of safety.

Subject Matter: Only one subject matter shall be covered in any one grievance. A written grievance shall contain the name and position of the grievant, a clear and concise statement of the grievance, the issue involved, the relief sought, the date the incident or violation took place, the specific article and section of the agreement alleged to have been violated, and the signature of the grievant and the date. Local 2771 may present grievances on behalf of the local union.

10.02 The parties agree that the prompt and just settlement of grievances is of mutual interest and concern. The grievant employee shall first bring his/her complaint to the grievance committee of the Union. If it is determined after investigation by the Union that a grievance does exist, it shall be processed in the manner described as follows:

Step 1. The employee and a union representative shall present the grievance in writing to the employee's immediate supervisor within ten (10) working days from the date the employee knew or should have known of the cause giving rise to the grievance. In the event of a grievance, the employee shall perform his/her assigned task and grieve the complaint later, except in matters involving the health or safety of the employee. The immediate supervisor shall provide a reply in writing to the employee and the Union within five (5) working days.

Step 2. If the grievance is not resolved at Step 1, the Union shall present the grievance in writing to the department head within five (5) working days of the Step 1 answer. The department head shall provide a written reply to the grievance which shall be given to the employee and the union representative within five (5) working days after receipt of the grievance.

Step 3. If the grievance is not resolved at Step 2, the grievance shall be submitted in writing to the Waupaca County Personnel Committee through the personnel office, within ten (10) working days of receipt of the Step 2 answer. The personnel committee shall meet with the employee and the union committee at a mutually agreeable date and time to discuss the grievance. The committee will render a decision in writing no later than its regularly scheduled meeting following the grievance conference.

Step 4. If a satisfactory settlement is not reached at Step 3, the Union shall notify the chairperson of the personnel committee in writing of its intent to submit the grievance to arbitration within thirty (30) working days of receipt of the Step 3 responses or last date said response was due. At the same time of giving the above notice of intention to

arbitrate, the Union shall also request the W.E.R.C. to appoint an arbitrator from its staff.

If the appointee is unacceptable, the party to whom the appointee is unacceptable shall notify the other party and then request the W.E.R.C. to prepare a list of five (5) arbitrator nominees from the panel. Each party shall have two (2) strikes in alternate sequence and the nominee remaining after the strikes shall be the arbitrator and he/she shall be so informed by the parties.

Arbitration proceedings shall be implemented in a manner prescribed by the arbitrator. The decision of the arbitrator shall be final and binding on both parties, subject to judicial review. In rendering his/her decision, the arbitrator shall neither add to, detract from, nor modify any of the provisions of this agreement. The arbitrator shall be requested to render his/her decision within thirty (30) days after close of hearing or receipt of briefs, whichever is later.

The costs of the arbitrator shall be divided equally between the parties. The parties will share in the cost of the transcript when both parties agree that a transcript is necessary. If the arbitrator requests a transcript, the cost will be split between the parties. In cases involving discipline in excess of five days or discharge, the parties will share the cost of the transcript.

. . .

10.06 General. Any employee may process his/her grievance as outlined above, but the Union shall have the right to present and act in support of its position in the matter of the grievance. However, the Union shall determine if the grievance shall be processed by arbitration.

. . .

This grievance procedure can be summarized as follows: Step 1 requires that the grievance be submitted to the immediate supervisor for review. Step 2 of the process requires the grievance to go to the department head for review. Step 3 of the process involves the Personnel Committee through the Personnel Director. Step 4 of the process is the arbitration step. It specifies that if the grievance is not settled at Step 3, "the Union shall notify . . .the personnel committee in writing of its intent to submit the grievance to arbitration. . ." This step requires the Union to give notice to the County of its intention to arbitrate (the unresolved grievance).

6. The collective bargaining agreement also contains a process whereby employees or their department head can request a reclassification of a job based on the actual duties being performed. The Personnel Committee is charged with reviewing reclassification requests. That process is found in Article 12. That article provides in pertinent part:

ARTICLE 12 – JOB CLASSIFICATION AND WAGE SCHEDULE

12.01 All employees shall be paid according to their work assignment.

12.02 The job classifications and wage schedules shall be the same as set forth in attached Schedule A.

12.03 The number of employees to be assigned to any job classification and the job classifications needed to operate Waupaca County shall be determined by the Employer and shall constitute the table of organization.

12.04 Probationary employees, part-time employees, and LTE's shall be paid at the rates now listed in the attached schedule.

12.05 A request for reclassification may be made at any time by either the employee and/or supervisor, but such request must be in writing. Such request shall be forwarded to the personnel director for review. The recommendation of the department head and the personnel director shall be forwarded to the Personnel Committee within a reasonable time not to exceed two months from its next scheduled meeting. The Personnel Committee shall approve or reject the request at its next scheduled meeting following the receipt of said request and recommendations. In the event that the request is being submitted by the department head, it shall be effective the day that he/she submits the request. Should the request be denied, the employee may not appeal through the grievance procedure.

. . .

The County's Personnel Committee is charged with reviewing reclassification requests made pursuant to Sec. 12.05. Decisions made by the Personnel Committee regarding reclassification requests are not grievable.

7. Kathy Hobbs began employment with the County in February, 2004 as a Clerk Typist I in the Register of Deeds Office. At the time, George Jorgensen was the County's Register of Deeds and Hobbs' immediate supervisor. The Register of Deeds is an elected position.

8. In the Fall of 2004, Hobbs and Register of Deeds Jorgensen submitted a request to reclassify Hobbs' position from Clerk Typist I in Labor Grade 2 to Deputy Register of Deeds I in Labor Grade 3. There is about a 75 cent per hour wage difference from Labor Grade 2 to Labor Grade 3. Schedule A in the parties' collective bargaining agreement specifies that Labor Grade 3 covers two classifications: Clerk Typist II and Deputy Register of Deeds I. Hobbs' reclassification request was submitted to the County Personnel Committee, which has been delegated the duty of reviewing employee reclassification requests by the County Board. On September 16, 2004, the County Personnel Committee denied the reclassification request. The stated basis for the denial was as follows:

> The external comparables indicate that the position is more than adequately compensated among comparable and surrounding counties and does not support reclassification. The internal comparables show this position's duties and responsibilities are similar to those of other Clerk Typist positions in Waupaca County and does not have the additional duties and responsibilities to warrant a reclassification. Based on this information the Personnel Committee has denied the reclassification.

As noted in Finding 6, this reclassification denial was not grievable pursuant to the express terms of Section 12.05 of the collective bargaining agreement.

9. On June 3, 2005, Hobbs and Jorgensen again requested that Hobbs' Labor Grade 2 position be reclassified as a Labor Grade 3 position. This request was again submitted to the County Personnel Committee. On August 12, 2005, County Personnel Director Amanda Welch notified all employees who had requested reclassifications that year, including Hobbs, that the County Personnel and Finance Committee had decided to not consider any reclassification requests. The stated basis for this action was "due to budgetary concerns. . . for the 2006 budget year. . ." Jorgensen subsequently requested the Personnel and Finance Committee to reconsider Hobbs' reclassification request. The Committee reconsidered Hobb's reclassification request, but once again denied it. As noted in Finding 6, this reclassification denial was not grievable pursuant to the express terms of Section 12.05 of the collective bargaining agreement.

10. On October 3, 2005, Jorgensen, in his capacity as Register of Deeds, deputized Hobbs. Section 59.43(3), Stats., provides as follows:

> **(3)** Register of Deeds: Deputies. Every register of deeds shall appoint one or more deputies, who shall hold office at the register's pleasure. The appointment shall be in writing and shall be recorded in the register's office. The deputy or deputies shall aid the register in the performance of the register's duties under the register's direction, and in case of the register's vacancy or the register's absence or inability to perform the duties of the register's office the deputy or deputies shall perform the duties of register until the vacancy is filled or during the continuance of the absence or inability.

11. On October 6, 2005, the Union filed a grievance on Hobbs' behalf which was denominated # 05GR07. The factual allegations raised in this grievance were as follows: "[o]n 10-3-05 grievant was deputized by George Jorgensen and did not receive pay commensurate with job responsibilities and labor grade." The grievance alleged that by this action, the County violated "Schedule A of Non-Professional Employees Classification and Pay Chart, and Article 12." The Union's requested remedy was as follows:

> Pay the Grievant the labor grade according to her work assignment. Grievant seeks Labor Grade 3 pay as Deputy Register of Deeds I. Pay Grievant retroactive to 10/3/05, and make the employee whole.

12. That same day, Union Steward Robin Doemel met with Jorgensen regarding the grievance referenced in Finding 11. That same day, Jorgensen responded to the grievance in writing. He wrote:

> Per the grievance 05GR07 presented to me today (10/06/2005), I am responding to the issues presented in said grievance:
>
> 1. I admit that Kathy Hobbs was deputized on October 3, 2005 pursuant to State Statute 59.43(3).
>
> 2. I agree that Kathy Hobbs hasn't been paid an increase for this change.
>
> 3. I agree that Kathy Hobbs should be paid at a labor grade 3 as a Deputy Register of Deeds.

13. The next day, October 7, 2005, Union Steward Doemel sent County Personnel Director Welch the following letter:

> On October 6, 2005, I met with George Jorgensen, Register of Deeds, in Step 1 and Step 2 of the grievance process regarding Kathy Hobbs, Deputy Register of Deeds.
>
> Enclosed you will find:
>
> - Copy of Grievance #05GR07
>
> - Response from George Jorgensen, Register of Deeds, resolving the grievance. He wants Kathy Hobbs to be paid at Labor Grade 3 rate.
>
> Since this matter has been resolved through the grievance process per Article 10 of the Collective Bargaining Agreement, I assume the grievant will be paid at Labor Grade 3 retroactive to October 3, 2005.

14. On October 18, 2005, Welch responded to Doemel in writing as follows:

I am in receipt of your correspondence regarding the rate of pay for the Clerk Typist I position in the Register of Deeds Office. Although George Jorgensen, Register of Deeds, has deputized all three of his employees, he does not have the authority to determine the number of employees to be assigned to any job classification nor does he have the authority to determine the job classifications needed to operate his department. This would include any reclassifications of employees. Those determinations are authorized by the Waupaca County Board of Supervisors.

Waupaca County maintains a Table of Organization with an authorized count of positions. The County Board has authorized and appropriated funds for the elected Register of Deeds along with the following positions for 2005: (1) Deputy Register of Deeds II, (1) Deputy Register of Deeds I, and (1) Clerk Typist I. All of these positions are full time.

The matter you presented is not a grievable issue within the terms of the bargaining agreement and therefore cannot be processed as such.

15. On November 1, 2005, Doemel responded to Welch in writing as follows:

Thank you for your 10/18/05 response to Grievance 05GR07.

You indicated that this is not a grievable issue. The union disagrees with you and we are pursuing the grievance process. The grievance was resolved at Step I and Step 2 of the grievance process by the department head, George Jorgensen.

Kathy Hobbs has accepted new responsibilities in the Register of Deeds office and has been deputized. Mr. Jorgensen, the department head, felt that he could not run his office effectively without Ms. Hobbs being deputized and gave her additional responsibilities.

Mr. Jorgensen had also resolved in writing that Ms. Hobbs should be paid at Labor Grade 3, Deputy Register of Deeds I. How this is implemented is not a concern of the union; perhaps you need to work that out with the department head. Therefore, we want Ms. Hobbs to be compensated for her work assignment and additional responsibilities retroactive to October 3, 2005.

Please advise when you will be resolving the grievance.

16. On November 16, 2005, Doemel responded to Welch again as follows:

I haven't received a response from you regarding my letter of November 1, 2005.

Please let me know what the status is on this situation, or if you have spoken directly with Kathy Hobbs.

Michael Phelan and I would be happy to meet with you to further explain our stand on this grievance which has been resolved by Mr. Jorgensen. We are still waiting to hear when Ms. Hobbs will be compensated.

17. On November 30, 2005, Welch responded to Doemel as follows:

In response to your letter, the County continues to take the position that this is not a grievable issue pursuant to the collective bargaining agreement. Article 12.05 states the following regarding reclassification of positions: *". . .In the event that the request is being submitted by the department head, it shall be effective the day that he/she submits the request. Should the request be denied, the employee may not appeal through the grievance procedure."* In this case the Department Head did submit a request for reclassification of the Clerk Typist I position. The request was denied; therefore, the employee may not appeal through the grievance procedure.

Additionally, Article 2 – Management Rights, 2.01 of the collective bargaining agreement states *"these rights include, but are not limited to the following: . . . (I) To determine the kinds and amounts of services to be performed as pertains to the operations and the number and kinds of classifications to perform such services;"* As I have stated previously, although George Jorgensen, Register of Deeds, has deputized all three of his employees, he does not have the authority to determine the number of employees to be assigned to any job classification nor does he have the authority to determine the job classifications needed to operate his department. Those determinations are authorized by the Waupaca County Board of Supervisors. The current Table of Organization authorizes the following positions (1) elected Register of Deeds, (1) Deputy Register of Deeds II, (1) Deputy Register of Deeds I, and (1) Clerk Typist I.

18. The Union never advanced the grievance identified in Finding 11 to Step 4 of the grievance procedure or moved it to arbitration.

19. On January 17, 2006, the Union filed a second grievance on Hobbs' behalf which was denominated #06GR03. The factual allegations raised in this grievance were as follows: "Waupaca County has failed to implement the department head's resolution to grievance 05GR07 by failing to pay the grievant according to her work assignment and duties performed." The grievance alleged that by this action, the "County has failed to comply with Article 10 of the Union Contract." The Union's requested remedy was as follows: "implement

the original resolution of Grievance 05GR07 in which the department head resolved the grievance in writing stating that the grievant should be paid according to her work assignment retroactive to 10/3/05, and make the employee whole." Upon receiving the grievance, Jorgensen wrote the following on it: "I agree with this grievance #06GR03/05GR07."

20. On January 23, 2006, the Union appealed the grievance referenced in Finding 19 to Step 3 of the grievance procedure. The appeal, which was sent by Union Steward Doemel to Personnel Director Welch, provided thus:

> Enclosed please find:
>
> 1. Copy of Grievance #06GR03.
> 2. Copy of written reply from George Jorgensen, Department Head.
>
> This is a follow-up grievance to Grievance #05GR07. Waupaca County Professional and Non-Professional Employees Union, Local 2771, contends that during the initial grievance process of 05GR07, the Department Head George Jorgensen resolved the grievance. At this time the union feels that the Waupaca County Finance and Personnel Committee has failed to implement a prompt and just settlement to Grievance 05GR07 which was resolved by the Department Head; therefore, Grievance 06GR03 has been initiated.
>
> Grievant Kathy Hobbs and I met with the Department Head George Jorgensen on 1/17/06 in Step 1 and 2 of the grievance procedure. Mr. Jorgensen provided us with a written reply indicating that he agrees with the grievance. Having completed Step 1 and 2 of the grievance process, the union committee respectfully requests a meeting with the personnel committee to proceed with Step 3. Please contact our staff representative Houston Parish to set up a time for this meeting.

21. On February 9, 2006, Welch responded to Doemel as follows:

> In your most recent letter dated January 23rd regarding the above issue, you state that the union has filed a second "grievance" because the County has failed to implement a just settlement to your initial "grievance." The County continues to take the position that this is not a grievable issue pursuant to the collective bargaining agreement. Article 12.05 states the following with regard to denial of reclassification requests, *"Should the request be denied, the employee may not appeal through the grievance procedure."* Employee Kathy Hobbs requested a reclassification to a higher labor grade and the reclassification was denied; therefore failure to pay at the higher grade level is not a grievable issue and the County will not recognize it as such.

> Furthermore, a County Department Head does not have the authority to determine an employee's classification. Those determinations are only authorized by the Waupaca County Board of Supervisors. The authorized classification of the position held by Kathy Hobbs is Clerk Typist I, Labor Grade 2 on Schedule A in the Professional/Non-Professional Employees Union collective bargaining agreement.

22. The Union never advanced the grievance identified in Finding 19 to Step 4 of the grievance procedure or moved it to arbitration.

23. On May 5, 2006, Council 40 Staff Representative Houston Parrish amended grievance # 06GR03 (i.e. the second grievance and one identified in Finding 19). The factual allegations raised in this amended grievance were as follows: "Employer failed to implement prior grievance resolution to 05GR07 and has continued to not pay grievant according to her work assignment and duties performed." The grievance alleged that by this action, the County violated "Article 10 – Grievance Procedure" and "Article 12 – Failure to pay employee per work assignment." The Union's requested remedy was as follows: "Implement original grievance resolution and make employee whole by paying her according to her work assignment."

24. On May 24, 2006, Welch responded to Parrish as follows:

> I received your letter regarding your intent to amend your previous grievance regarding the Clerk Typist position in the Register of Deeds Department. The request is untimely, not arbitrable and not a violation of the contract.

25. The Union never advanced the amended grievance identified in Finding 23 to Step 4 of the grievance procedure or moved it to arbitration.

26. On August 3, 2006, the Union filed the instant complaint with the Wisconsin Employment Relations Commission alleging that the County violated Sec. 111.70(3)(a)5, Stats., by "refusing to participate in and abide by the grievance process set forth in the current labor agreement."

27. The Union never advanced any of the grievances involved herein to Step 4 of the grievance procedure or moved them to arbitration.

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

CONCLUSIONS OF LAW

1. Jorgensen's written response to Grievance 1 dated October 6, 2005 did not create a binding grievance settlement. Therefore, the County did not violate Sec. 111.70(3)(a)5 by refusing to honor that document as a binding grievance settlement.

2. Under Step 4 of the grievance procedure contained in the parties' collective bargaining agreement, the Union's appeal to arbitration is a condition precedent to the contractual obligation of the County to proceed to arbitration.

3. The Union did not appeal any of the grievances involved here to the arbitration step (Step 4), or make a formal demand (to the County) to proceed to arbitration, so the County did not have to proceed to arbitration on them. Therefore, the County did not violate Sec. 111.70(3)(a)5 by its conduct here.

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

ORDER

The complaint of prohibited practices filed in this matter is dismissed.

Dated at Madison, Wisconsin, this 26th day of July, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones /s/
Raleigh Jones, Examiner

WAUPACA COUNTY

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Union

It is the Union's position that the County violated both Sec. 111.70(3)(a)5 and the collective bargaining agreement by its actions here. It makes the following arguments to support that contention.

First, the Union contends that the County failed to honor a grievance settlement. The grievance settlement that the Union references in this contention is Register of Deeds Jorgensen's written response to Grievance 1. According to the Union, his written response to the grievance constituted a grievance settlement because he sustained the Union's position and agreed that Hobbs should be paid at a Labor Grade 3 as a Deputy Register of Deeds. Building on the premise that there was a grievance settlement, the Union opines that "if the employer and the union cannot agree to the precise amount of pay that is owed, then such dispute is subject to the grievance procedure, but the determination that she is owed the pay is not." With regard to Jorgensen's authority to settle the grievance, the Union points out that the collective bargaining agreement says that when an employee files a grievance, the employee's supervisor is to respond to same. The Union submits that is what Jorgensen did here – he responded to the grievance. The Union asserts that Jorgensen was empowered to respond to the grievance because he was Hobbs' supervisor and had been delegated the responsibility to respond to grievances by the County Board. Next, the Union emphasizes that when Jorgensen responded to the grievance, he sustained it. According to the Union, that resolution must be honored. The Union believes that the fact that the County later disagreed with Jorgensen's resolution of the grievance is irrelevant. Finally, the Union disputes the County's contention that Jorgensen did not have the authority to resolve that grievance. The Union avers that he did. Building on that premise (i.e. that Jorgensen was empowered to resolve/settle the grievance), it is the Union's view that no justifiable reason was offered for not honoring the grievance settlement. The Union argues that the County's failure to honor that grievance settlement violated both Sec. 111.70(3)(a)5 and the collective bargaining agreement.

Second, the Union contends that the County also committed a prohibited practice by refusing to engage in the grievance process. According to the Union, what happened here is that the County expressly repudiated the grievance procedure when it took the position that the grievance was not grievable. The Union submits that in response, it relied on the County's stated position and filed the instant complaint. The Union argues that if the County does not like the result, then it should not have expressly stated that the subject matter involved in the grievance was not grievable/arbitrable. The Union characterizes the County's argument in this case to be that the Union should not have relied on the County's express, written representations. With regard to the County's argument that no formal request for arbitration was made, it is the Union's view that it did not need to do so here because the County had

already informed the Union that the grievance was not grievable/arbitrable. The Union characterizes the County's contention that the Union "must first wait until the County refuses to submit to arbitration" as nonsensical. The Union maintains that "regardless of the contract's provision allowing the Union to proceed to arbitration if the County fails to timely respond to a Step 3 grievance, the contract does not give the County the right to refuse to engage in the grievance process."

The Union also argues that the County "anticipatorily breached the contract" when it took the position that the subject matter was not grievable or arbitrable. As the Union sees it, "when a party clearly informs the other of its intent to breach the contract, the other party may consider the agreement breached. There is no need to wait around to see if the breach is, in fact, going to occur." It cites an arbitration award to support that premise.

Third, the Union contends that the grievances involved herein are both grievable and arbitrable. To support the former (i.e. that they are grievable), it relies on Sec. 10.01 which defines a grievance as "a dispute concerning the interpretation or application of this contract." It avers that all the grievances fall into this broad category. To support the latter (i.e. that they are all arbitrable), it relies on the STEELWORKERS' TRILOGY cases and the JEFFERSON SCHOOL DISTRICT case. Specifically, it cites the language therein that a grievance is presumed arbitrable "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." The Union avers that it cannot be said with positive assurance that the grievance is not arbitrable, so the Union reasons that the grievance is arbitrable. While the Union acknowledges that it cannot grieve reclassification requests, it asserts that exclusion does not apply to the grievances involved herein. According to the Union, the grievances involved herein do not involve a reclassification request or ask for a reclassification, but rather involve "receiving the proper rate of pay for one's work assignment." The distinction is important, of course, because the former are excluded from being a grievance while the latter are not. The Union contends that since the contract does not specifically exclude the grievances involved here from arbitration, they (i.e. the grievances) are arbitrable.

In sum, the Union asks that the complaint be sustained. It seeks the following remedies: First, it asks that "the initial grievance resolution be honored" with a finding that the County "refus[ed] to abide by the grievance process." Second, in the alternative, if the Examiner finds that the grievance was not resolved, the Union seeks an order directing the County to "process the grievances in accordance with the collective bargaining agreement" and submit them to arbitration in the event they (i.e. the grievances) are not resolved.

County

It is the County's position that it did not violate Sec.111.70(3)(a)5 by its actions here. It makes the following arguments to support that contention.

First, the County disputes the Union's assertion that it failed to honor a grievance settlement. The County notes that the Union's argument is prefaced on the fact that a settlement occurred in the first place. As the County sees it, no such settlement occurred. The County contends that Register of Deeds Jorgensen did not possess the authority to settle Grievance 1 at Steps 1 or 2. To support that premise, it notes that the collective bargaining agreement in question is between the Union and the County Board of Supervisors. It emphasizes that the Register of Deeds is not a party and has no authority to individually modify the collective bargaining agreement or create positions, including through a grievance settlement. According to the County, the Register of Deeds, like other department heads, has no authority to "settle" grievances dealing with certain matters reserved to the County Board of Supervisors such as health insurance issues, the application of benefits, or things having to do with personnel policies and procedures. The County avers that determining what positions are to be created is left exclusively to the County Board and it cites the Management Rights clause in support. The County points out that in his responses to both grievances, all Jorgensen said was that he agreed with the Union (which, the County notes, was the same position he took in making the reclassification requests). The County emphasizes that Jorgensen never said he was exercising any authority to settle the grievances. The County contends that the reason for this was simple: he had no authority to do so. The County argues that if the Register of Deeds had the authority to grant the grievance, he would have had the authority to grant the reclassification. According to the County, he did not have the authority to do either, and it maintains that the Union put forth no evidence suggesting that he had such authority. Next, the County notes that the contractual grievance procedure contains a number of steps in the process beyond that of the department head. It emphasizes that in this case, the Personnel Committee did address the matter and expressly informed the Union that payment for a deputy would not be made. The County maintains that when that happened, the Union was put on notice that the grievance was not resolved.

Second, the County disputes the Union's assertion that it refused to engage in the grievance process. According to the County, the record facts show otherwise. The County maintains that the record facts show that the County responded to the Union at each step of the grievance process for each grievance. Building on that premise, it is the County's view that it did participate in the grievance process and responded to the Union at each step.

As part of its argument on this point, the County emphasizes that the Union never advanced any of the grievances involved herein (i.e. Grievance 1, Grievance 2, or amended Grievance 2) to the grievance arbitration step (i.e. Step 4). According to the County, all the Union did was process the grievances through the third step of the grievance procedure, but it stopped there. The County avers that the Union never appealed any of them to the fourth step, or made a demand (to the County) to proceed to arbitration. The County contends that filing for arbitration is a threshold step that must be met, and the burden for doing so is on the Union – not the County. The County maintains that since the Union failed to appeal the grievance to the arbitration step, it is impossible to find that the County failed to cooperate in the grievance process.

Next, the County argues in the alternative that the grievances are no more than an improper attempt to obtain a job reclassification for Hobbs. For the purposes of context, it notes that the Union filed Grievance 1 shortly after the County denied Hobbs' first reclassification request. The County avers that the Union knew it could not grieve that decision (i.e. the denied reclassification), so it filed Grievance 1. According to the County, that grievance is identical in substance to the reclassification request (which was previously rejected) because the grievance sought increased pay for Hobbs for all duties she performed (just like the reclass did). To support that premise, it cites Hobbs' own testimony from the hearing, which in the County's view, confirms that the grievance sought the same remedy as the reclassification request did. Thus, the County sees the grievance as nothing more than a "repackaged" reclassification request. The County emphasizes that Sec. 12.05 clearly says that decisions regarding reclassification requests are within the exclusive authority of the County and the result is not grievable. Building on that premise, the County avers that if something is not grievable, it cannot be arbitrable either. The County submits that the Union should not be allowed to gain a reclassification for Hobbs through the grievance process when the County has already made the final, non-grievable decision.

Finally, the County argues in the alternative that another reason relief should be denied is because the Union failed to prove that Hobbs performed duties justifying higher pay without acknowledgment or agreement by the County. The County notes that both the underlying grievances and the instant complaint case are founded, at least in part, on the assumption that Hobbs performed duties different from her job description or beyond her job description with acknowledgment of that fact by the County. The County maintains that in order for that contention to stand, the Union had to present evidence that Hobbs performed duties different than her job description and that there was an agreement between the parties for Hobbs to do so. According to the County, the Union did not meet this burden. The County avers that the best source to describe the difference between Hobbs' job duties (as listed on her clerk typist job description) and what she actually performed would have been her direct supervisor, Jorgensen, but he was not called as a witness by the Union. With regard to Hobbs' testimony about what she did (i.e. that she allegedly spent three hours per day "signing death certificates; doing termination of decedent's property interest. . . dealing with legal people at the counter"), the County's view is that none of those duties are outside the job duties found in a clerk typist job description.

The County notes that in situations where an employee has performed duties outside their job classification, the parties have historically negotiated Memorandums of Understanding (MOU's) that address the employee's pay for that very type of situation. Here, though, the parties did not negotiate such an MOU. According to the County, the reason for this was because the County never assigned Hobbs to work in a higher rated position (namely the Register of Deeds position), and expressly denied the request that such duties be performed through the reclassification procedure.

In sum, the County sees this complaint as an attempt to circumvent the County's reclassification decision to not create a new Register of Deeds I position for Hobbs. It avers

that it did not violate Sec. 111.07(3)(a)5 by its conduct herein. It asks that the complaint be dismissed.

DISCUSSION

The complaint alleges that the County violated Sec. 111.70(3)(a)5 by its conduct here. Section 111.70(3)(a)5 makes it a prohibited practice for a municipal employer "[t]o violate . . . an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement. . ." This section gives the Commission jurisdiction to enforce contractual agreements to arbitrate disputes regarding the interpretation of the contract.

The initial focus of inquiry is on the Union's assertion that the County failed to honor a grievance settlement. This argument is obviously prefaced on the assumption that a grievance settlement occurred. The Union contends that such a settlement occurred. To support that premise, it relies on Jorgensen's written response to Grievance 1. In his response, Jorgensen wrote in pertinent part that he "agree[d] that Kathy Hobbs should be paid at a Labor Grade 3 as a Deputy Register of Deeds." It was subsequently the Union's position that Jorgensen's written response "resolved" the grievance. The County disagreed.

Based on the following rationale, the Examiner finds that Jorgensen's written response to Grievance 1 did not create a binding grievance settlement. First, it is noted that all Jorgensen said in the response just quoted was that he "agreed" with the Union (that Hobbs should be paid at a Labor Grade 3 as a Deputy Register of Deeds). That was not a surprising position for him to take on the grievance because it was identical to the position he took on Hobbs' reclassification request (namely, that Hobbs should be reclassified from a Labor Grade 2 to a Labor Grade 3). However, the dispositive question is not whether Jorgensen "agreed" that Hobbs should be paid at a Labor Grade 3; it is whether Jorgensen was empowered by the County to make that happen and bind the County with his decision. Clearly, he was not. Here's why. If Jorgensen was empowered to make that happen (i.e. to pay Hobbs at a Labor Grade 3), then he would have granted Hobbs the reclass to Labor Grade 3 on his own volition. He did not do that (i.e. grant her the reclass on his own volition) because he was not empowered to do so; only the County Board, through the County Personnel Committee, is authorized to grant reclasses. The record indicates that the County Personnel Committee twice denied the reclassification which Hobbs and Jorgensen requested for Hobbs. Following the denial of the second request, the Union filed a grievance which has been denominated in this decision as Grievance 1. The Union's requested remedy in Grievance 1 was as follows: "[p]ay the grievant. . .Labor Grade 3 pay as Deputy Register of Deeds I." Notwithstanding the Union's contention to the contrary, the remedy which the Union sought in Grievance 1 (which was just quoted) was identical to what would have happened if Hobbs had been reclassified from a Clerk Typist I to a Deputy Register of Deeds I (namely that her pay would have been permanently bumped from Labor Grade 2 to Labor Grade 3). Since Jorgensen was not empowered to grant Hobbs a reclass, it logically follows that he was not empowered either to grant a grievance which sought the same remedy as a reclassification would have (i.e. permanently change Hobbs' pay from a Labor Grade 2 to a

Labor Grade 3).

Second, the grievance procedure referenced in Sec. 10.02 begins with the following phrase: "[t]he parties agree. . ." The cover page of the parties' collective bargaining agreement makes it clear that the parties to the collective bargaining agreement, and thus the "parties" being referenced in Sec. 10.02, are the Union and the County Board of Supervisors. The reason that point is noteworthy here is because the Register of Deeds is not one of the named parties. While the Register of Deeds certainly is a supervisor and department head within the meaning of Steps 1 and 2 of the contractual grievance procedure, the grievance procedure does not address the level of authority which the County grants to supervisors and department heads to settle grievances. Since that topic is not addressed in the collective bargaining agreement, the Employer gets to decide how much authority it grants to its supervisors/department heads to settle grievances. In other words, that authority rests with the County. It is the County's position that Jorgensen was not empowered to settle this particular grievance because the Union's requested remedy essentially sought a reclass for Hobbs via the creation of another Deputy Register of Deeds I position in his office. The County's position has a sound contractual basis because both the Management Rights clause and Sec. 12.03 say that determining what positions are created is left exclusively to the County Board – not the Register of Deeds. In the instant situation where the Employer maintains that the Register of Deeds was not empowered to settle a grievance by essentially granting a reclassification, the Union needed to establish that the Register of Deeds had the authority to grant the remedy requested. The Union did not prove that.

In light of the above, the Examiner finds that Jorgensen's written response to Grievance 1 did not create a binding settlement agreement. That being so, the County did not violate Sec. 111.70(3)(a)5 by refusing to honor that document as a grievance settlement.

Since there was no binding settlement agreement, the Union was free to appeal the grievance further. It did. Specifically, it appealed Grievance 1, Grievance 2, and amended Grievance 2 to Step 3 of the grievance procedure. Each time, the County Personnel Director responded in writing that it was the County's position that the matter complained of was not a grievable issue based on Sec. 12.05 of the collective bargaining agreement (i.e. the provision which says that decisions made by the Personnel Committee regarding reclassification requests are not grievable). The Union asserts that by taking this position, the County expressly repudiated the grievance procedure. The Examiner finds otherwise. Specifically, the Examiner finds that it is not a repudiation of the grievance procedure when an employer takes the position that a grievance is not substantively arbitrable.

It is apparent from the Personnel Director's reply just referenced that the parties dispute whether the grievances involved here fall within the scope of their agreement to arbitrate. The County contends that the grievances do not fall within the scope of their agreement to arbitrate, and the Union contends that they do.

The law governing a Commission determination of whether a particular grievance falls within the scope of a contractual arbitration clause is ultimately rooted in the STEELWORKERS'

UNITED STEELWORKERS v. WARRIOR & GULF NAVIGATION CO., 363 U.S. 574 (1960); and UNITED STEELWORKERS v. ENTERPRISE WHEEL & CAR CORP., 363 U.S. 593 (1960). The Wisconsin Supreme Court adopted the principles of the STEELWORKERS' TRILOGY in DENHART v. WAUKESHA BREWING CO, INC., 17 Wis. 2D 44 (1962). Later, in JT. SCHOOL DISTRICT NO. 10 v. JEFFERSON EDUCATION ASSOCIATION, 78 Wis. 2D 94 (1977), the Court applied the law enunciated in the STEELWORKERS' TRILOGY to the Municipal Employment Relations Act. In that case the Court held that in determining arbitrability, the arbitration agreement enforcement forum's function "is limited to a determination whether there is a construction of the arbitration clause that would cover the grievance on its face, and whether any other provision of the contract specifically excludes it." Ibid, p. 111.

Applying these legal principles here, the focus of inquiry is not on whether the grievance has merit, but whether it (the grievance) is arbitrable. That decision typically involves answering the following two questions: first, is the parties' arbitration clause susceptible of an interpretation that covers the asserted dispute and second, is the grievance excluded from arbitration by any other provision of the agreement.

While I just said in the previous sentence that "that decision typically involves answering" those questions, this case is atypical. In this case, those questions need not be answered. The reason for that is explained below.

The Union's contention that the County refused to engage in the grievance process is not supported by the record facts. As was noted above, the Union appealed Grievance 1, Grievance 2, and amended Grievance 2 to Step 3, and the County's Personnel Director responded to the Union each time. After that happened, any or all of the grievances could have been appealed to the arbitration step (i.e. Step 4 of the contractual grievance procedure). However, that did not happen. None of them were appealed to the arbitration step (Step 4). Step 4 of the grievance procedure puts the burden on filing for arbitration on the Union – not the County. It specifically says that if the Union wants to appeal a grievance to arbitration, it "shall notify the chairperson of the personnel committee in writing of its intent to submit the grievance to arbitration. . ." The next sentence goes on to say: "at the same time of giving the above notice of intention to arbitrate, the Union shall also request the WERC to appoint an arbitrator from its staff." In this case, the Union did neither, nor did it make a demand to the County to proceed to arbitration. Instead, it filed the instant complaint.

The Union essentially asks the Examiner to ignore/overlook the fact that it did not appeal any of the grievances to arbitration. The Examiner declines to do so and instead relies on the Commission's decision in CITY OF ST. FRANCIS, DECS. NO. 12097-A and D (1974).

The facts in CITY OF ST. FRANCIS are very similar to what happened here. In that case the union filed a grievance, and the employer responded that the grievance was "not a valid grievance." The union in that case then filed a complaint against the employer alleging a violation of Sec. 111.70(3)(a)5. Before doing so though, it did not appeal the grievance to

arbitration. The Examiner found, as a conclusion of law, "that the presentation of the demand to proceed to arbitration is a condition precedent to the contractual obligation of the employer to proceed to arbitration." He further found, as another conclusion of law, that since the union had failed to demand that the employer proceed to arbitration, the employer "was under no obligation to proceed to arbitration. . ." The Commission subsequently affirmed the Examiner's Findings of Fact and Conclusions of Law. DEC. NO. 12097-D (10/74).

That case stands for the proposition that when a contractual grievance procedure culminates in arbitration, filing for arbitration is a threshold step that must be met before a refusal to arbitrate violation can be found. The Union's contention here that it did not need to file for arbitration in these cases because the County had taken the position that the grievances were not grievable/arbitrable is the same contention that the union raised in ST. FRANCIS on appeal. In their decision, the Commission rejected, without comment, the union's contention that filing for arbitration under the circumstances would have required it to engage in a "meaningless, futile act" and was "over-technical".

The Union essentially makes the same argument here, asserting that it is nonsensical for the Union to wait until the County refuses to submit to arbitration (before it can file a refusal to arbitrate complaint). While requiring a union to wait until the employer refuses to submit to arbitration (before it files a refusal to arbitrate complaint) can certainly be characterized as overly-technical, rhetorically speaking, is it any more overly-technical than requiring a union to comply with other technical requirements in the grievance procedure such as time limitations? The Examiner finds it is not. Unions know that if they fail to comply with time limitations in grievance procedures, the grievance can be dismissed as untimely. Thus, they learn to comply with the time limitations. That same principle applies to filing refusal to arbitrate complaints. Since Step 4 of this grievance procedure requires the Union to appeal grievances to arbitration, the Union had to appeal the grievance to arbitration and/or make a demand to proceed to arbitration – even if it was a futile act – before it filed a refusal to arbitrate complaint against the County. The Union's failure to do so was fatal to its case. Given the Union's own non-compliance with Step 4 of the grievance procedure, the Examiner cannot find that the County failed to cooperate in the grievance process or (unlawfully) refused to arbitrate any of the grievances involved.

Having reached that conclusion, the Examiner need not answer the two questions typically posed in such Sec. 111.70(3)(a)5 cases (i.e. is the parties' arbitration clause susceptible of an interpretation that covers the contract dispute and is the grievance excluded from arbitration by any other provision of the agreement). Accordingly, those questions will not be addressed.

In sum then, it is held that since the Union did not appeal any of the grievances to the arbitration step (Step 4), or make a formal demand (to the County) to proceed to arbitration, the County did not have to proceed to arbitration on them. Therefore, the County did not violate Sec. 111.70(3)(a)5 by its conduct here.

Those arguments not addressed in my discussion were considered, but were deemed unnecessary to decide these matters.

Dated at Madison, Wisconsin, this 26th day of July, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones /s/
Raleigh Jones, Examiner

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