STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**AFSCME LOCAL 2771,** Complainant,

vs.

**WAUPACA COUNTY,** Respondent.

Case 157
No. 66160
MP-4284

## Decision No. 32001-B

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**Appearances:**

**Houston Parrish**, Staff Representative, AFSCME Council 40, 1457 Somerset Drive, Stevens Point, Wisconsin 54481, appearing on behalf of AFSCME Local 2771.

**James Macy**, Attorney at Law, Davis & Kuelthau, S.C., 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin 54903-1278, appearing on behalf of Waupaca County.

### ORDER ON REVIEW OF EXAMINER'S DECISION

On July 26, 2007, Examiner Raleigh Jones issued Findings of Fact, Conclusions of Law and Order in the above-captioned matter, holding that the Respondent Waupaca County (County) had not violated Sec. 111.70(3)(a)(5), Stats., by refusing to honor a grievance settlement and/or refusing to arbitrate a grievance, and therefore dismissed in its entirety the Complaint that had been filed by AFSCME Local 2771 (Union).

On August 10, 2007, the Union filed a timely petition with the Wisconsin Employment Relations Commission (Commission) seeking review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats. Thereafter both parties filed written argument in support of their respective positions, the last of which was submitted on September 24, 2007.

For the reasons set forth in the accompanying Memorandum, the Commission affirms the Examiner's Findings of Fact except where modified below; sets aside the Examiner's conclusion that the County was not bound by the County Registrar's alleged resolution of a grievance; reverses the Examiner's conclusion that, under the circumstances of this case, the County did not violate Sec. 111.70(a)5, Stats.; concludes that the subject matter of the January 17, 2006 and May 5, 2006 grievances is substantively arbitrable; and orders the County to process and/or arbitrate said grievances upon request of the Union.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

## ORDER

A. The Examiner's Findings of Fact 1 through 17 are affirmed.

B. The Examiner's Finding of Fact 18 is set aside and the following Finding of Fact 18 is made:

> 18. The Union did not ask the County to hold an Article 10 Step 3 conference regarding the October 6, 2005 Hobbs grievance, the County did not hold such a conference or issue a Step 3 response to the grievance, and the Union did not request arbitration of that grievance pursuant to Step 3 of the Article 10 grievance procedure.

C. The Examiner's Findings of Fact 19 through 21 are affirmed.

D. The Examiner's Finding of Fact 22 is set aside and the following Findings of Fact 22, 23, and 24 are made:

> 22. By letter dated January 23, 2006, the Union requested "a meeting with the personnel committee to proceed with Step 3" regarding the January 17, 2006 grievance and "set up a time for this meeting." At a meeting of the County's Personnel Committee on April 10, 2006, the County conducted Step 3 conferences with the Union regarding certain grievances. During that meeting, the Union requested that the County also hear the January 17, 2006 grievance. The County responded that it would not recognize the January 17 grievance as a contractual grievance. The Union then explained its basis for believing the matter was not a reclassification request but instead was grievable.
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> 23. After the April 10, 2006 meeting, the County conveyed written responses to the Union regarding the grievances the Personnel Committee had heard at Step 3 at the April 10 meeting but did not convey any response to the Hobbs grievance. By e-mail addressed to the County's Personnel Director, dated April 24, 2006, the Union asked when it could expect a response from the Personnel Committee regarding

the Hobbs grievance. By e-mail dated May 2, 2006, the County responded that, "the Personnel Committee does not recognize the issue as a grievance and therefore did not respond as such. At the time Houston requested the matter to be heard at the committee level I explained that they would not hear the matter as a grievance."

24. The Union did not submit a request for arbitration regarding the January 17, 2006 Hobbs grievance pursuant to Step 4 of the contractual grievance procedure.

E. The Examiner's Finding of Fact 23 is renumbered Finding of Fact 25, is amended by adding a second paragraph as below, and as amended is affirmed:

25. [First paragraph as in Examiner's Finding of Fact 23]

. . .

Accompanying the May 5, 2006 Hobbs grievance was a letter from Union representative Parrish that stated:

> Enclosed please find the amended 06G03 grievance (the Kathy Hobbs grievance). A copy is being directed to Mr. Jorgenson as well. I understand the County may want to revisit Steps 1-3 if necessary, though the county has refused to acknowledge this matter as a grievance previously. If you wish to consider this amended grievance as completed through Step 3 I think we could do that as well. I look forward to hearing from you.

F. The Examiner's Finding of Fact 24 is renumbered Finding of Fact 26 and is affirmed.

G. The following Finding of Fact 27 is made:

27. While the County responded to Parrish's May 5, 2006 letter, the County's response did not include a substantive response to the Union's request to revisit Steps 1-3 regarding the May 5, 2006 Hobbs grievance or, alternatively, to consider the grievance as completed through Step 3. The County did not comply with the Union's request to conduct a contractual Step 3 grievance conference regarding said grievance nor convey to the Union a Step 3 response.

H. The Examiner's Finding of Fact 25 is renumbered Finding of Fact 28, is modified as follows, and as modified is affirmed:

28. The Union did not submit a request to the County to arbitrate the May 5, 2006 grievance pursuant to Step 4 of the contractual grievance procedure.

I. The Examiner's Finding of Fact 26 is affirmed.

J. The Examiner's Finding of Fact 27 is set aside.

K. The Examiner's Conclusion of Law 1 is set aside.

L. The Examiner's Conclusions of Law 2 and 3 are reversed, and the following Conclusions of Law 1 through 4 are made:

1. The County refused to participate in the grievance procedure regarding the January 17, 2006 and May 5, 2006 Hobbs grievances.

2. The Union's claim in the January 17, 2006 and May 5, 2006 grievances that the County violated Article 10 (the contractual grievance procedure) by refusing to implement an alleged resolution of the Hobbs grievance is substantively arbitrable.

3. The Union's claim in the January 17, 2006 and May 5, 2006 grievance that the County violated Section 12.01 of the collective bargaining agreement by failing to pay Hobbs according to her work assignments is substantively arbitrable.

4. By refusing to participate in the grievance procedure set forth in the collective bargaining agreement regarding the January 17, 2006 and May 5, 2006, grievances, the County has violated Secs. 111.70(3)(a)5, and, derivatively, (3)(a)1, Stats.

M. To remedy its violations of Secs. 111.70(3)(a)5 and 1, Stats., the County shall immediately:

1. Cease and desist from refusing to participate in the grievance arbitration procedure set forth in the collective bargaining agreement regarding the January 17, 2006 and/or May 5, 2006 grievances.

2. Take the following affirmative action which will effectuate the purposes of the Municipal Employment Relations Law:

a. If the Union so requests within thirty (30) days following receipt of this decision, process the January 17, 2006 and/or May 5, 2006 grievances at Steps 3 and/or 4 of the grievance procedure in accordance with Article 10 of the collective bargaining agreement.

b. Notify all County employees in the bargaining unit represented by the Union, by posting for thirty (30) consecutive days in conspicuous places where such employees are employed, copies of the Notice attached hereto and marked "Appendix A." Reasonable steps shall be taken by the County to ensure that this Notice is not altered, deface or covered by other material.

c. Notify the Wisconsin Employment Relations Commission within twenty (20) days following the date of this Order of the steps taken to comply herewith.

Given under our hands and seal at the City of Madison, Wisconsin, this 8th day of November, 2007.

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

## APPENDIX A

**NOTICE TO ALL EMPLOYEES OF WAUPACA COUNTY
WHO ARE REPRESENTED BY AFSCME, COUNCIL 40, LOCAL 2771**

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

1. We will not refuse to participate in the grievance and arbitration procedure regarding the grievances filed by AFSCME, Council 40, Local 2771 on January 17, 2006 and May 5, 2006, concerning Kathy Hobbs, in violation of Sec. 111.70(3)(a)5, Stats..

2. We will, upon timely request by AFSCME, Council 40, Local 2771, process the January 17, 2006 and/or May 5, 2006 grievances at Steps 3 and/or 4 of the grievance procedure in accordance with Article 10 of the collective bargaining agreement.

WAUPACA COUNTY

By: _____
Mandy Welch, Personnel Director

Date:_____

**THIS NOTICE WILL BE POSTED IN THE LOCATIONS CUSTOMARILY USED FOR POSTING NOTICES TO EMPLOYEES FOR A PERIOD OF THIRTY (30) DAYS FROM THE DATE HEREOF. THIS NOTICE IS NOT TO BE ALTERED, DEFACED, COVERED OR OBSCURED IN ANY WAY.**

**Waupaca County**

## MEMORANDUM ACCOMPANYING ORDER

### Summary of the Facts

Kathy Hobbs began employment with the County in February 2004 as a Clerk Typist I in the Register of Deeds office. As such she was at all relevant times a member of the bargaining unit represented by the Union, and her immediate supervisor was George Jorgensen, the County's elected Register of Deeds.

Pursuant to Sec. 12.05 of the collective bargaining agreement, the County's Personnel Committee is responsible for approving or rejecting reclassification requests. In the Fall of 2004, Hobbs and Jorgensen submitted a request to the Personnel Committee to reclassify Hobbs' position to Deputy Register of Deeds I, which would boost her position into a higher pay grade. On September 16, 2004, the Personnel Committee denied the reclassification request, stating, in part, "this position . . . does not have the additional duties and responsibilities to warrant a reclassification." Sec. 12.05 of the contract states that, "Should the [reclassification] request be denied, the employee may not appeal through the grievance procedure." No grievance was filed regarding the denial.

On June 3, 2005, Hobbs and Jorgensen again requested of the Personnel Committee that Hobbs be reclassified to Deputy Register of Deeds I. On August 12, 2005, the County notified Hobbs and Jorgensen, as well as all other employees who had requested reclassifications that year, that the Personnel Committee had decided not to consider any reclassification requests "due to budgetary concerns ... for the 2006 budget year . . . ." Jorgensen sought reconsideration of this decision but was denied. No grievance was filed regarding the denial.

On October 3, 2005, Jorgensen exercised what he viewed as his authority in Sec. 59.43(3), Stats., to deputize Hobbs and, according to the Union, assigned her certain duties consonant with such deputy status. On October 6, 2005, the Union filed a grievance claiming that Hobbs was not receiving pay "commensurate with job responsibilities and labor grade." The grievance requested that the County "Pay the Grievant the labor grade according to her work assignment ... retroactive to 10/3/05 . . . ." That same day the Union met with Jorgensen at Steps 1 and 2 of the Article 10 grievance procedure (i.e., immediate supervisor and department head, respectively). Jorgensen submitted a written response to the grievance, in which he stated, inter alia, "I agree that Kathy Hobbs should be paid at a labor grade 3 as a Deputy Register of Deeds."

A series of correspondence then ensued between the Union steward and the County's Personnel Director regarding the grievance and its alleged resolution. On October 7, 2005, the Union conveyed a copy of the grievance and Jorgensen's response to the Personnel Director, with a letter stating, inter alia, "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." On October 18, 2005, the Personnel Director responded in writing, stating her view that Jorgensen "does not have the authority to determine the job classifications needed to operate his department [including] any reclassifications of employees. … The matter you presented is not a grievable issue within the terms of the bargaining agreement and therefore cannot be processed as such." On November 1, the Union wrote back, asserting it disagreed that the issue was not grievable and that it was "pursuing the grievance process." The Union's letter again claimed that Jorgenson had resolved the grievance and that the Union therefore wanted Hobbs to be compensated accordingly. The letter concluded, "Please advise when you will be resolving the grievance." The Personnel Director responded in writing on November 30, 2005, restating the County's view that the issue was a "reclassification" that the employee "may not appeal through the grievance procedure."

Consistent with its view that the grievance had been resolved, the Union did not request that the County hear the October 5, 2005 grievance at Step 3, nor did the Union attempt to proceed to arbitration on that grievance.

On January 17, 2006, the Union filed another grievance regarding the Hobbs situation. This time the Union alleged that the County had "failed to implement the department head's resolution" to the first grievance, had also failed "to pay the grievant according to her work assignment and duties" and thus had violated Article 10 of the contract (the grievance procedure) as well as Article 12. When this grievance was presented to Jorgensen at Steps 1 and 2, he wrote, "I agree with this grievance." The Union appealed this grievance to Step 3 of the grievance procedure, by sending a letter on January 23, 2006 to the Personnel Director stating, inter alia, "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 [sic] to set up a time for this meeting."

The County did not comply with the Union's request to proceed to Step 3. Instead, the County responded with a letter dated February 9, 2006, restating its position that "this is not a grievable issue," citing the language in Section 12.05 of the contract regarding reclassification requests. The County's letter concluded with the statement, "failure to pay at the higher grade level is not a grievable issue and the County will not recognize it as such."

On April 10, 2006, the County Personnel Committee convened to conduct a Step 3 grievance hearing regarding a number of Union grievances. At one point during that meeting, the Union requested that the Committee also hear the January 17 Hobbs grievance at Step 3 at that time. The Committee responded that it would not do so, because it did not recognize the January 17 grievance as a grievance. The Union explained that it viewed the matter as a proper "pay for work assignment" grievance rather than a reclassification. The Personnel Director commented about the Union's apparent claim that Hobbs was doing two jobs at once.

Following the April 10 meeting, the County conveyed to the Union written Step 3 grievance responses regarding all of the grievances heard at that meeting, but did not convey any response regarding the Hobbs matter. When the Union inquired about when it could expect such a response, the County stated in an e-mail dated May 2, "[T]he Personnel Committee does not recognize the issue as a grievance and therefore did not respond as such. At the time Houston requested the matter to be heard at the committee level I explained that they would not hear the matter as a grievance."

Three days later, on May 5, the Union submitted directly to the Personnel Director an "Amended Grievance" regarding the Hobbs situation, accompanied by a letter noting that the County had previously "refused to acknowledge this matter as a grievance," and offering to "revisit Steps 1-3" or the alternative possibility that the Union might be willing to "consider this amended grievance as completed through Step 3." The County responded in writing on May 24, acknowledging receipt of the letter and stating, "The request is untimely, not arbitrable and not a violation of the contract." The County did not respond to the Union's proposals about processing the matter through Steps 1 through 3 of the grievance procedure.

The Union did not submit to the County a request to arbitrate either the January 17 grievance or the May 5 "amended" grievance. Instead, about two months after receiving the County's May 24 letter, the Union filed the instant prohibited practice complaint.

**Examiner's Decision and the Issues on Review**

The Examiner viewed the case as involving two issues. First, did Jorgensen's response at the initial steps as the grievance procedure settle the grievance in Hobbs' favor so as to bind the County? Second, should the County be required to arbitrate any of the three grievances in light of the Union's failure to have submitted a formal request for arbitration?

On the first issue, the Examiner concluded that, since Jorgensen clearly lacked authority under the collective bargaining agreement to reclassify Hobbs, and since (in his view) the remedy for the grievances would essentially accomplish such a reclassification, the union had not established that Jorgensen had authority to reach a settlement agreement that was enforceable against the County. On the second issue, the Examiner concluded that the County had processed the grievances through the preliminary first three steps and therefore the Union should have formally attempted to appeal the grievances to arbitration, "even if it was a futile act," before asking the Commission to order the County to arbitration, relying upon CITY OF ST. FRANCIS, DECS. NO. 12097-A AND D (1974).

In seeking review, the Union reiterates its argument that the contract gives Jorgensen, as the immediate supervisor and the department head, unrestricted authority to settle grievances at Steps 1 and 2 of the grievance procedure. Hence, the Union urges the Commission to order compliance with Jorgensen's resolution. The Union also strongly challenges the Examiner's conclusion that the County had processed and "responded to" the grievances through the

preliminary three steps, contending, instead, that the County did not simply deny that the issues were grievable but actually refused to process them. Under these circumstances, the Union argues, it is entitled to have the County deal with the grievances at Step 3 and should not be required to go through a hyper-technical appeal to arbitration before seeking an order from the Commission.

The County urges us to affirm the Examiner's conclusion that Jorgensen lacked authority to grant Hobbs' grievance, because, as a department head, he is not a party to the contract and has not been given authority to modify contractual provisions or, in effect, create a position. The County also argues that the Union has waived any claim regarding Hobbs' pay or upgrade by not pursuing the first grievance after receiving the Personnel Director's denial. The County asserts that the facts demonstrate that it did participate in the grievance process and responded to the Union at each step, and that the County's statements merely preserved its defenses regarding arbitrability. Accordingly, the Union's failure to request arbitration at the fourth step means that the County cannot be "guilty of failing to agree or respond," relying on CITY OF ST. FRANCIS, SUPRA.

## Discussion

In the instant case, the Union advances what we see as alternative claims. First, it asks the Commission to order the County to process and/or arbitrate the January 17, 2006 and the May 5, 2006 "amended" Hobbs grievances. Second the Union asks the Commission to enforce what the Union views as a settlement of the first (October 5, 2005) Hobbs grievance.[1]

Regarding the Union's first claim, it is important to note that the Union is not asking the Commission to bypass the contractual mechanisms and reach the merits of the breach of contract claims, but rather is seeking to use that grievance machinery. Few labor relations principles in either the private or the public sector are as consistent or compelling as the precept that matters subject to resolution through a collective bargaining grievance procedure should be addressed in that forum, where, as here, the parties have agreed to arbitration as the exclusive contractual enforcement mechanism. MAHNKE V. WERC, 66 WIS.2D 524, 529-30 (1974); CITY OF MEDFORD, DEC. NO. 30537-C (WERC, 8/04); STATE OF WISCONSIN, DEC. NO. 31384-B (11/05); STATE OF WISCONSIN, DEC. NO. 20830-B (WERC, 8/85). In a case such as this, where the complainant is seeking access to the grievance machinery, the Commission will compel the

[1] Contrary to what the Examiner suggests, the Union is not asking the Commission to order the County to process further the first Hobbs' grievance of October 5, 2005. The Union's claim regarding the October 6 grievance is that it was settled at Steps 1 and 2. Indeed, the County's alleged failure to implement the alleged settlement is an element of the subsequent two grievances.

parties to utilize the grievance procedure, including arbitration, despite any procedural defects that the other party may allege, as long as the subject matter of the grievance is on its face within the scope of the parties' grievance/arbitration procedure. MONROE COUNTY, DEC. NO. 31346-B (WERC, 12/05), citing, *inter alia*, DUNPHY BOAT CORP. V. WERB, 267 WIS. 316, 327 (1954).

Thus, as the Examiner acknowledged, the standard inquiry in cases such as this is limited to determining whether the parties have agreed to submit the subject matter of the claim to the grievance/arbitration procedure, i.e.: "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." JT. SCHOOL DISTRICT NO. 10 V. JEFFERSON EDUCATION ASSOCIATION, 78 WIS. 2D 94 (1977). However, relying upon CITY OF ST. FRANCIS, the Examiner decided instead that this case turned upon a preliminary procedural question, specifically, whether or not the Union had submitted a request for arbitration. The Examiner concluded that ST. FRANCIS stood "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." Examiner's Decision at 20. Therefore, in the Examiner's view, even if the circumstances indicate that a formal request is "over-technical" or "futile," it is still necessary before the Commission will entertain the complaint.

On first blush, the Examiner's reading of ST. FRANCIS as well as the broad holding that he extrapolated from that decision seem sound, if for no other reason than the general ripeness principle that cautions against deciding cases that do not (yet) present a controversy. On deeper consideration, however, we see it as inconsistent with the much stronger jurisprudence favoring arbitration and relegating all claims of procedural defects – including mootness and ripeness – to the grievance/arbitration procedure itself. JOHN WILEY & SONS V. LIVINGSTON, 387 U.S. 543 (1964); CITY OF ST. FRANCIS, DEC. NO. 13182-B (WERC, 4/75); MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 24948-C (WERC, 9/89).

A close look at the 1974 ST. FRANCIS case also suggests its holding should sweep less broadly than the Examiner believed. In that case, two individual members of the police officers' bargaining unit challenged the city's residency ordinance, arguing that they were unable to find affordable housing within the city limits. By letter dated May 30, 1973, the union requested a meeting with the city council to discuss the issue, and on June 14, 1973, the council met with the union and advised the union that the city intended to enforce the ordinance. The next day, June 15, 1973, the two officers filed a grievance on the same subject. By letter dated June 28, 1973, the city pointed out that it had already met on the subject and given the union an answer. The letter also stated, "The City maintains this is not a valid grievance and insists that [the two officers] should abide by the city ordinances . . . Their request for a further extension is denied." The union took no further action until August 6, 1973, when it filed a complaint with the Commission asking for an order to arbitrate. The only basis for the union's claim that the city had "repudiated" the grievance procedure was the

record closed but before the examiner issued his decision, the union submitted a request to arbitrate, which the examiner declined to consider. As noted by the Examiner in the instant case, the examiner in ST. FRANCIS reached the broadly stated conclusion that, "[T]he presentation of a demand to proceed to arbitration is a condition precedent to the contractual obligation of the employer to proceed to arbitration." The examiner in ST. FRANCIS cited what he called the Commission's "consistent" holding "that a complaining party must exhaust the contractual remedies available before the Commission will order the parties to arbitration." (Footnotes omitted). That examiner further stated:

> In this case, Respondent's letter of June 28, 1973 is a response to the grievance filed by [the two officers]; Respondent assumed the position, in its response, that the issue submitted was not arbitrable. It is clear to the Examiner, that Respondent in its June 28, 1973 letter, did not repudiate the grievance procedure or refuse to proceed to arbitration. *There is every indication from the record than an appropriate demand on the employer to proceed to arbitration will be honored."*
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> DEC. NO. 10297-A at 6 (emphasis added).

On review of the examiner's decision in ST. FRANCIS, the Commission called it "erroneous" for the examiner to have relied upon the exhaustion rule, since that rule applies when a party seeks to have the Commission reach the merits of a grievance and not to questions of "procedural arbitrability," which "are strictly for the arbitrator to determine." DEC. NO. 12097-D (WERC, 10/74) at 3. The Commission also questioned the evidentiary basis for the examiner's assertion that the record indicated the employer would honor a request to arbitrate. *Id.* at 4. The Commission noted that the complainant had not argued that it had made a demand for arbitration, nor had the complainant sought to amend its complaint to add the allegation, which the complainant could have done at any time prior to a final decision being issued. *Id.* Accordingly, the Commission affirmed the examiner's decision in ST. FRANCIS which included but did not reiterate the examiner's broadly stated conclusion of law. Subsequently, in response to the union's demand to arbitrate, the city in that case did indeed refuse to arbitrate, resulting in a second round of litigation at the Commission culminating in a decision issued on April 30, 1975, ordering the city to arbitrate the two officers' residency grievance.

At least three elements of the ST. FRANCIS situation are instructive in the instant circumstances. First, by eschewing the examiner's exhaustion rationale, emphasizing that alleged deficiencies in grievance processing will not bar an order to arbitrate, and noting the union's option to have amended its complaint to add that it did eventually request arbitration, the Commission's commentary accompanying its order in that case suggests that the Commission held a more constrained attitude toward the necessity of a "hyper-technical" demand than the examiner had taken.

Second, the factual scenario in ST. FRANCIS indicates that the union's complaint was significantly more premature than was the Union's complaint in the instant case. In ST. FRANCIS, the city had already met with the union to review and decide the residency issue when the grievance on the same issue was brought forward. The record in that case included only one response from the city regarding the grievance. The examiner in that case found the city's single response to have been merely a statement that the grievance was not arbitrable, rather than a refusal to process it. In contrast, in the instant case the County explicitly refused to place the January 17 grievance on the agenda for the contractually required Step 3 meeting with the Personnel Committee. When the Union tried to present the grievance at a Step 3 hearing on April 10 that was convened for other grievances, the County told the Union that the County would not consider the matter. Although some discussion with County officials then ensued, with the Union trying to persuade the County that the matter was a legitimate grievance and not merely a rehash of the reclassification effort, the County itself clearly did not view the colloquy as amounting to a Step 3 hearing. Later, when the Union asked for a Step 3 response, the County overtly and expressly refused to provide one, stating yet another time that the matter was not subject to the grievance procedure. Finally, when the Union brought forward its May 5 "Amended" grievance, the Union explicitly offered the County an opportunity to fast-forward through the grievance procedure and "consider this amended grievance as completed through Step 3," i.e., the step just before arbitration, to which the County – while again stating that "The request is untimely, not arbitrable and not a violation of the contract" – gave no response at all to the Union's suggestion about processing the grievance.

The distinction can be subtle, but we agree with the Union that there is a qualitative difference between stating that a matter is not grievable or not arbitrable, which is not unlawful and which the employer did in ST. FRANCIS, and actually and repeatedly refusing to process the grievance at all, which is how we view the County's conduct here. Thus, while the city's conduct in ST. FRANCIS could be viewed as simply staking out a legal position regarding arbitrability, the County's conduct in the instant case crossed the line from merely stating a position to actually refusing to process.

We see the present situation as more analogous to the situation in P & J CONTRACTING, DEC. NO. 10876-A (BELLMAN, 6/72), AFF'D BY OPERATION OF LAW, DEC. NO. 10876-B (WERC, 7/72). There, where an employer had failed to respond to a grievance and also failed to respond to the complaint at the Commission, the examiner was willing to assume from the circumstances that a formal request for arbitration would have been met with a similar silence and thus concluded that it would be "over-technical" to require such a formal request. We acknowledge that the P & J circumstances were not the same as those in the instant case. Here the County was not silent but actually stated its refusal to process the grievance; by the same token, in the P & J case the union had only made one request of the employer before seeking redress from the Commission, compared with the several attempts the Union in the instant case

had made to process the Hobbs matter (at least as to the January 17 grievance). The P & J case, to which the Commission referred without negative comment in ST. FRANCIS, does suggest, however, that the Commission has not maintained a rigid principle requiring, as the Examiner held, a formal request to arbitrate as a "precondition" to seeking an order to arbitrate. Rather there can be unusual circumstances where such a request would be unnecessary because it clearly would have been refused.

A third aspect of the ST. FRANCIS situation also militates in favor of applying its holding narrowly. As noted above, the examiner in that case was influenced by the fact that the record, as he saw it, gave reason to believe the city would comply with a request to arbitrate if one were made. Subsequently, the union made such a request, the employer refused to arbitrate, the union brought another complaint seeking an order to arbitrate, and the parties spent the better part of another two years in litigation before the Commission about whether the employer had a duty to arbitrate (and whether the prior litigation precluded the union's subsequent effort to obtain an order to arbitrate). At the conclusion of that litigation, the Commission ordered the city to arbitrate. CITY OF ST. FRANCIS, DEC. NO. 13182-B (WERC, 4/75). Presumably at that late juncture the parties finally grappled with the underlying contract dispute that had originated several years earlier. This unfortunate chronicle reinforces the wisdom of the prevailing principle in pre-arbitration litigation, i.e., benefit of the doubt should favor access to the grievance/arbitration procedure, where procedural defects as well as the merits of the claim can be fully addressed. CF. JEFFERSON SCHOOL DISTRICT, SUPRA. Contrary to what the examiner saw in the ST. FRANCIS situation, nothing in the record in the instant case – including the County's answer or its arguments, suggests that the County would have agreed to arbitrate had the Union requested. Thus dismissing this case could reprise the ST. FRANCIS scenario, with the Union requesting arbitration, the County refusing, and the parties returning to the Commission for a substantive arbitrability determination. This does not seem to us a desirable result.

In short, we think the instant circumstances sufficiently demonstrate that the County refused to process the grievance and would have refused to arbitrate if the Union had presented a formal demand. We emphasize, however, that this conclusion does not in and of itself mean that the County has violated the law or that an order to process/arbitrate should issue. We agree with the Examiner's statement that "it is not a repudiation of the grievance procedure when an employer takes the position that a grievance is not substantively arbitrable." Examiner's decision at 18. Under the holding of JEFFERSON SCHOOL DISTRICT, SUPRA, the County is entitled to test its belief that these grievances are not "substantively arbitrable" by refusing to process them unless/until the Commission has determined otherwise. We proceed, therefore, to determine whether either the January 2006 or the May 2006 grievances state claims that, under some construction of the contract, could fall within the scope of the grievance and arbitration procedure, and are not expressly excluded by some other provision.

Section 10.01 of the collective bargaining agreement defines a "grievance" as "a dispute concerning the interpretation or application of this contract or a question of safety." As noted above, Section 12.05 of the contract also expressly excludes from the grievance

procedure an appeal from a decision of the County's Personnel Committee denying a reclassification request. The County's principal basis for contending that none of the Hobbs grievances are arbitrable is that each, in effect, amounted to an appeal from Hobbs' two failed efforts to have her position reclassified from Clerk Typist to Deputy Register of Deeds. The Union, however, contends that the grievances were not an effort to reclassify Hobbs' position within the coverage of Section 12.05 of the contract, but rather were based upon Section 12.01, which provides that "All employees shall be paid according to their work assignment." The Union believes it can prove that Hobbs was assigned work during at least some portion of the day/week that was beyond the scope of her Clerk Typist classification and instead fell within a higher classification. If so, the remedy the Union seeks is not Hobbs' reclassification, but rather that Hobbs receive the higher pay for those periods of her work time.

It is not the Commission's province at this stage of the grievance proceedings to determine whether or not Hobbs was given work outside of her classification or, if so, whether or not Section 12.01 was intended to provide a remedy for Hobbs. It is also not our province to determine whether the January and/or May 2006 grievances sufficiently or appropriately articulated this issue and/or whether they were properly processed through any steps of the grievance procedure. These are issues that are left to the grievance procedure and to the arbitrator. It is merely our province to determine "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." JEFFERSON SCHOOL DISTRICT, SUPRA. Since the Union's argument involves a "dispute concerning the interpretation or application" of Section 12.01, and since nothing in the contract expressly excludes disputes arising under Section 12.01 from the grievance procedure, we conclude that both the January grievance and the May "amended" grievance are substantively grievable and arbitrable to the extent they raise the 12.01 issue.

In addition to the Section 12.01 issue, both the January and the May grievances also claim that the County violated the Article 10 grievance procedure by failing to honor what the Union views as Jorgensen's resolution of Hobbs' October 2005 grievance at steps 1 and/or 2 of the procedure. As noted earlier, the Union's contention that the County has failed to comply with a grievance settlement is also advanced as a second, alternative, prohibited practice in the complaint it filed in the instant case. The Examiner considered the merits of the breach of settlement claim, concluding that the collective bargaining agreement did not give Jorgensen authority to resolve Hobbs' October 2005 grievance and dismissing the alleged prohibited practice complaint in that regard.

While the Commission on occasion exercises its jurisdiction under Sec. 111.70(3)(a)5, Stats., to enforce grievance settlements, e.g., CITY OF MADISON, DEC. NO. 20656-C (WERC, 9/84), in the instant case the existence of such a settlement agreement is inextricably intertwined with the meaning of the parties' contract, including what authority they intended to give supervisors or managers at Steps 1 and 2 of the grievance procedure. The Union's grievances implicitly recognize this point. We believe the issue of whether the parties intended

to give Jorgensen authority at Steps 1 and 2 of the grievance procedure to grant the relief Hobbs requested is itself a substantively arbitrable issue (a dispute involving the interpretation of the contract, including, inter alia, Article 10) and best left for resolution pursuant to that procedure. We have therefore set aside the Examiner's order to the extent he resolved that issue and we have ordered the County to process and/or arbitrate the Union's grievance in that regard.

In sum, we conclude that the County has gone beyond merely stating a position that the instant grievances are not arbitrable, but in fact has refused to process them. Under these circumstances, the Union was not required to formally demand arbitration as a precondition to seeking an order to process and/or arbitrate those grievances. We therefore reach the standard threshold question in cases alleging a refusal to arbitrate and conclude that the grievances are substantively arbitrable, both as to the Section 12.01 issue and as to the issue of whether Jorgensen effectively resolved the October 2005 grievance at Steps 1 and 2 of the grievance procedure. We have ordered the County to process the January 17, 2006 and/or May 5, 2006 grievances upon a timely request of the Union, at Step 3 and/or 4, according to the Union's request.

Dated at Madison, Wisconsin, this 8th day of November, 2007.

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

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