STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CITY OF CUDAHY, Complainant,

v.

AFSCME DISTRICT COUNCIL 48, LOCAL NO. 742, Respondent.

Case 108
No. 66544
MP-4314

Decision No. 32305-A

MILWAUKEE DISTRICT COUNCIL 48, AFSCME, AFL-CIO AND ITS AFFILIATED LOCAL UNION 742, Complainant,

v.

CITY OF CUDAHY, Respondent.

Case 112
No. 67307
MP-4383

Decision No. 32306-A

Appearances:

Teresa C. Mambu-Rasch, Sweet and Associates, Attorneys at Law, 2510 East Capitol Drive, Milwaukee, Wisconsin 53211-5231, appearing on behalf of Milwaukee District Council 48, AFSCME, AFL-CIO and its affiliated Local Union 742.

Jason A. Kunschke, Michael, Best & Friedrich, Attorneys at Law, 100 East Wisconsin Avenue, Suite 3300, Milwaukee, Wisconsin 53202-4108, appearing on behalf of the City of Cudahy.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On December 15, 2006, the City of Cudahy filed a complaint with the Wisconsin Employment Relations Commission asserting that AFSCME District Council 48, Local No. 742 had committed a prohibited practice within the meaning of Sec. 111.70(3)(b) 4, Stats. by allegedly seeking to arbitrate an issue that had already been litigated and decided in a prior arbitration award. The complaint was held in abeyance while the parties attempted to resolve the dispute.

On September 19, 2007, Milwaukee District Council 48 AFSCME, AFL-CIO, and its affiliated Local Union 742 filed a complaint with the Commission alleging that the City of Cudahy had committed a prohibited practice within the meaning of Secs. 111.70(3)(a) 3, 5, and (derivatively) 1, Stats. by refusing to arbitrate a grievance.

The two complaints were consolidated for the purposes of hearing and decision by Commission order dated January 2, 2008.

The parties subsequently stipulated to content of the evidentiary record and filed written argument, the last of which was received June 23, 2009.

Given the delay that the parties have experienced in this matter, the Commission has determined that it will issue this decision directly rather than having a hearing examiner issue a decision which could then appealed to the Commission for *de novo* review.

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

FINDINGS OF FACT

1. The City of Cudahy, herein the City, is a municipal employer.

2. Milwaukee District Council 48 AFSCME, AFL-CIO and its affiliated Local Union 742, herein the Union, is a labor organization serving as the exclusive collective bargaining representative of certain employees of the City.

3. The City and Union were parties to a collective bargaining agreement which contained the following provisions:

ARTICLE VII – SENIORITY

1. Definition: Seniority means an employee's length of continuous service with employer since his date of hire. . .

ARTICLE XII – VACATION

1. Schedule: The vacation plan shall allow employees:

A. Two (2) weeks vacation after one (1) year of service.

B. Three (3) weeks vacation after seven (7) years of service.

C. Four (4) weeks vacation after fifteen (15) years of service.

D. Five (5) weeks vacation after twenty-three (23) years of service.

ARTICLE XXX – LONGEVITY

The City agrees to pay longevity pay to employees as follows:

A. After five (5) years - $5.00 per month longevity pay.

B. After ten (10) years - $10.00 per month longevity pay.

C. After fifteen (15) years - $15.00 per month longevity pay.

D. After twenty (20) years - $20.00 per month longevity pay.

E. After twenty-five (25) years - $25.00 per month longevity pay.

Longevity payments shall commence at the end of the closest payroll period ending after the anniversary date of hire.

ARTICLE XXII – MEDICAL BENEFIT PLAN FOR EARLY RETIREES

Medical and hospital insurance coverage shall be available to all retired full-time employees who have completed fifteen (15) years of service to the City and are at least age 60. . .

4. In 1997, the City hired an employee (Lynde) into a position represented by the Union. Lynde had previously been employed by the City. A dispute arose between the City and the Union/Lynde as to whether Lynde should receive credit for his prior City employment when vacation and longevity benefits were calculated. This dispute proceeded to grievance arbitration before Arbitrator Douglas V. Knudson.

5. In the grievance arbitration proceeding before Arbitrator Knudson, the parties agreed that he should resolve the following issue:

> Is the City violating Articles 12 and 30 of the contract by denying the grievant five weeks of vacation pay and twenty-five dollars per month longevity pay? If so, what is the remedy?

6. On December 4, 1998, Arbitrator Knudson issued his award concluding that the City had not violated Articles 12 and 30. He reasoned in pertinent part as follows:

> . . .in reviewing the contract provision concerning longevity pay, it is noted that the longevity payments are to commence at the end of the closest payroll period ending after the anniversary date of hire. In Lynde's case, his date of hire is February 25, 1997. There is no support in that language for the Union's interpretation that Lynde should get credit for a prior period of employment with the City. The undersigned is not convinced that the parties intended vacation eligibility to be computed in a different manner than longevity is computed, i.e., that an employee who is rehired should be given credit for prior periods of employment for computing vacation benefits.

7. In 2006, a contractual grievance arose between the City and the Union as to whether Lynde would be entitled to receive health insurance benefits under Article XXII of the collective bargaining agreement when he retired. The City asserted that Lynde was not entitled to such benefits given his break in City service and argued that the Knudson Award had already decided the issue. The Union contended that Lynde was entitled to the benefits and that the Knudson Award had not decided the issue.

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

CONCLUSIONS OF LAW

1. By requesting that the City of Cudahy proceed to contractual grievance arbitration over the Lynde health insurance grievance, Milwaukee District Council 48 AFSCME, AFL-CIO and its affiliated Local Union 742, did not refuse to accept the terms of the Knudson Award and thus did not commit a prohibited practice within the meaning of Sec. 111.70(3)(b) 4, Stats.

2. By refusing to proceed to contractual grievance arbitration over the Lynde health insurance grievance, the City of Cudahy is violating an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement and thus committed prohibited practices within the meaning of Secs. 111.70(3)(a)5 and, derivatively, 1, Stats.

3. By refusing to proceed to contractual grievance arbitration over the Lynde health insurance grievance, the City of Cudahy is not encouraging or discouraging membership

in a labor organization by discrimination in regard to hiring, tenure or other terms and conditions of employment and thus did not commit prohibited practices within the meaning of Secs. 111.70(3)(a)3 and, derivatively, 1, Stats.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issued the following

ORDER

1. The complaint allegations referenced in Conclusions of Law 1 and 3 are dismissed.

2. To remedy the prohibited practices found in Conclusion of Law 2, the City of Cudahy, its officers and agents, shall immediately take the following action which will effectuate the policies of the Municipal Employment Relations Act:

A. Cease and desist from violating an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement.

B. Upon request, participate in arbitrating the grievance regarding the Lynde health insurance grievance.

C. Notify all City of Cudahy employees represented for the purposes of collective bargaining by Milwaukee District Council 48 AFSCME, AFL-CIO and its affiliated Local Union 742, of the Commission's Order by posting copies of the Notice attached hereto as Appendix "A" for thirty days in conspicuous places where such employees work.

D. Notify the Wisconsin Employment Relations Commission and Milwaukee District Council 48 AFSCME, AFL-CIO and its affiliated Local Union 742, in writing, within twenty days of the date of this Order as to what steps have been taken to comply with the Order.

Given under our hands and seal at the City of Madison, Wisconsin this 8th day of July, 2010.

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 CITY OF CUDAHY EMPLOYEES
REPRESENTED BY MILWAUKEE DISTRICT COUNCIL 48
AFSCME, AFL-CIO and its affiliated LOCAL UNION 742**

Pursuant to an Order of the Wisconsin Employment Relations Commission issued on July 8, 2010, and in order to effectuate the policies of the Municipal Employment Relations Act, we hereby notify you that:

1. WE WILL NOT refuse to arbitrate grievances arising as to the meaning or application of the terms of a collective bargaining agreement between the City and Local 742.

2. WE WILL arbitrate the grievance as to whether employee Lynde is entitled to health insurance benefits.

Dated this _____ day of July, 2010.

_____
Mayor
City of Cudahy

THIS NOTICE WILL BE POSTED FOR THIRTY DAYS FROM THE DATE IT IS SIGNED AND SHALL NOT BE ALTERED, DEFACED OR COVERED IN ANY WAY.

CITY OF CUDAHY

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

As reflected in the complaints they have filed against each other, the parties disagree over their respective obligations to arbitrate the issue of whether Lynde has the necessary "years of service" to qualify for Article XXII health insurance benefits. Relying on the doctrine of preclusion, the City contends that it has no such obligation because the Knudson Award resolved how the contractual phrase "years of service" should be interpreted wherever that term is contractually used. The Union asserts to the contrary.

Where, as here, it is alleged that a party has refused to accept the terms of an arbitration award, the Commission in STATE OF WISCONSIN, DEC. NO. 31240-B (WERC, 5/06) held as follows as to a preclusion analysis:

> Without dissecting the differences between claim preclusion and issue preclusion, we note that issue preclusion is generally the more apposite concept when considering the effect of an arbitration award in a subsequent grievance. [2] For issue preclusion purposes (and thus for the second type of Section (1)(e) violation), it does not matter whether the same grievant is involved in the subsequent arbitration. What matters, as the Commission held in its seminal decision in WISCONSIN PUBLIC SERVICE CORPORATION, SUPRA, is whether the precise *issue* has been resolved and subsequent circumstances have not called the resolution into question.

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[2] Claim preclusion generally applies to situations where the same temporal events (or "transaction") give rise to more than one cause of action. Claim preclusion is related to the "merger doctrine," requiring that all claims arising out of a single transaction be combined; accordingly, such claims will be precluded whether or not they were actually litigated. See STATE OF WISCONSIN (DER) (METHU), DEC. NO. 30808-A (WERC, 1/06) at 8-9. Issue preclusion, on the other hand, applies to subsequent events or transactions that implicate issues already settled in previous litigation. Unlike claim preclusion, issue preclusion does not require the same parties, but does require that the issue actually have been litigated in the prior proceeding and have been necessary to the outcome. See discussion in WAUPACA COUNTY, DEC. NO. 30882 (WERC, 4/04).

In addition, in STATE OF WISCONSIN, DEC. NO. 32019-B (WERC, 1/09), the Commission held:

> In previous cases between these parties, the Commission has attempted to clarify what situations would constitute a refusal by the State to accept the terms of an arbitration award within the meaning of Sec. 111.84(1)(e), Stats. We have stated, "[B]ased upon issue preclusion principles, the State must comply 'with the resolution arbitrators have reached regarding the issues underlying an arbitration award, when the same issues arise subsequently between the same parties and no material facts have changed." STATE OF WISCONSIN, DEC. NO. 31865-D (WERC, 11/07), quoting, STATE OF WISCONSIN, DEC. NO. 31240-B (WERC, 5/06). However, we have cautioned that "the party asserting issue preclusion bears a relatively heavy burden to show that a particular issue was actually decided in a previous case … [T]he doctrine is 'equitable' and should not be applied rigidly to foreclose a party from an opportunity to litigate a claim." We have also emphasized that "arbitration … remains the primary forum for enforcing and interpreting contractual provisions. Both parties are entitled to fully litigate issues regarding the meaning of contract language in the arbitration forum. The Commission's jurisdiction under subsection (1)(e) is not a proper vehicle for extrapolating the outcome of issues that were not actually controverted in earlier case… ." ID. At 8.
>
> As both parties recognize, the first focus in a case of this type is to identify the factual and legal/language-interpretation issues involved in the new case and compare them with the factual and legal issues actually litigated and determined in the previous case. Since the point is to prevent unnecessary relitigation while at the same time allowing full access to the parties' chosen dispute resolution forum, this exercise is essentially practical rather than formulaic. Contrary to the Union's argument, we may be guided -- but not restricted -- by how the arbitrator formally stated the "issue" which is to be resolved by the award. There may be any number of factual or language interpretation issues capable of being extracted from any given arbitration award. Some may be dispositive of an entire future grievance; some may simply limit the scope of a future grievance, depending upon the degree of factual or legal overlap.

Here, the City contends that the Knudson Award resolved the issue of how "years of service" is to be defined in Article XXII of the contract. The City acknowledges that an alleged violation of Article XXII was not before Arbitrator Knudson. However, the City asserts that because the same contractual phrase found in Article XXII was interpreted by an arbitrator in the context of Articles XII and XXX, the arbitrator thereby resolved the Article XXII issue. We disagree.

As is evident from the portions of the Knudson Award quoted in Finding of Fact 6, the arbitrator's interpretation of "years of service" in the context of the Article XXX longevity pay issue was influenced by additional Article XXX language as to when longevity payments would

begin. Such additional language is not present in Article XXII. Working off his Article XXX interpretation (which was premised at least in part on this additional language as to when payments would begin), the arbitrator then interpreted Article XII vacation language in the same manner (i.e. no credit given to rehired employee for prior employment with the City), because he was "not convinced that the parties intended vacation eligibility to be computed in a different manner than longevity is computed . . . ." Given the critical role the additional Article XXX language played in Knudson Award, the absence of such additional language in Article XXII and the absence of any specific reference in the Knudson Award to Article XXII (or even more generally to "years of service" as found "elsewhere in the contract"), we conclude that the City has not met the previously noted "relatively heavy burden to show that a particular issue" (i.e. in this case the meaning of "years of service" in the context of Article XXII) "was actually decided in a previous case." Given our conclusion, it follows that the Union has not committed a Sec. 111.70 (3)(b) 4, Stats. prohibited practice by seeking to arbitrate the Lynde health insurance benefit grievance. It also follows that the City has committed prohibited practices in violation of Secs. 111.70 (3)(a) 5 and, derivatively, 1, Stats., by refusing to do so. [1] To remedy this prohibited practice, we have ordered the City to participate in arbitration of the Lynde grievance and to post an appropriate notice.

Dated at Madison, Wisconsin, this 8th day of July, 2010.

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

[1] Although the Union complaint alleges a violation of Sec. 111.70(3)(a)3, Stats., the Union's post-hearing argument makes no reference to this allegation and no evidence directly supportive of such an allegation is present in the record. Thus, we have dismissed this allegation. The Union complaint also requested attorney fees and costs, but the post-hearing argument makes no reference to this request and thus we deem it to have been abandoned.