

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**WINNEBAGO COUNTY HIGHWAY DEPARTMENT EMPLOYEES,  
LOCAL 1903, AFSCME, AFL-CIO, Complainant,**

vs.

**WINNEBAGO COUNTY, Respondent.**

Case 403  
No. 68059  
MP-4433

**Decision No. 32468-A**

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**Appearances:**

**Mr. Michael J. Wilson**, Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite "B", Madison, Wisconsin 53717-1903, for the Complainant.

**Attorney John A. Bodnar**, Corporation Counsel, Winnebago County, 440 Algoma Boulevard, P.O. Box 2808, Oshkosh, Wisconsin 54903-2808, for the Respondent.

**ORDER DISMISSING MOTION TO DEFER TO GRIEVANCE ARBITRATION**

On June 6, 2008, the Complainant, Winnebago County Highway Department Employees' Local 1903, AFSCME, AFL-CIO, filed a complaint with the Wisconsin Employment Relations Commission alleging that the Respondent, Winnebago County, had committed prohibited practices under Sec. 111.70(3)(a)1, 3 & 4, Wis. Stats., with respect to its imposition of a last chance agreement on bargaining unit member Randy Besaw on September 12, 2007, and ultimate termination of Besaw on September 28, 2007. The matter was scheduled for hearing on August 15, 2008. On August 1, 2008, the Respondent filed an answer to the complaint admitting and denying certain factual allegations in the complaint and denying that its action constituted prohibited labor practices. On August 6, 2008, the Respondent filed a motion to defer the complaint to arbitration alleging that the Union had also filed a grievance over Besaw's termination, which is still pending, that the Respondent has agreed to submit the issue of Besaw's termination to arbitration and that the Commission has a long-standing practice of refusing to exercise jurisdiction under Sec. 111.70(3)(a)5, Stats.

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where the underlying cause is also subject to the parties' contractual grievance procedure and the Complainant has not exhausted its contractual remedies. Having considered the Respondent's Motion to Defer to Grievance Arbitration and Complainant's response thereto;

NOW, THEREFORE, it is

**ORDERED**

That Respondent's Motion to Defer to Grievance Arbitration is denied.

Dated at Fond du Lac, Wisconsin, this 12th day of August, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

John R. Emery /s/

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John R. Emery, Examiner

**WINNEBAGO COUNTY**

**MEMORANDUM ACCOMPANYING ORDER DENYING MOTION  
TO DEFER TO GRIEVANCE ARBITRATION**

In this case, the allegations of the complaint assert, *inter alia*, that Randy Besaw was required to enter into a last chance agreement, in part due to protected activity, specifically concerns he raised regarding safety issues in the workplace, and that this action violated Sec. 111.70(3)(a)3, Stats, and, derivatively, Sec. 111.70(3)(a)1, Stats. It is further asserted that the Respondent allegedly failed to negotiate over the last chance agreement in violation of Secs. 111.70(3)(a)4 and 1, Stats. and allegedly failed to properly notify and include the Union in addressing the last chance agreement in violation of Sec. 111.70(3)(a)1, Stats. As and for relief, the complaint seeks a make whole remedy for Besaw, along with a cease and desist order and the posting of an accompanying notice imposed on the County for its alleged violations.

The Commission's criteria for deferral to arbitration are:

- (1) The parties must be willing to arbitrate and renounce technical objections which would prevent a decision on the merits by the arbitrator;
- (2) The collective bargaining agreement must clearly address itself to the dispute; and
- (3) The dispute must not involve important issues of law or policy. SCHOOL DISTRICT OF CADOTT COMMUNITY, DEC. NO. 27775-C (WERC, 6/94).

Here, the Respondent states in its motion that it agrees to submit the issue of Besaw's termination to arbitration. Under SCHOOL DISTRICT OF CADOTT, however, the Respondent must also waive technical objections that would prevent a determination of the grievance on the merits. This the Respondent has not done. Further, the motion does not append the collective bargaining agreement, nor cite the pertinent language therein, in order for the Examiner to determine whether and to what extent the contract clearly addresses itself to the dispute. I also note that the motion asserts that the Commission has applied what is known as the "exhaustion rule" to cases alleging violations of collective bargaining agreements under Sec. 111.70(3)(a)5, Stats., whereas this complaint alleges violations of Secs. 111.70(3)(a)1, 3 & 4, Stats. These allegations go beyond claims of contract violations to assert violations of statutory rights and protections which may not necessarily be satisfactorily addressed in a grievance arbitration proceeding and it is not clear from the motion or the pleadings whether or to what extent an arbitration award would adequately address all the underlying issues.

The motion to defer to grievance arbitration is, therefore, denied, and the hearing will proceed, as scheduled, on August 15, 2008, but, in light of the foregoing, the Respondent is given leave to resubmit the motion at the hearing.

Dated at Fond du Lac, Wisconsin, this 12th day of August, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

John R. Emery /s/

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John R. Emery, Examiner

