BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WAUSAU CITY HALL EMPLOYEES UNION
LOCAL 1287, AFSCME, AFL-CIO

and

CITY OF WAUSAU

Case 132
No. 68481
MA-14244

(L.K. Termination)

Appearances:

John Spiegelhoff, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1105 East Ninth Street, Merrill, Wisconsin 54452, for the labor organization.

Ruder Ware, L.L.S.C., by **Jeffrey T. Jones**, Attorney at Law, P.O. Box 8050, 500 First Street, Suite 8000, Wausau, Wisconsin 54402-8050, for the municipal employer.

ARBITRATION AWARD

The Union and the City are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. The Union made a request, in which the City concurred, for the Wisconsin Employment Relations Commission to provide a panel of randomly selected WERC arbitrators. The parties selected Stuart D. Levitan to hear and decide a grievance over the interpretation and application of the terms of the agreement relating to discipline. Prior to consideration of the matter on its merits, the employer raised an objection to the arbitrability of the dispute, contending that the grievant was not covered by the terms of the agreement relating to discipline and the grievance procedure at the time of her termination. To maximize efficiencies, the parties agreed to bifurcate the proceeding, with the arbitrator ruling on the arbitrability issue prior to consideration, if any, of the matter on its merits.

ISSUE

Did the provisions of Article 2(D) and Article 3 apply to L.K. when she was terminated on or about March 31, 2008?

RELEVANT CONTRACTUAL LANGUAGE

2007-2008 COLLECTIVE BARGAINING AGREEMENT

ARTICLE 1 - RECOGNITION

The City recognizes the Wausau City Hall Employees Union, Local 1287 (CH), AFSCME, AFL-CIO, as the exclusive bargaining representative for purposes of engaging in conferences and negotiations in regards to wages, hours and conditions of employment for all regular full-time and regular part-time employees of the City employed in City Hall and related buildings as described pursuant to W.E.R.C. Decision No. 20916, Case XXVII, No. 30999, ME-2175, but excluding department heads, supervisory, managerial, confidential, seasonal/temporary employees and all other City employees currently represented.

ARTICLE 2 – MANAGEMENT RIGHTS

The City possesses the sole right to operate the departments of the City and all management rights repose in it, but such rights must be exercised consistently with other provisions of this contract. These rights include but are not limited to the following:

. . .

D. To suspend, demote, discharge and take other disciplinary action against employees for just cause.

. . .

ARTICLE 3 – GRIEVANCE PROCEDURE

A. Definition and Procedure: A grievance shall be defined as a dispute over interpretation and application of the provisions of this collective bargaining agreement between the City and the Union. Grievances shall be handled and settled in accordance with the following procedure:

Step 1: An employee covered by this Agreement who has a grievance is urged to discuss that grievance with the immediate supervisor/department head as soon as the employee is aware of the grievance. In the event of a grievance, ….

BACKGROUND

The parties stipulated to the following facts: [1]

The City and the Union have been parties to past collective bargaining agreements since the non-professional collective bargaining unit pertaining to this matter was organized, including agreements covering the periods of 2005-2006 and 2007-2008. The parties are currently proceeding to interest arbitration on a successor 2009-2010 Collective Bargaining Agreement. [2]

On March 13, 2000, the City hired L.K. as a property appraiser in its Assessment Department. From the City's viewpoint, from the date of her hire forward, L.K. was experiencing job performance problems which the City attempted to correct through various means.

During 2001, the City restructured its Assessment Department, eliminating a Deputy Assessor position and creating a Commercial/Residential position. In November of 2006, the positions in the Assessment Department included, among others, the City Assessor (Department Head), one Commercial/Residential Appraiser, and two Residential Property Appraisers.

On November 10, 2006, the Union filed a Petition for unit clarification with the Wisconsin Employment Relations Commission, seeking to include the two Residential Property Appraiser positions and the one Commercial/Residential Appraiser position into the non-professional bargaining unit represented by the Union.

The City opposed the Petition for Unit Clarification on the grounds that: (1) the incumbents in the positions were professional employees who should not be included in a non-professional employee bargaining unit by means of an unit clarification; (2) even if the employees were not professional employees, they should not be included in the bargaining unit because they lacked a community of interest with the employees in the unit; and (3) the Commercial/Residential Appraiser position was a supervisor and/or managerial employee which should not be included in the bargaining unit.

On February 14, 2007, a hearing on the Petition for Unit Clarification was held before WERC Examiner Steven Morrison. The parties filed written briefs with the Commission, the last of which were received on May 9, 2007.

---

[1] I have modified the format of the Stipulation, and expanded it to include the text of documents which were incorporated by reference. I have also substituted the grievant's initials in place of her full name.

[2.] As noted below, the parties subsequently reached a voluntary agreement on a successor agreement.

On September 17, 2007, the Commission issued its decision on the Unit Clarification Petition. The Commission rejected the City's arguments that the Residential Property Appraiser and Commercial/Residential Appraiser should not be included within the bargaining unit and directed that these positions should be included within the bargaining unit.

On October 16, 2007, the City filed a Petition for Judicial Review of the Commission's decision of September 17, 2007, and a Motion to Stay that decision, with the Marathon County Circuit Court.

In late February of 2008, the parties' attorneys in the Circuit Court action (Attorney Jeffrey T. Jones representing the City of Wausau; Attorney Aaron Halstead representing Wausau City Hall Employees, Local 1287 CH, AFSCME, AFL-CIO; and Assistant Attorney General David Rice representing the Wisconsin Employment Relations Commission) stipulated that the circuit court could enter an Order staying enforcement of the decision of the Wisconsin Employment Relations Commission issued on September 17, 2007.

. On March 3, 2008, Circuit Court Judge Patrick Madden issued the following order:

> IT IS HEREBY ORDERED that the Motion For Stay of the Decision of the Wisconsin Employment Relations Commission dated September 17, 2007, is hereby granted.

On or about March 31, 2008, the City terminated L.K. from her employment based upon job performance issues. On April 7, 2008, the Union filed a Grievance at Step 3 of the Grievance Procedure challenging L.K.'s termination, as follows:

> Assessment department fired an employee that is protected under state law while a disputed union organizing effort is underway!
>
> Reinstate employee, reimburse all lost wages and benefits, and CEASE AND DESIST ALL HARRASSMENT of employees! (EMPHASIS in original)

On April 22, City Human Resources Director William P. Nagle denied the grievance, as follows:

> 1. Whether this person was "at will" or covered under an agreement, the termination was legal. (For the record, the employee was <u>not</u> in a union) {<u>emphasis</u> in original}

2. For the record, this "Finance" designation is, I believe, in error.

3. Employees are not being harassed.

On April 29, 2008, the Union appealed the denial of the Grievance to Step 4 of the Grievance Procedure. Ultimately, the City and the Union reached an informal agreement to hold the Grievance in abeyance pending the outcome of the matter in the Marathon County Circuit Court.

On September 8, 2008, Judge Patrick Madden issued a decision which concluded, "it is the judgment of this Court that the Commission's decision is affirmed in its entirety." The Decision and Order did not address the stay.

On September 16, 2008, the Union advised Ms. Ila Koss, City Human Resource Manager, that the Union wished to proceed with the Grievance, as follows:

> As you are aware, Local 1287 CH filed a grievance on behalf of L.K. alleging the City did not have just cause to terminate her employment. This grievance was filed on April 7, 2008. At the time the grievance was filed, the Commission had already determined the position of City Assessor appropriately belonged in Local 1287 CH as a result of a unit clarification hearing. The Union in filing the grievance asserted Ms. K had all the rights contained in the collective bargaining agreement especially as it relates to access to the grievance procedure and just cause provision.
>
> The City then appealed the decision of the Commission to the Circuit Court seeking to reverse the decision of the Commission. At the time of the City's appeal to Circuit Court, the grievance had proceeded through Steps 1-3. The parties engaged in discussions related to holding the grievance in abeyance as the representation issue was pending in Circuit Court. The City, through Attorney Jones, effectively agreed to hold the grievance in abeyance through a memorandum dated April 28, 2008. The Union had appealed the decision of the Human Resources Director (Attorney Nagle at the time) to the Common Council on April 29, 2008. The grievance has not been heard by the Common Council at this time.
>
> On September 15, 2008, I was notified the Iron (sic) County Circuit Court affirmed the decision of the Commission. As a

> result, the Union wishes to proceed forward with Ms. K's grievance to Step 4 of the grievance procedure with the Common Council of the City. The Union does recognize that the City does have the right to appeal the Circuit Court decision affirming the decision of the Commission to the District Court of Appeals. I am unsure what the position of the City is regards to this matter. As we have discussed, the Union is ready to present Ms. K's grievance on September 22, 2008 to the Common Council.
>
> Further, as a result of the Circuit Court affirming the decision of the Commission, the Union again demands to bargain on wages, hours and conditions of employment for the three positions in the City Assessor's office previously found by the Commission to be appropriately placed in Local 1287 CH. I would like to speak further reference this issue and sort out the issues the parties need to discuss. (sic) As the accretion of the three assessor positions are into an existing bargaining unit, we should be able to narrow down the issues which need to be bargained.

On October 27, 2008, the City's Human Resources Committee met with Union officials to review the Grievance. Due to issues raised by the Union, the parties agreed to mutually extend the time limits for the Committee to complete its review of the Grievance and provide a response.

On November 20, 2008, the City Human Resources Committee again reviewed the Grievance with the Union. On November 24, 2008, Mr. Jim Brezinski, Chairperson of the Human Resources Committee, responded to Mr. Spiegelhoff as follows:

> As you are aware, the City's Human Resources Committee reviewed the grievance pertaining to the termination of Ms. L.K. at its meeting held on Thursday, November 20, 2008. At the conclusion of the meeting, the Committee voted to deny the grievance. To the extent the labor agreement existing between the City and Local 1287 (CH) may be relevant, the Committee found no violation of the collective bargaining agreement provisions.
>
> Also, it is doubtful that the collective bargaining agreement pertains to this matter at all or that Ms. K's termination is subject to grievance arbitration as the circuit court had stayed the Wisconsin Employment Relations Commission's decision incorporating the

> property appraisers into the collective bargaining unit. If the circuit court's order stayed the Commission's decision, matters which occurred during the time period between the issuance of the stay and the date of that the circuit court's decision was issued would not be subject to arbitration.

Subsequent to November 24, 2008, city legal counsel Jeffrey T. Jones of Ruder Ware L.L.S.C. and union staff representative John Spiegelhoff exchanged correspondence clarifying that the City was not refusing to process the L.K. grievance to arbitration, but was not waiving any defenses to the grievance, and could "well raise the issue of the arbitrability of the Grievance …."

On December 1, 2008, the Union advised the City that it was processing the Grievance to arbitration. On December 10, 2008, the Union filed a Petition with the Commission for grievance arbitration.

Subsequent to the filing of their initial briefs and this stipulation, the parties stipulated to additional facts, as follows:

Union dues are deducted from employee wages. In October/November, 2008, the city began deducting union dues from the property appraisers' wages because the Union had so requested and the City had no objection. The property appraisers' wages and fringe benefits continued to be determined under the City's Non-Union Ordinance.

On January 26, 2009, following mediation undertaken by Marshall Gratz of the Commission staff, the parties reached a settlement for a 2009-2010 collective bargaining agreement, which included the following provisions:

. . .

2. General wage increases:

   2.0% effective retro to 1-1-09
   1.0% effective retro to 7-1-09
   2.0% effective retro to 1-1-10
   1.0% effective retro to 7-1-10

. . .

7. Issues specific to assessor (i.e. property appraisers) full and part time shall be bargained further under pending City Hall unit interest arbitration petition.

8. Except as noted above, include all 2007-08 provisions and appendices.

On February 16, 2009, Steven Morrison of the Commission staff conducted a mediation session regarding the property appraisers in Local 1287 (CH), which resulted in the following tentative agreement: [3]

1. All language and fringe benefits effective January 1, 2009.

2. Six-step wage schedule (attached) for the commercial appraiser position and the property appraiser position with Step F being a ten year rate similar to the ten year rate listed in the Non-Union Ordinance that previously covered wages for these positions.

3. A 2% wage adjustment on January 1 and a 1% wage adjustment on July 1 of 2009 and 2010 with no retroactive wage payments. [4]

4. The position of part-time appraiser would be paid at Step D of the new wage schedule and would receive limited fringe benefits (like those provided to the Crossing Guard position) with a proration of benefits based upon the number of hours worked in the prior year.

5. Agreement by the Union and City that the settlement of the wages for the two positions (commercial and property appraiser) would not be precedent by the Union for the determination of the ten year rate or the spread between the ten year and the seven year rate on the salary schedule.

POSITIONS OF THE PARTIES

In support of its position that the grievance should be held arbitrable, the Union asserts and avers as follows:

Because the City did not appeal the Circuit Court decision affirming the Commission's unit clarification decision in its entirety, it stands to reason the Commission decision was therefore effective September 17, 2007. The motion

[3] The record is silent on the status of a ratification vote.

[4] In its Petition for Interest Arbitration, filed Dec. 1, 2008, the Union had proposed a 2007-2008 salary grid for the newly accreted positions, stating, "Back pay for incumbents based upon the inclusion of the positions into Local 1287 CH which occurred in September 2007 through a unit clarification."

to stay was temporary, but the City's position essentially creates a permanent stay with the contractual conditions of the collective bargaining agreement having no force or effect from the order granting the stay on March 4, 2008 to the order affirming the Commission on September 8, 2008. This line of reasoning leads to harsh, absurd or non-sensical results and denies L.K. an opportunity to challenge her termination under the just cause provision of the contract. Essentially she is carved out of the contract, unlike all other bargaining unit members. This should not be allowed to happen. The City argument that the newly accreted positions are at-will employees until an agreement is reached is contrary to the spirit and intent of the unit clarification process, which is that once these positions are found to be within the unit, contractual provisions of the agreement apply. Otherwise, the city could fire all employees as soon as the commission ordered their accretion. Once the court affirmed the commission's unit clarification, the city was obligated to honor all the terms of the existing labor agreement, including the just cause provision, with retroactivity implied to the date of the commission order in September 2007. A logical deduction can be made that the grievant obtained the just cause standard retroactive to that date.

Further, the city has not taken the position that the other assessor positions are not subject to the just cause provision. During bargaining, the city never advanced nor took the position that these assessor positions should not be subject to the just cause provisions. During conciliation of a prohibited practice complaint, the parties resolved not only that complaint but also reached a tentative agreement on a successor labor agreement, leaving only the issue of the wages for the accreted assessors. The city has not advanced any proposal that would deny just cause to these positions, thus treating the grievant differently than other employees. This connotes disparate treatment; either all the assessor positions have just cause, or none of them. The city wishes to play both sides of the fence.

Further, the city has processed this grievance and initiated dues deduction for the other assessor positions when their wages, hours and conditions of employment have not been fully settled. The city cannot pick and choose which contractual provisions to apply. Processing the grievance leads to the logical conclusion that the grievance procedure and the just cause provisions apply to this grievant. By processing the grievance, the city effectively agreed to the grievance procedure and logically the just cause standard that accompanied the substance of the grievance. The city knows that proposing no just cause for these provisions borders on the ridiculous and would lead to interest arbitration.

The city's likely argument that it only processed the grievance to forestall a prohibited practice complaint was rendered moot by the city's action. It could have defended its position against such a complaint.

> Moreover, the city has also been making dues deduction for the incumbent assessors since October, 2008, meaning that the city has honored a contractual provision prior to the parties reaching an agreement on all mandatory subjects of bargaining affecting these employees. The city cannot argue out of both sides of its mouth. Either none of the contractual terms and conditions apply or all of them apply. The city's actions demonstrate the just cause provisions apply to the grievant.
>
> The retroactivity of the just cause standard to September 2007 is implied by the court order affirming the commission's unit clarification in September 2008, which placed the grievant and the other assessor positions within the recognition clause. The city also processed the grievance and made dues deductions. The city has never argued these positions will not have just cause, but wishes to carve out this grievant from that important due process. This should not be allowed to happen.

In support of its position that the grievance is not arbitrable, the Employer asserts and avers as follows:

> Because the circuit court stayed the Commission's decision, that decision was not in effect from that point forward, and the provisions of the collective bargaining agreement did not apply to the grievant at the time of her discharge.
>
> Moreover, regardless of the stay, the terms of the collective bargaining agreement would still not have applied to the grievant's discharge, because an existing position that has been clarified into a collective bargaining unit is not automatically covered by the terms of the agreement. Following accretion, the parties must bargain the applicable terms. None of the terms of the 2007-2008 collective bargaining agreement applied to the grievant at the time of her termination; her position is not even listed in the recognition clause.
>
> Under this collective bargaining agreement, the arbitrator must not in any way modify its terms, and shall be restricted to interpreting the agreement in the area where the alleged breach occurred. A conclusion that the terms of the agreement applied to the grievant, without the parties agreement to that effect would constitute the arbitrator writing the parties' agreement for them.
>
> The arbitrator should find that the court's stay and the fact that the parties had not reached an agreement as to the contractual terms applying to the assessor positions at the time the grievant was terminated precluded application of the terms of the labor agreement to the grievant, and dismiss the grievance.

DISCUSSION

In order for this dispute to be arbitrable, I must find that, at the time of her termination, L.K. was covered by the terms of the collective bargaining agreement relating to discipline and the grievance procedure. Notwithstanding the strong public policy favoring arbitration to resolve labor disputes, I am unable to do so.

It was on September 17, 2007 that the Commission clarified the existing bargaining unit by ordering the accretion thereto of the commercial and property appraisers, including L.K. On October 16, the city sued to overturn the Commission decision, and sought a stay pending resolution of the litigation. In late February, 2008, the parties stipulated to such a stay, which was issued on March 3, 2008. L.K. was fired on March 31, 2008. On September 8, 2008, the Commission order was affirmed.

The union asserts that the court's affirmation of the Commission order in September, 2008, constituted a lifting of the stay, which "implicitly" meant that the Commission order had been in effect all along, and that L.K. was thus covered by all terms of the 2007-2008 labor agreement between the parties as of September 17, 2007. Therefore, the union concludes, L.K. was covered by the terms of the agreement relating to discipline and the grievance procedure when she was discharged on or about March 31, 2008.

I am not sure I agree that the court's affirmation of the Commission order in September 2008 meant that the order was retroactively in effect for the previous year. However, assuming for the sake of this discussion that it was, that still leaves the question of whether L.K. was covered by the labor agreement's terms regarding discipline and the grievance procedure in March, 2008.

To determine whether the putative grievant was covered by the terms of the collective bargaining agreement when she was terminated in March, 2008, a review of commission and court case law concerning representation elections, unit clarifications and interest arbitration proceedings is in order.

IN JOINT SCHOOL DISTRICT NO. 1, TOWNS OF MINOCQUA, HAZELHURST & LAKE TOMAHAWK, DEC. NO. 19381 (WERC, 2/82) the Commission directed an election in a collective bargaining unit consisting of all bus drivers, to determine if they wished to "be merged," or accreted, into an existing bargaining unit. Citing COCHRANE-FOUNTAIN CITY COMMUNITY JOINT SCHOOL DISTRICT NO. 1, DEC. NO. 13700 (WERC, 6/75), the commission stated explicitly:

> Terms and conditions of any existing collective bargaining agreement, however, shall not automatically be applied to employees in the residual unit unless collective bargaining produces such a result.

The COCHRANE-FOUNTAIN CITY decision, which itself cited no earlier authority, directed an election to determine if a registered nurse desired to be accreted into an existing unit of professional teachers. The Commission directed:

> … that if the registered nurse selects the Petitioner (the Cochrane-Fountain City Education Association) as her bargaining representative the residual unit of the professional registered nurse shall be merged with the overall unit of teaching personnel. *However, the terms of the 1975-1976 master agreement covering teaching personnel are not automatically to be applied to the registered nurse unless collective bargaining produces such a result."* (*emphasis* added).

In GREENDALE SCHOOL DISTRICT, DEC. NO. 20184 (WERC 12/1982), the Commission considered whether an agreement concerning newly accreted positions is a "new collective bargaining agreement" for the purposes of an interest arbitration proceeding. [5] The Commission, in a 2-1 decision with Commissioner Herman Torosian dissenting, found that it was not, and that the existing terms would apply to the subject positions. That determination was upheld by the circuit court. MILWAUKEE DIST. COUNCIL 48 V. WERC, No. 603-055 (Milwaukee County Cir. Ct. Oct. 17, 1983). Subsequently, in CITY OF EAU CLAIRE, DEC. NO. 22795-C at 18 (Honeyman, 5/1986) , the Commission stated: "We think it appropriate that the Examiner and parties be apprised that Commissioner Torosian's dissent in GREENDALE SCHOOLS represents the view of at least a majority of the present commission." Disregarding EAU CLAIRE, however, the WERC in WAUSAU SCHOOL DISTRICT, DEC. NO. 25972 (WERC, 4/89) reverted to its GREENDALE SCHOOL position, and held that interest arbitration was not available to resolve a dispute over the wages, hours and conditions of employment of positions accreted to a bargaining unit with an existing collective bargaining agreement. A few months later, in WOOD COUNTY, DEC. NO. 26178 (WERC, 9/89), the Commission, again over Torosian's dissent, reiterated this position.

The facts in WAUSAU SCHOOL DISTRICT were undisputed. A printer's position was added to the union in 1988, during the term of an existing collective bargaining agreement. As the court of appeals stated, "(u)nder commission precedent, when unrepresented positions are added to an existing bargaining unit, the bargaining agreement does not cover these positions." WAUSAU SCHOOL DISTRICT MAINTENANCE & CUSTODIAL UNION V. WISCONSIN EMPLOYMENT RELATIONS COMMISSION, 157 Wis. 2D 315 (Ct. App. 1990) After unsuccessfully negotiating the printer's wages, hours and conditions of employment, the union filed a petition for interest arbitration. The WERC found that the union was not seeking a "new collective bargaining agreement" and denied the petition. The union appealed to the circuit court, which reversed and ordered mandatory arbitration. WERC appealed the circuit court's decision, which the Court of

---

[5] The statute, sec.111.70(4)(cm)6., reads in part: *Interest arbitration. If a dispute has not been settled after a reasonable period of negotiation ... and the parties are deadlocked with respect to any dispute between them over wages, hours and conditions of employment to be included in a new collective bargaining agreement, either party, or the parties jointly, may petition the commission, in writing, to initiate compulsory, final and binding arbitration, as provided in this paragraph*

Appeals affirmed. The Court of Appeals also adopted the position taken by Commissioner Torosian in his dissent in GREENDALE SCHOOL, DEC. NO. 20184 at 7:

> Unlike DANE COUNTY this is not a case where, during the term of an agreement, a new matter or issue arises over which the Union wants to bargain and if necessary proceed to mediation-arbitration. Here we have a group of employees who prior to their accretion were not represented for purposes of collective bargaining agreement. Under such circumstances the Commission has long held, as noted by the majority, that accreted employes are not automatically covered by the terms of an existing collective bargaining agreement covering employes in the accreted-to unit, and that said accreted employees have the right, and the employer has the duty, to bargain over their wages, hours and conditions of employment. It follows then that the parties must in good faith make an attempt to reach an agreement over matters that are mandatorily bargainable. The resultant agreement, if negotiated, is in my opinion, a new initial agreement; a new initial agreement because it covers employes who were not previously represented and who were not covered by an agreement. The fact that they have gained bargaining rights by way of an accretion to a larger unit of employes, does not in my opinion change the fact that said employes are negotiating for a new agreement. As such they have a right to utilize the mediation arbitration process to secure same. Thus, it is clear to the undersigned that such an agreement is a new agreement within the contemplation of Sec. 111.70(4)(cm)6.

The court held that the interest arbitration provisions in Sec. 111.70(4)(cm)6, Stats., apply in situations where municipalities and unions are negotiating the wages, hours and conditions of employment for positions newly accreted to the bargaining unit, and affirmed the circuit court's order of interest arbitration.

Clearly, if interest arbitration were available to establish the wages, hours and working conditions for the accreted appraisers in the instant case – as, indeed, it was, as evidenced by the informal investigation Morrison conducted pursuant to the union's petition – that would mean, by definition, that those employees were not covered by the terms of the collective bargaining agreement unless and until a successor agreement (either arrived at voluntarily, or through arbitration) was in place.

Thus, contrary to the assertion by the union, it is now settled law that where an existing position has been clarified into a bargaining unit, that position is *not* automatically covered by the existing collective bargaining agreement and the municipal employer is required to bargain with the union with regard to the wages, hours and conditions of employment for that position. CITY OF MAUSTON, DEC. NO. 28534-C (Shaw, 3/98), citing MADISON VOCATIONAL, TECHNICAL AND ADULT EDUCATION DISTRICT, DEC. NO. 8382-A (WERC, 1/80).

In noting that the city treated the accreted appraisers as within the labor contract for purposes of dues deduction, but not for purposes of the grievance procedure, the union

correctly identifies an apparent inconsistency in the city's legal position. To paraphrase an earthier aphorism -- you can't be just a little bit under the contract; either an employee is within its terms, or not.

But there is a difference between being in the unit and having a collective bargaining agreement. Article 27 requires "all employees in the unit" to pay their proportionate share of the cost "of the collective bargaining process and contract administration." It also requires the city to deduct dues upon an employee's authorization. Upon affirmation of the Commission decision, the incumbent employees were accreted into the unit, and thus met the terms of Article 27. The city would have been subject to a grievance or prohibited practice complaint had it refused to implement dues deduction as requested.

The fact that the city acceded to the union's request to deduct union dues from the accreted employees establishes that the employees were in the bargaining unit and that the union was providing representation through the collective bargaining process. Against the weight of commission and court precedent noted above, their status as employees within the unit does not establish that the entire labor agreement applied at that point.

The union is correct, of course, that retroactivity is a standard concept in labor negotiations. The parties' first contract could have indeed made the just cause standard and grievance procedure, and other terms, effective on the date of the commission's decision. The prospect of such a result was greater the sooner the parties reached agreement; the more activity that occurred prior to agreement certainly lessened the likelihood that the agreement would eventually provide full retroactivity.

Because the city took the highly unusual step of suing to overturn the commission decision, bargaining was put on hold for more than a year. It was not until mid-February, 2009 – more than six weeks after expiration of the labor agreement in force at the time of the commission decision – that the parties agreed on terms for the accreted appraisers. By then, the parties were well-versed in the instant legal issue concerning when the labor agreement applied to the grievant.

Briefs were written before the successful mediation conducted by commission investigator Morrison, so the union could not anticipate how that voluntary agreement would counter its arguments. But in their Settlement Agreement Regarding Property Appraisers of February 16, 2009, the parties agreed that, "All language and fringe benefits effective January 1, 2009." Thus, contrary to the union's initial proposal and its written argument herein, there is nothing in the record to establish, or even indicate, that the terms of the grievance procedure applied to these positions prior to that effective date. In fact, the record is demonstrably to the contrary.

Thus, even if the lifting of the stay in September 2008 meant that the Commission order clarifying the bargaining unit had been in effect since its issuance in September 2007, the voluntary settlement by the parties to apply "all language" of the labor agreement to the accreted

positions effective January 1, 2009, necessarily meant that the just cause standard and the grievance procedure were not applicable to L.K. on March 31, 2008. I therefore have no jurisdiction to hear this matter on its merits.

Accordingly, on the basis of the collective bargaining agreement, the record evidence and the arguments of the parties, it is my

AWARD

That because the provisions of Article 2(D.) and Article 3 did not apply to L.K. when she was terminated on or about March 31, 2008, the grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 20th day of March, 2009.

Stuart D. Levitan /s/
Stuart D. Levitan, Arbitrator

SDL/gjc
7407