

SAM GUTHRIE,  
  
Complainant,  
  
vs.  
  
LOCAL 82, COUNCIL 24,  
AFSCME, AFL-CIO and  
UNIVERSITY OF WISCONSIN -  
MILWAUKEE, HOUSING DEPARTMENT,  
  
Respondents.

Case 41  
No. 40722 PP(S)-146  
Decision No. 11457-I

Jacobson, Sodos & Krings, S.C., Attorneys at Law, Suite 316, 152 West Wisconsin Avenue, Milwaukee, Wisconsin 53203, by Mr. Thomas M. Jacobson and Chernov, Croen & Stern, Attorneys at Law, Suite 1275, 330 East Kilbourn Avenue, Milwaukee, Wisconsin 53202, by Mr. Alan S. Brostoff, appearing on behalf of the Complainant.

Lawton & Cates, Attorneys at Law, 214 West Mifflin Street, Madison, Wisconsin 53703, by Mr. Richard V. Graylow, appearing on behalf of the Respondent Local 82, Council 24, WSEU, AFSCME, AFL-CIO.

The Wisconsin Employment Relations Commission having, on May 30, 1984, issued revised Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above-entitled matter wherein inter alia the Commission concluded that the Respondent Local 82, Council 24, AFSCME, AFL-CIO had committed an unfair labor practice against Complainant Guthrie within the meaning of Sec. 111.84(2)(a), Stats., and granted Complainant Guthrie certain relief; and the Commission's decision and remedy having been affirmed by decision of Milwaukee County Circuit Court Judge Michael P. Sullivan on January 29, 1986 (Case No. 642-461) and by the Wisconsin Court of Appeals, District I, by decision dated February 24, 1987, (unpublished); and the Wisconsin Supreme Court having, on July 29, 1987, ordered that the petitions for review filed by Complainant Guthrie and Respondent AFSCME were denied; and Complainant Guthrie and Respondent AFSCME having thereafter been unable to agree upon what action, if any, was required of Respondent AFSCME to comply with the Commission's remedial Order in the above-entitled matter; and the parties thereafter having unsuccessfully attempted to narrow or resolve the factual and legal issues which they believed arose from the question of compliance with the Commission's Order; and hearing having ultimately been held on July 8, 1988, in Milwaukee, Wisconsin, before Examiner Peter G. Davis; and the parties thereafter having filed written argument, the last of which was received on August 31, 1988; and the Commission having considered the record and the arguments of the parties and being fully advised in the premises, makes and issues the following

1. That the University of Wisconsin - Milwaukee, herein the State, is an agency of the State of Wisconsin operating an educational facility in Milwaukee, Wisconsin.

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2. That Local 82, Council 24, AFSCME, AFL-CIO, herein Respondent Union, is a labor organization having its principle offices at 5 Odana Court, Madison, Wisconsin; and that Respondent Union was, at all times pertinent herein, the collective bargaining representative of certain employees of the University of Wisconsin-Milwaukee.

3. That Samuel E. Guthrie, herein the Complainant, was employed by the University of Wisconsin-Milwaukee until his discharge on July 14, 1972; and that Complainant thereafter filed an unfair labor practice complaint with the Wisconsin Employment Relations Commission alleging that the Respondent Union had violated Sec. 111.84(2)(a), Stats., by failing to process his contractual grievance protesting his discharge to final and binding arbitration and that the Respondent State had violated Sec. 111.84(1)(e), Stats., by discharging him without just cause.

4. That on May 30, 1984, the Wisconsin Employment Relations Commission issued a decision entitled Revised Findings of Fact, Conclusions of Law and Order as to Complainant Guthrie's unfair labor practice complaint; and that said Commission decision contained the following Revised Conclusions of Law, Revised Order, and pertinent Memorandum:

#### REVISED CONCLUSIONS OF LAW

1. That the Respondent Union, Local 82, Wisconsin State Employees Union, Council 24, AFSCME, AFL-CIO, by arbitrarily failing to make a considered decision on whether to pursue Complainant Sam Guthrie's discharge grievance to arbitration, breached its duty of fair representation and thereby has violated Sec. 111.84(2)(a), Stats.

2. That the Commission has jurisdiction over the allegations in the complaint that the Respondent University of Wisconsin - Milwaukee, by discharging Complainant on July 14, 1972, breached the parties' collective bargaining agreement and thereby violated Sec. 111.84(1)(e), Stats.

3. That as Respondent Union Local 82, Wisconsin State Employees Union, Council 24, AFSCME, AFL-CIO, breached its duty of fair representation, the Commission will exercise its jurisdiction to determine whether Respondent University of Wisconsin - Milwaukee violated the parties' collective bargaining agreement and thereby violated Sec. 111.84(1)(e), Stats., by discharging Complainant Guthrie.

4. That since the Respondent Employer, University of Wisconsin - Milwaukee had just cause, within the meaning of the collective bargaining agreement, to discharge Complainant Guthrie on July 14, 1972, Respondent University of Wisconsin - Milwaukee, by said discharge, did not violate said agreement or Sec. 111.84(1)(e), Stats.

Based upon the above and foregoing Revised Findings of Fact and Revised Conclusions of Law, the Commission makes and files its

#### REVISED ORDER

IT IS ORDERED THAT:

1. Local 82, Wisconsin State Employees Union, Council 24, AFSCME, AFL-CIO, its officers and agents, shall immediately:

- (a) Cease and desist from breaching its duty to fairly represent employees by failing to make considered decisions as to whether to pursue grievances to arbitration;

(b) Pay Complainant Samuel E. Guthrie an amount of money equal to the cost, including reasonable attorney's fees, incurred by him when litigating the merits of his discharge during the hearing before Examiner Schurke.

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

2. The complaint, except as to the violation of Sec. 111.84(2)(a), Stats., is dismissed.

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MEMORANDUM ACCOMPANYING REVISED FINDINGS  
OF FACT, CONCLUSIONS OF LAW AND ORDER

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Remedy:

Having found that Respondent Union committed an unfair labor practice within the meaning of Sec. 111.84(2)(a), Stats., when it breached its duty of fair representation by failing to make a considered decision on whether to arbitrate Complainant's discharge grievance, we have ordered Respondent Union to cease and desist therefrom. We have revised the Examiner's cease and desist order to accurately reflect the basis upon which we have found such a violation.

In addition, we think it appropriate to grant Complainant Guthrie affirmative relief by order Respondent Union to pay Guthrie an amount of money equal to the costs, including reasonable attorney's fees, which were incurred by Guthrie when litigating the merits of his discharge during a portion of the proceeding before Examiner Schurke. Such an order is an appropriate remedy herein because Respondent Union's breach in essence deprived Guthrie of a potential arbitration hearing on his discharge for which he would have borne no cost. As the merits of Guthrie's discharge were litigated before Examiner Schurke in the functional equivalent of an arbitration hearing and as Guthrie bore the costs, we find it appropriate that he be reimbursed for same so as to best approximate the cost free arbitration as to which he was potentially deprived by Respondent Union. While the Respondent Union might have been able to provide representation at a lesser cost than that incurred by Complainant with his own counsel, we do not find the potential for a cost difference troublesome because it is Respondent Union's conduct which created the potential for such additional expense. We find Examiner Schurke's remedy of reasonable attorneys fees and costs incurred in the prosecution of the entire complaint to be overbroad as it extends beyond remedying the potential deprivation of a cost free arbitration hearing suffered by Complainant Guthrie.

As we have concluded that Respondent Employer had just cause to discharge Complainant Guthrie, we have revised the Examiner's Order by deleting the requirement of reinstatement with backpay.

5. That under the contingent fee agreement between Complainant Guthrie and his attorney, Complainant Guthrie has not paid and is not obligated to pay any attorney's fees to his attorney for the litigation of the merits of his discharge before Examiner Schurke.

6. That under the contingent fee agreement between Complainant Guthrie and his attorney, Complainant Guthrie has not paid but is obligated to pay costs advanced by his attorney when litigating the merits of his discharge before Examiner Schurke.

7. That Respondent Union has not paid any monies to Complainant Guthrie pursuant to the Commission's remedial Order in this matter.

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

#### CONCLUSIONS OF LAW

1. That inasmuch as Complainant Guthrie has not incurred any attorney's fees from the litigation of the merits of his discharge before Examiner Schurke, the Respondent Union's failure to pay any monies to Complainant Guthrie does not constitute non-compliance with a portion of the Commission's remedial Order.

2. That inasmuch as Complainant Guthrie has incurred costs from the litigation of the merits of his discharge before Examiner Schurke, the Respondent Union's failure to pay any monies to Complainant Guthrie does constitute non-compliance with a portion of the Commission's remedial Order.

Based upon the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

#### ORDER 2/

That Respondent Union shall immediately pay to Complainant Guthrie a sum of money equal to the monies Complainant Guthrie is obligated to pay to his attorney as costs incurred when litigating the merits of his discharge before Examiner Schurke.

Given under our hands and seal at the City of  
Madison, Wisconsin this 21st day of December, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld  
Stephen Schoenfeld, Chairman  
Herman Torosian  
Herman Torosian, Commissioner  
A. Henry Hempe  
A. Henry Hempe, Commissioner

2/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

(Footnote two continued on page five)

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(Footnote two continued from page four)

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefore personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.

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(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

UNIVERSITY OF WISCONSIN-MILWAUKEE  
(HOUSING DEPARTMENT)

MEMORANDUM ACCOMPANYING  
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In this compliance proceeding, the issue before us is whether the Respondent Union has complied with our Order to pay Complainant Guthrie costs and/or reasonable attorney's fees incurred when litigating the merits of his discharge before Examiner Schurke.

POSITIONS OF THE PARTIES

Respondent Union:

Respondent Union asserts that where, as here, Complainant Guthrie was never billed for any of his attorney's services, nor did he pay anything to them for fees, costs, etc., it is not required to pay Respondent Guthrie any amount of money under the Commission's Order. Respondent Union contends that the Commission's Order was made in the context of its equitable remedial powers and not under a fee-shifting statute which, in general, might require fee awards for the reasonable market value of work performed under a contingency contract. Respondent Union asserts that while the Commission had the equitable power to grant Guthrie greater relief, the Commission Order at issue herein was a rationale exercise of the Commission's equitable power particularly where, as here, the Union had acted in subjective good faith and thus deterrence by penalty was unnecessary. Respondent Union asserts that the Commission's Order was intended to place Complainant Guthrie in the same position he would have been in had Respondent Union proceeded to arbitration. Because Complainant Guthrie has paid nothing to his attorneys nor been requested to do so, Respondent Union asserts that Complainant Guthrie is already in the same position he would have been in had the Respondent Union proceeded to arbitration.

Assuming arguendo that Complainant Guthrie is entitled to attorney's fees he has not directly incurred, the Respondent Union asserts that he may collect said fees only for hours spent before Examiner Schurke litigating the merits of his discharge.

Given the foregoing, Respondent Union respectfully requests that the Commission conclude that the Respondent Union has complied with the terms of the Commission's Order.

Complainant Guthrie:

Complainant Guthrie argues that if the intent of the Commission's remedial Order was to foreclose the payment of any attorney's fees to Complainant Guthrie's counsel unless said fees constitute a reimbursement for actual out-of-pocket payments to his attorneys, then the remedial Order is unsound and incorrect as a matter of public policy, and is inadequate under the State Employment Labor Relations Act (SELRA) as a matter of law. Complainant Guthrie argues that it appears that when fashioning its remedial Order, the Commission assumed, without benefit of evidence or hearing, that Mr. Guthrie would not and/or could not have had a contingent fee arrangement. Complainant Guthrie notes that this assumption is clearly unfounded given the record in the compliance proceeding. Complainant Guthrie asserts that the contingent nature of the fee agreement should not foreclose payment of appropriate attorney's fees citing New York Gas Light Club, Inc. v. Carey, 447 U.S. 54 (1980); Watkins v. LIRC, 117 Wis.2d 753 (1984).

Complainant Guthrie further argues that it was wholly arbitrary for the Commission to limit attorney's fees to a portion of the Schurke proceeding and urges the Commission to reconsider this aspect of its decision. Complainant Guthrie asserts that nothing in any prior judicial review of this matter prevents the Commission from taking a fresh look at the remedy in this case on reconsideration. Complainant Guthrie argues that the Commission's rationale for cutting off Complainant Guthrie's attorney's fees - the notion that the proceeding before the

Examiner was the "analogue" of an arbitration case - could not further from the mark as the statutory grounds for review on arbitrator's decision are radically different from the statutory grounds available for review of an examiner's decision. Thus, at the various review phases (Commission, Circuit Court, etc.), the "analogue" breaks down entirely, and reliance on the analogy is a basis for cutting off attorney's fees is arbitrary and capricious. Complainant Guthrie argues that as the Commission well knows, if litigating the merits of Guthrie's discharge in the proceeding before Examiner Schurke really were the functional equivalent of an arbitration hearing, then Examiner Schurke's decision would not have been reviewed de novo as it was here.

With respect to the amount of attorney's fees, Complainant Guthrie argues that the computation of those fees should follow the established criteria set forth in such cases as Johnson v. Georgia Highway Express, Inc. 488 F.2d 714 (5th Cir. 1974) and Copeland v. Marshal, 641 F.2d 880 (D.C. Cir. 1980). Accordingly, Complainant Guthrie argues that the attorney's fees in the instant case ought to be based on a "lodestar" figure for the entire case. Therefore, Complainant Guthrie asks that the Commission convene hearing for the purpose of taking evidence as to what the appropriate "lodestar" figure would be in this case.

## DISCUSSION

As the Findings of Fact herein indicate, the Commission's Order in this matter sought to make Complainant Guthrie whole by requiring that Respondent Union pay any costs, including reasonable attorneys fees, which he incurred when litigating the merits of his discharge before Examiner Schurke. As the record establishes that Complainant Guthrie, pursuant to the contingent fee agreement with his legal counsel, has not paid and is not obligated to pay any attorney's fees to his lawyer, we conclude that Guthrie has not "incurred" attorney's fees within the meaning of our Order. Thus, Respondent Union is not obligated to pay any attorney's fees to Complainant Guthrie under our Order. However, as Complainant Guthrie is obligated under the contingent fee arrangement to pay costs advanced by his attorney, we are satisfied that Guthrie has "incurred" costs under our Order. As the Respondent Union has paid no monies to Guthrie and as we presume from the record 3/ that such costs exist, Respondent Union has not complied with this portion of our Order.

As the Commission decision, including the remedial Order, has been affirmed by both the Circuit Court and the Court of Appeals, we do not believe we are presently empowered to reconsider the propriety of our Order. 4/

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3/ The focal points of the compliance hearing were the nature of the fee arrangement between Complainant Guthrie and his attorney and the number of hours and fee levels attributable to litigation of the merits of discharge before Examiner Schurke. Thus, the existing record does not allow for a precise determination of the amount of money Respondent Union must pay as costs under our Order. We are confident that the parties will be able to agree upon said amount so as to avoid the need to recovene the compliance hearing.

4/ On July 22, 1988, Complainant Guthrie also filed a Motion for Reconsideration of the Commission's May 30, 1984 decision. Complainant asserted therein that the Commission should vacate said decision and review the Schurke decision anew under Sec. 788.10, Stats. because Complainant asserts, the Commission's remedy indicates the Commission thought the Schurke decision was the functional equivalent of an arbitration award. We deny Complainant's Motion for the following reasons: (1) our original decision has been affirmed on judicial review and thus we are not empowered to reconsider same; (2) Complainant could have but did not raise this theory on petition for rehearing pursuant to Sec. 227.49, Stats.; and (3) the review of Examiner decisions is governed by Sec. 111.07, Stats. and we remain satisfied that our original decision was correct under that statute.

Given the foregoing, we conclude that the Respondent Union has complied with our Order as to attorney's fees but is not in compliance with our Order as to costs.

Dated at Madison, Wisconsin this 21st day of December, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld  
Stephen Schoenfeld, Chairman

Herman Torosian  
Herman Torosian, Commissioner

A. Henry Hempe  
A. Henry Hempe, Commissioner