STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

STATE ENGINEERS ASSOCIATION, Complainant, vs. STATE OF WISCONSIN, Respondent.	Case VII No. 19453 PP(S)-34 Decision No. 13864-A

Appearances:

Mr. David A. Flesch, Attorney at Law, appearing on behalf of the Complainant.

Mr. Lionel L. Crowley, Attorney at Law, Department of Administration, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complaint of unfair labor practices having been filed with the Wisconsin Employment Relations Commission in the above-entitled matter and the Commission having appointed Byron Yaffe, a member of the Commission's staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5) of the Wisconsin Statutes; and hearing on said complaint having been held at Madison, Wisconsin on September 29, 1975, before the Examiner; and the Examiner having considered the arguments, evidence and briefs and being fully advised in the premises makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That State Engineers Association, hereinafter referred to as the Complainant, is a labor organization and the collective bargaining representative for certain professional engineering employes of the State of Wisconsin with principal offices located at 1618 West Beltline Highway, Madison, Wisconsin.

2. That the State of Wisconsin, hereinafter referred to as the Respondent, is an employer as defined in Section 111.81(16) of the Wisconsin Statutes.

3. That at all times pertinent hereto, the Complainant and Respondent have been parties to a collective bargaining agreement which among its several provisions, contains the following which are material herein:

"ARTICLE IV

GRIEVANCE PROCEDURE

. . .

Section 2 Procedure.

. . .

Step Four:

. . .

Where the question of arbitrability is not an issue, the arbitrator shall only have authority to determine compliance with the provisions of this Agreement. The arbitrator shall not have jurisdiction or authority to add to, amend, modify, nullify, or ignore in any way the provisions of this Agreement and shall not make any award which in effect would grant the Association or the Employer any matters which were not obtained in the negotiation process.

. . .

ARTICLE VII

HOURS OF WORK

. . .

Section 2 Worktime.

A. Definitions.

(1) Overtime -- Time that an employe works in excess of 40 hours per work week.

(2) Work Week -- A regularly reoccurring period of 168 hours in the form of seven consecutive 24-hour periods.

(3) Work Time --

(a) All hours actually spent performing duties on the assigned job.

. . .

B. Eligibility for Overtime Credit.

Overtime will be earned and credited in the same manner as overtime is earned and credited at this time and will be credited at the straight time rate. However, all employes in positions classified as Engineering Technician 4 currently receiving the premium rate (time and one-half) will continue only to the end of this contract. Compensation shall be in cash or compensatory time off as the employer may elect.

. . .

ARTICLE XV

GENERAL

Section 1 Obligation to Bargain.

This Agreement represents the entire Agreement of the parties and shall supersede all previous Agreements, written or verbal. The parties agree that the provisions of this Agreement shall supersede any provisions of the rules of the Director and the Personnel Board relating to any of the subjects of collective bargaining contained herein when the provisions of such rules differ with this Agreement. The parties acknowledge that during the negotiations which resulted in this Agreement each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that all of the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. Therefore,

the Employer and the Association, for the life of this Agreement and any extension, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter referred to or covered in this Agreement, or with respect to any subject or matter not specifically referred to or covered in this Agreement, even though such subject or matter may not have been within the knowledge or contemplation of either or both of the parties at the time that they negotiated or signed this Agreement."

4. That prior to January 1, 1974, administrative or security personnel in the Respondent's Department of Natural Resources were used as duty officers on weekends; that after January 1, 1974, environmental engineers as well as administrative and security personnel were assigned to weekend standby duty on a rotating basis; that environmental engineers assigned to such duty were paid at a straight hourly over-time rate for hours spent answering calls while on duty but not for all other hours spent on assigned weekend standby duty.

5. That the duty officer on weekend standby duty must be available to answer calls during the hours when the district office is closed, usually from 4:30 p.m. Friday until 8:00 a.m. on Monday; that during said period, the duty officer has the power and authority to call out personnel and equipment to respond to an emergency; that such officer is subject to disciplinary action should he fail to properly respond to an emergency; that the duty officer is issued a page-boy beeper effective within a 25-mile radius of the transmitter, thus limiting the mobility of the officer since he must be able to respond by telephone to a call on the beeper within five minutes; and that while on duty, the officer must keep himself in proper physical and mental condition in order that he can at all times effectively respond to calls.

6. That in 1974, the Complainant filed a grievance alleging that Respondent violated Article VII, Section 2, the work-time provision of the agreement, by not compensating environmental engineers for the entire weekend that they are assigned standby duty; that pursuant to Article IV of the collective bargaining agreement, the parties submitted the grievance to Arbitrator Edward B. Krinsky for a final and binding decision; that on November 22, 1974, Arbitrator Krinsky issued an award on said grievance with an accompanying opinion, which Award reads as follows:

"(1) The Employer has the right to assign Environmental Engineers as duty officers.

(2) By not compensating employees except for time spent responding to emergencies, the Employer has violated Article VII, Section 2. A certain number of hours of the weekend should be compensated as 'time spent performing duties on the assigned job,' whether or not the employees are actually responding to emergencies.

(3) During the thirty day period following the issuance of this Award, the parties should attempt to reach a mutually satisfactory determination of: (a) how many hours of the duty officer's weekend should be compensated as overtime (whether monetarily or as compensatory time off); and (b) the retroactive pay or compensatory time off to be given to the employees assigned as duty officer to date. If the parties are unable to agree within the thirty day period (or longer if an extended period is jointly requested in writing) the arbitrator will make a binding determination of these issues."

7. That the parties met pursuant to the Arbitrator's request and reached a tentative agreement which was subsequently rejected by the Complainant's membership; that the Complainant notified the Arbitrator

on March 14, 1975 that the parties had been unable to negotiate an agreement and asked that he issue an award.

8. That on March 17, 1975, Arbitrator Krinsky issued the following award:

"1) The employee shall be compensated at his regular hourly rate for all hours responding to calls.

2) Except for hours spent responding to calls there shall be no pay to employees between the hours of midnight and eight in the morning.

3) Except for hours spent responding to calls all hours between eight in the morning and midnight shall be compensated at three-quarters of the employee's regular hourly rate.

4) In accordance with the Overtime provisions of the labor agreement, 'Compensation (in items #1-3 above) shall be in cash or compensatory time off as the employer may elect.'

5) This Award is retroactive and covers all hours during which Environmental Engineers have been assigned as duty officers in District 1."

9. That the Respondent has continued to refuse to implement the March 17 award of Arbitrator Krinsky setting forth the compensation formula for duty officers assigned weekend standby duty.

Upon the basis of the above and foregoing Findings of Fact, the Examiner makes and renders the following

CONCLUSIONS OF LAW

1. That the award of Arbitrator Krinsky which was issued on March 17, 1975, is based upon his interpretation and application of the terms of the collective bargaining agreement existing between the Complainant and Respondent and that the interpretation and application was within Arbitrator Krinsky's authority under Article IV of said agreement.

2. That the State of Wisconsin, by its refusal to comply with the award of Arbitrator Krinsky within a reasonable time has committed and is committing prohibited practices within the meaning of Section 111.84(1)(d) of the Wisconsin Statutes.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and renders the following

ORDER

IT IS ORDERED that the State of Wisconsin, its officers and agents shall immediately:

(1) Cease and desist from refusing to comply with the award of Arbitrator Edward B. Krinsky dated March 17, 1975.

(2) Take the following affirmative action which the Examiner finds will effectuate the policies of the State Employment Labor Relations Act:

(a) Comply with the award of Arbitrator Edward B. Krinsky dated March 17, 1975, by compensating the individuals on behalf of whom said grievance was filed in accordance with said award.

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

Dated at Madison, Wisconsin this 4th day of December, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Byron Yaffe, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On August 8, 1975, the Complainant filed a complaint with the Commission alleging that the Respondent committed unfair labor practices within the meaning of the State Employment Labor Relations Act, Section 111.84, Wisconsin Statutes, by refusing to accept and implement an arbitration award issued on March 17, 1975, pursuant to final and binding arbitration provisions of a collective bargaining agreement between the parties. On September 22, 1975, the Respondent filed an answer in which it admitted refusal to comply with said award, but alleged, as affirmative defenses, that the Arbitrator had exceeded his authority and that the award was contrary to law, and that therefore, the complaint be dismissed. Hearing in the matter was held on September 29, 1975, at Madison, Wisconsin after which both parties filed briefs.

The Complainant asserts that the Commission has jurisdiction only to decide whether or not the Arbitrator's award was complied with and in the case of non-compliance, to issue an appropriate order; that the procedure outlined in Chapter 298, Wisconsin Statutes, is the exclusive remedy provided under the Statutes for the appellate review of an arbitration award, and that the Respondent cannot have the Arbitrator's award reviewed in an unfair labor practice proceeding. In the alternative, the Complainant asserts that even if the Commission has jurisdiction to review the award, it should be upheld as final and binding on the parties.

The Respondent argues that the Arbitrator exceeded his authority by incorporating new terms into the collective bargaining agreement rather than determining compliance with the provisions of the agreement. It further asserts that these new terms were arbitrary, capricious and punitive in that the Arbitrator ignored express provisions of the agreement and made his decision in a short period of time without any rationale or reason in contravention of state law and the federal Wage and Hour Act and without allowing the Employer an adequate opportunity to present its view.

The Standard for Commission Review of Arbitration Awards:

Even though Section 298.09 of the Wisconsin Statutes provides for court review of arbitration awards, the Commission also has power to review and enforce such awards under Sections 111.84(1)(e) and 111.84(2)(d) of the State Employment Labor Relations Act. In such cases, the Commission has determined that it will apply the standards set forth in Section 298.10 of the Wisconsin Statutes for review of arbitration awards. 1/ The statutory standards for vacating such awards are as follows:

> "(a) Where the award was procured by corruption, fraud or undue means;
>
> (b) Where there was evident partiality or corruption on the part of the arbitrators, or either of them;
>
> (c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown,

---

1/ Harker Heating and Sheet Metal, Inc., et. al, (6704) 4/64; H. Froebel & Son (7804) 11/66; Research Products Corp., (10223-A) 12/71.

or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced;

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made."

The Respondent asserts that the Arbitrator exceeded his jurisdiction in this case, which raises the issue of the applicability of the fourth above-mentioned standard to the facts present herein. That standard is consistent with the standard applied by federal courts in reviewing arbitration decisions under Section 301 of the Labor Management Relations Act.

The standard which the Examiner believes is appropriate to apply in this instance was well articulated by Judge Hastie in Honold Manufacturing Company v. Fletcher: 2/

". . . a labor arbitrator's award does 'draw its essence from the collective bargaining agreement' if the interpretation can in any rational way be derived from the agreement, viewed in the light of its language, its context, and any other indicia of the parties' intention; only where there is a manifest disregard of the agreement, totally unsupported by principles of contract construction and the law of the shop, may a reviewing court disturb the award." (Footnote omitted)

Thus, in determining whether to uphold an arbitrator's decision, a reviewing tribunal must not merely substitute its own interpretation of an agreement for that of the arbitrator. So long as the arbitrator's decision can be construed as an interpretation of the agreement, reviewing tribunals, under both federal 3/ and state 4/ labor law policy, should not engage in a plenary review of the merits of that interpretation.

Application of Section 298.10 to the Facts of this Case:

In this case, the Respondent argues that the Arbitrator exceeded his authority under Article IV, Section 2, to decide only whether the parties have complied with the provisions of the agreement. Respondent urges that standby pay is not dealt with in any provision of the agreement, and accordingly, the Arbitrator should not have decided that the parties must negotiate such pay, particularly in light of the zipper clause in Article XV of the agreement. Respondent relies on City Electric, Inc. v. Local 77 5/ wherein the court found the arbitrator exceeded his authority in requiring the parties to negotiate concerning a $10 travel allowance. The facts in City Electric are, however, unlike those in the present case in that there, the arbitrator directed the parties to negotiate because the $10 per day travel allowance was a common practice and not because any such allowance was required by the terms of the parties' agreement. Here, the Arbitrator directed the parties to clarify the terms of their agreement by negotiations. He did not require the parties to incorporate into the agreement new provisions which were not based upon provisions in

---

2/ 70 LRRM 2368 at p. 2371 (3d Cir. 1969).

3/ Steelworkers v. Enterprise Wheel & Car Corp., 353 U.S. 593, 46 LRRM 2423 (1960).

4/ Supra, footnote 1.

5/ City Electric, Inc. v. Local 77, 89 LRRM 2537 (9th Cir. 1975).

the then-existing agreement. The Arbitrator interpreted the contract as already covering standby pay under the worktime provisions of Article VII, Section 2A, and thus, merely attempted in his initial award to have the parties clarify by negotiations the compensation due officers assigned such duty.

When the parties failed to reach an agreement on this issue, the Arbitrator issued a second and final award to resolve the issue which was also based upon his interpretation of the collective bargaining agreement. This award again drew its essence from the collective bargaining agreement in that it was based upon the Arbitrator's interpretation of Article VII, Section 2 A of the agreement which defines "worktime", the environmental engineers' hourly rate as set forth in the agreement, and the overtime compensation provision as set forth in Article VII, Section 2 of the agreement.

Although the formula for computing standby pay which was fashioned by the Arbitrator was not specifically set forth in the agreement, in the Examiner's opinion, once the Arbitrator found a violation of the contract, he clearly had the authority to exercise considerable discretion to formulate an appropriate remedy.

In Enterprise Wheel, the Court noted:

> "When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency. Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement." 6/

Even where arbitrators have been empowered by the parties to determine only whether or not a contract has been violated, as was the case in this instance, in reviewing such awards, the courts have often acknowledged that arbitrators have the power to fashion appropriate remedies if such remedies draw their essence from the agreement which is the source of their jurisdiction. 7/

Thus, in this case, the Examiner concludes that the Arbitrator's decision was based on his interpretation of the collective bargaining agreement. The parties bargained for and agreed to accept the Arbitrator's view of the contract, and it is therefore not appropriate for the Examiner to overrule the Arbitrator simply because his interpretation of the collective bargaining agreement might differ from that of the Arbitrator's.

6/ Supra, footnote 3.

7/ Lynchburg Foundry Co. v. Steelworkers, 69 LRRM 2879 (4th Cir. 1968); Tobacco Workers v. Lorillard Corp., 78 LRRM 2273 (4th Cir. 1971); Newark Wire Cloth Co. v. Steelworkers, 80 LRRM 2094 (D.C., N.J. 1972); Texas Gas Corp. v. Chemical Workers, 49 LRRM 2409 (W. Dist., Louisiana, 1962).

The Respondent also maintains that the Arbitrator's award was arbitrary, capricious and punitive and evidenced partiality on the part of the Arbitrator.

The Respondent points to certain factors as indicative of the Arbitrator's arbitrariness and partiality; including the number of standby hours which he directed to be compensated, the rate of such compensation, the short period of time in which the Arbitrator reached a decision on the remedy, his failure to afford the Respondent another hearing to present its position on the remedy, and the Arbitrator's disregard of case and statutory law. The Examiner is persuaded that the Respondent has failed to demonstrate by a clear preponderance of the evidence that the Arbitrator acted in a partial and arbitrary manner. In fact, the record supports a finding that the Arbitrator diligently attempted to avoid penalizing the Respondent by granting the parties a period of more than three and one-half months to negotiate a remedy before he fashioned one himself. There is also nothing in the record to indicate that the arbitration hearing deprived the Respondent of due process in any manner.

In addition, although the Wage and Hour Administrator's interpretation of compensable work time under the Fair Labor Standards Act is consistent with the Respondent's construction of worktime in the agreement pertinent herein, 8/ it is not binding on the Arbitrator in his construction of the term "work time" in the collective bargaining agreement. Even though such standby time may not be mandatorily compensable under the Fair Labor Standards Act, employers are clearly not prohibited by that or any other statute 9/from compensating employes for standby time either on a straight time or over-time basis. Thus, even if the Examiner were persuaded that the Respondent intended to utilize the Fair Labor Standards Act definition of work time in the negotiation of the agreement pertinent herein, it would be totally inappropriate and contrary to both national and state labor policy to refuse to enforce the Arbitrator's award simply because the Examiner disagreed with the Arbitrator's interpretation of the parties' intent in negotiating their collective bargaining agreement. So long as the essence of the Arbitrator's award is drawn from the agreement, as is the case in this instance, a reviewing tribunal has no authority to refuse to enforce the award because it construes the agreement differently.

Accordingly, because the essence of the arbitration award contested herein is drawn from the parties' collective bargaining agreement, because the award violates no wage and hour statutes, and because the Respondent has failed to prove by a clear preponderance of the evidence that the Arbitrator who issued the award was arbitrarily partial in any manner, the Examiner concludes that the award is enforceable and the complaint filed herein is therefore meritorious.

For the foregoing reasons the Examiner finds that the Respondent has violated Section 111.84(1)(e) of the Wisconsin Statutes by refusing to

---

8/ See CCH Labor Law Reporter, Wages & Hours, Vol. 1., 24,111.17, Interpretative Bulletin, Section 785.17.

9/ Theune v. Sheboygan 67 Wis. 2d 33, 226 N.W. 2d 396 (1975), which is relied on by the Respondent to support its contention that standby duty is not compensable, is also not controlling here since the Court defined compensable work time under pertinent statutes and ordinances, and not under a negotiated collective bargaining agreement.

comply with Arbitrator Krinsky's award of March 17, 1975 and has therefore directed the Respondent to cease and desist refusing to comply with said award and to compensate the employes affected by the award in the manner set forth therein.

Dated at Madison, Wisconsin this 4th day of December, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Byron Yaffe
Byron Yaffe, Examiner