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-C

ORDER AFFIRMING THE EXAMINER'S FINDINGS OF FACT AND REVISING THE EXAMINER'S CONCLUSIONS OF LAW AND ORDER

Examiner Byron Yaffe having on December 4, 1975, issued Findings of Fact, Conclusions of Law and Order as well as Memorandum Accompanying same in the above-entitled matter wherein the Examiner concluded that the above named Respondent, by refusing to implement an arbitration award issued by Arbitrator Krinsky on March 17, 1975, had committed and was committing an unfair labor practice within the meaning of 111.84(1)(e) of the State Employment Labor Relations Act (SELRA); and further wherein the Examiner ordered the Respondent to comply with the terms of said award; and thereafter the Respondent having timely filed a petition pursuant to Section 111.07(5), Wisconsin Statutes, requesting the Commission to review the decision of the Examiner; and thereafter the Complainant and Respondent having filed briefs in the matter; and the Commission, having reviewed the entire record, the petition for review and the briefs filed in support of and in opposition thereto, and being fully advised in the premises, being satisfied that the Examiner's Findings of Fact be affirmed but that his Conclusions of Law and Order be revised;

NOW, THEREFORE, it is

ORDERED

A. That the Findings of Fact issued by the Examiner herein be, and the same hereby are, affirmed.

B. That the Examiner's Conclusions of Law be, and the same hereby are, revised to read as follows:

REVISED CONCLUSIONS OF LAW

1. That the preliminary award of Arbitrator Krinsky which was issued on November 22, 1974, was based upon his interpretation and application of the terms of the collective bargaining agreement existing between the Complainant and Respondent and that said interpretation and application was within Arbitrator Krinsky's authority under Article IV of said agreement.

2. That the supplemental Award of Arbitrator Krinsky, which was issued on March 17, 1975, pursuant to his retention of jurisdiction for purposes of formulating an appropriate remedy, was in excess of his powers, insofar as it established a new rate of pay for the purpose of remedying a violation of the collective bargaining agreement previously

found, and therefore, the State of Wisconsin, by its refusal to comply with said Award and Supplemental Award, did not commit an unfair labor practice within the meaning of Section 111.84(1)(e) of the State Employment Labor Relations Act.

On the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

REVISED ORDER

IT IS ORDERED that the arbitration proceeding involved be, and the same hereby is, remanded to Arbitrator Edward B. Krinsky for the sole purpose of issuing a new award on remedy which is in conformity with his powers and authority granted under the collective bargaining agreement existing between the parties.

Given under our hands and seal at the City of Madison, Wisconsin this 29th day of June, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

_____
Herman Torosian, Commissioner

DEPARTMENT OF NATURAL RESOURCES, VII, Decision No. 13864-C

MEMORANDUM ACCOMPANYING ORDER AFFIRMING THE EXAMINER'S FINDINGS OF FACT AND REVISING THE EXAMINER'S CONCLUSIONS OF LAW AND ORDER

In its petition for review, the Respondent takes no exception to the Examiner's Findings of Fact. The sole issue on review is the correctness of the Examiner's Conclusions of Law and Order.

In its brief filed in support of its petition for review, the Respondent raises a number of arguments, most of which were raised before the Examiner and adequately dealt with in his opinion. 1/ The Commission agrees in most respects with the rationale of the Examiner as expressed in his Memorandum with regard to those arguments and they are not repeated herein, except for purposes of clarifying our analysis.

The Commission agrees with the Examiner that the Arbitrator's preliminary Award dated November 24, 1974, was based on the Arbitrator's interpretation of Article VII, Section 2 of the collective bargaining agreement. In his preliminary Award, the Arbitrator did observe that the question of "how much time should be considered for compensation purposes" was difficult and that it was arguably appropriate to discount some hours. (e.g. for normal sleep and perhaps meals). By affording the parties a period of time in which to attempt to reach agreement as to "(a) how many hours of the duty officer's weekend should be compensated as overtime (whether monetarily or as compensatory time off), and (b) as to the retroactive pay or compensatory time off to be given to the employes assigned as duty officers to date" the Arbitrator did not require the parties to agree to a new provision or provisions to be included in the agreement. Having found a violation, the Arbitrator merely afforded the parties an opportunity to agree as to the amount of money or compensatory time off due and owing the affected employes to remedy the violation, and retained jurisdiction in the event that they failed to do so.

The Commission also agrees with the Examiner that once an Arbitrator, acting within his authority, has found a violation of the collective bargaining agreement, he has the implicit authority to issue a lawful remedy to correct the violations found and that he has considerable flexibility in that regard, especially where the parties in their agreement have not set forth the appropriate remedy. However, in this case, the parties have an explicit agreement with regard to the appropriate compensation for "work time" which is performed on a straight time or overtime basis.

In his award, dated November 24, 1974, the Arbitrator concluded that a certain number of hours of the weekend should be compensated as time spent performing duties on the assigned job. Whether the employes are actually responding to emergencies, such work time should have been compensated as provided in the agreement. When the parties failed in their efforts to reach an agreement on the remedy, the Arbitrator was called upon to exercise his retained jurisdiction to formulate an appropriate remedy.

1/ Although it did not raise the issue in its answer, the Respondent introduced evidence at the hearing in an effort to show that the parties had reached a settlement agreement on the grievance prior to the arbitrator's supplemental Award on remedy. This argument was not discussed in the Respondent's brief or the Examiner's decision for the apparent reason that the tentative agreement reached was expressly conditioned on approval by the Association's membership which was not forthcoming.

The following remedy was provided by the Arbitrator in his award dated March 17, 1975:

> "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."

In reviewing the above quoted award for enforcement purposes, it is not within the Commission's province to determine whether it agrees or disagrees with the terms of the Award or the contract interpretation on which it is based. The sole issue is whether the Arbitrator has exceeded his jurisdiction in issuing the award in question. We conclude that he has.

While it would appear that the Arbitrator found that the hours between midnight and eight a.m. were not "time spent performing duties on the assigned job" and therefore do not require compensation under the terms of the agreement, his conclusion that all hours between eight a.m. and midnight (except for hours spent responding to calls) must be compensated at 3/4 of the employes regular hourly rate constitutes the establishment of a rate of pay contrary to the rates set out in the agreement and in contravention of the express limitations on his authority contained in Article IV, Section 2, Step 4 which reads as follows:

> "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."

For the above and foregoing reasons, the Commission concludes that the March 17, 1975 Award is unenforceable, because, in formulating the remedy contained therein, the Arbitrator exceeded his powers under the agreement, which were limited by Article IV, Section 2, Step 4 quoted above, and the Commission has remanded the matter to the Arbitrator for purpose of issuing an Award in conformity with the express limitations on his authority. Because we have concluded that the Arbitrator exceeded his authority in formulating a remedy and remanded the matter to the Arbitrator, it is unnecessary to determine whether the Arbitrator's failure to afford the parties an opportunity to present additional evidence and arguments on the appropriate remedy constitutes an

additional basis for refusing to enforce the award. 2/ The Arbitrator may, if he deems it necessary, resolve any question of whether further hearing or arguments are necessary based on the record before him.

Dated at Madison, Wisconsin this 29th day of June, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

_____
Herman Torosian, Commissioner

2/ It should be noted that in its letter dated March 17, 1975, the Respondent objected to the authority of the Arbitrator to issue his preliminary award on the merits for the reasons previously argued before the Arbitrator and for the additional reason that the result was different than the result in a Wisconsin Supreme Court case on a similar subject rendered after the Arbitrator had entered his award. The Respondent did not therein request the right to present further evidence or arguments on the question of the appropriate remedy.