

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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BARRON COUNTY HIGHWAY DEPARTMENT	:	
EMPLOYEES LOCAL UNION NO. 518,	:	
AFSCME, AFL-CIO,	:	
	:	
Complainant,	:	
	:	Case XI
vs.	:	No. 19643 MP-518
	:	Decision No. 14025-A
BARRON COUNTY HIGHWAY DEPARTMENT,	:	
	:	
Respondent.	:	
	:	

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Appearances:

- Mr. Richard C. Erickson, Representative, appearing on behalf of the Complainant.
- Mr. Charles Ackerman, Labor Consultant, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Barron County Highway Department Employees Local Union No. 518, AFSCME, AFL-CIO, hereinafter the Complainant, having filed a complaint on October 2, 1975, with the Wisconsin Employment Relations Commission, hereinafter the Commission, alleging that Barron County Highway Department, hereinafter Respondent, has committed a prohibited practice within the meaning of Section 111.70(3)(a)5 of the Municipal Employment Relations Act (MERA); and the Commission having appointed Sherwood Malamud, a member of its staff, to act as Examiner to make and issue Findings of Fact, Conclusions of Law and Orders pursuant to Section 111.07(5) of the Wisconsin Employment Peace Act as made applicable to municipal employment by Section 111.70(4)(a) of MERA; and hearing on said complaint having been held at Barron, Wisconsin on December 3, 1975, and the parties having failed to file briefs in accordance with the agreed to briefing schedule; and the Examiner having considered the evidence and arguments of the parties 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 Complainant Barron County Highway Department Employees Local Union No. 518, AFSCME, AFL-CIO, is a labor organization, and is the voluntarily recognized collective bargaining representative of employees employed by the above-captioned Municipal Employer; that Richard C. Erickson is the District Representative of the Wisconsin Council of County and Municipal Employees, AFSCME, AFL-CIO assigned to Complainant; and that Erickson maintains his offices at 1110 North 22nd Street, Superior, Wisconsin.
2. That the Barron County Highway Department is a Municipal Employer; and that its representative for purposes of collective bargaining and labor relations is Mr. Charles Ackerman who maintains his offices at 515 West 5th Street, North, Ladysmith, Wisconsin.

3. That Complainant and Respondent were signators to a collective bargaining agreement for the years 1972, 1973 and 1974 which were in force at all material times and which contained the following material provisions:

1972 Agreement:

"ARTICLE III - Probationary Period

Section 1 Employees beginning employment with the Barron County Highway Department shall serve a probationary period. Said period shall consist of three (3) months duration, to determine whether or not the employee is suited and qualified for the job."

1973 Agreement:

"ARTICLE III - Probationary Period

Section 1 Employees beginning employment with the Barron County Highway Department shall serve a probationary period. Said period shall consist of six (6) months duration, to determine whether or not the employee is suited and qualified for the job.

Section 2 Newly hired office clerical employees shall serve a one (1) year probationary period.

. . .

Section 7 Office clerical employees shall be paid fifty dollars (\$50.00) per month less than the established salary for the first six months of probation and twenty-five dollars (\$25.00) per month less than the established salary during the second six months of probation. Upon completion of twelve months of probation they shall be paid the maximum."

1974 Agreement:

"ARTICLE XIV

Grievance Procedure

. . .

Section 5 . . . Both parties to this agreement agree that the decision of the Arbitration Board shall be considered final and binding."

4. That on December 1, 1972, Respondent hired Barbara Weisser, hereinafter the grievant, into the position of a Clerk I; that a dispute arose between Complainant and Respondent as to whether the three-month probationary period specified in the 1972 agreement or the 12-month probationary period specified in the 1973 agreement be applied to the grievant.

5. That a grievance was filed and processed by the parties to arbitration before a panel of arbitrators; that the panel members of Complainant and Respondent delegated to the neutral member of the panel, Mr. James L. Stern, hereinafter the Arbitrator, their powers and they requested him to issue an award as a single arbitrator.

6. That the Arbitrator conducted a hearing in the matter on May 14, 1975; the parties were present and given full opportunity to present oral and written evidence and to make such arguments as were pertinent to the issues; and that on August 22, 1975, Arbitrator Stern issued his award which in material part provided as follows:

"For the reasons noted above and with due consideration of the exhibits, testimony and arguments of the parties, the arbitrator hereby finds that Barbara Weisser, the Office Clerical Employee hired on December 1, 1972, should have completed her probationary period at the end of February 1973 and therefore upholds the grievance of the Union.

Furthermore, the arbitrator grants the remedy requested by the Union and orders that the Employer pay Barbara Weisser the sum of \$300 which is the amount that she did not receive because she was kept in probationary status for twelve months instead of three months."

7. That the Respondent received a copy of Arbitrator Stern's Award, and thereafter Respondent failed to pay grievant \$300 as ordered in the Arbitrator's Award, and that Respondent continues to fail to comply with said Award.

8. That the Award issued by the Arbitrator was rendered in a fair and impartial manner, pursuant to the jurisdiction vested in said Arbitrator by the collective bargaining agreement and the parties.

9. That the minutes of the hearing on May 14, 1975, were transcribed by a court reporter, Mrs. Karlye Buchman; that prior to and at the hearing Complainant indicated that it did not desire a copy of the transcript and that it would not pay for such transcript; that Respondent desired a transcript of the hearing, ordered one copy of said transcript for itself and provided one copy of said transcript to the Arbitrator; that prior to the commencement of said hearing on May 14, 1975, when the issue arose as to whether the Union should be required to pay for one-half of the cost of the Arbitrator's copy of the transcript Complainant agreed to have the Arbitrator rule on Complainant's duty to contribute to such cost and Respondent objected to the Arbitrator making a ruling on said issue; that the Arbitrator made no ruling on the issue pertaining to the Union's duty to pay for one-half of the cost of the Arbitrator's copy of the transcript; and that the court reporter presented Respondent with a bill of \$323.36 for all expenses incurred and for the preparation of an original and one copy of the transcript of the May 14, 1975 hearing; and that Complainant has refused to pay for any of the costs of the Arbitrator's copy of the transcript pursuant to Respondent's request for such payment.

Based upon the above and foregoing Findings of Fact, the Examiner makes and files the following

#### CONCLUSIONS OF LAW

1. That the Barron County Highway Department, by failing to pay Barbara Weisser pursuant to the arbitration award issued by Arbitrator James L. Stern on August 22, 1975, has refused and failed, and continues to refuse and fail to comply with said award, and therefore, in that regard, Barron County has committed and continues to commit a prohibited practice within the meaning of Section 111.70(3)(a)5 of the Municipal Employment Relations Act.

2. That the assertion by Barron County Highway Department of an affirmative defense by way of a set-off against the Arbitrator's award in the amount of half the cost of the Arbitrator's copy of the transcript is not an affirmative defense to a charge of failing to comply with an arbitrator's award cognizable under Section 111.70(3)(a)5 of MERA.

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

ORDER

IT IS ORDERED that Respondent's affirmative defense by way of a set-off to the Arbitrator's award be, and the same hereby is, dismissed.

IT IS FURTHER ORDERED that Barron County Highway Department, its officers and agents, shall immediately:

1. Cease and desist from:
  - a. Failing and refusing to recognize and accept as conclusive the arbitration award issued on August 22, 1975 whereby it was determined by the Arbitrator that Barbara Weisser should have served a three-month rather than a 12-month probationary period, and that payment of \$300 be made to her.
2. Take the following affirmative action which will effectuate the policies of the Municipal Employment Relations Act:
  - a. Immediately comply with the arbitration award issued on August 22, 1975, by paying Barbara Weisser \$300 as directed in said award.
  - b. Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days following the date of this Order as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin this 23rd day of June, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

  
Sherwood Malamud, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

In its complaint, Complainant alleged that Arbitrator Stern issued an award on August 22, 1975, in which the Arbitrator determined that the grievant Barbara Weisser should serve the three-month probationary period specified in the 1972 agreement rather than the 12-month probationary period established in the 1973 agreement. Furthermore, the Arbitrator directed Respondent to pay the grievant \$300 which represents the amount of money withheld from Weisser's pay as a result of Respondent's action of placing her on probation for a 12-month period.

Respondent did not file a written answer, but at the hearing, Respondent did orally answer all the allegations contained in the complaint. Respondent did not deny that the May 14, 1975 arbitration hearing was conducted in a fair and impartial manner and that the award issued was within the Arbitrator's jurisdiction. Furthermore, Respondent admitted that it has not paid grievant \$300 as directed by the Arbitrator. Based upon the above, the Examiner finds that the Arbitrator's award conformed to the standards established in Chapter 298 of the Wisconsin Statutes. <sup>1/</sup> Respondent admits that it failed to comply with the August 22, 1975 award and accordingly, the Examiner has ordered the Employer to comply with said award.

However, Respondent asserted an affirmative defense by way of a set-off to Complainant's claim. Respondent alleges that Complainant has a duty to pay for one-half the cost of the Arbitrator's copy of the transcript. It argues that just as each party must pay one-half of the Arbitrator's fee, that same obligation carries over to payment of the Arbitrator's copy of the transcript.

The following undisputed facts were considered by the Examiner in evaluating Respondent's affirmative defense and set-off claim: That Complainant had indicated prior to and at the hearing that it did not desire a copy of the transcript; that Complainant asserted at the hearing that it would not share the cost of the transcript with Respondent; that the Arbitrator received a copy of the transcript; that the parties' agreement does not contain a provision whereby expenses attributable to an arbitrator are to be shared; and that Arbitrator Stern offered to rule on the transcript issue at the hearing, but the Employer objected to his ruling on the matter, and accordingly, the Arbitrator refrained from doing so.

The Examiner has rejected Respondent's assertion of an affirmative defense which in substance is based upon Complainant's failure to contribute to the cost of the Arbitrator's copy of the transcript. The violation alleged by Complainant is Respondent's failure to comply with an arbitration award in violation of Section 111.70(3)(a)5 of MERA. The affirmative defenses cognizable to such a charge are as follows: (a) Respondent's compliance with the Arbitrator's award; and (b) the Arbitrator's non-compliance with the statutory standards provided in

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<sup>1/</sup> City of Franklin (11296) 9/72, wherein the Commission established that in proceedings to enforce arbitration awards, the statutory tests provided in Chapter 298 of the Wisconsin Statutes be applied in such proceedings before the Commission.

Chapter 298 of the statutes. Respondent did not assert either of these two defenses to Complainant's charge, and accordingly, Respondent's affirmative defense by way of a set-off was dismissed. 2/

Finally, Complainant requested that as a remedy that Respondent be ordered to pay the grievant \$300 as directed by the Arbitrator. The Examiner has directed Respondent to comply with the Arbitrator's award. Complainant also requested that interest be imposed. The Examiner finds that the imposition of interest is inappropriate in this case and therefore interest was not assessed against Respondent.

Dated at Madison, Wisconsin this 23rd day of June, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

  
Sherwood Malamud, Examiner

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2/ This is not the appropriate forum for the resolution of the issue raised by Respondent. The issue was raised at the arbitration hearing, but that opportunity for resolution of the issue was rejected. Other forums exist for such resolution which have not been employed by Respondent.