STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LEO WITKOWSKI and AFSCME, COUNCIL 24, WISCONSIN STATE EMPLOYEES UNION, AFL-CIO, Complainant, vs. STATE OF WISCONSIN, DEPARTMENT OF ADMINISTRATION, and its EMPLOYMENT RELATIONS SECTION, Respondent.	Case XC No. 20691 PP(S)-38 Decision No. 14823-A

Appearances:
Lawton & Cates, Attorneys at Law, by Mr. Richard V. Graylow, appearing on behalf of the Complainant.
Mr. Robert C. Stone, Attorney at Law, Department of Administration, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

A complaint of unfair labor practices having been filed with the Wisconsin Employment Relations Commission in the above-entitled matter, and the Commission having appointed Thomas L. Yaeger, 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 sec. 111.07(5), Stats.; and hearing on said complaint having been held at Madison, Wisconsin on September 13, 1976, before the Examiner; and the Examiner having considered the evidence and arguments, 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 Leo Witkowski at all times material hereto was employed at the Wisconsin Correctional Institute, Fox Lake, Wisconsin, as a Correctional Officer Three, and is an "employee" within the meaning of sec. 111.81(15), Stats.; and, that complainant, AFSCME, Council 24, Wisconsin State Employees Union, AFL-CIO, herein union, is a labor organization within the meaning of sec. 111.81(9), Stats., which represents, for collective bargaining purposes, certain security and public safety, blue collar and non-building trades, and technical employes of the State of Wisconsin.

2. That State of Wisconsin, herein respondent, has its principal offices at Madison, Wisconsin, and is an "employer" within the meaning of sec. 111.81(16), Stats.

3. That at all times material herein, complainant and respondent union were parties to a collective bargaining agreement effective July 1, 1973, covering wages, hours and other conditions of employment of all the aforesaid represented employes in the employ of Respondent; and that said collective bargaining agreement contained the following provisions which are relevant herein:

"ARTICLE IV
Grievance Procedure

Section 1 Definition.

A grievance is defined as, and limited to, a written complaint involving an alleged violation of a specific provision of this Agreement.

. . .

Step Four: Grievances which have not been settled under the foregoing procedure may be appealed to arbitration by either party within fifteen (15) calendar days from the date of the agency's answer to Step Three, or the grievance will be considered ineligible for appeal to arbitration.

. . .

The decision of the arbitrator will be final and binding on both parties of this Agreement.

. . .

ARTICLE XIII
Employee Benefits

. . .

b. Effective July 1, 1974, the annual leave schedule provided under (a) shall be amended to include: 136 hours (17 days) of annual leave each year for a full year of service after ten (10) years of service; 176 hours (22 days) of annual leave each year for a full year of service after twenty (20) years of service. The new schedule rates shall be prorated for calendar year 1974."

4. That on July 12, 1974, Witkowski, assigned to the security and public safety bargaining unit, filed an appeal to respondent's answer to his grievance at Step 2 of the procedure;

"MANAGEMENT HAS AGREEDED [sic] TO PASS 1st & 2nd STEPS AND PROCEEDE [sic] WITH STEP 3 OF THE GRIEVANCE PROCEDURE.
WE HAVE BEEN NOTIFIED BY OUR MANAGEMENT AT W.C.I. OF DENIAL IN PART OF THE ADDITIONAL VACATION BENEFITS GRANTED BY THE CONTRACT AS OF JULY 1, 1974.
ALL EMPLOYEES ENVOLVED [sic] ARE THOSE THAT HAVE REACHED THE 10 OR 20 YEAR REQUIREMENT PRIOR TO JULY 1, 1974.

Relief Sought

THAT ALL EMPLOYEES THAT MEET THE REQUIREMENTS SHALL BE GIVEN THE PROPER AMOUNT OF VACATION AS REQUIRED PER CONTRACT.";

that on August 2, 1974, said grievance was denied; that, on August 12, 1974, the union appealed said grievance to arbitration; and, that on May 14, 1975, a hearing on said grievance was held by Arbitrator Phillip G. Marshall.

5. That at the aforesaid arbitration hearing Robert C. Stone, appearing on behalf of respondent therein, stated the issue before

Marshall was ". . . Whether this section [Article XIII, Section 5B(1)(b)] was violated in granting one extra day of vacation in 1974 for employes with 10 to 20 full years of service prior to July 1, 1974."; that on October 1, 1975, Marshall issued his "Discussion and Award" in the Witkowski grievance; that said Award provided:

> "Grievance allowed. Article XIII, Section 5B(1)(b) was violated by the Employer when it denied grievant Leo Witkowski the full vacation benefit called for by the agreement as more fully set forth above.";

that in his discussion Marshall said:

> "The grievant in his written complaint (Ex. 2) alleges that the Employer violated Article XIII, Section 5B(1)(b) of the collective bargaining agreement of the parties by failing to grant the full vacation benefit called for by the contract to him and to others similarly situated, i.e., those employees with 10 or 20 full years of service prior to July 1, 1974.
>
> . . .
>
> It is the Union's contention that during the course of negotiating the current collective bargaining agreement it was led to believe that effective July 1, 1974, 'those state employes who were in the ten (10) to fifteen (15) years of service bracket and those state employes in the twenty (20) to twenty-five (25) bracket would receive two (2) additional days of paid vacation and that for 1974, those two (2) days would be prorated, based on the employes seniority date for the calendar year of 1974. In the calendar year 1975, those state employes entering or already in the aforementioned brackets would receive thw [sic] two (2) additional paid vacation days effective on their seniority date.'
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> . . .
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> The Union position is that it negotiated a two (2) day increase to be prorated on the seniority date of the employe for calendar year 1974 as the agreement states and an example of which is found in Exhibit 5, and in calendar year 1975, eligible employes would receive the increase based on their seniority date, as per Article XIII, Section 5(B) of the current agreement.
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> . . .
>
> The language employed is not only reasonably supportive of the Union's contention but appears to be the more reasonable of the contended interpretations.
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> . . .
>
> Grievant Witkowski and those similarly situated would in the light of the contract language employed have every reason to believe that for the 1974 vacation year they would be the beneficiaries of the increased vacation benefit, particularly where as here it was a two year contract in which the existing vacation formula was retained for the first year of the agreement.";

that said award wherein respondent was found to have violated Article XIII, Section 5B(1)(b), incorporated the arbitrator's conclusions concerning the meaning of said language; and, that the union's interpretation of said disputed contract language was adopted.

6. That on or about November 4, 1975, respondent implemented Marshall's award in accordance with the following memo from Stone to Employee Relations Specialist Foley:

> "After reviewing Marshall's award it has been determined that the relief granted should apply to the following groups:
>
> 1. Leo Witkowski and Local 1005 1/
> 2. Don Mulder and Local 173 2/
> 3. Harvey Hoeft and Local 18 3/
>
> The coverage of Mulder and Hoeft and their locals is based upon a preliminary agreement by Gene Vernon to consolidate these three cases under Witkowski's name. 4/
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> Employes at the 10-15 year level and the 20-25 year level during 1974 should receive the full two days for 1974 under Article XIII, Section 5(B)(1)(b) rather than the one additional day as previously administered. However, employes reaching these seniority levels during 1974 should have the two days prorated according to their seniority date. For example, an employe reaching ten years service on April 1, 1974 would receive 1 1/2 days extra, while an employe reaching this level on October 1, 1974 would receive only 1/2 additional day.";

that sometime on or after October 1, 1975, complainant union requested respondent to "apply Marshall's award to all State employes similarly situated"; and, that respondent refused and continues to refuse to apply said award to anyone other than those set forth above.

7. That respondent has not and is not seeking to have Marshall's award set aside.

8. That there is no evidence respondent applied an interpretation of Article XIII 5B(1)(b) to ten other employes in the three units different from that applied to Witkowski, Hoeft and Mulder.

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

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1/ Local 1005 represents certain unit employes at Wisconsin Correctional Institute - Fox Lake.

2/ Local 173 represents certain unit employes at Central State Hospital - Waupun.

3/ Local 18 represents certain unit employes at Wisconsin State Prison - Waupun.

4/ Mulder and Hoeft, assigned to the security and public safety bargaining unit, filed grievances substantially identical to Witkowski's on July 5, 1974, and August 2, 1974, respectively.

CONCLUSIONS OF LAW

1. That Phillip G. Marshall's arbitration award, dated October 1, 1975, is res judicata as to the interpretation of Article XIII, Section 5B(1)(b) and as to all similarly situated bargaining unit employes employed by respondent, State of Wisconsin, in the security and public safety, blue collar and non-building trades, and, technical employes bargaining units represented by complainant AFSCME, Council 24, Wisconsin State Employees Union, AFL-CIO.

2. That respondent, State of Wisconsin, by refusing to apply Phillip G. Marshall's arbitration award to all similarly situated bargaining unit employes, noted in 1 above, violated the terms of the collective bargaining agreement existing between it and complainant, AFSCME, Council 24, Wisconsin State Employees Union, AFL-CIO and, thereby, has committed and is committing an unfair labor practice within the meaning of sec. 111.84(1)(c), Stats.

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

ORDER

That respondent, State of Wisconsin, and its agents, shall immediately:

1. Cease and desist from refusing to apply the aforesaid arbitration award for the calendar year 1974, to all similarly situated bargaining unit employes employed by respondent, State of Wisconsin, in the security and public safety, blue collar and building trades and technical employes bargaining units represented by complainant, AFSCME, Council 24, State Employees Union, AFL-CIO.

2. Take the following affirmative action which the Examiner finds will effectuate the policies of sec. 111.80, Stats.

   (a) Apply the aforesaid arbitration award retroactively for the calendar year 1974 to all similarly situated bargaining unit employes employed by it in the security and public safety, blue collar and non-building trades and technical bargaining units.

   (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 20th day of January, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Thomas L. Yaeger
Thomas L. Yaeger, Examiner

DEPARTMENT OF ADMINISTRATION (SECURITY & PUBLIC SAFETY), XC, Decision No. 14823-A

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The complaint herein was filed on July 28, 1976. Complainants alleged therein that Respondent has committed unfair labor practices within the meaning of sec. 111.84(1)(a) and (e), Stats., by refusing to apply an arbitration award to all respondent employes similarly situated to the grievant. Respondent's answer denies Complainant's allegations. In its brief, respondent argues that while substantially identical grievances were filed by three individuals and ultimately consolidated for hearing under the Witkowski grievance, said grievants were acting on behalf of themselves or alternatively themselves and their locals. Further, respondent claims it implemented the award with respect to the grievants and their locals. In the alternative, respondent contends that under the most expansive reading of the award it can only be read to apply to the security and public safety bargaining unit, inasmuch as none of the grievants were members of either of the other two legally constituted bargaining units covered by the subject collective bargaining unit.

Complainants, on the other hand, argue that the contract applies uniformly to the three statutorily created bargaining units represented by complainant union, namely, security and public safety, blue collar and non-building trades and, technical. Therefore, complainant's reason that an arbitration award interpreting a provision of said agreement, although precipitated by the filing of a grievance in only one of said units, should be applied to any employe in the three units who is or was similarly situated. Thus, by only applying the disputed arbitration award to three locals representing employes in the security and public safety unit, respondent has ignored the res judicata effect of a final and binding arbitration award in violation of sec. 111.84(1)(e), Stats.

Res Judicata Effect of an Arbitration Award

This Commission, over the past several years, has repeatedly held that the principle of res judicata applies to arbitration awards 5/ In Dept. of Administration, where the principle was followed, the employer and union were the same as in the instant proceeding. Therein, an arbitration award issued by the same Phillip G. Marshall, interpreting a provision of the same collective bargaining agreement that is in issue herein was found to be conclusive as to both parties and, res judicata as to meaning and application of the particular provision in dispute. Therein, it was the respondent that asserted the applicability of the principle of res judicata to preclude the arbitration of two grievances involving the termination of two employes who allegedly failed to return to work at the conclusion of an approved leave of absence.

The principle of res judicata, as applied by this Commission to arbitration awards is that an arbitration award will be found to be

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5/ Wisconsin Telephone Co., (4771) 2/59; Wisconsin Gas Co., (81180-C and 81180-E) 3/68; Handcraft Co., Inc., (10300 A, B) 7/71; Wisconsin Public Service Corp., (11954-D) 5/74; Department of Administration, (13539-C, D) 3/76.

conclusive of a subsequent dispute, where there is an identity of parties to the collective bargaining agreement in issue, identity of issues and relief sought, and no material discrepancies of fact existing between the prior dispute governed by the award and the subsequent dispute. Herein, there is an identity of parties, issues, and relief sought but, respondent claims the situation of those employes to which the award has been applied and those to whom complainant seeks to have it applied are factually distinguishable inasmuch as the employes are in different bargaining units.

The instant dispute, as presented to arbitrator Phillip G. Marshall was concerned with the implementation of additional vacation benefits negotiated into the parties' 1973 contract at Article XIII, Section 5B(1)(b). Specifically, the dispute involved the manner in which two additional days of vacation granted to employes with 10 or 20 years service for 1974, would be prorated. There was no dispute concerning eligibility and, the only issue concerned the meaning of the disputed language. On the basis of the arbitrator's decision therein, complainants seek to have the award applied to all employes governed by said contract, in addition to those to whom respondent has applied the award.

Respondent argues that the grievances were not filed as unit-wide grievances and, therefore, cannot now be expanded to grant unit-wide relief. Witkowski and the grievants whose grievances were consolidated therewith were all members of the security and public safety bargaining unit. There is no record evidence that any grievances were filed concerning this matter in either the blue collar and non-building trades or technical units. Notwithstanding, Arbitrator Marshall's award interpreted a provision of the parties' agreement governing employes in all three bargaining units and, his interpretation therein of Article XIII, Section 5B(1)(b) is no less binding upon all units covered by the contract merely because it was precipitated by a grievance in only one of said units. Therefore, the award is res judicata as to the meaning of Article XIII, Section 5B(1)(b).

While the award is res judicata as to the interpretation of Article XIII, Section 5B(1)(b), the question remains whether said award is res judicata as to any and all employes similarly situated to Witkowski who did not file grievances but, who are included in the bargaining units governed by the subject collective bargaining agreement. Respondent's entire defense to not applying the aforesaid award to all employes similarly situated is predicated upon the belief that the Witkowski and other grievances did not pertain to all employes in the security and public safety unit,not to mention employes in the other two units. However, no claim was made herein that the cases of other employes to whom complainant argues the award should have been applied are factually dissimilar from those to whom the award ultimately was applied. Respondent does claim, however, that the complainant could have filed a "group" grievance covering, presumably, all employes in each unit but, chose not to and, therefore, should now be precluded from expanding the relief sought.

A careful review of the record in the subject arbitration, as well as the arbitrator's decision, reveals a conflict between the position now being advanced by respondent and its position taken therein. Respondent's counsel herein was also counsel of record in the arbitration proceeding and, he characterized the issue before the arbitrator as "whether this section [Article XIII, Section 5B(1)(b)] was violated in granting one extra day of vacation in 1974 for employes with 10 to 20 full years of service prior to July 1, 1974." (emphasis added). Counsel for respondent did not restrict the definition of "employes"

to Witkowski, Mulder and, Hoeft, nor to employes of the security and public safety bargaining unit. Rather, that statement reflects an intent to treat the dispute as one involving the class of all employes entitled to the disputed vacation improvement. Further, Witkowski's appeal of his grievance to Step 3 of the procedure put respondent on notice that it was a class grievance.

> "All those employes envolved [sic] are those that have reached the 10 or 20 year requirement prior to July 1, 1974."

Also, absent any evidence to the contrary, it can be inferred that respondent determined, as a matter of policy, to treat all employes in all three bargaining units the same under its interpretation of the disputed language. However, now respondent seeks to selectively apply the arbitrator's decision.

After carefully scrutinizing Marshall's award herein, it also seems clear that the said award granted the relief sought by Witkowski's grievance. Marshall said, "Grievance allowed." That clearly refers back to the grievance itself which Marshall noted in his decision as being:

> "The grievant in his written complaint (Ex. 2) alleges that the Employer violated Article XIII, Section 5B(1)(b) of the collective bargaining agreement of the parties by failing to grant the full vacation benefit called for by the contract to him and to others similarly situated, i.e., those employees with 10 or 20 full years of service prior to July 1, 1974."

It seems obvious that Marshall, in granting the grievance, also granted the class relief requested in that said award did not specifically restrict itself to Witkowski, whereas, the grievance clearly sought to have the "full vacation benefit" applied to Witkowski and all others similarly situated.

Aside from the foregoing, complainant, after receiving the aforesaid award demanded same be applied to all those similarly situated with Witkowski and, respondent refused and continues to refuse to so apply said award. Therefore, even assuming arguendo that the Witkowski grievance was not a class grievance, complainant union requested that it be applied as such. While said demand, apparently, was not made in the form of a grievance, this, in any event, is not sufficient to avoid the application of the principle of res judicata. As noted earlier, there is no claim that the cases of the remaining members of the class are factually dissimilar from those who benefited from said award and, therefore, to require the formal filing of a grievance is unnecessary. Respondent's answer admits such a demand was made. As noted in complainant's brief, practicality obviates the necessity of conceiveably several hundred or possibly thousand eligible employes filing grievances in order to receive the benefits to which they are entitled as opposed to the manner in which the demand was made, particularly where no claim is made that their requests are time barred.

Lastly, Respondents have raised no contractual defenses, requiring interpretation of the parties' contract, to applying Marshall's arbitration award to other similarly situated employes in either of the three bargaining units. Therefore, by applying the principle of res judicata, as requested by complainant, the principles of consistency and finality of arbitration awards are furthered.

For the foregoing reasons the Examiner has concluded that Marshall's arbitration award of October 1, 1975, is res judicata as to the interpretation of Article XIII, Section 5B(1)(b) and to all employes covered

by the subject collective bargaining agreement and having 10 or 20 years of service with Respondent in the calendar year 1974.

Dated at Madison, Wisconsin this 20th day of January, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Thomas L. Yaeger, Examiner