STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, MODIFYING EXAMINER'S CONCLUSIONS OF LAW AND AFFIRMING EXAMINER'S ORDER

Examiner Thomas L. Yaeger, having on January 20, 1977, issued his Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above-entitled proceeding, wherein the above-named Respondent was found to have committed and was committing an unfair labor practice within the meaning of Section 111.84(1)(e) of the State Employment Labor Relations Act, and wherein the Respondent was ordered to cease and desist therefrom and to take certain affirmative action with respect thereto; and the Respondent having timely filed a petition pursuant to Section 111.07(5), Wisconsin Statutes, requesting the Commission to review the Examiner's decision; and the Commission having reviewed the entire record, the Respondent's petition for review and brief filed in support thereof, and the reply brief filed by Complainants in opposition thereto, and being satisfied that the Examiner's Findings of Fact, and Order be affirmed but that his Conclusions of Law should be modified;

NOW, THEREFORE, it is

ORDERED

That pursuant to Section 111.07(5), Wisconsin Statutes, the Wisconsin Employment Relations Commission hereby:

A. Affirms and adopts the Examiner's Findings of Fact;

B. Modifies the Examiner's Conclusions of Law to read as follows:

1. That Philip G. Marshall's Arbitration Award, dated October 1, 1975, interpreting and applying Article XIII, Section 5B(1)(b) of the collective bargaining agreement is applicable to Leo Witkowski and 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 Complainant Union's demand that it apply Philip G. Marshall's Arbitration

Award to all similarly situated employes in the bargaining units noted in paragraph 1. above, has failed and refused to accept said award as final and binding on it and has committed, and is committing, an unfair labor practice within the meaning of Section 111.84(1)(e), Wisconsin Statutes.

C. Affirms and adopts the Examiner's Order and therefore, the Respondent shall notify the Wisconsin Employment Relations Commission within ten (10) days of receipt of a copy of this Order as to what steps it has taken to comply therewith.

Given under our hands and seal at the City of Madison, Wisconsin this 20th day of October, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

_____
Herman Torosian, Commissioner

_____
Charles D. Hoornstra, Commissioner

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

MEMORANDUM ACCOMPANYING ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, MODIFYING EXAMINER'S CONCLUSIONS OF LAW AND AFFIRMING EXAMINER'S ORDER

In its petition for review, the Respondent contends that the Examiner's Findings of Fact are clearly erroneous as established by the clear and satisfactory preponderance of evidence and prejudicially affect the right of the Respondent and that a substantial question of law is raised by his Conclusions of Law and Order. Specifically, the Respondent contends that the Examiner erred in Finding of Fact No. 3 wherein he found that the Complainant Union and Respondent were parties to a single collective bargaining agreement covering all of the employes represented by the Complainant Union in three separate collective bargaining units, and that he erred in both conclusions of law wherein he found that the award of Arbitrator Marshall was res judicata as to the application of Article XIII, Section 5B(1)(b) to all employes covered by said agreement, and that the Respondent was violating Section 111.84(1)(e) by refusing to apply said award to all similarly situated employes covered by said agreement. Its brief in support of its petition is basically a repetition of the arguments and authorities cited in its brief to the Examiner.

The Complainants elected not to file an initial brief in opposition to the petition for review, but rather relied upon the arguments contained in their brief to the Examiner. However, in their reply brief, the Complainants also contend that the petition for review was not filed within 20 days of the date on which the Examiner's decision was mailed to the parties, as required by Section 111.07(5), Wisconsin Statutes. The basis of this contention is a letter of transmittal signed by the Examiner which bears the date of "January 19, 1977" and was apparently received in the offices of the Complainants' attorney on January 21, 1977. The Examiner's Order was dated January 20, 1977 and the petition for review was filed 20 days later, on February 9, 1977.

Timeliness of Petition

A review of the case file 1/ and an affidavit executed by the Commission's clerical employe who actually placed copies of the Examiner's decision in the mail discloses that the decision and letter of transmittal were probably prepared for the Examiner's signature on January 19, 1977, but that both were signed by the Examiner on January 20, 1977 and placed in the mail on the latter date. Apparently, the date on the copy of the letter of transmittal which was sent to the Complainants' attorney was not corrected to reflect the actual date of mailing. Since the petition for review was received on the 20th day following the placement of the decision in the mail, it was timely filed under the provisions of Section 111.07(5), Wisconsin Statutes. 2/

1/ The file contains a copy of the letter of transmittal with a corrected date of January 20, 1977 and a receipt for registered mail deposited, which is dated January 20, 1977.

2/ Although the Commission is satisfied that the Respondent's petition for review was filed within 20 days after the Examiner's Findings and Order were placed in the mail, it might be noted that on January 21, 1977 the Examiner issued and transmitted to the parties an Order correcting Conclusion of Law No. 2 to reflect that the Respondent violated Section 111.84(1)(e), Wisconsin Statutes, rather than Section 111.84(1)(c), Wisconsin Statutes. If said Order is deemed to be a "modification" within the meaning of Section 111.07(5), the Petitioner had until February 10, 1977 rather than February 9, 1977 in which to file its petition for review.

Merits of the Petition

The Commission has reviewed the Respondent's petition for review and the arguments advanced in support of, and in opposition to, said petition. We agree with the Examiner's Finding of Fact No. 3 wherein he indicates that the Respondent and the Union are parties to a collective bargaining agreement covering all three bargaining units. The Respondent's contention that there exist three collective bargaining agreements because three separate, but identical, agreements were enacted into law by the legislature, is of no practical consequence on the facts in this case. The same union and employer were parties to said three agreements which were identical in all respects and actually reduced to one physical document.

In the Commission's view, the issue in this proceeding involves the scope of the arbitration award, rather than whether said award constitutes res judicata. It is the Respondent's contention that the award in question was limited in its application to those employes who actually filed grievances i.e., Witkowski, Hoeft, and Mulder, or, at most, to those employes who were similarly situated and worked at the institutions represented by the local unions in which Witkowski, Hoeft and Mulder are officers. It is the Complainant Union's contention that the award in question, which sustained the Witkowski grievance, was applicable to all employes covered by the provisions of Article XIII, Section 5B(1)(b) of the agreement.

The Examiner found that the question of the proper interpretation and application of Article XIII, Section 5B(1)(b) to other similarly situated employes covered by the agreement was res judicata in view of the Arbitrator's award. The Commission concludes that the doctrine of res judicata, as applied in the case of Department of Administration (13539-C and D) 3/76, and other cases cited therein, is not applicable to the facts in this case. This is not a situation where the union seeks to apply the holding of a prior arbitration award on the same matter to a new grievance.

Witkowski's grievance was the only grievance which was discussed in the proceedings before the Arbitrator. 3/ That grievance was a class grievance filed on behalf of "all employes . . . that have reached the ten or 20 year requirement prior to July 1, 1974." The relief sought was that "all employes that meet the requirement shall be given the proper amount of vacation as required per contract." At the outset of the hearing, the Union's representative stated the grievance in general terms as "a dispute relating to interpretation of a contract relating to amounts of vacation to be applied to certain people during the year 1974." Most significantly the Respondent's attorney stated at page 4 of the transcript:

3/ The record before the Arbitrator and the Arbitrator's award clearly indicate that this was the case. The only reference that can even be found to other grievances, occurred in the following colloquy on cross-examination of Union Representative Karl Hacker by the Respondent's attorney at page 81 of the transcript:

> "Q And how many grievances have you filed with regard to this vacation provision?
>
> "A I am not positive, but I believe there is more than just Leo Witkowski's grievance that are pending."

There is no evidence that the Hoeft and Mulder grievances or letter dated August 15, 1974 from the Respondent's attorney to the Union which referred to the Mulder grievance were ever referred to in that proceeding.

"The issue as the State sees it, is whether the Employer violated Article XIII, Section 5 (1), Sub b of the agreement."

Finally, the discussion contained in the award of the Arbitrator indicates that he understood that the grievance covered Witkowski and all other employes covered by the provisions of Article XIII, Section 5B(1)(b) who were similarly situated.

There is no indication anywhere in the record of the proceeding before the Arbitrator, that the submission was limited to Witkowski, or to Witkowski, Hoeft, and Mulder, or to the three local unions in which Witkowski, Hoeft and Mulder were officers. On the contrary, the record discloses that the Respondent agreed that the issue before the Arbitrator was the proper interpretation and application of Article XIII, Section 5B (1)(b).

By failing and refusing to comply with the Union's demand that it properly apply that interpretation to all the employes covered by the agreement, the Respondent has failed and refused to accept the award as final and binding, and in that regard has committed an unfair labor practice within the meaning of Section 111.84(1)(e), Wisconsin Statutes.

For the above and foregoing reasons, we have affirmed the Examiner's Findings of Fact and Order and modified his Conclusions of Law.

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

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

_____
Herman Torosian, Commissioner

_____
Charles D. Hoornstra, Commissioner