STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

STATE ENGINEERS ASSOCIATION, Complainant, vs. STATE OF WISCONSIN, Respondent.	Case XCIV No. 21214 PP(S)-40 Decision No. 15183-A

Appearances:

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

Mr. Robert C. Stone, Attorney at Law, Department of Administration, appearing on behalf of the Respondent.

INTERIM 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 Amedeo Greco, 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 March 15, 1977, before the Examiner; and the parties thereafter having filed briefs; and the Examiner having considered the arguments, evidence and briefs, and being fully advised in the premises, makes and files the following Interim 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 its 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 were parties to a collective bargaining agreement which was effective from July 1, 1973, through June 30, 1975; that Article IV therein contained a grievance-arbitration provision; that said provision culminated in final and binding arbitration; and that said procedure stated at Section 2, Step Four, inter alia,

> ". . . 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."

4. That Article IV, Section 5 of said contract, entitled "Retroactivity", stated:

"Section 5 Retroactivity.

Settlement of grievances may or may not be retroactive as the equities of particular cases may demand. In any case, where it is determined that the award should be applied retroactively, the maximum period of retroactivity allowed shall be a date not earlier than fourteen (14) calendar days prior to the date of initiation of the written grievance in Step One unless the circumstances of the case made it impossible for the employe to know he had grounds for such a claim prior to that date, in which case the retroactivity shall be limited to a period of thirty (30) calendar days prior to the date the grievance was initiated in writing. Employes who voluntarily terminate their employment will have their grievances immediately withdrawn and will not benefit by any later settlement of a group grievance."

5. That Article V, entitled "Wage and Employe Benefits", provided at Section 1 therein:

"Employes hired on or after the effective date of this Agreement or those currently in probationary status shall be compensated according to Appendix A of this Agreement."

6. That Article VII of said contract, entitled "Hours of Work", provided in part:

"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."

7. That Article XV of said contract, entitled "General", stated in part:

"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."

8. 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.

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

10. That on February 12, 1974, the Complainant filed a grievance 1/ alleging that Respondent violated Article VII, Section 2 of the work-time provision of the agreement by not compensating environmental engineers for the entire weekend that they were assigned standby duty; that pursuant to Article IV of the collective bargaining agree-

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1/ Subsequent to the close of the hearing, the parties stipulated that the grievance was filed on said date.

ment, 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 provided in part:

> "(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.
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> (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."

11. 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, and 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."

12. That the Respondent refused to implement the March 17, 1975, Award of Arbitrator Krinsky which set forth the compensation formula for duty officers assigned weekend standby duty.

13. That the Complainant thereafter filed an unfair labor practice complaint with the commission against Respondent, wherein it alleged that Respondent had unlawfully refused to honor the aforementioned Arbitration Award; that hearing on said complaint was conducted by Hearing Examiner Byron Yaffe, a member of the commission's staff; and that Examiner Yaffe thereafter found that Respondent had

violated Section 111.84(1)(e) of the Wisconsin Statutes by failing to comply with the Krinsky Arbitration Award.

14. That Respondent appealed said decision to the commission; that the commission on June 29, 1976, issued an "Order Affirming the Examiner's Findings of Fact, and Revising the Examiner's Conclusions of Law and Order"; that the commission there issued "Revised Conclusions of Law" which stated:

> "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.
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> 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."

and that the commission ordered that the matter be remanded to Arbitrator 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."

15. That pursuant thereto, the matter was remanded back to Arbitrator Krinsky who held a hearing in the matter on September 23, 1976; that Arbitrator Krinsky issued an Award on December 2, 1976; that Arbitrator Krinsky framed the issue to be decided as "what is the appropriate remedy for Case No. 152, decided by Arbitrator Krinsky in Arbitration Awards dated November 22, 1974, and March 17, 1975, and remanded to the Arbitrator by the WERC by order of June 29, 1976"; that Arbitrator Krinsky noted in his Award that:

> "When the parties were unable to negotiate a settlement based on the November 22nd Award the arbitrator found that it was appropriate that the employes be compensated for the hours between eight a.m. and twelve midnight. The award of compensation was based on a conclusion that the employes were 'performing duties on the assigned job' and thus that work time was involved. Because the arbitrator recognized that the duties performed during these hours were less arduous than those normally performed during the employes' usual work time, he fashioned a 3/4-time rate reasoning that the parties might be well-served by an Award which recognized the peculiar nature of the standby problem which might not warrant full pay even though it came within the contractual definition of work time. The State claimed the 3/4-time rate was inappropriate, and the WERC agreed. Since, in the arbitrator's view, the duties involved between eight a.m. and midnight are within the definition of 'work time' in the

contract, the arbitrator has concluded in light of the WERC remand and the arguments of the parties that the appropriate remedy is an award of full pay for the hours between eight a.m. and twelve midnight."

and that Arbitrator Krinsky's Award provided that:

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

2) By not compensating employes 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 employes are actually responding to emergencies.

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

4) All hours between eight a.m. and midnight shall be considered as 'time spent performing duties on the assigned job' and shall be compensated at the employees' regular hourly rate.

5) In accordance with the Overtime provisions of the labor agreement, 'Compensation' for overtime hours shall be in cash or compensatory time off as the Employer may elect.

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

16. That Complainant therafter requested Respondent to comply with the Krinsky Award; and that at all times material herein, Respondent has refused to implement any aspect of the December 2, 1976, Arbitration Award issued by Arbitrator Krinsky.

17. That by letters dated July 1, 1977, and July 14, 1977, the Complainant and Respondent respectively advised the Examiner that: (1) if there was an error in computing retroactivity in Arbitrator Krinsky's Award, the earliest date for such retroactive payment would be fourteen (14) days prior to the filing of the February 12, 1974 grievance; and (2) should there be any modification to Arbitrator Krinsky's Award regarding the question of retroactivity, that said modification should be made by the Examiner and that the matter should not be remanded back to Arbitrator Krinsky.

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

CONCLUSIONS OF LAW

1. That the December 2, 1976 Award of Arbitrator Krinsky, wherein he found that Respondent violated the contract by not compensating employes except for time spent responding to emergencies, was based upon his interpretation and application of the terms of the collective bargaining agreement and that said interpretation and application was within Arbitrator Krinsky's authority under Article IV of said agreement.

2. That as to the question of remedy, Arbitrator Krinsky exceeded his authority insofar as he ordered that Respondent is

required to compensate those employes for "all hours during which Environmental Engineers have been assigned as duty officers in District 1."

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 December 2, 1976, Arbitration Award issued by Arbitrator Krinsky be, and the same hereby is, modified at page 11 therein to provide:

> (6) This Award is retroactive and covers all hours during which Environmental Engineers have been assigned as duty officers in District 1. However, backpay shall be limited in that it shall commence to run on the fourteenth (14th) day prior to the time that the underlying grievance was filed on February 12, 1974. All hours worked prior to said fourteenth (14th) day shall not be compensated.

IT IS FURTHER ORDERED that Respondent shall notify the Examiner in writing within twenty (20) days from the date of this Order as to whether it has complied with the terms of the modified Award of Arbitrator Krinsky.

Dated at Madison, Wisconsin this 28th day of July, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco
Amedeo Greco, Examiner

MEMORANDUM ACCOMPANYING INTERIM FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complainant maintains that Respondent unlawfully refused to comply with the terms of the December 2, 1976, Arbitration Award issued by Arbitrator Krinsky. In its defense, Respondent asserts several grounds as to why it was justified in refusing to comply with said Award.

In this connection, the commission on June 29, 1976, found:

> "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."

By virtue of said statement, it seems that the commission found that Arbitrator Krinsky did not act outside his authority when he initially found that Respondent had breached the contract by failing to compensate employes except for time spent responding to emergencies. Going on, the commission made it clear that it was remanding the case back to Arbitrator Krinsky only because the commission found that Arbitrator Krinsky's suggested remedy was in excess of his powers. Thus, the only question on remand to Arbitrator Krinsky centered on the appropriate remedy to be issued. Accordingly, it appears that the commission has already found that Arbitrator Krinsky did not exceed his powers when he found that Respondent had violated the contract and that, as a result, Respondent is now precluded from relitigating the substantive merits of whether it violated the contract.

However, assuming arguendo that Respondent is not precluded from raising that issue herein, the record shows that Arbitrator Krinsky did not exceed his authority when he found that Respondent had violated the contract.

Thus, Respondent asserts that "the Arbitrator has never ruled that standby is 'work time' as used in the contract." This statement is incorrect. For, in his December 2, 1976, Award, Arbitrator Krinsky specifically noted that his initial award "was based on a conclusion that the employes were 'performing duties on the assigned job' and thus that work time was involved." In his initial November 22, 1974, Award, Arbitrator Krinsky found that the employes herein are "indeed working for the Employer and making sacrifices for the Employer throughout the weekend 'performing duties on the assigned job' though perhaps limited ones." Based upon those findings, it is clear that Arbitrator Krinsky found that the standby time herein is work time.

Related to this issue is Respondent's contention that "standby is not work time under the contract." Since the Arbitrator considered this point and found that standby was work time, and because Arbitrator Krinsky had it within his providence to make such a finding, and inasmuch as a finding is supported by the facts herein, the Employer's contention is without merit. 2/

2/ In support thereof, Respondent relies on Theune v. Sheboygan 67 Wis. 2d 33, 226 N.W. 2d 396 (1975). However, as noted by Examiner Yaffe in State of Wisconsin, VII, Decision No. 13864-A, Theune is "not controlling here since the court defined compensable work time under pertinent statutes and ordinances, and not under a negotiated collective bargaining agreement."

Respondent also argues that the Arbitration "Award is an addition to the contract and, therefore, in excess of his contractual authority." In support of this claim, Respondent claims that the Arbitrator awarded "compensation at a rate less than that provided by the contract." Respondent apparently makes this claim because the Arbitrator found that certain hours, from midnight to 8:00 a.m., were not compensable. The Arbitrator, however, specifically considered this problem, and found that while the employes should not be paid when they were sleeping, they should be paid for that standby time when they were awake, as it was during that time that the employes were performing services for Respondent. Furthermore, the Arbitrator ordered that the Respondent pay said employes for that time at the contractually established rate. In such circumstances, there is no basis for finding that the Arbitration Award constitutes an addition to the contract.

Respondent next argues that "if standby is work time, it is not compensable and the Employer has complied" on the ground that the standby duty was not "approved" for compensation, as is required under departmental policy. Had such standby duty been approved for compensation, however, it is improbable that the instant grievance would have been filed. Thus, the dispute herein centers on the fact that Respondent has refused to award compensation for the time in issue, thereby violating its collective bargaining agreement. Respondent cannot therefore escape liability on the ground that its breach of contract now justifies no remedy. This is especially so where, as here, Respondent ordered the affected employes to be on standby status in the first place.

Respondent also claims that "if standby is considered approved overtime, the maximum compensation is eight hours pay for each day." If the employes were on standby for only eight hours, this argument might have some merit. Here, however, employes in some cases were ordered to be on standby for more than eight hours. Accordingly, there is no basis for reversing Arbitrator Krinsky's finding that employes are entitled to be compensated for all hours worked, exclusive of sleeping.

Lastly, Respondent maintains that should compensation be considered proper, the Arbitrator's Award violated Article IV, Section 5, of the agreement, which generally provides that, except in certain circumstances, the maximum amount of retroactivity under the contract shall be "a date not earlier than fourteen (14) calendar days prior to the date of initiation of the written grievance in step one. . ." Here, as noted above, Arbitrator Krinsky's Award provided for full retroactivity and covers "all hours during which Environmental Engineers have been assigned as duty officers in the District."

This is the first time that Respondent has ever raised this issue, despite the fact that these proceedings have lasted for several years. Because of the delayed raising of this issue, Complainant argues in its brief that Respondent is estopped from raising this argument at this time.

The Examiner finds that Respondent is not precluded from raising the retroactivity issue. This is so because the commission earlier modified Arbitrator Krinsky's prior Award and remanded the question of a remedy to him. Accordingly, this is the first time that Respondent has been faced with remedy which was otherwise made pursuant to the Arbitrator's authority. Accordingly, and because Respondent at the hearing before the Arbitrator could justifiably expect that the Arbitrator would comply with any contractual time limitations, Respondent can challenge the correctness of the remedial action in the instant proceeding, even though it did not raise this point earlier.

Turning now to the merits of the retroactivity issue, Arbitrator Krinsky ordered full retroactivity for all hours in dispute, even though Article IV, Section 5, of the contract provides:

> "Settlement of grievances may or may not be retroactive as the equities of particular cases may demand. In any case, where it is determined that the award should be applied retroactively, the maximum period of retroactivity allowed shall be a date not earlier than fourteen (14) calendar days prior to the date of initiation of the written grievance in Step One unless the circumstances of the case made it impossible for the employe to know he had grounds for such a claim prior to that date, in which case the retroactivity shall be limited to a period of thirty (30) calendar days prior to the date the grievance was initiated in writing. Employes who voluntarily terminate their employment will have their grievances immediately withdrawn and will not benefit by any later settlement of a group grievance." (Emphasis added).

Under this provision, then, retroactivity cannot be awarded in excess of fourteen (14) days before a grievance was filed, unless the employe did not know he or she had grounds for a claim prior to that date, in which case the maximum amount of retroactivity shall be thirty (30) days. Here, by providing for full retroactivity, Arbitrator Krinsky's Award was in excess of the fourteen (14) day limit specified in the contract. 3/ To that extent, Arbitrator Krinsky's Award thereby exceeded his powers and authority granted under the collective bargaining agreement existing between the parties.

Here, both parties have stipulated that if the Arbitration Award is defective as to the question of retroactivity, that any modification to the Award should be performed by the Examiner and that the matter should not be remanded back to Arbitrator Krinsky. Accordingly, and because the parties have also stipulated that the earliest date for retroactive payment would be fourteen (14) days prior to the filing of the February 12, 1974 grievance, and because it is clear that Arbitrator Krinsky intended for there to be the maximum amount of retroactivity permitted under the contract, the Examiner has modified the Award to provide that retroactivity shall commence to run fourteen (14) days prior to the filing of the February 12, 1974 grievance.

Furthermore, the Examiner will retain jurisdiction over this matter in order to accord Respondent an opportunity to decide whether it will comply with the modified Award. Accordingly, Respondent will notify the Examiner within twenty (20) days as to whether it will comply with the modified Award.

Dated at Madison, Wisconsin this 28th day of July, 1977.

By Amedeo Greco
Amedeo Greco, Examiner

3/ As noted in Finding of Fact number 17, both parties have stipulated that the earliest date for such retroactive payment would be fourteen (14) days prior to the filing of the February 12, 1974 grievance.