

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

STATE OF WISCONSIN, DEPARTMENT OF
ADMINISTRATION,

Complainant,

vs.

AMERICAN FEDERATION OF STATE, COUNTY
AND MUNICIPAL EMPLOYEES, COUNCIL 24,
WISCONSIN STATE EMPLOYEES UNION,
AFL-CIO (ALL LOCALS),

Respondent.

Case CIX
No. 21969 PP(S)-48
Decision No. 15759-B

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT AND
ENLARGING EXAMINER'S CONCLUSION OF LAW AND ORDER,
AND MEMORANDUM ACCOMPANYING SAME

Examiner Byron Yaffe having, on May 2, 1979, issued Findings of Fact, Conclusion of Law and Order, as well as Memorandum Accompanying same in the above-entitled matter wherein the Examiner concluded that the above-named Respondent Council 24, had committed, and was committing, an unfair labor practice within the meaning of Section 111.84(2)(d) of the State Employment Labor Relations Act (SELRA), by violating two collective bargaining agreements which had existed between the Complainant State of Wisconsin, and Council 24 in that Council 24 failed to reimburse the State for payments made by the State to certain employes at their regular rates of pay for time off of their regular hours of work in performing duties relating to or on behalf of Council 24, and to remedy such violation the Examiner ordered Council 24 to cease and desist from such violation, to reimburse the State, at such time as the State notified Council 24 as to the specific amount so due and owing by Council 24, to post notices advising employes covered by said agreements of said violation, and the reimbursement of the sums due and owing the State, and to notify the Commission as to compliance with the Examiner's Order; and thereafter Council 24 having timely filed a petition, pursuant to Section 111.07(5), Wis. Stats., for Commission review of the decision of the Examiner; and the State having filed a brief and Council 24 having filed a brief and a reply brief 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 satisfied that the Examiner's Findings of Fact be affirmed, but that the Examiner's Conclusion of Law and Order, as well as the Examiner's Memorandum accompanying same be enlarged;

NOW, THEREFORE, it is

ORDERED

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

B. That the Examiner's Conclusion of Law issued herein be, and the same hereby is enlarged to read as follows:

CONCLUSIONS OF LAW

1. That the fact that Council 24 filed its answer to the complaint filed herein, one day beyond the date set by the Examiner for the filing thereof, does not relieve the State of Wisconsin of its burden to establish, by a clear and satisfactory preponderance of the evidence, as set forth in Section 111.07(3), Wis. Stats., that Council 24 committed unfair labor practices within the meaning of Section 111.84(2)(d) of the State Employment Labor Relations Act.

2. That, inasmuch as the complaint herein was filed within some seven months of the unfair labor practices alleged therein, Section 111.07(14), Wis. Stats., does not prevent the Wisconsin Employment Relations Commission from exercising its jurisdiction herein to determine whether Council 24 has committed the alleged unfair labor practices.

3. That, since labor organizations consist of employees acting in concert, and since Council 24 is such a labor organization, said Council 24 is a proper party respondent in a proceeding to determine whether it committed any unfair labor practice within the meaning of Sec. 111.84(2)(d) of the State Employment Relations Act.

4. That the collective bargaining agreements material herein do not permit or require the State of Wisconsin to utilize the contractual arbitration procedure to determine whether, as charged by the State of Wisconsin, Council 24 has violated any provision of said agreements, and, therefore, the Wisconsin Employment Relations Commission will, and herein does, exercise its jurisdiction to determine whether Council 24 violated such agreements, and whether thereby Council 24 has committed unfair labor practices within the meaning of Section 111.84(2)(d) of the State Employment Labor Relations Act, as alleged in the complaint filed by the State of Wisconsin.

5. That Council 24, in violating collective bargaining agreements previously existing between it and the State of Wisconsin, by failing to reimburse the State of Wisconsin for payments made by the State to certain employees at their regular rates of pay for time off of their regular hours of work in performing duties relating to or on behalf of Council 24, has committed, and is committing an unfair labor practice within the meaning of Section 111.84(2)(d) of the State Employment Labor Relations Act.

C. That the Examiner's Order issued herein be, and the same hereby is, amended to read as follows:

ORDER

IT IS ORDERED that Council 24, its officers and agents, shall immediately:

1. Cease and desist from violating the 1975-1977 collective bargaining agreements existing between it and the State of Wisconsin in failing to reimburse the State of Wisconsin, in the sum of \$38,348.76, reflecting the balance due the State for payments made by the State to certain employees at their regular rates of pay for time off during their regular hours of work in performing duties relating to or on behalf of Council 24.

2. Take the following affirmative action which the Commission deems will effectuate the policies of the State Employment Labor Relations Act:

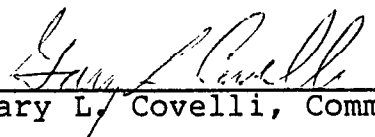
- a. Comply with the pertinent provisions of the 1975-1977 collective bargaining agreements existing between it and the State of Wisconsin by reimbursing the State of Wisconsin the sum of \$38,348.76.
- b. Notify all employees covered by the collective bargaining agreements herein by posting in conspicuous places in its offices and all other places where union materials are ordinarily posted, where employees are employed, copies of the notice attached hereto and marked "Appendix A". That notice shall be signed by the Union and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by the Union to insure that said notices are not altered, defaced or covered by other material.
- c. 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.

Given under our hands and seal at the City of Madison, Wisconsin this 6th day of March, 1980

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Morris Slavney, Chairman


Herman Torosian, Commissioner


Gary L. Covelli, Commissioner

APPENDIX "A"

NOTICE TO ALL EMPLOYEES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the State Employment Labor Relations Act, we hereby notify State employees who are included in the collective bargaining units consisting of:

Security and Public Safety
Blue Collar and Nonbuilding Trades
Technical
Social Services
Research, Statistics and Analysis

that:

WE WILL cease and desist from violating the 1975-1977 collective bargaining agreements which existed between Council 24 and the State of Wisconsin in failing to reimburse the State, in the sum of \$38,348.76, reflecting the balance due the State for payments made by the State to certain employees in the above units at their regular rates of pay for time off of their regular hours of work in performing duties relating to or on behalf of Council 24.

WE WILL immediately reimburse the State of Wisconsin the sum of \$38,348.76.

American Federation of State, County
and Municipal Employees, Council 24,
Wisconsin State Employees Union,
AFL-CIO

By _____

THIS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS AND MUST NOT BE ALTERED, DEFACED OR COVERED BY OTHER MATERIAL.

ACCOMPANYING MEMORANDUM

This proceeding is in the nature of a petition for review timely filed by Council 24 with respect to Findings of Fact, Conclusion of Law and Order (and Memorandum accompanying same) issued by Examiner Byron Yaffe on May 2, 1979. In its petition Council 24 requested the Commission to review de novo the Examiner's Findings of Fact, Conclusion of Law and Order. The Council 24 took exception to all Findings of Fact subsequent to the Examiner's Finding of Fact No. 4, and to the Examiner's Conclusion of Law and Order. Briefs were filed by the parties and the record was closed on October 31, 1979.

The Examiner's Decision

The Examiner found that the parties had entered into collective bargaining agreements wherein the State agreed to pay employes at their regular rate of pay for time spent in specified authorized activities on behalf of Council 24, including time spent in negotiating the collective bargaining agreements involved, and whereby Council 24 would reimburse the state for the total cost of such payments, plus 18%-representing the cost of mandated fringe benefits and social security payable on said payments by the State. The Examiner also found that Council 24 undertook the primary and ultimate responsibility to assure that the State was reimbursed for such payments, and in that regard, on or about December 31, 1975 the State paid in full all employes entitled to such payments, that Council 24 and its affiliated locals had reimbursed the State, in various installments, for only a portion of said payments to employes. The Examiner concluded that Council 24 violated said collective bargaining agreements, and thereby committed an unfair labor practice within the meaning of Sec. 111.84(2)(d) of the State Employment Labor Relations Act (SELRA). The Examiner ordered Council 24 to reimburse the State for the balance due, and in that regard he also ordered the State to furnish Council 24 with specific data in order to ascertain the exact amount due and owing.

In his decision the Examiner, in effect, denied a motion of the State that the facts alleged in its complaint be deemed proven since the answer thereto was filed by Council 24 one day later than the date for said filing as established by the Examiner. The Examiner, in his decision, also refuted a number of contentions raised by Council 24, including the following:

1. That the complaint is barred by the applicable statute of limitations.
2. That Council 24 is not a proper party respondent since SELRA does not provide that labor organizations may commit unfair labor practices under said Act.
3. That the State is barred from seeking a Commission determination with respect to whether Council 24 violated the collective bargaining agreements involved, since the State did not utilize the contractual grievance and arbitration procedure contained in said agreements.
4. That, in any event, Council 24 did not violate any agreement, in that:
 - a. The pertinent provisions do not cover payments for which the State claims reimbursements.

- b. The pertinent provisions are void and/or unenforceable because of vagueness.
- c. Council 24 is not directly obligated to reimburse the State, but rather Council 24 was only obligated to funnel payments to the State as said payments were received from employes and/or affiliated local unions.
- d. Any reimbursement obligation owing by Council 24 was foregiven by the State in subsequent collective bargaining.
- e. The State also violated the agreements and therefore Council 24 is excused from any obligation thereunder.

The Petition For Review

As noted, in its petition for review Council 24 excepted to the Examiner's decision, and in support thereof, in addition to reiterating the various positions it had taken before the Examiner, it also argued that the "oral agreement" between the parties to apply the contract provisions involved to time spent in negotiations prior to the effective date of the written collective bargaining agreements is unenforceable on statutory and common law grounds.

The State's Opposition to the Petition For Review

The State reiterated its position as stated in the pleadings, in the testimony during the hearing, and in its brief filed with the Examiner. It contends that the pertinent contractual provision set forth a valid and enforceable debt owed it by Council 24, which is ultimately and primarily responsible for the satisfaction of that debt in full. The State contends, that pursuant to those contractual provisions, it paid certain employes for specified union activities and that Council 24 agreed to fully reimburse the State and to save it from all financial expense resulting from its payments. It asserts in particular that it had no recourse under the agreements in question other than to file an unfair labor practice complaint, that the "oral agreement" applying the provisions of the written agreements to certain activities undertaken prior to the effective dates of those agreements is valid and enforceable, that it did not forgive the debts in question or commit any material breach of those agreements, that contractual provisions are clear as to the nature of the activities covered, and that refusal of Council 24 to satisfy its debt to the State in full pursuant to both written agreements constitutes a clear breach of those agreements. The State finally asserts that it complied in full with the Examiner's directive to more specifically ascertain the extent of the liability herein by furnishing Council 24, on or about July 18, 1979, with a listing of all employes who were paid by it for time spent in the union activities involved, together with the amounts involved for each such employe, and the nature and dates of the activities engaged in.

Discussion

x Initially it should be noted that the State did not take issue with the Examiner's conclusion, expressed in his Memorandum, to the effect that while the answer to the complaint was filed by Council 24 one day late, the Rules of the Commission permit a liberal construction thereof, and absent any showing of prejudice by such late

filing, such late filing did not constitute a waiver or admission as to the material facts alleged in the complaint. We affirm the Examiner's rationale in said regard (See p. 14, Ex. Memorandum), and we have amended the Examiner's Conclusion of Law to incorporate such a legal conclusion.

In his Memorandum the Examiner succinctly discussed Council 24's contention that the complaint was barred by the one year statute of limitations as reflected in Sec. 111.07(14), Wis. Stats. (See pp. 15 and 16, Ex. Memorandum). We agree with the Examiner's rationale with respect to said issue. However, the Examiner did not enter a specific Conclusion of Law with regard thereto. We have amended the Conclusion of Law to reflect same.

Council 24's contention that Sec. 111.84(2) of SELRA does not encompass labor organizations was also discussed by the Examiner, and he concluded that said argument could not be sustained. (See pp. 16 and 17 Ex. Memorandum). We affirm the Examiner's reasoning, and we have also included specific Conclusion of Law with regard thereto.

The Examiner also rejected the contention of Council 24 to the effect that the Commission should not rule on the merits of the complaint since the State did not utilize the contractual grievance and arbitration procedure set forth in the written collective bargaining agreements involved. The Examiner correctly concluded that such procedure, by the terms of the provisions involved, were not available to the State. (See pp. 14 and 15, Ex. Memorandum) The Amended Conclusion of Law specifically incorporates such a legal conclusion.

The Examiner further correctly concluded that Council 24 committed an unfair labor practice as alleged in the complaint. We adopt, except as noted below, the rationale in his Memorandum relating to the remaining defenses put forth by Council 24.

The Examiner in his memorandum suggested that there was a separate, enforceable oral agreement which applied to the subsequent payments for time spent during negotiations. We disagree. As the Examiner noted in his findings (Finding of Fact No. 5) there existed an agreement between the parties to the effect that the State would pay employes for time spent in negotiations leading up to 1975-1977 collective bargaining agreements and Council 24 would reimburse the State for said payments. Said payments to the employes were made on or about December 31, 1975, after the written agreements had become effective and pursuant to the provisions of the written agreements.

It is perfectly clear from the record evidence that all payments made by the State and reimbursements made by Council 24 to the State were made pursuant to Article II, Section 13 of the collective bargaining agreements, which section was clearly understood, by agreement of the parties, to apply to negotiations leading up to the 1975-1977 collective bargaining agreements.

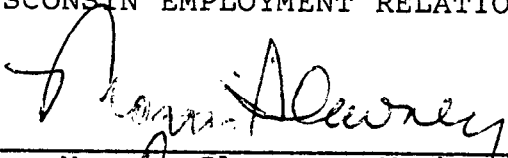
We have further amended the Examiner's Conclusion of Law to reflect the exact indebtedness of Council 24. We note that in his decision the Examiner directed the State to furnish Council 24 with a list of employes who were paid for activities covered by the pertinent provisions, including the nature of the activities engaged in and dates on which they occurred. Pursuant to the Examiner's decision, the State on July 18, 1979 sent Council 24 a list of employes who were paid for such activities covered, which included

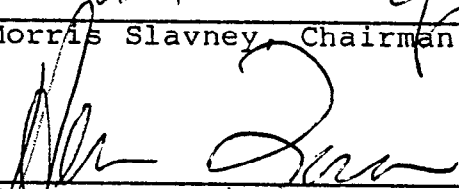
a breakdown as to employing departments, the nature of the covered activities, the dates upon which said activities occurred and the amount of pay received by each employe. Said list indicates that the State incurred costs of \$92,459.37, that it had received payments from the Union and its affiliated locals totalling \$54,110.61 and the balance owed by Council 24 remains at \$38,348.76. Council 24 has received said list and to date has not disputed its accuracy.

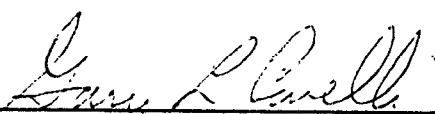
The Order and the Notice To Employes have also been amended by the Commission in order to give full effect to the Amended Conclusions of Law.

Dated at Madison, Wisconsin this 6th day of March, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Morris Slavney, Chairman


Herman Torosian, Commissioner


Gary L. Covelli, Commissioner