STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MADISON TEACHERS INCORPORATED and LAURAMAE ANDERSON, Complainants, vs. MADISON METROPOLITAN SCHOOL DISTRICT, BOARD OF EDUCATION, MADISON METROPOLITAN SCHOOL DISTRICT, Respondent.	Case LXXXIII No. 23286 MP-874 Decision No. 16471-D

ORDER AMENDING EXAMINER'S FINDINGS OF FACT, AFFIRMING EXAMINER'S CONCLUSION OF LAW, AND AMENDING EXAMINER'S ORDER

Examiner Thomas L. Yaeger having, on December 19, 1978, issued Findings of Fact, Conclusion of Law and Order, together with Accompanying Memorandum, in the above entitled matter, wherein the Examiner had concluded that the District had committed a prohibited practice, within the meaning of Sec. 111.70(3)(a)5 of the Municipal Employment Relations Act, by failing to comply with a final and binding arbitration award, issued pursuant to provisions contained in a collective bargaining agreement existing between Madison Teachers Incorporated and the District, and wherein said Examiner found that the District acted in bad faith with regard to said matter, and as a result, among other things, ordered the District to make Lauramae Anderson whole for loss of pay, plus interest at 7%, and further that the District pay attorney's fees incurred by Madison Teachers Incorporated in seeking enforcement of the award involved; and the District, having timely filed, on January 8, 1979, 1/ a petition requesting the Wisconsin Employment Relations Commission to review the decision of the Examiner; and the parties having filed briefs in support of and in opposition to the petition for review; and thereafter, and prior to March 7, 1979, a petition to intervene, having been filed by an individual claiming to have an interest in the matter, and the Commission, having on March 7, 1980, issued an Order permitting such intervention, wherein said Intervenor was directed to submit to the Commission a statement setting forth the nature of the evidence and argument which the Intervenor intended to present to the Commission; and thereafter, and prior to any further action, the Intervenor having, on September 16, 1980, in writing, advised the Commission that the Intervenor no longer desired to continue as an Intervenor, and as a result the Commission, on September 22, 1980, set aside its Order Granting Intervention; and the Commission, having reviewed the entire record, the petition for review and the briefs of Counsel, being fully advised in the premises, makes and issues the following

ORDER

IT IS HEREBY ORDERED THAT

1/ On or about the same date the District advised that it had taken the action required in the arbitration award with regard to the transfer of Lauramae Anderson. The petition for review focused on the Examiner's finding of bad faith and the awarding of attorney's fees and interest.

1. The Examiner's Findings of Fact be, and the same hereby are amended to the extent that para. 8 thereof now reads as follows:

> 8. That the District did not comply with the arbitration award issued by Arbitrator Hutchison in failing to transfer Lauramae Anderson to the Administrative Clerk position; and that Sturdevant, acting as an agent of District, in determining not to so transfer Anderson, on his evaluation that she was not qualified, did not make such a determination in bad faith.

2. The Examiner's Conclusion of Law be, and the same hereby is, affirmed.

3. The Examiner's Order be, and the same hereby is, amended to the extent that para. 2. a. thereof now reads as follows:

> 2. Take the following affirmative action which the Commission finds will effectuate the policies of the Municipal Employment Relations Act:
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> a. Comply with Arbitrator Kay B. Hutchison's award dated March 22, 1978, by 1) immediately declaring the Lake View Elementary School Administrative Clerk position vacant and immediately awarding said position to Lauramae Anderson; 2) making Lauramae Anderson whole for wages and fringe benefits lost since April 7, 1978, because of the District's refusing to comply with Arbitrator Hutchison's award.

Given under our hands and seal at the City of Madison, Wisconsin this 15th day of May, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

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Herman Torosian, Commissioner

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Gary L. Covelli, Commissioner

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

The instant proceeding was initiated by a complaint filed by Madison Teachers Incorporated and two employes involved alleging that the District committed a prohibited practice in violation of the Municipal Employment Relations Act by failing to comply with an arbitration award, which, pursuant to the collective bargaining agreement existing between the parties, was final and binding upon them. Said collective bargaining agreement covered the wages, hours, and working conditions of secretarial, clerical, technical and employes performing related duties in the employ of the District.

In August, 1977 the District filled a vacant Administrative Clerk position at the Lake View Elementary School by assigning Lavaune Blaska, who was employed as a Secretary I to the Area Director, which was at the time a confidential position and thus excluded from the bargaining unit covered by the aforesaid collective bargaining agreement. 2/ Thereupon two employes in the unit covered by the agreement filed a grievance wherein they contended that the selection of Blaska for the vacant position violated the agreement, which included a provision requiring vacancies to be filled by qualified bargaining unit personnel. The grievance was processed through the contractual grievance procedure and ultimately wound up in final and binding arbitration before Arbitrator Kay Hutchison, who subsequently, following a hearing, issued her award in the matter on March 22, 1978. The complaint filed herein was filed on July 18, 1978. The complaint proceeding was heard by Examiner Thomas L. Yaeger on August 23, 1978 and his decision was issued on December 19, 1978. At the outset of the hearing before the Examiner, Hinze, one of the complaining employes, was withdrawn as a complainant.

In his decision the Examiner set forth the following Findings of Fact pertinent to the instant review proceeding before the Commission:

> 6. That on March 22, 1978, Arbitrator Hutchison issued her award; that in said award she determined inter alia that the District breached the aforesaid collective bargaining agreement in bypassing qualified unit employes Heinz and Anderson when filling the Lake View vacancy; and that she ordered the District to vacate the position, interview Anderson and Heinz [sic] for the vacancy and select between them.
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> 7. That on or about March 31, 1978, Lake View Principal, Gene Sturdevant interviewed Heinz [sic] and Anderson pursuant to the aforesaid arbitration award; that Sturdevant interviewed Anderson first and found her unqualified; that Sturdevant then interviewed Heinz [sic] and offered her the Administrative Clerk vacancy; that Heinz [sic] rejected the offer and chose instead to stay in her present position; and that after Heinz [sic] rejected the vacancy the District involuntarily transferred Blaska to the position, the same position she had held from on or about August 17, 1977, until said position was vacated by Arbitrator Hutchison's award.
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> 8. That the District acted in bad faith and contrary to Hutchison's award when its agent, Sturdevant determined

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2/ On or about September 19, 1977, after Blaska had been selected to fill the vacancy, the parties agreed that the Secretary I to the Area Director was not a confidential position.

on or about March 31, 1978, not to consider Anderson for the vacant Administrative Clerk position because he deemed she was not qualified; and that by the aforesaid conduct the District has not complied with Arbitrator Hutchison's award.

In the Memorandum accompanying his Findings of Fact, Conclusions of Law and Order, the Examiner reasoned, in material part, as follows:

> A careful review of the record herein reveals a clear and satisfactory preponderance of evidence that the District has not complied with Arbitrator Hutchison's award. Said award directed the District to interview Heinz [sic] and Anderson and select between them on the basis of their relative abilities. The Arbitrator could not have made her point more clear, that both grievants were eligible to fill the position and only the decision as to which of the two was preferred was left to the District.
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> > "It is not the Arbitrator's function, under the contract, to determine the relative qualifications of the two applicants for the Lake View vacancy. Thereby, the undersigned will not substitute her judgement for that of the Employer in deciding whether Ms. Anderson or Ms. Heinze [sic] should be awarded the job."
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> In the proceeding before the Arbitrator the District even argued that:
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> > "MTI [union] has failed to establish that the promotion of either of the grievants would have been 'useful' to the Employer or that either of them was qualified for the position by 'practice' or 'practical training.'"
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> but the Arbitrator found otherwise.
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> > "In the opinion of the undersigned, the District must demonstrate that it is not 'practical' to promote or transfer a unit 'employe' in order to fill the vacancy from outside the bargaining unit.
> >
> > . . .
> >
> > This Arbitrator finds that the District has failed to demonstrate that the promotion of either of the grievants to the Lake View vacancy would be neither efficient nor workable."
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> Thus, it was clearly not for the District to decide on or about March 31, 1978, that Anderson was not a "qualified candidate". Further, the Examiner, contrary to District assertions does not believe this decision was based on "evidence later discovered". Even Sturdevant's letter of March 31st states:
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> > "she has regularly experienced problems with personal relations <u>in at least 3 of the positions she had held</u>." (Emphasis added.)
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> Surely the District would not expect the undersigned to believe that this information concerning her qualifications was not known prior to August 12, 1977, and was not obtainable in the normal course of reviewing the applicants under consideration at that time.
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> Even if the District had discovered new evidence that Anderson should not have been entitled to the vacancy on August 12, 1977, it cannot now be used to unilaterally alter the award. The Arbitrator's decision was based upon the

record made by the parties. While arbitrators have been known to reopen cases prior to issuance of the award for the purpose of allowing a party to adduce new evidence they cannot be required to do so. In any evident, here the evidence was allegedly discovered after the award had been issued. Further, the District has never challenged the award's validity. Consequently the decision as to whether Anderson was qualified to fill the vacancy was not open to question by the District after receipt of Hutchison's decision. To permit the contrary result being urged by the District would nullify the often enunciated public policy encouraging arbitration as the preferred method of resolving disputes with employers.

Thus, the District in order to be in compliance with Hutchison's award would have had to fill the vacancy with Anderson after Heinz [sic] had rejected the position. Clearly, the District was initially left with a choice only because both grievants were qualified and both wanted the position. However, once one grievant disclaimed an interest there was no longer a choice and Anderson should have filled the vacancy. Therefore, by failing to comply with a valid binding and enforceable arbitration award it has committed a prohibited practice in violation of Section 111.70(3)(a)5, Stats. (Footnotes omitted)

The Examiner ordered the District to award the position to Anderson to make her whole, with interest at 7%, and further that the District reimburse Madison Teachers Incorporated for reasonable attorney's fees in seeking enforcement of the award. The Examiner predicted the latter relief on the basis of his finding that the defenses asserted by the District were "spurious" and with "no chance of success".

Petition for Review

In its petition the District contended that the Examiner's finding that the District failed to comply with the award was erroneous because it had (a) vacated the position; (b) interviewed Anderson and Hinze; and (c) "selected between them pursuant to the agreement", and further the finding that the District, through Sturdevant, had acted in bad faith and contrary to the award was also erroneous because the only evidence as to Sturdevant's actions and motivations was contained in his letter to Sullivan which established that his actions were in good faith and not pretextual, and because the Union's agreement to drop Hinze as a Complainant supported a finding that Sturdevant acted in good faith.

Position of the District

In its brief and reply brief the District repeats and expands upon a number of its arguments made before the Examiner and set out in its petition for review. The District first contends that it complied with the award, as evidenced by the fact that the award directed the District to select between Hinze and Anderson "pursuant to the agreement"; the Complainants failed to challenge the selection process utilized or even to call Sturdevant as a witness during the hearing before the Examiner; Hinze unexpectedly declined to accept the position, a contingency which the award failed to anticipate; and other arbitrators, in formulating

The District relies on two Commission cases, White Lake Joint School District No. 2 (12623-A) 9/75; and Winter Joint School District No. 1 (13276 A, B) 7/75, to support its claim that the Commission lacks statutory authority to order a party to pay attorney's fees, in the absence of express statutory authorization, or an agreement between the parties calling for the payment thereof by the now prevailing party. It points out that a number of state agencies have been granted such authority in certain types of cases, but notes the absence of any such express authorization in Sec. 111.07(4), the section applicable in this case.

The District acknowledges that there is a judicially created exception to the general rule that the prevailing party in litigation must pay its own attorney's fees, and that such exception has been applied in cases involving the enforcement of arbitration awards where there is a strong showing of bad faith. It is the District's position that there is no such showing here. According to the District, the Examiner apparently reached such a finding because he "disbelieved" the District's claim that the disqualification of Anderson was based on "evidence later discovered". However, the District argues that the record does not contain any evidence to support a finding that Sturdevant acted in bad faith and points out that the Complainants did not call Sturdevant as a witness. Finally, the District argues that the Examiner's finding was premised on his erroneous conclusion that the District was foreclosed by the terms of the award from determining that Anderson was not qualified.

With regard to that portion of the Examiner's order which requires that Anderson receive back pay with interest, the District argues that the Examiner erroneously relied on the decision of the National Labor Relations Board in Florida Steel Corp. 3/, which case involved an employer with a proven proclivity to engage in unfair labor practices. The District also notes in this regard that the Commission does not normally order the payment of interest on back pay except in unusual circumstances, which it contends are not present here.

Position of Complainants

Madison Teachers Incorporated and Anderson contend that the District not only failed and refused to accept the award of the Arbitrator as final and binding on it but did so willfully. According to the Complainants, the award and the rationale of the Arbitrator in support thereof makes it clear that she found that, based on the evidence presented concerning the "practicality" of promoting either of them, that both Hinze and Anderson were entitled to the position. The sole reason why the Arbitrator failed to award the position to one of them was because of her finding that the District had a right to choose between them as long as they both desired to fill the position. If Anderson had been the only grievant, the Arbitrator would have directed the District to give her the position.

According to the Complainants, the District's interpretation that it had the right to disqualify Anderson or Hinze flies in the face of the words of the award. Further, the Complainants point out that the District continued Blaska in the position throughout the period after the issuance of the award and prior to the Examiner's finding of bad faith.

With regard to the District's present claim that it was impractical to promote Anderson, the Complainants note: that the Arbitrator, who had copies of her evaluations and test scores, specifically found that the District had failed to prove that this was so; that the District's attorney admitted at the hearing before the Arbitrator that Anderson was "minimally qualified" and that she was a "fine employe"; and that this claim was not raised until Hinze turned the job down. The Complainants also point out that had the District actually vacated the

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3/ 231 NLRB No. 117, 96 LRRM (1977).

position and awarded it to Anderson, it would have had three months under the provisions of Section IV (2) of the agreement in which to determine whether Anderson should be allowed to remain in the position. Further, the Complainants ask if the District was really acting in good faith in an effort to comply, why did it not repost the new "vacancy" that it apparently believes was created when Hinze turned down the position?

On the question of whether the Commission has the authority to order the payment of attorney's fees, the Complainants point out that the Wisconsin Supreme Court held in Tecumseh Products Co. v. WERB 4/ that the Commission has jurisdiction to apply federal labor law in the enforcement of collective bargaining agreements and agreements to accept arbitration awards. Since federal courts will, in appropriate circumstances, order a party to pay attorney's fees, the Commission presumably has such authority when acting as a "section 301" forum under Section 111.06(1)(f) of the Wisconsin Employment Peace Act. Ergo, the Complainants argue, the Commission must have such authority under the parallel provisions of Section 111.70(3)(a)5 of the Municipal Employment Relations Act.

In support of the Examiner's decision to order back pay with interest, the Complainants cite numerous decisions of the National Labor Relations Board which have held that such an order is an appropriate make whole remedy.

Finally, in support of the Examiner's order that the District pay reasonable attorney's fees, the Complainants cite numerous decisions of the federal courts, under section 301 of the Labor Management Relations Act, awarding attorney's fees where there is a willful refusal to comply with an arbitration award in order to effectuate the strong public policies encouraging the voluntary arbitration of labor disputes and supporting the principle of finality of such arbitration awards.

Discussion

We find the District's claim that it has in fact complied with the arbitration award to be without merit. While we do not fault the District for failing to physically vacate the position until it had taken the necessary steps to interview Hinze and Anderson to determine whether it preferred to offer the position to Hinze or Anderson, it had no right to ignore the fact that the arbitrator had determined that both Hinze and Anderson qualified for the vacancy. As the Examiner correctly points out, the District had all the relevant information at its disposal at the time it certified the nine employes for interviews. Further, at the hearing before the Arbitrator the District conceded that Anderson was qualified, and the Arbitrator, who had reviewed the qualifications of both Hinze and Anderson, so determined.

Under the terms of the award the District was obligated to offer the position to either one of the two grievants. When Hinze declined, the District should have offered the position to Anderson. The District's literal reading of the Arbitrator's term "select between them" did not comply with the intent of the award and the Arbitrator's reasoning in support thereof. However, even that reading is inconsistent with the District's actions thereafter since, as the Complainants point out, if the District believed that it had met its obligations under the award, then Hinze's decision not to accept the position should have been treated as creating a new vacancy, and the District should have followed the posting provisions of the agreement.

Having concluded that the District did not comply with the award it remains to be decided whether the Examiner was correct when he found that the District acted in bad faith and ordered the payment of attorney's fees and back pay with interest.

4/ 23 Wis 2d 118, 126 N.W. 2d 520 (1964).

In awarding attorney's fees the Examiner relied on Commission dicta in a previous case involving Madison Teachers Incorporated and the District, 5/ wherein a Wisconsin Employment Relations Commission Examiner had concluded that the District had not complied with an arbitration award and ordered it to do so, the District petitioned the Commission to review the Examiner's decision, and in response, Madison Teachers Incorporated sought an affirmance of the decision, as well as attorney's fees in the matter. The Commission sustained the Examiner, but at the same time denied attorney's fees, stating "because the Commission is satisfied on the record in this case that the Respondent's [illegible] made by the Award in question is not taken in bad faith or based upon legal arguments which are insubstantial and without justification, that it would be inappropriate to order that Respondent be directed to pay Complainant's attorney's fees and other costs of litigation incurred in this matter."

We do not believe that the facts in this case warrant the findings, as made by the Examiner, that the District acted in bad faith. Like the Examiner, we find no merit to the District's contention that it had complied with the award. We disagree with its interpretation of the award and its claimed right to disqualify Anderson, 6/ but do not find that its argument in this regard is without possible legal basis or otherwise frivolous so as to make its conduct willful. Likewise we do not find positive evidence to support a finding of bad faith. If, for instance, Sturdevant had been called as a witness and the Complainants established by a clear and satisfactory preponderance of the evidence that he had foreknowledge that Hinze would reject the offer, and that the District had adopted its interpretation of the award in order to make a sham of its compliance efforts, it would be appropriate to conclude that the District acted in bad faith. In the absence of such evidence, we decline to do so.

Accordingly we have modified the Examiner's Finding of Fact, para. 8 to reverse the finding of bad faith. We have also modified the Order to delete the requirement that the District pay attorney's fees and interest on any back pay due Anderson.

Since the Examiner relied on and, applied the standard regarding attorney's fees, a standard which could be inferred from the prior Madison case, and also because the same parties are involved herein, we have dealt with the issue of bad faith. However, as argued by the District, the Commission has generally refused to order the Respondent to pay complainant's attorney's fees, except where the parties have an agreement providing for same, because it is not generally considered to be an appropriate part of remedial (make whole) orders issued by the Commission. This view is consistent with the general rule of law that attorney's fees may not be recovered as an item of damages in the absence of contractual or statutory liability 7/ therefore.

The general policy of the Commission, with respect to the granting of attorney's fees and costs in proceedings before it, was expressed in United Contractors, Inc. 8/ wherein the Commission adopted the Examiner's decision with respect to same, where the Respondent had neglected to comply with an arbitration award. In said decision the Commission set forth that it would not grant attorney's fees, except where the parties had agreed otherwise, because "the goal of an expeditious adjudication of an award enforcement proceeding could be significantly hindered by the addition of potential controversial issues concerning what costs and disbursements were actually incurred, which of those types of costs

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5/ Madison Metropolitan School District (14038-B) 4/77.

6/ It should be noted that the District did have a basis in fact for disqualifying Anderson. Further, if it were acting in bad faith it need not have done so, based on its interpretation of the award.

7/ Yanta v. Montgomery Ward and Co. 66 Wis 2d 53, 62-63, 224 N.W. 2d 389 (1974).

8/ Decision No. 12053-A, B, 7/74.

should be granted, what is a reasonable amount of each type of cost, what constitutes a frivolous defense, did the Respondent have justification for non-compliance, etc.".

In the instant proceeding the Examiner understandably construed the Commission's statement, contained in the previous case involving the Madison Teachers Incorporated and the District, with respect to attorney's fees and costs, as establishing a new policy that if it can be established that the employer's failure to comply with an arbitration award is based on bad faith, or upon legal arguments which are insubstantia and without justification, it would then be appropriate to order the employer to pay attorney's fees and other costs incurred by the party seeking the enforcement of the award. While the Commission included said language in that decision primarily in response to the rational proposed by Madison Teachers Incorporated for the granting of such costs, our decision inferred that such costs would be ordered otherwise. Upon reflection, we conclude that if we were to adopt the standards set forth by the Examiner in the instant case, we would be faced with arguments in both complaint and arbitration proceedings to the effect that the party initiating said proceeding did so in bad faith and without substantial legal basis, and thus justifying an order that the defending party be granted attorney's fees and other costs, even though the Commission has no legal basis to do so.

In a case involving University of Wisconsin-Milwaukee, 9/ commonly identified as the Guthrie decision, wherein the Commission sustained that portion of the Examiner's decision wherein he concluded that the union involved had denied employe Guthrie "fair representation" in the processing of a grievance with regard to Guthrie's discharge. The Examiner had ordered the union to pay Guthrie "reasonable" attorney's fees. On review, the Commission was confronted with the issue as to such fees, and limited same to $1,000 stating:

> We agree with the examiner's rationale that the union is liable for attorney's fees. Although ordinarily the Commission does not award attorney's fees, we believe the effect of the union's violation of its duty toward complainant cannot be dissipated without such an award. In arriving at this conclusion, we further note that the nature of the union's violation is not a mere technical error under the law. Rather, it consists in conduct which is wholly arbitrary inasmuch as the union failed to make a considered decision on complainant's request that his grievance be arbitrated.
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> We do not, however, believe the purposes of the law require that the union pay all of the attorney's fees incurred in prosecuting this case before the commission. Although such relief would be appropriate under the make-whole and status quo ante principles which characterize our remedial orders, these considerations must be weighed against the general principle that attorney's fees are not recoverable as part of make-whole relief. The uniqueness of this case, warranting departure from that general rule, is that complainant was unlawfully denied representation in respect to arbitration. Since he was denied representation in respect to arbitration, we believe the more reasonable remedy is to reimburse complainant for the equivalent cost of representation on the merits of the discharge grievance. Although the union might have provided such representation at a cost less than the reasonable value of an attorney's fee, the union cannot complain since its conduct compelled complainant to seek relief through counsel at his own expense.

We wish to indicate that the granting of attorney's fees in the Guthrie case was not intended to establish a policy that the Commission

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9/ Decision No. 11457-F, 12/77 (appeal pending in court).

would grant same in all cases where the bargaining representative had been found to have denied an employe fair representation in the processing of the employe's grievance. In such cases, we shall consider, on a case to case basis, in light of our experience and the facts in each case where we would find such a denial, what remedy will best tend to place the employe involved in the posture he or she would have been had fair representation not have been denied.

We conclude that the rationale set forth by the Commission in United Contractors, Inc., previously discussed herein, is, and shall continue to be, the policy of the Commission with respect to whether attorney's fees and other costs shall be assessed against the "losing" party in complaint and arbitration proceedings involving the Commission and its staff. Pursuant to that policy no attorney's fees nor costs will be granted, unless the parties have agreed otherwise, or unless the Commission is required to do so by specific statutory language. The only exception shall be in cases where the Commission finds that an employe has, or employes have, been denied fair representation under the circumstances previously discussed herein.

This Commission in decisions rendered by it, without a previous Examiner decision, has not included the payment of interest on back pay or other forms requiring the payment of moneys as part of the remedial order issued in said cases. Such remedies have been included in an insignificant number of decisions and awards rendered by Examiners in complaint and arbitration cases, and in such complaint cases there were no exceptions filed relating to the granting of interest. Until recently staff members of the Commission, who have issued awards as arbitrators, have not imposed payment of interest on back pay or other monetary benefits due and owing under the award.

We deem that it is also appropriate for the Commission to set forth its policy with respect to whether interest should be included in the computation of moneys due and owing to persons and parties, and required to be paid, as a result of complaint decisions and arbitration awards issued by the Commission as a body, and by individual Commissioners and staff members acting as Examiners and Arbitrators.

Chapters 814 and 815, Wis. Stats., dealing with costs in civil proceedings, permits the courts of this State to grant interest in proceedings involving the recovery of moneys "from the time of verdicts, decision or report until judgment is entered . . ." 10/, and at the same rate after entry of judgment. 11/ Further, Sec. 111.70(7m)(e) of the Municipal Employment Relations Act relating to the enforcement of interest arbitration decisions, provides as follows:

> Any party refusing to include an arbitration award or decision under sub. (4)(cm) in a written collective bargaining agreement or failing to implement the award or decision, unless good cause is shown, shall be liable for attorney's fees, interest on delayed monetary benefits, and other costs incurred in any action by the nonoffending party to enforce the award or decision.

We deem an approach similar to that which the Supreme Court has taken in Chapters 814 and 815 with regard to the granting of interest by the courts of this State to provide a model for the policy herein established by the Commission with respect to interest payments on moneys due and ordered to be paid by Examiners and Commission Arbitrators in decisions and awards issued by them. Henceforth our policy with respect thereto shall be as follows:

> In arbitration cases, awards requiring the payment of moneys shall not include interest, unless the collective bargaining agreement involved provides for same.

10/ Sec. 814.04(4).

11/ Sec. 815.05(8).

In complaint cases seeking enforcement of arbitration awards, interest shall be computed, on the sum of money due and owing under the award, from the date on which the award was received by the party owing said moneys.

In complaint cases, other than those seeking enforcement of arbitration awards, interest shall be computed, on the sum of moneys due and owing under the decision, from the date on which the party owing said moneys receives the decision of the Examiner, or the decision of the Commission, the latter in cases where the Commission's decision is the initial decision.

We do not deem the payment of interest to constitute a penalty, but rather to be part of the "make whole" remedy as a result of the award or complaint decision. While it could be argued that interest should begin accrue from the date of the violation found, such a rule, unlike the rule followed by the courts, does not give adequate consideration to the interests of the responding party to insist on a determination of the question of liability before incurring additional liability for interest.

In this case the Examiner's order for interest was premised on a finding of bad faith which finding we have reversed. For this reason we do not deem it appropriate to order the payment of interest on the back pay due Anderson, if any, since the Commission's new policy announced herein is not intended to be applied retroactively. It will only be applied to those complaint or arbitration cases filed after the date of this decision.

Dated at Madison, Wisconsin this 15th day of May, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Gary L Covelli
Gary L. Covelli, Commissioner

CONCURRING OPINION OF COMMISSIONER TOROSIAN

While I concur with the majority that attorney fees are not justified in the instant case, I disagree with the iron-clad policy enunciated by the majority of denying attorney fees in all future cases. I agree that, for some of the policy reasons stated in the United Contractors case, the Commission should be reluctant to grant attorney fees. However, I feel the Commission should retain the flexibility, and therefore adopt a policy, which would enable it to grant attorney fees in exceptional cases where an extraoridinary remedy is justified. In this regard I would adopt the reasoning of the National Labor Relations Board stated in Heck's Inc., 88 LRRM 1049, wherein the National Labor Relations Board stated its intention ". . . to refrain from assessing litigation expenses against a respondent, notwithstanding that the respondent may be found to have engaged in 'clearly aggravated and pervasive misconduct' or in the 'flagrant repetition of conduct previously found unlawful' where the defenses raised by that respondent are 'debatable' rather than 'frivolous'."

In my opinion limiting the granting of attorney fees to such cases would best balance some of the policy considerations cited in United Contractors and the interest of the Commission in discouraging frivolous litigation and to protect the integrity of our process.

Dated at Madison, Wisconsin this 15th day of May, 1981.

By _____
Herman Torosian, Commissioner

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