STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

STATE ENGINEERING ASSOCIATION, Complainant, vs. STATE OF WISCONSIN, Respondent.	Case CXXXII No. 24784 PP(S)-60 Decision No. 17116-A

Appearances:

Kelly and Haus, Attorneys at Law, 302 East Washington Avenue, Madison, Wisconsin 53703, by Mr. William Haus, appearing on behalf of the Complainant.

Mr. Thomas E. Kwiatkowski, Attorney at Law, Division of Collective Bargaining, State of Wisconsin, 149 East Wilson Street, Madison, Wisconsin 53702, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The above named Complainant having filed a complaint with the Wisconsin Employment Relations Commission on June 22, 1979 alleging that the above named Respondent had committed an unfair labor practice within the meaning of Section 111.84(1)(e) of the State Employment Labor Relations Act (SELRA); and the Commission having appointed Peter G. Davis, a member of its staff, as Examiner to make and issue Findings of Fact, Conclusion of Law and Order as provided in Section 111.07(5), Stats.; and hearing on said complaint having been held before the Examiner in Madison, Wisconsin on August 22, 1979; and briefs having been exchanged on August 21, 1980; and the Examiner having considered the evidence and arguments of the parties, makes and issues the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. The State Engineers Association, herein the Complainant, is a labor organization and the collective bargaining representative of certain professional and engineering employes of the State of Wisconsin.

2. The State of Wisconsin, herein the Respondent, is an employer.

3. From July 1, 1973 through June 30, 1975, Complainant and Respondent were parties to a collective bargaining agreement which contained the following provisions:

ARTICLE IV

GRIEVANCE PROCEDURE

Section 1 General.

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

Only one subject matter shall be covered in any one grievance. A written grievance shall contain a clear and concise statement of the grievance and indicate the issue involved, the relief sought, the date the incident or violation took place, and the specific section or sections of the Agreement involved.

. . .

All grievances must be presented promptly and no later than fourteen (14) calendar days from the date the grievant first became aware of, or should have become aware of with the exercise of reasonable dilligence, [sic] the cause of such grievance.

. . .

Section 2 Procedure.

Step One:

Within seven (7) calendar days of receipt of the written grievance from the employe(s) or his representative(s), the supervisor will schedule a meeting with the employe(s) and his representative(s) to hear the grievance and return a written decision to the employe(s) and his representative(s).

Step Two:

If dissatisfied with the supervisor's decision in Step One, to be considered further, the grievance must be appealed to the designated agency representative within seven (7) calendar days following receipt of the decision in Step One. The appropriate agency representative will meet with the employe(s) and his representative(s) and attempt to resolve the grievance. A written decision will be placed on the grievance following the meeting by the appropriate agency representative and returned to the employee and Association representative within seven (7) calendar days from its appeal to the agency representative.

Step Three:

If dissatisfied with the Employer's answer in Step Two, to be considered further, the grievance must be appealed to the designee of the appointing authority (i.e., Division Administrator, Bureau Director, or personnel officer) within seven (7) calendar days from receipt of the answer in Step Two. Upon receipt of the grievance in Step Three, the department will provide copies of Steps 1 through 3 to the Employment Relations Section of the Department of Administration as soon as possible. The designated agency representative(s) will meet with the employe and a representative of the Association to discuss and attempt to resolve the grievance. Following this meeting the written decision of the agency will be placed on the grievance by the Appointing Authority of the agency and returned to the grievant and his Association representative within twenty-one (21) calendar days from receipt of the appeal to Step Three.

Step Four:

Grievances which have not been settled under the foregoing procedure may be appealed to arbitration by either party within thirty (30) calendar days from the date of the agency's answer in Step Three, or the grievance will be considered ineligible for appeal to arbitration. If an unresolved grievance is not appealed to arbitration, it shall be considered terminated on the basis of the Third Step answers of the parties without prejudice or precedent in the resolution of future grievances. The alleged violations as stated in the Third Step shall constitute the sole and entire subject matter to be heard by the arbitrator, unless the parties agree to modify the scope of the hearing.

. . .

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

Section 3 Time Limits.

Grievances not appealed within the designated time limits in any step of the grievance procedure will be considered as having been adjudicated on the basis of the last preceding Employer answer. Grievances not answered by the Employer within the designated time limits in any step on the grievance procedure may be appealed to the next step within seven (7) calendar days of the expiration of the designated time limits. The parties may, however, mutually agree in writing to extend the time limits in any step of the grievance procedure.

. . .

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.

4. On or about January 1, 1974 certain employes in Respondent's Department of Natural Resources, Southern Division, who were in the bargaining unit represented by Complainant began to be assigned as weekend duty officers responsible for calling out personnel and equipment to respond to emergencies. During such standby weekend duty,

employes were required to remain available to answer emergency calls and to keep themselves in proper physical and mental conditions so that they could effectively respond at all times. Jack Jones, a representative of Complainant, filed the following grievance on February 12, 1974 protesting the foregoing assignments.

EMPLOYE CONTRACT GRIEVANCE REPORT

Name - Last, First, Middle Initial

All Bargaining Unit Employes

Agency	Division
D.N.R.	So. District

Work Unit Telephone

This grievance alleges violation of Article III; VII Section 2 of the labor agreement.

Describe the grievance - state all facts, including time, place of incident, names of persons involved, etc.

D.N.R. management has implemented a new condition of employment occuring since the SHEA contract was negotiated, requiring bargaining unit employes to work additional hours a week and duty officers without providing compensation or informing the Association of the change in work schedules. The additional hours are in excess of the contractual 40-hour week and therefore constitute overtime.

Relief sought

We demand either a discontinuance of the practice of requiring employes to work the added hours, or that the employer provide compensation according to the terms of the SHEA contract retroactive to the date of inception of the new practice.

This Southern District grievance remained unresolved as it proceeded through the contractual grievance procedure and the Complainant elected to pursue same to final and binding arbitration.

5. On March 26, 1974 eight employes in Respondent's Department of Natural Resources, West Central District, who were in the bargaining unit represented by Complainant filed the following grievance alleging that Respondent had violated Article III and Article VII, Section 2 of the 1973-1975 contract.

D.N.R. management has implemented a new condition of employment occuring since the SHEA contract was negotiated. On March 15, 1974 bargaining unit employees in the West Central District were assigned to work additional hours as week-end duty officers without providing compensation or informing the Association of the change in work schedules. The additional hours worked are in excess of the contractual 40-hour week and therefore constitute overtime.

Relief sought

> Rescind the policy of using bargaining unit employes in supervisory positions, or pay regular overtime for all time spent as duty officer, or provide compensatory time off for all time spent as duty officer, or reclassify affected employes, or renegotiate affected articles of agreement.

On or about April 5, 1974 a representative of Respondent denied said grievance at the first step. The employes pursued this West Central District grievance to the second step on April 11, 1974, modifying the relief sought by adding "compensation for duty already served." Respondent denied the second step grievance on April 11, 1974 with the following statement:

> Response to first step grievance by supervisor was correct. On-call duty status was not a violation of contract. However the quarterly district duty officer assignment list for the period ending June 2, 1974 is rescinded and will be revised.

On or about April 19, 1974 Respondent rescinded the West Central District standby weekend duty officer assignments and returned to a mid-1973 method of assignment which did not require specific employes to remain available on specific weekends.

6. Sometime in late March, 1974 a group grievance was filed at the third step of the contractual grievance procedure by an employe of Respondent's Department of Natural Resources, Northwest District who was in the bargaining unit represented by Complainant. Said grievance challenged the duty officer assignment on behalf of bargaining unit members in all Department of Natural Resources Districts.

7. On April 4, 1974 Glenn L. Nelson, representative of Respondent, sent the following memo to representatives of Complainant.

> SUBJECT: Grievances on Weekend Duty Officer Assignments
>
> Jack L. Jones, President SHEA, has filed his Association Grievance appeal to arbitration. We are now receiving other grievances on this same subject from other employes in various locations throughout the Department.
>
> Since these recently filed grievances are the same subject as that which Jack Jones has now filed as an association arbitration, we will hold all action on these until such time that the arbitration decision has been released.

Jack Jones responded to said memo with the following April 8, 1974 letter to Nelson.

> Re: Your Memorandum (No. 9160) dated April 4, 1974
>
> Dear Sir:
>
> We have received a copy of the above memo setting forth your position on grievances relative to Weekend Duty Officer assignments.

Your position is not entirely clear to Association officers. We specifically question the intent of the statement, "we will hold all action on these until such time that the arbitration decision has been released."

Our Association is opposed to leaving outstanding grievances on the Duty Officer issue unresolved at various steps of the grievance procedure. Instead, we recommend either of the following approaches:

1) that all outstanding grievances on the Duty Officer issue be combined and resolved in a single arbitration.

2) that each Duty Officer grievance be separately advanced according to the procedure set forth in the Agreement.

Please advise me if either of the above approaches is compatible with the intent of your memo.

On April 16, 1974 Nelson responded to Jones' April 8, 1974 letter as follows:

I agree with your contention that my language was not very clear in my memo to Bill Heberlein on April 4.

What I really intended was your recommendation No. 1 which also coincides with a memo from Gene Vernon to Robert Mueller on April 8.

After this exchange of correspondence, the Complainant took no further action to process either the West Central District or the Northwest District grievances. There were no oral conversations between the parties regarding precisely which grievances were being combined.

8. The Southern District grievance was submitted to Arbitrator Edward B. Krinsky on July 16, 1974. The parties stipulated that the following issue was to be resolved by the Arbitrator:

By assigning Environmental Engineers as duty officers in District 1 did the Employer violate Argicle VII, Section 2 of the agreement bwtween the parties?

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.

(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 employes 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 uested in writing) the arbitrator will make a binding determination of these issues."'

9. The parties met pursuant to the Arbitrator's request and reached a tentative agreement which was subsequently rejected by the Complainant's membership. 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. 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-qaurters 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."'

10. 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.

11. 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. Hearing on said complaint was conducted by Hearing Examiner Byron Yaffe, a member of the Commission's staff. 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.

12. Respondent appealed said decision to the Commission who, on June 29, 1976, issued an "Order Affirming the Examiner's Findings of Fact, and Revising the Examiner's Conclusions of Law and Order". 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.

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."'

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."

13. Pursuant thereto, the matter was remanded back to Arbitrator Krinsky who held a hearing in the matter on September 23, 1976. Arbitrator Krinsky issued an Award on December 2, 1976. 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". 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."'

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."'

14. Complainant thereafter requested Respondent to comply with the Krinsky Award. Respondent failed to implement any portion of the December 2, 1976 Award. Complainant then filed an unfair labor practice complaint with the Commission against Respondent wherein it alleged that Respondent had unlawfully refused to implement the December 2, 1976 Award. Hearing on said complaint was conducted by Hearing Examiner Amedeo Greco, a member of the Commission's staff. On July 28, 1977 Examiner Greco made the following Interim Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

. . .

16. That Complainant thereafter 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.

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."

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.

In his Memorandum Accompanying Findings of Fact, Conclusions of Law and Order, Examiner Greco stated:

> 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 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.

15. On August 29, 1977 Examiner Greco issued the following Supplemental Findings of Fact, Conclusion of Law and Order:

FINDING OF FACT

That the State of Wisconsin has failed to compensate the employes herein pursuant to the terms of the December 2, 1976, Arbitration Award which was modified by the July 28, 1977, Interim Order issued by the Examiner.

CONCLUSION OF LAW

That the December 2, 1976, Arbitration Award issued by Arbitrator Krinsky, as modified herein, was not in excess of the Arbitrator's powers and that, therefore, the State of Wisconsin, by its refusal to comply with the terms of the modified Award, committed an unfair labor practice within the meaning of Section 111.84(1)(e) of the State Employment Labor Relations Act.

ORDER

IT IS ORDERED that the State of Wisconsin, its officers and agents, shall immediately:

(1) Cease and desist from refusing to comply with the terms of the December 2, 1976, Arbitration Award issued by Arbitrator Edward B. Krinsky, as modified herein.

(2) Take the following affirmative action which the Examiner finds will effectuate the policies of the State Employment Labor Relations Act:

(a) Comply with the December 2, 1976, Arbitration Award, as modified herein, by compensating the individuals on behalf of whom said grievance was filed in accordance with the terms of said modified Award.

16. Respondent appealed Examiner Greco's Decision to the Commission. On February 28, 1978 the Commission affirmed Examiner Greco's decision and subsequently denied Respondent's Motion for Rehearing or Clarification. Respondent, by a letter dated May 1, 1978 informed the Complainant that:

'"The Respondent does not intend to appeal the above entitled WERC matter and intends to comply with the decision as modified. Since the facts occurred so long ago, will you please inform the membership of the State Engineering Association that anyone who feels they have a claim against the Department of Natural Resources, pursuant to the above decision, to contact their supervisor so that we will insure that no one will be missed. If you have any questions, please feel free to contact me."'

17. Respondent subsequently paid the claims of those employes covered by the Southern District grievance. On or about October 6, 1978 Complainant submitted the following claim to Respondent for West Central District employes:

Leonard N. Burr	Sept. 28, 29, 30, 1973	39-1/2 hours
	Nov. 30, Dec. 1, 2, 1973	39-1/2 "
	Jan. 25, 26, 27, 1974	39-1/2 "
	Total	158 hours
Kenneth Thiele	Oct. 26, 27, 28; 1973	39-1/2 hours
	Feb. 22, 23, 24; 1974	39-1/2 "
	Apr. 26, 27, 28; 1974	29-1/2 "
	Total	118-1/2 hours
H. Donald White	Oct. 19, 20, 21; 1973	39-1/2 hours
	Dec. 14, 15, 16; 1973	39-1/2 "
	Feb. 15, 16, 17: 1974	39-1/2 "
	Apr. 19, 20, 21; 1974	39-1/2 "
	Total	158 hours
Harold Erickson	Oct. 12, 13, 14; 1973	39-1/2 hours
	Dec. 21, 22, 23; 1973	39-1/2 "
	Feb. 8, 9, 10; 1974	39-1/2 "
	Apr. 12*, 13, 14; 1974	50 "
	Total	168-1/2 hours

Complainant received the following response from Respondent on or about October 12, 1978:

> On March 27, 1974 a First Step grievance was filed by Stuart Durkee on behalf of the engineers in the Eau Claire District. This step was answered on April 5, 1974 and a Second Step was subsequently filed on April 11, 1974. The Step two answer on April 15, 1974 by Arthur Oehmcke agreed to rescind the March 15, 1974 District Duty Officer assignment. Since this was the basis for the grievance and the relief sought was a rescind of this assignment it appeared that the issue was resolved. Also, I do not find that any 3rd Step grievance was filed which is a necessary procedure for the issue to be considered further.
>
> Even if there had been a 3rd Step filed, the arbitration decision did not cover most of the hours which you made claim in your October 6, 1978 memo. The employement [sic] relations agreement which was in effect at that time restricted the arbitration award to a maximum period of retroactivity of 14 days prior to the date of initiation of the written grievance in Step One. Therefore, no hours prior to March 13, 1974 are included in the decision.
>
> Also, the arbitration decision covered the very specific circumstances where the employe was to be reachable at all times while on such duty assignment. The only assignments in the Eau Claire District which would have met those restrictions would have been under the March 15, 1974 memo. Since Mr. Oehmcke rescinded that memo on April 19, 1974 (in compliance with the grievance answer at Step 2 on April 15, 1974) only those weekends prior to that date would have met such provision.

It appears that very few of the hours indicated in your October 6 memo would meet these requirements even if this issue was not considered settled by your failure to file Step 3 of the grievance.

On January 28, 1979 Complainant made the following response to Respondent's October 12, 1978 letter:

> Investigation of DNR Duty Officer award indicates that payment for time spent as duty officer would commence two weeks prior to filing of First Step grievance carried to arbitration this would place the starting date in January, 1974.
>
> Your letters to Mr. Jack D. Jones, then President of the State Engineering Association, indicate that all grievances concerning this matter would be treated in the same way as the arbitrator decided. There were three grievances filed namely Southern District, Eau Claire, and Spooner. No further action was taken by the Association on the Eau Claire and Spooner grievances in light of your letter stating how they would be handled.
>
> The Association has checked with the districts and finds the individuals on attached list are still employed by the State of Wisconsin and have been assigned as Duty Officers on listed dates and not compensated for them. These are dates within the framework of the Arbitrator's decision.
>
> The Association believes that these individuals should be compensated for these dates and sincerely hopes that this matter can finally be settled.
>
> List of employees of Dept. of Natural Resources not having been compensated for Duty Officer assignments
>
> Superior, Wisconsin Section

John Poddock	May 31-June 2, 1974	39-1/2 hours
	June 21-June 23, 1974	39-1/2 hours
Bob Gothblod	April 5-April 7, 1974	39-1/2 hours
	June 28-June 30, 1974	39-1/2 hours
Dan Kling	One weekend in April or June, 1974	39-1/2 hours

> Eau Claire, Wisconsin Section
>
> See list furnished you from Harold Erickson. Remove dates prior to January, 1974.

The foregoing letter precipitated the following February 12, 1979 response from Respondent:

> As of March 28, 1978, upon receipt of the WERC order denying our motion for rehearing on this case, we accepted the arbitration decision.
>
> On May 1, 1978 Mr. Crowley advised Mr. David Flesch, your legal representative, of our intent to comply with the decision. He also at that same time informed him that it

would be necessary for individuals who felt they had claim from that decision to properly inform us of that right.

Shortly after that correspondence, the eligible engineers from the Southern District so filed their claims ans were properly credited in accordance with the decision.

In October 1978, a group of engineers from the Eau Claire District did file a claim. I responded to their claim advising them of the various reasons that their claims were not valid. I did not even question at that time why they delayed five months in making their claim. Now, through your letter, four months later they are challenging the facts presented in my October memo.

Further, with no explanation nor justification, nine months after the decision, you are making claim for three engineers from Spooner. In addition to this request coming way too late for reasonable consideration, I have no indication as to how these engineers would have made a case for parallel conditions to Southern District in the first place.

The arbitration award was granted for Southern District only (erroneously called #1 in the decision).

18. Respondent has not paid any of the claims submitted by Complainant which allegedly arose from the West Central District (Eau Claire) and the North West District (Spooner/Superior).

Based upon the above and foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSION OF LAW

By refusing to pay certain claims from Department of Natural Resources employes, Respondent State of Wisconsin is refusing to comply with the December 2, 1976 Krinsky Award, as subsequently modified, and thus is committing an unfair labor practice within the meaning of Section 111.84(1)(e) of the State Employment Labor Relations Act.

Based upon the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes and issues the following

ORDER

IT IS ORDERED that the State of Wisconsin, its officers and agents, shall immediately:

1. Cease and desist from refusing to comply with the terms of the December 2, 1976 Arbitration Award issued by Arbitrator Edward B. Krinsky, as subsequently modified.

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

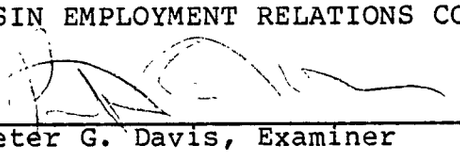
(a) Comply with the December 2, 1976 Arbitration Award, as subsequently modified, by compensating those individual employes who served as weekend duty ofifcers in the West Central District between March 12, 1974 and the effective date of the April 19, 1974 rescission of the duty officers assignments.

(b) Comply with the December 2, 1976 Arbitration Award, as subsequently modified, by compensating any employes who served as weekend duty officers in the Northwest District during the period commencing fourteen (14) calendar days prior to the filing of the Northwest grievance and ending with the termination of duty officer assignments or the expiration of the 1973-1975 bargaining agreement, whichever occurred first.

(c) Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days from the date of this Order as to what steps it has taken to comply herewith.

Dated at Madison, Wisconsin this 17th day of November, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Peter G. Davis, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The issue raised by the instant complaint is whether Respondent's payment of claims from Southern District DNR employes constitutes full compliance with the Krinsky Award. Complainant contends that Respondent must pay claims from West Central and Northwest District DNR employes inasmuch as the parties agreed that the grievances from said Districts would be combined with that from the Southern District for the purposes of arbitration. Respondent argues that it has no obligation to pay any of the West Central claims because said grievance was settled at the second step of the grievance procedure when it rescinded the duty officer policy and Complainant failed to pursue said grievance to the third step of the contractual grievance procedure. Should the Examiner disagree, Respondent alleges that the Krinsky Award only impacts upon employes in the West Central District who served as duty officers between the March 15, 1974 inception of the duty officer policy and its April 19, 1974 rescission. Respondent contends that it has no duty to pay any Northwest District claims because Complainant has failed to establish that the duty officer policy was ever in effect in said District during the period in question. In the alternative Respondent argues that any obligation it may have had to pay Northwest District claims was extinguished when the Complainant failed to submit any specific claims until eight months after Respondent notified Complainant that it intended to comply with the Krinsky Award.

An examination of the record reveals that on or about April 16, 1974, which was the date of Nelson's confirming memo to Jones, the parties agreed that "all outstanding grievances on the Duty Officer issue be combined and resolved in a single arbitration." At the time of said agreement, grievances originating in the Southern District, the West Central District, and the Northwest District had been filed on the duty officer issue. Thus there can be little doubt that these three grievances, being "all" of the "outstanding grievances on the Duty Officer issue" were to "be combined and resolved in a single arbitration." The "single arbitration" referred to in the foregoing agreement was held before Arbitrator Krinsky.

Respondent's argument that the West Central grievance was settled and thus not subject to the foregoing agreement must be rejected for a variety of reasons. When the agreement to combine was reached, it is clear that the West Central grievance was sitting unresolved at the second step of the grievance procedure and thus was an "outstanding grievance." Although the duty officer assignments in the West Central District were rescinded shortly after the agreement in question was reached, the rescission did not resolve the issue of compensation for hours already served which was raised by Complainant at the second step. As Respondent has not been able to point to any contractual or statutory provision which precludes Complainant from altering the relief it seeks between the first and second step of the grievance procedure, the rescission, which arguably would have met Complainant's remedial request at the first step, did not settle the grievance at the second step. Similarly Complainant's failure to continue to process the West Central grievance after the agreement to combine was reached did not result in a settlement of the grievance. Complainant's April 8, 1974 memo proposed that the grievances be combined or that each grievance be separately advanced and resolved. When Respondent agreed to the option of combining grievances, it can hardly argue subsequently that a grievance was settled because the option which it rejected was not followed by the Complainant. Nor can Respondent credibly argue that

the agreement to combine did not include the West Central grievance because it was not at the third step when the agreement was reached. The agreement makes reference to "all" outstanding grievances, not merely those at the third step. Having rejected Respondent's arguments as to the scope of the combination agreement, the Examiner turns to a determination of the extent of Respondent's liability from the West Central and Northwest grievances.

The Krinsky Award, as subsequently modified by the Commission, ordered Respondent to compensate Environmental Engineers for certain hours during which they were assigned as duty officers. Given Article IV, Section 5 of the parties' bargaining agreement, the remedial impact of the Award was found to commence "(14) calendar days prior to the date of initiation of the written grievance at Step One . . ." As the West Central duty officer grievance was filed on March 26, 1974, the impact of the Krinsky Award is limited to certain hours during which West Central District employes were assigned as duty officers from March 12, 1974 until the effective date of the rescission of the duty officer policy. As it was the duty officer assignments which were grieved and the duty officer grievances which were combined, it is only duty officer assignments, as opposed to any other standby assignments, for which compensation is due.

The precise impact of the Krinsky Award upon the Northwest District grievance can not be determined from the instant record inasmuch as the grievance itself could not be located. However as it is clear that the Northwest grievance was a "duty officer grievance" and that said grievance was "outstanding" by Respondent's own admission when the agreement to combine was consummated in mid-April, 1974, the Respondent is obligated to compensate Northwest District employes pursuant to the Krinsky Award for certain hours they were assigned as duty officers. The temporal scope of Respondent's liability is defined by the fourteen (14) calendar day limit on retroactive applicability and the ultimate discontinuance of duty officer assignments. Respondent's arguments about the consequences of Complainant's lack of proof vis-a-vis the specifics of the Northwest grievance and the tardy submission of the Northwest claims are unpersuasive. Respondent is bound by the terms of the April, 1974 combination agreement and the Krinsky Award. If indeed no duty officer assignments occurred in the Northwest District, then Respondent has no liability. If such assignments were made within the temporal scope of Respondent's liability, then Respondent must compensate the individuals in question.

A final issue exists when one is attempting to define the terms of compliance with the Krinsky Award. Article IV, Section 5 of the parties' 1973-1975 contract states that "Employes who voluntarily terminate their employment . . . will not benefit by any later settlement of a group grievance." As the contractual provision clearly and unambiguously refers to "settlement" and the instant case is conspicuously lacking anything which might even remotely be deemed a settlement of the grievances in question, the undersigned concludes that the contractual phrase does not act to deny any individuals who may have voluntarily terminated employment the compensation to which they are entitled under the Krinsky Award.

Complainant's request that it be awarded costs and attorneys fees in this matter has been denied. While it could well be argued that Respondent's conduct through the tortured history of this case has not been motivated by a desire to develop good labor relations with Complainant, said conduct falls short of a willfull completely unjustified refusal to comply which might warrant costs and attorneys' fees.

Dated at Madison, Wisconsin this 17th day of November, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Peter G. Davis, Examiner