

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN STATE EMPLOYEES UNION (WSEU),
AFSCME, COUNCIL 24, AFL-CIO,

Complainant,

vs.

STATE OF WISCONSIN, DEPARTMENT OF
EMPLOYMENT RELATIONS,

Respondent.

Case CXLII
No. 25121 PP(S)-67
Decision No. 17313-A

Appearances:

Lawton & Cates, Attorneys at Law, 110 East Main Street,
Madison, Wisconsin 53703 by Mr. Richard V. Graylow,
appearing on behalf of Complainant.

Mr. Thomas E. Kwiatkowski, Attorney at Law, Department of
Employment Relations, 149 East Wilson Street, Madison,
Wisconsin 53702, appearing on behalf of Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

James D. Lynch, Examiner: A complaint was filed with the Wisconsin Employment Relations Commission on September 12, 1979 alleging that Respondent had committed certain unfair labor practices within the meaning of Section 111.84, Wis. Stats. The Commission on October 8, 1979 appointed James D. Lynch as Examiner to make and issue Findings of Fact, Conclusions of Law and Order in this matter. This matter was heard pursuant to notice on November 20, 1979 at the Commission's office in Madison, Wisconsin; post-hearing briefs were filed with the Examiner by January 31, 1980; and being fully advised in the premises, having considered the evidence and arguments of counsel, the Examiner hereby makes and issues the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. Wisconsin State Employees Union, AFSCME, Council 24, AFL-CIO, hereinafter referred to as the Union, is a labor organization existing for the purpose of representing employees through collective bargaining. The Union is the exclusive bargaining representative of some approximately 25,000 employees of the State of Wisconsin in the blue collar building trades, the technical security, and public safety, clerical and related, professional research statistics and analysis bargaining units. Daniel R. Bertrand is employed by the State as a Correctional Officer at the Green Bay Correctional Institute and as such is represented by the Union.

2. The State of Wisconsin, hereinafter referred to as the Employer, is a political entity employing among others, individuals as correctional officers. The State maintains a prison facility known as the Green Bay Correctional Institute in Green Bay, Wisconsin.

No. 17313-A

3. The Union and the Employer were at all times material hereto, parties to a collective bargaining agreement covering the wages, hours and working conditions of employees referred to in Finding of Fact No. 1, *supra*. This agreement provided, *inter alia*, for a grievance procedure culminating in a binding arbitration step for the resolution of unresolved grievances.

4. On November 20, 1977, Bertrand filed a grievance alleging that he was not receiving the rest periods to which he was contractually entitled. Said grievance was processed to arbitration before Arbitrator Frank Zeidler in accordance with the terms of the collective bargaining agreement.

5. On September 25, 1978, Arbitrator Zeidler issued his award in the rest break grievance and sustained the grievance. Arbitrator Zeidler ruled that: 1. the grievance was limited to Daniel Bertrand and was not a group grievance (p. 2); 2. the grievance extends to the question of getting rest periods as an employee, no matter what the employee's assignment is (p. 8); 3. the clear language of the contract calls for the grievant to get rest periods each shift (p. 8); and 4. in order to avoid violating the agreement, the Employer should begin scheduling rest breaks for the grievant (p. 9).

6. The State of Wisconsin has failed to provide the grievant, and other employees similarly situated at the Green Bay Correctional Institute, with rest periods of any sort at any time following the issuance of the arbitrator's award although required to do so by the terms of said award.

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

CONCLUSION OF LAW

1. The Employer by its failure to provide rest periods of any sort to the grievant as required by the arbitration award issued on September 25, 1978, has refused to comply with the terms of an arbitration award and thereby has committed an unfair labor practice within the meaning of Section 111.84(1)(e), Wis. Stats.

On the basis of the above and foregoing Findings of Fact and Conclusion of Law, the Examiner hereby makes and enters the following

ORDER

IT IS HEREBY ORDERED that the Employer, its officers and agents, shall immediately:

1. Cease and desist from refusing to comply with the terms of the September 25, 1978 Arbitration Award issued by Arbitrator Frank Zeidler.
2. Resubmit the matter to Arbitrator Zeidler for a supplemental award which defines the sort of rest period to which the arbitrator ruled that the grievant was entitled in order that the Employer properly may implement this award prospectively.

3. Take the following affirmative action which the Examiner finds will effectuate the purposes of the State Employment Labor Relations Act.
- a. Comply with the September 25, 1978 Arbitration Award by granting time-off to the grievant Daniel Bertrand in a period of time equal to the amount of rest period time he was denied daily (one half hour) for all days Bertrand worked from the date of the award up to and through the present date. This time-off occasioned by this remedy shall be scheduled to be taken within a ninety day period of the date of this decision.
 - b. Notify all employees by posting in conspicuous places in all work places at the Green Bay Correctional Institute where employees are employed, copies of the notice attached hereto and marked Appendix "A". Said notice shall be signed by the Employer, and shall be posted immediately upon receipt of a copy of this order and shall remain posted for sixty (60) days thereafter. Reasonable steps shall be taken by the Employer to ensure that said notices are not altered, defaced or covered by other material.
 - c. Pay Complainant's reasonable costs and attorney's fees in the amount of one thousand dollars (\$1,000.00), and deliver said amount to Lawton and Cates, Attorneys at Law, 110 East Main Street, Madison, Wisconsin 53703.
 - d. Notify the Wisconsin Employment Relations Commission within twenty (20) days of the date of this order regarding what steps it has taken to comply with this order.

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

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


James D. Lynch, Examiner

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 our employees that:

1. WE WILL comply with the terms of the award of Arbitrator Frank Zeidler dated September 25, 1978.
2. WE WILL make Daniel Bertrand whole for all lost rest periods since September 25, 1978, and we will reimburse Wisconsin State Employees Union, AFSCME, Council 24, AFL-CIO for costs and attorney fees incurred in prosecuting our refusal to comply with Arbitrator Zeidler's award.

By _____
Director, Department of Employment
Relations

Dated this _____ day of _____, 1980.

THIS NOTICE MUST BE POSTED FOR SIXTY (60) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY MATERIAL.

DEPARTMENT OF EMPLOYMENT RELATIONS (SECURITY & PUBLIC SAFETY vs.
DEPARTMENT OF HEALTH AND SOCIAL SERVICES), Case CXLII,
Decision No. 17313-A

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER

The Union filed the instant complaint alleging that the Employer had committed an unfair labor practice by its refusal to implement the terms of an arbitration award rendered pursuant to the binding arbitration provisions of the labor agreement. The pleadings allege and the facts establish that Daniel Bertrand, a correctional officer at the Green Bay Correctional Institute, filed a grievance on November 28, 1977, alleging that he was not receiving rest breaks to which he claimed contractual entitlement. In due course this matter was processed to arbitration before Arbitrator Frank Zeidler. On September 25, 1978, the arbitrator issued an award in which he sustained the grievance. The Employer filed an answer in which it denied that it had refused to accept the arbitrator's award. It further alleged that in certain respects the award was null and void as being in excess of the arbitrator's powers and lastly, that any dispute regarding same should be deferred to the grievance arbitration procedure of the contract or remanded to Arbitrator Zeidler for decision.

RELEVANT FACTS:

Arbitrator Zeidler, in his September 25, 1978 award, found:
1. the grievance was limited to Daniel Bertrand and was not a group grievance; (p. 2 Award); 2. the grievance extends to the question of getting rest periods as an employee, no matter what the employee's assignment (p. 8 Award); 3. the clear language of the contract calls for the grievant to get rest periods each shift (p. 8 Award); and 4. in order to avoid violating the agreement that the Employer should begin scheduling rest breaks for the grievant (p. 9 Award).

Uncontradicted testimony at hearing establishes that the grievant, Daniel Bertrand, as well as other similarly situated employees at the Green Bay Correctional Institute, has never been scheduled for, nor provided with rest breaks from the date of Arbitrator Zeidler's award to the present. Testimony also establishes that the State sought to formulate a two type rest period system which it never implemented, at least with respect to these employees.

POSITION OF THE UNION:

The Union argues that the Employer has failed to implement the Arbitration Award in any manner whatsoever. The Union argues that the Employer's duty to implement the award regarding rest periods extends to all employees covered by the agreement not merely to the individual grievant, Daniel Bertrand. The Union denies that any policy short of actual physical relief from an employer's work station would constitute full compliance with the award. In light of what it characterizes as the Employer's established unwillingness to abide by the contract, it seeks an order finding a contract violation and finding that the term "15 minute rest period" means an uninterrupted period of repose in which the employee may do what he chooses including, if he so desires, sleep. The Union contends that the Employer has acted in bad faith in refusing to implement the award and prays for "costs, disbursements and expenses together with an order directing it to implement forthwith the terms of Zeidler's arbitration Award."

POSITION OF THE EMPLOYER:

First, the Employer argues that it has formulated a rest period policy encompassing two different sorts of rest periods which it contends, is in full compliance with the terms of the arbitrator's

award. Second, the Employer contends that its obligation under the award is limited to providing rest periods for the grievant because the award specifically limited its relief to the grievant, Daniel Bertrand. Next, the Employer contends that the interpretation to be given to the term rest period is an independent contractual dispute which, therefore, should be deferred to the grievance arbitration procedure. Lastly, the Employer argues that if the Examiner does not defer, then he must remand to the arbitration the issue of what constitutes a rest period.

APPLICABLE LAW:

In ruling on the enforceability of an arbitration award, it must first be noted that the Commission applies 1/ the standards are set forth in Section 298.10(1) of the Wisconsin Statutes, which provide that an arbitration award can be vacated on the following grounds:

(a) Where the award was procured by corruption, fraud, or undue means;

(b) Where there was evident partiality or corruption on the part of the arbitrators, or either of them;

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced;

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.

Here the Employer contends alternatively that it complied with the award and if it did not then the arbitrator's award is in excess of his powers. Inasmuch as the Employer presented no evidence, argument or citation of authority in support of that proposition, said argument is dismissed. Thus, having disposed of the traditional defenses to a complaint alleging refusal to abide by binding arbitration award, the relevant question becomes whether the Employer has implemented the terms of the award.

SCOPE OF AWARD AND THE EMPLOYER'S OBLIGATION TO IMPLEMENT

As noted earlier, the parties disagree as to the extent of the Employer's duty to provide rest breaks pursuant to the terms of the Award. The Union contends that the award applies to all employees while the Employer contends that the award is limited to an individual grievant Daniel Bertrand. While it is clear from the award that the arbitrator limited the issue to Daniel Bertrand, it is

1/ See, for example, WERC v. Madison Metropolitan School District, City of Madison, et al, No. 14038-B (4/77).

clear that the award concerned itself with questions of much broader application. 2/ However, as the Arbitrator limited his award and relief to the individual grievant, the question of implementation is limited to the inquiry of whether the Employer provided rest breaks to the grievant.

IMPLEMENTATION:

While the Employer argues that it formulated a two-pronged policy regarding rest periods which it contends complies with the arbitration award, testimony establishes that said policy was never implemented as to Bertrand as well as other similarly situated employees at the Green Bay Correctional Institute. Therefore, the mere existence of a policy cannot be said to satisfy the Employer's obligation to implement the policy by actually scheduling and affording the grievant a fifteen minute rest period on each four hour shift to which the grievant was assigned. By its failure to do so, the Employer has failed to accept the terms of an arbitration award and has committed unfair labor practices thereby.

As the Employer has failed to implement the award and, further, has failed to show any valid reason for its failure, its inaction in

2/ See Award at p. 8 wherein it states:

. . . The arbitrator holds that the text of the grievance does not limit itself just to the position the grievant was having at the time of the grievance, but extends to the question of getting rest periods as an employee, no matter what the assignment is. It is true that there are different conditions of work between the auto shop and the yard in that the possibilities of getting some kind of a rest period in the auto shop are greater than a rest period in the yard. However, the grievance addresses itself to a request for rest periods as a condition of regular employment. . . .

See also Award at p. 9 wherein it states:

AWARD. The grievance of Daniel Bertrand, Officer II, Green Bay Reformatory, that management is in violation of Article VI, Section 3 of the Agreement between the parties, is sustained. The clear language of the Agreement calls for all employees to receive rest periods during each one half shift, and management may not interpret this clause to mean that only some employees receive it. . . .

Thus, while the award granted relief only as to the named grievant, said award would appear to be res judicata as to common issues decided therein in the course of a subsequent grievance filed between these parties. AFSCME, Council 24, WSEU, AFL-CIO v. State of Wisconsin, DOA and its Employment Relations Section, No. 13539-C (3/76).

this respect must be considered to be taken without justification and in bad faith. In such a case, an award of attorney's fees to the party required to bring such action to enforce the award is appropriate relief. 3/ Thus, having considered the nature of the proceeding, the issues raised thereby, their complexity and the amount of time necessary to investigate, prepare for litigation and brief the matter, the Examiner is satisfied that costs and attorney's fees in the amount of one-thousand dollars (\$1,000.00) is appropriately ordered, as directly attributable to the Employer's wrongful failure to accept the terms of the award. 4/

Additionally, the Employer's inaction has also deprived Bertrand of a benefit to which the arbitrator found him to be contractually entitled. Thus, the question of appropriate relief to the injured individual must be addressed. Inasmuch as the Union bargained and Arbitrator Zeidler confirmed that "[t]he clear language of the Agreement calls for all employees to receive rest periods during each one-half shift . . .", the purpose of the language is to provide relief from the job. Accordingly, monetary damages would not make Bertrand whole. Thus, the Examiner orders the Employer to make Bertrand whole for the loss of this time by affording him a stated amount of paid time off from his employment without the cessation of any benefits which inure to him as a result of his employment. The Examiner rules that the amount to which Bertrand is hereby entitled shall be equal to one half hour a day (15 minutes rest period per each one-half shift) for each day Bertrand performed work at the Green Bay Correctional Institute for the period beginning with the issuance of the arbitrator's award up to and through the current date. Said time shall be utilized only in eight hour blocks of time (unless an amount less than eight hours is a remainder) at times which are mutually agreeable to the parties. In no event shall implementation of this remedy extend beyond ninety (90) days from the date of this decision. From this date forward, the Employer shall cease and desist from failing to schedule and to provide the grievant with rest periods.

PROSPECTIVE IMPLEMENTATION AND REMAND:

The Employer argues that the question of what constitutes a rest period is an independent contractual violation which must be deferred to the grievance arbitration procedure. Alternatively, the Employer argues that this question should be referred to Arbitrator Zeidler for decision. The Union argues that in view of the Employer's non-compliance herein the Examiner should exercise jurisdiction to determine the meaning of the term rest period.

Both parties appear to concede that a question exists as to the meaning to be given the term "fifteen minute rest period" and that resolution of this question has a significant impact on the nature of


3/ Madison Teachers Inc., et al v. Madison Metropolitan School District, Board of Education, Madison Metropolitan School District, No. 17471-A (12/78).

4/ Allen R. Holle v. Bloomer Joint School District No. 1 and Bloomer Professional Educators Association, No. 16228-A (8/80).

the Employer's obligation to provide such rest breaks henceforth. As this question was presented to the arbitrator and was necessarily considered by him in reaching his conclusion that the grievant was entitled to said rest periods, the Examiner deems it appropriate to remand the question of the meaning to be given that term so that the Employer may be informed as to the precise action it must take in fulfilling its contractual obligation prospectively. Therefore, the Examiner will not exercise jurisdiction to determine the alleged contract violation.

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

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
James D. Lynch, Examiner