STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN STATE EMPLOYEE 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-B

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.

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

Examiner James D. Lynch having, on October 17, 1980, issued Findings of Fact, Conclusion of Law and Order in the above-entitled proceeding, wherein he found that the Respondent, State of Wisconsin, Department of Employment Relations, has refused to comply with an arbitration award and thereby committed an unfair labor practice within the meaning of Section 111.84(1)(e) of the State Employment Labor Relations Act (SELRA), and wherein he ordered said Respondent to cease and desist therefrom, and take certain action with respect thereto, including submission of the matter to the arbitrator for a determination as to what actions on the Respondent's part would constitute compliance with the intent of said award relating to the granting of time off to the individual grievant, and further the Examiner ordered the Respondent to pay costs and attorneys fees, in the amount of $1,000 to the Complainant; and said Respondent having, on November 5, 1980, timely filed a petition requesting the Commission to review the Examiner's decision, pursuant to the provisions of Sec. 111.07(5), Wis. Stats., and on January 30, 1981 the Respondent having filed a brief in support of its petition; and the Complainant having advised the Commission on March 13, 1981 that it did not desire to file a brief in response to the petition, relying instead on its arguments and briefs submitted to the Examiner; the Commission having held the matter in abeyance pursuant to the request of the parties, to permit them the opportunity to resolve the matter; and on June 3, 1982 the Commission having been informed that efforts in that regard were unsuccessful, and a request having been made that the Commission issue its decision in the matter; and the Commission, having reviewed the entire record, the decision of the Examiner, the petition for review and the briefs of the parties, being fully advised in the premises, makes and issues the following

AMENDED FINDINGS OF FACT

1. That Wisconsin State Employees Union, AFSCME, Council 24, AFL-CIO, hereinafter referred to as WSEU, is a labor organization and has its offices at 5 Odana Court, Madison, Wisconsin 53719.

2. That the State of Wisconsin, hereinafter referred to as the State, is an employer employing various employes in the performance of its various functions; that various classifications of its employes are included in various appropriate collective bargaining units, and are represented by various labor organizations for purposes of collective bargaining pursuant to the State Employment Labor Relations Act; and that in performing the latter function the State is represented

by its Department of Employment Relations, which has its offices at 149 East Wilson Street, Madison, Wisconsin 53702.

3. That at all times material herein WSEU has been, and is, the certified collective bargaining representative of State employes occupying various classifications in an appropriate collective bargaining unit identified as consisting of "security and public safety" classifications; that in said relationship the State and WSEU were parties to a collective bargaining agreement covering the wages, hours and working conditions of employes in said bargaining unit, which agreement by its terms was effective from September 11, 1977 through at least June 30, 1979; that said agreement contained, among its provisions, a grievance and arbitration provision providing for the final and binding arbitration of grievances relating to alleged violations of said agreement, as well as the following provision material herein:

ARTICLE VI

HOURS OF WORK

. . .

Section 3: Rest Periods

98 All employes shall receive one (1) fifteen minute rest period during each one-half shift. The employer retains the right to schedule employe's rest periods to fulfill the operational needs of the various work units. Rest periods may not be postponed or accumulated. If an employe does not receive a rest period because of operational requirements, such rest period may not be taken during a subsequent work period.

4. That on November 28, 1977, Daniel R. Bertrand, an Officer II, employed by the State in its Department of Health and Social Services, hereinafter referred to as DHSS, in its Division of Corrections at the Green Bay Correctional Institute, hereinafter identified as GBCI, who at all times material herein was included in the "security and public safety" bargaining unit, and thereby covered by the said collective bargaining agreement, filed a grievance, wherein he alleged that the State was violating Article VI, Section 3 of the collective bargaining agreement by failing to provide Bertrand with rest periods in accordance therewith; that said grievance was processed through the contractual grievance procedure, including final and binding arbitration before Arbitrator Frank P. Zeidler, who conducted hearing in the matter on August 3, 1978; that Arbitrator Zeidler issued his award in the matter on September 25, 1978, wherein he, in a nine page document, set forth the issue to be determined by him, the factual issue surrounding the grievance, the positions of the WSEU and the State, a discussion with respect to the positions of the parties, his rationale in the matter, and a statement setting forth his "Award"; and that in said award, the Arbitrator set forth the "ISSUE" as follows:

> THE ISSUE: The issue as stated by the Union: "Has the Employer violated Article VI, Section 3, by denying the employees a rest period? If so, the employees should be given rest periods.
>
> The issue as stated by the Employer is: "Has the employer violated Article VI, Section 3, by denying Daniel Bertrand rest periods, granted Article VI, Section 3?"
>
> The arbitrator believes that this grievance is limited to Daniel Bertrand and is not a group grievance. Therefore the Employer's statement of the issue is being accepted.

5. That in his award the Arbitrator set forth his "DISCUSSION" and "AWARD" as follows:

> DISCUSSION. The issue has been stated above: Did the Employer violate Article VI, Section 3 by denying the grievant rest periods? The first matter to be considered is whether this grievance covers just the period of time when the employee was working in the auto shop or does it cover his current position as an Officer in the yard? 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.

This brings one to the question of what the parties intended when they agreed to Article VI, Section 3? From the testimony it appears that the parties were under different conceptions of what they were agreeing to when they agreed to the language of Article VI, Section 3. Some of the testimony on what was agreed to was hearsay on the part of both parties, but this hearsay testimony is useful in that it gives information on why the parties are holding the positions they are. The Chief Steward of the Union says that he was told by the Director of the Wisconsin State Employees Union that all employees were to get a rest break, the Union understanding however that there were to be times when they could not be granted. From the testimony of the Chief Negotiator for the Employer, it was the Employer's understanding that the language of the clause meant that some employees were not to be getting a rest break at all because of their assignments. The parties therefore appear to have agreed to language which meant quite different things to each one.

Where the intent of the parties is different as to the meaning of a clause, it is the custom in arbitration for the arbitrator to consider whether the language is clear and unequivocal and give its clear meaning. The language in the current clause says quite plainly "all Employes shall receive one (1) fifteen (15) minute rest period during each one-half shift." The word "all" is the decisive word here. This does not mean that only some will get rest periods. The Employer may not use the next sentence which is the Employer retains the right to schedule employes' rest period to fulfill "the operational needs of the various work units", to mean that some employees get zero rest periods. By doing so the Employer nullifies the first sentence and renders it meaningless. The arbitrator therefore concludes that the clear language of the clause calls for the grievant to get a rest period each shift, subject to certain operational needs, which may call for his working through a half day without a break on some occasions, but not all the time.

The arbitrator must now give consideration to the problem which the Employer says is posed by such a decision. The Employer already has too much overtime, and this type of an arbitrator's decision will likely present large problems of staffing. According to the Employer, overtime must first be reduced, and then the Employer can think of trying to provide breaks. The arbitrator recognizes this problem. Nevertheless the language of the Agreement is clear, and to avoid violating the Agreement, the Employer should begin scheduling rest breaks for the grievant. It is the arbitrator's recommendation that the Employer be given reasonable time to review the problem of providing rest breaks for this security officer grievant, and to apply the introduction of breaks after a study of how to do it with the least cost and disruption.

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. Management however should be given a reasonable period of time to study how to provide the rest period for the grievant with the least disruption and expense to management.

6. That following the issuance of said award, and pursuant to the instructions of managerial and supervisory personnel, a study was conducted in an attempt to determine the estimated cost of implementing rest periods for all Corrections personnel who were not then receiving rest periods; that in estimating

same Neniskis, the Budget Management Analyust coordinating said study, assumed that: (a) there would be no decrease in the existing security level;' (b) programs would not be reduced or modified; (c) the rest periods would occur during the first three hours of each four hour period of all shifts; (d) it would require a total of 40 minutes (20 minutes per period) to provide relief workers with sufficient time for travel between posts and the exchange of necessary information; and (e) no rest periods would be provided at the eight corrrection camps and the four community corrections centers, since there was then "single coverage" at such facilities, making the cost of providing relief unrealistically high; that Neniskis estimated that a total of 422 additional overtime hours per day would be required to provide relief coverage, which at that time amounted to a cost of $4,115 per day, or $1,501,793 annually; and that said Budget Analyst submitted a report thereon, in writing on November 21, 1978, to her superiors in DHSS.

7. That thereafter said Analyst was told to prepare a second report which, in part, was predicated on a revised "definition" of the term "rest period," and in that regard it was assumed that certain correctional facilities which had reported that they currently permitted some employes to take "informal" rest periods, defined as "decreasing activity and drinking coffee and/or smoking cigarettes", were already providing "rest periods" to the affected employes, and that, therefore, it would be unnecessary to incur additional overtime to relieve said employes from their duties during such "rest periods"; that based on said assumption, said Analyst estimated that providing "rest periods" to the employes involved would require a total of 18,538 ovetime hours per year, at a cost of $181,721 for relief personnel; that such data was included in a report to managerial personnel dated December 14, 1978, and noted therein was the conclusion that certain security problems could result by said plan, particularly at the maximum security institutions, although corrections officers and youth counselors, who were taking informal rest periods would not be permitted to leave their posts, or be relieved of their duty responsibilities; and that the report also indicated that the Superintendents at the various institutions, and those managerial and supervisory personnel in the Division of Corrections opposed the proposed plan.

8. That between December 14, 1978 and January 18, 1979 management personnel of DHSS determined to implement a policy of providing two types of rest periods to employes entitled to same, and in that regard agents of DHSS contacted institutional Superintendents to explain same, as well as to discuss the implementation thereof; that, however, between the date of the issuance of the arbitration award and January 15, 1979 WSEU's Executive Director received reports to the effect that the correction officers at the GBCI were not being provided with rest periods; that on January 15, 1979 said Executive Director and other representatives of WSEU met with managerial personnel of DHSS, during which meeting the representatives of WSEU were advised of the existing practices with regard to the providing of rest periods at the corrections institutions, the cost of same, and the manner in which DHSS had commenced providing the rest periods to the employes represented by WSEU; that, in response, WSEU's Executive Director indicated an objection to the manner in which DHSS was providing the rest periods, and indicated that compliance with the award would require the implementation of 15 minute rest periods for all corrections officers and youth counselors, regardless of the costs or any other concern of DHSS, and that unless this was done, WSEU wold seek to enforce the arbitration award.

9. That on January 18, 1979 DHSS sent the following letter, over the signature of its Deputy Secretary, to the Executive Director of WSEU.

> This is in response to your request that we outline in writing our policy regarding the provision of rest breaks in our correctional facilities.
>
> As was mentioned at our meeting on Monday of this week, each institution was asked to analyze its posts and make recommendations for complying with the "rest break" arbitration decision. After reviewing the recommendations, each institution was contacted by phone and instructed to proceed with implementation in accordance with their post analysis.
>
> In essence, depending on the activities associated with a post, two types of rest breaks would be authorized.

Type A: Those posts where staff could reduce their activity and break informally by drinking coffee, smoking a cigarette, etc., while remaining at their post--they mostly would use their own discretion in choosing an appropriate time, or in a few instances (such as a tower), a set time would be agreed to in advance and security coverage would be increased in other parts of the institution during the break period for that particular post.

Type B: Those posts which would require relief coverage because activities under the post cannot be cut back, other staff is not available to supervise residents, or security in the particular post cannot be decreased without causing considerable threat to residents and the institutions.

Contrary to the implication that was made at our Monday meeting that we would be implementing this practice without any apparent cost impact, our preliminary cost estimate for overtime and/or supplemental staff, exceeds $180,000 on an annual basis. In these times of severe budget/staff constraints we feel these projected costs are considerable and, hence we plan to monitor the situation closely.

We appreciate the feedback you and your staff provided at our meeting and as a follow up we will renew our contact with the institutions to ensure compliance with the decision. Obviously, it will take a while for some of the implementation "bugs" to be worked out. We would, therefore, appreciate your continuing feedback as to which posts/ institutions are not receiving the rest break.

10. That the Arbitrator, in the award material herein, concluded that employe Bertrand was entitled to receive "one (1) fifteen (15) minutes rest period for each one-half shift, subject to the operational needs which may call for Bertrand working through half a day without a break on some occasions, but not all the time", and that, however, the State "be given a reasonable period of time to study how to provide the rest period for the grievant with the least disruption and expense to management"; that the State, in said regard, between the issuance of said award on September 25, 1978 and January 18, 1979, the date on which the State notified WSEU by letter of the manner in which it intended to provide rest periods to its employes, had taken a reasonable period of time to study the means necessary to implement the award; but that, however at no time after the issuance of the award, and especially since January 18, 1979, and at least the date of the hearing herein, has the State permitted employe Bertrand to take rest periods as provided in the arbitration award, and that the State thereby has not complied with the arbitration award issued in the Bertrand grievance.

Upon the basis of the above and foregoing Amended Findings of Fact, the Commission makes and issues the following

AMENDED CONCLUSION OF LAW

1. That the State of Wisconsin, its officer and agents, by failing and refusing to comply with the award of arbitration issued by Frank P. Zeidler, involving the "rest period grievance" of employe Daniel Bertrand, by failing to provide Bertrand with rest periods since January 18, 1979 as provided in said award, has committed, and is committing, an unfair labor practice within the meaning of Sec. 111.84(1)(e) of the State Employment Labor Relations Act; and that the State of Wisconsin, its officers and agents, in said regard, has not committed an independent act of interference, restraint, coerce or a refusal to bargain in good faith within the meaning of Sec. 111.84(1)(a) and 111.84(1)(d) of SELRA.

Upon the basis of the above and foregoing Amended Findings of Fact and Amended Conclusion of Law, the Commission makes and issues the following

AMENDED ORDER 1/

That the State of Wisconsin, its officers and agents shall immediately:

1. Cease and desist from failing to comply with the arbitration award issued by Frank P. Zeidler on September 25, 1978, with respect to the grievance involving employe Daniel Bertrand.

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

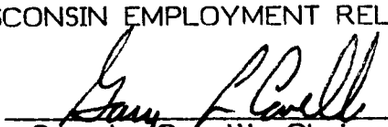
a. Notify the Wisconsin State Employees Union, AFSCME, Council 24, AFL-CIO, in writing, that it desires to meet with its representatives in an attempt to reach an accord on the total number of hours of rest periods employe Daniel Bertrand should have been permitted to take pursuant to the arbitration award, issued by Frank P. Zeidler on September 25, 1978, for the period from January 19, 1979 to such time as the parties resolve the matter, and in said regard either pay Bertrand, at his regular hourly rate of pay, normally paid to him at the time of such denials, such lump sum due and owing, or grant Bertrand time off with pay equal to the amount of rest period time he should have received pursuant to said arbitration award, and in that regard meet with the representatives of the WSEU of said purposes.

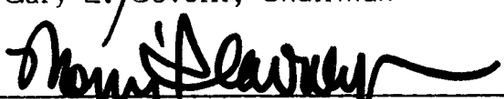
b. In case representatives of the State and the WSEU cannot reach an accord in said matter, within twenty days from date hereof, the State shall request the Wisconsin Employment Relations Commission to schedule further hearing in the matter for the purpose of taking evidence to determine the number of hours of pay due and owing Bertrand as a result of the arbitration award.

c. Notify the Wisconsin Employment Relations Commission, within twenty days from the date of this Order, as to the steps it has taken to comply herewith.

Given under our hands and seal at the City of Madison, Wisconsin this 7th day of July, 1982

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Gary L. Covelli, Chairman


Morris Slavney, Commissioner

1/ Pursuant to Sec. 227.11(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.12(1) and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats.

227.12 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025 (3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case. (Continued on page 7)

(Continuation of Footnote 1)
227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.12, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.11. If a rehearing is requested under s. 227.12, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

MEMORANDUM ACCOMPANYING AMENDED FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

In its complaint initiating the instant proceeding, WSEU alleged that the State had not implemented the arbitration award issued by Arbitrator Zeidler as it applied to "various of its work units", and therefore contended that the Commission should issue an Order directing the State to implement same and make all employes whole retroactively to September 28, 1978, together with further and other appropriate relief. The complaint contained no specific reference to any section of the State Employment Labor Relations Act alleged to have been violated by said alleged failure to implement said award.

In its answer and amended answer, the State did not deny that it failed to comply with the award as it applied to employe Bertrand, but, in effect, contended that the award was in no way applicable to employes other than Bertrand.

The Examiner's Decision

The Examiner found that the State "had failed to provide the grievant and other employes similarly situated at GBCI 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 the award". He concluded that the State's failure to provide rest periods of any sort to the grievant as required by the arbitration award constituted a refusal to comply with the terms of the award, and therefore constituted an unfair labor practice within the meaning of Sec. 111.84(1)(e) of SELRA.

Although he made no specific finding of bad faith on the part of the State, the Examiner set forth in his Memorandum his belief that the State's failure to implement the award was without justification, and constituted bad faith because the State failed to establish any valid reason for its failure to do so. In his remedial order the Examiner, in addition to ordering the State to cease and desist from complying with the award, also ordered the State to re-submit the matter to the Arbitrator 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". Finally, the Examiner ordered the State to comply with the award by granting grievant time off equal to the amount of rest period time he was denied, pay WSEU costs and attorney's fees in the amount of $1,000, post notices at GBCI, indicating its intent to comply with the award, and make Bertrand whole for the lost time, and notify the Commission as to its compliance with said Order of the Examiner.

Petition For Review

In its Petition for Review the State takes specific exception to the finding of the Examiner in characterizing the award, and its application to employes other than Bertrand, as well as to his Conclusion of Law and Order. In its brief in support of its petition, the State sets out what it believes the issues to be in the instant proceeding, which differ in certain material respects from the issues as they were raised in its answer and as set out in its brief to the Examiner. Here the State contends, apparently for the first time, that the award was "not consistent with the terms of the collective bargaining agreement". In its answer and amended answer the State did contend, by way of an affirmative defense, that to the extent that WSEU was contending that the award ordered relief to individuals other than Berstrand, or ordered relief to institutions other than GBCI, said award was null and void as being in excess of the Arbitrator's powers and constituting an award upon a matter not submitted to him.

The other differences in the State's statement of the issues on appeal all relate to the Examiner's remedial order remanding the matter to Arbitrator Zeidler, granting Bertrand time off and awarding costs and attorney's fees. No further argument was presented with regard to the alleged violations of Secs. 111.84(1)(d) and 111.84(1)(a) of SELRA, presumably because the Examiner neglected to specifically deal with those issues. We have therefore given consideration to the arguments raised by the State in its amended answer and in its brief to the Examiner in dealing with those issues.

Discussion

We find no merit to the State's argument attacking validity of Arbitrator Zeidler's award. Assuming arguendo that the State is not precluded from raising this issue for the first time more than two years after said award was issued and after the Examiner's adverse decision was rendered, the arguments presented are unpersuasive. The award was based on the Arbitrator's interpretation of Article VI, Section 3 and dealt with Bertrand's right, as an employe covered by that provision, to receive rest periods. He in no way exceeded his powers, either by "adding to the agreement" or in directing the State to "increase positions" as alleged. The State's arguments in this regard are premised on a strained misreading of the award, which dealt with Bertrand's general entitlement to rest periods under Article VI, Section 3 and not the State's right to schedule rest periods. While the Arbitrator did make reference to the State's right under the agreement to deprive Bertrand of occasional rest periods, such reference was appropriately related to his discussion of the issue presented and did not manifest any infidelity to the limits on his authority.

With regard to the State's claim that it has implemented the award, it argues that the award expressly permitted the State the latitutde to provide the grievant with rest period "with the least disruption and expense to management". Thus, the State argues, that it was free to formulate a policy allowing a reduction in activity at posts where it was practiceable to do so ("Type A" rest period) and only provide relief for those posts where work activity could not be reduced ("Type B" rest periods). It further argues that this is consistent with an award in a reported arbitration case. 2/

We do not here determine whether the State is correct in its contention that the provision of a "Type A" rest period is consistent with its obligations under the agreement. For reasons noted below, we agree with the State that said issue, if it is not resolved by the parties, should be resolved in accordance with the grievance and arbitration provisions of the parties' agreement. However, it is clear that the State has failed to implement the award with respect to Bertrand. However we do not agree that it was accurate for the Examiner to find in his Findings of Fact No. 6 that the State "failed to provide rest periods of any sort at any time" at GBCI, or that the award required the State to provide other employes similarly situated with rest breaks. The award issued by the Arbitrator involves only Bertrand. We have accordingly modified the Examiner's findings in this regard. 3/

While it is true, as the State argues, that WSEU did not bring such noncompliance to the attention of officials of DHSS until late August 1979, that fact does not excuse its failure to comply with the award as it involved Bertrand. It is the State's contention that WSEU entrapped it into committing an unfair labor practice by its inaction and the inaction of the affected employes. Putting aside the question of whether such inaction was mere forebearance or deliberate, this inaction does not excuse the State's failure to meet its statutory obligations. At most such inaction relates to the question of the appropriate remedy for the violations.

We agree with the State that it was inappropriate for the Examiner to remand the matter to the Arbitrator. The Examiner reasoned that, although the State had failed to comply with the award, the Arbitrator had also been presented with the question of what constituted a rest period and had considered that issue in deciding to direct the State to provide the grievant with rest periods. We disagree. There is nothing in the award to indicate that the Arbitrator had been presented with the question of what constituted a rest period or that consideration of that issue had any impact on his decision to order the State to provide the grievant with rest periods. The State is correct that the question of what constitutes a rest period within the meaning of the parties' agreement is a distinct question which should be resolved by the parties directly or through future resort to the established grievance and arbitration procedure.

2/ Northrup Worldwide Aircraft Services, Inc. 65 LA 658 (Goodstien 1975)

3/ The Examiner's findings have been further modified and enlarged for the purpose of presenting a more accurate description of the award, and to detail the actions of the State and WSEU thereafter.

The State takes specific exception to that portion of the Examiner's order which directs the State to grant Bertrand time off equal to the amount of rest period time he would have received had it complied with the award immediately. It notes that it had been given a reasonable amount of time in which to implement the award and points out that there was no contention made by WSEU that the amount of time taken was unreasonable. We agree with this much of the State's arguments and have modified the order accordingly. The State also argues that such an order is unjustified because of the inaction of Bertrand and WSEU in failing to bring the matter to the attention of management. However, in view of the fact that Bertrand was the sole grievant and the fact that the Arbitrator recognized and honored the State's claim in that regard, its failure to provide him with rest periods after its "study" is particularly inexcusable. Finally, the fact that the parties' agreement precludes the accumulation of break time does not persuade the Commission that it should eliminate the order granting of time off to Bertrand. It is difficult under the circumstances of this case to formulate an appropriate make whole remedy. Bertrand was deprived of paid rest periods, not compensation. There is no way to restore that lost opportunity for rest periods. By permitting the State to grant him time off with pay, or by paying him for time lost in rest periods, the Commission has attempted to strike a balance between granting Bertrand a monetary windfall and granting him no meaningful remedy.

Finally, the State also takes specific exception to that portion of the Examiner's order which requires the State to pay WSEU's cost and attorneys fees in the amount of $1,000.00. It argues that this order, and the statement in the Examiner's memo on which it was based, ignores the parties apparent disagreement over what constitutes a rest period and is contradicted by his own action in remanding the dispute to the arbitrator. In addition the State contends that WSEU does not have "clean hands" because of its inaction and the "bad faith" demonstrated by its "cut off of communication" when it learned that the State was not proposing to take action with regard to rest periods with which it agreed.

In resolving the question of the appropriateness of the Examiner's order for costs and attorneys fees we do not find it necessary to resolve these claims of inconsistency, lack of "clean hands" and "bad faith". The Examiner's decision was rendered prior to the Commission's decision in the Madison Schools case 4/ wherein we clarified our policy with regard to the awarding of costs and attorneys fees. Prior to that decision, and based on dicta in an earlier Commission decision involving the same parties, 5/ the Commission's policy was unclear. The Examiner concluded, that the Commission's policy was to award attorneys fees whenever a party refused to comply with an arbitration award for reasons which were "taken in bad faith or based upon legal arguments which are insubstantial and without justification". 6/ However, as indicated in our Madison Schools decision, it is the Commission's policy not to award costs or attorneys fees unless the parties have agreed otherwise, or unless the Commission is required to do so by specific statutory language. Since neither of those factors are present in this case that portion of the Examiner's order requiring the State to pay costs and attorneys fees has been deleted.

In its original complaint filed herein WSEU did not set out which specific sections of SELRA had allegedly been violated. At the outset of the hearing WSEU was permitted to amend its complaint in this regard, and alleged that the State has violated Secs. 111.84(1)(a), 111.84(1)(d) and 111.84(1)(e) of SELRA. In its closing argument WSEU made no specific reference to these statutory provisions, concentrating instead on its claim that the arbitration award, by its terms, required the State to implement rest periods for all correctional officers employed by the State. However in the State's brief, and in WSEU's reply brief, the parties presented their arguments with regard to the applicability of Sections 111.84(1)(a) and 111.84(1)(d) of SELRA to the facts in this case.

The State contends that the evidence does not establish that it took any specific actions to interfere with, restrain or coerce employes (Sec. 111.84(1)(a)) in the exercise of rights set out in Section 111.82 of SELRA. On

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4/ Madison Metropolitan Schools (16471-D) 5/15/81.

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

6/ Decision No. 16471-D at p. 9, quoting from Decision No. 14038-B.

the contrary the State argues that the WSEU's witnesses voluntarily chose not to pursue the grievance procedure. With regard to the allegation that it violated Section 111.84(1)(d) of SELRA, the State argues that it has never refused to fulfill any bargaining obligations arising out of the arbitration award. It points out that it promptly conducted the study contemplated by the award, and contends that it "implemented it within a reasonable period of time, and consulted with the Union regarding that policy". Finally it contends that any "bad faith" rests with the WSEU which "conducted a well orchestrated campaign to keep higher management ignorant of any difficulties with the implementation of the award".

WSEU contends that the State has acted in bad faith by unilaterally redefining rest periods and contending that the award does not require it to provide rest periods to employes other than Bertrand, even though such argument runs contrary to the res judicata principles previously applied by the Commission in another case involving these same parties, wherein the State successfully contended that WSEU could not relitigate the same issue which it had previously lost in arbitration, Department of Employment Relations, Decision No. 13539-C 3/76. According to WSEU, the State's contention that it should have filed additional grievances is contrary to this decision and would be an exercise in futility and a waste of money and other resources.

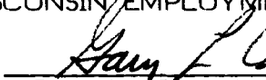
We do not agree with WSEU that the award required that the State implement rest periods for any employes other than Bertrand. However, it is obvious from a reading of that award that the issue decided therein had potential application to numerous other employes. In fact the actions of the department thereafter gave recognition to this fact.

The State's actions, in conducting the study concerning the implementation of the rest periods, and later meeting with representatives of WSEU were consistent with some of the terms of the award. However it did not implement the taking of rest periods by Bertrand. Nevertheless it should be noted that there was nothing in the submission grievance, nor any part of the award which required the State to implement rest period for other employes. The proceeding herein involves an action seeking enforcement of said award. It only applied to Bertrand. Alleged violations of the collective bargaining agreement with respect to other employes who allegedly were being denied rest periods could have been grieved, as required in such collective bargaining agreement, and processed through the grievance and arbitration steps set forth therein. The fact that such procedure would be repetitious and costly does not constitute a basis for remedying such an alleged violation of the agreement by concluding that the State did not bargain in good faith with WSEU by not applying the award to other employes who may have been denied rest periods. Technically, it could be argued that a violation of a collective bargaining agreement by an employer constitutes a unilateral change in wages, hours and working conditions, and therefore a refusal to bargain in good faith with the bargaining representtive prior to implementing such change. However, the taking of jurisdiction of such an allegation would render meaningless the usual grievance and arbitration provisions which exist in a collective bargaining agreement, and therefore, we found no merit to such an allegation in this proceeding. Similarly we do not find the State's conduct to constitute a violation of Sec. 111.84(1)(a) Stats.

We have provided the parties with an opportunity to resolve the amounts of time and/or sum of monies due Bertrand as a result of the State failure to implement the arbitration award, and if they are unable to do so, the State is ordered to request the Commission to schedule hearing in the matter to determine same, and for that purpose only. 7/

Dated at Madison, Wisconsin this 7th day of July, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Gary L. Covelli, Chairman


Morris Slavney, Commissioner

7/ Because of his participation in the efforts of the parties to resolve the matters involved herein by mediation, Commissioner Torosian did not participate in this decision.