STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RADIO AND TELEVISION BROADCAST ENGINEERS, LOCAL UNION NO. 715, IBEW, AFL-CIO, Complainant, vs. WISN DIVISION - THE HEARST CORPORATION, Respondent.	:	Case VIII No. 25628 Ce-1847 Decision No. 17572-D

Appearances:

Lawton & Cates, Attorneys at Law, by Mr. Bruce M. Davey, 110 East Main Street, Madison, Wisconsin 53703, appearing on behalf of the Complainant.

Quarles & Brady, Attorneys at Law, by Mr. David E. Jarvis, 780 North Water Street, Milwaukee, Wisconsin 53202, appearing on behalf of the Respondent.

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

Examiner Stanley H. Michelstetter II having on March 31, 1981 issued Findings of Fact, Conclusion of Law and Order and Memorandum in the above entitled matter, wherein he concluded that the above named Respondent did not commit any unfair labor practices within the meaning of Secs. 111.06(1)(f) and (g) of the Wisconsin Employment Peace Act (WEPA) with respect to the reinstatement of an employe pursuant to an arbitration award; and the above named Complainant having on April 20, 1981, timely filed a petition with the Wisconsin Employment Relations Commission, wherein it requested that the Commission reverse the Examiner's decision; and the Commission, having reviewed the entire record, the petition for review, and the briefs filed in support thereof, and in opposition thereto, makes and issues the following:

ORDER

A. That the Examiner's Findings of Fact be, and the same hereby are, amended as follows:

FINDINGS OF FACT

1. That Radio and Television Braodcast Engineers, Local Union No. 715, IBEW, AFL-CIO, hereinafter referred to as the Union, is a labor organization representing employes for the purposes of collective bargaining, having its offices at 5006 West Burleigh Street, Milwaukee, Wisconsin.

2. That WISN Division - The Hearst Corporation, hereinafter referred to as the Employer, is engaged in the operation of a television broadcast facility in the Milwaukee, Wisconsin area, and has its principal offices at P.O. Box 402, Milwaukee, Wisconsin.

3. That at all times material herein, the Employer has recognized the Union as the exclusive collective bargaining representative of all Broadcast Engineers, excluding the Assistant Chief Engineers; that in said relationship the Employer and the Union, were parties to a collective bargaining agreement covering wages, hours and conditions of employment of said Broadcast Engineers; and that said collective bargaining agreement contained a provision providing for the final and binding arbitration of grievances arising under said agreement; a "Work Week" provision, which among other things, required those Broadcast Engineers working a five day week to have two consecutive days off; a "Work Day" provision which required the Employer to employ said regular full-time Engineers on a forty hour per week basis; and the following provision relating to "Severance Pay":

> Except for willful misconduct, any Engineer whose services are terminated by the Employer shall receive severance pay on the basis of one week's pay for each full year of service, up to a maximum of ten (10) week's pay.

4. That in January, 1970 Clifford Rodney Negley, Jr., a resident of Elkhorn, Wisconsin, commenced his employment as a regular full-time Broadcast Engineer with the Employer; that Negley continued in such employment until August 7, 1978, when the Employer notified Negley that he was being terminated for the following reasons:

> "We have reviewed your work record, your job performance, your recent failure to be at work as scheduled, and your falsification of your time report. We have concluded to terminate your services immediately."

5. That upon said discharge the Employer paid Negley, as severance pay under the aforementioned collective bargaining agreement, approximately $3200 for his continued service from his date of hire to his date of termination; that Negley's termination was grieved by the Union pursuant to the contractual grievance procedure; that said grievance ultimately proceeded to binding arbitration; and that the Arbitrator, following a hearing in the matter, issued his Award on July 11, 1979, which contained the following conclusionary "Award":

> The Employer did not have cause to discharge grievant Clifford Rodney Negley, Jr. The Employer shall offer grievant immediate reinstatement to his former or equivalent position but without backpay. Grievant's seniority shall include all time worked prior to August 7, 1978 and it shall continue from the date reinstatement is offered to grievant. The period covering the processing of the grievance and arbitration award shall not be included in the computation of grievant's seniority.

6. That following his discharge, and continuing at all times material herein, Negley was employed at Briggs & Stratton Corp., in Milwaukee, working the 9:00 p.m. to 8:30 a.m. shift; and that while employed by the Employer, Negley regularly worked from 3:00 p.m. to 11:00 p.m.

7. That on July 17, 1979, following the receipt of a copy of the Award, Gerald R. Robinson, the Employer's Chief Engineer, sent a letter to Negley which stated in material part the following:

> . . .WISN-TV hereby offers you immediate reinstatement to your former or equivalent position but without backpay.
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> Please contact me immediately to let me know whether or not you accept the offer. If you accept the offer we will put you in the work schedule and notify you promptly.

8. That on July 20, 1979 the Union's Business Manager directed a letter to the Employee Relations Director of the Employer, indicating that said Business Manager had spoken to Negley regarding the Employer's offer of reinstatement and that Negley would inform the Employer on July 23, 1979 of his decision as to whether Negley would accept the offer of reinstatement; that also on July 20 Robinson received a phone call from Negley, during which the latter indicated that he would "give his answer" either the following Monday or Tuesday, July 23 or July 24; that on July 23 Negley again called Robinson, and after being informed by Robinson that Negley would be working the same shift previously worked by him, 3:00 p.m. to 11:00 p.m., and was expected to report on Thursday, July 26, Negley indicated a desire to work an earlier shift; that Robinson denied such request; that on July 24 Negley sent a wire to Robinson indicating "I accept the job"; that the following day, July 25, Negley visited the Employer's premises for the purpose of talking to Robinson; that however Robinson was unavailable, and as a result Negley spoke to Robinson's secretary and informed her that he would not work his full shift on Thursday, the 26th, but would only work until 8:00 p.m.; that although Negley did not convey his reason for working such hours, it was his intent to be on time for his shift at Briggs & Stratton that evening; that on the following day, July 26, at approximately 3:00 p.m., after Negley had reported for duty, Robinson met with Negley, during which meeting Robinson submitted the following memorandum addressed to Negley, written by Robinson on July 25, following a conversation had between Robinson and his secretary regarding Negley's conversation with the secretary on July 25:

You told Laura that you would be available to work 5 hours a day from July 26 thru July 29. This had never been discussed and I am not in agreement with your working just 5 hours. I expect you to work an 8 hour shift each day. We have never had any discussion regarding anything less than an 8 hour shift.

The Arbitrator's award indicates that the "Employer shall offer grievant immediaate reinstatement to his former or equivalent position but without backpay." Upon your discharge you received 8 and 7/12ths weeks of severance pay. This money need now be repaid to WISN-TV. Please indicate if this payment will be made in one lump sum or on a week-to-week basis.

9. That the above meeting continued for approximately fifteen minutes, during the course of which Robinson strongly indicated that Negley would be expected to work his full shift, and that the Employer expected Negley to make arrangements to repay the severance pay previously received by him; that in response to an inquiry made by Negley as to whether he would be obligated to return the severance pay should he choose not to return to employment, Robinson indicated that the Employer would not seek such repayment; that thereupon Negley bid good-bye to Robinson and left the premises; and that until the date of the filing of the complaint herein, the Employer heard nothing more in the matter, except for a call from the Union representative several weeks thereafter, as to whether the Employer would pay Negley as a result of his appearance at the Employer's premises on July 26th, a request denied by the Employer.

10. That the above described circumstances establish (1) that Negley refused to accept the offer of re-employment proffered by the Employer pursuant to the arbitration award; (2) that the Employer did not constructively discharge Negley on July 26, 1979, but, on the contrary, Negley refused to return to employment on said date; and that, therefore, the Employer has not failed or refused to abide by the terms of said arbitration award.

B. That the Examiner's Conclusion of Law and Order be, and the same hereby are, affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 16th day of December, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Gary L. Covelli, Chairman

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Morris Slavney, Commissioner

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Herman Torosian, Commissioner

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

This proceeding was originally initiated by a complaint alleging that the Employer had violated Secs. 111.06(1)(f) and (g), Stats. by failing to comply with a binding grievance arbitration Award wherein the Employer was ordered to reinstate Negley to his former or equivalent position. In its answer the Employer denied any of the violations alleged in the complaint, and affirmatively alleged that Negley had rejected the offer of reinstatement required by the Award.

The Examiner's Decision

In his Findings of Fact, the Examiner set forth that Negley commenced his employment as a Broadcast Engineer in January, 1970; that he was terminated on August 7, 1978; that pursuant to the collective bargaining agreement the Employer paid Negley severance pay in the amount of approximately $3000; that following said termination Negley obtained other employment at Briggs & Stratton Corp., which continued at all times material thereafter; that during the course of said other employment the Union processed a grievance alleging that Negley's termination by the Employer was in violation of the collective bargaining agreement; and that said grievance was heard by an Arbitrator who issued the Award set forth in the Findings of Fact. The Examiner further found that on July 17, 1979, after the issuance of said Award the Employer offered Negley "unconditional reinstatement to this former position" and that on July 23, 1979 "Negley notified the Employer of his unconditional acceptance". In addition the Examiner found that Negley was told to report on July 26, and that he was thereafter scheduled to work "his previous hours with Tuesday and Wednesday as his scheduled days off." The Examiner also specifically made the following Findings of Fact:

> 10. That at no time did Negley notify Briggs & Stratton Corp. of an intention to quit. That although Negley informally explored the possibility of a leave of absence or other accommodations of his Briggs & Stratton job to his job with the Employer, at no time did he make a formal or informal request to Briggs & Stratton Corp. for a leave or other change to accommodate the two jobs. That by July 25, 1979, Negley's efforts in this regard were abandoned.
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> 11. That on July 25, Negley notified the Employer that he would leave work three hours early on the following day and each work day until July 29, 1979.
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> 12. That shortly after Negley reported for work on July 26, 1979, he met with his supervisor, Robinson, who told him that he was to work a full eight-hour day on that day and every subsequent day. That he also told him that he expected Negley to repay the severance pay and offered various time payment options to him. That at the conclusion of this conversation, Negley walked out and never returned to the Employer's place of business. That Negley quit his employment with the Employer because of an irreconcilable conflict between the schedule with the Employer and his schedule with Briggs & Stratton Corp. and not because the Employer threatened to require the repayment of the severance pay.

The Examiner ultimately concluded that because Negley "quit his employment" the Employer did not commit any unfair labor practices within the meaning of Secs.111.06(1)(f) or (g) of WEPA.

The Petition for Review

The Union filed an appeal, which the Commission considers to be a petition to review the Examiner's decision, pursuant to Sec. 111.07(5) of WEPA, urging the Commisssion to reverse the Examiner. The Union contends that Findings of Fact 10 and 12 as set forth heretofore, "are clearly erroneous and are not established by a clear and satisfactory preponderance of the evidence and therefore prejudicially affect the rights" of the Union. The Union also took exception to certain statements made by the Examiner in his Memorandum relative to the above Findings of Fact. The Union contends that Negley did not return to employment due to the Employer's insistenence that Negley make arrangements for the repayment of severance pay which had been paid at the time of Negley's August 7, 1979 termination. The Union argues that the arbitration Award did not require that

Negley return the severance pay, that therefore the Employer's demand that Hegley repay said severance pay constituted a condition to re-employment, and that, therefore, such offer of re-employment was not in compliance with the Award.

The Employer contends that the record evidence amply supports the Findings and Conclusions set forth by the Examiner and emphasizes that the record establishes that Negley "hoped that he would be able to work at both jobs, but when it became obvious he could not, he eagerly accepted respondent's offer to drop the severance pay issue in return for his voluntary termination".

Discussion

In order to properly appraise the rationale of the Examiner, we deem it appropriate to quote same.

> The determinative issue is whether Negley quit or was constructively discharged.
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> Essential to a determination of the above issue is an interpretation of the disputed conversation which occurred July 26. This interpretation rests on the background leading up to it. From Negley's side he admitted he was not interested in permanently retaining the WISN job or in doing anything that would jeopardize his Briggs & Stratton job. His goal in accepting reinstatement was to work approximately six months until his pension vested. Because the scheduled hours of the two jobs overlapped, Negley knew he had to arrange to avoid the conflict if he was to keep both of them that long. To do this, he first discussed the possibility of taking a leave of absence or other alternatives from the Briggs job with lower ranking personnel there. Although the Union characterizes Negley as still being in the process of exploring these efforts on July 26, I conclude they were abandoned. No formal or informal request was ever made to proper authorities at Briggs. I conclude that if Negley had intended to do so, he would have done so before the late date of July 26. Instead, at best Negley whimsically intended to try to work both jobs by limiting his work at WISN to five non-conflicting hours followed by his full shift at Briggs. However, Negley's testimony and conduct suggest he was hoping to provoke his discharge before July 26. From the Employer's side, if Negley's testimony about earlier conversations is to be belived at all, its actions appear to be calculated to convey the Employer's displeasure and designed to pressure Negley to quit. Although it offered full reinstatement, it began by treating him coldly. Thereafter, it escalated to denying his discretionary type requests.
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> Turning to the disputed conversation itself, Robinson testified that after he gave Negley the letter, he insisted he work a full eight hours on that day and he "expected the . . .severance pay to be repaid in total." (Emphasis supplied.) It is undisputed that he offered Negley various time payment options. He testified Negley professed to not understand and that he read him the award. He testified Negley thought about it for a while and then said, "If I go now, do I owe you anything?" When he responden, "No," Negley got up, shook hands, and left.
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> Negley's version appears to substantially conflict with Robinson's. He testified Robinson told him that if he didn't work the full eight hours on July 26, he would be fired and also said that the Employer would have the severance pay back or "(it) was going to take care of me." It appears that he inferred he would be fired on the spot if he didn't agree to repay the severance pay. He asserts the two bickered for a while, and then he just walked out. Negley's testimony at this point and in other places clearly confuses his inferences with what was said. Further, his memory of the discussion was clearly sketchy and disjointed. Accordingly, I credit Robinson's testimony as to what was said.
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> Robinson's testimony, that he "expected" Negley to repay the severance pay in the context of also using the term to direct Negley to work eight hours clearly carried with it the implied threat to discipline or discharge him if he did not eventually agree to repay the severance pay. It also carried with it the message that it was part of

the Employer's "minimum required" posture. No consideration is given as to the Employer's legal right, if any, to recover the severance pay; it is possible from the context and timing that the Employer was attempting to use it to cause Negley to quit rather than to really obtain repayment. If this is so, I would find a violation of section 111.06(1)(f) or (g). However, I conclude this possible threat was not, in fact, the reason Negley quit, but instead, he quit because he recognized he could not work both jobs. I, therefore, conclude Negley quit his employment and was not constructively discharged. Accordingly, the Complaint is dismissed.

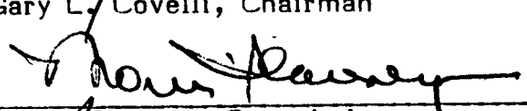
We do not deem it necessary for the Examiner to have made a determination as to the credibility of the testimony of Negley or that of Robinson. We are satisfied that the testimony of both establishes that the Employer offered reinstatement to Negley to his former position and to the shift previously worked by him. There is no question that at that time Negley was also employed elsewhere and desired to retain such employment. It was established that Robinson strongly indicated to Negley that the latter would have to make arrangements to repay the severance pay made to him on the date of his discharge in August, 1979, and that it was obvious for Negley to conclude that the failure to reach an accord on arrangements to make such repayment would affect his employment with the Employer.

The Commission is satisfied that the Employer had the right to seek the return of the severance pay. A close examination of the Award makes no reference to any severance payment received by Negley. While the Award did not require any backpay, we cannot equate the lack of such remedy with a conclusion that Negley was to keep the severance pay in lieu thereof. Since a return to employment pursuant to the Award would return Negley to active employment status, his employment could no longer be considered as having been terminated especially as the Award did not result in the forfeiture of Negley's seniority from the date of his original hire to the date of his discharge in August 1979. Under all the circumstances we are satisfied that when Negley said "good-bye" following his conversation with Robinson on July 26 and did not return to work or make any further inquiry or take any further action, he rejected the offer of reinstatement. Said rejection was prompted by his learning that he would have been required to work eight hours daily, forty hours per week, on a regular shift basis, which would have caused some conflict with his second job hours, and that the Employer expected a return of the severance pay previously paid to Negley. We have therefore amended the Examiner's Findings of Fact but have affirmed his Conclusion of Law and Order.

Dated at Madison, Wisconsin this 16th day of December, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Gary L. Covelli, Chairman


Morris Slavney, Commissioner


Herman Torosian, Commissioner