STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN STATE EMPLOYEES UNION (WSEU), AFSCME, COUNCIL 24, AFL-CIO, Complainant, vs. STATE OF WISCONSIN, Respondent,	Case CL No. 26489 PP(S)-74 Decision No. 18084-A

Appearances:

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

Mr. Sanford N. Cogas, Attorney at Law, State of Wisconsin, Department of Employment Relations, 149 East Wilson Street, Madison, WI 53703

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

AFSCME, Council 24, Wisconsin State Employees Union, AFL-CIO, having on July 3, 1980, filed a complaint with the Wisconsin Employment Relations Commission, wherein it alleged that the State of Wisconsin, Department of Administration and its Employment Relations Section, had committed unfair labor practices within the meaning of Section 111.84 of the Wisconsin State Employment Labor Relations Act; and hearings in the matter having been scheduled and subsequently postponed over the period September 24, 1980 to April 3, 1981; and the hearing having been conducted on April 3, 1981, by Robert M. McCormick, Examiner, the Commission having appointed him to hear said matter and to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Section 111.07(5) of the Wisconsin Statutes; and briefs having been filed by June 3, 1981; and at conclusion of hearing the Respondent having moved for dismissal of the complaint and at the time, the Examiner having denied same; the undersigned having considered the record evidence and arguments of the parties and their written briefs, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That AFSCME, Council 24, Wisconsin State Employees Union, hereinafter referred to as the Complainant, is a labor organization having its principal offices at 5 Odana Court, Madison, Wisconsin; and that at all times pertinent hereto, Martin Beil has served as its President, Tom King has served as its Executive Director.

2. That the State of Wisconsin, Department of Administration and its Employment Relations Section, hereinafter referred to as the Respondent, is an agency of the State of Wisconsin charged under Section 111.81(16), Wisconsin Statutes, with responsibility for the employer functions of the executive branch under the State Employment Labor Relations Act; that the Respondent maintains its principal office at 149 East Wilson, Madison, Wisconsin and that, at all times pertinent hereto, Hugh Henderson, has served as Secretary of the Respondent, authorized to act on behalf of Respondent in matters and relationships affecting the Respondent and the collective bargaining representatives of employes of the State of Wisconsin.

3. That Respondent recognizes the Complainant as the exclusive collective bargaining representative of a number of classified state employes whose classifications have been allocated to the following statutorily created bargaining units: blue collar, technical, security and public safety, professional-social services and others; and that the Respondent and Complainant were parties to a collective bargaining agreement effective from September 11, 1977 until June 30, 1979 which contained the following provisions pertinent hereto:

ARTICLE XIII
EMPLOYEE BENEFITS

. . .

SECTION 14: LENGTH
OF SERVICE PAYMENT

A.
273 The Employer agrees to provide an annual length-of-service payment to eligible employees. The payment schedule for the term of the contract shall be:

(1) June 30, 1978 - a full year payment
(2) June 29, 1979 - a full year payment

274 In the event of retirement, death or termination payment will be made at an earlier date.

B.
275 The amount of the length-of-service payment shall be based upon seniority date. No employee shall be granted more than one length-of-service payment for the 12 month period beginning January 1 and ending the following December 31.

C.
276 The schedule of payments shall be as follows:

5 full years of service	$ 50
10 full years of service	100
15 full years of service	150
20 full years of service	200
25 full years of service	250

D.
277 To be eligible for the length-of-service payment the employee must have completed the required number of years prior to or during the calendar year in which payment is to be made.

E.
278 Payments under this section to eligible employees shall be prorated according to the number of paid work hours the employees had during the calendar year, excluding any overtime hours worked.

4. That pursuant to the arbitration provision of the existing collective bargaining agreement, Arbitrator Robert J. Mueller entered an award on April 2, 1979, in which he sustained a grievance filed by employe June Fogelberg concluding that the Respondent violated Article XIII, Section 14 by failing to credit and pay the grievant for half of a year of service from July 1, 1977 to January 1, 1978. Arbitrator Mueller held that "calendar year" for purposes of Paragraphs D and E of Section 14, covering length of service payments, should be construed as referring to "fiscal year".

5. That the Complainant, on July 27, 1979, on July 19, 1979, on August 13, 1979 filed additional grievances involving the fringe benefit identified as "length of service". After processing these grievances through the first three stpes, Complainant appealed the following grievances of currently employed State employes to arbitration on the dates indicated:

Isabel Donohue and Local 973 on August 7, 1979
David Rasmussen and Local 1215 on September 20, 1979
Fred Leubke and Local 579 on August 28, 1979
Sharon DeWaskin and Local 2748 on September 24, 1979
Betty Marquis, Neal Gleason and Local 144 on August 7, 1979
Richard R. Olbrantz and Local 144 on September 24, 1979

6. That at all times subsequent thereto, the Respondent has refused, and continues to refuse to submit the grievances referred to in Finding of Fact 5 to arbitration pursuant to the terms of the collective bargaining agreement contending that the Fogelberg award referred to in Finding of Fact 4 is determinative.

7. That though the grievances referred to in Finding of Fact 5 were filed after the expiration of the 1977-1979 agreement, the record evidence indicates that the parties made no change in Article XIII, Section 14.

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

CONCLUSION OF LAW

That the award issued by Arbitrator Robert J. Mueller on April 2, 1979 with respect to the grievance filed by June Fogelberg is conclusive on the Complainant and Respondent and is res judicata as to the interpretation of Article XIII, Section 14, Paragraphs D and E, of the collective bargaining agreement between the parties; and that the Respondent, State of Wisconsin, Department of Administration and its Employment Relations Section, has not committed and is not committing unfair labor practices within the meaning of Section 111.84(1)(e) of the State Employment Labor Relations Act by refusing to again submit the issue of the calculation of length of service payments under Article XIII, Section 14, to arbitration under the collective bargaining agreement; and, therefore, the grievances referred to in Finding of Fact 5 are resubmissions by the Union on the question of the calculation of length of service payments under Article XIII, Section 14 of the collective bargaining agreement.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes the following

ORDER

IT IS ORDERED that the complaint filed in the above-entitled matter be, and hereby is, dismissed; and that the award of attorneys fees, requested by Respondent, is hereby denied.

Dated at Madison, Wisconsin this 22nd day of June, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Robert M. McCormick
Robert M. McCormick, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

PLEADINGS AND CONFORMING THE PROOF

In its complaint filed on July 3, 1980, the Union alleges that the State has violated the collective bargaining agreement between the parties and thereby violated Section 111.84(1)(e) of the Wisconsin Statutes by refusing to proceed to arbitration on the six grievances, i.e. Donohue, Rasmussen, et al. grievances, appealed to arbitration in August and September of 1979. At the conclusion of the hearing, the State filed a Motion to Dismiss in which it claimed that the parties were bound by a decision issued on April 2, 1979 by Arbitrator Robert J. Mueller, so that the State was not obligated to re-arbitrate the issue raised in the Donohue, Rasmussen, et al. grievances. The State offered no additional defenses to its refusal to proceed to arbitration on these grievances. The matter was heard on April 3, 1981. Briefs and answering briefs were filed by the parties and the transcript of the hearing was delivered to the Examiner on April 7, 1981.

The parties submitted copies of two separate 1977-1979 labor agreements, as exhibits, Joint Exhibit #1 and Union Exhibit #2. The Examiner in Finding of Fact 3 has set forth Article XIII, Section 14 from the Union Exhibit #2, as the language of Joint Exhibit #1 does not conform to the identical clauses in the Fogelberg Award, issued by Arbitrator Mueller. There was no other evidence introduced with respect to the parties having amended or changed Section 14, D and E.

POSITION OF THE STATE

While acknowledging that it has refused to proceed to arbitration on the Donohue, Rasmussen, et al. grievances, the State defends its action in that regard on the basis of a series of cases in which the Commission has held that the final and binding decision of an arbitrator in one case will bind the parties as res judicata on other grievances raising the same issue.

The State contends that the evidence demonstrates that the Donohue, Rasmussen, et al. grievances raise the identical issue and relate to the same contract provision, namely, Article XIII, Section 14, as interpreted by Arbitrator Mueller in the Fogelberg Award, and that the arbitration award in the Fogelberg case is therefore res judicata of the instant disputes.

POSITION OF THE UNION

The Union argues that the State must be directed to arbitrate the pending grievances. It contends that the defense of res judicata has no applicability to the grievances at bar, maintaining that the grievances are significantly and materially different from that presented to Arbitrator Robert Mueller for resolution in 1979. The Union argues that the parties are not identical because the grievants are not identical. It also argues that the issues are not identical because the most recent grievances were filed under provisions of a different, subsequent agreement. The Union further maintains that significant and material differences exist between the pending grievances and the Fogelberg grievance as they involve currently active State employes rather than retired employes. Citing the Fogelberg award, it stresses that Mueller did not intend to reduce or take away any moneys to which employes would otherwise be entitled and demands the right to arbitrate the pending grievances.

DISCUSSION

Clearly the Union's argument that the parties involved in the previous and pending grievances are different because the respective grievant's are different must fail in light of existing case law. Wisconsin Telephone Company (4471) 3/57; aff. Milwaukee Co. Cir. Ct., 4158; rev. on other grounds 6 Wis. 2d 243 (1959). In that case, the Commission, recognizing that the actual parties in interest were the parties to the collective bargaining agreement, the employer and union, held the previous award as conclusive under the doctrine of res judicata. Likewise, the Union's contention that the issues are different because successor agreements are involved also fails. In Pure Milk Association (6584) 12/63; aff. Dane Co.

Cir. Ct. 10/64; remanded for further hearing, 2/64; supplemental order (6584-B) 12/65, the Commission rejected this argument holding that res judicata rationale applied to enforcement of an arbitration award favoring a union following the expiration of the collective bargaining agreement under which that award was rendered, where the successor agreements between the parties contained language identical to that interpreted by the arbitrator. There was no evidence introduced with respect to the parties' adoption of different language of Article XIII, Section 14, from that interpreted by Arbitrator Mueller in Fogelberg .

The Union has correctly cited the most recent Commission policy as stated in Wisconsin Public Service Corp. (11954-D) 5/74 at page seven which is as follows:

> ". . . this Commission has said repeatedly that it will apply the principles of res judicata to a prior arbitration award in complaint cases filed alleging a violation of Section 111.06(1)(g), where there is no significant discrepancy of fact involved in the prior award and in the subsequent case to which a complainant is requesting the Commission to apply the award. A balance must be struck between the need for consistency and finality to contract interpretation as evidenced by prior arbitration awards and invading that province specifically reserved by the courts to the arbitrator - deciding the merits of the dispute. Where no material discrepancy of fact exists, the prior award should be applied. In these circumstances both interests are accommodated without undermining either."

The Union's argument that a material discrepancy of fact exists in the present case must, however, be rejected. There is no significant distinction between "retired" and "currently active employes" with regard to the computation of "length of service" payments. The issue to which Arbitrator Mueller's award was addressed was the manner in which length of service payments are to be calculated. Arbitrator Mueller in the Fogelberg Award answered this definitively by establishing calculation of benefits based upon the fiscal rather than calendar year under Article XIII, Section 14, Paragraphs D and E. The Union is not entitled to relitigate the interpretation of Article XIII, Section 14, and is bound by Arbitrator Mueller's interpretation. There is no evidence in the record to support the Union's argument that Article XIII, Section 14, changed.

Any Union reliance on Arbitrator Mueller's statements as to the intention of the parties to reduce or take away moneys from employes under the length of service provision is misplaced as the language of the award makes it abundantly clear that this is mere dicta in the context of the Fogelberg award.

The State at the hearing requested attorney's fees. The general policy of the Commission with respect to attorney's fees and costs in proceedings before it has been set forth in United Contractors, Inc. Decision No. 12053-A, B, 7/74 and Madison Teachers, Inc. Decision No. 16471-D, wherein the Commission has declined to grant attorney's fees, except where the parties had agreed otherwise, or unless it is required to do so by specific statutory authority. The only exception has been in cases where the Commission found an employe to have been denied fair representation. Accordingly, the State's request for attorneys fees is denied.

Dated at Madison, Wisconsin this 22nd day of June, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Robert M. McCormick
Robert M. McCormick, Examiner