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 CLXXXII No. 30285 PP(S)-90 Decision No. 20144-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. Edward A. Corcoran, Attorney at Law, Department of Employment Relations, 149 East Wilson Street, Madison, Wisconsin 53702, appearing on behalf of Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Wisconsin State Employees Union (WSEU), AFSCME, Council 24, AFL-CIO, having on August 24, 1982 filed a complaint with the Wisconsin Employment Relations Commission alleging that the State of Wisconsin has committed certain unfair labor practices within the meaning of the State Employment Labor Relations Act (SELRA); and the Commission having appointed Coleen A. Burns, a member of its staff, as Examiner to make and issue Findings of Fact, Conclusions of Law and Order pursuant to Section 111.07, Stats.; and hearing on the Complaint having been held before the Examiner in Madison, Wisconsin on January 26, 1983 and May 25, 1983; and post-hearing briefs having been filed by August 24, 1983; and the Examiner having considered the evidence and arguments makes and issues 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 within the meaning of Section 111.81(9), Stats., and has its principal offices at 5 Odana Court, Madison, Wisconsin 53719.

2. That the State of Wisconsin, hereinafter referred to as the Respondent, is an employer within the meaning of Section 111.81(16), Stats., and is represented by its Department of Employment Relations, which has offices at 149 East Wilson Street, Madison, Wisconsin 53702.

3. That at all times material hereto the Respondent and the Complainant were parties to a collective bargaining agreement which provided for the final and binding arbitration of grievances arising thereunder.

4. That on or about May 19, 1981, the Complainant filed a grievance alleging that the Respondent had violated the parties' collective bargaining agreement when it discharged Paul Aspatore; that the grievance was denied by the Respondent and ultimately appealed to arbitration; and that on March 20, 1982, Arbitrator George Fleischli issued the following award on the Aspatore grievance:

> The decision to discharge the grievant was without just cause and therefore in violation of Article IV, Section 9 of the agreement. The Employer is hereby directed to immediately

reinstate the grievant to his position as a Correctional Officer II at its Green Bay Correctional Institution without loss of seniority or other benefits and to make him whole for lost wages by paying him a sum of money equal to the difference between what he would have earned had he not been so discharged and that which he earned or received that he otherwise would not have earned or received had he not been so discharged. In restoring the grievant's lost benefits, the Employer shall be required to reimburse the grievant for the actual cost of any alternative health insurance he may have purchased at his own expense in an amount not to exceed the amount it would have paid for such insurance on his behalf, had he not been so discharged. Reimbursement for lost wages and benefits shall be made within a reasonable period of time after they have been properly documented.

5. That in November 1980, the Complainant filed a grievance alleging that the Respondent had violated the parties' collective bargaining agreement when it discharged Dale Hawkinson; that the grievance was denied by the Respondent and ultimately appealed to arbitration; and that on May 12, 1982, Arbitrator Joseph B. Kerkman issued the following Award in the Hawkinson grievance:

1. The grievant is to be reinstated to his position of Correctional Officer II with back pay running from the time ten days after the date of his discharge until the date of his reinstatement. The back pay is to be offset by any unemployment compensation received by the grievant, any outside earnings from employment in which the grievant first became engaged after his termination, and any welfare assistance received by the grievant while he was unemployed. In the event, however, that the welfare agency makes claim for reimbursement of the welfare assistance received by the grievant, the Employer has the responsibility for reimbursing the welfare agency for said claim.

2. The reinstatement of the grievant is to be without loss of seniority and without loss of any fringe benefits to which he would have been entitled had he not been discharged. In the event that grievant expended moneys for health insurance premiums, grievant is to be reimbursed for said premiums, and if grievant experienced any medical claims which were not reimbursed by insurance coverages, the Employer is to make payment for said medical expenses, provided said expenses would have been covered by the group insurance program in force while grievant was employed.

6. That on August 24, 1982, the Complainant filed with the Commission the instant complaint, which was amended on January 21, 1983 without objection from the Respondent, alleging, inter alia, that the Respondent has violated the State Employment Labor Relations Act (SELRA), specifically Sections 111.84(1)(a), 111.84(1)(d), and 111.84(1)(e) by refusing to implement the Arbitration Awards of Arbitrators Fleischli and Kerkman; that in said Complaint, the Complainant requests the entry of an Order directing the Respondent to implement said Arbitration Awards as follows: (1) to pay for overtime opportunities unlawfully withheld and denied during the time the discharges were in effect and prior to the entry of the Arbitration Award; (2) to pay the grievants for weekend differential and holiday premium time which would and should have been paid to the grievants had they not been unlawfully discharged; (3) to return to Hawkinson the sum of $8,540.08 which the Respondent had deducted from his "reinstatement" check for the purpose of reimbursing Dodge County Social Services for welfare benefits paid to his wife and children; (4) to reimburse Hawkinson for the $500.00 in attorney fees which he expended in an effort to secure unemployment compensation benefits; and (5) to reimburse Aspatore for health insurance premiums which he was forced to pay during the time he was unlawfully discharged, and that Respondent requests such further and other relief as may be appropriate including, but not limited to, attorney fees.

7. That the Respondent filed an answer on January 13, 1983 and an amended answer on January 26, 1983, wherein the Respondent denies that it has violated the State Employment Labor Relations Act, as alleged by the Complainant, and, therefore, requests that the Complaint be dismissed on the merits; that as an Affirmative Defense, the Respondent asserts that the subject matter of the Complaint is an independent issue which should be deferred to the contractual grievance and arbitration procedure; and that Respondent further asserts that the Commission does not have jurisdiction to determine the merits of Complainant's allegations with respect to the payment of welfare benefits and attorney fees because acceptance of the Union's position would result in the modification and/or vacation of an arbitration award, a remedy which is outside the scope of the Commission's authority.

8. That the record fails to establish that either Arbitrator Kerkman or Arbitrator Fleischli was presented with evidence or argument that Respondent had a practice of not including overtime in back pay calculations involving reinstatement situations, or that Complainant specifically requested Arbitrators Kerkman and Fleischli to reimburse Hawkinson and Aspatore, respectively, for lost overtime opportunities.

9. That Article IV, Section 2, of the collective bargaining agreement contains the following language:

> . . .arbitrability unless the parties agree otherwise. Where the question of arbitrability is not an issue, the arbitrator shall only have authority to determine compliance with the provisions of this Agreement. The arbitrator shall not have jurisdiction or authority to add to, amend, modify, nullify, or ignore in any way the provisions of this Agreement and shall not make any award which in effect would grant the Union or the Employer any matters which were not obtained in the negotiation process.

that the Agreement does not specify which remedies are to be ordered by the Arbitrator, and that the Agreement does provide for payment of time and one-half for hours in pay status which are in excess of forty (40) hours per week.

10. That prior to his discharge on May 19, 1981 and following his return to work in early April, 1982, Aspatore was employed at the Green Bay Correctional Institution; that at all times material herein, officers such as Aspatore volunteered for overtime by signing a sheet for the days they wished to work overtime; that if overtime was needed, it was offered to the officers who had signed the sheet, according to seniority; that from June 1, 1980 through April 10, 1981, Aspatore signed for overtime on twenty-five days and worked all of those days for which he was eligible, sixteen; that from May 25, 1979 to June 1, 1980, Aspatore signed for overtime on twenty days and worked all but one of the thirteen days for which he was eligible; that from May 25, 1979 through April 10, 1981, there were days on which Aspatore would have been eligible to work overtime, but for which he did not sign; that the record fails to establish the number of days for which he was eligible, but did not sign; that the record is silent with respect to overtime opportunities available and/or worked prior to May 25, 1979 or between April 10, 1981 and the date of Aspatore's discharge; that if Aspatore had not been discharged, he would have been eligible to work overtime on forty-nine days during the period of May 20, 1981 through March 28, 1982, a period of approximately ten and one-half months; that if Aspatore had remained employed during the period of May 20, 1981 through March 28, 1982, his hourly rate would have increased from $6.725 to $7.399; and during the period of April 12, 1982 through August 20, 1982, Aspatore signed for overtime on twenty-two days and worked the ten days on which he was eligible.

11. That prior to his discharge on November 7, 1980 and following his return to work in May, 1982, Hawkinson was employed at the Waupun Correctional Institution; that prior to his discharge, overtime was offered on the basis of seniority; that following his return to work, Hawkinson was required to sign a slip indicating interest in overtime; that if overtime was needed, it was offered, on the basis of seniority, to those who had signed the slip; that from January 2, 1979 through November 6, 1980, with the exception of three occasions, all overtime was worked on a voluntary basis; that from January 2, 1979 through April 23, 1979, Hawkinson was eligible to work overtime on eleven days, of which he worked three, declined to work six, and on two was unavailable when called;

that from April 24, 1979 through November 6, 1980, Hawkinson was eligible to work overtime on seventy-seven days, of which he worked twenty-one, declined to work twenty-one, and, on thirty-five, was unavailable when called; that the record is silent with respect to overtime available and/or worked from August 11, 1977 through December 31, 1978; that if Hawkinson had not been discharged, he would have been eligible to work on sixty-six days during the period of November 7, 1980 through May 19, 1982; that during the period of May 27, 1982 through September 13, 1982, Hawkinson was eligible for overtime on sixteen days, of which he worked five, declined four, and, on seven, was unavailable when called; and that if Hawkinson had remained employed from November 7, 1981 through May 19, 1982, his hourly wage rate would have increased from $7.039 to $7.726.

12. That the Awards of Arbitrators Kerkman and Fleischli require Respondent to restore wages which were lost as a result of Respondent's unlawful discharge of Hawkinson and Aspatore, respectively; that Aspatore and Hawkinson would have worked overtime, but for their discharge; that overtime opportunities are wages which were lost as a result of Respondent's unlawful discharge of Aspatore and Hawkinson; that, therefore, the Awards require Respondent to reimburse Aspatore and Hawkinson for lost overtime opportunities; that Aspatore was unemployed for approximately ten and one-half months; that the record fails to establish a significant difference between the amount of overtime availabale in the ten and one-half month period preceding Aspatore's discharge, June 1, 1980 through April 10, 1981, and the ten and one-half month period during his discharge, May 20, 1981 through March 28, 1982; that it is reasonable for Respondent to reimburse Aspatore for the same number of overtime hours which he worked during the period of June 1, 1980 through April 10, 1981, inclusive; that Hawkinson was unemployed for approximately eighteen and one-half months; that the amount of overtime available in the eighteen and one-half months preceding Hawkinson's discharge, April 24, 1979 through November 6, 1980, inclusive, is significantly more than the overtime available during the eighteen and one-half month period of his discharge, November 7, 1980 through May 19, 1982; that it is unreasonable for Respondent to reimburse Hawkinson for the same number of overtime hours which he worked from April 24, 1979 through November 6, 1980; that in the aforesaid eighteen and one-half month period preceding his discharge, Hawkinson worked twenty-seven percent of the days on which he was eligible for overtime; that it is reasonable for Respondent to reimburse Hawkinson for twenty-seven percent of the overtime hours for which he would have been eligible during the period of his discharge, less any hours available during the suspension period imposed by Arbitrator Kerkman; that Aspatore's overtime rate is one and one-half times the hourly rate of $7.062, a wage equal to the average of each hourly rate he would have received during the period of his discharge; and that Hawkinson's overtime rate is one and one-half times the hourly rate of $7.383, a wage equal to the average of each hourly rate he would have received during the period of his discharge.

13. That Dodge County Department of Social Services issued $8,540.08 in Aid to Families with Dependent Children (AFDC) via checks made payable to Jacqueline Hawkinson, the wife of Dale Hawkinson; that the checks were issued for a period of time in which Hawkinson was unemployed due to his unlawful discharge; that Dodge County had the lawful authority to issue said checks to Dale Hawkinson and his wife, jointly or individually; that Dodge County had determined that the female parent was the more stable parent and, consequently, had a practice of issuing AFDC checks to the female parent; that the Hawkinson family was eligible for AFDC because there were dependent children in the household and, as a result of Dale Hawkinson's unemployment, the family had no income; and that Hawkinson was the biological father of the four children in his household.

14. That the $8,540.08 in AFDC is welfare assistance received by Hawkinson within the meaning of Arbitrator Kerkman's Award; and that, therefore, Respondent complied with the terms of the Award when it deducted the amount of the AFDC from Hawkinson's back pay and remitted the same to Dodge County, which had filed a claim for reimbursement of the $8,450.08 with Respondent.

15. That the May 12, 1982 Award of Arbitrator Kerkman contains a section entitled "The Remedy", which states, inter alia, as follows:

> The Union has requested that grievant be reinstated with full back pay, and benefits, and further requested that grievant be reimbursed for his out of pocket expenses for legal fees connected with his pursuit of his unemployment.

> compensation claim, and for his defense of the criminal charges against him in Dodge County Circuit Court. The Union cites no authority for reimbursement of legal fees, and the undersigned can find no precedent for such an award, consequently, there will be no reimbursement for legal fees which grievant incurred by reason of the pursuit of his unemployment compensation claim or the defense in the charges against him in Dodge County Circuit Court.

and that the Award does not require Respondent to reimburse Hawkinson for attorney fees which he expended in an effort to secure unemployment compensation benefits.

16. That during the period of his unlawful discharge, Aspatore expended the sum of $30 for stitches and a tetanus shot; that Aspatore has not submitted proof of payment of said medical expenses to the Respondent; that Arbitrator Fleischli's Award does not require Respondent to reimburse Aspatore for any medical expenses except for the cost of alternative health insurance; and that, therefore, Respondent is not required to reimburse Aspatore for the $30 expended for stitches and a tetanus shot.

17. That Aspatore was married in September, 1981; that Aspatore's wife paid health insurance premiums during his period of unemployment; that Aspatore submitted to Respondent a statement from his wife's employer setting forth the amount of premiums paid by his wife during the period of his discharge; that said statement fails to establish that the health insurance purchased by the wife provided health insurance coverage to Aspatore; that upon reinstatement, Aspatore and his wife were enrolled in the family insurance plan provided by Respondent; that the Award does not require Respondent to reimburse Aspatore for the purchase of health insurance premiums which do not provide health insurance coverage to Aspatore; that the Award, as a condition precedent to the reimbursement of health insurance costs, requires Aspatore to submit proper documentation that he has purchased alternative health insurance; that Aspatore has not submitted proper documentation and, therefore, Respondent has no obligation to reimburse Aspatore for the health insurance premiums requested in the Complaint; and that upon receipt of proper documentation, Respondent is required to reimburse Aspatore for the actual cost of any alternative health insurance, whether purchased by Aspatore or his wife, which provided coverage for Aspatore, in an amount not to exceed that which Respondent would have been required to pay for health insurance if Aspatore had not been discharged.

18. That Respondent admits that the Kerkman and Fleischli Awards require Respondent to reimburse Hawkinson and Aspatore for lost weekend differential and holiday premium pay; and that Respondent and Complainant stipulate that Respondent is required to pay Hawkinson the sum of $545.88 and to pay Aspatore the sum of $315.33 for lost weekend differential and holiday premium pay.

19. That the Complaint alleges that Respondent has refused and continues to refuse to implement the terms of the Awards of Arbitrators Kerkman and Fleischli, contrary to the provisions of SELRA; and that the Complaint was filed within one year of the issuance of the Awards.

20. That the parties' collective bargaining agreement defines a grievance as follows:

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

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

CONCLUSIONS OF LAW

1. That the Complaint is not barred by the one-year statute of limitations provided for in Secs. 111.07(14) and 111.84(4), Stats.

2. That the failure or refusal to comply with a lawful arbitration award which is final and binding upon both parties is an unfair labor practice in violation of Sec. 111.84(1)(e) and, therefore, the Commission has subject matter

jurisdiction to determine the merits of the instant complaint which alleges that Respondent has refused and continues to refuse to implement the terms of such an arbitration award; that the Commission has jurisdiction to adjudicate cases which allege unfair labor practice violations, even though the facts might also support a breach of contract claim which is resolvable through a contractual grievance and arbitration procedure; and that the decision to defer the alleged statutory violations to arbitration is a discretionary act.

3. That Respondent has not violated the provisions of the State Employment Labor Relations Act (SELRA) by refusing to reimburse Aspatore in the amount of $30 which he expended on medical treatment, or in refusing to reimburse Aspatore for the amount of health insurance premiums paid by his wife.

4. That Respondent has not violated the provisions of SELRA by refusing to reimburse Hawkinson for money expended on attorney fees in an effort to secure unemployment compensation benefits, or by deducting the sum of $8,540.08 from the back pay award of Hawkinson and remitting the same to Dodge County.

5. That Respondent violated Sec. 111.84(1)(e), Wis. Stats., when it failed to reimburse Hawkinson and Aspatore for weekend differential, holiday premium time, and overtime which they would have earned but for their unlawful discharge.

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

ORDER 1/

1. That to remedy its violation of Sec. 111.84(1)(e), Wis. Stats., Respondent, its officers and agents, shall immediately take the following affirmative action:

a. Cease and desist from failing or refusing to comply with the terms of the Awards of Arbitrators Kerkman and Fleischli.

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

b. Make Hawkinson whole by paying him the sum of $545.88 in weekend differential and holiday premium and by paying Hawkinson a sum of money equal to that which he would have received if he had worked twenty-seven percent of the overtime hours which would have been available during the period of his unlawful discharge, exclusive of any overtime hours which would have been available during the suspension period imposed by the Arbitrator, together with interest at a rate of 12% per year on the monetary amounts due, with interest to be calculated from May 12, 1982, the date on which Arbitrator Kerkman issued the Award.

c. Make Aspatore whole by paying him the sum of $315.33 in weekend differential and holiday premium and by paying Aspatore a sum of money equal to that which he would have received if he had worked the same number of overtime hours which he worked during the period of June 1, 1980 through April 10, 1981, inclusive, together with interest at a rate of 12% per year on the monetary amounts due, with interest to be calculated from March 20, 1982, the date on which Arbitrator Fleischli issued the Award.

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

2. In the event Aspatore submits proper documentation that Aspatore's wife's health insurance plan provided health insurance coverage to Aspatore during the period of his unlawful discharge, then Respondent, within a reasonable period of time after receipt of the documentation, shall reimburse Aspatore for the cost he and/or his wife incurred in purchasing the health insurance, in an amount not to exceed the amount Respondent would have paid for such insurance had Aspatore not been discharged.

3. It is further ordered that the Complaint be dismissed as to all violations of SELRA alleged, but not found herein.

Dated at Madison, Wisconsin this 30th day of May, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Coleen A. Burns
Coleen A. Burns, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

PLEADINGS:

In its complaint filed on August 24, 1982 and amended on January 21, 1983, the Complainant alleges that the Respondent has violated Section 111.84(1)(a), Section 111.84(1)(d), and Section 111.84(1)(e) of the State Employment Labor Relations Act (SELRA) by refusing to implement the March 20, 1982 Arbitration Award of George Fleischli, in which he reinstated Paul Aspatore; and the May 12, 1982 Arbitration Award of Joseph B. Kerkman, in which he reinstated Dale Hawkinson. Complainant requests an order requiring Respondent to comply with the terms of the Awards and requests such further and other relief as may be appropriate including, but not limited to, attorney fees. The Respondent denies that it has violated the State Employment Labor Relations Act and, as an Affirmative Defense, asserts that matters raised in the complaint should be deferred for resolution through the parties' contractual grievance and arbitration procedures. At hearing, the Respondent agreed that the grievants should be reimbursed for weekend differential and holiday premium time. In post-hearing briefs, the parties stipulated that Hawkinson and Aspatore should be reimbursed for weekend differential and holiday premium time in the amounts of $545.88 and $315.33, respectively.

POSITIONS OF THE PARTIES:

COMPLAINANT

Overtime and Health Insurance

Complainant, citing various court and agency decisions, argues that lost overtime opportunities and health insurance premiums are commonly included in make whole remedies. The Complainant denies Respondent's assertion that the private sector cases cited by the Complainant are not controlling.

Welfare Benefits

Complainant contends that Sec. 49.195, Wis. Stats., provides for repayment of welfare benefits received by the applying parent when the applying parent has acquired property by "gift, inheritance, sale of assets, court judgment or settlement of any damage claim". 2/ The Complainant avers that Hawkinson's wife, and not Hawkinson, applied for and received the welfare benefit. The Complainant further avers that the back pay Award was not property acquired by "gift, inheritance, sale of assets, court judgment or settlement of any damage claim". The Complainant maintains, therefore, that Respondent had no legal right to deduct the welfare payments from Hawkinson's back pay.

Attorney Fees

Complainant requests that Hawkinson be reimbursed for the $500 in attorney fees which he expended in an effort to secure unemployment compensation benefits.

2/ 49.195 Recovery of aid to families with dependent children. (1) If any parent at the time of receiving aid under s. 49.19 or at any time thereafter acquires property by gift, inheritance, sale of assets, court judgment or settlement of any damage claim, the county granting such aid may sue the parent to recover the value of that portion of aid which does not exceed the amount of the property so acquired. . .

RESPONDENT

Overtime

The Respondent denies that either Arbitration Award requires that the grievants be reimbursed for lost overtime opportunities. The Respondent avers that it would be inappropriate to require Respondent to pay overtime because the grievants did not request such a remedy from the Arbitrator. According to the Respondent, payment of overtime is also inappropriate because the grievants did not work the overtime and, therefore, did not suffer the disutility for which overtime is intended to compensate. Additionally, the Respondent asserts that overtime is too speculative to be considered an appropriate remedy.

The Respondent contends that the parties have had a past practice of not paying for lost overtime opportunities in reinstatement situations. According to the Respondent, the Complainant was aware of such practice as early as March, 1981. Since an unfair labor practice complaint is required to be filed within one year of the date that the Complainant became aware of the alleged violation, Respondent claims that the instant Complaint, filed in August, 1982, is untimely with respect to the issue of payment of overtime. According to the Respondent, the cases cited by the Complainant as authority for including lost overtime opportunity in back pay are neither controlling nor necessarily on point. The Respondent contends that the Fair Labor Standards Act of 1938; Section 103, Wisconsin Statutes; and Ind. 704.015, Wisconsin Administrative Code, require that a private sector employe be paid overtime for hours worked in excess of forty hours in a week. The Respondent argues that public sector employers are not required to pay such overtime but, rather, are required to pay only those amounts negotiated in the applicable collective bargaining agreement. The Respondent argues that the payment of overtime in a reinstatement case was never negotiated into the parties' collective bargaining agreement and, therefore, awarding such damages would be beyond the scope of the parties' contract. The Respondent asserts that Wisconsin Law requires that a person can only be held responsible for such consequences as may have been contemplated by the parties at the time the contract was entered into.

Welfare Benefits

The Respondent asserts that the Kerkman Award expressly requires that Hawkinson's back pay be reduced by any welfare assistance received while he was unemployed. Furthermore, the Award requires the Respondent to reimburse the welfare agency for any claims filed. Since Dodge County Social Services filed a claim in the amount of $8,540.08, representing the amount of welfare benefits paid to Hawkinson's family, the Respondent contends that it complied with the Award when it deducted the sum of $8,540.08 from Hawkinson's back pay and paid the claim of Dodge County Social Services. Respondent argues that it is immaterial that the welfare checks were payable to Mrs. Hawkinson, and not Hawkinson. Respondent argues that the welfare checks, regardless of payee, were received as a result of Hawkinson's unemployment and were used to support Hawkinson's family and, therefore, subject to reimbursement. According to the Respondent, an Examiner's decision which would disallow the offset would violate public policy and force Dodge County into needless litigation because Sec. 49.195, Wis. Stats., provides that a county granting aid can recover the amount granted if <u>any</u> parent receives property through the settlement of any claim (emphasis added).

Attorney Fees

Respondent asserts that Arbitrator Kerkman specifically rejected Hawkinson's claim for legal fees incurred in pursuit of unemployment compensation. Consequently, the Respondent denies that it has a duty to reimburse Hawkinson for the $500 in attorney fees which he expended in an effort to secure unemployment compensation.

Health Insurance

The Respondent asserts that Arbitrator Fleischli's Award directed Aspatore to furnish proof of payment of health insurance to the Respondent as a condition of reimbursement. The Respondent contends that Aspatore has failed to provide such proof and, therefore, denies that it has violated the Award.

DISCUSSION:

Jurisdiction

At hearing, Counsel for Respondent requested that the allegations with respect to payment of welfare benefits and attorney fees be dismissed on the basis that Complainant is seeking relief which the Commission does not have authority to grant, i.e., the vacation and/or modification of an arbitration award. The Examiner is persuaded, however, that the issue presented in the Complaint is whether or not Respondent has complied with the terms of an arbitration award. As Respondent acknowledges, the Commission has jurisdiction to order Respondent to comply with the terms of an arbitration award.

Respondent, in its answer, alleges that the Complaint raises issues which are resolvable through the parties' contractual grievance and arbitration procedures. Respondent requests, therefore, that the allegations in the Complaint be deferred to arbitration. 3/ The Commission, however, has jurisdiction to adjudicate cases which allege unfair labor practice violations even though the facts may also support a breach of contract claim resolvable through arbitration. 4/ Whether to exercise said jurisdiction or defer the alleged statutory violation to arbitration is a discretionary act. 5/ Where, as here, a statutory violation can be found without an interpretation of a provision of the parties' collective bargaining agreement, no useful purpose is served by deferring resolution of the allegations to arbitration.

Sec. 111.07(14), Stats., sets forth a one-year statute of limitations which is made applicable to the instant proceeding by virtue of Sec. 111.84(4), Stats. Since the instant Complaint alleges that Respondent has committed unfair labor practices by refusing to implement the Awards of Arbitrators Fleischli and Kerkman, the alleged violation could not have occurred prior to the issuance of the Awards on March 20, 1982 and May 12, 1982, respectively. 6/ Inasmuch as the Complaint was filed on August 24, 1982, it is clearly within the one-year period set forth in the statutes. The Examiner, therefore, rejects Respondent's assertion that the Complaint is untimely.

Overtime

Where, as here, the record fails to establish that either Arbitrator Kerkman or Arbitrator Fleischli was presented with evidence or argument that Respondent had a practice of not including overtime in back pay calculations involving reinstatement situations, there is no basis to conclude that the Arbitrators intended their Awards to conform to the alleged practice. Consequently, the Examiner rejects Respondent's assertion that it would be inappropriate to construe the Award in a manner which is inconsistent with the past practice.

As the Respondent argues, the record fails to establish that Complainant specifically requested Arbitrators Kerkman and Fleischli to reimburse Hawkinson and Aspatore for lost overtime opportunities. The failure to request a remedy, however, does not preclude an Arbitrator from ordering the remedy. Consequently, the Examiner rejects the Respondent's assertion that it is inappropriate to construe the Award as ordering a remedy which is not specifically requested.

3/ Respondent does not address this issue in either oral or written argument.

4/ State of Wisconsin, Department of Health and Social Services, 17218-A (3/17/81) at 9-10.

5/ State of Wisconsin, Department of Administration, and its Employment Relations Section, 15261 (1/13/78) at 8.

6/ Respondent asserts that the one-year statute of limitations commenced at sometime prior to the issuance of the Awards when, allegedly, Complainant first became aware of Respondent's practice of not including overtime in the calculation of back pay.

There is no genuine issue concerning the authority of an arbitrator to award back pay. Where, as here, the employer has unlawfully discharged an employe, an award of back pay necessarily compensates the employe for hours which have not been worked. Consequently, the Examiner rejects Respondent's assertion that reimbursement of overtime must be denied on the basis that the employes did not suffer the disutility of working overtime.

In a proceeding seeking enforcement of an Award, the Examiner must give effect to the language contained in the Award. Both the "back pay" Award of Arbitrator Kerkman and the "make whole" Award of Arbitrator Fleischli require Respondent to restore wages which were lost as a result of the unlawful discharge. Where there is a reasonable expectation that an employe would have worked overtime during the period of an unlawful discharge, overtime wages are wages lost as a result of the unlawful discharge. 7/ Consequently, overtime wages must be included in the calculation of back pay. The question to be determined herein is whether Aspatore and Hawkinson had a reasonable expectation of earning overtime during the period of their discharge.

Both Aspatore and Hawkinson would have been offered overtime opportunities if they had been employed during the period of their respective discharge. Furthermore, prior to their discharge and after their reinstatement, each worked overtime. There is, therefore, a reasonable expectation that each would have worked overtime if he had been employed during the period of his discharge. As a result, the Awards of Arbitrators Kerkman and Fleischli require that Hawkinson and Aspatore, respectively, be compensated for lost overtime opportunities.

Unless the record establishes that there is a significant difference between the amount of overtime available during the discharge period and the period of equivalent duration immediately preceding the discharge, equity is served by reimbursing the affected employe for the same number of hours as he had worked in the period preceding the discharge.

Aspatore was unemployed from May 20, 1981 through March, 1982, a period of approximately ten and one-half months. If Aspatore had remained employed during the period of his discharge, he would have been eligible to work overtime on forty-nine days. During the period of June 1, 1980 through April 10, 1981, the ten and one-half month period which preceded his discharge, Aspatore signed for overtime on twenty-five days and worked all of those days for which he was eligible, sixteen. 8/ According to Daniel Bertrand, Assistant Security Director at Green Bay Correctional Institution, the person who compiled the evidence on Aspatore's use of overtime, Aspatore did not sign for all the overtime opportunities for which he was eligible. The record, however, fails to establish the number of overtime opportunities for which he was eligible, but did not sign. 9/ As a result, the record does not warrant the conclusion that the amount of overtime available during the discharge period differed significantly from that which was available during the ten and one-half month period which preceded the discharge. With respect to Aspatore, therefore, equity is served by compensating him for the same number of overtime hours which he worked from June 1, 1980 through April 10, 1981.

Hawkinson was discharged on November 7, 1980 and returned to work on or about May 24, 1982, a period of approximately eighteen and one-half months. If Hawkinson had been employed during the period of his discharge, he would have been eligible to work overtime on sixty-six days. During the approximately eighteen

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7/ Dare Pafco, Inc., 73-2 ARB paragraph 8478 (High, 1973).

8/ Although Aspatore was discharged on May 19, 1981, the record is silent with respect to overtime opportunities available and/or worked between April 10, 1981 and the date of discharge. As a result, the applicable ten and one-half month base period is June 1, 1980 through April 10, 1981, inclusive.

9/ Given the information contained in the record, it is impossible to determine the total number of days on which Aspatore would have been eligible for overtime. Consequently, the percentage formula utilized in the Hawkinson remedy is inapplicable to Aspatore.

and one-half month period which preceded his discharge, April 24, 1979 through November 6, 1980, overtime was available on seventy-seven days, of which Hawkinson worked twenty-one days. The evidence with respect to Hawkinson, unlike Aspatore, establishes that significantly less overtime was available during the period of discharge than was available in the preceding period of equivalent duration. Consequently, it is not reasonable to reimburse Hawkinson for the same number of overtime hours which he worked from April 24, 1979 through November 6, 1980. Rather, it is more equitable to reimburse Hawkinson for the same percentage of overtime worked, i.e., twenty-seven percent. Respondent, therefore, is required to compensate Hawkinson for twenty-seven percent of the overtime hours for which he would have been eligible during the period of his discharge, less any hours available during the period of the suspension imposed by the Arbitrator.

Although the record contains evidence with respect to overtime available and worked following the discharges, the Examiner is persuaded that where, as here, the vast majority of overtime is worked on a voluntary basis, the assessment of damages should be based upon the period preceding the discharge, when payment of lost overtime opportunities is not at issue. By limiting the base period to pre-discharge overtime, one eliminates the question of whether the employe is "stacking the deck" by working more than "normal" amounts of overtime. Payroll records indicate that Aspatore and Hawkinson would have received a pay increase during their respective discharge periods. Since it is likely that a portion of the lost overtime opportunities would have been worked when each rate was in effect, it is reasonable to use the average of the two hourly rates as the base rate upon which to compute the overtime rate.

According to Respondent, however, an award requiring reimbursement of lost overtime opportunities is contrary to Wisconsin Law. Respondent asserts that reimbursement of lost overtime opportunities was not a remedy contemplated by the parties at the time of the execution of the contract and, therefore, Respondent cannot be held liable for such damages. Wisconsin Law, however, does not limit damages to those actually contemplated by the parties. Rather, Wisconsin Law limits liability to damages which "necessarily and foreseeably" flow from the breach. 10/ Overtime wages lost as a result of a discharge which violates the terms of a contract are damages which "necessarily and foreseeably" flow from the breach of the contract.

According to Respondent, public employers are exempt from the overtime provisions of the Fair Labor Standards Act and Wisconsin Statutes which are comparable thereto. Respondent argues therefore that, unlike private employers, public employers can only be compelled to pay overtime if they have agreed to pay overtime. Respondent denies that it has agreed to pay lost overtime opportunities in reinstatement situations. Respondent argues, therefore, that the Arbitrator has no authority to order Respondent to pay lost overtime opportunities. Inasmuch as the contract provides for the payment of overtime, it is immaterial that Respondent is exempt from the overtime pay requirements of the Fair Labor Standards Act. As Respondent argues, the contract does not expressly state that Respondent shall pay lost overtime opportunities in reinstatement situations. Respondent, however, has agreed to the final and binding arbitration of grievances. Consequently, Respondent has agreed to be bound by the Arbitrator's Award. Where, as here, the contract is silent with respect to the specific remedy to be imposed for breach of contract, an arbitrator is considered to have the right to fashion a remedy appropriate to the circumstances. There is no genuine issue as to the authority of an arbitrator to place the nonbreaching party in as favorable a position as if the contract had been performed. Since the record warrants a finding that Aspatore and Hawkinson would have worked overtime but for the discharge, reimbursement of lost overtime opportunities is consistent with the arbitral authority to make whole. Consequently, the Examiner rejects Respondent's assertion that the Awards exceed the contractual authority of the Arbitrators.

10/ Pleasure Time, Inc. v. Kuss, 78 Wis 2d 373, 385 (1976).

Welfare Assistance

Assuming, arguendo, as the Complainant contends, that the County would not prevail in a Sec. 49.195 suit for recovery of AFDC from Hawkinson, such a result does not make the Kerkman Award unlawful, nor does it make it unlawful for the Respondent to deduct the AFDC from Hawkinson's back pay. Arbitrator Kerkman was not seeking to ensure that the County received reimbursement for the AFDC in accordance with Sec. 49.195, but rather was seeking to restore the grievant to the economic position which he would have obtained but for the employer's violation of the contract. Where, as here, an employe is found to be unlawfully discharged, arbitrators commonly deduct interim earnings, i.e., money earned during the period of discharge, from the award of back pay. 11/ The rationale underlying the deduction of "interim earnings" being that, if the employee had not been discharged, he would not have had the opportunity to acquire the interim earnings and thus, if the grievant were allowed to keep his "interim earnings", he would be placed in a better position than if there had been no contract violation. Since contract damages are compensatory, the damaged party is not entitled to damages which place the party in a better position than if the contract had been performed. 12/ The Hawkinson family would not have been eligible for the $8,540.08 if Hawkinson had retained his employment. The AFDC, therefore, would not have been available but for the Respondent's decision to unlawfully discharge Hawkinson. To allow Hawkinson to benefit by the AFDC, as well as complete back pay, would have the result of placing Hawkinson in a better economic position than if he had not been unlawfully discharged. Although, as Arbitrator Kerkman recognized, it may be novel to offset an award of back pay by welfare assistance, it is not inconsistent with the principles underlying an arbitrator's authority to make a grievant whole.

Contrary to the contention of the Complainant, the Examiner is not persuaded that the AFDC offset must be disallowed on the basis that the AFDC checks were payable to Mrs. Hawkinson. Although the County had the authority to issue the AFDC checks to either Hawkinson or his wife, or in both names jointly, the County had the policy of issuing AFDC checks to the female parent. The name on the check, therefore, was not a matter of right, but rather of bureaucratic happenstance. Despite the fact that Mrs. Hawkinson was the payee, eligibility for the AFDC was the direct result of Hawkinson's unemployment. Furthermore, neither Hawkinson nor his wife would have been entitled to AFDC if the household had not contained children. 13/ The purpose of the AFDC was not to support Hawkinson or his wife but, rather, "to encourage and make possible more normal living conditions for dependent children." 14/ Since the evidence fails to establish that Mrs. Hawkinson did not share Hawkinson's household, or that the AFDC was expended in a manner other than that for which it was intended, the Examiner is persuaded that Hawkinson derived economic benefit from the AFDC payments. 15/ The Examiner concludes, therefore, that the $8,540.08 was "welfare assistance received by the grievant", within the meaning of Arbitrator Kerkman's Award. Consequently, the Respondent is entitled to deduct the sum of $8,540.08 from Hawkinson's back pay.

11/ Elkouri and Elkouri, How Arbitration Works, BNA Books (1981), p. 357-358.

12/ Dehnart v. Waukesha Brewing Co., 21 Wis 2d 583, 595 (1963).

13/ Hawkinson is the father of the four children who lived in his household.

14/ Stacy v. Ashland County Dept. of Public Welfare, 39 Wis 2d 595, 605 (1967).

15/ The fact that Hawkinson's unemployment made the family eligible for AFDC supports the underlying presumption herein, namely, that Hawkinson's wages supported his family when he worked. Therefore, welfare assistance which supported his family when he was unemployed was of economic benefit to Hawkinson.

Attorney Fees

The May 12, 1982 Award of Arbitrator Kerkman contains a section entitled "The Remedy", in which Arbitrator Kerkman denies Hawkinson's request to be reimbursed for "legal fees" incurred in the pursuit of his unemployment compensation claim. The Examiner, therefore, is satisfied that Arbitrator Kerkman's Award does not require the Respondent to reimburse Hawkinson for the $500 he expended when he retained an attorney in an effort to secure unemployment compensation benefits.

Health Insurance

Arbitrator Fleischli, in his Award, requires Respondent to reimburse Aspatore for the cost of any alternative health insurance which he may have secured during the period of his discharge, in an amount not to exceed the amount which Respondent would have paid for such premiums during the period of the discharge. Given the specificity of the language with respect to health insurance benefits, the Examiner is persuaded that the Award limits Respondent's liability with respect to medical expenses to money expended for health insurance premiums. Consequently, Respondent is not required to reimburse Aspatore for the $30 which he expended for stitches and a tetanus shot.

Many arbitrators accept the principle that an employe has a duty and responsibility to mitigate damages. By not securing alternate health insurance, an employe exposes himself to medical and hospitalization costs which far exceed that which the employer would have paid for health insurance premiums. Where an employe fails to secure alternate health coverage, an arbitrator could reasonably conclude that the resulting expense is due more to the inaction of the employe than the actions of the employer. Since the purpose of a "make whole" remedy is to reimburse the employe for damages resulting from the employer's action, it is not unreasonable to exclude expenses for which the employe can be said to be responsible. Consequently, limiting reimbursement to the actual cost of the alternative health insurance premiums is not inconsistent with the "make whole" remedy contained in the Award.

Although the record does not warrant the conclusion that Aspatore purchased health insurance at his own expense 16/, Respondent is required to reimburse Aspatore for such costs if he submits proper documentation. If, as Respondent argues, the health insurance premiums paid by Aspatore's wife were for single coverage of the wife, then Respondent is not required to reimburse the cost of such coverage; the reason being that the wife's single coverage did not provide a health insurance benefit to Aspatore. 17/ If, on the other hand, the documentation establishes that the insurance premium paid by Aspatore's wife provided health insurance coverage to Aspatore, then Respondent is required to reimburse Aspatore in accordance with the terms of the Award.

Weekend Differential-Holiday Premium Pay

The parties, in their briefs, stipulated to the fact that the Awards require Respondent to pay Hawkinson the sum of five-hundred and forty-five dollars and eighty-eight ($545.88) and to pay Aspatore the sum of three-hundred and fifteen dollars and thirty-three cents ($315.33) for weekend and holiday premium pay.

16/ Aspatore's testimony warrants the conclusion that he believed that his wife's insurance was a family plan, but that he was not certain.

17/ In making this determination, the Examiner is mindful of the fact that Aspatore testified that expenses incurred in the birth of his baby would have been covered by his wife's insurance.

CONCLUSION:

Contrary to the assertion of the Complainant, the Examiner finds no basis for concluding that Respondent has violated either Sec. 111.84(1)(a) or Sec. 111.84(1)(d) of SELRA. The record, however, supports the conclusion that Respondent has violated Sec. 111.84(1)(e) by failing to comply with the terms of a lawful arbitration award which, by the terms of the parties' collective bargaining agreement, is final and binding upon both parties; specifically, by failing to reimburse Aspatore and Hawkinson for overtime opportunities, weekend differential, and holiday premium pay which would have been received by Aspatore and Hawkinson but for their unlawful discharge.

Although Complainant requests reimbursement of attorney fees, the Commission does not award attorney fees in complaint proceedings except where the parties have agreed otherwise, the Commission is required to do so by specific statutory language, or there is a violation of the duty of fair representation. 18/ The exceptions are not present in the instant case and, therefore, Complainant's request for attorney fees is denied.

The Order provides interest on the monetary amounts due in accordance with the Commission policy articulated in Wilmot Union High School. 19/ The fact that interest was not specifically demanded in the Complaint is of no consequence. 20/ The applicable interest rate is the Sec. 814.04(4), Stats., rate in effect at the time the Complaint was filed.

Dated at Madison, Wisconsin this 30th day of May, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Coleen A. Burns
Coleen A. Burns, Examiner

18/ Racine Unified School District, 20735-A (3/12/84) at 14.

19/ Wilmot Union High School District, 18820-B (12/83) at 8-10, citing, Madison Teachers v. WERC, 115 Wis 2d 623 (Ct. App. IV No. 82-579, 10/25/83) and Anderson v. LIRC, 111 Wis 2d 245 (1983).

20/ West Side Community Center, Inc., 19212-B (3/5/84) at 6-7.