

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN STATE EMPLOYEES :
UNION (WSEU), AFSCME, (AMERICAN :
FEDERATION OF STATE, COUNTY AND :
MUNICIPAL EMPLOYEES), COUNCIL 24, :
AFL-CIO, :
Complainant, :
vs. :
STATE OF WISCONSIN, :
Respondent. :

Case CLXXXIII
No. 30322 PP(S)-91
Decision No. 20145-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. Sanford Coqas, 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 September 2, 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 in said matter to make and issue Findings of Fact, Conclusions of Law and Order pursuant to Sec. 111.07, Stats.; and hearing on the complaint having been held before the Examiner in Madison, Wisconsin, on December 29, 1982; and post-hearing briefs having been filed by February 21, 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 Sec. 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 Sec. 111.81(16), Stats., and is represented by its Department of Employment Relations which has its offices at 149 East Wilson Street, Madison, Wisconsin 53702.

3. That Respondent recognizes the Complainant as the exclusive collective bargaining representative of a number of classified state employees whose classifications have been allocated to the following statutorily created bargaining units: blue collar, technical, security and public safety, professional-social services and others; that the Respondent and Complainant at all times material hereto were parties to collective bargaining agreements which provided, inter alia, for a three step grievance procedure; and that at all times material hereto, grievances not resolved under the foregoing procedure could be appealed to an arbitrator whose decision thereon would be final and binding.

4. That pursuant to the arbitration provisions set forth in Paragraph Three, supra, Arbitrator Hoyt Wheeler entered an Award on July 17, 1978 which contained the following statement of the issue and Award:

No. 20145-A

ISSUE: The issue, as stipulated by the parties, is: "Whether the Employer has violated either Article VI, Section 2, or Article XIII, Section 3, para. 242F, and if so, what shall be the remedy?"

. . . .

AWARD: The Arbitrator is of the opinion to, and does hereby, SUSTAIN IN PART the grievances consolidated for hearing in this case. The Arbitrator interprets the collective bargaining agreement as providing that the Employer is in violation of the agreement when it reschedules vacations, or "compensatory holidays" for the sole purpose of avoiding the accumulation of hours in pay status which would entitle employees to overtime pay, but not when the Employer adjusts sick leave and compensatory time for this purpose.

5. That the Respondent and the Complainant were parties to the Award described in Paragraph Four, supra; that the dispute which was the subject of the Wheeler Award involved the Respondent's practice of "downing" time reports turned in by employees by a sufficient number of hours to reduce the hours in pay status during the week to forty (40) hours, thereby avoiding the payment of overtime; that as a result of the "downing", employees received time off, but not pay or credit, for non-worked hours in pay status (such as vacation, holiday and sick leave) when such hours came after the employee had accumulated forty (40) hours in pay status during the week; and that both worked hours in pay status and non-worked hours in pay status were counted (paid and credited) for the purpose of determining the initial forty (40) hours.

6. That on November 3, 1980, Trooper Kent filed the third step of a group grievance; that the third step of individual grievances were filed on August 16, 1981 by Trooper York and on August 17, 1981 by Troopers Nollenberg and Seymour; that all of the grievances involved the cancellation of either vacation or holiday time in instances where the employee was recalled to work from vacation or holiday; that each grievance requested payment of overtime for all time worked as a result of recall from the holiday or vacation; that the record fails to establish when the Respondent returned its third step response to Trooper Kent; that the Respondent returned its third step response to the York, Nollenberg and Seymour grievances on September 8, 1981; that Respondent has denied all the grievances on the basis that the Respondent has the right to cancel vacations when employees are called back to work; and that the Respondent has offered and continues to offer to submit said grievances to arbitration.

7. That the grievance of Trooper Kent states that the Respondent violates the contract and the Wheeler Award when it cancels the vacation of employees called back to work during that vacation; that the grievance requests that the Respondent return to the previous policy of paying employees time and one-half for all hours worked during the employees scheduled vacation and further requests that employees be made whole for any monetary loss incurred as a result of the vacation cancellation policy; and that the grievance seeks reimbursement to the Complainant for all expenses incurred as a result of the Respondent's failure to follow the contract and Award.

8. That the grievance of Trooper York states that during the week of May 30, 1981, he worked eight (8) hours on Sunday as scheduled, was off Monday, and scheduled for holidays on Tuesday through Friday; that he worked one hour on Thursday for a scheduled trial; that he claimed forty-one (41) hours of pay for the week; that the Respondent reduced the Thursday holiday from eight hours to seven hours; and that the reduction is inconsistent with the Wheeler Award and that he is entitled to one hour of overtime, plus penalty and interest.

9. That the grievance of Trooper Seymour states that on Tuesday, July 14, 1981, he was on vacation and was called back to duty to attend a court trial; that as a result of the call back, his vacation was downed by two and one-half (2 1/2) hours pay at the premium rate, plus penalty and interest.

10. That the grievance of Trooper Nollenberg states that he worked eight (8) hours on Sunday, Monday, Tuesday and Wednesday; that on Thursday he was scheduled for eight (8) hours legal holiday; that on Thursday he worked four and one-half

(4 1/2) hours at court trials; that his scheduled "comp-day" was reduced to three and one-half (3 1/2) hours, in violation of the contract; and that he is entitled to receive four and one-half (4 1/2) hours of overtime, plus penalty and interest.

11. That on September 2, 1982, the Complainant filed with the Commission the instant complaint, which was amended at hearing on December 29, 1982 without objection from the State, alleging, inter alia, that the July 17, 1978 Award of Arbitrator Wheeler is final and binding on the contractual grievances set forth in Paragraph Six, supra, 1/ and that by denying said grievances, the Respondent has violated Sec. 111.84(1)(e), Stats.; that at hearing on December 29, 1982, the State denied that the Wheeler Award of July 17, 1978 was final and binding with respect to the grievances set forth in Paragraph Five, supra, and further denied that the Respondent's conduct in the matter is in violation of Sec. 111.84(1)(e); and that, at hearing, the Respondent alleged that the instant complaint has not been timely filed.

12. That the instant grievances and the dispute which was the subject of the Wheeler Award involve an allegation that the Respondent has violated Articles VI and XIII of the relevant contract; and that, at all times material hereto, the language of Article VI and XIII relevant to the Wheeler Award and the instant complaint has remained unchanged.

13. That the grievance procedure with respect to the instant grievances was exhausted at the time that the Respondent returned its third step response to said grievances; that the Respondent returned its third step response to the York, Nollenberg and Seymour grievances on September 8, 1981, within one year of the filing of the instant complaint; and that the record fails to establish the date upon which the Respondent returned its third step response, if any, to the Kent grievance.

14. That the Wheeler Award does not contain any discussion of a factual situation wherein an employee is called back to work from a vacation or holiday; and that, in the Wheeler Award, the disputed conduct involved the "downing" of non-worked hours in pay status when such hours occurred after the employee had been credited with forty (40) hours in pay status for the week.

15. That the grievances which are the subject of the complaint involve a factual situation wherein the Respondent has cancelled the vacation or holiday of an employee who has been recalled to work during the vacation or holiday; that the York grievance involves the cancellation of non-worked hours in pay status which occurred prior to the accumulation of forty hours in pay status for the week; and that, therefore, there are material discrepancies of relevant fact between the instant grievances and the dispute governed by the Wheeler Award.

16. That the grievances which are the subject of the complaint involve the issue of whether or not the Respondent has the right to cancel vacations or holidays of an employee recalled to work during that vacation or holiday; that Arbitrator Wheeler does not address the issue of whether or not the Respondent has the right to cancel vacations or holidays when an employee is recalled to work; and that, therefore, the grievances which are the subject of the complaint do not share an identity of issue with the dispute which is governed by the Wheeler Award.

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 Arbitration Award of Hoyt Wheeler entered on July 17, 1978 is not res judicata as to the grievances which are the subject of the instant complaint and, therefore, the Respondent's actions do not violate said Award nor

1/ The complaint alleges that a similar grievance was filed by Trooper Flesch but no evidence with respect to that grievance was introduced at hearing.

constitute an unfair labor practice within the meaning of Sec. 111.84(1)(e) of the State Employment Labor Relations Act.

ORDER

IT IS ORDERED that the complaint in the instant matter be, and the same hereby is, dismissed. 2/

Dated at Madison, Wisconsin this 25th day of May, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By *Coleen A. Burns*
Coleen A. Burns, Examiner

-
- 2/ 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.

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER

Pleadings:

In its complaint filed on September 2, 1981, the Complainant alleges that the Respondent has violated the collective bargaining agreement between the parties and thereby violated Sec. 111.84(1)(c), Stats. Specifically, the Complainant alleges that in denying the contractual grievances filed by State Patrol Troopers Bradley Seymour, Keith I. Nollenberg, Eugene Kent, Clarence F. York, and James J. Flesch, the Respondent has refused and continues to refuse to implement the Wheeler Arbitration Award of July 17, 1978 in a final and binding fashion. At hearing on December 29, 1982, the Complainant, without objection by the Respondent, amended its complaint by alleging that the conduct of the Respondent violates Sec. 111.84(1)(e), Stats., and not Sec. 111.84(1)(c) as originally pled. At hearing, the Respondent answered the complaint and denied that it has violated Sec. 111.84(1)(e), Stats.

Positions of the Parties:

Complainant

The Complainant argues that the parties, issues, and pertinent contractual language of the instant grievances are identical to the parties, issues and pertinent contractual language of the grievance which was the subject of the July 17, 1978 Arbitration Award of Hoyt Wheeler. Therefore, the Wheeler Award is res judicata for all of the instant grievances. The Complainant's position is supported by memoranda prepared and circulated by the Department of Employment Relations and Department of Transportation. The Respondent, by failing to apply the Wheeler Award to the instant grievances, has committed and continues to commit unfair labor practices.

Respondent

The Respondent argues that in order for an Award to be res judicata, the grievance decided in the Award must share an identity of issue, party, and contract language with the grievances for which the doctrine of res judicata is claimed. The interpretation or application of that award by the Respondent, whether correct or not, is not relevant to the issue of res judicata. Therefore, the memoranda issued by the Respondent are not controlling herein.

The Wheeler Award involved the Respondent's practice of "downing" sick leave and vacation time when its use at the end of a work week would result in an employee obtaining overtime reimbursement. The instant grievances, however, involve the Respondent's practice of cancelling a Trooper's vacation when he or she is subpoenaed to appear in court for job-related purposes. The present issue was not clearly addressed by Arbitrator Wheeler. Therefore, the doctrine of res judicata is not applicable to the instant grievances. For that reason, the Respondent has offered and continues to offer to arbitrate the instant grievances. Furthermore, the complaint has not been timely filed.

Discussion:

Jurisdiction

The Respondent, in opening statement at hearing, raised for the first time the issue of the timeliness of the instant complaint. The issue of timeliness, however, was not addressed by either party in their post-hearing briefs. Sec. 111.07(14), Stats., sets forth a one year statute of limitation which is made applicable to the instant proceeding by virtue of Sec. 111.84(4), Stats. Where, as here, a collective bargaining agreement provides a grievance procedure for the voluntary settlement of disputes arising thereunder, the Commission will not entertain a complaint, on the merits, until the parties have exhausted said

voluntary procedures. 3/ In order to effectuate this policy, the one year period of limitation for filing of a complaint in such cases is computed from the date the grievance procedure was exhausted, provided the Complainant has not unduly delayed the grievance procedure. 4/

At all times material hereto, the parties' collective bargaining agreements have contained a three step grievance procedure. Grievances which are not resolved at the third step may be appealed to arbitration. Inasmuch as the Complainant is alleging that the doctrine of res judicata governs the disposition of the instant grievance and that, therefore, the Respondent has no right to insist that the instant grievances be submitted to arbitration, the Examiner is persuaded that, in the instant matter, the grievance procedure was exhausted at the time the Complainant received the Respondent's response in the third step of the grievance procedure. Since the Respondent's third step response to the grievances of Troopers York, Nollenberg, and Seymour were returned to the Complainant on September 8, 1981, within one year of the filing of the instant complaint, and there has been no allegation or evidence that Complainant unduly delayed the processing of said grievances, the Examiner concludes that the complaint, with respect to said grievances, has been timely filed. With respect to the group grievance filed by Trooper Kent, the record indicates that the third step grievance was received by the Respondent on November 4, 1980. The record, however, fails to establish when the Respondent returned its third step response. Inasmuch as the complaint is being dismissed on the merits and the unfair labor practice allegation concerning the Kent grievance does not differ materially from the allegation made with respect to the York, Nollenberg and Seymour grievances, the Examiner does not find it necessary to determine whether that portion of the complaint dealing with the Kent grievance has been timely filed. 5/

Res Judicata Effect of an Arbitration Award

The principle of res judicata is applicable to arbitration awards. 6/ An arbitration award will be found to govern a subsequent dispute in those instances where the dispute which was the subject of the award and the dispute for which the application of the res judicata principle is sought share an identity of parties, issue and remedy. 7/ In addition, no material discrepancy of fact may exist between the dispute governed by the award and the subsequent dispute. 8/

The Wheeler Award involves the practice of "downing" non-worked hours in pay status (such as sick leave, vaction and holidays) after an employe had accumulated forty (40) hours in pay status during the week. Worked hours in pay status and non-worked hours in pay status were counted (paid and credited) for the purpose of determining the initial forty (40) hours in pay status. In the instant complaint, however, the York grievance contains an allegation that hours in pay status (a holiday) were reduced prior to the accumulation of forty (40) hours in pay status, a factual situation not present in the Wheeler Award. Furthermore, there is no evidence that Arbitrator Wheeler was confronted with the practice complained of in the instant grievances, i.e., the cancellation of an employe's vacation or holiday in those situations where the employe is recalled to work. Therefore, a material discrepancy of fact exists between the dispute decided by Arbitrator Wheeler and the grievances which are the subject of this complaint.

3/ City of Madison, (15725-A) 1/31/79; Prairie Farm Joint School District No. 5 (12740-A) 5/30/75.

4/ Ibid.

5/ The complaint alleges that similar contractual grievances have been filed by James J. Flesch. No evidence, however, was introduced with respect to the Flesch grievance.

6/ Wisconsin Telephone Co., (4771) 2/59; Wisconsin Gas Co., (8118-C, E) 3/68; Handcraft Co. Inc., (10300-A, B) 7/71; Wisconsin Public Service Corp., (11954-D) 5/74; Department of Administration, (13539-C, D) 3/76; State of Wisconsin, (18084-A) 6/82.

7/ Department of Administration, (14823-A) 1/77.

8/ Ibid.

Moreover, the issue presented in the instant grievances, the Respondent's right, or lack thereof, to cancel the vacation or holiday of an employee recalled to work, was not addressed by Arbitrator Wheeler. The existence of material discrepancies of fact and the lack of identity of issues between the dispute governed by the Wheeler Award and the instant grievances precludes the application of the principle of res judicata herein.

Dated at Madison, Wisconsin this 25th day of May, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By *Coleen A. Burns*
Coleen A. Burns, Examiner