

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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WISCONSIN STATE EMPLOYEES	:	
UNION (WSEU), AFSCME,	:	
COUNCIL 24, AFL-CIO,	:	Case CLXXXV
	:	No. 30723 PP(S)-93
Complainant,	:	Decision No. 20200-A
	:	
vs.	:	
	:	
STATE OF WISCONSIN,	:	
DEPARTMENT OF EMPLOYMENT	:	
RELATIONS,	:	
	:	
Respondent.	:	
	:	

Appearances:

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

Mr. Thomas E. Kwiatkowski, Attorney at Law, Department of Employment Relations, 149 East Wilson Street, Madison, Wisconsin 53702, appearing on behalf of Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The Wisconsin State Employees Union (WSEU), AFSCME, Council 24, AFL-CIO having on December 1, 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 Douglas V. Knudson, 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 March 8 and 24, 1983; and at the hearing the Complainant having orally amended its complaint; and post-hearing briefs having been filed by June 17, 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 Wisconsin State Employees Union (WSEU), AFSCME, Council 24, AFL-CIO, hereinafter referred to as the Complainant, is a labor organization within the meaning of Sec. 111.81(9), Stats., and has its principal office 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 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, clerical, technical, security and public safety, and, others; that Respondent and Complainant, at all times material hereto, were parties to a succession of 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 of the the existing contract between the parties, Arbitrator Frank Zeidler entered an Award on September 25, 1978 which contained the following statement of the issue and Award:

THE ISSUE. The issue as stated by the Union: "Has the Employer violated Article VI, Section 3, by denying the employees a rest period? If so, the employees should be given rest periods."

The issue as stated by the Employer is: "Has the Employer violated Article VI, Section 3, by denying Daniel Bertrand rest periods, granted Article VI, Section?"

The arbitrator believes that this grievance is limited to Daniel Bertrand and is not a group grievance. Therefore the Employer's statement of the issue is being accepted.

AWARD. The grievance of Daniel Bertrand, Officer II, Green Bay Reformatory, that management is in violation of Article VI, Section 3 of the Agreement between the parties, is sustained. The clear language of the Agreement calls for all employees to receive rest periods during each one half shift, and management may not interpret this clause to mean that only some employees receive it. Management however should be given a reasonable period of time to study how to provide the rest period for the grievant with the least disruption and expense to management.

that Article VI, Section 3 of the 1977-79 contract between the parties read as follows:

. . .

Section 3: Rest Periods.

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

that said provision remained virtually unchanged in both the 1979-81 and 1981-83 contracts between the parties; and that the 1981-83 contract contained the following negotiating notes:

Negotiating Note

If disputes regarding rest breaks occur in the units represented by WSEU, the procedure developed for Correctional Officers and Youth Counselors shall be used as the model for resolving those disputes. If no agreement is reached, the Union and the employee(s) retain the right to process the issue through the grievance procedure, with the time limits beginning after the 60 day negotiating period.

Negotiating Note

Upon agreement on rest periods as a result of the negotiation procedure set forth in the negotiation note, the WSBU shall withdraw the ULP presently pending before the Wisconsin Employment Relations Commission which relates to this issue (Bertrand Case) and will withdraw the grievances filed by all Correctional Officers and Youth Counselors as part or all of those grievances.

The one-half step payment in December of 1981 and 1982 to Correctional Officers and Youth Counselors fully absolves the State of any liability under the grievances, Bertrand arbitration and the ULP for all time from the effective date of the agreements back to the time of the filing of the grievances.

Negotiating Note

CORRECTIONAL OFFICERS AND YOUTH COUNSELORS

Within the institution in the Department of Health and Social Services which employ Correctional Officers and/or Youth Counselors, the local Union and local management shall meet as soon as possible after the effective date of the Agreement to negotiate a solution to the problem of providing rest periods to all Correctional Officers and Youth Counselors. These negotiations shall take place in accordance with the provisions of Article XI, Section 2.

To begin the negotiation procedure, local management shall submit a list of the posts and types of break for each post to the local Union.

In these negotiations, the parties shall consider "Type A" (defined as a rest period for those work stations where an employee could reduce his/her activity while remaining at the station. The employee would either be expected to use his/her sound discretion in choosing an appropriate time for the reduction in his/her activity, or a set time would be established in advance and operational coverage would be increased by other employees during the break period for that particular assignment.) and "Type B" (defined as a rest period for those work stations where relief coverage could be provided within existing staffing levels.) breaks as potential solutions and shall also consider other types and kinds of solutions which may be appropriate for a particular post or institution, as may be mutually agreed to.

In the event disputes remain at the local level 40 days after the effective date of the Agreement, a department level meeting with representatives of the Department of Health and Social Services, Department of Employment Relations and Council 24 shall be held within 20 days to resolve any remaining differences. In institutions where agreement is reached, they shall go in effect notwithstanding unresolved issues at other institutions.

Absent agreement, no changes in present practices shall be made at any post in any institution. Following agreement, no changes shall be made in the practice with regard to any post unless there is mutual agreement to change the practice.

Any and all agreements relating to this issue shall be signed by both parties.

5. That on September 12, 1979 Complainant filed an unfair labor practice complaint alleging that Respondent had failed to implement Zeidler's arbitration; that, following a hearing on the matter, Examiner James D. Lynch issued a decision on October 17, 1980; that said decision was appealed to the Commission, which issued a decision on July 7, 1982; that, in its decision, the Commission held that Respondent had failed to comply with Zeidler's arbitration award and ordered Respondent to grant Bertrand either pay or time off with pay for the amount of rest period time he should have received pursuant to said arbitration award; and that the Commission further stated:

There is nothing in the award to indicate that the Arbitrator had been presented with the question of what constituted a rest period or that consideration of that issue

had any impact on his decision to order the State to provide the grievant with rest periods. The State is correct that the question of what constitutes a rest period within the meaning of the parties' agreement is a distinct question which should be resolved by the parties directly or through future resort to the established grievance and arbitration procedure.

. . .

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

6. That in October and November of 1980 grievances were filed on behalf of certain employees represented by Complainant alleging violations of the rest break provision of the contract between the parties at certain of the institutions operated by Respondent; that during the negotiations which culminated in the 1981-83 contract, the parties agreed each affected employee would receive a one-half step payment to absolve Respondent of any liability under the grievances arising prior to December 20, 1981; that the parties further agreed to enter into local negotiations to resolve the rest period issue; that the local negotiations produced agreements at several institutions but not at the following institutions, Dodge Correctional Institution, Central State Hospital, Ethan Allen School, Fox Lake Correctional Institution, and, Taycheedah Correctional Institution; that Respondent either continued existing rest period programs or implemented new rest period programs at the five institutions where local agreements had not been reached; and that the grievances covering the employees at said five institutions remained unresolved and resulted in the instant proceeding.

7. That in a letter dated August 26, 1982, Complainant requested Respondent to extend the remedy from the Bertrand case to those employees who were covered by the unresolved grievances over rest periods, to which request Respondent has not agreed; that on December 1, 1982 Complainant filed the instant complaint alleging that Respondent's conduct violates Sections 111.84(1)(c), (d) and (e) of the State Employment Labor Relations Act; and that at the hearing Complaint amended its complaint to further allege Respondent's conduct violates Sec. 111.84(1)(a), Stats.

8. That the arbitration award of Frank Zeidler, dated September 25, 1978 did not define rest period, and therefore, said award did not resolve the issue of whether the provision of "Type A" rest periods satisfied the contractual requirement for all employees to receive one fifteen minute rest period during each one-half shift; that the dispute in the instant proceeding involves a different issue and facts than did the proceeding before Arbitrator Zeidler; and that the principle of res judicata is applicable to an arbitration award where subsequent disputes both share an identity of parties, issue and remedy, and, have no material discrepancy of fact between the subsequent disputes and the dispute which was the subject of the arbitration award. 1/

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

CONCLUSION OF LAW

That the arbitration award of Frank Zeidler, dated September 25, 1978, is not res judicata as to the question of what constitutes a rest period within the meaning of the parties' collective bargaining agreement, which is an issue in the grievances involved in the instant complaint; and that, therefore, Respondent's refusal to extend to all affected employees represented by Complainant the same remedy, as was extended to one employee in Arbitrator Zeidler's award dated September 25, 1978, does not constitute an unfair labor practice within the meaning of Sections 111.84(1)(a), (c), (d) or (e) of the State Employment Labor Relations Act.

1/ State of Wisconsin, 20145-A, 5/83.

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

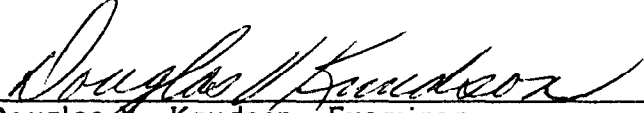
ORDER

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

Dated at Madison, Wisconsin this 5th day of August, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Douglas A. Knudson, Examiner

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- 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,
CONCLUSION OF LAW AND ORDER

Pleadings:

In its complaint filed on December 1, 1982 and amended at the hearing on March 8, 1983, Complainant alleges that Respondent has committed unfair labor practices within the meaning of Sec. 111.84(1)(a), (c), (d) and (e), Stats., by refusing to apply the terms of an arbitration award by Frank Zeidler to all employees of Respondent who are situated similarly to the grievant in Zeidler's case. Respondent's answer denied Complainant's allegations that its actions violated any part of Sec. 111.84(1), Stats. At the hearing Respondent moved for a dismissal of the complaint on the basis that the complaint failed to allege a violation of any provisions of the State Employment Labor Relations Act. The Examiner reserved ruling on said motion.

Position of Complainant:

Complainant argues that all of the grievances on rest periods, filed subsequent to that of Daniel Bertrand, are controlled by the Commission's decision in Bertrand's case. Such a conclusion is compelled by commonly accepted principles of res judicata and/or collateral estoppel. All of the material issues were completely litigated in the Bertrand decision, including a rejection of Respondent's defense concerning different types of rest periods, i.e., "type A" and "type B". Further, Complainant believes that its position is supported by the contract language, the language of the negotiating notes and the attempted settlement of the matter proposed by Respondent.

Complainant requests that Respondent be directed to implement the terms of the Zeidler arbitration award, as modified and confirmed by the Commission, for all employees covered by the pending grievances. Complainant also seeks such other relief as may be appropriate, including, but not limited to, attorneys' fees, costs and disbursements.

Position of Respondent:

Respondent contends that the Commission previously rejected Complainant's res judicata argument, in the Zeidler case, with respect to other employees, and left the grievances in the instant matter for processing through the contractual grievance and arbitration procedures. The principle of res judicata does not apply herein, because the issues, remedy and facts are different. Further, the Zeidler award neither defined a rest period, nor, determined that employees other than Bertrand had been denied rest periods. Additionally, the relevant language of the current contract is different from the language involved in the Zeidler case.

Any potential remedy was modified by the one-half salary step increase paid for any liability arising prior to December 20, 1981.

Since the definition of a rest period has not been determined, the Commission is unable to decide if Respondent has committed a violation by granting certain types of periods. Therefore, the complaint should be dismissed.

Discussion:

The principle of res judicata is applicable to arbitration awards. 3/ 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,

3/ State of Wisconsin, 20145-A, 5/83.

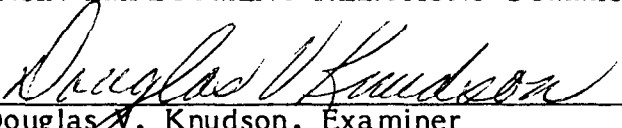
issue and remedy. 4/ In addition, no material discrepancy of fact may exist between the dispute governed by the award and the subsequent dispute. 5/

The Zeidler award involved a grievance by Bertrand alleging a denial of any rest periods. Although the grievances at issue herein allege a failure to receive rest periods per the terms of the contract and the award of Arbitrator Zeidler, the record does not establish that Respondent has failed to grant rest periods to other employees, but rather, reveals that the parties disagree herein over whether the type of rest periods, i.e., "Type A", being given to some employees constitutes compliance with the contract and Zeidler's award. The resolution of such a disagreement requires a determination of the question of what constitutes a rest period. It is clear from the record that in the decisions involving the Bertrand cases neither Zeidler nor the Commission dealt with the question of what constituted a rest period within the meaning of the parties' contract. In fact, the Commission specifically stated that such a question should be resolved through the grievance and arbitration procedure. 6/ Therefore, the lack of identity of issues and material facts between the dispute governed by the Zeidler award and the grievances involved herein precludes the application of the principle of res judicata to those grievances.

Dated at Madison, Wisconsin this 5th day of August, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


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4/ Ibid.

5/ Ibid.

6/ State of Wisconsin, 17313-B, 7/82.