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 193 No. 31820 PP(S)-100 Decision No. 20910-B

Appearances:

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

Mr. Sanford N. Cogas, Attorney at Law, Department of Employment Relations, 149 East Wilson Street, Madison, Wisconsin 53702, appearing on behalf of the Respondent.

ORDER MODIFYING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Examiner Daniel J. Nielsen having, on August 29, 1984, issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above-entitled proceeding, wherein he concluded that Respondent had committed unfair labor practices within the meaning of Secs. 111.84(1)(a) and (e) of the State Employment Labor Relations Act (SELRA) and ordered remedies for said violations; and Respondent having, on September 7, 1984, timely filed a petition for Commission review of said decision; and the parties having filed briefs in this matter until December 18, 1984; and the Commission having reviewed the record, including the petition for review and the briefs filed in support of and in opposition thereto; and the Commission being satisfied that the Examiner's Findings of Fact, Conclusions of Law and Order should be modified;

NOW, THEREFORE, it is

ORDERED 1/

1. That the Examiner's Finding of Fact 9 is hereby modified to read as follows:

> 9. That the Fleischli Award did not specifically order Respondent State to do anything or to refrain from doing anything as regards personnel outside Highway District 4; and that, therefore, Respondent State has complied with the remedial action required of it by Arbitrator Fleschli therein.

1/ Pursuant to Sec. 227.11(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.12(1) and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats.

227.12 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the

(Footnote 1 continued on Page 2)

In all other respects, the Examiner's Findings of Fact are hereby affirmed.

2. That the Examiner's Conclusions of Law 3, 4 and 5 are hereby modified to read as follows:

> 3. That the State of Wisconsin, by failing to pay to Paul Weidner until December 12, 1983, the monetary relief ordered by Arbitrator Fleischli in his February 23, 1983 Award, refused to accept the terms of an arbitration award, in

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(Footnote 1 continued)

grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025 (3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.12, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.11. If a rehearing is requested under s. 227.12, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.20 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

violation of Sec. 111.84(1)(e), Stats., and committed a derivative act of interference in violation of Sec. 111.84(1)(a), Stats.

4. That by failing to do in the other seven Highway Districts what it did in District 4 with regard to the Fleischli Award, Respondent State did not refuse to accept the terms of an arbitration award in violation of Sec. 111.84(1)(e), Stats., and did not interfere with employe rights in violation of Sec. 111.84(1)(a), Stats.

In all other respects, the Examiner's Conclusions of Law are hereby affirmed.

3. That the Examiner's Order in this matter is hereby modified to read as follows:

IT IS HEREBY ORDERED that the Respondent, State of Wisconsin, its officers and agents shall immediately:

1. Cease and desist from failing to implement back pay orders in grievance arbitration awards within a reasonable time of its receipt of such awards.

2. Take the following affirmative actions which the Commission deems necessary to effectuate the underlying purposes of SELRA:

   a. Pay to Paul Weidner interest on the monies due him as of February 23, 1983 under the terms of the Fleischli Award, at the statutory rate of 12% per year 2/, for the period from February 24, 1983 through December 12, 1983.

   b. Notify all bargaining unit employes in its Division of Highways by posting in all Highway District Offices a copy of the Notice appended hereto as "Appendix A"; and

   c. Notify the Wisconsin Employment Relations Commmission in writing within 20 days of the date of this Order regarding what steps it has taken to comply with this Order.

Given under our hands and seal at the City of Madison, Wisconsin this 7th day of March, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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Marshall L. Gratz, Commissioner

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Danae Davis Gordon, Commissioner

2/ The applicable interest rate is the Sec. 814.04(4), Stats., rate in effect at the time the complaint was initially filed with the agency. Wilmot Union High School District, Dec. No. 18820-B (WERC, 12/83), citing, Anderson v. LIRC 111 Wis.2d 245, 258-59 (1983) and Madison Teachers Inc. v. WERC, 115 Wis.2d 623 (CtApp IV, 10/83). The instant complaint was filed on June 24, 1983, at a time when the Sec. 814.04(4), Stats., rate in effect was "12% per year." Sec. 814.04(4), Wis. Stats. Ann. (1983).

APPENDIX "A"

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the purposes of the State Employment Labor Relations Act, we hereby notify our employes that:

The State of Wisconsin will cease and desist from failing to implement back pay orders in grievance arbitration awards within a reasonable time of its receipt of awards containing back pay orders.

STATE OF WISCONSIN
DIVISION OF HIGHWAYS

BY: _____

THIS NOTICE MUST BE POSTED FOR THIRTY DAYS FROM THE DATE HERETO AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY MATERIAL.

DEPARTMENT OF EMPLOYMENT RELATIONS (BLUE COLLAR & NONBUILDING TRADES)

MEMORANDUM ACCOMPANYING
ORDER MODIFYING EXAMINER'S
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Background:

In its complaint initiating this proceeding, the Complainant alleged that the Respondent committed unfair labor practices within the meaning of Secs. 111.84(1)(a), (d) and (e), Stats., by refusing to comply with the terms of an arbitration award requiring Respondent to pay the individual grievant compensation for travel time. The Respondent, in its answer, denied that it had committed unfair labor practices, and alleged that a subsequent grievance had never been filed and that the arbitrator's award was invalid and in excess of his authority.

The Examiner's Decision:

The Examiner initially discussed the nature of the case as tried before him in comparison to those issues raised on their face by the complaint and answer. The Examiner found that the parties tried somewhat different issues than were raised in the pleadings, and that these issues, despite the failure of either party to amend its pleadings formally, had been properly heard. The issues as reformulated during the course of the hearing focused, in the Examiner's view, on "the failure of the State to pay interest to affected individuals and the application of the award only to District 4 personnel". The Examiner reviewed the applicable rules of the Commission and noted that the parties had stipulated to the relevant facts, including the limited scope given the award by the Respondent Employer. The Examiner further noted that both parties had argued the scope of the award in their briefs, and he found that because neither party had raised any objection to that issue being considered by the Examiner, it was properly before him.

The Examiner concluded that the issue of interest on monies owing to the Grievant was present in the proceeding, on the basis that prejudgment interest on back pay is available as a matter of law if monies are in fact owed and need not be specifically pled, citing, Madison Teachers, Inc. v. WERC. 3/ The Examiner found that the issue of interest on payments to employes other than the individual Grievant was raised neither by the pleadings nor by the Complainant's brief; and that therefore, despite the Respondent's mention of such interest payments in its brief, that issue was not properly before him. The Examiner therefore declined to consider it.

The Examiner found that subsequent to the filing of the complaint but prior to the hearing, the Respondent had requested that all employes in Highway District No. 4 who were represented by Complainant file claims for any amounts owing to them under the award. The Examiner found that Respondent had paid, on or about December 12, 1983, the full amounts claimed by the nine employes (including the original Grievant) who filed claims, but that the Respondent did not pay any interest on these monies. The Examiner found that the Respondent did not cure the unfair labor practice arising out of its failure to comply with the award by its subsequent compliance, but merely mitigated damages due to the original Grievant, Paul Weidner. The Examiner therefore ordered the Respondent to pay interest on monies due to Weidner from the date of the arbitrator's award until the date that the principal sum owing to the Grievant had in fact been paid.

With respect to the scope of the arbitration award, the Examiner found that the Respondent had stipulated that it had not applied the award outside District 4. The Examiner found that a fair reading of the award, however, demonstrated that the issue litigated before and decided by the arbitrator was not

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3/ 115 Wis.2d 623, 630 (CtApp IV, 1983).

limited to employes in District 4, but rather to all similarly situated employes statewide. The Examiner considered the arguments of the Respondent, as reflected in the arbitrator's award, and noted that the Respondent's primary arguments before the arbitrator focused on bargaining history, which was of statewide implication. The Examiner concluded that the arbitrator's discussion focused in turn on an interpretation of contractual language which also was implicitly of statewide application. The Examiner found that the arbitrator had expressly disclaimed the existence of any past practice unique to District 4 which would have led to the granting of the grievance, and he concluded that the rationale of the award indicated that it was intended to be implemented statewide. The Examiner noted that in Department of Administration (Security and Public Safety), 4/ the Commission rejected a similar employer defense because the parties involved had understood the issue there to be the proper interpretation of a contractual term, rather than the unique contractual rights of one employe. The Examiner therefore concluded that the Respondent had failed to comply with the terms of the award by limiting it to employes within District 4, and the Examiner ordered the State to prospectively apply the terms of the arbitration award to all similarly situated employes statewide.

The Petition for Review and Positions of the Parties Concerning Same:

The Respondent's petition for review asserts that the Examiner's Finding of Fact 9 and Conclusions of Law 4 and 5 raise substantial questions of law and policy, but noted that Respondent would comply with the provisions of the Examiner's Order No. 2. a. The Respondent argues that the application of the award's terms beyond Highway District No. 4 is contrary to the terms of the award itself and that there is nothing in the award to indicate an intention on the part of the arbitrator to extend the scope of the award to that degree. In particular, the Respondent contends that the arbitrator's order clearly states that "District 4 personnel should be instructed that eighteen mile limitation contained in said provision is not applicable to temporary field locations, as requested in the grievance." (Respondent's emphasis). The Respondent contends that the Grievant "got exactly the relief that was requested" and that the Examiner cannot grant relief more expansive than that originally requested by the Grievant and ordered by the arbitrator.

The Complainant opposes the petition for review on the grounds that the Examiner's decision fairly read the arbitrator's award and its implications, and applied the proper scope to them. The Complainant argues that the Employer here is not Highway District No. 4, but the State of Wisconsin as a whole, and that the State negotiated and signed the collective bargaining agreement which has statewide application. The Complainant contends that the original grievance requested relief for all employes similarly situated and that the Employer realized the extent of this relief, quoting from the Employer's brief to the arbitrator, "as many as fifteen hundred employees could be affected". The Complainant further argues that the Employer speaks out of both sides of its mouth by contending in its brief to the Commission that the award applies only to the Grievant, while simultaneously extending the terms of the award to all District 4 employes. The Complainant requests that the Examiner's decision be affirmed in all respects.

Discussion:

The petition for review does not challenge the Examiner's Findings of Fact and Conclusions of Law concerning interest owing to the original Grievant, and our review of the record persuades us that there is no reason to disturb said Findings and Conclusions on this issue.

With respect to the scope of the award, this is not a case in which either party asserts that the Commission should effect a modification of the arbitrator's award. Rather, our role is to interpret and apply the terms of the arbitrator's decision and award in determining whether the State has complied with its remedial requirements.

4/ Dec. No. 14823-C (WERC, 10/77).

In the "Award" section of his award, arbitrator Fleischli stated his outcome and remedy as follows:

> The Employer has violated Article VI, Section 2 A(3)(b)(3) of the Labor Agreement by disallowing travel time from the employee's motel to the work site when staying in the field on a work assignment because said provision does not apply to such travel time. The Employer is therefore directed to pay the grievant, Paul W. Weidner, a sum of money equal to the wages he lost as a result of such disallowance. Further, District 4 personnel should be instructed that the 18 mile limitation contained in said provision is not applicable to temporary field locations, as requested in the grievance.

The arbitrator described the grievance before him as follows: 5/

> The grievance alleges that the Employer's refusal to allow the grievant to measure his starting and ending time from his departure from or arrival back at the motel is violative (. . .) of the agreement.
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> . . .
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> The grievance goes on to state:
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> "The aggrieved paragraph defines work time as including the time incurred while travelling in excess of 18 miles from an employee's home work station or place of residence.
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> "District policy normally requires our represented employees to stay in a temporary field location (motel, rooming house, etc.) when their job duties are 35 miles or more from the headquarters city.
>
> "Since a temporary field location is neither an employee's home work station or place or residence, we feel that the 18 miles criteria cannot be applied to such locations as is now the policy in District policy.
>
> "Relief sought - District 4 personnel be instructed that the 18 mile criteria is not applicable to temporary field locations."

The arbitrator had formulated the issue for determination in the case as follows:

> "Has the Employer violated Article VI, Section 2-A(3)(b)(3) of the Labor Agreement by disallowing travel time from the employee's motel to the work site when staying in the field on a work assignment?"

A reading of the arbitrator's decision strongly suggests that the scope of possible remedial order was not a primary focus of the presentations to the arbitrator. 6/ In that regard, however, the arbitrator did state that the Employer "notes that the concept (advanced by the Union) would affect a large number of employes in many departments, because the language of the agreement applies to as many as fifteen hundred employees who are required to stay overnight" (Award at 11). The arbitrator also stated " . . . the Union points out that District No. 4 is only one small part of one division within a much

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5/ The Complainant submitted a copy of the underlying grievance with its brief. The grievance, however, was neither offered nor admitted as part of the Exhibits at the hearing before the Examiner, and its unilateral submission at this time is improper. We have therefore not considered it as evidence.

6/ The arbitrator noted that a verbatim transcript of the proceeding had been prepared. Neither party sought to introduce the transcript into the record in the complaint proceeding.

larger department. . . . The Union argues that the testimony of its witnesses establishes that a different policy has been followed in a number of Districts throughout the state. . . ." (Award at 7-8).

The arbitrator's careful discussion of these arguments and of the facts in the case was couched in terms of the specific rights of the Grievant under the specific fact situation present in the case. Typical of the arbitrator's discussion in that regard was his conclusion at one point that, ". . . nevertheless, it would appear that the Grievant is entitled to pay for travel time on the facts in this case." (Award at 22). Nowhere in his discussion does the arbitrator specifically refer to his decision or remedy as statewide in its intended scope. Moreover, the directive contained in the "Award" section of the decision quoted above specifically refers only to the Grievant and to District 4 personnel. The arbitrator's characterization of the position taken by the Union in the case before him does not appear clearly to involve a request for affirmative relief that is statewide in scope. Therefore, despite the State's argument to the arbitrator that "the concept" might apply statewide, it is not clear--from the arbitrator's description of the grievance, from his summaries of the parties positions and arguments, or from the terms of the remedial portion of the award itself--that a statewide grievance was contemplated or remedied in the case. These facts distinguish this case from Department of Administration, supra, relied on by the Examiner, because in that case the record clearly showed that the grievance was filed on behalf of "all employees . . . (similarly situated)" 7/ and was treated as such by both parties and by the arbitrator.

We therefore conclude that the Examiner erred by concluding that the Fleischli award, in and of itself, imposes an obligation on the State to take affirmative remedial action outside of Highway District No. 4. In our opinion, Respondent State has complied with the remedial requirements of the award on its face. Even if the remedial portion of the award were deemed ambiguous as to its scope, the discussion and arguments preceding it likewise fail to identify any clear claim by the Union such as would warrant a broader reading of the arbitrator's remedy. We have modified the Examiner's Conclusions of Law, Order, and Appendix "A" notice form accordingly.

It should be emphasized that our role in this case is merely to ascertain whether that the State has complied with the requirements of the remedial language of the Fleischli award; our role is not to determine whether that award is worthy of res judicata effect when and if a factually parallel grievance arises outside of Highway District No. 4. Thus, we are not deciding here whether the WERC would order the State to give res judicata effect to the award in a complaint case in which the Union alleges that the State is violating Sec. 111.84(1)(e), Stats., by refusing to apply the contract as interpreted in the Fleischli award in a future grievance arising outside District 4 which grievance is otherwise not materially different from the grievance dealt with in the Fleischli award. 8/ All we are concluding is that--contrary to the Examiner's conclusion--the State has met the requirements of the specific remedy ordered by

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7/ Supra, Note 3 at p. 4.

8/ See generally, Wisconsin Public Service Corp., Dec. No. 11954-D (WERC, 5/74) (WERC will determine in appropriate complaint cases whether an award must be given res judicata effect, rather than leaving that question for resolution by a second grievance arbitrator; res judicata effect will be ordered where the subsequent grievance is shown to be factually no different than that which was resolved in the award).

arbitrator Fleischli, albeit in so tardy a fashion as to warrant the interest ordered by the Examiner on Grievant Weider's back pay for the period of the delay.

Dated at Madison, Wisconsin this 7th day of March, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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Marshall L. Gratz, Commissioner

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Danae Davis Gordon, Commissioner