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 239 No. 37231 PP(S)-131 Decision No. 23885-B

Appearances:

Lawton & Cates, Attorneys at Law, 214 West Mifflin Street, Madison, Wisconsin 53703, by Mr. Richard V. Graylow, appearing on behalf of Complainant.

Ms. Susan C. Sheeran and Mr. Glen D. Blahnik, Employment Relations Specialists, Department of Employment Relations, 137 East Wilson Street, Madison, Wisconsin 53702, appearing on behalf of Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Wisconsin State Employees Union (WSEU), AFSCME, Council 24, AFL-CIO, having, on July 9, 1986, filed a complaint with the Wisconsin Employment Relations Commission alleging that the State of Wisconsin had 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 November 5, 1986 and January 20, 1987; and post-hearing briefs having been filed by May 5, 1987; 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(12), 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(8), Stats., and is represented by its Department of Employment Relations which has its offices at 137 East Wilson Street, Madison, Wisconsin 53702.

3. At all times material hereto, Respondent and Complainant have been signatories to various successive collective bargaining agreements; each agreement has covered several bargaining units represented by Complainant, e.g., blue collar and non-building trades, clerical and related, technical, and security and public safety; not all of the provisions in the agreement are applicable to all of the bargaining units; and employes in the various bargaining units are employed in a variety of Respondent's agencies.

4. On August 2, 1984, Arbitrator Leonard Bessman entered an Award, hereinafter Bessman Award, the caption to which is as follows:

In the Matter of the Arbitration
of a Dispute between

Sharon Mulak, Local 1, Wisconsin
State Employees Union, AFSCME
Council 24, AFL-CIO,

Grievant and Union

and

State of Wisconsin, State
Historical Society,

Employer

Opinion and Award
in Arbitration
Case Numbers 3867, 3957,
and 3958

In the opinion accompanying the Bessman Award, Arbitrator Bessman included a "Background" section which contained the following:

> Background
>
> The State of Wisconsin, including its agencies, and Wisconsin State Employees Union, AFSCME Council 24, AFL-CIO, and its affiliated locals, entered into a collective bargaining agreement on December 20, 1981 (the Agreement), which was in effect at the times pertinent to the three grievances presented for decision in this matter. The employer is the State Historical Society of Wisconsin (the Employer), and the bargaining unit is Local I (the Union), whose members are classified employees in the Clerical and Related Bargaining unit, as defined by the Wisconsin Employment Relations Commission.

The opinion also included the following statement of the stipulated issues:

> The Issues
>
> 1. Did the Employer violate Article VII of the Agreement by not posting the positions of Microfilm Technician 2, Program Assistant 3/Sales Desk, and Clerical Assistant 2/Mail Room?
>
> 2. Did the Employer violate Article XI, Section 14, of the Agreement by allowing nonbargaining unit employees to assume the duties of the vacated positions?

The Article XI, Section 14, language interpreted by Arbitrator Bessman is as follows:

> Article XI - Miscellaneous
>
> Section 14: Contracting
>
> 188 When a decision is made by the Employer to contract or subcontract work presently being performed by employes of the bargaining unit, the state agrees to a notification and discussion with the local Union not less than thirty (30) days in advance of the implementation.

When Arbitrator Bessman addressed the issue of the alleged violation of Article XI, Section 14, the factual situation being addressed was the Employer's use of limited term employes (LTEs) to perform work presently performed by bargaining unit members; the Opinion also contained a section entitled Statement of Facts, which included the following:

> Founded in 1846, the Employer receives state funds for the purpose of promoting 'a wider appreciation of the American heritage with particular emphasis on the collection, advancement, and dissemination of knowledge of the history of Wisconsin and of the West.' It collects historical and cultural resources, which it makes available to students, scholars, and the general public. In addition, it operates a museum, which displays artifacts in Madison and a historymobile, which serves as a traveling museum for residents in other parts of the state.

The Award issued by Arbitrator Bessman is as follows:

> Award
>
> For the reasons stated, it is ordered that henceforth whenever the Employer decides to hire limited term employees to perform work presently performed by members of the Union, the Employer give notification to the Union and afford the Union the opportunity for discussion with the Employer not less than thirty days in advance of the implementation, all in accordance with Article XI, Section 14, of the Agreement.

and the Bessman Award was issued pursuant to a provision in the collective bargaining agreement which provided for final and binding arbitration.

5. In May 1985, the Honorable Robert R. Pekowsky, Judge, Dane County Circuit Court, Branch 5, issued a Memorandum Decision and Judgment in which he confirmed the Bessman Award.

6. On August 20, 1984, M. James Severa, Employment Relations Officer at the State Historical Society of Wisconsin, issued the following letter:

> Mr Thomas D Ramsfield
> President Local 1
> WSEU AFL-CIO
> 126 South Franklin Street
> Madison Wisconsin 53703
>
> Dear Mr Ramsfield:
>
> This is to alert you that it is the intention of this agency to hire approximately 100 Limited Term Employees to work in the Historical Society's Madison headquarters building over the period of the next year. Most of these LTEs will be student-interns who are enrolled in academic and technical programs at the university or the technical college that coincide with the mission of the agency and the operation of its programs in the library, archives, museum and the several historic sites around the state.
>
> Most of the tasks performed by these appointees are characterized as basic clerical and labor support services and are not intended to emulate those presently or normally executed by staff represented by the Union who are in this employing unit. This work is offered as a practicum to apply and amplify their training with experience.
>
> It should be noted that this notice is sent solely to comply with the arbitrator's award related to this issue that was dated August 2, 1984 and that it is not our intention to establish this procedure as normal management practice.
>
> If you have any comments concerning any of the foregoing, please contact the writer.

7. On September 7, 1984, Ron Blascoe, President of AFSCME Local 1, issued the following letter:

M. James Severa
Employment Relations Officer
State Historical Society
816 State Street
Madison, WI 53706

Dear Mr. Severa,

This is to inform you that the union finds your letter of 20 August, announcing that you intend to hire 'approximately 100' Limited Term Employees (LTEs), wholely inadequate to meet the conditions of the union contract and the arbitrator's award.

The unambiguous intent of Art. XI, Sec. 14 of the union contract and the 2 August, 1984, decision by Arbitrator Leonard Bessman is to require the employer to supply the union with sufficient information so that the union can determine whether the LTEs will be doing work that is normally done by union members.

Your 20 August letter notes your intention to hire 'approximately 100' LTEs, sometime over the next year, to do 'basic clerical' work. You must agree that this information is inadequate to meet the intent cited above. Your conclusion that the LTEs' work is not intended to emulate work normally done by union members is not satisfactory. We could (sic) like to look at the positions ourselves and reach our own conclusion on that matter. And, frankly, it has been our experience at the Historical Society and elsewhere that LTEs often work side by side with our members doing the exact same work.

In addition, I must comment on your statement that 'this notice is sent solely to comply with the arbitrator's award...and that it is not our intention to establish this procedure as normal management practice.' The arbitrator's decision was that you must notify the union of your intent to hire LTEs because it is required that you do so under Art. XI, Sec. 14 of the contract that was negotiated and signed by representatives of the state and our union. Thus it is our view that the arbitration award applies as long as that contract is in effect. We are confident that future arbitrators will agree.

To conform with the intent of the contract and the 2 August arbitrator's award, we would like the following information:

1. A complete listing of the LTE positions you intend to fill and when you intend to fill them.

2. Position descriptions for each position with sufficient detail so that we can determine whether the work to be done is work that is normally done by union members. (Note that we also intend to use those position descriptions to ensure that after LTEs are hired they do not work beyond their job descriptions.)

Finally, let me assure you that our union is completely serious about ending the abusive uses of LTEs that have occured (sic) throughout the state and that we will devote all necessary resources in pursuing this matter.

If this is not clear to you, or if you have any questions, feel free to call me at 266-7250.

9. On August 19, 1985, Severa issued the following letter:

Mr Ronald J Blascoe
President Local 1 WSEU
AFSCME Council 24 AFL-CIO
126 South Franklin Street
Madison Wisconsin 53703

Dear Mr Blascoe:

In accordance with the arbitrator's decision related to this issue, which was rendered on August 2, 1984, this is to advise you that it is the intention of this agency to hire approximately 150 Limited Term Employes to work in our Madison headquarters building over the period of the next year.

Over 90% of these LTEs will be student interns who are enrolled in academic programs at the university or area technical college that coincide with the mission of the Society and the operation and implementation of its programs in the archives, library and museum, as well as the administrative, editorial and historic preservation offices in this city. The Division of Historic Sites also employs a number of LTEs as interpreters and grounds maintenance personnel at its several site locations around the state during the season that these are open to the public.

In the Madison facility, most of the tasks performed by these appointees are characterized as basic clerical and labor support services and are not intended to emulate those presently or normally executed by permanent staff who are in this employing unit. Rather, the work is offered as a practicum, in a historical institutional setting, so that these students can apply their academic training and amplify it with experience that will add to their job skills as potential future employes, both here and elsewhere.

If you have any comments concerning any of the foregoing, please contact the writer.

10. On August 20, 1986, Severa issued the following letter:

Mr Ronald J Blascoe
President Local 1 WSEU
1122 Spaight Street
Madison Wisconsin 53703

Dear Mr Blascoe:

In accordance with the arbitrator's decision relating to this issue, which was rendered on August 2, 1984, this is to advise you that it is the intention of this agency to hire approximately 200 Limited Term Employes to work in our Madison headquarters building and at the State Historical Museum on the Capitol Square over the period of the next year.

Over 90% of these will be student interns enrolled in academic programs at the University or Area Technical College that coincide with the mission of the Society and the operation and implementation of its various programs in the archives, publications, preservation, library, museum and fiscal and administrative services division in this city. In addition, the Division of Historic Sites employs a significant number of LTEs as interpreters, conservators and grounds maintenance personnel at its several site locations around the state during the months that these are open to the public.

In our Madison facilities, most of the tasks performed by these appointees are characterized as basic clerical and labor support services and are not intended to emulate to any extent those presently or normally executed by permanent FTE staff who are assigned to this employing unit. Rather, the work is

offered as a practicum in an historical institutional setting so that these students can apply their academic training and amplify it with experience that will add to their job skills as potential future employes here and elsewhere.

If you have any comments concerning any of the foregoing, please contact the writer.

11. On December 27, 1985, James G. Statton, Director, Classified Personnel Office, University of Wisconsin-Madison, issued the following letter:

Mr. Steve Preller
Local 171, WSEU
306 N. Brooks St.
Madison WI 53715

Dear Mr. Preller:

We have been advised by the Division of Collective Bargaining, Department of Employment Relations that the arbitration award you refer to in your letter of December 13, 1985 applies only to Local 1 and the State Historical Society. Consequently, we have been advised to refuse your request for notification, discussion and information based on your interpretation of that arbitration award.

The arbitration award referred to in this letter is the Bessman Award.

12. On January 23, 1986, Jim Ubich, a BMH-2, a member of the blue collar and non-building trades bargaining unit, employed at the University of Wisconsin-Madison Physical Plant, filed a grievance which alleges as follows:

In a letter dated 12/27/85 UW Personnel refused to notify Local 171 of jobs which have been contracted out to limited term employees on the UW Madison campus. Our request was made pursuant to Article 11/14/1 of the labor agreement. The employer has contracted out an increasing amount of work normally performed by bargaining unit employees by hiring a series or pool of LTE's and students to do our work. This non-provisional use of LTE's is illegal under state law and the employer's refusal to notify the union of their use violates the contract. The failure of the UW to notify the Union of the hiring of students to do work normally performed by bargaining unit employees also violates the contract.

the grievance filed by Ubich, hereinafter Ubich grievance, requested the following relief:

That the employer provide the following information on all students and LTE's it is presently contracting out bargaining unit work to: employee's name, employing unit, work unit, work address, work schedule, and the length of time the employer intends to employ each employee. The employer will provide the previous information for each new LTE or student that it contracts work out to. Notification to be according to the contract.

and that on March 6, 1986 the grievance was denied, without comment, by the Respondent.

13. The Ubich grievance is subject to the terms and provisions of the December 5, 1985 to June 30, 1987 collective bargaining agreement between Respondent and Complainant; and in this agreement, the language of Article XI, Section 14, interpreted by Arbitrator Bessman has been modified and renumbered to read as follows:

Section 15: Contracting Out

11/15/1 (BC, CR, SPS, T, RSA, PSS) When a decision is made by the Employer to contract or subcontract work normally

performed by employes of the bargaining unit, the state agrees to a notification and discussion with the local Union at the time of the Request for Purchase Authority (RPA) but not less than thirty (30) days in advance of the implementation. The Employer shall not contract out work normally performed by bargaining unit employes in an employing unit if it would cause the separation from the state service of the bargaining unit employes with the employing unit who are in the classifications which perform the work. It is understood that this provision shall not limit the Employer's right to contract for services which are not provided by the employing unit, services for which no positions are authorized by the legislature, or services which an agency has historically provided through contract (including, but not limited to, group home services, child caring institutions, and services under s. 46.036, Stats.) If an employe is involuntarily transferred or reassigned as a result of subcontracting, every reasonable effort will be made to retain the employe in the same geographic area and at the same rate of pay.

14. On July 9, 1986, the instant complaint was filed alleging that Respondent has violated Sec. 111.84(1)(a), (1)(b), (1)(c), (1)(d) and (1)(e), Stats., by refusing to implement the Bessman Award at the University of Wisconsin; Complainant further alleges that the Bessman Award is res judicata as to the Ubich grievance; and Respondent denies that it has violated any of the provisions of Sec. 111.84(1), Stats., and, further, denies that the Bessman Award is res judicata as to the Ubich grievance.

15. When Arbitrator Bessman uses the word "Employer" in his Opinion and Award, he is referring to the State Historical Society of Wisconsin; and the Bessman Award is limited by its terms to the State Historical Society of Wisconsin.

16. The Bessman Award does not require Respondent to implement the Bessman Award at the University of Wisconsin-Madison, nor at any place other than the State Historical Society of Wisconsin.

17. Respondent has implemented the Bessman Award at the State Historical Society of Wisconsin.

18. The principle of res judicata is applicable to an arbitration award where the award and subsequent disputes share an identity of parties, issue and remedy, and, further, there is no material discrepancy of fact between the subsequent disputes and the dispute which was the subject of the arbitration award.

19. The Ubich grievance, unlike the Bessman Award, involves a claim that the "contracting" notice is required when students perform bargaining unit work; the Ubich grievance, unlike the Bessman Award, involves a claim that Respondent's non-provisional use of LTEs is illegal, and that the Ubich grievance and the Bessman Award do not share an identity of issue.

20. Neither the Bessman Award, nor the opinion accompanying the Bessman Award, addresses the issue of whether Respondent is required to provide the information requested in the Ubich grievance; and, therefore, the Bessman Award and the Ubich grievance do not share an identity of remedy.

21. The factual situation addressed by Arbitrator Bessman involved the hiring of LTEs to perform work presently performed by bargaining unit members; and while the Ubich grievance contains an allegation that the University of Wisconsin is hiring LTEs to perform work normally performed by bargaining unit members, neither this allegation, nor the other allegations concerning Respondent's use of students and LTEs are substantiated by the record evidence.

22. The record has failed to demonstrate that the Bessman Award and the Ubich grievance share substantially similar facts; the record has demonstrated that the Ubich grievance and the Bessman Award do not share an identity of issue and remedy; and, therefore, the Bessman Award is not res judicata as to the Ubich grievance.

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

CONCLUSIONS OF LAW

1. The Bessman Award is not res judicata as to the Ubich grievance.

2. Respondent complied with the Bessman Award when it implemented the Bessman Award at the State Historical Society of Wisconsin.

3. Respondent's refusal to implement the Bessman Award at the University of Wisconsin-Madison does not constitute an unfair labor practice within the meaning of Sec. 111.84(1)(e) of the State Employment Labor Relations Act.

4. Complainant has failed to demonstrate that Respondent has violated any provision of Sec. 111.84(1) of the State Employment Labor Relations Act.

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

ORDER 1/

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

Dated at Madison, Wisconsin this 23rd day of September, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Coleen A. Burns
Coleen A. Burns, Examiner

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.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In its complaint filed on July 9, 1986, Complainant alleges that Respondent has committed unfair labor practices within the meaning of Sec. 111.84(1)(a), (1)(b), (1)(c), (1)(d) and (1)(e) of the State Employment Labor Relations Act by refusing to implement the August 2, 1984 arbitration award issued by Arbitrator Bessman. 2/ Respondent denies that it has committed any unfair labor practices and, further, asserts that it has complied with the Bessman Award.

POSITIONS OF THE PARTIES

Complainant

Complainant's Exhibit No. 4 is a grievance filed by James Ubich, a blue collar employe working at the UW-Physical Plant. The Employer's denial of the grievance is noted at the bottom of the grievance. By denying the grievance without further explanation one must assume that the Employer manifested its belief in the truth of the allegations contained in the grievance. Statements which a party opponent has manifested his or her belief in as true are not considered hearsay. Sec. 908.01(4)(b)2, Stats.

Out-of-court admissions made by a party opponent are not hearsay. Sec. 908.01(4)(b)1, Stats. Complainant's Exhibit No. 5 is such an admission. The Exhibit is a letter from James Stratton to Steven Preller in which Stratton specifically denies the Union request for notice before LTEs are employed at the Physical Plant. Together, Complainant's Exhibits No. 4 and 5, establish that the Union is not receiving notice of the use of LTEs.

The award of Arbitrator Leonard Bessman requires the State of Wisconsin to give notice to the Union whenever it hires LTEs to perform work currently or historically performed by the constituency of the Union. The Union does not deny that the Award has been complied with at the State Historical Society. Respondent, however, has not complied with the Award at the UW-Physical Plant. The refusal of the State to implement the Award on a statewide basis violates the Award and, thus, violates Sec. 111.84(1)(e), Stats.

The Bessman Award interpreted Article XI, Section 14, contained in the parties October 30, 1983 to June 30, 1985 collective bargaining agreement. The relevant language in the 85-87 agreement is substantially the same as the 83/85 language. The sole difference being the addition of the words ". . . at the time of Request for Purchase Authority (RPA) but. . . . ." This addition does not change the substance of the State's obligation to notify the Union if it intends to hire LTEs. Under the old language, the State of Wisconsin had to notify the Union thirty days in advance of implementation. Now, if the RPA is made more than thirty days in advance of implementation, notice to the Union must be made at the time of the RPA. If there is no RPA, then the notice requirement is thirty days. The other language added to the section is not relevant because it does not address the issue of notice. The change in the contract language does not render the Award moot or otherwise inapplicable.

The issue of the proper interpretation of Article XI, Section 15, has already been litigated before Arbitrator Bessman. The parties and the remedy sought are the same. The Award is res judicata and the Respondent is collectively estopped from relitigating the proper contract interpretation.

2/ Complainant has failed to address the Sec. 111.84(1)(a), (1)(b), (1)(c), and (1)(d) allegations in written argument. Accordingly, the Examiner considers Complainant to have abandoned these claims.

On December 27, 1985, James Stratton informed the Union that it was the State's position that notice need not be given at the UW-Physical Plant. The complaint was filed on July 8, 1986, within one year of receipt of Stratton's letter, and, thus, is timely filed. Respondent has violated Sec. 111.84(1)(e) by refusing to apply Section XI, Section 15, as interpreted by the Arbitrator.

Respondent

The Bessman Award identifies the Employer as the State Historical Society. Commencing on August 20, 1984, the State Historical Society has provided, and the Union has received, the notice required by Arbitrator Bessman's Award. The Society's actions constitute full implementation and compliance with the Award.

The Union has not introduced any competent evidence to show that there has been a violation of Sec. 111.84(1)(a), (1)(b), (1)(c), (1)(d), and (1)(e). The third step grievance filed by an employe of the University of Wisconsin-Madison in the blue collar unit represented by Local 171 and a letter from Mr. Stratton to Mr. Preller have nothing to do with the State Historical Society.

The grievance and letter from Stratton, Complainant's Exhibits 4 and 5, are ordinary, third party hearsay. The Exhibits should not be admitted over objection where direct testimony on the same facts is available. Even if admitted, the Union produced no evidence, especially sworn testimony, establishing the underlying facts alleged. The Exhibits have no probative value and cannot be used by the Commission as the basis of findings of fact and conclusions of law. Reliance on inherently unreliable and irrelevant exhibits would be contrary to the requirements of Sec. 227.45(1), Wis. Stats., that ". . . (b)asic principles of relevancy, materiality and probative force shall govern the proof of all questions of fact."

The adverse inference rule is applicable in determining that the Union has failed to meet its burden of proof. If evidence within a party's control would strengthen his case and the party does not introduce the evidence, it may be inferred that the evidence is unfavorable. The Union could easily have called or subpoenaed Mr. Ubich, Mr. Corcoran and Mr. Stratton. The drawing of a negative inference is particularly logical and appropriate where the absence of testimony as to the underlying facts alleged raises questions as to the admissibility and/or weight to be given Complainant's Exhibits.

The complaint was filed nearly two years after the Employer implemented the Award and, thus, is not timely. Assuming arguendo, that the complaint is timely, the Union acquiesced in the Employer's actions, intentionally and voluntarily abandoned its claim, and, thus, is estopped on equitable grounds from pursuing its claim herein. The State Historical Society implemented the Award on August 20, 1984. The Union did not challenge the implementation nor the State's position on the scope of the decision even though Gary Hausen, WSEU Council 24 Field Representative, testified that the letter of August 20, 1984 was an unfair labor practice.

The Award is moot and no longer enforceable in that the relevant language was renegotiated in the 1985-87 agreement. Parties may rid the agreement of an arbitrator's interpretation by a change in the negotiated agreement.

The scope of the Award is limited to clerical employes of the State Historical Society represented by Local 1. The Arbitrator's statement of facts, discussion, and remedy are specific to the State Historical Society. The Circuit Court confirmed, but did not modify the Award. Thus, the references to "Employer" and "Union" in the Court's order is similarly limited.

The Union is seeking an order directing the State to implement and comply with the Award. Thus, the issue is not one of res judicata, but rather, whether there has been a failure to implement an award. If there were an issue of res judicata, the Union's claim would be defeated because there is not an identity of issue, party, and language.

Respondent has complied with the Bessman Award. Respondent has not violated Sections 111.84(1)(a), (1)(b), (1)(c), (1)(d) and (1)(e), Stats.

DISCUSSION

Timeliness

Respondent asserts that the State Historical Society implemented the Bessman Award on August 20, 1984 and, thus, any complaint challenging the Award was required to be filed within one year of August 20, 1984. Complainant, however, is not arguing that the State Historical Society has refused to implement the Bessman Award. 3/ Rather, Complainant is alleging that Respondent has failed to implement the Award in other agencies and departments which employ Complainant's bargaining unit members such as the University of Wisconsin. Accordingly, the specific act giving rise to the unfair labor practice alleged herein is that conduct of Respondent which served to notify Complainant that Respondent intended to limit application of the Award to the State Historical Society.

On December 27, 1985, James G. Stratton issued a letter advising Complainant that Respondent considered the Bessman Award to be applicable only to the State Historical Society. The record fails to demonstrate that, prior to Stratton's letter of December 27, 1985, Complainant was put on notice that Respondent intended to limit application of the Award to the State Historical Society. Accordingly, it cannot be concluded that the date of the unfair labor practice alleged herein predates December 27, 1985. The instant complaint was filed on July 9, 1986 and, thus, is timely. 4/

Admissibility of Complainant's Exhibits No. 4 and 5

On the first day of hearing, Respondent acknowledged that it had no objection to admitting Complainant's Exhibits 1 thru 5 into the record, except that it reserved its right to argue relevancy. 5/ Noting Respondent's reservation, the Examiner admitted Complainant's Exhibits 1 thru 5 into the record. 6/ By failing to make a hearsay objection at the time the Exhibits were offered into the record, Respondent has waived any right to argue that Complainant's Exhibits 4 and 5 should be excluded from the record as hearsay.

As Respondent argues, many of the allegations contained in the Ubich grievance (Complainant's Exhibit No. 4) were not substantiated by the record evidence. While the unsubstantiated allegations cannot be accepted as fact, 7/ the exhibit is relevant for such purposes as establishing the issues raised in the grievance and the remedy sought in the grievance. 8/ Likewise, Complainant's Exhibit No. 5, the Stratton letter of December 27, 1985, is relevant for the purpose of establishing Respondent's refusal to implement the Bessman Award at the University of Wisconsin. 9/

Respondent's Motion to Strike Complainant's Exhibits No. 4 and 5 on the basis that they (1) are hearsay and (2) irrelevant is hereby denied.

3/ Complainant admits that Respondent has implemented the Bessman Award at the State Historical Society of Wisconsin (Complainant's Reply Brief, p. 2).

4/ Sec. 111.07(14), Stats., sets forth a one year statute of limitations which is made applicable to the instant proceeding by Sec. 111.84(4), Stats.

5/ T. p. 3-4

6/ T. p. 4

7/ Contrary to the argument of Complainant, by denying the grievance without further statement, Respondent has not manifested a belief in the truth of the allegations contained in the grievance.

8/ Respondent does not claim that Complainant's Exhibit No. 4 is not authentic. In Paragraph Seven of the Answer to complaint, Respondent acknowledges that Ubich filed such a grievance on January 23, 1986.

9/ The authenticity of Complainant's Exhibit No. 5 is acknowledged in Paragraph Nine of the Answer to the Complaint.

Section 111.84(1)(e) Allegation 10/

Sec. 111.84(1)(e) makes it an unfair labor practice for Respondent to refuse to implement an arbitration award which is final and binding. According to Complainant, Respondent has refused to implement the August 2, 1984 Award of Arbitrator Leonard Bessman and, thus, has violated Sec. 111.84(1)(e).

Neither party disputes the fact that the Bessman Award is final and binding upon the parties. At issue in Respondent's refusal to implement the Award at the University of Wisconsin.

Respondent, contrary to Complainant, maintains that the Award is applicable only to the State Historical Society. The parties agree that the Award has been implemented at the State Historical Society.

The Award issued by Arbitrator Bessman is as follows:

> Award
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> For the reasons stated, it is ordered that henceforth whenever the Employer decides to hire limited term employees to perform work presently performed by members of the Union, the Employer give notification to the Union and afford the Union the opportunity for discussion with the Employer not less than thirty days in advance of the implementation, all in accordance with Article XI, Section 14, of the Agreement.

The question to be decided is whether "Employer", as that term is used by Arbitrator Bessman, refers only to the State Historical Society, or whether it refers to all agencies of Respondent who have employes who are subject to the collective bargaining agreement containing the provision interpreted by Arbitrator Bessman, such as the University of Wisconsin.

Arbitrator Bessman's Award carries a caption which identifies the State of Wisconsin, State Historical Society as the "Employer". Arbitrator Bessman commenced the "Background" portion of the opinion as follows:

> The State of Wisconsin, including its agencies, and Wisconsin State Employees Union, AFSCME Council 24, AFL-CIO, and its affiliated locals, entered into a collective bargaining agreement on December 20, 1981 (the Agreement), which was in effect at the times pertinent to the three grievances presented for decision in this matter. The employer is the State Historical Society of Wisconsin (the Employer), and the bargaining unit is Local I (the Union), whose members are classified employees in the Clerical and Related Bargaining unit, as defined by the Wisconsin Employment Relations Commission. 11/

Thus, while recognizing the State of Wisconsin, as the signatory to the relevant collective bargaining agreement, Bessman expressly defined "the Employer" as the State Historical Society of Wisconsin. Having reviewed the remaining portions of Arbitrator Bessman's Opinion, the Examiner finds no language which would

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10/ The complaint alleges violations of Sec. 111.84(1)(a), (1)(b), (1)(c), (1)(d) and (1)(e). However, Complainant's written argument addresses only the alleged violation of Sec. 111.84(1)(e). Accordingly, the Examiner considers Complainant to have abandoned the other claims.

11/ Opinion and Award, p. 1

demonstrate that Arbitrator Bessman intended the word "Employer" to be given a meaning other than "State Historical Society of Wisconsin." To the contrary, Bessman's use of the word "Employer" consistently demonstrates that he is referring to the State Historical Society of Wisconsin. 12/

As Respondent argues, Arbitrator Bessman has limited the application of the Award to the State Historical Society. By implementing the Award at the State Historical Society, Respondent has complied with the Bessman Award. Respondent has not refused to implement the Bessman Award and, thus, there is no violation of Sec. 111.84(1)(e.

Res Judicata

Complainant argues that the issue of the proper interpretation of Article XI, Section 15, has been litigated before and decided by Arbitrator Bessman. Complainant maintains, therefore, that Bessman's Award is res judicata in this proceeding.

The Commission will apply the principle of res judicata to arbitration awards. 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. 13/ In addition, there cannot be any material discrepancies of fact existing between the prior dispute governed by the award and the subsequent dispute. 14/

As Complainant argues, the language interpreted by Arbitrator Bessman is contained in a collective bargaining agreement which covers employes in agencies and departments other than the State Historical Society. Assuming arguendo, that Respondent and Complainant, as signatories to the collective bargaining agreement, are "parties identical" for purposes of res judicata, the record does not demonstrate that the Bessman Award and the grievance of January 23, 1986, the dispute which Complainant asserts is governed by the Bessman Award, share an identity of issue or remedy.

The parties submitted the following stipulated issues to Arbitrator Bessman:

> 1. Did the Employer violate Article VII of the Agreement by not posting the positions of Microfilm Technician 2, Program Assistant 3/Sales Desk, and Clerical Assistant 2/Mail Room?
>
> 2. Did the Employer violate Article XI, Section 14, of the Agreement by allowing nonbargaining unit employees to assume the duties of the vacated positions?

12/ For example, Arbitrator Bessman commences the section of the Award entitled "Statement of Facts" with the following:

> Founded in 1846, the Employer receives state funds for the purpose of promoting 'a wider appreciation of the American heritage with particular emphasis on the collection, advancement, and dissemination of knowledge of the history of Wisconsin and of the West.' It collects historical and cultural resources, which it makes available to students, scholars, and the general public. In addition, it operates a museum, which displays artifacts in Madison and a historymobile, which serves as a traveling museum for residents in other parts of the state. (Note: Wisconsin became a state in 1848)

13/ State of Wisconsin (DER), Dec. No. 20145-A (Burns, 5/83).

14/ Id.

However, when deciding the second issue, Arbitrator Bessman addressed the narrower issue of whether Article XI, Section 14, notice was required when the Employer hires limited term employes (LTEs) to perform work being done by bargaining unit members.

The grievance of January 23, 1986, contained the following allegations:

> In a letter dated 12/27/85 UW Personnel refused to notify Local 171 of jobs which have been contracted out to limited term employees on the UW Madison campus. Our request was made pursuant to Article 11/14/1 of the labor agreement. The employer has contracted out an increasing amount of work normally performed by bargaining unit employees by hiring a series or pool of LTE's and students to do our work. This non-provisional use of LTE's is illegal under state law and the employer's refusal to notify the union of their use violates the contract. The failure of the UW to notify the Union of the hiring of students to do work normally performed by bargaining unit employees also violates the contract.

The January 23, 1986 grievance, unlike the issue presented to Arbitrator Bessman, contains the issue of whether the notice requirements of Article XI, Section 14, are applicable to students as well as LTEs. 15/ Moreover, unlike the Bessman Award, there is an allegation that the "non-provisional use of LTEs is illegal under state law." Accordingly, the dispute governed by the Bessman Award and the Ubich grievance do not share an identity of issue.

The remedy ordered by Arbitrator Bessman is "that henceforth whenever the Employer decides to hire limited term employees to perform work presently performed by members of the Union, the Employer give notification to the Union and afford the Union the opportunity for discussion with the Employer not less than thirty days in advance of the implementation, all in accordance with Article XI, Section 14, of the Agreement." The Ubich grievance requests the following remedy:

> That the employer provide the following information on all students and LTE's it is presently contracting out bargaining unit work to: employee's name, employing unit, work unit, work address, work schedule, and the length of time the employer intends to employ each employee. The employer will provide the previous information for each new LTE or student that it contracts work out to. Notification to be according to the contract.

Neither Arbitrator Bessman's Award, nor the opinion accompanying the Award, addresses the issue of whether Respondent is required to provide the information requested in the grievance of January 23, 1986. Nor does the Award, by its terms, require Respondent to provide the information requested in the grievance. Accordingly, there is not an identity of remedy.

The factual situation addressed by Arbitrator Bessman involved the hiring of LTEs to perform work presently performed by members of the collective bargaining unit. While the Ubich grievance includes a similar allegation, i.e., that the University of Wisconsin has hired LTEs to perform bargaining unit work, the record does not substantiate the allegation. Nor does it substantiate any of the other allegations concerning the use of LTEs and students. Indeed, the record is silent with respect to the facts underlying these allegations. Having no basis to compare the factual circumstances underlying the Ubich grievance with the facts presented to Arbitrator Bessman, one cannot conclude that there are no material discrepancies of fact between the Ubich grievance and the Bessman Award.

15/ The grievance refers to Article XI, Section 14. The provision was renumbered to Article XI, Section 15, 1. While the term "students" and "LTEs" may be interchangeable, this fact is not established herein.

For the reasons discussed supra, the Examiner is persuaded that the Bessman Award and the Ubich grievance lack an identity of issue and remedy. Further, the record fails to demonstrate that there are no material discrepancies of fact existing between the dispute giving rise to the grievance and the dispute governed by the Bessman Award. Accordingly, it is not appropriate to apply the principle of res judicata herein.

Conclusion

The record fails to demonstrate that Respondent has violated Sec. 111.84(1)(e), Stats., or any other provision of Sec. 111.84(1), Stats. The complaint is dismissed in its entirety.

Dated at Madison, Wisconsin this 23rd day of September, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Coleen A. Burns
Coleen A. Burns, Examiner