STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN STATE EMPLOYMENT 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-D

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, and Mr. Thomas E. Kwiatkowski, Attorney, Department of Employment Relations, 137 East Wilson Street, Madison, Wisconsin 53702, appearing on behalf of Respondent.

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

Examiner Coleen A. Burns having on September 23, 1987 issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above matter wherein she dismissed the complaint filed by WSEU alleging that the State had committed various unfair labor practices by refusing to implement a grievance arbitration award; and WSEU having timely filed a petition with the Commission seeking review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.84(4) Stats.; and the Commission having on October 22, 1987 issued an Order denying a motion from the State that the petition be dismissed for failure to comply with applicable administrative rules; and the parties thereafter having filed written argument in support of and in opposition to the petition for review, the last of which was received on November 20, 1987; and the Commission having considered the matter and being fully advised in the premises, makes and issues the following

ORDER 1/

A. That Examiner's Findings fo Fact 1-17 are hereby affirmed and Examiner's Findings of Fact 18-22 are hereby set aside.

B. That Examiner's Conclusions of Law 1-3 are hereby affirmed and Examiner's Conclusion of Law is modified to read

> 4. Complainant failed to establish by a clear and satisfactory preponderance of the evidence that Respondent's refusal to implement the Bessman Award at the University of Wisconsin-Madison violated Secs. 111.84 (1)(a), (b), (c), or (d) Stats.

(Footnote one found on pages two and three.)

C. That the Examiner's Order is hereby affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 18th day of February, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian, Commissioner

Commissioner A. Henry Hempe did not participate in this case.

(Footnote one from page one.)

1/ Pursuant to Sec. 227.48(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. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.
227.49 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 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.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefore 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. 227.49, 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. 227.48. If a rehearing is requested under s. 227.49, 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. 77.59(6)(b), 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

(Footnote one continued on page three.)

(Footnote one continued from page two.)

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. 227.57 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.

DEPARTMENT OF EMPLOYMENT
RELATIONS (CLERICAL & RELATED)

MEMORANDUM ACCOMPANYING

BACKGROUND

In its complaint initiating this proceeding, the Complainant alleged that the Respondent had committed unfair labor practices within the meaning of Secs. 111.84(1)(a), (1)(b), (1)(c), (1)(d) and (1)(e), Stats., by refusing to implement a 1984 arbitration award issued by Arbitrator Leonard Bessman. Respondent denied it had committed any unfair labor practices, and asserted that it had complied with the terms of the Bessman Award.

The Bessman Award arose out of a grievance which arose in the clerical and related bargaining unit challenging the administration of a collective bargaining agreement between the State of Wisconsin and the Wisconsin State Employes Union, AFSCME Council 24, AFL-CIO and its affiliated locals. The caption defined the grievant and union as "Sharon Mulak, Local 1, Wisconsin State Employes Union, AFSCME Council 24, AFL-CIO," and the employer as "State of Wisconsin, State Historical Society." The stipulated issues were as follows:

> 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 employes to assume the duties of the vacated positions?

The language of Article XI, Section 14, provided that:

> "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."

The Bessman Award ordered that:

> "(H)enceforth whenever the Employer decides to hire limited term employes 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 State and the Union moved in the Circuit Court for Dane County for an Order to Vacate and an Order to Confirm, respectively. On May 6, 1984, Hon. Robert R. Pekowsky issued a Memorandum Decision and Judgment which confirmed the Bessman Award.

On January 23, 1986, Jim Ubich, a member of the blue-collar and non-building trades bargaining unit, (Local 171), employed at the University of Wisconsin-Madison, filed a grievance alleging that the UW was violating Article XI, Section 14 by refusing to provide the Union with certain information relating to the use of LTEs and students to perform work normally performed by bargaining unit members. The Ubich grievance was in response to a December 27, 1985 letter from the UW-Madison Director of Classified Personnel, James Stratton refusing Local 171's request for notification, discussion and information on such matter, a refusal the Director stated was based on advice from the Department of Employment Relations that the Bessman Award applied only to Local 1 and the State Historical Society.

The Ubich grievance was denied, without comment, on March 6, 1986. Such denial formed the basis of the instant complaint, filed on July 9, 1986.

THE EXAMINER'S DECISION

The Examiner dismissed the complaint concluding that (1) the Bessman Award, by its terms, only applied to the State Historical Society and (2) that the Bessman Award was not res judicata as to the Ubich grievance.

As to the scope of the Bessman Award, the Examiner commented as follows:

> 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
>
> > 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 demonstrate that Arbitrator Bessman intended the word "Employer" to be given a meaning other than "State

---

11/ Opinion and Award, p.1.

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).

As to the issue of res judicata, the Examiner opined:

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/

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?

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:

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

> 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 Awrad, 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.

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

---

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.

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.

POSITION OF THE PARTIES ON REVIEW

On October 9, 1987, Complainant filed a Petition for Review, which stated, in its entirety, that:

> Appeal is taken from all adverse Findings and Conclusions. By way of illustration, rather than limitations the Examiner concluded that independent State agencies were not bound by an Arbitration Award rendered against the State Historical Society. This conclusion is preposterous. It is prejudicial, reversible error. It overlooks the uncontroverted testimony in the record. Substantial questions of law and policy are raised by the instant litigation.

On October 19, 1987, the Respondent filed a Motion to Dismiss Petition for Review, asserting that Complainant had failed to comply with ERB 12.09(2), Wis. Admin. Code, thereby denying Respondent effective notice of the issues on Appeal.

Because ERB 12.09(2) relates to Petitions under the Municipal Employment Relations Act, the Commission considered the Motion to Dismiss as being appropriately filed pursuant to ERB 22.09(2), the applicable rule setting forth the basis for and contents of petitions for review under SELRA. After due consideration, the Commission, on October 22, 1987, finding that Complainant "has minimally complied with ERB 22.09(2) and will further define its position in its brief on review," denied the motion to dismiss the petition.

Complainant Union submitted, on October 26, 1987, a letter in which it stated that it "relies upon the Briefs and materials previously filed with the Examiner," and in which it recited the text of the Circuit Court Order affirming the Bessman Award. The Complainant also restated its belief that the Award "binds the parties by its terms," and that the responding party is the State of Wisconsin, in its entirety as one governmental unit. On November 20, 1987, Complainant waived its right to file a reply brief.

The State responded, on November 13, 1987, by describing the Complainant's posture on review as "a subversion of the administrative rules requiring some substantive definition of the issues on review." Accordingly, the Respondent renewed its motion to dismiss for failure to comply with ERB 22.09(2), Wis. Admin. Code. Absent a dismissal, Respondent called for a standard of review which accords "substantial deference" to the Examiner's findings and conclusions.

Finally, the Respondent also quotes from its previous briefs to the Examiner, and requests the Commission, "should (it) indulge Complainant's petition for review," to refer to such briefs "in reviewing whatever issues it gleans as in dispute . . ."

DISCUSSION

In response to the Respondent's renewal of its motion to dismiss the petition, we deny same noting that Complainant's petition and supporting letter brief are sufficient to put us on notice as to the basis upon which Complainant seeks review.

Before the Examiner and now on review, the Complainant asserts two distinct theories: (1) that the Bessman Award was sufficiently broad in its scope to extend to the Ubich grievance and (2) even if the Award itself is narrowly construed, the Award should be given res judicata effect as to the Ubich grievance.

Based upon this record, we conclude that the Examiner correctly determined that Bessman limited the scope of his Award to the State Historical Society. On balance, Bessman's focus on the specific facts arising out of the Historical

Society context, his references to the "employer" as the Historical Society, and the absence of persuasive evidence that the briefs or the grievance submitted to Bessman explicitly posed a statewide grievance combine to overcome the Complainant's argument that "Issue" and "Award" sections of Bessman's opinion establish statewide scope. Our conclusion in this regard is similar to that reached in State of Wisconsin, Dec. No. 20910-B (WERC, 3/85).

The distinct res judicata argument raised by Complaintant is premised upon the accepted doctrine that once an issue has been litigated in a final and binding manner by the parties to an agreement, the prevailing party should not be required to relitigate the same issue in subsequent parallel disputes.

As we noted in Wisconsin Public Service Corporation, Dec. No. 11954-D (WERC, 5/74);

> this Commission has said repeatedly that it will apply the principles of res judicata to a prior arbitration award in complaint cases filed alleging a violations of Section 111.06(1)(g), where there is no significant discrepancy of fact involved in the prior award and in the subsequent case to which a complainant is requesting the Commission to apply the award. A balance must be struck between the need for consistency and finality to contract interpretation as evidenced by prior arbitration awards and invading that province specifically reserved by the courts to the arbitrator - deciding the merits of the dispute. Where no material discrepancy of fact exists, the prior award should be applied. In these circumstances both interests are accomodated without undermining either.

Section 111.84(1)(e) of the State Employment Relations Act is the applicable counterpart to Sec. 111.06(1)(g) Stats. cited above.

Here, the Article XI, Section 14 contractual language interpreted by Bessman was amended by the parties subsequent to their receipt of his award. It is the amended language which is at issue in the Ubich grievance. Respondent argues that the amendment was a response to the Bessman Award and that a different result will be reached as to the Ubich grievance. Even if Respondent's assertions are incorrect and the Complainant is correct that the amended language will ultimately be interpreted in the same substantive manner as was the language before Bessman, we nonetheless conclude that the amended language represents a material factual difference for the purposes of the doctrine of res judicata and that the Bessman Award is therefore not res judicata as to the Ubich grievance. Affirmance of the Examiner is therefore warranted. We wish to make it clear, however, that the identity of parties requirement of the res judicata doctrine was met in this case inasmuch as the State of Wisconsin and AFSCME are the contractual parties involved in the Bessman Award and the Ubich grievance. 2/ Our decision should not be viewed as expressing any opinion on the merits of the Ubich grievance or on the potential that a subsequent arbitrator may elect to give substantial weight to the Bessman Award if he/she determined that the amended Article XI language is substantively the same as the language Bessman interpreted. That remains the province of the grievance arbitrator under the parties' agreement. 3/

Given the basis for our holding, we need not and do not reach the Examiner's determinations that the Ubich grievance did not share sufficient identity of issue remedy or underlying fact to warrant application of res judicata. 4/ We have

---

2/ See State of Wisconsin, Dec. No. 14823-C (WERC, 10/77).

3/ Wisconsin Public Service Corp., supra; Wisconsin Gas, Dec. No. 8118 (Bellman, 3/68).

4/ We would note, however, that as a general matter the broader scope of a second grievance does not preclude giving res judicata effect to the resolution of the first grievance to the extent that the scope of the first grievance is encompassed in the second. See State of Wisconsin, Dec. No. 13539-C (Shurke), Handcraft Co., Dec. No. 10300-A (Shurke, 7/71). Avco Corp. v. Local 787, UAW, 459 F.2d 96 (CA 3, 1972).

therefore set aside certain of the Examiner's Findings of Fact. We have also modified Conclusion of Law 4 to more specifically dispose of the allegations in question.

Dated at Madison, Wisconsin this 18th day of February, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian, Commissioner

Commissioner A. Henry Hempe did not participate in this case.