STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JOYCE CARAVELLO and THE WISCONSIN STATE EMPLOYEES UNION (WSEU), AFSCME, COUNCIL 24, AFL-CIO,

Complainants,

vs.

STATE OF WISCONSIN,

Respondent.

Case 245
No. 38490 PP(S)-135
Decision No. 25281-C

Appearances:

Lawton & Cates, S.C., Attorneys at Law, 214 West Mifflin Street, Madison, Wisconsin 53703-2594, by Mr. Richard V. Graylow, appearing on behalf of Complainants.

Ms. Renee Bugge, Employment Relations Specialist, Division of Collective Bargaining, Department of Employment Relations, and Ms. Teel Haas, General Counsel, 137 East Wilson Street, Madison, Wisconsin 53707-7855, appearing on behalf of Respondent.

ORDER AFFIRMING IN PART AND REVISING IN PART EXAMINER'S FINDINGS OF FACT AND AFFIRMING IN PART AND REVERSING IN PART EXAMINER'S CONCLUSIONS OF LAW AND ORDER

Examiner Coleen A. Burns having issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above-entitled matter on October 25, 1988, wherein she dismissed a complaint filed by the above-noted Complainants alleging that the State of Wisconsin had committed certain unfair labor practices by violating the terms and conditions of a final and binding settlement agreement; and the Complainants having timely filed a petition with the Commission seeking review of the Examiner's decision; and the parties having submitted written argument in support of and in opposition to said petition for review, the last of which was received on February 27, 1989; and the Commission having, by letter dated November 10, 1989, advised the parties that further hearing was necessary; and Commission Chairman A. Henry Hempe having, by letter dated November 28, 1989, advised the parties that he was recusing himself from participation;

and the parties thereafter having engaged in unsuccessful settlement discussions; and additional hearing having ultimately been held on

January 9, 1991, and the parties thereafter having orally argued the matter to the Commission on February 8, 1991; and the Commission having reviewed the matter and being fully advised in the premises, makes and issues the following

ORDER 1/

A. That Examiner's Findings of Fact 1-7 are affirmed.

B. Examiner's Findings of Fact 8-12 are set aside and the following Findings of Fact are hereby made by the Commission:

8. That at all times material herein, pursuant to the mandates of Sec. 230.04(12), Stats., DER maintained an historical roster which recorded personnel transactions and other information regarding State employes; that every two weeks various State payroll departments encode upon a magnetic tape all of the personnel transactions which have occurred during the two-week period; that following this encoding, the tape is delivered to DER which runs the program to update the roster; that DER produces a microfiche copy of the roster on a monthly basis; that one copy of the monthly microfiche is retained by DER and a second copy is sent to Central Payroll; that employes outside of DER do not have computer access to the roster; that upon written request, DER will furnish a copy of the microfiche to other State agencies; that at all times material herein, the Department of Industry, Labor and Human Relations (DILHR) and the Department of Transportation received a microfiche copy of the historical roster quarterly; that State agencies used the microfiche for various purposes including initial determinations regarding employe eligibility for reinstatement; that copies of the historical roster are not placed into individual employe personnel files; that prior to the settlement agreement, the microfiche copy of the historical roster for Caravello indicated that she had been discharged; that employes who have been discharged do not have reinstatement rights; and that following the settlement agreement, the record of the discharge remained on the Caravello microfiche.

9. That at all times material herein, DER maintained a list of all former State employes who had advised DER that they were interested in exercising permissive reinstatement rights; that this list was automatically distributed to all State agencies; that shortly after her discharge was rescinded pursuant to the December 1984 settlement agreement, Caravello applied through DER to have her name placed on this reinstatement list; that at all times material herein, Caravello's name was included on the reinstatement list; that following the settlement agreement Caravello also began to apply for employment directly with State agencies for specific vacancies; that when making such applications, she would advise the agencies that she was eligible for reinstatement; and that these

1/ See footnote on Pages 3 and 4.

applications yielded several interviews and one offer of LTE employment with the Department of Revenue which Caravello rejected due to the wage rate being offered.

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 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. 227.49, 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 county in which a petition for review of the decision

(Footnote continued on Page 4)

1/ (Footnote continued from Page 3)

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.

10. That in May 1986, Caravello was employed by DILHR as an LTE; that at all times material herein certain State agencies including DILHR maintained their own list of former State employes who had expressed an interest directly to that agency in being reinstated; that on May 14, 1986, Caravello submitted a written request to be placed on DILHR's reinstatement list; that Pat Hook, DILHR Personnel Assistant in charge of the reinstatement list, subsequently advised Caravello that because the microfiche copy of the historical roster showed Caravello as being discharged, she was ineligible for reinstatement; that the historical roster was not found in Caravello's personnel files; that Caravello told Hook to contact Caravello's former supervisor at DOA, who then referred Hook to the DOA Personnel Director, Peter Olson; that Olson veri-fied that (1) Caravello had been employed by DOA, (2) Caravello had a three-year reinstatement eligibility retroactive to January 12, 1984, the date of her resignation, and (3) that her reinstatement eligibility would be up to an MIT 2 or its equivalent; that Hook then placed Caravello into the DILHR reinstatement system; that Caravello was referred to more than twenty DILHR vacancies; that Caravello was not selected for any of the DILHR vacancies; and that the conversations between Caravello, Hook and Olson concerning her eligibility for reinstatement occurred in June or July of 1986.

11. That after Caravello learned through Hook that the microfiche still indicated that she had been discharged, Caravello and Union Representative Hausen both telephonically contacted DOA Personnel Director Olson to ask that the microfiche be changed to eliminate the discharge reference; that Caravello telephonically made the same request to DOA paralegal Ruth Hable; that in response to these requests, DOA contacted DER who advised DOA that the microfiche could not be changed; that in response to these requests, DOA did change its internal records to change the existing code reference contained therein from one reflecting Caravello's discharge to a code consistent with Caravello's voluntary resignation.

12. That in November 1986, Caravello began full-time employment with the University of Wisconsin; that Caravello obtained this employment through a direct contact with the University during which she advised the University that she was eligible for reinstatement; that following commencement of her University employment, Caravello changed her name to DeRosia; that the current microfiche copy of the DeRosia historical roster references her former name of Caravello but does not include reference to her discharge; and that the current microfiche copy of the Joyce Caravello historical roster references the name of DeRosia and ends with the entry referencing her discharge.

13. That the State of Wisconsin's actions were not motivated by hostility toward Complainants' exercise of rights under the State Employment Labor Relations Act.

C. That Examiner's Conclusion of Law 1 is affirmed.

D. That Examiner's Conclusions of Law 2-4 are set aside and the following Conclusions of Law are made:

2. That the State of Wisconsin violated an implicit term of the settlement agreement when it failed to remove the entry on the microfiche copy of the historical roster for Caravello which references her discharge, and thereby committed an unfair labor practice within the meaning of Secs. 111.84(1)(e), and deriva-tively (1)(a), Stats.

3. That by violating the settlement agreement the State of Wisconsin did not commit an unfair labor practice within the meaning of Sec. 111.84(1)(c), Stats.

E. That the Examiner's Order dismissing the complaint is reversed in part and set aside and the following Order is made:

ORDER

1. That the State of Wisconsin, its officers and agents, shall immediately:

A. Cease and desist from violating settlement agreements reached with its employes and their collective bargaining representatives.

B. Make Complainant Caravello whole with interest 2/ for any lost wages and benefits suffered by her as a result of the violation of the settlement agreement.

C. Eliminate the existing reference to Caravello's discharge from the microfiche of the Joyce Caravello historical roster.

D. Cause the Notice attached hereto as Appendix A to be posted for sixty (60) days in conspicuous places where bargaining unit employes are employed

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2/ The applicable interest rate is the Sec. 814(4), Stats., rate in effect at the time the complaint was initially filed with the agency. The instant complaint was filed on March 10, 1987, when the Sec. 814.04(4) rate was "12 percent per year." Section 814.04(4), Wis. Stats. Ann. (1986). See generally Wilmot Union High School District, Dec. No. 18820-B (WERC, 12/83) citing Anderson v. LIRC, 111 Wis.2d 245, 258-9 (1983) and Madison Teachers Inc. v. WERC, 115 Wis.2d 623 (CtApp IV, 1983).

and other notices to employes are usually posted.

2. That the portion of the complaint alleging that the State of Wisconsin committed an unfair labor practice within the meaning of Sec. 111.84(1)(c), Stats., is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin this 19th day of August, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner

Chairman A. Henry Hempe did not participate.

"APPENDIX A"

NOTICE TO ALL EMPLOYES

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

We will not violate grievance settlement agreements reached between the State of Wisconsin and the Wisconsin State Employees Union (WSEU), AFSCME, Council 24, AFL-CIO.

Dated this ____ day of _____, 1991.

By _____
Mr. Jon E. Litscher
Secretary
Department of Employment Relations
State of Wisconsin

THIS NOTICE MUST BE POSTED FOR SIXTY (60) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY MATERIAL.

STATE OF WISCONSIN

MEMORANDUM ACCOMPANYING
ORDER AFFIRMING IN PART AND REVISING IN PART EXAMINER'S
FINDINGS OF FACT AND AFFIRMING IN PART AND REVERSING IN PART
EXAMINER'S CONCLUSIONS OF LAW AND ORDER

THE EXAMINER'S DECISION

The Examiner initially concluded that as disputes regarding compliance with settlement agreements are not subject to the grievance/arbitration procedures in the parties' collective bargaining agreement, it was appropriate to proceed to the merits of the complaint.

The Examiner recited the terms of the settlement agreement as being the following:

> Whereas the Grievant, Joyce Caravello, and the Wisconsin State Employees Union have filed grievances alleging violation of Article IV of the Agreement between the parties, have processed the grievances through the contractual grievance procedure, and appealed the matter to arbitration, the parties hereby agree that the above-entitled matter has been settled in all respects on the following basis:
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> 1. The Employer will remove from the personnel file the letter of discharge dated January 12, 1984 and the letter of suspension dated November 29, 1983, and the Employe will voluntarily resign effective January 12, 1984.
>
> 2. The Employer agrees that it will pay damages to the Grievant in the amount of eight thousand dollars ($8,000) in a lump sum within 30 days after the Grievant's compliance with her responsibilities under this Settlement Agreement.
>
> 3. The Grievant agrees to list the Personnel Director of the Department of Administration as the contact person on any resumes of applications for employment that she may present to prospective employers. No personal or employment references relating to the Grievant shall be given to prospective employers or employing agencies except by DOA's Personnel Director, through the Personnel Office. Such references shall include only the title and pay range of the Grievant's last position, her length of service in that position in the DOA and the last pay rate of the Grievant.

4. The Grievant's position has been reclassified, and the Grievant regraded from a Typesetting System Input Operator 2 (2-06) to a Management Information Technician 2 (6-08), effective November 13, 1983.

5. Upon execution of this document, Grievant shall withdraw or cause to be dismissed, voluntarily and with prejudice, those proceedings and all other pending appeals, charges and/or complaints which have been filed against the Employer, the Department of Employment Relations, the Department of Administration, their subunits, or their employes arising out of the subject matter of these proceedings, and further shall not file additional appeals, charges and/or complaints of any nature or type against the Employer (DER and DOA), their subunits, or their employes based on or arising out of events occurring prior to the execution of this document. This document when executed shall be deemed proper authorization for dismissal of all said appeals, actions or proceedings.

This Settlement shall not constitute a precedent for any other case.

The Examiner found that the State had complied with the settlement agreement reached with Complainants resolving the discharge of Complainant Caravello. She rejected Complainants' argument that the agreement was breached by the entry on the historical roster which continued to indicate that Caravello had been discharged even after settlement was reached. Examining the specifically enumerated provisions of the settlement agreement, the Examiner found that as the historical roster is not included in personnel files, it is not the type of record which is required to be expunged by the provisions of Paragraph One of the parties' settlement agreement. She further concluded that the entry on the historical roster did not violate Paragraph Three of the settlement agreement regarding "personal and employment references."

The Examiner rejected Complainants' argument that the Department of Administration Personnel Director had acknowledged that the failure to correct the historical roster was a violation of the settlement agreement. She reasoned that the Personnel Director's willingness to attempt to adjust the historical roster entry reflected the State's good faith and willingness to act in a manner consistent with the intent of the settlement agreement.

Given the foregoing, the Examiner dismissed the complaint in its entirety.

POSITIONS OF THE PARTIES

Complainants

In their briefs on review, Complainants argued that the Examiner erred when she concluded that the State had not violated the settlement agreement. Complainants asserted the record demonstrates that the State admitted that the failure to correct the historical roster and the microfiche produced therefrom was a mistake which required action by the State to correct. Complainants contended that the State's mistake had enormous employment ramifications for Caravello in that it precluded her from being included on the reinstatement list. Complainants alleged that the consequences of the State's error are made clear by the fact that shortly after the mistake was corrected, Caravello was rehired to a permanent position.

During oral argument, Complainants asserted that the settlement agreement should be construed as requiring a purge of all references to the discharge from all State records. As the microfiche is a State generated record, Complainants argued that the State should be held accountable for the failure to correct the microfiche.

Given the foregoing, Complainants ask that the Examiner's decision be reversed by the Commission and that an appropriate remedial Order be entered.

The State

The State urges the Commission to affirm the Examiner's decision. Contrary to Complainants' arguments, the State asserts that the record does not support a conclusion that the Department of Administration Personnel Director admitted that the failure to correct the historical roster violated the settlement agreement. The State contends that it is equally fallacious for Complainants to argue that the correction of the historical roster and microfiche led to Complainant Caravello's reinstatement. The State argues that the microfiche was never changed and that Caravello's subsequent reinstatement demonstrates that the failure to change the roster and microfiche did not harm Caravello in any way.

During oral argument, the State contended that neither the express nor implied terms of the settlement agreement obligated it to change the microfiche.

Given the foregoing, the State asks the Commission to affirm the Examiner.

DISCUSSION

Initially, we concur with the Examiner's conclusion that as the settlement agreement is not enforceable through the grievance/arbitration provisions of the parties' collective bargaining agreement, 3/ it is appropriate to exercise the Commission's jurisdiction under Sec. 111.84(1)(e), Stats., to determine whether the State violated the terms of the settlement agreement by failing to remove the reference to Caravello's discharge from the microfiche. 4/

It is clear that the settlement agreement does not contain any reference to the microfiche and further that when the settlement agreement was being negotiated, there was no discussion of the microfiche. Indeed, DOA employe Hable, who was one of the State representatives who drafted the agreement, did not then know that a microfiche existed.

We also conclude that the microfiche is not a "personal or employment reference" within the meaning of Paragraph 3 of the settlement agreement and that the microfiche was not in Caravello's personnel file and thus not subject to implicit removal under Paragraph 1.

3/ While the Examiner concluded in this regard that "deferral to arbitration is not appropriate," it is more accurate to state that where the parties have bargained a procedure for final and binding impartial resolution of disputes over contractual compliance, the Commission generally will not assert its statutory jurisdiction under Sec. 111.84(1)(e), Stats. to resolve breach of contract claims because of the presumed exclusivity of the contractual procedure and a desire to honor the parties' agreement. State of Wisconsin, Dec. No. 20830-B (WERC, 8/85). Issues of "deferral" typically arise where, unlike here, grievance arbitration is available to resolve issues of contract interpretation which may be determinative of unfair labor practice allegations other than breach of contract. See State of Wisconsin, Dec. No 15261 (WERC, 1/78).

We would also note that because grievance settlement agreements are collective bargaining agreements, they are enforceable through Sec. 111.84(1)(e), Stats., and not (1)(d), Stats. However, as Respondent has neither asserted nor established any prejudice from the fact that this case was pled, tried and decided under (1)(d), Stats., and as it is clear that in fact the parties fully litigated the issue of whether the settlement agreement was breached, we are satisfied that it is appropriate to proceed to resolve the dispute under (1)(e), Stats. See also ERB 20.01 and 22.02(5)(b).

4/ While the State may be correct that Complainant Caravello has a right to litigate the propriety of the State's action before the State Personnel Commission, the State is incorrect when it asserts that said possibility deprives the Commission of jurisdiction herein. The issue before us is an alleged lack of compliance with a settlement agreement and not whether Caravello's statutory reinstatement rights have been violated.

Given the foregoing, it is clear that the State's conduct and the position it advocates in this litigation have been taken in good faith.

However, what is also clear to us is that the spirit and intent of the settlement agreement was to place Caravello in the position she would have been in vis-a-vis future State employment had she voluntarily quit her State employment in January, 1984, and never been discharged. A primary benefit of the settlement to Caravello was the ability to exercise reinstatement rights without the cloud of a prior discharge making her less attractive to State agencies. The continued existence of the reference to her discharge on the microfiche is inconsistent with the spirit and intent of the settlement agreement because one of the potential uses of the microfiche by State agencies was to make initial assessments of reinstatement eligibility. Caravello's DILHR experience provides a graphic example of how the microfiche entry regarding her discharge had the potential to harm her reinstatement chances.

We find ample support in the record from the testimony and actions of the State for our view of the intent of the agreement. A DER signatory to the agreement testified that the agreement was designed, in part, to avoid the risk that the prior termination would be communicated to prospective employers. (Tr. 49, Vol. 2) The continued existence of the microfiche was inconsistent with this purpose because it communicated that information to prospective employers. When DOA employes Olson and Hable learned that the discharge entry remained on the microfiche, they sought unsuccessfully to have the entry corrected. Such actions are consistent with the intent of the agreement to shield Caravello from the potentially negative impact which the microfiche entry could have upon a State agency's interest in reinstating her.

Having found a violation of the settlement agreement, we turn to the difficult matter of remedy. Caravello is entitled to be made whole for any wage loss suffered as a result of the microfiche. However, while it is clear that the microfiche entry had the potential to harm Caravello's opportunity for reinstatement, there is no persuasive evidence in this record that it had any such impact.

We are satisfied from the record that the microfiche entry did not prevent Caravello from being included on any reinstatement lists. As the microfiche has never been corrected and Caravello was placed on all reinstatement lists for which she applied, we reject Union arguments to the effect that Caravello's reinstatement opportunities suddenly improved once the microfiche problem came to light. It was placement on the DILHR reinstatement list despite the microfiche entry which produced a surge of opportunities for Caravello. It was Caravello's own initiative, not a reinstatement list, which ultimately produced employment with the University of Wisconsin. Thus, while we have ordered the State to make Caravello whole for any losses suffered, the existing record does not provide any affirmative basis for awarding any back pay because no actual harm in the context of a specific vacancy has been identified. Should the Union be able to produce such evidence at any remedy hearing necessitated by our decision, we will then direct the State to take appropriate compensatory action.

As noted earlier, the microfiche itself continues to reflect Caravello's discharge. Although Caravello has secured employment and her name has changed to DeRosia and then to Syphard, the potential remains for the discharge entry to harm her as to future employment opportunities with the State. Thus, we have ordered that the microfiche be altered to eliminate this potential harm and thus bring the State into compliance with the intent of the settlement agreement. 5/

Dated at Madison, Wisconsin this 19th day of August, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner

Chairman A. Henry Hempe did not participate.

5/ As we are satisfied that the breach was not motivated in whole or in part by hostility towards Complainant's exercise of SELRA rights, we have affirmed the Examiner's dismissal of the (1)(c) allegations.