STATE OF WISCONSIN
CIRCUIT COURT
DANE COUNTY

DEPARTMENT OF EMPLOYMENT RELATIONS, State of Wisconsin,
Petitioner,

vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,
Respondent.

Case No. 91CV4377
Decision No. 25281-D

MEMORANDUM DECISION AND ORDER

Petitioner, the Department of Employment Relations (DER), seeks judicial review under ch. 227, Stats., of a final decision and order of the respondent, the Wisconsin Employment Relations Commission (Commission), dated August 19, 1991, which affirmed in part and revised in part a hearing examiner's findings of fact, conclusions of law and order dated October 25, 1988. In its decision, the Commission determined, inter alia, that DER violated an implicit term of a settlement agreement when it failed to remove a reference to a state employee's discharge from a microfiche historical roster maintained by DER on all state employees. The settlement agreement was entered into by the State and the Wisconsin State Employes Union to resolve a grievance which had been filed by state employee Joyce Caravello (Caravello) concerning her termination from employment with the State. DER contends that the Commission's decision should be set aside because it is affected by material errors of law, includes conclusions of law which are based on findings of fact which are not supported by substantial evidence in the record, and is arbitrary and capricious. For the reasons set out below, I affirm the decision and order of the respondent.

BACKGROUND

The following facts are not in dispute. Caravello was terminated from her employment as a Typesetting System Input Operator 2 with the State of Wisconsin on January 12, 1984. Following her termination, Caravello and the Wisconsin State Employes Union (Union) filed a grievance contesting her discharge. On December 4, 1984, Caravello, the Union, and DER 1/ entered into a settlement agreement which provides, in relevant part:

> 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 Employee 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 reference 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.
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> 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.

Shortly after her discharge was rescinded and she resigned pursuant to the agreement, Caravello submitted a written request to DER to have her name placed on the list DER maintains on all former State employees who have advised DER they are interested in exercising permissive reinstatement rights. Employees who have been discharged from employment with the State do not have permissive reinstatement rights. Caravello's voluntary resignation, however, entitled her to permissive reinstatement rights with the State to an equivalent position for three years following her resignation. This did not guarantee her a position. At all relevant times herein, Caravello's name was included on that list.

On May 14, 1986, Caravello submitted a written request to DILHR asking that she be placed on its reinstatement list used for filling vacancies. When Caravello contacted DILHR in regards to a specific vacancy, she was informed that she was not eligible for reinstatement because the historical roster maintained on microfiche showed that she had been discharged. 2/

Upon learning that the historical roster indicated that she had been discharged rather than showing a voluntary resignation, Caravello contacted DILHR Personnel Assistant, Pat Hook, and told Hook to speak with DOA Personnel Director, Peter Olson. When Olson verified that Caravello had been employed by DOA, and not been terminated and had a three year eligibility retroactive to the date of her resignation, Hook placed Caravello into the DILHR reinstatement system.

After Caravello learned that the microfiche historical roster still showed that she had been discharged, Caravello, together with the Union representative, asked the Department of Administration (DOA) to correct the record. DOA Personnel Director, Peter Olson, attempted to have the historical roster changed to delete the reference to the discharge but was informed by DER that the microfiche record could not be altered. The system, as it was then programmed, would apparently not accept the change because Caravello was not then on pay status and therefore had an

inactive code.

Although Caravello secured full-time employment with the University of Wisconsin on November 10, 1986, Caravello and the Union filed a complaint against DER on March 10, 1987, alleging that DER had violated secs. 111.84(1)(a), (a)(c), and (a)(d), Stats., by failing to comply with the terms of the settlement agreement. The complainants asserted that the terms of the agreement were violated because DER had failed to remove the reference to Caravello's discharge from the historical roster contained on the microfiche record and maintained by DER.

An evidentiary hearing on Caravello's complaint was conducted by WERC Hearing Examiner Burns on April 25, 1988. In her decision dated October 25, 1988, Examiner Burns determined that the State had not violated the terms of the settlement agreement and had not committed an unfair labor practice.

On November 14, 1988, the Union filed a petition with the Commission seeking review of the Examiner's decision. After reviewing the briefs submitted, the Commission advised the parties that an additional hearing on the matter was necessary. This additional hearing was held on January 9, 1991, on the issues of how state agencies used the permissive reinstatement process to fill vacancies, what action, if any, an individual must take to pursue reinstatement, and how the resolution of these two issues applied to Caravello.

The Commission issued its decision on August 19, 1991. In that decision, the Commission concluded, *inter alia,* that the State had violated an implicit term of the settlement agreement and, accordingly, had committed unfair labor practices under secs. 111.84(1)(a) & (1)(e). The Commission ordered the State, in relevant part, to:

> B. Make Complainant Caravello whole with interest 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.

DER filed a Petition for Rehearing with the Commission on September 9, 1991 but this request was denied. It then filed this Petition with the court pursuant to sec. 227.52, Stats.

INTENT OF THE PARTIES

The petitioner first takes issue with the Commission's finding that the intent of the parties to the agreement was to put Caravello in the position she would have occupied had she voluntarily resigned. Petitioner argues that this finding is not supported by substantial evidence in the record. In its decision, the Commission stated:

> 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.

Section 227.52, Stats., provides:

> (6) If the agency's action depends on any fact found by the agency in a contested case proceeding, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record.

Substantial evidence has been defined by our Supreme Court as evidence which is relevant, probative and credible and which is in a quantum that will permit a reasonable factfinder to base a conclusion on it. Princess House, Inc. v. DILHR, 111 Wis.2d 46, 54 (1983).

I conclude that substantial evidence exists in the record to support the Commission's finding. First, Kristiane Randall, Administrator, Division of Collective Bargaining, Department of Employment Relations at the time the agreement was signed and signatory to the agreement, testified on the relevance of Paragraph 3 in the agreement. She stated:

> Q What kind of problems was this particular sort of provision designed to address?
> A The major problem is that when a person is terminated and then reinstated there is no way of blotting out the memory of the supervisor of the fact that the termination occurred. So one of the things this is designed to provide is a specific person within an agency to contact who would be scripted to provide a particular type of reference rather than running the risk of having a supervisor say there was in fact a termination.

Ms. Randall's testimony reveals that the agreement was designed, in important part, to avoid the risk that the prior termination would be communicated to prospective employers.

Second, one can reasonably infer that the actions of DOA employees in attempting to delete the discharge entry on the microfiche historical roster constitutes an admission of not having fully followed through with what the parties intended-namely, to reverse the effects on Caravello that a termination would have on her reinstatement rights if she sought state employment. According to the testimony of the Union representative who negotiated the settlement agreement on Caravello's behalf, DOA employee Pete Olson told him that the 'fiche was in error, that a mistake had been made and they would try to correct it.' Olson testified that,

> A. [The Union representative] had called to point out that the fiche was showing TER-Discharged and that that was not, in fact, what the situation was but a some sort of resignation, and I acknowledged to him that, in fact, that's what the fiche showed and we would attempt to change it. I explained in great depth the difficulty involved, if not impossibility, in changing the existing fiche that was out to agencies, but that we would do what we could to try to address this.
> Q. Okay, and did you, in fact, try to change it?

A. Yes. I talked with Ruth Hable and Phil Wemer to make the necessary changes that they were able to do, and they have already testified that, in fact, they did that.

Nonetheless, DER argues that "if the parties had intended to make an agreement to remove any and all references to Caravello's discharge from any records maintained by the State, then they would have drafted Paragraph One very differently..." It is true that in construing the terms of a contract the best evidence of what the parties intended is the language they used to express their agreement. Here DER attaches to the use of the phrase "personnel file" an exclusive intent that records other than this need not be corrected. There are three reasons why such an absolute position cannot be sustained.

First, when a party to a mutual agreement, such as is present here, confers on another a right or benefit, that party impliedly agrees to take no action or omit no step which defeats the right or benefit. George v. Oswald, 273 Wis. 380, 383 (1956); Frangesch v. Kamp, 262 Wis. 446, 450 (1952). Here the reinstatement rights of Caravello, as indisputably demonstrated by her experience with DILHR, could have been wholly defeated by the failure of DER to purge all of its employment records of the rescinded termination. The law gives primacy to the parties' language, but it does not permit one party to deprive the other of potentially the major benefit of the contract by a literal and too narrow reading of two words.

Second, the phrase "personnel file" is capable of two meanings. It can be seen as the restricted, technical term that includes solely certain contents prescribed by law or it can be seen as a more generic term which denotes any employment records maintained by an employer as to a particular employee. Under such a circumstance, it is perfectly permissible that evidence beyond the language used be relied upon to ascertain the parties' intent. This would include the evidence of the parties' practical construction of the agreement found in the statements and actions of Mr. Olson.

Third, the assertion by DER that the failure to make explicit reference to the microfiche was a conscious choice to exclude it from the agreement's coverage flies in the face of the state's own admission. Ruth Hable, who was involved in the settlement negotiations with the DER staff person, conceded that at the time the agreement was executed she was unaware of the existence of the microfiche. Nor did DER show that any person involved in the preparation or approval of the agreement had any knowledge of it at that time, much less that they intended to exclude it from the purging responsibility of the state.

In sum, there is substantial evidence in the record to support the Commission's finding that the intent of the parties was to put Caravello in the position she would have occupied had she voluntarily resigned from her employment with the State.

IMPLICIT TERM OF CONTRACT

Having concluded that the Commission's finding that the intent of the settlement agreement was to place Caravello in a position she would have occupied had she voluntarily resigned was supported by substantial evidence in the record, I now turn to the question of whether removing the discharge entry from the historical roster was an implicit term of the agreement necessary to effectuate the

intent of the parties.

In its decision, the Commission agreed with the State that the settlement agreement did not contain any reference to the microfiche historical roster and that during settlement discussions, no reference was made to the microfiche. The Commission also stated that the microfiche was not a "personal or employment reference" and was not part of Caravello's official personnel file such that it was subject to explicit removal under Paragraph I of the agreement. Nevertheless, the Commission concluded that the State 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. The Commission stated:

> 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.

Initially it must be determined what standard of review to apply to the Commission's conclusion. A settlement agreement is effectively an extension of the collective bargaining agreement and the construction of a collective bargaining agreement is a conclusion of law. Board of Education, Brown Deer Schools v. WERC, 86 Wis.2d 201, 210 (1978).

The weight this court should give to an agency's conclusion of law has been the topic of much discussion. The statutes as well as caselaw gives guidance. Section 227.57(5), Stats., provides that 'the court shall set aside or modify the agency action if it finds that the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action...." Section 227.57(10), Stats., provides that 'due weight shall be accorded the experience, technical competence, and specific knowledge of the agency involved, as well as the discretionary authority conferred upon it.' Under these provisions, the weight that is due an agency's interpretation of the law boils down to the comparative institutional capabilities and qualifications of the court and the administrative agency in deciding the issue. Sauk County v. WERC, 165 Wis.2d 406, 421-22 (1991)(Abrahamson, J., dissenting). Factors to consider include the agency's actual experience with the precise or similar issue or with a given subject matter or area, the need for uniform administration and application of the law, the consistency of the agency's decisions and the soundness of the agency's legal reasoning and methodology. Id. at 423.

In the present case, the Commission is unquestionably more experienced than this court in addressing problems arising in the field of employment relations and in construing the language of collective bargaining agreements. From this experience in the precise field to which they have been assigned by the legislature, it is safe to infer that they have the kind of expertise that will assist in assessing the impact of the failure to have made the deletion from the microfiche roster. Accordingly, I conclude that the Commission's conclusion of law should be entitled to great weight. Under the 'great weight' standard, it is only when the interpretation of the contract is irrational that a reviewing court does not defer to it. Sauk County, 165 Wis.2d at 413.

WERC's conclusion that a deletion of a discharge reference in Caravello's historical microfiche roster was necessary to effectuate the intent of the parties is clearly rational. First, the record

discloses that in 1986, when Caravello asked DILHR to place her name on its Reinstatement List, she was told that this was impossible because the historical roster maintained on microfiche showed that she had been discharged. This is one example of the very problem the Commission concluded the parties drafted the settlement agreement to avoid, namely placing Caravello in the position she would have occupied had she voluntarily resigned from her employment with the State. Second, the argument that the settlement agreement does not make reference to the historical roster on microfiche is unpersuasive. If it were mentioned in the settlement agreement, there would be no need to consider whether it should be implied. Third, as noted above, the Commission's construction of the agreement is entirely consistent with the admonition from George and Frangesch that it is implied in every mutual agreement that one Party shall take no action or omit no step which serves to defeat the benefit afforded the other under their bargain. Whether the failure to purge the microfiche falls within this rule rests on the judgment of the Commission, and its determination must be given great weight.

REMEDY

The Commission made the following order:

> B. Make Complainant Caravello whole with interest 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's historical roster.

In its memorandum decision appended to the order, the Commission stated:

> 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.

It is well-accepted that administrative agencies have wide discretion in fashioning remedies for violations of labor statutes. WERC v. Evansville, 69 Wis.2d 140, 158 (1975). In the area of the Employment Peace Act, for example, our Supreme Court stated that, "[i]t is an established principle that a Board order should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Board" Libby, McNeill & Libby v. WERC, 48 Wis.2d 272, 286-87 (1970). See also, Wisconsin Employment

Relations Board v. Algoma Plywood & Veneer Company, 252 Wis. 549, 561, 32 N.W.2d 417 (1948)("[I]n order to reverse, we must find that the order has no reasonable tendency to effectuate the purposes of the act"). DER has the burden of showing that the remedy is irrational or unrelated to statutory purposes.

Section 111.80, Stats., states in relevant part:

> Declaration of policy. The public policy of the state as to labor relations and collective bargaining in state employment, in furtherance of which this subchapter is enacted, is as follows:
> (2) Orderly and constructive employment relations for state employes and the efficient administration of state government are promotive of all of these interests. They are largely dependent upon the maintenance of fair, friendly and mutually satisfactory employee management relations in state employment, and the availability of suitable machinery for fair and peaceful adjustment of whatever controversies may arise...
> (3) Where permitted under this subchapter, negotiations of terms and conditions of state employment should result from voluntary agreement between the state and its agents as an employer, and its employes...

Section 111.07, Stats., states in relevant part:

> Prevention of unfair labor practices ... (4) ... Final orders may dismiss the charges or require the person complained of to cease and desist from the unfair labor practices found to have been committed, suspend his rights, immunities, privileges or remedies granted or afforded by this subchapter for not more than one year, and require him to take such affirmative action, including reinstatement of employees with or without pay, as the Commission deems proper...

A. REMOVAL OF MICROFICHE REFERENCE

DER makes several arguments in support of its contention that the Commission's order to remove a reference to Caravello's discharge on the historical roster maintained on microfiche is irrational and does not effectuate the purposes of the Act.

DER first argues that the Union has already failed in two hearings to prove its allegations that Caravello was somehow harmed in the past by the existence of the microfiche entry. This argument misses the mark because it does not address why Caravello will not be harmed in the future as a result of the continued existence of the microfiche entry, and DER presented nothing at the hearing or in argument on this case that would show that the continued presence of the termination information on the microfiche could not, as a matter of law or practice, have a negative impact on Caravello.

DER's second argument is that, "even if the microfiche cards are presumed to create a potential harm to Caravello's job opportunities, correcting the microfiche cards from this day forward may not eliminate the potential harm the Commission is trying to address "because some agencies may

still use uncorrected copies of the microfiche (emphasis in original)." DER also points out the fact that Caravello has changed her name twice since 1984, a fact which petitioner claims limits the possibilities that anyone looking up Caravello's historical records today would likely locate the reference to her discharge. DER reasons, "anyone looking up her historical microfiche records today would look under the name Joyce Caravello. Only if they back-tracked through the cross-references to De Rosia and then to Caravello, would they even see the 1984 'termination' entry.'"

The flaw in these arguments is that, in contesting a remedy imposed by the Commission, DER bears the burden of showing that the remedy is irrational or will not effectuate the purposes of the Act. All DER is saying is that removing the microfiche entry may not guarantee that the danger the settlement agreement was designed to avoid will be fully accomplished. What it neglects to take note of is that the remedy of the Commission will improve the chances that there will be no future problem. All agencies who use up to date microfiche rosters will have correct information and any potential employer who does the 'back-track' which DER believes will be unlikely will obtain accurate information. Because this future, potential benefit will clearly serve the intention of the parties and correspondingly the purposes of the Act, DER has failed to satisfy its burden of proof.

DER next argues that in order to comply with the order, 'it would be necessary to write a special computer program, and then process the program, all at a very high cost to the State." DER has offered no statutory or case law support for its position that a Commission's order must be overturned because compliance would result in expense and difficulty, nor have its cost-benefit arguments in this regard shown the Commission's conclusion to be irrational.

B. BACKPAY

With respect to the Commission's order on backpay, DER argues that the record shows that the Union did not identify even one instance in which Caravello was denied an interview or an opportunity to apply for a job because of the microfiche record. DER's argument is premature, however, because no back pay has yet been awarded and it will still be the Union's and Caravello's burden to prove any actual harm in order to establish their claim if any such claim is even brought. If it is not, DER has suffered no harm. If it is, any preliminary argument that it should be denied for failure to fully present it in the hearings already conducted is better addressed by the Commission in the context of an actual claim than by this court in the abstract. Further, DER has not shown that such supplemental proceedings on the issue of actual harm suffered are wholly unauthorized under the law.

In sum, DER has not met its burden of showing that the Commission's order is irrational or does not effectuate the purposes of the State Employment Relations Act.

For all of the forgoing reasons,

IT IS HEREBY ORDERED that the decision of the Commission be affirmed and this action is dismissed.

Dated this 23rd day of December, 1992.
BY THE COURT

/s/ Michael Nowakowski
Michael Nowakowski
CIRCUIT COURT JUDGE

cc:
AAG John Niemisto, Attorney Teel D. Haas, Attorney Richard V. Graylow

Endnotes

1/ The Department of Employment Relations is responsible for representing the State of Wisconsin in its responsibility as an employer under the State Employment Labor Relations Act, Ch. 111, subch. V, Stats.

2/ The historical roster is a record of personnel transactions and is maintained by DER on microfiche. 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. This tape is delivered to DER, which then updates the roster and produces a microfiche copy of the roster on a monthly basis. Upon written request, DER will furnish a copy of the microfiche to other State agencies. At all times relevant herein, DILHR and DOT received a microfiche copy of the historical record quarterly.