STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CITY OF GREEN BAY, PARK DEPARTMENT EMPLOYEES, UNION LOCAL 1672, AFSCME, AFL-CIO, Complainant, vs. CITY OF GREEN BAY, Respondent.	Case 169 No. 40028 MP-2060 Decision No. 25602-A

Appearances:
Lawton & Cates, S.C., by Mr. Richard V. Graylow, 214 W. Mifflin Street, Madison, Wisconsin, 53703-2594, appearing on behalf of the Complainant.
Mr. Mark A. Warpinski, Assistant City Attorney, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER GRANTING MOTION TO DISMISS

On January 19, 1988, City of Green Bay, Park Department Employees, Union Local 1672, AFSCME, AFL-CIO, filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission alleging that the City of Green Bay had violated Secs. 111.70(3)(a)1, 3, 4 and 5, Stats., by refusing to abide by an arbitration award issued by Arbitrator Edmond J. Bielarczyk regarding pay for a "snow day." Respondent, on June 7, 1988, filed its answer to the complaint, together with a Motion to Dismiss. The Commission appointed Dennis P. McGilligan, a member of its staff, to act as Examiner in this matter. By letter dated June 17, 1988, the Examiner confirmed the parties' agreement to decide the issues raised by Respondent's motion by briefing the matter without hearing. The parties completed their briefing schedule on September 22, 1988. The Examiner, having considered the evidence and arguments of the parties, and being satisfied that the complaint should now be dismissed, makes and files the following Findings of Fact, Conclusions of Law and Order Granting Motion to Dismiss.

FINDINGS OF FACT

1. Complainant City of Green Bay, Park Department Employees, Union Local 1672, AFSCME, AFL-CIO is a labor organization within the meaning of Sec. 111.70(1)(h), Stats., and has its principal place of business at 2785 Whippoorwill Drive, Green Bay, Wisconsin.

2. Respondent City of Green Bay is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and has its principal place of business at the Green Bay City Hall, 100 N. Jefferson Street, Green Bay, Wisconsin.

3. At all times material herein, Complainant and Respondent have been parties to a collective bargaining agreement covering certain employes of the City of Green Bay Park Department.

4. Sometime in 1985 Complainant filed a grievance on behalf of the aforesaid employes for compensation covering a declared snow day emergency which occurred on March 4, 1985.

5. Said grievance was ultimately appealed by Complainant to final and binding arbitration.

6. On February 9, 1987, Arbitrator Edmond J. Bielarczyk, Jr., issued an arbitration award which found as follows:

The City violated the collective bargaining agreement when it failed to compensate employees in accordance with Article X for a snow day emergency, which occurred on March 4, 1985. The City is directed to make the employes whole.

Article X of the above collective agreement reads as follows:

ARTICLE X
MAINTENANCE OF BENEFITS

The Union agrees that at all times and as far as it is within their power to further the interest of the Park Department. In conformity with the Union's policy of a 'fair day's pay for a fair day's work', the Union shall at all times endeavor to see that this policy is carried out in practice as well as in theory.

The Employer agrees to maintain existing benefits and conditions not referred to specifically in this Agreement.

7. On December 2, 1985, some Park Department employes represented by the Complainant were unable to report to work because of an unusually high accumulation of snow. The Respondent refused to pay said employes for their missed work.

8. On February 18, 1987, Complainant filed a grievance with the Respondent requesting that the aforesaid employes be made whole for the missed day of work on December 2, 1985, due to an excessive accumulation of snow.

9. On April 6, 1987, Complainant asked the Wisconsin Employment Relations Commission to assign an arbitrator to issue a "final and binding arbitration award" with respect to Complainant's grievance. In that grievance-arbitration proceeding (City of Green Bay, Parks Department Case #: 161 No: 38634 MA-4563), Respondent raised an objection to the issuance of a decision in the matter based on the grounds that the grievance had not been timely filed.

10. Prior to a decision by the arbitrator, Complainant filed the instant complaint of prohibited practice against the Respondent on January 19, 1988, wherein Complainant alleged that because Arbitrator Edmond J. Bielarczyk rendered a decision on behalf of the Complainant on February 9, 1987, directing the Respondent to pay Complainant's members for a declared snow day emergency, Respondent had committed a prohibited practice by failing to pay Complainant's members for the missed day of work due to heavy snow on December 2, 1985.

11. In City of Green Bay (Parks Department) Case#: 161 No. 38634 MA-4563, Arbitrator William C. Houlihan ruled on April 8, 1988, in favor of Respondent as follows:

"That contract that provides the snow day benefit provides the grievance procedure as the mechanism available to resolve disputes. It requires that those with claims must file and pursue their claims in a specified manner. That was not done here. It is no defense to say that the City would have denied the grievance, although that is almost certainly the case. However, the existence of the procedure anticipates disputes over the application of the terms of the agreement. It is those very disputes that the procedure is designed to handle.

The labor agreement provides for a mutual written waiver or extension of the contractual time limits. This is an approach the parties but not this Arbitrator, could have explored. There is no evidence that a mutual extension or waiver was ever intended or executed.

What is left is a 10 working day timeline to file a grievance. I do not believe that is tolled by an existing disputes relative to the substance of the grievance. The Article precludes me from modifying the 10 day provision."

Arbitrator Houlihan denied Complainant's grievance on timeliness grounds.

12. On June 7, 1988, Respondent filed an answer to the complaint of prohibited practices wherein Respondent raised a Motion to Dismiss on the grounds that the Houlihan arbitration award is res judicata and that the Bielarczyk arbitration award deals with a different set of facts and is non-precedential. In its answer Respondent also raised an issue whether the prohibited practices complaint is timely filed. Thereafter the parties briefed the issues as noted above.

13. The record supports a finding that because Arbitrator Bielarczyk's arbitration award dealt specifically with a declared snow day emergency, and the instant dispute over December 2, 1985 did not, there is a material discrepency of fact betwen the disputes.

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

CONCLUSIONS OF LAW

1. That because Arbitrator Edmond J. Bielarczyk's arbitration award dealt specifically with a declared snow day emergency, and the instant dispute involving December 2, 1985 did not, there is a material discrepancy of fact between the two disputes; and, therefore, said arbitration award is not res judicata with respect to the instant complaint.

2. That because the complaint is filed out of time within the meaning of Secs. 111.70(4)(a) and 111.07(14), Stats., the Commission is without jurisdiction to determine the merits of the complaint.

Upon the basis of the foregoing Findings of Fact and Conclusions of Law, the Examiner makes and renders the following

ORDER GRANTING MOTION TO DISMISS 1/

That the Motion filed by Respondent that the complaint in this matter be dismissed is hereby granted, and the complaint is hereby dismissed.

Dated at Madison, Wisconsin this 20th day of October, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Dennis P. McGilligan
Dennis P. McGilligan, 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

(Footnote one continued on page four)

(Footnote one continued from page three)

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 GRANTING MOTION TO DISMISS

BACKGROUND

In the complaint initiating these proceedings, Complainant alleged that Respondent violated Secs. 111.70(3)(a)1, 3, 4 and 5, Stats., by refusing to pay employes it represents for a "snow day" which occurred on December 2, 1985 consistent with an earlier arbitration award issued by Edmond J. Bielarczyk. On June 7, 1988, Respondent filed an answer with the Commission denying that it had committed any violation of the applicable statutes because one, the Bielarczyk arbitration award is not _res judicata_ with respect to the instant dispute; two, the Houlihan arbitration award precludes the Complainant from filing the instant prohibited practices complaint; and three, the instant prohibited practices complaint is not timely filed. As noted above, the parties waived hearing in the matter and briefed the dispute.

COMPLAINANT'S POSITION

Complainant basically argues that the arbitration award of Edmond J. Bielarczyk is _res judicata_ with respect to the instant dispute and must be enforced. In support thereof, Complainant argues that the parties are identical, the facts are the same and the operative provisions of the collective bargaining agreement are identical.

For a remedy, Complainant requests that the affected employes be made whole for the "snow day" of December 2, 1985; that appropriate remedial Orders be entered and that Respondent be ordered to pay costs, disbursements and expenses of the complaint including attorneys' fees.

RESPONDENT'S POSITION

Respondent contends that the Bielarczyk arbitration award is not _res judicata_ because there is a material difference of facts between the prior dispute governed by the Bielarczyk decision and the present dispute. The difference between the two, according to the Respondent, is that no snow day emergency was declared on December 2, 1985.

Respondent also contends that Complainant is precluded from proceeding with the instant prohibited practices complaint according to the doctrine of _res judicata_ since Arbitrator Houlihan reviewed the same subject matter in an arbitration forum and denied the grievance.

Finally, Respondent contends that the instant prohibited practices complaint is untimely filed.

DISCUSSION

Complainant initially argues that the aforesaid Bielarczyk arbitration award is _res judicata_ with respect to the instant dispute.

The Commission will apply the principle of _res judicata_ to arbitration awards. 2/ 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

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2/ _State of Wisconsin (DER)_, Dec. No. 23885-B (Burns, 9/87), _aff'd_ in pertinent part, Dec. No. 23885-D (WERC, 2/88).

share an identity of parties, issue and remedy. 3/ In addition, there cannot be any material discrepancies of fact existing between the prior dispute governed by the award and the subsequent dispute. 4/

However, there is a material discrepancy of fact existing between the prior dispute governed by the Bielarczyk arbitration award and the instant dispute. Complainant argues herein that Respondent is obliged to pay employes who failed to report for a snow day which occurred sometime after March 4, 1985. The snow day in question occurred on December 2, 1985. On March 4, 1985, a snow day emergency was declared by Respondent. Certain members of the Complainant's bargaining unit did not receive compensation because they failed to report to work on that day. Arbitrator Bielarczyk ruled that Respondent violated the collective bargaining agreement when it "failed to compensate employes in accordance with Article X for a snow day emergency which occurred on March 4, 1985." As a result of that award, Respondent was required to compensate members of Complainant's bargaining unit who did not report to work during a declared snow day emergency.

Paragraph 10 of the instant prohibited practices complaint alleges the following: "Subsequently another 'snow day' occurred." There is no allegation in the prohibited practices complaint that the subsequent snow day referred to in paragraph 10 above was a declared snow day emergency. Nor is there anything in the record which would support a finding regarding such an allegation. That distinction is material with respect to the instant complaint.

Bielarczyk's arbitration award dealt specifically with a declared snow day emergency. Complainant's bargaining unit members received compensation for missing work on a declared snow day emergency. Respondent concedes in its reply brief said compensation has been "incorporated into the collective bargaining agreement and must be maintained as a benefit under the pertinent contractual language." However, although there may have been heavy accumulations of snow on the date in question - December 2, 1985 - Respondent did not declare a snow day emergency. This incident therefore is not the same as the March 4, 1985, incident which was the basis of the Bielarczyk award. The Examiner concludes that Respondent's failure to declare a snow day emergency represents a material factual difference for the purposes of the doctrine of res judicata and that the Bielarczyk award is therefore not res judicata as to the instant complaint.

Having decided that the Bielarczyk award is not res judicata with respect to the instant dispute, two questions remain. One, is whether the instant prohibited practices complaint is timely filed. Two, concerns the effect of Houlihan's arbitration award on the instant dispute.

For the reasons discussed below, the Examiner finds that the instant prohibited practices complaint is not timely filed. Section 111.07(14), Stats., as amended by Sec. 111.70(4)(a), specifies that "the right of any person to proceed under this Section shall not extend beyond one year from the date of the specific act or prohibited practice alleged." Under this statute of limitations, the Commission is without jurisdiction to determine the merits of a complaint filed more than one year after the act or prohibited practice alleged.

A determination is therefore necessary as to what event triggered the running of the one-year statute of limitations specified in Secs. 111.07(14) and 111.70(4)(a), Stats.: the alleged incident which occurred on December 2, 1985 or Arbitrator Bielarczyk's award which was issued on February 9, 1987. On its face, the complaint alleges as unlawful actions occuring several years prior to the date of its filing.

The Commission has held that where a collective bargaining agreement provides procedures for the voluntary settlement of disputes arising thereunder, it would not entertain a complaint, on the merits, that either of the parties has violated such an agreement before the parties have exhausted the voluntary procedures for

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3/ State of Wisconsin (DER), Dec. No. 20145-A (Burns, 5/83), aff'd by operation of law, Dec. No. 20145-B (WERC, 6/83).

4/ Id.

resolving disputes. 5/ In effectuating this policy, the Commission concluded that a cause of action involving an alleged violation of contract does not arise until the grievance procedure has been exhausted and that, therefore, the one-year limitation period for filing a complaint is computed from the date when the grievance procedure is exhausted, provided that the complainant has not unduly delayed the grievance procedure. 6/

In the instant case, however, Complainant has offered no persuasive reason why it waited over two years to file a grievance concerning the "snow day" on December 2, 1985. Nor does the record indicate a valid explanation for such a delay. In the absence of any persuasive evidence to the contrary, the Examiner is forced to conclude, as argued by Respondent, that the filing of the instant prohibited practices complaint was simply "an afterthought motivated by the complainant's realization that they had not timely complied with the grievance arbitration provisions of the collective bargaining agreement." Based on the complainant's failure to initiate the parties' grievance procedure on a timely basis, and the aforesaid Commission policy, the Examiner finds that the one-year limitation period for filing a complaint must be computed in the instant case from the date of the alleged incident. Utilizing this approach it is clear that the prohibited practices complaint is untimely filed.

Even if the Examiner could consider the issues raised before Arbitrator Houlihan the Complainant's case would fail. It is the Commission's policy to defer to the grievance arbitration provisions of the parties' collective bargaining agreement for the resolution of disputes arising thereunder. 7/ In the instant case, the Complainant filed a grievance over Respondent's failure to pay employes for the "snow day" which occurred on December 2, 1985; and processed same to final and binding arbitration before Arbitrator Houlihan. Arbitrator Houlihan denied the grievance as untimely. Complainant offers no persuasive reason, nor does the record contain same, why the Commission should not defer to Arbitrator Houlihan's award in the instant case.

Based on the above and foregoing analysis, the Examiner has concluded that the Bielarczyk arbitration award is not res judicata with respect to the instant dispute and, therefore, Respondent could not have violated said award by its failure to pay certain employes for a "snow day" which occurred on December 2, 1985. The Examiner has also concluded that the complaint is filed out of time within the meaning of Secs. 111.70(4)(a) and 111.07(14) Stats. The complaint filed herein has therefore been dismissed.

Respondent has requested an order directing the Complainant to pay to the Respondent its attorney's fees and costs. However, Respondent has not met the standard set forth by the Commission for the awarding of such costs 8/; and, accordingly, the Examiner does not find it appropriate to order attorneys fees and costs in the instant case.

Dated at Madison, Wisconsin this 20th day of October, 1988.

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By Dennis P. McGilligan
Dennis P. McGilligan, Examiner

5/ Harley-Davidson Motor Company, Dec. No. 7166 (WERB, 6/65); Prairie Farm Joint School District, Dec. No. 12740-A (Yaeger, 5/75), aff'd by operation of law, Dec. No. 12740-B (WERC, 6/75).

6/ Prairie Farm Joint School District No. 5, supra.

7/ City of Beloit Joint School District No. 1, Dec. No. 14702-B, at p. 5 (Davis, 3/77), aff'd by operation of law, Dec. No. 14702-C (WERC, 4/77).

8/ See Commissioner Torosian's concurring opinion in Madison Schools, Dec. No. 16471-D (WERC, 5/81), aff'd in pertinent part, MTI v. WERC, 115 Wis. 2d 623 (CtApp IV, 1983) and Rock County, Dec. No. 23656 (WERC, 5/86).