

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MS. SAMELLA WILLIAMS and	:	
THE WISCONSIN STATE EMPLOYEES	:	
UNION (WSEU), AFSCME,	:	
COUNCIL 24, AFL-CIO,	:	
	:	Case 257
Complainants,	:	No. 40486 PP(S)-144
	:	Decision No. 25805-B
vs.	:	
STATE OF WISCONSIN,	:	
	:	
Respondent.	:	

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 the Complainants.

Ms. Renae Bugge, Employment Relations Specialist, Department of Employment Relations, State of Wisconsin, 137 East Wilson Street, P.O. Box 7855, Madison, Wisconsin 53707-7855, appearing on behalf of the Respondent.

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

Examiner Coleen A. Burns having on August 3, 1989 issued her Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above matter wherein she concluded that Respondent had not committed unfair labor practices within the meaning of Secs. 111.84(1)(a), (c) or (d), Stats., by requiring Complainant Williams to pay an interest charge on a retirement fund payment; and Complainants' having on August 15, 1989 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 parties thereafter having filed written argument in support of and in opposition to said petition; and the period for the filing of such argument having been terminated on October 3, 1989; and the Commission having considered the matter and being fully advised in the premises, makes and issues the following

ORDER 1/

That the Examiner's Findings of Fact, Conclusions of Law and Order are affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 5th day of December, 1989.

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.

1/ (Footnote 1/ appears on page two.)

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 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.

STATE OF WISCONSIN

MEMORANDUM ACCOMPANYING ORDER AFFIRMING EXAMINER'S
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Examiner's Decision

Examiner Burns' memorandum accompanying her Findings of Fact, Conclusions of Law and Order states, in pertinent part:

Merits

The testimony of Union Representative Manlove demonstrates that, at the time the parties' negotiated the settlement agreement of December 20, 1984 (Settlement Agreement), both the Union Representative responsible for negotiating the Settlement Agreement, Cindy Manlove, and the Employer representative responsible for negotiating the Settlement Agreement, Eloise Anderson, were aware of the fact that Samella Williams had withdrawn monies from the Wisconsin Retirement System. Union Representative Manlove's testimony also demonstrates that, at the time the parties reached the settlement, it was understood that Williams would have to repay retirement monies. While Manlove recalled that there was a discussion concerning the fact that the retirement monies would be repaid pursuant to payroll with-holding, in an amount between 10 and 25 percent of Williams' biweekly pay, Manlove did not claim that the parties had reached any agreement on the specific amounts to be repaid by Williams. Nor is such an agreement reflected in the Settlement Agreement.

As the Union argues, the Settlement Agreement does not place any responsibility for the repayment of retirement monies upon Williams. Conversely, however, as the Union does not argue, the Settlement Agreement does not relieve Williams of any responsibility for the repayment of retirement monies. The reason being that the Settlement Agreement is silent on the issue of Williams' responsibility to repay the retirement monies which she withdrew from the Wisconsin Retirement System. The Settlement Agreement addresses only the Employer's obligation to restore benefits. Specifically, Paragraph Five of the Settlement Agreement states as follows:

5. The employer agrees to pay back wages minus deductions in the amount of \$4,162.46 and restore all benefits as of August 2, 1984.

As the record demonstrates, the Employer did issue William's a check in the amount of \$4,162.46 and restored all her benefits as of August 2, 1984. The Union does not argue and the record does not demonstrate that the Employer has failed to comply with Paragraph Five of the Settlement Agreement.

In summary, it is evident that, at the time the parties entered into the Settlement Agreement, it was

understood that Williams would have a responsibility to repay monies into her retirement account. The parties, however, did not address this repayment in the terms of the Settlement Agreement. As the Union argues, the Settlement Agreement is "conspicuously silent" with respect to the pay back of these retirement monies. However, contrary to the argument of the Union, this silence does not serve to restrict the Employer's right to charge the interest in dispute herein. Rather, this silence demonstrates that the repayment of the retirement monies is not governed by the Settlement Agreement. Accordingly, the Examiner rejects the Union's assertion that the Employer, or its agent DOT, violated the Settlement Agreement when DOT required Williams to pay \$72.44 in interest on the 1986 calendar year balance of the retirement monies which Williams owed to DOT. 3/

As the Employer argues, such a conclusion is not inconsistent with the "make whole" principle underlying the Settlement Agreement. The reason being, that the Employer is generally considered to be responsible for restoring only those wages and benefits which were lost as a result of the Employer's conduct. For the reasons discussed below, the Examiner is persuaded that, to the extent that Williams may have been "damaged" by the payment of the \$72.44 interest charge, the damage is attributable to conduct which was under the control of Williams.

The Examiner has no reason to doubt Williams' testimony that her discharge created a financial hardship which necessitated the removal of monies from her Wisconsin Retirement System account. Williams, however, had the legal option, if not the financial option, of leaving the monies in her retirement account. 4/ Moreover, under the provisions of Sec. 40.25(5)(b), Wis. Stats., which the Employer used as its authority to assess the interest charge, Williams could have avoided any interest charge by paying DC)T the entire \$4,227.47 by the end of the 1986 calendar year.

CONCLUSION

Contrary to the argument of Complainants, the record does not demonstrate that the Employer has violated the Settlement Agreement in violation of Sec. 111.84(1)(a), (1)(c) and/or (1)(d), Wis. Stats., by requiring Williams to pay the \$72.44 interest charge. Accordingly, the complaint of prohibited practices is dismissed in its entirety.

. . .

3/ The Employer argues that the interest charge was consistent with the Employer's obligations under the parties' collective bargaining agreement, Chapter 40 of the Statutes, and ETF's

administrative rules. However, the issue presented to the Examiner involves only the alleged breach of the settlement agreement. The Examiner makes no determination as to whether the Employer's conduct is consistent with the parties' collective bargaining agreement, Chapter 40 of the Statutes, or ETF's administrative rules.

4/ Sec. 40.25(2), Wis. Stats.

POSITIONS OF THE PARTIES

Complainants

Complainants argue that the Examiner erred when she concluded Respondent did not violate the applicable settlement agreement by charging Complainant Williams interest on monies Williams repaid to Respondent. Complainants assert that Respondent lost the right to charge Complainant Williams interest because the Settlement Agreement contains no language preserving this right. Citing Article XV of the applicable bargaining agreement and Secs. 111.815(2) and 111.93(3), Stats., Complainants contend that the Settlement Agreement is binding upon all of Respondents' agencies and departments, and supersedes all else. Complainants contend that as the Settlement Agreement is silent regarding payment of interest, Respondent violated the agreement when it compelled Complainant Williams to make the interest payment.

Given the foregoing, Complainants ask that the Examiner's decision be reversed.

Respondent

Respondent urges the Commission to affirm the Examiner. Respondent contends that the decision to impose an interest penalty on Complainant Williams does not violate the parties' settlement agreement and is consistent with Article XIII of the applicable bargaining agreement obligates the Respondent to act in conformance with the retirement benefit provisions of Chapter 40, Wis. Stats. Respondent argues that when Complainants negotiated the settlement agreement knowing Complainant Williams had received a separation benefit which would have to be repaid, Complainants had the opportunity to negotiate regarding the issue of interest payments and did not do so. Absent negotiated terms to the contrary, Respondent asserts that it was correct when it administered the settlement agreement in a manner consistent with the parties' master bargaining agreement, Chapter 40 and Employment Trust Fund administrative rules.

DISCUSSION

The Examiner found and the record establishes that at the time the Settlement Agreement at issue herein was reached, representatives of Complainants and Respondent both assumed that Complainant Williams would be required to restore the monies she withdrew from her retirement account. The parties' representatives discussed the manner in which the repayment would occur. The Settlement Agreement is silent as to this repayment obligation. Within this factual context, we are asked to determine whether the Settlement Agreement precluded Respondent from electing to charge Complainant Williams interest on the amount which Williams had not repaid at the end of the calendar year following her reinstatement. As we believe the Examiner correctly concluded that the Settlement Agreement simply does not address the issue of interest, we affirm her decision that the Settlement Agreement was not violated by Respondent's action.

In our view, when the parties bargained the Settlement Agreement and elected to make no mention of Complainant Williams' obligations vis-a-vis her retirement account, the parties chose to leave such matters outside the scope of their agreement and thus presumably subject to whatever provisions of the master bargaining agreement, statutes and/or administrative code are applicable. Thus, the Examiner correctly concluded that the agreement before her was not violated by Respondent's action. Whether Respondent's action was consistent with the applicable statute and administrative rule is beyond the scope of the issue before us.

Given the foregoing, we reject Complainant's argument that unless the settlement agreement explicitly stated that Respondent retained the right to seek interest, Respondent lost said right. Rather, we have concluded that the issue simply wasn't addressed in the Settlement Agreement leaving the parties with whatever rights and obligations they possessed as to such matters.

Therefore, we have affirmed the Examiner.

Dated at Madison, Wisconsin this 5th day of December, 1989.

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.