STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN STATE EMPLOYEES UNION (WSEU) AFSCME, COUNCIL 24, AFL-CIO, Complainant, vs. STATE OF WISCONSIN, Respondent.	Case 265 No. 42005 PP(S)-153 Decision No. 26031-A

Appearances:

Lawton & Cates, S.C., Attorneys at Law, 214 West Mifflin Street, Madison Wisconsin 5

Mr. David J. Vergeront, Legal Counsel, Department of Employment Relations, 137 East Wilson Street, P.O. Box 7855, Madison, Wisconsin 53707-7855, for the State.

FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER

Wisconsin State Employees Union (WSEU), AFSCME, Council 24, AFL-CIO, herein, the Union, on April 3, 1989, filed a complaint of unfair labor practices with the Wisconsin Employment Relations Commission in which it alleged the State of Wisconsin, herein, the State, had committed unfair labor practices within the meaning of Chapter 111, Stats. On May 30, 1989, the Commission appointed Jane B. Buffett, a member of its staff, to act as Examiner, to make and issue Findings of Fact, Conclusion of Law and Order pursuant to Sec. 111.07(5), Stats. Hearing was set for July 5, 1989, and subsequently postponed. Hearing was set for September 5, 1989 and subsequently postponed. Hearing was set for October 13, 1989 at which time the parties reached a tentative resolution of the dispute. On May 22, 1990 Complainant requested the matter be set for hearing. Hearings set for September 5 and October 18, 1990 were each subsequently postponed. Hearing was set for January 29, 1991 at which time the parties submitted a stipulation of facts and exhibits which comprised the evidence in the matter. A transcript was prepared and received February 11, 1991. Briefs and reply briefs were filed, the last of which was received March 29, 1991. Upon review of the stipulations, the Examiner determined the factual stipulations included a hypothetical fact and requested further hearing to complete the record. On February 4, 1992 said hearing was held. The parties filed additional briefs, the last of which was received on March 23, 1992. The Examiner, having considered the evidence and arguments of the parties, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. Wisconsin State Employees Union (WSEU) AFSCME, Council 24, AFL-CIO (herein, the Union), is a labor organization with offices at 5 Odana Court, Madison, Wisconsin 53719.

2. State of Wisconsin (herein, the State) is a state employer with offices at 137 East Wilson Street, Madison, Wisconsin 53707.

3. The Union represents employes of the State in a bargaining unit of blue collar and non-building trades employes. Some members of the unit accumulate compensatory time for working overtime or on holidays. Richard Olsen and Gary Martinson are employes of the State and members of said bargaining unit.

4, The State and the Union are parties to a succession of collective bargaining agreements. The agreement covering the period November 6, 1987 to June 30, 1989 contains the following relevant provision:

> **6/3/2 (BC, SPS, T)** Eligibility for Overtime Credit
> The Employer agrees to compensate employes at the premium rate of time and one-half in cash or compensatory time, or combination thereof, as the Employer may elect, for all hours in pay status which are in excess of forty (40) hours per workweek under the following conditions:
>
> . . .
>
> **6/4/2** Scheduling of Compensatory Time
> When compensatory time credits have been earned by an employe for overtime work or work on a holiday, this accrued time shall be used prior to seasonal layoff or January 1, whichever comes first. However, if the Employer does not permit the employe to use accrued compensatory time by January 1, the employee may carry such credits into the first four months of the new calendar year. Accrued compensatory time in excess of five (5) days may be scheduled at the convenience of the Employer. For Fruit and Vegetable Grading Service employes of the Department of Agriculture, Trade and Consumer Protection only, accrued compensatory time credits may be carried over into the first six (6) months of the new calendar year.
> (Underlining in original.)
>
> **6/4/3 (BC, CR, T, SPS)** Employes not covered by the Fair Labor Standards Act shall have the right to take earned compensatory time off for overtime. At the Employer's discretion, the employe may be paid in cash for unused compensatory time credits at the end of the year. If cash is not paid the employe shall carry such time until May 1 of the following year. Unused compensatory time credits shall then be paid in cash at the employe's current hourly rate.

5. As of May 1, 1988, Richard Olsen, an Experimental Herd Assistant at the Blaine Dairy Center was credited with compensatory time carried over from the end of the calendar year, 1987, which he had not used. On May 1, 1988 he did not receive cash compensation for such compensatory time credits, nor did he receive such cash compensation at any time thereafter. On or about May 23,

1988, Olsen's supervisor, Robert Elderbrook, called Olsen into his office to tell him that he had accumulated too much compensatory time and he should take time off or Elderbrook would schedule Olsen for time off. Subsequently, Olsen scheduled two weeks of time off in August, 1988, for which he received pay, and thereby reduced his compensatory time credit by 80 hours.

6. Gary Martinson is an employe at the Arlington Dairy Center. In February, 1988, Elderbrook told Martinson to take some time off or he would schedule Martinson for time off. Subsequently, Martinson indicated the days he would take off. The record does not indicate whether said time off was taken prior to or after May 1, 1988.

7. In the past, at unspecified times, Martinson has been told by supervisors to take time off in order to lessen his compensatory time credit.

8. Certain unnamed employes received a combination of cash payment and compensatory time for credits carried beyond May 1. Other unnamed employes carried over all of the outstanding credits as compensatory time. Both of these groups of employes carried over such time without being directed to do so.

9. On May 13, 1988 employe Timothy DeSmet of the Dairy Forage Center work unit filed a grievance including the following description of the grievance:

> On 5/1/88 the employer failed to abide by article 6,4,4, the payment of carried over comp. time.

(Elsewhere in the grievance, DeSmet referenced Section 6/4/3.)

The grievance progressed through the grievance procedure, and ultimately, on October 22, 1988, Employment Relations Manager Edward Corcoran made the following response:

> The employer agrees to abide by the terms of the labor agreement. Grievance Sustained.

The grievance did not specify which employes were alleged to have been aggrieved.

10. On April 3, 1989 the Union filed a complaint of unfair labor practice regarding the grievance. The disputed facts were set forth in the following two paragraphs:

> 11. The Employer has not abided by and continues to refuse to abide by the Labor Agreement and the distribution of comp. time, as well as said Grievance settlement.
>
> 12. More particularly, the Employer was (sic) and continues to refuse to pay out accumulated comp. time in cash on or prior to May 1 of the year after which it was earned. In some cases the Employer has forced Employees to take time off in an effort to reduce the amount of money it was otherwise required to "cash-out".

11. At the February 4, 1992 hearing the parties stipulated to exhibits, facts and the following statement of the issue:

> Issue: If an employee who did not receive cash

in lieu of accrued 1987 compensatory time subsequently uses any of that accrued compensatory time as time off with pay, is that employee also entitled to receive a cash equivalent for the time off with pay that he already has taken?

And subissues of that are: is the resolution the same if, a) an employee was instructed to carry over certain compensatory time as opposed to receiving cash in lieu and/or, b) an employee desired to carry over certain compensatory time as opposed to receiving cash in lieu.

12. Olson and Martinson were directly instructed by Elderbrook to take time off with pay.

13. By not paying employes a monetary sum equal to the value of the unused compensatory time that was carried over from 1987 and remained outstanding as of May 1, 1988, the State violated the collective bargaining agreement and the settlement agreement.

CONCLUSION OF LAW

By not paying employes a monetary sum equal to the value of the unused compensatory time that was carried over from 1987 and remained outstanding as of May 1, 1988, the State violated the collective bargaining agreement and the settlement agreement and thereby committed an unfair labor practice within the meaning of Sec. 111.84 (1)(e) and derivatively, Sec. 111.84(1)(a), Stats..

ORDER 1/

IT IS ORDERED that the State, its officers and agents, shall immediately:

1. Cease and desist from violating the collective bargaining agreement and from violating any settlement agreements resolving grievances.

(Footnote 1/ appears on the next page.)

2. Take the following affirmative action which the Examiner finds will effectuate the policies of the State Employment Labor Relations Act:

   a. Pay Richard Olsen and Gary Martinson a sum of money equal to the value of any and all compensatory time credits for 1987 that remained outstanding as of May 1, 1988 and the interest thereon. 2/

   b. Notify all employes at any Dairy Forge Center site in the bargaining unit represented by the Union by posting in conspicuous places where those employes are employed, copies of the Notice attached hereto and marked "Appendix A". That Notice shall be signed by the Dairy Herd Manager and a representative of the Department of Employment Relations and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken to ensure that said Notices are not altered, defaced

or covered with other material.

c. Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days from the date of this Order as to the steps it has taken to comply with this Order.

Dated at Madison, Wisconsin this 24th day of July, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Jane B. Buffett /s/
Jane B. Buffett, 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.

(Footnote 1/ continues and Footnote 2/ appears on the next page.)

(Footnote 1/ continues)

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and 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.

2/ The applicable interest rate is the Sec. 814(4), Stats., rate in effect at the time the complaint was initially filed, April 3, 1989. Wilmot Union High School District, Dec. No. 18820-B, (WERC, 12/83); Green County, Dec. No. 26798-B (WERC, 7/92).

APPENDIX A

NOTICE TO ALL EMPLOYES

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

WE WILL NOT violate the collective bargaining agreement or any settlement agreement.

WE WILL pay Richard Olsen and Gary Martinson cash for any and all compensatory time credits for 1987 that remained outstanding as of May 1, 1988.

Dated ________________ By ________________________
Dairy Herd Manager,
Dairy Forage Research Center

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On behalf of the Department
of Employment Relations

THIS NOTICE MUST REMAIN POSTED FOR 30 DAYS FROM THE DATE HEREON AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL.

STATE OF WISCONSIN
(DEPARTMENT OF EMPLOYMENT RELATIONS)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT ,
CONCLUSION OF LAW AND ORDER

BACKGROUND

The State operates a Dairy Forage Research Center at which employes sometimes accrue compensatory time credits by working overtime and on holidays. On May 1, 1988 the State did not pay cash to certain employes for such credits. The Union filed a grievance, asserting such failure violated the parties' contract. The grievance ultimately reached Employment Relations Manager Edward Corcoran who responded, "The employer agrees to abide by the terms of the labor agreement. Grievance sustained." Some employes, however, did not receive cash payment. The Union subsequently filed the instant unfair labor practice complaint, alleging that the State was violating both the labor agreement and the grievance settlement.

POSITIONS OF THE PARTIES

A. The Union

The Union insists the language of the contract provides that all employes who did not receive cash for their compensatory time balance outstanding as of May 1 must receive cash for that time whether or not they subsequently took time off with pay for part or all of that time.

In its reply brief, the Union argues the principles and cases cited by the State are not applicable to this instant situation in which the employes were ordered to use their accumulated compensatory time. The Union also points to the grievance settlement which it asserts is a State concession that it was obligated to pay cash for compensatory time as of May 1, 1988. It insists both arbitrators and the Commission have broad authority in fashioning appropriate remedies. According to the Union, failing to award a cash remedy to the affected employes could allow the State to profit from its unlawful conduct. It finds that the State's order to the affected employes to use their compensatory time balance for time off with pay was unlawful.

In its brief submitted after the supplemental hearing, the Union argues that the State's failure to pay employes for accumulated compensatory time after May 1 violated the contract. Additionally it asserts that the conversation between the employes and their immediate supervisor was in fact, an order to take compensatory time off.

B. The State

The State argues that it did not violate the labor agreement and the settlement agreement because the affected employes have already been compensated by receiving time off with pay, and therefore any additional cash payment would constitute a windfall to the employes and a punishment to the State. Such a remedy would contravene the principle that contract remedies are only compensatory. The State also analyzes the facts as a debt owed to the employe as of May 1, 1988 and finds that said debt has been reduced by the value of the time off with pay the employe has received and any other result would in essence grant the employe more value than the original debt. The State points to arbitral precedents holding that remedies for contract violations should make the aggrieved employes whole, but not put them in a better position than they would have been, but for the employer's contract violation. Finally, the State points to Commission cases and asserts the rule

is that remedies should be limited to compensatory damages.

In its brief submitted after the supplemental hearing, the State insists it did not violate the collective bargaining agreement because no employes were ordered to carry over compensatory time, and no employees were denied either time off with pay or remuneration for accrued compensatory time accumulated through April, 1988. Additionally, the State reiterates its position that even if a violation should be found, no remedy should be ordered because such would be a windfall to employes who have already received time off with pay.

DISCUSSION

A. The Merits

Section 111.84(1)(e) Stats., provides that it is an unfair labor practice for the state employer

> To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting state employes....

A grievance settlement has been found to be a collective bargaining agreement within the meaning of this subsection. 3/ In this case, the grievance settlement, the State's notification to the Union that it would abide by the contract, does not modify the contract, so that the question of whether the labor agreement was violated and whether the settlement agreement was violated are one and the same question.

The parties agree that contract provision 6/4/3 generally calls for payment in cash for accrued compensatory time from the previous year that had not been used prior to May 1. The disagreement concerns whether the State violated the collective bargaining agreement when it compensated certain employes for all or part of their outstanding credits not in cash but by granting time off with pay after May 1, either at the direction of a supervisor or voluntarily.

Examination of Section 6/3/2 reveals that the parties recognized and specified two forms of compensation for overtime credits: cash or compensatory time. In contrast, Section 6/4/3 provides:

> ...If cash is not paid the employe shall carry such time until May 1 of the following year. Unused compensatory time credits shall then be paid in cash at the employe's current hourly rate.

Clearly, the last sentence provides for payouts after May 1 of the following year in only one form: cash.

Under the plain meaning of this language, the State violated the contract when it failed to make cash payment for the outstanding compensatory time remaining after May 1, 1988.

B. The Remedy

As to remedy, the two groups of employes fall into two distinct

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3/ City of Prairie du Chien, Dec. No. 21619-A (Schiavoni, 7/84), aff'd by operation of law, Dec. No. 21619-B (WERC, 8/84).

categories. The parties stipulated that certain employes received all or part of their payment in time off with pay after May 1 and without being directed to take the time off. 4/ Although the rights of this first group of employes were violated when they did not receive a monetary sum equivalent to their outstanding compensatory time credits, they have received compensation for that time in the form of time off with pay. Since these employes voluntarily accepted the time off, it is appropriate to infer that the state relied upon their willingness to schedule time off with pay when it granted them that benefit. Therefore, the state was entitled to conclude that the employes were satisfied and the time off with pay discharged its obligation. These employes have been made whole and no further remedy is necessary.

The remedy for those employes, Richard Olsen and Gary Martinson, who did not voluntarily schedule time off with pay and did so only at the direction 5/ of their supervisors is a different matter.

The State correctly cites Commission and court precedents for the proposition that remedies pursuant to Chapter 111, Stats., should make complainants whole but should not bestow windfalls upon them, or punish respondents. 6/ Similarly, arbitrators interpreting contract rights respect the prohibition against putting grievants in a better position than they would have been but for the employer's breach, and generally avoid awarding monetary damages where the harm can not be measured monetarily. For example, this principle has guided arbitrators who reason that inconvenience is not measurable and decline to order cash remedies for employes who have been forced to take vacations at times other than those they had previously chosen.

In the instant case, however, grievants were deprived of a definite monetary entitlement: cash payment for accrued compensatory time outstanding after May 1, 1988. Making the grievants whole requires payment of those ascertainable damages.

The Examiner recognizes that the remedy ordered will cause the State to pay twice for the compensatory time, but that duplication does not, by itself, make the remedy a windfall that exceeds the requirements of making whole. In respect to double payment, the instant case bears similarity to decisions pursuant to Chapter 111, Stats., and arbitration awards involving terminations, suspensions and denials of promotion. In those cases, the grievant is compensated for time not worked, or is compensated for work at a higher level of work than the grievant performed, even though the employer has, presumably, already paid another employer who actually performed the work. Those remedies are found necessary, however, in order to make the grievant whole for the losses incurred and the remedy is not considered punitive despite the double payment it causes. 7/

4/ Transcript of January 29, 1991 proceedings at pages 7-8.

5/ It must be noted that "direction" referred to here is the instruction to use time off with pay as compensation for credits outstanding after May 1. Neither the pleadings nor the argument addressed the question of the State's right to instruct employes, prior to May 1, to take time off with pay in order to reduce their compensatory time balance. For the sake of completeness, Martinson's testimony that he had in the past received such instructions has been noted in the Findings of Fact No. 7.

6/ Dehnart v. Waukesha Brewing Co., 21 Wis.2d 583 (1963).

7/ E.g., School District of Drummond, 120 Wis 2d 1, (1984). In Joint School

In discussing the problem of double payments, Arbitrator Archibald Cox wrote the following:

> [T]he company pays twice when it improperly discharges a man or violates his seniority. It pays back wages and also pays the person who took the grievant's place. And the "only justification for an award of back pay is that there is no method of doing perfect justice." Thus, the dilemma lies in being forced to choose between denying the employee an adequate remedy or forcing the employer to pay twice for the same work. When the employer causes the loss, however innocently, it is more just that he should bear the cost of making the employee whole than that the employee should be forced to suffer a denial of contract rights without a remedy. 8/

In the instant case, the employer not only pays twice, but both payments are to the same employe, thereby giving rise to the State's theory that the remedy would constitute a windfall. The principal stated by Arbitrator Cox is nonetheless applicable. One of the two parties must bear the loss, and it is more just that the burden should be borne by the State who, on its own initiative, compensated the grievant in time off with pay when it was properly liable for cash payment. A contrary order would cause the burden to fall on the passive members of this scenario, the grievants, thus depriving them of reparation for the definite monetary loss they have suffered: cash payment for their 1987 compensatory time account which was outstanding as of May 1, 1988. In sum, the Examiner is satisfied that the remedy ordered herein is a make-whole remedy authorized by the State Employment Relations Act. 9/

District No. 1, City of River Falls, Dec. No. 12754-B, (WERC, 3/76), at p.4, the Commission explicitly stated such back pay is not punitive. See State of Wisconsin Department of Administration, Dec. No. 15699-B (WERC, 11/81) for a case in which a discriminatory failure to promote was remedied by an order to compensate the complainant for the difference between the actual rate of pay and the rate of pay for the disputed promotion.

8/ Electric Storage Battery Co., AAA Case No. 19-22 (Cox, 1960).

9/ The record demonstrates that Olsen was entitled to payment for unused compensatory time outstanding as of May 1, 1988. See Finding of Fact

No. 5. The record was insufficient to reach any finding as to whether Martinson had outstanding credits as of that date. The remedial order has been written to require payment to Martinson if such outstanding credits existed at that time.

Additionally, the Examiner has ordered the usual statutory interest. 10/

Dated at Madison, Wisconsin this 24th day of July, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Jane B. Buffett /s/
Jane B. Buffett, Examiner

10/ See footnote 2/.