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-B

Appearances:
Lawton & Cates, S.C., Attorneys at Law, by Mr. Richard V. Graylow, 214 West Mifflin Street, Madison, Wisconsin 53703-2594, for the Complainant.
Mr. David J. Vergeront, Legal Counsel, Department of Employment Relations, 137 East Wilson Street, P.O. Box 7855, Madison, Wisconsin 53707-7855, for the Respondent.

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

On July 24, 1992, Examiner Jane B. Buffett issued Findings of Fact, Conclusion of Law and Order with Accompanying Memorandum in the above matter wherein she concluded that the State of Wisconsin had committed unfair labor practices within the meaning of Sec. 111.84(1)(e) and derivatively Sec. 111.84(1)(a), Stats. On August 11, 1992, the State of Wisconsin filed a petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's decision pursuant to Secs. 111.84(4) and 111.07(5), Stats. The parties thereafter filed written argument in support of and in opposition to the petition, the last of which was received on October 5, 1992.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

ORDER 1/

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.

Continued

The Examiner's Findings of Fact, Conclusion of Law and Order are affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 11th day of December, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairperson

Herman Torosian /s/
Herman Torosian, Commissioner

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

1/ Continued

> (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, CONCLUSION OF LAW AND ORDER

In its complaint, Wisconsin State Employees Union (WSEU) asserted that the State of Wisconsin (State) had violated the parties' collective bargaining agreement by failing to pay certain employes an amount of money equal to the value of certain unused compensatory time which was outstanding on May 1, 1988. During hearing, the parties agreed to the following statement of issues:

> 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.

The Examiner's Decision

The Examiner concluded that the parties' collective bargaining agreement obligated the State to make cash payments to employes for the value of compensatory time which the employes had carried over from 1987 and which remained unused as of May 1, 1988. Applying this contractual obligation to the employes in question, the Examiner determined that the State's failure to make these payments constituted unfair labor practices within the meaning of Secs. 111.84(1)(e) and derivatively 111.84(1)(a), Stats.

As to the question of how to remedy this unfair labor practice, the Examiner first considered the question of what remedy was appropriate for those employes who voluntarily utilized carried-over compensatory time after May 1, 1988. As to these employes, the Examiner concluded that because the employes had voluntarily taken time off, said employes had received compensation for the compensatory time and had thereby been made whole. Thus, she did not order the State to make cash payouts to these employes.

However, as to those employes who were compelled to take time off with pay by their supervisor, the Examiner concluded that it was appropriate to order the State to make the cash payment for the 1987 compensatory time outstanding as of May 1, 1988. In reaching this conclusion, the Examiner rejected the State's argument that she was thereby granting the employes a windfall and providing punitive relief. The Examiner reasoned in this regard that double payment is not inherently punitive, citing instances in which an employer is ordered to make an improperly discharged employe whole despite the fact that the employer has already paid another employe to perform the work in question. The Examiner acknowledged that, contrary to a discharge situation, the same employe was receiving both compensatory time and cash payments in the instant matter. However, she determined that because it was the State who chose to compel the employes to take time off with pay rather than making the cash payment to which the employes were entitled, the State, not the employes, should bare the burden of the monetary loss.

Positions of the Parties

The State concedes a violation of the contract, as found by the Examiner, but asserts that the Examiner erred as to the question of remedy. The State asserts that the Examiner's Order provides an improper windfall for the two employes who did not voluntarily schedule compensatory time off.

The State asserts that the involuntary nature of the use of compensatory time is not a valid distinction which warrants the remedy ordered by the Examiner. The State contends that any analogy to the remedy in an improper discharge case is flawed because, as acknowledged by the Examiner, the discharged employe has not received any benefit or remedy prior to reinstatement with back pay while the employes in question have already received time off with pay for the compensatory time in question. The State asserts that the employes in question have already been made whole and contends that any obligation to make cash payments is thus improper. The State argues that the best analogy for the purposes of remedy would be those instances in which employes are forced to take vacations at times different than they desire. The State asserts that in such instances employes are not typically compensated.

Given the foregoing, the State asks that the Examiner's decision be reversed to the extent it directs the State to make any cash payments to the two employes in question.

WSEU urges the Commission to affirm the Examiner. WSEU notes that the State does not contest its obligation to make the cash payments nor the fact that the payments were not made. Thus, WSEU argues it is clear the employes who were forced to utilize compensatory time after May 1, 1988 are entitled to receive the cash value of accrued compensatory time as of May 1, 1988.

WSEU urges the Commission to reject the State's argument that the remedy in question is punitive. WSEU contends that the Examiner convincingly responded to the State's argument in this regard through her analogy to wrongful terminations.

WSEU also argues that the remedy should be considered in light of the broad authority of the Commission to fashion remedies that will effectuate the purposes of the State Employment Labor Relations Act. WSEU asserts that the State's position in this proceeding oversimplifies the goal of the Commission's remedial powers. WSEU argues that the Commission can legitimately consider not only the impact upon the employes but also the need to encourage labor peace by giving the State an incentive to avoid committing the unfair labor practice again. In this regard, WSEU notes that if the State's position as to remedy were upheld, the State would have violated the collective bargaining agreement without taking any responsibility for the consequences of its action. Thus, WSEU asserts that the remedy in question is appropriate in part because it deters the State from committing the unfair labor practice in question again.

Given the foregoing, the WSEU argues the Examiner's Order should be affirmed.

Discussion

We affirm the Examiner. Contrary to the argument of the State, the remedial distinction drawn by the Examiner between those employes who voluntarily utilized compensatory time and those who were compelled to use compensatory time is persuasive and appropriate. Both groups of employes were improperly denied cash payments to compensate them for accrued compensatory time. Those employes who subsequently chose to use the accrued time after the

State failed to make the required payments can reasonably be seen as having elected to take time off in lieu of cash and to have thereby extinguished their remedial claim. However, where the use of compensatory time was compelled, the entitlement to the cash payment remains. 2/ These employes did nothing to lessen their claim to the contractually established cash benefit.

Further, as argued by WSEU, it is entirely appropriate for the Commission to exercise remedial authority in ways which ensure that the wrongdoer does not profit from its conduct and that future violations are deterred. 3/ Here, if the cash payments in question were not ordered as relief, the State would have profited from its act of compelling employes to utilize compensatory time and would not be deterred from such future conduct.

Given the foregoing , we are satisfied that the Examiner's remedy was appropriate and we have affirmed same.

Dated at Madison, Wisconsin this 11th day of December, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairperson

Herman Torosian /s/
Herman Torosian, Commissioner

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

2/ Unlike the vacation denial analogy proffered by the State, the contractual right in question is receipt of a cash payout not when time off can be utilized. Thus, although the State is correct that monetary payments are seldom ordered by grievance arbitrators to remedy vacation scheduling disputes, the State's analogy is not apt.

3/ Somerset School District Dec. No. 26742-B (WERC, 4/92).