STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

THE WISCONSIN STATE EMPLOYEES UNION (WSEU), AFSCME, COUNCIL 24, AFL-CIO, Complainant, vs. STATE OF WISCONSIN, Respondent.	Case 269 No. 42504 PP(S)-157 Decision No. 26103-B

Appearances:
Mr. Richard V. Graylow, Lawton & Cates, S.C., Attorneys at Law, 214 West Mifflin Street, Madison, Wisconsin 53703-2594, appearing on behalf of the Complainant.
Mr. David C. Whitcomb, Legal Counsel, Department of Employment Relations, 137 East Wilson Street, Madison, Wisconsin 53703, appearing on behalf of the Respondent.

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

Examiner James W. Engmann having on November 15, 1989 issued Findings of Fact, Conclusion of Law and Order with Accompanying Memorandum in the above matter wherein he concluded that Respondent State of Wisconsin had not refused to accept the terms of Arbitration Awards issued by Arbitrators Kerkman and Petrie regarding scheduling of vacation and therefore had not committed unfair labor practices within the meaning of Secs. 111.84(1)(a) and (e), Stats.; and Complainant WSEU having 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 the petition for review, the last of which was received February 19, 1990; and the Commission having reviewed the matter and being fully advised in the premises, makes and issues the following

ORDER 1/

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

Given under our hands and seal at the City of Madison, Wisconsin this 6th day of April, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Commissioner

_____
William K. Strycker, Commissioner

Chairman A. Henry Hempe did not participate.

(See Footnote 1/ 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.

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(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

THE EXAMINER'S DECISION:

The Examiner dismissed the complaint alleging that the Respondent State

had not complied with the terms of the Kerkman or Petrie Arbitration Awards based upon his ultimate Finding of Fact 8 which stated:

> 8. That the Local Policy implemented in April 1986 has been rescinded by the Employer; that the Bureau Policy dated March 3, 1987, as amended, governs vacation in UC offices statewide; that neither Arbitrator Kerkman nor Arbitrator Petrie found the Bureau Policy dated March 3, 1987, to be violative of the collective bargaining agreement; that neither Arbitrator Kerkman nor Arbitrator Petrie ordered the Bureau Policy dated March 3, 1987, to be rescinded; that the Bureau Policy does not contain the elements grieved in the Kerkman and Petrie cases; and that by following the Bureau vacation Policy dated March 3, 1987, the Employer is not violating the terms of either the Kerkman or the Petrie arbitration awards.

In his Memorandum, the Examiner reasoned:

> In its complaint the Union alleges that the Employer has violated Secs. 111.84(1)(a) and (e), Stats. by refusing to accept the terms of arbitration awards issued by arbitrators Kerkman and Petrie regarding scheduling of vacation. In its answer the Employer denies said allegation.
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> Section 111.84(1)(e), Stats., states that it is an unfair labor practice for an 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; including an agreement to arbitrate or to accept the terms of an arbitration award, where previously the parties have agreed to accept such award as final and binding upon them.
>
> The Union is not alleging a contract violation on a refusal to arbitrate; instead, the Union argues that the Employer is refusing to accept the terms of two arbitration awards on two aspects of the same vacation policy.
>
> The two arbitration awards are very specific as to both the issue and the remedy. In the Kerkman award dated August 23, 1988, the Arbitrator dealt with the issue of whether the aspect of the Local Policy implemented in April 1986 which allowed no more than one employe at a time to take a full week of vacation violated the collective bargaining agreement. Arbitrator Kerkman found that it did. In doing so the Arbitrator compared the Local Policy with the Bureau Policy dated March 3, 1987. He found that the Bureau Policy, in effect throughout the state except in Milwaukee and Waukesha, required the Employer to review week by week the number of employes it required on the job, and then to permit those in excess of that minimum requirement to go on vacation. The fact that the Bureau Policy required a week by week review and determination as to the number of employes that may be on vacation convinced the Arbitrator that the Local Policy's blanket determination of no more than one employe on vacation per week was arbitrary. Therefore the Arbitrator ordered the Local Policy of permitting only one adjudicator to take a full week's vacation at any one time rescinded.
>
> In the Petrie award dated May 4, 1989, the Arbitrator dealt with the issue of whether the aspect of the Local Policy implemented in April 1986 which did not allow any employe to take vacation during weeks 52 and 1 violated the collective bargaining agreement. Arbitrator Petrie found that it did. In doing so, the Arbitrator reviewed the Bureau Policy dated March 3, 1987. He found that said Bureau Policy afforded substantial protection to the Employer's ability to satisfactorily exercise and carry out its contractual and statutory rights and responsibilities during holiday periods. Therefore, the Arbitrator ordered the Employer to rescind the Local Policy.
>
> The Union argues that the Bureau Policy of March 3, 1987, as amended January 19, 1989, 2/

contained the elements previously held violative of the collective bargaining agreement by Arbitrators Kerkman and Petrie.

2/ Although there is testimony as to this amendment, the amendment itself was not offered into evidence.

As to the Kerkman award regarding one employe on vacation at a time, the Union on reply brief may have abandoned this argument, stating at one point, "Finally, even though the 'one employee on vacation' rule is apparently gone, the current Policy nonetheless serves the same function of limiting vacation time options." In any case the record does not support an allegation that the Kerkman award has not been implemented. The Local Policy of April 1986 has been rescinded. The Bureau Policy, cited with approval by both Arbitrators, does not limit vacation to one employe at a time. Therefore, the Union has not met its burden of proving that the Employer violated Secs. 111.84(a) and (e), Stats., by refusing to accept the terms of the Kerkman award.

The Union argues that, as to the Petrie award regarding not allowing any employe off during certain weeks of the year, the Bureau Policy limits vacations to the period prior to week 46, approximately November 20, 1989. More accurately, however, the Bureau Policy does not prohibit vacations during any time period, as the Local Policy before Petrie did, but states that local UC managers "shall not pre-approve in April, vacations or holiday leave for production staff for the week before Christmas, the week of Christmas and New Years, or the week following the New Year's holiday." Indeed, the Bureau Policy is written so as to state how vacation time over the holidays is to be selected. But, the Union argues, denial of vacation preapproval is a denial of vacation. While its argument might be granted some weight if placed before an arbitrator, said argument was not placed before Arbitrator Petrie who, therefore, did not rule on the issue of denial of vacation preapproval. The Policy in place is not the Local Policy which totally banned vacations during the holiday period and, thus, is not the Policy ordered rescinded.

The Union also argues that res judicata precludes relitigation of the vacation scheduling policy. That is true as to the Local Policy before Arbitrator Petrie. He found the Local Policy violated the collective bargaining agreement and ordered it rescinded because the Local Policy ban on vacation during the Christmas and New Year holidays was arbitrary. If the Local Policy had not been rescinded or if the ban of no vacation during weeks 52 and 1 was still in effect, the principles of res judicata would apply. Said principle would prevent the Employer from arguing the merits as to that aspect of the Local Policy. Indeed the Employer would be in violation of Secs. 111.84(a) and (e), Stats., by not accepting the terms of the arbitration award, and this Examiner would order the Employer to do so.

But the Local Policy has been rescinded. The ban on vacations during weeks 52 and 1 is not operative. The arbitration award of Petrie has, therefore, been accepted by the Employer. Therefore, the Union has not met its burden of proving that the Employer violated Secs. 111.84(a) and (e), Stats., by refusing to accept the terms of the Petrie award.

In essence the Union is seeking a finding that the arbitration awards involving the Local Policy limit the Bureau Policy. There are several problems with this approach. First, the policies are different, so the principle of res judicata does not apply. Second, the Bureau Policy was in evidence in both cases and the Arbitrators spoke of them with approval. The Union did not seek a determination before the Arbitrators that the Bureau Policy violated the collective bargaining agreements. If the Union is seeking such a finding in

this forum, it will be frustrated since such a decision need come from an arbitrator, not this Examiner.

What is before this Examiner is the question of whether the Employer has refused to implement the Kerkman and Petrie arbitration awards. The Employer has rescinded the Local Policy. It has rescinded the limitation of one employe on vacation for a week at a time and the prohibition of any employe taking vacations in certain weeks. Nor has the Employer taken these aspects of the Local Policy and placed them in the Bureau Policy.

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POSITION OF THE PARTIES:

Complainant:

Complainant asserts that the Examiner erred in his application of the doctrine of res judicata after reviewing the terms of the Kerkman and Petrie Arbitration Awards. Complainant argues that although Respondent State did rescind the April, vacation policy, Respondent State's March 1987 vacation policy contains the same offensive features which limit the right of employes to take vacation. Complainant asserts that Kerkman and Petrie both found limitations on the right of employes to take vacation to be unlawful. Complainant argues that if portions of the April 1986 vacation policy were originally unlawful, their re-creation in March 1987 can be no less unlawful.

Therefore, the Complainant asks that the Examiner's decision be reversed.

Respondent:

Respondent asserts that Complainant is incorrect when contending that the March 1987 vacation policy is merely a rehash of the April, 1986 policy. Respondent contends that the two elements of the earlier policy that the Arbitrators concluded violated the provisions of the collective bargaining agreement are not present in the March 1987 policy. Therefore, Respondent argues that its administration of its March 1987 policy cannot constitute a refusal to accept the terms of the Kerkman or Petrie Awards.

Respondent alleges that Complainant's argument herein simply amounts to an assertion that Complainant does not like the March 1987 policy. Respondent asserts that if Complainant believes that this policy violates the collective bargaining agreement, Complainant should challenge the policy through the contractual grievance arbitration procedure.

Respondent therefore urges the Commission to affirm the decision of the Examiner.

DISCUSSION:

We have reviewed the Examiner's decision quoted extensively above and concluded that he correctly resolved the issues before him. Contrary to Complainant's apparent assumption, Kerkman and Petrie did not hold that any restriction on employe rights vis-a-vis scheduling vacation violated the parties' contract. Kerkman and Petrie only resolved specific issues regarding blanket prohibitions against use of vacation if another employe was on vacation at the same time or if the vacation use fell during weeks 52 and 1 of the year. These prohibitions are not present in the March 1987 vacation policy. The issues raised by Complainant before the Examiner involved aspects of the March 1987 policy which were not litigated before Kerkman or Petrie.

As the Examiner fully and thoughtfully responded to all Complainant's contentions before him and as we fully concur with his analysis, we find no need to comment further.

Dated at Madison, Wisconsin this 6th day of April, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Commissioner

_____
William K. Strycker, Commissioner

Chairman A. Henry Hempe did not participate.