STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN STATE EMPLOYEES UNION (WSEU), AFSCME, COUNCIL 24, AFL-CIO, Complainant, vs. THE STATE OF WISCONSIN, Respondent.	Case 307 No. 45538 PP(S)-178 Decision No. 26959-A

Appearances:
Lawton & Cates, S.C., Attorneys at Law, 214 West Mifflin Street, Madison, Wisconsin 53703-2594, by Mr. Richard V. Graylow, on behalf of Wisconsin State Employees Union, AFSCME, Council 24, AFL-CIO.
Ms. Teel D. Haas, Chief Legal Counsel, Department of Employment Relations, State of Wisconsin, 137 East Wilson Street, P.O. Box 7855, Madison, Wisconsin 53707-7855, on behalf of the State of Wisconsin.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Wisconsin State Employees Union, AFSCME, Council 24, AFL-CIO, hereinafter the Complainant, filed a complaint with the Wisconsin Employment Relations Commission on March 22, 1991, alleging that the State of Wisconsin, hereinafter the Respondent, had committed prohibited practices within the meaning of Sec. 111.84(1)(a), (c), and (d) of the State Employment Labor Relations Act (SELRA) by refusing to comply with a final and binding grievance arbitration award. The Respondent filed an answer with the Commission on October 11, 1991, wherein it denied it has committed any prohibited practices and denied it has failed to comply with the arbitration award. The Commission appointed Jane B. Buffett, a member of its staff, to act as Examiner in the matter. A hearing was held on October 30, 1991 in Madison, Wisconsin. At hearing, Complainant amended its complaint to allege violations of Secs. 111.84(1)(a) and (e), Stats. A stenographic transcript was made of the hearing and received on November 25, 1991. The parties completed the submission of post-hearing briefs in the matter by February 3, 1992. The Examiner, having considered the record and the arguments of the parties, makes and issues the following

FINDINGS OF FACT

1. The Complainant is a labor organization with its offices located at 5 Odana Court, Madison, Wisconsin 53719. At all times material herein, Allen

Highman has been a field representative for Complainant and has been responsible for contract administration, including processing grievances through the grievance procedure to arbitration. At all times material herein, the Union has been the exclusive collective bargaining representative of Respondent's employes in the Blue-Collar and Non-Building Trades bargaining unit. Said bargaining unit includes certain employes at the University of Wisconsin-Madison campus in the Physical Plant Division, including Building Maintenance Helper 2 positions in the Custodial Department.

2. The Respondent State of Wisconsin, is represented in employment relations matters by the Department of Employment Relations (DER), which has

its offices located at 137 East Wilson Street, Madison, Wisconsin 53707-7855. The Respondent maintains and operates the University of Wisconsin System, which includes the UW-Wisconsin-Madison campus. Among its functions, the UW-Madison operates and controls the Physical Plant located in Madison, Wisconsin. At all times material herein, Donald Sprang has held the position of personnel manager of the Physical Plant Division on the UW-Madison Campus and in that role performs personnel, staffing, payroll and labor relations functions. At all times material herein, Glen Blahnik has held the position of Employment Relations Specialist in the Division of Collective Bargaining of the Department of Employment Relations. In that position, Blahnik was responsible for contract interpretation and for representing the Respondent in negotiations and in grievance arbitration.

3. At all times material herein, Complainant and Respondent have been bound by a collective bargaining agreement covering the wages, hours and conditions of employment of employes in the Blue-Collar and Non-Trades bargaining unit. Said Agreement contained, and continues to contain, a grievance arbitration provision that provides for final and binding arbitration:

ARTICLE IV

Grievance Procedure

> **4/3/7** The decision of the arbitrator will be final and binding on both parties of this Agreement. When the arbitrator declares a bench decision, this decision shall be rendered within fifteen (15) calendar days from the date of the arbitration hearing. On discharge and 230.36 hazardous duty cases, the decision of the arbitrator shall be rendered within fifteen (15) calendar days from receipt of the briefs of the parties or the transcript in the event briefs are not filed. On all other cases the decision of the arbitrator shall be rendered within 30 days from receipt of the briefs of the parties or the transcript in the event briefs are not filed.

Said Agreement also contained provisions for earning and using sick leave, paid annual leave of absence (vacation) and personal holidays:

ARTICLE XII

Employe Benefits

. . .

Section 5: Sick Leave

13/5/1 The Employer agrees to provide a sick leave plan as follows:

(1) Employes shall earn sick leave at the rate of .05 of an hour in pay status in a biweekly period to a maximum of four (4) hours for each full biweekly pay period of service.

Employes shall earn sick leave at the rate of .05 of an hour for each hour in excess of 80 hours in a biweekly pay period to a maximum of .8 hours for 96 hours work in a pay period.

Employes who regularly work 9.6 hours per day and 48 hours per week shall be paid 9.6 hours of pay for each 9.6 hours of sick leave taken.

(2) Sick leave shall not accrue during any period of absence without pay except for leaves authorized by management for Union activities, or for any hours in excess of 96 hours per bi-weekly period of service. Approved leaves of absence without pay totalling four (4) hours or less in a biweekly pay period will be disregarded for administrative purposes.

(3) Unused sick leave shall accumulate from year to year in the employe's sick leave account.

. . .

Section 6: Paid Annual Leave of Absence (vacation)

13/6/1 The Employer agrees to provide employes with a formal paid annual leave of absence plan (vacation) as set forth below.

13/6/2 Employes shall begin earning annual leave on their first day in pay status. After completion of the first six months in a permanent, seasonal or sessional position pursuant to Section 230.28(1), of the Wisconsin Statutes, or as a trainee unless covered under Wis. Adm. Code, (Rules of the Administrator, Division of Merit Recruitment and Selection), employes are eligible for and shall be granted noncumulative annual leave based on their seniority date as follows:

(1) Regular Employes

Annual leave shall be based upon seniority date at the rate of:

(A) 80 hours (10 days) each year for a full year of service during the first five (5) years of service.

(B) 120 hours (15 days) each year for a full year of service during the next five (5) years of service.

(C) 136 hours (17 days) each year for a full year of service during the next five (5) years of service.

(D) 160 hours (20 days) each year for a full year of service during the next five (5) years of

service.

(E) 176 hours (22 days) each year for a full year of service during the next five (5) years of service.

(F) 200 hours (25 days) each year for a full year of service during all succeeding years of service.

. . .

13/6/3 Annual leave shall be computed as follows:

(1) Annual leave credits in any given year shall not be earned for any period of absence without pay.

(2) Subject to the annual leave schedule in effect under (1), Regular Employes of this section annual leave for covered employes shall be prorated during the first year of employment at the rate of 80 hours; during the sixth year of employment at the rate of 80 or 120 hours respectively; during the eleventh year of employment at the rate of 120 or 136 hours respectively; during the sixteenth year of employment at the rate of 136 or 160 hours respectively; during the twenty-first year of employment at the rate of 160 or 176 hours respectively; during the twenty-sixth year of employment at the rate of 176 or 200 hours respectively.

(3) Upon termination of employment annual leave shall be prorated.

. . .

Section 9: Holidays

A. Holidays.

. . .

13/9/3 The Employer agrees to provide three (3) additional noncumulative personal holidays each year to all employes. These three (3) holidays may be taken at any time during the year including non-Christian holidays provided the days selected by the employe have the prior approval of the appointing authority. Said approval shall be granted if the employe gives the appointing authority or his/her designee fourteen (14) days notice of his/her intent to take a personal holiday for religious reasons.

All employes not satisfactorily completing the first six months of their probationary period will earn only the annual proration of their personal holidays.

. . .

4. Stephen Morkin, an employe at the UW-Madison Physical Plant and a member of the Blue Collar and Non-Trades bargaining unit, was terminated from his employment by Respondent in November of 1988. A grievance was filed on Morkin's behalf over his termination. The parties proceeded to arbitration on their dispute before Arbitrator Gil Vernon. On July 13, 1990 Arbitrator Vernon issued his award which reduced the discharge to a ten day suspension and stated, in pertinent part:

> The Arbitrator must conclude that the Grievant's

conduct on the day in question, while deserving of discipline, was not, under these circumstances, worthy of discharge. The discharge is reduced to a ten-day suspension and the Grievant should be paid for all lost wages and benefits.

AWARD

The Grievance is sustained to the extent indicated in the Opinion.

_____
Gil Vernon, Arbitrator

The issue of what would constitute the appropriate remedy if Morkin were ordered reinstated was not raised or argued to Arbitrator Vernon.

5. On July 20, 1990, Sprang sent Morkin the following letter regarding his reinstatement:

Dear Mr. Morkin:

On November 4, 1988, your employment was terminated with this Division. That action was appealed to arbitration through the contractual grievance process. The arbitrators decision has been received ordering your re-instatement.

In accordance with the terms of the arbitrators decision, you are being restored to a Building Maintenance Helper 2 position with our Custodial Department effective July 30, 1990. The following provisions shall apply:

1. The first 10 days of your absence are considered as a disciplinary suspension without pay.

2. You will receive your previous rate of $8.429 per hour, plus any intervening negotiated increases. Restoration of lost wages and benefits will be computed in accordance with the arbitrator's decision and guidelines developed by the Department of Employe Relations. In order to make the proper determination of lost wages, you will be required to provide this office with adequate proof of actual interim wage earnings, unemployment compensation benefits or public assistance received since November 4, 1988.

3. You will retain your original seniority date of November 23, 1981.

4. New applications will be required to reinstate desired insurance programs. Applications must be submitted within 30 days of your reinstatement.

5. Your normal work schedule will be from 5:00 p.m. to 1:30 a.m., with a thirty-

minute lunch break, Monday through Friday.

6. You will be assigned to Crew #14 which meets at 1300 University Avenue. Ms. Elizabeth Deischer, Housekeeping Service Supervisor 1, is the supervisor of the crew and will be responsible for your work assignments, related job instructions and performance evaluations.

Please report to Mr. Larry Eaton at the Custodial Office, 1225 University Avenue, at 5:00 p.m. on Monday, July 30. He will have you complete the initial in-processing prior to starting your work assignment.

Sincerely,

Donald W. Sprang /s/
Donald W. Sprang
Personnel Manager

Morkin was reinstated effective July 30, 1990; however, it was not until March of 1991 that the Respondent calculated Morkin's lost wages and benefits. Sprang advised Morkin by the following letter of March 15, 1991 as to those calculations, which letter states, in relevant part:

Dear Mr. Morkin:

We have completed the computation of back pay and benefits in compliance with the arbitration award made by Arbitrator, Gil Vernon. Following is an explanation of the items included.

I. ANNUAL LEAVE, PERSONAL HOLIDAYS AND LEGAL HOLIDAYS

a. Annual leave, personal holidays and legal holidays earned during the period of unemployment (November 6, 1989 (sic) - July 29, 1990) are included in the total hours paid as back pay.

b. Annual leave and personal holidays for the year 1990 were prorated. Fifty-one (51) hours of annual leave and ten (10) hours personal holiday are credited for the period July 30 through December 31. The remaining hours are included in hours paid as indicated above.

c. Sick leave credit was prorated based on

> the amount of sick leave used during the year immediately prior to the termination. In 1988 you started the year with 23.3 hours of sick leave and used all sick leave earned during the year, ending up with a balance of 1.9 hours on November 5, 1988. Based on your prior use, we considered all sick leave earned during the period of November 6, 1988 through July 30, 1990, as used and included as part of the hours paid.
>
> . . .
>
> A check for $5,713.13 is being issued as full and final settlement for all lost wages and benefits as provided in the arbitration award made by Arbitrator Gil Vernon, dated July 13, 1990.
>
> Sincerely,
>
> Donald W. Sprang /s/
> Donald W. Sprang
> Personnel Manager

The Respondent paid Morkin his lost compensation and benefits consistent with Sprang's letter of March 15, 1991.

6. On March 22, 1991, the Complainant filed the instant complaint with the Commission alleging that the Respondent had failed to comply with Arbitrator Vernon's award of July 13, 1990.

7. By prorating Morkin's sick leave, annual paid leave (vacation) and personal holiday credits for 1990, Respondent has not complied with the terms of Arbitrator Vernon's final and binding award of July 13, 1990, reinstating Morkin and ordering that he "be paid for all lost wages and benefits."

Based upon the foregoing Findings of Fact, the undersigned makes the following

CONCLUSION OF LAW

The Respondent State of Wisconsin, its officers and agents, by prorating Stephen Morkin's sick leave, annual paid leave and personal holidays for 1990, failed to comply with the terms of the final and binding arbitration award issued by Arbitrator Vernon on July 13, 1990, in violation of Sec. 111.84(1)(e), and derivatively, Sec. 111.84(5)(a), of the State Employment Labor Relations Act.

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

ORDER

IT IS ORDERED that the Respondent State of Wisconsin, its officers and

agents, shall immediately:

1. Cease and desist from refusing to comply with the terms of the final and binding award issued on July 13, 1990 by Arbitrator Vernon regarding Stephen Morkin.

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

   a. Credit Morkin's sick leave, annual paid leave and personal holiday accounts for the amounts he would have earned in 1990 prior to his reinstatement had he been working during that period without proration of those benefits.

   b. Notify all of Respondent's employes at the UW-Madison Physical Plant Division in the bargaining unit represented by Complainant 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 Personnel Manager of the Physical Plant Division 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 12th day of June, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

APPENDIX A

NOTICE TO ALL EMPLOYEES

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 fail to comply with an arbitrator's award by pro-rating sick leave, annual paid leave, and personal holiday credits when the arbitrator did not order such pro-ration.
>
> WE WILL credit Grievant Stephen Morkin's sick leave, annual paid leave and personal holiday accounts for the amounts he would have earned prior to his reinstatement had he been working during that period without proration of those benefits.

Dated _____ By _____
Personnel Manager,
Physical Plant Division

_____
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

On July 13, 1990, Arbitrator Vernon issued a final and binding grievance arbitration award in which he reduced the grievant's discharge to a ten-day

suspension and ordered that the grievant, Stephen Morkin, "be paid for all lost wages and benefits." Sometime after Morkin was reinstated, the Respondent computed his lost benefits and prorated those benefits for 1990 based upon what Respondent concluded was Morkin's past pattern of usage of those benefits. The instant complaint was filed in response to that proration and subsequently amended to allege a violation of Secs. 111.84(1)(a) and (e), Stats. The Respondent filed an answer wherein it denied that it had not complied with the award.

Complainant

The Complainant takes the position that Respondent's proration of Morkin's sick leave, annual paid leave and personal holidays constitutes an unlawful action in light of the arbitration award. Complainant notes a prior Commission decision which found the employer had not complied with a reinstatement order when it refused to pay for lost overtime and time and attendance bonuses. Link Bros. Packing, Dec. No. 12900-E (WERC, 3/76). The Commission reaffirmed its decision in Link Bros. in State of Wisconsin, Dec. No. 20144-A (WERC, 5/84) in which it held that in addition to lost overtime opportunities, health insurance premiums, weekend differential and interest were all part of the compensation due a reinstated employe. There is no mention of proration in any of those decisions.

Complainant also asserts that there have been many employes reinstated without proration, pursuant to arbitration awards involving these parties. Thus, past practice is contrary to Respondent's position on proration.

In its reply brief, Complainant disputes that there is anything in the award to support proration. It also asserts that if Respondent desired the right to prorate the benefits, it should have stipulated that issue before the arbitrator. Having not done so, it is too late to do so at this point. As part of its requested relief, Complainant asks that it be awarded its costs and attorney's fees in this action.

Respondent

The Respondent takes the position that the decisions to prorate Morkin's various leave accounts are a reasonable interpretation of the award and accomplish the purpose of making him "whole" for the wages and benefits he lost while unemployed. In support of its position, Respondent cites various authorities and asserts that the general legal principles that govern the concept of "make whole" awards indicate that the amount received should be limited to that necessary to make the employe "whole", and that the intent is not to punish the employer or to place the employe in a better position than he would have been in if the contract had not been breached.

With regard to paid annual leave (vacation), Respondent asserts that in deciding how to make an employe "whole", it attempts to provide the employe with the benefits and wages that would have accrued for that period the employe was not at work. A full-time state employe is paid for 2,088 hours per year and included in that pay is 120 hours of paid annual leave, earned sick leave and 24 hours of personal holidays. The employe does not get paid for the 2,088 hours plus the paid annual leave, etc. Rather, the leave is included within that pay. Morkin received full back pay for 1990 until the date he was reinstated, and included in that back pay is the amount of leave he would have earned had he been in pay status during that time - 69 hours. It was "costed out" as part of the back pay award. He was also credited with 51 hours upon his reinstatement in anticipation he would earn it during the remainder of 1990. Respondent asserts that if it would have credited Morkin with the full 120 hours, it would have given him a "windfall." Since he had received the full back pay, to now credit him with the 61 hours for that period would in effect be paying him twice for those hours. Also, Morkin's leave records for

1987 and 1988 indicate it was his practice to use his annual leave as soon as he earned it (by July in 1987 and by February in 1988). It is reasonable to conclude that if Morkin had been working during that period in 1990, he would have used at least the amount he had earned during that time, if not all of it, for 1990. Thus, it was reasonable to prorate his paid annual leave on that basis and was consistent with the language and the spirit of the award. Similarly, the personal holidays were also part of the back pay award and were prorated on the basis of the number of hours he would have earned during that period (2 hours per month x 7 months) and he was credited with 0 hours for the remainder of 1990.

Sick leave is also an earned benefit based on the time an employe is in pay status. Recognizing that sick leave can be accumulated unlike the other leaves involved, Respondent asserts that in determining the amount Morkin would have accumulated during the period in 1990 he was not in pay status required taking into account what he would have earned during that time and his normal pattern of usage of the benefit. Noting that an employe earns 4 hours of sick leave each bi-weekly pay period worked, and asserting that the evidence shows Morkin had only 1.9 hours of sick leave accumulated when he was terminated - that he used it as fast as he earned it - Respondent concludes it reasonably determined that Morkin would not have had any sick leave accumulated as of July 30, 1990, even if he had been working. According to the Respondent, to credit Morkin with any sick leave for the period he was not working in 1990 would be to ignore 10 years of past history and would place him in a better position than if he had been working. Hence, Respondent concludes its decision to prorate Morkin's sick leave did not violate the award and was consistent with the principle of making employes whole for their losses, but not unduly benefiting them.

In its reply brief, the Respondent cites Link Bros., supra, and State of Wisconsin, supra, as examples of decisions in which the Commission has held that it is appropriate to consider an employe's previous use of leave, previous history of outside earnings or previous history of working overtime in determining what is to be included in a "make whole" award. Respondent contends it merely applied the same principles applied by the Commission in its determination of what it would take to make Morkin "whole".

DISCUSSION

There is no dispute as to the enforceability of Vernon's award. Rather, the dispute is whether, by prorating Morkin's sick leave, annual paid leave and personal holiday credits, the Respondent has complied with the award. In that regard, the Examiner first notes that the Respondent does not contend that it presented its arguments for proration of Morkin's benefits to the arbitrator, nor is there anything in the record to indicate such a presentation. Presumably, if that issue had been raised, the arbitrator would have noted and addressed those arguments in his award. The award makes no mention of either proration or of Respondent's raising the issue. The award states only that "The discharge is reduced to a ten-day suspension and the Grievant should be paid for all lost wages and benefits." (Jt. Ex. No. 2).

In its decision in Madison Metropolitan School District 2/, the Commission stated at footnote 3:

> Because the Commission is called upon to enforce arbitration awards which are governed by federal law, as well as Wisconsin law (See Tecumseh Products Company vs. WERB, 23 Wis. 2d 118, 126 N.W. 2d 520, 1964), it

2/ Dec. No. 14038-B (WERC, 4/77); aff'd Dec. No. 157-075, Dane Co. Cir. Ct. (12/77); aff'd Ct.App. IV Dec. No. 77-614 (10/78).

> sees no valid reason to apply a standard for enforcement of awards under sec. 111.70(3)(a)5, which differs in any material way from the standard applied by the commission and the courts in cases arising in interstate commerce unless the law compels such a different standard. 3/

This Examiner similarly sees no good reason for applying a different standard for enforcement of an award arising under SELRA and would similarly seek guidance from the federal courts.

Fortunately, the law in the Seventh Circuit Court of Appeals is clear and provides persuasive precedent on the issue of whether a party may raise for the first time in an enforcement proceeding an issue regarding the appropriate remedy. The Seventh Circuit has repeatedly held that a party may not do so and reaffirmed that holding in its recent decision in United Food and Commercial Workers Local 100A v. John Hofmeister & Son, Inc., 950 F.2d 1341 (7th Cir. 1991). In Hofmeister & Son, the Court noted at length the employer's failure to raise before the arbitrator an issue regarding appropriate remedy. The Court further noted the similarity to prior cases where the Court had disallowed such defenses under those circumstances:

> The issue in count one is whether Hofmeister has complied with the arbitrator's award requiring that Hernandez be reinstated and made whole. Hofmeister contends that it complied with the award based on its assumption that the award only required that Hernandez be reinstated to the position he would have been in had there been no wrongful discharge. This contention is remarkably similar to the employer's position in Chicago Newspaper Guild v. Field Enterprises, Inc., 747 F.2d 1153 (117 LRRM 2937) (7th Cir. 1984).
>
> In Chicago Newspaper, the Union filed a grievance on behalf of a discharged employee. After holding hearings, an arbitrator ordered the employee reinstated and paid back pay. Id. at 1155. After the employee was discharged, but while the arbitration proceeding was pending, the employer laid off 550 employees. Neither party informed the arbitrator of the layoffs. After the award issued, the employer sent the employee a letter stating that he had been reinstated as of February 1, 1977 (the day after his discharge) and laid off as of March 7, 1978 (the date of the other layoffs). Thus, the employer contended, had the employee been on the active payroll, he would have been laid off. The employer paid the employee back pay and vacation benefits only for the period between the retroactive reinstatement and layoff. Id. The union sued the employer to enforce the arbitration award, alleging that the employer's actions failed to comply with the award. The union argued that the employer was required to return the employee to the active payroll, and to provide back pay for the entire period between the discharge and reinstatement.
>
> This court refused to accept the employer's argument and affirmed the district court's grant of summary judgment in favor of the union. We stated:

3/ The Commission noted, however, that as the case arose under MERA, Wisconsin law, rather than federal law, ultimately governed. At 4.

> (E)ven if (the employer) were able to prove that (the employee) would have been laid off in March 1978, we would not accept such an argument in this enforcement proceeding because it was not presented to the arbitrator below. The long-established federal policy of settling labor disputes by arbitration would be seriously undermined if parties kept available information from the arbitrator and then attempted to use the information as a defense to compliance with an adverse award.
>
> Id. at 1157, citing Mogge v. International Ass'n of Machinists, 454 F.2d 510 (78 LRRM 2939) (7th Cir. 1971).

950 F.2d at 1343

The Court then went on to hold:

> . . .Case law in this and other circuits is clear on this issue. "Failure to present the issue and evidence below (before the arbitrator) waives the issue in an enforcement proceeding." Teamsters, Chauffeurs, etc., Local Union No. 330 v. Elgin Eby-Brown Co., 670 F.Supp. 1393, 1398 (127 LRRM 2950) (N.D. Ill. 1987) (collecting cases).
>
> . . .
>
> Thus, it seems clear that the parties to an arbitration proceeding must provide the arbitrator with enough information so that he may not only reach an informed decision, but also craft a reasonable remedy. If parties were allowed to withhold information during arbitration, and then use it to sandbag their opponents during enforcement proceedings, much of the efficiency and usefulness of arbitration would be lost. See Danly Machine, 852 F.2d at 1028. Of course, parties cannot be expected to anticipate every possible defense or datum that might influence an arbitrator's award. In this case, however, as in Danly Machine, this concern need not detain us. Reinstatement and back pay awards are common remedies in wrongful discharge cases. Evidence of Hernandez' medical condition was submitted to and considered by the arbitrator. See Decision of Arbitrator at 3-4, Appellant's Br., App. B. If Hofmeister was concerned about the propriety of a back pay award given Hernandez' condition, it had ample opportunity to make its case to the arbitrator. The evidence it presented to the district court was available during the arbitration proceeding had Hofmeister troubled itself to collect it. It is not unreasonable in this case to require Hofmeister, as we have required parties in other cases, see Danly Machines, 852 F.2d at 1024; Chicago Newspaper, 747 F.2d at 1153; and Mogge, 454 F.2d at 510, "to anticipate [ ] that problems would arise" regarding a back pay award. Danly Machine, 852 F.2d at 1028. Permitting parties to keep silent during arbitration and raise arguments

> in enforcement proceedings would "undermine the purpose of arbitration." Mogge, 454 F.2d at 513.
>
> 950 F.2d at 1344

The Court's rationale is applicable in this case. Morkin's grievance involved the propriety of his discharge and the normal remedy in such cases is reinstatement and a "make whole" order of back pay and benefits. The evidence used by the Respondent to justify the proration of Morkin's benefits was available at the time of the arbitration. Thus, as in Hofmeister & Son, supra, the Respondent was required to present the issue to the arbitrator if it wanted the matter considered as to the appropriate remedy. It is too late to raise the issue in an enforcement proceeding under those circumstances.

Consistent with this conclusion, the Respondent has been ordered to comply with the award by reinstating all of the sick leave, annual paid leave and paid holidays it had deducted for the first seven months of 1990. The Examiner does not conclude that Respondent's position is so "frivolous" as to meet the "extraordinary bad faith" test for the award of costs and attorney's fees. 4/

Dated at Madison, Wisconsin this 12th day of June, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

4/ Wisconsin Dells School District, Dec. No. 25997-C (WERC, 8/90).