

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

Appearances:

Lawton & Cates, S.C., Attorneys at Law, by Mr. Richard V. Graylow, 214 West Mifflin Street, Madison, Wisconsin 53703-2594, 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.

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

On June 12, 1992, Examiner Jane B. Buffett issued Findings of Fact, Conclusion of Law and Order with Accompanying Memorandum in the above matter wherein she determined that the State of Wisconsin had failed to comply with the terms of a final and binding arbitration award, and had thereby committed unfair labor practices within the meaning of Secs. 111.84(1)(e) and derivatively 111.84(1)(a), Stats.

The State of Wisconsin timely filed a petition with the 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 September 23, 1992.

Having reviewed the record and the parties' argument, the Commission makes and issues the following

ORDER

- A. Examiner's Findings of Fact 1 through 6 are affirmed.
- B. Examiner's Finding of Fact 7 which read as follows is set aside:
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."
- C. Examiner's Conclusion of Law which read as follows is set aside:
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.

D. The Commission makes and issues the following Conclusion of Law:

Arbitrator Vernon's award does not resolve the question of Morkin's entitlement to sick leave, annual paid leave and personal holidays for 1990.

E. Examiner's Order which reads as follows is set aside:

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 employees at the UW-Madison Physical Plant Division in the bargaining unit represented by Complainant by posting in conspicuous places where those employees 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.

F. The Commission makes and issues the following Order:

1. The question of Morkin's entitlement to sick leave, annual paid leave and personal holidays for 1990 is remanded to Arbitrator Vernon for issuance of a supplemental award.
2. The instant proceeding shall be held in abeyance. Should compliance issues arise following issuance of the supplemental award, the Commission will conduct hearing, if necessary, and make additional Findings, Conclusions and Order. If no compliance issues arise following issuance of the supplemental award, the Commission will dismiss the instant complaint.

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

STATE OF WISCONSIN

MEMORANDUM ACCOMPANYING ORDER AFFIRMING AND
MODIFYING EXAMINER'S FINDINGS OF FACT AND
MODIFYING EXAMINER'S 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 State computed his lost benefits and prorated those benefits for 1990 based upon what the State 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 State filed an answer wherein it denied that it had not complied with the award.

The Examiner's Decision

The Examiner concluded that where, as here, the State did not raise before the Arbitrator the issue of whether the grievant's sick leave, annual paid leave and personal holidays for 1990 should be prorated in the event he is reinstated, the State is precluded from having that issue resolved in an enforcement proceeding. In reaching her conclusion, the Examiner relied heavily upon United Food and Commercial Workers Local 100A vs. John Hofmeister, Inc., 950 F.2d 1341 (7th Cir. 1991).

The Examiner therefore found that the State's refusal to pay sick leave, annual paid leave and personal holidays to the grievant for 1990 on a

non-prorated basis constituted a failure to comply with the Arbitrator's award thereby violating Secs. 111.84(1)(e) and derivatively 111.84(1)(a), Stats.

Positions of the Parties

The State

The State of Wisconsin asserts the Examiner erred by concluding that the State had failed to comply with Arbitrator Vernon's award. The State contends that the Examiner erroneously concluded that disputes as to how the Arbitrator's phrase "lost wages and benefits" should be interpreted could not be raised in an enforcement proceeding. The State argues that the Examiner misapplied the Hofmeister decision because the State is not herein seeking to "sandbag" Council 24 with new defenses but rather is seeking an answer to the question of what is the meaning of "lost wages and benefits". The State asserts that the Arbitrator's award is ambiguous as to this question.

The State further argues that the Examiner's decision should be reversed or modified because the approach relied upon by the Examiner was not argued by Complainants until the filing of reply briefs before the Examiner. The State further contends that the Examiner's decision establishes a new precedent with far-reaching implications for how grievance arbitration proceedings are presently litigated in Wisconsin. In this regard, the State asserts that should the Commission hold this new approach is appropriate, same should be applied prospectively only so that the State is not unfairly penalized by application of new "rules of the game".

Should the Commission conclude it is appropriate to resolve the merits of the parties' dispute, the State contends that its proration of the disputed benefits is consistent with existing case law and a reasonable interpretation of the Vernon award.

Given the foregoing, the State urges the Commission to reverse the Examiner and dismiss the complaint.

Council 24

Council 24 urges the Commission to affirm the Examiner. It contends that the State's effort to prorate fringe benefits is contrary to the parties' past practice and at odds with the Arbitrator's award. Council 24 asserts that the Examiner properly concluded that if the State wanted to prorate benefits, the State should have litigated that issue before the Arbitrator. Council 24 asserts that the Examiner properly applied the Hofmeister decision to this case.

Given the foregoing, Council 24 asserts the Examiner must be affirmed.

Discussion

Arbitrator Vernon ordered the State to pay the grievant "all lost wages and benefits". The parties dispute the extent of the grievant's entitlement under the Vernon award to 1990 sick leave, annual paid leave and personal holidays. The parties did not litigate this dispute before Vernon. Vernon's view on the question is not known.

Under such circumstances, it cannot be determined whether the State has complied with the Vernon award. A decision on this allegation can only be made after the Arbitrator resolves the dispute. Thus, we have remanded the dispute to Vernon for resolution.

In our view, remand is consistent with the practice of the federal courts in such circumstances 1/ and is an approach we have utilized in the past. 2/ Thus, in the Hofmeister case cited by the Examiner, the Court remanded the parties' dispute over the meaning of a "make whole" award to the arbitrator for resolution. Thus, in Madison Schools, the question of when the arbitrator's remedy should take effect was also remanded to the arbitrator for decision.

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- 1/ Local 100A v. John Hofmeister and Son, Inc., 950 F.2d 1341 (7th Cir. 1991); Teamsters Local No. 579 v. B & M Transit, Inc., 882 F.2d 214 (7th Cir. 1989); Ethyl Corp. v. United States Steelworkers, 768 F.2d 180 (7th Cir. 1985); United Steel Workers v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960).
- 2/ Madison Schools, Dec. No. 16493-A (Schoenfeld, 6/79) aff'd by operation of law (WERC, 3/81).

As the foregoing indicates, we have concluded the Examiner was overly broad in her reading of Hofmeister. We read Hofmeister as holding that employers cannot "sandbag" unions and employes by raising new defenses in enforcement proceedings 3/ but that awards which are ambiguous should be remanded to the arbitrator unless the ambiguity can be resolved from the record. 4/ Here, the State is not raising a new defense, but rather disagrees with Council 24 on how to implement the "lost wages and benefits" portion of Vernon's award. The ambiguity in the award cannot be resolved on this record. Thus, we have modified the Examiner's decision to remand the matter to Arbitrator Vernon.

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

3/ Hofmeister at 1344.

4/ Supra, at 1345.