STATE OF WISCONSIN
CIRCUIT COURT
DANE COUNTY
BRANCH 6

WISCONSIN STATE EMPLOYEES UNION, AFSCME, AFL-CIO,
Petitioner,

vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,
Respondent.

Case No. 93-CV-0123
Decision No. 26959-C

DECISION AND ORDER AFFIRMING COMMISSION DECISION TO REMAND CASE TO ARBITRATOR

NATURE OF PROCEEDING

This is a proceeding under ch. 227, Stats., to review a Decision and Order of the Wisconsin Employment Relations Commission under the State Employee Relations Act (SELRA). secs. 111.80 - 111.94, Stats. The Commission determined that arbitrator Gil Vernon's arbitration award did not resolve the question of employee Stephen Morkin's entitlement to sick leave, annual paid leave and personal holidays for 1990. The Commission remanded the question to the arbitrator for issuance of a supplemental award, and did not determine the issue of whether the State of Wisconsin had violated SELRA, sec. 111.84(1)(e), Stats., by failing to comply with the terms of a final and binding arbitration award.

BACKGROUND AND FACTS OF THE CASE

Mr. Stephen Morkin, an employee of the UW-Madison Physical Plant Division, was terminated from his position in November 1988. His termination was grieved through the appropriate channels and proceeded to arbitration before arbitrator Gil Vernon. On July 13, 1990, the arbitrator issued his opinion and award which 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. (Arbitrator's Opinion and Award, p. 23) (emphasis added).

On July 30, 1990 Morkin was reinstated by the State. On March 15, 1991 Morkin was notified that the amount of paid annual leave and personal holidays would be prorated for 1990, and that his sick leave account would be diminished based upon his past usage of

such leave. As Morkin had used his -sick leave as quickly as he received it in past years, he was given no sick leave credit. Thus, Morkin was not credited for the total number of days for the which he would have had if he had been working at the beginning of 1990 and used none of the benefits, but rather he was credited with a partial number of these days based on the State's proration and calculations of what he would have had in a normal year considering his past record. The State had not raised the proration issue before the arbitrator, nor did the arbitrator independently discuss it in his opinion and award.

On March 22, 1991 the Union filed a complaint with the Commission alleging that the State violated SELRA by failing to comply with the arbitration award because it prorated Morkin's benefits rather than granting him the total 1990 benefits. On June 12 1992, the commission's hearing examiner issued her decision sustaining the Union's position. The examiner determined that the State had not complied with the arbitrator's award, and ordered the State to "[c]redit Morkin's sick leave, annual paid leave and holiday accounts for the amounts he would have earned in 1990 prior to his reinstatement had he been working during the period without proration of benefits.' (Examiner's Decision, P. 9).

The State filed a Petition for Review with the Commission on July 1, 1992. On December 11, 1992 the Commission issued an Order modifying the Examiner's Decision, holding that the Arbitration Award '[d]oes not resolve the question of Morkin's entitlement to sick leave, annual paid leave and personal holidays for 1990.' (Commission's Decision, p. 2). The Commission remanded the question to the arbitrator for issuance of a supplemental award.

DECISION

After reviewing all the documents presented and the file and record herein, the Court AFFIRMS the Commission's decision to remand the question of Morkin's entitlement to sick leave, annual paid leave and personal holidays for 1990 to the arbitrator.

ANALYSIS

A. Standard of Review

There is no dispute as to the facts of the case at hand. The only issue is the interpretation of the arbitrator's decision and what that decision means in effect.

The Wisconsin Supreme Court has held that when reviewing an administrative agency's decision there are three levels of deference to that agency's statutory interpretation: (1) the 'great weight' standard, which is "the general rule in this state." This standard is properly used when the administrative agency's experience and knowledge aid in the interpretation of the statute and where a legal question is intertwined with factual determinations or with value or policy determinations; (2) the 'due weight' or 'great bearing' standard where the agency decision is 'very nearly' one of first impression; (3) the 'de novo' standard where the issue is clearly one of first impression and the agency has no special experience or expertise in determining the issue. Sauk County v. WERC, 165 Wis. 2d 406, 413-414, 477 N.W. 2d 267 (1991); Local No. 695 v. LIRC, 154 Wis. 2d 75, 82-84, 452 N.W. 2d 368 (1990); West Bend Education Ass'n v. WERC, 121 Wis. 2d 1, 12, 357 N.W.

2d 534 (1984); Beloit Education Ass'n v. WERC, 73 Wis. 2d 43, 67-68, 242 N.W. 2d 231 (1976).

The statute involved here, Section 111.84(1)(e), states that it is unfair labor practice for an employer individually or in concert with others:

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

In this case there is no dispute as to the meaning or interpretation of the statute; both parties agree that the award of the arbitrator is final and binding. The question is the interpretation of the meaning of the award itself.

Although it may be that the Commission has not specifically addressed the question of proration of an award which states an employee must be paid 'all lost wages and benefits,' it certainly has had to review and decide issues as to the meaning of other arbitration awards. This is much the same situation as occurred in the recent Wisconsin Supreme Court decision in Braatz v. LIRC, 174 Wis. 2d 286, 293, 496 N.W. 2d 597 (1993). Although the court in Braatz reversed a LIRC decision concerning the interpretation of a marital status provision of the Wisconsin Fair Employment Act, it gave deference to LIRC's conclusion because of LIRC's experience in interpreting the statute in question. The court overturned the LIRC decision only because there was no reasonable basis to support its conclusion.

It is also true that in determining the meaning of arbitration awards there is
some consideration of policy involved, as it is the Commission's duty to ensure that the awards are properly carried out.

Thus, the proper standard with which this court should review the Commission's decision is that of 'great weight,' and that decision can only be reversed if it is not reasonable.

B. The Commission Decision To Remand To the Arbitrator

As the language of the award is ambiguous, it was reasonable for the Commission to remand the issue to the arbitrator for clarification. The phrase '[a]ll lost wages and benefits' could be read to mean either view expressed by the parties to the case. It is possible to believe that the arbitrator intended Morkin to receive all benefits for 1990, but it is also possible that it was only intended for him to receive those benefits he would have earned and not used, i.e. 'lost,' up to that date. Because of these two possible readings the Commission could properly remand the issue to the arbitrator for determination of a supplemental award.

The court will now address the specific arguments raised by the Union to support its contention that the Commission remand was inappropriate.

1. Proration Was Not Raised As A Defense Before The Arbitrator

In determining that the State of Wisconsin had not complied with the arbitration award by prorating Morkin's sick leave, annual paid leave and personal holidays, the examiner relied heavily upon Local 100A v. John Hofmeister and Son, Inc., 950 F.2d 1340 (7th Cir. 1991). In its Decision and Order overturning the examiner, the Commission determined that the examiner's reading of Hofmeister was overly broad. This court agrees with the Commission.

In Hofmeister the court determined that employers can not 'sandbag' unions and employes by withholding information during the arbitration proceeding and then raise new issues in the enforcement proceedings. However, the court further stated and determined that the arbitrator's award in that case was ambiguous with its 'make whole' language, and that the award must be remanded to the arbitrator for clarification. Id. at 1345. (citations omitted).

The situation in this case is that of an ambiguous arbitration award and not of an employer "sandbagging" the Union by holding back a defense before the arbitrator and then raising that defense during enforcement proceedings. The State and the Union disagree on how to implement the arbitration award. The State's position is not a defense, but simply a different reading of the intention of the award.

2. "Silence" In The Arbitration Award On The Issue Of Proration

Petitioner Union also argues that because the arbitration award did not specifically mention proration of the benefits it must be taken to mean that the arbitrator did not intend proration. In support of this contention Union cites Auto Mechanics Local 701 v. Joe Mitchell Buick, 930 F.2d 576 (7th Cir. 1991), and Teamsters, Local Union 330 v. Elgin Eby-Brown Co., 670 F. Supp. 1393 (N.D. M. 1987). However, each of these case present different circumstances than the instant case.

In Joe Mitchell Buick, 930 F.2d at 578, the court addressed the issue of whether arbitrators have discretion to decide whether lost earnings should be offset by interim earnings or a failure to mitigate. In that case the issue of mitigation was clearly raised before the arbitrator and the arbitrator was silent on the issue in his award. The court determined that this silence indicated that no offsets were to be made for failure to mitigate under these circumstances and that the award was not ambiguous because of the arbitrator's silence. Id. The court in Joe Mitchell clearly states that an arbitrator's silence on mitigation of damages means there is to be no offset to lost earnings, but the court in no way touches on the issue before the court in this case. Joe Mitchell provides no guidance in determining how to interpret the language "[a]ll lost wages and benefits" in an arbitration award. The instant case does not revolve around silence, but around ambiguity.

In Elgin Eby-Brown Co., the court resolved what it considered to be an ambiguous arbitration award as it believed that it had the requisite facts before it to make such a determination. The court determined the award was not ambiguous with respect to mitigation, but was only ambiguous as to the amount to be deducted from back pay. Because the court had the facts before it to resolve this ambiguity, it did so, thus making remand unnecessary.

Further, in Elgin Eby-Brown Co., it was determined that because Eby-Brown did not raise the issue

of mitigation before the arbitrator, it could not present failure to mitigate as a defense in an enforcement proceeding. The court reasoned that this was a settled issue of law and awarded Local 330 attorney's fees as well as the judgment enforcing the arbitrator's award.

Once again, the cited case does not address the issue before the court here. In the instant case the court does not have before it the facts necessary to determine the arbitrator's intention in his use of '[a]ll lost wages and benefits.' In the opinion of this court, and of the Commission, the language is ambiguous. Also, as discussed earlier, the Commission is not raising a defense in the enforcement proceeding that was not raised at arbitration. Due to these factors, the Commission's decision to remand must be considered reasonable.

3. Past Practice Of The State

The Union also argues that the past practice of the State with respect to proration should carry 'great weight' and cites Cutler-Hammer, Inc. v. Industrial Comm., 109 N.W. 2d 468, 475, 13 Wis. 2d 618, 632 (1961) as support. As proof of past practice Union provides a copy of page 53 of the transcript from the Hearing before the Examiner in this case. The pertinent part of the script reads as follows:

> Q. Mr. Highman, let me ask a question based on your years of experience here on the Madison campus for the state employees union. Is Mr. Morkin's case the first one that you are aware of that where they have prorated these benefits?
> A. Yes, to my knowledge it is the first case.

Although past practice should be given consideration, from the facts available it is uncertain whether this specific language has previously been in issue. The testimony at the Hearing before the Examiner provides that to Mr. Highman's knowledge there has been no previous proration of benefits for union members. However, there is no indication that there has ever been a situation where there was no proration based on the language "[a]ll lost wages and benefits." Because of this, and given the weight this court must give to the Commission's decision, the court must defer to that body's decision to remand to the arbitrator. There are not enough facts on the record for this court to determine that past practice is powerful enough to decide in any other way.

CONCLUSION

Because the Commission's decision to remand the case to the arbitrator to clarify the intent of his award must be given 'great weight,' and because that decision was reasonable given the evidence available, this court must affirm that decision. The case should be remanded to the arbitrator to clear up the ambiguity of the award as per the instructions of the Commission.

IT IS SO ORDERED.

Dated this 26th day of October, 1993.

BY THE COURT:

/s/ Richard J. Callaway

RICHARD J. CALLAWAY
Circuit Judge

cc:

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NOTICE OF ENTRY OF DECISION AND ORDER

To: Richard V. Graylow
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PLEASE TAKE NOTICE that a decision and order affirming the Commission's decision to remand this case to arbitrator, of which a true and correct copy is hereto attached, was signed by the court on the 26th day of October, 1993, and duly entered in the Circuit Court for Dane County, Wisconsin, on the 26th day of October, 1993.

Notice of entry of this decision and order is being given pursuant to secs. 806.06(5) and 808.04(1), Stats.

Dated this 10th day of November, 1993.

JAMES E. DOYLE
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