STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

THE WISCONSIN STATE EMPLOYEES UNION (WSEU), AFSCME, COUNCIL 24, AFL-CIO,		
Complainant,	Case 327	
		No. 47743 PP(S)-190
vs.		Decision No. 27510-A
THE STATE OF WISCONSIN,		
Respondent.		

Appearances:
Lawton & Cates, S.C., Attorneys at Law, 214 West Mifflin Street, P.O. Box 29
Mr. Thomas E. Kwiatkowski, Attorney/Senior Labor Relations Specialist, Divisi
behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Wisconsin State Employees Union, AFSCME, Council 24, AFL-CIO, filed a complaint on July 8, 1992 with the Wisconsin Employment Relations Commission, alleging that the State of Wisconsin, Department of Corrections, violated Chapter 111.84, Stats., by refusing to abide by a final and binding arbitration award. The Commission appointed Mary Jo Schiavoni, a member of its staff, to act as Examiner and make and issue Findings of Fact, Conclusions of Law and Order in this matter as provided in Sec. 111.07(5), Stats. Hearing on the complaint was held on June 23, 1993, in Madison, Wisconsin. A stenographic transcript was made of the hearing and was received on July 12, 1993. The parties completed the submission of post-hearing briefs and reply briefs by September 28, 1993. The Examiner, having considered the evidence and arguments of the parties, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Wisconsin State Employees Union, AFSCME, Council 24, AFL-CIO, hereinafter the Complainant, is a labor organization with its principal offices

located at 5 Odana Court, Madison, Wisconsin 53705. Complainant's Local Union 126 is the exclusive collective bargaining representative of employes in positions previously allocated by action of the Commission to certain statutorily-created bargaining units. At all times material herein, Ronald Orth was a Field Representative for the Complainant. George Rawson is an individual who, at all times material herein, has been employed by the State of Wisconsin in the Department of Corrections, Division of Adult Institutions, as a Correctional Officer II at the Taycheedah Correctional Institution. As a Correctional Officer, Rawson is in a bargaining unit represented by the Complainant for the purposes of collective bargaining.

2. The Respondent State of Wisconsin is a state employer, whose collective bargaining responsibilities and contract administration are administered by the Department of Employment Relations, hereinafter DER, which has its offices located at 137 East Wilson Street, Madison, Wisconsin 53707-7855. The Department of Corrections is an independent agency created and operating by virtue of State Statutes. As part of its statutory responsibilities, the Department of Corrections, through its Division of Adult Institutions, maintains and operates the Taycheedah Correctional Institution (TCI). At all times material herein, Nona Switala was the Warden at TCI, Captain Patricia Stockwell was the first shift supervisor at TCI and Ann Sohm was the Personnel Manager at TCI. Switala is no longer employed by the Respondent and no longer resides in Wisconsin. For approximately the last four years, Glen Blahnik has been the Assistant Administrator for the Division of Collective Bargaining and in that position Blahnik is responsible for overseeing the contract administration and the negotiations of contracts with the State's classified employes and some unclassified employes. All of these individuals were, at all times material, agents and representatives of Respondent.

3. The Respondent and the Complainant have been party to a series of collective bargaining agreements. Beginning with the parties' 1985 Collective Bargaining Agreement, and continuing in their successor agreements, the parties' agreement has contained the following "Special Expedited Arbitration" in the Arbitration Procedures in addition to the existing final and binding grievance arbitration procedure contained in the Agreement:

> **Section 12: Special Arbitration Procedures**
>
> **4/12/1** In the interest of achieving more efficient handling of routine grievances, including grievances concerning minor discipline, the parties agree to the following special arbitration procedures. These procedures are intended to replace the procedure in Subsection 4/3/1-7 for the resolution of non-precedential grievances as set forth below. If either of the parties believes that a particular case is precedential in nature and therefore not properly handled through these special procedures, that case will be processed through the full arbitration procedure in subsection 4/3/1-7. Cases decided by these methods of dispute resolution shall not be used as precedent in any other proceeding.
>
> Two arbitrators will be mutually agreed to by District Council 24, WSEU, and the State Division of Collective Bargaining for both of these procedures during the term of the contract.
>
> A. Expedited Arbitration Procedure
>
> (1) The cases presented to the arbitrator will consist of campus, local institution or work site issues, short-term disciplinary actions (five day or less suspensions without pay), denials of benefits

under 230.36, Stats., and other individual situations mutually agreed to.

(2) The arbitrator will normally hear at least four (4) cases at each session unless mutually agreed otherwise. The cases will be grouped by institution and/or geographic area and heard in that area.

(3) Case presentation will be limited to a preliminary introduction, a short reiteration of facts, and a brief oral argument. No briefs or transcripts shall be made. If witnesses are used to present facts, there will be no more than two (2) per side. If called to testify, the grievant is considered as one of the two witnesses.

(4) The arbitrator will give a bench or other decision within five (5) calendar days. The arbitrator may deny, uphold, or modify the action of the Employer. All decisions will be final and binding.

(5) Where written decisions are issued, such decisions shall identify the process as non-precedential in the heading or title of the decision(s) for identification purposes.

(6) The cost of the arbitrator and the expenses of the hearing will be shared equally by the parties.

(7) Representatives of DER and AFSCME Council 24 shall meet and mutually agree on an arbitrator.

. . .

4. Prior to late 1989, Rawson worked in the Gatehouse at TCI and his work schedule was Monday through Friday, 8:00 a.m. to 4:00 p.m., with weekends and holidays off. In addition to Rawson, there was a half-time position in the Gatehouse that was used to cover night visits and weekends. In November of 1989, the half-time position was eliminated and management determined to cover the Gatehouse for a period of two full shifts, 6:00 a.m. - 2:00 p.m. and 2:00 p.m. - 10:00 p.m., on a "federal rotation" schedule of six days on, two days off, with the days off changing each week. Rawson was placed on the first shift, 6:00 a.m. - 2:00 p.m., and placed on the federal rotation schedule. Rawson grieved the change in his work schedule and that grievance ultimately proceeded to expedited arbitration, along with two other unrelated grievances before Arbitrator Kerkman. On July 23, 1991, Arbitrator Kerkman issued a "Non-Precedential Award" under Article 4, Section 12, of the parties' Agreement. That Award reads in relevant part, as follows:

CASE NO. 8923 - GEORGE RAWSON GRIEVANCE

THE ISSUE:

Did the Employer violate the grievant's contractual rights by changing his work schedule as defined in Article VI?

THE FACTS:

George Rawson, grievant herein, was employed in a Gate House position for the Employer at its Taycheedah facilities. Up until the time of the change of his schedule, the grievant had worked a Monday through Friday schedule, commencing at 8:00 a.m. and

finishing at 4:00 p.m. In addition to the grievant, there was also a half-time position to relieve the grievant on weekends and for night visits.

In November, 1989, the half time position was eliminated, and the Employer determined that the gate house would be covered for a period of two full shifts. In so doing, the grievant was placed on first shift, and the hours were changed from 8:00 a.m. to 4:00 p.m., to 6:00 a.m. to 2:00 p.m. Additionally, the grievant was removed from the Monday through Friday work schedule, and was placed on a schedule which required the grievant to work on Saturdays and Sundays. The Union and the grievant were timely notified of the change prior to the effective date of the change.

The matter was grieved and the parties were unable to reach a resolution of the grievance, giving rise to the instant proceedings.

DISCUSSION:

Work schedules are defined in the Agreement at 6/2/1 as an employee's assigned hours, days of the week, days off, and shift rotations. At 6/2/2 of the Agreement, the Employer retains the right to change work schedules only to meet the operational needs of the service, and the Employer is prohibited from making those changes arbitrarily, providing, the specified notices are provided to the local Union and the employees affected by that change.

It is undisputed that the Employer has given the appropriate notice required in the Contract for the grievant's work schedule change. The issue is whether the Employer made the work schedule change of the grievant for operational needs as is required in 6/2/2 of the Agreement. The Union argues that there were no operational needs involved, because the Employer could have merely changed the work hours and not the Monday through Friday schedule by the use of employees assigned in utility classifications to avoid the payment of overtime. The Employer argues that employes assigned in utility classifications are assigned there for the purpose of filling in for vacations and absences due to illness, etc., and are not there for the purpose of working regular assigned hours in the gate house. The Employer admits that its motivation in making the schedule change for the grievant was the avoidance of overtime and argues that the avoidance of overtime constitutes an operational need.

While the avoidance of overtime may be a legitimate operational need of the Employer, the specific provisions of 6/2/2 state: "Work schedules will not be changed to avoid the payment of overtime." Thus, the Employer, when it made the change in the grievant's schedule to avoid overtime, violated 6/2/2 of the Agreement which prohibits changes made for the purpose of avoidance of the payment of overtime. The

grievance will, therefore, be granted.

AWARD

The grievant is to be restored to a Monday through Friday schedule commencing at 6:00 a.m. and ending at 2:00 p.m.

5. As a result of the Kerkman Award, on or about August 11, 1991, Rawson was returned to a Monday through Friday, 6:00 a.m. - 2:00 p.m. work schedule with weekends and holidays off, in the Gate House. Neither party moved to confirm or vacate the award. In December of 1991, Warden Switala was advised, pursuant to her request for the information, that it had so far cost approximately $2,072.48 in overtime as a result of returning Rawson to a Monday through Friday schedule. A local labor-management meeting was held at TCI with Mike Docta, Mark Steberg, Tim Boehrig, Bob Rudey and Barb Sweeney present for the local union, and Warden Switala, Mary Sheridan, Terry Shoemaker, Jim Carpenter and Ann Sohm present for management. Among the items discussed at said meeting was the issue of the cost of keeping Rawson on the Monday through Friday work schedule at the Gate House. In that discussion, Warden Switala indicated that there had been a similar case that had gone to arbitration where the Respondent had prevailed, and that she felt the arbitrator in Rawson's case had misunderstood what it was that Rawson was grieving. Warden Switala advised those present for the local union that unless the Union could suggest an alternative plan, she was going to put Rawson on the federal rotation. The local union requested that it be given till December 16, 1991 to respond, but did not subsequently suggest or propose any alternative plan. The local union advised Rawson of the discussion regarding his work schedule shortly after the labor-management meeting. Rawson subsequently advised Warden Switala of his dissatisfaction at not being approached personally by management about the matter and tendered his resignation from two voluntary positions he held at TCI. By the following memorandum of December 12, 1991, Warden Switala notified Rawson of the reasons the subject had been raised:

TO: George Rawson, CO 2
Security Department

FROM: Nona J. Switala, Warden
Taycheedah Correctional Institution

RE: Your Memorandum of December 11, 1991

1. I advised the union leadership that I would consider alternative proposals to changing the gatehouse post to a rotating shift in order to eliminate the costs generated by the current arrangement. The union leadership will be presenting their suggestions next Monday. No decision is definite; what, if any, impact on vacation schedules is unknown.

2. One of my major responsibilities for which I am held accountable, is that of budget. As I've told the union, TCI and the taxpayers cannot afford to have one post independent of a seven-day relief cycle. We estimate a cost of approximately $10,000, due to the inefficiency of not fitting the rotation cycle. Admittedly, that responsibility is not an easy one to carry; nor does it always make me popular.

Nevertheless, it is part of the expectations placed upon me.

3. You are, naturally, taking this personally. The union leadership and I must consider this post and this shift -- not as a person, but as a part of a multi-facited (sic) object wherein all the parts must be inter-related in order to mesh in an efficient, effective manner. The current arrangement is out-of-sync, is inefficient, and expensive.

4. I am sorry you are hurt, but I doubt the hurt will have been any less if I had announced the problem in another manner. Mr. Boehrig told us that he discussed the agenda item with you before the meeting and you accurately speculated as to the issue. We did, however, request that he or Mr. Docta, confirm your suspicions that evening, before the rumor mill was activated.

5. You, George Rawson, have done nothing to create the problem. Originally, your post was one shift per day, Monday through Friday. We had a half-time officer to cover your shift on weekends and holidays.

   When the decision was made to have two shifts per day, seven days per week, the need to establish a rotation and relief factor became essential.

   It is inefficient to have one piece of a seven-day post operate independently of the other pieces.

   It was this change in coverage and the need to use staff resources efficiently that created the dilemma we all face.

   The dilemma is not George Rawson; it is first shift gatehouse post -- a position of seven days a week; a part of two shifts per day.

6. Your resignation is accepted. As you know, you've done an exceptional job for which you have been most proud and for which you have received TCI's on-going appreciation. Your decision to withdraw from the amory (sic) and the fire safety specialist is yours to make and, while we may regret your decision, we will certainly honor it. Please turn all records, etc., over to Mrs. Sheridan.

6. On December 12, 1991, Boehrig advised Warden Switala that the Union would not be submitting any alternative plan regarding Rawson's work schedule. By the following memorandum of January 14, 1992, Warden Switala advised Rawson and the Union that Rawson would be placed on the federal rotation schedule effective February 2, 1992:

> TO: Mr. George Rawson
>
> FROM: Nona J. Switala, Warden
> Taycheedah Correctional Institution
>
> RE: Work Schedule Changes
>
> As you know, in December, I approached the local union leadership about the need to provide gatehouse coverage without generating a relief conflict and overtime costs. As I told you in my December 12, 1991, letter, the union leadership requested time to develop an alternative to returning you to a rotating schedule.
>
> On December 12, 1991, Tim Boehrig called me. He said he had consulted with someone in Council 24, and the decision was made to withdraw the offer to develop alternatives for my consideration.
>
> We have reviewed the shift schedule in a variety of ways. Minimal staff disruption and schedule efficiency comes with changing your schedule to mesh with the other person involved in first shift gatehouse coverage.
>
> Effective February 2, 1992, you will return to a rotating schedule with Key E. All 1992 vacation that you have scheduled prior to January 14, 1992, will be honored as scheduled.

7. Rawson filed a grievance on the pending change in his work schedule. Rawson's work schedule was changed to the federal rotation on February 2, 1992. Rawson's grievance was processed through the parties' grievance procedure in their Agreement and was appealed to arbitration on April 13, 1992 and is presently pending. On July 8, 1992, Complainant filed the instant complaint with the Commission. Rawson subsequently posted out of the Gatehouse position into a position as third shift Patrol Utility on a federal rotation schedule.

8. The change that took place subsequent to the issuance of the Kerkman Award and prior to placing Rawson back on the federal rotation in 1992 was staffing the 2:00 p.m. - 10:00 p.m. shift at the Gatehouse with a full-time position, and putting a relief position on the federal rotation for the Gatehouse, leaving Rawson as the only employe on a Monday through Friday schedule in the Gatehouse.

9. In 1981, the Respondent and Complainant Local Union 1914 proceeded to arbitration on a grievance filed in February, 1980, concerning management's changing the work schedules of several employes at Respondent's UW-Eau Claire to avoid the payment of overtime. An award was issued in that case by Arbitrator Mueller on July 8, 1991, wherein the Arbitrator concluded that minimizing overtime fell within the interpretation of "operational needs", and that since Respondent had given the contractually-required notice of the schedule change and the change was based on an operational need, there was no contract violation. Said Award is referenced by the parties as the "Patton Award". Said Award contains at page two the following stipulation:

> 3. That for the year 1979, the Employer again paid time and one-half to an employee for the time worked pursuant to a grievance and settlement of such

grievance, entered as Joint Exhibit No. 5, which stated as follows:

> "1. Maria will be paid 4 hours at her straight time rate (as of Feb. 1979)
>
> "2. The group grievance (5-22-80 3rd step ans. date) time limits for appeal to the 4th step will begin on 12-17-80. This grievance dealing with change in work schedule at Hibbard Hall may now be appealed to arbitration if the Union wishes to do so.
>
> "3. The resolution of the Patton 5-15-79 grievance is without prejudice and will not serve as precedent in any other grievance.
>
> . . .

The reference in item 3 above is to a previous grievance by Patton and is not in reference to the grievance filed by Patton in 1980 and decided by Arbitrator Mueller in his July 8, 1981 Award. 2/

10. The factual situation at the time Respondent returned Rawson to a federal rotation in February of 1992 was materially the same as that presented in Rawson's grievance decided by Arbitrator Kerkman's Award of July 23, 1991. The Respondent State placed Rawson on a federal rotation schedule February 2, 1992 for essentially the same reason it did so in 1989, to avoid overtime costs incurred as a result of his not working on weekends and holidays. The parties, the grievant, the issue and the remedy in both cases are identical.

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

CONCLUSION OF LAW

The Award issued by Arbitrator Kerkman on July 23, 1991, with regard to the Rawson grievance decided therein, is conclusive as to the grievance filed by Rawson in January of 1992 in response to his being returned to a federal rotation work schedule. By returning Rawson to a federal rotation for essentially the same reason in February of 1992 as it did in the case presented to Arbitrator Kerkman, contrary to the Award issued July 23, 1991, the Respondent State, and its agents and officers, have refused to accept the terms of an arbitration award the parties previously agreed would be final and binding upon them in violation of Sec. 111.84(1)(e), Stats.

Based upon the foregoing Findings of Fact and Conclusion of Law, the Examiner makes the following

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2/ This is clear from the above-cited text of Arbitrator Mueller's Award without need to refer to any exhibits proffered post-hearing.

ORDER 2/

That the Respondent State of Wisconsin, its officers and agents, shall immediately

1. Cease and desist from failing to comply with the terms of the Award issued by Arbitrator Kerkman on July 23, 1991, as it concerns the grievance of George Rawson regarding his work schedule.

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

   a. Offer George Rawson the right to return to the Gatehouse position on a Monday-Friday work schedule as awarded by Arbitrator Kerkman.

   b. Notify all bargaining unit employes in the affected security and public safety bargaining unit, that it will comply with the terms of the Kerkman Award as it relates to the work schedule of George Rawson by posting in all conspicuous places on its premises where notices to its employes are usually posted, a copy of the Notice attached hereto as Appendix "A". Such copy shall be signed by an agent of Respondent State, and shall be posted immediately upon receipt of a copy of this Order, and shall remain posted for thirty (30) days after its initial posting. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced or covered by other materials.

   c. Notify the Wisconsin Employment Relations Commission within twenty (20) days of the date of this Order regarding the steps it has taken to comply with the Order.

Dated at Madison, Wisconsin this 18th day of November, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Mary Jo Schiavoni /s/
Mary Jo Schiavoni, Examiner

(Footnote 2/ will appear on the next page.)

2/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

> (5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

This decision was placed in the mail on the date of issuance (i.e. the date appearing immediately above the Examiner's signature).

APPENDIX "A"

NOTICE TO ALL BARGAINING UNIT EMPLOYES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the State Employment Relations Act, we hereby notify our employes that:

1. We will cease and desist from failing to comply with the terms of an arbitration award issued by Arbitrator Joseph B. Kerkman on June 23, 1991, regarding the grievance of George Rawson with respect to his work schedule.

2. We will not, in any other manner, interfere with, restrain or coerce our employes in the exercise of their rights as guaranteed by SELRA.

STATE OF WISCONSIN
DIVISION OF CORRECTIONS

By _____

THIS NOTICE MUST REMAIN POSTED FOR SIXTY (60) DAYS FROM THE DATE HEREOF, AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY MATERIAL.

STATE OF WISCONSIN (DEPARTMENT OF EMPLOYMENT RELATIONS)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

POSITIONS OF THE PARTIES

Complainant

The Complainant takes the position that the Respondent State is and has been violating the arbitration award issued on July 23, 1991, involving the work schedule grievance of George Rawson. That award directed the Respondent to restore Rawson to the Monday through Friday schedule commencing at 6:00 a.m. and ending at 2:00 p.m. In February, 1992, Rawson was returned to the federal rotation shift in violation of the Award.

The "Kerkman Award" held that the Respondent could not change Rawson's work schedule for the purpose of avoiding the payment of overtime. Therefore, effective July 23, 1991 (the date of the award), the Respondent was prohibited from changing Rawson's Monday through Friday, eight hours per day, schedule in order to avoid the payment of overtime. However, approximately seven months later, it again changed Rawson's schedule in order to avoid the payment of overtime.

The Commission has applied the concept of res judicata to compel compliance and enforcement of arbitration awards in general. That concept is applied when the following factors are present: identity of parties; identity of issues; and identity of remedy. Citing, State of Wisconsin, Dec. No. 13539-C, D (WERC, 3/76); State of Wisconsin, Dec. No. 20200-A (Knudson, 8/83); State of Wisconsin, Dec. No. 20145-A (Burns, 5/83). Complainant asserts that each of the required elements for the application of res judicata is the same in this case as it was when the Kerkman Award was entered. The parties are identical, the issue is precisely the same, the work location is the same and the issue is the same, i.e., was the schedule change to avoid the payment of overtime? Thus, the doctrine of res judicata must be applied and the State compelled to comply with the Award.

In its reply brief, Complainant asserts that regardless of the State's argument that the Kerkman Award was not precedential, the State overlooks the clear language of the Agreement that the procedure in question calls for a "final and binding decision". Thus, by the terms "final" and "binding", the Kerkman Award was final and it was binding upon the parties. It adjusted the dispute over the scheduling forever, not just for five months. In Complainant's view, as the State applies the Kerkman Award, it would be neither final nor binding, since applying it for five months is neither permanent nor binding. Complainant also points to the testimony of Blahnik, Respondent's chief negotiator, that an expedited arbitration procedure applies to those parties and entities involved as well as the fact situation involved. In this case, Complainant does not seek to expand the scope of the Kerkman Award beyond the grievant, George Rawson, the work location (the Gatehouse at TCI), or the Department of Corrections. These were the identical parties before Arbitrator Kerkman and are the identical parties in this case.

Complainant also questions the Respondent's reliance upon the "Patton Award", asserting that the parties in that case stipulated at the time of hearing that the award would not be precedential, "the resolution of the Patton May 15, 1979 grievance is without prejudice and will not serve as precedent in any other grievance." Besides the Respondent's present argument being in violation of that above stipulation, the Patton Award concerned a different institution at a different location. The Complainant maintains that even if the Patton Award has precedential value, there is no identity of parties, and it therefore has no application to the instant dispute.

Respondent

The Respondent first contends that the Commission should defer this dispute to the parties' contractual grievance arbitration process, since the

Union has failed to exhaust the remedies available in that final and binding exclusive procedure. The Commission should not assert its jurisdiction in this dispute based upon the well-established Commission policy that:

> Where an exclusive collective bargaining representative of the employes has bargained an agreement with the employer which contains a procedure for final impartial resolution of disputes over contractual compliance, the Commission generally will not assert its statutory complaint jurisdiction over any breach of contract claims covered by the contractual procedure and a desire to honor the parties' agreement.
> **Terry Frank v. State of Wisconsin, Dec. No. 20830-A (Schiavoni, 12/83), aff'd in pertinent part, Dec. No. 20830-B (WERC, 8/85).**
>
> In applying that policy, the Commission considers certain criteria:
>
> 1. The parties must be willing to arbitrate and renounce technical objections which would prevent a decision on the merits by the arbitrator;
>
> 2. The collective bargaining must clearly address itself to the dispute; and
>
> 3. The dispute must not involve important issues of law or policy.

Respondent argues that in this case, all of those criteria have been satisfied. First, the parties' Agreement contains an exclusive final and binding grievance arbitration procedure which has not been exhausted by Complainant. In fact, the parties are currently awaiting the selection of an arbitrator in this dispute. Second, neither party has alleged technical objections to that arbitration. Third, Article III, Section 1, paragraphs 1 and 2, and Article VI, Section 2 of the Agreement clearly address the issue of changing the grievant's work schedule for operational needs and overtime. Fourth, the issues of work schedule and overtime in this case are routine and have been previously litigated in arbitration.

Next, the Respondent asserts that the non-precedential Kerkman Award should not be given res judicata effect in the current dispute due to significant differences in material facts and a lack of identity of issues between the Kerkman arbitration and this case. It is long-standing Commission policy that:

> An arbitration award will be found to govern a subsequent dispute in those instances where the dispute which was the subject of the award and the dispute for which the application of the res judicata principle is sought share an identity of parties, issue and remedy. State of Wisconsin (DER), Dec. No. 20145-A (Burns, 5/83), aff'd by operation of law, Dec. No. 20145-B (WERC, 6/83). In addition, there cannot be any material discrepancies of fact existing between the prior dispute governed by the award and the subsequent dispute. Id. State of Wisconsin, Dec. No. 23885-B (Burns, 9/87), aff'd in relevant part, Dec. No. 23885-D (WERC, 2/88).

Contrary to the Complainant's assertion, the Commission should not give the Kerkman Award res judicata effect, but should remand the case to arbitration due to significant discrepancies in material fact and lack of identity of issue existing between that award and the current dispute. Those discrepancies of material fact between the Kerkman Award and the current dispute are as follows. First, Rawson's supervisor at TCI, Captain Stockwell, testified as to the duties of a CO II at the Gatehouse and the work schedule at the time of the Kerkman Award and as to the significant changes that occurred at TCI which necessitated changes in the staffing pattern by December of 1991. Second, while at the time of the Kerkman Award management had determined that it was necessary to change Rawson's schedule because of high overtime costs, by December of 1991, Rawson's Monday through Friday, 8:00 a.m. to 4:00 p.m. shift was causing significant operational difficulties. Ann Sohm, Personnel Director at TCI, testified as to those difficulties. Third, at the time of the Kerkman Award, management changed Rawson's work schedule after giving proper notice under the contract to Rawson and the union. However, in December of 1991 management requested the union to work with it on coming up with alternatives to as to avoid a change in Rawson's schedule. The union did not cooperate and accordingly, management changed Rawson's work schedule. Fourth, in his award, Arbitrator Kerkman assumed that Rawson was losing overtime pay as a result of the decision to change his work schedule. That assumption was subsequently proven to be incorrect. Sohm testified to the fact that Rawson never lost overtime as a result of the schedule changes that resulted in the Kerkman Award or the present dispute. Further, there is a lack of identity of issues between the Kerkman Award and the current dispute. The issue before Arbitrator Kerkman was as follows:

> Did the Employer violate the grievant's contractual rights by changing his work schedule as defined in Article VI? (J-Ex 2).

In addition to that issue, the current dispute also presents an additional issue of whether the precedential award in "Patton" governs the outcome of this dispute. Arbitrator Kerkman never considered whether the precedential Patton award affected the outcome of that dispute.

The Respondent also contends that its decision to change Rawson's work schedule in light of operational needs and following the Complainant's failure to offer any alternative, is consistent with its rights expressed in the clear and unambiguous language of Article III to manage, direct and utilize personnel in the most efficient manner possible as determined by management. Article III expressly recognizes management rights to "manage and direct the employes of the various agencies" and "assign. . .employes in positions within the agency" and "to utilize personnel, methods and means in the most efficient manner possible as determined by management." That language is clear and unambiguous. It means that management gives employes their assignments and sets their work schedules, qualified only by the notice requirement in Article VI, Section 2. The Agreement does not limit management to which employes it may manage and direct. The control of overtime costs is a legitimate efficiency goal of management and was recognized as such by Arbitrator Mueller in the "Patton Award" where he wrote at length about the importance of the control of overtime costs to the Employer. The evidence is clear in this case that management's action is within its contractual rights under Article III and its statutory management rights pursuant to Section 111.90(1) and (2), Stats. to direct, manage and "utilize personnel in the most efficient manner possible as determined by management." Respondent claims that the decision in 1991 to change Rawson's schedule was based on an operational need, i.e., a part-time relief position had been eliminated and the activities at the Gatehouse increased, necessitating additional coverage. Rawson's schedule, it stresses,

was out of sync with the federal rotation Gatehouse schedule, and created significant over-budget overtime costs.

Respondent asserts that this case presents a "contractual language issue of first impression: the binding scope of a non-precedential arbitration award." It maintains that the unambiguous language of Article IV, Section 12 and accompanying bargaining history of that provision, clearly demonstrate the parties' intent to limit the binding scope of the non-precedential expedited arbitration process to the specific facts of a grievance, a specific grievant, a specific agency and a specific time. The Complainant premises its claim in this case on the belief that management is forever bound to a particular set of circumstances through a non-precedential expedited arbitration award. That belief is contrary to both the clear language of Article IV, Section 12 and its bargaining history. The language of Article IV, Section 12, paragraph 1 is clear with regard to its binding scope:

> In the interest of achieving more efficient handling of routine grievances, including grievances concerning minor discipline, the parties agree to the following special arbitration procedures. These procedures are intended to replace the procedure in Subsection 4/3/1-7 for the resolution of non-precedential grievances as set forth below. If either of the parties believes that a particular case is precedential in nature and therefore not properly handled through these special procedures, that case will be handled through the full arbitration procedure in subsection 4/3/1-7. Cases decided by these methods of dispute resolution shall not be used as precedent in any other proceeding. [Emphasis added]

That language does not indicate that non-precedential arbitration is interchangeable with precedential arbitration procedures. A separate contract provision exists for the precedential arbitration process. The contractual distinctions between a non-precedential and precedential arbitration process determines the binding scope of an award under either. Under the non-precedential arbitration, the language clearly states that non-precedential arbitration awards shall not be used as precedent in any other proceeding. Such awards, by contract language are limited to the specific facts, grievant, agency and time. Any other construction of that language would seriously misconstrue the intent of the parties. In the event that it is found necessary to look to the bargaining history of Article IV, Section 12, paragraph 1, the testimony of Glen Blahnik, Assistant Administrator in the Division of Collective Bargaining and chief negotiator of the 1985 agreement with Complainant establishes that both parties understood the limited scope of the non-precedential expedited procedure. Thus, Complainant's belief that management is forever bound by an expedited award is incorrect.

DISCUSSION

Respondent first argues that the Commission should not assert jurisdiction in this case, but should defer the dispute to arbitration. However, the Complainant's allegation in this case is that the Respondent is refusing to comply with Arbitrator Kerkman's award, which, it asserts, controls the situation presented in Rawson's grievance. Given the Complainant's assertion that Respondent cannot require it to again arbitrate the issue of Rawson's work schedule, the dispute in that regard is not appropriate for deferral. 3/

3/ State of Wisconsin, Dec. No. 20145-A (Burns, 5/83), aff'd by operation of

The Complainant essentially argues that there is no material difference in the factual situation existing when management first placed Rawson on the federal rotation schedule, resulting in the Kerkman Award, and the factual situation at the time management decided to return him to the federal rotation - the instant case. A review of the record establishes that this is, for all practical purposes, the case. The only differences in the facts have to do with how the second shift (2:00 p.m. - 10:00 p.m.) in the Gatehouse was filled. In the first instance the second shift was filled by various employes being assigned to cover the Gatehouse, and in the second instance, the second shift had become a regularly assigned full-time position working a federal rotation. Also in the second instance, there was a relief position assigned to the Gatehouse on a federal rotation schedule. While Warden Switala referred to a problem with Rawson's Monday-Friday schedule putting him "out of sync" with the rest of the staffing in the Gatehouse, Jt. Exhibits No. 11, 13 and 14, and State Exhibit 15 as well as the testimony of Sohm (Tr. 36-7) indicate that overtime costs remained management's primary concern with Rawson's work schedule. The increase in activities resulting in extending the hours the Gatehouse needed to be manned, appears to have occurred prior to 1992, as it appears to have been the impetus for going to a full second shift on the Gatehouse, which is referenced in the Kerkman Award. (Jt. Exhibit No. 2). While it is laudable that management approached the Complainant's local representatives with the matter prior to taking action, that does not appear to materially affect either party's rights under their Agreement.

Finally, whether Arbitrator Kerkman was correct or incorrect in his award in this matter or his assumptions does not appear to change the issue presented by either fact situation. As Respondent notes, the issue before Arbitrator Kerkman was:

> "Did the Employer violate the grievant's contractual rights by changing his work schedule as defined in Article VI?"

Respondent asserts there is not an identity of issues in this case with the aforementioned issue, since there is also the issue of the precedential effect of the "Patton Award" on this dispute. The problem with Respondent's argument is that it puts the cart before the horse. The precedential effect of the "Patton Award" is only relevant if the Complainant is required to submit this dispute to arbitration for resolution, i.e., only if the Kerkman Award does not control the outcome of this dispute. This is also the case with respect to Respondent's argument that the Kerkman award is not res judicata for other subsequent cases.

The Respondent accurately points out that Article IV, Section 12, paragraph 1, of the parties' Agreement, expressly states in reference to those "Special Arbitration Procedures", that:

> If either of the parties believes that a particular case is precedential in nature and therefore not properly handled through these special procedures, that case will be processed through the full arbitration procedure in subsection 4/3/1-7. Cases decided by these methods of dispute resolution shall not be used as precedent in any other proceeding.

This indeed makes clear that the Kerkman Award is not res judicata for other

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law, Dec. No. 20145-B (WERC, 6/83).

subsequent cases. Again, however, the cart is in front of the horse, as there is no need for another "proceeding" if the Kerkman Award is controlling.

Thus, the real and underlying question to be answered is whether the Kerkman Award continues to control the instant situation, or, in other words, whether it remains dispositive in this case. Respondent asserts that it is not bound forever by that award and it does not apply when the situation changes. Taking the last point first, it has previously been concluded that the situation has not materially changed from that presented to Arbitrator Kerkman. The problem with Respondent's other argument, that an expedited, non-precedential award such as the Kerkman Award applies only to the case before it, and not to the same fact situation at a subsequent time, is that it goes too far. Respondent may be correct as to later similar situations involving other grievants, but it cannot be correct as to situations like this case. Here, there is the same grievant, Rawson, placed back on his former work schedule at the direction of the arbitrator, and management subsequently taking the same action with regard to the grievant, for the same reasons, with materially the same facts existing, the very same case the arbitrator had found violated the grievant's contractual rights. If the Respondent were correct in its interpretation of the effect that an award in an expedited, non-precedential arbitration has, the award would be meaningless. How long would an employer have to comply with such an award? One day? One week? One month? One year? In this instance, the Respondent apparently felt six months was sufficient. That is not the case. Until there is a material change in the factual situation, the award continues to bind the Respondent as to the grievant. For that reason, it is concluded that the Respondent violated the Kerkman Award when it changed Rawson to a federal rotation on February 2, 1992. Therefore, the Respondent has been ordered to offer Rawson the right to return to his former position in the Gatehouse on a Monday-Friday work schedule consistent with Arbitrator Kerkman's Award. As there has been no showing of bad faith on Respondent's part, the Complainant's request for costs and attorney's fees has been denied.

Dated at Madison, Wisconsin this 18th day of November, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Mary Jo Schiavoni /s/
Mary Jo Schiavoni, Examiner