STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN STATE EMPLOYEES UNION (WSEU), AFSCME, COUNCIL 24, AFL-CIO,	
Complainant,	Case 329 No. 48055 PP(S)-192
vs.	Decision No. 27566-A
STATE OF WISCONSIN (DER),	
Respondent.	

Appearances:
Mr. Richard V. Graylow, Lawton & Cates, S.C., Attorneys at Law, P.O. Box 296
Mr. Thomas E. Kwiatkowski, Senior Labor Relations Specialist, Department of Emp

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Wisconsin State Employees Union (WSEU), AFSCME, Council 24, AFL-CIO filed a complaint on September 11, 1992 wherein it alleged that State of Wisconsin (DER) (hereafter State or Employer) had failed and refused to abide by the terms of a settlement agreement reached between the parties on September 17, 1991 regarding a grievance filed over the 1990 discharge of Mr. Vernardt Rost from his employment at the UW-Fond du Lac campus. On February 24, 1993, the Wisconsin Employment Relations Commission appointed Sharon A. Gallagher, a member of its staff to act as Examiner in the matter. Hearing was originally scheduled in this case for August 10, 1993 but the hearing was cancelled, rescheduled and held on October 22, 1993 at Fond du Lac, Wisconsin. A stenographic transcript was made and received by November 9, 1993. The parties agreed to submit their initial briefs by January 20, 1994 which were thereafter exchanged by the Examiner. The parties submitted their reply briefs by February 22, 1994. Having considered the evidence and arguments and being fully advised in the premises, the Examiner makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Complainant, WSEU, is a labor organization within the meaning of the State Employment Labor Relations Act with its offices located c/o Mr. Martin Beil, 5 Odana Court, Madison, Wisconsin 53719. At all times material WSEU has been and is the exclusive bargaining agent for certain employes of the State of Wisconsin at its UW-Fond du Lac campus, including Vernardt Rost, prior to his discharge.

2. State of Wisconsin is an employer within the meaning of the State Employment Labor Relations Act and was the employer of Vernardt Rost prior to his discharge in 1991. The State of Wisconsin has delegated its collective bargaining authority to the Department of Employment Relations regarding the bargaining unit of which Rost was formerly a member. The offices of DER are located at 137 East Wilson Street, Madison, Wisconsin.

3. At all times relevant and material herein, the parties were bound by collective bargaining agreements covering wages, hours and conditions of employment including grievance arbitration clauses culminating in final and binding arbitration.

4. On September 17, 1991 the parties reached a voluntary settlement of a grievance filed over the termination of Vernardt Rost, which settlement was reached by DER representative Stephen B. Sargeant and Council 24 representative Ronald Orth and was stated by Mr. Stephen B. Sargeant and recorded on a verbatim transcript read as follows:

> MR. SARGEANT: Yes, sir. Whereas the grievant, Vernardt A. Rost, and the State Employees Union have filed a grievance alleging violation of Articles 3, 4/9 and 11/7 of the agreement between the parties have processed this grievance through the contractual grievance procedure and appeal the matter to arbitration on September 17, 1991. The parties hereby agree that the above referenced matter has been settled in all respects on the following basis: Item one, the employer will pay the grievant an amount to be determined as gross wages, which will yield a net amount of $5,000. Upon request, the employer will provide a neutral reference, which shall be limited to the grievant's length of employment, position or positions held, and rate or rates of pay. The grievant will not seek or accept employment with any division, subdivision or unit of the University of Wisconsin System. In the event the grievant gains employment with any employer and that employer is subsequently absorbed by the University of Wisconsin System, this provision shall not bar or be cause for termination of that employment. The grievant voluntarily resigns his employment with the University of Wisconsin System effective July 20, 1990. The grievant and the union agree to withdraw or cause to be dismissed voluntarily and with prejudice the grievance identified above and any other pending appeals, charges and/or complaints which have been filed against the State of Wisconsin or its agents, officers or employees arising out of any events related to the above identified grievance before any federal, state or local court, commission, board, agency, committee, arbitrator or any other forum. The grievant and the union agree not to commence any further action in any form against the State of Wisconsin, its agents, officers or employees arising out of the above identified grievance. This settlement shall not constitute any admission of wrongdoing by either party. And finally, this settlement shall not constitute a precedent for any other case.

5. The Employer properly calculated both the net and gross amounts due Vernardt Rost pursuant to the clear language of the 1991 Settlement Agreement. The Employer began with a $5,000 net amount, added the Social Security and Medicare amounts ($382.50) Rost would have received on the $5,000 net amount for a total of $5,382.50. The Employer then looked at the annual table for Wisconsin withholding for the tax year for a single taxpayer with a standard deduction of $3,900, and it subtracted that $3,900 amount from the gross figure and multiplied the remaining amount by .049 to yeild a State tax amount of $72.64 (total $5,455.14).

The Employer then looked at the Federal tax tables for an annual single taxpayer and subtracted the personal exemption and standard withholding ($5,500) from the gross amount due to find that $0 Federal taxes were due on the gross amount of $5,455.14.

The Employer then recalculated the Social Security and Medicare as well as the State tax and came up with a gross settlement amount of $5,493.50 to yeild a net of $5,000. The Employer rounded up the gross to $5,500 again adjusting the State taxes and the Social Security and Medicare. Rost therefore actually netted just over $5,000. No Federal taxes were due on the $5,500 as rounded.

6. The Employer paid Rost the proper amount in settlement of his grievance pursuant to the 1991 Settlement Agreement.

CONCLUSION OF LAW

The Employer did not violate the 1991 Settlement Agreement or the State Employment Labor Relations Act.

ORDER 1/

The complaint is hereby dismissed in its entirety.

Dated at Madison, Wisconsin this 15th day of March, 1994.

By Sharon A. Gallagher /s/
Sharon A. Gallagher, Examiner

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

(Continued)

(Footnote Continued)

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).

State of Wisconsin

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Positions of the Parties:

Union:

The Union asserted that Rost did not "net" $5,000 pursuant to the Settlement Agreement because he had to pay additional State and Federal taxes on the amount he received. Therefore, the Union contended, the State violated the Settlement Agreement by failing to pay $301.75 in State tax and $825.00 in Federal taxes. In regard to the Federal tax liability, the Union submitted page 45 from the 1991 Federal tax tables which made reference inter alia, to Form 1040A, line 22, showing gross wage amounts from 5,000 to 5,900, and appeared to indicate the amount of Federal tax on amounts within this range for single taxpayers would be up to $881.00. The Union argued that the State's failure to withhold any Federal tax on $5,000 amount "was unlawful and illegal." The Union pointed out that each of Rost's other part-time employers had withheld Federal income tax on the amounts Rost earned -- ranging from $1,135.00 to $6,789.00. The Union urged that these other examples show how "preposterous and illegal" the State's acts were in calculating that $0 in the Federal tax was due on Rost's $5,000. Therefore, the Union sought backpay of $1,126.75 so that Rost would actually "net" $5,000. The Union observed, in addition, that if there is any ambiguity in the language of the agreement, that should be construed against the drafter of the agreement, the State of Wisconsin.

Employer:

The Employer asserted that because the terms of the settlement agreement are clear and unambiguous the Examiner must give them full force and effect under the limited authority allowed under the law applicable to this case. In addition, the Employer urged, the Employer's actions in issuing Rost a check for $5,000 after calculating withholding amounts based upon Rost's receipt of $5,000 from the Employer comported with the clear terms of the Settlement Agreement.

Even if the language of the agreement is found ambiguous, the Employer asserted, the facts support the Employer's interpretation and application of that language. In this regard, the Employer observed that in the discussion which lead to the Settlement Agreement, Employer representative Sargeant and Union representative Orth specifically discussed and referred to the Employer's policy of withholding taxes and Social Security/Medicare from gross Settlement amounts; that Sargeant never told Orth that the money given to Rost under the settlement would be tax free; and that during settlement discussions, although Sargeant inquired regarding Rost's marital and filing status, no other tax implications of Rost's receipt of the $5,000 were discussed and no mention was made by the Union or Rost of any other income Rost had received in 1991 or that he expected to receive.

Finally, the Employer argued that a ruling in favor of the Union in this case would mean that the Employer would have to act as tax adviser and indemnifier for Rost and in essence, to be responsible to pay taxes due on earnings from other employers of which the State was unaware. This, the State contended, would be absurd. The Employer observed that such an absurd interpretation of the Settlement Agreement should be avoided where, as here, there was a clear and reasonable interpretation of the language which the Employer has already made totally effective. Therefore, the Employer sought dismissal of the complaint in its entirety.

Reply Briefs:

Union:

The Union filed its reply brief on February 22, 1994, after having received an extension of time from the Examiner.

The Union urged that the State had breached the Settlement Agreement by unlawfully failing to withhold any Federal taxes on the "net" amount of $5,000 due Rost. The Union re-asserted its prior arguments that Rost had to pay Federal taxes due to his receipt of the Settlement monies from the State and that therefore Rost did not receive a "net" of $5,000, as provided by the terms of the Settlement. The Union appended to its brief, two pages relating to withholding for individuals on wages paid after December 1990, which showed that for an annually paid, single (filing individually) taxpayer, the amount of Federal tax to be withheld on wages "after subtracting withholding allowances" was $1,250 on such wages over $1,250 but not over $22,600.

The Union argued that the State by its initial brief had attempted to re-define "net" in a way contrary to its every-day meaning as well as its legal meaning. Thus, the Union contended, because the State failed to withhold enough in both State and Federal taxes, Rost had to pay taxes on the "net" Settlement amount. This was the State's responsibility, not Rost's or the Union's, in the Union's view. The Union therefore sought a make-whole remedy for Rost.

Employer:

The Employer urged that it properly calculated Rost's State and Federal taxes based solely on the income he received for 1991 from the Employer. In regard to the State tax obligation, the Employer noted that the Union placed in evidence Rost's unfiled 1991 Amended State Income Tax Form 1X which showed that Rost had made in excess of $16,000 in gross income from various employers, including the Employer. Yet, the Employer observed, the Union did not submit a copy of Rost's filed 1991 State or Federal Tax Returns.

The Employer noted that its legal withholding obligation is different from Rost's tax liability. The Employer contended that the Union misused the one page from the IRS Instruction Booklet submitted with its brief and that the Union failed to take into consideration the standard deduction and the personal exemption in coming to the conclusion that the Employer should have paid $825.00 in Federal taxes for Rost. This, the Employer asserted, was a mistake which would shift tax liability to the Employer for income paid to Rost by other employers. Therefore, the Employer sought dismissal of the complaint in its entirety.

Discussion:

The sole dispute in this case concerns the proper meaning of the sentence:

> Item one, the employer will pay the grievant an amount to be determined as gross wages, which will yield a net amount of $5,000.

The difficulty in this case is that although the Employer timely issued Mr. Rost a check for $5,000 (dated October 23, 1991), the Union has asserted that the Employer failed to calculate the gross amount of wages properly so that Mr. Rost ended up having to pay more in State and Federal taxes for the 1991 tax year. The dispute is over the gross amount used to reach a net of

$5,000; it is not over the net amount stated on the check. Thus, rather than withholding $0 in Federal tax and $79.25 in State tax, as the Employer did (having started from a gross amount of $5,500), the Union asserted that the Employer should have withheld an additional $381.00 in State tax, and Federal tax amounting to $825.00, for a gross settlement amount of $7,008. The Employer's error, the Union urged, was demonstrated by an amended tax return dated August 9, 1993, prepared by Rost's tax preparer, Mr. Robert Marcoe and by Mr. Marcoe's testimony at the instant hearing.

I find that the language of the Settlement Agreement is clear and unambiguous. That language obligated the Employer to pay Rost a net of $5,000, starting from a gross amount that would yield that net amount, assuming that that $5,000 was to be his only income from the State of Wisconsin in 1991. It is very significant that no mention is made in the settlement language of other income Rost may have earned in 1991, or what might occur later in the tax year, or that the $5,000 would be "tax free" to Rost. It is also significant that all the Employer knew regarding Rost's tax status at the time it calculated the gross amount due was that Rost's marital status was single and that he took the "standard deduction."

The circumstances surrounding this settlement amount to extrinsic evidence which support the clear language of the agreement and they are, therefore, relevant to this case. In this regard, I note that the Employer was unaware of any other income Rost may have earned in 1991 2/ when it negotiated the settlement with Rost and the Union in September, 1991. In fact, during the discussions that lead to the Settlement, no mention was made of Rost's other sources of income or of any tax implications of his receipt of the Settlement money. In addition, the parties discussed settlement with the State's withholding policy clearly in mind. DER representative Sargeant also testified, without contradiction, that he never assured the Union that the settlement amount of $5,000 would be tax free to Rost.

Given these circumstances as well as the fact that Rost had been discharged by the Employer in July, 1990 and that he had not worked for the Employer or any arm of the State of Wisconsin thereafter, the Employer could reasonably assume that the money it was obliged to pay Rost should equal a net of $5,000, based upon Rost having received just $5,000 from the Employer in 1991. To reach any other conclusion would amount to requiring the Employer to be responsible for all of Rost's other tax liabilities, liabilities which were not discussed, revealed or contemplated when the parties entered into this Settlement Agreement.

In addition, Joint Exhibit 5 demonstrated that the Employer used the proper method to compute Rost's State tax on the net of $5,000, figuring FICA first and adding this to $5,000 and then subtracting the single person deduction of $3,900, to get the annual net wage amount. This amount, the Employer then multiplied by 4.9% tax and after minor adjustments, it arrived at a gross amount of $5,493.50 which it rounded up to a gross amount of $5,500.00. Thus, the Employer's withholding of $79.25 (on the adjusted gross amount) for State tax was entirely appropriate.

The question then arises whether the Employer's withholding of no Federal taxes on the gross amount of $5,500.00 was appropriate. Joint Exhibit 6

2/ In 1991, Rost received income from three employers other than UW-Fond du Lac, as follows:

Anderson Cleaning Systems,	$6,780
First & Main Partnerships,	$5,333
Thresherman's Mutual Ins. Co.	$1,125

indicates that the standard Federal deduction for single annual taxpayers in 1991 was $3,400.00. State Benefits Manager Wilson stated that because the gross amount necessary to net Rost $5,000 under State tax laws was $5,455.14 and this amount was less than the sum of Rost's Federal personal exemption plus his standard deduction ($2,150 + $3,400) no Federal tax was due on the gross amount. There is nothing in the record that contradicts this view. 3/ In addition, the Joint Exhibits clearly reflect that the Employer used the proper method to reach both the gross and net income amounts due Rost under the Settlement Agreement.

The Union argued that Rost's amended 1991 State tax return as well as the testimony of his tax preparer, Mr. Marcoe, showed that the State underpaid both State and Federal tax on a net of $5,000 to Rost. I disagree. Initially, I note that Rost's "amended" 1991 State return was never filed and that Marcoe admitted that the reason it was not filed was:

> Because we cannot say the state did not give him
>
> $5,500. His regular return included the $5,500 . . .
>
> (Tr. 24).

Indeed, a close analysis of this "amended" return shows Rost's actual gross income for 1991 was $16,485 which included gross wages from three part-time employers as well as the Settlement money. It does not follow that figuring

3/ The Union submitted a one-page excerpt from "1991 Tax Table" (page 45) with its brief. There was no explanation of the document thereon or in the Union's brief other than an assertion that it proved that between $874 and $881 in Federal tax was due on the money Rost received from the State pursuant to the Settlement Agreement. I am not persuaded by this assertion or the incomplete evidence allegedly supporting it.

Rost's 1991 income and taxes based on a gross amount from which one has subtracted the $5,500 Settlement he received from the Employer, that such figuring would result in finding the actual tax due on the $5,500.

The fact that Rost's other part-time employers withheld Federal taxes on the amounts paid by them does not mean that the State used the wrong method to calculate the gross and net amounts due Rost pursuant to the Settlement and the law. Clearly, Rost's other part-time employers were not figuring his withholding amounts based on a one-time lump sum annual payment of $5,500. Rather, these employers were likely paying Rost weekly, biweekly, monthly, etc. Such multiple payments over a year would require the use of "wage-bracket tables" different from those used if an annual payroll period was involved, and that would require withholding to be figured by the "percentage method" (Joint Exhibit 6).

Thus, the Union over-stated its case in asserting that the method used by the Employer was "unlawful and illegal." On the contrary, it is clear from this record, that the Employer's use of a $5,500 gross amount, in fact, yielded Rost $5,000, in accord with the Settlement Agreement. Indeed, by its arguments it is clear that the Union failed to recognize, as the law and the tax table forms provide, that the Employer was entitled to subtract withholding allowances prior to coming up with the figure representing Rost's taxable earnings. The Employer followed the proper calculation procedure: its net of $5,000 and gross of $5,500 were correct and its subtraction from gross wages of the $3,900 deduction for State tax purposes and of the personal exemption and deduction for Federal tax purposes ($5,550) was correct, to show Rost's taxable income on the Settlement amount and to net him $5,000. It appears to the undersigned that the Union is essentially attempting a "reach" -- to hold the Employer responsible for tax liability incurred due to Rost's other part-time periods of employment in 1991 of which the Employer was totally unaware. Such a result is neither required by the terms of the Settlement Agreement nor by State law.

Therefore, based on the relevant evidence and argument, this complaint must be dismissed in its entirety.

Dated at Madison, Wisconsin this 15th day of March, 1994.

By Sharon A. Gallagher /s/
Sharon A. Gallagher, Examiner