STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

Appearances:

Lawton & Cates, S.C., Attorneys at Law, by Mr. Richard V. Graylow, P.O. Box 2965, Madison, Wisconsin 53701, appearing on behalf of the Complainant.

Mr. Thomas E. Kwiatkowski, Senior Labor Relations Specialist, Department of Employment Relations, 137 East Wilson Street, P.O. Box 7855, Madison, Wisconsin 53707-7855, appearing on behalf of the Respondent.

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

On March 15, 1994, Examiner Sharon A. Gallagher issued Findings of Fact, Conclusion of Law and Order in the above matter wherein she concluded that Respondent State of Wisconsin had complied with a settlement agreement between Respondent State and Complainant Wisconsin State Employees Union. She therefore dismissed the complaint which alleged that Respondent State was violating Secs. 111.84(1)(a)(c) and (e), Stats.

On March 24, 1994, Complainant timely filed a petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.84(4), Stats. The parties thereafter filed written argument in support of and in opposition to the petition, the last of which was received May 23, 1994.

Having considered the matter and being fully advised in the premises, the Commission makes and issues the following

ORDER 1/

A. Examiner's Findings of Fact 1 - 4 are affirmed.

1/ Footnote 1/ found on pages 2 and 3.

1/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane County if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Continued

B. Examiner's Findings of Fact 5 - 6 are set aside and the following Finding of Fact is made:

> 5. Respondent drafted the settlement agreement which was read into the record at the arbitration pro-ceeding. Respondent issued a check to grievant for $5,00.00 on October 23, 1991. Respondent's obligation under "Item one" of the settlement agreement was to pay the "gross wage" amount nec-essary for Respondent to: (1) give the grievant a check for $5,000.00; (2) make whatever State and Federal withholding payments were required by State and Federal tax law if the "gross wage" were the grievant's sole income for 1991 and (3) make whatever Social Security and Medicare payments were required if the "gross wage" were the grievant's sole income for 1991. Respondent's payment of the "gross wages" of $5,500.00 with grievant receiving $5,000.00 after Respondent deducted Social Security and Medicare payments of $420.75 and a State withholding payment of $79.25 met Respondent State's oblig-ations under "Item one" of the settlement agreement.

C. Examiner's Conclusion of Law and Order are affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 29th day of July, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner

Chairman A. Henry Hempe did not participate.

1/ Continued

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

STATE OF WISCONSIN

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

The Pleadings

The complaint alleges that Respondent State is violating Secs. 111.84(1)(a)(c) and (e), Stats. by refusing to abide by the terms of a grievance settlement agreement.

Respondent's answer contends that it has complied with the settlement agreement by paying $5,000.00 to the grievant.

The Examiner's Decision

The Examiner concluded that Respondent State had complied with the settlement agreement and thus dismissed the complaint. She reasoned that the clear language of the settlement agreement as well as the circumstances surrounding the agreement supported Respondent's view as to the agreement's meaning.

In reaching her conclusion, the Examiner rejected Complainant's position that the agreement entitled the grievant to receive $5,000.00 from Respondent and to have Respondent pay the additional amount of $2,008.00 (through withholding) to cover the actual additional State and Federal tax liability created by the grievant's receipt of $5,000.00. She stated in pertinent part:

> 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 signifi-cant 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 repre-sentative Sargeant also testified, without contradic-tion, that he never assured the Union that the settle-ment 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

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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

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 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.

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.

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 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.

POSITIONS OF THE PARTIES

Complainant asserts the Examiner erred when concluding that Respondent had appropriately used $5,500 as the "gross wage" amount required by the settlement agreement. It contends the agreement obligated Respondent to use whatever "gross wage" was needed for the grievant to incur no out of pocket tax liability in 1991 and to "net" $5,000.00. Complainant argues that its view of Respon-dent's obligations is supported by the plain meaning of the agreement, by the testimony of the individuals who negotiated the agreement, and by application of the doctrine that any ambiguity should be resolved against the party that drafted the language, in this instance the Respondent.

Given the foregoing, Complainant urges the Commission to reverse the Examiner and order the Respondent to make the grievant whole for the additional

tax liability he in fact incurred.

Respondent asserts the Examiner correctly applied the tax and contract law applicable to the settlement agreement and appropriately dismissed the complaint. Respondent asks that the Examiner be affirmed.

DISCUSSION

Contrary to the Examiner, we do not find that the terms of the settlement agreement are clear and unambiguous as to how "an amount to be determined as gross wages, which will yield a net amount of $5,000" is to be calculated. The language standing alone is ambiguous and could reasonably be interpreted in a manner which would support either party's position herein.

Nor is the bargaining history provided by the testimony of Respondent representative Sergeant and Complainant representative Orth particularly helpful. Their testimony presents conflicting views on whether Respondent did or did not obligate itself to withhold State and Federal tax amounts sufficient to insure the grievant would have no out of pocket tax liability under the agreement.

What we find ultimately persuasive and dispositive when interpreting the agreement is the conduct of the parties, most particularly the nature of the information which Complainant did and did not provide Respondent about the grievant relative to implementing the agreement. The only information sought by Respondent and provided by Complainant was the grievant's marital status and other "standard W-4 information." In our view, if the settlement agreement obligated Respondent to calculate "gross wages" in a manner which would insure that the grievant would have no out of pocket tax liability, sometime after December 31, 1991, Complainant would have needed to provide Respondent with additional information such as other income the grievant received during 1991. Only then could Respondent have made the appropriate calculation. No information was sought by Respondent or provided to Respondent by Complainant as to other income the grievant had received or might receive during 1991. Thus, in our view, the conduct of the parties is more consistent with Respondent's assertions as to the meaning of the agreement than Complainant's. Even acknowledging that Respondent drafted the agreement, we find the parties' conduct to be the most reliable guide to the correct interpretation of the agreement.

Given the foregoing and because we are persuaded that Respondent otherwise correctly calculated the "gross wages" amount, we have affirmed the Examiner's dismissal of the complaint.

Dated at Madison, Wisconsin this 29th day of July, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner

Chairman A. Henry Hempe did not participate.