

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**MILWAUKEE DISTRICT COUNCIL 48,  
AFSCME, AFL-CIO, and its Affiliated  
Local 554, Complainant,**

vs.

**MILWAUKEE COUNTY, Respondent,**

Case 376  
No. 50983  
MP-2893

**Decision No. 28063-E**

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**Appearances:**

**William Padway**, Padway & Padway, Attorneys at Law, 606 West Wisconsin Avenue, 20th Floor, Milwaukee, Wisconsin 53203, appearing on behalf of John Kropp.

**Timothy R. Schoewe**, Deputy Corporation Counsel, Milwaukee County, Milwaukee County Courthouse, Room 303, 901 North Ninth Street, Milwaukee, Wisconsin 53233, appearing on behalf of Milwaukee County.

**Mark Sweet**, Law Offices of Mark A. Sweet, 705 E. Silver Spring Drive, Milwaukee, Wisconsin 53217, appearing on behalf of Milwaukee District Council 48, AFSCME, AFL-CIO and its affiliated Local 554.

**ORDER**

On October 9, 1995, Examiner Jane B. Buffet issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above matter wherein she concluded that Respondent Milwaukee County had committed a prohibited practice within the meaning of Sec. 111.70(3)(a)1, Stats., by failing to release John Kropp to conduct union business on the same basis as other union officials. To remedy the prohibited practice, the Examiner ordered the County to: (1) cease and desist from such conduct; (2) reimburse Kropp's paid leave accounts for the personal leave time he was forced to utilize in lieu of improperly denied union leave time; and (3) post a Notice to employees advising them of the action the County would be taking to remedy the violation.

Dec. No. 28063-E

The County sought Commission review of the Examiner's decision and on March 21, 1997, the Commission affirmed the Examiner.

The County then sought judicial review of the Commission's decision and on February 11, 1998, a Notice of Entry of Decision and Order affirming the Commission was entered by the Milwaukee County Circuit Court.

For several years thereafter, the parties periodically disputed whether the County had or had not complied with the Commission's Order. During those disputes the County advised the Commission and AFSCME that it had posted the Notice and believed it had restored Kropp's leave time. The County ultimately determined that it had not restored Kropp's leave and then did so on March 10, 2003. The County confirmed the restoration by letter to Kropp dated April 8, 2004.

On January 3, 2005, John Kropp filed a request with the Wisconsin Employment Relations Commission asking that the Commission: (1) require Milwaukee County to comply with the posting portion of the Commission's Order in MILWAUKEE COUNTY, DEC. NO. 28063-C (WERC, 2/97); AFF'D CIRCT MILW 2/98; (2) order the County to pay interest on the value of the denied leave time for the period between the February 11, 1998 circuit court decision and March 10, 2003; and (3) direct the County to pay Kropp's attorney fees incurred as to the preparation, filing and processing of the January 3, 2005 request.

On January 25, 2005, the County responded to the request by asserting that it had complied with the Commission's Order and that interest and attorney fees were not appropriate.

On February 2, 2005, AFSCME District Council 48 joined Kropp's request for compliance.

The parties thereafter submitted written argument in support of and in opposition to the request, the last of which was received March 3, 2005. In its written argument, the County advised that although it had done so once, it had again posted the Notice in question.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

### **ORDER**

On or before June 1, 2005, Milwaukee County shall provide a sworn affidavit to the Commission, Kropp and AFSCME District Council 48 specifying the locations where the Notice was posted pursuant to the County's February 25, 2005 letter and the duration of said

postings. To the extent it has not already done so, the County shall post the notice in the locations specified in Attorney Padway's March 3, 2005 e-mail message.

The request for interest and attorney fees is denied.

Given under our hands and seal at the City of Madison, Wisconsin, this 5th day of May, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

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Judith Neumann, Chair

Paul Gordon /s/

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Paul Gordon, Commissioner

Susan J. M. Bauman /s/

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Susan J. M. Bauman, Commissioner

Milwaukee County

MEMORANDUM ACCOMPANYING ORDER

The background of this matter is recited in the preface to our Order. Given the County's assurances as to posting of the Notice (and subject to those assurances being verified by sworn affidavit), the issues before us are limited<sup>1</sup> to whether interest should be paid on the liquidated value of 19 hours of leave time (as of February 11, 1998 when the circuit court affirmed the Commission) and whether Kropp should receive attorney fees incurred as to this request for compliance with our Order.

Interest

Since 1983, in complaint proceedings where a violation of law is found, the Commission and its examiners have been routinely awarding interest on "fixed and determinable claims" -- typically back pay -- beginning with the date of the loss and ending on the date of payment. WILMOT UNION HIGH SCHOOL DISTRICT, DEC. NO. 18820-B (WERC, 12/83). In her 1995 Order (which was affirmed by the Commission and the circuit court), the Examiner did not award interest on the value of the lost leave time and indicated in her decision that reimbursement of Kropp's leave account made him whole.

Kropp does not contest the absence of an award of interest in the Examiner's Order. Rather, he argues that an interest obligation was created when the circuit court affirmed the Commission and relies on the following language of Sec. 814.04(4), Stats.:

Except as provided in s 807.01(4), if the judgment is for the recovery of money, interest at the rate of 12% per year from the time of the verdict, decision or report until judgment is entered shall be computed by the clerk and added to the costs.

Kropp asserts that the Examiner's decision is analogous to a "verdict"; that the Examiner ordered payment of a set sum of money; and that the court affirmation of the Examiner's/Commission's decision is the equivalent to the entry of a "judgment." Assuming arguendo that court affirmation of Commission decision can create an interest obligation where interest was not awarded by the Commission itself, Kropp's Sec. 814.04(4) analogy fails because the Examiner did not order payment of any money.<sup>2</sup> Rather, as noted above, the Examiner ordered reimbursement of Kropp's leave account. Thus, we reject Kropp's claim for interest.

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<sup>1</sup> The County asserted that Kropp lacked standing to seek compliance because he was not the named Complainant before Examiner Buffet. Complainant AFSCME's subsequent concurrence with Kropp's request resolved that issue. In any event, we note that the Commission has its own institutional interest in compliance with its orders and will pursue the matter whenever non-compliance is asserted.

<sup>2</sup> By contrast, in WILMOT, SUPRA, the Examiner ordered payment of ten days pay to make the employee whole for a denial of sick leave.

**Attorney Fees**

Kropp's request for attorney fees is denied. Attorney fees in complaint proceedings are awarded: (1) where an extraordinary remedy is deemed appropriate -- DER(UW HOSPITAL), DEC. NO. 29093-B (WERC, 11/98); (2) as part of a make whole remedy where a breach of the duty of fair representation is found (and then only for the portion of the proceeding in which a violation of contract claim is tried against the employer) -- UNIVERSITY OF WISCONSIN-MILWAUKEE (GUTHRIE), DEC. NO. 11457-H (WERC, 5/84) ; and (3) where the party found to have illegally failed to implement a Sec. 111.70(4)(cm), Stats., interest arbitration award did not have good cause for its conduct. ERC 33.20(2).

We deny the request for attorney fees on several grounds. First, the County reimbursed Kropp's leave account prior to the commencement of this proceeding and thus prior to Kropp incurring any fees. Therefore, there is no basis for an award of fees to the extent the request is linked to gaining County compliance with the reimbursement portion of the Commission's Order. Second, as we have denied the request for interest on the leave reimbursement, there is no basis for an award of fees to the extent the request is linked to success on the merits of that request. Third, the County contends that it posted the required Notice long ago and the parties have elected not to litigate that issue based on the County's assurances that it would nonetheless post the Notice again. Therefore, there is no meritorious basis for an award of attorney fees as to gaining compliance with the posting portion of our Order.

Having denied the request for attorney fees, we nonetheless think it important to note that the length of time it took the County to comply with our Order was unacceptable. To the extent we were less than diligent in ensuring timely compliance, we apologize and will take steps to avoid contributing to any such compliance delays in the future.

Dated at Madison, Wisconsin, this 5th day of May, 2005.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

Judith Neumann /s/

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Judith Neumann, Chair

Paul Gordon /s/

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Paul Gordon, Commissioner

Susan J. M. Bauman /s/

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Susan J. M. Bauman, Commissioner