STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN STATE EMPLOYEES UNION (WSEU), AFSCME, COUNCIL 24, AFL-CIO, Complainant, vs. STATE OF WISCONSIN, DEPARTMENT OF EMPLOYMENT RELATIONS, Respondent.	Case 385 No. 51877 PP(S)-233 Decision No. 28378-A

Appearances:

Mr. Richard V. Graylow with briefing by Mr. John C. Talis, Lawton & Cates, S.C., 214 West Mifflin Street, PO Box 2965, Madison, WI 53701-2695, appearing on behalf of the Complainant Union.

Mr. Mark Wild, Attorney at Law, Wisconsin Department of Employment Relations, Office of Legal Counsel, 137 East Wilson Street, PO Box 7855, Madison, WI 53707-7855, appearing on behalf of the Respondent Employer.

EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On November 30, 1994, the above-named Complainant Union filed with the Wisconsin Employment Relations Commission (herein WERC) a complaint alleging that the above-named Respondent Employer had committed and was committing unfair labor practices within the meaning of Secs. 111.84(1)(a) and (e), Stats., of the State Employment Labor Relations Act (herein SELRA). On April 19, 1994, the Commission issued an order appointing the undersigned Marshall L. Gratz as Examiner in the matter.

Pursuant to notice, the Examiner conducted a hearing concerning the complaint on Friday, June 2, 1995 at the Commission's office in Madison, Wisconsin. By arrangement at the hearing, three proposed exhibits were submitted at a later date. Two of those exhibits, Exhibits 8 and 9, were received into the record without objection. The third, Exhibit 11, was subsequently withdrawn. Both parties submitted initial and reply briefs. The Examiner exchanged the last of the briefs on August 9, 1995.

The Examiner has considered the record evidence and arguments submitted by the parties. On the basis of the record, the Examiner makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The Complainant, Wisconsin State Employees Union (WSEU), AFSCME, Council 24, AFL-CIO (herein Union) is a labor organization with offices at 8030 Excelsior Drive, Suite C, Madison, WI 53717-1903.

2. The Respondent, the State of Wisconsin (herein Employer), as an employer, is represented by the Department of Employment Relations (herein DER). DER represents the State for purposes of collective bargaining and labor relations and maintains its principal offices at 137 East Wilson Street, PO Box 7855, Madison, WI 53707-7855. The Department of Corrections is an agency of the State which has, at all material times, employed a number of individuals represented by the Union, including security and public safety employes at the Kettle Moraine Correctional Institution (herein KMCI) in Plymouth, Wisconsin, at the Green Bay Correctional Institution (herein GBCI) in Green Bay, Wisconsin and at the State Prison at Waupun, Wisconsin (herein Waupun).

3. The Employer and Union have been parties to a series of collective bargaining agreements covering bargaining units including the Security and Public Safety bargaining unit. Those agreements include one nominally covering a term of November 13, 1993 to June 30, 1995 (herein 1993-95 Agreement) and another nominally covering a term of September 11, 1977 - June 30, 1979 (herein 1977-79 Agreement). Each of those agreements contained language applicable to the Security and Public Safety bargaining unit which included a grievance procedure culminating in final and binding arbitration, a Management Rights article and a provision entitled "Call Back Time." The Management Rights article in each of those Agreements contained the following sentence: "However, the provisions of this Article shall not be used for the purpose of undermining the Union or discriminating against any of its members." That sentence appears in 3/1/1 of the 1993-95 Agreement and in the 1977-79 Agreement. The Call Back Time provision in Art. VI, Sec. 13 of the 1993-95 Agreement consists in part of the following paragraphs:

> 6/13/1 (BC,CR,T,SPS) Employes called back for duty or called in on the employe's day off will be guaranteed a minimum of four (4) hours of work with pay.
>
> 6/13/2 (BC,CR,T,SPS) Work schedules will not be changed because of call back time in order to avoid overtime except where the call back consists of a full eight (8) hour shift.

The 1977-79 agreement contained the same language as that quoted above in its Art. VI, Sec. 6,

Paras. 101 and 102, except that the guaranteed minimum was two hours instead of four.

4. At all material times, Sergeant Michael Kleman was employed by the State at KMCI as a Correctional Officer 3 covered by the 1993-95 Agreement, and regularly assigned to the third shift. Kleman was not regularly scheduled to work on Saturday, May 23, 1994. On that day he was called at home and was offered and accepted voluntary overtime on the second shift at Unit #9. He reported for what he assumed would be eight hours of overtime consisting of the full second shift, but was relieved by an employe who was working regularly scheduled hours. Kleman therefore went home after working seven hours and was paid for the seven hours of overtime he worked on that occasion. Kleman and other Union witnesses testified that it had always previously been Kleman's experience and that of other KMCI employes that overtime assignments were for eight hours unless otherwise stated when they were offered. Nothing had been said when the May 23 overtime was offered to Kleman to the effect that the assignment involved less than the full eight hours constituting the second shift. A grievance claiming that Kleman was entitled to work and be paid for the eighth hour of the second shift in the circumstances was filed on June 4, 1994 and denied on June 7, 1994. On its face, that grievance (herein the Kleman grievance) alleged violations of Agreement Article VI, Secs. 2 and 3 and of the Local Agreement on the following basis:

> On 5-23-94 Sgt. Kleman was called in for OT in Unit 9 on 2nd shift. At 9:30pm Kleman was sent home 1 hr. early. As a result, Kleman only worked 7 of the 8 hrs. he was called in for. Kleman was replaced by Krapfl, who was a permanent regular 2nd shift position (School - Hobbies). Past precedence has been that regular positions were not used to relieve people on OT. Mgt. arbitrarily implemented this policy to avoid the payment of OT. A precedence has clearly been violated since nothing like this (using permanent positions to relieve people on OT) has been done in over 10 years.

The relief requested in the grievance was "Allow Sgt. Kleman 1 hr. make-up OT in accordance with the make-up OT provisions of the Local Agreement." That grievance and several other similar grievances regarding Kleman and other KMCI employes remain unresolved and pending in abeyance at a pre-arbitral step of the parties' grievance procedure, awaiting the outcome of the instant complaint proceeding.

5. On November 30, 1994, the Union filed the instant complaint alleging that the Employer was violating the Zeidler award described in Finding of Fact 6, below, and therefore violating Secs. 111.84(1)(e) and (a), Stats., by failing to allow Kleman to work a full eight hours of overtime on May 23, 1994. The Union asserts that in the Zeidler award and in the Kleman situation, based on past practice, Kleman had a right to work a full eight hours because he was not told in advance that the overtime being offered him was for less than eight hours. In this proceeding, the Employer has treated that claim as encompassed within the Kleman grievance, and

the Examiner finds it appropriate on that basis to treat it as included therein. Accordingly, references herein to the Kleman grievance are to the grievance initiated on June 4, 1994, which is deemed to include the claim that, based on past practice, Kleman had a right to work a full eight hours of overtime on May 23, 1994, because he had not been told when the overtime was offered to him that he was being offered less than eight hours. In its answer to the complaint, the Employer denied that its conduct violated SELRA citing, among other things, the existence of the Bellman award described in Finding of Fact 7, below, in support of its position.

6. On December 26, 1979, Arbitrator Frank P. Zeidler issued an arbitration award (herein the Zeidler award) following a hearing conducted by him on September 26, 1979. The Zeidler award concerned a grievance of Edward Boguski, a Security and Public Safety bargaining unit Correctional Officer II employed by the Employer at GBCI, claiming that on September 30, 1978, he had improperly been sent home before completing what he expected to be a full eight-hour overtime shift contiguous to and beginning immediately after his regularly scheduled shift hours ended. The Zeidler award quoted both the "Parts of the Agreement Referred to in the Grievance" and an "ADDITIONAL PERTINENT ARTICLE OF THE AGREEMENT," but no reference was made in that award to the Call Back Time provisions noted in Finding of Fact 3, above. The agreement provisions so quoted were presumably drawn from the 1977-79 Agreement which was in effect at the time the grievance arose, though no specification to that effect was set forth on the face of the award. The Zeidler award also described the testimony of the various witnesses presented by the parties. The testimony so described regarding past practice related exclusively to practices at GBCI. The "DISCUSSION" and "AWARD" portions of the Zeidler award, read, as follows:

> DISCUSSION. The issue is, "Did Management violate Article VI, Section 1 and 2 or any part of the Agreement when it sent the grievant home on September 30 after three hours and 50 minutes of voluntary call-in time?
>
> The facts are that the grievant was asked to come in on a voluntary basis to replace an officer who was ill. The grievant asked the supervisor calling him what position was open and states that he was told that the Rotunda position was vacant. The arbitrator believes this to be the case. The grievant thereupon accepted, and when he came on the second shift, he was assigned instead to the South Cell Hall, and was sent home at 6 p.m.
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> The Agreement is silent on how many hours an employee on voluntary call-in is to work. Management has the right to determine how many hours an employee shall work on overtime under its general rights to manage in the management rights clause. However, in this case, the arbitrator is of the opinion that management violated Section 6 of Article III, the management rights clause, in that it

> discriminated against the employee. The employee was told that if he agreed to come in on a voluntary basis, he would be given the Rotunda position. He was also not told that his hours would be less than the eight hours normally filled by a person who would have been in that position. Instead the grievant was assigned to another position and then sent home before the shift ended. The arbitrator believes that this constitutes a failure of Management to carry out its commitment to the employee. The arbitrator believes that there was a generally established practice for employes who were called in to fill the normal eight hour shift of another employee to work that full shift, or otherwise to be told how many hours would be worked. The arbitrator therefore holds that the grievance is justified and should be sustained.
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> As to the exact number of hours the grievant was off, the arbitrator is uncertain as to whether this was four hours or four hours and ten minutes.
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> The grievant should therefore be paid from the time the record shows he was off the shift to the end of the shift, and the pay should be at time and one half.
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> Nothing in this decision should be interpreted as limiting management's rights to limit overtime, if it designates the time in advance according to past practice.
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> AWARD. The grievance of Edward Boguski, Officer II, that he should be paid for additional hours of work to the end of a shift on which he volunteered is sustained. The parties should determine from the records exactly when he left the shift before its end, and he should then be paid for the remainder of the shift at time and one half. Management violated Article III, Section 6 of the Agreement when it agreed to have the employee fill a vacancy in the Rotunda and then did not place the employee there but rather sent him to another position and shortened his shift.

No reference was made in the Zeidler award to the Bellman award described in Finding of Fact 7, below.

7. On May 12, 1979, Arbitrator Howard S. Bellman issued an arbitration award (herein the Bellman award) following a hearing conducted by him on April 23, 1979. The Bellman award concerned a grievance of Terry J. Leege, a Security and Public Safety bargaining unit Correctional

Officer I employed by the Employer at Wisconsin State Prison - Waupun. Leege's grievance claimed he had improperly been sent home before completing what he expected to be a full eight-hour overtime shift contiguous to and beginning immediately after his regularly scheduled shift hours ended. Arbitrator Bellman denied the grievance. He noted that the case arose under the parties' 1977-79 Agreement. The "DISCUSSION" and "AWARD" portions of the Bellman award, read, as follows:

> DISCUSSION:
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> On July 30, 1978, while he was working his regular 5:00 a.m. to 2:00 p.m. shift, the grievant was asked by a representative of administration if he would also work the next shift. The grievant agreed to work said 2:00 p.m. to 10:00 p.m. shift and did so until approximately 5:30 p.m. when he was asked to leave because officers regularly scheduled for that shift had become available. In order to work the second shift, the grievant had cancelled a personal business engagement. He incurred some long distance telephone expenses in doing so.
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> A witness called by the Union, Henry Klemmer, who is a Sergeant at the facility, and who has been an employee at the prison for five years and a Union officer for a few years, testified that as far as he knew it was the practice at the facility to give employees who had accepted overtime assignments the choice of remaining and completing their assignments, or leaving when the availability of regularly assigned employees made the overtime unnecessary. He described this practice as including estimates of the amount of overtime by administration at the time of the acceptance by the employees so that the employees could balance the additional income against the additional inconvenience. He also recalled that when overtime was accepted and the employee desired to foreshorten the estimated amount of time, the employee might be allowed to do so only if he could secure a replacement for himself.
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> On the other hand, Captain Lionel Zimmerman, a 22-year employee at this facility with administrative responsibilities, called as a witness by the Employer, testified that involuntarily foreshortened overtime such as the grievant experienced, has occurred on most weekends. This is the case, he explained, because the reduced schedule of activities on weekends normally allows regularly scheduled officers to relieve officers on overtime at various points in the shift.
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> Zimmerman also acknowledged, however, that at the time of

the instant grievance there was a recent change in the facility's practices. Previously, when a regularly schedule[d] officer became available to relieve another, the administration would relieve an officer who had requested vacation or holiday time before relieving officers on overtime. The change required that officers on overtime be relieved first. Zimmerman denied that it was ever the practice to allow the officers on overtime to elect to leave or complete the accepted amount of overtime.

The Union contends that by requiring the grievant to leave work in the middle of the overtime shift despite representations to him that the shift would be completed, the Employer violated Article VI, Sections 1 and 2. It is recognized, however, that nothing in said provisions expressly obligates the Employer to estimate the amount of overtime being offered; or to adhere to such an estimate, when it is made, by providing the aforesaid election to officers on overtime for whom relief is available. It is also acknowledged that under the terms of the collective bargaining agreement officers may be required to work overtime, and that no local agreement has been entered modifying any of these factors.

Rather, the Union urges that practice has, by implication, incorporated into these provisions the obligation to estimate overtime when seeking volunteers, and to adhere to such estimates by allowing such employees the described options. The Union also stresses the equities of representing that a certain amount of overtime is available, thus persuading an employee to give up other matters, then not providing the estimated overtime. It contends that the avoidance of such inconvenience and inequity is only a reasonable construction, and that the Employer should be sufficiently aware of its own resources to make such an obligation practicable.

The Employer emphasizes the absence of such obligations from the explicit terms of the collective bargaining agreement or any local agreement, and contends that such obligations amount to a guarantee of overtime work which can be found nowhere in the parties' agreement. It takes the position that such a guarantee should not be inferred because to do so might provide pay for employes who have no work to perform. Further, the Employer argues, the Union's argument clashes with the mutual understanding that the Employer can require overtime, but relieve employees so obliged at any time.

The record does not establish precisely what was said to the grievant about the likelihood that he would work the entirety of the second shift. However, apparently, he fairly inferred that such overtime had been offered. In the Arbitrator's view, it was

inequitable under such circumstances to disallow the represented amount of overtime on the basis of relief that became available in a predictable manner. If as Captain Zimmerman testified, such relief was "routine" on weekends, that should have been explained to the grievant, if any estimates of the amount of overtime offered were going to be made.

However, the issue to be determined is not one of abstract equity, but rather whether the Employer's conduct violated the specified contract provisions. This depends on whether the practice alleged by the Union is found. In the Arbitrator's judgment, given the total lack of even ambiguous contract language to which such a practice might be applied, and the great significance of obligating the Employer as urged by the Union, there must be very clear and convincing proof of said practice.

The instant record does not provide such evidence. Although Captain Zimmerman's testimony was somewhat vague, and he could not specify similar instances, and he did acknowledge some shift in practices; the Union's witnesses were not in command of the facts either. They were only aware of their own experiences, and that no case like the grievant's had been reported to them in the past.

It is concluded that the instant record simply does not support a finding that the practice alleged by the Union existed to the extent of becoming contractual in nature.

AWARD

On the basis of the foregoing, and the record as a whole, it is the decision and award of the undersigned Arbitrator that the instant grievance should be, and the same hereby is, dismissed.

8. The Zeidler award and the Kleman grievance share an identity of parties and remedy, but they do not share an identity of issue.

9. By its refusal to grant the relief requested in the Kleman grievance, the Employer has failed and refused to give the Zeidler award res judicata effect as regards Kleman's situation on May 23, 1994, but the Employer has not thereby failed to accept the terms of the Zeidler award.

CONCLUSIONS OF LAW

1. Under SELRA, it is appropriate to exercise the Commission's jurisdiction to

determine whether Sec. 111.84(1)(e), Stats., requires the Employer to give the Zeidler award res judicata effect with respect to the Kleman grievance.

2. Because the Zeidler award and the Kleman grievance do not share an identity of issue, the Employer is not required by Sec. 111.84(1)(e), Stats., to give the Zeidler award res judicata effect with respect to the Kleman grievance and the claim deemed encompassed therein that, based on past practice, Kleman was entitled to eight hours of overtime because he had not been told when the overtime was offered to him that he was being offered less than eight hours.

3. The Employer, by its refusal to grant the relief requested in the Kleman award and its consequent failure to give the Zeidler award res judicata effect with respect to the Kleman grievance, did not fail or refuse to "accept the terms of an arbitration award where previously the parties have agreed to accept such award as final and binding" in violation of Sec. 111.84(1)(e) or in derivative violation of Sec. 111.84(1)(a), Stats., and therefore did commit an unfair labor practice in violation of those provisions of SELRA.

4. The Union's complaint in this matter is not frivolous.

ORDER 1/

1/ 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

1. The Employer's request that the Examiner decline to exercise the Commission's jurisdiction with respect to the Union's complaint in this case is denied.

2. The Union's complaint is dismissed on its merits.

3. The Employer's request for an order requiring the Union to pay the Employer's attorney fees, costs and disbursements is denied.

Dated at Shorewood, Wisconsin, this 10th day of October, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz /s/
Marshall L. Gratz, Examiner

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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).

MEMORANDUM ACCOMPANYING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

At issue in this case is whether the Employer's undisputed failure to apply the Zeidler award described in Finding of Fact 6 to the Kleman grievance described in Findings of Fact 4 and 5 constitutes a failure to "accept the terms of an arbitration award where previously the parties have agreed to accept such award as final and binding" in violation of Sec. 111.84(1)(e) and in derivative violation of Sec. 111.84(1)(a), Stats. 2/

In its complaint, the Union requests that the Commission declare that the Zeidler award required the Employer to allow Kleman to work a full eight hours of overtime on May 23, 1994, because he had not been told in advance that the overtime being offered him was for less than eight hours. The Union further requests that the Commission declare the Employer's failure to do so violative of SELRA and order the Employer to: cease and desist; apply the Zeidler award to Kleman's May 23, 1994, situation; make Kleman whole for any losses suffered; pay the Union's costs, fees, disbursements, expenses and attorney fees; and do whatever else the Commission deems just and appropriate in the circumstances.

2/ The June 4, 1994 grievance form filed on Kleman's behalf does not specifically assert the Union's claim herein that, based on past practice, Kleman had a right to work a full eight hours of overtime on May 23, 1994, because he had not been told when the overtime was offered to him that he was being offered less than eight hours. Nevertheless, as noted in Finding of Fact 5, that claim is deemed to be encompassed within the Kleman grievance as that term is used herein because the Employer has treated the grievance as including that claim. In that regard, all of the Employer's pleadings and arguments in this case have treated that claim as encompassed within the June 4, 1994 grievance. The record also indicates that the Union shares that understanding, even though the complaint makes no reference to and places no reliance on the June 4, 1994 grievance. For example, Union witnesses testified that the processing of the June 4, 1994 grievance has been held in abeyance pending the results of this complaint proceeding (tr.95,139); that the Union prefers not to submit that grievance to arbitration if it can, instead, prevail in this complaint proceeding (tr.85); and that the Union intends to proceed to arbitration if it does not prevail on the complaint. (tr.85) In any event, the conclusions reached in this decision concerning res judicata would not change if the claim advanced in the complaint were not deemed encompassed in the June 4, 1994 grievance.

In its answer, the Employer denied that it was violating SELRA, asserted various affirmative defenses noted in the summary of its position below, and requested that the Commission either decline to exercise jurisdiction of the matter or dismiss the complaint on its merits. The Employer further requested that the Commission order the Union to pay the Employer's attorneys fees, costs and disbursements and provide the Employer with any other relief that is just and proper.

At the outset of the hearing the Employer moved for immediate dismissal of the complaint on ground that the Kleman grievance was pending unresolved at a pre-arbitral step of the parties' contractual grievance procedure. The Employer therefore asked the Examiner to decline to exercise the Commission's jurisdiction, to require the Union to exhaust the parties' agreed upon grievance and arbitration procedure, and to defer to whatever results are ultimately reached therein. The Examiner declined to rule on that request until the case was fully heard and argued. The Examiner's decision on that issue has been incorporated as a part of this decision.

The Findings of Fact set forth the factual background the Examiner considers necessary to decide the limited res judicata issue presented by the pleadings and arguments submitted in this case. Because the Examiner does not have occasion to decide the merits of the Kleman grievance in this case, the Examiner has not found it necessary to make detailed findings regarding certain of the factual issues that were addressed in the evidence presented at the hearing. Similarly, the basic Agreement provisions regarding overtime have not been set forth in the Findings of Fact because those provisions were not found to be controlling in either the Zeidler award or the Bellman award.

POSITION OF THE UNION

The evidence shows that the Employer has failed to accept the terms of an arbitration award in violation of Sec. 111.84(1)(e) and (a), Stats. Under WERC precedents, the Zeidler award is entitled to res judicata effect as regards the Kleman grievance. Citing, among others, State of Wisconsin, WERC Dec. No. 13539-C (Schurke, 3/76), aff'd by operation of law, -D (WERC, 4/76)(Commission has long held that grievance award concerning one employe is conclusive and res judicata as to subsequent dispute regarding another employe "where the issue and relief sought in the second grievance were identical in all respects to the issue and the relief sought in the initial grievance." Id. at 10); State of Wisconsin, Dec. No. 27510-A (Schiavoni, 11/93), aff'd by operation of law, -B (WERC, 1/94)(res judicata applies where there is no significant discrepancy of fact between the two cases at issue. Id. at 15); City of DePere, Dec. No. 16891 (Pieroni, 3/79) aff'd by operation of law, -A (WERC, 3/79). Among the policy considerations that the Commission has taken into consideration in fashioning of its res judicata approach are the following:

> While it is undoubtedly important that disputes arising over labor contracts be settled quickly and efficiently by arbitration where the

> contract so provides, it is just as important to maintain the integrity of the arbitration process by respecting binding decisions once they have been handed down. While . . . arbitrators are not bound by the precedents of prior arbitration decisions, this cannot be taken to mean that arbitration decisions which are generally applicable to more than one specific grievance are to be ignored, and that the same issue should be submitted to a potentially unending string of arbitrators until the aggrieved party is given an award with which he is satisfied. This would make a mockery of the contract provision that the arbitrator's decision is final.

Wisconsin Public Service Corporation, Dec. No. 11954-D (WERC, 5/74) at 7, quoting from UAW v. Robertshaw Controls Co., __ F.Supp. __, 63 LRRM 2348, 2348-49 (DCSD Ohio, 1966).

The Kleman grievance involves the same parties, contract language and facts as the Zeidler award. Both involve Correctional Officers and a proven past practice whereby call-ins for overtime were and are understood to be for a full eight-hour shift unless the employe is told in advance that they will be for a lesser stated period. The stated basis for the aspect of the Zeidler award pertinent to this case was, "[t]he arbitrator believes that there was a generally established practice for employees who were called in to fill the normal eight hour shift of another employee to work that full shift, or otherwise to be told how many hours would be worked." The Union presented testimony by Kleman, Local 163 president Bob Peters, and Staff Representative Orth to the same effect in this case regarding past practice. Kleman further testified that when he was called and offered the opportunity to work overtime on the second shift, he assumed that the opportunity would be for eight hours because no lesser number of hours was specified.

The Zeidler award does not conflict with the call-in and call-back minimums in the parties' agreements. Officers who are asked to come in for only a two-hour shift will still be paid the call-in minimum of four hours. Officers called in without any indication of the length of the shift will be entitled to rely on an eight-hour shift.

Moreover, even if the Zeidler award contained errors of fact or law, it is nonetheless binding on the parties. Citing, City of Oshkosh v. Local Union 796-A, AFSCME, 99 Wis.2d 95 (1980)("The parties bargain for the judgment of the arbitrator--correct or incorrect--whether that judgment is one of fact or law . . . In sum, the arbitrator's award should be treated as though it were a written stipulation by the parties setting forth their own definitive construction of the labor contract." Id. at 103,104).

Any Employer reliance on the earlier Bellman award is misplaced because Arbitrator Zeidler heard and decided his case after the Bellman award was issued; and because the Zeidler award was neither vacated by a reviewing tribunal, nor reversed by agreement of the parties during intervening rounds of bargaining, nor supplanted by a subsequent arbitration award to the contrary.

Any Employer effort to limit the Zeidler award to the GBCI where it arose must be rejected because, as Orth testified, except for local agreements not at issue here, the parties' collective agreements and awards issued under them apply bargaining unit wide, and the bargaining unit encompasses employes at various institutions including both GBCI and KMCI.

In its reply brief, the Union additionally asserted that Employer's contention that WERC lacks jurisdiction of the instant complaint was previously rejected in a prior case on point. Citing, State of Wisconsin, Dec. No. 27510-A, above ("Given the Complainant's assertion that the Respondent cannot require it to again arbitrate the issue . . . the dispute in that regard is not appropriate for deferral." Id. at 17, which in turn cited State of Wisconsin, Dec. No. 20145-A (Burns, 5/83) at 6, aff'd by operation of law, -B (WERC, 6/83).) Moreover, from a policy standpoint, it would be improper to permit the Employer to force the Union to submit the same issue to a potentially unending string of arbitrators until it reaches a result satisfactory to it. The Employer's contention that the Union alleges only a violation of the Zeidler award and not a violation of the Agreement is nonsensical because the Zeidler award is based on past practice, and past practice "is equally a part of the collective bargaining agreement although not expressed in it." Citing, United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574, 581-82 (1960). As noted above, that practice is not inconsistent with any language in the Agreement and there have been no intervening changes in agreement language that have altered the binding past practice cited in the Zeidler award.

The Employer's effort to force the Union to arbitrate all issues institution by institution would create a totally unmanageable, unduly costly, and chaotic system of labor relations contrary to the anti-fragmentation policy set forth by the Legislature in Sec. 111.825(1), Stats., and contrary to the policy considerations underlying the Commission's decisions applying the res judicata doctrine.

For those reasons, the Examiner should grant the relief requested in the Complaint.

POSITION OF THE EMPLOYER

The Union does not allege a violation of the Agreement in this case, it only alleges a violation of the Zeidler award.

The Zeidler award does not have res judicata effect on the Kleman grievance for three basic reasons.

First, the Zeidler award was not based on any contractual provision, but rather on a past practice at GBCI; so it only has res judicata effect with regard to identical disputes arising at GBCI. Arbitrator Zeidler stated that "[t]he Agreement is silent on how many hours an employee on voluntary call-in is to work" and that "[t]he arbitrator believes there was a generally established

practice for employees who were called in to fill the normal eight hour shift of another employee to work that full shift, or otherwise to be told how many hours would be worked." The past practice at GBCI is not necessarily the past practice at other correctional institutions.

Second, the Zeidler award is in direct conflict with the Bellman award. Both the Bellman and Zeidler awards involved an employe working his/her regular shift and being asked to work and working the next shift but being sent home prior to the end of the next shift. The Bellman award dismissed the grievance because the record in that case did "not support a finding that the practice alleged by the Union existed to the extent of becoming contractual in nature." Since both awards focused on the respective practices at the different institutions involved, and because they reached contrary conclusions, neither award has res judicata effect on the Kleman grievance because it arose at yet a third institution, KMCI. Accordingly, if the Kleman case is to be adjudicated, it must be submitted to the grievance and arbitration procedure which the parties have agreed in their collective bargaining agreements is the exclusive method for resolving contract grievances. Under existing Commission precedents, the Commission therefore ought not assert its Sec. 111.84(1)(e) jurisdiction to decide the Kleman grievance. Citing, among others, State of Wisconsin, Dec. No. 27708-A (McLaughlin, 1/95)("The Commission generally will not assert its statutory jurisdiction under Sec. 111.84(1)(e), Stats., to resolve breach of contract claims because of the presumed exclusivity of the contractual procedure and a desire to honor the parties' agreement" except where the employe alleges denial of fair representation, the parties have waived the arbitration provision, or a the party who allegedly violated the contract ignores and rejects the arbitration provisions in the contract. Id. at 41-42 Notes 11-12)

Third and finally, unlike the Kleman grievance, neither the Zeidler award nor the Bellman award concerns a call in / call back. The identity of cause of action necessary for res judicata to be applicable is therefore not present in this case. The Zeidler and Bellman awards both involved an employe working his/her regular shift being asked to work the next shift and being sent home prior to the end of the next shift. Arbitrators Zeidler and Bellman both concluded that no contractual language addressed the disputes involved. The arbitrators presumably felt that the call in / call back provisions did not apply because the employes were already at work; otherwise the arbitrators would have mentioned those provisions in their awards. Unlike those situations, however, Kleman was not working on the day when he was called and asked to work the second shift. Therefore, the call in / call back provisions of the contract (6/13/1 and 2 of the 1993-95 Agreement) would apply to his situation. 3/ Paragraph 1 of that Section provides, "Employes called back for duty or called in on the employe's day off will be guaranteed a minimum of four (4) hours of work with pay." In this case the Union seeks to invoke an eight hour guarantee based on past practice at KMCI despite the fact that the Agreement expressly provides for a guarantee of only four hours. Kleman worked seven hours and was paid for seven hours, exceeding the contractually-expressed four hour

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3/ The Employer referred to two additional awards attached to its brief as "precedent concerning the definition of call in / call back." The Examiner has disregarded those two additional awards because they were not properly offered and were not made a part of the record evidence in this case.

minimum. Any possible remaining questions based on past practice at KMCI should be resolved through the agreed-upon grievance procedure and not by the Commission in an award enforcement proceeding under Sec. 111.84(1)(e), Stats.

In its reply brief, the Employer argues that if, notwithstanding the arguments above, the Commission concludes that the Bellman and Zeidler awards share an identity of facts, parties, issue and remedy with the Kleman grievance, then the Commission should apply the res judicata principle to the Bellman award because it was the earlier award on the subject, making it error for Arbitrator Zeidler to fail to give it res judicata effect. The Union's position requiring giving res judicata effect to the most recent case on point is absurd because it would render meaningless the Commission precedents recognizing the binding effect of prior awards in appropriate cases, and would cause the first award on a subject to be disregarded in the third and subsequent identical instances just because the advocates failed to call it to the attention of the arbitrator in the second such case.

Arbitrator Zeidler presumably did not acknowledge the Bellman award either because he was not aware of it or because it concerned a different correctional institution, was based on past practice of that other institution, and was not based on any express agreement provision. In any event, the Commission is now aware of the Bellman award and must consider it in addressing the instant complaint.

The Union's contention that awards should be applied bargaining unit wide would apply as well to the Bellman award as it does to the Zeidler award. It should apply to neither, however, because both of those awards were based on evidence (or the lack of evidence) of a practice specific to the institutions involved, and neither was based on specific language of the Agreement applicable to the bargaining unit generally.

For those reasons, the Commission should either decline to exercise its jurisdiction with respect to the complaint or should dismiss the complaint on its merits.

DISCUSSION

Propriety of Exercising Commission Complaint Jurisdiction

The Union's pleadings and arguments make it clear that it seeks a determination that the Zeidler award is entitled to res judicata effect as regards the Kleman grievance. This is not a case in which the Union is asking the Examiner and Commission to address the merits of the Kleman grievance de novo. The Examiner therefore finds it proper to exercise the Commission's jurisdiction to make the determination sought by the Union in this case. The exercise of jurisdiction for that purpose is not inconsistent with the Commission's well established policies of requiring exhaustion of agreed-upon grievance and arbitration procedures, and of deferral to outcomes

reached in such procedures. E.g., State of Wisconsin, Dec. No. 27510-A, above, at 17. Indeed, if the Commission were to decline to exercise its jurisdiction to determine whether a prior award warrants res judicata effect in a newly-arisen case, no complainant could ever avoid re-arbitration of an issue decided in a previous award on grounds of res judicata, and the doctrine would be rendered meaningless.

Decisional Standards Regarding Res Judicata
Effect of Grievance Arbitration Awards

The Commission's longstanding standards for applying res judicata to grievance awards have been aptly stated as follows:

> 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) at 13, aff'd in relevant part, Dec. No. 23885-D (WERC, 2/88). See also, State of Wisconsin, WERC Dec. No. 13539-C, above, and cases cited and analyzed therein dating back to Wisconsin Telephone Co., Dec. No. 4471 (WERB, 1957), aff'd (CirCt Milwaukee, 4/58), rev'd on other grounds, 6 Wis.2d 243 (1959). In Wisconsin Public Service Commission, above, the Commission expressed its basic rationale for the above standards as follows:

> A balance must be struck between the need for consistency and finality to contract interpretation as evidenced by prior arbitration awards and invading that province specifically reserved by the courts to the arbitrator - deciding the merits of the dispute. Where no material discrepancy of fact exists, the prior award should be applied. In these circumstances both interests are accommodated without undermining either.

Id. at 7.

Factual Difference Regarding Type of Overtime Worked

As between the Kleman grievance and the dispute giving rise to the Zeidler award, the

parties involved and remedy sought/granted appear identical. However, one factual difference between the two cases involves the type of overtime worked. The Zeidler award involved hours of work performed on a hold-over basis that were contiguous with and immediately after the employe had completed his regularly scheduled hours of work. In contrast, neither the eight hours claimed nor the seven hours worked by Kleman before he was sent home were contiguous with any other hours worked by Kleman on the day in question. In that regard, Grievant testified that he was regularly assigned to the third shift (tr.20); that he did "in fact go home early" after working seven second shift hours on May 23 (tr.22); and that had he known when it was offered to him that the second shift overtime work did not involve a full eight hours, he possibly could have turned it down in favor of waiting for an offer of overtime on third shift. (tr.40).

That factual difference presents the following additional issues in the Kleman grievance that were not presented by the facts in the Zeidler award: whether the language that has been in the parties' Call Back Time section in each of the relevant agreements [e.g., 6/13/1 of the 1993-95 Agreement] applies to the hours involved in the Kleman situation; and, if so, whether the parties' expressed agreement in that language to a four hour guaranteed minimum [which had been a two hour guaranteed minimum in the 1977-79 agreement] precludes the imposition of an eight hour guarantee based on past practice generally or the Zeidler award in particular.

Thus, the Union's arguments, that the Call Back Time language of that 1993-95 Agreement provision in no way conflicts with or precludes giving effect to the past practice and the Zeidler award as regards the Kleman grievance, present issues which were neither presented by the facts of the Zeidler award nor addressed by Arbitrator Zeidler in that award. Requiring the Union to resolve those heretofore unresolved issues in the manner agreed upon in the parties' grievance and arbitration procedure is consistent with the principles and policies reflected in the Commission decisions cited by the Union in this case.

For that reason alone, the Examiner would conclude that the Kleman grievance and the Zeidler award do not "share an identity of . . . issue" and that the Employer's failure to give the Zeidler award res judicata effect regarding the Kleman grievance did not violate Sec. 111.84(1)(e) or (a), Stats.

Factual Difference Relating To
Past Practices at Different Institutions

Even if the overtime hours Kleman worked had immediately followed regularly scheduled hours worked by him, it would not follow that either the Zeidler award or the Bellman award would be entitled to res judicata effect regarding the Kleman grievance. Both of those awards were predicated on the respective arbitrator's assessment of evidence of past practice at the particular institution involved, and not on evidence regarding a past practice involving any of the Employer's other institutions employing Security and Public Safety bargaining unit Correctional Officers.

Accordingly, those two awards are not necessarily inconsistent with one another. In the Bellman award, the evidence concerning past practice at Waupun was not sufficient to persuade the arbitrator that the relief requested in the grievance was warranted in the circumstances of a grievance arising at Waupun. In the Zeidler award, the evidence concerning past practice at GBCI was sufficient to persuade the arbitrator that the relief requested in the grievance was warranted in the circumstances of a grievance arising at GBCI. Neither of those awards addresses or resolves the issue of whether the past practice at KMCI is sufficient to warrant the relief requested in the Kleman grievance in the circumstances of a grievance arising at KMCI. For that additional reason, the Kleman grievance does not "share an identity of . . . issue" with either the Zeidler award or the Bellman award, such that neither of those awards warrants res judicata effect in a Sec. 111.84.(1)(e), Stats., award enforcement proceeding.

Nevertheless, in any further grievance procedure processing of the Kleman grievance, the parties can certainly argue that one or another of those awards should guide the outcome of the Kleman grievance. See, Wisconsin Gas Co., Dec. No. 8118-E (Bellman, 3/68), aff'd by operation of law, -F (WERC, 4/68)("No attempt has been made herein to decide if the acts complained of in the grievances constituted violations of the labor contract. . . . Subsequent arbitrators, faced with the grievances referred to herein, may seek guidance from the prior award, but if such a proceeding occurs and if such issues are reached, they will also have to consider factors not pertinent in the previous arbitration case. . . ." Id. at 17).

For those reasons, the Examiner has concluded that the Zeidler award does not warrant res judicata effect as regards the Employer's treatment of Michael Kleman as regards May 23, 1994. Accordingly, the instant complaint has been dismissed on its merits.

Employer's Request for Attorney Fees, Costs and Disbursements

As noted above, the Employer requested in its answer that the Union be ordered to pay the Employer's attorney fees, costs and disbursements. The circumstances in which the WERC grants any such requests are quite narrow. See, e.g., Wisconsin Dells, Dec. No. 25997-C (WERC, 8/90) and Madison Metropolitan School District, Dec. No. 16471-B (WERC, 5/81) (position taken must be "frivolous," not merely "debatable").

The Examiner finds that the instant complaint clearly does not fall within that narrow range. Accordingly, the Employer's requests in those regards have been denied.

Dated at Shorewood, Wisconsin this 10th day of October, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz /s/
Marshall L. Gratz, Examiner