

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**STEVE PRELLER**, Complainant,

vs.

**STATE OF WISCONSIN, DEPARTMENT OF EMPLOYMENT RELATIONS;  
UW HOSPITAL & CLINICS SUPERINTENDENT GORDON DERZON; UWHC  
PUBLIC AUTHORITY GOVERNING BOARD; GREG KRAMP; RENAE BUGGE;  
NEAL STRANGER; DON KLIMPEL; BOB SCHEUER**, Respondents.

Case 430  
No. 54593  
PP(S)-263

**Decision No. 28938-G**

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**Appearances:**

**Mr. Steve Preller**, 135 South Marquette Street, Apartment 1, Madison, Wisconsin 53704, appearing on his own behalf.

vonBriesen, Purtel & Roper, S.C., by **Attorney Doris E. Brosnan**, 411 East Wisconsin Avenue, Milwaukee, Wisconsin 53202, appearing on behalf of UWHC Public Authority Governing Board and the individually-named Respondents.

Lawton & Cates, S.C., by **Attorney P. Scott Hassett**, Ten East Doty Street, Suite 400, P.O. Box 2965, Madison, Wisconsin 53701-2965, appearing on behalf of Intervenor Local 171, Wisconsin State Employees Union, AFSCME Council 24, AFL-CIO.

**ORDER**

On July 12, 1999, the Commission issued an Order Granting Petition for Rehearing in this matter for the purpose of deciding whether the Commission's May 24, 1999 Order Affirming in Part and Reversing in Part Examiner's Findings of Fact, Conclusions of Law and Order contained material errors of law or fact. We held our consideration of this matter in abeyance pending completion of the presentation of evidence and argument in a UNIVERSITY OF WISCONSIN HOSPITAL AND CLINICS AUTHORITY declaratory ruling proceeding which presents related issues.

Dec. No. 28938-G

We have completed our consideration and are persuaded that our May 24, 1999 decision was correct in all respects except for Paragraph N(1) of our Order and the text of the Notice – both of which we conclude should have been but were not limited to the rights Complainant Preller was found to possess by Judge O’Brien. Therefore, we modify Paragraph N(1) of our Order and the text of our Notice to read as follows:

1. Respondent State of Wisconsin, its officers and agents, shall cease and desist from violating the 1995-1997 collective bargaining agreement by failing to allow Complainant Preller to process grievances on his own behalf or through a representative of his own choosing up to and including arbitration.

...

“APPENDIX A”

NOTICE TO ALL EMPLOYEES

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

1. WE WILL NOT violate the 1995-1997 contract with AFSCME Council 24 by refusing to allow Steve Preller to process grievances on his own behalf or through representatives of his own choosing, up to and including arbitration.

\_\_\_\_\_  
State of Wisconsin

\_\_\_\_\_  
Date

Given under our hands and seal at the City of Madison, Wisconsin this 14th day of November, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/

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James R. Meier, Chairperson

Paul A. Hahn /s/

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Paul A. Hahn, Commissioner

I concur and dissent.

A. Henry Hempe

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A. Henry Hempe, Commissioner

**Department of Employment Relations**

**CONCURRENCE AND DISSENT OF COMMISSIONER A. HENRY HEMPE**

In its original order in this matter 1/ (from which I dissented), the majority did not reveal whether it agreed with Dane County Circuit Judge Sarah O'Brien's determination that the Union no longer had ownership of the grievances filed by bargaining unit members it represented. 2/ Rather, basing its deference to Judge O'Brien's opinion on an outdated view of *res judicata* no longer countenanced by the law 3/ and a Commission precedent of dubious assistance, 4/ the majority directed (that):

Respondent State of Wisconsin, its officers and agents, shall cease and desist from violating the 1995-1997 collective bargaining agreement by failing to allow individual employees to process grievances on their own behalf or through representatives of their own choosing up to and including arbitration. (Emphasis supplied)

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1/ *STATE OF WISCONSIN, Dec. No. 28938-C (WERC, 5/99)*.

2/ *On December 10, 1997, Circuit Judge Sarah O'Brien issued a decision to the same parties as in the instant matter, but in a separate case involving a different cause of action. In her decision, Judge O'Brien interpreted the language of the collective agreement at issue in this matter as allowing the Complainant to proceed through every step of the grievance procedure, including arbitration, with a representative of his own choosing, union or not. PRELLER v. LITSCHER, DANE CO. CIR. CT., CASE NO. 97-CV-729. The Union was frustrated in its efforts to obtain an appeal on the merits.*

3/ *See NORTHERN STATES POWER CO. v. BUGHER, 189 WIS2D 541, 525 N.W.2D 723 (1995), in which the Wisconsin Supreme Court distinguished between claim preclusion (i.e., *res judica*) and issue preclusion, an important distinction, but one the majority fails to make.*

4/ *WAUKESHA COUNTY, DEC. NO. 24110-B (WERC, 3/88), cited as support by the majority for its original order, dealt with a matter of claim preclusion, not a question of issue preclusion raised in the instant case.*

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Unfortunately, the majority's deference to -- indeed, enlargement of -- Judge O'Brien's prior opinion managed to upset both established labor law and the long-standing practice of the parties. But perhaps understandably alarmed by its growing perception of the potential mischief that had been created, on reconsideration the majority now seeks to contain its enlargement of the judicial relief provided by Judge O'Brien.

It does so by limiting its own award in this case to only the precise and literal relief the judge had provided in the earlier case. Thus, according to the majority, it is now only Complainant Preller, and no other individual hospital employee, who may “. . . process grievances on his own behalf or through a representative of his own choosing up to and including arbitration.” 5/ This, of course, is the extent of relief that Judge O’Brien had granted in the earlier, separate matter before her.

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*5/ In the case before the Commission, Preller was seeking leave to process a different grievance on his own behalf than the subject grievance before Judge O’Brien. However, as a practical matter, neither the O’Brien ruling nor the majority’s reconsidered opinion today has any effect on Steve Preller, individually, for Preller is no longer an employee of the UW Hospital.*

*6/ UNIVERSITY OF WISCONSIN HOSPITAL AND CLINIC BOARD, DEC. NO. 29784-D. This is a declaratory ruling in which the Commission concluded that an employee does not have an independent right to arbitrate a grievance. This conclusion, of course, is diametrically opposed to the result reached in the majority’s first decision in the instant matter that it now reconsiders and limits. Inasmuch as the 1997-2000 contract language the Commission therein interprets is identical to the 1995-97 contract language at issue in the instant matter, the Commission’s declaratory ruling may be fairly viewed as a repudiation of the O’Brien interpretation.*

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The majority’s action today removes at least a portion of the unpalatable precedential barb originally created not as much by the O’Brien ruling, but by the majority’s subsequent deference to and enlargement of it. For it is fair to infer that by its action in the instant matter, in conjunction with an additional determination by a unanimous Commission in yet another, separate case also issued today, 6/ the majority signals its disagreement with the O’Brien ruling in the earlier case. In this respect, the majority’s modified order is an encouraging step in restoring a modicum of stability and predictability in the administration of the parties’ contractual grievance procedure.

But the modified order does not provide complete relief. Regrettably, the majority neither explains that its original order in this matter was based solely on its belief that the doctrine of *res judicata* required it to so order, nor deals with what appears to me to be its flawed perception of the doctrine of *res judicata*.

Inasmuch as it now appears that this misperception, not an independent analysis of the contract language on the merits, was what led the majority to follow Judge O’Brien’s decision in the first place, a correction in this area would have also been helpful. Instead, the majority fashions a result that now provides no relief to the original complainant, Steve Preller 7/ as long as he remains unemployed by UW Hospital, but continues to apply a *res judicata* test that has no currency.

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7/ See Note 5.

The result is confusion. On the one hand, the majority's opinion in this matter may be incorrectly read as support for Judge O'Brien's earlier, erroneous interpretation of the 1995-97 contract language in issue. On the other hand, in the declaratory ruling also issued today by a unanimous Commission in which the Commission interprets identical language that has reappeared in the 1997-2000 labor contract, 8/ the majority abandons the 1997 Circuit Court interpretation in favor of a more conventional view -- a view that is totally consistent with the intent of the parties.

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8/ *SUPRA*, Note 6.

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Under these circumstances it is difficult to know whether to concur with the majority's felicitous result herein since, as a practical matter, it accomplishes what Hearing Examiner Greco had originally directed, or to dissent on the basis that the practical result reached herein may be misconstrued by future parties. I resolve that conundrum by describing this opinion as a Concurrence/Dissent, and leave to its readers the question of whether it is more one than the other.

Dated at Madison, Wisconsin this 14th day of November, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

A. Henry Hempe /s/

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A. Henry Hempe, Commissioner

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28938-G