STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JERRY C. WAGNER, Complainant,

vs.

WISCONSIN STATE EMPLOYEES UNION, AFSCME COUNCIL 24, AFL-CIO, Respondent.

Case 455
No. 55359
PP(S)-278

Decision No. 29177-C

Appearances:

Mr. Jerry C. Wagner, P.O. Box 263, Amery, Wisconsin, appearing on his own behalf.

Murray & Cross, **Attorney Nola J. Hitchcock Cross,** 845 North 11th Street, Milwaukee, Wisconsin 53233, appearing on behalf of Wisconsin State Employees Union, AFSCME Council 24, AFL-CIO.

ORDER

On December 28, 1998, Examiner Amedeo Greco issued Findings of Fact, Conclusion of Law and Order with Accompanying Memorandum in the above matter wherein he concluded that Respondent had not violated the State Employment Labor Relations Act by refusing to submit Complainant's discharge grievance to arbitration. He therein dismissed the complaint and ordered Complainant to:

> . . . pay all of the legal fees and costs that have been incurred, or may be incurred, by Council 24 in defending itself in this action.

By letter dated January 19, 1999, pursuant to its authority under Sec. 111.07(6), Stats., the Commission (Commissioner Hempe dissenting) set aside the Examiner's Findings of Fact, Conclusion of Law and Order with Accompanying Memorandum for the purpose of correcting mistakes therein.

On January 20, 1999, the Commission received a petition for review of the Examiner's decision from Complainant. By letter that same date, the Commission advised the parties that Complainant's petition was untimely inasmuch as the period for filing same expired January 19, 1999. The Commission therein also advised the parties that they could file written argument as to the Examiner's interpretation of STATE OF WISCONSIN, DEC. NO. 29093-B (WERC, 11/98) or any other portion of his decision. On February 10, 1999, the Commission received written argument from Complainant asking that the Examiner's decision with respect to attorney fees and costs be reversed. On April 6, 1999, Respondent filed a Motion to Reconsider asserting Examiner Greco had acted in a manner consistent with STATE OF WISCONSIN, SUPRA.

Having considered the matter and being fully advised in the premises, the Commission hereby makes and issues the same Findings of Fact, Conclusion of Law and Order with Accompanying Memorandum as were issued by the Examiner on December 28, 1998 with the following exceptions:

A. The Examiner's Order is modified by striking that portion which states:

> IT IS FURTHER ORDERED that Jerry C. Wagner pay all legal fees and costs that have been incurred, and may be incurred, by Council 24 in defending itself in this action.

B. The last 17 paragraphs of the Examiner's Memorandum are stricken.

Given under our hands and seal at the City of Madison, Wisconsin this 24th day of May, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/
James R. Meier, Chairperson

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

I dissent.

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

Wisconsin State Employees Union, AFSCME, Council 24, AFL-CIO

MEMORANDUM ACCOMPANYING ORDER

We have corrected mistakes in the Examiner's decision by: (1) modifying his Order to eliminate the Complainant's obligation to pay Respondent's attorneys fees and costs; and (2) deleting the portion of his Memorandum in which he sets forth his rationale for his Order of attorneys fees and costs.

In his decision, the Examiner acknowledged that in STATE OF WISCONSIN, DEC. NO. 29093-B (WERC, 11/98) we concluded the Commission and its Examiners lacked the statutory authority to award attorneys fees and costs to responding parties in complaint proceedings. However, he interpreted STATE OF WISCONSIN to carve out a narrow exception to the general "no fees or costs" rule where "the parties have agreed" such fees and costs can be imposed. He then found this narrow exception applicable to the facts of this case and ordered that fees and costs be paid by Complainant to the Respondent.

The Examiner's interpretation of STATE OF WISCONSIN was reasonable but incorrect. Had our STATE OF WISCONSIN decision been clearer, the "parties have agreed" phrase would have been understood as an example of the rare circumstance in which even **a complaining party** is entitled to attorneys fees and costs. See GREAT LAKES CONSTRUCTION CORP., DEC. NO. 20845-A (SHAW, 1/84), AFF'D BY OPERATION OF LAW, DEC. NO. 20845-B (WERC, 2/84).

Given the foregoing, we have modified the Examiner's decision as to attorneys fees and costs. We are hopeful that through this decision, it now understood that **attorneys fees** and **costs** are **only** available **to complainants** in complaint proceedings and, **even as to complainants**, are **rarely** an **appropriate** part of a remedial order.

Dated at Madison, Wisconsin this 24th day of May, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/
James R. Meier, Chairperson

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

Wisconsin State Employees Union, AFSCME, Council 24, AFL-CIO

DISSENT OF COMMISSIONER A. HENRY HEMPE

The majority reverses that portion of Examiner Greco's order that directs the Complainant to pay all legal fees and costs that have been incurred in this matter by Council 24. It further strikes the last seventeen paragraphs of the Examiner's Memorandum.

The paragraphs thus stricken read as follows:

> Here, for the reasons stated above, Council 24's actions in not taking Wagner's grievance to arbitration were based upon a "rational basis" and a valid explanation and they thus fell within the "wide range of reasonableness" permitted under FORD MOTOR CO. V. HUFFMAN, 345 U.S. 330 (1953), and reiterated in MARQUEZ, supra. See also VACA V. SIPES, 386 U.S. 171, 191 (1967), which upheld a union's wide discretion in determining whether to advance a grievance to arbitration by stating: "We do not agree that the individual employee has an absolute right to have his grievance taken to arbitration. . ."
>
> There is a second problem with Wagner's complaint: he signed the Waiver of Claims and Indemnification referenced in Finding of Fact No. 20 above which stated, *inter alia*, that he: "hereby waives any claims against Council 24, known or unknown, growing out of Council 24's representation of grievant in this matter thus far."
>
> Wagner certainly understood by signing said form that he could not sue Council 24 over its failure to arbitrate his termination. Indeed, Wagner even consulted Attorney McQuillen, a highly experienced and able attorney, before he signed it and before Attorney McQuillen on his behalf forwarded it to Council 24. Wagner therefore fully understood its legal ramifications.
>
> Wagner nevertheless claimed at the hearing that said waiver is invalid because, in his words: "That waiver in and of itself was coerced and not voluntary. Therefore it's not valid." He also argues in his reply brief that he had no choice but to sign it, as that was the only way he could arbitrate to get his job back.
>
> The waiver at that time gave Wagner something of value; i.e. Council 24's willingness to let Wagner arbitrate his termination on his own. Thus, Hacker testified that Council 24 owns the grievance procedure and that, as a result, employes do not have the right to arbitrate their grievances on their own unless Council 24 lets them. In securing Council 24's permission to arbitrate,

Wagner therefore received a valuable *quid* in exchange for his *quo*, i.e. his signed waiver. That is why Council 24 makes a good point when it states:

> . . .This was not without cost to the Council. Releasing ownership of a grievance always presents risks for the Council. It allows a grievant to make arguments which the Union may not otherwise wish to make for purposes of consistency and strategy. Few unions are willing to take such risk.

It is true that Wagner felt pressure to sign said waiver, but that is true in almost all situations in which individuals and parties agree to settle for less than they really want, but more than they might otherwise obtain if they plow ahead with their case and are ultimately rebuffed. That is why all parties to a settlement sometimes are unhappy over the very settlement terms they have agreed to.

Moreover, adoption of Wagner's claim would leave open the possibility that other individuals or parties might also try to get out of their waiver or settlement agreements on the ground that they too, like Wagner, were coerced into signing them. Absent extraordinary circumstances, such claims must be rejected lest they, too, disrupt and/or destroy the stability that comes with such waiver or settlements.

However, even assuming *arguendo*, that his waiver should be disregarded and that Wagner, in fact, had the legal right to arbitrate his grievance without Council 24's permission, Wagner's complaint still must be dismissed because, for the reasons stated above, Council 24 did not breach its duty to fairly represent him when it refused to arbitrate his termination based upon the information it had at that time and Wagner's own "confused" testimony at his unemployment compensation hearing.

Left, then, is the second question of whether Wagner must now pay Council 24's legal expenses and costs in defending itself against his complaint after he agreed in his signed Waiver of Claims and Indemnification to "indemnity [sic] and hold Council 24 harmless in any and all future claims or proceedings relating to his grievance."

In this connection, Wagner rightfully points out that legal fees ordinarily are not awarded unless an action is frivolous under either Section 814.025(3), Stats., Section 809.25(3), Stats., or under such Commission cases as ONALASKA SCHOOL DISTRICT, SUPRA, WISCONSIN DELLS, SUPRA, or MADISON METROPOLITAN SCHOOL DISTRICT, SUPRA.

However, while that is the general rule, the Commission majority in MADISON METROPOLITAN SCHOOL DISTRICT, supra, carved out a narrow exception by ruling that attorney's fees and costs can be imposed when "the

parties have agreed. . .” The Commission recently addressed this issue in DEPARTMENT OF EMPLOYMENT RELATIONS (UW HOSPITAL AND CLINICS) AND COUNCIL 24, WSEU, LOCAL 1942, AFSCME, AFL-CIO, DECISION NO. 29093-B (11/98), when it ruled that it normally lacks general statutory authority to award attorney's fees and costs to responding parties in complaint proceedings. However, the Commission in that case did not overturn its earlier decision in MADISON, supra, wherein it stated that it would award attorney's fees and costs if the parties have agreed that they can be imposed. To the contrary, the Commission there expressly quoted this part of MADISON, supra, without stating that it was being overruled.

Here, the parties have done just that via the aforementioned Waiver of Claims and Indemnification form that Wagner signed. Said waiver is aimed at preventing an employe from having his/her cake in the form of getting Council 24's approval to personally arbitrate his/her termination and then trying to eat it too by turning around and suing Council 24 after he/she has finished with the arbitration proceeding. That is why there is merit to Council 24's claim: “Fairness requires that Wagner be accountable for his actions. He cannot accept the fruits of his waiver without accepting its terms.”

While Wagner is not an attorney, he can hardly plead ignorance as to what this waiver language means since: (1), the language is so clear; (2), he has never expressed any confusion as to what it means; and (3), he signed it after he consulted with Attorney McQuillen. To disregard the plain terms of his waiver under these considerations would in effect mean that any other waiver should be disregarded only because one side is unhappy with it.

That would not be sound labor policy because it is of the utmost importance that participants in labor disputes trust each other when they deal with the myriad of issues arising in the labor-management context, including those issues involving an employe's relationship with his/her union, as unions and employes interact with each other regarding almost every conceivable employment issue, including those relating to whether a union will arbitrate an employe's grievance.

Unions thus must be able to trust that the employes they represent will adhere to any waiver or settlement agreement they sign, just as they must be able to trust employers who sign other waivers or settlement agreements. For absent that trust and enforcement of whatever terms are agreed to, a union may be reluctant to enter into any future agreements with employes relating to whether they can appeal their discharges to arbitration. Hence, if the waiver here is not enforced, that will be a clear signal to all unions that any similar kinds of waivers are no longer worth the paper they are written on.

> It also would signal something else: substantial expansion of an employe's right to sue his or her union over alleged breaches of the duty of fair representation. As matters stand today, employes can, and do, sue their unions over almost every conceivable alleged breach of this duty. That is why, some say, many unions today look over their shoulders to see if a duty of fair representation charge is forthcoming whenever they refuse to advance a member's grievance to arbitration and why grievances sometimes are advanced to arbitration even though unions know they are without merit and even though the United States Supreme Court has ruled in such cases as VACA V. SIPES, supra, that unions have very wide latitude in determining whether to arbitrate particular grievances.
>
> There is very little that unions can do in the face of such baseless complaints except for: (1), properly investigating the merits of all grievances; (2), relying on lawful, non-discriminatory reasons in determining why certain grievances should not be arbitrated; and (3), obtaining the kind of express waiver found here. Little, apparently, can be done to filter out baseless complaints even after a union has properly investigated a grievance and even after a union has decided not to arbitrate a grievance because of lawful considerations. However, something can be done when an employe has signed the kind of waiver found here because - unless they contravene some clearly-stated public policy which is not the case here - it is the function of this agency to enforce agreements that have been voluntarily agreed to, a point expressly acknowledged by the Commission in MADISON, supra, when it ruled that legal fees and costs can be imposed if the parties have so agreed.
>
> Wagner thus must be held to the terms of the Waiver of Claims and Indemnification he signed. Hence, he must reimburse Council 24 for whatever legal fees and costs it has accrued, or will accrue, in defending itself in this action.

I find these paragraphs persuasive. By this reference I incorporate each and every one of the seventeen paragraphs stricken by the majority into the body of this dissent.

Contrary to the view of the majority, I am further persuaded that as a matter of even-handed justice, stable labor relations, and consistency with the public policy of the state, the Complainant should be required to pay the fees and costs incurred by Council 24 as directed by the Examiner.

As the Examiner notes, in a case in which I participated our Commission left open a narrow doorway through which respondents could recover fees and costs when the parties so agreed. In DEPARTMENT OF EMPLOYMENT RELATIONS (UW HOSPITAL AND CLINICS) AND WSEU, LOCAL 1942, AFSCME, AFL-CIO, DEC. NO. 29093-B, 11/98) we ruled that normally we lack general statutory authority to award attorney fees and costs to respondents.

We did not, however, overturn that portion of an earlier decision MADISON METROPOLITAN SCHOOL DISTRICT, DEC. NO. 16471-D (WERC, 5/81) that allowed imposition of attorney fees and costs when the parties have so agreed. Indeed, we quoted with approval the very passage from that case in which that action was endorsed.

In the instant matter, the Examiner noted that the waiver and indemnification agreement signed by the Complainant included Complainant's promise that in accepting ownership of the grievance he would indemnify and hold Council 24 harmless ". . . in any and all future claims or proceedings relating to this grievance." The Examiner found this provision in essence constituted an agreement by the parties to allow the recovery of attorney fees and costs by the respondent-Union. Taking the Commission at its word, the Examiner thus awarded attorney fees and costs to the respondent-Union.

The majority now claims that that doorway through which the Examiner entered was left open through inadvertence and that Commission wording in DEPARTMENT OF EMPLOYMENT RELATIONS should have been clearer. Yet the increased clarity the majority now professes to have intended appears with the assistance of 20/20 hindsight. The fact is that we neither foresaw nor considered a factual situation like the instant matter arising.

Predictability of result can be a helpful impetus towards voluntary settlements of disputes. However, the blanket of absolute certainty with which the majority now seeks to smother any award of fees and costs to respondents under any circumstances may well lead to consequences neither foreseen nor welcomed by the majority.

Under the ruling of the majority, a union is provided a significant disincentive to transfer ownership of a pending grievance to the grievant, even in cases where the grievant signs a waiver and indemnification agreement as was done in the instant case. For even if the ownership transfer is made in consideration of a signed waiver and indemnification agreement, should the grievant ultimately prevail on the grievance, the majority's ruling removes any risk to the grievant for subsequently seeking unjustified recovery of his or her attorney fees through Commission channels. Under this circumstance, a union may well choose to insulate itself from the aggravation and expense of protecting itself in the subsequent action simply by retaining ownership of the grievance. And even though the grievance may be frivolous, duty of fair representation considerations may prevent the union from settlement of the matter when representing an obstinate grievant. Each party – union, employer and grievant – cannot help but feel helpless frustration over this arrangement.

Finally, the majority's action appears to me to contravene the expressed public labor relations policy of this state. Sec. 111.80(1) ". . . recognizes that there are 3 major interests involved (in labor relations and collective bargaining in state employment): that of the public, that of the employe, and that of the employer. . . . It is the policy of this state to protect and promote each of these interests with due regard to the situation and to the rights of others." The majority's ruling seems to me to frustrate this policy, for it serves to protect only the interests of an Employe-Complainant at the expense of the legal rights of the Respondent-Union - rights that were created by a voluntary agreement between the two parties!

In summary, I believe the clarification the majority projects in this matter is both unbalanced and unjust, will have a destabilizing effect on labor relations in state employment, and is contrary to state policy as to labor relations in state employment.

Sometimes narrow doorways are best left unblocked.

Dated at Madison, Wisconsin this 24th day of May, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

rb
29177-C