STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CALUMET COUNTY COURTHOUSE EMPLOYEES UNIT LOCAL 1362, AFSCME, AFL-CIO, Complainant,

vs.

CALUMET COUNTY, JOHN KEULER, ADMINISTRATIVE COORDINATOR, ELIZABETH DAVEY, PERSONNEL MANAGER, MELODY BUCHINGER, CORPORATION COUNSEL/CHILD SUPPORT DIRECTOR, Respondents.

Case 107
No. 58495
MP-3600

Decision No. 29887

Appearances:

Davis & Kuelthau, S.C., by **Attorney James R. Macy,** 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin 54903-1278, appearing on behalf of Respondents Calumet County, John Keuler, Elizabeth Davey, and Melody Buchinger.

Ms. Helen Isferding, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, Wisconsin 53717-1903, appearing on behalf of Calumet County Courthouse Employees Unit Local 1362, AFSCME, AFL-CIO.

ORDER DENYING MOTIONS TO STAY AND FINALIZE

On August 20, 1999, Arbitrator Sharon Gallagher issued an arbitration award which stated in pertinent part:

> The County violated the collective bargaining agreement when it terminated Lisa Fox. Fox shall be reinstated, without backpay but with full seniority, to her former position or a position substantially similar thereto conditioned upon her completion of assessment for alcoholism. Fox's reinstatement and continued

> employment after her return to work are also expressly conditioned upon Fox's successful completion of any recommended treatment for her problem with alcohol after her reinstatement. In addition should Fox commit any breach of confidentiality after her return to work, the County may discharge her forthwith pursuant to this Award. If Fox refuses to agree to assessment and treatment, her discharge shall stand.

On January 27, 2000, Calumet County Courthouse Employees Unit Local 1362, AFSCME, AFL-CIO, filed a complaint with the Wisconsin Employment Relations Commission alleging that Respondents Calumet County, John Keuler, Elizabeth Davey and Melody Buchinger had committed prohibited practices within the meaning of the Municipal Employment Relations Act by taking actions in response to the award which constituted a refusal to comply with the award.

On March 6, 2000, Respondents filed a Motion to Finalize with Arbitrator Gallagher asking her to determine whether the actions it had taken complied with her award.

On March 7, 2000 Respondent filed a Motion to Stay with the Wisconsin Employment Relations Commission asking that no action be taken until Arbitrator Gallagher responded to the Motion to Finalize.

By letter dated March 10, 2000, Arbitrator Gallagher advised Complainant and Respondents that because she did not retain jurisdiction over the matter, it was "inappropriate" for her to rule on Respondents' Motion to Finalize and that "In such circumstances, it is up to the Commission to rule on issues such as that raised in Mr. Macy's Motion."

By letter dated March 23, 2000, Respondents asked the Commission "to allow Arbitrator Gallagher to maintain jurisdiction so as to finalize her award" and asserted that Respondents could not defend themselves in the prohibited practice proceeding until the award is finalized. Respondents argue that "although Arbitrator Gallagher may not have expressly retained jurisdiction, she did so defacto (sic) based upon the specific and express conditions set forth in the award."

On April 14, 2000, Complainant filed written argument in opposition to the Respondents' Motions and asked that the complaint be scheduled for hearing.

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

ORDER

The Motion to Stay and the Motion to Finalize are denied.

Given under our hands and seal at the City of Madison, Wisconsin this 8th day of May, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

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

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

Calumet County

**MEMORANDUM ACCOMPANYING ORDER
DENYING MOTIONS TO STAY AND FINALIZE**

The pleadings in this matter indicate that the parties disagree over whether Respondents' actions comply with Arbitrator Gallagher's award.

When an arbitrator has retained jurisdiction over the matter in his or her award to resolve remedial disputes that may arise, either party can ask the arbitrator to exercise that retained jurisdiction. Where, as here, the arbitrator has not retained jurisdiction, the parties can nonetheless jointly agree to give the arbitrator jurisdiction to resolve a remedial dispute.

Having the arbitrator resolve the dispute is a fast and cost efficient way for the parties to proceed. It also acknowledges the reality that who better than the arbitrator can decide what the arbitrator's award requires. Thus, even where parties litigate compliance issues before us in a complaint proceeding, we may ultimately determine the matter that should be remanded to the arbitrator to resolve the issue. 1/

1/ SEE, STATE OF WISCONSIN, DEC. NO. 26959-B (WERC, 12/92), a review of an examiner's decision in which we remanded a remedial dispute to an arbitrator and held the complaint proceedings in abeyance pending issuance of a supplemental arbitration award.

> Arbitrator Vernon ordered the State to pay the grievant "all lost wages and benefits." The parties dispute the extent of the grievant's entitlement under the Vernon Award to 1990 sick leave, annual paid leave and personal holidays. The parties did not litigate this dispute before Vernon. Vernon's view on the question is not known.
>
> Under such circumstances, it cannot be determined whether the State has complied with the Vernon Award. A decision on this allegation can only be made after the Arbitrator resolves the dispute. Thus, we have remanded the dispute to Vernon for resolution.
>
> In our view, remand is consistent with the practice of the federal courts in such circumstances 1/ and is an approach we have utilized in the past. 2/ Thus, in the HOFMEISTER case cited by the Examiner, the Court remanded the parties' dispute over the meaning of a "make whole" award to the arbitrator for resolution. Thus, in MADISON SCHOOLS, the question of when the arbitrator's remedy should take effect was also remanded to the arbitrator for decision.

1/ LOCAL 100A v. JOHN HOFMEISTER AND SON, INC., 950 F.2D 1341 (7TH CIR. 1991); TEAMSTERS LOCAL NO. 579 v. B & M TRANSIT, INC., 882 F.2D 214 (7TH CIR. 1989); ETHYL CORP. v. UNITED STATES STEELWORKERS, 768 F.2D 180 (7TH CIR. 1985); UNITED STEEL WORKERS v. ENTERPRISE WHEEL AND CAR CORP., 363 U.S. 593 (1960).

2. MADISON SCHOOLS, DEC. NO. 16493-A (SCHOENFELD, 6/79) AFF'D BY OPERATION OF LAW (WERC, 3/81).

Given all of the foregoing, we believe the parties should have the opportunity of agreeing to grant Arbitrator Gallagher jurisdiction to resolve their dispute.

However, if the parties do not so agree, the Respondents' pleadings in this matter ask that we remand the matter to Arbitrator Gallagher and hold the complaint in abeyance.

We conclude that remand at this juncture is premature. Absent an evidentiary hearing and subsequent consideration of written argument (as had occurred in the STATE OF WISCONSIN case cited above), we cannot and should not decide whether the parties' compliance dispute can only be resolved by the arbitrator or whether the award is sufficiently clear in the context of a factual record to allow for a decision on the merits of the complaint regarding compliance or lack thereof. Therefore, we deny Respondents' motions.

Unless the parties advise us within ten days of this Order that they have agreed to give Arbitrator Gallagher jurisdiction over the dispute, we will assign the complaint to an examiner for hearing and decision.

Dated at Madison, Wisconsin this 8th day of May, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

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

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

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