STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

THE WISCONSIN STATE EMPLOYEES UNION (WSEU) COUNCIL 24, AFSCME, AFL-CIO and LOCAL 3394, Complainants,

vs.

STATE OF WISCONSIN (DEPARTMENT OF CORRECTIONS), Respondent.

Case 630
No. 63129
PP(S)-337

Decision No. 31240-B

Appearances:

Bruce Davey, Lawton & Cates, S.C., Attorneys at Law, 10 East Doty Street, Suite 400, P.O. Box 2965, Madison, Wisconsin 53701-2965, appearing on behalf of the Wisconsin State Employees Union (WSEU), Council 24, AFSCME, AFL-CIO and Local 3394.

David J. Vergeront, Chief Legal Counsel, Office of State Employment Relations, 345 West Washington Avenue, Madison, Wisconsin 53701, appearing on behalf of the State of Wisconsin (Department of Corrections).

ORDER ON REVIEW OF EXAMINER'S DECISION

On December 8, 2005, Examiner Stuart D. Levitan issued Findings of Fact, Conclusions of Law and Order Dismissing Complaint in the captioned matter, concluding that the State of Wisconsin (Department of Corrections) (hereafter State) had not refused to accept the terms of an arbitration award, in violation of Sec. 111.84(1)(e), Stats., by disciplining a member of the bargaining unit represented by Wisconsin State Employees Union (WSEU), AFSCME, AFL-CIO and Local 3394 (hereafter Union) for smoking in a non-smoking area, even though the same employee earlier had prevailed in an "expedited arbitration" regarding discipline for smoking in the same area. Accordingly, the Examiner dismissed the Union's complaint.

On December 27, 2005, the Union filed a timely petition with the Wisconsin Employment Relations Commission (hereafter Commission) seeking review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.84(4), Stats. The parties thereafter filed written argument in support of and in opposition to the petition. The record was closed on March 1, 2006, when the Union indicated that it did not intend to submit a reply brief.

For the reasons set forth in the Memorandum that accompanies this Order, the Commission affirms the Examiner's Order, although on somewhat different grounds.

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

ORDER

A. The Examiner's Findings of Fact 1 through 12 are affirmed.

B. The Examiner's Finding of Fact 13 is set aside and the following Finding of Fact is made:

> 13. It cannot be ascertained from the Ver Ploeg arbitration award itself or from the surrounding circumstances whether or not the award resolved any or all of the issues that are the subject of the Union's pending grievances regarding the discipline Luder received on January 14, 2003.

C. The Examiner's Findings of Fact 14 and 15 are affirmed.

D. The Examiner's Conclusion of Law 1 is set aside and the following Conclusion of Law is made:

> 1. Because it cannot be ascertained from the September 25, 2001 Ver Ploeg arbitration award or from the surrounding circumstances whether the award resolved any or all of the issues that are the subject of the Union's pending grievances regarding the discipline Luder received on January 14, 2003, that award is not conclusive as to the Union's pending grievances regarding Luder's January 14, 2003 discipline.

E. The Examiner's Conclusions of Law 2, 3, and 4 are affirmed.

F. The Examiner's Order dismissing the complaint is affirmed.

Given under our hands and seal at the City of Madison, Wisconsin, this 26th day of May, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

Commissioner Paul Gordon did not participate.

MEMORANDUM ACCOMPANYING ORDER ON REVIEW OF EXAMINER'S DECISION

Summary of the Facts

As indicated in the foregoing Order, the Commission has affirmed most of the Examiner's Findings of Fact, which are summarized as follows.

Since 1986, the State has employed Roger Luder as a correctional officer at the Columbia Correctional Institute in Portage. As such he is and has been a member of the bargaining unit represented by the Union. At all material times Luder has worked in Housing Unit 6, a 500-bed unit for inmates requiring special management.

At all relevant times, the Union and the State have operated under a negotiated rest break agreement which contains the following language:

> 1. Staff may drink coffee or similar beverages on their posts. Staff may smoke on their post, assuming it is not a "no smoking" area. Supervisors do have the discretion to dictate, in writing, when and where this behavior is appropriate.
>
> . . .
>
> 4. This agreement covers any and all AFSMCE Local 3394 employees at Columbia Correctional Institute now and in the future. Changes to this agreement can be made by mutual consent of the parties.

Luder's job assignment, like some others within the bargaining unit, does not permit him to leave his post even during lunch or breaks. Since approximately 1987, Luder has smoked at the officer's desk in the dayroom of Unit 6, his post, while on duty. Until approximately January 2000, the State had no policy forbidding smoking in Luder's work locations. However, effective January 2000, the facility warden promulgated a policy permitting smoking only in "designated areas," which did not include the officer's desk in the dayroom of Unit 6. Nonetheless Luder continued to smoke several times per shift at his post.

On August 30, 2000, the State suspended Luder for one day for smoking a cigarette during his rest break at the officer's desk in the dayroom of housing unit 6 on July 21, 2000. Luder grieved the suspension and continued to smoke while the grievance was pending. On October 5, 2000, Luder was suspended for three days for smoking at his post during a rest break on September 22. Again, Luder grieved. Luder's grievances contended that the January 2000 policy allowing smoking only in designated areas violated the negotiated rest break agreement and discriminated against personnel who, like Luder, were not allowed to leave their posts for breaks.

The collective bargaining agreement between the Union and the State contains two "special arbitration procedures" in addition to a regular arbitration procedure. The preamble to both procedures states the following:

> **4/12/1** In the interest of achieving more efficient handling of routine grievances, including grievances concerning minor discipline, the parties agree to the following special arbitration procedures. These procedures are intended to replace the procedure in Subsection 4/3/1-7 for the resolution of non-precedential grievances as set forth below. If either of the parties believes that a particular case is precedential in nature and therefore not properly handled through these special procedures, that case will be processed through the full arbitration procedure in subsection 4/3/1-7. Cases decided by these methods of dispute resolution shall not be used as precedent in any other proceeding.

The Union and the State agreed to submit both of Luder's year 2000 grievances to the contractual "Expedited" procedure. That procedure limits each party to "a preliminary introduction, a short reiteration of facts, and a brief oral argument. No briefs or transcripts shall be made. If witnesses are used to present facts, there will be no more than two (2) per side," including the grievant if called to testify. The procedure requires the arbitrator to give a bench "or other" decision within five calendars days, denying, upholding, or modifying the action of the employer. Whether or not the decision is in writing, "All decisions will be final and binding."

In Luder's case, the selected arbitrator (Ver Ploeg) upheld both grievances and ordered Luder to be made whole. The decision was not in writing and the record does not reflect precisely what underlying issues or arguments were presented to the arbitrator or what conclusions she reached on any issue or argument. In accordance with the arbitration award, the State fully compensated Luder for his lost wages owing to his suspensions.

After the Ver Ploeg award, Luder continued to smoke at his post on a daily basis, although at some point he switched from cigarettes to cigars. In May 2002, the facility management established a Smoking Policy Review Committee, of which Luder was a member. The committee met three or four times over the next 18 to 24 months, but ultimately made no changes in the smoking policy.

On January 14, 2003, the facility warden issued Luder an official written reprimand for smoking a cigar at his post on December 3, 2002. Also on January 14, 2003, the warden issued Luder a one-day suspension for smoking a cigar at his post on December 13, 2002. Luder grieved both disciplinary actions and, at the time of the hearing in the instant case, they had been submitted to arbitration which was still pending.

The Examiner's Decision and the Petition for Review

The Examiner discussed three prohibited practice allegations in his decision. His central conclusion was that the State did not refuse to accept the terms of the Ver Ploeg arbitration award, because he found "material discrepancies of fact" between the grievances that Ver Ploeg arbitrated and Luder's current grievances. Hence he dismissed the alleged violation of Sec. 111.84(1)(e), Stats. The Union's petition for review challenges the Examiner's conclusion of "material discrepancies of fact" and urges the Commission to conclude that the circumstances between the 2000 grievances and the 2003 grievances are sufficiently identical that the Ver Ploeg award should preclude the State from disciplining Luder for smoking at his post.

The Examiner also dismissed two allegations that the Union had raised in its complaint but that the Union had not argued in its briefs to the Examiner. First, he held that the record did not establish that in disciplining Luder the State had threatened any reprisal or promised any benefit that would constitute an independent violation of Sec. 111.84(1)(a), Stats. Second, he dismissed the Union's allegation that the State had refused to bargain over its smoking policy, because he found no evidence to indicate that the Union had ever requested such bargaining. Accordingly, he dismissed the alleged violation of Sec. 111.84(1)(d), Stats. The Union's Petition for Review asserted that it was challenging each of the foregoing conclusions of the Examiner. However, neither the Petition itself nor the Union's written arguments submitted in support of the Petition for Review offer any factual or legal arguments to support overturning the Examiner's decision in these respects. Absent a developed challenge by the Union, our independent review of the record reveals no error in the Examiner's dismissal of these allegations, and we affirm his Order in these respects without further discussion.

The Ver Ploeg Award as Conclusive of Luder's 2003 Grievances

Section 111.84(1)(e), Stats., provides in pertinent part that the State commits an unfair labor practice if it does not "accept the terms of an arbitration award, where previously the parties have agreed to accept such award as final and binding upon them." It is clear from the language of this provision that its application is dependent upon whether the parties themselves have "agreed" to accept an award as "final and binding."

Historically, the Commission has viewed the Section (1)(e) requirement, and its municipal and private sector analogs, as taking two forms. First, an employer must comply with the specific remedy set forth in a specific arbitration award. SEE, E.G., STATE OF WISCONSIN, DEC. NO. 14823-C (WERC, 10/77) (holding that the State violated the law by granting the relief only to the specific grievants when the award by its terms covered all similarly situated employees). Second, taking guidance from the concepts of claim preclusion (res judicata) and issue preclusion (collateral estoppel), an employer must comply with the resolution arbitrators have reached regarding the issues underlying an arbitration award, when

the same issues arise subsequently between the same parties and no material facts have changed. SEE, E.G., WISCONSIN PUBLIC SERVICE CORPORATION, DEC. NO. 11954-D (WERC, 5/74). In STATE OF WISCONSIN, DEC. NO. 20910-B (WERC, 3/85), the Commission articulated the distinction between these two discrete violations, ultimately, however, ruling only on the first one:

> It should be emphasized that our role in this case is merely to ascertain whether that [sic] the State has complied with the requirements of the remedial language of the Fleischli award; our role is not to determine whether that award is worthy of res judicata effect when and if a factually parallel grievance arises outside of Highway District No. 4. Thus, we are not deciding here whether the WERC would order the State to give res judicata effect to the award in a complaint case in which the Union alleges that the State is violating Sec. 111.84(1)(e), Stats., by refusing to apply the contract as interpreted in the Fleischli award in a future grievance arising outside District 4 which grievance is otherwise not materially different from the grievance dealt with in the Fleischli award. [citing WISCONSIN PUBLIC SERVICE CORP. as authority for that type of violation]. All we are concluding is that – contrary to the Examiner's conclusion – the State has met the requirements of the specific remedy ordered by Arbitrator Fleischli ... .

It is only the second type of Section (1)(e) violation, i.e., a violation resting upon preclusion principles, that precipitates an inquiry into the similarity of "material facts" between the first and the subsequent grievances.

In this case, the Union is not contending that the State has failed to comply with the specific remedy ordered by Ver Ploeg in Luder's year 2000 expedited grievance arbitration. That award, as far as this record reveals, was simply that the grievance was "upheld," and that the employer must "make whole" the grievant. The State evidently expunged that discipline and reimbursed Luder for any wages lost during the period of suspension. Ver Ploeg did not order the State to permit Luder to smoke at his station nor to "cease and desist" disciplining Luder for smoking at his work station. Accordingly, it is clear that the State has complied with the specific elements of the Ver Ploeg award and hence has not violated the first prong of the Section (1)(e) requirements.

Instead, the Union's claim rests upon the second branch of Commission case law under Section (1)(e): that the Ver Ploeg award precludes the State from requiring the Union to relitigate in subsequent situations whether Luder may be disciplined for smoking at his work station. The Union contends that this issue has already been decided by the Ver Ploeg award, given the substantive similarity in the facts.

The State's principal defense is that the Expedited Arbitration procedure in the contract was designed to permit quick and efficient resolution of relatively minor grievances in exchange for eliminating any "precedential" application of those awards. As the State notes,

the non-precedential nature of the awards is mentioned repeatedly in the Expedited Arbitration language in the collective bargaining agreement. In the State's view, the contractual "non-precedential" language limits the meaning of the "final and binding" language regarding Expedited awards. In effect the State argues that the parties have agreed that the second type of Section (1)(e) violation is not available for Expedited awards, i.e., that such awards are not preclusive of issues or claims in any subsequently arising situation.

The Union counters that the term "precedent" in general legal parlance refers to the use of a previous decision as authority in a subsequent case and, as such, is a term of art that is distinct from the terminology relating to claim or issue preclusion. The Union implicitly contends that, by agreeing that Expedited awards are "final and binding," the parties have incorporated both prongs of the Commission's case law under Section (1)(e), including the concept of claim and issue preclusion.

It is apparent, therefore, that both parties in this case rely upon their respective interpretations of the contractual terms "precedential" and "final and binding." Neither party, however, has offered bargaining history or other evidence that would assist us in determining what the parties intended when they negotiated those terms. While the term "precedential" may be coterminous with "legal authority" in general jurisprudence, the term arguably has a broader meaning in common labor relations parlance, given its ubiquity in grievance settlements, various expedited arbitration procedures, and other forms of pragmatic dispute resolution designed to avoid protracted arbitration proceedings.[1] Both parties do, however, cite cases in support of their respective interpretations.

The Union cites a complaint case arising under Section (1)(e), STATE OF WISCONSIN, DEC. NO. 27510-A (SCHIAVONI, 11/93), AFF'D BY OPERATION OF LAW, DEC. NO. 27510-B (WERC, 1/94). In that case, the examiner concluded that the State had failed to comply with an arbitration award that had been issued under one of the Umpire procedure, which, like the Expedited procedure, is one of the "final and binding" but "non-precedential" alternatives to standard arbitration in the parties' collective bargaining agreement. Her analysis, however, did not distinguish the two forms such a violation could take under Commission case law and to that extent is unhelpful here. In that case, Arbitrator Kerkman concluded that the State had violated the contract by changing the grievant's schedule for a contractually invalid reason. The arbitrator produced a written decision, including a few paragraphs of reasoning, and ordered the grievant "to be restored to a Monday through Friday schedule commencing at 6:00 a.m. and ending at 2:00 p.m." The State complied with this directive for a period of time, but then, essentially for the same reasons it offered the first time, once again changed the grievant's schedule again. The Commission examiner rejected the State's argument that the first award, being non-precedential, was limited to the first situation. She held that the first

[1] Indeed, the concepts of claim and issue preclusion, as well as "precedent" and "stare decisis" are often applied differently in labor arbitration than in general litigation. SEE GENERALLY, BORNSTEIN, GOSLINE, AND GREENBAUM, EDS., LABOR AND EMPLOYMENT ARBITRATION, SECS. 9.03 THROUGH 9.07 (MATTHEW BENDER, 2005).

award continued to bind the State in the second situation, since the case involved the same grievant and no material circumstances had changed. Given the examiner's emphasis on the identity of the grievant – whom she erroneously referred to as the same "party" as in the first arbitration – it seems possible that the Examiner would have reached a different conclusion if the identical issue had arisen with a different employee.

One problem with the Union's reliance on the Schiavoni decision, and with the Union's general argument in the instant case, is that both seem to rest upon the involvement of the same grievant in the earlier and the later cases, without explaining precisely why that should matter. Under the preclusion prong of the Section (1)(e) analysis, as set forth in WISCONSIN PUBLIC SERVICE CORPORATION, the award would be binding whether or not it involved in the same grievant. Without dissecting the differences between claim preclusion and issue preclusion, we note that issue preclusion is generally the more apposite concept when considering the effect of an arbitration award in a subsequent grievance.[2] For issue preclusion purposes (and thus for the second type of Section (1)(e) violation), it does not matter whether the same grievant is involved in the subsequent arbitration. What matters, as the Commission held in its seminal decision in WISCONSIN PUBLIC SERVICE CORPORATION, SUPRA, is whether the precise *issue* has been resolved and subsequent circumstances have not called the resolution into question.

Since the Schiavoni decision seems to rest to some degree upon the fact that the subsequent grievance involved the same employee, and since the prior award in that case had been in writing, clearly articulated its basis (i.e., the issue decided) and included a prospective remedy, the Schiavoni decision does not provide solid guidance about what the terms "precedential" and "final and binding" mean in a case arising out of an one or two-word award under the Expedited procedure that does not contain a prospective remedial component. Would Schiavoni have held the State in violation of Section (1)(e) if the State had changed a different but similarly situated employee's schedule for the same reasons that the Kerkman award had invalidated?

By the same token, the State also cites a case in support of its view of the contractual terms, i.e., a 1997 arbitration award from Arbitrator Grenig. The underlying grievances challenged the State for refusing to reimburse corrections officers who were assigned to trips during the first shift, returned to the institution too late for a hot cafeteria meal which was otherwise available to such officers, and were offered a cold bag supper instead. The officers sought meal reimbursement rather than the cold bag supper. In support of the grievances, the Union introduced an award issued under the Umpire system. The instant record does not reveal

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[2] Claim preclusion generally applies to situations where the same temporal events (or "transaction") give rise to more than one cause of action. Claim preclusion is related to the "merger doctrine," requiring that all claims arising out of a single transaction be combined; accordingly, such claims will be precluded whether or not they were actually litigated. See STATE OF WISCONSIN (DER) (METHU), DEC. NO. 30808-A (WERC, 1/06) at 8-9. Issue preclusion, on the other hand, applies to subsequent events or transactions that implicate issues already settled in previous litigation. Unlike claim preclusion, issue preclusion does not require the same parties, but does require that the issue actually have been litigated in the prior proceeding and have been necessary to the outcome. See discussion in WAUPACA COUNTY, DEC. NO. 30882 (WERC, 4/04).

whether the 1997 Umpire award was in writing, whether it described the issues being resolved, whether it concerned similar facts or issues to those before Arbitrator Grenig, or whether it included any prospective relief. Arbitrator Grenig stated:

> Nonprecedential umpire decisions or grievance settlements cannot be relied upon here in determining whether the Employer has violated the contract. Umpire decisions and nonprecedential grievance settlements are binding on the parties with respect to the specific claim involved. However, the parties have agreed that they will not be used as authority in other proceedings.

Unlike the Schiavoni decision, the Grenig award is a direct interpretation of the contractual language regarding the meaning of "precedential." As such it is relatively more persuasive than the Schiavoni complaint decision. If it were clear that the Umpire decision that had been submitted to Arbitrator Grenig involved the same issues and material facts as the grievance Grenig was reviewing, and if it were clear that the Union had argued that "final and binding" was intended to encompass issue preclusion with respect to Umpire awards, we might find the Grenig award dispositive as to the meaning of the parties' contractual language. Without this information, however, the award's conclusory discussion of the term "non-precedential" is not sufficiently convincing in and of itself to hold that the State's interpretation is clearly correct.

As noted at the outset, a violation of Section (1)(e) depends by its very terms upon what effect the parties have agreed to give arbitration awards under their collective bargaining agreements. Thus the most direct way to decide whether the State has violated that section would be to determine what the terms "final and binding" and "precedential" mean in the parties' Expedited Arbitration procedure. A decision based upon the meaning of the parties' arbitration agreement would provide clear guidance for handling future cases. However, given the foregoing discussion, we are reluctant to render such a far-reaching interpretation based upon the fragile evidentiary basis contained in this record. Instead we will assume, *arguendo,* that the parties intended an unwritten Expedited Award such as the Ver Ploeg award to carry the same preclusive effect as an award rendered under the full arbitration procedure and that the second prong of the Section (1)(e) requirements apply to such awards.

Assuming, then, that the Ver Ploeg award precludes relitigation of the issues decided therein unless material circumstances have changed, the first question is what issues were actually resolved and necessary to the outcome. This creates obvious difficulties for Expedited awards, especially if, as here, no written reasoning accompanies the award. As the Examiner noted, the instant situation is not one in which all of the issues in Luder's current grievances were necessarily or inherently decided in the Ver Ploeg award. In a prototypical "just cause" arbitration, several possible grounds could be argued for overturning the discipline, including procedural irregularities that may pertain in one case but not another (including, without limitation, lack of notice regarding the rule, lack of clarity in the rule, failure to provide sufficient prior warning regarding consequences, disparate treatment compared with others who have violated the rule, or lack of progressive discipline).

Here, the Union claims that Ver Ploeg held that the employer could not apply its no-smoking rule to Luder, because to do so discriminated against security officers, like Luder, who are required to remain at their posts during their breaks. Given its view of what the scope of the Ver Ploeg award, the Union challenges the Examiner's conclusion that material circumstances had changed. Specifically, the Examiner concluded that (1) smoking a cigar as opposed to a cigarette, (2) Luder's service on an intervening but inconclusive smoking policy committee, and/or (3) the amount of discipline imposed in the 2003 cases were materially different facts than had pertained in the Ver Ploeg arbitration. If, however, as the Union claims, Ver Ploeg had (or must have) held that Luder had a right to smoke during his break because he was required to remain at his station, then none of the facts cited by the Examiner reasonably could be viewed as *material* to the outcome. Such a categorical holding would not likely have been different because of the degree of discipline, smoking a cigar rather than a cigarette, or Luder having participated in an unsuccessful bilateral effort to change the policy. If that had been Ver Ploeg's award, and assuming "final and binding" includes issue preclusion under the Expedited procedure, we would agree that the State would be refusing to accept the terms of the Ver Ploeg award if the State re-disciplined Luder based upon a policy that the arbitrator had invalidated.

But did the Ver Ploeg award necessarily decide the broad issue as the Union contends? The Union argues that the award could not have rested upon an "excessive discipline" ground or else the arbitrator would have reduced the discipline. That argument is valid as far as it goes, but fails to account for the several other possible grounds on which the arbitrator could have found a lack of just cause, such as lack of sufficient prior notice or disparate treatment compared with other employees who had violated the no-smoking rule or other rules.

A stronger argument lies in what this record reveals as to the arguments the Union made to the arbitrator in connection with Luder's year 2000 grievances. The record contains evidence in the form of the grievance documents that were submitted to Arbitrator Ver Ploeg indicating that the basis of the first Luder grievances was that the January 2000 policy allowing smoking only in designated areas, which violated the negotiated rest break agreement and discriminated against personnel who, like Luder, were not allowed to leave their posts for breaks. Nothing in the record suggests that the Union presented any other issue or argument to support overturning Luder's discipline in 2000. The record does not reveal precisely what was actually argued to the arbitrator at the time of the arbitration or what she may have said to support her bench award. The record also shows that someone at some time wrote the word "discriminatory" on the Union's grievance tracking form for one of Luder's two year 2000 grievances, in the section of the form dealing with the disposition of the grievance.

Is this evidence sufficient to conclude that the award resolved the broad issue of Luder's right to smoke at his post during breaks and therefore that the State may not discipline Luder for doing so without being found in violation of Sec. 111.84(1)(e), Stats.? Or does it remain reasonably plausible on this record that the arbitrator may have decided the 2000 grievances on some ground other than Luder's generalized right to smoke, a ground that may not pertain to the 2003 grievances?

This extremely close question ultimately must be answered on the basis of the burden of proof. As always in a complaint proceeding, the complaining party (here, the Union) bears the burden of establishing the requisite elements of the claims by a clear and satisfactory preponderance of the evidence. See Secs. 111.07(3) and 111.84(4), Stats. Similarly, the party asserting issue preclusion bears a relatively heavy burden to show that a particular issue was actually decided in a previous case. WAUPACA COUNTY, DEC. NO. 30822 (WERC, 4/04), and cases cited therein. As the Commission noted in WAUPACA COUNTY, the jurisprudence regarding issue preclusion cautions that the doctrine is "equitable" and should not be applied rigidly to foreclose a party from an opportunity to litigate a claim. Therefore it is up to the Union to convince us that the Ver Ploeg award actually determined that the State could not prohibit Luder from smoking (unless material circumstances changed) and, by the same token, that she did not rule for Luder on some other more limited ground.

Since the Ver Ploeg award *could* have been based upon more than one ground and the reasoning is not provided, and since we have no other clear evidence about what the arbitrator stated in her award, we must look to what issues were presented to her. The record is clear that Luder's year 2000 grievances referred only to the general issue of his right to smoke at his post on break, but we would have to speculate that the Union did not make other arguments to the arbitrator and that the arbitrator's award was not influenced by other "just cause" factors. It seems to us that such speculation is not sufficient to meet the Union's burden of proof, particularly where the equitable doctrine of issue preclusion is in play.

Accordingly, we hold that the State has not refused to accept an arbitration award and hence has not violated Sec. 111.84(1)(e), Stats., and we affirm the Examiner's dismissal of the complaint.

Dated at Madison, Wisconsin, this 26th day of May, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

Commissioner Paul Gordon did not participate.

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