STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CITY OF HORICON PUBLIC WORKS, LOCAL 1323-H, AFSCME, AFL-CIO WISCONSIN COUNCIL 40, Complainant,

vs.

CITY OF HORICON, Respondent.

Case 33
No. 64729
MP-4150

Decision No. 31389-A

Appearances:

Hawks, Quindel, Ehlke & Perry, S.C.[1] by **Attorney Bruce F. Ehlke,** 222 West Washington Ave, Suite 705, Madison Wisconsin 53701-2155, appearing on behalf of Complainant

Lindner & Marsack, S.C, by **Attorney Alan M. Levy**, 411 East Wisconsin Avenue, Milwaukee, Wisconsin 53202, appearing on behalf of Respondent

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On April 29, 2005, City of Horicon Public Works, Local 1322-H AFSCME, AFL-CIO, Wisconsin Council 40, hereafter "Complainant," filed a complaint with the Wisconsin Employment Relations Commission in which it alleged that City of Horicon, hereafter referred to as "Respondent," committed prohibited practices in violation of Section 111.70(3)(a)5 and, derivatively, Section 111.70(3)(a)1, Stats. The complaint arises from post-award proceedings following an Arbitration Award by Arbitrator Sharon Gallagher who ordered that a former employee of Respondent, Lee Kolb, be reinstated, his discharge expunged, and that he be made whole for all lost wages. Respondent unsuccessfully sought to have the Circuit Court vacate the award. The Circuit Court confirmed the award. Shortly thereafter, a dispute arose between Complainant and Respondent because Respondent allegedly failed to reinstate Mr. Kolb pursuant to the award. Complainant filed a complaint in that matter before the

[1] Formerly, Shnediman, Hawks & Ehlke, S.C.

WERC alleging that Respondent had committed a prohibited practice in failing to comply with the award. The WERC assigned Examiner Dennis McGilligan to hear the matter. The matter was resolved during the hearing after mediation by Examiner McGilligan. The parties entered into a consent agreement on the record before Examiner McGilligan. The parties reduced the consent agreement to writing and, thereupon, Examiner McGilligan issued an order dismissing the complaint before him based on the consent agreement. The consent agreement required that Respondent pay back-pay to Mr. Kolb, set a date when he would have been laid off, waives reinstatement rights, and directed that Respondent make appropriate contributions to the Wisconsin Retirement System, herein WRS. Thereafter, the instant dispute arose. Complaint contends that Respondent did not appropriately report Mr. Kolb's earnings to the Department of Employee Trust Funds, herein ETF, and, consequently failed to make the appropriate contribution to WRS. The Commission appointed Stanley H. Michelstetter II, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Secs. 111.07(5) and 111.70(4)(a), Stats. The Examiner held a hearing in the matter on August 31, 2005, in Horicon, Wisconsin. The Examiner closed the record as of December 8, 2005, upon the receipt of the parties' briefs, the last of which was received December 8, 2005.

FINDINGS OF FACT

1. The Respondent, City of Horicon, is a "municipal employer" with main offices at 404 East Lake Street, in the City of Horicon, Wisconsin. It operates a water utility. Mr. David J. Pasewald is the Clerk-Treasurer of Respondent and was responsible for properly making Respondent's retirement reports and payments to ETF.

2. The Complainant, AFSCME, Local 132-H, AFSCME, AFL-CIO, Wisconsin Council 40, is a "labor organization" with offices at 8033 Excelsior Drive, in the City of Madison, Wisconsin. Complainant is the collective bargaining representative of certain of the Respondent's employees at Respondent's water utility, including at the material times, John Kolb, Jr. Mr. Lee Gierke was employed by Complainant as a staff representative and represented Complainant in collective bargaining with Respondent.

3. Respondent and Complainant are party to a collective bargaining agreement which provided at all material times for a grievance procedure culminating in final and binding arbitration.

4. Respondent hired Mr. Kolb in April, 1998, as an operator in the water utility. Mr. Kolb had had prior service with other employers subject to the Wisconsin Retirement System, herein WRS, of slightly less than 20 years of service. Mr. Kolb worked continuously in positions with Respondent at the water utility until Respondent discharged him effective April 7, 2000.

5. Complainant filed a grievance alleging that the discharge of Mr. Kolb was not for just cause in violation of the parties' collective bargaining agreement. The grievance was

properly processed to the arbitration stage and the parties submitted the dispute to arbitration before Arbitrator Sharon Gallagher. Arbitrator Gallagher issued an arbitration award dated December 6, 2000, in which she found that Respondent violated the parties' collective bargaining agreement by having discharged Mr. Kolb without just cause. She ordered Respondent to: ". . . expunge Kolb's personnel record of any reference to the discharge and to reinstate him with full back pay and benefits from the effective date of his termination, April 7, 2000 forward." Respondent did not raise an independent issue before Arbitrator Gallagher concerning the elimination of the

6. Respondent did not reinstated Mr. Kolb or otherwise comply with the arbitration award. Respondent and Complainant filed cross motions under Sec. 788.10, Stats, in the Circuit Court for Dodge County with respect to the arbitration award. Respondent sought to have the award vacated and Complainant sought an order affirming the award. The Court denied Respondent's motion to vacate by decision and order dated May 14, 2001. The Court granted Complainant's motion to confirm by decision and order dated May 22, 2001. Respondent did not raise an independent issue before Arbitrator Gallagher concerning the elimination of the position previously occupied by Mr. Kolb for reasons unrelated to his discharge.

7. Respondent, thereafter, refused to reinstate Mr. Kolb to a position with it, or to pay the back pay and benefits ordered by Arbitrator Gallagher's award. Respondent did allow Mr. Kolb to work as a part-time seasonal employee for a short period from June 18, 2001, until October 18, 2001. Respondent did not pay any back pay and benefits until after the developments in Findings of Fact 8 through 11.

8. Complainant filed a complaint with the WERC on August 31, 2001, alleging, among other things, that Respondent committed a prohibited practice in violation of Section 111.70(3)(a)(1) and (5), Stats. by engaging in the actions stated in Finding of Fact 7, above.

9. The WERC appointed Dennis McGilligan as the Hearing Examiner to conduct the hearing and make an administrative law decision with respect to the complaint specified in Finding of Fact 8. Examiner McGilligan held a hearing as to the complaint on March 13, 2002, during the course of which the parties consented to have the examiner mediate the dispute. Examiner McGilligan met separately with each of the parties until the matter was resolved. Examiner McGilligan caused the parties to meet jointly with him before the court reporter when they reached an agreement on all of the issues. The parties had a discussion on the record before Examiner McGilligan in which they discussed the outline of their mutual settlement agreement and in which they agreed to later reduce the agreement as thus stated to writing. The parties agreed that once the settlement was reduced to writing, signed by the parties, and forwarded to Examiner McGilligan that Examiner McGilligan could dismiss the complaint in the case before him. The parties did not reach a final agreement at that hearing as to the specific amounts which Respondent was required to pay to the Wisconsin Retirement System with respect to the back pay specified in the agreement. Neither party determined

during the negotiations what the specific contribution would be. Attorney Alan Levy, representing the Respondent in this matter stated as to pension and tax contributions before Examiner McGilligan:

> ". . . I should mention I suppose of the payment of $30,100, the City will be paying, as you said, additional amounts appropriate for tax and retirement purposes, and we'll withhold from the check normal payroll taxes"

10. Thereafter, the parties wrote a written agreement with respect to the matters in dispute which stated in relevant part:

CONSENT DECREE

At hearing on March 13, 2002, in the Horicon City Hall, Horicon, Wisconsin, the parties agreed to the following agreement.

1. The City of Horicon will pay to John Kolb $30,100.00 in full and final payment of all back wages owed to him.

2. In addition, the City of Horicon will make the appropriate contributions to the Wisconsin Retirement System and the appropriate FICA and other payroll contributions that might be required.

3. The City of Horicon will hold Mr. Kolb harmless in the event that the Job Service Division, Department of Workforce Development, were to seek reimbursement from him of any unemployment compensation benefits that may have been paid to him or currently are payable to him based on his employment with the City. In other words, if the Department of Workforce Development seeks the reimbursement of any such unemployment compensation payments, the City will take the necessary steps to ensure that Mr. Kolb does not have to make that reimbursement.

4. The record/Consent Decree shall reflect that Mr. Kolb's employment was terminated as a result of the layoff because his position was eliminated effective January 16, 2002, and that the wage rate that will be calculated will be based on the $30,100.00 being divided by the number of hours required to get him to that point in time, after taking into account the hours he worked and for which he's already been credited as a seasonal employee during 2001.

5. In consideration of the above, John Kolb waives any reinstatement rights he may have under the collective bargaining agreement between the City of Horicon and the local union, and also he will waive any right to

grieve – file a grievance relating to the matters that are the subject of the consent decree, and finally it is agreed that this complaint case will be resolved by the issuance of a Consent Decree by the Examiner. As part of the aforesaid waiver, Mr. Kolb waives any recall rights under the contract.

6. The City of Horicon will hold the Union and the employee, Mr. Kolb, harmless for purposes of any claims for repayment to the unemployment compensation agency as a result of this settlement.

7. The parties also agree that not only will there be a consent order granted based on this agreement but that nobody will appeal that order in any way. In other words, the Consent Decree will be full and final settlement of all matters raised by the filing of the complaint in the following matter; CITY OF HORICON PUBLIC WORKS, LOCAL 1323H, AFSCME, AFL-CIO, WISCONSIN COUNCIL 40 VS. CITY OF HORICON, Case 30, No. 60319, MP-3759.

8. The Union agrees that there's no basis for a grievance because the wage rate allocated to Mr. Kolb under this arrangement may not be the wage rate that has been negotiated in the contract. This wage rate will be for settlement purposes only for this case and set no other precedent.

9. The City of Horicon will, at the request of Mr. Kolb, furnish a letter of recommendation confirming his employment during the years he served the City and confirming that his employment was terminated as a result of a layoff that was necessary because the position to which he was assigned was eliminated.

10. Regarding the City of Horicon's payment of $30,100.00, the City will be paying the additional amounts appropriate for tax and retirement purposes, and will withhold from the check normal payroll taxes.

11. The City of Horicon will issue a check to Mr. Kolb within one week of receiving the Order and Decree in this matter.

Based on all of the above, the Examiner will issue and Order dismissing the complaint.

11. Examiner McGilligan issued WERC Dec. No. 30261-A dated March 25, 2002, incorporating the settlement agreement and stating that the complaint before him was being dismissed because the "Examiner being satisfied" that it should be dismissed.

12. Thereafter, Respondent promptly paid Mr. Kolb the $30,100 specified as back pay in the settlement agreement. Mr. Pasewsald acting in good faith on behalf of Respondent calculated proposed WRS pension contribution for the back pay period for Mr. Kolb and submitted a "late" contribution report to the Wisconsin Department of Trust Funds, herein ETF. However, the report did not comply with ETF requirements as specified in Chapter 13 of ETF's Administration Manual and ETF statutes and rules. Ultimately, Mr. Pasewald submitted a copy of Examiner McGilligan's order of dismissal together with the consent agreement of the parties contained therein.

13. ETF issued a letter dated March 18, 2004, to Mr. Pasewald, with a copy to Mr. Kolb, in which it stated in relevant part:

> ". . . . The settlement agreement, or *Consent Decree* . . . .does not meet the requirement of ETF 20.12, and the payment made to Mr. Kolb is not earnings for WRS purposes. In order for Mr. Kolb's $30,100 payment to be considered WRS earnings, the payment must have been made as part of a compromise settlement that meets all the specific conditions enumerated within ETF 20.12(4). Specifically, the agreement does not meet section ETF 20.12(4)(h), among others, that requires that the following conditions be met if the remedy includes payment of wages for a period following a disputed termination:
>
> 1. The employer must rescind the termination date, and, if the employee is not reinstated, specify a date on which the employee-employer relationship terminated.
>
> 2. The employer must pay the employee all wages from the rescinded termination date through the date the employee returns to work or the new termination date.
>
> In the *Consent Decree,* the agreement specified a later termination or layoff date, however, Mr. Kolb was not paid all wages from the rescinded termination date through the new termination date. Therefore, the payment was not consistent ". . . with previous payment for hours of service rendered by the employee" as required by Section 40.02(22)(b), Wis. Stats. The $30,100 was significantly less than what Mr. Kolb would have earned with the City during that period had he not been discharged. . . . . "

14. Mr. Kolb, by his Attorney, Bruce Ehlke, filed an appeal with ETF by letter dated May 28, 2004. Respondent was not given notice that the appeal was filed.

15. ETF by Director Betsy Woodward, Director Employer Administration Bureau, issued a written ruling on the appeal dated July 13, 2004, which provided in relevant part:

" . . . . My determination that the *Consent Decree* fails to meet the conditions of Administrative Code ETF 20.12 and that the $30,100 payment made to you as a result of the agreement is not WRS earnings, is based upon the following:

- Wisconsin Statute §40.02 (22)(b) 9., excludes from consideration as WRS earnings any amounts paid as a result of a "compromise settlement" unless the conditions specified within ETF 20.12 are met. ETF 20.12 (2) defines compromise settlement, in part, as a written, binding agreement between an employer and employee to settle a wage dispute or involuntary termination and defines a compromise settlement's "effective date" as the date an order is issued or a compromise is considered final. Your decision to forego the WERC prohibitive (sic) practice hearing in lieu of a compromise settlement made the *Consent Decree* the "compromise settlement" with the latest "effective date," therefore, this determination is based solely on its language.

- ETF 20.12 (3) specifies that the department may decline to act on a compromise settlement that does not contain all information required by the rule. The *Consent Decree* lacks essential elements required by ETF 20.12.

- ETF 20.12 (4) (d) requires that the compromise settlement specify the wages to be paid for each annual earnings period as well as the associated hours that would have been rendered if not for the disputed discharge. The *Consent Decree* fails to provide this required information.

- ETF 20.12 (4) (h) requires that the termination date be rescinded or changed to a later termination date and that the employer pay <u>all</u> back wages from the rescinded termination date through the date of reinstatement or the new termination date. While the *Consent Decree* indicates a new termination date it does not pay full back wages from the rescinded termination date through the new termination date. The $30,100 payment is not consistent ". . . with previous payment for hours of service rendered by the employee" as required by section 40.02 (22)(b) 9., Wis. Stats., when compared with your previously reported WRS hours and earnings. For example, prior to your April 7, 2000 discharge the City reported WRS earnings at a rate of $14.20 per hour for 1998; $14.99 per hour for 1999; and $15.63 per hour at the time of your discharge in 2000. The $30,100 payment is significantly less than what you would have earned with the City during the period from the rescinded termination date through the new termination date, amounting to approximately $10.21 per hour.

> As a result of the factors enumerated above, the Department considers the $30,100 payment to be a damage award, meant to resolve your dispute with the City as well as secure your waiver of collective bargaining rights, including the right to reinstatement previously awarded in the December 6, 2000 arbitration ruling. Damage awards are expressly excluded from consideration as WRS earnings by Wisconsin Statutes §40.02 (22) (b) 9. …."

Although it is the policy of ETF to do so, ETF failed to provide a copy of this letter to Respondent. Respondent never received a copy of that ruling prior to the hearing in this matter.

16. Mr. Kolb, by his attorney, filed an appeal of the matter to the WRS Board by letter dated August 11, 2004. The matter has been held in abeyance, pending a resolution of the issues presented before the Examiner. Under ETF policy, ETF would also accept and review *de novo* any revised late wage report Respondent submitted concerning this matter.

17. Mr. Kolb received unemployment compensation during the period between his discharge and January 16, 2002, the date specified in the consent agreement for his layoff and consequent termination of employment. In the year 2000, Mr. Kolb received $7,939 of unemployment compensation for the period after his discharge in that year. For October 21, 2001, through December 29, 2001, Mr. Kolb received unemployment compensation in the amount of $2,030, which was actually paid in the year 2002, after Respondent's unemployment compensation appeals were exhausted. Although Respondent took credit toward Mr. Kolb's back pay for the unemployment compensation [2], it refuses to include the same in a late report of "unreduced" wages to ETF, as required by ETF 20.12(7)(a).

18. Mr. Ehlke also discussed the matter with representatives of ETF to determine if there might be a revision of the consent agreement which would resolve the matter. Mr. Ehlke then prepared a "settlement agreement" which revised the terms of the consent agreement to provide the type of information which ETF representatives told Mr. Ehlke would make the wages earned in this period creditable for WRS purposes and make at least some of the service creditable for this period for WRS purposes. He forwarded that proposed "settlement agreement" to Mr. Gierke who requested by e-mail dated January 21, 2005, that Mr. Levy have Respondent agree to the same. Mr. Levy responded to Mr. Gierke by e-mail on January 25, 2005, that Respondent's management would not agree to revise the settlement and that they would have to have approval of the City Council to do so. The substance of the proposed settlement provides as follows:

> The parties named above, AFSCME Local 1323-H and the City of Horicon, and John T. Kolb, Jr., the employee whose grievance is the subject of this proceeding, hereby stipulate and agree as follows:

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[2] Respondent expressly took credit for the unemployment compensation paid for the year 2000. Respondent did not expressly take credit for the unemployment compensation paid for the year 2001; however, the Examiner concludes that Respondent constructively took credit for that unemployment compensation.

1. As a result of collective bargaining, the City of Horicon and AFSCME Local 1323-H, at all times relevant hereto, were subject to and bound by a collective bargaining agreement.

2. John Kolb, Jr. was hired by the City of Horicon in April, 1998 as an operator-in-charge of the Water Plant. Kolb was a member of the bargaining unit represented by AFSCME Local 1323-H.

3. Effective as of April 7, 2000, the City terminated Kolb's employment. Kolb was paid his full wages and other benefits through April 24, 2000 and removed from the City's payroll effective as of April 25, 2000.

4. AFSCME Local 1323-H grieved the termination of Kolb's employment, asserting that there had not been "just cause" for that action. Said grievance was appealed to arbitration pursuant to the collective bargaining agreement.

5. Arbitrator Sharon A. Gallagher conducted a hearing on August 30, 2000 as provided for by the parties' collective bargaining agreement. On December 6, 2000, Arbitrator Gallagher issued her Arbitration Award, determining that there had not been "just cause" for the termination of Kolb's employment and ordering that the City "expunge Kolb's personnel record of any reference to the discharge and to reinstate him with full back pay and benefits from the effective date of his determination (sic), April 7, 2000, forward."

6. On January 5, 2001, the City filed a Motion to Vacate the Arbitration Award with the Circuit Court for Dodge County. AFSCME Local 1323-H filed a Motion to Confirm. On May 22, 2001, the Dodge County Circuit Court issued an order denying the motion to vacate and granting the motion to confirm the arbitration award.

7. Following the issuance of the Circuit Court order on May 22, 2001, the City continued to fail and refuse to reinstate Kolb in his employment. Among other things, the City contended that, even if Kolb had been or were to be reinstated in his employment, because of a reduction in the number of Water Plant employees and given his limited seniority, Kolb permanently would have been laid off as of the end of December, 2000.

8. On August 30, 2001 AFSCME Local 1323-H filed the Complaint of prohibited practices that initiated the above-indicated proceeding. It is the City's position that Kolb should not be reinstated in his employment, nor receive any back wages, especially not for any period of time prior to the end of 2000 when, it contends, he would have been laid off. It is the position of AFSCME Local 1323-H and Kolb that Kolb should have been reinstated in his employment and paid his full back wages, retroactive to April 24, 2000.

9. In order to avoid the cost and delay associated with any further litigation relating to this matter, the parties to this proceeding and Kolb agree to settle their dispute, subject to the following terms and conditions:

A. The termination of John Kolb's employment effective as of April 7, 2000 shall be, and hereby is, rescinded and expunged. This employment action will be reported to any person or party who legally has a right to this information, including, but not limited to, the Wisconsin Department of Employee Trust Funds.

B. The City of Horicon will pay to John Kolb $30,100.00 in full and final payment of all back wages owed to him. These wages are allocated as follows:

	Hours	Back Wages	Interim Earnings	Difference
4/25/00-10/28/00	896	$13,991.60	$7,939.00	$6,052.60
10/29/00-12/31/00	290	4,523.60	0.00	4,523.60
1/1/01-6/17/01*	835	13,044.80	0.00	13,044.80
10/21/01-12/31/01	337	5,260.00	0.00	5,260.00
1/1/02-1/16/02	78	1,219.00	0.00	1,219.00
				$30,100.00

* Kolb was reemployed by the City of Horicon as a summer seasonal laborer from June 18, 2001 through October 18, 2001. All wages earned by Kolb in regard to that employment have been paid to him and all related Wisconsin Retirement System contributions previously have been remitted to the Department of Employee Trust Funds.

C. In addition, the City of Horicon will make the appropriate contributions to the Wisconsin Retirement System and the appropriate FICA and other payroll contributions that might be required.

D. The City of Horicon will hold Kolb harmless in the event that the Job Service Division, Department of Workforce Development, were to seek reimbursement from him of any

unemployment compensation benefits that may have been paid to him or currently are payable to him based on his employment with the City. If the Department of Workforce Development seeks the reimbursement of any such unemployment compensation payments, the City will take the steps necessary to ensure that Kolb does not have to make that reimbursement.

E. The record made in this proceeding shall reflect that Kolb's employment was terminated as a result of the lay-off, because his position was eliminated, effective January 16, 2002. The back wages payable to Kolb will be calculated taking into account the unemployment compensation benefits that he received in 2000 and the hours he worked and for which he already has been paid as a summer seasonal laborer during 2001.

F. In consideration of and for the above, John Kolb waives any reinstatement rights that he may have under the collective bargaining agreement between the City of Horicon and AFSCME Local 1323-H. As part of the aforesaid waiver, Kolb waives any recall rights under the contract. He also waives any right to grieve or file a grievance relating to the matters that are the subject of the consent decree. It is agreed that this Complaint case will be resolved by the issuance of a Consent Decree by the Wisconsin Employment Relations Commission Examiner.

G. The City of Horicon will hold the Union and the employee, John Kolb, harmless for purposes of any claims for repayment to the unemployment compensation agency as a result of this settlement.

H. The parties also agree that not only will there be a Consent Decree issued based on this Agreement, but that nobody will appeal that order in any way. The Consent Decree will be a full and final settlement of all matters raised by the filing of the Complaint in the above entitled proceeding.

I. The City of Horicon will, at the request of John Kolb, furnish a letter of recommendation confirming his employment during the years he served the City and confirming that his employment was terminated as a result of a lay-off that was necessary because the position to which he was assigned was eliminated.

J. Regarding the City of Horicon's payment of the $30,100.00 difference between Kolb's back wages, calculated as provided for by this Settlement Agreement, and his interim earnings, the City will pay the additional amounts appropriate for tax and retirement purposes, and will withhold from the check normal payroll taxes.

K. The City of Horicon will issue a check to Kolb within one week of receiving the Consent Decree in this matter.

10. Upon the filing of this Settlement Agreement with the Wisconsin Employment Relations Commission the commission may enter its order dismissing the Complaint filed in the above indicated proceeding. The effective date of this Settlement Agreement shall be March 13, 2002.

19. On March 8, 2004, Mr. Ehlke sent Mr. Levy a letter requesting that Respondent agree to sign an "addendum" to the consent agreement, which addendum, Mr. Ehlke believed would resolve the WRS issues before ETF and allow Mr. Kolb to receive credit for WRS service and a contribution from Respondent to Mr. Kolb's retirement account. The addendum provides as follows:

In order to clarify and facilitate the payment of the "appropriate contributions to the Wisconsin Retirement System" that the City of Horicon has agreed to make pursuant to Paragraph 2 of the Consent Decree approved by the parties on March 13, 2002, in the above-entitled case, the parties stipulate that the $30,100.00 that the City has paid to John Kolb, pursuant to Paragraph 1 of said Consent Decree, in full and final payment of all back wages owed to him in relation to said case, shall be allocated as follows:

	Hours	Back Wages	Interim Earnings	Difference
4/25/00-10/28/00	896	$13,991.60	$7,939.00	$6,052.60
10/29/00-12/31/00	290	4,523.60	0.00	4,523.60

1/1/01-6/17/01[3]	835	13,044.80	0.00	13,044.80
10/21/01-12/31/01	337	5,260.00	0.00	5,260.00
1/1/02-1/16/02	78	1,219.00	0.00	1,219.00
				$30,100.00

Mr. Pasewald reviewed the proposed addendum. By letter dated March 16, 2004, Mr. Levy responded as follows:

> "The Personnel and Finance Committee of the Horicon City Council has reviewed your recent correspondence requesting an amendment to the City's 2002 settlement with John Kolb. The Committee also reviewed the settlement (which was a WERC consent decree).
>
> The Committee could find nothing in the settlement document which requires the requested amendment. The Committee declines to join in the amendment. Unless something is presented which shows why the terms of the settlement document require the City to act otherwise, the City will not join in the requested amendment."

Mr. Ehlke again wrote Mr. Levy stating that the proposed addendum does not change the consent agreement but merely specifies how the WRS contribution should be allocated. Mr. Levy responded by letter dated April 1, 2005, stating that Respondent will not execute the proposed addendum. Respondent continues to decline to do so.

Based upon the above and foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. Complainant is a labor organization with the meaning of Section 111.70(1)(h), Stats.

2. Respondent is a municipal employer within the meaning of Section 111.70(1)(j), Stats.

3. John Kolb is a municipal employee within the meaning of Section 111.70(1)(i), Stats.

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[3] Kolb was reemployed by the City of Horicon as a summer seasonal laborer from June 18, 2001 through October 18, 2001. All wages earned by Kolb in regard to that employment have been paid to him and all related Wisconsin Retirement System contributions previously have been remitted to the Department of Employee Trust Funds.

4. The consent agreement referred to in Finding of Fact 10 which was agreed-upon by the parties is a collective bargaining agreement within the meaning of Section 111.70(3)(a)5, Stats.

5. Respondent is required by ETF Sections 20.12(4)(3) and 20.12(7)(a), to file an accurate late earnings report of the "unreduced" back pay specified in the consent agreement referred to in Finding of Fact 10, including, without limitation, unemployment compensation of $7,039 paid to Mr. Kolb for the year 2000, unemployment compensation of $2,030 paid for Mr. Kolb for that part of the year 2001 within the back pay period specified in the consent agreement, and other interim earnings which were taken into consideration in this settlement but which were not previously reported by Respondent to ETF.

6. Respondent is required by ETF Section 20.12(4) and Section 2 of the consent agreement specified in Finding of Fact 10, to report the back pay wages and hours of service in sufficient detail to enable the department to readily calculate the wages and hours for each payroll purpose. The specification set forth in the form of Section 9 of the amended settlement agreement referred to in Finding of Fact 18, above, and identically in the addendum to the settlement agreement specified in Finding of Fact 19, above, is required by Section 2 of the consent agreement specified in Finding of Fact 10, above. Respondent is required by Section 2 of the consent agreement to structure the allocation of hours to maximize Mr. Kolb's WRS benefit to the fullest extent allowed by law.

7. Respondent committed a prohibited practice within the meaning of Section 111.70(3)(a)5 and, derivatively, Section 111.70(3)(a)1, Stats., by violating Section 2 the consent agreement by failing to make an appropriate report to ETF of the unreduced wages Mr. Kolb received for the period from his discharge until January 16, 2002, the proper period those wages relate to, and by failing to provide all of the appropriate documentation required by ETF 20.12(4)(f).

8. Respondent did not commit a prohibited practice by failing to execute the revised settlement agreement specified in Finding of Fact 18, above because the same contained provisions not related to the WRS contribution which were not agreed upon by the parties.

9. Respondent committed a prohibited practice within the meaning of Section 111.70(3)(a)5., by violating Section 2 of the consent agreement by refusing to sign the proposed addendum referred to in Finding of Fact 19.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Examiner makes the following

ORDER

It is ordered that Respondent City of Horicon, its officers and agents, shall immediately:

(a) Cease and desist from violating collectively bargained settlement agreements between it and Complainant.

(b) Immediately file a late earnings report with ETF of the unreduced back pay which is the subject of this dispute, together with sufficient information to enable ETF to readily calculate the wages and hours for each payroll period for the back pay period specified in the consent agreement. Respondent shall cooperate with Complainant to maximize Mr. Kolb's WRS benefit for the back pay and related service to the maximum extent allowed by law.

(c) Provide ETF with a copy of the subject arbitration award, the consent agreement, the court decision denying motion to vacate the subject arbitration award, court decision granting motion to confirm the subject arbitration award, Examiner McGilligan's consent order, this decision, and any subsequent decision thereon.

(d) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days of the date of this Order, as to what steps have been taken to comply with this Order.

Dated at Madison, Wisconsin this 10th day of April, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stanley H. Michelstetter /s/
Stanley H. Michelstetter II, Examiner

CITY OF HORICON

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The long and tortured procedures which have been followed in this case are fully set out in the Findings of Fact, Conclusions of Law and Order set out above and will not be restated here. This case arises from a dispute about the meaning, application, and enforcement of the term "appropriate contributions to the Wisconsin Retirement System" in Section 2 of the parties' stipulated "Consent Decree" issued by Examiner McGilligan on March 25, 2002. The parties take the following positions:

Complainant

The grievance settlement is a "collective bargaining agreement" within the meaning of Section 111.70(3)(a)5, Stats. Respondent violated the part of the settlement agreement in which it agreed to make the "appropriate" contribution required by Section 2 of the consent decree to WRS for the period between the award and his reinstatement. Specifically, Respondent failed to include the $7,939.00 [4] he received for unemployment compensation for the back pay period in its report to ETF. Testimony from WRS agents indicated that the term "unreduced earnings" includes unemployment compensation and interim earnings used to reduce the amount of back pay. Respondent took credit for the unemployment compensation in this settlement. Complainant's attorney consulted with WRS who agreed that if the parties agreed to include the unemployment compensation in the Respondent's report, Complainant would receive WRS credit. Respondent has refused Complainant's request to do so. Respondent also did not properly address the allocation of hours of work for Mr. Kolb for the period prior to reinstatement.

These actions were in bad faith and an intentional disregard of the settlement. It also seeks a finding that the Respondent's actions violated Section 111.70(3)(a)1, Stats. It seeks an order that Respondent make "whatever" contributions which are required, based upon the term "unreduced compensation" for the period from his termination until the agreed upon January 16, 2002, reinstatement date. It also seeks an order requiring Respondent to pay its reasonable attorney fees and the costs of this action because its actions in this case were in bad faith.

Respondent

The sole issue in this case is whether Respondent has committed a prohibited practice by declining to change the terms of the March 2002, Consent Decree. There were no detailed negotiations and there were no discussions concerning the WRS contribution. The only agreement the parties had was what was written: there were no verbal agreements. The

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4 Later, changed to $9,969.

agreement was that Respondent would make the "appropriate" WRS contribution for the negotiated amount of $30,100. The purpose of contract interpretation is not to make the agreement conform to the parties subsequent wishes, but what the parties negotiated in the document. Therefore, extrinsic evidence cannot be considered unless the contract is ambiguous. This contract is not ambiguous. The fact that the settlement makes a poor fit with pension rights is evidence that the parties did not intend that there be any pension benefit.

The WRS rules do not call for the payments Complainant seeks. The word "appropriate" means "compatible with." ETF rules provide that "no payment resulting from a court order or *compromise* settlement may be considered as earnings for Wisconsin Retirement System purposes." [Emphasis by Respondent] For a compromise settlement to be treated as earnings, ETF 2-/12(5)(e)(2) requires that it must "expunge the previously reported termination." Mr. Kolb did accept a layoff and waived any reinstatement rights. Mr. Kolb was not made entirely whole by the settlement. The two "determinations" from ETF demonstrate that ETF does not deem the payments in question to be wages.

ETF Administrative Manager Gilding's testimony in this case was designed to save ETF time by ending Complainant's appeal in the ETF procedure. The ETF position is complicated by Ms. Gilding's interpretation of that agency's own rules by her use of the novel concept of what she testified that ETF likes to see. Her proposal is not a formal department determination, but, rather, is a plea for a different settlement because she cannot find a way to justify accepting any contributions based on the original agreement. However, under the actual language of the settlement, the contribution is zero.

The Employer has not interfered with Mr. Kolb's rights under MERA. Complainant wants to amend the agreement. Holding to the terms of a voluntary agreement - at least until someone shows why the agreement's provisions require its own amendment - is not interference with the employee's exercise of rights protected under Section 111.70(2) of MERA. Respondent is willing to make any payment which the WRS finds to be appropriate based on the Consent Decree's present form.

That Mr. Kolb's purported concern that a WRS contribution was very important to him was never communicated to Respondent in the negotiations leading to the consent decree. The words "make it work" said by Mr. Pasewald after the consent decree had been entered referred to an allocation of hours and dollars which Respondent did submit, and is what had been negotiated, whether or not it was accepted by ETF.

Respondent continues to object to any reference to the unemployment compensation case because Sec. 108.101(1), Stats, prohibits the admission of UC Examiner decisions in an judicial proceeding not arising under Ch. 108, Stats. In any event, the decision supports the view of Respondent that the settlement is a compromise and is less than full back pay. Respondent requests that the complaint be dismissed.

DISCUSSION

The term "collective bargaining agreement" is not defined in Section 111.70, Stats. The WERC has long taken the position that settlement agreements reached between a collective bargaining representative and municipal employer are "collective bargaining agreements" within the meaning of Sec. 111.70, Stats., MILWAUKEE COUNTY, DEC. NO. 30970-A,B (Mawhinney, WERC, 3/2005), at p. 9; CITY OF LACROSSE, DEC. NO. 29954-C, D (Burns, WERC, 6/01), at p. 29. The parties do not dispute that the settlement they reached embodied in the consent agreement and as stated at the hearing before Examiner McGilligan, was a "collective bargaining agreement" within the meaning of Sec. 111.70, Stats, but rather they dispute the meaning of its terms. The major issue in this matter is whether Respondent violated Section 111.70(3)(a)5, Stats., by failing to make an appropriate report to ETF for WRS purposes of the "unreduced" wages resulting from the parties' settlement.

The primary differences between the parties are; 1. Respondent believes that the obligation as to WRS reporting and contribution is limited solely to the letter of the consent agreement and 2. that Respondent views the term "appropriate" as requiring it only to require it to make contributions as to the $30,100 stated in the agreement, not on the "unreduced" amount of $30,100 plus the $9,969 [5] of unemployment compensation. Complainant takes the position that the term "appropriate" is broader, requiring, among other things, that Respondent agree to cooperate in making agreements so that Mr. Kolb can receive the maximum WRS contribution ETF will allow under the facts. It also believes "appropriate" requires Respondent to report to ETF the "unreduced" amount of wages earned as back pay and otherwise comply with ETF statutes and rules. The Examiner concludes that the use of "appropriate" is ambiguous, but that the position of Complainant is generally correct.

Language of an agreement is ambiguous if it is fairly susceptible to two different interpretations. Ambiguities may be patent; that is, being obvious from the face of an agreement. Or they may be latent; that is, occurring when the language is applied to a factual situation. When language of the agreement is ambiguous, the responsibility of the Examiner is to use the rules of construction to determine what the intent of the parties was. See, e.g, COLUMBIA PROPANE LP V. WISCONSIN GAS CO., 250 Wis.2D 582 (Ct. App, 2001). Further, the Examiner may consider evidence extrinsic to the consent agreement, such as oral statements by the parties at hearing, negotiation history, and the context of the settlement, to determine the parties' intent. Cf. INTERN V. MIDWEST EXPRESS AIRLINES, 279 F.3D. 553, 169 LRRM 2412 (CA 7, 2002) (parole evidence rule applicable to collective bargaining agreements]) SEITZINER V. COMMUNITY HEALTH NETWORK, 270 Wis.2D 1 (2004)

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[5] Testimony at the hearing with respect to "unreduced" wages dealt with unemployment compensation Mr. Kolb received for the year 2000. The post-hearing documentation Complainant provided pursuant to an agreement of the parties as Complainant's Exhibit 1 demonstrates that Mr. Kolb also received unemployment compensation paid in the year 2002, of which $2,030 related to the back pay period in 2001. Accordingly, the total unemployment compensation which Respondent must report as "unreduced" wages is $9,069.

It is also important to note that not all ambiguity is the result of error by the parties. It is not uncommon in collective bargaining to use ambiguous language to deal with unforeseen or unforeseeable situations. Parties often rely upon third party dispute resolution to resolve those disputes, if they cannot agree.[6] In these situations, the intent of the parties may be better determined by looking to the purpose of their agreement and broadly construing their agreement to achieve their mutual purpose.

The parties "intent" in this situation can be determined from the terms of the agreement as a whole and the context of its adoption. Even though Respondent may have thought of its agreement to pay Mr. Kolb $30,100, as a lump sum buy-out, the language of the agreement demonstrates that Respondent recognized that Complainant was not agreeing to a lump sum buy out. Additionally, Respondent had reason to know the WRS contribution was important to Mr. Kolb because it reason to know Mr. Kolb had substantial prior WRS service. The parties chose to define the payment as back pay in Section 1, rather than as a lump-sum payment. The terms show that the parties mutually went to substantial lengths to structure the agreement so that Mr. Kolb could get the maximum possible WRS benefit from the payment Respondent was making. The very fact that the parties chose to include a specific provision as to an "appropriate" contribution to pension, and that it was included in item 2 (particularly in light of the degree of emphasis it was given when it was presented to Examiner McGilligan at Tr. page 5) indicate that the parties mutually recognized that the WRS contribution was an important consideration to Mr. Kolb in creating this agreement. Further, the parties went to the unusually great efforts to try to structure this settlement in a manner in which Mr. Kolb was to be treated as being employed full-time for the entire back pay period. This strongly suggests that the parties recognized that the WRS contribution and related service credit was an important item. Considering those unusual provisions, the correct interpretation of the term "appropriate" is that the parties intended that Respondent take whatever steps which are necessary to successfully get Mr. Kolb as much WRS credit for the unreduced wages and time-worked as is consistent with this agreement and as is permitted by law.

The Examiner next concludes, contrary to Respondent's position, that the issue as to the WRS contribution under ETF Statutes and administrative rules has not been "finally" decided. He further concludes that ETF statutes and rules do not necessarily preclude Mr. Kolb from receiving a WRS contribution and service credit under the consent agreement. Complainant's Exhibit 11 is a determination made under the signature of Director Woodward of the ETF. This decision provided that the employee had the right to "appeal" to the appropriate WRS governing board if the appeal were filed. Complainant's Exhibit 12 dated August 12 is an appeal addressed to the Department. Ms. Jean Gilding, Administrative Manager of ETF testified in this matter. It is clear from her testimony that she has a great deal of experience administering applicable WRS law and procedure. Further, she is the official in

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[6] See, Elkouri, *How Arbitration Works*, (BNA, 6th Ed.) start of Ch. 9 6th p. 430.] Restatement (First) of Contracts Sec. 226 (1932); COLFAX ENVELOPE CORP. V. GRAPHIC COMMUNICATIONS LOCAL 458-3M (CHICAGO); 20 F.3D 750, 145 LRRM 2974 (CA 7, 1994) The discussion of the Court in COLFAX, *supra*, is particularly instructive as to the interpretation of ambiguity in a collective bargaining agreement when there is no real "meeting of the minds."

charge of much of the administration with respect to the appeal of the WRS credit denial in this case. She was Ms. Woodward's supervisor at the time of the determination. I conclude that she is an expert on the subject. She testified without contradiction, that ETF considers the denial of WRS credit herein as a matter currently under appeal. [7] Accordingly, I have given her testimony great weight as to that and all of the other matters to which she testified.

Ms. Gilding testified that it is her responsibility to examine situations in which an appeal is pending to see if she can find a resolution. She testified at Tr. p. 91 that employers who make "late earnings reports" [8] based upon settlements of employment issues are supposed to read Ch. 13 of the ETF manual and are also required to submit the settlement documents with their report. [9] ETF then reviews the settlement agreement to determine if the contribution report qualifies as a permissible contribution in compliance with applicable WRS statutes and applicable ETF rules and policies. She noted that filing a correct report is a part of the contribution process. [10] She acknowledged at Tr. pages 95, 111-121, 126, some difficulty in interpreting this settlement because it was "unusual."

The parties' settlement did not deal with a number of unforeseen issues under WRS law. Ms. Gilding testified that it was her view that Mr. Kolb's back pay and, at least, part of his back pay service period would qualify for credit if Respondent had properly reported Mr. Kolb's "unreduced" earnings for the period. [11] Proper reporting is required by the term "appropriate" in Section 2 of the consent agreement. Although it might appear otherwise, Ms. Gilding testified that Sec. 40.02(22)(b)(8),(9), Stats, and the Department's rules, primarily ETF 20.12, do not clearly resolve the dispute arising under the facts of this case. In summary, it is her view that Mr. Kolb is entitled to credit for the wages paid to him and, at least, some service credit, but only if Respondent properly reported his "unreduced" wages.

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[7] She testified at tr. p. 131, line 20 that this matter was considered "under appeal." Further, she testified that the matter could still be reviewed again were Respondent to filed an amended transaction report with ETF. See, also, Ms. Gilding's testimony at tr. page 89.

[8] See, discussion at tr. pp. 90-3

9 See, Sec. 1302(e) of the manual, complainant exhibit 8.

[10] The Examiner finds today, pursuant to Ms. Gilding's testimony, that Respondent did not file a correct report in that it listed the reduced earnings of Mr. Kolb for the disputed period rather than the "unreduced" earnings. Further, Respondent did not submit all the appropriate documentation which the Examiner finds is necessary for ETF's determination under its law. Section ETF 20.12(2)(a) broadly defines "compromise settlement" to include an arbitrator's decision, WERC decision and, by analogy, court orders. Section 1302 of the WRS manual requires the employer to submit these documents to ETF. Respondent submitted the award and Examiner McGilligan's decision on ETF's request, but did not submit the court decisions. See, first and second bullet points in the letter referenced in Finding of Fact 15.

[11] See, Tr. pp. 100-103.

Many of the issues presented involve the interpretation of the collective bargaining agreement (consent decree) and the function of the WERC's decision to dismiss the complaint before Examiner McGilligan based upon that consent decree. Ms. Gilding testified that ETF has significant discretion under the unusual circumstances presented by this case. The Examiner recognizes that ETF and the appropriate administering board have the main responsibility to interpret their governing statutes, rules and polices. Nonetheless, the WERC is responsible under Section 111.70(3)(a)5, Stats., to administer the application of the term "appropriate" in the agreement. The term "appropriate" requires that that the Examiner make a definitive construction of some of the other terms of the consent decree which, in turn, requires interpretation of ETF rules. Accordingly, the construction of this unusual consent decree is primarily within the expertise of the WERC.

Respondent heavily relies upon the terms of Section 40.02(22)(b)8, Stats., for the proposition that it is not required to do anything further. Specifically, Respondent contends that under Section 5 of the consent agreement, the payment of back wages is contingent upon Mr. Kolb waiving any reinstatement rights. It reads that Statute as precluding any WRS contribution where the employee waives reinstatement. The Examiner disagrees. The applicable Statutes provide as follows. Section 40.02(22)(a), Stats., provides that "wages" means the gross amount paid to an employee except as provided in, among other provisions, Sec. 40.02(b)8, Stats. Sec. 40.02 (22)(b), Stats., states that "wages" do ". . . not mean payments made for reasons other than for personal services rendered to or for an employer, including, but not limited to:

. . .

> 8. Payments contingent on the employee having terminated covered employment or having died.
>
> 9. Payments for damages, attorney fees, interest or penalties paid under court judgment or by compromise settlement to satisfy a grievance or wage claim even though the amount of damages or penalties might be based on previous salary levels. However, the department may by rule provide that a payment of additional wages to a continuously participating employee or the payment of salary to a participant for any period of improper termination of participating employment, is earnings, if the payment is treated by the employer and employee as taxable income and is consistent with previous payment for hours of service rendered by the employee." [12] [Emphasis Examiner's]

A question exists as to whether this settlement falls under subsection 8 or subsection 9. The

[12] The impact of Sec. 40.02(22)(b)9 is discussed below. ETF's rules for implementing this statute are contained in ETF 20.12. Those rules are discussed below as well.

final decision of the Circuit Court established that the back pay period was a period of

improper termination. The only issue before Examiner McGilligan was whether Mr. Kolb would have been laid off. Accordingly, Subsection 9 has some applicability. Subsection 9 allows ETF to establish rules for accepting back pay settlement for WRS contribution.

ETF has adopted those rules. While there are issues under those rules, they do allow for WRS credit even though an employee does not achieve reinstatement.

. . .

ETF 20.12(3):
(3) Except as provided in this section, no payment resulting from a court order or compromise settlement may be considered as earnings for Wisconsin retirement system purposes. The department may decline to act on a court order or compromise settlement which does not contain all of the information required under this section or is otherwise defective.

ETF 20.12(4)
(4) Subject to all provisions of this section, the department shall treat as earnings for Wisconsin retirement system purposes a payment made under a court order or compromise settlement by a participating employer to an employee or former employee provided all of the following conditions are met:

ETF 20.12(4)(a)
(a) The payment is one of the following:

ETF 20.12(4)(a)1.
1. Retroactive wages paid to a participant for a period following an involuntarily termination of the employee's participating employment by that participating employer, which are paid under court order or the terms of a compromise settlement which also expunges the previously reported termination.

ETF 20.12(4)(a)2.
2. Retroactive wages paid to a participant for a period during which the participating employee was involuntary placed on leave or suspension by that participating employer.

. . .

ETF 20.12(4)(b)
(b) The employee or former employee is living on the effective date of the court order or compromise settlement.

ETF 20.12(4)(c)
(c) The court order or compromise settlement is in writing and is signed and dated by the issuing authority or by the parties to the agreement.

ETF 20.12(4)(d)
(d) The court order or compromise settlement specifies the wages to be paid to the employee for each annual earnings period and the associated hours of service actually rendered by the employee or that would have been rendered but for the disputed suspension or termination.

ETF 20.12(4)(e)
(e) The employer reports the wages and hours of service to the department under a transaction code designated by the department for actions resulting from court orders and compromise settlements. At the department's request, the employer shall report wages and hours of service in sufficient detail to enable the department to readily calculate the wages and hours for each payroll period during the period under dispute and shall distinguish between additional wages, if any, paid for hours of service previously reported to the department, and wages and hours of service not previously reported.

ETF 20.12(4)(f)
(f) If the dispute concerns a termination of participating employment or if the amount of wages reported under par. (e) exceeds the employee's current basic rate of pay, multiplied by 80, the employer submits with the transaction report the original court order or compromise settlement or a complete copy thereof. The department may require submittal of the court order or compromise settlement associated with a smaller wage payment. If the employer fails to submit the transaction report and the court order or compromise settlement, if required, within 90 days after the effective date, the employee, the collective bargaining agent, or the issuing court or agency may submit a complete copy of the court order or compromise settlement to the department for purposes of requesting employer reporting.

ETF 20.12(4)(g)
(g) The employer remits required contributions on the wages, or that portion of the wages which the department treats as earnings, including interest computed under s. 40.06(5), Stats., and s. ETF 10.635.

ETF 20.12(4)(h)
(h) If the remedy includes payment of wages for a period following a disputed termination of participating employment, the court order or compromise settlement does all of the following:

ETF 20.12(4)(h)1
1. directs the employer to rescind the termination date previously reported to the department and, if the employee is not to be reinstated, specifies the date on which the employee-employer relationship terminated, which date shall be treated as the termination date for Wisconsin Retirement system purposes. This date may not be later than the effective date of the court order or compromise settlement.

ETF 20.12(4)(h)2.
2. Directs the employer to pay the employee all wages from the rescinded termination date to the date the employee returns to work or the new termination date reported under subd. 1. as if the employee had been continuously employed throughout the period under the conditions of employment prevailing prior to the termination, except that the court order or compromise settlement may direct that wages be reduced by the amounts earned from other sources and may identify a period of suspension for which wages are not paid.

. . . ." [13]

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[13] ETF also has rules stating what are not earnings entitled to WRS credit. In so far as is relevant to the remainder of this decision, they provide as follows:

" . . .

ETF 20.12(5)

"(5) The department may not consider any of the following payments as earnings:

. . .

ETF20.12(5)(e)1.
1. A payment which is other than wages or salary for personal services actually rendered to that participating employer by the participating employee, or which would have been rendered but for the disputed termination or suspension.

ETF 20.12(5)(e)2
2. A payment, including a wage payment, made in return for, or in order to secure, the employee's resignation or termination from participating employment, whether immediately or at some specified time in the future, or to secure release from an unexpired contract of employment, including the employee's voluntary waiver of grievance rights under a collective bargaining contract. This subdivision does not prevent a remedy from including both a wage payment and a payment to secure the employee's agreement to other conditions, provided the court order or compromise settlement specifies the portion of the total payment that represents wages.

. . . " [Emphasis by Examiner]

Ms. Gilding testified at tr. pages 122, 131 that ETF had a great deal of discretion in applying this section and that she concluded that this section did not preclude the acceptance of a contribution for Mr. Kolb. The above rules have considerable ambiguity in this fact situation. They do not expressly deal with a situation in which a final judgment directs reinstatement and full back pay, but there is a subsequent dispute about whether the position would have been properly eliminated for reasons unrelated to the discharge. The last sentence of ETF 20.12(5)(e)2 may allow for back pay to be given WRS credit even though there is a subsequent agreement to deal with the subsequent position elimination issue. Further, Section ETF 20.12(7) (discussed below) also authorizes ETF to allocate back pay to achieve partial credit in its discretion. Accordingly, the Examiner concludes that ETF does have substantial discretion in the circumstances presented by this case.

The Examiner disagrees with Respondent's implicit position that the amount of back pay is consideration for Respondent waiving his recall rights in the settlement by virtue of the term ". . . in consideration of the above. . . ." The Examiner concludes that the better construction of the agreement is that the only consideration for Mr. Kolb for waiving reinstatement was the fact that the Employer would promptly pay him the wages he was due, but that no part of the consideration for the waiver of reinstatement is the amount of the wages which are due. This is true because this matter involves two intervening reasons why Respondent resisted having Mr. Kolb return to employment. The first reason was his discharge. The Court's order confirming the award was a final order enforcing the award. Respondent is required to expunge the discharge and reinstate Mr. Kolb, paying him all due back wages. The second issue was the purported subsequent elimination of Mr. Kolb's position. As noted above, it is only the second issue which was properly in dispute before Examiner McGilligan.

The Examiner's construction above is based upon the unusual terms of the settlement and the statements of the parties as they made the stipulation before Examiner McGilligan. The Examiner concludes that those statements reflect both parties' understanding of the likely outcome if the matter continued to be litigated. Experienced labor relations professionals like Mr. Levy and Mr. Gierke would have recognized at the time the settlement was negotiated that Mr. Kolb had a strong case for receiving back pay, but that the resolution of the back pay claim could be significantly delayed by further litigation. At the same time, it appears that both parties recognized that if Respondent eliminated Mr. Kolb's position, it is unlikely he would ever successfully obtain reinstatement.

Respondent never reinstated Mr. Kolb and the complaint before Examiner McGilligan was filed shortly after the Circuit Court decision confirming the arbitrator's award. The proposed revised settlement agreement at par. 7 (referenced in Finding of Fact 18) notes a proposed stipulation that Mr. Kolb would have been laid off in December 2000. Arbitrator Gallagher issued her award on December 6, 2000. If Respondent's reasons for the elimination of Mr. Kolb's position were known at the time of the arbitration or even during the Circuit Court proceeding, there would have been a question as to whether the position was waived by

not having addressed the issue to the arbitrator as part of the remedy issue before her, or to the

Court for consideration of potential remand. See, LOCAL 100 A v. JOHN HOFFMEISTER AND SON, INC., 950 F.2D 1340, 139 LRRM 2110 (CA7, 1991); CHICAGO NEWSPAPER GUILD v. FIELD ENTERPRISES, INC., 747 F.2D 1153, 117 LRRM 2937(CA 7, 1984); WSEU v. WERC, 189 Wis.2D 406 (Ct. App. 1994) [14]

If, on the other hand, Respondent denied to a Court or agency enforcing the award that it had knowledge of the reason for the elimination of the position before the Court's decision, (a position the credibility of which surely would have been questioned), then its refusal to at least temporarily reinstate Mr. Kolb certainly would have been questionable. See, CHRYSLER MOTORS CORP. v. INTERNATIONAL UNION, 2 F.3D 760, 144 LRRM 2018 (CA7, 1993). Thus, it is reasonable for both parties to have viewed it likely that Mr. Kolb would eventually obtain substantial back pay at the conclusion of protracted litigation.

Irrespective of the strength of the back pay claim, Mr. Kolb's long term prospects for reinstatement were slim. See, Ted. St. Antoine, editor, *The Common Law of the Workplace*, (BNA, 2d Ed, 2005.), Section 10.10 and 10.11. The award shows that Mr. Kolb had only two years of service when he was discharged. Under these circumstances, it is not likely Mr. Kolb would have had significant "bumping" rights under the collective bargaining agreement. It is likely that this substantial limitation might have restricted Mr. Kolb's rights to a "substantially equivalent" position in the original arbitration award and might also have restricted his "bumping" rights were his position legitimately eliminated after his reinstatement.

Under these circumstances, the Examiner concludes that the consideration for Mr. Kolb's waiver of rights to be recalled from layoff were the prompt payment, rather than the amount of the payment, of the back pay. The transcript of the consent agreement at pp. 7-8, before Examiner McGilligan show that Attorney Ehlke emphasized that the matter will be "resolve[d]" with the consent decree and that the parties were not going to appeal the matter. These terms are reflected in the consent decree itself. The consent decree goes to unusually great lengths to structure the back wages as wages for the full period. This unusual structure tends to preclude any of the actual wage payments being in the form of a buy-out of other rights. Accordingly, the Examiner concludes that the proper construction of the consent agreement is that no part of the amount of the back wages is consideration for Mr. Kolb's waiver of his reinstatement rights. Instead, the sole consideration for Mr. Kolb's waiver of his reinstatement rights was the prompt payment of those wages. Under the circumstances of the consent agreement and the correct interpretation of the consent agreement, none of the back payment is "a payment made in return for, or in order to secure, the employee's resignation or termination" within the meaning of ETF 20.12(5)(e)1.

A major issue in this case is whether the Employer is required to report the "unreduced" earnings of Mr. Kolb by including his unemployment compensation. The

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[14] WSEU, *supra*, cites approvingly CHICAGO NEWSPAPER, *supra*, and HOFMEISTER, *supra*.

payment to Mr. Kolb is a lump sum payment or really back wages. The Examiner concludes that Respondent is required to report the unreduced wages and related matters both because it is required to do so by ETF regulations and because the settlement was not a lump sum payment. The lump sum issue was discussed above.

Section ETF 20.12(7)(a) requires that contributions be determined on the basis of "unreduced" back pay. It also provides that ETF ". . . determine the hours of service to be credited in each annual earnings period from data available to the department or by dividing the unreduced amount otherwise treatable as earnings in accord with this section for each affected annual earnings period by the rate of pay the department determines applied during the period under dispute." [Emphasis by Examiner] Section 1304 of Ch. 13 of the "WRS Administration Manual" demonstrates the proper calculations. Ms. Gilding's testimony, starting at tr. page 115, describes the process and demonstrates Respondent's error. In essence, Respondent took credit for the interim earnings Mr. Kolb received, as is customary in labor relations back pay determinations. Because public employers self-fund unemployment compensation, Respondent also took credit for the unemployment compensation Mr. Kolb received for the back pay period. Respondent only reported the $30,100 of back pay it paid on its "late earnings report" to ETF, but did not include the unemployment compensation he received for the back pay period or make a notation as to the other interim earnings for which it took credit. [15] Respondent did not inform ETF when it made the late earnings report the period of time covered by unemployment compensation or the period of time covered by interim earnings.

Ms. Gilding's main point as to the unemployment compensation of $7,939 for 2000 was that it was counted as wages earned for WRS purposes and Respondent was responsible to report it. She also testified that Respondent included the hours that Mr. Kolb was on unemployment compensation in the statement of the total back pay period hours, but did not report the period of time Mr. Kolb was receiving unemployment compensation in its report. (tr. pp.103, 119-122) Ms. Gilding testified hat filing a correct late transaction report is part of the reporting process. (tr. p. 92) The Examiner concludes that Respondent is required to report to ETF on its form both the $7,939 for 2000, of unemployment compensation Mr. Kolb received and the specific period he received it for. Similarly, Complainant's Exhibit 1 demonstrates that $2,030 of the unemployment compensation received by Mr. Kolb in 2002, related to the back pay period in 2001. Accordingly, the record demonstrates by analogy that Respondent is also required to report that amount as "unreduced" earnings for 2001, and the period for which it was received. Respondent is also required to make proper notations concerning other interim earnings.

The next issue concerns how much service credit Mr. Kolb would get, if any, because

[15] Mr. Kolb was also re-employed by Respondent as a season laborer during the back pay period. Those wages were subject to WRS. Respondent properly reported those wages and employment periods to ETF as they occurred. Respondent did not inform WRS that it had taken credit for those wages or report the period they covered when it made the "late earnings report" to WRS.

the wage rate for back pay is less than the wage rate Mr. Kolb was receiving before he was

discharged or would have received had he stayed fully employed in his former position. The Examiner concludes that the parties treated Mr. Kolb as being fully employed by Respondent for the back pay period, but reduced the wage rate at which he was paid back pay to "stretch" it to cover the entire period. The parties made the mutual error of assuming that ETF would accept that structure and give Mr. Kolb service credit for the entire back pay period. Section ETF 20.12(4)(h)2 requires that for a back pay to count as creditable wages, it must require the employer to pay the employee " . . . all wages from the rescinded termination date to the . . . new termination date reported under subd. 1, as if the employee had been continuously employed throughout the period under the conditions of employment prevailing prior to the termination, except that the court order or compromise settlement may direct that wages be reduced by amounts earned from other sources . . . ." [Emphasis supplied.] Section 20.12(5)(e)5 excludes from "wages" payments made "based on a change in the method of computing the base compensation of the employee during the last five years of employment . . . . " There is substantial ambiguity in those provisions. For example, they do not expressly deal with the situation in which an employee who was improperly discharged would have suffered a reduced wage rate in a reduction in force which occurred while his discharge case is pending. Complainant's Exhibit 6, note 4 shows that Mr. Kolb was employed as a summer seasonal laborer from June 18, 2001, through October 18, 2001, at a reduced wage rate. [16] It is unclear from the record in this case whether Mr. Kolb would have suffered a reduction to that presumably lower paid position as a result of a temporary reduction in force. It is clear from the terms of the settlement that the parties attempted to structure the settlement as full back pay at a lesser wage rate for the period in question. The testimony of Ms. Gilding at Tr. pages 96-7, 99-100 is that the purpose of these ETF rules is to insure that the amount specified as wages is not artificially increased. In any event, she testified that ETF has discretion to determine the intent of the agreement and to disregard the specific terms of a settlement to determine what wages are creditable under its rules. (tr. pages 99-101, 121,126-8) Other provisions of ETF statutes and rules appear to indicate this provision of the consent agreement is subject to discretion by ETF and that ETF is not bound by the parties' characterization of their settlement. See, ETF 20.12(7)(a). [17] That rule appears to allow ETF to give less than 2080 hours service credit when the wages are less than the full amount the employee would have earned had he worked full time over a work year. Ms. Gilding testified that had Respondent properly reported the "unreduced" earnings of Mr. Kolb and the time period that he was on unemployment compensation, she would be able to calculate the service and contribution credit to which Mr. Kolb was entitled. She demonstrated the proper calculations prescribed by the last sentence ETF 20.12(7)(a), at tr. page 116. Ms. Gilding's testimony appears to be that ETF will give Mr. Kolb full service credit for the back pay period if the

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[16] Those wages were covered by WRS and properly reported to ETF at the time.

[17] The last sentence of which provides: "The department may determine the hours of service to be credited in each annual earnings period from data available to the department or by dividing the unreduced amount otherwise treatable as earnings in accord with this section for each affected annual earnings period by the rate of pay the department determines applied during the period under dispute."

unreduced wages and other matters are properly reported. However, the final decision will be

made when the information is provided. It is possible that ETF may give Mr. Kolb less than full service credit for the full back pay period.

The final issue as to the construction of the settlement is whether Respondent is required by the term "appropriate" in Section 2 of the consent agreement to specify Mr. Kolb's earnings in a manner consistent with ETF regulations even though that specification may appear to conflict with the express provisions Section 4 of the consent agreement. This arises because it is unclear whether ETF will grant Mr. Kolb full, or only partial, WRS service credit when the "unreduced" earnings are correctly reported. The Examiner is satisfied that one of the main purposes of Section 4 was to obtain WRS service credit for the entire back pay period. The Examiner is satisfied that neither party recognized at the time the agreement was written that ETF might not grant full service credit even though they structured their agreement in Section 4 for full service credit. The Examiner is satisfied that this creates a latent ambiguity between the word "appropriate" in Section 2 and the structure created in Section 4. Ms. Gilding's testimony indicated that ETF would accept the back pay for partial service credit if Respondent correctly reports the "unreduced" earnings specified above and allocates the unreduced back pay in the form specified both in the revised "settlement agreement" complaint proposed (Complainant's Exhibit 6, item 9B) and also identically in Respondent's Exhibit 6, the "Addendum to Settlement Agreement." [18] Section 20.12(7)(a) expressly grants the authority to ETF to make this type of determination.

The Examiner is satisfied that because the purpose of Section 4 was to maximize Mr. Kolb's WRS benefit, the structure contemplated by Section 4 does not necessarily apply if ETF will not accept for full credit. Only the "appropriate" language of Section 2 applies. This requires Respondent to provide the late earning report in the form contemplated by the appropriate parts of the proposed changes to the consent agreement.

Accordingly, Respondent violated Section 111.70(3)(a)5, Stats, and, derivatively, Section 111.70(3)(a)1, Stats, by violating the requirements of Section 2 of the consent agreement to file an appropriate late earnings report with ETF. Specifically, it failed to include the full unreduced earnings in its report and properly report the specific period the earnings were for. Additionally, it did not file a correct late earning report because it did not include all of the documentation which ETF would need to understand the consent agreement.

REMEDY

The remedy ordered in this case is of the type normally ordered in this type of case.

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[18] Tr. p. 100-101. At Tr. page 116, Ms. Gilding explained how she arrived at those numbers. She, in fact, had Mr. Kolb's wage rate wrong and did not have the additional unemployment compensation paid for 2001. Her testimony provides sufficient guidance to Respondent to make a correct report similar to that requested by Complainant Complainant's Exhibit 6 and Respondent's Exhibit 6. Respondent was not required to execute the revised "settlement agreement" because it went beyond the needs of ETF to give credit and because it also changed substantive terms of the settlement.

because it is unnecessary to do so. The remedy ordered herein is sufficient in the Examiner's judgment to remedy the violations found.

Respondent has requested a remedy including attorney's fees. Wisconsin applies the American rule that attorney fees are not ordinarily awarded absent an express statute authorizing the same or a contractual agreement authorizing the same.[19] The WERC has indicated that it will consider requests for attorney's fees in complaint cases in a narrow class of cases which includes, in relevant part, when an extraordinary remedy is deemed appropriate; i.e, when a party's position is deemed frivolous. See, MILWAUKEE COUNTY, DEC. NO. 28063-E (WERC, 5/2005); DER (UW) HOSPITAL DEC. NO. 29093-B (WERC, 11/98). Further, the recently adopted changes to the Wisconsin Administrative Procedure Act have specified that attorney fees may be awarded as a sanction for frivolous claims.[20] The Examiner believes the case law of the WERC on frivolous claims and the statute on the same subject serve the same purpose and therefore applies the standards expressly stated in the statute.

The WERC will also grant attorneys fees as a remedy where the parties have expressly agreed in a collective bargaining agreement that they be awarded. See, MADISON TEACHERS INCORPORATED V. WERC AND MADISON METROPOLITAN SCHOOL DISTRICT, WERC DEC. NO. 16471-D (WERC, 5/81), aff'd in relevant part 115 Wis.2D 623 (Ct. App., 1983). That case was further discussed in the dissent of Commissioner Hempe in WISCONSIN STATE EMPLOYEES UNION, AFSCME, COUNCIL 24, AFL-CIO, DEC. NO. 29177-C (WERC, 5/99). It

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[19] See, MILWAUKEE EDUCATION ASSOCIATION V. MILWAUKEE BOARD OF SCHOOL DIRECTORS, 147 Wis.2D 791 (Ct. App, 1988); WINKELMAN V. KRAFT FOODS, INC. 279 Wis.2D 335 (Ct. App, 2005).

[20] Section 227.482 provides in relevant part as follows:

> "(1) If a hearing examiner finds, at any time during the proceeding, that an administrative hearing commenced or continued by a petitioner or a claim or defense used by a party is frivolous, the hearing examiner shall award the successful party the costs and reasonable attorney fees that are directly attributable to responding to the frivolous petition, claim, or defense.
>
> . . .
>
> (3) To find a petition for a hearing or a claim or defense to be frivolous under sub. (1), the hearing examiner must find at least one of the following:
>
> (a) That the petition, claim, or defense was commenced, used or continued in bad faith, solely for the purposes of harassing or maliciously injuring another.
>
> (b) That the party or the party's attorney knew, or should have known, that the petition, claim or defense was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification, or reversal of existing law."

It was effective on February 6, 2004, before the complaint was filed. It therefore applies to this case.

should be noted that in MADISON TEACHERS, *supra*, the WERC did not treat a collective bargaining agreement to accept an arbitration award as final and binding as an agreement

implying the authority to grant attorneys fees in the absence of bad faith. The Examiner addresses the contractual theory of attorney fee awards first. The parties agreed in Section 7 of the consent agreement:

> The parties agree that not only will there be a consent order granted based on this agreement but that nobody will appeal that order in any way. In other words, the Consent Decree will be full and final settlement of all matters raised by the filing of the complaint in the following matter: [Examiner McGilligan's case]"

The Examiner is satisfied that prompt compliance with the consent award and payment of Mr. Kolb's entitlements were an essential element of the consent decree. Nonetheless, neither this provision, nor any other provision in the consent agreement expressly authorizes attorney fees as a remedy for the violation of the agreement. Accordingly, attorney fees are not an appropriate remedy in this case under the contractual award theory.

The Examiner next addresses the "frivolous" theory for awarding attorney fees. He concludes that Respondent's position in this case was arguable and not frivolous as of the date of receipt of Complainant's post-hearing exhibit 1. Respondent was under a duty under WRS law to file an amended late earnings report as to the unreduced earnings of the unemployment compensation for which it took credit in calculating the back pay.[21] The Examiner is satisfied that Respondent did not know, nor should it necessarily have known (for the purposes of Section 227.483, Stats.) that it was under a continuing duty under Section ETF 20.12(7)(a) to file an amended late earnings report until it heard Ms. Gilding's testimony at this hearing. Mr. Pasewald administered the WRS contribution for Respondent. His creditable testimony indicates that he understood the settlement as a lump sum even though it was expressed as wages. See, Resp. Ex. 5 and related testimony, tr. p. 136. In any event, he did make a prompt report to WRS, even if the same was incorrect. Although Mr. Paseweld might have gained a better understanding of the issues involved from the manual provided by ETF, it is apparent that the misunderstanding of the crucial issues was honest. Finally, ETF inexplicably failed to provide Respondent with some of its letters concerning this matter. It also did not make telephone contact with Respondent as it usually does in the normal course of its procedures. Ms. Gilding's testimony fully explained Respondent's on-going duty to file an amended late earnings report during the hearing on this complaint. The Examiner is satisfied that Mr. Pasewald did not understand the scope of the Employer's obligation to report "unreduced" earnings. Respondent participated in the unemployment compensation hearing (Complainant's ex. 5) and was otherwise aware of the $7,939, Mr. Kolb received in unemployment compensation in 2000. It was also aware by virtue of its participation in the UC proceeding that he received additional unemployment compensation as a result of the unemployment compensation decision after hearing. Complainant's post hearing exhibit 1

[21] Respondent violated section 2 of the consent agreement by not filing the amended late earnings report.

detailed the full amount of unemployment compensation Mr. Kolb received which was attributable to the back pay period. Accordingly, the Examiner is satisfied that Respondent

knew as of the date of the receipt of that exhibit the amount of the unemployment compensation Mr. Kolb received relating to the back pay period. Respondent's sole remaining argument for not meeting this duty under ETF 20.12(7)(a)was that the back pay paid under the consent agreement was not back pay under WRS law because it was paid to secure his waiver of his right to reinstatement.[22] However, the determination as to whether the payment was to secure a waiver is a matter for the ETF. Respondent's duty to file an accurate late earnings report is an independent duty of Respondent. The Examiner is satisfied that until the date of receipt of Complainant's exhibit 1 detailing unemployment compensation received, that Respondent's position met the minimal standards of Section 227.483, Stats. The Examiner concludes after that date, Respondent's failure to file a correct late earnings report including the unreduced earnings (unemployment compensation) would be without a legal basis. The legal fees incurred after that date, but before this decision relating to briefing this matter would have been incurred any way. Accordingly, Complainant is not entitled to an award of attorney fees, but is put on notice under Sec. 227.483(3)(b), Stats. that further failure to file a proper late earnings report is without legal basis.[23]

Respondent is ordered to file a corrected report which lists all unreported UC and note the period for which Kolb received the UC. It is ordered to provide ETF with arbitrator's decision, the Circuit Court decisions, Examiner McGilligan's decision with consent decree, transcript, my Examiner decision and decisions subsequent thereto.

Dated at Madison, Wisconsin this 10th day of April, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stanley H. Michelstetter /s/
Stanley H. Michelstetter II, Examiner

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[22] The argument that it was not "back pay" within the meaning of the consent agreement was frivolous. However, a lump sum payment even denominated as back pay under an agreement is not necessarily back pay for WRS purposes if it is paid to obtain the employee's withdrawal from his or her employment. See, Sec. 40.02(22)(b)8, Stats.

[23] See, MORTERS V. SCOPTUR, 2005 AP 703 (Ct. App., 2006). See, Sec. 814.025, Stats, which is analogous to Sec. 227.482, Ststs.

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