STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN EMPLOYEES UNION, AFSCME, COUNCIL 24, AND ITS AFFILIATED LOCAL UNIONS 219 AND 3394, Complainants,

vs.

STATE OF WISCONSIN, DEPARTMENT OF CORRECTIONS, Respondent.

Case 777
No. 66660
PP(S)-377

Decision No. 32019-B

Appearances:

Kurt Kobelt, Lawton and Cates, Attorneys at Law, P.O. Box 2965, Madison, Wisconsin 53701-2965, appearing on behalf of the Wisconsin State Employees Union, AFSCME, Council 24, and its Affiliated Local Unions 219 and 3394.

David Vergeront, Chief Legal Counsel, Office of State Employment Relations, 101 East Wilson Street, 4th Floor, P.O. Box 7855, Madison, Wisconsin 53707-7855, appearing on behalf of the State of Wisconsin, Department of Corrections.

ORDER ON REVIEW OF EXAMINER'S DECISION

On June 6, 2008, Examiner Stuart D. Levitan issued Findings of Fact, Conclusions of Law, and Order in the above-captioned matter, holding that the Respondent State of Wisconsin, Department of Corrections (State) did not refuse to abide by an arbitration award in violation of Sec. 111.84(1)(e), Stats. Accordingly, the Examiner dismissed the complaint.

On July 14, 2008, the Complainants Wisconsin State Employees Union, AFSCME, Council 24, and its Affiliated Local Unions 219 and 3394 (Union) filed a timely petition with the Wisconsin Employment Relations Commission (Commission) seeking review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.84(4), Stats. Thereafter both parties filed briefs in support of their respective positions in the matter, all of which were received by October 17, 2008.

For the reasons explained in the Memorandum accompanying this Order, the Commission has largely affirmed the Examiner's decision.

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

ORDER

A. The Examiner's Findings of Fact 1 through 33 are affirmed.

B. The Examiner's Finding of Fact 34 is set aside.

C. The Examiner's Conclusion of Law 2 is set aside.

D. The Examiner's Conclusions of Law 1 and 3 are modified and restated as Conclusions of Law 1 through 3 as follows:

1. The Grenig award conclusively determined, inter alia, that, where a rest break practice or local agreement at an institution allowed employees to smoke during breaks, the State violates Negotiating Note 5 of the Master Agreement if it imposes a total ban on smoking on the premises of that institution without mutual agreement, even if the practice or local agreement permitted management to designate smoking areas.

2. The Grenig award did not conclusively determine whether or to what extent the rest break practice at Columbia Correctional Institution (CCI) permitted smoking or whether the parties may have reached mutual agreement regarding a smoking ban at CCI.

3. Because the issues described in Conclusion of Law 2, above, were not conclusively determined by the Grenig award, the State has not refused to comply with an arbitration award in violation of Secs. 111.84(1)(e) and (a), Stats., by refusing to rescind the smoking ban at CCI in light of the Grenig award.

E. The Examiner's Order is affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 7th day of January, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

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

STATE OF WISCONSIN (DEPARTMENT OF CORRECTIONS)

MEMORANDUM ACCOMPANYING ORDER ON REVIEW OF EXAMINER'S DECISION

Summary of the Facts

The Examiner's Findings of Fact have been largely affirmed and the most pertinent can be summarized as follows.

Negotiating Note 5 of the 2005-2007 Master Agreement between the State and the Union sets forth certain provisions relating to rest breaks for Officers and/or Youth Counselors employed by the Department of Health and Family Services and/or the Department of Corrections. In pertinent part, Negotiating Note 5 states:

. . .

> Absent agreement, no changes in present practices shall be made at any post in any institution. Following agreement, no changes shall be made in the practice with regard to any post unless there is mutual agreement to change the practice.
>
> … Any and all agreements relating to this issue shall be signed by both parties.

The Master Agreement also permits certain affiliated local unions, including those involved in the instant case, to negotiate "Local Agreements" on certain subjects. At relevant times, the Kettle Moraine Correctional Institution (KMCI) and the Columbia Correctional Institution (CCI) maintained local agreements on the subject of rest breaks.

The KMCI local agreement, as implemented in a mutually-acknowledged practice, permitted officers to smoke during rest breaks. Over the several years prior to May 1, 2006, KMCI management has designated areas on the premises where staff could smoke. On October 11, 2005, KMCI notified staff that KMCI would become tobacco-free effective May 1, 2006. On October 21, 2005, the Union grieved KMCI's upcoming smoking ban. On September 28, 2006, Arbitrator Jay E. Grenig issued an arbitration award regarding the following stipulated issue: "Did the Employer violate the collective bargaining agreement when it banned tobacco products from [KMCI]? If so, what is the appropriate remedy?" The Grenig award concluded that the past practice and previously agreed local agreement at KMCI regarding rest breaks permitted smoking, that Negotiating Note 5 required the State to maintain that local practice unless the Union agreed otherwise, that, while the Union may have acquiesced in the employer's designating smoking areas, the total ban on smoking at KMCI violated both Negotiating Note 5 and the Master Contract regarding "reasonable work rules" because it precluded smoking during rest breaks.

Neither the Grenig award nor the instant record indicates that local union officials at KMCI participated in developing any smoking related policies or directives subsequent to the initial KMCI local agreement regarding rest breaks.

For many years, the written local agreement at CCI has included a four-page Rest Break Agreement, stating, inter alia, the following:

> GENERAL PROVISIONS
>
> . . .
>
> 2. Staff may drink coffee or similar beverages on their post. Staff may smoke on their post, assuming that 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 AFSCME Local 3394 employees at Columbia Correctional Institution now and in the future. Changes to this agreement can be made by mutual consent of both parties.

Since at least mid-1989, CCI management has issued a series of smoking directives/policies each increasingly more restrictive of the locations where staff would be permitted to smoke. At some point, management's directives prohibited staff from smoking at their posts, even if they were on "eight straight" shifts. CCI also has an ongoing Labor/Management Committee (LMC) which meets periodically to address various issues. The LMC includes members of the local union's executive board. Smoking policies, including the possibility of a smoking ban, have been the subject of discussion from time to time at those meetings. In addition, in mid-2002, CCI management established a Smoking Policy Review Committee that included some bargaining unit employees, including the local union's vice-president. In or about mid 2004, after meeting several times, the Review Committee recommended in writing to CCI management that CCI should become smoke free.

There is no evidence that the Union, its local affiliates, or any individual employee objected to the Review Committee's proposal. There is also no evidence that the Review Committee or the LMC engaged in or believed they were engaging in collective bargaining regarding the smoking issue or that they considered the effect of the Review Committee's work on Negotiating Note 5 of the Master Agreement or on CCI's local rest break agreement.

On September 23, 2005, State DOC Deputy Secretary Richard Raemish issued a memorandum on the subject "Tobacco Cessation," stating that, effective September 1, 2006, all tobacco products would be banned from DOC correctional facilities. On October 10, 2005, CCI management posted a memo to all CCI Staff, announcing that all CCI grounds and

buildings would be tobacco-free effective May 1, 2006. CCI management reiterated this directive, in essence, on January 15, 2006. CCI Management again mentioned the upcoming ban at an April 4, 2006 LMC meeting and issued another memorandum announcing the ban on April 28, 2006. Neither the Union nor its local affiliate filed a grievance regarding any of these directives. The ban went into effect as advertised.

On October 17, 2006, the Union (through its local affiliate) filed a grievance stating:

> After being made aware that a negotiated agreement between an employer and their employees supersedes a Governors Executive directive. We are filing on behalf of the Local 3394 members. It states in our Rest Break Agreement that staff may smoke on their post. The Governor's order cannot supersede this agreement, as was proven with an arbitrator's decision made on a KMCI grievance award to their members. ...
>
> Cease & desist the Governor's executive order and allow staff to smoke at the previous designated smoking areas as was the case before this order.

The grievance was denied through Steps 1 and 2. The Union subsequently filed the instant unfair labor practice complaint.

<u>The Examiner's Decision and the Issues on Review</u>

The Examiner reached three principal conclusions. First, he held, contrary to the State's argument, that each correctional institution is not a separate "employer" for purposes of adherence to arbitration awards as required by Sec. 111.84(1)(e), Stats. Rather, the State was bound to apply arbitration awards from one institution to another, so long as the precise issue was actually litigated and decided in the earlier award.

Second, the Examiner held that, while the Grenig award decided several "sub-issues," the award did <u>not</u> decide what "mutual agreement" might mean for purposes of Negotiating Note 5, since that issue was not advanced, litigated, or decided in the KMCI grievance. Since the State would/could advance that issue in support of the smoking ban at CCI, the State has not refused to comply with the Grenig award by refusing to rescind the smoking ban at CCI.

Third, the Examiner held, in the alternative, ostensibly as an application of the second prong of the "Luder" test, that there were significant differences in material facts between the KMCI situation and the CCI situation such that the Grenig award should not bind the State for purposes of the CCI smoking ban. These differences included the difference in language between the two local agreements and the contrast between the attitude and response of the two local unions toward the notion/implementation of a smoking ban and in particular the participation of certain Union members or officials in a labor-management committee studying the issue.

On review, the Union argues, in summary, that: (1) because the language of the KMCI and the CCI local agreements is "effectively the same" in that both permit smoking in management-designated areas, and because the Grenig award determined that, where local agreements had permitted staff to smoke during breaks in management-designed areas, a total ban on smoking violates Negotiating Note 5, the Grenig award required the State to rescind the smoking ban at CCI; (2) there are no material factual differences between the two situations, and evidence regarding the local union's alleged acquiescence in the plan for a total tobacco ban relates to a "waiver" issue that might be a procedural defense at an arbitration but has no bearing on the substantive question of whether a smoking ban violates Negotiating Note 5; and (3) the Examiner misconstrued the second prong of the Commission's "Luder" analysis – whether, subsequent to an award, material facts have changed so as to call the award into question – by examining events that occurred prior to the award.

DISCUSSION

In previous cases between these parties, the Commission has attempted to clarify what situations would constitute a refusal by the State to accept the terms of an arbitration award within the meaning of Sec. 111.84(1)(e), Stats. We have stated, "[B]ased upon issue preclusion principles, the State 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." STATE OF WISCONSIN, DEC. NO. 31865-D (WERC, 11/07), quoting, STATE OF WISCONSIN, DEC. NO. 31240-B (WERC, 5/06). However, we have cautioned that "the party asserting issue preclusion bears a relatively heavy burden to show that a particular issue was actually decided in a previous case … [T]he doctrine is 'equitable' and should not be applied rigidly to foreclose a party from an opportunity to litigate a claim." We have also emphasized that "arbitration … remains the primary forum for enforcing and interpreting contractual provisions. Both parties are entitled to fully litigate issues regarding the meaning of contract language in the arbitration forum. The Commission's jurisdiction under subsection (1)(e) is not a proper vehicle for extrapolating the outcome of issues that were not actually controverted in earlier case… ." ID. At 8.

As both parties recognize, the first focus in a case of this type is to identify the factual and legal/language-interpretation issues involved in the new case and compare them with the factual and legal issues actually litigated and determined in the previous case. Since the point is to prevent unnecessary relitigation while at the same time allowing full access to the parties' chosen dispute resolution forum, this exercise is essentially practical rather than formulaic. Contrary to the Union's argument, we may be guided -- but not restricted -- by how the arbitrator formally stated the "issue" which is to be resolved by the award. There may be any number of factual or language interpretation issues capable of being extracted from any given arbitration award. Some may be dispositive of an entire future grievance; some may simply limit the scope of a future grievance, depending upon the degree of factual or legal overlap.

Here, Arbitrator Grenig issued an award interpreting a provision in the Master Agreement, i. e., Negotiating Note 5. The Master Agreement state-wide provision is itself

tied to "local" institution-based practices or agreements, being designed to maintain practices that may vary from institution to institution and permitting change in those local practices if there is "mutual agreement." By its very nature, then, Negotiating Note 5 has both state-wide and local implications. By the same token, arbitration awards interpreting Negotiating Note 5 may have either state-wide or local application or both.

We agree to some extent with the first of the Union's arguments summarized above, in that the Grenig award decided one pertinent state-wide issue that also appears to be involved in the CCI grievance. Specifically, Grenig interpreted the term "change in present practices" as used in Negotiating Note 5 as follows: a total smoking ban was a "change" from a prior practice that permitted smoking on institution grounds, even if the prior practice allowed management to designate smoking areas and therefore, in accordance with Negotiating Note 5, the total ban would violate the Master Agreement unless the change was "mutually agreed" upon. As an interpretation of a provision in the state-wide Master Agreement, this ruling would apply at any institution. The State may not relitigate that interpretation.

However, contrary to the Union's second argument, as summarized above, we agree with the Examiner that certain factual issues arising in the CCI grievance were not decided in the Grenig award. In particular, the Grenig award did not decide the factual issue of whether there was a prior practice/agreement at CCI that permitted smoking on institution grounds, nor did the Grenig award determine what "mutual agreement" might mean in any context and certainly not in the CCI context. "Mutual agreement" was not at issue in the KMCI grievance. In the CCI situation, evidence exists that *could* be interpreted to have modified the prior practice of permitting smoking and/or *could* be interpreted as a "mutual agreement." The facts regarding the study committee and the Union's conduct clearly could affect the outcome of the grievance and therefore constitute a material issue. The Union vigorously contends that the Examiner "grossly misconstrued" the evidence pertaining to the CCI smoking study committee and the local union's acquiescence in a smoking ban, and that, properly viewed, the evidence would not show mutual agreement to a smoking ban. The Union may be correct, but, as the Examiner also noted (despite his unnecessarily extensive discussion of the evidence), the issue is for the arbitrator to decide. Like the Examiner, we by no means suggest that such an interpretation is correct or even likely. It is simply an issue in the CCI context that was not raised or decided in the KMCI arbitration. [1]

Accordingly, we conclude with little difficulty that the Examiner correctly decided that the Grenig award has not conclusively decided all the issues that are involved in the CCI grievance and therefore the State has not refused to comply with the Grenig award by refusing to lift the total smoking ban at CCI. We emphasize, however, that the State would not be able to argue, contrary to the Grenig award, that management's discretion to designate smoking areas permits management to impose a total ban.

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[1] To the extent either party views this evidence – or any other evidence – as indicating that the Union has "waived" its opportunity to file a grievance, we agree with the Union that such an argument relates to procedural arbitrability that would have to be submitted to an arbitrator in connection with the CCI grievance.

We have set aside the Examiner's Finding of Fact 34 and Conclusion of Law 2 regarding "significant differences of materials facts between the situation at KMCI and CCI …" as being unnecessary to the resolution of the matter before us and as reflecting some continuing confusion about the second prong of the so-called "Luder" test. To the extent the Examiner meant that the CCI situation presented somewhat different factual issues than the KMCI situation and that those factual issues could be decided in a manner that might change the outcome of the grievance, we have already agreed with the Examiner. As noted earlier, there can be many "material factual issues" in any given grievance, some of which may have been previously litigated and therefore must be accepted for purposes of Sec. 111.84(1)(e), Stats. This finding is affirmed and incorporated into our conclusion that not all of the CCI issues were resolved by the KMCI award.

However, as the Union suggests in its third argument as summarized above, the Examiner appears to have made this finding and conclusion in relation to the second prong of the "Luder test," i.e., whether, even if an issue has previously been decided, "subsequent circumstances have … called the resolution into question." STATE OF WISCONSIN, DEC. NO. 31240-B (WERC, 12/05). We have attempted in an earlier decision to clarify that prong, stating that "'Material factual circumstances' means "subsequent events that are material to the previous outcome of the issue." STATE OF WISCONSIN, DEC. NO. 31865-D (WERC, 11/07). We now reiterate that the second prong only comes into play if a particular issue (whether factual or language interpretation) has been decided in a previous arbitration. At that point, one must examine whether any circumstances that affected the previous outcome may have changed, so as to call into question the continued vitality of that outcome.

For the foregoing reasons, we affirm the Examiner's Order dismissing the complaint in this matter.

Dated at Madison, Wisconsin, this 7th day of January, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

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

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