STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN STATE EMPLOYEES ASSOCIATION, AFSCME, AFL-CIO, LOCAL NO. 18, Complainant, vs. STATE OF WISCONSIN, DEPARTMENT OF HEALTH AND SOCIAL SERVICES, DIVISION OF CORRECTIONS; SANGER POWERS; AND JOHN BURKE, Respondents.	Case III No. 12219 PP(S)-3 Decision No. 8892

Appearances: Lawton & Cates, Attorneys at Law, by Mr. John C. Carlson and Mr. John H. Bowers, for the Complainant.
Brady, Tyrrell, Cotter & Cutler, Attorneys at Law, by Mr. T. L. Tolan, Jr. and Mr. Fred G. Groiss; and Mr. Gene Vernon, Employment Relations Section, for the Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complaint of prohibited practices having been filed with the Wisconsin Employment Relations Commission in the above entitled matter, and hearing having been conducted on July 25 and 26, 1968, at Waupun, Wisconsin, before Commissioner Zel S. Rice II, and the Commission having considered the evidence, arguments and briefs of counsel, and being fully advised in the premises makes the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Wisconsin State Employees Association, AFSCME, AFL-CIO, Local No. 18, hereinafter referred to as the Complainant, is affiliated with Wisconsin State Employees Association, AFSCME, AFL-CIO, hereinafter referred to as WSEA, a labor organization certified by the Wisconsin Employment Relations Commission as the representative of certain employes in the employ of the State of Wisconsin for the purposes of collective bargaining, pursuant to the State Employment Labor Relations Act, Subchapter V of Chapter 111, Wisconsin Statutes; and that the Complainant maintains its offices at Waupun, Wisconsin.

2. That Department of Health and Social Services, Division of Corrections, hereinafter referred to as the Respondent Employer, is an agency of the State of Wisconsin and, as such, employs various employes in offices and institutions maintained and operated by it, including the Wisconsin State Prison, hereinafter referred to as WSP, at Waupun, Wisconsin; that Sanger Powers, hereinafter referred to as Respondent Powers, is the Administrator of the Division of Corrections and, as such is an agent of the Respondent Employer; and that John C. Burke, hereinafter referred to as Respondent Burke, is the Warden of WSP and, as such, is an agent of the Respondent Employer.

3. That at WSP the Respondent Employer employs various security personnel, consisting of approximately 32 employes classified as Officer III, 105 employes classified as Officer II, 40 employes classified as Officer I, and 10 employes classified as Trainees; that the Complainant is the collective bargaining representative for said security personnel; that said security personnel are supervised by Respondent Burke, three Associate Wardens, two of whom are Roger Crist and Ramon Gray, three Captains, and eight Lieutenants; that a majority of such security personnel are members of the Complainant; and that the aforementioned supervisory personnel have knowledge of such membership.

4. That a majority of the officers employed at WSP work one of three daily shifts in a consecutive five-day work week on a rotating basis; that as a result, any particular officer is able to determine in advance his days off during any particular month, and no weekly work schedules are posted by the Respondent Employer for the regularly assigned officers; that because of their work schedules, many officers work on holidays and are subsequently granted, in accordance with seniority, days off, selected by each officer for holidays so worked; that the officers also select their vacation periods by seniority, and such selections are honored by the Respondent Employer; and that the officers also earn compensatory time off for time spent in "In Service Training" and Respondent Employer has permitted officers who earn such time off to take same when they desire unless the requested time off would interfere with the needs of the WSP.

5. That in the past number of years the Respondent Employer has conducted biennial conferences attended by its correctional officers for the purpose of additional training; that in the past, correctional officers were requested to indicate their desire as to their attendance at said conferences, which attendance was voluntary and very well attended by correctional officers; that 180 of 242 officers were in attendance at the conference held just previous to the one scheduled for May 1968; that in October 1967 the Respondent Employer commenced

preparations for the Eighth Biennial Corrections Conference to be held in May 1968; that in preparing for same the Respondent Employer planned a format different from that used in prior conferences in that participants, which included, among others, correctional officers, were to be divided into small discussion groups and active participation was to be encouraged; that as a result of such changed format it was necessary to pre-arrange the various discussion groups in order to achieve a proper blend of experience and physical capabilities, as well as to maintain, through the various employes of various classifications and experience, the security at WSP; and that in said regard, rather than requesting the officers to initially indicate their dates to attend, the Respondent Employer determined to schedule the officers for attendance on the various dates of the Conference, with the privilege of indicating their choice not to attend.

6. That early in 1968 and prior to May 8, 1968, the WSEA, and its various Locals, including the Complainant, engaged in an active campaign in an attempt to persuade pertinent State officials to grant an across-the-board increase of $50 per month to all classified employes of the State, and more specifically, the Complainant sought an upgrading of two pay ranges for officers employed at WSP; and that in said regard WSEA, by letter, requested the Governor to recall the State Legislature into special session to consider said salary requests; and that, in reply, on April 25, 1968, the Governor declined to do so.

7. That, after extensive preparation on the Correctional Conference, the Respondent Employer posted schedules at WSP on approximately May 1, 1968, indicating that the Conference was to be held on May 21, 22 and 23 and listing those officers scheduled to attend on each of said dates; that said notice consisted of three separate documents, each containing the following introductory statement:

> "The following officers will attend the 1968 Wisconsin Correctional Conference in Milwaukee on (date). Anyone who is scheduled and does not wish to attend, please notify Captain Young as soon as possible.";

that the notice signifying attendance for May 21 contained the names of 48 officers; that the notice signifying attendance for May 22 contained the names of 50 officers; and that the notice signifying attendance for May 23 contained the names of 49 officers.

8. That prior to May 9 some 22 of the 147 officers scheduled to attend the Conference for one day thereof advised Gray that they had chosen not to attend the Conference; that after the posting of the

schedules but prior to May 9 Complainant's president, Richard Jarvis, had learned that Gray had informed fellow officers that the Respondent Employer was maintaining a list of officers who declined to attend the Conference and that such declination would be considered in determining and distributing merit increases to officers during the coming year; that thereupon Jarvis, on May 8, called Gray with regard to his alleged statement and in said conversation Gray acknowledged making same; that then Jarvis advised that Respondent Employer's intended action in that regard would be considered at Complainant's membership meeting to be held that evening; that in said conversation Jarvis indicated that some of the officers had discussed the possibility of boycotting the Conference, or utilizing some other means to embarrass the Governor, who was scheduled to speak at the Conference; that in conclusion Jarvis indicated that, because of Gray's statement with respect to the effect of non-attendance on merit increases, the membership of the Complainant would likely determine to boycott the Conference; and that following said conversation Gray advised Respondent Burke and Crist the contents thereof.

9. That on the evening of May 8, during a meeting of Complainant's membership, President Jarvis reported on his conversation with Gray and, although no vote was taken, the membership understood that Complainant's policy encouraged the officers not to attend the Conference, however, that each of the officer members should make such determination for himself.

10. That on May 9, 39 officers deleted their names from the posted Conference attendance schedules, indicating an intention not to attend the Conference; that on May 10 Respondent Employer posted the following notice:

> "All our schedules for the time of the Conference have been made up. Changes cannot be made. All those who signed up for the Conference, and on May 9 or later gave notice they would not go, should realize that they should either attend that Conference as scheduled or they will have that scheduled day off as compensatory time, or holiday, if they have such coming, or as a day of vacation.
>
> If you notified us you were not going, and should change your mind and want to go, please notify your scheduling supervisor."

11. That also on May 9 Respondent Employer posted a copy of a telegram received on the same date from Respondent Powers, which stated, among other things, the following:

"The conference has been planned around the rehabilitative contribution which can be made by all members of the staff working as a team with particular reference to the rehabilitative role of the correctional officers and youth counselors.

Attention by institution staff at the conference, although not mandatory, is strongly encouraged."

12. That on May 10 an additional 11 officers indicated an intention not to attend the Conference by deleting their names from the posted Conference attendance schedules; that on May 11 Jarvis telephoned Respondent Burke and requested the latter to reconsider the decision indicated in the notice posted on May 9, contending that there was sufficient time to reschedule the officers who, after May 8, had indicated their intention not to attend the Conference; and that also on May 11, 4 additional officers indicated an intention not to attend the Conference.

13. That on May 12 Jarvis wrote Respondent Burke a letter wherein he renewed his request and contention stated orally to Respondent Burke on the previous day; that in reply, on May 14, Respondent Burke replied to Jarvis by letter wherein he stated as follows:

"I received your letter of May 12, 1968 when I came to work at 6:25 a.m. on May 13, 1968. It was handed to me by Sergeant Gordon Peppler.

Chapter VII, page 3, of the Department's Manual of Instructions and Administrative Orders--Personnel, says:

'Section 16.275(6)(an) Wis. Stats., effective 8/1/61, reads as follows:

"It is the intent of this section that all employes shall be granted 7-1/2 holidays annually in addition to regularly scheduled days off and annual leave, the time to be at the discretion of the department head."

'Since offices are to remain open, except as stated above, holidays falling on a Saturday and those falling on a Sunday when the following Monday is not considered the holiday, are to be considered compensatory days off. Such compensatory days off are to be subject to the same rules as apply to vacation credits for calendar year employes, i.e., (1) they are to be granted at the discretion of the employing officer;--'

We set up a schedule for employes for next week, the week of the Conference. This schedule took into consideration many things for the efficiency and the security of this institution.

Through no fault of ours, a number of our employes have now notified us that they do not desire to attend the Conference on the day they were scheduled to attend.

It is not reasonable for us to be changing our schedule from day to day.

Some were going to the Conference on their 'day off' and would have been given that day off some other time. Now they will have the day off as originally scheduled, unless they decide to go to the Conference.

Some who were scheduled for the Conference, and now do not care to go, will be given the day off as Holiday or Compensatory time. It has always been our right to give that time at our convenience for the good of the service. These persons can still go to the Conference if they wish.

Some who have no Holidays or Compensatory time coming will be given a day's vacation or, of course, can still attend the Conference.

We will not re-schedule all the employees who withdrew their names from the Corrections Conference list."

14. That also on May 14 Respondent Burke caused the following notice to be posted:

"Subject: To further clarify the situation regarding our schedules and the Wisconsin Corrections Conference.

1. No one is required to attend the Conference. It is recommended, however, that the Conference may help career people learn more about their line of work and to some it may help them earn training credits toward possible promotion.

2. Arranging schedules is complicated, because all posts must be covered and there must be a balance between new, inexperienced men and more experienced and well trained men.

3. It is not reasonable for us to be changing our schedule from day to day.

4. As of now, the situation is like this:

Some were going to the Conference on their 'day off' and would have been given that day off some other time. Now they will have the day off as originally scheduled, unless they decide to go to the Conference.

Some who were scheduled for the Conference, and now do not care to go, will be given the day off as Holiday or Compensatory time. It has always been our right to give that time at our convenience for the good of the service. These persons can still go to the Conference if they wish.

Some who have no Holidays or Compensatory time coming will be given a day's Vacation or, of course, can still attend the Conference."

15. That on May 15 Respondent Burke caused the following statement to be added to the May 14 notice:

> "This applies to those who gave notice on May 9 or later that they did not care to attend the Conference. This is a supplement to my memorandum of May 10."

16. That on May 16 Respondent Burke caused the following notice to be posted:

"SPECIAL NOTICE ON WISCONSIN CORRECTIONS CONFERENCE ATTENDANCE

We have from day to day reviewed the situation that has developed regarding the Conference.

It has now been decided that the policy we will remain with is as follows:

1. All of those who before May 9 gave notice they did not care to go to the Conference will carry on as usual.

2. All of those who canceled their desire to go to the Conference on May 9 or since will be guided by the following:

   a. Those scheduled for a regular day off will attend the Conference (if they notify us they wish to) or will take the day off as scheduled.

   b. Those who have eight (8) hours of compensatory time or holiday time or any time other than regular vacation time coming, will either attend the Conference (if they notify us of their wish to) or will have the day off.

   c. Those who do not have eight (8) hours of any kind of time (other than vacation) coming, can either attend the Conference (if they notify us they wish to) or must report for work.

3. Work assignments as posted will be followed.

Those not going to the Conference, and where it is not their regular day off, or they do not have eight (8) hours of time (other than vacation) coming, will report to work as noted on a special schedule that will be posted. They will be 'extras'."

17. That on May 17 representatives of WSEA met with Respondent Powers in Madison in an effort to persuade the Respondent Employer to modify its position with respect to requiring certain officers who chose not to attend the Conference to take earned time or a holiday off because of such non-attendance; that at said meeting Respondent Powers indicated that the Respondent Employer had the right to schedule days off and that it was too late to make schedule changes; and that in said meeting Respondent Powers characterized Jarvis as one of the "ringleaders" of the Conference boycott.

18. That from May 12 through May 18 some 19 additional officers indicated their intention not to attend the Conference, thus totaling some 73 officers who, from May 9 through May 18, although scheduled to attend the Conference, had indicated they would not attend; that 6 of the 73 officers changed their minds and did attend the Conference; as did 53 other officers; that of the remaining 67 officers who on or after May 9 gave notice that they would not attend the Conference as scheduled, 15 were permitted by the Respondent Employer to work as "extras" on the date they were originally scheduled to attend the Conference since they had no earned holiday or compensatory time to their credit; that of the remaining 52 of such officers, the Respondent Employer, after a determination by Respondent Burke, Gray and Crist, required 14 officers to take a day off as unused holiday time, and of the remaining 38 officers, compelled an undetermined number of officers to take a day off of compensatory time or take the day off as a regularly scheduled day off; that at least one officer was required to work on his regularly scheduled day off; that, however, those officers who prior to May 9 had indicated that they did not desire to attend the Conference, and who did not attend the Conference, worked or took their regular day off, in accordance with their regular work schedules.

19. That Richard Jarvis, president of Complainant, commenced his employment with Respondent Employer in 1947 at WSP and has continued in such employment at all times material herein, as an Officer I to 1965, when, upon creation of the classification, he became an Officer II; that in 1958 Jarvis was assigned to the rear of the Segregation Block, where he performed his duties in a satisfactory manner, and while performing such duties, Jarvis was offered an Officer III classification (sergeant), which he refused because of his presidency in the Complainant; that in November 1967 Jarvis was transferred to the front of the Segregation Block where his contacts with the inmates were decreased while his clerical duties were increased; that such transfer occurred shortly after Jarvis had injured an arm in an automobile accident, causing him some absence from his employment, and upon his return he was again assigned to the front section of the Segregation Block; that prior thereto there were two other occasions on which Jarvis was absent because of illness, the first in 1959 when he missed 60 days because of a "coronary insufficiency" and the second in 1967 when he was absent because of pneumonia; that on June 2, 1968, pursuant to notice given to him on May 27, 1968, Jarvis was transferred from the front of the Segregation Block to Tower duty and remained in such assignment at all times thereafter; and that, to make room for such assignment, the

Respondent Employer transferred Officer Clayton Solberg from such Tower duty to other duties as a relief officer after Solberg had requested a transfer in order to qualify for a promotion from Officer I to Officer II.

20. That Solberg has been an employe of the Respondent Employer at WSP since 1950; that in July 1963, while classified as an Officer III, Solberg requested Respondent Burke to transfer him to an Officer I position because of an arthritic condition; that pursuant to said request, Solberg was reclassified to Officer I in August 1963 and thereupon was assigned as a Tower Officer; that on May 29, 1968, two days after Solberg learned that he was to be taken off Tower duty, he advised Crist of his continuing arthritic condition and displayed to Crist a physician's report dated February 29, 1968, reflecting that Solberg should limit his activity and avoid excessive physical exertion; that none the less, Solberg, on June 2, 1968, was removed from Tower duty, Jarvis being assigned to such duty as noted heretofore, and Solberg was assigned, not at his request, at times to duty in the Segregation Block, where he performed regular and temporary assignments in the front and rear thereof, requiring him to engage in greater physical activity than when he performed his duties in the Tower.

21. That Jarvis has been a member of Complainant since the first year of his employment at WSP, holding the office of president for the last 6 years, the office of vice-president for the preceding 6 years, and for the past 5 years has been a member of Complainant's grievance committee which has processed some 150 grievances with management personnel of the Respondent Employer, and that more recently, and since the effective date of the State Employment Labor Relations Act, Jarvis has been a member of Complainant's bargaining committee, and in that capacity has been actively engaged in negotiations with agents of the Respondent Employer in an attempt to consummate a collective bargaining agreement covering certain conditions of employment of officers employed by the Respondent Employer at WSP, as well as certain of its other employes.

22. That the determinations by the Respondent Employer (a) with respect to scheduling Conference attendance, (b) with respect to the change of work schedules of certain officers who chose not to attend the Conference, (c) with respect to the decision that those officers, who on May 9, 1968, and thereafter indicated an intention not to attend the Conference, and who had at least one day of either earned compensatory or holiday time, be required to take an earned day off because of non-attendance at the Conference, and (d) with respect to the decision to

transfer Richard Jarvis from the Segregation Block to Tower duty, were unilaterally made by agents of the Respondent, including Respondents Burke and Powers, without affording the Complainant and its agents an opportunity to bargain collectively with respect thereto.

23. That the action of the Respondent Employer in refusing to permit officers, who determined on May 9, 1968, and thereafter not to attend the Corrections Conference, and who had at least one day of either earned compensatory or holiday time, to work on the day each of them had been previously scheduled to attend the Conference, and requiring said officers to use either a day of earned compensatory or holiday time, was not motivated by the concerted activity of said officers as members of the Complainant, nor by similar activity of the remaining members of the Complainant to boycott such Conference, but rather because of scheduling difficulties, in part resulting from the timing of the notifications given by such officers of their intent not to attend the Conference as previously scheduled; and that, therefore, such action by the Respondent Employer was not intended to, nor did it, interfere, restrain or coerce its employes in their concerted activity on behalf of, or membership in, the Complainant.

24. That the Respondent Employer, by transferring Richard Jarvis on June 2, 1968, from duties in the Segregation Block to a Tower assignment, was primarily motivated by Jarvis' activity as president of the Complainant in encouraging fellow officers not to attend the Corrections Conference in May 1968, and because of Jarvis' activities and efforts in attempting to persuade the agents of the Respondent Employer, including the individual Respondents, to permit those officers who, after May 9, 1968, indicated a choice not to attend the Conference and who had at least one day earned compensatory or holiday time, to work rather than be compelled to take a day off as compensatory or holiday time, and that the reasons assigned by the Respondent Employer for said transfer, that of Jarvis' physical condition, his unauthorized use of the business phone, the established policy of transferring employes to gain different experience, and the need to fill the vacancy in the Tower caused by the transfer of Solberg, were pretexts designed to conceal the true reasons for Jarvis' transfer.

Upon the basis of the above and foregoing Findings of Fact, the Commission makes the following

CONCLUSIONS OF LAW

1. That, since attendance at the May 1968 Corrections Conference by officers in the employ of the Respondent, Department of Health and Social Services, Division of Corrections, was voluntary, rather than compulsorily required by said Respondent, the concerted refusal of the majority of said officers to attend said Conference did not, and does not, constitute a strike within the meaning of Sec. 111.81(14) of the State Employment Labor Relations Act.

2. The unilateral determination by Respondent Employer, Department of Health and Social Services, Division of Corrections, by its agents, including Respondents John C. Burke and Sanger Powers, with respect to the change in policy affecting the use of holiday and other time off by its officers, and the unilateral implementation of such policy, did, and does, constitute a refusal to bargain in good faith with the collective bargaining representative of such officers, the Complainant, Wisconsin State Employees Association, AFSCME, AFL-CIO, Local No. 18, in violation of Sec. 111.84(1)(d) of the State Employment Labor Relations Act.

3. That, by requiring officers who, after May 9, 1968, had indicated an intention not to attend the May 1968 Corrections Conference, and who had at least one day of earned or compensatory time, to take such days off in lieu of Conference attendance, and in not scheduling said officers for work in accordance with their normal schedules, the Respondent, Department of Health and Social Services, Division of Corrections, by the actions of its agents, Respondents John C. Burke and Sanger Powers, did not discriminate against and/or interfere, coerce and restrain, and is not discriminating against and/or interfering, coercing and restraining its employes in violation of Secs. 111.84(1)(c) and (a) of the Act.

4. That, since the transfer of Richard Jarvis, the president of Complainant, Wisconsin State Employees Association, AFSCME, AFL-CIO, Local No. 18, on June 2, 1968, from the Segregation Block to Tower duty was motivated by Jarvis' protected activity in persuading certain officers not to attend the May 1968 Corrections Conference, and by his protected activity in attempting to persuade Respondents John C. Burke and Sanger Powers, as agents of the Respondent, Department of Health

and Social Services, Division of Corrections, to permit certain officers who determined not to attend said Conference, to work their normally scheduled days rather than be compelled to take a day off as earned compensatory or holiday time, the Respondent, Department of Health and Social Services, Division of Corrections, unlawfully discriminated against Richard Jarvis, and thus committed a prohibited practice within the meaning of Secs. 111.84(1)(c) and (1)(a) of the State Employment Labor Relations Act.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law the Commission makes the following

ORDER

IT IS ORDERED that the Respondent, Department of Health and Social Services, Division of Corrections, and its agents, including Respondents John C. Burke and Sanger Powers, shall:

1. Cease and desist from:

(a) Discriminatorily transferring employes, or in any like or related manner interfering with, restraining or coercing employes in the exercise of their right to self-organization, to form, join or assist Wisconsin State Employees Association, AFSCME, AFL-CIO, Local No. 18, or any other labor organization, to bargain collectively through representatives of their own choosing or to engage in other concerted activities for purposes of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activity.

(b) Refusing to bargain collectively with Wisconsin State Employees Association, AFSCME, AFL-CIO, Local No. 18, as the collective bargaining representative of its officers, with respect to changes in policy affecting the use of holiday and other time off by its officers, and other matters subject to collective bargaining pursuant to Sec. 111.91 of the State Employment Labor Relations Act.

2. Take the following affirmative action which the Wisconsin Employment Relations Commission finds will effectuate the policies of the State Employment Labor Relations Act:

(a) Offer to Richard Jarvis immediate re-transfer from Tower duty to his former position in the Segregation Block at Wisconsin State Prison, without prejudice to any rights or privileges previously enjoyed by him.

(b) Upon request, bargain with Wisconsin State Employees Association, AFSCME, AFL-CIO, Local No. 18, as the exclusive representative of its officers, with respect to contemplated changes in policies affecting the use of holiday and other time off by its officers, and other matters subject to collective bargaining pursuant to Sec. 111.91 of the State Employment Labor Relations Act.

(c) Notify all of its employes employed at the Wisconsin State Prison, by posting in conspicuous places on said premises, where notices to all its employes are usually posted, a copy of the notice attached hereto and marked "Appendix A." Such copy shall be signed by Warden John C. Burke and shall be posted immediately upon receipt of a copy of this Order, and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken to insure that said notice is not altered, defaced or covered by other material.

(d) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days of the receipt of a copy of this Order what steps it has taken to comply herewith.

Given under our hands and seal at the City of Madison, Wisconsin, this 7th day of March, 1969.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney 1/
Morris Slavney, Chairman

Zel S. Rice II 2/
Zel S. Rice II, Commissioner

William R. Wilberg
William R. Wilberg, Commissioner

1/ Chairman Slavney dissents from the Conclusion of Law as set forth in Paragraph 2 and would conclude that there was no violation of Sec. 111.84(1)(d), and, therefore, also dissents from that portion of the Order relating thereto.

2/ Commissioner Rice dissents from the Conclusion of Law as set forth in Paragraph 3 and would conclude that the activity referred to therein did constitute a violation of Sec. 111.84(1)(c) and (1)(a).

APPENDIX "A"

NOTICE TO ALL EMPLOYES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the State Employment Labor Relations Act, we hereby notify our employes that:

1. WE WILL NOT discourage membership in Wisconsin State Employees Association, AFSCME, AFL-CIO, Local No. 18, or any other labor organization of our employes, by transferring or otherwise discriminating against any employe with regard to his hire, tenure of employment, or in regard to any term or condition of employment, or in any like or related manner interfere with, restrain or coerce employes in the exercise of their right to self-organization, to form, join or assist Wisconsin State Employees Association, AFSCME, AFL-CIO, Local No. 18, or any other labor organization, to bargain collectively through representatives of their own choosing or to engage in other concerted activities for purposes of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activity.

2. WE WILL NOT refuse to bargain collectively with Wisconsin State Employees Association, AFSCME, AFL-CIO, Local No. 18, as the collective bargaining representative of our employes, with respect to changes in policies affecting the use of holiday and other time off by our officers, and other matters subject to collective bargaining pursuant to Sec. 111.91 of the State Employment Labor Relations Act.

3. WE WILL offer to Richard Jarvis immediate re-transfer from Tower duty to his former position in the Segregation Block at Wisconsin State Prison, without prejudice to any rights or privileges previously enjoyed by him.

4. WE WILL, upon request, bargain collectively with Wisconsin State Employees Association, AFSCME, AFL-CIO, Local No. 18, as the collective bargaining representative of our officers, with respect to changes in policies affecting the use of holiday and other time off by our officers, and other matters subject to collective bargaining pursuant to Sec. 111.91 of the State Employment Labor Relations Act.

WISCONSIN STATE PRISON

By _____
John C. Burke, Warden

Dated this _____ day of _____, 1969.

THIS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL.

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN STATE EMPLOYEES ASSOCIATION, AFSCME, AFL-CIO, LOCAL NO. 18, Complainant, vs. STATE OF WISCONSIN, DEPARTMENT OF HEALTH AND SOCIAL SERVICES, DIVISION OF CORRECTIONS; SANGER POWERS; AND JOHN BURKE, Respondents.	Case III No. 12219 PP(S)-3 Decision No. 8892

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Issues

The issues raised in the instant proceeding, in the pleadings, by the evidence, and arguments of Counsel, are as follows:

1. Was the boycott of the Corrections Conference by union members lawful concerted activity within the meaning of Sec. 111.82 of the State Employment Labor Relations Act?
2. If the boycott activity is deemed to be lawful activity within the meaning of the Act,
   (a) Did the Employer, by its unilateral determinations with respect to scheduling Conference attendance, with respect to the change of work schedules of certain officers who chose not to attend the Conference, with respect to the decision that certain officers be required to take an earned day off because of non-attendance at the Conference, and with respect to the decision to transfer Richard Jarvis from the Segregation Block to Tower duty, refuse to bargain in good faith with the Union in violation of Sec. 111.84(1)(d) of the Act?

(b) Did the Employer discriminate against and/or interfere with, coerce and restrain its employes in violation of Sec. 111.84(1)(c) and (1)(a) of the Act, to discourage their lawful concerted activity, by requiring those officers, who had at least one day of earned compensatory time or holiday time, and who, on May 9 and thereafter, advised the Employer that they would not attend the Conference, to take an earned day off rather than being permitted to work in accordance with their normal schedule on the date of their non-attendance at the Conference?

(c) Did the Employer commit a similar violation of the Act by transferring Union President Jarvis from the Segregation Block to Tower duty on June 2, 1968?

Contentions of the Parties

The Boycott Activity

The Union contends that since attendance at the Corrections Conference was voluntary, rather than mandatory, the boycott activity by Union members did not constitute a strike, but concerted activity protected by the Act. In support of such contention the Union argues that its members did not engage in any work stoppage but rather insisted on being permitted to perform their normal duties in accordance with their normal schedule.

The Employer submits that the concerted action of Union membership in boycotting the Conference falls within the definition of a strike as set forth in Sec. 111.81(14) of the Act, and, therefore, is a prohibited practice as set forth in Sec. 111.84(2)(e). It argues that the voluntary nature of the Conference attendance, as opposed to mandatory attendance, is irrelevant since the Conference is considered a valuable training tool to the job performance of the security force, and furthermore, both the Conference and prison operations were disrupted because of the Union's concerted boycott. Despite this concerted boycott, the Employer submits that it chose a course of action which minimized the retribution which was available to it under the Act.[3/] Further, the Employer contends that the concerted activity with respect to the Conference boycott is not activity which is deemed protected under the Act because it was a manifestation of the Union's displeasure with the State's action with regard to the WSEA demands relating to improved wages and employment benefits, which the Employer argues "are non-bargainable subjects" under the Act.

3/ Sec. 111.81(14)(a), (b) and (c).

The Alleged Refusal to Bargain

The Union also contends that the Employer committed a prohibited practice by refusing to bargain with the Union, as required by Sec. 111.84(1)(d), (a) with respect to the Employer's unilateral action in changing the method of attending the Conference, (b) in changing work schedules and days off, both of which are mandatory subjects of bargaining as set forth in Sec. 111.91(1), and (c) by its unilateral intradepartmental transfer of Jarvis from the Segregation Block to Tower duty.

The Employer denies that it violated any duty to bargain. It contends that the Union was well aware of the Conference long prior to May 1968 and at no time prior thereto did the Union request that the Employer bargain with respect to any aspect of the Conference, and that any request of the Union which can be equated with a request to bargain was first made by the Union on May 8. The Employer further argues that agents of the Employer, upon invitation of the Union, entered into discussions with Union representatives regarding the demands of the Union to permit employes who chose not to attend the Conference to work on their regularly scheduled days and not be compelled to take an earned day off. It also denies any bargaining violation with respect to the decision to transfer Jarvis.

The Alleged Acts of Interference, Restraint, Coercion and Discrimination with Respect to Scheduling Days Off as a Result of Non-Attendance at Corrections Conference

The Union further contends that the Employer unlawfully discriminated[4/] against its employes who withdrew from the Conference after the Union's meeting of May 8, where it was determined to boycott the Conference, by treating said employes differently from those who withdrew prior to the meeting, since the difference in treatment (not being permitted to work in accordance with their normal schedule and being compelled to take an earned day off) was punitive in nature and intended to discourage membership in the Complainant. It also argues that the Employer committed unlawful acts of interference, restraint and coercion[5/] by threats contained in the bulletins relating to Conference attendance and failure thereof, posted on May 10, 14 and 16, 1968, in that the employes were advised that they should either attend the Conference as scheduled or face the loss of a day of earned time.

4/ Sec. 111.84(1)(c).

5/ Sec. 111.84(1)(a).

The Union also argues that the timing of management's decision in relationship to the Union's decision to boycott the Conference clearly indicates that it was intended to be punitive in that no employes were given any warning that they would lose any time by virtue of their decision not to attend the Conference, and in addition, if it were not punitive, there would have been no reason for management to subsequently modify its policy to permit employes who had not accumulated any time to work instead of losing a day's pay.

The Employer submits that, after learning of the proposed boycott, it acted in a reasonable manner and in conformity with the Management Rights Provision in Section 111.90(1) of the Act, and that it scheduled work for certain officers and off-days for others to insure that over-staffing would not occur and to keep operating costs at a minimum, and further that it would have been unreasonable for management to schedule work from day to day since many factors relating to the efficiency and security of WSP must be considered.

The Employer notes that Sec. 16.275(6), Wis. Stats., grants appointing officers discretion in scheduling holidays and regularly scheduled days off. It contends that it has never waived this discretion, and in the past has required employes to obtain prior approval before taking any leave. The Employer submits that the policy of requiring employes to take a holiday or compensatory time off in this instance was within the discretion of its management.

The Employer further asserts that there is no evidence in the record to substantiate the allegation that its conduct was motivated by anti-union animus or was intended to discourage membership in the Union. In support of its position that the policy was not discriminatory, the Employer notes that both members of the Union and non-members who gave notice of their intention not to attend the Conference after May 8, 1968, were charged with loss of a holiday or other accumulated time off.

With respect to Employer's arguments that the policy was adopted because of the security needs of the institution and to insure efficiency in the operation, the Union submits that the Employer has failed to prove its case. In support of this contention the Union notes that as early as May 10 the Warden, in a memorandum, stated that changes could not be made in the schedule; however, changes in fact were made subsequent to this date as evidenced by the fact that seven relief officers who had not originally been scheduled to attend the Conference were rescheduled to attend the Conference some time between May 10 and May 15, when the amended Conference attendance lists were posted. In addition, additional

changes were made after May 16 when the Employer permitted officers who had no earned compensatory or holiday time to work if they decided not to attend the Conference.

With respect to the Employer's contention that it would have been too costly to reschedule all of the employes who withdrew from the Conference after May 8, the Union notes that it would have been no more costly than if they had attended the Conference and had been paid a day's wages for their attendance.

The Alleged Unlawful Conduct with Respect to the Transfer of Richard Jarvis

The Union alleges that the transfer of Jarvis constituted unlawful interference and discrimination in reprisal for his role in the boycott and surrounding activity, and that the Employer's alleged reasons for such transfer are specious.

The Employer argues that the Union possesses the burden of proof in establishing that Jarvis' concerted activity was the motivating factor for his transfer and that such burden of proof, which requires a clear and satisfactory preponderance of the evidence, has not been met. It is submitted that the evidence does not even substantiate the allegation that Jarvis' transfer to the Tower was undesirable. Officer Solberg had previously requested a promotion to Officer II, and in order to fulfill the requirements of this position, a transfer was required. Therefore, an opening occurred on the Tower, which was comparable in both salary and responsibility to Jarvis' old position. The Employer contends that Jarvis' transfer was totally unrelated to his concerted activity. Jarvis has a history of physical disabilities which are substantiated by his request to be transferred to the front of the Segregation Building, his planned resignation from the Union presidency, and his actual resignation from the negotiating committee chairmanship. In addition, the Employer had good reason to believe Jarvis was misusing prison phones for Union business, and lastly, Jarvis' transfer had been under consideration for several months, and the actual decision was made two months prior to the biennial training conference. The effective date of the transfer was made in accordance with past practice, namely, after the institution's monthly meeting, at which time seven transfers were made involving both Union and non-Union employes.

With respect to Jarvis' physical condition, the Union argues that at no time was Jarvis or his physician ever consulted with respect to his ability to handle the work, and secondly, the heart attack which allegedly justified his transfer, at least in part, occurred nine years

before the transfer. In addition, Jarvis' arm disability was merely "suspected" and his "pulmonary condition" occurred in February 1968, more than three months prior to the transfer.

The Union argues that the alleged misuse of the telephone had not been proven, and that, in fact, the timing of the investigation with respect to this matter indicates that it was made because of Jarvis' leadership role in the Union's boycott of the Conference, that although Associate Warden Crist testified that he had suspected Jarvis of misusing the telephone since November 1967, nothing was done about such suspicion until May 20, 1968, the day before the Conference was to begin, that on the latter date Crist asked the inmate who operated the switchboard if there were an unusual number of calls from the Segregation Building, and he was advised that there were. The Union emphasizes that this bit of information constituted the only evidence of telephone misuse by anyone in the Segregation Building, and more, that Crist further testified that he made the decision to transfer Jarvis before he made any investigation.

With respect to the Employer's assertion that one of the reasons for Jarvis' transfer was to give him experience on the Tower, the Union argues that such justification is clearly a pretext in view of Jarvis' lengthy work history at the institution.

OPINION OF CHAIRMAN SLAVNEY

The Boycott Activity

Although the record demonstrates that the Employer considered the Conference valuable in improving the work performance of its employes, it is also clear that Conference attendance traditionally has been strictly on a voluntary basis, and that, prior to the instant matter, no individuals have been penalized in any way for their failure to attend such conferences. For this reason, I cannot accept the Employer's contention that the Union's boycott of the Conference constituted an unlawful strike. In my opinion, the statutory language in Sec. 111.81(14) contemplates that in order for employes to engage in a strike, there must be a concerted refusal to perform assigned duties and responsibilities required to be performed, rather than duties and responsibilities which the employes may voluntarily choose or not choose to perform. Had the Employer required attendance at the Conference, I would agree that the boycott of the Conference constituted a strike within the meaning of Sec. 111.81(14). Under such circumstances, attendance at the Conference would appear to have been a legitimate job assignment and employe responsibility, and the concerted refusal to accept such training during working hours would violate the statutory prohibition against "concerted interruption of operations or services by employes." However, in this instance, the Employer specifically chose another course, that being to permit the employes to choose whether or not they desired to attend the Conference, strictly on a voluntary basis, as has been the past practice for many years. Although it is admitted that the procedure for this year's conference was altered somewhat to facilitate scheduling of the Conference into equally balanced groups, there is no question that the Employer contemplated that it be kept on a voluntary basis. Because of the voluntary nature of the Conference, I conclude that the Union's decision to boycott the Conference and the employes' decision to abide by this policy do not constitute a concerted interruption of operations or services by employes within the meaning of Sec. 111.81(14), and, therefore, that such action does not constitute a strike within the meaning of that section of the Act.[6/]

6/ See Dow Chemical Co., 152 NLRB 1150

While the mandatory subjects of bargaining, as set forth in Sec. 111.91(1),[7] do not include wages and fringe benefits, there is nothing in the Act which prohibits the State as an employer from bargaining on such matters if it chooses. Section 111.91(2)[8] provides that the State is not required to bargain on compensation and on certain other matters relating to State employes. As long as the boycott activity was not conducted for the purpose of attempting to persuade or coerce the Employer to bargain on a matter prohibited under the Act,[9] or for the purpose of coercing the Employer to commit any unlawful act, such activity falls within the protection of Sec. 111.82.

The Alleged Refusal to Bargain

There is no question that the manner in which the employes were selected to attend the Conference and the decision as to rescheduling, the determination as to what officers of those who chose not to attend the Conference would work on their regularly scheduled days or would be compelled to take an earned day off, and the determination to transfer Jarvis were decisions unilaterally made by the agents of the Employer, and there is no question that "work schedules," "time off" and "intra-departmental transfers" are mandatory subjects of bargaining under the Act.[10]

7/ "111.91 SUBJECTS OF COLLECTIVE BARGAINING. (1) Matters subject to collective bargaining are the following conditions of employment for which the appointing officer has discretionary authority:
(a) Grievance procedures;
(b) Application of seniority rights as affecting the matters contained herein;
(c) Work schedules relating to assigned hours and days of the week and shift assignments;
(d) Scheduling of vacations and other time off;
(e) Use of sick leave;
(f) Application and interpretation of established work rules;
(g) Health and safety practices;
(h) Intradepartmental transfers; and
(i) Such other matters consistent with this section and the statutes, rules and regulations of the state and its various agencies."

8/ "111.91 . . . (2) Nothing herein shall require the employer to bargain in relation to statutory and rule provided prerogatives of promotion, layoff, position classification, compensation and fringe benefits, examinations, discipline, merit salary determination policy and other actions provided for by law and rules governing civil service."

9/ e.g., an agency shop provision.

10/ See footnote 7.

After the Employer became aware of the boycott of the Conference and that a substantial number of employes had on May 9 indicated an intent not to attend the Conference, and after work schedules had been previously prepared by the Employer for the days on which the Conference was scheduled, the Employer posted the notice of May 10 where it had unilaterally determined that "all those who signed up for the Conference and on May 9 or later gave notice they would not go should realize that they should either attend the Conference as scheduled or they will have that scheduled day off as compensatory time, or holiday, if they have such coming, or as a day of vacation." The gist of the Union's contention that such unilateral action constitutes a refusal to bargain is based on the argument that the Employer changed its policy, established by past practice, in requiring employes who indicated a desire not to attend the Conference to take a day off as earned time or a holiday in lieu of not attending the Conference, and that, therefore, a change in such policy, without first providing the Union with an opportunity to bargain on such change of policy, constituted a violation of the duty to bargain.

The Employer's past practice with respect to work schedules on days conferences were conducted existed where there was no refusal by a substantial number of employes to attend the past conferences. In the situation involved herein, the past practice of the employes with regard to conference attendance was changed by the Union boycott in that the majority of employes who the Employer anticipated would attend the Conference voiced an intent not to do so, and thereby the conditions under which the past practice had been established were changed, not initially by the Employer but as a result of the boycott.

The Employer, in planning the Conference, including its attendance and preparing work schedules for the days on which the Conference was to be held, relied on the past practice of employes as to their conference attendance. However, on short notice, a large number of employes indicated a desire not to attend the Conference, and as a result, the Employer had no other choice in order to insure the proper operation of the Institution than to "change" its past practice. Under such circumstances the Employer's failure to provide the Union with an opportunity to bargain on the matter before it posted its notice, in my opinion, does not constitute a violation of Sec. 111.84(1)(d) of the Act. Furthermore, prior to the implementation of such "change" in past practice, representatives of the Union did engage in conferences with

representatives of the Employer on the matter, and after such conferences the Employer did revise its original determination, by not requiring those employes who had no banked earned time or holiday time to take a day of vacation. Those employes were told they could report for work as "extra" employes. The fact that the Union was unsuccessful in persuading the Employer not to require employes to take earned time or a holiday off does not establish that the Employer refused to bargain in good faith in regard thereto.

There has been no attempt to establish that the unilateral action of the Employer was an attempt to, or did, in fact, undermine the authority of the Union as the bargaining representative. If the implementation of the decisions of the Employer with respect thereto were intended or had been made for such purpose, then I would have concluded that the Employer had violated its duty to bargain collectively and in good faith with the Union.

The Act does not contemplate that all managerial decisions made by the agents of State employers affecting day-to-day conditions of employment in those areas subject to mandatory collective bargaining must be held or deferred until the collective bargaining representative has been advised of the intended action and be given the opportunity to bargain.

Sec. 111.90 of the Act, setting forth "Management Rights," provides as follows:

> "111.90 MANAGEMENT RIGHTS. Nothing in this subchapter shall interfere with the right of the employer, in accordance with applicable law, rules and regulations to:
>
> (1) Carry out the statutory mandate and goals assigned to the agency utilizing personnel, methods and means in the most appropriate and efficient manner possible.
>
> (2) Manage the employes of the agency; to hire, promote, transfer, assign or retain employes in positions within the agency and in that regard to establish reasonable work rules.
>
> (3) Suspend, demote, discharge or take other appropriate disciplinary action against the employe for just cause; or to lay off employes in the event of lack of work or funds or under conditions where continuation of such work would be inefficient and nonproductive."

Rules of statutory construction require the conclusion that Secs. 111.91(1) and 111.90 must be interpreted so that said provisions harmonize with each other rather than conflict.

The fact that a State Employer may make unilateral determinations on those conditions of employment subject to mandatory bargaining

under the Act does not per se constitute an unlawful refusal to bargain with the certified or recognized representative of the employes affected by such unilateral determinations. To conclude otherwise would completely negate Sec. 111.90.

My conclusion in this regard applies to the change in work schedules as a result of the Conference, as well as the unilateral determination with respect to the transfer of Jarvis. The fact that "work schedules" and "intradepartmental transfers" are set forth in the Act as mandatory subjects of bargaining does not, in itself, preclude the Employer from changing work schedules of individual employes or from effectuating intradepartmental transfers without first permitting the Union to bargain thereon except, of course, if the parties provide otherwise in a collective bargaining agreement. It is my opinion that the Employer has not refused to bargain collectively with the Union as alleged in the complaint.

The Alleged Acts of Interference in Scheduling Days Off

I am not satisfied that the Union has established that the Employer's activities, following the Union meeting of May 8, with respect to scheduling of work or days off for those officers who on May 9 or thereafter informed the Employer that they chose not to attend the Conference, were intended to, or did, in fact, discriminate against, interfere with, restrain or coerce employes in violation of the Act. A significant number of officers, who were Union members, prior to May 9 gave notice of their intention not to attend the Conference although they had been scheduled to do so. They were permitted by the Employer to work on their regularly scheduled days. From the exhibits introduced into the record it appears that Jarvis indicated prior to May 9 that he would not attend the Conference although scheduled. Yet Jarvis, the acknowledged leader of the boycott activity, was not compelled to take a day off. I am of the opinion that the bulletins posted by the Employer after May 9 did not contain unlawful threats. On the contrary, they were indicative of the scheduling problems being encountered by the Employer because of the daily cancellations as to Conference attendance. Further, as more cancellations came in, the Employer relaxed its policy by not requiring any officers who cancelled attendance to take a day off as vacation time. The argument that it was the intent of the Employer to retaliate against the officers for the concerted refusal to attend the Conference loses its impact as a result

of the Employer's action in not requiring those officers who had no banked earned compensatory or holiday time, but who had a balance of vacation days, to take a day of their vacation rather than permitting them to work as "extras."

The Transfer of Jarvis

Although it is true that the Union has the burden of proving that Jarvis' union activity was the motivating factor for his transfer, and that such proof must be by a clear preponderance of the evidence, it is also true that inferences may be made supporting such a conclusion when the alleged reasons for the transfer do not appear to be supported by the evidence in the record. With respect to Jarvis' physical disabilities, the record indicates that Jarvis' previous assignment was not one which required strenuous physical effort, in that his contact with inmates was minimal, so there appears to be little justification for a transfer which admittedly has minimal physical demands because of his alleged physical disabilities. With respect to the same issue, it is significant to note that the most recent alleged physical disability which allegedly justified the transfer occurred more than three months prior to the actual transfer, and there is no evidence that any of the conditions described by the Employer were affecting Jarvis' ability to perform his job at the time of, or shortly before, the transfer. Furthermore, Solberg's physical condition appeared to be more disabling than Jarvis'. For all of the above reasons, I find this argument of the Employer to be merely a pretext.

With respect to Jarvis' alleged misuse of the telephone, it would appear that the timing of the Employer's actions supports the conclusion that the Employer was motivated, at least in part, by Jarvis' leadership role in the Union's boycott of the Conference. Although there is some reason to believe from the record that Jarvis may have been misusing the office phone in the Segregation Building for Union business, it appears more than coincidental that Assistant Warden Crist investigated the matter the day before the Conference was to begin, when, in fact, he testified that he suspected Jarvis' misuse of the phone since November 1967, more than seven months prior to the Conference. In addition, Crist's testimony that he made the decision to transfer Jarvis before he made any investigation of Jarvis' misuse of the phone further supports the conclusion that this reason was also pretextual.

I agree with the Union that the Employer's assertion that one of the reasons for Jarvis' transfer was to give him experience in the Tower is clearly specious in view of Jarvis' lengthy work history at WSP and his knowledge of its functions and layout which would necessarily result therefrom.

Under such circumstances, I find that the true reason for Jarvis' transfer was because of his leadership role in the Conference boycott and, therefore, in violation of Sec. 111.84(1)(c) and (1)(a).

Dated at Madison, Wisconsin, this 7th day of March, 1969.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

OPINION OF COMMISSIONER WILBERG

I concur with both of my colleagues that the boycott of the Corrections Conference by the Union members constitutes lawful concerted activity within the meaning of Sec. 111.82 of the State Employment Labor Relations Act, and further agree with Chairman Slavney that the Employer did not discriminate against and/or interfere, coerce and restrain the employes in violation of Sec. 111.84(1)(c) and (1)(a) of the Act by requiring the employes who, on May 9th and thereafter, advised the Employer that they would not attend the Conference and who had at least one day of earned compensatory time or holiday time, to take an earned day off instead of being permitted to work in accordance with their normal schedule on the date they were scheduled to attend the Conference.

With respect to the issue as to whether the Employer has committed a prohibited practice by refusing to bargain over the adoption of the policy affecting the employes' use of vacations, holidays and other earned time, I agree with the conclusions of Commissioner Rice. The subjects of collective bargaining spelled out in Sec. 111.91, Wisconsin Statutes, clearly establish the following items as matters which are subject to collective bargaining: "Work schedules relating to assigned hours and days of the week and shift assignments; and scheduling of vacations and other time off." With the passage of the State Employment Labor Relations Act, it has become the policy of the State "to encourage the practices and procedures of collective bargaining in state employment...", and in implementing this policy, the Legislature has seen fit to require the State, as an employer, to bargain over certain conditions of employment, once the employes' majority representative has been chosen.

Here the employes have selected their bargaining representative, and the parties were in fact engaged in collective bargaining at the time the Employer made the decision to adopt a policy with respect to the use of holidays and earned time off, matters which are clearly subject to collective bargaining under Sec. 111.91. When the Union requested modification of this policy, the Employer expressed its adamant refusal. There is no evidence that at any time, either before or after the demand to change the policy by the Union, that the Employer in good faith contemplated negotiation of the matters in question.

It has been argued by Chairman Slavney that the Union, in deciding to boycott the Conference, created a novel situation, and thereby the conditions under which a past practice with respect to conference attendance had been established were changed. Chairman Slavney then concludes that the Employer had no other choice in order to insure the efficient operation of the Institution than to change its past practice.

Even if the Employer were compelled to modify its holiday and compensatory time policy because of the Union's decision to boycott the Conference, this does not justify a conclusion that it was not obliged to negotiate such a modification.

The Act does not contemplate that all managerial decisions must be negotiated if they are mandatory subjects of bargaining for management clearly has the right to implement established policy on a day-to-day basis without consulting and negotiating with the Union on questions of implementation. However, the decision in question was not implementation of a policy that was a mandatory subject of bargaining. Instead, the Employer modified an existing policy with respect to the employes' rights to use compensatory time and holiday benefits. Such a decision must be distinguished from a managerial decision involving implementation of policies affecting the day-to-day conditions of employment. The Employer, therefore, was obliged to negotiate the modification of the holiday and compensatory time policy that it unilaterally implemented in this instance.

Chairman Slavney finds that even though there was no duty to bargain, the Employer did engage in conferences with the Union and in fact the Employer revised its decision pursuant to such conferences. He further argues that the fact that the Union was unsuccessful in persuading the Employer not to require employes to take earned time or holidays off, does not establish that the Employer refused to bargain in good faith in regard thereto. This conclusion is not supported either by the pleadings or the record. Instead of engaging in good faith negotiations, the Employer unilaterally decided to implement and apply a new compensatory time and holiday policy. Although the Employer met and listened to the Union's position, at no time did it enter into good faith negotiations with the Union on the adoption or modification of this policy. During the course of these negotiations, the Employer's firm position was that the decision had been made and would not be changed. On the basis of all of the foregoing, there is substantial evidence that the Employer failed to meet and negotiate in good faith on the adoption of the policy in question. While there is evidence that the Employer revised its initial policy, there is nothing to relate

this revision to the requests by the Union. Accordingly, the Employer's refusal to negotiate in good faith with the Union on the adoption of the earned time and holiday policy constitutes an unlawful refusal to bargain in violation of Section 111.84(1)(d).

In remedying this prohibited practice, and in order to effectuate the policies of the State Employment Labor Relations Act, the Employer's response to the situation created by the concerted boycott of the Conference must be kept in mind. In my opinion, the response was neither punitive or discriminatory; however, this conclusion does not negate the fact that it was unilaterally made and violated the right of the employes, through their representative, to negotiate changes in policy with respect to certain conditions of employment. Accordingly, I would recommend as appropriate relief in this instance a cease and desist order and the posting of the attached notice. The Employer should not be required to grant employes the holiday or compensatory time they were required to use since the unilateral action by the Employer, although concluded to be a prohibited practice, was to a material extent precipitated by the Union's extraordinary and late decision regarding attendance at the Conference.

I concur with the conclusions and rationale of my colleagues on the issues regarding the motivation for Jarvis' transfer and the Employer's alleged refusal to bargain on this matter.

Dated at Madison, Wisconsin, this 7th day of March, 1969.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By William R. Wilberg
William R. Wilberg, Commissioner

OPINION OF COMMISSIONER RICE

I concur with my colleagues that the boycott of the Corrections Conference by Union members constituted lawful concerted activity within the meaning of Sec. 111.82 of the State Employment Labor Relations Act. I also concur with the conclusion of Commissioner Wilberg that the Employer has committed a prohibited practice by refusing to bargain over the change of policy affecting the employes' use of vacations, holidays and compensatory time.

However, I would disagree with Chairman Slavney that the Employer was forced to change its policy in response to the Union's decision and that the Employer had no other choice than to change its past practice in order to insure the proper operation of the Institution. I would find that the Employer had a choice and had sufficient opportunity to bargain with the Union over the changes in the policy with respect to use of vacations, holidays and compensatory time. The Employer did not believe that it had to bargain with the Union and made no effort to do so. It remained firm in its decision to make a unilateral change in the policy with respect to the use of vacations, holidays and other compensatory time.[11/]

I would disagree with the conclusion of my colleagues that the adopted policy with respect to vacations, holidays and compensatory time did not constitute unlawful interference and discrimination within the meaning of Sec. 111.84(1)(a) and (c). The Employer permitted those officers who indicated, prior to the concerted decision, that they would not attend the Conference to work on their regularly scheduled days even though they had originally been scheduled to attend the Conference. However, after the Union adopted the boycott policy, the Employer required officers who then elected not to attend the Conference to use vacations, holidays or compensatory time. It is obvious from the record, and the Employer admits, that this policy was at least in part motivated by the Employer's desire to retaliate against the employes for engaging in the concerted activity. Since the employes' conduct was not illegal and was, in fact, protected, any discrimination against the employes engaging in such conduct constituted unlawful interference and discrimination within the meaning of Sec. 111.84(1)(a) and (c).

The Employer has attempted to create the impression that at the time it learned of the proposed boycott, it no longer had an opportunity to reschedule officers during the days of the Conference. The record

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11/ I am aware that the Employer eventually changed its policy with regard to vacations, but all determinations with respect to this policy were unilateral.

does not support such a conclusion. Changes in schedules were made after the Employer became aware of the Union's intention to boycott the Conference. The 13 days' notice of the proposed boycott gave the Employer sufficient time to readjust its schedules to permit employes who chose not to attend the Conference to work on their regularly scheduled days. It would have been simple enough for the Employer to permit employes who did not attend the Conference to work on their regularly scheduled days during this period since it had less than the regular number of officers available to operate the Institution. As a matter of fact, in order for the Employer to carry out its retaliatory measures against those employes who engaged in the concerted activity, at least one of the officers scheduled to work during the Conference was not permitted to take his regularly scheduled days off during this period.

The Employer argues that it could not have rearranged the work schedules because it did not know how many employes would withdraw from the Conference, but this argument does not hold up. The Employer could easily have established a reasonable deadline for notice of withdrawal from the Conference that would have enabled it to prepare a final work schedule after said deadline. Rather than take this reasonable step, the Employer adopted a policy that punished those employes who engaged in the concerted activity. It made no attempt to permit employes to work their regular schedules even though there was sufficient time to make the necessary changes. This course of action clearly constituted retaliation against the employes for their concerted activity that we deem to be protected, and was meant to be punitive. The policy also discriminated against these same employes. There is no question that the policy was adopted to discourage employes from participating in the concerted activity. Accordingly, the Employer unlawfully discriminated against its employes because they engaged in a boycott of a voluntary conference, which constitutes protected concerted activity, and, therefore, the Employer interfered with its employes' statutory rights.

Having found that the adoption of the policy constitutes unlawful interference and discrimination, it logically follows that the warnings to the employes that they would be required to use earned time and that they would not be permitted to work on their regularly scheduled days if they chose not to attend the Conference also interfered with the employes in the exercise of their statutory rights.

In remedying the prohibited practice resulting from the refusal to bargain, I concur with the order of Commissioner Wilberg. However, in view of my finding that the Employer also engaged in acts of interference and discrimination, I would also order that the employes be made

whole by restoring the holidays or compensatory time that they were required to use on their regularly scheduled work days. This relief would be appropriate since the response of the Employer was both punitive and discriminatory, as well as the fact that the Employer's unilateral decision violated the rights of the employes, through their representative, to negotiate changes of policy with respect to certain conditions of employment.

I concur with my colleagues on their conclusions and their rationale with respect to the issues regarding Jarvis' transfer and the Employer's alleged refusal to bargain on this matter.

Dated at Madison, Wisconsin, this 7th day of March, 1969.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Zel S. Rice II, Commissioner