

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DONNA E. DAVIS,	:	
	:	
Complainant,	:	
	:	
vs.	:	
	:	Case CVII
STATE OF WISCONSIN, DEPARTMENT	:	No. 21873 PP(S)-46
OF ADMINISTRATION, and its	:	Decision No. 15699-B
EMPLOYMENT RELATIONS SECTION,	:	
	:	
Respondent.	:	
	:	

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, AND CONCLUSIONS OF LAW AND REVISING EXAMINER'S ORDER

Examiner Duane McCrary, a member of the Commission's staff, having, on May 5, 1980, issued his Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above-entitled matter wherein he concluded that Respondent State of Wisconsin had committed unfair labor practices within the meaning of Secs. 111.84(1)(a) and (c) of the State Employment Labor Relations Act by failing to promote Complainant Donna Davis, at least in part, because of hostility toward her lawful protected concerted activity; and Respondent State of Wisconsin having, on May 22, 1980, filed a petition seeking Commission review of said decision, pursuant to Section 111.07(4), Stats.; and both Respondent State of Wisconsin and Complainant Donna Davis having subsequently filed briefs in support and in opposition to said petition; and the Commission having reviewed the record and the briefs of the parties, and being satisfied that the Examiner's Findings of Fact and Conclusions of Law should be affirmed and that the Examiner's Order should be revised;

NOW, THEREFORE, it is

ORDERED

1. That the Examiner's Findings of Fact and Conclusions of Law in the above-entitled matter be, and the same hereby are, affirmed.

2. That Paragraph 3(a) of the Examiner's Order in the above-entitled matter be revised to read as follows:

3. . . .

a) Immediately make Complainant Donna E. Davis whole for any loss in wages or benefits she suffered by reason of Respondent State of Wisconsin's failure to promote her by paying to her a sum of money equal to that which she would have received while holding the Psychologist Supervisor I - Doctorate (Management) position from the date said position was filled to the date Complainant Davis resigned her employment less any amount earned by Complainant Davis through employment with Respondent State of Wisconsin during said period.

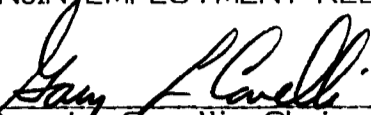
3. That the content of Paragraph 2 of "Appendix A" referenced in Paragraph 3(b) of the Examiner's Order in the above-entitled matter be revised to read as follows:

2. WE WILL immediately make Donna E. Davis whole for any loss in wages or benefits she suffered by reason of our illegal failure to promote her to the position of Psychologist Supervisor I - Doctorate (Management) by paying her a sum of money equal to that

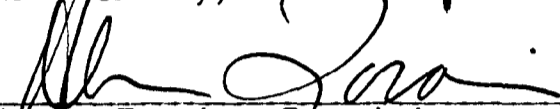
which she would have received while holding the Psychologist Supervisor I - Doctorate (Management) position from the date said position was filled to the date Donna E. Davis resigned her employment with the State of Wisconsin during said period.

Given under our hands and seal at the City of Madison, Wisconsin this 13th day of November, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Gary L. Covelli, Chairman


Morris Slavney, Commissioner


Herman Torosian, Commissioner

MEMORANDUM ACCOMPANYING
ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, AND
CONCLUSIONS OF LAW AND REVISING EXAMINER'S ORDER

BACKGROUND:

In her complaint initiating the instant proceeding, Donna E. Davis alleged that the State of Wisconsin committed unfair labor practices within the meaning of Sections 111.84(1)(a) and (c) of the State Employment Labor Relations Act (SELRA) by failing to promote her, at least in part, because of hostility toward her protected concerted activity. In its answer, the State denied Davis' allegations.

EXAMINER'S DECISION:

In his decision the Examiner found: (1) that at all material times, Davis was an "employee" under Section 111.81(15) of SELRA; (2) that Davis engaged in lawful concerted activity when she filed a non-contractual departmental grievance questioning the reorganization of the psychology department within which she worked at Central Wisconsin Colony; (3) that the State was hostile toward Davis' lawful concerted activity; (4) that, at least in part, said hostility caused the State to fail to promote Davis to a position she was seeking; and (5) that the State's action violated Sections 111.84(1)(a) and (c) of SELRA. To remedy said statutory violations, the Examiner ordered the State to offer Davis the position she was denied and to make her whole for any losses suffered. However, as Davis had subsequently resigned her employment and as the Examiner concluded that the record did not demonstrate a causal connection between the denial of the promotion and the resignation, the Examiner found that the State's back pay liability extended only from the date Davis should have been promoted to the date she resigned. The Examiner also ordered the State to post a notice to employees.

PETITION FOR REVIEW:

In its petition for review and supporting brief, the State makes several arguments. Initially it alleges that the Commission lacks subject matter jurisdiction over any dispute involving the validity of a denial of a promotion to a position within the classified civil service. It contends that the Wisconsin Legislature has excluded the operation of the civil service system from the reaches of collective bargaining under SELRA and has unequivocally granted the Administrator of the Division of Personnel and the Personnel Commission exclusive jurisdiction over all controversies with respect to appointment and promotion. Thus the State submits that the Commission must dismiss the instant complaint. Secondly, the State argues that Davis' filing of a departmental grievance does not constitute protected activity within the meaning of Section 111.82 of SELRA. It alleges that because said grievance related to State action of a type which Sections 111.90 and 111.91(2) of SELRA exclude from the parameters of bargaining, the filing of such a grievance is not protected by SELRA. Thirdly, the State argues that it could not have committed a violation of Section 111.84(1)(c) of SELRA inasmuch as said statutory provision makes reference to encouraging or discouraging membership in a labor organization and Davis was not a union member, nor does the record reveal that she was deterred in or discouraged from seeking such membership as a result of the State's failure to promote her. Fourthly, the State contends the record does not support the finding of animus made by the Examiner. Fifthly, the State asserts that neither Section 111.84(1)(a) nor Section 111.84(1)(c) of SELRA apply to the denial of a promotion to a supervisory and/or management position. It argues that it should be free under SELRA to exercise substantial discretion when filling such a position and to exclude individuals such as Davis, whose resistance to management decisions indicate an incompatibility with a supervisory position. Lastly, the State argues that because Davis voluntarily resigned from State service, the case should be dismissed as moot.

DISCUSSION:

A review of the instant record yields substantial support for the Examiner's factual finding that the State was hostile toward Davis' filing of a departmental grievance and that said hostility played a part in the State's decision not to

promote Davis. Indeed the State would almost appear to concede as much when it argues that it can properly overlook employes like Davis who show an incompatibility with management when filling supervisory positions. Instead the State's attack upon the Examiner's decision focuses primarily on certain legal conclusions reached therein and on the Commission's jurisdiction to even consider the complaint. A discussion of these issues follows.

As to the threshold issue regarding the Commission's jurisdiction, we reject the State's assertion that disputes over appointment or promotion are statutorily excluded from our purview. Section 111.84(1)(c) of SELRA prohibits ". . . discrimination in regard to hiring, tenure or other terms or conditions of employment . . ." due to an employe's having engaged in activity protected by SELRA. The scope of said provision, with its reference to other terms or conditions of employment, clearly includes promotional opportunities and thus disputes as to whether a promotion was denied, at least in part, because an employe engaged in protected activity may properly be resolved by the Commission pursuant to its obligation to resolve unfair labor practice controversies. 1/

Turning to the issue regarding the protected nature of Davis' activity, the record supports the Examiner's conclusion that Davis was an "employee" under SELRA 2/ who thus enjoyed the rights of state employes set forth in Section 111.82 of SELRA. 3/ Said provision, in relevant part, grants employes the right to "engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection". The state argues that while Davis' filing of a departmental grievance would generally qualify as "activity for the purpose of . . . mutual aid or protection", which is therefore protected under SELRA, her activity is removed from the protected realm because its subject, departmental reorganization, is beyond the scope of mandatory bargaining under SELRA. This novel linkage of concerted activity to mandatory subjects of bargaining must be rejected. While departmental reorganization may well be a subject over which a labor organization could not bargain, such action clearly has a potential impact upon employes' working conditions and thus the protest of an employe like Davis clearly falls within the realm of activity protected by SELRA, namely "mutual aid or protection". The grievance involved was signed by Davis and four other Psychologists protesting a determination by management involving an intended reorganization in the Mental Hygiene Division at Central Wisconsin Colony, which would include, among other changes, that "the unit chief, who may not have a degree, will determine if a professional passes or fails probation, and will also write the professional's yearly evaluation."

Looking at the State's argument regarding the inapplicability of Section 111.84(1)(c) of SELRA, the Examiner properly concluded that the rationale of Juneau County 4/ is applicable to SELRA. In that case the Commission found that MERA's Section 111.70(3)(a)3 ban on discrimination, the language of which is virtually paralleled by Section 111.84(1)(c) of SELRA, extended to any concerted activity which is statutorily protected. Applying that holding to the instant dispute the Examiner correctly found that Davis' activity, though not directly related to membership in a labor organization, was nonetheless protected under Section 111.84(1)(c), as well as Section 111.84(1)(a) of SELRA.

1/ Section 111.84(4) of SELRA provides "any controversy concerning unfair labor practices may be submitted to the commission . . ."

2/ Although Davis was functioning as Acting Director of the Psychology Department at the time in question, the record reveals that the duties which Davis was assigned would not warrant a conclusion that she was a supervisory or managerial employe who would therefore be excluded from SELRA's protection.

3/ 111.82 Rights of state employes. State employe shall have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing under this sub-chapter, and to engage in lawful, concerted activities for the purpose of collectively bargaining or other mutual aid or protection. Such employes shall also have the right to refrain from any or all of such activities.

4/ (12593-B) 1/77.

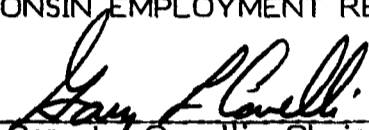
As to the State's argument that the protections of SELRA are unavailable to employees seeking a supervisory or managerial position, the Commission can find no statutory basis for such an exclusion. When the individual seeking the position is an employe under SELRA, that individual, in this case Davis, enjoys all of the rights which SELRA extends to employes, including the right to seek managerial or supervisory positions without being discriminated against as a result of engaging in protected activity.

Looking lastly at the State's argument regarding the impact of Davis' subsequent resignation, this factor is absolutely irrelevant to the resolution of the issue as to whether the State violated SELRA while Davis was still an employe. Thus, Davis' resignation in no way renders the matter moot. However, said resignation does impact upon the remedy which is appropriate in this case. Where, as here, the Examiner properly found there to be inadequate evidence in the record that the resignation was caused by the State's illegal actions, an order of reinstatement is not warranted. Given Davis' apparently independent decision to resign, the Examiner's remedy has been modified to eliminate reinstatement.

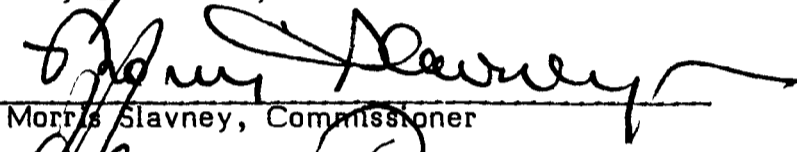
Dated at Madison, Wisconsin, this 13th day of November, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

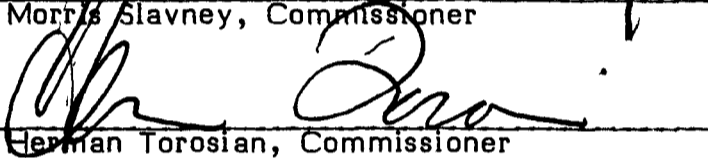
By



Gary L. Covelli, Chairman



Morris Slavney, Commissioner



Herman Torosian, Commissioner