STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

STATE OF WISCONSIN, DEPARTMENT OF ADMINISTRATION, Complainant, vs. AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 24, WISCONSIN STATE EMPLOYEES UNION, AFL-CIO (ALL LOCALS), Respondent.	Case CIX No. 21969 PP(S)-48 Decision No. 15759-A

Appearances:
Mr. Lionel L. Crowley, Attorney at Law, on behalf of the Complainant.
Lawton & Cates, Attorneys at Law, by Mr. Richard V. Graylow, on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The State of Wisconsin, Department of Administration, herein the State, filed the instant complaint on August 17, 1977 with the Wisconsin Employment Relations Commission, herein Commission, wherein it alleged that American Federation of State, County and Municipal Employees, Council 24, Wisconsin State Employees Union, AFL-CIO (all Locals), herein Council 24, had committed certain unfair labor practices under Section 111.84(2)(d) of the State Employment Labor Relations Act, herein SELRA. The Commission on August 22, 1977, thereafter appointed the undersigned to make and issue Findings of Fact, Conclusion of Law and Order, as provided for in Section 111.07(5) of the Wisconsin Statutes. Hearing on said complaints was held in Madison, Wisconsin on January 25 and April 19, 1978. Briefs and reply briefs were received by August 1, 1978.

Having considered the arguments and the evidence, the Examiner makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That the State of Wisconsin, Department of Administration, is an employer as defined in Section 111.81(16) of the Wisconsin Statutes. At all times material herein, Jerome Nelson, Director of the Bureau of Collective Bargaining and James Phillips, Deputy Director of the Bureau of Collective Bargaining and Chief Negotiator, have acted on behalf of the State and have served as its agents.

2. Council 24 is a labor organization as defined under Section 111.81(9) of the Wisconsin Statutes and it represents certain employes employed by the State. At all times material herein, Thomas W. King has served as Council 24's Executive Director.

3. The State and Council 24 were privy to a collective bargaining agreement which was effective from September 14, 1975 to June 30, 1977 and which covered a unit consisting of Security & Public Safety, Blue Collar & Non-Building Trades, and Technical

employes (identified by the parties as the "Green" contract). The parties were also privy to a September 14, 1975 to June 30, 1977 contract which covered certain Professional-Social Services & Research, Statistics and Analysis bargaining units (identified as the "Brown" contract). Article II, Section 13 of both contracts, entitled "Loss of Benefits," provided:

> Employees shall receive their regular rate of pay for the first 174 hours of time spent per calendar year in authorized Union activities contained in Article II, Section 5 (Union Conventions, Educational Classes and Bargaining Unit Conferences) and Section 8 (Attendance at Local Union Meetings).
>
> Employees shall receive their regular rate of pay for time spent in authorized Union activities contained in Article II, Section 12 (Executive Board of Council 24) and for contract negotiation meetings with the Employer (24-designated members of the Union's bargaining team).
>
> The Union shall reimburse the Employer for the total costs involved provided the Employee does not charge such time to vacation, holiday credits, or compensatory time credits.

4. The State agreed to said language in part in order to alleviate Council 24's concern that senior employes near retirement would have their pension adversely affected if said employes were not paid by the State for the time they spent on negotiations. In addition, Council 24 sought said provision so that its members who spent time on negotiations would continue to receive fringe benefits such as sick leave, retirement and vacation; and that the parties' intent in agreeing to Article II, Section 13 was to hold employes harmless from loss of such benefits for participating in covered Union activities and to hold the State harmless for the costs of providing such benefits. Because the accrual of employe retirement benefits could only be preserved by keeping employes on the State payroll when they were engaged in covered activities, the reimbursement arrangement was orally agreed upon in lieu of a bookkeeping transaction which the parties originally contemplated.

5. At some undetermined date prior to the execution of the 1975-1977 contracts, King and James Wood, then Deputy Secretary, Department of Administration, orally agreed that State employes who participated in the negotiations leading up to the 1975-1977 contracts were to be granted the same rights as those later agreed to under Article II, Section 13, even though their negotiating activity occurred prior to the execution of the 1975-1977 contracts. However, the parties did not agree during negotiations on a time frame under which the Union would reimburse the state for its payment for these covered activities.

6. That the parties agreed that the Union would also pay the State eighteen percent of the gross salary paid to employes for covered activities in order to cover the State's costs for social security and other fringe benefits and the employe's contributions into their retirement account.

7. That the Union supplied the State with information on the number of hours spent by its bargaining committee members in negotiations and there appears to be no dispute as to the accuracy of this information.

8. That the parties agreed that Council 24 would reimburse the State for its payments to employes who participated in the nego-

tiations which led up to the 1975-1977 contracts; and that with respect to other covered activities, although it was understood that local unions affiliated with Council 24 could (and in fact did) directly reimburse the State for their membership's covered activities; the Union, i.e. Council 24, assumed the ultimate responsibility, pursuant to the terms of Article II, Section 13 to reimburse the State for the payment to employes for such covered activities in the event its affiliated local unions did not reimburse the State in the proper amount.

9. The parties contracts provided for substantially similar grievance-arbitration procedures which provided for final and binding arbitration. Article IV, entitled "Grievance Procedure," in the "Green Book", for example, provided:

> Section 1. Definition
>
> 33 A grievance is defined as, and limited to, a written complaint involving an alleged violation of a specific provision of this Agreement.
>
> 34 Only the subject matter shall be covered in any one grievance. A grievance shall contain a clear and concise statement of the grievance by indicating the issue involved, the relief sought, the date the incident or violation took place, and the specific section or sections of the Agreement involved. The grievance shall be presented to the designated supervisor involved in quadruplicate (on mutually agreed upon forms furnished by the Employer to the Union and any prospective grievant) and signed and dated by the employee(s) and/or Union representative.
>
> 35 An employee may choose to have his/her appropriate Union representative represent him/her at any step of the grievance procedure. If an employee brings any grievance to the Employer's attention without first having notified the Union, the Employer representative to whom such grievance is brought shall immediately notify the appropriate Union representative and no further discussion shall be had on the matter until the appropriate Union representative has been given notice and an opportunity to be present. Individual employees or groups of employees shall have the right to present grievances in person or through other representatives of their own choosing at any step of the grievance procedure, provided that the appropriate Union representative has been afforded the opportunity to be present at any discussion and that any settlement reached is not inconsistent with the provisions of this Agreement.
>
> 36 All grievances must be presented promptly and no later than thirty (30) calendar days from the date the grievant first became aware of, or should have become aware of with the exercise of reasonable diligence, the cause of such grievance.
>
> Section 2 -- Grievance Steps
>
> 37 Step One. Within seven (7) calendar days of receipt of the written grievance from the Employee(s) or his/her representaive(s), [sic] the supervisor will schedule a meeting with the Employee(s) and his/her representative(s) to hear the grievance and return a written decision to the Employee(s) and his/her representative(s).
>
> 38 Step Two. If dissatisfied with the supervisor's answer in Step One, to be considered further, the grievance

must be appealed to the designated agency representative within seven (7) calendar days from receipt of the answer in Step One. The appropriate agency representative(s) will meet with the Employee(s) and his/her representative(s) and attempt to resolve the grievance. A written answer will be placed on the grievance following the meeting by the appropriate agency representative(s) and returned to the Employee(s) and his/her representative(s) within seven (7) calendar days from receipt of the appeal to the agency representative.

39 Step Three. If dissatisfied with the Employer's answer in Step Two, to be considered further, the grievance must be appealed to the designee or the appointing authority (i.e., Division Administrator, Bureau Director, or personnel office) within seven (7) calendar days from receipt of the answer in Step Two. Upon receipt of the grievance in Step Three, the department will provide copies of Steps One through Three to the Bureau of Collective Bargaining of the Department of Administration as soon as possible. The designated agency representative(s) will meet with the Employee and his/her representative(s) and a representative of Council 24 (as Council 24 may elect) to discuss and attempt to resolve the grievance. Following this meeting the written decision of the agency will be placed on the grievance by the Appointing Authority of the agency and returned to the grievant, his/her representative(s), and Council 24 representative within twenty-one (21) calendar days from receipt of the appeal to Step Three.

40 Step Four. Grievances which have not been settled under the foregoing procedure may be appealed to arbitration by either party within thirty (30) calendar days from the date of the agency's answer in Step Three, except grievances involving discharge or claims filed under State Statute 16.31 must be appealed within fifteen (15) calendar days, or the grievance will be considered ineligible for appeal to arbitration. If an unresolved grievance is not appealed to arbitration, it shall be considered terminated on the basis of the Third Step answers of the parties without prejudice or precedent in the resolution of future grievances. The issue as stated in the Third Step shall constitute the sole and entire subject matter to be heard by the arbitrator, unless the parties agree to modify the scope of the hearing.

10. Pursuant to Article II, Section 13, above, the State on or about December 31, 1975 paid employes for all time they spent in certain union activities for the 1975 year, including those activities which predated execution of the 1975-1977 contracts.

11. At about the same time, King, advised Robert Dunn, then Secretary of the Department of Administration, in a December 18, 1975 letter that:

> I am writing with regard to the payment by the State to the members of the bargaining committees which, in turn, must be repaid by the WSEU.
>
> You have my assurance that the amount will be repaid at the earliest possible time -- desirably within a two-week period or less, depending on mail service.
>
> If you can give me advance notice of the payments, I will be able to forewarn the members of the bargaining committees and expedite the process.

12. Thereafter, by letter dated December 29, 1975, Peter Vallone, the State's then Director of the Bureau of Collective Bargaining, informed King that the State expected Council 24 to reimburse it by January 14, 1976. In reply, King by letter dated March 3, 1976 advised Dunn that:

> Unfortunately, and I think primarily due to the lack of sensitivity on the part of Pete Vallone, his distortion of our agreement with the State, and his unwillingness to resolve significant problems in regard to the remittance of the costs for negotiations to the State, we are unable at this time to submit payment of $80,000 to the State.
>
> There is a dispute as to the amount, the cost of fringe benefits, and the manner in which the State screwed up paying the amounts to employees.
>
> As soon as we can find someone in the Bureau of Collective Bargaining or whatever other department or bureau is necessary to objectively and sensibly discuss these problems we will move forthwith to remit the money to the State.

13. That sometime shortly before March 10, 1976, Jerome Nelson, then the Acting Director of the Bureau of Collective Bargaining, met with King and agreed to prepare a list by department, of the employes who received payment under Article II, Section 13 including the hours and amounts involved for each employe.

14. By letter dated March 10, 1976, Nelson advised King that:

> As agreed to in our recent meeting we have prepared a listing of employes, by department, who received payment under Article II, Section 13 (Loss of Benefits) of our present contract. The attached list gives the employe, number of hours involved and amount paid. The total amount is $66,920.06. With the 18% fringe factors applied, the total amount to be refunded by the Wisconsin State Employees Union is $78,965.67. Please remit within 15 days. If you have any questions or problems regarding this matter please contact me.

Attached to said letter was a listing of employes by department, as well as the hours involved, in activities allegedly covered by the agreement and the amount previously paid by the State to each employe for such agreed activities.

15. By letter dated March 31, 1976, John Krummey, Council 24's Financial Administrator, informed Nelson that:

> We request the following information from you regarding the negotiation checks paid to members of the bargaining committees from the last contract negotiations:
>
> Amount of Federal taxes withheld
> Amount of State taxes withheld
> Amount of Social Security withheld
> Amount of retirement contributions withheld
> Gross amount of check
> Net amount of check
>
> This information is essential to us in completing our annual audit for the past fiscal year.
>
> Your cooperation is appreciated.

In response, Nelson by letter dated April 7, 1976, supplied King with the requested information.

16. On April 9, 1976, King advised Nelson:

> Enclosed is our check in the amount of $30,000 as a payment toward the wages our members received for their activities in collective bargaining of the 1975-77 contract.
>
> As we use the additional information you have recently provided us to get additional money, we will forward it to you as rapidly as possible.

Enclosed therein was a check for $30,000.

17. On May 4, 1976, Nelson advised King that:

> Pursuant to a request of Mr. Krumney dated March 31, 1976, a breakdown of the amount due the state under Article II, Section 13 (Loss of Benefits) was forwarded to your office on April 7, 1976.
>
> A check from WSEU for $30,000 has been received by the state, reducing the amount due to $48,965.76. Since no questions have been raised with this office, I am not aware of any reason why this reimbursement money should not have been forwarded promptly. So that further problems can be avoided in this area of mutual obligation, please remit the remaining sum of $48,965.67 immediately. Your check should be sent to my attention.
>
> I have enclosed a draft copy of a memo to all departments for your review. I think it clearly indicates the position of the state regarding this matter.
>
> If you have any questions, please contact me immediately.

Attached to said letter was a memorandum which stated:

> Date: May 4, 1976
>
> To: All Departments
>
> From: Jerome M. Nelson, Acting Director
> Bureau of Collective Bargaining
>
> Subject: WSEU Professional and Non-Professional Agreements, Article II, Section 13 (Loss of Benefits)
>
> Due to problems that have arisen in administration, effective immediately no time off with pay should be granted under the above section for employes in these bargaining units until further notice from this office.
>
> Employes have the option of taking leave without pay, vacation, personal holiday, or compensatory time for activities previously covered by this section.

18. By letter dated May 24, 1976, Nelson advised King that:

> Numerous communications have been directed to you regarding reimbursement to the State under the Loss of Benefits provision of the contracts, Article II, Section 13. The

most recent of these letters, dated May 4, 1976, indicated that the amount currently in question is $48,965.67.

The paragraphs of Article II, Section 13 set forth obligations for both parties that are interwined with each other. This mutual dependency requires that the continuation of the State's obligations be tied to the satisfaction of the union's responsibilities.

As of this date, the union has failed to meet these responsibilities required by the contract. Due to the continuing nature of this situation it is imperative that the matter be cleared up before further leave with pay can be granted under Section 13. Accordingly, I intend to issue the attached memo to all departments on June 1, 1976, unless full payment of $48,965.76 is received by that date. Please send the payment to Mr. Robert Stone's attention.

Attached to said letter was a memorandum which was almost identical to the one earlier attached to Nelson's May 4, 1976 letter to King.

19. State and Council 24 representatives met on June 4, 1976 wherein they discussed the amount of money which Council 24 allegedly owed to the State. Council 24 representatives did not there challenge the accuracy of the State's figures. An attempt was then made by the State to establish a payment schedule for the monies allegedly owed. The Union at that time refused to agree to such a schedule. King then indicated that there was a cash flow problem and that payment would be made as soon as Council 24 received the money from the employes to whom checks had been issued, which was, in King's opinion, consistent with the parties' agreement.

20. On July 22, 1976, Council 24 issued a check in the amount of $10,000.00 to the State as partial payment under Article II, Section 13 of the collective bargaining agreements. On the same day, Nelson and King signed a memoramdum of understanding which provided that employes would no longer be reimbursed by the State for Union activities enumerated under Article II, Section 13 of the contract. Said memorandum provided:

The parties hereby agree that Article II, Section 13 of the Professional and Non-Professional agreements will be administered on and after July 1, 1976, as follows:

The employes will be granted time off without pay by the employer for authorized union activities contained in Article II, Section 6, Section 8, Section 12 and for contract negotiation meetings with the employer (with the number of designated members as specified in the contract).

Any payment at the regular rate of pay due employes for the first 174 hours of time spent per calendar year in authorized union activities contained in Article II, Section 6 and Section 8 as well as any payments due for time spent in activities authorized in Article II, Section 12 and for contract negotiation meetings shall be the responsibility of the union which, when such payments are appropriate, shall make them directly to the employes.

Employes on leave of absence without pay shall continue to earn length of service, vacation and sick leave credits for the first 174 hours of time spent per calendar year in authorized union activities contained in Article II, Section 6 (union conventions, educational classes and bargaining unit conferences), Section 8 (attendance at local

union meetings) and Automatic Progression and Parking Study Committee meetings.

Employes on leave of absence without pay shall continue to earn length of service, vacation and sick leave credits for time spent in authorized union activities contained in Article II, Section 12 (executive board of Council 24) and for contract neogtiation meetings with the employer (24 designated members of the union's Non-professional bargaining team and 12 designated members of the union's Professional bargaining team).

It is expressly understood that the union or the employe can contribute to the Wisconsin Retirement Fund an amount equal to the amount that both the employe and employer would have contributed to the Wisconsin Retirement Fund if the employe had not been on leave of absence without pay.

In entering into said agreement, the parties did not have any discussions regarding the forgiveness of Council 24's alleged debt. Following the execution of the above memorandum, the State no longer paid employes when they were engaged in the above-defined activities.

20. On October 6, 1976 King met with representatives of the State. There, King said that payment of the amount due the State would be made in several weeks, after Council 24 had received the final billing from the State. No agreement was reached at said meeting as to whether such payments would be made by the locals directly or by Council 24.

21. By letter dated October 14, 1976, Nelson advised King:

Notice is hereby given that the final total owed to the State by WSEU pursuant to Article II, Section 13 of the WSEU's Professional and Non-Professional Agreements is $54,171.39. A history of payments and a breakdown of amounts are attached.

Payment of this amount must be transmitted to Jerome Nelson, Bureau of Collective Bargaining, on or before November 1, 1976. If payment is not made by that date, further action will be taken.

22. That after receipt by the Union of the final billing of October 14, 1976, Karl Hacker, Assistant Director of Council 24, requested from Phillips information as to the dates and times of employe activities, other than negotiating activities, which the State believed to be covered by the agreement; he also asked for a breakdown of the particular activities engaged in by individual employes. In response to this request Hacker was informed that such information was not available.

23. That in December 1976 Hacker asked Phillips to bill the locals directly for amounts owed under Article II, Section 13 for all covered non-negotiation activities and that Phillips refused to bill the locals directly; that a subsequent billing to the Union by letter dated January 13, 1977 for $54,335.52 contained a breakdown of amounts allegedly owed by the various locals; that the information on local membership which was used to prepare this billing was given to Phillips by Hacker; that after the Union receipt of the billing, at least two errors were pointed out to Phillips by Hacker and were corrected and that Hacker indicated that the billing would be submitted to the locals by the Union.

24. On February 11, 1977, Council 24 issued a check for $8,100.00 to the State to cover part of State's expenses incurred under Article II, Section 13 of the collective bargaining agreements. Said check was received by the State on February 15, 1977.

25. On February 16, 1977, King sent the following memorandum to all local union presidents and the Local 171 administrator:

> Enclosed you will find a billing from the State of Wisconsin pursuant to Article II, Section 13 of the contract for the period September 14, 1975 through July 10, 1976. These billings cover time off work by members of your local union for bargaining unit conferences, educational meetings, conventions, etc. as provided for in Article II, Section 13.
>
> There will be no further billings inasmuch as the administration of that section of the contract has been changed.
>
> The fringe benefits amounts include retirement and social security. The 18% charges is the total cost for these two benefits. 4% of the total goes directly into the employee's retirement account.
>
> Please remit your checks as soon as possible to the State of Wisconsin, Department of Administration, c/o Robert Durkin, Administrator of the Division of Employee Relations, One West Wilson Street, Madison, WI 53702.
>
> We appreciate your rapid remittance as we want to go into negotiations with a clean slate.

26. That sometime between February 16, 1977 and February 23, 1977 King received complaints from certain locals that there were errors in the billings; that in response to said complaints King directed the locals to stop payments to the State; that King thereafter advised the State that he would not ask the locals to pay unverified amounts.

27. By letter dated February 23, 1977, Robert E. Durkin, Administrator, Employe Relations Division, advised King that:

> I am surprised to hear that DC 24 is not in agreement with the billing submitted by the state for time used by Council members under Article II, Section 13 in the period September 14, 1975 through July 11, 1976. It was my understanding that District Council representatives had agreed the billing was in fact correct.
>
> In any event, the billing you have received represents our best information. If you believe there are errors, we will be pleased to investigate and correct them. In order to do so we must be told which charges District Council believes to be incorrect. We expect that as the Council receives reimbursement for items not in dispute that you will forward them to the state as you have agreed.
>
> We are very anxious that this matter be resolved. As you know, it has become a matter of media and legislative interest. It should be a mutual concern that this peripheral issue not complicate the more substantive problems that we will have to deal with in the coming months. The state expects no more in reimbursement than is due it; on the other hand, we cannot accept any less than that amount.

I have asked Jim Phillips of the Bureau of Collective Bargaining to be prepared to meet at the convenience of any representative you designate so that this question may be promptly and finally resolved.

28. By letter dated February 28, 1977, Nelson informed Karl Hacker, Council 24's Assistant Director, that:

> You have recently indicated that some of the charges included in the billing under the above provision were not appropriate. Therefore, I am requesting that you forward, in writing, the specifics of the amounts in dispute so that inquiries can be made.

Neither Hacker, nor King thereafter made any effort to provide the information Nelson requested in his letter of February 28.

29. That from time to time the State received payments directly from locals and that the last such payment was in March 1977, and that total payments received by the State from locals totaled $6,010.61.

30. By letter dated March 11, 1977, Nelson advised King that Council 24 owed a total of $40,802.40 to cover the cost of collective bargaining. Thereafter the State received additional money from Council 24's locals, so that the alleged outstanding balance then stood at $40,149.46.

31. In arriving at said figure, the State relied upon entries made on employe payroll sheets. More particularly, the State relied on "Code 19" entries which included various union activities covered under Article II, Section 13. The "Code 19" entries on the payroll sheets, however, also included certain activities not listed under Article II, Section 13, such as attendance at labor-management or grievance meetings. As to the latter activities, the State fully reimbursed employes for participating in such activities and, as a result, Article II, Section 13 never applied to them. Throughout the course of this dispute, Council 24 representatives advised the State that the "Code 19" entries relied on by the State included such items as labor-management or grievance meetings. As of the date of the hearings in this proceeding, the State has not been able to break out of the code 19 entries those activities which were covered by the parties' agreement(s).

32. The parties commenced bargaining for a successor contract on approximately February 25, 1977. On either April 27 or 28, 1977, the State proposed in said negotiations that the contracts be amended by inserting therein the July 22, 1976 memorandum noted above, provided, however, that Council 24 agreed to pay $40,000.00 towards its alleged debt. Council 24 refused to agree to said proposal. The parties ultimately agreed however to inclusion of said memorandum in their subsequent contracts.

33. On July 18, 1977 Phillips and King agreed to continue the terms of the expired 1975-1977 contract when they signed a memorandum which provided:

> It is agreed by the undersigned parties to the labor agreement which expired on July 2, 1977 that these contracts shall be extended until ratification of the new contracts agreed to on July 17, 1977 or until August 14, 1977 whichever is later. Until the effective date of the new contracts specified above all terms and conditions of the old 1976-1977 contracts will continue in full force and effect

specifically including all provisions relating to wages and employe benefits.

Thereafter, the parties agreed to new contracts, which were ratified on or about September 7, 1977 by the Joint Committee on Employment Relations. Said contracts became effective on September 11, 1977.

34. The State has never filed a grievance over its claim that Council 24 owes it $40,149.46, which is the amount of money which the State now alleges Council 24 owes it.

35. That Respondent's answer was served on Complainant and filed with the Commission on November 23, 1977, on the day after the date of service set forth in the Examiner's Notice of Rescheduling of Hearing dated September 30, 1977.

Upon the basis of the above Findings of Fact, the Examiner makes the following

CONCLUSION OF LAW

Council 24 has violated Section 111.84(2)(d) of the State Employment Labor Relations Act by refusing to reimburse the State of Wisconsin for activities covered by Article II, Section 13 of the collective bargaining agreements between the parties as well as the oral agreement between the parties covering the negotiations of the 1975-1977 contracts for which the State has not yet been reimbursed.

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

ORDER

IT IS ORDERED that Council 24 shall reimburse the State of Wisconsin for expenses which the State of Wisconsin incurred under Article II, Section 13 of the parties' 1975-1977 collective bargaining agreements as well as the oral agreement between the parties covering the negotiations of the 1975-1977 contract.

IT IS FURTHER ORDERED that Council 24, its officers and agents, shall immediately:

1. Cease and desist from unconditionally refusing to reimburse the State of Wisconsin for expenses incurred by the State purusant to Article 11, Section 13, of the 1975-1977 collective bargaining agreements and the parties' oral agreement referred to herein.

2. Take the following affirmative action which the Examiner finds will effectuate the policies of SELRA:

   a. Upon proper notification by the State of Wisconsin as to the amount of money due for activities covered under Article II, Section 13, of the 1975-1977 contracts, as well as the parties' oral agreement 1/ immediately reimburse the State for all said expenses.

1/ As described elsewhere herein in the Memorandum Accompanying Findings of Fact, Conclusion of Law and Order.

b. Notify all employes covered by the collective bargaining agreements herein by posting in conspicuous places in its offices and all other places where union materials are ordinarily posted, where employes are employed copies of the notice attached hereto and marked "Appendix A." That notice shall be signed by the Union 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 by the Union to insure that said notices are not altered, defaced or covered by other material.

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

Dated at Madison, Wisconsin this 2nd day of May, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Byron Yaffe
Byron Yaffe, Examiner

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 employes that:

WE WILL, upon proper notification by the State of Wisconsin as to the exact amount of money due for activities covered under Article II, Section 13, of the 1975-1977 collective bargaining agreements and the parties' oral agreement covering the negotiations of the 1975-1977 contract, immediately reimburse the State of Wisconsin for all said expenses.

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 24, WISCONSIN STATE EMPLOYEES UNION, AFL-CIO

By_____

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Complainant moved at the hearing for an order granting the relief designated under mandatory language ERB 22.03(6), namely, an admission and waiver of hearing by Respondent as to the material facts alleged in the complaint based upon the Respondent's filing of an untimely answer.

Respondent contends that the language of the regulation is merely advisory and that substantial compliance with the Examiner's Notice was achieved by service of the answer on November 23, 1977. One day delay in service did not prejudice Complainant in any way, since the date of hearing was approximately two months after service of the answer.

The answer was not timely served under the language of ERB 22.03(6), and 20.08(4). Nevertheless, ERB 20.01 sets out the policy of liberal construction of the Rules and allows the Examiner to waive any requirements of the Rules unless a party shows prejudice.

The Commission has previously construed the identical rules which are applicable to proceedings under MERA and had held that where there is no showing of prejudice, the specific rule governing timely filing of answers is held to have been waived. City of Milwaukee and Elsworth L. Salisbury, No. 8017 (1967). This policy has most recently been upheld in School District of Walworth, II, No. 16550-A (1978).

The Examiner in persuaded that no prejudice has been demonstrated in this proceeding and therefore concludes that the Respondent's failure to file a timely answer does not constitute a waiver or admission as to the material facts alleged in the complaint.

The State primarily maintains that Council 24 has breached Article II, Section 13, of the 1975-1977 collective bargaining agreement by refusing to reimburse the State for $40,149.46 for those expenses incurred by the State when it implemented Article II, Section 13.

Council 24, on the other hand, asserts that it does not owe the State any money. In support thereof, it has raised a number of major defenses. It claims that: (1) the matter should be deferred to the parties' contractual grievance-arbitration procedure; (2) the statute of limitations has run out; (3) a Union cannot violate Section 111.84(2)(d) of SELRA; (4) Article II, Section 13 does not cover the expenses in issue; (5) the contract is void and/or unenforceable because of its vagueness; (6) Council 24 is not obligated to reimburse the State directly for covered Union activities, other than for the negotiations for the 1975-1977 contracts and that if any obligation exists, it is the employes' and the local unions'; (7) the State has failed to prove that the expenses alleged are chargeable under Article II, Section 13; (8) the obligation was forgiven by the express terms of the parties' agreements; (9) the obligation was excused through collective bargaining; (10) the State itself violated the agreements. These contentions will be discussed hereafter.

With reference to whether the matter should be deferred to the contractual grievance-arbitration procedure, it is well settled that the Commission will not ordinarily assert its jurisdiction over

alleged breaches of contract if there is a valid grievance-arbitration procedure for the resolution of said matters which the charging party can utilize.

Here, the Council 24 rightfully notes that Step 4 of the contractual grievance procedure provides that:

> Grievances which have not been settled under the foregoing procedure may be appealed to arbitration by either party within (30) calendar days from the date of the agency's answer in step 7 there. (Emphasis added).

By so providing that "either party" can appeal to arbitration, this clause tends to support the Union's view that the State can arbitrate the matter herein. Upon further analysis, however, it is clear that the grievance-arbitration forum is not available to the State in this dispute.

This conclusion is buttressed by reading the entire grievance-arbitration procedure, which makes absolutely no reference whatsoever to the State's ability to file a grievance. To the contrary, the grievance procedure expressly states that "the grievance shall be presented to the "designated supervisor"; that the "supervisor" shall "hear the grievance and return a written decision to the Employee(s) and his/her representatives;" that the grievance must be appealed to the "designated agency representative"; that said representative shall prepare a written answer for "the Employee(s) and his/her representative(s)"; that said grievance can thereafter be appealed "to the designee or the appointing authority (i.e., Division Administrator, Bureau Director, or personnel office"; and that "the written decision of the agency will be placed on the grievance by the appointing authority of the agency and returned to the grievant . . . ." Read together, it is absolutely clear that the underlying grievance procedure only provides for employe or union grievances. 2/ Accordingly, it must be concluded that the State does not have the contractual right to file a grievance and that, as a result, it cannot proceed to arbitration on a matter wherein it alleges that the Union has breached the parties' collective bargaining agreement. 3/

Council 24 next argues that the one year statute of limitations has run on said matter. In support thereof, Council 24 argues in its brief "All amounts which the State now seeks to recover from this Union were paid and due on or before July 1, 1976," which was more than one year before the instant complaint was filed on August 17, 1977.

This contention is without merit as the record fails to show that the amounts herein necessarily were due to be paid before July 1, 1976, or for that matter, on any specified date thereafter. Thus, when asked at the hearing when Council 24 was obligated to

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2/ See, for example, Racine Education Association, Decision 14308-D, 14389-D, 14390-C, (6/77).

3/ See Atkinson v. Sinclair Refining Company, 370 U.S. 238, 50 LRRM 2433 (1962) and Stockman Bakery Company v. Bakery Workers Local 427, 315 F. Supp. 647, 74 LRRM 2957 (N.D. Pa. 1972).

repay the amounts herein, King answered that there was no time frame under which Council 24 would reimburse the State. 4/

It should also be notied with respect to this issue that the instant complaint was not filed until it became clear to the State that no additional payments would be made by Council 24 in response to the State's allegation that $40,149.46 was still due and owing. This did not occur at least until after February 15, 1977 when Council 24 made its last partial payment to the State pursuant to the parties agreement(s). Thus, the complaint was filed well within one year after the State became aware of the fact that further payments would not be made by the Union.

The Union also argues that a Union cannot violate Section 111.84 (2)(d) of SELRA on the ground that said proviso only prohibits "employee(s) from violating collective bargaining agreements" and that it does not prohibit labor organizations from doing so.

If the Union's position were to be accepted, that in effect would mean that a labor organization could not violate any of the terms of Section 111.84(2) of SELRA. The Examiner does not believe that the legislature intended such a result.

In this regard, it is noteworthy that the two other major pieces of labor legislation enacted by the Wisconsin legislature, the Wisconsin Employment Peace Act and the Municipal Employment Relations Act, contain prohibitions on union conduct which are contained in similarly worded provisions as those found in Section 111.84(2). Accordingly, it is unreasonable to assume that the legislature intended not to include similar union prohibitions under SELRA.

Secondly, the language itself in Section 111.84(2) provides that it is "an unfair practice for an employe individually or in concert with others" to engage in certain activities. Since a labor organization by definition is composed of employes acting in "concert with others" this later phrase is broad enough to encompass labor organizations within its meaning.

That this is so is clearly reflected in the subsequent language. Thus, Section 111.84(2)(c) prohibits the refusal to bargain collectively on matters set forth in Section 111.91(1) with the duly authorized officer or agent of the Employer. As only a labor organization can engage in such bargaining, this prohibition clearly applies to labor organizations. Going on, Section 111.84(2)(c) makes it unlawful to "execute a collective bargaining agreement previously orally agreed upon." Again, since only a labor organization can sign such a contract, said proviso clearly applies to labor organizations.

Moving on to Section 111.84(2)(d), the pertinent provision herein, said section prohibits the violation of an "agreement to arbitrate." Again, since employes themselves cannot normally on their own arbitrate contractual disputes, it is clear that this provision, in its entirety, was intended to apply to labor organizations. In addition, Section 111.84(2)(d) goes on to add that it is unlawful to refuse to accept the "terms of an arbitration award

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4/ Transcript, p. 98.

where previously the parties have agreed to accept such awards as final and binding upon them." (Emphasis added). Since the term "parties" logically applies to the parties to a collective bargaining agreement, this prohibition is likewise applicable to a labor organization.

Accordingly, based upon the foregoing, it must be concluded that Section 111.84(2)(d) is applicable to labor organizations.

Council 24 also alleges that Article II, Section 13 does not cover the expenses in issue. In support thereof, Council 24 claims that said proviso does not apply retroactively and that, moreover, any oral agreement to that effect is not part of the contract.

Respondent argues that, although Article II, Section 13 is facially applicable to expenses of the State incurred by payments to employes participating in negotiations leading to the agreements, that the negotiations were concluded prior to the effective date of the agreements. Citing Barneveld Joint School District No. 15, 12538-B, (1975), Respondent claims that absent implicit express language, a contract operates prospectively only. Therefore, Respondent argues, the agreements cover negotiation activities only for the successor agreements, and do not cover prior negotiations.

The State contends that Article II, Section 13, by virtue of the parties' oral agreement, covered the negotiations for the parties' 1975-1977 agreements, as well as the other union activities specified therein, which were not given retroactive coverage.

The record demonstrates that the parties clearly entered into a binding and enforceable oral agreement which provided employes the same benefits which were ultimately incorporated into Article II, Section 13, at least with respect to authorized attendance at negotiating meetings. Said agreement also created enforceable rights and responsibilities on the part of both the Union and the State. In light of this conclusion, is is not necessary to determine whether said oral agreement reflected an agreement to give retroactive application to Article II, Section 13, or whether instead it reflected a separate and distinct oral agreement between the parties.

In the alternative, Respondent Union contends that the Loss of Benefits provision of the agreements only required it to act as conduit for reimbursement to the State for amounts paid to employes. The Union had no legal obligation to pay the State, but only to transmit to the State the amounts of employes' net pay checks which employes turned over to it, for those employes who participated in the negotiations leading to the 1975-1977 agreements. The Union concedes that as to these amounts, it had an obligation to include with its remittance to the State an amount equal to 18% of the gross amount of the employes' checks. The 18% add-on factor was intended to hold the Employer harmless for the costs of providing benefits to the employes for the times for which they were paid. The Union also contends that the agreement under which it transmitted to the State amounts representing payment to employes for negotiation time was a separate oral agreement not included in Article II, Section 13 of the agreements.

As to other union activities covered under Article II, Section 13, the Union contends that the procedure for reimbursing the State was a three-step procedure under which it was not legally responsible to pay the State. The State was to bill Council 24 for amounts paid to employes; Council 24 was then to bill the locals for the amounts paid to their members; the locals were to transmit to the State the amounts paid to the State, along with the 18% add-on factor.

The Union contends that, with respect to the amounts claimed due by the State with respect to negotiating committee members,

that it has transmitted all of the amounts turned over to it by the employes and that this is all that it was legally obligated to do.

With respect to amounts claimed due by the State for other activities under Article II, Section 13, the Union disputes the accuracy of the hours billed to employes by the State. It concedes that if the State billings were correct, that the locals would be required to pay the State. Even if the locals are required to pay the State, Council 24 argues that it has no legal obligation to pay since it agreed to function only as conduit in an administrative capacity to coordinate the payments to the State.

The State on the other hand argues that although the parties' agreement did not prohibit the locals from reimbursing the State for covered activites, the parties' agreement provides that the "Union" shall reimburse the State for its payments for covered activities, and the "Union" which is a party to that agreement is Council 24 and its affiliated locals. Therefore Council 24, as well as its affiliated locals, has assumed all of the liabilities thrust upon the Union by the terms of said agreement.

Several distinct issues are raised by the Respondent Union's contentions herein. First, although a separate oral agreement was reached between the parties covering the negotiation activities leading up to the 1975-1977 contracts, the record demonstrates that said agreement essentially provided that employes would be granted the same rights as those later agreed to in Article II, Section 13; with the Union, i.e. Council 24 agreeing to reimburse the State for its payment of wages and fringe benefits to the employes engaged in covered activities. Although there is a dispute as to whether this oral agreement reflected an agreement to apply Article II, Section 13 retroactively, there is no question that such an agreement was reached and that it was mutually intended to be binding and enforceable.

Although the parties oral agreement, as well as their agreement under Article II, Section 13, left several specifics as to implementation unresolved, the basic components of both agreements are sufficiently specific to create enforceable rights and responsibilities on the part of both parties. Among those rights and responsibilities are the following:

Affected employes were entitled to be paid their full salaries and fringe benefits for the periods they spent in the negotiations of the 1975-1977 contract, as well as for the periods they engaged in other activities covered by Article II, Section 12.

The Union obliged itself to reimburse the State (pursuant to Article II, Section 13 as well as the parties' oral agreement) for such payments. This obligation includes an agreement to hold the State harmless for all costs involved in providing the aforementioned benefit. This agreement ultimately became one in which the Union agreed to reimburse the State the gross amount of the wages paid to the employes while they were engaged in covered activities plus 18% of such amount to cover the State's contribution to Social Security and other fringe benefits. Although the Union asserts that it was only obliged to return the net amount received by employes, which reflected deductions for taxes, social security, etc., (rather than the gross amount of their wages) plus 18% of that amount, this assertion is inconsistent with the parties' clear intent to make the State whole, as part of a "wash" transaction, for all of the costs it incurred in providing the benefit.

Although it appears that Council 24 intended that its affiliated locals would reimburse the State for covered activities other

than the negotiations leading to the 1975-1977 contracts, and that the State did not disagree with the Union that its locals could directly reimburse it for payments made for covered activities, said understanding did not negate the parties' basic understanding that the Union (Council 24 as well as its affiliated locals) had the responsibility, under the parties' written and oral agreements, to reimburse the State for all of its costs, even in the event its members failed to turn over to it the payments they received from the State for covered activities and/or in the event its affiliated locals failed to reimburse the State in the proper amounts for such activities. The agreement between Council 24 and the State, though intended to be a mere "wash" transaction, obligated the Union (Council 24) to hold the State harmless for costs incurred, just as it obligated the State to hold employes harmless while engaging in covered activities. In the event employes failed to turn over to the Union the amounts they received from the State for covered activities, the Union's recourse was against those employes. It is not reasonable to construe the parties' agreement as leaving the State without recourse in enforcing its right to obtain full reimbursement from the Union under such circumstances.

Alternatively, Council 24 maintains that Article II, Section 13, is void for vagueness.

This contention is also groundless as the record clearly establishes that Article II, Section 13, was meant to cover expenses involved in certain union activities, such as contract negotiations, executive board and local meetings and other activities which are elsewhere clearly spelled out in the contract. Indeed, in this connection, it is significant that Council 24 has already reimbursed the State for about $40,000.00, which it obviously would not have done if there was a real dispute as to what Article II, Section 13 covered.

Council 24 next argues that the obligation was forgiven by the express terms of the agreement. In support thereof, Council 24 relies upon Article XVI, entitled "termination of Agreement," which provides in substance that upon termination of the contract all obligations are automatically cancelled. This provision, however, is inapplicable to the instant matter as the State filed the instant complaint before the contract expired. Accordingly, there is no basis for finding that Article XVI bars the instant action. 5/

Along the same line, Council 24 argues that the obligation was excused through collective bargaining.

With respect to this allegation, although it is true that the State in April, 1977 did propose that Council 24 reimburse it for approximately $40,000.00 as a condition to a certain agreement, and although said condition was rejected by Council 24, said refusal does not necessarily mean that the proper amount due and owing was to be forgiven. Indeed, King himself admitted that the State in negotiations never stated that Council 24's debt was to be forgiven, 6/ a point which was corroborated by Phillips. 7/ Accordingly, absent

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5/ By the same token, the 1973-1975 contracts did not cover the instant situation, as the oral agreement reached pertaining to the negotiations of the 1975-1977 contracts clearly was not affected by the terms of the 1973-1975 contract's terms.

6/ Transcript, p. 93.

7/ Transcript, p. 121.

any express waiver by the State that it was dropping its claim, there is no basis for concluding that said claim was excused through collective bargaining.

Council 24 also contends that it was the State which violated Article II, Section 13 in that it unilaterally decided to implement the agreement through a payroll transaction rather than by handling it as a mere bookkeeping transaction as originally intended.

This contention, too, is without merit. For, while it is true that the State initially unilaterally decided to treat this matter as a payroll transaction, instead of the mere "wash" as originally agreed to, such a change was not a material change from the original agreement and was implicitly agreed to by the Union prior to the time the final draft of Article II, Section 13 was written.

The decision to implement the agreement in this manner was made to effectuate the purposes of the agreement, specifically, to assure that employes would not suffer loss of retirement credits. Pursuant to Chapter 41 Wisconsin Statutes, the State believed that employes had to be issued pay checks for the periods they were employed in covered activities. Although the Union initially urged the use of a bookkeeping transaction, when it learned of the State's understanding of the impact of Chapter 41 Wisconsin Statutes, it orally agreed to implement the agreement by means of a payroll transaction.

Although the record is unclear as to whether employes were to receive separate checks for activities covered by Article II, Section 13, as urged by the Union, or whether they were to receive payment pursuant to said Article in their regular paychecks, as urged by the State, the State's method of payment, even if violative of the agreement, does not excuse Council 24's failure to repay the amount due since the method of payment is not related to the existence or lack thereof of the Union's obligation.

Finally, Council 24 maintains that it has complied with the contractual language in issue and that the State has failed to prove that it violated the collective bargaining agreements.

In this connection, Council 24 rightfully notes that the State did not produce any first hand evidence that employes were engaged in activities covered under Article II, Section 13 for which the State has not been reimbursed. Instead, the State at the hearing asserted that its figures were gleaned from "Code 19" entries entered in employe charge sheets. Hacker testified without contradiction that the "Code 19" entries also include certain activities such as grievance and labor management relations meetings which were not covered under Article II, Section 13. The record therefore is unclear as to exactly how much Council 24 still owes the State for employe activities covered by Article II, Section 13.

The record does however demonstrate that Council 24 in its discussions with the State over this matter has not disputed the fact that the State was entitled to additional reimbursement. Instead, it has disputed the accuracy of the amount due and owing.

In light of the above, and in view of the position taken by the Union in the instant proceeding, specifically, that for a variety of reasons described elsewhere herein it does not owe the State any additional monies, it must be concluded that the Union, by unequivocally refusing to reimburse the State any additional amounts pursuant to the terms of Article II, Section 13 and the oral agreement reached between the parties covering the negotiations of the 1975-1977 contracts, has violated said agreements.

The Examiner further finds that the amount which Council 24 owes the State is limited to the amount paid by the State for activities covered under Article II, Section 13 and that, as a result, the "code 19" entries are not sufficiently reliable to determine the amount due since they include activities not covered under Article II, Section 13. As a result, before Council 24 is required to fully comply with the order herein, the State shall be required to furnish Council 24 with a list of employes who were paid for covered activities, including the nature of the activities engaged in and the dates on which they occurred. In this regard, in order to compile such a list, Council 24 and its local affiliates shall be required to provide the State, upon request, with all relevant records and other information within its possession which will facilitate the compilation of such an itemized list of covered activities by the State.

Dated at Madison, Wisconsin this 2nd day of May, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Byron Yaffe
Byron Yaffe, Examiner