

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Case CXII  
No. 22437 DR(S)-10  
Decision No. 16552

**Appearances:**

Lawton & Cates, Attorneys at Law, 110 East Main Street, Madison,  
Wisconsin, by Mr. Richard V. Graylow, appearing on behalf of  
the Union;

Mr. Lionel Crowley, Department of Administration, State of Wisconsin,  
Room 244, One West Wilson Street, Madison, Wisconsin, appearing  
on behalf of the State.

**FINDINGS OF FACT, CONCLUSION OF LAW**  
**AND DECLARATORY RULING**

AFSCME, Council 24, Wisconsin State Employees Union, AFL-CIO, having on January 9, 1978 filed a petition with the Wisconsin Employment Relations Commission, herein Commission, requesting the Commission to issue a Declaratory Ruling, pursuant to Section 227.06(1), Stats., to determine the legality of the granting of wage and fringe benefit increases to certain employees in the classified service of the State of Wisconsin by the Department of Administration and/or the Director of the Bureau of Personnel, during the pendency of a representation proceeding involving said employees; and a hearing on the petition having been held on March 15, 1978, at Madison, Wisconsin; and the Commission having considered the evidence, 1/ and the briefs and arguments filed by the parties, and being fully advised in the premises, issues the following Findings of Fact, Conclusion of Law and Declaratory Ruling.

## FINDINGS OF FACT

1. That AFSCME, Council 24, Wisconsin State Employees Union, AFL-CIO, hereinafter referred to as the WSEU, was at all times material herein, a labor organization within the meaning of Section 111.81(9), Stats., with offices at 5 Odana Court, Madison, Wisconsin.

2. That the State of Wisconsin, Department of Employment Relations, hereinafter referred to as the State, was at all times material herein, the Employer within the meaning of Section 111.81(16), Stats.

3. That on May 6, 1977 the Wisconsin Federation of Teachers-Wisconsin Federation of Professional Employees, AFT, Local 3619, AFL-CIO, filed a petition with the Wisconsin Employment Relations Commission, requesting that a representation election be conducted among employees of the State who were employed in the statewide "Fiscal and Staff Services" collective bargaining unit; that on May 19, 1977, WSEU, notified the Commission that

1/ At the hearing the Examiner advised the parties that the Commission would take administrative notice of any and all of its records pertaining to the representation petition involved. (State of Wisconsin, Case XCVII).

it desired to intervene in said representation proceeding; that on June 21, 1977 the Commission notified WSEU that it would be permitted to intervene in said proceeding; that hearing in said matter was conducted on August 2, 1977; that on September 23, 1977, and as amended on September 29, 1977, the Commission directed an election among the employees in said unit to determine whether said employees desired to be represented by either of the aforesaid labor organizations or no organization; that said election was conducted by mail ballot; and that the results thereof were certified by the Commission on November 18, 1977, which certification reflected that the employees in said unit rejected a collective bargaining representative.

4. That it is the customary policy of the State to grant annual wage and fringe benefit increases to non-represented classified employees to become effective on or about July 1st of each year; that in accordance with said policy, and pursuant to Sec. 608.63, Stats., the Director of the Bureau of Personnel, prior to July 1, 1977, submitted a unilateral pay plan granting wage and fringe benefit increases to non-represented State employees, including the employees in the "Fiscal and Staff Services" unit, for the fiscal year 1977-1978, to the State Personnel Board and to the legislative Joint Committee on Employment Relations; that said bodies approved said unilateral pay plan, and on or about July 3, 1977, said increases were implemented by the Director of Personnel; that such increases were granted to the employees in the "Fiscal and Staff Services" unit, as well as to other non-represented State employees, during the pendency of the representation proceeding involving the employees in the "Fiscal and Staff Services" unit, and that the implementation of increases in wages and fringe benefits to employees in said unit was not motivated with the intent to interfere with the free choice of the employees involved in the election noted above.

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

#### CONCLUSION OF LAW

That, when the State Employer, without unlawful motivation, implements wage and fringe benefit increases to unrepresented employees in a manner and at a time as was the Employer's custom, and when said increases are implemented, pursuant to such custom, during the pendency of a representation proceeding involving said employees, said conduct does not constitute unlawful interference with the rights of such employees under the State Employment Labor Relations Act.

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

#### DECLARATORY RULING

The State of Wisconsin did not unlawfully interfere with the rights of any employee, as set forth in the State Employment Labor Relations Act, when it granted wage and fringe benefit increases to "Fiscal and Staff Services" unit employees on July 3, 1977 during the pendency of a representation proceeding involving said employees, since the manner and timing of such increases were consistent with the State's custom in that regard, and since such increases were not improperly motivated.

Given under our hands and seal at the  
City of Madison, Wisconsin this 13th  
day of September, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

Morris Slavney  
Morris Slavney, Chairman

Herman Torosian  
Herman Torosian, Commissioner

Marshall L. Gratz  
Marshall L. Gratz, Commissioner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,  
CONCLUSION OF LAW AND DECLARATORY RULING

Position of the Union:

In support of its petition, WSEU contends that the State unlawfully interfered with the conduct of an election and the exercise of Section 111.82, Wis. Stats. 2/ rights, by allowing its Director of the Bureau of Personnel to implement a statutorily directed unilateral pay plan for unrepresented employees during the pendency of a representation question among certain of said unrepresented employees. It asserts that Section 16.086(3) 3/ Wis. Stats., permits the Director to exercise discretion in determining whether to submit a proposal to the Personnel Board and, even if one is submitted and ultimately approved by JCER, 4/ discretion as to when it should be implemented. Furthermore, said statute does not prohibit delaying implementation where a question concerning representation is pending, until resolution thereof. Therefore, where the Director implements a unilateral wage increase pursuant to his authority under Section 16.086(3) during an election campaign, he interferes with said election thereby committing an unfair labor practice within the meaning of Section 111.84(1)(a).

Position of the State:

The State, to the contrary, argues that the compensation plan implemented pursuant to Section 16.086(3) Wis. Stats., during the pendency of a representation question in the unit of classified unrepresented "Fiscal and Staff Services" employees was required by Section 111.93(2), Wis. Stats. 5/ and, therefore, compliance therewith cannot constitute interference violative of Section 111.84(1)(a). Further, the State contends herein said action was not motivated by an intent to effect the outcome of the election. Rather, the compensation plan was implemented pursuant to a statutory directive and that it was anticipated by all employees just as the next increase to be effective the first pay period in July, 1978. 6/ Thus, the State concludes it would be unrealistic to find, as WSEU requests, inasmuch as this would have the effect of freezing benefits and wages that require adjustment on a regular basis from the time an election petition is filed until said petition is finally disposed of.

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- 2/ "111.82 Rights of state employees. State employees 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 subchapter, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection. Such employees shall also have the right to refrain from any or all of such activities."
- 3/ Said section governs the establishment and revision of the compensation plan for classified civil service.
- 4/ Joint Committee on Employment Relations.
- 5/ "(2) All civil service and other applicable statutes concerning wages, hours and conditions of employment shall apply to employees not included in certified bargaining units."
- 6/ The Employer's brief makes reference to July 2, 1977 but, we believe same to be a typographical error and it should be July 2, 1978.

Interference:

Pursuant to Section 111.82 7/ Wis. Stats., State employes have the right of self-organization free from employer interference. To interfere with said right is an unfair labor practice under Section 111.84(1)(a), Wis. Stats.

The law is well settled that granting benefits during the pendency of such representation matters may constitute interference although evidence of same is not a per se ground for setting aside an election. 8/ In Exchange Parts 9/ the Supreme Court said:

"The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged."

Thus, to avoid being accused of illegal conduct, an employer can freeze wages and benefits as long as the onus is not placed upon the union. 10/ However, an employer cannot withhold wage and benefit payments which employes would have received in the normal course of the employer's business. 11/ The latter conduct is unlawful interference.

The subject wage increase was unilaterally granted to all non-represented classified employes 12/ during the pendency of the representation petition in the unit of "Fiscal and Staff Services." Said increase was recommended to JCER by the Bureau of Personnel Director pursuant to Section 16.086(3), Wis. Stats. and was adopted by said body. As provided for in said statute, such wage increases (adjustments in the compensation plan) may result from the Director's "biennial state-wide wage survey" mandated by Section 16.086(3)(am) Wis. Stats. In the past, it has been customary policy for the State, each July, to grant across the board annual

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7/ Note 2, supra.

8/ Centrolia Fireside Health, Inc., 96 LRRM 1471, 233 NLRB No. 31 (1977).

9/ NLRB v Exchange Parts, 375 US 405, 55 LRRM 2098 (1964).

10/ The Singer Company, Friden Division, 199 NLRB 1195 (1972); Waterbury Community Antenna, 97 LRRM 1057, 233 NLRB no. 190 (1977).

11/ NLRB v Katz, 369 US 736, 50 LRRM 2177 (1962); Liberty Telephone & Communications, Inc., 83 LRRM 1422, 204 NLRB 317 (1973); United Aircraft Corporation, Hamilton Standard Division, 81 LRRM 1397, 199 NLRB 658 (1972) enf'd in part 490 F. 2d 1105, 85 LRRM 2263 (CA2, 1973); General Motors Acceptance Corp., 79 LRRM 1662, 196 NLRB 137 (1972), enf'd 476 F. 2d 850, 82 LRRM 3093 (CA1, 1973); Florida Steel Corp., 90 LRRM 1329, 220 NLRB No. 169 (1975).

12/ Section 16.084(1), Wis. Stats.

wage increases to all classified non-represented employees. 13/ Consequently, said employees have come to expect that such increases will be granted every year in the normal course of State business. Further, no evidence was adduced herein that would lead us to conclude that the subject employees in the "Fiscal Staff Services" bargaining unit were not anticipating receiving such a wage increase in July, 1977.

Also, because of the prevalent practice of granting said annual increases each July, the start of the fiscal year, we cannot infer an unlawful purpose solely from the timing of said increase.

"An unlawful purpose is not lightly to be inferred. In the choice between lawful and unlawful motives, the record taken as a whole must present a substantial basis pointing toward the unlawful one." 14/

Herein there is no record evidence, aside from timing, that will substantiate a finding that an unlawful purpose attaches to the disputed wage increase granted to the "Fiscal and Staff Services" unit employees during the pendency of the representation proceeding. Indeed, because of the State's past history of granting said annual wage increases, to have withheld the subject increase might well have constituted unlawful interference. 15/ Consequently, we find that the unilateral wage increase granted "Fiscal and Staff Services" employees by the State did not interfere with said employees' right of self-organization.

Dated at Madison, Wisconsin this 13<sup>th</sup> day of September, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

  
Morris Slavney, Chairman

  
Herman Torosian, Commissioner

  
Marshall L. Gratz, Commissioner

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13/ For example, Department of Administration, State Bureau of Personnel Classification and Compensation Plan 1974-1975 and 1975-1976 adopted pursuant to Sections 16.086(3) and 16.085, Wis. Stats.

14/ NLRB v. McGahey et. al. d/b/a Columbus Marble Works, 233 F 2d 406, 38 LRRM 2142 (CA 5, 1956)

15/ See note 11, supra.