STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

| | |
|---|---|
| WISCONSIN FEDERATION OF TEACHERS STATE EMPLOYEES LOCAL 3271, Complainant, vs. STATE OF WISCONSIN, DEPARTMENT OF HEALTH AND SOCIAL SERVICES, Respondent. | Case CXXXIX No. 24986 PP(S)-64 Decision No. 17218-A |

Appearances:
Habush, Habush and Davis, Attorneys at Law, by Mr. John S. Williamson, Jr., 777 East Wisconsin Avenue, Milwaukee, Wisconsin 53202, appearing on behalf of the Complainant.
Mr. Sanford Cogas, Attorney, Division of Employment Relations, 149 East Wilson Street, Madison, Wisconsin 53702, appearing on behalf of the Respondent.

## FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

A complaint and amended complaint of unfair labor practices having been filed with the Wisconsin Employment Relations Commission in the above-entitled matter; and the Commission having appointed Stephen Pieroni, a member of the Commission's staff to act as Examiner; and the hearing on said amended complaint having been held at Madison, Wisconsin on February 29, 1980 before the Examiner; and the parties having filed post hearing briefs by June 16, 1980; and the Examiner having considered the evidence, arguments and briefs and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

## FINDINGS OF FACT

1. The WFT, State Employees Local 3271 hereinafter referred to as the Complainant or Union, is a labor organization having offices at 120 East Wilson Street, Madison, Wisconsin.

2. That the State of Wisconsin, by its agency, the Department of Health and Social Services, Division of Corrections, herein referred to as the Employer or Respondent, is an Employer and that at all times material herein the Division of Corrections supervised the operation of the Waupun Correctional Institution, hereinafter WCI. That at all times material hereto, Mr. Thomas Israel functioned as the superintendent of the WCI; Mr. George Smullen functioned as the Education Director and Mr. James Cosgrove functioned as the Teacher Supervisor at WCI; Mr. Carl Manthe functioned as the Director of Treatment, Division of Corrections in Madison and Mr. Bernard Nugent was employed by the Department of Health and Social Services and functioned as Respondent's labor relations specialist; and all of said individuals functioned as Respondent's agents.

3. That at all times material hereto Complainant and Respondent were parties to a collective bargaining agreement which was in full force and effect from July 1, 1977 to June 30, 1979 covering, among others, Adult Basic Education (ABE) instructors employed at the Waupun Correctional Institution. Said ABE instructors are represented by WFT Local 3271 in a bargaining unit composed of classified employes of the State of Wisconsin in the Professional-Education bargaining unit.

4. That said 77-79 collective bargaining agreement contained the following pertinent provisions:

ARTICLE IV

Grievance Procedure

Section 1 Definition

. . .

75 A bargaining unit employe may choose to have his/her appropriate Federation representative represent him/her at any step of the grievance procedure. If an employe brings any written grievance to management's attention without first having notified the Federation, the management representative to whom such grievance is brought shall immediately notify the Federation representative and no further discussion shall be had on the matter until the Federation has been given notice and an opportunity to be present.

76 Individual employes or groups of employes shall have the right to present grievances in person or through other representatives of their own choosing at any step of he [sic] grievance procedure, provided that the appropriate Federation representative has been afforded the opportunity to be present at any discussions and that any settlement reached is not inconsistent with the provisions of this Agreement.

. . .

80 Step Three: If dissatisfied with the Employer's answer in Step Two, . . . the grievance must be appealed to the designee of the appointing authority . . . . The designated agency representative will meet with the employe and his/her representative and a non-employe representative of the Federation may be present as a representative at the grievance meeting as the Federation may elect.

. . .

82 Step Four: (Without quoting this lengthy provision, it is sufficient to state that this provision provides for the establishment of a panel of seven arbitrators, one of whom would be selected to hear

any one grievance. The arbitrator selected under this provision would have authority to render a final and binding decision.)

. . .

Section 4 Representation

92 An employe may consult with his/her appropriate Federation representative during non-instructional working hours for a reasonable period of time relative to a grievance matter. . . .

. . .

Section 7 Jurisdictional Areas - Grievance Representatives

95 There shall be only one Federation grievance representative for each of the following jurisdictional areas:

. . .

97 Department of Health and Social Services

. . .

17. Waupun

. . .

98 The Federation shall furnish to the Employer in writing the names of the grievance representatives for the above jurisdictional areas within thirty (30) calendar days after the effective date of this agreement. . . .

. . .

99 Each grievance representative designated by the Federation shall be an employe in the jurisdictional area for which he/she is the designated representative. No Federation grievance representative will be assigned more than one jurisdictional area and no Federation grievance representative shall process grievances outside his/her jurisdictional area. The Federation grievance representative shall be the only Federation representative to process Steps 1, 2, and 3 of all grievances that arise in his/her jurisdictional area. A non-employe representative of the Federation may be present as a representative at the Step 3 grievance meeting as the Federation may elect.

ARTICLE IX

Layoff Procedure

(This provision defines the applicability and procedures to be followed in the event employes are to be laid off. Contained therein is a provision

which allows the Employer to exempt two employes from layoff.)

ARTICLE XI

Miscellaneous

Section 1 Discrimination Prohibited

311 The parties agree that their respective policies will not violate the rights of any employes covered by this Agreement because of age, sex, creed, color, national origin, Federation or non-Federation affiliation.

5. That Mr. Thomas Corcoran first became employed at WCI on June 1, 1977 as an Adult Basic Education teacher. That in May, 1978, pursuant to the parties' collective bargaining agreement, Corcoran was designated the grievance representative for Local 3271 employes who were employed at the Waupun Correctional Institution. Mr. Sherman Van Driesse was designated the alternate grievance representative. Both Corcoran and Van Driesse handled third step grievances at WCI on behalf of Local 3271. During the period that Corcoran was the designated grievance representative, there were approximately thirty grievances filed by Local 3271. For several years prior to the time Corcoran became the designated grievance representative, no grievances had been filed with the Respondent on behalf of Local 3271.

6. That while Corcoran was the designated grievance representative, Ms. Margaret Liebig was a staff representative employed by the Wisconsin Federation of Teachers and in that capacity she handled some of the grievances at the third step on behalf of Local 3271 employes employed at WCI.

7. That in January, 1977 the Division of Corrections directed Mr. George Smullen to implement the "New Ways Learning Center" program at WCI. Said program, taught by the ABE teachers, was designed to teach residents who had less than sixth grade reading ability to become functionally literate. At the inception of the program, the Division of Corrections established a goal of six students to one teacher as a minimum ratio to be met in order to continue the program. That the class attendance of the residents was monitored throughout the existence of this program and despite numerous efforts by management, teachers, and certain students to meet this ratio, the ratio of students to teacher never rose above three to one. That as a result of insufficient attendance by residents, Respondent decided in the spring of 1979 to lay off two ABE teachers. Said layoffs occurred in October of 1979. The two teachers who were laid off were Corcoran and Ms. Ruth Ellickson. According to the provisions of the collective bargaining agreement, Respondent was permitted to exempt two teachers from the layoff group. Accordingly, for reasons relating to affirmative action, Respondent exempted one teacher, Mr. Barry, who had less seniority than Corcoran. Since Corcoran had less seniority than Ellickson, he would have been laid off even if Respondent had not exempted Mr. Barry from layoff. That there is insufficient factual basis in the record to conclude that Respondent's decision to lay off Corcoran was due, even in part, to animus toward Corcoran for his lawful concerted activity on behalf of Local 3271. Further, there is no basis in the record to conclude that Respondent harassed or discriminated against Corcoran in any other manner because of his union activity.

8. That Respondent found other employment at WCI for both Corcoran and Ellickson so that neither employe suffered an interruption in their continuous employment or a loss of salary. Corcoran was transferred to a social worker position which is in a different bargaining unit than Local 3271.

9. That Sherman Ansell, at all times relevant hereto, was the President of Wisconsin Federation of Teachers Local 3271. Ansell is not the designated grievance representative for Local 3271 employes who are employed at WCI. Ansell is employed full time by the State of Wisconsin at the Board of Vocational, Technical and Adult Education in Madison, Wisconsin.

10. That in May and June, 1979 Ansell attempted to process seven grievances on behalf of the Federation at the third step of the grievance procedure. Ansell was initially informed by Mr. Bernard Nugent that since Ansell was not the designated grievance representative under the terms of the parties' grievance procedure, he could not process the grievances at the third step of the grievance procedure and therefore the employer would not meet with Ansell at the third step.

11. That after receiving Nugent's reply, Ansell wrote a letter to Mr. Lionel Crowley, then attorney for the Department of Employment Relations, requesting that the employer waive the third step of the grievance procedure with respect to the seven grievances in question and proceed to arbitration on each of said grievances. In a letter to Ansell, dated June 8, 1979, Crowley insisted that the Union comply with the parties' grievance procedure and indicated that Respondent would meet with the Union at the third step if the Union complied with the grievance procedure. That throughout these proceedings Respondent has refused to meet with Ansell because of its belief that Ansell was not a proper union grievance representative under Article IV of the parties' contract. Respondent was willing to meet with the designated grievance representative, Corcoran or his alternate, Van Driesse or Ms. Liebig, the WFT staff representative.

12. That after receiving Crowley's letter dated June 8, 1979, Ansell did not make arrangements for the designated grievance representative or his alternate or Ms. Liebig to process said grievances at the third step of the grievance procedure. Nor did Ansell at any time file a grievance over the employer's refusal to meet with Ansell at the third step of the grievance procedure. Rather, Ansell filed an unfair labor practice complaint on behalf of the Union on August 7, 1979 in which he alleged that Respondent's refusal to meet with him constituted a violation of various sections of the State Employment Labor Relations Act. Said complaint was amended on September 7, 1979, to include the allegation that Respondent committed an unfair labor practice when it laid off Corcoran.

13. At the hearing on the instant matter, Respondent agreed to waive any procedural objections such as timeliness and would arbitrate the dispute concerning whether Ansell is an appropriate union grievance representative for the purposes of processing grievances under Article IV of the appropriate collective bargaining agreement.

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

## CONCLUSIONS OF LAW

1. That the conduct of Respondent's agents in refusing to recognize Ansell as an appropriate union grievance representative at the third step of the parties' grievance procedure constitutes a dispute over the interpretation and application of the provisions of the collective bargaining agreement existing between the parties, specifically Article IV thereof, and therefore the Examiner will not at this time assert the Commission's jurisdiction to determine whether the Respondent has committed any unfair labor practices within the meaning of Section 111.84 (1)(a)(b) and (c) of SELRA as alleged and in said regard dismisses said allegations without prejudice to the Complainant's right to refile a complaint in this regard if an arbitrator renders an award which does not resolve the merits of this dispute or if the arbitrator resolves the dispute in a manner that is repugnant to the policies of SELRA. 1/

2. That the conduct of Respondent's agents in refusing to recognize Ansell as an appropriate union grievance representative at the third step of the parties' grievance procedure did not constitute an unfair labor practice within the meaning of Sections 111.80(2), 111.82 or 111.83(1) of SELRA as alleged inasmuch as SELRA does not make an alleged violation of either of said provisions an independent unfair labor practice.

3. That Respondent's decision to lay off Corcoran in October, 1979 was not done in retaliation toward Corcoran for his lawful concerted activity on behalf of Local 3271 and therefore Respondent did not commit any unfair labor practice within the meaning of Sections 111.84(1)(a) or (c) of SELRA.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

## ORDER

IT IS ORDERED that the amended complaint filed herein, be and the same hereby is, dismissed without prejudice to the right of the Complainants to refile a complaint pursuant to Conclusion of Law Number 1 above.

Dated at Madison, Wisconsin this 17th day of March, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Stephen Pieroni, Examiner

---

1/ The limitation of the filing of complaints set out in Section 111.07(14) Stats., shall be deemed to have been tolled during the pendancy of the complaint herein as well as during the period required to process the grievance to final and binding arbitration should the Union elect to pursue arbitration within a reasonable time after receipt of this decision.

## MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

### Introduction

This case concerns two different labor disputes between the parties. The first dispute, as alleged in the original complaint, concerns the Employer's refusal to recognize Sherman Ansell as an appropriate union grievance representative for purposes of processing grievances at the Waupun Correctional Institution on behalf of Local 3271. There is no dispute that Ansell was attempting to act on behalf of the Union. Ansell is the President of Local 3271 but not the designated union grievance representative for Local 3271 employes at Waupun Correctional Institution (WCI). Ansell is employed by the State of Wisconsin at the Board of Vocational, Technical and Adult Education in Madison, Wisconsin. Neither Ansell nor any other union representative grieved the Respondent's refusal to meet with Ansell for the purpose of processing grievances.

Complainant filed an amended complaint in which it raised the second issue that Respondent allegedly committed an unfair labor practice by laying off the designated grievance representative, Corcoran, in retaliation for Corcoran's lawful concerted activity on behalf of Local 3271.

### Position of the Complainant

According to the Union's brief, the disposition of the first issue centers on the language of Article IV, Section 2, Step Three which reads as follows:

> If dissatisfied with the Employer's answer in Step Two, . . . the grievance must be appealed to the designee of the appointing authority . . . . The designated agency representative will meet with the employe and his/her representative and a non-employe representative of the Federation may be present as a representative at the grievance meeting as the Federation may elect. (Examiner's emphasis)

The Union concedes for the purpose of argument that "non-employe" refers to persons not employed by the State, as Respondent contends. But the Union argues that it would be incorrect to construe the above language to exclude Ansell, who is a State employe, from being present at Step Three merely because this language permits a union representative who is not a State employe to be present at Step Three. In this case, to construe a permission to some persons as a denial to others would: 1) serve no useful purpose; 2) lead to an absurd result; 3) precipitate a conflict with another contract provision; and 4) cause unlawful discrimination.

Said objections are explained by the Union as follows: One, the Respondent implicitly admitted that permitting a State employe to be present at Step Three would not cause disruption. This is so because

Respondent's agent (Nugent) admitted in the record that it would permit a grievant to select an officer of WEAC who could be a State employe to represent him at Step Three. Therefore the State recognizes that the presence of a State employe does not cause disruption.

Two, the Respondent's interpretation would lead to absurd results in that officers of a rival minority union (WEAC) who are also State employes could represent a grievance at Step Three, but officers of the Federation who are State employes could not. It makes no sense to assume that the Federation would negotiate a provision that gives WEAC greater power to represent employes in the grievance procedure than officers of the Federation.

Three, Article XI, Section 1 provides in pertinent part:

> The parties agree that their respective policies will not violate the rights of any employes covered by this Agreement because of . . . Federation or non-Federation affiliation.

Because the Respondent's interpretation would give the above-described advantage to officials of a minority union and thereby disadvantage employes affiliated with the Federation, said construction of Article IV would precipitate a conflict with Article XI, Section 1. A contractual provision should be interpreted in such a way as to avoid conflict with another provision whenever possible.

Four, Respondent's construction of Article IV flouts the policy of SELRA. The above provision as construed by the State, illegally discriminates between officers and members of WEAC on the one hand and officers and members of the Federation on the other.

With respect to the layoff of Corcoran, the Union asserts that the layoff was a ruse to get rid of an active union steward. In support of said contention the Union alleges the following facts: 1) Throughout Corcoran's tenure as a steward, pupil enrollment failed to meet the State's goal of six pupils to one teacher and therefore the only intervening event was Corcoran's union activity which the State wanted to avoid; 2) The Employer prevented the implementation of Corcoran's plan to increase pupil attendance by denying Corcoran the opportunity to make a presentation to new residents as they were processed in an evaluation program; 3) General harassment of Corcoran in the following ways: denying him the contractual right to use his preparation period for union activity; by denying him pay for attendance at a conference while paying another bargaining unit employe for her attendance; by writing a reprimand when Corcoran was late for class and inquiring on one occasion why Corcoran was leaving work early when he was actually performing union business.

Position of Respondent

With respect to Respondent's refusal to meet with Ansell at the third step, Respondent's position can be summarized as follows: First, the Complainant failed to exhaust the contractual grievance procedure and therefore that portion of the complaint which pertains to Respondent's refusal to recognize Ansell as a proper union grievance representative should be dismissed.

Second, the Examiner should defer the issue concerning the proper union grievance representative to the parties' contractual arbitration procedure.

Third, Respondent was correct in its interpretation of the parties' collective bargaining agreement inasmuch as Ansell was not the designated grievance representative under the contract and, as an employe of the State, he could not act as the representative of the Federation within the meaning of the parties' grievance procedure. To accept the Complainant's interpretation would oblige the State to meet with the local president and the designated grievance representative of the Federation at the same time. This would unnecessarily require the State to pay two employes when only one State employe was needed. Further, the parties' past practice supports the Respondent's interpretation of Article IV.

Concerning the layoff of Corcoran, Respondent avers that the record evidence demonstrates that said decision was made without any evidence of union animus toward Corcoran and was in conformity with the applicable provisions of the contract.

Respondent's Refusal to Meet With the President of the Local at Step Three of the Grievance Procedure

Subject Matter Jurisdiction and the Question of Deferral

It is well established that the Commission has jurisdiction to adjudicate cases which allege unfair labor practice violations even though the facts might also support a breach of contract claim which is resolvable only through arbitration. 2/ Here, in addition to alleging that Respondent violated the collective bargaining agreement in violation of 111.84(1)(e) the Union's complaint also alleged violations of Sections 111.80(2), 111.82, 111.83(1) and 111.84(1)(a) and (b). Hence, the Union's claims are not wholly contractual and the Examiner concludes that the Commission has subject matter jurisdiction to adjudicate the alleged unfair labor practice violations other than a breach of contract. 3/

However, whether to exercise said jurisdiction or defer the alleged statutory violations to arbitration is a discretionary act. The Commission has previously stated that it will abstain and defer only after it is satisfied that the legislature's goal to encourage the resolution of disputes through the method agreed to by the parties will be realized and that there are no superseding considerations in a particular case. Among the guiding criteria considered by the Commission for deferral are the following: 1) The parties must be willing to arbitrate and renounce technical objections which would prevent a decision on the merits by the arbitrator; 2) The collective bargaining agreement must clearly address itself to the dispute; and 3) The dispute must not involve important issues of law or policy. 4/

Applying these criteria and taking into consideration the particular facts of this case, the Examiner is convinced that he should abstain from adjudicating the alleged violations of Sections 111.84(1)(a)(b) and (e) and defer same to the parties' grievance-arbitration procedure contained in Article IV of their contract. This is so because the Examiner is persuaded that a statutory violation

---

2/ AFSCME, Council 24 vs. State of Wisconsin (15261) 1/78 and cases cited therein at footnote 5.

3/ Ibid. at p. 8.

4/ Ibid. and School District of Menomonie (16724-B) 1/81.

cannot be found here without an interpretation of Article IV. Further, the Employer has agreed to arbitrate the merits of the contract dispute and would waive any procedural objections which might prevent the arbitrator from hearing the merits. Moreover, the undersigned does not agree with the Union that important issues of law or policy are presented by the instant case. The Union argues that Respondent's construction of the disputed language contravenes the labor policy of SELRA because it would allow a minority union to attain bargaining advantages which are denied to members of the majority union. However, a minority union is not here involved and the undersigned is not convinced that Respondent's position clearly contravenes any policy underlying the State Employment Labor Relations Act. Hence, the legal and policy arguments raised by the Union are speculative in nature and lack sufficient importance to require a determination by the Examiner at this time.

Of significant importance in the determination of this issue is the fact that the alleged statutory violations clearly cannot be determined without interpreting the contract; the parties have negotiated a workable grievance-arbitration procedure complete with a panel of arbitrators who are presumably familiar with the terms of the agreement as well as the nuances in the parties' bargaining relationship. It seems to the undersigned that in this case the legislative policy of encouraging the parties to utilize their mutually agreed upon forum for the resolution of contractual disputes should take precedence. Furthermore, to hold otherwise under these particular circumstances would have the potential of encouraging a party in the future to engage in "forum shopping" when faced with a similar situation. The better policy is to encourage the parties to utilize their grievance-arbitration procedure.

A different situation exists with respect to the allegations in the Union's complaint that Respondent violated Sections 111.80(2); 111.82 and 111.83(1) by refusing to meet with Ansell. In this regard, the alleged statutory violations can be determined without regard to the contractual provisions. Therefore, no useful purpose would be served by deferring these allegations to arbitration. The State Employment Labor Relations Act does not make an alleged violation of either one of these provisions an independent unfair labor practice. An unfair labor practice is defined in Section 111.84. Section 111.80(2) is a statement of policy; Section 111.82 is a general statement of rights of State employes. Section 111.83(1) permits employes to present grievances and to authorize the employer to entertain them without opening itself to liability for dealing directly with employes in derogation of the duty to bargain only with the exclusive bargaining representative. However, SELRA does not make it an independent unfair labor practice under 111.83(1) for an employer to refuse to meet with an employe who wishes to present a grievance individually. 5/ Accordingly, the Examiner has dismissed that portion of the complaint which alleges violations of Sections 111.80(2); 111.82 and 111.83(1). In addition, the Examiner has dismissed the allegations referring to Section 111.84(1)(a) and (b) but without prejudice to Complainant's right to refile a complaint in this regard if an arbitrator does not resolve the merits of this dispute or if the arbitrator resolves the dispute in a manner that is repugnant to the policies of SELRA.

---

5/ cf. Greenfield School District No. 6 (14026-B) 11/77 which discusses the identical statutory language under MERA and finds no unfair labor practice.

Layoff of Union Steward

The second major issue before the Examiner is to determine whether the Respondent violated Section 111.84(1)(a) and (c) by laying off Corcoran in retaliation for his lawful union activities.

In this regard the Commission has ruled that an Employer cannot adversely affect an employe's employment situation when one of the motivating factors for the Employer's action is the employe's lawful concerted activity. 6/ Here the Complainant has the burden of proving by a clear and satisfactory preponderance of the evidence that Respondent's decision to lay off Corcoran was based, at least in part, on Corcoran's lawful concerted activities. 7/ To prevail, Complainant must therefore establish that Corcoran was engaged in lawful concerted activity and that Respondent had knowledge of that fact; that Respondent bore animus against Corcoran because of such activity and that finally, Respondent's stated reasons for its actions were pretextual in nature, and that one of the reasons for Respondent's actions was to retaliate against Corcoran for his lawful concerted activities.

In order to establish an independent violation of Section 111.84(1)(a) Complainant must establish that the layoff of Corcoran is an action which is likely to interfere with, restrain or coerce Corcoran or other employes in the exercise of their protected rights. However, the only way in which Respondent could interfere with employes exercise of protected rights is if Corcoran or other employes could reasonably conclude that the layoff was made in retaliation for Corcoran's lawful activities as a union steward. Therefore the allegation of interference is derivative from the allegation of discriminatory retaliation. Accordingly, the standards applied are those for discrimination within the meaning of Section 111.84(1)(c).

Although the instant complaint turns upon State employe rights under Sections 111.82 and 111.84 of SELRA, the statutory expressions of employes' rights under Section 111.70(2) of the Municipal Employment Relations Act (MERA) and Section 111.82 of the State Employment Labor Relations Act are virtually the same. Thus the Examiner concludes that the Commission's determination with respect to employe rights under MERA can properly be extended to the instant case. 8/

Turning to the merits of the complaint, there is no question concerning Respondent's knowledge of Corcoran's activities on behalf of Local 3271. Corcoran had filed approximately thirty grievances during the year and one-half that he was a steward and met with the Respondent at various steps of the grievance procedure on several of said grievances.

---

6/ Muskego-Norway School District No. 9 (7247) 8/65 aff'd 35 Wis. 2d 540 6/67.

7/ Ibid. and Mary Mason and AFSCME Council 24 vs. State of Wisconsin (15945-A) 7/79.

8/ Donna E. Davis vs. State of Wisconsin (15699-A) 5/80; Mary Mason et al. vs. State of Wisconsin supra.

However, there is little persuasive evidence in the record to establish either that Respondent bore animus toward Corcoran for his union activity or that Respondent's reasons for laying off Corcoran were pretextual or were designed, at least in part, to retaliate against Corcoran because of his union activity.

The problem with the Union's case is that Respondent presented legitimate explanations for each and every allegation advanced by the Union. Thus, the weight of the record evidence strongly favors the Respondent's position.

First, the background of the New Ways Learning Center indicates that in January, 1977 the Division of Corrections proposed that said program be established by April 15, 1977 to teach illiterate residents to become functionally literate. Before Corcoran became the steward in May, 1978, the Division of Corrections-Education Department had established that the program should generate a ratio of six pupils to one teacher in order to stay in existence. Smullen filed a status report with the warden in December, 1978 which indicated that despite the efforts of everyone involved in the program, the ratio had not been raised above three to one. The record demonstrates that even after Corcoran became active as a steward, the Employer continued its efforts to increase pupil enrollment. (Exhibits 12, 24 and 25 and testimony of Smullen, Tr. 132-134)

Despite continuous efforts by management, ABE teachers and students, Respondent decided in the spring of 1979 that the program could not meet its objectives and that two ABE teachers would have to be laid off. Corcoran and Ruth Ellickson, who was not active in the Union, were both eventually laid off in October, 1979. The reason for the delay between the time the decision to lay off was made and the actual layoffs occurred was due in large part to Respondent's efforts to obtain additional certifications for Corcoran in order to avoid his layoff. Further, Respondent went out of its way to delay Corcoran's layoff until Respondent could place Corcoran in a suitable alternate job at the Waupun Correctional Facility. He was eventually placed in a position as a social worker and did not lose a day of employment.

In addition, the Examiner is persuaded that Corcoran's layoff was not a pretext because Respondent laid off two people - Corcoran and Ellickson. Since Ellickson was not active in the Union, it can only be concluded that Respondent, of necessity, had to lay off two employes. Corcoran had the second least seniority of all the ABE teachers. The fact that Respondent exempted a black ABE teacher with less seniority than Corcoran only worked to the detriment of Ellickson, not Corcoran.

Moreover, Smullen credibly testified that he spoke with Mr. Manthe concerning Corcoran's proposal to make a presentation during the assessment and evaluation program in order to increase pupil enrollment. Manthe, who was Smullen's supervisor, told Smullen that having a counselor present during the evaluation process had in the past proved to be ineffective. Also, it would have duplicated efforts that Megna, the director of Assessment and Evaluation, was already performing. Finally, Manthe concluded it was best to wait until management knew which of the new inmates were permanently assigned to Waupun and then rely upon the vocational counselor to contact those inmates who tested at or below the sixth grade level. None of these reasons can be discredited by the Examiner. The Examiner concludes that said reasons outweigh the Union's argument that other programs were allowed presentations during the assessment and evaluation process.

Next, Smullen credibly testified that he had no problem with Corcoran using some of his prep time for union business but that for security reasons Corcoran's supervisor had to know where Corcoran was located in the prison while he conducted union business. Also Smullen had a legitimate concern for how much time Corcoran was spending on union business during his preparation periods.

Further, the record reveals that Corcoran was denied pay for the conference in question because the Department of Employment Relations advised Respondent that it would be improper to pay Corcoran. This was so because his attendance was required as part of a graduate course in which Corcoran was enrolled so as to become reclassified. Respondent had no reason to disagree with DER's directive.

In regard to the reprimand for tardiness, same was grieved by Corcoran and then amicably settled prior to arbitration. As a result, the reprimand was removed from Corcoran's personnel file. Without more evidence, said incident does not make the Union's case. Finally, it is clear that Smullen, as Corcoran's supervisor, had a legitimate right to inquire why it appeared that Corcoran was leaving the grounds fifteen minutes early on a particular occasion. Nothing further was done by Smullen when he was told that Corcoran was on legitimate union business.

In conclusion, the undersigned concludes that the Union failed to prove by a clear and satisfactory preponderance of the evidence that Respondent's reasons for the layoff were a pretext or that Corcoran's union activities played any part in Respondent's decision. The complaint is therefore dismissed in this regard.

Dated at Madison, Wisconsin this 7th day of March, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Stephen Pieroni, Examiner