STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

STATE ENGINEERING ASSOCIATION, Complainant, vs. STATE OF WISCONSIN, Respondent.	:	Case CXLVI No. 26058 PP(S)-71 Decision No. 17790-C

Appearances:

Kelly and Haus, Attorneys at Law, 302 East Washington Avenue, Madison, Wisconsin, 53703, by Mr. William Haus, for the Complainant.

Mr. Thomas Kwiatkowski, Attorney at Law, Department of Employment Relations, Division of Collective Bargaining, 149 East Wilson Street, Madison, Wisconsin, 53702, for the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The State Engineering Association having on April 21, 1980, filed a complaint with the Wisconsin Employment Relations Commission alleging that the State of Wisconsin had committed certain unfair labor practices within the meaning of the State Employment Relations Act (SELRA); and the Commission having appointed Peter G. Davis, a member of its staff, as Examiner in said matter to make and issue Findings of Fact, Conclusions of Law and Order pursuant to Section 111.07(5), Stats., and the State of Wisconsin having subsequently filed a countercomplaint with the Commission alleging that the State Engineering Association had committed an unfair labor practice within the meaning of SELRA by filing its complaint against the State of Wisconsin; and hearing on both the complaint and countercomplaint having been held before the Examiner in Madison, Wisconsin on October 23, 1980; and Respondent having filed a post-hearing brief on February 6, 1981; and Complainant having notified the Examiner on May 31, 1981 that it would not be filing a post-hearing brief; the Examiner, having considered the evidence and arguments, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The State Engineering Association, herein the Complainant, is a labor organization and the collective bargaining representative of certain professional and engineering employes of the State of Wisconsin.

2. The State of Wisconsin, herein the Respondent, is an employer.

3. Complainant and Respondent were parties to a collective bargaining agreement covering the period of November 7, 1979 through June 30, 1981 which contained the following provisions:

PURPOSE OF AGREEMENT

> 2 It is the intent and purpose of the parties hereto that this Agreement constitutes an implementation of the provisions of Sections 111.80-111.97, 1977 Wisconsin Statutes, consistent with the legislative authority contained therein, and provides for orderly and constructive employment relations in the public interest and in the interests of employes hereby covered and the State as an Employer.

3 The parties do hereby acknowledge that this Agreement represents an amicable understanding reached by the parties as the result of the unlimited right and opportunity of the parties to make any and all demands with respect to the employer-employe relationship which exists between them relative to the subjects of bargaining.

. . .

ARTICLE III

MANAGEMENT RIGHTS

34 It is understood and agreed by the parties that management possesses the sole right to operate its agencies so as to carry out the statutory mandate and goals assigned to the agencies and that all management rights repose in management, however, such rights must be exercised consistently with the other provisions of this Agreement.

35 Management rights include:

1. To utilize personnel, methods, and means in the most appropriate and efficient manner possible as determined by management.

2. To manage and direct the employes of the various agencies.

3. To transfer, assign or retain employes in positions within the agency.

4. To suspend, demote, discharge or take other appropriate disciplinary action against employes for just cause.

5. To determine the size and composition of the work force and to lay off employes in the event of lack of work or funds or under conditions where management believes that continuation of such work would be inefficient or nonproductive.

6. To determine the mission of the agency and the methods and means necessary to fulfill that mission including the contracting out for or the transfer, alteration, curtailment or discontinuance of any goods or services. However, the provisions of this Article shall not be used for the purpose of undermining the Association or discriminating against any of its members.

36 It is agreed by the parties that none of the management rights noted above or any other management rights shall be subjects of bargaining during the term of this Agreement. Additionally, it is recognized by the parties that the employer is prohibited from bargaining on policies, practices and procedures of the civil service merit system relating to:

1. Original appointments and promotions specifically including recruitment, examinations, certifications, appointments, and policies with respect to probationary periods.

2. The job evaluation system specifically including position classification, position qualification standards, establishment and abolition of classifications, assign-

ment and reassignment of classifications to salary ranges, and allocation and reallocation of positions to classifications, and the determination of an incumbent's status resulting from position reallocation.

. . .

ARTICLE VIII

LAYOFF PROCEDURE

Section 1 Application of Layoff

108 The Association recognizes the right of the Employer to layoff employes in accordance with the procedures set forth in this Article. Such procedures, however, shall not apply to:

A. Temporary layoff of less than 21 consecutive calendar days;

. . .

ARTICLE XII

WAGES

Section 12 Travel and Lodging

217 The Employer agrees to continue in effect the provisions of ss. 16.535 and 20.916 of the 1977 Wis. Stats., relating to the reimbursement of State employes for expenses incurred while traveling on State business. The Association recognizes that the Employer has the right to develop reasonable guidelines to implement and administer the provisions of ss. 16.535, 20.916 and this Section. The employer agrees to provide advance notice, 30 days whenever possible, to the Association of any Department of Employment Relations formal recommendations relating to guideline changes. The reasonableness of such changes to the guidelines which includes both application and interpretation may be challenged through the grievance procedure contained in this Agreement.

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ARTICLE XV

GENERAL

Section 1 Obligation to Bargain

246 This Agreement represents the entire Agreement of the parties and shall supersede all previous agreements, written or verbal. The parties agree that the provisions of this Agreement shall supersede any provisions of the rules of the Director and the Personnel Board relating to any of the subjects of collective bargaining contained herein when the provisions of such rules differ with this Agreement. The parties acknowledge that during the negotiations which resulted in this Agreement each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that all of the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. Therefore, the Employer and the Association, for the life of this Agreement, and any extension, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated to bargain collectively with

respect to any subject or matter referred to or covered in this Agreement, even though such subject or matter may not have been within the knowledge or contemplation of either or both of the parties at the time that they negotiated or signed this Agreement.

4. On or about November 2, 1979, Hugh Henderson, Secretary, Department of Employment Relations, received the following directive from Governor Lee Sherman Dreyfus:

"In the interest of energy conservation and pursuant to the authority of the Governor in s. 230.35(5)(c), Stats., I am directing that all state-owned or leased buildings, universities, and other facilities, except institutions, prisons and other 24-hour operations close all day December 24 and 31, 1979. By maintaining the buildings at low temperatures for the full four days of the Christmas and New Year weekends, it is estimated the state will save 8 percent of its otherwise normal energy consumption per day. It will also save energy expenditure in transportation to and from work.

Under the state holiday schedule, state employees (except limited term employees) are entitled to a half-day of holiday on the afternoon of December 24 and 31. There is no statutory authority to close state buildings and give employees paid time off for the mornings of each of these half-days. However, appointing authorities should make every reasonable effort to accommodate employees regarding the following recommended options:

1. Employees may use 1979 vacation or personal holiday time.

2. If no 1979 time is available, employees may use vacation or personal holiday time to which they will be entitled in 1980. (Employees on probation would similarly be able to "borrow" against 1980 vacation or holiday time.

3. Employees may use any accrued compensatory time.

4. With approval of the appointing authority, or the appointing authority's designee, employees may work extra hours to "make up" the eight hours lost. The make-up work should be performed during the same weeks as the half-days when state offices will be closed, so employees will not be working more than 40 hours in any one week, as time and one-half compensation for this purpose will not be allowed.

5. Employees may use leave without pay, if they choose not to exercise any of the above options.

Please inform all department heads of this directive."

Pursuant to said directive state buildings were closed on December 24 and December 31, 1979 and employes represented by Complainant were allowed to exercise one of the foregoing options or a variation thereof. Respondent rejected Complainant's demand for bargaining over the closings and the impact of said action upon employes.

5. In 1979 the Wisconsin Legislature passed the following legislation which became effective July 29, 1979.

SECTION 79m. 16.843(2) of the statutes is amended to read:

16.843(2) Except for persons designated in sub. (3), the parking of any motor vehicle in any of the 4 driveways of the capitol park leading to the capitol building is prohibited. Parking of any motor vehicle on the grounds of any of the state office buildings shall be in accordance with the rules and orders established by the department ~~and the~~. The department ~~may~~ shall establish a schedule of fees for parking at ~~any state~~ every state-owned office building ~~or facility, not including~~ excluding the capitol. In addition, the department may establish fees for parking at other state facilities. Fees established under this subsection shall be based upon the land cost, maintenance cost and construction cost of the parking facility for which the fees are assessed. Any person violating this subsection or any ~~regulations~~ rule or order adopted pursuant thereto shall be fined not ~~exceeding~~ more than $25 or imprisoned not ~~exceeding~~ more than 10 days.

Prior to the implementation of said legislation, the Respondent had already been charging parking fees at the GEF I and Hill Farms Building D office buildings in Madison, Wisconsin. In February 1980, pursuant to the foregoing legislation, Respondent began implementing parking fees at other state facilities. During bargaining for the parties 1979-1981 contract, which concluded on or about September 20, 1979, neither Complainant nor Respondent raised the issue of parking fees.

6. Following implementation of the parking fees, Complainant never demanded that Respondent bargain over the impact of the implementation of said fees.

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

CONCLUSIONS OF LAW

1. Complainant State Engineering Association contractually waived its ability to demand bargaining regarding Respondent State of Wisconsin's decision to close its buildings on December 24, 1979 and December 31, 1979, or regarding the impact of said decision; and thus Respondent State of Wisconsin's refusal to bargain over said subjects does not constitute an unfair labor practice within the meaning of Section 111.84(1)(a) or (d) of SELRA.

2. Complainant State Engineering Association's failure to demand bargaining over Respondent State of Wisconsin's implementation of parking fees constitutes a waiver of any right Complainant may have had to bargain over said decision or the impact thereof; and thus Respondent State of Wisconsin's refusal to bargain over said subjects does not constitute an unfair labor practice within the meaning of Section 111.84(1)(a) or (d) of SELRA.

3. Complainant State Engineering Association did not commit an unfair labor practice within the meaning of Section 111.84(2)(d) of SELRA by filing the instant complaint.

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

ORDER

That the instant complaint and countercomplaint be, and the same hereby are, dismissed in their entirety.

Dated at Madison, Wisconsin this 2nd day of July, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Peter G. Davis, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complainant alleges that Respondent violated Section 111.84(1)(a) and (d) of SELRA by refusing to bargain over (1) the decision to close State buildings on December 24 and December 31, 1979 and/or the impact of said decision; and (2) the decision to implement a parking fee at State facilities and/or the impact of said decision. In its Answer, Respondent denied Complainant's allegations and filed a countercomplaint asserting that Complainant had violated Section 111.84(2)(d) of SELRA by filing the instant complaint.

Section 111.84(1)(d) of SELRA states that it is an unfair labor practice for Respondent

> "To refuse to bargaing collectively with a representative of a majority of its employes in an appropriate collective bargaining unit."

Section 111.81(2) of SELRA defines "collective bargaining" as:

> "the mutual obligation of the state as an employer, by its officers and agents, and the representatives of its employes, to meet and confer at reasonable times, in good faith with respect to subjects of bargaining provided in S. 111.91(1) . . . "

Section 111.91(1) of SELRA establishes the parameters of Respondent's bargaining obligation in the following manner:

> 111.91 Subjects of bargaining. (1) Matters subject to collective bargaining to the point of impasse are wage rates, as related to general salary scheduled adjustments consistent with sub. (2), and salary adjustments upon temporary assignment of employes to duties of a higher classification or downward reallocations of an employe's position; fringe benefits; hours and conditions of employment, except as follows:
>
> (a) The employer shall not be required to bargain on management rights under s. 111.90, except that procedures for the adjustment or settlement of grievances or disputes arising out of any type of disciplinary action referred to in s. 111.90(3) shall be a subject of bargaining.
>
> (b) The employer shall be prohibited from bargaining on matters contained in sub. (2), except as provided under sub. (3).
>
> (c) Demands relating to retirement and group insurance shall be submitted to the employer at least one year prior to commencement of negotiations.
>
> (d) The employer shall not be required to bargain on matters related to employe occupancy of hours or other lodging provided by the state.

The Section 111.90 Management Rights exclusion referred to in Section 111.91(1) contains the following language:

> 111.90 Management rights. Nothing in this subchapter shall interfere with the right of the employer, in accordance with this subchapter to:
>
> (1) Carry out the statutory mandate and goals assigned to the agency utilizing personnel, methods and means in the most appropriate and efficient manner possible.

(2) Manage the employes of the agency; hire, promote, transfer, assign or retain employes in positions within the agency; and in that regard establish reasonable work rules.

(3) Suspend, demote, discharge or take other appropriate disciplinary action against the employe for just cause; or to lay off employes in the event of lack of work or funds or under conditions where continuation of such work would be inefficient and nonproductive.

The bargaining obligation established by the foregoing statutory provisions continues during the term of a collective bargaining agreement and precludes Respondent from unilaterally implementing a change in a mandatory subject of bargaining. However Respondent's duty to bargain and Complainant's right to same may be waived by the terms of the parties' bargaining agreement and/or the conduct of the parties. 1/ Application of the foregoing to the instant dispute follows.

The December 1979 Closures

It is undisputed that on December 24 and December 31, 1979 Respondent unilaterally closed its buildings and extended various options to its employes regarding the handling of the resultant loss of work hours. Such action was in essence a temporary layoff of employes who could then use vacation, holiday, comp time or other options to avoid a loss in pay. Article III of the 1979-81 contract between the parties specifies that Respondent's "Management Rights include:

5. To determine the size and composition of the work force and to lay off employes in the event of lack of work or funds or under conditions where management believes that continuation of such work would be inefficient or nonproductive."

Said Article also states:

"It is agreed by the parties that none of the management rights noted above . . . shall be subjects of bargaining during the term of this Agreement."

The above quoted contractual provisions clearly reveal that Respondent and Complainant have struck a bargain which left Respondent with broad layoff powers which were not to be subjected to the bargaining process during the term of the contract. By agreeing to such language Complainant clearly waived any right it might have had to bargaing over the decision to close buildings and in essence lay off employes. 2/

1/ State of Wisconsin (13017-C,D) 5/77.

2/ It could also be argued that the terms of Section 230.35(5)(c), Wis. Stats. remove the decision to close state buildings from the scope of mandatory bargaining.

Section 230.35(5)

. . .

(c) The governor may order some or all of the offices and other work stations of the departments of state government closed for specified periods of time or may order such other deviations in office hours or the standard basis of employment as may be necessitated by weather conditions, energy shortages or emergency situations. The governor's order may specify how any time off or other deviation occasioned by the order may be covered for state employes.

Turning to the subject of impact of the temporary lay off on the employes Complainant represents, one again finds that the parties have already struck a bargain. Article VIII of the contract contains an extensive layoff procedure which specifically refers to temporary layoffs. As the parties clearly contemplated the possibility that short term temporary layoffs could occur, they clearly had an opportunity to spell out any special options which employes might have available to them under such circumstances. By reaching an agreement on the subject of temporary layoff, Complainant clearly waived its right to bargain over the impact of such layoffs for the term of the contract. Such a finding is supported by the "zipper clause" found in Article XV of the parties' agreement.

Parking Fees

Assuming arguendo that either the decision to implement a fee schedule or the impact of such implementation is a mandatory subject of bargaining, 3/ the record again requires a finding that Complainant waived any right to bargain over said subject(s). First, it is clear that prior to the 1979-1981 contract, parking fees were being charged in some locations frequented by unit members. Thus Complainant had an opportunity to bargain over this subject during initial negotiations for the 1979-1981 contract. Secondly, it could well be argued that Complainant did in some sense bargain over the question of parking fees, as evidenced by the Article XII, Section 12 Travel and Lodging portion of the 1979-81 contract. Thirdly, it could be argued that prior to reaching agreement on the 1979-81 contract, Complainant knew or should have known about the legislation which mandated parking fees at all State facilities and thus had an opportunity to bargain about same. Finally, if one were inclined to ignore the foregoing evidence of waiver, there remains the fact that Complainant never demanded that Respondent bargain over the subjects in question. Absent a demand, which is required even though implementation had occurred, no duty to bargain arises. 4/ Given the foregoing, and the ever present Article XV "zipper clause", a finding of waiver by conduct and by contract is compelling.

Countercomplaint

Respondent argues that Complainant is seeking to gain through this unfair labor practice proceeding that which it could not gain or did not seek to gain during bargaining, and that such conduct violates Article XV of the contract and thus constitutes an unfair

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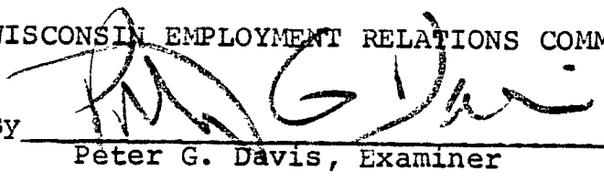
3/ Section 16.843(2), Wis. Stats., which legislatively mandates the establishment of a parking fee schedule, would appear to have removed the subject of the decision to implement such a schedule from the realm of mandatory bargaining under SELRA. As to the impact of the implementation of parking fees, there would seem to be little doubt about the mandatory nature of the subject of payment of fees when an employe is required as part of his or her employment to drive to a state facility. However, where use of a parking facility or indeed of a car is discretionary, the mandatory nature of this subject becomes somewhat doubtful.

4/ City of Appleton (17034-D) 5/80. Although this case involved the Municipal Employment Relations Act and not SELRA, the Examiner finds no basis for concluding that the doctrine set forth therein is not applicable to SELRA.

labor practice within the meaning of Section 111.84(2)(d) of SELRA. 5/ Respondent did not and one suspects could not cite any authority for its theory. As the undersigned can not conceive of any basis for concluding that Complainant's use of a statutorily provided mechanism for dispute resolution is an unfair labor practice, Respondent's countercomplaint has been dismissed.

Dated at Madison, Wisconsin this 2nd day of July, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Peter G. Davis, Examiner

5/ Section 111.84(2)(d) states:

"It is an unfair labor practice for an employe individually or in concert with others: To violate the provisions of any written agreement with respect to terms and conditions of employment affecting employes . . ."