STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN STATE EMPLOYEES UNION (WSEU), COUNCIL 24, AFSCME, AFL-CIO, and its appropriately affiliated LOCAL 18,	
Complainant,	Case CLXXXI No. 29716 PP(S)-89
vs.	Decision No. 19630-A
STATE OF WISCONSIN,	
Respondent.	

Appearances:

Mr. Richard V. Graylow, Lawton and Cates, Attorneys at Law, Tenney Building, 110 East Main Street, Madison, WI 53703-3354, appearing on behalf of Wisconsin State Employees Union (WSEU), Council 24, AFSCME, AFL-CIO, and its appropriately affiliated Local 18.

Mr. Sanford N. Cogas, Attorney at Law, Division of Collective Bargaining, Department of Employment Relations, 149 East Wilson Street, Madison, WI 53702, appearing on behalf of the State of Wisconsin.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Wisconsin State Employees Union (WSEU), Council 24, AFSCME, AFL-CIO, and its appropriately affiliated Local 18, having, on May 11, 1982, 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 Labor Relations Act (SELRA) by eliminating a position known as Control Sergeant and by creating a position known as Control Lieutenant; and hearing in the matter having been conducted in Madison, Wisconsin, on September 17, 1982 by Richard B. McLaughlin, an Examiner on the Commission's staff; and a stenographic transcript having been prepared of that hearing; and the parties having filed briefs and a reply brief or a waiver of a reply brief by January 4, 1983; and the Commission having, on July 26, 1983 issued a unit clarification decision in a companion case 1/ to the present complaint; and the Examiner having reviewed the record and the briefs of the parties, and being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. That Wisconsin State Employees Union (WSEU), Council 24, AFSCME, AFL-CIO, and its affiliated Local 18, hereinafter referred to as the Union, is a labor organization having its offices located at 5 Odana Court, Madison, Wisconsin 53719.

2. That the State of Wisconsin, hereinafter referred to as the State, is an employer which employs certain employes in the performance of its various functions including the operation of a correctional institution at Waupun, Wisconsin, hereinafter referred to as the Prison; that, at the Prison, the State employs certain personnel who are included in a bargaining unit represented by the Union for purposes of collective bargaining under the State Employment Labor Relations Act (SELRA); and that in performing its function as an employer, the State is represented by its Department of Employment Relations, which has its offices located at 149 East Wilson Street, Madison, Wisconsin 53702.

1/ State of Wisconsin, (11243-K) 7/83. The procedural background to the present complaint case was set forth by the Commission in footnote 1 at page 1 of this decision.

3. That the State employs certain classified employes at the Prison who occupy the positions of Officer 1, 2, 3 and 4; that the Union is the certified exclusive bargaining representative of various classified Prison employes in a bargaining unit composed of Security and Public Safety employes; and that from November 9, 1979 until December 19, 1981, the Union and the State were parties to a collective bargaining agreement which included, among its provisions, the following:

ARTICLE II

Recognition and Union Security

Section 1 Bargaining Unit

The Employer recognizes the Union as the exclusive collective bargaining agent for all employes, as listed below:

. . .

SECURITY AND PUBLIC SAFETY

Classification

Officer 1
Officer 2
Officer 3

. . .

4. That the position of Control Lieutenant replaced a position known as Control Sergeant; that the State described this change in a letter sent to Mr. Harris VanderVelde, a Control Sergeant, on July 24, 1981; that this letter stated:

> This letter will serve as formal notice that effective August 9, 1981, the position you presently occupy "Control Sergeant", 1st Shift, "D" Group is being eliminated as it is being converted to a supervisory position. 2/ Since you will be without a position you will be allowed to select one of the present vacant Officer III positions which would otherwise have been filled by promotion. You remain eligible to compete in future transfer opportunities.
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> This change is necessary in order to bring this position in conformity with current institution requirements.

. . .

that both positions are occupied by classified employes of the State; that as of September 17, 1982 the State employed three employes, each classified as Officer 4, in the position of Control Lieutenant; that one of these three employes was Howard McLaughlin 3/; and that the employes who occupied the position of Control Sergeant were classified as Officer 3.

5. That the Prison is organized so that Control Lieutenants report to Line Captains, who hold the classification of Officer 6, who report to the Institution Security Director, who, in turn, reports to the Institution Superintendent; and that immediately below the Control Lieutenants are employes holding the classification of Officers 1 and 2 who perform the function of security monitors and of prisoner escort and transfer.

2/ i.e. the position known as Control Lieutenant.

3/ Not related to Commission Examiner Richard B. McLaughlin.

6. That the job description for Control Lieutenants divides the duties of the position into four components: maintenance of shift schedules after their basic preparation; operation of institution control center; direction of officer staff performing escort/transfer and transportation function; and, provision of relief to other Officer 4 and 5 positions; that shift schedules are prepared by an Administrative Captain and ultimately distributed to Control Lieutenants who ensure that the schedule is duly manned; that Control Lieutenants receive call-ins from officers unable to work; that Control Lieutenants cannot independently authorize a leave of absence, but can request a Doctor's slip and can inform employes of the procedures to obtain an authorized leave, or can inform employes of the procedures which may result from an unauthorized absence; that if employe absences result in vacancies in the shift schedule, the Control Lieutenants will contact the shift Captain to determine if the Captain wishes the vacancies to be filled; that Control Lieutenants can call officers in on overtime to fill such vacancies; that established procedures exist to determine which particular employe will be allowed to perform overtime work; that if an employe refuses overtime, the Control Lieutenant writes a report to reflect that refusal, and informs the employe of the disciplinary procedures which may be triggered by the refusal; that in operating the institution control center, Control Lieutenants operate monitoring equipment to observe inmates, operate radio and teletype equipment, answer phones, and respond to any problems detected during their observations; that Control Lieutenants direct officers performing escort/transfer and transportation functions primarily by overseeing inmate movement pursuant to escort passes issued without input from the Control Lieutenants; that in emergency situations, Control Lieutenants can direct officers in transporting inmates as necessary; that Control Lieutenants are also responsible for the tally of inmates, and can assign employes to investigate problems detected by the tally; that Control Lieutenants may assume the duties of higher ranking officers if those higher ranking officers are incapacitated; that no employes report directly to the Control Lieutenants during the course of a routine day; and that if a Control Lieutenant finds it necessary to assign employes to respond to a non-routine situation, he will assign an officer within his immediate work area.

7. That the State hires employes for the Prison by giving an examination to job applicants and then selecting the particular applicant to be hired through an interviewing process of the certified applicants; that although Control Lieutenants have the apparent authority to interview applicants, no examples have been offered of said Lieutenants having exercised this authority; that no examples have been offered of a higher ranking Officer consulting a Control Lieutenant for a recommendation on which applicant should be hired; and that Lieutenant McLaughlin played no role in the hiring of an applicant who was placed in a position subordinate to his.

8. That the State uses the examination/interview procedure set forth in Finding of Fact 7 to promote employes, that Control Lieutenants have the apparent authority to participate on a committee which reviews applications for promotion, but that no examples of such participation have been offered; that Control Lieutenants and other officers may be requested to file recommendations regarding a particular promotion applicant; that these recommendations are completed on the basis of any daily contact the officer has had with the applicant, and are considered collectively by the State; and that McLaughlin, who has been a Control Lieutenant since the summer of 1981, has filled out such a recommendation, but has not participated in any other fashion in the promotion of a Prison employe.

9. That McLaughlin has not participated in the layoff, recall, or transfer, of any Prison employe; that Prison employes are periodically evaluated by their supervisors on forms prepared by the State; and that McLaughlin has not completed such a form on any employe since he became a Control Lieutenant in the summer of 1981.

10. That the Prison Superintendent makes the ultimate decision on discharging employes, and may do so on recommendation from a subordinate Officer; but that no instances have been identified of a discharge having been made on recommendation from a Control Lieutenant.

11. That the collective bargaining agreement referred to in Finding of Fact 3 contains a formal grievance procedure; that McLaughlin has neither granted nor denied a formal grievance while a Control Lieutenant, nor been asked to make a recommendation regarding the imposition of discipline in a specific case; that Control Lieutenants file reports regarding employe behavior which may result in

discipline; that these reports state the relevant facts which they have become aware of in the performance of their normal duties and which may involve violations of work procedures or Health and Social Services Departmental rules; that said reports state facts which may result in discipline, and a statement of the work rule violated, but do not contain a recommendation regarding the appropriate discipline; that if a report states facts which warrant a verbal reprimand, said reprimand is issued by a Captain; that if a report states facts warranting more stringent discipline, then it is routed to a Major who reviews it, and returns it to a Captain for the conduct of a pre-disciplinary hearing; that after said hearing, the matter is sent back to the Major who reviews it, and sends the matter on to the Prison Superintendent with a recommendation of specific discipline; and that Control Lieutenants do not attend these pre-disciplinary hearings.

12. That the Commission issued a decision entitled State of Wisconsin (11243-K) on July 26, 1983 in which the Commission stated the following:

CONCLUSIONS OF LAW

> 1. That the State Board of Personnel has no jurisdiction to determine whether any individual employed in the classified service of the State of Wisconsin should or should not be included in any appropriate collective bargaining unit consisting of State employes, as set forth in the provisions of the State Employment Labor Relations Act (SELRA), and that, on the contrary, said jurisdiction and authority rests with the Wisconsin Employment Relations Commission, pursuant to Sections 111.81(3)(a) and (b), and 111.81(15) of the SELRA.
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> ORDER
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> That the Officer 4 employes occupying the position of Control Lieutenant be, and the same hereby are, included in the bargaining unit described in Finding of Fact 3. 4/

. . .

13. That VanderVelde trained Officer McLaughlin and other officers who assumed the duties of Control Lieutenant; that many of the duties performed by VanderVelde, as a Control Sergeant, are now performed by the Control Lieutenants; that many of the duties of Control Lieutenants regarding the maintenance of shift schedules and the operation of the institution control center were performed by VanderVelde during his employment with the State as a Control Sergeant; that VanderVelde, when a Control Sergeant, was responsible for locating and processing contraband in prisoners' possession, as Control Lieutenant's presently are; that the Control Lieutenants do, however, perform duties and possess authority that VanderVelde did not possess as a Control Sergeant; that the authority of Control Lieutenants to call officers in on overtime was not possessed by VanderVelde as a Control Sergeant; that, when exercised, the authority of Control Lieutenants over Escort Officers is greater than that possessed by VanderVelde when a Control Sergeant since Escort Officers, at that time, reported to an Officer 5; that the inmate tally now taken by Control Lieutenants was, at the time VanderVelde was a Control Sergeant, taken by various non-bargaining unit officers; that Control Lieutenants can demand a doctor's slip regarding an officer's absence while VanderVelde, when a Control Sergeant, could not; that Control Lieutenants have greater authority regarding opening the Prison gates in non-routine situations than was possessed by VanderVelde when a Control Sergeant; that the State had a good faith belief that the Control Lieutenants played a greater role in the evaluation, hire, and discipline of lower-ranking officers than VanderVelde did when he was a Control Sergeant; that VanderVelde and any other Control Sergeant whose duties were changed as a result of the creation of the Control Lieutenant position were placed in other bargaining unit positions; and that the State

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4/ i.e. the same bargaining unit described in Finding of Fact 3 of this decision.

created the Control Lieutenant position to supplant certain duties of the Control Sergeants in response to the institutional requirements of the Prison, and did not take this action to encourage membership in any labor organization.

CONCLUSIONS OF LAW

1. That whether or not the State of Wisconsin committed any unfair labor practice within the meaning of Sec. 111.84 of the SELRA by eliminating certain Control Sergeant positions and by creating certain Control Lieutenant positions on or about July 24, 1981 states a controversy concerning unfair labor practices within the meaning of Sec. 111.84(4) of the SELRA and thus a controversy over which the Commission has jurisdiction.

2. That the Wisconsin State Employees Union (WSEU), Council 24, AFSCME, AFL-CIO, and its affiliated Local 18, is a "Labor organization" within the meaning of Sec. 111.81(9) of the SELRA, and was the exclusive bargaining representative for the employes of the bargaining unit mentioned in Finding of Fact 3 above at the time the State created the position of Control Lieutenant.

3. That the bargaining unit mentioned in Finding of Fact 3 is an appropriate collective bargaining unit within the meaning of Secs. 111.81(3)(a), and (b) of the SELRA.

4. That the occupants of the position of Control Lieutenant are employes within the meaning of Sec. 111.81(15) of the SELRA, and were properly assigned to appropriate bargaining unit mentioned in Finding of Fact 3.

5. That the employes who occupied the position of Control Sergeant at the time of the State's creation of the Control Lieutenant position were employes within the meaning of Sec. 111.81(15) of the SELRA.

6. That the State of Wisconsin's actions in eliminating the Control Sergeant position and in creating the Control Lieutenant position on or about July 24, 1981 were not undertaken to encourage or to discourage membership in any labor organization or in retaliation against any State employe's exercise of activity protected under Sec. 111.82 of the SELRA, and, therefore, the State of Wisconsin did not by these actions commit any unfair labor practice within the meaning of Sec. 111.84(1)(c) of the SELRA.

7. That the State of Wisconsin, by eliminating the position of Control Sergeant and by creating the position of Control Lieutenant on or about July 24, 1981, did not commit any unfair labor practice within the meaning of Sec. 111.84(1)(f) of the SELRA.

8. That the State of Wisconsin, by treating the employes occupying the position of Control Lieutenant as supervisory employes not within the bargaining unit mentioned in Finding of Fact 3 above, without the agreement of the Wisconsin State Employees Union (WSEU), Council 14, AFSCME, AFL-CIO, and its affiliated Local 18, and without a basis to do so under the provisions of the SELRA, committed an unfair labor practice within the meaning of Sec. 111.84(1)(a) of the SELRA.

ORDER 5/

That the complaint be, and hereby is, dismissed regarding the alleged violations of Secs. 111.84(1)(c) and (f) of the SELRA.

That to remedy its violation of Sec. 111.84(1)(a) of the SELRA, the State of Wisconsin, its officers and agents, shall immediately cease and desist from

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5/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition (Continued on Page Six)

taking any action inconsistent with the Wisconsin Employment Relations Commission's determination that the employes occupying the position known as Control Lieutenant are properly assigned to the Security and Public Safety bargaining unit mentioned in Finding of Fact 3 above and represented by the Wisconsin State Employees Union (WSEU), Council 24, AFSCME, AFL-CIO, and its affiliated Local 18.

Dated at Madison, Wisconsin this 26th day of January, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By
Richard B. McLaughlin, Examiner

5/ (Continued)

with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

THE PARTIES' POSITIONS

The Union argues that the State, by unilaterally determining the "supervisory" status of the Control Lieutenants, violated Commission case law and committed a "blatant act of intimidation, restraint and coercion" which violated Secs. 111.84(1)(a), (c) and (f) of the SELRA. The Union has requested the Commission to issue a cease and desist order against the State, to return the questioned position to the bargaining unit represented by the Union, and to order the State to pay the costs, disbursements and legal fees of the present action. The State argues that under prior Commission cases an unfair labor practice could have been committed by the State only if its determination that the Control Lieutenant position was supervisory, was found erroneous by the Commission. Even if the State's determination was found to be erroneous, the State asserts the factual nature of the present case renders prior Commission cases non-precedential, and that the State's actions in creating the Control Lieutenant position were made in good faith and thus not in violation of any part of the SELRA.

DISCUSSION

The parties litigated a companion case to this complaint in a unit clarification proceeding ruled on by the Commission in decision number 11243-K. In that decision, the Commission determined that the issue regarding the unit placement of the employes occupying the Control Lieutenant position rested exclusively with the Commission, and that the employes occupying the Control Lieutenant position were not supervisory employes, but employes properly assigned to the Security and Public Safety bargaining unit represented by the Union. As a result of this unit clarification decision, the issues presented in this case turn on whether or not the State committed any unfair labor practice within the meaning of Secs. 111.84(1)(a), (c) or (f) by treating the employes occupying the Control Lieutenant position as supervisory, and thus not bargaining unit employes, in the absence of any agreement by the Union or of any determination of the matter by the Commission.

The record 6/ contains no evidence to support the finding that the State's actions in this case violated Secs. 111.84(1)(c) and (f) of the SELRA. To establish a violation of Sec. 111.84(1)(c) of the SELRA, the Union would have to establish by a clear and satisfactory preponderance of the evidence that the State's actions in eliminating the Control Sergeant position and in creating the Control Lieutenant position were undertaken at least in part with hostility toward employe activity protected by a Sec. 111.82 of the SELRA. There is no evidence in the record that the State created the Control Lieutenant position to supplant the Control Sergeant position for any reason other than the administrative demands of the Prison. Nothing in the record would indicate that VanderVelde or any other Control Sergeant was engaged in protected activity which the State acted to encourage or discourage by creating the Control Lieutenant position. In the absence of any evidence to establish the State's hostility toward protected employe activity, the State cannot be considered to have violated Sec. 111.84 (1)(c) of the SELRA. In addition, the record does not establish the State's procedures, if any, regarding the deduction of Union dues or fair share contributions from either the Control Sergeants or from the Control Lieutenants. Thus there is no basis to support any finding that the State has acted in any way violative of Sec. 111.84(1)(f) of the SELRA.

The remaining contention raised by the Union centers on Sec. 111.84(1)(a) of the SELRA. To establish an independent violation of this section, the Union would have to establish that the State's acts in creating the Control Lieutenant

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6/ The parties stipulated that the record developed at the hearing on the unit clarification issues would be the record upon which the present complaint would be decided.

position were likely to interfere with, restrain or coerce employes in the exercise of their protected rights. 7/ A determination of this point requires an examination of the Commission's decision in State of Wisconsin, (18696) 5/81. In that case, the Commission stated that:

> . . . the State, and its labor relations agent, the Department of Employment Relations (DER) cannot properly rely on . . . a determination by the Personnel Board as a basis for excluding or including positions from or in appropriate collective bargaining units. Sole reliance on change in classification by the Personnel Board as a basis for the unilateral removal from, or addition to, a bargaining unit without agreement of the employe organization involved, as the bargaining representative, subjects the State to a possible unfair labor practice proceeding, as in the instant matter, and to a possible conclusion that the State committed an unfair labor practice should the Commission arrive at an opposite conclusion with respect to the classification involved. 8/

Under this language, the Commission did not mandate that the State bring every question of unit placement to the Commission, but did set forth that in cases contested by the majority representative of the bargaining unit involved, the State could rely on a unilateral determination of bargaining unit placement at its own risk. The risk involved centers on "a possible unfair labor practice proceeding," and the nature of that proceeding turns on the facts of each case. In this case, as noted above, the only possible violation involves Sec. 111.84(1)(a) of the SELRA. This section has in fact been violated in this case because the State's determination that the employes occupying the position of Control Lieutenant were supervisory employes, was not found by the Commission to have any basis under the SELRA. If the State could unilaterally and without any basis under the SELRA treat employes occupying certain positions as non-bargaining unit employes without any agreement by the majority representative of the bargaining unit involved and without any recourse to the Commission, the effect would be to produce a chilling effect on employe exercise of protected rights since the Commission is the agency entrusted with the determination of contested cases regarding the exercise of protected rights, and since the authority of the majority representative to bargain for members of the bargaining unit would inevitably be undermined by such action. Because this effect would be likely to interfere with, restrain or coerce employe exercise of protected rights, the State's acts in unilaterally treating the employes occupying the Control Lieutenant position as supervisory non-bargaining unit employes without any basis in the SELRA for such action were violative of Sec. 111.84(1)(a) of the SELRA.

The State's violation of this Section has been fully remedied by the order stated above. The Union's request that the questioned position be returned to the bargaining unit has been fully addressed by the Commission in the unit clarification proceeding. No contention has been raised that the State improperly eliminated the position of Control Sergeant or lacked the authority to do so. Thus, the placement of the employes occupying the Control Lieutenant position in the bargaining unit represented by the Union in Commission decision number 11243-K, fully resolves the issues regarding the bargaining unit placement of the employes affected by the State's action. In addition, the record does not demonstrate that the State acted in bad faith. The State's objection to the Commission's jurisdiction over the unit clarification matter, though not found persuasive by the Commission, cannot be labeled frivolous since, unlike prior cases, no employe was removed from the bargaining unit. In addition, the procedure followed by the State in treating the employes occupying the Control Lieutenant position as supervisory employes does not demonstrate "a willful disregard of the Commission's authority." The Commission, in decision number 18696, did not specify that the State could not take any action regarding the unit placement of employes without the Commission's prior approval. Rather, the Commission stated that any such action, in a contested case, would be taken at the State's risk. The difference in duties between the Control Lieutenant and Control Sergeant positions,

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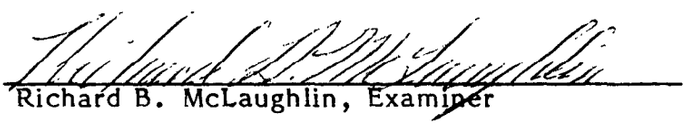
7/ State of Wisconsin, Department of Health and Social Services, (17218-A) 3/81 at 11.

8/ At 4.

though not significant enough to convince the Commission that the Control Lieutenants were supervisory employes, does support the conclusion that the State had a good faith belief that these employes were supervisory. The final issue regarding the remedy in this case concerns the Union's request for attorneys' fees and costs. There is no support in Commission case law for this request which, accordingly, has not been granted. 9/ Accordingly, the cease and desist order stated above is the sole remedy appropriate on the facts of this case.

Dated at Madison, Wisconsin this 26th day of January, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Richard B. McLaughlin, Examiner

9/ State of Wisconsin, (18059-B) 11/81.