

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN STATE EMPLOYEES :
UNION (WSEU), AFSCME, :
AFL-CIO, :
: :
Complainant, : Case 232
: No. 36087 PP(S)-124
: Decision No. 23161-B
vs. :
: :
STATE OF WISCONSIN, DEPARTMENT :
OF EMPLOYMENT RELATIONS, :
: :
Respondent. :

STATE OF WISCONSIN, DEPARTMENT :
OF EMPLOYMENT RELATIONS, :
: :
Complainant, :
: :
vs. : Case 234
: No. 36582 PP(S)-126
: Decision No. 23317-B
: :
WISCONSIN STATE EMPLOYEES :
UNION (WSEU), AFSCME, :
AFL-CIO, :
: :
Respondent. :

Appearances:

Lawton & Cates, Attorneys at Law, by Mr. Richard V. Graylow, 214 West Mifflin Street, Madison, WI 53703-2594, appearing on behalf of the Union.
Ms. Barbara J. Buhai, Attorney at Law, Division of Collective Bargaining, Department of Employment Relations, 137 East Wilson Street, P. O. Box 7855, Madison, WI 53707-7855, appearing on behalf of the State.

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDERS

The above-named Union having filed a complaint with the Wisconsin Employment Relations Commission on November 29, 1985, alleging that the above-named State committed unfair labor practices within the meaning Secs. 111.84(1)(a), (b), (c), and (d), Stats.; and the Commission having appointed Andrew Roberts, a member of the Commission's staff, to act as Examiner; and a hearing on the Union's complaint having been set for February 27, 1986 and the State having filed a counter-complaint on February 21, 1986, alleging that the Union committed unfair labor practices within the meaning of Secs. 111.84(2)(c) and (d), Stats.; and the Examiner having consolidated the cases on February 25, 1986; and hearing having been held on the cases on February 27, April 22 and 24, and July 22, 1986; and all briefs having been filed by December 3, 1986; and the Examiner having considered the evidence and arguments and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Orders.

1. That American Federation of State, County and Municipal Employees (AFSCME), Council 24, AFL-CIO, hereinafter referred to as the Union, is a labor organization existing for the purpose of representing employes in collective bargaining.

2. That the State of Wisconsin, hereinafter referred to as the State, is an employer within the meaning of the State Employment Relations Act.

3. That the Union and the State were parties to a collective bargaining agreement, the term of which was from October 30, 1983 through June 30, 1985; that the parties mutually agreed to extend it; and that said collective bargaining agreement contains the following pertinent provisions:

ARTICLE VI

Hours of Work

Section 1 Scheduling

6/1/1 Work Schedules

Work schedules are defined as an employee's assigned hours, days of the week, days off, and shift rotations.

6/1/2 In those departments where work schedules are fixed or posted, changes in such work schedules shall be made only to meet the operational needs of the service and shall not be made arbitrarily. Insofar as possible, a minimum of five (5) calendar days notice will be provided to the local Union and to employees affected by a change in such work schedule. Work schedules will not be changed to avoid the payment of overtime. However, with management approval, employees may voluntarily agree to changes in work schedules. The Union shall have the right to file a grievance in accordance with Article IV commencing at Step Two if it feels a work schedule change has been made arbitrarily.

6/1/3 This section shall be amended in accordance with agreements reached pursuant to the provisions of Article XI, Section 2.

6/1/4 Scheduling of Overtime

Whenever scheduled overtime work is required, the Employer will whenever practicable, assign such scheduled overtime work by seniority on a rotating basis unless mutually agreed otherwise among those included employees in that classification assigned to the work unit who normally perform the work involved.

6/1/5 in the overtime assignment process, employees shall be permitted to decline scheduled overtime work; however, the Employer shall have the right to require the performance of overtime work. When all employees in the work unit who normally perform the work involved decline an opportunity for scheduled overtime, the Employer shall require the performance of scheduled overtime work on each occasion in reverse seniority order, beginning with the employee with the least seniority.

. . .

6/2/4 Overtime Compensation

(1) Compensatory Time

- (a) Regular Rate - The amount of compensatory time earned shall equal the amount of actual hours worked in excess of 40 hours per work week.
- (b) Premium Rate - The amount of compensatory time earned shall be one and one-half (1-1/2) times the amount of actual hours worked in excess of 40 hours per work week.

(2) Cash Payment

- (a) Regular Rate - The employee's rate per hour including any applicable supplemental pay.
- (b) Premium Rate - Is one and one-half (1-1/2) times the employee's regular rate.

. . .

6/2/6 Scheduling of Compensatory Time

When compensatory time credits have been earned by an employe for overtime work or work on a holiday, this accrued time shall be used prior to seasonal layoff or January 1, whichever comes first. However, if the Employer does not permit the employe to use accrued compensatory time by January 1, the employe may carry such credits into the first four months of the new calendar year. Accrued compensatory time in excess of five (5) days may be scheduled at the convenience of the Employer.

6/2/7 Employes not covered by the Fair Labor Standards Act shall have the right to take earned compensatory time off for overtime. At the Employer's discretion, the employe may be paid in cash for unused compensatory time credits at the end of the year. If cash is not paid the employe shall carry such time until May 1 of the following year. Unused compensatory time credits shall then be paid in cash at the employe's current hourly rate.

UNION MANAGEMENT MEETINGS

11/2/3 Items to be included on the agenda for the above-mentioned Labor Management meetings are to be submitted at least five (5) days in advance of the scheduled dates of the meeting if at all possible. The purpose of each meeting shall be:

. . .

(7B) (SPS) Negotiate hours of work, work schedules, overtime assignments and the procedures for the administrative investigation of citizen complaints. In the event no agreement is reached, either party may appeal to arbitration pursuant to the procedures of Article IV, Section 2, step Four except that the decision of the arbitrator shall be advisory.

ARTICLE XV

General

Section 1: Obligation to Bargain

15/1/1 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 Administrator 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 that area of collective bargaining, and that all of the understandings and agreements arrived at by the parties after the exercise of that right an opportunity are set forth in this Agreement. Therefore, the Employer and the Union 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, or with respect to any subject or matter not specifically 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.

**SPECIAL NEGOTIATIONS FOR SELECTED CLASSES
INCLUDED IN THE SECURITY AND PUBLIC SAFETY
BARGAINING UNIT**

1. Conservation Wardens, Forest Rangers, and Natural Resources Patrol officers shall be allowed to convert a maximum of 260 hours of compensatory time earned on unassigned days (6th and 7th day of their work week). No more than eight (8) hours of compensatory time may be earned on any such unassigned day.
2. Payment for such compensatory time shall be calculated on the basis of the number of compensatory time hours to be converted times the employee's hourly base rate in effect at the time of conversion of the compensatory time.
3. a) Individual employees covered by this special agreement shall receive no more than 130 hours of cash payment for compensatory time earned during the period (July 1 - November 30, 1983) and no more than 130 hours of cash payment for compensatory time earned for the second six months (December 1, 1983 - May 31, 1984). The payment for July 1 - November 30, 1983 period shall be received by December 31, 1983, and the payment for compensatory time earned for the December 1, 1983 - May 31, 1984 period shall be received by June 30, 1984. Personnel covered by this agreement shall receive no more than 130 hours of cash payment for compensatory time earned for periods June 1, 1984 through November 30, 1984 and December 1 through May 31, 1985. The payment for the June 1, 1984 - November 30, 1984 period shall be received by December 31, 1984 and the payment for the December 1, 1984 - May 31, 1985 shall be received by June 30, 1985. Cash payment for compensatory time earned shall be paid only for overtime worked during that six-month period and no such time in excess of 130 hours may be carried forward for cash payment into the next subsequent six-month period.
- b) Compensatory time shall accrue on a yearly basis (June 1 - May 31). Any compensatory time not liquidated by means of cash payment or used compensatory time shall lapse on August 31.
- c) Compensatory time in excess of 140 hours in a six-month period may be ordered off by the appropriate supervisor.
4. Compensatory time earned on the 6th and 7th day can be converted to cash at the employee's hourly base rate in effect at the time of conversion of the compensatory time for hours related to:
 - a) "Planned overtime" or other overtime having the advance approval or directed by either the district director or the director of the Bureau of Law Enforcement or his designee (e.g., deer season, spring fish runs, organized missions or group checks).
 - b) Immediate actions requiring investigations resulting from complaints or requests. Such overtime shall be self-ordered according to standards and guidelines established in cooperation with the area warden and approved by the area supervisor and district director. The decision regarding standards and guidelines may be appealed, in writing, to the

Secretary of Natural Resources whose decision shall be final.

4. That in February, 1985 the United States Supreme Court issued Garcia v. San Antonio Metropolitan Transit Authority, 105 S. Ct. 1005 (1985); that the Court, through that decision, imposed Fair Labor Standards Act (FLSA) requirements on states and municipalities; that initially the Court required implementation on April 15, 1985 but it was subsequently extended; and that in November, 1985 Congress amended the FLSA, effective April 15, 1986.

5. That Department of Natural Resources Administrator of Division of Enforcement George Meyer became aware of Garcia in March, 1985; that Meyer then determined that the conservation wardens were covered by FLSA; that the conservation wardens have "assigned" and "unassigned" days; that two days of each week are unassigned; that at the time Garcia was issued, wardens did not receive any compensatory time or cash payout for working more than eight hours per day or forty hours in a week; that such additional hours were considered "donated" time; that work on unassigned days was only compensated up to eight hours each day and accumulated to 130 hours which they could cash out; and that after such 130 hours the wardens received compensatory time.

6. That Meyer determined that the DNR could be liable for warden overtime under the FLSA of an additional \$1.2 million; that on May 24, 1985 Meyer and Local Union President Tom Thornton discussed the overtime situation; that each expressed concerns of the FLSA; and that DNR Bureau Director Ralph Christiansen also discussed, during the spring of 1985, the FLSA problem with Thornton.

7. That on June 25, 1985 DNR Secretary C.D. Besadny issued the following guideline:

Recently the Department has been informed by the Department of Employment Relations of the application of the overtime provisions of the Fair Labor Standards Act (FLSA) to state and local employees. It is likely that upon receipt of final guidance from the U.S. Labor Department, such provisions will be applicable to state conservation wardens. Pursuant to the law enforcement provisions of the FLSA, conservation wardens are to be paid time and a half for all time worked over 171 hours in a 28-day work period.

Our preliminary determination is that full funding of all overtime hours currently worked by state conservation wardens would require a budgetary increase of 1.8 million dollars annually. Within the current budget, approximately 90,000 hours of conservation warden overtime is unfunded. The Governor's Office and the Departments of Administration and Employment Relations have been informed of this budgetary shortfall. Further guidance from those offices and the U.S. Department of Labor will be received in the next few months and will be passed on to you. It is not known whether any, a portion, or all of the overtime compensation for wardens above the existing budgeted amounts will be funded. We do know that the current projected biennial balances in the Conservation Fund will be far short of funding full overtime compensation for conservation wardens.

It is anticipated that various federal and state agencies will be providing additional guidance on overtime hours and funding within the next few months. (Until such guidance is forthcoming, interim overtime guidelines are necessary to assure that the current conservation law enforcement budget remains balanced. The following guidelines will be applicable to all represented conservation wardens from July 3 to September 1, 1985.) (It is likely that non-represented conservation wardens will be excluded from the coverage of the FLSA.) The Bureau of Law Enforcement, District Wardens and Warden Supervisors, at their July 17-19 meeting, will discuss implementation problems, procedures and uniformity. Prior to September 1, 1985, meetings will be held with representatives

of represented employees to discuss long-term overtime guidelines and implementation.

The overtime guidelines for represented conservation wardens for July 3 to September 1, 1985 will be:

1. The normal scheduled work period shall consist of 80 hours of work in 10 work days within a payroll period.
2. A normal work day shall consist of 8 hours in a 24-hour period; this shall not preclude the warden from adjusting his/her hours to accomplish his/her job as long as he/she stays within 80 hours during a pay period.
3. There will be four regular days off in a pay period unless otherwise authorized by the Warden Supervisor.
4. There will be no call-outs on days off without the Warden Supervisor's approval except as provided by the overtime guidelines outlined in section 7 of this directive.
5. Warden Supervisors will assign adjoining wardens in groups of four or less; at least one warden from each group will be on duty each day.
6. The Warden Supervisor may assign overtime duty outside directive guidelines. This shall be accomplished in the best interests of resource and recreational enforcement and public safety.
7. One or more of the following conditions must exist for a warden to respond to a situation without prior approval of the Warden Supervisor when overtime is required:
 - a. Responding to an emergency call for assistance from another DNR employee or other law enforcement agency where human safety is a vital issue.
 - b. Responding to a natural or man-caused disaster or emergency within his/her patrol district requiring immediate action to protect lives or property.
 - c. Answering a complaint of an ongoing violation necessitating immediate action.
8. If a warden works in excess of 8 hours on any work day, or responds to a call on a day off, he/she shall notify the Warden Supervisor by radio or telephone within 24 hours of the additional hours worked.
9. All represented wardens will be expected to justify accrued overtime on a case by case basis on the reverse side of their biweekly timesheets. All such overtime shall be approved by the Warden Supervisor. (Law Enforcement time report 9100-13E will be revised as necessary.)

Conservation Wardens are expected to carry out and prioritize their normal work assignments within the above guidelines to best protect public safety and the environment and provide service to the public. Your cooperation in making these difficult adjustments while still providing excellent service to the public will be appreciated. I pledge full cooperation in dealing with the difficult problems ahead in the implementation of or revision of the overtime provisions of the FLSA. Thank you for your assistance in this important matter.

that said guideline was reissued on July 12, 1985; that on July 17-19, 1985 a staff meeting was held at which some bargaining unit wardens, among others,

attended; that the Garcia decision was discussed at that meeting; and that on July 22, 1985 new guidelines were issued by Besadny as follows:

STANDARD & GUIDELINES FOR WARDEN OVERTIME

The overtime guidelines for represented conservation wardens effective July 29, 1985 will be:

1. The normal scheduled work period shall consist of 80 hours of work in 10 work days within a payroll period.
2. A normal work day routinely should consist of 8 hours in a 24-hour period; this shall not preclude the warden from adjusting his/her hours to accomplish his/her job as long as he/she stays within 80 hours during a pay period.

If a warden works in excess of 8 hours on any work day, or responds to a call on a day off under the permissible overtime guidelines, he/she shall notify the Warden Supervisor by radio or telephone within 24 hours of the additional hours worked.

3. There will be four regular days off in a pay period unless otherwise authorized by the Warden Supervisor.
4. There will be no call-outs on days off without the Warden Supervisor's approval except as provided by the overtime guidelines outlined in section 7 of this directive.
5. Warden Supervisors will assign adjoining wardens in groups of four or less; at least one warden from each group will be on duty each day.
6. The Warden Supervisor may assign overtime duty outside directive guidelines only for gun deer season, spring fish run enforcement, and investigation of fatal or serious personal injury accidents. This shall be accomplished in the best interests of resource and recreational enforcement and public safety.
7. One or more of the following conditions must exist for a warden to respond to a situation without prior approval of the Warden Supervisor when overtime is required:
 - a. Responding to an emergency call for assistance from another DNR employee or other law enforcement agency where human safety is a vital issue.
 - b. Responding to a natural or man-caused disaster or emergency within his/her patrol district requiring immediate action to protect lives or property.
8. All represented wardens will be expected to justify accrued overtime on a case by case basis on the reverse side of their biweekly timesheets. All such overtime shall be approved or denied by the Warden Supervisor. Special instructions will be provided on using existing timesheets.

Conservation Wardens are expected to carry out and prioritize their normal work assignments within the above guidelines to best protect public safety and the environment and provide service to the public. Your cooperation in making these difficult adjustments while still providing excellent service to the public will be appreciated. I pledge full cooperation in dealing with the difficult problems ahead in the implementation of these standards and guidelines. Thank you for your assistance in this important matter.

8. That in July, 1985, Besadny wrote letters to Governor Anthony Earl and various Congressman which estimated the impact of the FLSA to be \$1.7 million per

year and which proposed various alternatives; and that Meyer discussed the letters with Thornton in August, 1985.

9. That on August 7, 1985 Christiansen and other DNR Administrators met with Executive Director of the Union Martyr Beil and other union personnel; and that Christiansen explained the rationale for the new guidelines.

10. That on August 21, 1985 Area Supervisor Rick Wojciak issued the following memorandum to fire control employees of the DNR:

It is getting to be that time of year again where we have to start worrying about comp. time balances, fall fire season and the end of the year. Several of you have quite substantial balances of comp. time. In order to head off any work scheduling problems, I am again requiring this year that all comp. time in excess of 40 hours be liquidated by October 1, 1985. After October 1, 1985 any hours remaining in excess of 40 will be scheduled off by the area office.

Plan your leave accordingly to meet this goal.

that similar memorandums had been sent in the past; that on September 1, 1985 Attorney Richard Graylow wrote the following letter to Besadny:

I once again write to you as counsel for the Wisconsin State Employees Union (WSEU).

It has come to my attention that the Department of Natural Resources (DNR) is forcing its classified, full-time employees, especially Wardens, to utilize accumulated, accrued compensation (comp. time) time. In a sense they have been ordered to liquidate same.

If the foregoing is true, it is my opinion that the DNR is once again in violation of the Fair Labor Standards Act (FLSA), which prohibits this "forced-liquidation" of comp. time. The Act requires that "comp. time" be bought back from the affected employees on a dollar-for-dollar basis. It does permit or allow forced liquidation of same.

Accordingly, I once again ask you to cease and desist. Please bring the Department's wage and hour policies into conformity with the Fair Labor Standards Act immediately. I urge you to solve, or attempt to solve, these and related problems at the bargaining table.

and that Besadny responded as follows:

You have raised questions regarding the Department of Natural Resources' compliance with the Fair Labor Standards Act.

We are currently proceeding to comply with that Act in accordance with the instructions received from the Department of Employment Relations.

Your letter suggested that there may have been some Conservation Wardens who were being required to utilize accumulated accrued compensatory time credits. This may have occurred with Wardens who had credits available which were earned prior to April 15. As you are aware, time credits earned prior to the effective date of the Act are not covered by the Fair Labor Standards Act. You also are probably aware that compensatory time credits earned under the contract prior to April 15 which have not been used by August 31 lapse. It is possible that what you were hearing related to that liquidation.

There also exists in the Fire Control Program a number of Forest Fire Control Assistants who have accumulated significant amounts of compensatory time credits. A large

number of these credits will not be eligible for conversion to cash under the Fair Labor Standard Acts. Since the Forest Fire Control Assistants are eligible for the "fire protection special exemption" under the Act, a large portion of their overtime credits will be granted in compensatory time as provided under the WSEU Employment Relations Agreement. Also in accordance with that agreement, the compensatory time balances in excess of five days may be scheduled at the convenience of the employer. This may be happening at the present time in some of our areas.

I hope that the above explanations help you understand that this department is attempting to comply fully with both the Fair Labor Standards and the current Employment Relations Agreements. If you find any circumstances in the future which you suspect are not in compliance, please bring them to our attention so that we may correct them.

11. That on September 23, 1985 Besadny issued the following to the DNR supervisory personnel:

As you may have heard or read, a supreme court decision made earlier this year called the "Garcia" decision, requires that government employees be covered by the federal Fair Labor Standards Act (FLSA). The FLSA is a law which regulates overtime compensation for certain types of employees. The DNR employees covered by the law are those we have traditionally identified as 40-I.

The federal Department of Labor determined that the effective date of coverage of the FLSA was April 15, 1985, but because of the complexity of the law the state has not been ready to implement the changes required by the law until this pay period (9/15 - 9/28). This difference in the effective date and the implementation date will mean some 40-I employees will be eligible for retroactive payments as outlined later in this memo.

As a result of the FLSA I must also ask you to implement the following changes for 40-I employees:

- 1) Effective with the September 15, 1985 pay period all 40-I employees (Blue Collar, Technical, Clerical and non-professional confidential) except Forest Fire Control Assistants, conservation Wardens and Forest Rangers, will be paid 1 1/2 time in cash for all hours in pay status over 40 hours per week. Under the FLSA they will no longer be allowed to receive 1 hour of comp. time credit and 1/2 hour in a cash payment for each overtime hour worked. Compensatory time for these employees will be granted for holiday time worked only.
- 2) Due to recordkeeping requirements of the FLSA effective September 15, 1985 all 40-I employees will be required to submit the bi-weekly Time Report (Form 9100-13). Those who are not currently required to complete this form for Finance purposes will not be expected to fill out the "Time Report Code" section of the form.

Also, as required in Manual Code 9133, all supervisors are reminded that they are to establish work schedules for each employe. If a 40-I employee's schedule is not currently in writing it should be formalized now and maintained at each work unit for 3 years.

- 3) Effective with this memo no new alternative work pattern (AWP) schedules will be approved for 40-I employees which result in an employee working more than 40 hours in a week; thus creating overtime liability.

Any AWP schedule currently in existence for 40-I employees allowing an employee to work more than 40 hours in one week and less than 40 hours in the second week of a pay period must be revised by the supervisor back to 40 hour weeks. All AWP schedule revisions must be submitted to the Bureau of Personnel and Human Resources by October 18, 1985. They will be reviewed by Glenn Nelson, and the earliest possible date will be established to implement the change. (The union may need to be notified and the employee must be notified as specified in the contract).

- 4) Since we have been unable to proceed with the implementation until the September 15 pay period, we will make retroactive payments to employees who have unused, and therefore unpaid compensatory time credits due which were generated by overtime worked between April 15 and September 14, 1985. During the next few weeks we will be reviewing time reports to identify 40-I employees who have unpaid compensatory time credits and are eligible for cash payment under the FLSA. If an employee is eligible, a separate check will be issued in the amount due and a record of the latest time report showing the adjustment for cash payment will be sent to the employee and the supervisor. The checks for DNR employees will be issued on November 14, 1985. This will probably be two weeks after other state employees receive their retroactive payments. The delay is occurring because we must manually compute the back payments, where as other agencies' computations are being performed by computer.

In order to facilitate this conversion of compensatory time credits to cash payments I must establish a cutoff time for the use of credits earned between April 15 and September 14. Therefore, you are hereby instructed to stop approving the use of any compensatory time credits generated since April 15. Time which has already been requested by the employee and received supervisory approval to be used prior to October 12, 1985, will be honored. Any exception beyond October 12 must be approved by the Deputy Secretary. Compensatory time credits earned prior to April 15 shall continue to be granted as usual.

Note: In computing the retroactive payments, any compensatory time used since April 15 will be deducted from compensatory time credits earned since April 15.

- 5) Fire Control Assistants, Conservation Wardens and Forest Rangers are covered by special provisions of the FLSA.

Therefore Forest Fire Control Assistants will continue to receive credit for overtime on the present contract basis (full-time comp. time and half-time cash) until they worked in excess of 106 hours in the bi-weekly pay period. After 106 hours the FLSA provisions apply and hours worked in excess will be paid in cash at the rate of 1 1/2 time.

Conservation Wardens and Forest Rangers will continue to receive overtime credit as specified in the contract until they have worked in excess of 86 hours in a bi-weekly pay period. All overtime hours worked in excess of the 86 hours will be paid in cash at the rate of 1 1/2 time. Contract provisions do not apply after 86 hours, the FLSA supercedes.

The Conservation Wardens will continue to work overtime in accordance with the guidelines established in the July 22 memo. These provisions will remain in effect

until the WSEU contract is settled and they can be reviewed in light of both the FLSA and the contract.

Compensatory time credits earned by Conservation Wardens, Forest Rangers and Forest Fire Control Assistants for overtime worked up to the limits of 86 hours or 106 hours shall continue to be approved for use as specified in the contract.

- 6) All Professional, Supervisory and Management employees are exempt from the overtime provisions of the FLSA. These employees will remain in 05-E overtime status and will continue to receive overtime credits in the same manner as previously granted.

I have attached our list of class titles and the overtime code (05-E or 40-I) for each class for your information. This list is a result of the DNR personnel staff's review of our jobs in relation to the Fair Labor Standards Act provisions. These assigned codes must be formally reviewed and approved by the state Department of Employment Relations (DER) before they are final. The DER review may not be completed for months so we will work under the assumption that our code assignments will be approved, if a few are not, adjustments will be made to the list and we will distribute a revised copy to you.

We wish to thank all of you for your cooperation in implementing the changes required by this very complex federal act. We will continue to provide information to you as it becomes available. We will be holding Supervisory training to cover the fine points and answer questions that may arise. Until such time that we are able to hold training sessions, we recommend that questions be directed to your Supervisor of Services office or to Glenn Nelson in the Bureau of Personnel and Human Resources.

that said memorandum was not then implemented; and that Besadny then issued the following on November 22, 1985:

On September 23, 1985 I advised you that changes have occurred in our overtime pay policies caused by the federal Fair Labor Standards Act.

We have now been informed an amendment to the Act has changed the effective date from April 15, 1985 to April 15, 1986. The amendment to the FLSA also states that compensatory time credits may be utilized for payment of overtime rather than the cash payment provision which the original act required. Because of these new changes, we will be able to return to the procedures of overtime payment which were in effect prior to September 15, 1985.

The anticipated retroactive cash payment for overtime credits which was to be accomplished by a check on November 14, 1985 will not occur. All compensatory time credits which have been earned by 40-I employees will be retained to be used as compensatory time. If such compensatory time credits cannot be used by the end of the current calendar year because of the freeze placed on those credits in the September 23 memo, the unused credits may be carried over into the first 4 months of 1986.

Until December 1, 1985, Conservation Wardens are to be credited with compensatory time in accordance with the 1983-85 employment relations special agreement (pages 134-135-136). They will be eligible for cash conversion of those credits earned from June 1 through November 30, 1985. The conversion information has been sent out and payments will be made on the December 19, 1985 paycheck. All Conservation Warden

Supervisors will be responsible for the accurate recording of the credits on the bi-weekly time reports from those pay periods and the prompt and accurate reporting of the conversion totals on the Conversion Report Form which has recently been distributed to the District Offices. The reporting time is very short and will require some preparation time prior to the November 30 reporting date. There is no leeway on those reporting dates and any late reports will result in delay of payment until 1986.

It is expected that beginning on December 1, 1985 the Conservation Warden Overtime credit earning provisions will be changed by the newly negotiated agreement.

The requirement to keep work schedules and submit time reports for all 40-I and LTE employees specified in the September 23 memo will not change (the reporting information is attached). Please note that the Time Report (Form 9100-13) will require a PMN code entry in order to be properly processed.

Also, any existing or new alternative work schedules will continue to require that employees be scheduled to work no more than 40 hours per week as specified in the September 23 memo.

Thank you all for the cooperation you have given and patience you have used during this difficult period of change. Please continue to utilize your Supervisor of Services and Glenn Nelson of the Bureau of Personnel and Human Resources for answers to any questions you may have.

12. That on September 23, 1985 the following memorandum was issued to DNR Special Investigators:

STANDARD & GUIDELINES FOR SPECIAL INVESTIGATORS OVERTIME

The overtime guidelines for represented special investigators effective September 15, 1985 will be:

1. The normal scheduled work period shall consist of 80 hours of work in 10 work days within a payroll period.
2. A normal work day routinely should consist of 8 hours in a 24-hour period; this shall not preclude the investigator from adjusting his/her hours to accomplish his/her job as long as he/she stays within 80 hours during a pay period.

If an investigator works in excess of 8 hours on any work day on a day off under the permissible overtime guidelines, he/she shall notify the Chief of Special Investigation by telephone within 24 hours of the additional hours worked.

3. There will be four regular days off in a pay period unless otherwise authorized by the section chief.
4. There will be no call-outs on days off without the section chief's approval except as provided by the overtime guidelines outlined in section 6 of this directive.
5. The Chief of Special Investigation section may assign limited overtime duty outside directive guidelines only for active field investigations; when the success of the investigation depends upon such an assignment.
6. One or more of the following conditions must exist for an investigator to respond to a situation without prior approval of the section chief when overtime is required:

- a. Responding to an emergency call for assistance from another DNR employee or other law enforcement agency where human safety is a vital issue.
 - b. Responding to a natural or man-caused disaster or emergency requiring immediate action to protect lives or property.
7. All represented investigators will be expected to justify accrued overtime on a case by case basis on the reverse side of their biweekly timesheets. All such overtime shall be approved or denied by the Chief of Special Investigation.

Special investigators are expected to carry out and prioritize their normal work assignments within the above guidelines to best protect the resources and the environment and provide service to the public. Your cooperation in making these difficult adjustments while still providing excellent service to the public will be appreciated. I pledge full cooperation in dealing with the difficult problems ahead in the implementation of these standards and guidelines. Thank you for your assistance in this important matter.

13. That on October 8, 1985 the following memorandum was issued to wardens:

We have had a chance to review our warden overtime experience for the first quarter of 1985-86. That review shows, as expected, that our overtime costs have been minimal for the first quarter. The resultant unexpended funds allow us to consider an expanded overtime response for the remainder of this calendar year.

By copy of this memo, the warden overtime guidelines are being changed effective October 13, 1985 through December 21, 1985. Considerable discussion has occurred regarding the uniform applicability of standards statewide governing overtime. These discussions have recognized difficulties in applying very restrictive guidelines to varying resource, social, and safety problems. Under the new guidelines considerable discretion and responsibility will be expected from warden supervisors in implementing appropriate priority overtime response in their areas.

Warden supervisors, district wardens, the law enforcement training officer (for recruits), and the special investigation chief will be responsible for administering appropriate overtime response for the remainder of this year not to exceed an average of 50 hours for each employee under their supervision. This includes all hours in excess of 86 hours per pay period. It should be obvious that this does not represent "full funding" of all possible overtime hours and will require considerable coordination and planning. As soon as possible, each districts warden supervisors, district warden and specialist, and area directors should meet and discuss area and district priorities.

Further, it is expected that in mid-December, 1985, district wardens and law enforcement bureau staff will meet to discuss spring 1986 personnel movements with an emphasis on prior planning for deployment of personnel between districts based on anticipated resource and law enforcement problems.

The following standards and guidelines will be applicable to all represented conservation wardens effective October 13, 1985, through December 21, 1985. This memorandum supercedes my memorandum of July 22, 1985.

STANDARDS & GUIDELINES FOR WARDEN OVERTIME

The overtime guidelines for represented conservation wardens effective October 13, 1985 through December 21, 1985 will be:

1. The normal scheduled work period shall consist of 80 hours of work in 10 work days within a payroll period.
2. A normal work day routinely should consist of 8 hours in a 24-hour period; this shall not preclude the warden from adjusting his/her hours to accomplish his/her job as long as he/she stays within 80 hours during a pay period.

If a warden works in excess of 8 hours on any work day, or responds to a call on a day off under the permissible overtime guidelines, he/she shall notify the warden supervisor by radio or telephone within 24 hours of the additional hours worked.

3. There will be four regular days off in a pay period unless otherwise authorized by the warden supervisor.
4. Represented wardens may, at their own discretion, respond to complaints, resource problems, and safety related issues up to and including 86 hours per pay period. Such time between 80-86 hours shall be individually justified on the reverse side of their timesheets. There will be no call-outs beyond 86 hours in a 2 week period without the warden supervisor's approval except as provided by the overtime guidelines outlined in section 7 of this directive.
5. Warden supervisors will assign adjoining wardens in groups of four or less; at least one warden from each group will be on duty each day.
6. Warden supervisors, district wardens (for district enforcement specialists), chief of special investigation section, and law enforcement training officer (for recruits), may assign overtime duty outside directive guidelines. This shall be accomplished in the best interests of resource and recreational enforcement and public safety.
7. One or more of the following conditions must exist for a warden to respond to a situation without prior approval of his/her supervisor when overtime is required:
 - a. Responding to an emergency call for assistance from another DNR employee or other law enforcement agency where human safety is a vital issue.
 - b. Responding to a natural or man-caused disaster or emergency within his/her patrol district requiring immediate action to protect lives or property.
 - c. Responding to complaints of ongoing violations necessitating immediate action. Response in this category must be in conformance with Area/District priorities.
 - d. Investigation of fatal or serious personal injury accidents.
8. All represented wardens will be expected to justify accrued overtime beyond 86 hours in a 2 week time period on case by case basis on Form 4100-48 attached to their biweekly time sheets.
All such overtime shall be approved or denied by the warden supervisor. Special instructions will be provided on using existing time sheets.

Conservation wardens are expected to carry out and prioritize their normal work assignments within the above guidelines to best protect public safety and the environment and provide service to the public. Your cooperation in making these difficult adjustments while still providing excellent service to the public will be appreciated. I pledge full cooperation in dealing with the difficult problems ahead in the implementation of these standards and guidelines.

Thank you for your assistance in this important matter.

14. That there are 14 minimum security facilities (3 of which are farm facilities) administered by the Division of Corrections of the Department of Health and Social Services; and that farm officers supervise the farming at the facility while the correctional officers supervise the bunkhouse and all grounds facilities.

15. That Deputy Administrator of the Division of Corrections Steve Kronzer learned of Garcia in the summer of 1985, and he determined that bunkhouse employes and employes working 48 hours in the conservation camp were covered; that because of the potential liability it was ordered that all covered employes working more than 40 hours be reduced to 40 hours; that after all such employes were identified Camp Superintendent James Matthews met with President of Local 3021 Andrea Bacon and Local 18 Union Officer Tom Dunn, among others, through the summer, 1985 to discuss what could occur; that in the latter part of August, 1985 Matthews informed the locals that the reduction plan would be implemented on September 15, 1985; that on August 23, 1985 Administrative Captain Lynam Zimmerman sent Correctional Officer Clarence Roberts the following:

This letter will serve as formal notice that effective September 1, 1985 a change in your Third Shift hours will be put into effect. Your new Third Shift hours will be 10:00 P.M. to 6:00 P.M.

This change is necessary in order to bring this position in conformity with current institution requirements.

If you have any questions regarding this change, please contact your Shift Supervisor. You should also make necessary revisions in your post orders.

that on September 1, 1985 Zimmerman's hours were reduced from 9 hours 36 minutes per day to 8 hours per day; that similar letters were issued to the other correctional officers who were affected; that on August 28, 1985 Matthews sent Bacon the following correspondence:

As we discussed on August 26, 1985, the Oregon Correctional Center will receive two additional positions. This has come about through the reduction of the 9.6 hour day to a regular 8 hour day. We do not know when all the necessary paperwork can be completed to hire the new people, but we will have LTE's fill in in the interim.

I am attaching a sample schedule which will be followed when all the positions are given to us. This will constitute our notice to the Union as specified under the contract.

As always, it was good meeting with you.

that on August 30, 1985 Matthews sent Local 18 Union Officer Joseph McCarthy the following correspondence:

As we discussed on August 28, 1985, the northern centers - McNaughton, Gordon, Flambeau, along with Winnebago - will receive two additional positions. This has come about through the reduction of the 9.6 hour day to a regular 8 hour day. We do not know when all the necessary paperwork can be completed to hire the new people, but we will have LTE's fill the positions in the interim.

While we discussed possible schedules, they will be an 8 hour work day with beginnings and endings not dissimilar from the present. In all probability there will be a half-four overlap for one position on each shift for communications purposes.

We do not have an implementation date but will advise as soon as we learn of it.

and that on or about September 15, 1985 the Department of Corrections implemented the change.

16. That from late summer through early fall, 1985 Dickey met with Beil and discussed the impending reduction in hours of certain non-farm employes; that in a September meeting Beil indicated there would be a problem with vacation time because of the reduction; that in latter fall, 1985 Dickey and Kronzer learned that Garcia would not be implemented until April, 1986; and that they decided to continue with the reduction in hours during fall, 1985 because the Division of Corrections had intended to reduce hours for a few years and because there was a budget reduction at that time.

17. That in April, 1985 the Union and State exchanged bargaining proposals; that the Union proposed, inter alia, time and one half for work over 40 hours per week for all employes; that the parties thereafter began a series of bargaining sessions; that during a June 26, 1985 session Beil learned of the DNR June 25, 1985 guideline regarding Garcia and he informed the chief negotiating spokesperson for the State, Alfred Hunsicker; that Hunsicker was unaware of the DNR guideline at that time but after reviewing the matter he informed Beil that he believed such guideline merely limited wardens right to self-schedule overtime; that DNR Negotiator Richard Fox also indicated at that bargaining session that the guideline was necessary because of budgetary considerations; and that Beil responded that it would be necessary to have an overtime provision in the successor bargaining agreement.

18. That the parties thereafter entered into mediation; that on the second day of mediation the State indicated it needed FLSA implementation language; that thereafter various proposals were exchanged in mediation sessions regarding the FLSA and overtime; that in July, 1985 Beil and Hunsicker met and both acknowledged that certain correctional employes would be eligible for FLSA overtime; that tentative agreement was ultimately reached on October 23, 1985; and that on October 30, 1985 the parties again met to clarify the DNR warden overtime issue; and that the agreement was thereafter ratified by the Union and the State.

19. That the 1985-1987 agreement became effective December 5, 1985; and that such agreement contains the following pertinent provisions:

NEGOTIATING NOTE NO. 8

1985-1987 AGREEMENT

FLSA COVERAGE

The parties recognize their obligation to abide by the U.S. Department of Labor's requirements relating to the State coverage by the Fair Labor Standards Act, as amended.

NEGOTIATING NOTE NO. 9

1985-1987 AGREEMENT

**AGREEMENT REGARDING OVERTIME FOR
DNR TECHNICAL AND BLUE COLLAR EMPLOYES**

The Employer agrees to compensate all Technical and Blue Collar employes (except Blue Collar Fire Control Employes) at the premium rate of time and one-half in cash or compensatory time (or a combination thereof) as the Employer may elect for all hours in pay status which are in excess of forty (40) hours per week.

As a minimum, the one-half time premium credits earned

for such work in excess of forty (40) in the workweek shall be granted in compensatory time off for these employes.

Any time off which is charged to compensatory time credits shall not be counted as hours in pay status when forty (40) hours are exceeded and premium pay is to be credited.

The Union recognizes that employes engaged in fire control activities during high hazard periods are subject to flexible scheduling and overtime distribution shall be based on such emergency conditions.

Management and the Union and the employes agree that all employes covered by this Agreement and this special agreement are not eligible for Unemployment Compensation while on compensatory time off. To this end management at its sole discretion may limit the consecutive or total hours of compensatory time off scheduled off to not more than 16 in a workweek. Additionally, it is agreed and understood that any employe who applies for Unemployment Compensation for a period of time while they were taking compensatory time off will, in the future scheduling of compensatory time off, be granted no more than 16 hours compensatory time off in a workweek.

The provisions of Article VI, Section 2 6/2/5 shall apply to the compensatory time earned pursuant to this note.

. . .

NEGOTIATING NOTE NO. 11

1985-1987 AGREEMENT

SPECIAL NEGOTIATIONS FOR SELECTED CLASSES INCLUDED IN THE SECURITY AND PUBLIC SAFETY BARGAINING UNIT

1. Conservation Wardens and Forest Rangers shall be granted overtime credits for all hours worked beyond eighty (80) hours in each biweekly pay period.
 - (a) These credits shall be granted in the following manner:
 - (1) The time worked during the eighty-first (81st) through the eighty-sixth (86th) hours shall be credited as compensatory time on a straight-time, hour-for-hour basis.
 - (2) The time worked in excess of eighty-six (86) hours shall be credited as compensatory time at the premium rate of time and one-half.
 - (3) In each six (6) month period, the first two hundred two (202) hours of compensatory time credits accrued shall be paid in cash.
 - (4) All compensatory time credits earned after two hundred two (202) hours have been accrued in each six (6) month period shall continue to accumulate and are to be used for compensatory time off.
 - (5) Compensatory time shall accrue on a yearly basis (June 1-May 31). Any compensatory time not liquidated by means of cash payment or used compensatory time shall lapse on August 31.
 - (6) Compensatory time in excess of eighty (80) hours in a six (6) month period may be ordered off by the appropriate supervisor.
 - (b) Cash payment for such compensatory time credits shall be calculated on the basis of the number of compensatory time hours to be converted times the employe's hourly base rate in effect at the time of conversion of the compensatory time.

- (c) Individual employees covered by this special agreement shall receive no more than two hundred two (202) hours of cash payment for compensatory time credits earned during the six (6) month period December 1, 1985, through May 31, 1986. The payment for the December 1, 1985, through May 31, 1986, period shall be received by June 30, 1986. Personnel covered by this agreement shall receive no more than two hundred two (202) hours of cash payment for compensatory time credits earned for periods June 1, 1986, through November 30, 1986, and December 1, 1986, through May 31, 1987. The payment for the June 1, 1986, through November 30, 1986, period shall be received by December 31, 1986, and the payment for the December 1, 1986, through May 31, 1987, period shall be received by June 30, 1987. Cash payment for compensatory time credits earned shall be paid only for overtime worked during that six (6) month period, and no such time in excess of two hundred two (202) hours may be carried forward for cash payment into subsequent six (6) month period.
- (d) Immediate actions requiring investigations resulting from complaints or requests. Such overtime shall be self-ordered according to standards and guidelines established in cooperation with the area warden and approved by the area supervisor and district director. The decision regarding standards and guidelines may be appealed, in writing, to the Secretary of Natural Resources, whose decision shall be final.
2. Employes covered by these special negotiations who receive compensation for overtime credit in cash shall receive a sick leave credit, at the time of payment, or .04 hour for all compensatory time credit hours which are paid off in cash.
3. This Negotiating Note shall be in effect for the term of this Agreement.

20. That the Union, through its Attorney Richard Graylow, prepared its complaint which is at issue herein on October 22, 1985 and filed said complaint on the above-indicated date of November 29, 1985.

21. That by such above-described memorandum issued by the State, the State did not: individually or in concert with others interfere with, restrain or coerce State employes; initiate, create, dominate or interfere with the formation or administration of any labor or employe organization or contribute financial support to it; encourage or discourage membership in any labor organization by discrimination in regard to hiring, tenure or other terms or conditions of employment; or refuse to bargain collectively.

22. That by preparing and filing its complaint the Union did not refuse to bargain collectively or violate the provisions of a written agreement.

CONCLUSIONS OF LAW

1. That the State, by issuing the above-described memorandum, did not: individually or in concert with others interfere with, restrain or coerce State employes in violation of Sec. 111.84(1)(a), Stats.; initiate, create, dominate or interfere with the formation or administration of any labor or employe organization or contribute financial support to it in violation of Sec. 111.84(1)(b), Stats.; encourage or discourage membership in any labor organization by discrimination in regard to hiring, tenure or other terms or conditions of employment in violation of Sec. 111.84(1)(c), Stats.; or refuse to bargain collectively in violation of Sec. 111.84(1)(d), Stats.


2. That the Union, by preparing and filing its above-cited complaint, did not refuse to bargain collectively in violation of Sec. 111.84(2)(c), Stats., or violate the provisions of a written agreement in violation of Sec. 111.84(2)(d), Stats.

ORDERS 1/

1. That the State's Motion to Defer the Union's Complaint to Arbitration, filed on February 17, 1986, be, and the same hereby is, denied.
2. That the State's Motion to Dismiss the Union's Complaint, filed on February 12, 1986, be, and the same hereby is, denied.
3. That the Union's Motion to Dismiss the State's Complaint, made at hearing on February 27, 1986, be, and the same hereby is, denied.
4. That the Union's Complaint be, and the same hereby is, dismissed in its entirety.
5. That the State's Complaint be, and the same hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin this 30th day of January, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Andrew Roberts, Examiner

1/ 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 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.

STATE OF WISCONSIN, DEPARTMENT
OF EMPLOYMENT RELATIONS

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDERS

PARTIES POSITIONS

Union

The Union contends that the State committed an unfair labor practice when the DNR implemented new guidelines and procedures with respect to overtime calculation and entitlement and when DHSS reduced the hours of some its employees without having bargained the subjects with the Union. The Union argues that such matters are mandatory subjects of bargaining because they relate primarily to wages, hours and conditions of employment. The State's duty to bargain on these matters is not negated by the extension of the FLSA to states, the language of the management rights clause of the collective bargaining agreement, or past actions of the Union in this area. The Union maintains that conversations between agency officials and various employees did not constitute bargaining for purposes of justifying the unilateral implementation of the changes, particularly where only the Department of Employment Relations and Council 24 are empowered to bargain on behalf of the State and Union, respectively. Finally, the Union argues that this case involves the violation of the statutory duty of the State to bargain over mandatory subjects, not violations of the collective bargaining agreement.

State

The State argues that its actions were legally mandated by the Garcia decision and the FLSA and that immediate action was needed to bring the agencies into compliance with the law in those areas in which they were in violation. The State also argues that it has a fiscal responsibility to protect itself from exceeding its budget based on the projected monetary impact of the extension of the FLSA to it. Moreover, from the standpoint of the collective bargaining agreement, not only were its actions authorized by the management rights clause of the contract, but there was also nothing in the contract which guaranteed employees a set number of hours or overtime. The action was thus in harmony with the contract.

The State contends that it did attempt to bargain the changes before implementing them, but it took place on a local level pursuant to the contractually authorized labor-management meetings. The fact that the Union failed to take full advantage of the bargaining opportunity does not mean that bargaining did not take place. Additionally, proposals regarding this issue were brought up at the continuing negotiations for the 1985-1987 master agreement.

Finally, the actions of the DNR and DHSS have support in past practice in that the State has implemented guidelines in the past without objection from the Union. Also the actions of DHSS reflect a continuing effort dating back to the 1970's under which the agency has been converting non-farm positions from 9.6 hour days to 8 hour days.

With respect to the State's counter-complaint, the State argues that the Union did not file its complaint until shortly after the contract was signed by the Governor, which was several months after Beil threatened to do so. Such demonstrates a violation of Secs. 111.80(2)(c) and (d), Stats.

PROCEDURAL ISSUES

Prior to hearing the State made a motion to defer the matter to arbitration. The undersigned thereafter informed the parties both orally and by letter of February 25, 1986 that he was denying the motion to defer that and an appropriate order would be forthcoming. Accordingly, the undersigned herein denied the motion. 2/

2/ See, e.g., State of Wisconsin, Dec. No. 24109 (WERC, 12/86).

The State additionally raised an affirmative defense prior to hearing that the Commission does not have subject matter jurisdiction because the matter of compliance with the FLSA is solely within the purview of the State. However, compliance with the FLSA directly affects the wages and hours of the pertinent employees. Neither the Management Rights provision nor Secs. 111.90 or 111.91, Stats., restrict the parties from bargaining over such an issue. The matter is therefore a mandatory subject of bargaining which the Commission has subject matter jurisdiction over. The State's Motion to Dismiss is denied because the Union's complaint presented a contested case. 3/

The Union's Motion to Dismiss the State's complaint, that the Union made at the outset of the hearing, is also denied because the State's complaint similarly presented a contested case. 4/

MERITS

State's Counter-Complaint

On February 21, 1986 the State filed a counter-complaint in which it charged that the Union, by filing its complaint, violated Secs. 111.80(2)(c) and (d), Stats. In that regard the State argues that Beil threatened to file a complaint in the summer of 1985, but the complaint was not filed until approximately five months later - immediately after Governor Earl signed the contract into law.

At the outset it must be noted that pursuant to Secs. 111.07 and 111.84, Stats., the Union has a statutory right to file a complaint alleging violation(s) of Sec. 111.84(1), Stats. As found above, the Union's complaint on its face presented a contested case. Moreover, there was no demonstration that simply by the timing of the Union's complaint there was bad faith or a violation of Sec. 111.80(2)(c) or (d), Stats. Finally, the Union's complaint addresses the State's FLSA policies issued on June 25, July 12, August 23 and September 23, 1985. It does not address State policies issued during the term of the successor 1985-1987 collective bargaining agreement, which the Governor signed into law. Accordingly, the State's complaint has been dismissed in its entirety. 5/

Union's Complaint

We turn next to the Union's complaint. The Union in its complaint points to FLSA memorandum issued by Besadny on June 25, July 12, and September 23, 1985 with respect to DNR employees and to a memorandum issued by the Division of Corrections on August 23, 1985 with respect to certain correctional employees. All the memorandum affected overtime, compensatory time and/or hours, generally, of the pertinent employees. As noted above, the issue of the implementation of FLSA memorandum is bargainable. However, having found that said issue is a bargainable subject does not necessarily require that the State was obligated to bargain over the issue mid-term of the 1983-1985 collective bargaining agreement. 6/

The duty to bargain collectively during the term of an agreement does not extend to matters covered by the agreement or to matters on which the Union has otherwise clearly and

3/ Mutual Fed. Savings & Loan Assoc. v. Savings & Loan Adv. Comm., (1968) 38 Wis. 2d 381; State ex rel. City of LaCrosse v. Rothwell, (1964) 25 Wis. 2d 228, rehearing denied; Town of Ashwaubenon v. Public Service Commission (1964) 22 Wis. 2d 38, rehearing denied; State ex rel. Bail v. McPhee (1959) 6 Wis. 2d 190; General Electric Co. v. Wisconsin Employment Relations Board (1957) 3 Wis. 2d 227, 241.

4/ Ibid.

5/ Cf., Milwaukee Public Schools, Dec. No. 23150-A (Crowley, 12/86); and Green County, Dec. No. 20030-D (McCormick, 10/83).

6/ There is no dispute that the 1983-1985 collective agreement was extended, and effective during, the time of the disputed memorandum.

unmistakably waived its right to bargain. (footnote omitted) 7/

The pertinent provisions of the collective bargaining agreement (specifically, Sections 6/1/1, 2, 3, 4, 5; 6/2/6 and 7 (scheduling); Section 11/2/3(7B) (Union-Management Meetings); Section 15/1/1 (Obligation to Bargain); and Special Negotiations For Selected Classes Included in the Security and Public Safety Bargaining Unit, all quoted in Finding No. 3) have been carefully reviewed and compared with the State's memorandum that the Union takes issue with. It becomes apparent after such scrutiny that the dispute herein is addressed in the language of those provisions of the labor contract. Those clauses deal with overtime, compensatory time, schedules, and payout, as well as procedures for dealing with disputes over same. All disputed memorandum issued by the State are covered by such provisions. 8/

Accordingly, the State did not violate Sec. 111.84(1)(d), Stats., when it issued the above-described memorandum, since they are "matters covered by the agreement." The evidence also does not demonstrate that there was a violation by the State of Secs. 111.84(1)(a), (b), or (c), Stats. Therefore, the Union's complaint has been dismissed in its entirety.

Dated at Madison, Wisconsin this 30th day of January, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Andrew Roberts
Andrew Roberts, Examiner

7/ City of Richland Center, Dec. No. 22912-B (WERC, 8/86). See, also, Brown County, Dec. Nos. 20620, 20623 (WERC, 5/83); and Racine Unified School District, Dec. No. 18848 (WERC, 6/82).

8/ The question as to whether there was a contractual violation is, of course, not before the undersigned.