STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

Appearances:

Lawton & Cates, Attorneys at Law, by Mr. Richard V. Graylow and Mr. Steve Ehlke, 214 West Mifflin Street, Madison, WI 53703-2594, appearing on behalf of WSEU.

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.

ORDER MODIFYING EXAMINER'S FINDINGS OF FACT, AND AFFIRMING EXAMINER'S CONCLUSION OF LAW AND ORDER

On January 30, 1987, Examiner Andrew Roberts having issued Findings of Fact, Conclusions of Law and Order dismissing the complaint filed in the above-captioned matter; and on February 16, 1987, WSEU (also herein referred to as the Union) having timely filed a petition for Commission review in the matter; and the parties having completed briefing to the Commission on May 26, 1987; and the Commission 1/ having reviewed the record and the arguments of Counsel and being satisfied that the Examiner's Findings of Fact should be modified and that the Examiner's Conclusion of Law and Order should be affirmed;

NOW, THEREFORE, it is hereby

ORDERED 2/

1. That the Findings of Fact issued by Examiner Andrew Roberts in the above matter on January 30, 1987 shall be and hereby are affirmed and adopted as the Commission's Findings of Fact, with the following modification of Finding of Fact 3:

1/ Commissioner Torosian did not participate in this review proceeding because he was the Commission's mediator during the negotiations over a successor to the parties' 1983-85 contract.

2/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may (Continued on Page 2)

a. Insertion of the following before ARTICLE VI:

ARTICLE III
Management Rights

3/1/1 It is understood and agreed by the parties that management possesses the sole right to operate its agencies so as to carry out the statutory mandate and goals assigned to the agencies and that all management rights repose in

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2/ (Continued)

order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

management, however, such rights must be exercised consistently with the other provisions of this Agreement. Management rights include:

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

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

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

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

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

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

3/1/2 It is agreed by the parties that none of the management rights noted above or any other management rights shall be subjects of bargaining during the term of this Agreement. Additionally, it is recognized by the parties that the Employer is prohibited from bargaining on the policies, practices and procedures of the civil service merit system relating to:

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

(2) The job evaluation system specifically including position classification, position qualification standards, establishment and abolition of classifications, assignment and reassignment of classifications to salary ranges, and allocation and reallocation of positions to classifications, and the determination of an incumbent's status resulting from position reallocation.

b. Insertion of the following after ARTICLE XV:

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.

AGREEMENT REGARDING OVERTIME FOR DNR BLUE COLLAR FIRE CONTROL EMPLOYES

The Employer agrees to compensate all 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.

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 work week. 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 work week.

For each hour worked beyond the basic forty (40) hours in each work week, the employe shall be given one (1) hour of compensatory time credit which will be handled the same as all previous compensatory time for this group of employes.

In addition to the straight rate compensatory time, the employe shall recieve (sic) one-half time credits for all overtime hours worked in cash. This will require special reporting to payroll identifying that the hours reported are for one-half time credit only.

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

2. That the Conclusion of Law and Order issued by Examiner Andrew Roberts in the above matter on January 30, 1987 shall be and hereby are affirmed and adopted as the Commission's.

Given under our hands and seal at the City of Madison, Wisconsin this 29th day of September, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Stephen Schoenfeld, Chairman

_____
Dahae Davis Gordon, Commissioner

MEMORANDUM ACCOMPANYING ORDER MODIFYING EXAMINER'S FINDINGS OF FACT AND AFFIRMING EXAMINER'S CONCLUSION OF LAW AND ORDER

On November 29, 1985, WSEU filed a complaint alleging that the State committed unfair labor practices within the meaning of Secs. 111.84(1)(a), (b), (c) and (d), Stats., 3/ by unilaterally issuing memoranda changing its policy concerning Department of Natural Resources (DNR) employes' utilization of accrued compensatory time off, changing its policy with regard to computation and compensation of overtime for certain DNR employes and reducing the hours of certain Department of Health and Social Services (DHSS) employes from 9.6 to 9 hours per day. On February 12 and 17, 1986, the State respectively filed and amended a "counter-complaint" alleging that WSEU committed unfair labor practices within the meaning of Secs. 111.84(2)(c) and (d), Stats., 4/ by filing the above-noted complaint which allegedly demonstrated bad faith intentions not to abide by the 1985-87 agreement it had just negotiated with the State and instead to seek through complaint filing what it could not obtain at the table in that bargain. By telephone call and follow-up letter dated February 25, 1986, the Examiner denied various State pre-hearing motions including motions to dismiss for lack of subject matter jurisdiction and for failure to exhaust contractual remedies and to defer to contractual grievance arbitration procedures. Also on February 25, 1986, the Examiner issued an order consolidating the two matters for hearing. At the outset of the first day of hearing, the Union moved to dismiss the State's

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3/ 111.84 Unfair labor practices. (1) It is an unfair labor practice for an employer individually or in concert with others:

(a) To interfere with, restrain or coerce state employes in the exercise of their rights guaranteed in s. 111.82.

(b) To initiate, create, dominate or interfere with the formation or administration of any labor or employe organization or contribute support to it . . . .

(c) To encourage or discharge membership in any labor organization by discrimination in regard to hiring, tenure or other terms or conditions of employment. . . .

(d) To refuse to bargain collectively on matters set forth in s. 111.91 with a representative of a majority of its employes in an appropriate collective bargaining unit. . . .

. . .

111.91 Subject of bargaining. (1)(a) Except as provided in pars. (b) to (e), matters subject to collective bargaining to the point of impasse are wage rates, as related to general salary scheduled adjustments consistent with sub. (2), and salary adjustments upon temporary assignment of employes to duties of a higher classification or downward reallocation of an employe's position; fringe benefits; hours and conditions of employment. . . .

4/ 111.84 . . . (2) It is an unfair labor practice for an employe individually or in concert with others: . . .

(c) To refuse to bargain collectively on matters set forth in s. 111.91(1) with the duly authorized officer or agent of the employer which is the recognized or certified exclusive collective bargaining representative.

(d) To violate the provisions of any written agreement with respect to terms and conditions of employment affecting employes, including an agreement to arbitrate or to accept the terms of an arbitration award, where previously the parties have agreed to accept such awards as final and binding upon them.

counter-complaint for failure to state a claim under SELRA. There followed four days of hearing over a period of several months, followed by the filing of briefs and reply briefs. On January 30, 1987, the Examiner issued his Findings of Fact, Conclusions of Law and Order denying the parties' various procedural motions and dismissing both complaints on their merits. The WSEU then sought Commission review of the Examiner's decision dismissing the complaint. The Examiner's dismissal of the State's counter-complaint was affirmed by operation of law on February 26, 1987.

DECISION OF THE EXAMINER

With regard to the State's pre-hearing motions filed as to the Union's complaint, the Examiner explained that he had denied the State's pre-hearing motion for deferral to arbitration based generally on the Commission's decision in State of Wisconsin, Dec. No. 24109 (WERC, 12/86); and that he had denied the State's pre-hearing motion for dismissal for lack of jurisdiction over FLSA matters on the grounds that compliance with FLSA directly affects the wages and hours of employes represented by WSEU and is not otherwise excluded from the scope of mandatory bargaining by the exclusionary provisions of Secs. 111.90 and 111.91, Stats.

With regard to the merits of the Union's complaint, the Examiner noted that the disputed DNR and DHSS memoranda "affected overtime, compensatory time and/or hours generally, of the pertinent employes," and as such affected matters generally within the scope of mandatory bargaining under SELRA. Examiner decision at 21. He noted, however, that the parties' 1983-85 agreement was in effect (by its terms or by reason of an extension agreement) throughout the period of time during which the disputed memoranda were issued. He further noted that pertinent provisions of that 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 . . . deal with overtime, compensatory time, schedules, and payout, as well as procedures for dealing with disputes over same." He therefore concluded 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 (sic) issued by the State are covered by such provisions." Examiner decision at 22. In that regard, the Examiner quoted and relied upon City of Richland Center, Dec. No. 22912-B (WERC, 8/86) for the proposition that:

> The duty to collectively bargain 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 unmistakably waived its right to bargain.

He also cited Brown County, Dec. Nos. 20620, 20623 (WERC, 5/83) and Racine Schools, Dec. No. 18848 (WERC, 6/82). On the basis of that principle, the Examiner concluded that the State did not commit a refusal to bargain within the meaning of Sec. 111.84(1)(d), Stats. In doing so, he noted, "The question as to whether there was a contractual violation is, of course, not before the undersigned." Examiner Decision at p. 22 n.8. The Examiner further concluded that the evidence also did not establish that the State violated Secs. 111.84(1)(a), (b) or (c), Stats., and on those bases dismissed the Union's complaint in its entirety.

WSEU'S PETITION FOR REVIEW AND ARGUMENTS IN SUPPORT THEREOF

In its Petition for Review, WSEU states, "Appeal is taken from all adverse Findings and Conclusions." WSEU notes, by way of illustration only, that the Examiner erroneously concluded that the Union had waived its right to bargain without discussing or analyzing testimony that the master table bargaining process was contemporaneously proceeding when the disputed memoranda were issued and that their issuance had an adverse effect on that ongoing bargaining process.

In its brief in support of its Petition for Review, the Union asserts that the record establishes that the State issued several memoranda altering the method by which both overtime and compensatory time are calculated and paid and that such memoranda were issued unilaterally and without the Union's knowledge or permission

and without bargaining collectively with the Union. On that basis the Examiner should have concluded that the SELRA violations alleged in the Union's complaint were proven.

The Union contends that the Examiner erred by concluding that the Union's agreement to extend the 1983-85 agreement beyond June 30, 1985 constituted a waiver by the Union of the right to bargain about changes in the methods by which overtime and compensatory time were calculated and paid. The Union asserts that the Examiner misinterpreted prior Commission caselaw in that regard and thereby has allowed the State to undermine the collective bargaining process. The Union acknowledges that "it is well established that the duty to bargain collectively during the term of Agreements does not extend to matters covered by the Agreement or to matters on which the Union has otherwise clearly and unmistakably waived its rights to bargain." Citing, City of Richland Center, Dec. No. 22912-B (WERC, 8/86); Brown County (Department of Social Services), Dec. No. 20623 (WERC, 5/83); and Joint Union High School District No. 1, Dec. No. 12073-B (WERC, 10/73). However, the Union contends that the Commission has never "held that a Union waived its right to bargain while negotiations were occurring simply by agreeing to extend expired Agreements." Union Brief to Commission at 4. The Union argues that the established principle noted above ought not to be applied where agreements are extended and negotiations are ongoing because to do so permits the employer, as here, to unilaterally implement policy changes that undercut understandings being negotiated at the bargaining table which disrupts bargaining and in turn discourages unions from entering into agreement extensions in the first place.

The Union asserts that it has proven a classic case of interference, restraint and coercion in violation of Sec. 111.84(1)(a), Stats. It notes that it is not required to prove that the State's conduct was calculated or intended to interfere with employe exercise of SELRA rights, but only to show that the State's conduct had a reasonable tendency to so interfere. Citing, Brown County (Sheriff-Traffic Department), Dec. No. 19314-B (WERC, 6/83). In addition, the Union asserts that there was interference with and interruption of collective bargaining through the employes' exclusive representative, constituting violations of SELRA as alleged in the Union's complaint.

Replying to the State's arguments to the Commission, WSEU argues that the Examiner concluded that the State did not violate its duty to bargain because WSEU supposedly waived its right to bargain by agreeing to an extension of the old collective bargaining agreements. Contrary to the State's contentions, WSEU contends that the Examiner did not conclude--and hence did not base his decision on a conclusion--that the disputed DNR memoranda issued subsequent to that of June 25, 1985 were merely modifications of that initial memorandum. WSEU further argues that, contrary to the State's contentions, WSEU is not arguing that guidelines related to matters covered by an existing agreement cannot be issued by the State at any time when contract negotiations are in process. Rather, WSEU argues only

> that Guidelines cannot be issued without bargaining for the period between the expiration of the old collective bargaining agreements and the effective date of the new Agreements when bargaining is simultaneously occurring at another site, . . . even if the Union agrees to an extension of the old collective bargaining Agreements. . . . This Union's desire to extend an Agreement does not and did not mean that the Union was satisfied with the prior Agreement. Indeed, the fact that negotiations were proceeding contemporaneously regarding the successor Agreement(s) demonstrates that the Union, or the employer, sought changes. If both parties were satisfied with the old collective bargaining Agreement(s) they would merely agree to readopt it in its/their entirety and no further negotiations would be necessary. While negotiations proceed, the matters being bargained are all in a state of flux. The sole reason for extending the old Agreements was to preserve the status quo while negotiations proceeded. It does not mean the Union agrees to waive its right to bargaining the new guidelines.

Union Reply Brief to Commission at 2-3.

Reiterating its arguments to the Examiner, WSEU argues that the Commission has previously held that a public employer's unilateral change violates the bargaining law even when the employer acts in an effort to comply with the FLSA, citing, Madison Schools, Dec. No. 12610 (WERC, 4/74); that the State's reliance on certain discussions with employes as constituting collective bargaining is misplaced because those conversations were informal, were not considered to be collective bargaining by the employes involved, and did not involve the Department of Employment Relations, citing Sec. 111.815, Stats.; and that the disputed memoranda were not presented to the Union by DER bargaining representatives at the ongoing master table contract negotiations, but in fact were in some instances not even known about by the State's master table bargaining representatives prior to their issuance. The Union argues that the subject memoranda contained directions, policies and procedures pertaining to overtime, compensatory time and length of duty day, all of which are mandatory subjects of bargaining. Since it never bargained with the Union prior to such issuance, the Union contends that the State's issuance of those memoranda violated Secs. 111.84(1)(a), (b), (c) and (d), Stats.

For the foregoing reasons, WSEU requests that the Commission make appropriate modifications of the Examiner's findings, conclusions and order so as to conclude that the violations of SELRA alleged in the WSEU complaint were committed by the State and so as to order the State to remedy those violations in the manner specified in that complaint.

THE STATE'S ARGUMENTS IN OPPOSITION TO THE PETITION FOR REVIEW

In its brief in opposition to the Petition for Review, the State requests that the Examiner's Findings of Fact and Conclusions of Law be upheld and, where appropriate, expanded. The State notes that the Union's brief to the Commission in support of its petition for review does not object to the Examiner's decision as regards the actions of DHSS. The State therefore asserts that it is presuming that the Union no longer challenges DHSS' efforts to comply with the FLSA during the term of the contract and that the State has therefore limited its arguments on review to the Union's contentions regarding the actions of the DNR.

The State asserts that the record evidence supports the Examiner's findings and conclusions that the DNR guidelines were issued under the auspices of the collective bargaining agreement. The State argues, however, that the Examiner failed to note perhaps the two most applicable contract provisions, the management rights clause and the DNR Negotiating Note at p. 135 of the 1983-85 agreement, which provisions, the State contends, are definitive that no bargaining obligation existed at all.

The State, contrary to WSEU, contends that the Examiner's decision was not based on the existence of an extension of the 1983-85 agreement. The State asserts, instead, that the Examiner properly concluded that the Union clearly waived its right to bargain about all of the memoranda at issue. The first set of disputed DNR overtime guidelines were issued on June 25, 1985 (after notice to and discussion with the Local) and prior to the nominal termination of the 1983-85 agreement. The State argues that any further DNR guidelines issued after June 30, 1985 were merely clarifications and modifications of the June 25, 1985 guidelines. As to these latter guidelines, the Union waived its right to bargain because the State discussed the impact of these guidelines both locally and at the master bargaining table, and the Union only challenged the guidelines in a complaint after bargaining was concluded. The State therefore argues that the Union waived its right to bargain because the first set of guidelines were issued during the nominal term of the 1983-85 agreement and the others were issued during the extension, but not challenged by complaint filing until after bargaining had been completed.

The State argues that the Examiner erroneously concluded that compliance with the FLSA is a mandatory subject of bargaining. At most, the State argues, only the impact of management decisions regarding FLSA compliance must be bargained. DNR did bargain that impact.

The State asserts that the Examiner failed to address various significant facts and issues presented by both parties including discussions, bargaining sessions, past practices concerning DNR wardens, self-scheduling, management rights, advisory arbitration, the DNR negotiating note, the guidelines themselves and significant case law. In particular, the Examiner failed to address the

State's heavy reliance upon a grievance arbitration award involving Rock County, Wisconsin wherein the arbitrator recognized the right of management to promulgate rules to protect the County from unintended performance of overtime in the altered legal environment following the US Supreme Court's decision in Garcia v. San Antonio Metropolitan Transit Authority, 105 S.Ct. 1005 (2/85).

Besides matters covered by the contract, the guidelines also involved non-bargainable subjects, i.e., subjects not covered by the agreement. In those regards, the DNR had the right to unilaterally protect itself from unintended expenditures for FLSA-required overtime payments to Wardens for what had previously been unrestricted overtime hours most of which were donated and without pay. The DNR guidelines placed limits on planned and self-ordered overtime, but did not affect, for example, how overtime was computed or the rate at which it was compensated. If the State had the obligation to bargain the impact of its budget decisions, it did so both locally and at the master table. Notably, the Union made no demands at the master table regarding scheduling additional hours of work.

Finally, the State argues that, to the extent that the Union is suggesting that management cannot exercise its management rights during bargaining, the Union is asserting rights not afforded it by SELRA.

In its arguments to the Examiner, the State had further argued that FLSA rights take precedence over conflicting provisions bargained in a collective bargaining agreement; that 1983-85 contractual provisions allowing DNR wardens to donate unlimited amounts of time without compensation on days 1 through 5 and providing payment for only 8 hours on days 6 and 7 no matter how many hours were worked violated the spirit and intent of the FLSA; and that therefore the DNR had to take the necessary and only steps it could in issuing guidelines and restrictions to come into compliance with the Act. Similarly, the DHSS practice of working non-farm employes at 9.6 hours a day at the straight-time rate was also not legally permissible once Garcia made FLSA applicable to the State. DHSS had to bring its work practices into conformity with FLSA either by working employes at the statutorily prescribed straight time rate of 40 hours per week or by paying overtime. DHSS came into compliance by assigning work 8 hours a day to the non-farm employes who were subject to FLSA coverage. Such action to protect against unanticipated and unbudgeted for FLSA liability was within the rights of State management under the terms of the 1983-85 agreement including the management rights clause. Citing, a grievance arbitration award issued for Rock County, Wisconsin, 87 LA 1 (Larney, 1987).

DNR attempted to involve the Union every step of the way as much as possible. Similarly, DHSS worked closely with the local unions and Council 24 concerning the reduction of hours in the camp system. There was no anti-union animus involved.

There is no evidence that the DNR guidelines or the DHSS actions in reducing hours violated the agreement. The DNR secretary had ultimate authority to issue the guidelines under the 1983-85 Negotiating Notes on DNR Overtime. Those guidelines issued were reasonable and flexible, based on past practice in 1974 and 1977, and responsive to employe and environmental concerns. The DNR retained the express management right to utilize personnel, methods and means in the most appropriate and efficient manner as determined by management. Similarly, neither DHSS nor the agreement ever guaranteed a particular number of hours, especially 9.6 hours per day, nor any overtime. There was a long and well established history and practice of reducing the hours of non-farm employes from 9.6 to 8 for operational needs without union protest. Meeting the public employe's fiscal responsibility currently and in the future in these ways was a proper exercise of such management rights. Citing, Rock County grievance award, supra. There is no evidence that the disputed actions were discriminatorily applied. All employes who were not exempt from FLSA were subject to management's even-handed determinations to comply with FLSA.

With no evidence that the Departments' actions were unreasonable, that they were motivated by union animus, that they contravened any contractual provision or that they were applied discriminatorily, and with no evidence that the requirements of FLSA can be waived, the practices and actions of DNR and DHSS must be upheld as a proper exercise in attempting to comply with the FLSA. Citing, Rock County grievance award, supra.

Furthermore, the Agreement affirmatively authorized and indeed mandated that DNR and DHSS come into compliance with the FLSA. The Locals and Council 24 had ample notice and opportunity to address the disputed actions at the local level

and to pursue contractual advisory arbitration if dissatisfied with the results of the local labor-management discussions of the disputed actions. The fact that various local discussions occurred constitutes fulfillment of any in-term bargaining obligation on the part of the State. Moreover, the Union's failure to pursue these matters in contractual advisory arbitration represents a waiver of bargaining and should foreclose the instant prohibited practice on the grounds of a failure to exhaust their available contractual remedies.

Thus, although the Departments took actions pursuant to budgetary constraints, operational needs and the sudden change in federal law such that they had the right to do so unilaterally under the management rights clause alone, both agencies followed many other contractual procedures before making their decisions and implementing them. In addition, the decisions of the Departments were also consistent with past practices, were based on management discretion, have as a foundation Union acquiescence in the past and were discussed, as well as their effects, with the local unions.

At the master table, a number of proposals relating to FLSA, DNR warden overtime, and the hours to be assigned DHSS non-farm camp personnel were advanced, negotiated and resolved. Also during master table bargaining, the Union claimed that the DNR guidelines constituted a prohibited practice. The State's representative replied that the guidelines merely restructured when overtime was to be worked and as such were within management's prerogatives to determine unilaterally. The Union did not advance proposals regarding the contents of the DNR guidelines themselves, e.g., on such matters as additional hours of work for the affected employes. When the overall bargain was completed, it included a zipper provision acknowledging a full opportunity to advance proposals and expressly waiving further bargaining.

DISCUSSION

Upon review of the lengthy record in this matter, we are satisfied that the Examiner's findings, conclusions and order should be affirmed. We have modified his findings only to include certain additional contractual provisions which lend further support to the validity of his ultimate Finding of Fact 21 and of his Conclusions of Law and Order.

There is no contention advanced at the Commission review level that the Examiner erred in denying the State's various pre-hearing motions including motions to dismiss for lack of subject matter jurisdiction and to defer to contractual grievance arbitration. For that reason, and because any modification of those rulings that we might order would not alter the ultimate dismissal of the Union's complaint ordered herein, we have left the Examiner's determinations in those regards undisputed.

With regard to the Examiner's dismissal of the Union's complaint, as noted above, the Union disputes the Examiner's conclusion that the Union had waived the State's obligation to bargain with it before issuing and implementing the disputed memoranda. In particular, the Union claims that the Examiner mistakenly applied to the parties' extension agreement in effect from July 1, 1985 through December 4, 1985, the principle that there is no duty to bargain during the term of a collective bargaining agreement as regards subject matters covered by that agreement. The general principle involved and the cases cited by the Examiner regarding it are noted in the summary of the Examiner's decision, above.

We agree with the Union that the Examiner did in fact apply the above-noted principle to the extension agreement. In that regard, we reject the State's contrary reading of the Examiner's decision as merely treating the memoranda issued after June 30, 1985 as clarifications of that issued prior to that nominal termination date of the 1983-85 agreement. The Examiner expressly noted at p. 21 n.6 of his decision that the 1983-85 agreement was undisputedly extended, and effective during the time of the post-June 30, 1985 memoranda in dispute.

Although the Union has noted that the cases cited by the Examiner in support of the above principle all arose during the nominal term of an agreement rather than after its nominal expiration and during an extension, the Union has cited no authority for its contention that an extension agreement does not have the effect given it herein by the Examiner.

Upon consideration of that question, we agree with the Examiner that the principle was applicable to the extension agreement in effect herein from and after July 1, 1985, as well as to the nominal term of the 1983-85 Agreement. To be sure, the extension agreement did not relieve the State of the obligation to bargain collectively at the master table as to the disposition of mandatory subject proposals of the Union as regards the period beginning July 1, 1985. Nevertheless, the extension agreement did, in our view, provide the State with the same defense to a claim of unlawful unilateral action during the term of the extension that the 1983-85 agreement itself provided for its nominal term. Indeed, the parties' wavier of bargaining language in 15/1/1 of the 1983-85 Agreement specifically and expressly makes that waiver applicable "for the life of this Agreement and any extension. . . ". The fact that master table negotiations were ongoing that might--even retroactively to July 1, 1985--undo or alter the effect of those of the disputed memoranda issued after the nominal June 30, 1985 agreement termination date need not and does not diminish the above-noted effect of the extension agreement. When the parties agreed to extend the 1983-85 agreement from and after July 1, 1985, that agreement had the effect not only of keeping provisions of benefit to the Union in effect, but it also kept provisions of benefit to the State in effect as well.

The Union has not shown that the Examiner was mistaken in concluding that the provisions of the parties' collective bargaining agreement addressed and "covered" the subject matters of the disputed memoranda "as well as procedures for dealing with disputes over same." Its arguments have focused, instead, on the notion that the extension agreement cannot be given the same effect as regards actions taken during its term as the 1983-85 agreement is to be given during its nominal term. As noted above, we do not agree with the Union in that regard. Hence, upon consideration of the record we have affirmed the Examiner's conclusion that the parties' agreement and extension agreement in effect both before and after July 1, 1985 covered the subject matters dealt with in all of the disputed memoranda, i.e., those issued throughout the period June 25 through December 4, 1985 when the extension agreement was succeeded by the new 1985-87 agreement. 5/

There is also no evidence that the State refused to negotiate about Union contract proposals concerning the subject matters of the disputed memoranda. On the contrary, the record shows that the State and Union bargained at the master table about various Union and State proposals dealing with FLSA, DNR overtime, DHSS non-farm camp hours and the like and ultimately reached an overall agreement including a zipper provision paralleling 15/1/1 quoted in Finding 3 at p. 3 of the Examiner's decision. There is no Union contention or showing that the State refused to bargain at the master table about a Union contract proposal related to the subject matters of the memoranda. 6/ Hence, we conclude as the Examiner did that the Sec. 111.81(4), Stats., duty to bargain--as distinguished from any contractual obligations the State was under--was not violated by the State's conduct at issue herein.

5/ Having so concluded, we need not and do not reach the issue of whether any of the memoranda dealt with subjects within the purview of mandatory bargaining under SELRA or whether the Examiner erred by stating in his Memorandum that they did. Whether mandatory or nonmandatory in nature, the subject matters of each of the disputed memoranda were covered by the terms of a collective bargaining agreement in effect at the time of issuance of the memoranda, relieving the State of any statutory obligation to bargain in advance of its issuance and implementation of those memoranda. Our affirmance of the Examiner's Findings, Conclusions and Order does not rest on his Memorandum statements that the memoranda dealt with mandatory subjects under SELRA. We do not consider it essential to our exercising Sec. 111.84(4) and 111.07, Stats., jurisdiction to hear and dismiss the Union's complaint on its merits that we determine whether subject matters dealt with in the disputed memoranda constitute mandatory subjects of bargaining.

6/ The State did refuse a Union master table demand that it rescind the DNR guidelines and bargain before reissuance of any other such guidelines (Tr. 4-24-86 at 66-67 and State Ex. 42), but since the subject matters involved were covered by the 1983-85 agreement and the extension thereof in effect at all material times, the State did not have a statutory duty to bargain with the Union before issuing those of its guidelines that it issued and implemented.

The Commission's decision in Madison Schools, Dec. No. 12610 (WERC, 4/74) cited by the Union does not warrant the conclusion that the State violated its duty to bargain in the instant circumstances. In that case the Commission held that the FLSA and the employer's legal obligations to comply with it do not automatically and immediately relieve the employer of otherwise existing statutory bargaining obligations as regards the changes in mandatory subjects of bargaining necessary to comply with the FLSA. That case does persuasively establish that the manner in which FLSA compliance is achieved is not necessarily outside the scope of mandatory public sector bargaining. However, in the instant case, for reasons noted above, any SELRA duty to bargain that the State was otherwise under was relieved by the terms of the existing agreement and of the extension thereof, such that the State's actions in question did not contravene the statutory duty to bargain. The Examiner did not hold and the Commission on review is not holding herein that the FLSA immediately and automatically relieved the State of an otherwise existing SELRA duty to bargain.

We also find no basis in the record upon which to disturb the Examiner's conclusions that the State's actions at issue did not independently violate Secs. 111.81(1)(a), (b) or (c). At most, the evidence shows that the issuance of the memoranda complicated the bargaining by intensifying the Union leadership's and membership's concerns as regards the ongoing negotiations about FLSA, DNR overtime, DHSS non-farm camp hours and the like. That conduct was not (for reasons noted above) violative of the State's SELRA duty to bargain, and we do not find it to have been interference, restraint or coercion within the meaning of Sec. 111.81(1)(a), Stats. The Union has advanced no arguments specifically supporting or explaining its subsection (1)(b) and (1)(c) allegations, and we find no basis for either in the record.

In so concluding, we find it appropriate to note, as the Examiner did, that the instant determination does not attempt to wholly resolve the question of whether the State's complained-of conduct violated the terms of the parties' 1983-85 agreement or of the extension thereof. A number of the State's arguments, including many of those predicated on the management rights clause and the Rock County grievance arbitration award bore more directly on that question than they did on the more general question of whether the contract terms constituted a defense to the refusal to bargain, interference and discrimination allegations at issue herein. Accordingly, we also have not addressed such contractual matters except to the extent necessary to resolve the allegations squarely before us.

As noted, for the sake of completeness of the factual background represented in the Findings of Fact in this matter, we have modified the Examiner's Finding of Fact 3 to include the Management Rights clause of the parties' 1983-85 Agreement and the other two Negotiating Notes in that Agreement concerning DNR Overtime matters. 7/

For all of the foregoing reasons, we have otherwise affirmed the Examiner's Findings, Conclusion and Order in its entirety and have thereby dismissed the Union's complaint in this matter.

Dated at Madison, Wisconsin this 29th day of September, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Danae Davis Gordon
Danae Davis Gordon, Commissioner

7/ The State correctly asserted that the Examiner had not included the management rights article among those he listed as pertinent to the dispute and included in his Finding of Fact 3. However, the State incorrectly asserted that the Examiner failed to so treat the DNR Negotiating Note appearing on p. 135 of the 1983-85 Agreement. That note was entitled "Special Negotiations for Selected Classes Included in the Security and Public Safety Bargaining Unit", and it was set forth in its entirety in the Examiner's Finding of Fact 3 and was listed among those provisions of the agreement pertinent to the instant dispute in his Memorandum.