STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

TINA M. BUECHNER, Complainant, vs. STATE OF WISCONSIN DEPARTMENT OF EMPLOYMENT RELATIONS, and WISCONSIN STATE EMPLOYEES UNION, COUNCIL 24, AFSCME, AFL-CIO, Respondents.	Case 233 No. 36093 PP(S)-125 Decision No. 23486-B

Appearances:

Ms. Tina M. Buechner, 505 Fair Oaks Avenue, Madison, WI 53714, appearing pro se.

Lawton & Cates, Attorneys at Law, 214 West Mifflin Street, Madison, WI 53703, by Mr. Richard V. Graylow, appearing on behalf of Wisconsin State Employees Union, Council 24, AFSCME, AFL-CIO.

Division of Collective Bargaining, by Ms. Susan Sheeran, Employment Relations Specialist, appearing on behalf of the State of Wisconsin.

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Examiner Daniel J. Nielsen having, on July 9, 1986, issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above-entitled proceeding wherein he concluded that Respondents had not committed any unfair labor practices within in the meaning of Secs. 111.84(1) or (2), of the State Employment Labor Relations Act (SELRA), in connection with the negotiation and the implementation of a settlement agreement between Wisconsin State Employees Union, Council 24, AFSCME, AFL-CIO and the State of Wisconsin concerning certain layoffs under Chapter 317, Laws of 1981 and certain grievances involving rest breaks; and the Complainant having, on July 16, 1986, timely filed a petition for Commission review of said decision; and the parties having filed briefs in the matter, the last of which was received on August 13, 1986; and the Commission having reviewed the record including the Examiner's decision, the Petition for Review and the briefs filed in support of and in opposition thereto; and the Commission being satisfied that the Examiner's Findings of Fact, Conclusions of Law and Order should be affirmed,

NOW, THEREFORE, it is

ORDERED 1/

That the Commission affirms and adopts as its own the Examiner's Findings of Fact, Conclusions of Law and Order issued in this matter on July 9, 1986.

Given under our hands and seal at the City of Madison, Wisconsin this 12th day of December, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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Marshall L. Gratz, Commissioner

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Danae Davis Gordon, Commissioner

(See Footnote 1 on Page 2)

1/ Pursuant to Sec. 227.11(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. 227.12(1) and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats.

227.12 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 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.

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 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. 227.12, 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. 227.11. If a rehearing is requested under s. 227.12, 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. 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. 227.20 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.

MEMORANDUM ACCOMPANYING ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

In the complaint initiating these proceedings, the Complainant alleges that the State and the Union have committed unfair labor practices within the meaning of Secs. 111.84(1)(e) and (2)(d), Stats., by "giving benefits back to WSEU represented employees as of November 24, but not to WSEU employees who were unrepresented as of November 24 . . ." The benefits cited by the Complainant flowed from a settlement agreement negotiated by the Union and the State. The State and Union negotiators, according to the Complainant's complaint, "failed to represent me in negotiating the settlement . . . and (did not notify) me that I was dropped from the grievance." The Examiner permitted the Complainant to amend the complaint at the hearing conducted on May 16, 1986, to allege a violation of Sec. 111.84(1)(c), Stats. The State in its written answer to the complaint, alleged that it had not committed any unfair labor practice under the SELRA, and that the Examiner should dismiss the complaint, or, in the alternative, bifurcate hearing on the matter so that an initial determination could be made regarding whether the Union had violated its duty of fair representation to the Complainant before any hearing regarding the Complainant's allegations against the State. The Union, in its written answer, denied that it had committed any unfair labor practice under the SELRA, and requested the Examiner to dismiss the complaint for failing to state a cause of action. At the May 16, 1986, hearing, the Union asserted, by motion, that the complaint had not been timely filed. The Examiner, at the May 16, 1986, hearing, denied the State's motion to bifurcate the matter and took the remaining motions under advisement.

THE EXAMINER'S DECISION

The Examiner initially addressed the timeliness of the filing of the complaint. The Examiner noted that the complaint was filed on December 6, 1985, and concluded that the relevant one year limitations period under Sec. 111.07(14), Stats., and ERB 10.08(1) dated from no earlier than December 7, 1984. Against this background, the Examiner concluded that the complaint had been filed within the relevant one year period.

The Examiner next determined that the settlement agreement negotiated by the State and the Union did not constitute prohibited discrimination under Sec. 111.84(1)(c), Stats. The Examiner addressed the asserted discrimination thusly:

> Neither on its face nor in application does the settlement agreement make any distinction between union members and nonmembers. Rather, the agreement draws a distinction between those employes who were included in the bargaining unit as of November 24, 1984, and those who were not.

Concluding that there was no reason to believe the settlement agreement "in any way encourages or discourages membership in the Union", the Examiner concluded no discrimination prohibited by the SELRA had been proven by the Complainant.

Turning to the Union's "duty of fair representation", the Examiner noted that a Union breaches this duty owed to bargaining unit members "when its conduct towards a member or members is arbitrary, discriminatory or undertaken in bad faith." Noting that the Union and the State "proferred rational explanations for the selection" of the November 24, 1984, eligibility date, that the choice of any eligibility date would have benefitted some employes over others, and that the establishment of an eligibility date was a necessary condition of the agreement from the State's perspective, the Examiner concluded that the Union's conduct could not be characterized as arbitrary.

Nor could the Union's conduct be characterized as discriminatory for, according to the Examiner, the Complainant "was personally unknown to all the negotiators." The Examiner further noted that there was no reason "to suggest

that the Complainant belongs to a class of persons against whom the Union might have wished to discriminate." Since the eligibility date created a class of employes who "were not eligible to be represented by the Union when the agreement was reached", and had been "by and large" excluded from receiving benefits for that reason, and since the Complainant herself was, at the time the Union and the State reached agreement, a "confidential" employe, the Examiner questioned whether the Union owed the unrepresented employes not covered by the settlement agreement any duty of representation at all. Noting, in any event, that "the Complainant has shown no motive for discrimination, nor any evidence of discrimination as that term is commonly understood in duty of fair representation cases", the Examiner concluded the Union's conduct could not be characterized as discriminatory.

Nor could the Union's conduct be characterized as being undertaken in bad faith, according to the Examiner. Although the Complainant accurately noted that she had been denied certain benefit allowances afforded other employes, the Examiner concluded that the Union had, in the settlement agreement, "made the best deal that it could for the majority of its represented employes." To determine such conduct was undertaken in bad faith would, according to the Examiner, essentially undermine the collective bargaining process by calling into question virtually any decision.

Reviewing the record as a whole, the Exminer concluded that the complaint should be dismissed in its entirety.

THE PETITION FOR REVIEW

The Complainant timely filed a petition for review which states:

> The complainant, Tina M. Buechner as a party in interest, is dissatisfied with the findings and order of the examiner, Daniel J. Nielsen, dated July 9, 1986. Therefore, I am requesting the commission as a body for a review of the findings and order in this case according to sec. 111.07(5), Stats.

THE POSITIONS OF THE PARTIES

In a brief supporting her Petition for Review, the Complainant initially argues that: "It would have been possible to have restored benefits to those employees who had changed to non-represented positions." Reviewing the testimony of the State's negotiator, the Complainant argues that the Union and the State could have, but knowingly did not, extend the benefit restorations to employes who had changed to non-represented positions. The Complainant's next line of arguement is that: "No eligibility requirement of having to still be union-represented needed to be put in the settlement agreement." The Complainant asserts that adding any eligibility requirement "is actually making more work administratively to have to go through records and find who is still represented and who is not." According to the Complainant, the eligibility requirement served only to save the State money and to allow the Union the opportunity to show favoritism to "those employes who had still stayed represented by them." This assertion introduces the Complainant's third line of argument, which is that "the State and the Union are, by the nature of the settlement agreement, discriminating against people who have left Union representation." The Complainant concludes her argument by asserting that the settlement agreement was undertaken in bad faith because:

> It is not enough that the settlement was for the good of most of the represented employees when it is shown that it would be possible to restore benefits to all employees that were laid off and that the union and state knowingly did not. (Emphasis from text)

The Union in its written brief in opposition to the Petition for Review, urges that the Complainant was "not entitled to settlement benefits through no fault of the Union." Specifically, the Union asserts that the "subject of reclassification is not bargainable under the . . . SELRA . . ." and that had the Complainant not been reclassified "she would have been entitled to full benefits." It follows, according to the Union, that any claim the Complainant may have "is properly against the State as an Employer."

The State, in its written brief in opposition to the Petition for Review, asserts that the Examiner's decision is consistent with the evidence and relevant case law and must be affirmed. More specifically, the State urges that the Mueller arbitration established that there was no contract violation involved in the Chapter 317 layoffs, and thus that the State has no liability for those layoffs. That the Union and the State chose to negotiate in good faith regarding the details of the Chapter 317 layoffs can not be considered an unfair labor practice, according to the State. The State contends that the evidence will not support any finding that the Union breached its duty to fairly represent the Complainant or that the State discriminated on the basis of union membership. Under the relevant case law, according to the State, neither the Union nor the State can be faulted for reaching an agreement which extends to less than every conceivably eligible employe unless "impermissible discrimination, improper motive, or . . . bad faith" is proven. The State urges that the facts of the present matter prove only that "the State was unwilling to agree to any settlement agreement which would have involved any more administrative complexity, resulting in greater expenditures of time and money because the State believed it had no liability to begin with." This position was, according to the State, reasonable. To accept the Complainant's arguments would, according to the State, put negotiators in the impossible situation of seeking to reach agreement only when the wishes of every conceivably concerned employe had been fully addressed. The State argues that such a conclusion would effectively destroy any incentive for parties to a collective bargaining relationship to reach any settlement agreements and this "is inconsistent with the state policy of maintaining labor peace and stability." It follows, according to the State, that as a matter of law or of policy the Complainant's claims must be rejected.

DISCUSSION

The facts in this matter appear to be undisputed. Because none of the Examiner's Findings of Fact have been specifically challenged, the discussion here will be limited to the conclusions drawn by the Examiner and to certain points raised by the Complainant's challenge to those conclusions. The Examiner's conclusions will be addressed in the order he discussed them.

None of the parties challenge the Examiner's conclusion that the complaint was timely filed. The Examiner correctly observed that Sec. 111.07(14), Stats., read together with the Commission's rules, govern this issue. 2/ The Examiner correctly noted that, December 7, 1984, the day after the signing of the settlement agreement on December 6, 1984, is the earliest date under ERB 20.08 (1) that can be utilized to determine the relevant one year limitations period under ERB Sec. 111.07(14), Stats. Since the complaint was filed on December 6, 1985, it follows, as the Examiner correctly noted, that the complaint was timely filed.

The Examiner next addressed the Complainant's amendment of the complaint to allege a violation of Sec. 111.84(1)(c), Stats., which provides that it is an unfair labor practice for the State:

> . . . to encourage or discourage membership in any labor organization by discrimination in regard to hiring, tenure or other terms or conditions of employment.

This provision concerns membership in a labor organization, not "membership" in a bargaining unit. A bargaining unit is nothing more than a grouping of employes, and "membership" in a bargaining unit connotes nothing more than being an individual within that grouping. To be certified as a bargaining representative for a bargaining unit, a Union must demonstrate majority support within the bargaining unit. It is possible, then, to be a member of a bargaining unit and not be a member of a labor organization. The Complainant's arguments seem to ignore this distinction. It is undisputed in the present case that the settlement agreement challenged by the Complainant applied with equal force to Union members and to non-Union members within the bargaining units represented by the Union. The Examiner stated he could not discern how the settlement agreement which distinguished only between bargaining unit members and non-members as of November 24, 1984, in any way encouraged membership in the Union as a labor

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2/ The specific rule, however, is ERB 20.08 (1) and not ERB 10.08 (1). The provisions of the two rules are identical for all purposes relevant here.

organization. This hits the essential point here, for the record does not demonstrate how the distinction drawn in the settlement agreement could have encouraged or discouraged membership in the Union as a labor organization. The Complainant asserts that benefits afforded to bargaining unit members also serve to encourage membership in the Union as a labor organization. This ignores that the settlement agreement also applied to non-Union members of the bargaining unit. The settlement agreement is, then, as arguably a disincentive as it is an incentive to encourage membership in the Union as a labor organization, since the benefits of the settlement agreement applied to non-Union members as well as to Union members of the bargaining unit. In sum, the Examiner correctly dismissed the Complainant's allegation that the State violated Sec. 111.84(1)(c), Stats.

The Examiner correctly noted and applied the law regarding the duty of fair representation. We note that an allegation of the breach of this duty by the Union should arise under Sec. 111.84(2)(a), Stats., which has not been pleaded by the Complainant. Ignoring this, and assuming, for the purposes of this discussion, that the Union owed the Complainant a duty of fair representation at the time the settlement agreement was being negotiated, 3/ the Examiner correctly concluded that the Union's conduct did not constitute arbitrary, discriminatory or bad faith behavior.

That the Complainant chose to plead allegations against the Union and the State under Secs. 111.84(1)(e) and (2)(d), Stats., complicates the analysis of the present matter. Assuming that the settlement agreement is a "collective bargaining agreement" or a "written agreement" within the meaning of these two sections, and that no bar to the interpretation of that agreement exists, does not help in addressing the Complainant's concerns, since she does not seek either the interpretation or the enforcement of the settlement agreement as a collective bargaining or a written agreement.

Essentially, what the Complainant alleges is that the State and the Union knowingly did not extend the restored benefits to all the employes conceivably eligible to receive them. While it is clear the Complainant is dissatified with the eligibility provision of the settlement agreement, the basis by which the eligibility provision could impact any right guaranteed the Complainant under Sec. 111.82, Stats., and enforceable by the Commission under Secs. 111.84(1) or (2), Stats., is unclear, and is, in fact, totally lacking. The Commission is not empowered under the SELRA to generally review agreements reached by the State and the Union regarding their desirability as matters of personnel relations, and that is what the Complainant seeks here. As the Union and the State asserted, and as the Examiner correctly concluded, adopting the Complainant's arguments would effectively destroy any incentive for the parties to a collective bargaining relationship to engage in meaningful bargaining which inevitably requires difficult decision to be made. We find nothing unlawful about the State and Union's decision herein to agree on November 24, 1984, as the eligibility date for coverage under the settlement agreement.

It is perhaps arguable that the Complainant has asserted that the settlement agreement has violated other rights afforded her by the SELRA. Such an assertion should be brought under Secs. 111.84(1)(a) or (2)(a), Stats., sections the Complainant has not alleged. Ignoring the difficulties presented in the Complainant's pleading of her case would not, however, offer any reason to overturn the Examiner's conclusions. The cited sections would demand proof that the Union or the State interfered with the Complainant's exercise of rights granted by Sec. 111.82, Stats., which provides:

> State employes shall have the right of self-organization and the right to form, join or assist labor organizations, to

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3/ The Examiner speculated on whether the Complainant was an "employe", within the meaning of the SELRA, at the time the settlement agreement was being negotiated and on whether the Union owed her a duty of fair representation at all. This speculation is not essential to the resolution of the issues of the present appeal. The parties have not questioned this point, and assuming either that the Union did or did not have the duty to fairly represent the Complainant does not affect the Examiner's ultimate disposition of the issues.

> bargain collectively through representatives of their own choosing under this subchapter, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection. Such employes shall also have the right to refrain from any or all of such activities.

To establish a violation of the cited sections, the Complainant would have to show what conduct protected by Sec. 111.82, Stats., the State and the Union have interfered with. In this case, the Complainant has not identified any activity protected by Sec. 111.82, Stats., which she was engaged in and which the Union and the State interfered with. She did not file a grievance regarding the status of her "lost" benefits, and did not request the Union to file such a grievance in her behalf. 4/ Rather, as the Examiner correctly noted, the Union filed a grievance on behalf of all employes laid off pursuant to Chap. 317, Laws of 1981, including the Complainant. The Union's grievance was dismissed in arbitration. In sum, we find the record devoid of any evidence of a violation of Secs. 111.84(1)(a) or (2)(a) derivatively Sec. 111.82, Stats.

We agree with the Examiner's ultimate conclusion that the facts do not establish any basis to conclude either the State or the Union committed any unfair labor practice against the Complainant by entering into or implementing the settlement agreement of December 6, 1985. Accordingly, the Examiner's general conclusion that neither the State nor the Union have committed any unfair labor practice has been affirmed.

Dated at Madison, Wisconsin this 12th day of December, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Marshall L. Gratz, Commissioner

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Danae Davis Gordon, Commissioner

4/ The Examiner could have, but chose not to make an express Finding of Fact on the latter point. The absence of the finding is irrelevant to this appeal, since it is the absence of a demonstration of protected concerted activity by the Complainant which is the relevant point here.