STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN STATE EMPLOYEES UNION (WSEU), AFSCME, COUNCIL 24, AFL-CIO, Complainant, vs. STATE OF WISCONSIN, DEPARTMENT OF EMPLOYMENT RELATIONS, Respondent.	Case 236 No. 36951 PP(S)-128 Decision No. 24109

Appearances:

Mr. Richard V. Graylow, Lawton & Cates, Attorneys at Law, 214 W. Mifflin Street, Madison, Wisconsin 53703-2594, appearing on behalf of Wisconsin State Employees Union (WSEU), AFSCME, Council 24, AFL-CIO, referred to below as the WSEU.

Ms. Barbara Buhai, Attorney, Division of Collective Bargaining, Department of Employment Relations, 137 East Wilson Street, P.O. Box 7855, Madison, Wisconsin 53707-7855, appearing on behalf of the State of Wisconsin, Department of Employment Relations, referred to below as the State.

ORDER DENYING MOTION TO DEFER COUNT ONE OF FIRST AMENDED COMPLAINT TO GRIEVANCE ARBITRATION AND GRANTING MOTION TO MAKE COUNT FOUR OF FIRST AMENDED COMPLAINT MORE DEFINITE AND CERTAIN

The WSEU having, on May 7, 1986, filed with the Wisconsin Employment Relations Commission (Commission) a complaint of unfair labor practice consisting of two counts in which the WSEU alleged that the State was violating Secs. 111.84(1)(a), (b), (c), and (d) of the State Employment Labor Relations Act (SELRA), by the State's use of limited term employes and inmates to perform certain work; and the WSEU and the State having, by June 11, 1986, agreed to waive the issuance of an Examiner's decision in the matter; and hearing in the matter having, on July 2, 1986, been set, with the agreement of the WSEU and the State, for September 9, 10 and 11, 1986; and the WSEU having, on July 9, 1986, filed with the Commission a first amended complaint consisting of four counts in which the WSEU alleged that the State was violating Secs. 111.84(1)(a), (b), (c) and (d), Stats., by the State's use of limited term employes, inmates and work release prisoners to perform certain work; and the State having, on August 13, 1986, filed with the Commission an answer with affirmative defenses and motions, in which the State requested, among other things, that the Commission defer count one of the complaint to grievance arbitration and that the Commission order the WSEU to make count four of the complaint more definite and certain; and the hearing set for September 9, 10 and 11, 1986, having, on September 2, 1986, been postponed, by the agreement of the WSEU and the State; and the WSEU having, on September 8, 1986, responded in writing to the State's request to make count four of the complaint more definite and certain; and the Commission, through Richard B. McLaughlin, an Examiner on its staff, having, on September 12, 1986, rescheduled hearing on the matter for October 15, 16, and 17, 1986, and also having, on September 12, 1986, confirmed in writing that the WSEU and the State would submit written argument regarding the State's motion to defer count one of the complaint to grievance arbitration by September 15, 1986; and the State having, on September 15, 1986, filed written argument in support of its motion to defer count one of the complaint to grievance arbitration as well as a supplemental statement of position; and the WSEU having, on September 17, 1986, filed written argument in opposition to the State's motion to defer count one of the complaint to grievance arbitration; and the State having, on September 18, 1986, filed with the Commission a written request that the WSEU's brief not be considered due to the untimeliness of its filing; and the WSEU having, on September 24, 1986, filed with the Commission a written request that the WSEU be granted a two day extension of the briefing schedule so that its brief could be considered by the Commission; and

the State having, on September 26, 1986, filed with the Commission further written argument that the Commission not consider the WSEU's brief due to the untimeliness of its filing; and the State having, on September 29, 1986, filed with the Commission a written request that the Commission allow the State to amend its answer and affirmative defenses to include as attachments fifteen grievances relevant to count one of the complaint; and the hearing set for October 15, 16 and 17, 1986, having been, on the request of the WSEU and the State, postponed; and hearing on the matter having, on October 15, 1986, been rescheduled for December 18 and 19, 1986, and for January 12, 13 and 14, 1987; and the Commission having considered the record, the positions of the parties, and being satisfied that the State's motion to defer count one of the first amended complaint to grievance arbitration should be denied, but that the State's motion to make count four of the first amended complaint more definite and certain should be granted;

NOW, THEREFORE, it is

ORDERED

That the State's motion to defer to grievance arbitration count one of the first amended complaint filed by the WSEU on July 9, 1986, be, and the same hereby is, denied.

That the WSEU shall make count four of the aforementioned first amended complaint more definite and certain by supplying to counsel for the State as soon as feasible following the WSEU's receipt of this Order, but no later than December 11, 1986, the specific duties performed by the work release prisoners, the time and place of the particular acts alleged in the complaint, including any layoff or transfer, and a statement of which sections of the SELRA have allegedly been violated.

Given under our hands and seal at the City of Madison, Wisconsin this 2nd day of December, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Marshall L. Gratz, Commissioner

_____
Danae Davis Gordon, Commissioner

STATE OF WISCONSIN, DEPARTMENT
OF EMPLOYMENT RELATIONS

MEMORANDUM ACCOMPANYING ORDER DENYING MOTION TO DEFER COUNT ONE OF FIRST AMENDED COMPLAINT TO GRIEVANCE ARBITRATION AND GRANTING MOTION TO MAKE COUNT FOUR OF FIRST AMENDED COMPLAINT MORE DEFINITE AND CERTAIN

BACKGROUND

The WSEU filed an initial complaint of unfair labor practice with the Commission on May 7, 1986. Commission records indicate the complaint was served on the State on May 13, 1986. On July 9, 1986, the WSEU filed a first amended complaint with the Commission. In the cover letter to the first amended complaint, counsel for the WSEU stated: "Opposing counsel has been served." The portions of counts one and four relevant to this decision read as follows:

COUNT NO. 1

USE OF LIMITED TERM EMPLOYEES (LTE'S)

6. On or about March 17, 1986, the State through the Department of Health and Social Services, the Division of Corrections and the Wisconsin State Prison located in Waupun, Wisconsin (re)-hired an individual identified as Mr. Edwin Zillmer.

7. Prior to March 17, 1986, Zillmer retired after approximately thirty (30) years of state service as a full-time employee classified as a Correctional Officer.

8. During the (sic) time he was classified as a Correction Officer (CO) and was exclusively represented by this Complaining Union.

9. As previously noted, on or about March 17, 1986, Mr. Zillmer was re-hired.

10. Subsequent to his re-hire he has been performing, as an LTE, work generally, usually and habitually performed by full-time, classified state employees, exclusively represented by this Complaining Union.

11. By way of illustration, rather than limitation, Mr. Zillmer performs and continues to perform the following duties and responsibilities:

A. Supervision of inmates in utility duties;

B. Maintenance of security standards in the work area; and

C. Performance of duties not related to the locking mechanism contract.

12. Prior to the retirement of said Mr. Zillmer, he and the position into which he was allocated, were exclusively represented by this Complaining Union.

13. This Union has no representational rights over or for LTEs.

14. The (in)actions of the State as described in Paragraph Nos. 6 through 13, are unlawful and in violation of Section 111.84(1)(a), (1)(b), (1)(c), and (1)(d), Wis. Stats. (1984-85).

. . .

COUNT NO 4

USE OF WORK RELEASE PRISONERS AT MENDOTA (sic)
MENDOTA MENTAL HEALTH INSTITUTE (MMHI)

. . .

29. At lest (sic) four (4) work release prisoners incarcerated at Oakhill Correctional Institute in Oregon, Wisconsin worked, continue to work and are expected to continue to work at Mendota Mental Health Institute (MMHI) located in Madison, Wisconsin.

30. Two (2) of said work release prisoners are working as part of the Grounds Crew, at least one (1) as an Electrician and at least one (1) in the Power Plant.

31. Prior to the arrival of said work release prisoners the Grounds Crew consisted of approximately four (4), full-time, permanent, employees classified as Laborers and Laborer Specialists. All were exclusively represented by this Complaining Union. All, or at least some, have now been laid off. Their work is now being done by said work release inmates. This Union has no representational rights for said inmates.

32. Said work release inmate(s) working in the Power Plant has (have) caused the transfer from said Power Plant of certain full-time, permanent, classified employees exclusively represented by this Complaining Union, illustrated by but not limited to the following: Power Plan (sic) Helper and Power Plant Operator. Said work release prisoners are now doing the work previously performed by employees exclusively represented by this Union in the Power Plant. This Union has no representational rights for said work release prisoners.

. . .

The State, in an answer together with various other documents filed with the Commission on August 13, 1986, requested that count one of the complaint be deferred to grievance arbitration, and that count four of the complaint be made more definite and certain by the submission of "a clear and concise statement of the facts, including the time and place of occurrence of particular acts alleged, the participants therein, the nature of the acts alleged, and a statement of what, if any, sections of the statute have allegedly been violated."

The WSEU, in a letter dated filed with the Commission on September 8, 1986, responded thus to the State's request for greater detail on count four:

> I wish to indicate that the Union's investigation continues into the routine, habitual and methodical use of work release prisoners at both Mendota Mental Health Institute and the Central Wisconsin Colony and Training School, both in Madison, Wisconsin. It appears that the Department's use of incarcerees continues unabated.
>
> Accordingly, we will present these claims at the time of the hearing. To the extent an amendment is needed to further cover the situation at Central, same will be offered immediately prior to the hearing on the merits.

The parties ultimately briefed the issue regarding the State's motion to defer count one of the complaint to grievance arbitration, with the State submitting its brief, together with a supplemental "statement of position," on September 15, 1986. Referring to the Union's letter filed with the Commission on September 8, 1986, the State stated, in its "statement of position," that:

> Respondent is unwilling and unable to proceed at this time without said information . . . Respondent is unable to proceed, answer, defend, prepare or present its case and is

unduly prejudiced by being foreclosed from discovering what it has done that is allegedly unlawful.

The Union filed its brief opposing the State's motion to defer count one to arbitration on September 17, 1986. The State, in a letter filed with the Commission on September 18, 1986, requested that the WSEU's brief not be considered part of the record due to the untimeliness of its filing. The WSEU, in a letter filed with the Commission on September 24, 1986, made the following request:

> To the extent that it is necessary, I respectfully ask that the time for receipt of the Union's Brief be extended for two (2) days to October (sic) 17, 1986 in light of extensive and oppressive Office business.
>
> It would appear further that in light of DER's letter to you of September 18, 1986, that no prejudice has been alleged or incurred.

The State responded to this letter in a letter filed with the Commission on September 26, 1986, which reads, in relevant part, as follows:

> Respondent renews its objection to the consideration of Complainant's brief and respectfully requests that Complainant's untimely Motion for an Extension of Time be denied. The filing of Complainant's brief on September 17, 1986, is both untimely and prejudicial to Respondent. Complainant had the privilege of having Respondent's brief in hand prior to filing its brief. Complainant's brief thus serves the purpose of a reply brief rather than an original brief. Respondent did not agree to any extension of time nor obviously to this unfair advantage.

In a letter filed with the Commission on September 29, 1986, the State requested that it be allowed to "amend its Answer and Affirmative Defenses" to include "as attachments" fifteen grievances filed on issues raised in count one of the complaint.

THE POSITIONS OF THE PARTIES

The parties restricted their briefs to the issues raised by the State's motion to defer count one of the complaint to grievance arbitration.

The State initially contends that "public polciy (sic) encourages dispute settlement through the procedures of collective bargaining." Specifically, the State notes that it "is long standing Federal Labor Law policy to defer to arbitration procedure whenever it is appropriate," and cites the case law of the United States Supreme Court and the National Labor Relations Board as well the National Labor Relations Act itself. The Commission has, according to the State, incorporated these policies into its own case law. Citing Racine Unified School District, Dec. No. 18443-B (3/81), 1/ the State asserts that three criteria guide the Commission in determining whether to defer a case to arbitration:

> (1) the parties are willing to arbitrate and renounce technical objections that would prevent a decision on the merits by an arbitrator; (2) the issues raised in the grievance are substantially identical to the issues raised in the prohibited practices complaint and are capable of material resolution through an arbitration procedure; and (3) the dispute does not involve important issues of law or policy.

According to the State, the present matter meets all three of the stated criteria for deferral. The State contends that a review of the complaint in light of established Commission case law demands that the motion to defer be granted.

1/ This decision was issued by Commission Examiner Houlihan, and not appealed to the Commission.

Noting that the WSEU has alleged violations of Secs. 111.84(1)(a), (b), (c) and (d), Stats., but not of Sec. 111.84(1)(e), Stats., which makes it an unfair labor practice for the State to violate a collective bargaining agreement, the State concludes that the WSEU's pleading of the case constitutes nothing more than a "procedural maneuver" which is a "smokescreen and an attempt to manufacture jurisdiction." Arguing that the WSEU has, in prior cases, failed to acknowledge that the Commission has the discretion to defer to arbitration matters alleging unfair labor practices beyond breach of contract claims, and urging that the present matter does not raise any issue not fully resolvable in arbitration, the State concludes that the Commission should exercise its discretion to defer the present matter to arbitration. The State also argues that a deferral to arbitration would avoid the potential of conflicting results by an arbitrator and the Commission. The State closes its brief by asserting that "it is unduly prejudiced in its preparation and presentation and is unable to proceed with Counts II & III of the Complaint until the Commission has ruled on its request for deferral," and by requesting an indefinite postponement of the hearing until the Commission rules on the deferral issue.

The WSEU contends that the State's motion to defer "is substantially similar, if not identical, to a host of similar Motions proferred by the State over the years in contested cases all meeting the same fate: ie, dismissal." Citing State of Wisconsin, (Dept. of Administration), Dec. No. 15261 (WERC, 1/78), the WSEU concludes the State "herein makes the same argument; not one innovative change has been made." A review of the relevant case law establishes, according to the WSEU, that:

> The Complaint at bar is . . . devoid of any references to breach of contract. Arbitration will not resolve the instant dispute. As such the same result is required/ commanded; no deferral. (Emphasis from text)
>
> Deferral is simply not appropriate in these circumstances. No Arbitrator could determine interference, restraint, coercion, bad faith bargaining or other violations of SELRA alleged in the Complaint.

It follows, according to the WSEU, that count one should not be deferred to arbitration, and that hearing on the complaint should proceed.

DISCUSSION

The Motion To Make Count Four Of The Complaint More Definite And Certain

The sufficiency of the contents of a complaint of unfair labor practice is governed by ERB 22.02 (2) which states:

> CONTENTS. Such complaint shall contain the following:
>
> (a) The name, address, and affiliation, if any, of the complainant, and of any representative thereof.
>
> (b) The name and address of the respondent or respondents, and any other party named therein.
>
> (c) A clear and concise statement of the facts constituting the alleged prohibited practice or practices, including the time and place of occurrence of particular acts and the sections of the statute alleged to have been violated thereby.
>
> (d) A prayer for specific and general relief.
>
> (e) A statement that the filing fee established by s. 111.94(2), Stats., accompanies the complaint.

The requirements for a motion to make complaint more definite and certain are contained in ERB 22.03 (3), which states:

> MOTION TO MAKE COMPLAINT MORE DEFINITE AND CERTAIN. If a complaint is alleged to be so indefinite as to hamper the respondent or any other party in the preparation of

> its answer to the complaint such party may, within 5 days after the service of the complaint, by motion request the commission to order the complainant to file a statement supplying specified information to make the complaint more definite and certain.

A review of the background stated above indicates that it is most unlikely that the State's motion was filed "within 5 days after" the service of the first amended complaint. Under ERB 20.01, however, the untimeliness is not necessarily fatal to the Complainant's motion. The relevant portion of ERB 20.01 states that "(t)he commission . . . may waive any requirements of these rules unless a party shows prejudice thereby." 2/

In the present matter, no such prejudice exists and a waiver of the timeliness of ERB 22.03 (3) is appropriate. The lack of prejudice is apparent since count four of the complaint falls short of the requirements of ERB 22.02 (2). Count four fails to establish the specific acts performed by the work release prisoners as well as the time and place of the occurrence of those acts as well as of the layoffs and transfers, all of which is demanded by ERB 22.02 (2) (c). In addition, count four does not include a statement of "the sections of the statute alleged to have been violated . . ." as required by that subsection. The indefiniteness of count four is made apparent by the fact that the timeliness of the allegations of paragraphs 31 and 32 under Sec. 111.07(14), Stats., is not established, without rebuttal, on the face of the complaint. To strictly apply the timelines of ERB 22.03 (3) against this background only risks further delay in hearing this matter by inviting reasonable claims of surprise and requests for continuances on the part of the State. Accordingly, the timeliness of ERB 22.03 (3) must be waived for the purposes of the State's motion in this matter.

The State's motion to make count four of the complaint more definite and certain has been granted regarding the State's request for a detailed statement of the specific acts performed by the work release prisoners, a point presumably raised by the State's request for information on "the nature of the acts alleged"; regarding the State's request for a detailed statement of the time and place of occurrence of the particular acts alleged; and regarding the State's request for a statement of what, if any, sections of the SELRA have allegedly been violated by the acts complained of. ERB 22.02 (2) (c) does not specifically call for the identification of the participants involved, and the Commission is satisfied that, given the detailed statement of the acts performed by the work release prisoners as well as the time and place of occurrence of those acts and the resulting layoffs and transfers, the identification of the work release prisoners involved is not so essential to the State's ability to prepare its case that the WSEU should be required to supply that information under the terms of the above stated Order. If, however, the identity of the work release prisoners is presently known to the WSEU, then it would be desirable and appropriate for the WSEU to supply that information to the State even though no such affirmative obligation is imposed by the Order entered above.

To the extent that the acts complained of by the WSEU are on-going, further amendments to the complaint can be raised and considered under the provisions of ERB 22.02 (5). 3/ For the purposes of the present motion, however, the underlying basis of the allegations of count four must be stated with sufficient particularity to permit the State to respond to the complaint by answer and by the

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2/ For prior application of this provision, see American Federation of State, County and Municipal Employees, Council 24, Wisconsin State Employees Union, AFL-CIO (all locals), Dec. No. 15759-B (WERC, 3/80).

3/ ERB 22.02 (5) states:

> "AMENDMENT. (a) Who may amend. Any complainant may amend the complaint upon motion, prior to the hearing by the commission; during the hearing by the commission if it is conducting the hearing; or by the commission member or examiner authorized by the commission to conduct the hearing; and at any time prior to the issuance of an order based thereon by the commission, or commission member or examiner authorized to issue and make findings and orders."

ultimate presentation of evidence. The Order entered above, by bringing count four of the complaint into compliance with ERB 22.02 (2), will accomplish this.

The Motion To Defer Count One Of The Complaint To Grievance Arbitration

A preliminary point to consideration of the State's motion to defer count one of the complaint to grievance arbitration is whether the Commission should conclude the WSEU's brief is properly before it. The Commission is not well equipped under Chapters 227 or 111, Stats., or with the administrative resources to entertain or to encourage extensive pre-hearing motion practice, much less the litigation of collateral issues to pre-hearing motion practice. The briefing deadline questioned by the State was not Commission imposed. The State seeks to strictly enforce this deadline against the WSEU while asserting a motion to make definite and certain which is untimely under a strict reading of the relevant Commission rule, and while submitting into the record, without WSEU objection, fifteen grievances appealed to arbitration in August of 1986, well before the September 15, 1986, briefing deadline. While the State characterized the grievances as "attachments" relevant to a requested amendment of the answer, the grievances are, if anything, relevant attachments to its motion to defer and the supporting brief. As demonstrated by the Commission's determination regarding the State's motion to make count four of the complaint more definite and certain, the Commission's ultimate concern is to have the prehearing record as completely developed as possible to assure a meaningful hearing. This concern is best addressed by accepting the WSEU's arguably untimely filed brief as well as the State's arguably untimely submitted grievances. If the State had persuasively demonstrated that the WSEU's two day delay in submitting its brief resulted in a tactical advantage for the WSEU, the result could be different. In this case, however, the State's motion to defer does not raise any issues of first impression and there is no reason to believe the WSEU in any way received a tactical advantage by submitting its brief when it did.

Turning to the merits of the asserted motion to defer count one of the complaint to grievance arbitration, the WSEU correctly points out that the Commission does not lose subject matter jurisdiction over a complaint simply because the facts alleged might also support a breach of contract claim resolvable through arbitration. The State, however, correctly points out that the Commission may, in its discretion, choose not to exercise its subject matter jurisdiction over unfair labor practice allegations which allege facts which also might support a breach of contract claim resolvable through arbitration so that the contractual dispute resolution procedure can be given its fullest effect. A case bearing on this point is State of Wisconsin, Department of Administration, and its Employment Relations Section. In that case, the Commission stated:

> Deferral of alleged statutory violations to arbitration is a discretionary act in which the commission abstains from adjudicating the statutory question. The United States Supreme Court has approved deferral on the ground that it harmonizes the objectives of administrative determinations of unfair labor practices with the equally important legislative objective to encourage parties to utilize their mutually agreed upon forum for the resolution of contractual questions. The decision to abstain from discharging the commission's statutory responsibility to adjudicate complaints in favor of the arbitral process will not be made lightly. The commission will abstain and defer only after it is satisfied that the legislature's goal to encourage the resolution of disputes through the method agreed to by the parties will be realized and that there are no superseding considerations in a particular case. Among the guiding criteria for deferral are these: First, the parties must be willing to arbitrate and renounce technical objections, such as timeliness under the contract and arbitrability, which would prevent a decision on the merits by the arbitrator. Otherwise, the commission would defer only to have the dispute go unresolved. Second, the collective bargaining agreement must clearly address itself to the dispute. The legislative objective to encourage the resolution of disputes through arbitration would not be realized where the parties have not bargained over the matter in dispute. Third, the dispute must not involve important issues of law. An arbitrator's award is

> final and ordinarily not subject to judicial review on questions of law. Further, questions of legislative policy and law are neither within the province nor the expertise of arbitrators. 4/

In the present matter, sufficient questions exist regarding the application of all three criteria that the State's motion to defer count one of the first amended complaint to arbitration must be denied. Regarding the first criterion, the State has noted in its brief that:

> The parties have utilized the grievance procedures and are prepared to go to arbitration. The facts and issues underlying the dispute are identical, and are both arbitrable and solvable under the agreement.

This statement can be read to establish that the State has renounced technical objections to the arbitration of the various grievances, but is arguably something less than an explicit waiver of such objections.

Even if the Commission were to assume that the State's brief establishes that the first criterion of deferral has been met, the applicability of the second and third criteria to this matter are sufficiently dubious to preclude deferral. The submitted grievances cite a welter of different contractual provisions. The provisions cited vary from grievance to grievance and are, in certain grievances, difficult to decipher. Apart from asserting generally that the parties' collective bargaining agreement addresses the matter, the State does not isolate which agreement provisions do cover the disputes. Thus, the specific contract provisions to be addressed in arbitration are not clear at this time, and this makes the applicability of the second criterion to the present matter problematic. The aplicability of the third criterion to the present matter is also problematic. The Commission cannot say, with anything approaching an appropriate degree of certainty, that significant issues of law are not presented on the present facts.

On balance, the Commission is convinced that the first count of the first amended complaint is best treated as part of a contested case requiring full hearing. The denial of the State's motion to defer that count of the complaint to grievance arbitration should not, however, be read to limit the State's right to introduce, at hearing on the merits of the complaint, evidence regarding the amenability of count one to arbitration and to reassert its motion after that hearing, if appropriate, as a part of its brief on the merits. The Commission's denial of the motion simply reflects the Commission's belief that a deferral of count one of the first amended complaint to grievance arbitration is not warranted on the present state of the record.

Dated at Madison, Wisconsin this 2nd 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/ Dec. No. 15261 (WERC, 1/78), citations omitted.