STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

STATE ENGINEERING ASSOCIATION, Complainant, vs. DEPARTMENT OF EMPLOYMENT RELATIONS (PROFESSIONAL-ENGINEERING) Respondent.	Case 247 No. 39023 PP(S)-138 Decision No. 24747-A

Appearances:

Kelly & Haus, Attorneys at Law, 121 East Wilson Street, Madison, Wisconsin 53703-3422, by Mr. William Haus, on behalf of the State Engineering Association.

Mr. Thomas E. Kwiatkowski, Attorney, Department of Employment Relations, Division of Collective Bargaining, State of Wisconsin, 137 East Wilson Street, P. O. Box 7855, Madison, Wisconsin 53707-7855, on behalf of the State of Wisconsin, Department of Employment Relations.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The State Engineering Association, hereinafter the Complainant, having, on June 30, 1987, filed a complaint with the Wisconsin Employment Relations Commission, hereinafter the Commission, wherein Complainant alleged that the State of Wisconsin, Department of Employment Relations, hereinafter the Respondent, had committed unfair labor practices within the meaning of Secs. 111.84(1)(a), (b), (c), (d) and (e) of the State Employment Labor Relations Act (SELRA); and the Respondent having, on September 22, 1987, filed an answer wherein it denied that it had committed any unfair labor practices and raised certain affirmative defenses; and the Commission having appointed David E. Shaw, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order in the matter as provided in Sec. 111.07(5), Stats.; and a hearing on said complaint having been held before the Examiner at Madison, Wisconsin on November 4 and 5, 1987; and the parties' having completed filing post-hearing briefs by September 26, 1988; and the Examiner having considered the evidence and the arguments of the parties, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That the Complainant is a labor organization with its principal offices located at 4510 Regent Street, Room B, Madison, Wisconsin 53705; that, at all times material herein, Complainant has been, and is, the certified collective bargaining representative of the bargaining unit consisting of the following:

> All employes employed in the classified service of the State of Wisconsin occupying the classifications of:
>
> Architect 1, 2, 3, 4, 5, 6
> Building Construction Superintendent 1, 2
> Civil Engineer 1, 2, 3, 4, 5, 6
> Civil Engineer 1, 2, 3, 4, 5, Transportation
> Electrical Engineer 1, 2, 3, 4, 5
> Engineering Technician 4, 5, 6
> Environmental Engineer 1, 2, 3, 4
> Landscape Architect 1, 2, 3, 4
> Mechanical Engineer 1, 2, 3, 4, 5, 6
> Public Service Engineer 1, 2, 3, 4, 5
> Specification Writer 1, 2, 3

excluding all other employes, limited term employes, non-permanent seasonal employes, sessional employes, confidential employes, supervisory employes, and managerial employes.

and that said employes in the bargaining unit are employed in various departments and agencies throughout State service at various locations in the State and are supervised by personnel within their respective agencies.

2. That the Respondent State of Wisconsin is an employer; that the Respondent State is represented for the purposes of collective bargaining and labor relations by the Respondent Department of Employment Relations, which has its principal offices located at 137 East Wilson Street, P.O. Box 7855, Madison, Wisconsin 53707-7855; and that at all times material herein, David Riehle has been employed by the Respondent as an Employment Relations Specialist and, at all times material herein, has been the chief negotiator for the Respondent in negotiations with Complainant for collective bargaining agreements covering the bargaining unit represented by Complainant.

3. That on February 19, 1985 the U.S. Supreme Court issued its decision in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, wherein it held that the minimum wage and overtime provisions of the federal Fair Labor Standards Act (FLSA) apply to public employes.

4. That in the parties' negotiations for the collective bargaining agreement covering the period December 5 to June 30, 1987, the members of the Complainant's bargaining team were permitted to use vacation time, compensatory time if they earned it, or leaves of absence without pay for time off work spent bargaining; that the members of Complainant's bargaining team were permitted to use leave of absence without pay in less than full day increments for time spent in bargaining on the 1985-1987 agreement and were not precluded from also working at their jobs on days they took such leave for part of the day; that during the latter stages of negotiations for the 1985-1987 agreement, the Respondent State made a proposal that it would provide 48 hours of "compensatory time to reimburse the Complainant's bargaining team members for leave without pay, vacation time, etc., that they had taken for bargaining time, in exchange for there being no grievances filed regarding time for bargaining for the 1985-87 agreement; that Complainant had made a proposal in the 1985-87 negotiations for paid bargaining time in terms of compensatory time; that the Respondent State's proposal regarding the use of compensatory time for bargaining was agreed to by Complainant and was made a settlement agreement rather than part of the contract; that the parties reached agreement on a collective bargaining agreement covering the period from December 5, 1985 to June 30, 1987; that said agreement contained the following provisions in relevant part:

ARTICLE II

ASSOCIATION RECOGNITION

. . .

Section 4 Association Activity

Bargaining unit employes, including officers and representatives shall not conduct any Association activity or business on State time except as specifically authorized by the provisions of this Agreement.

. . .

Section 7 Time Off for Association Business

The Statewide Association Officers, up to a maximum of twenty-five (25), who are members of the bargaining unit shall be granted time off (not to exceed ten (10) work days per employe per year, except for the Association President and Vice President who shall be granted time off not to exceed twenty (20) work days each per year) for the purpose of conducting Association business and affairs, excluding time spent in negotiations. This time off may be charged to

vacation, personal holidays, compensatory time off, or to leave of absence without pay as the individual employe may designate. When using leave of absence without pay employes shall continue to earn vacation and sick leave credits and qualify for pay for legal holidays and length of service payment. The Association shall furnish to the Employer in writing the names of up to a maximum of twenty-five (25) Statewide Association officers within thirty (30) calendar days of the effective date of the Agreement. Any changes thereto made thereafter shall be forwarded to the Employer within fourteen (14) calendar days.

. . .

Section 13 Future Negotiations

Up to fifteen (15) employes (not to exceed twelve (12) at any one meeting) who are members of the Association bargaining team may elect to use leave of absence without pay for participation in the 1987-89 contract negotiation process. When using such leave of absence without pay employes shall continue to earn vacation and sick leave credits and qualify for pay for legal holidays and length of service payments. Such earning of and qualifying for benefits shall be limited to a maximum of the first twenty-five (25) work days spent in the contract negotiation process.

. . .

ARTICLE III

Management Rights

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

34 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.

. . .

and that said Agreement provided at Article IV for final and binding arbitration of grievances arising under the Agreement.

5. That following the issuance of the U.S. Supreme Court's decision in Garcia and the issuance of interpretations of the FLSA by the Department of Labor, the Respondent State determined that certain of its employes, including all of the members of the bargaining unit represented by Complainant, are "professional employes" within the meaning of that term as defined in the FLSA; and that Riehle issued the following memorandum to the personnel representatives in the various agencies employing members of the Complainant's bargaining team:

Date: March 24, 1987

To: Omer Jones, Trig Thoresen, Peter Olson, Ken DePrey and Lynn Murawski

From: Dave Riehle

Subject: Time Off for State Engineering Association (SEA) Employes to Participate in Bargaining the 1987-89 Contract

Article II, Section 13 of the SEA contract provides that members of the SEA bargaining team may elect to use leave without pay for participation in the 1987-89 contract negotiation process.

To assure that the leave can properly be treated as being without pay under the FLSA, the leave must be in full day increments and the employe must not perform any services for the Employer during that day. When employes are on leave without pay, employes should not be instructed by the Employer to perform services or be allowed by the Employer to perform services on that day. Supervisors of the employes should be made aware that leave without pay must be in full day increments and that no services for the Employer are permitted on such days.

If an SEA represented employe requests a partial day of leave without pay for bargaining, the employe should be instructed by the Employer that under the FLSA leaves of absence without pay for partial days are not permitted. The Employer can agree to an employe's request for a leave of absence without pay for a full day or leave for a partial day using accumulated paid leave credits for the hours away from work. The Employer can also agree to reschedule work hours so that the employe is not scheduled to work during those hours when the employe participates in bargaining. Rescheduled work hours must be in the same pay period so that no overtime payments for such hours are generated under the contract.

SK11.DR
cc: Al Hunsicker

6. That Complainant's bargaining team and the Respondent State's bargaining team met on March 30, 1987 for the purpose of discussing ground rules for negotiations for a 1987-89 agreement; that at said meeting Complainant proposed certain ground rules for negotiations which included the following proposals:

11. Tentative agenda will be set for succeeding sessions.

a. 80 hours of C.T.O. shall be provided every member and alternate member of the State Engineering Association bargaining team as of the first day of bargaining to be used on an hour per hour basis of business hours or any hours in excess of business hours of bargaining as charged for by the Department of Employment Relations bargaining team. Any business hours of bargaining time required beyond the aforementioned 80 hours C.T.O. will follow the procedure as outlined in No. 12 of the Engineering Ground Rules.

12. SEA bargaining team members will be granted time off from work to attend negotiations and caucuses. Such members may use compensatory time credits, vacation credits, personal holiday credits, or leave without pay to cover such absences. SEA team members using leave without pay for negotiation or caucus sessions will continue to earn vacation, sick leave, legal holiday, and length-of-service credits for those days, within the limitations of Article II, Section 13. Those SEA employes in salary ranges 14-07 and 14-08 will receive compensatory time credit for all hours worked the workweek prior, during and/or after a bargaining day;

that at said meeting the Respondent State proposed certain ground rules for negotiations which include the following proposal:

> 12. SEA bargaining team members will be granted time off from work to attend negotiations and caucuses. Such members may use compensatory time credits, vacation credits, personal holiday credits, or leave without pay to cover such absences. SEA team members using leave without pay for negotiation or caucus sessions will continue to earn vacation, sick leave, legal holiday, and length-of-service credits for those days, within the limitations of Article II, Section 13;

and that at said meeting Riehle, as chief spokesman for the Respondent State, indicated to Complainant's bargaining team that the FLSA did not permit partial days of leave without pay for professional employes and the relationship of that to the provisions in the parties' 1985-87 agreement regarding use of leave without pay for bargaining time; that the Complainant's and the Respondent State's respective bargaining teams met again on April 13, 1987 to discuss ground rules for negotiations at which meeting the Complainant presented its amended proposed ground rules, which include the following:

> 12. 180 hours of C.T.O. shall be provided every member and alternate member of the State Engineering Association bargaining team as of the first day of bargaining to be used on an hour per hour basis during normal business hours. Any business hours of bargaining time required beyond the aforementioned 180 hours C.T.O. will follow the procedure as outlined in No. 13 of the Engineering Ground Rules.
>
> 13. SEA bargaining team members will be granted time off from work to attend negotiations and caucuses. Such members may use compensatory time credits, vacation credits, personal holiday credits, or leave without pay to cover such absences. SEA team members using leave without pay for negotiation or caucus sessions will continue to earn vacation, sick leave, legal holiday, and length-of-service credits for those hours, within the limitations of Article II, Section 13. The employer will take into consideration leaves to attend negotiations and caucuses when setting and reviewing work expectations;

that at said meeting the Respondent State indicated that it was its position that leave without pay could not be taken in partial day increments if the employe worked part of the day since under the FLSA professional employes must be paid for the whole day if they work any part of the day; that the Complainant took the position at said meeting and thereafter that leave without pay may be taken in less than full day increments; that the State offered to bargain in full day increments or that the work schedule of the members of Complainant's bargaining team could be modified so that if they bargained part of a day, they would not have to take leave without pay for the day or paid leave as long as the hours were made up in the same pay period that the bargaining time occurred; and that the Respondent State's initial bargaining proposals contained a proposal to modify Article II of the agreement to provide for taking leave without pay in full day increments and the proposal was modified orally when it was presented.

7. That paid time off for bargaining remained in dispute in bargaining over the ground rules for negotiations; that the Complainant took the position that it would not bargain on the agreement without ground rules and the parties agreed to cancel the two bargaining sessions scheduled for April of 1987; that the Complainant and Respondent subsequently agreed to bargain without ground rules and met on May 11 and 12, 1987 for negotiations on a 1987-89 agreement; that on June 5, 1987, Riehle contacted Keith Richardson, the chief spokesman for Complainant's bargaining team, by telephone to discuss moving forward in negotiations and during that conversation Riehle indicated that the State would be

willing to offer 48 hours of compensatory time off for bargaining if the parties could reach agreement on a new contract by July 4, 1987; that as of June 5, 1987 the parties had met approximately six times for negotiations on the agreement and Complainant had approximately 100 items and Respondent had approximately five items on the table at that point; that the parties met on June 8, 1987 for bargaining and that toward the end of the session Complainant asked about the 48 hours of compensatory time off for bargaining and Riehle orally presented the offer consisting of 48 hours of compensatory time off for bargaining for members of Complainant's bargaining team with the contingencies that agreement would be reached on a contract by July 4, 1987, on the basis of the State's "best offer," which it would give at the next session and that any grievances relating to time off for bargaining be dropped; that Richardson asked that the State's offer be put in writing and Riehle refused to present the offer in writing; that Respondent State proposed that a provision on the 48 hours of compensatory time off for bargaining be placed in the agreement, while Complainant proposed that its proposal regarding compensatory time off for bargaining be placed in the ground rules; that the parties met again on June 9 and 22, 1987 for bargaining on an agreement; that at the June 22, 1987 bargaining session the Complainant had approximately 15 items on the table and the Respondent State had one item on hazardous pay and a wage offer of 2% on the table; that at the June 22nd bargaining session the Respondent State suggested the possibility of using mediation; that the Respondent State did not make its "best offer" at the June 22nd bargaining session and the parties agreed not to bargain further at that point; that the parties did not meet again for bargaining until October 6, 1987; that the Respondent State's offer for compensatory time for bargaining was still on the table as of said date; and that at all times material herein the Respondent State did not condition further bargaining or reaching agreement on a contract on acceptance of its proposal regarding compensatory time off for bargaining set forth previously in this Finding of Fact.

8. That Complainant's bargaining team for the 1987-89 negotiations consisted of four individuals from Madison and individuals from LaCrosse, Green Bay, Waukesha and Wisconsin Rapids; that with the exception of one instance involving James Andreshak, no member of the Complainant's bargaining team was permitted to take leave without pay in increments of less than a full day for bargaining on the 1987-89 agreement or to perform any work for the Respondent State on a day when such leave without pay was requested; that Andreshak, Roger Bohn, Bernard Kranz, Keith Richardson, Martin Romero, Robert Schaefer and Melvin Sensenbrenner were at all times material members of the Complainant's bargaining team for negotiations on a 1987-89 agreement; that Sensenbrenner submitted a leave slip for paid vacation for May 19, 1987, but subsequently had to work three hours that day as well as bargain and requested to withdraw the vacation and submit the rest of that day as leave without pay, which request was denied and he was directed to use vacation time; that Sensenbrenner again attempted to use leave without pay for four hours on June 8, 1987 for bargaining and that request was subsequently denied and he used vacation time to cover the time off; that Richardson twice requested to use leave without pay in partial day increments on days bargaining was scheduled and was directed by his supervisors that he could not use leave without pay on days when he works and takes time off to bargain, but should use vacation or personal holiday time or make up the hours during the week; that Kranz attempted to use leave without pay for two hours on a day there was bargaining and was told by his supervisor that he would have to use some other type of leave for that time off; that Schaefer reported to work on June 2, 1987 and requested to use leave without pay for bargaining on that date and was told to leave work immediately if he intended to take less than a full day of leave without pay, but since he had already reported to work he was required to use "professional time" or vacation and he chose to use professional time; that Romero initially approached his supervisor about sometime using leave without pay for bargaining, but that he and his supervisor worked out an informal arrangement whereby time spent bargaining would be considered covered by extra hours that he at times worked; that Andreshak submitted one hour and fifty minutes of leave without pay for bargaining for June 8, 1987 and it was approved by his supervisor; that Andreshak ultimately worked a total of over 80 hours in the pay period during which he took the leave without pay and his normal pay was not reduced for that pay period as his normal pay period is 80 hours; that Andreshak had not yet worked the extra hours in the pay period at the time his leave slip for leave without pay was approved; that Bohn was instructed in writing by his supervisor that if he intended to work two hours on June 8, 1987 and take the rest of that day off for bargaining, he would have to cover the time off by taking vacation, personal holiday or compensatory time off or make up the six hours of work within the pay

period; and that the Respondent State did not offer or attempt to bargain with the Complainant before implementing its interpretation of how the leave without pay for bargaining provision was to be applied.

9. That the subject of the use of leave without pay by members of the Complainant's bargaining team for bargaining on a 1987-89 collective bargaining agreement is specifically covered by Article II, Section 13, of the parties' 1985-1987 agreement.

10. That the Respondent's action during the term of the 1985-87 agreement of unilaterally implementing its policy regarding the use of leave without pay for bargaining by members of the Complainant's bargaining team, did not independently have a reasonable tendency to interfere with, restrain or coerce the employes in the bargaining unit represented by Complainant in the exercise of their rights guaranteed in Sec. 111.82, Stats., and did not independently encourage or discourage membership in Complainant's organization by discrimination in regard to conditions of employment.

11. That the Respondent State's oral proposal that provided for 48 hours of compensatory time off for bargaining for members of Complainant's bargaining team if agreement was reached on a 1987-89 contract by July 4, 1987 on the basis of the Respondent State's best offer did not threaten the independence of the Complainant as a representative of the interests of the employes in the bargaining unit, and did not reasonably tend to interfere with those employes in the exercise of their rights guaranteed in Sec. 111.82, Stats.

Based upon the above Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. That as the issue of the use of leave without pay by members of the Complainant Association's bargaining team for bargaining on a 1987-89 agreement is covered by the terms of the parties' 1985-87 Agreement, and as said Agreement contains a provision for final and binding grievance arbitration, the Examiner will not exercise the Commission's jurisdiction over the allegation in the instant complaint that the Respondent State violated the terms of the parties' Agreement in violation of Sec. 111.84(1)(e), Stats.

2. That as the issue of the use of leave without pay by members of the Complainant Association's bargaining team for purposes of bargaining on a 1987-89 agreement is covered by the terms of the parties' 1985-87 Agreement, the Respondent State, its officers and agents, did not have a duty to bargain further on that issue during the term of the parties' 1985-87 Agreement and, therefore, by unilaterally implementing, in term, its policy regarding the use of leave without pay for bargaining by members of the Complainant Association's bargaining team, the Respondent State did not refuse to bargain in violation of Sec. 111.84(1)(d), Stats.

3. That the Respondent State, its officers and agents, by unilaterally implementing, during the term of the 1985-87 Agreement, its policy regarding the use of leave without pay for members of the Complainant Association's bargaining term for bargaining on a 1987-89 agreement, did not independently interfere with, restrain or coerce state employes in the exercise of their rights guaranteed in Sec. 111.82, Stats., in violation of Sec. 111.84(1)(a), Stats., and did not independently discriminate in regard to conditions of employment in violation of Sec. 111.84(1)(c), Stats.

4. That the Respondent State, its officers and agents, by making a proposal providing for 48 hours of compensatory time off for bargaining for members of Complainant's bargaining team contingent upon reaching agreement on a contract by July 4, 1987, on the basis of the State's best offer, did not dominate or interfere with the administration of a labor organization in violation of Sec. 111.84(1)(b), Stats., and did not interfere with state employes in the exercise of their rights guaranteed in Sec. 111.82, Stats., in violation of Sec. 111.84(1)(a), Stats.

On the basis of the foregoing Findings of Fact, and Conclusions of Law, the Examiner makes and issues the following

ORDER 1/

That the instant complaint be, and the same hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin this 13th day of December, 1988.

By _____
David E. Shaw, Examiner

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

Section 111.07(5), Stats.

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

DEPARTMENT OF EMPLOYMENT RELATIONS (PROFESSIONAL-ENGINEERING)

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER

BACKGROUND

The complaint alleges that for the negotiations on a 1987-89 agreement, and prior to expiration of the 1985-87 agreement, the Respondent State has unilaterally imposed a requirement that when it is necessary for members of Complainant's bargaining team to take leave without pay (LWOP) for bargaining, they must take it in full day increments and will not be permitted to perform any work on such days, and that such a requirement is contrary to the practice in the past and to express provisions of the parties' Agreement. The complaint further alleges that during negotiations the Respondent offered the members of Complainant's bargaining team paid time off for bargaining in exchange for their agreeing to reach a tentative agreement by a specified time and on Respondent's terms. Complainant asserts that such conduct constitutes violations of Secs. 111.84(1)(a), (b), (c), (d) and (e), Stats.

In its answer the Respondent alleges that the members of Complainant's bargaining team were not "required" to use LWOP for bargaining and were free to use other forms of leave time if they chose, and that its requirement that LWOP be used in full day increments was necessary to ensure that it in fact would be without pay. As to the allegation that it attempted to influence or corrupt the Complainant's bargaining team with an offer of compensatory time for bargaining, Respondent answers that its proposal was made in the context of overall negotiations in the interest of a timely settlement. The Respondent also raised a number of affirmative defenses in its answer: (1) That the parties' Agreement did not provide for paid bargaining time for Complainant's representatives; (2) that Complainant proposed that paid bargaining time be authorized for its bargaining team as part of the negotiation ground rules, and while the Respondent did not agree, it did take the position that the subject would be considered in the overall negotiations for a new agreement; (3) that the U.S. Supreme Court's decision in Garcia extended the provisions of the FLSA to the Respondent; (4) that under the FLSA exempt employes lose their exempt status if deductions are made from their pay for employe - initiated absences of less than a full day, which means that LWOP for less than a full day would not really be without pay and would result in paid time for bargaining in the absence of such a provision in the agreement or the ground rules; and (5) that to remain consistent with the exempt status of these employes and the terms of the parties' Agreement, the Respondent offered to bargain in full day increments and allowed the use of LWOP for full days or the use of accumulated paid leave for full or partial days employes were absent from work for bargaining or to reschedule work hours around the bargaining.

Complainant

The Complainant takes the position that the Respondent State unilaterally adopted a policy regarding the use of LWOP by employes in the bargaining unit for Association business or bargaining that is contrary to the express terms of the parties' 1985-1987 Agreement and the practice that existed prior to the 1987 negotiations. Article II, Sections 7 and 13, of the Agreement expressly give designated employes the option of using LWOP for Association business and bargaining, and the practice prior to 1987 was that they could use LWOP in less than full day increments for those purposes. The Respondent State's policy targets the members of the Association's bargaining team and encourages individual bargaining between those members and management, threatens those members with loss of pay for being involved in bargaining and "promotes a subtle form of exploitation" in that they are treated as "professionals" where it benefits the State to do so, and as "hourly employees" where it is to the State's advantage. Complainant also takes the position that the Respondent State's subsequent proposal for paid bargaining time for the Association's team members, conditioned upon their accepting the State's last offer, violated Secs. 111.84(1)(a) and (b), Stats.

In support of its positions, Complaint first asserts that the Respondent State's unilaterally adopted policy regarding the use of LWOP for Association

business and bargaining imposes a "dilemma" on the Association's bargaining team members in that in order for them to participate in bargaining sessions of less than a full day, they must take LWOP for the rest of the day as well - a forced partial day lay off and loss of income, or use vacation or other earned leave when they do not desire to use such leave. Imposing such a price on employes as a condition of their serving on their union's bargaining team is a per se violation of their rights under Sec. 111.82, Stats., and, therefore, violates Sec. 111.84(1))(a), Stats. Exacting such a penalty from those employes that choose to be involved in bargaining for their union also violates Sec. 111.84(1)(c), Stats. The Complainant contends also that the Respondent State has "opted" to classify the employes in the bargaining unit as "professionals" within the meaning of the FLSA and has consistently assigned the Association bargaining team members workloads that ignored the fact that those employes were away from work for bargaining, has expected them to still get the work done and pays no extra when they work more than 40 hours, but seeks to dock their pay if less than 40 hours are worked due to bargaining. Under the Respondent State's policy, if the employe takes LWOP for bargaining, he not only loses the pay for the time spent bargaining, but also for any portion of that work day not spent bargaining.

Complainant also contends that the Respondent State violated its duty to bargain by unilaterally adopting a policy that changed the employes' wages, hours and working conditions without first bargaining those changes, in violation of Sec. 111.84(1)(d), Stats.

The Complainant contends that the Respondent State's policy regarding LWOP violates the parties' collective bargaining agreement in the following respects. Article II, Section 13, explicity permits members of the Association's bargaining team to use LWOP for bargaining on the 1987-89 agreement. Article VI, Section 1, was violated in that the Respondent State did not change the bargaining team members' work schedules in accord with that provision when the State did not allow members to work on scheduled work days on which bargaining took place or by forcing them to take paid leave on those days. Article VI, Section 3, and 3 B, was violated when the Respondent State, by its policy, forced bargaining team members to use paid leave at times and in amounts they did not desire. Complianant asserts tha the FLSA does not present a defense, as the Respondent State chose to designate the employes in the bargaining unit as "exempt" "professional" employes within the meaning of that Act, and then proceeded to change their wages, hours and working conditions in disregard of the parties' collective bargaining agreement. There is no law that permits an employer to alter the existing terms of a labor agreement to achieve exempt status for a group of employes. If the contractual wages, hours and working conditions of those employes are not consistent with exempt status under the FLSA, they are not exempt. If the FLSA requires the Respondent State to pay wages in excess of that called for by the labor agreement, it must do so as a matter of law and cannot alter the terms of the agreement to avoid those legally imposed requirements. Article II, Section 13, of the Agreement permits Association bargaining team members to use LWOP for 1987-1989 negotiations and that use has not been restricted in the past to full day increments. The employes were not viewed by the Respondent State as salaried in the past and have been treated as hourly. There is also nothing in the parties' agreement or otherwise that guarantees or requires that the employes be exempt, and the Respondent State may not abrogate the employes' contractual rights in order to protect its interest in having them considered exempt.

It is also argued by the Complainant that the Respondent State's policy contravenes the salary requirements of the FLSA. The FLSA requires that "professional" and "administrative" employes be paid on a salaried basis, as defined in Sec. 541.118 of the Act. That provision also provides in part that:

> 1) An employee will not be considered to be "on a salary basis" if deductions from his predetermined compensation are made for absences occasioned by the Employer . . . . Accordingly, if the employee is ready, willing and able to work, deductions may not be made for time when work is not available.
>
> 2) Deductions may be made, however, when the employee absents himself from work for a day or more for personal reasons, other than sickness or accident. . . . (Emphasis added)

Here the employe requests less than a full day off and the Respondent State requires the employe to take the entire day off, and then treats it as if the employe requested the full day off for personal reasons. The employe is ready and willing to work for the remainder of the day, but the Respondent State's policy does not permit him to work. The policy is aimed at the members of the Association's bargaining team, and in order to take time off for bargaining they had to use paid leave time or forego income for a time period greater than the time for bargaining. The Respondent State cannot choose to designate the employes as exempt under the FLSA and then raise the FLSA as an excuse for not complying with the agreement and cannot use it to justify discouraging employes from participating in protected activity. The authorities cited by the Respondent State are not on point as it is not being argued that the FLSA requires that time spent in negotiations must be considered as "hours worked," rather, the problem is that the State is requiring the employes to take hours off in addition to the time spent in bargaining in order to use LWOP. The authority cited (Sec. 785.42, CFR) does not permit deductions for absences of less than a full day and does not authorize or justify forcing the Association bargaining team members to take more time off than the employes requested in order to avoid the salary requirement of the FLSA. The Complainant asserts that the elements in this case permit the inclusion of a Sec. 111.84(1)(e) charge despite the presence of a grievance procedure in the agreement. In addition, the Respondent State has waived its right to object to the charge by not raising that as an affirmative defense in its answer.

Lastly, the Complainant contends that the Respondent State's proposal on June 8, 1987 to grant 48 hours of compensatory time off to Association bargaining team members for use toward time spent in bargaining, if the Association accepted the State's "last best offer" by July 4, 1987, is a per se violation of Secs. 111.84(1))(a) and (b), Stats. An employer offering a financial inducement aimed exclusively at members of the union's bargaining team, conditioned upon their making concessions or accepting the employer's last best offer, interferes with the employes' bargaining rights in violation of Sec. 111.84(1)(a), and is an attempt to influence their judgment, thereby tending to dominate or interfere with the administration of a labor organization in violation of Sec. 111.84(1)(b).

Respondent

The Respondent State takes the position that its memorandum and policy regarding the use of LWOP for bargaining in full day increments only do not constitute an unfair labor practice as its policy is consistent both with the FLSA and the parties' Agreement. It also takes the position that its proposal for compensatory time off for members of Complainant's bargaining team does not constitute interference, coercion or domination in violation of SELRA.

The Respondent State first contends that with the issuance of Garcia and the employes in this bargaining unit subsequently being classified as "exempt" employes under the FLSA, it was justified in administering its LWOP policy as it did in order to comply with the intent of the parties' Agreement without violating the FLSA. Article II, Section 13, of the Agreement permits members of the Association's bargaining team to use LWOP for bargaining, and, under the FLSA, it must be used in full day increments in order to in fact be without pay. The Agreement does not require that employes must be able to use LWOP in certain increments. The State has the management rights under the Agreement to "utilize personnel methods, and means in the most appropriate and efficient manner possible . . ." and to "manage and direct" its employes, Hence, even though bargaining team members had been able to use LWOP in past negotiations in partial days, with the need to comply with the FLSA, under which partial days would subject the State to liability, the State had the right to manage such leaves in a manner that would reconcile the intent of the Agreement with the requirements of the FLSA so as to avoid liability. The State notified its agencies and the Complainant of its position and the latter understood the State's position and the impact of the FLSA on LWOP. The parties' Agreement or the FLSA do not prohibit the State from taking the action it did. Further, the FLSA recognizes that an employer does not have to treat time in adjusting grievances as "hours worked," if the parties have not recognized it as such. Citing, Sec. 785.42, C.F.R. Thus, it is left to the parties to bargain and here the parties have bargained provisions, and the practice has been, that the use of such leave for bargaining was without pay. An opinion letter extending Sec. 785.42 to negotiations in general pointed out that, however, deductions for absences of less than a full day are not permitted. The State was entitled to require a full day's absence for use of LWOP for bargaining in order to comply with the restrictions under the FLSA and

still comply with Agreement's provisions that the leave be without pay. It was not obligated to bargain a new framework for the use of LWOP other than that expressed in Article II. Since it had no duty to bargain a change in a "current, effective agreement," it did not refuse to bargain in violation of SELRA.

Regarding the alleged discrimination against the members of the Association's bargaining team, the Respondent State contends that those individuals were not singled out because of their participation in concerted, protected activity, rather, they are members of the class of employes relevant to the contract problem being anticipated. There is no evidence of animus. The State was only concerned with effectuating Article II, Section 13 of the Agreement in a manner consistent with the FLSA, and that was achieved by requiring that LWOP be used in full day increments. To allow them to use partial days would have resulted in their receiving a full day's pay under the FLSA, which would be contrary to the intent of the Agreement. The Respondent State asserts it tried its best to treat the individuals uniformly. Andreshak was the only employe who used LWOP in a partial day increment and that ultimately had no practical effect due to his working more than 80 hours in that pay period. Romero was allowed to reschedule his hours, but that option was made available to all of these individuals. According to the Respondent State, there is no evidence that the State refused to adjust team members' workloads. Romero utilized the rescheduling and the others did not explore that option, instead choosing to force the issue on the LWOP. It is also asserted that there is no pattern of discrimination by the Respondent State, as the class was defined by the terms of Article II, Section 13. The law does not require the State to insulate an employe from the loss of pay or leave time for participating in negotiations. That is a "personal committment" on the employe's part. The State only administered its leave policy consistent with the law and the Agreement and treated the employes in accord with both. Moreover, the State was open to negotiation on the subject.

As to an alleged violation of Sec. 111.84(1)(e) Stats., the Respondent State contends that its policy of only permitting LWOP for bargaining in full day increments did not violate the Agreement. The policy permits LWOP in a manner that effectuates it as leave without pay and maintains the quid pro quo of no loss of certain benefits. The Agreement does not require the granting of LWOP in partial day increments and Article II gives management the right to use methods in the most appropriate and efficient manner as possible. As there is no violation of the Agreement, there is no violation of Sec. 111.84(1)(e). The Association's complaint is grounded on a dispute of contract interpretation. Assuming arguendo that there existed grounds for such a dispute of interpretation, the Complainant Association's recourse is to the exclusive dispute resolution procedure it bargained to resolve such disputes, i.e., the contractual grievance and arbitration procedure. No other unfair labor practices are contingent upon the outcome of the dispute as to interpretation and no public policies are implicated. Hence, the Commission has no grounds for retaining jurisdiction. The Respondent State asserts it placed the Complainant on notice at the hearing that it took the position that the alleged contract violation should be subject to the contractual grievance procedure and not before the Commission as an unfair labor practice. Citing City of Appleton 2/, the Respondent State contends that notice was sufficient and that there is no requirement that it be raised as an affirmative defense.

Lastly, the Respondent State asserts that its proposal regarding compensatory time for bargaining for the Association's team members was a counterproposal to the Complainant Association's proposal for paid bargaining time. Tying the proposal to reaching an overall agreement by an early date was justifiable in light of the Association's position on paid bargaining time. The Association first proposed 80 hours of compensatory time off for bargaining and changed that to 180 hours when there was not agreement on the 80 hours. When the State would not agree to 180 hours, the Association refused to bargain further till the issue was settled. In contrast, the State only proposed paid bargaining time as part of a timely agreement on the whole contract. The State did not refuse to consider any counter from the Association and offered to make its best offer, and despite two more days of negotiations that narrowed the number and scope of the issues in dispute, the Association never asked the State for its best offer. It is not coercion or domination to place a contingency on a proposal so long as the

---

2/ Decision No. 14615-C (WERC, 8/78).

contingency does not require an illegal act. The State's proposal with a contingency of a settlement by July 4th, with almost a month's lead time, was not coercion or illegal, especially since the State remained open to discussion of counterproposals on the matter, including the July 4th contingency. The Complainant Association opened the bargaining on the issue and indicated that it was essential to reaching overall agreement, thus, placing a contingency of its own on final agreement. The Association's team members are responsible for exercising their judgment in evaluating proposals and deciding what final agreement is best for the unit, and the State did not interfere with their judgment by its proposal. The Complainant cannot propose paid bargaining time, which only benefited its team members, and then complain that because the State did not concede on the point "their loyalties were being divided" by the State by its making the issue "part of the dynamic quid pro quo of bargaining." Thus, the allegations of coercion and domination must be dismissed.

DISCUSSION

LWOP For Bargaining

In its briefs the Complainant has alleged that by unilaterally implementing a policy whereby use of LWOP for bargaining must be in full day increments the Respondent State violated Secs. 111.84(1)(a)(c)(d) and (e), Stats. The Complainant alleges independent violations of those sections, i.e., that the State's unilaterally imposed policy constituted interference, discrimination, a refusal to bargain, and a violation of the parties' 1985-1987 Agreement.

The Respondent State contends that as the parties' Agreement contains a provision for final and binding grievance arbitration, the Commission should not assert jurisdiction over the contract violation charge. The Respondent State raised that contention in its opening statement at the start of the first day of hearing. There was no objection at that point from the Complainant Association as to the timeliness of that contention, nor did it request a continuance in order to be able to respond to the contention. The Examiner concludes that the Complainant was not prejudiced by the Respondent State's failure to raise the contention in its answer prior to hearing, and that, therefore, the issue is appropriately rasied and is before the Examiner.

The Commission has consistently held that:

> Where an exclusive collective bargaining representative of the employes has bargained an agreement with the employer which contains a procedure for final impartial resolution of disputes over contractual compliance, the Commission generally will not assert its statutory complaint jurisdiction over any breach of contract claims covered by the contractual procedure because of the presumed exclusivity of the contractual procedure and a desire to honor the parties' agreement. Mahnke v. WERC, 66 Wis.2d 524, 529-30 (1974); United States Motor Corp., Dec. No. 2067-A (WERB, 5/49); Harnischfeger Corp., Dec. No. 3899-B (WERB, 5/55); Melrose-Mindoro Joint School District No. 2, Dec. No. 11627 (WERC, 2/73); City of Menasha, Dec. No. 13283-A (WERC, 2/77); University of Wisconsin-Milwaukee, Dec. No. 11457-E (12/75), rev'd on other grounds, Dec. No. 11457-H (WERC, 5/84). 3/

The instant case does not involve circumstances that would cause it to fall within recognized exceptions to that general rule. Therefore, the undersigned has concluded that it would not be appropriate in this case to assert the Commission's jurisdiction over the alleged violations of the parties' Agreement in violation of Sec. 111.84(1)(e), Stats.

The Complainant has alleged the Respondent State refused to bargain regarding the requirement that LWOP must be used in full day increments if an employe elects to use LWOP for bargaining. Both parties have, however, asserted that specific provisions of the Agreement support their respective positions on the use of LWOP

3/ State of Wisconsin, Dec. No. 20830-B (WERC, 8/84), at 9.

for bargaining. The Complainant has contended that Article II, Section 13, "explicitly allows members of the Association bargaining team to elect to use leave of absence without pay for participation in the 1987-89 contract negotiation process." The Respondent State relies on Article II, Sections 7 and 13, and Article III, Management Rights, in asserting that it "was acting within its prerogatives under the existing agreement. . . " and that "It was under no obligation to bargain a new framework for the use of leave without pay for negotiations than the intent expressed in Article II generally, and Section 13 in particular. Without an obligation to bargain a change to these terms which were part of a current, effective agreement, the State did not refuse to bargain in violation of SELRA." The Commission has held that "The duty to bargain collectively during the term of an agreement does not extend to matters covered by the agreement . . ." 4/ Article II, Section 13, of the parties' Agreement expressly covered the use of LWOP for bargaining for members of the Complainant Association's bargaining team for negotiations on a 1987-89 agreement. The parties have already bargained over and reached agreement on the matter and there was no duty on the Respondent State's part to bargain further on the matter in term 5/, it is instead a matter of a dispute on contract interpretation. To the extent the Complainant alleges there was any individual bargaining between management and members of Complainant's bargaining team, the record indicates that, other than the dispute as to the use of LWOP, they were given the same options as in the past and that they have under the Agreement.

While the Complainant has alleged independent violations of Secs. 111.84(1)(a) and (c), Stats., there is no evidence in the record that would support a finding of independent violations. Contrary to the Complainant's claim, it is not per se interference with an employe's rights under Sec. 111.82, Stats., to require employes to take LWOP in full day increments, even if bargaining does not take a full day, or to permit them to use paid leave or rearrange their work schedules. The employes have several alternatives to chose from and there is not a guarantee under SELRA that an employe be able to participate in negotiations without suffering any loss of pay or having to use paid leave time to avoid loss of pay, those are matters for bargaining.

With regard to Sec. 111.84(1)(c), to establish an independent violation the Complainant must establish that "(1) (employes) engaged in protected concerted activity, (2) . . . the employer was aware of said activity and hostile thereto, and (3) . . . the employer's action was based at least in part upon said hostility." 6/ In this case the provision of the Agreement, Article II, Section 13, by its terms, applies only to members of the Association's bargaining team and it is the application of that provision that is in dispute. There has been no showing of animus by the Respondent State toward the Complainant Association or its bargaining team members or that animus toward them or the Association was even partially the basis for the manner in which the State applied Article II, Section 13. Rather, the evidence demonstrates that the Respondent State took the action it did in order to comply with its view of what the FLSA requires. 7/ Therefore, there is not a basis in the record for finding an independent violation of Sec. 111.84(1)(c), Stats., and that charge has been dismissed.

Respondent's Proposal for Use of Compensatory Time for Bargaining

The record indicates that the Respondent State twice verbally proposed providing the Complainant's bargaining team with 48 hours of compensatory time off for bargaining if the parties could reach agreement on the new contract by July 4,

---

4/ State of Wisconsin, Dec. No. 23161-B (Roberts, 1/87), aff'd, Dec. No. 23161-C (WERC, 9/87); City of Richland Center, Dec. No. 22912-B (WERC, 8/86).

5/ As indicated in the Findings of Fact, however, the matter was discussed in negotiations almost from the start of bargaining on a 1987-89 agreement.

6/ State of Wisconsin, Dec. No. 25393 (WERC, 4/88). Citing, State of Wisconsin Department of Employment Relations v. WERC, 122 Wis.2d 132, 140 (1985).

7/ The Examiner does not deem it relevant in this regard whether the State is correct or mistaken in its view of what the FLSA requires.

1987, and the last proposal added the further contingency that it be on the basis of the State's "best offer" that it would subsequently present. The record also indicates that paid time off for bargaining was a major issue in the parties' negotiations. The Complainant Association had proposed 80-180 hours of compensatory time off for bargaining for its team members as part of the parties' bargaining ground rules and at one point refused to meet for bargaining on the contract unless agreement was reached on the ground rules. The difference in the proposals appears to be the fact that the Respondent State tied its proposal to reaching agreement by a specified time and on the basis of its "best offer." The Complainant asserts that the Respondent State's proposal is in effect a bribe aimed exclusively at the members of its bargaining team in order to induce them to agree to the State's terms.

Section 111.84(1)(b), Stats., states it is an unfair labor practice for an employer (State) to "dominate or interfere with the . . . administration of any labor or employee organization . . ." the Commission has held that to establish a violation of that provision, it must be demonstrated that the State's conduct "threatened the independence of the Union as an entity devoted to the employes' interests as opposed to the Employer's interest. 8/ There is no doubt that the Respondent State's proposal was intended to put pressure on the members of the Complainant's bargaining team to agree to the State's offer, however, Sec. 111.84(1)(b), Stats., is not necessarily intended to insulate members of a union's bargaining team from pressures of all sorts. In this case the Respondent State made a counter-proposal on an issue that by all indications was important to the Association bargaining team, and although it asked for something in return, the State did not condition its willingness to continue bargaining or to reach agreement on a contract on the acceptance of its proposal. The parties met on two more occasions (June 9th and 22nd) after the Respondent State last made the proposal and agreement was reached on a number of issues and a number of issues were dropped by both parties at those subsequent sessions. The Examiner has concluded that the pressure placed on the members of Complainant's bargaining team by the Respondent State's proposal was not of the sort or degree to threaten the independence of the Complainant as a representative of the employes' interests. Thus, no violation of Sec. 111.84(1)(b), Stats., has been found.

The Examiner also has not found sufficient evidence in the record that would establish that the Respondent State's proposal would tend to interfere with the rights of the bargaining unit employes set forth in Sec. 111.82, Stats. Thus, no violation of Sec. 111.84(1)(a), Stats., has been found, either derivatively or independently.

Based on the foregoing, the instant complaint has been dismissed in its entirety.

Dated at Madison, Wisconsin this 13th day of December, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
David E. Shaw, Examiner

8/ State of Wisconsin, Dec. No. 25393, (WERC, 4/88) at 17. Citing, State of Wisconsin, Dec. No. 17901-A, (Pieroni, 8/81) at 8; aff'd Dec. No. 17901-B (WERC, 10/82).