STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DISTRICT COUNCIL 24, THE WISCONSIN STATE EMPLOYEES UNION (WSEU), AFSCME, AFL-CIO, and its appropriately affiliated LOCAL UNION NO. 82, and DARYL RANSOM, Complainants, vs. STATE OF WISCONSIN, DEPARTMENT OF EMPLOYMENT RELATIONS (DER), Respondent.	Case 253 No. 40153 PP(S)-142 Decision No. 25284-B

Appearances:
Mr. Richard V. Graylow, Lawton & Cates, S.C., Attorneys at Law, 214 West Mifflin Street, Madison, Wisconsin 53703-2594, at hearing and on brief, and Mr. Chris Wolle, Law Clerk, on brief, appearing on behalf of District Council 24, the Wisconsin State Employees Union (WSEU), AFSCME, AFL-CIO, its appropriately affiliated Local Union No. 82, and Daryl Ransom.
Mr. David Whitcomb, Legal Counsel, Department of Employment Relations, 137 East Wilson Street, Madison, Wisconsin 53703, appearing on behalf of the State of Wisconsin, Department of Employment Relations (DER).

FINDINGS OF FACT
CONCLUSIONS OF LAW AND ORDER

District Council 24, the Wisconsin State Employees Union (WSEU), AFSCME, AFL-CIO, its appropriately affiliated Local Union No. 82, and Daryl Ransom, (hereinafter Complainants), having filed a complaint of unfair labor practices with the Wisconsin Employment Relations Commission (hereinafter Commission) on February 5, 1988, alleging that the State of Wisconsin, Department of Employment Relations (hereinafter Respondent or State) had violated Secs. 111.84(1)(a) and (c), Stats.,; and the Commission having appointed James W. Engmann, a member of its staff, on March 21, 1988, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order, as provided for in Sec. 111.84(4) and Sec. 111.07, Stats.; and on March 21, 1988, the Examiner having issued a Notice of Hearing on Complaint, scheduling said hearing for July 6, 1988; and on July 5, 1988, the Examiner on request of the parties having issued a Notice of Postponement of Hearing, rescheduling said hearing for October 5, 1988; and the Respondent having filed with the Commission on September 21, 1988, an Answer and Affirmative Defenses to Complaint of Unfair Labor Practice wherein it denied that it had violated Secs. 111.84(1)(a) and (c), Stats.; and on September 30, 1988, the Examiner on request of the parties having issued a Notice of Indefinite Postponement of Hearing; and on October 25, 1988, the Examiner having issued a Notice of Rescheduling of Hearing, scheduling said hearing for February 9, 1989; and the Respondent having filed with the Commission on January 6, 1989, a Motion to Dismiss Complaint as Being Untimely Filed; and the Complainants having responded to said Motion by filing with the Commission on January 26, 1989, an Affidavit; and on January 30, 1989, the Examiner having issued an Order Granting Respondent's Motion to Dismiss in Part and Denying Respondent's Motion to Dismiss in Part; 3/ and a hearing before the Examiner having been conducted on February 9, 1989, in Madison, Wisconsin, and on May 2, 1989, in Milwaukee, Wisconsin; and the hearing having been transcribed, the transcriptions of which were received on or before May 17, 1989; and the parties having submitted briefs and reply briefs, the last of which was received on October 2, 1989; and the Examiner, having considered the evidence and the arguments of the parties, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That District Council 24, the Wisconsin State Employees Union (WSEU), AFSCME, AFL-CIO (hereinafter WSEU or Union) is a labor organization which maintains its offices at 5 Odana Court, Madison, Wisconsin 53719; that Local Union No. 82 (hereinafter Local) is appropriately affiliated with the Union; and that Daryl Ransom (hereinafter Complainant) is a member of the Local and the Union and represented by them for purposes of collective bargaining.

2. That the State of Wisconsin is an employer which has delegated responsibility for collective bargaining purposes to the Department of Employment Relations (hereinafter DER), which maintains its offices at 137 East

1/ Decision No. 25284-A.

Wilson Street, Madison, Wisconsin 53707-7855; and that the State also operates a university system, including a campus of the University of Wisconsin at Milwaukee (hereinafter UW-M).

3. That the Complainant began work at UW-M on February 19, 1979 in the civil service classification of Laborer in the Grounds Department; that in 1981 he was selected as a Steward by the Local; that as a Steward from 1981 until the time of hearing, he was involved in over 250 grievances; that the Complainant's activity in filing and processing grievances as a Union Steward is an activity protected by Sec. 111.84(2), Stats.; that by the nature of the Union activity in which the Complainant was involved, UW-M was aware of the Complainant's union activity; that on June 22, 1986, the Complainant was transferred to the Custodial Department; that said transfer was in lieu of layoff; that as a result of the transfer, his civil service classification changed to Building Maintenance Helper 2; that since this was a lateral transfer to a classification in the same pay range as Laborer, the transfer did not cause any change in wages or benefits; and that after the transfer, the Complainant continued to act as Steward.

4. That subsequent to the transfer of the Complainant, a vacancy occurred in a Laborer position in the Grounds Department; that said Laborer position was reviewed for appropriate classification by Personnel Services at UW-M; that it was determined that the vacancy would be staffed as a Laborer-Special; that the classification of Labor-Special is a higher classification than Laborer; that said vacancy was announced in the fall of 1986; that UW-M requested the Division of Merit Recruitment and Selection (hereinafter DMRS) of DER to use certification of a campus register to fill the vacancy; that the first certification of five candidates was dated November 17, 1986; that as only one candidate from that certification was interested in the position, UW-M requested an additional certification; that the second certification of four candidates was dated December 12, 1986; that this certification included the Complainant; that as the first and second certifications did not produce five interested candidates, UW-M requested an additional certification; that the third certification was dated January 13, 1987; that as the three certifications did not produce five interested candidates, UW-M requested a fourth certification on January 26, 1987; and that the fourth certification was dated February 4, 1987.

5. That in January 1987, the Division of Administrative Affairs of UW-M instituted a hiring freeze and stopped recruitment to fill vacancies; that said freeze was division wide, including the Department of Physical Plant Services of which the Grounds Department is a subunit; that on February 10, 1987, UW-M officially suspended the recruitment for the Labor-Special vacancy; that, therefore, neither the Complainant nor anyone else was transferred into the Laborer-Special vacancy; that the decision of UW-M and its Division of Administrative Affairs to institute a hiring freeze and to suspend recruitment to fill the vacancy in the position of Laborer-Special was not motivated, in whole or in part, by the Complainant's union activity; and that said decision was not likely to interfere with, restrain or coerce the Complainant in the exercise of his protected rights as a Union steward.

6. That on or about May 20, 1987, the Department of Physical Plant Services was authorized to fill the Laborer-Special vacancy; that Tasha Trott (hereinafter Specialist) was a personnel specialist employed at UW-M; that she was involved in the filling of the Laborer-Special position; that the Specialist requested a certification from the open competitive register in June 1987; that the register was received and a number of persons were interviewed from that register; that in a memorandum to DMRS dated July 16, 1987, the Specialist requested cancellation of the open recruitment; that she did so because she had become aware that during the first attempt to fill the vacancy, a campus certification had been used; that the Specialist's request to cancel the open recruitment was denied by DMRS in a memorandum dated July 20, 1987; that the Specialist sent a second memorandum to DMRS dated July 20, 1987, explaining her purpose for writing the July 16, 1987, memorandum; that the request of the Specialist was not granted by DMRS; that the Specialist knew the Complainant by name but was not aware of his union activity; and that the actions of the Specialist were not motivated, in whole or in part, by the Complainant's union activity.

7. That the Complainant's name did not appear on the open recruitment register; that, therefore, the Complainant was not chosen to fill the vacancy of Laborer-Special; that another person was hired to fill the Laborer-Special vacancy; that the decision by UW-M to hire another person for the vacancy of Laborer-Special and not to transfer the Complainant was not motivated, in whole or in part, by the Complainant's Union activity; and that said decision was not likely to interfere with, restrain or coerce the Complainant in the exercise of his protected rights as a Union steward.

CONCLUSIONS OF LAW

1. That the State's action in instituting a hiring freeze and suspending recruitment of the Laborer-Special position in January and February of 1987 did not encourage or discourage membership in any labor organization in violation of Sec. 111.84(1)(c), Stats., nor did it interfere with, restrain or coerce

state employes in the exercise of their rights guaranteed in Sec. 111.82, in violation of Sec. 111.84(1)(a), Stats.

2. That the State's action in hiring a person from the open recruitment register to fill the Laborer-Special vacancy in late 1987 did not encourage or discourage membership in any labor organization in violation of Sec. 111.84(1)(c), Stats., nor did it interfere with, restrain or coerce state employes in the exercise of their rights guaranteed in Sec. 111.82 in violation of Sec. 111.84(1)(a), Stats.

Based upon the above and foregoing Findings of Fact and Conclusions of Law, the Examiner issues the following

ORDER 2/

IT IS ORDERED that the complaint is dismissed in its entirety.

Dated at Madison, Wisconsin this 22nd day of May, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
James W. Engmann, Examiner

2/ 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

See Footnote 2/ Continued on Page 4

Footnote 2/ Continued

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.

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER

BACKGROUND

The complaint filed in this matter on February 5, 1988, alleged that the Respondent had violated Secs. 111.84(1)(a) and (c), Stats., by (1) laying off the Complainant on June 30, 1986, in part because of his union activity, and (2) refusing to recall the Complainant to work since that date, in part because of his union activity. On January 6, 1989, the Respondent filed a Motion to Dismiss Complaint as Being Untimely Filed, alleging that the lay off had occurred more than one year prior to the filing of the complaint and was therefore barred by Sec. 111.07(14), Stats. On January 26, 1989, the Complainant filed an Affidavit which stated that from June 1986 through July 1988, the Complainant or the Local had communicated the Complainant's desire to return to work and had made attempts to return the Complainant to work. After considering the matter, the Examiner granted the Respondent's motion as to the allegation that the Respondent violated Secs. 111.84(1)(a) and (c), Stats., by laying off the Complainant on June 30, 1986, in an Order issued January 30, 1989. The Examiner denied the Respondent's motion as to the allegation that the Respondent violated Secs. 111.84(1)(a) and (c), Stats., by refusing to recall the Complainant to work since June 30, 1986, in the Order issued January 30, 1989. Therefore, the issue before the Examiner at this time is whether the Respondent's inaction in returning the Complainant to the position he held prior to his lay off in June 1986 violated Secs. 111.84(1)(a) and (c), Stats.

POSITION OF THE PARTIES

A. Complainant.

On brief, the Complainant argues that the State committed an unfair labor practice when it retaliated against the Complainant for his union activities; that under Sec. 111.84(1)(a) and (c), Stats., an employe may not be terminated from a position if but one of the motivating factors is his union activity, no matter how many other valid reasons may exist for removing him; that the Complainant has been and continues to be very active as a union steward; that bad feelings exist between management and the Complainant; that the Complainant worked as a laborer on the grounds crew at UW-M from 1979 until 1986; that UW-M transferred the Complainant to the custodial department in 1986; that concerted efforts by the Complainant to transfer back to the grounds crew have proved to be fruitless; that the State maintains that the Complainant's transfer out of and failure to return to the grounds crew is merely the neutral management of budget and workforce; that the State's actions and inactions regarding the Complainant were motivated, at least in part, by anti-union animus; and that such is an unfair labor practice under Secs. 111.84(1)(a) and (c), Stats., citing Muskego-Norway Consolidated Schools Joint School District No. 9 v. WERC, 35 Wis.2d 540, 562, 151 N.W. 2d 617 (1967).

On reply brief, the Complainant argues that a preponderance of the evidence indicates that the State committed unfair labor practices; that in its brief the State misapplied the "in part" test of Muskego-Noway; that the refusal of the State to return the Complainant to the grounds crew is an action based upon Union activities which constitutes an unfair labor practice; that the Complainant's supervisors did not want to deal with the Complainant in his role as union steward; that he ended up being transferred; that from his new position, the Complainant has been less able to pursue his duties as union steward; that in light of the hostility exhibited by his supervisors, it is only reasonable to conclude that part of the intent of the transfer was to put a muzzle on the Complainant; that the reason for the State's refusal to put the Complainant back on the grounds crew arises in part because the Complainant now presents less of a nuisance to the grounds crew supervisors in his custodial position; and that the circumstances of this record provide evidence which makes it more likely than not that the Complainant has been prevented from returning to the grounds crew because of his union activities.

B. Respondent.

On brief, the Respondent argues that the Complainant has to prove by a preponderance of the evidence that the Respondent's actions or decisions complained of were motivated in whole or in part by anti-union animus; that the record herein does not support a finding and conclusion that any action or decision of the Respondent violated Secs. 111.84(1)(a) or (c), Stats.; that there were only two occasions when the Complainant could have been returned to the grounds crew; that to have returned to the grounds crew, the Complainant would have had to be promoted from Laborer to Laborer-Special; that the Complainant had no contractual or civil service rights to be appointed to that position; that the Complainant could not have been appointed to the Laborer-Special vacancy because no appointment was made for the first recruitment and because he was not eligible for consideration in the second recruitment; that the reasons for not appointing the Complainant to the Laborer-Special vacancy are not in dispute and do not relate to protected concerted activities; that the record contains no evidence whatsoever that the Respondent's method of recruitment and selection for the Laborer-Special vacancy was handled in a manner inconsistent with the Respondent's personnel policies and procedure of general application; and that the Complainant's prayer for relief misconstrues the nature of the alleged violations.

On reply brief, the Respondent argues that UW-M did not retaliate against the Complainant for his union activities; that no action of the Respondent affected in any respect the Complainant's right to act as a union steward; that the examples pointed to by the Complainant as showing the hostility of the Complainant's supervisors are trivial in light of seven years of very active grievance activity; that the Complainant's application of SELRA to the facts is fallacious; that there is nothing in the record to suggest that any decision-maker involved in the budget freeze in late 1986 or the recruitment activity in 1987 knew of or was motivated by the Complainant's union activity; that the Complainant was not promoted because he was not eligible; that the Complainant was not reclassed because he did not request a reclass and he did not raise the possibility of being reclassed until after he was no longer in the position; that the Complainant was not promoted in January 1987 because the recruitment was one of many that were frozen and no one was promoted; that he was not promoted in July 1987 because the University was not allowed to consider him for the vacancy; and that the process for filling the Laborer-Special vacancy was driven by considerations independent of the Complainant.

DISCUSSION

The complaint alleges that the State has violated Secs. 111.84(1)(a) and (c), Stats., by refusing to return the Complainant to a position on the grounds crew.

Section 111.84(1)(a), Stats., makes it an unfair labor practice for the State to "interfere with, restrain or coerce state employes in the exercise of their rights guaranteed in Sec. 111.82." Section 111.82 guarantees State employes the right to engage in certain "lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection."

The Wisconsin Supreme Court has observed as follows:

> It is helpful to compare the wording of MERA and SELRA, whereupon we find that the rights guaranteed to employees under these acts are identical . . . It would be illogical to apply a different test to MERA than SELRA merely because a different group of protected persons are involved (municipal employees versus state employees). 4/

This observation has been reflected in the test applied by Commission examiners to determine an independent violation of Sec. 111.84(1)(a), Stats., for the test parallels that used to determine an independent violation of Sec. 111.70(3)(a)1, Stats. 5/

Applied to the facts at issue here, the test requires that the Complainant demonstrate by a clear and satisfactory preponderance of the evidence that the State's inaction in not returning the Complainant to the grounds crew was "likely to interfere with, restrain or coerce" the Complainant in the exercise of rights protected by Sec. 111.84(2), Stats. 6/ This is an objective test which does not require proof that the State intended to interfere with the Complainant's exercise of a protected right nor that the

---

3/ State of Wisconsin, Department of Employment Relations v. Wisconsin Employment Relations Commission, 122 Wis.2d 132, 143 (1985).

4/ See, i.e., State of Wisconsin, Dec. No. 25987-A (McLaughlin, 10/89).

5/ See, i.e., State of Wisconsin, Dec. No. 19630-A (McLaughlin, 1/84), aff'd by operation of law, Dec. No. 19630-B (WERC, 2/84).

State acted out of hostility toward the Union. 7/

The Complainant's processing of grievances through the contractual grievance procedure as a union steward constitutes "lawful, concerted activit(y) for the purpose of collective bargaining." The issue posed here is whether the State's inaction in not returning the Complainant to the grounds crew was likely to interfere with that right.

The Complainant argues that from his new position, the Complainant is less able to pursue his duties as union steward. The evidence the Complainant offers in support of this allegation is the assertion, supported in the record, that the number of grievances filed by the Complainant has decreased since the Complainant accepted a transfer in lieu of lay off. Such a decrease could be caused by many factors. This in and of itself does not prove interference. The Complainant did not show how his not being transferred to his former position was likely to interfere with, restrain or coerce the Complainant in the exercise of his duties as union steward, a right protected by statute. He continues to be selected as the union steward by the Local, and he continues to process grievances on behalf of the Local. Thus, the Complainant has not shown by a clear and satisfactory preponderance of the evidence that the State's inaction in not returning him to his former position was likely to interfere with, restrain or coerce the Complainant in violation of Sec. 111.84(1)(a), Stats. Therefore, that allegation is dismissed.

Section 111.84(1)(c), Stats., makes it 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." To establish a violation of this section, the Complainant must establish (1) that the Complainant had engaged in activity protected by Sec. 111.84(2), Stats.; (2) that the State was aware of that activity and was hostile to it; and (3) that the State's action or inaction was based, at least in part, upon said hostility. 8/ Applied to the facts at issue here, the test requires that the Complainant demonstrate by a clear and satisfactory preponderance of the evidence that the Complainant's activity as union steward was protected by Sec. 111.84(2), Stats.; that the State knew of the Complainant's union activity as union steward, and was hostile to it; and that the State's inaction in not returning the Complainant to his former position was based, at least in part, upon said hostility.

No dispute exists that the Complainant's activities as union steward are protected by Sec. 111.84(2), Stats., nor is there a dispute over whether UW-M was aware of his activity as union steward--it surely was. The Complainant has not, however, proven that the State bore the hostility necessary to establish a violation of Sec. 111.84(1)(c), Stats. That hostility, as the court noted, is "anti-union hostility". 9/ The Complainant, at best, can show that on several occasions over a eight year period and 250 grievances the Complainant's supervisors became upset with him. There is no persuasive evidence in the record that these supervisors held any animus toward the Local or the Union or toward the Complainant for representing the Union.

Even if the Complainant were able to show anti-union animus, the State's inaction in not returning the Complainant to his former job was not based at all on the Complainant's union activity. The first recruitment for the Laborer-Special vacancy was suspended as part of a division wide hiring freeze. The Complainant was not able to show that the decision to implement such a division wide freeze was based upon hostility toward the Complainant's union activity. The freeze originated far away from the Complainant and impacted on many people. The record does not contain any evidence that the hiring freeze decision had anything to do with the Complainant personally.

As to the second recruitment, again the record is clear that the person involved in filling the position was not aware of the Complainant's union activity and that the decision to use an open recruitment list had nothing to do with the Complainant. The action was taken in accordance with the State's personnel policies, and the filling of the vacancy with someone other than the Complainant was not done based in any way upon hostility to the Complainant's protected activity. Thus, the Complainant has not shown by a clear and satisfactory preponderance of the evidence that the State's inaction in not returning him to his former position was based in any part on any State hostility to the Complainant's engaging in protected activities. Therefore, that allegation is dismissed.

Dated at Madison, Wisconsin this 22nd day of May, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

6/ See, i.e., The State of Wisconsin, Department of Industry, Labor and Human Relations, Dec. No. 11979-B (WERC, 11/75).

7/ See State of Wisconsin, supra, 122 Wis.2d at 140.

8/ Ibid., at 144.

By _____
James W. Engmann, Examiner