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-C

Appearances:

Lawton & Cates, S.C., Attorneys at Law, by Mr. Richard V. Graylow, 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.

Ms. Teel Haas, 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).

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

Examiner James W. Engmann having on May 22, 1990 issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above matter wherein he concluded that Respondent State of Wisconsin had not violated Secs. 111.84(1)(a) or (c), Stats., by any action it had taken or failed to take vis-a-vis returning Complainant Ransom to a position he formerly held at the University of Wisconsin - Milwaukee; and the Examiner having previously, by Order dated January 30, 1989, dismissed as untimely filed Complainants' allegation that Respondent had violated Secs. 111.84(1)(a) and (c) by laying off Complainant Ransom; and Complainant having timely filed a petition with the Commission seeking review of the Examiners' May 22, 1990 decision pursuant to Secs. 111.84(4) and 111.07(5), Stats; and the parties thereafter having filed written argument or waived same by September 19, 1990; and the Commission, being fully advised in the premises, makes and issues the following

ORDER 1/

That the Examiner's Findings of Fact, Conclusions of Law and Order are affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 28th day of November, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
A. Henry Hempe, Chairman

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Herman Torosian, Commissioner

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William K. Strycker, Commissioner

(See Footnote 1/ on Page 2)

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

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

17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

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

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

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

. . .

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

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

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

The complaint was filed on February 5, 1988 and alleged in pertinent part:

. . .

> 5. Daryl Ransom, hereinafter Ransom, was and continues to be a full-time, classified State employee working for and employed by the State of Wisconsin at the UW-Milwaukee. Ransom was and continues to be exclusively represented by District Council 24 and Local Union No. 82.
>
> 6. Where material hereto, Ransom was hired as a laborer on the grounds crew on or about February 19, 1979.
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> 7. He continued to work as a member of said ground crew until about June 30, 1986, when he was laid off.
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> 8. During this period of time, that is to say the period of time between February 19, 1979 and June 30, 1986, Mr. Ransom processed a number of grievances for and in behalf of the grounds crew, of which he was a member, pursuant to the terms of the collective bargaining Agreements then in effect between these organizationally named Complainants and the State of Wisconsin.
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> 9. The number of grievances filed as referred to in the immediately preceding paragraph is conservatively estimated to be at least one hundred (100). The grievances filing and processing as articulated herein was open, notorious and was done with the full and complete knowledge of the State Employer.
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> 10. Ransom had and continues to have a good work record with the State of Wisconsin.
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> 11. The decision to lay-off Ransom was motivated, in part, because of the aforementioned activities of Ransom, relating to filing and processing grievances.
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> 12. At various times and occasions, since the effective date of layoff that is to say June 30, 1986, Ransom has tried without success to return to the ground crew.
>
> 13. The refusal to return Ransom to the ground crew was motivated, in part, by Ransom's grievance filing and processing activity, as previously noted herein.
>
> 14. The (in)action(s) of the State Employer as described herein is in violation of Sections 111.84(1)(a) and (1)(c) Wis. Stats. (1985-86).

. . .

Respondent filed an answer denying that it had committed the alleged unfair labor practices and subsequently filed a motion to dismiss alleging the complaint was untimely filed more than one year after the occurrence of the alleged unfair labor practice.

On January 30, 1989, the Examiner granted Respondent's motion to dismiss as to allegations which related to Complainant Ransom's layoff, but denied the motion as to the portion of the complaint related to Respondent's alleged failure to return Complainant Ransom to the grounds crew.

Following hearing and submission of written argument, the Examiner issued a decision on May 22, 1990 which dismissed the remaining portion of the complaint. He concluded that Respondent was not hostile toward Complainant Ransom's grievance activity and further that Respondent's conduct when seeking to fill the position to which Ransom wished to return was governed by considerations totally unrelated to Ransom's grievance activity.

POSITIONS OF THE PARTIES ON REVIEW

The Complainants

Complainants urge the Commission to reverse the Examiner's conclusion that the Respondent's failure to return Complainant Ransom to the grounds crew at University of Wisconsin-Milwaukee did not violate Secs. 111.84(1)(a) and (c), Stats.

Complainants contend that the record clearly establishes both Complainant Ransom's extensive union activity as a steward and Respondent's knowledge thereof. Complainants also assert that there is ample evidence in the record of Respondent's hostility toward Ransom's union activity. In this regard, Complainants argue the conduct of Ransom's first line supervisor during grievance meetings demonstrates the supervisor's disdain, resentment and hostility toward Ransom's activities as steward. Complainants also contend that Ransom's second line supervisor threatened Ransom on two occasions and that Complainants therefore have established the necessary linkage between Respondent's hostility and the failure to return Ransom to the grounds crew.

Complainants acknowledge that there is evidence in the record from which it could be concluded that Respondent's decision not to return Ransom was based on "benign neutral" factors. However, Complainants contend that the record also establishes Respondent's actions were motivated, at least in part, by hostility toward Ransom's activity as union steward. Citing DER v. WERC, 122 Wis.2d 132 (1985), Complainants contend that the record therefore warrants the conclusion that Respondent violated Secs. 111.84(1)(a) and (c),Stats.

The Respondent

Respondent asserts that the issue on review is limited to whether Respondent violated Secs. 111.84(1)(a) or (c), Stats., by failing to return Complainant Ransom to the grounds crew position he held before his transfer in lieu of layoff in June 1986. The Respondent urges the Commission to affirm the Examiner's conclusion that no violation was established by Complainants.

Respondent contends that:

. . .

> After June 1986, there were only two opportunities for Mr. Ransom to be considered for a vacancy on the grounds crew. The first opportunity arose in October 1986, and Mr. Ransom did receive an interview. But before anyone could be appointed to the position, the process was stopped by a hiring freeze that lasted several months. The employer has provided credible testimony and evidence about the budget cuts and hiring freeze that occurred in 1987, and has shown that these were neutral management decisions that affected many employees at the University, not just Mr. Ransom.
>
> The second opportunity to be considered arose in May 1987 after the hiring freeze was lifted. The employer has explained the process that was followed after the freeze was lifted to fill the Laborer-Special position. The personnel specialist who requested the open competitive register did not know anything about Mr. Ransom's union activities and was not aware that an agency-wide register had been used for the same position in January. Mr. Ransom's name was not on the certifi-cation list the employer was required to use. The directive to the employer to use the state-wide certifi-cation list, instead of the campus-wide list, came from the Administrator of the Division of Merit Recruitment and Selection, DER, who is statutorily responsible for administering the state civil service laws. There is nothing in the record to show that the Administrator knew anything about Mr. Ransom, or that his decision was in any way influenced by Mr. Ransom's union activities. In fact, there is evidence in the record that Mr. Ransom's previous supervisors,

> Mr. Skodinski and Mr. Domahoski, were the ones who contacted the Personnel Specialist and had her try to get permission from DMRS to use the campus-wide list that included Mr. Ransom's name as a candidate. Such efforts are certainly incon-sistent with the allegation of anti-Union animus.
>
> Respondent therefore respectfully requests that the Examiner's Decision No. 25284-B, dated May 22, 1990, be affirmed in its entirety.

DISCUSSION

The only issue timely raised by Complainants before the Commission is whether the fact that Complainant Ransom did not return to the University of Wisconsin-Milwaukee grounds crew during the one year period prior to the February 5, 1988 filing of the complaint was in any way related to hostility by Respondent toward Ransom because of his extensive protected activity filing and processing grievances. The Examiner properly dismissed as untimely filed that portion of the complaint which alleged that Complainant Ransom's June 1986 departure from the grounds crew was also based in part upon such hostility.

There is no dispute that Ransom was exercising Sec. 111.84(2) rights when he filed and processed grievances. Clearly, Respondent was aware of Ransom's grievance activity. What is disputed is whether Respondent was hostile toward Ransom's grievance activity and, if so, whether that hostility played any role in Ransom's inability to return to the grounds crew during the period in question.

As to the issue of hostility, the Examiner noted in his Memorandum that the record contains evidence that Complainant Ransom and his supervisors clashed on occasion during grievance meetings. However, the Examiner found this evidence insufficient to establish hostility by Respondent toward Complainant Ransom's grievance activity. To the extent the Examiner was reasoning that the processing of grievances may generate the angry expression of strong differences of opinion over the merits of a grievance and that such anger cannot necessarily be equated with hostility toward an employe's protected right to file or process grievance, we agree with the Examiner.

However, the record also contains evidence that on one occasion, the verbal exchanges between Ransom and his supervisor(s) moved beyond anger generated by the merits of a grievance and into the realm of hostility toward grievance activity itself. As to this occasion, Ransom testified that his second line supervisor intervened during a particularly loud grievance meeting and made comments most reasonably interpreted as a threat to Ransom's job security should he continue to so vocally process a grievance. (Tr. Vol. 1, p. 53)

On the other hand, the record also establishes that Ransom's second line supervisor raised the question of why no University of Wisconsin - Milwaukee employes appeared on the 1987 Laborer - Special certification list action which had the potential to enhance Ransom's opportunity to return to the grounds crew in the summer of 1987 (Tr. Vol. II, p. 58) While we find this record as to the question of hostility both more complex than portrayed by the Examiner and presenting a closer question, on balance, we reach the same ultimate conclusion as did the Examiner.

Even if the requisite hostility had been established by Complainants, the Examiner concluded that Ransom's inability to return to the grounds crew was based on factors totally unrelated to Ransom's union activity. The Examiner held in his Memorandum:

> 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.
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> As to the second recruitment, again the record is clear that the person involved in filing 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 Complaint 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.

We concur with the Examiner's analysis. We would additionally note that as to the first recruitment, Ransom was interviewed for a grounds crew position prior to imposition of the freeze. As to the second recruitment which produced the only grounds crew vacancy filled during the period in question, it should also be noted that after becoming aware that a state-wide certification was being used, the University of Wisconsin-Milwaukee attempted, albeit unsuccessfully, to limit the recruitment pool in a manner which would have given Ransom an opportunity to compete for the position as a previously certified applicant.

Given the foregoing, we are satisfied that Respondent's conduct when filling or attempting to fill grounds crew positions during the period in question was based solely upon factors unrelated to Ransom's grievance activity. Thus, we affirm the Examiner's dismissal of the complaint.

Dated at Madison, Wisconsin this 28th day of November, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
A. Henry Hempe, Chairman

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Herman Torosian, Commissioner

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William K. Strycker, Commissioner