STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN STATE EMPLOYEES UNION (WSEU), AFSCME, COUNCIL 24, AFL-CIO, Complainant, vs. STATE OF WISCONSIN, DEPARTMENT OF EMPLOYMENT RELATIONS, Respondent.	Case 236 No. 36951 PP(S)-128 Decision No. 25393

Appearances:

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

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

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On May 7, 1986, the WSEU filed with the Wisconsin Employment Relations Commission (Commission) a complaint of unfair labor practice consisting of two counts in which the WSEU alleged that the State was violating Secs. 111.84 (1) (a), (b), (c) and (d) of the State Employment Labor Relations Act (SELRA), by the State's use of limited term employes and inmates to perform certain work. By June 11, 1986, the WSEU and the State agreed to waive the issuance of an Examiner's decision in the matter. On July 2, 1986, with the agreement of the WSEU and the State, hearing on the matter was scheduled for September 9, 10 and 11, 1986, before Richard B. McLaughlin, a member of the Commission's staff. On July 9, 1986, the WSEU filed with the Commission a first amended complaint, consisiting of four counts, alleging that the State was violating Secs. 111.84 (1) (a), (b), (c) and (d), Stats., by the State's use of limited term employes, inmates and work release prisoners to perform certain work. On August 13, 1986, the State filed with the Commission an answer with affirmative defenses and motions, in which the State requested, among other things, that the Commission defer count one of the complaint to grievance arbitration and that the Commission order the WSEU to make count four of the complaint more definite and certain. On September 12, 1986, the Commission, through Examiner McLaughlin, rescheduled hearing on the matter for October 15, 16, and 17, 1986, and also confirmed in writing that the WSEU and the State were to submit written argument on the State's motions by September 15, 1986. The State filed a brief on the motions and a supplemental statement of position on September 15, 1986. The WSEU filed its brief on September 17, 1986. On September 18, 1986, the State filed with the Commission a written request that the WSEU's brief not be considered due to the untimeliness of its filing. On September 24, 1986, the WSEU filed with the Commission a written request that the WSEU be granted a two day extension of the briefing schedule so that its brief could be considered by the Commission. On September 24, 1986, the Union filed with the Commission a letter noting that one of its witnesses would be unable to be present at the hearings set for October 15, 16 and 17, 1986. On September 26, 1986, the State filed with the Commission further written argument that the Commission should not consider the WSEU's brief due to the untimeliness of its filing, and also filed with the Commission a request that the hearings set for October 15, 16 and 17, 1986, be rescheduled or conducted in a manner which did not permit WSEU witnesses to testify after the State had put in its case. On September 29, 1986, the State filed with the Commission a request that the Commission allow the State to amend its answer and affirmative defenses to include as attachments fifteen grievances relevant to

count one of the complaint. On October 11, 1986, the Commission, through Examiner McLaughlin, rescheduled hearing on the matter until December 18 and 19, 1986, and reserved January 12, 13 and 14, 1987, for any necessary further hearing. On November 11, 1986, the WSEU submitted certain authority relevant to the State's motions. On December 2, 1986, the Commission issued an order denying motion to defer count one of first amended complaint to grievance arbitration and granting motion to make count four of the first amended complaint more definite and certain. 1/ On December 4, 1986, the WSEU filed with the Commission a motion to amend the complaint by adding a count five by which the WSEU alleged that the State had violated Secs. 111.84 (1) (a), (b), (c) and (d), Stats., by using certain convicted felons to perform certain barbering work. Also on December 4, 1986, the WSEU filed a written request with the Commission that hearing in the matter scheduled for December 18 and 19, 1986, not be commenced until December 19, 1986. On December 11 and 12, 1986, the WSEU filed written responses to the Commission's order to make count four of the complaint more definite and certain. On December 12, 1986, the State filed its answer to count five of the amended complaint, and also filed a request that the Commission grant a continuance in the matter until January 12, 1987, so that the State could adequately prepare its defense to count five, and so that the WSEU could fully comply with the Commission's order to make count four of the complaint more definite and certain. On December 15, 1986, the WSEU submitted further written material regarding the Commission's order to make count four of the complaint more definite and certain. On December 16, 1986, Examiner McLaughlin issued a letter to the State and the WSEU informing them, among other things, that hearing on the matter would commence on December 19, 1986, would involve the taking of evidence, to the extent time permitted, on counts one, two, three and five of the complaint, and would involve the taking of evidence on count four only if counsel for the WSEU and the State were mutually willing and prepared to so proceed. On December 19, 1986, hearing on the matter was conducted in Madison, Wisconsin before Examiner McLaughlin. On January 6, 1987, the Commission, through Examiner McLaughlin, issued a letter to the WSEU and the State informing them that the WSEU had not yet complied with the Commission's order to make count four of the complaint more definite and certain, and that no evidence on count four would be taken at the hearing scheduled for January 12, 13 and 14, 1987. On January 7, 1987, the WSEU submitted further material and argument in response to the Commission's order to make count four of the complaint more definite and certain. Further hearing on the matter was conducted on January 12 and 13, 1987, in Madison, Wisconsin, before Examiner McLaughlin. During the course of that hearing argument on, and the amendment of, count four was submitted. On January 20, 1987, the WSEU made a written offer of proof regarding a certain exhibit submitted during hearing on the matter. In a letter filed with the Commission on January 26, 1987, the State refused to stipulate to the accuracy of all the material covered by the WSEU's offer of proof, and noted its willingness to schedule further hearing on the matter. In a letter filed with the Commission on January 29, 1987, the WSEU requested further hearing on the matter. Further hearing on the matter was conducted on April 3, 1987, in Madison, Wisconsin, before Examiner McLaughlin. During the course of that hearing the WSEU withdrew count four of the complaint. The WSEU and the State filed written briefs in the matter, the last of which was received by the Commission on September 11, 1987.

Having considered the arguments and the record, the Commission makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The WSEU is a labor organization which has its offices located at 5 Odana Court, Madison, Wisconsin 53719.

2. The State of Wisconsin, among its various functions, operates as an employer. As an employer, the State negotiates and administers collective bargaining agreements through its Department of Employment Relations, which has its offices located at 149 East Wilson Street, Madison, Wisconsin 53703. Among its operational subdivisions, the State operates a Department of Health and Social Services (DHSS) which, among its operational subdivisions, operates a Division of Corrections. The Division of Corrections, as of January of 1987, operated eight

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1/ State of Wisconsin, Department of Employment Relations, Dec. No. 24109 (WERC, 12/86). The Commission was composed of Chairman Torosian and Commissioners Gratz and Davis-Gordon

major adult correctional institutions, roughly fifteen community correctional facilities and two juvenile correctional facilities. Among these facilities are included a maximum security prison known as the Waupun Correctional Institution, which is referred to below as Waupun, and a medium security prison known as the Kettle Moraine Correctional Institution, which is referred to below as Kettle Moraine. The Division also operated, among those facilities, the Dodge Correctional Institution, which is referred to below as Dodge, as well as correctional institutions located in Green Bay, Oshkosh, and Portage. Also included among those facilities were minimum security facilities known as the Oregon, Flambeau, McNaughton, Winnebago and Gordon Centers.

3. The WSEU serves as the exclusive collective bargaining representative for all state employes whose classifications have been allocated to the statutorily created bargaining units known as the Clerical and related and the Security and public safety bargaining units. In its capacity as the exclusive collective bargaining representative for these employes, the WSEU has negotiated collective bargaining agreements with the State, including one which, by its terms, was in effect from December 5, 1985, to June 30, 1987. Included among the provisions of that agreement are the following:

ARTICLE II

Recognition and Union Security

Section 1: Bargaining Unit

2/1/1 The Employer recognizes the Union as the exclusive collective bargaining agent for all employes, as listed below:

. . .

2/1/3 SECURITY AND PUBLIC SAFETY (SPS)

. . .

2/1/5 CLERICAL AND RELATED (CR)

. . .

ARTICLE III

Management Rights

3/1/1 It is understood and agreed by the parties that management possesses the sole right to operate its agencies so as to carry out the staturory 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. 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.

(3) To transfer, assign or retain employes in positions within the agency.

(4) To suspend, demote, discharge or take other appropriate disciplinary action against employes for just cause.

(5) To determine the size and composition of the work force and to lay off employes in the event of lack of work or funds or under conditions where management believes that continuation of such work would be inefficient or nonproductive.

(6) To determine the mission of the agency and the methods and means necessary to fulfill that mission including the contracting out for or the transfer, alteration, curtailment or discontinuance of any goals or services. However, the provisions of this Article shall not be used for the purpose of undermining the Union or discriminating against any of its members.

ARTICLE XI

. . .

Section 15: Contracting Out

11/15/1 (BC, CR, SPS, T, RSA, PSS) When a decision is made by the Employer to contract or subcontract work normally performed by employes of the bargaining unit, the state agrees to a notification and discussion with the local Union at the time of the Request for Purchase Authority (RPA) but not less than thirty (30) days in advance of the implementation. The Employer shall not contract out work normally performed by bargaining unit employes in an employing unit if it would cause the separation from the state service of the bargaining unit employes within the employing unit who are in the classifications which perform the work. It is understood that this provision shall not limit the Employer's right to contract for services which are not provided by the employing unit, services for which no positions are authorized by the legislature, or services which an agency has historically provided through contract (including, but not limited to, group home services, child caring institutions, and services under s. 46.036, Stats.) If an employe is involuntarily transferred or reassigned as a result of subcontracting, every reasonable effort will be made to retain the employe in the same geographic area and at the same rate of pay.

. . .

ARTICLE XV

General

Section 1: Obligation to Bargain

15/1/1 This Agreement represents the entire Agreement of the parties and shall supercede all previous agreements, written or verbal . . . The parties acknowledge that during the negotiations which resulted in this Agreement each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that all of the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. Therefore, the Employer and the Union for the life of this Agreement and any extension, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter referred to or covered in this Agreement, or with respect to any subject or matter not specifically referred to or covered in this Agreement, even though such subject or matter may not have been within the knowledge or contemplation of either or both of the parties at the time that they negotiated this Agreement.

. . .

The agreement also contains provisions governing overtime (Article VI, Section 3), transfers (Article VII) and layoffs (Article VIII). The agreement contains, at Article IV, a grievance procedure which provides for final and binding arbitration.

4. Edwin Zillmer was employed by the State as a full time employe from October of 1953 until his retirement in October of 1983. During this period, Zillmer typically worked eight hours per day, and forty hours per week. At the time of his retirement, Zillmer was classified as a Correctional Officer II. The working title of the position Zillmer filled for the six years prior to his retirement was Construction Coordinator. As Construction Coordinator, Zillmer was responsible for overseeing the security attendant to escorting outside contractors into and out of Waupun for their work on construction projects within the facility. Among other duties as Construction Coordinator, Zillmer had to inform contractors and their employes of relevant security regulations, and had to escort such employes to and from their work within the institution. He also had to observe them at their work, and to keep them separated from inmates. In addition, Zillmer had to maintain a count of each contractor's tools to assure that all tools that came into the institution also left. He was responsible for assuring that all tools were not accessible, at any time, to inmates. While Construction Coordinator, Zillmer would, as necessary, travel throughout the institution overseeing a number of construction projects. He was responsible for observing and for coordinating the work of other officers assigned to effect the necessary security measures. At one point during his tenure as Construction Coordinator, Zillmer coordinated the work of fifteen officers. After Zillmer's retirement, the State employed another Correctional Officer, Gordon Peppler, to perform the duties of Construction Coordinator. Peppler served as Construction Coordinator from Zillmer's retirement until sometime in 1984. Construction work within the institution declined during Peppler's tenure, and no one succeeded him as Construction Coordinator. The State rehired Zillmer as a Limited Term Officer 1 at Waupun. Zillmer's work as a limited term employe (LTE) began on March 17, 1986. The purpose of this appointment was described in a letter from Warren Young, the Superintendent of Waupun, to Zillmer dated March 14, 1986:

> The purpose of this appointment is to provide security supervision over contractors and the immediate work area during the installation of a new locking system in the Northwest cell hall. This appointment cannot exceed 1,043 hours.

The purpose of the request for this LTE appointment was summarized in a "LIMITED TERM EMPLOYMENT REQUEST/REPORT" signed by Young in November of 1985. That document stated the following:

> This position is to provide security supervision over contractors and the immediate work area during the installation of new locking system in the Northwest Cell Hall. This project is expected to take from six to nine months.
>
> The State Building Commission approved funds for completion of this project and mandated that it be done. There is legislative interest in the completion of this project. The auditors also recommended that this be done. Alternative to hiring an LTE would be to hire overtime for the six to nine months of this project.

The locking project Zillmer was hired to assist with had been considered for roughly ten years prior to its authorization. The problem which prompted the authorization of the project involved the inmates' ability to tamper with a certain locking system. The immediate impetus for the project came when a fire bombing occurred and an inmate who grabbed hold of certain cell bars caused the bars to open. A subsequent investigation revealed that a number of cells could have their opening mechanisms tripped. The locking project ultimately involved the replacing of the mechanisms of about two hundred locks, the making of the necessary keys as well as the modification of the cell doors and the replacement of the cell door tracks. A private contractor performed the necessary work, which started in March of 1986 and continued until October of that year. The State offered the LTE appointment to Zillmer after another retired Correctional Officer had refused the offer. The State has a policy of preferring to hire retired officers for limited term security measures. As an LTE, Zillmer worked eight hours per day, forty hours per week, escorting the employes of the private contractor into and out of the institution. He was also responsible for maintaining a count of the contractor's tools and for assuring the security of those tools at all times. He also checked the contractor's employes with metal detection equipment, and observed their work, assuring the separation of those employes and the inmates. Zillmer was informed, at the time of his hire as an

LTE, that he should not escort prisoners as a part of his duties. Zillmer did, however, on at least one occasion, escort a prisoner from one part of the facility to another.

5. Karen Van Den Hoek was first hired by the State in July of 1983 to work as an LTE in the Security Office at Waupun. She worked in that status for various intervals between July of 1983 and August of 1984, when she was laid off. After again serving as an LTE at Waupun, Van Den Hoek was hired on a full time basis by the State in September of 1984, as a word processor at the Winnebago Mental Health Care Institution. On April 1, 1985, she transferred from Winnebago back to Waupun to assume a full time position classified as Typist. She worked as a full time Typist from April 1, 1985, until her lay off on June 21, 1986. She received letters notifying her of her then impending layoff on May 14 and May 27 of 1986. The letter of May 27, 1986, reads as follows:

> Due to budgetary reductions throughout the Department of Health and Social Services, your position has been designated for deletion commencing with the 1986-87 fiscal year. Therefore, this letter is your official notification of layoff from the Waupun Correctional Institution as a Typist, with an effective date of June 21, 1986.
>
> Under the terms of the agreement between the Wisconsin State Employees Union and the State of Wisconsin, you have the right to decide if you wish to exercise your bumping rights and/or request a voluntary demotion. You must notify your Personnel Manager, Glenn Weeks, in writing of your decision to exercise your bumping rights and/or request a voluntary demotion by June 1, 1986. You may also transfer in lieu of layoff at any time through your last working day. (See Article VIII, Section 5 for details.)
>
> If you are not able to voluntarily demote, transfer in lieu of layoff, or bump, or decide not to exercise these rights, your last day of work will be June 19, 1986, and your paycheck will be available on July 3, 1986. The final check will include any unused vacation and holiday time earned through June 21, 1986, or an adjustment made for overdrawn vacation and/or holiday time.
>
> Under Article VIII, Section 6 of the Labor Agreement, you have recall rights at the Waupun Correctional Institution employing unit in your current classification or in one which you could have bumped under Section 5(B)(1)a for a period of five years.
>
> Under Section 7 you also have rights for mandatory reinstatement within the Department to fill a vacancy in the same class or one to which you could have bumped under Section 5(B)(1)a in an employing unit other that the one from which you were laid off.
>
> In addition, you will be referred to other classifications in the Department of Health and Social Services on a permissive transfer or demotion basis according to the "Layoff Referral Information Sheet" (DHSS-DMS-Pers-150) providing you have completed the form and returned it to Gleen Weeks, Personnel Manager. If you do not obtain a position and you are laid off from the State of Wisconsin, your Form 150 will be used to enter your name into the Department of Employment Relations statewide layoff referral system. You will also be eligible to compete for promotional opportunities in state service for which you would have been eligible had layoff not occurred. It is the responsibility of the laid off employee to keep informed of promotional opportunities for which the employee is eligible to compete.
>
> Enclosed is an information sheet which explains the effect of a layoff on fringe benefits. Any questions regarding your fringe benefits should be directed to Lorna Kamp, Payroll and Benefits Assistant 4, Waupun Correctional Institution, 414-324-5571.

> It is our intention to provide you with as much assistance and information as possible in this matter. Please keep in close communication with your Personnel Office.

The Position Description for the classification title Typist summarized Van Den Hoek's duties thus:

> Responsible for the preparation of typewritten material required for the Administrative function of the Security Department. Preparation and recording of results of program and disciplinary hearings of inmates. Reception of new inmates to institution. Manitenance of inmate count and movement records.

The "OBJECTIVES AND TASKS" section of that Position Description states that the position required that about 75% of an incumbent's time was spent in "Preparation of typewritten material required for the Administrative function of the Security Department;" 10% of an incumbent's time was spent in "Preparation and recording of the results of program and disciplinary hearings of inmates;" 10% of an incumbent's time was spent in "Reception of new inmates to the institution;" and 5% of an incumbent's time was spent in "Maintenance of inmate count and movement records." Van Den Hoek performed such duties when employed by the State as a full time Typist at Waupun. The Position Description lists Virginia Allen as the "FORMER INCUMBENT" of the position. Van Den Hoek did return to Waupun as an LTE. The letter confirming her appointment summarized the appointment thus:

> This letter is to confirm your selection as Limited Term Typist at the Waupun Correctional Institution. You will be assigned to the Business Office. Your rate of pay will be $7.084 per hour, which includes your salary at the time of your lay-off on June 21, 1986, plus a 6 percent increase per contract agreement between the State of Wisconsin and WSEU for clerical and related employees.
>
> This appointment is effective Wednesday, August 20, 1986. Your are to report to the Personnel Office at 7:00 a.m. on that date.
>
> The purpose of this appointment is to perform typing and clerical and fiscal services for the Business Office. This appointment has been approved for three months only until vacant Fiscal Clerk 3 position is filled.

. . .

Among other duties as an LTE, Van Den Hoek assists in taking inmate counts, writing out checks that inmates send to various vendors, and assisting with purchasing and cash institution carriers. While employed as a full time Typist, Van Den Hoek worked forty hours per week on a rotating schedule of five days on, three days off, followed by ten days on, three days off. As an LTE, Van Den Hoek worked from 7:00 a.m. until 4:00 p.m. on Monday through Friday for forty hours per week.

6. Virginia Allen was first employed by the State at Waupun in August of 1983, as an LTE. She was employed by the State as a full time employe during the period from January 21, 1984, until October 25, 1985, classified as a Typist. While employed at Waupun, Allen worked in the Security Office. Among other duties, Allen checked in new admissions, and assigned them to housing units. She also set up and assigned passes for minor and major disciplines, and amended and updated certain security records. She also assisted in maintaining various inmate counts and in processing inmates for trips out of the institution. Sometime late in October, 1985, Allen was informed by Young and by Glenn Weeks, the Personnel Manager at Waupun, that her position was going to be eliminated, and that inmates would assume her duties. She helped to train the inmates who took over her duties. She transferred on October 25, 1985, to Dodge, where she continued to work classified as a Typist. Dodge is located in Waupun, Wisconsin. Allen's pay rate did not change as a result of the transfer, but she lost certain work for which a premium above the base rate was paid.

7. Jane Zwicker was employed by the State at Waupun from November of 1982 until her layoff on June 21, 1986. Zwicker was employed on a full time basis, classified as a Fiscal Clerk 1, from March of 1983 until June 21, 1986. Zwicker was notified of her layoff in a letter from Young dated May 14, 1986. The first three paragraphs of that letter read as follows:

> Due to budgetary reductions throughout the Department of Health and Social Services, your position has been designated for deletion commencing with the 1986-87 fiscal year. Therefore, this letter is your official notification of layoff from the Waupun Correctional Institution as a Fiscal Clerk 1, with an effective date of June 21, 1986.
>
> Under the terms of the agreement between the Wisconsin State Employees Union and the State of Wisconsin, you have the right to decide if you wish to exercise your bumping rights and/or request a voluntary demotion. You must notify your Personnel Manager, Glenn Weeks, in writing of your decision to exercise your bumping rights and/or request a voluntary demotion by May 19, 1986. You may also transfer in lieu of layoff at any time through your last working day. (See Article VIII, Section 5 for details.)
>
> If you are not able to voluntarily demote, transfer in lieu of layoff, or bump, or decide not to exercise these rights, your last day of work will be June 20, 1986, and your paycheck will be available on July 3, 1986. The final check will include any unused vacation and holiday time earned through June 21, 1986, or an adjustment made for overdrawn vacation and/or holiday time.
>
> . . .

The balance of this letter is identical to the corresponding paragraphs of the May 27, 1986, letter to Van Den Hoek, which is set forth in Finding of Fact 5 above. While employed as a Fiscal Clerk 1, Zwicker was covered by a Position Description which summarized the major goals of her position thus:

> Under supervision of Account Specialist 3--Supervisor assists Fiscal Clerk 3--Cashier in daily receipt and disbursement of inmate and institution funds; prepares billings and types vouchers, monthly estimates and billings, and performs other cash and check functions. This position works in the Business Office of a maximum security adult male correctional institution.

The section of the Position Description headed "GOALS AND WORKER ACTIVITIES" states that the position Zwicker occupied could typically be expected to require that she spend 30% of her time at duties involving the "Receipt and deposit of inmate and institution funds;" 20% of her time at duties involving the "Preparation of checks for signature and release;" 15% of her time at duties involving the "Preparation of typed copy and filing of reports and forms;" 10% of her time at duties involving the "Verification and preparation of utility bills;" 10% of her time at duties involving the "Transaction of business at reception counter;" and 15% of her time at duties involving the "Preparation of various reports, vouchers, invoices, requisitions and checks." Zwicker also was required to perform miscellaneous secretarial duties when no secretary was available to perform such duties.

8. George Ehlert was first employed by the State, classified as a Barber, in 1959. From 1962 until June 21, 1986, he worked as a barber at Kettle Moraine. Ehlert worked at Kettle Moraine on a full time basis until 1972. During this period, Kettle Moraine served as a juvenile correctional institution. Due to declining inmate population, Ehlert's full time position was reduced to a half time position in 1972. In 1974, Kettle Moraine was converted to a medium security correctional institution for adult males. While working at Kettle Moraine as a full time employe, Ehlert was required to operate the barber shop within the institution, schedule and perform haircuts and, where appropriate, instruct inmates on personal hygiene. Ehlert was also responsible for maintaining the barber shop and its equipment. Prior to his layoff on June 21, 1986, Ehlert worked half time at Kettle Moraine and half time at Dodge. While thus employed,

Ehlert's duties were covered by Position Descriptions for each institution. The Position Description for Kettle Moraine summarized the major goals of the position classified as Barber thus:

> Management and operation of the Barbering program of the institution. General areas of responsibilities include the provision of barbering services to residents and the management and scheduling of the barbering program.

The Position Description for Dodge summarized the major goals of the position classified as Barber thus:

> Management and operation of the Barbering program of the institution. General areas of responsibilities include the provision of barbering services to residents/patients and the management and scheduling of the barbering program.

Each of these Position Descriptions stated that the position Ehlert occupied could typically be expected to require him to spend 80% of his time at duties involving the "Provision of needed barbering services to residents;" and 20% of his time at duties involving the "Management of the barbering program." Ehlert was advised of his then impending layoff from Kettle Moraine in a letter from Richard Franklin, the Superintendent of Kettle Moraine, to Ehlert dated May 22, 1986. That letter reads as follows:

> The Governor's Fiscal Management Bill and the D.O.C. Budget fix have necessitated eliminating your position. Therefore, this letter is your official notification of layoff from the Kettle Moraine Correctional Institution as a Barber with an effective date of June 21, 1986.
>
> Under the terms of the agreement between the Wisconsin State Employes Union and the State of Wisconsin, you have the right to decide if you wish to exercise your bumping rights and/or request a voluntary demotion. You must notify Catherine Mlsna, Personnel Manager, in writing of your decision to exercise your bumping rights and/or request a voluntary demotion by May 28, 1986. You may also transfer in lieu of layoff at any time through your last working. (See Article VIII, Section 5 for details.)
>
> If you are not able to voluntarily demote, transfer in lieu of layoff or bump, or decide not to exercise these rights, your last day of work will be June 21, 1986, and your pay check will be available on July 5, 1986. The final check will include any unused vacation and holiday time earned through June 21, 1986, or an adjustment made for overdrawn vacation and/or holiday time.
>
> Under Article VIII, Section 6 of the Labor Agreement, you have recall rights at the Kettle Moraine Correctional Institution in your current classification or in one which you could have bumped under Section 5 (B) (1) a for a period of five years.
>
> Under Section 7 you also have rights for mandatory reinstatement within the Department to fill a vacancy in the same class or one to which you could have bumped under Section 5 (B) (1) a in an employing unit other than the one from which you were laid off.
>
> In addition, you will be referred to other classifications in the Department of Health and Social Services on a permissive transfer or demotion basis according to the "Layoff Referral Information Sheet" (DHSS-DMS-Pers-150) providing you have completed the form and returned it to Catherine Mlsna, Personnel Manager. If you do not obtain a position and you are laid off from the State of Wisconsin, your form 150 will be used to enter your name into the Department of Employment Relations statewide layoff referral system. You will also be eligible to compete for promotional

> opportunities in State service for which you would have been eligible had layoff not occurred. It is the responsibility of laid off employees to keep informed of promotional opportunities for which the employee is eligible to compete. Enclosed is an information sheet which explains the effect of a layoff on fringe benefits. Any questions regarding your fringe benefits should be directed to Catherine Mlsna, 414-526-3244, ext. 202.
>
> It is our intention to provide you with as much assistnce and information as possible in this matter. Please keep in close communication with your personnel officer.

Ehlert's barbering duties at Kettle Moraine were assumed by inmate barbers. Ehlert was not laid off from his half time position at the Dodge.

9. During the 1985-1987 biennium, DHSS and ultimately its Division of Corrections, was subject to financial stresses. Administrative personnel at DHSS understood that neither the Legislature nor the Governor were receptive to expanding the number of positions in State employment. Entering the 1985-1987 biennium, the Division of Corrections carried a deficit estimated at $300,000. In June of 1985, the Division of Corrections unsuccessfully requested the Joint Committee (JCF) to permit it to transfer funds from the fuel or utilities allocation to the deficit. JCF informed the Division of Corrections that it should defer the expenses. Budget projections regarding the number of inmates within the Division of Corrections for the 1985-1987 biennium averaged about 250 below the actual average. Waupun, for example, was constructed to house about 800 inmates, and during 1986 housed, at certain times, over 1,000 inmates. By January of 1987, Waupun housed about 905 inmates. The unanticipated increase in inmate population necessitated the unanticipated expenditure of funds to house and secure the inmates. The deficit experienced by the Division of Corrections fluctuated, during the 1985-1987 biennium, between $300,000 and $1,000,000. During this biennium, the Fair Labor Standards Act (FLSA) was applied to the State by Garcia v. San Antonio Metropolitan Transit Authority, 105 S. Ct 1005 (1985). The State, prior to the issuance of that decision, had utilized various employes in security and forestry positions in the minimum security centers mentioned in Finding of Fact 2 to work forty-eight hours per work week at a straight time pay rate. DHSS interpreted the application of the FLSA to the State to require the payment of overtime which DHSS estimated would cost the State $250,000. In the second year of the 1985-1987 biennium, the State experienced a shortfall in projected revenues. This shortfall prompted the enactment of Act 120, the Fiscal Management Bill, which is referred to below as the budget repair bill. Broadly speaking, the budget repair bill demanded State agencies to cut expenditures. The budget repair bill demanded far greater expenditure cuts than similar bills had required in prior bienniums. DHSS interpreted the various Legislative and Executive directives regarding its budget to require it to maintain existing services at a reduced cost.

10. In response to the financial difficulties presented in the 1985-1987 biennium, the Division of Corrections formed a committee to study staffing patterns at the institutions and to recommend possible cuts. Representatives from Waupun and Kettle Moraine were included on this committee. Recommendations of the committee and of the individual institutions were made to Walter J. Dickey, the Administrator of the Division of Corrections, and to Stephen Kronzer, the Deputy Administrator, who were responsible for selecting the positions to be redeployed or eliminated. Kronzer and Dickey directed the various administrators of affected institutions within the Division of Corrections to pare their budgets by a set figure and also to project cuts of 150% of that amount, to grant the Division of Corrections the flexibility to address the full impact of its budgetary and the FLSA liability. The Division sought to cover the FLSA liability by expanding staffing at the minimum security centers temporarily by the use of LTEs, and permanently by the replacement of the LTEs with positions redeployed from other correctional facilities. The redeployment process started in the fall of 1985. A memo from Dickey to Young dated October 7, 1985, and entitled "RE: Reduction for 1985-87 Fiscal Problems" summarized the then current status of the budget cutting process as it affected Waupun thus:

> The following positions are being deleted as soon as possible from the WCI staffing:

Class	Position #	Current Status
Officer 5	003169	Vacant
Officer 5	305979	Vacant
Fiscal Clerk 2	069270	Vacant . . .
Typist	000240	Transfer to CCI . . .
Stock Clerk 2	007541	Transfer to OSCI . . .
Typist	000673	Transfer to PRC/WCI . . .
Fiscal Clerk 1	069270	Transfer to CCI . . .

The incumbents in the above positions (or the least senior in those classes) should be encouraged to transfer to other units as soon as possible.

. . .

The Typist positions were those of Allen and Van Den Hoek, and the Fiscal Clerk 1 position was that of Zwicker. In a memo headed "Position Changes" from Weeks to, among others, Zwicker, Allen, Van Den Hoek, and Joseph McCarthy, President of WSEU Local #18, dated October 15, 1985, stated:

> You are requested to attend a meeting at 2:30 p.m. on Wednesday, October 16, 1985, for the purpose of informing you about upcoming budgetary changes at Waupun Correctional Institution. The meeting will be held in the Summit Conference Room.

At that meeting, Weeks and Young advised the employes noted above that position reductions were contemplated and that each of the employes present might be affected. Young and Weeks informed the employes that efforts would be made to effect transfers for any employe whose position was eliminated. Through the fall and the following winter, further budget cuts were considered by the Division of Corrections. A memo dated March 7, 1986, from Pamela Brandon, Assistant Administrator of the Division, to various administrators within the Division, summarized the then current status of the position reduction process thus:

> For your information, I am providing the attached summary of the position actions that are required to accommodate the DOC Internal Budget Fix and the Governor's Fiscal Management Bill. Walter will be sharing this information with the Union sometime next week.
>
> In order to facilitate these actions, it is extremely important that we receive your cooperation in our efforts to locate alternative jobs for the individuals affected. Please remind your personnel managers that it is imperative that they assist your employees in locating alternative employment. Sandy Powers is available to assist centrally in identifying existing vacancies in each unit and will provide this information to your personnel manager as requested so that they can encourage affected staff to submit transfer requests. During the course of interviews for existing vacancies in your units, hiring preference should be given to those staff whose positions will be eliminated on 6/22/86. To the extent we can facilitate permissive transfers, we will be able to avoid having to develop layoff plans as well. In addition, please be sure that your personnel staff do not submit certs for any of the positions that have been identified for elimination.

. . .

The Division of Corrections ultimately redeployed the Fiscal Clerk 1 and Typist positions once held by Zwicker, Allen and Van Den Hoek to three positions classified as Officer 3, located at the Oregon, Gordon and Flambeau minimum security centers. Inmates assumed the duties no longer performed by Zwicker, Allen and Van Den Hoek. Ehlert's half time position at Kettle Moraine was eliminated. An inmate barber assumed his duties. Franklin, as a member of the committee noted above, recommended the deletion of Ehlert's position. Franklin made this recommendation because he felt barbering in adult correctional institutions had traditionally been performed by inmates. Ehlert, Zwicker, and Van Den Hoek were ultimately laid off as noted above. Allen was able to transfer.

Van Den Hoek returned to Waupun as an LTE, as noted in Finding of Fact 5. Neither Van Den Hoek nor Zwicker were qualified to fill the vacant Fiscal Clerk 3 position, which became vacant in August of 1986. The request for the LTE appointment assumed by Van Den Hoek was explained in a memo from Young to Brandon dated July 11, 1986, thus:

> I am requesting an LTE position for the business office for several reasons. The business office has lost two fiscal clerks in 1986, a typist in 1984, and is scheduled to lose a secretary 1 - confidential position (currently vacant) in July 1986. In addition we have had two key positions vacant for much of this year, the account spec. 4 position which was recently filled and the account spec. 3 position which remains vacant at this time . . .
>
> At the same time that our FTEs are declining in number, we note that the business office duties are increasing to include two major new initiatives; FMS and Release Savings.
>
> . . .

11. Classified positions have been reviewed by DER to determine the descriptive work within the occupational area encompassing the position, and to determine the pay ranges that relate to the market for that occupation in Wisconsin. A Classification Specification is a general description in writing of an occupational area. A classification specification is not a description of any individual position, but is a general description of the types of positions within an occupational area. DER maintains separate classification specifications entitled Fiscal Clerk, Typist, Barber and Officer 1, 2 and 3. Employes occupying Correctional Officer positions at Waupun are required to keep keys and tools within Waupun secure at all times. Such employes are trained in procedures relating to the control of keys and tools. As of January of 1987, the Division of Corrections employed a full time employe classified as a Barber at Green Bay, and a half time employe classified as a Barber at Dodge. The full time position at Green Bay reflects that Green Bay has a certified vocational training program by which inmates are trained to be barbers. The half time position at Dodge reflects that Dodge serves as an intake facility with a high turnover where it is necessary to identify and assess scalp and grooming problems. Barbering duties at the remaining adult correctional institutions are performed by inmates. The Division of Corrections has used inmates as barbers since at least 1963. Ehlert, while working at Kettle Moraine, requested the assistance of a trained inmate. From at least 1957 until sometime in the mid 1970s, the bulk of the clerical duties at Waupun's security office was performed by inmates. After a riot in 1976, the use of inmates to perform such clerical duties declined, with officers replacing inmates and civilians ultimately replacing the officers. Some use of inmates to perform clerical duties did, however, continue throughout this period, and continues to the present. Since at least 1974, it has been common practice at DHSS to use inmates in correctional institutions or rehabilitation centers to perform various work functions, both to assist in the operation of the institution and to afford training and rehabilitation oppurtunities. In addition, the Division of Corrections has sought to find ways to keep inmates busy for security reasons. About two-thirds of the inmate population at Waupun, in January of 1987, worked in some capacity or attended school. The Division of Corrections does pay inmates for work they perform. The WSEU does not serve as the collective bargaining representative for LTEs.

12. The State was not, in undertaking the position elimination and redeployment process noted above and in utilizing Zillmer as an LTE on the locking project noted above, motivated in any part by hostility toward the WSEU's or any affected employe's exercise of concerted activity. The State's use of LTE and inmate labor to perform work once performed by Allen, Zwicker, Van Den Hoek and Ehlert, was not motivated in any part by hostility toward the WSEU's or any of those individual employe's exercise of concerted activity. Nor did the State, by these actions, intend to threaten or undermine the independence of the WSEU as an entity devoted to the interests of the employes it represents.

13. It is highly probable that submission of the parties' dispute as to the appropriate interpretation to be given Articles II, III, XI and XV of the 1985-87 contract to the final and binding arbitration procedure established by the collective bargaining agreement between the State and WSEU would result in an award interpreting said Articles in a manner that would fully resolve WSEU's claim that the State's actions recited above violated Secs. 111.84(1)(a) or (d), Stats.

Based upon the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSIONS OF LAW

1. The State has not, by the position elimination and redeployment process discussed above, by utilizing Zillmer as an LTE on the locking project discussed above, or by utilizing LTE and inmate labor to perform work once performed by Ehlert, Allen, Van Den Hoek, and Zwicker, committed any violation of Secs. 111.84 (1)(b) or (c), Stats.

2. In view of Finding of Fact 13, it is permissible and appropriate for the Commission to defer to the parties' 1985-87 contractual grievance arbitration procedure for disposition of the matters of contractual interpretation pertinent to the claimed violations of Secs. 111.84(1)(a) or (d), Stats.

Based upon the above and foregoing Findings of Fact and Conclusion of Law, the Commission makes and issues the following

ORDER

1. The complaint filed by the WSEU on May 7, 1986, and its various amendments, are dismissed as to the alleged violations of Secs. 111.84(1)(b) and (c), Stats.

2. The claimed violations of Secs. 111.84(1)(a) and (d), Stats. are hereby deferred to the parties' 1985-87 contract grievance arbitration procedure and further Commission action with respect to those claims is hereby held in abeyance. The Commission will dismiss these allegations on motion of either party upon a showing that the subject matter of the claimed violations of Secs. 111.84(1)(a) and (d), Stats. has been resolved in a manner not clearly repugnant to the underlying purposes of SELRA.

Given under our hands and seal at the City of Madison, Wisconsin this 26th day of April, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian, Commissioner

Commissioner A. Henry Hempe did not participate in this case.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The background facts and procedural development of this case are as stated in the preface and Findings of Fact.

THE PARTIES' POSITIONS

In its initial brief, the WSEU phrases the issue for decision thus: "Did the State violate Sections 111.84 (1) (a-d), Wis. Stats. and thus commit Unfair Labor Practices (ULPs)?" The WSEU contends that proof on each count of the complaint dictates the conclusion that the State has violated Secs. 111.84 (1) (a), (b), (c) and (d), Stats., "when it removed work normally performed by bargaining unit personnel from the bargaining unit." The WSEU initially contends that the record establishes that the State has acted to erode the WSEU represented bargaining unit in clear violation of the "well established" proposition that "bargaining units must be protected from employer attempts to erode the units." Citing arbitral authority for this proposition, the WSEU argues more specifically that proof on each count of the complaint establishes the following:

> In the present situation, the State has been attempting to and in fact has eroded the bargaining unit comprised of State employees. It has done so by laying off bargaining unit employees and having prison inmates doing the work instead, and by hiring back former State employees as limited term employees . . . who are not part of the unit, to do the work they formerly did as full-time, permanent, Union represented employees. The net effect of these actions is to have exactly the same work done, but now have it done by non-bargaining unit personnel at substantial cost savings. The consequence is that the size, power and strength of the bargaining unit is diminished, something the Commission should guard against.

The WSEU next asserts that: "It is beyond question that it is wrongful for an employer to give work done by bargaining unit employees to employees outside of the bargaining unit." Citing arbitral and judicial precedent, the WSEU contends that:

> Thus the basic legal theory is clear. If work is done by bargaining unit personnel, it is wrongful for an Employer to take the work out of the bargaining unit and assign it to non-bargaining unit employees.

A review of the record establishes, according to the WSEU, that the State has utilized inmates to take over the work of Van Den Hoek, Zwicker, Allen and Ehlert, in clear violation of the legal theory noted above. Beyond this, the WSEU contends that "(t)he State failed in its duty to mandatorily bargain the reduction of bargaining unit work." In addition to this, the WSEU contends that "the State violated the labor agreement by removing work from the bargaining unit," pointing specifically to the agreement's recognition clause and to Article XI, Section 15. The WSEU's next line of argument is that the State, in using LTE or inmate labor to replace bargaining unit positions, "has totally ignored Chapter 230, Wisconsin Statutes." The WSEU summarizes its review of the record by asserting: "The totality of all the wrongful acts committed by the State amount to violations of Sections 111.84 (1) (a-d), Wis. Stats." Specifically, the WSEU contends that conduct violative of Sec. 111.70 (3) (a) 1, Stats., is also violative of Sec. 111.84 (1) (a), Stats., when committed by the State, and that "(r)educed to its most common denominator, by removing bargaining unit work from the unit, the State, at least, violated Section 111.84 (1) (a)." In addition, the WSEU contends that the State's manipulation of "the size, composition and work done by the Union's employees" coupled with the State's denigration of Chapter 230 constitutes an attempt by the State to dominate the WSEU in violation of Sec. 111.84 (1) (b), Stats. The same conduct, according to the WSEU, discourages membership in the WSEU, and thus constitutes a violation of Sec. 111.84 (1) (c), Stats. That the State did not bargain its reduction of bargaining unit work constitutes, according to the WSEU, a violation of Sec. 111.84 (1) (d), Stats.

The State, in its initial brief, states the issues for decision thus:

> 1. Whether the Employer violated Sections 111.84 (1) (a), (1) (b), (1) (c) and (1) (d) (Wis. Stats.).

2. A. Whether the Commission has the authority under Section 111.81 (2), Wis. Stats., to determine that limited term employes are eligible employes and to assign them to an appropriate bargaining unit. If so, whether the Commission has the authority under 230.15, 230.25 and 230.26, Wis. Stats. to order the appointment of such employes to classified service as permanent employes.

B. Whether the Commission has the authority to create permanent positions under Section 16.505, Wis. Stats.

The State prefaces its argument with an extensive review of the record, covering the budgetary process regarding the authorization and creation of positions, the budgetary crisis facing the Division of Corrections in the 1985-1987 biennium, the hiring of Zillmer as an LTE, the use of inmates to perform functions once performed by Allen, Van Den Hoek and Zwicker, and the use of inmate barbers at Kettle Moraine to perform functions once performed by Ehlert. With this review as preface, the State asserts that it has not violated SELRA in any regard, but has acted appropriately within the authority granted it by "Section 111.90, Wis. Stats., and Article III of the 1985-1987 Collective Bargaining Agreement." Specifically, the State asserts that the Division of Corrections faced a fiscal crisis regarding an internal budget deficit, the (then) Governor's budget repair bill and the unanticipated application of the FLSA to the State. Against this background, the Legislature and the Governor directed the Division of Corrections to continue to provide service, but to do so within severe budget constraints. The result, according to the State, was the Division's determination to redeploy positions where possible and to use LTEs and inmates to perform work for which no position existed. The State summarizes its contentions regarding the clerical duties once performed by Zwicker, Van Den Hoeck, Allen and the barbering duties once performed by Ehlert, thus:

> The Union cannot argue that the Employer was required to continue to employ Zwicker, Van den Hoeck and Ehlert as full time equivalents when their positions no longer existed. This is contrary to the law. The Union also cannot contradict which positions were cut as this was solely a management decision . . . The use of inmates does not violate SELRA or the contract. The Union's amorphous concept of bargaining unit work - that only FTEs can perform this work - simply does not exist. Work needs to be performed whether or not the Legislature has authorized a requisite number of positions.

The State summarizes its position regarding the duties performed by Zillmer as an LTE thus:

> The Northwest Hall Locking Project was a one time, short term project for which an LTE was needed. Edwin Zillmer's work was restricted to the locking project. He did not perform the traditional correctional officer duties nor did he even perform his former duties as a Construction Coordinator. More importantly, there was no position authorized for the locking project and none was needed. Finally, the Employer certainly was not required to pay the equivalent of 1,044 hours at a rate of time and one-half to a FTE Correctional Officer. This would be a mismanagement of the Employer's limited funds.

The State's next line of argument is that "(t)he Commission does not have the authority under s. 111.81 (2) to determine that limited term employes are eligible employes and to assign them to appropriate statutory bargaining units." Specifically, the State asserts that the Commission's sole authority under Sec. 1111.81 (2), Stats., "is to assign eligible employes to appropriate bargaining units." According to the State, the classification of a position "limits and controls the duties and responsibilities performed," and the classification of a position is the sole responsibility of the State. Since only the Legislature is empowered to create a position, it follows, according to the State, that the Commission "cannot create positions and place them in the bargaining unit." The State's next line of argument is that "(t)he Commission does not have authority under 230.15 and 230.26, Wis. Stats., to order the appointment of LTEs to the classified service as permanent employes." From this, the State concludes that "a Commission order attempting to appoint LTEs to the classified service and consequently in the bargaining unit would conflict with the terms and conditions

of their appointment and the statutory and contractual limitations on rights to be granted limited term employees." Viewing the record as a whole, the State concludes that the complaint, as amended, must be dismissed.

In its first reply brief, the WSEU contends that "(t)he State has misstated the dispositive issue in this matter and has shown no persuasive justification for its commission of unfair labor practices . . . the real issue in this dispute is the removal of work and workers from the bargaining unit and the substituted use of LTEs and convicts." Specifically, the WSEU contends that it has not challenged the State's use of the procedures for appointing LTEs, or contended the State has abused the budgetary process. Rather, the focus of this dispute, according to the WSEU is that "the State removed bargaining unit work from the bargaining unit, reassigned the same work to others thereby committing . . . ULPs." More specifically, the WSEU contends the "jurisdictional" issues asserted by the State constitute nothing more than an "effort to dodge the real issue." The WSEU contends that the issue, properly focused, falls well within the Commission's jurisdiction, regarding both its merits and any appropriate remedy. The WSEU's next line of argument is that "(t)he State has shown no persuasive justification for its commission of unfair labor practices." Specifically, the WSEU contends that the State's acts are inconsistent with the management rights clause of the parties' collective bargaining agreement, violate Article XI, Section 15, and would be inappropriate even if these contractual restrictions did not exist. In addition, the WSEU argues that even though the fiscal difficulties cited by the State may have existed, "(f)iscal and cost concerns are no justification for the commission of unfair labor practices." Similarly, the WSEU argues that "(p)ast practice is not a valid justification for the State's actions." Specifically, the WSEU argues:

> There is a distinction between the past and the present. In the past the inmates helped out the bargaining unit personnel. Currently, the inmates have replaced the bargaining unit personnel. (Emphasis from text.)

The WSEU concludes its first reply brief with an extensive review of its major contention that "(t)he State violated Sections 111.84 (1) (A-D) of the Wisconsin Statutes."

In its reply brief, the State argues that the concept of bargaining unit work as propounded by the WSEU is not a viable concept under either the SELRA or the parties' collective bargaining agreement. The State summarizes its position thus: "In this respect, public policy under SELRA cannot favor the labor monopoly of bargaining unit work or work jurisdiction propounded by the WSEU." Specifically, the State argues that the bargaining unit monopoly argued by the WSEU cannot be founded on the broad mandate contained in Sec. 111.90 Stats., and Article III of the collective bargaining agreement to "utilize personnel, methods and means in the most appropriate and efficient manner possible." The State contends that the SELRA presumes the use of non-bargaining unit personnel, such as LTEs, to perform work also done by bargaining unit members. Any other conclusion, according to the State, would render the exclusion of LTEs from the definition of "Employe" at Sec. 111.81 (7), Stats., "an irrelevant reference." Article III, Point (6) of the parties' collective bargaining agreement underscores, according to the State, that the contract can not be used to found the concept of a bargaining unit monopoly on certain work. In addition to this, the State contends that its actions were authorized by, and not inconsistent with, Article III of the collective bargaining agreement, because the State has not sought to undermine the WSEU but to "continue necessary services in the face of a budget shortfall." Beyond this, the State argues that the use of inmates was consistent with past practice and was "as much a public policy or mission goal . . . as it was useful to meet the budget crisis." The State concludes by arguing that the WSEU's concerns regarding subcontracting are misplaced because the State's actions in the present matter do not constitute a subcontract under Article XI, Section 15, but "a transfer of services to resources (LTEs and inmates) under the State's jurisdiction, as distinguished from private contractors." (Emphasis from text.)

In its final reply brief, the WSEU contends that the State has mischaracterized the nature of its acts regarding the bargaining unit, and has attempted to mask a willful and unlawful erosion of the bargaining unit as an inescapable reaction to a budget crisis. In addition, the WSEU brands the State's assertion that it has complied with Chapter 230 as "a joke," and contends that the State's use of Sec. 111.90 as a justification for using LTEs or inmates is a misreading of the term "personnel." Beyond this, the WSEU asserts that the State

has failed to appreciate the contractual basis of the concept of bargaining unit work. Specifically, the WSEU contends that this concept is firmly rooted in Article II, Section 1, Article III, and Article XI, Section 15. The WSEU concludes by asserting that the State has in fact violated the SELRA, and "must be ordered to remedy its error."

DISCUSSION

As a threshold matter, it should be noted that the Commission views the State's jurisdictional contentions to present issues regarding the Commission's remedial authority, and not a basis to refuse to consider the merits of this dispute. The Commission does not view the present matter as one seeking to arrogate to the Commission a right to assign LTEs to a bargaining unit or to order the appontment of LTEs to the classified service. Rather, the Commission views the complaint as the WSEU's challenge of the impact of the State's actions in eliminating and redeploying positions, including its use of LTEs and inmates, on the rights granted by SELRA to Ehlert, Van Den Hoek, Allen and Zwicker as employes, and to the WSEU as their bargaining representative.

The Alleged Violation Of Sec. 111.84 (1) (b), Stats.

Sec. 111.84 (1) (b), Stats., makes it an unfair labor practice for the State, as an employer, to "dominate or interfere with the . . . administration of any labor or employe organization . . . " To establish a violation of this section, the WSEU must demonstrate 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." 2/ Evidence of such conduct is lacking in this case. As the Findings of Fact demonstrate, the State sought to notify Union representatives of the position deletion and redeployment process at points during the process. Each layoff letter advises the affected employe of certain contractual rights. Similarly, the Findings of Fact demonstrate that the State offered to assist affected employes in seeking other positions within State service. Such conduct does not threaten the independence of the WSEU as an entity devoted to the employes' interests.

The Alleged Violation Of Sec. 111.84 (1) (c), Stats.

To establish a violation of Sec. 111.84 (1) (c), Stats., the WSEU must establish "(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." 3/ To state these elements of proof is virtually to demonstrate the absence of the necessary proof in the present matter. There is no persuasive proof that Van Den Hoek, Zwicker, Ehlert, Allen or any Correctional Officer was engaging in concerted activity or that the State was aware of such activity at the time of the position deletion and redeployment process discussed above. Nor is there persuasive proof that personnel within the Division of Corrections or any other relevant agency bore animus toward any of the above noted employes for any reason at all.

The Alleged Violation Of Secs. 111.84 (1) (a) and (d), Stats.

As to the WSEU's allegations that the State has violated Secs. 111.84(1)(a) and (d), Stats., we conclude that the appropriate disposition of said allegations is very likely to be dependent upon the manner in which the parties' 1985-87 contract is interpreted. While both parties have placed various contractual provisions at issue in the positions they have taken in this litigation, neither party has extensively litigated the precise manner in which these various provisions should be interpreted. Thus, although interpretation of the contract would be necessary to resolve WSEU's allegations, we are not particularly well equipped to engage in such an effort based upon the record herein. Furthermore, if we were to proceed to interpret the contract, we would implicitly be undermining the grievance arbitration mechanism which the parties have created to resolve contractual interpretation disputes and would also create the potential

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

3/ State of Wisconsin, Department of Employment Relations, v. Wisconsin Employment Relations Commission, 122 Wis.2d 132, 140 (1985).

for our reaching contractual conclusions which might conflict with those already reached through the parties' contractual process. Therefore, we conclude that it is appropriate to give the parties an opportunity to use the contractual grievance arbitration process to determine their respective contractual rights as to the use of inmates and LTE's in the circumstances recited in our Findings. While we are confident that use of the parties' grievance arbitration process will effectively resolve the parties' Sec. 111.84(1)(a) and (d), Stats. dispute, we will, as our Order indicates, retain our jurisdiction over said allegations and will proceed to decide same in the event that proves necessary.

Dated at Madison, Wisconsin this 26th day of April, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian, Commissioner

Commissioner A. Henry Hempe did not participate in this case.