STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

THE WISCONSIN STATE EMPLOYEES UNION (WSEU), AFSCME, COUNCIL 24 AFL-CIO,	
Complainant,	Case 262 No. 41310 PP(S)-149 Decision No. 25936-A
vs.	
THE STATE OF WISCONSIN,	
Respondent.	

Appearances:
Lawton and Cates, S.C., Attorneys at Law, 214 West Mifflin Street, Madison, Wisconsin 53703-2594, by Mr. Richard Graylow, appearing on behalf of Complainant.
Mr. David Ghilardi, Legal Counsel, Department of Employment Relations, State of Wisconsin, 137 East Wilson Street, P.O. Box 7855, Madison, Wisconsin 53707-7855, appearing on behalf of Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Wisconsin State Employees Union (WSEU), AFSCME, Council 24, AFL-CIO, filed a complaint on November 18, 1988 alleging that the State of Wisconsin had committed unfair labor practices within the meaning of Secs. 111.84(1) (a), (c), (d) and (e), Stats., by refusing to set an arbitration hearing in Milwaukee rather than Madison, cancelling said arbitration hearing after it was scheduled and making settlement offers to agents other than the Union. Thereafter, the matter was held in abeyance pending settlement discussions between the parties. The Commission appointed Raleigh Jones, a member of its staff, to act as Examiner in the matter and to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.07(5), Stats. A hearing was held in Madison, Wisconsin on July 13, 1989, at which time the parties were given full opportunity to present their evidence and arguments. Both parties filed briefs and reply briefs by August 25, 1989. The Examiner having considered the evidence and arguments of counsel and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The Wisconsin State Employees Union (WSEU), AFSCME, Council 24, hereinafter referred to as the Union or Complainant, is a labor organization within the meaning of Sec. 111.81(12), Stats., and has its principal offices at 5 Odana Court, Madison, Wisconsin.

2. The State of Wisconsin, hereinafter referred to as the State or Respondent, is an Employer within the meaning of Sec. 111.81(8), Stats., and is represented by its Department of Employment Relations, hereinafter referred to as DER, which has its offices at 137 East Wilson Street, Madison, Wisconsin.

3. The State and Union have been, and are, parties to collective bargaining agreements covering wages, hours and conditions of employment for employes in the professional social services bargaining unit. This unit includes, among others, employes possessing the classification of social worker in the Department of Health and Social Services. The parties' latest labor agreement covered the period from November 6, 1987 to June 30, 1989 and contained, among its provisions, a grievance procedure which culminated in final and binding arbitration of grievances arising under the agreement.

4. Ms. Belle Guild, an employe represented by the Union, was suspended and subsequently discharged from her employment as a social worker with the Department of Health and Social Services, hereinafter referred to as DHSS. Four grievances concerning these and related matters were filed and are presently pending; three involve allegations of harassment and suspension and the fourth involves Guild's discharge from employment. Guild's representatives on these grievances are Union representative Cindy Manlove and Attorney Richard Graylow and the Employer's representative is DER Attorney David Whitcomb. In addition to these grievances, Guild filed several discrimination complaints against the State. Guild's representative on these complaints is Attorney Helen Marks Dicks and the Employer's representative is DHSS Attorney Kitty Anderson.

5. The harassment and suspension grievances were heard before Arbitrator Joseph Kerkman in Milwaukee, Wisconsin on February 4 and 5 and April 14, 1986, at which time the matter was continued pending the scheduling of additional hearing dates. Additional hearing dates were scheduled for February 17-19, 1987. Prior to the reconvening of the hearing, the Union requested postponement of these hearing dates from the State due to the "unusual circumstances surrounding these cases." Pursuant to this request, Arbitrator Kerkman cancelled the rescheduled hearing dates and postponed the matter indefinitely.

6. Thereafter, the parties were able to agree on dates for the rescheduled arbitration hearing (i.e. October 17 and 18, 1988), but not the location. The Union insisted the hearing be held in Milwaukee and the State insisted on Madison. No agreement on location was reached by the parties whereupon DER Attorney Whitcomb cancelled the upcoming arbitration hearing. No further hearing in the matter has been held.

7. Union representative Manlove proposed to Whitcomb that Arbitrator Kerkman make a "bench decision" on the location issue, but Whitcomb declined same suggesting instead that the location issue be decided by a separate arbitrator. Manlove later informed Whitcomb in writing that she was willing to choose a separate arbitrator to decide the location issue, and Whitcomb responded in writing that Manlove was to contact his office to select an arbitrator and date for the location issue. Manlove never contacted Whitcomb's office to select an arbitrator and date for the location issue.

8. Whitcomb talked with all representatives involved in Guild's legal actions (i.e. Anderson, Dicks, Manlove and Graylow) concerning the possibility of settling all the pending legal actions, but never made a settlement offer to anyone concerning any case related to Guild. In May, 1989, DHSS Attorney Anderson made a settlement offer to Attorney Dicks who responded to same with a counteroffer, but neither offer was accepted. The settlement offer included a release among its terms. Neither Whitcomb nor any Union representatives were involved in this offer and counteroffer between Anderson and Dicks.

9. By refusing to hold the Guild arbitration hearing in Milwaukee rather than Madison, and subsequently cancelling same, the State did not interfere with, restrain or coerce state employes in the exercise of their right to bargain collectively, did not discriminate against employes because of their union activity and did not refuse to bargain collectively with Complainant Union.

10. By Whitcomb's solicitation of general settlement discussions among the parties and Anderson's settlement offer to Dicks, the State did not interfere with, restrain or coerce state employes in the exercise in their right to bargain collectively, did not discriminate against employes because of their union activity and did not refuse to bargain collectively with Complainant Union.

Based on the above and foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. Respondent State has not been shown to have committed any violations of Secs. 111.84 (1)(a), (c), or (d), Stats.

2. The Examiner will not exercise the Commission's jurisdiction over the instant Sec. 111.84(1)(e) complaint allegation that the State violated the terms of the parties' collective bargaining agreement by not holding the Guild arbitration hearing in Milwaukee because the collective bargaining agreement allegedly violated contains a grievance procedure culminating in final and binding arbitration which the parties have agreed is the exclusive mechanism for resolution of such disputes, and there is no allegation of circumstances that would warrant assertion of jurisdiction.

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

ORDER 1/

IT IS ORDERED that the complaint filed herein be, and the same hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin this 19th day of October, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Raleigh Jones, Examiner

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

Section 111.07(5), Stats.

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

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER

In its complaint, the Union alleged that the State violated Secs. 111.84(1)(a), (c), (d) and (e), Stats., by refusing to set an arbitration hearing in Milwaukee rather than Madison, cancelling said arbitration hearing after it was scheduled and making settlement offers to agents other than the Union. The State denied it committed any unfair labor practices by its conduct herein.

UNION'S POSITION

The Union states the issues for decision as follows:

> 1. Did the State violate SELRA by insisting on Madison as the location for the reconvened arbitration hearing and cancelling the previously agreed-upon dates?
>
> 2. Did the State violate SELRA by making settlement offers to other than those associated with the Union?

The Union answers the first issue noted-above in the affirmative. It contends that the State acted contrary to arbitral precedent when it refused to accept Milwaukee as the hearing site and when it cancelled the October 17 and 18, 1988 hearing. In its view, the instant dispute was precedentially resolved by Arbitrator Howard Bellman in a 1979 arbitration award wherein he ruled that the place of grievance filing, the place of grievance processing, work station and location of most witnesses were dispositive in determining where an arbitration hearing was to be held. The Union applies the same criteria to the Guild case and concludes they all favor Milwaukee: Guild lives and formally worked in Milwaukee; the discipline occurred there; the grievance was filed and processed there; all the witnesses are there; and the first couple of days of hearing were held there. Thus, the Union submits that its choice of Milwaukee as the hearing location is supported by both the Bellman decision and reason. The Union further contends that even if the Bellman decision is not on point, other arbitral law supports the its position that the hearing must be held in Milwaukee.

The Union also answers the second issue noted above in the affirmative. In this regard it asserts that the State, via DHSS Attorney Anderson, made a settlement offer to a non-union representative, namely Attorney Dicks. According to the Union, this settlement offer bypassed the Union. The Union characterizes this action as bad faith conduct and a violation of the State's duty to bargain with the Union in its capacity as Guild's exclusive bargaining representative.

The Union therefore asks that the State's conduct be found unlawful under SELRA, that the State be ordered to cease and desist from same, and that appropriate remedial orders be entered.

STATE'S POSITION

The State answers both the issues raised by the Union in the negative.

With regard to the first issue, the State contends the Union failed to establish that the arbitration hearing was required to be held in Milwaukee, or that the State was responsible for cancelling the scheduled arbitration hearing. According to the State, other than this case, the location of arbitration hearings have always been determined by the mutual agreement of the parties. In support thereof, it notes that the parties have held arbitration hearings in locations other than the home city and work location of the grievant where both were identical. Here, when the parties could not agree on the hearing location, the State contends the Union should have followed the contractual dispute resolution procedure and submitted the location issue to the arbitrator as proposed by DER Attorney Whitcomb, rather than file the instant complaint as it did. Finally, the State argues that the Bellman arbitration award, which is relied upon by the Union for the proposition that an arbitration hearing is to be held in the home city and work location of the grievant where both are identical, is not on point in the instant matter and is not precedential because the arbitrator expressly limited that decision to the particular facts of that case.

With regard to the second issue, the State submits that no agent of DER at any time made any settlement offers in relation to the grievances in question. In this regard, the State acknowledges that Whitcomb attempted to draw together all the necessary representatives so as to resolve grievant Guild's legal claims. It asserts that the drawing of Attorney Dicks, the grievant's representative in certain discrimination cases related to the grievances in question, into the settlement discussions is justified by the reality that no settlement of the grievances could occur unless the discrimination cases were

also settled.

The State therefore concludes that the complaint is without merit and it asks that the complaint be dismissed in its entirety.

DISCUSSION

The Legal Framework

The complaint alleges Employer violations of Secs. 111.84(1)(a), (c), (d) and (e), Stats.

Section 111.84(1)(a), Stats., makes it an unfair labor practice for the State, as an employer, "to interfere with, restrain or coerce state employes in the exercise of their rights guaranteed in Sec. 111.82." 2/ To establish an independent violation of this section, the Complainant must prove that Respondent's action was likely to interfere with, restrain or coerce the Complainants in the exercise of their protected rights. 3/

Section 111.84(1)(c), Stats., makes it an unfair labor practice for the State, as an employer, "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 demonstrate "(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." 4/ The hostility proscribed by this section is anti-union animus.

Section 111.84(1)(d), Stats., makes it an unfair labor practice for the State, as an employer, "to refuse to bargain collectively with a representative of a majority of its employes in an appropriate collective bargaining unit." This duty to bargain applies only to the exclusive bargaining representative.

Section 111.84(1)(e), Stats., makes it an unfair labor practice for the State, as an employer, "to violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting state employes, including an agreement to arbitrate. . . . " A labor organization enjoying exclusive representative status can file a complaint with the Commission under this section alleging that an employer has violated the parties' collective bargaining agreement. Where the labor organization has bargained an agreement with the employer which does not contain a procedure for final impartial resolution of disputes over contractual compliance, the Commission will assert its breach of contract jurisdiction if the the contractual procedure has been exhausted. 5/ However, where a labor organization has bargained an agreement with the employer which contains a procedure for final impartial resolution of disputes over contractual compliance, the Commission generally will not assert its statutory complaint jurisdiction over any breach of contract claims covered by the contractual procedure 6/ because of the presumed exclusivity of the contract procedure and a desire to honor the parties' agreement. 7/

2/ Section 111.82 of SELRA declares that state employes:

> . . . shall have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing under this subchapter, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection. Such employes shall also have the right to refrain from any or all of such activities.

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

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

5/ American Motors Corp. v. WERB, 32 Wis.2d 237, 249 (1966). Weyauwega Joint School Dist. No. 2, Dec. No. 14373-B (6/77), aff'd Dec. No. 14373-C (WERC, 7/78).

6/ Exceptions to this policy include instances where (1) the employe alleges denial of fair representation, Wonder Rest Corp., 275 Wis.2d 273 (1957); (2) the parties have waived the arbitration provision, Allis Chalmers Mfg. Co., Dec. No. 8227 (WERB, 10/67); and (3) the party who allegedly violated the contract ignores and rejects the arbitration provisions in the contract, Mews Ready-Mix Corp., 29 Wis.2d 44 (1965).

7/ Mahnke v. WERC, 66 Wis.2d 524, 529-30 (1974); United States Motor Corp., Dec. No. 2067-A (WERB, 5/49); Harnischfeger Corp., Dec. No. 3899-B (WERB, 5/55); Melrose-Mindoro Joint School District No. 2, Dec. No. 11627 (WERC, 2/73); City of Menasha, Dec. No. 13283-A (WERC, 2/77).

Application Of The Legal Framework To The Facts

In deciding whether the State's actions in this matter violated any of the above-noted sections of SELRA, discussion will be divided along two lines: (1) the location of the Guild arbitration hearing, and (2) the making of settlement offers to agents other than the Union. Each of these points is addressed below.

As noted in Finding of Fact 6, the parties were not able to agree on where the reconvened Guild arbitration hearing would be held; the State insisted on Madison and the Union insisted on Milwaukee. At no place in either its brief in chief or its reply brief did the Complainant Union show how the State's insistence on holding the reconvened Guild arbitration hearing in Madison, and cancelling the arbitration hearing when agreement on a location could not be reached, constituted a violation of Secs. 111.84(1)(a), (c) or (d), Stats. As a result, none of the elements of proof needed to show unlawful interference, discrimination or a refusal to bargain were shown here. Stated simply, there is no mandate under these or other sections of SELRA that the State must hold arbitration hearings at a particular locale. Consequently, no violations of these sections have been found with regard to the State's insistence on holding the reconvened Guild arbitration in Madison and cancelling the hearing when no agreement concerning location was reached.

The Examiner now turns to the Union's breach of contract claim. In this regard, the Union alleged that the State's refusal to hold the Guild arbitration hearing in Milwaukee constituted a violation of Sec. 111.84(1)(e), Stats. As noted in Finding of Fact 3 though, the parties' labor agreement contains an arbitration procedure which is available to the WSEU for resolution of such disputes over contract compliance. The Examiner is satisfied that this arbitration procedure is potentially available to the WSEU to obtain final impartial resolution of any dispute concerning the location of Guild's reconvened arbitration hearing. Any doubt in this regard has been eliminated by the State's express willingness to arbitrate the issue of where the Guild hearing will be held. Moreover, this case does not involve circumstances that would cause it to fall within any of exceptions noted in footnote 6 to the Commission's policy of giving deference to the parties' dispute resolution procedure. Given the foregoing then, the Examiner will not assert the Commission's jurisdiction over the Union's breach of contract claim. Therefore, no decision is rendered by the undersigned as to whether the Bellman arbitration award, or any other arbitration award, is "precedential" concerning the location of the Guild arbitration hearing. That call is for the arbitrator to make.

Attention is now turned to the matter of the State's making settlement offers to agents other than the Union. In this regard, it is noted that grievant Guild has several discrimination complaints pending against the State in addition to her grievances. At least five representatives are involved in these legal actions: Union representative Manlove and Attorney Graylow represent Guild in connection with her grievances; Attorney Dicks represents Guild in connection with her discrimination complaints; DER Attorney Whitcomb represents the State in connection with Guild's grievances; and DHSS Attorney Anderson represents the State in connection with Guild's discrimination complaints. Whitcomb talked with all these representatives concerning the possibility of settling all the pending legal actions, but never made a settlement offer to anyone concerning any case related to Guild. Anderson though made a settlement offer in May, 1989 to Dicks who in turn counteroffered, but neither offer was accepted. Neither Whitcomb nor any Union representatives were involved in this offer and counteroffer between Anderson and Dicks.

The Union contends that Whitcomb's solicitation of general settlement discussions and Anderson's settlement offer to Dicks constituted a violation of the State's duty to deal exclusively with the Union. The Examiner disagrees for the following reasons. First, with regard to Whitcomb's actions, it is simply noted that he was not precluded from communicating directly with all the parties involved in Guild's legal actions regarding settlement possibilities. To the contrary, he had every right to do so. Likewise, Anderson was not precluded from communicating directly with Dicks regarding their pending litigation (i.e. the discrimination complaints). Consequently, these communications did not constitute individual bargaining by the State. Next, with regard to Anderson's settlement offer to Dicks, it follows that since Anderson and Dicks could communicate with each other concerning their pending litigation, they could also exchange settlement proposals concerning same without the Union's involvement. This is because they were empowered to resolve Guild's discrimination complaints. Here, there is no evidence that Anderson and Dicks discussed any settlement other than the discrimination complaints. That being so, the Union failed to prove that Anderson and Dicks tried to resolve matters within the Union's province (i.e. Guild's grievances). While Anderson's settlement offer did include a general release among its terms, there is no evidence this release was anything more than the standard boilerplate release which the State commonly includes in any proposed settlement. Thus, it appears that the release in the proposed settlement offer was a routine release as opposed to one which specifically identified and disposed of Guild's pending grievances. Therefore, no violation of

Secs. 111.84(1)(a), (c) or (d), Stats., has been found concerning Anderson's settlement offer to Dicks.

In summary then, it is concluded that the State did not act unlawfully when it refused to hold an arbitration hearing in Milwaukee rather than Madison. Likewise, Whitcomb's solicitation of general settlement discussions among the parties and Anderson's settlement offer to Dicks were not unlawful. Consequently, no violation of Secs. 111.84(1)(a), (c) or (d) Stats. has been shown. In addition, the Examiner has not asserted the Commission's jurisdiction over the Union's breach of contract claim under Sec. 111.84(1)(e), Stats. Accordingly, the complaint has therefore been dismissed in its entirety.

Dated at Madison, Wisconsin this 19th day of October, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Raleigh Jones, Examiner