STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

OAKHILL CORRECTIONAL INSTITUTION, LOCAL 3021, DISTRICT COUNCIL 24, AFL-CIO, and WISCONSIN STATE EMPLOYEES UNION,		
Complainants,		Case 263 No. 41528 PP(S)-151
vs.		Decision No. 25978-A
STATE OF WISCONSIN, and OAKHILL CORRECTIONAL INSTITUTION,		
Respondents.		

Appearances:

Mr. Richard V. Graylow, Lawton & Cates, S.C., Attorneys at Law, 214 West Mifflin Street, Madison, Wisconsin 53703-2594, appearing on behalf of Oakhill Correctional Institution, Local 3021, District Council 24, AFL-CIO, and Wisconsin State Employees Union.

Mr. David C. Whitcomb, 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 State of Wisconsin, and Oakhill Correctional Institution.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Oakhill Correctional Institution, Local 3021, District Council 24, AFL-CIO, and Wisconsin State Employees Union, filed a complaint with the Wisconsin Employment Relations Commission on January 6, 1989, alleging that the State of Wisconsin, and Oakhill Correctional Institution, had committed unfair labor practices within the meaning of Secs. 111.84(1)(e), 111.92(3), 111.92(4) and 111.93(3), Stats. In a letter to the parties dated February 15, 1989, William C. Houlihan, the Commission's Coordinator of Mediation, confirmed the parties' mutual willingness to hold the scheduling of a hearing on the matter in abeyance pending the parties' informal efforts to resolve their dispute. These efforts proved unsuccessful, and on April 21, 1989, a pre-hearing conference was held before Richard B. McLaughlin, an Examiner on the Commission's staff. At that pre-hearing conference the parties agreed to set a hearing date of August 28, 1989, to permit the matter to be addressed in then on-going collective bargaining sessions. On April 24, 1989, the Commission formally appointed Richard B. McLaughlin to act as Examiner to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.84(4), and Sec. 111.07, Stats. On August 14, 1989, the State filed its answer to the complaint. Hearing on the matter was conducted in Madison, Wisconsin, on August 28, 1989. A transcript of that hearing was provided to the Commission on August 29, 1989. The parties agreed at that hearing that the issues posed were legal in nature and could be posed by motion. They further agreed to the motion and briefing schedule. In response to that schedule, the State filed a motion for summary judgement, a brief in support of the motion and supporting documents with the Commission on September 19, 1989. The Union filed a responsive brief and supporting documents with the Commission on October 2, 1989. The State completed the agreed upon briefing schedule by filing a reply brief with the Commission on October 12, 1989.

FINDINGS OF FACT

1. Local 3021, District Council 24, AFL-CIO, referred to below as the Union, is a labor organization which represents certain employes of the Oakhill Correctional Institution. The Union is a local affiliated with AFSCME Council 24, Wisconsin State Employees Union, AFL-CIO, which is referred to below as WSEU. The WSEU maintains its offices at 5 Odana Court, Madison, Wisconsin 53719.

2. The State of Wisconsin, referred to below as the State, is an employer which has delegated responsibility for collective bargaining purposes to the Department of Employment Relations, which maintains its offices at 137 East Wilson Street, Madison, Wisconsin 53707-7855.

3. The State, through the Division of Corrections of the Department of Health and Social Services, operates a minimum security correctional institution known as the Oakhill Correctional Institution, which is referred to below as Oakhill. Catherine Farrey is currently the Superintendent of Oakhill.

4. The WSEU and the State are parties to a collective bargaining agreement in effect, by its terms, from November 6, 1987, to June 30, 1989. This agreement is referred to below as the Master Agreement. The WSEU and the State have agreed to extend the effective date of the Master Agreement until

agreement on a successor agreement has been reached. The Master Agreement contains, among its provisions, the following:

ARTICLE VI

HOURS OF WORK

. . .

Section 15: Alternative Work Patterns

6/15/1 Alternative work patterns include flexible time, non-standard workweek employment, part time employment, job sharing and other patterns that may be developed between the parties.

. . .

6/15/4 (SPS) The Employer agrees that reasonable efforts will be made to explore the possibility of implementing alternative work patters in appropriate work environments. Implementation of alternative work patterns or any variation thereof shall be by mutual agreement between the Employer and the Union.

. . .

6/15/6 Mutual agreement can be reached on the local level or at the appropriate division or department labor-management meeting.

. . .

ARTICLE XI

Miscellaneous

. . .

Section 2: Union-Management Meetings

11/2/1(BC, SPS, T) The State agrees to continue the existing Union Management meetings . . . Such meetings shall be held once every month unless mutually agreed otherwise.

. . .

11/2/5(BC, CR, T, SPS) All other aspects of the aforementioned meetings including time and location shall be determined by the local Union and local management.

. . .

11/2/9 Agenda

Items to be included on the agenda for the aforementioned Labor-Management meetings are to be submitted at least five (5) days in advance of the scheduled dates of the meeting if at all possible. The purpose of each meeting shall be:

. . .

(9A)(SPS) Negotiate hours of work, work schedules overtime assignments and the procedures for the administrative investigation of citizen complaints. In the event no agreement is reached, either party may appeal to arbitration pursuant to the procedures of Article IV, Section 2, step Four except that the decision of the arbitrator shall be advisory. If the advisory award is not implemented by local management, a representative of the department, a representative of the Department of Employment Relations, and a represent-ative of the Wisconsin State Employees Union, District Council 24, will meet to discuss the implementation of the award.

. . .

ARTICLE XIII

Employee Benefits

. . .

Section 6: Paid Annual Leave of Absence (vacation)

13/6/1 The Employer agrees to provide employes with a formal paid annual leave of absence plan (vacation) as set forth below.

. . .

13/6/10 Within the basic framework provided above the implementation and application of the provisions of this section and all other aspects of vacation scheduling shall be determined by the local Union and local management within sixty (60) days. Agreements reached under the provisions of this section will be reduced to writing.

. . .

The WSEU and the State have been parties to a number of collective bargaining agreements during the 1980's. Each of those agreements has had an expiration date of June 30 of an odd-numbered year, thus corresponding to the years of the State's biennium. Each of those agreements has been extended beyond its nominal expiration date to the date that the WSEU and the State were able to reach agreement on a successor.

5. The Union and Oakhill management reached a local agreement on certain conditions of employment at Oakhill. This agreement is referred to below as the Local Agreement, and contains, among its provisions, the following:

AGREEMENT BETWEEN
OAKHILL CORRECTIONAL INSTITUTION
LOCAL #3021

As authorized in Article XI, Section 2 and other articles of the WSEU agreements (Blue Collar and Non-Building Trades, and related Bargaining Units) that apply, the following represents a negotiated agreement between Oakhill Correctional Institution and the Wisconsin State Employees Union Local #3021. This agreement is limited to those employees assigned to and working at Oakhill Correctional Institution and in no way affects employees assigned to any other facility under Local 3021's jurisdiction. On those matters where this agreement is silent, the agreement between the State of Wisconsin and WSEU shall prevail.

. . .

This agreement supersedes all other previously written or unwritten local agreements on the subjects contained herein.

Either party may initiate negotiations of proposed

> additions, deletions, or changes to this contract by giving notice of their intent at the regular Labor/ Management meetings.
>
> This agreement shall extend until a new local contract between the two (2) parties has been negotiated.
>
> All provisions of this agreement are effective on date of signing excepting those provisions relating to Correctional Officers overtime which shall take effect April 19, 1981.

. . .

The Local Agreement includes the signatures of Michael D. Brown, then President of the Union, and of Andrew W. Basinas, then Superintendent of Oakhill. Those signatures are dated "3-25-81". The Local Agreement was amended, through the agreement of the Union and Oakhill Management, on June 17, 1981; October 29, 1981; October 13, 1983; and October 25, 1983. The Local Agreement covers, among other subjects, hours of work, overtime and vacation scheduling.

6. Farrey sent a memo entitled "Absence of Local Agreement" and dated July 11, 1988, to John Thompson, the President of the Union. That memo reads as follows:

> As you know in September, 1986, Local 3021 and OCI Management Negotiating Teams began meeting to update the Local Agreement dated March 1981.
>
> In early February, 1988, the teams had reviewed all items that were presented by both parties for local agreement and had developed a draft of a new agreement. You indicated you would need to review the draft proposal with representative Don Frisch from Council 24 before the draft could be approved by Local 3021 for tentative agreement.
>
> In early March, 1988, (the letter is undated), you presented to Rita Smick, Personnel Manager, a page of changes. You indicated Mr. Frisch felt those changes should be brought to our attention. On March 11, 1988, Mrs. Smick wrote you a memorandum addressing each of the items on your letter and asking that if you wished to discuss any of the items to contact her by March 17, 1988. You did not contact her.
>
> At the March 10, 1988, Union/Management meeting you informed management that Mr. Frisch had advised you that you had a tentative agreement and a ratification vote would need to be taken. You said the ratification vote would most likely take place before the end of March.
>
> On April 5, 1988, Mrs. Smick sent you a memorandum indicating that although she had not been officially informed, she had heard the proposed local agreement was not ratified. She asked for confirmation of this and what, if any, suggestion you had for acquiring local agreement at OCI. You did not reply to this request.
>
> At the April 14, 1988, Union/Management meeting, you informed management that the tentative local agrement had not been ratified. Mrs. Smick then asked you to put in writing by the end of the month those items that the union felt precluded ratification. At the end of April, OCI Management had not received the requested information from you.
>
> On May 3, 1988, Mrs. Smick sent to you a memorandum indicating she had not received the requested information and asking you for it within the next week or two.
>
> Also, between April 5, 1988, and the Union/Management meeting on June 16, 1988, Mrs. Smick had verbally asked you for this written information on at least two occasions.
>
> At the June 16, 1988, Union/Management meeting, Management had still not received this requested information. You did say during the meeting that trades and the issue of working for missed overtime were concerns. As of this date, we have not heard from Local 3021 indicating any interest in resolving the issues or in resuming negotiations.

> It has been our position that the March 1981 local agreement terminated on June 30, 1987 with the December 5, 1985 to June 1987 Master Contract, but as long as efforts were being made to renegotiate a revised local agreement, we would temporarily extend the provisions of the old local agreement which contains many out dated provisions.
>
> Despite the many efforts on Mrs. Smick's part to obtain information from you regarding the status of the tentative agreement, you have not demonstrated any interest in communicating with us or in resolving any outstanding issues.
>
> Accordingly, after consulting with the Division of Corrections Office of Human Resources, and the Department of Health and Social Services, Bureau of Personnel and Employment Relations, we believe we are at an impasse in our negotiations and are formally notifying Local 3021 that the 1981 agreement will no longer be effective as of 11:59 p.m. July 30, 1988. Beginning at 12:00 a.m. midnight on July 31, 1988, we will adhere to the provisions of the Master Contract where there is specific language concerning locally negotiable items. Where there is no specific language, we will adhere to the procedures as noted below:
>
> . . .
>
> It is our intent to issue, on or about July 18, 1988, a copy of the procedures listed in this memorandum to all affected employees in order to insure they are fully aware of the changes.
>
> If you have an interest in seriously discussing and resolving the issues that may have caused your membership to reject the tentative agreement, please contact Rita Smick.

The July 11, 1988, memo covers, among other subjects, hours of work, overtime and vacation scheduling.

7. The State did not, by issuing the July 11, 1988, memo and by terminating the Local Agreement, engage in bad faith or surface bargaining. The Master Agreement generally authorizes negotiations at the local level between the Union and Oakhill management on certain subjects. The Master Agreement does not specifically provide that the Local Agreement shall extend beyond July 30, 1988. The Union and Oakhill management have not mutually agreed to extend the Local Agreement beyond July 30, 1988. The terms of the Local Agreement can not be considered to be in effect beyond July 30, 1988.

CONCLUSIONS OF LAW

1. The Union is a "Labor organization" within the meaning of Sec. 111.81(12), Stats.

2. The State is an "Employer" within the meaning of Sec. 111.81(8), Stats.

3. Under no interpretation of the facts alleged by the January 6, 1989, complaint and its subsequent amendments, can the terms of the Local Agreement be considered enforceable under Secs. 111.84(1)(a), (d) or (e), Stats., beyond July 30, 1988. Thus, the issuance of the July 11, 1988, memo and the termin-ation of the Local Agreement by Oakhill management do not raise any factual or legal issue remediable under Secs. 111.84(1)(a), (d) or (e), Stats.

ORDER 1/

The complaint filed on January 6, 1989, and its subsequent amendments, are dismissed.

Dated at Madison, Wisconsin this 6th day of December, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Richard B. McLaughlin, 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

BACKGROUND

The complaint filed by the Union alleges State violations of Secs. 111.84(1)(e), 111.92(3), 111.92(4) and 111.93(3), Stats. At the August 28, 1989 hearing on this matter, the Union amended the complaint to drop any allegation that the State's conduct violated Secs. 111.92(3), 111.92(4), or 111.93(3), Stats, and to add the allegation that the State's conduct violated Secs. 111.84(1)(a) and (d), Stats. The Parties also stipulated that the issues stated by the pleadings were legal in nature, and could be posed on a motion for summary judgement. The parties agreed that for the purpose of addressing the motion, the facts alleged in the complaint could be treated as if they were accurate, and that if further facts were necessary, they would be supplied in the course of the briefing schedule. Each party attached affidavits to their brief, and neither party has contested the facts alleged in those affidavits.

THE PARTIES' POSITIONS

The State's Motion For Summary Judgement And Supporting Brief

The State poses the motion for summary judgement thus:

> The respondent hereby moves the Wisconsin Employment Relations Commission to enter summary judgment for the respondent as provided by sec. 227.46, Stats., and ERB 20.11, Wis. Admin. Code on the ground that the pleadings filed herein show that there is no genuine issue of material fact and that the respondent in entitled to judgment as a matter of law.

Noting that "the material facts are not in dispute", the State argues that "the complainant's legal theory is premised on two material misunderstandings". The two misunderstandings are the Union's assumptions that the Local Agreement is a collective bargaining agreement under the SELRA, and that the Local Agreement "has force and effect independent of the collective bargaining agreement pursuant to which it was negotiated". There are, according to the State, at least five characteristics which distinguish the Master Agreement from the Local Agreement: "the parties; its source of authority (SELRA as opposed to the collective bargaining agreement itself); its content; the process by which it acquires effect; and its uniqueness". From this it follows, the State asserts, that even if Oakhill acted in a manner inconsistent with the Local Agreement, its actions could not have violated Sec. 111.84(1)(a) or (d), Stats. That the Local Agreement has no force independent of the Master Agreement is definitively established, according to the State, by an award issued by Arbitrator Kerkman. Beyond this, the State argues that the Kerkman award conclusively establishes that there can be no finding of a violation of Sec. 111.84(1)(e), Stats., in this matter since that award "involved the same parties, collective bargaining agreement, and substantive issue". Since there "are no material factual disputes and the issue presented is a question of law", and since the record establishes that the Local Agreement is not an independently enforceable agreement, it follows, according to the State, that the complaint must be dismissed.

The Union's Responsive Brief

The Union contends that "Article VI, Section 15, Paragraph 1, et seq., page 54; Article XI, Section 2, Paragraph 9, et seq., page 90 and Article XIII, Section 6, Paragraph 10, et seq., page 121" establish that "(t)he present Local Agreement . . . was created and authorized by the master Labor Agreement". Noting that the Master Agreement was negotiated between the WSEU and the State, and that the Master Agreement was ratified as required by the SELRA, the Union concludes that "(a)t the end of each fiscal biennium new life was breathed into the Local Agreement". The most recent example was "sometime after November 6, 1987, when the State Legislature agreed with the parties 1987-1989 collective bargaining Agreement and passed enabling, omnibus legislation approving same". Beyond this, the Union asserts that the Local Agreement, by its own terms, "recognizes its ongoing validity". Noting that the relevant language of the Local Agreement "is clear and unambiguous", the Union contends that:

> This Union's position is clear, straight-forward and supported by common sense. The Local Agreement is a collective bargaining Agreement because it looks like one, reads like one, is identified as such and served as one for seven plus (7+) years.

The Union concludes that "the State's Motion for Summary Judgment should and must be denied".

The State's Reply Brief

Noting that the Union's brief "does not challenge any of the facts asserted" by the State in its brief, and that the Union did not "present any additional facts", the State concludes that the facts are not contested. Beyond this, the State asserts that: "local agreements are enforceable during the term of the collective bargaining agreement under which they were entered into or until subsequently terminated by one of the parties". Acknowledging that the Master Agreement was duly ratified by the State and the WSEU, the State contends that the Union incorrectly assumes that the Legislature breathes new life into such local agreements by ratifying master agreements. This assumption, according to the State, is not supported by language in the Master Agreement and violates common sense by creating local agreements "that could remain in effect in perpetuity". Beyond this, the State contends that the Union's assumption is contrary to the Kerkman award which, although not technically applicable under res judicata, is dispositive here. Beyond this, the State asserts that the language of the Local Agreement quoted in the Union's brief "can not operate to create authority or power which does not otherwise exist". Because such authority is not given by the Master Agreement, it follows, according to the State, that the language of the Local Agreement is of no relevance to this matter. Noting that the citations of authority included in the Union's brief are merely "general rules of interpretation", the State asserts that they should have no bearing on the issue posed here, which focuses on "the operative effect of negotiation and ratification of subsequent collective bargaining agreements on preexisting local agreements". The State concludes that the Kerkman award is the decisive authority on this issue, and reasserts its request that the complaint be dismissed.

DISCUSSION

The Commission, 2/ with judicial approval, 3/ has authorized examiners to determine pre-hearing motions to dismiss. Hearing was conducted in this matter on August 28, 1989. At this hearing, the Union and the State stipulated the factual basis upon which the present motion could be addressed. They also reserved a right to request further hearing if the stipulated basis for addressing the motion was determined to be insufficient by either party or the examiner. The reservation of a right to further hearing makes the present motion, in effect, a pre-hearing motion to dismiss. The standard appropriate to determining the merit of a prehearing motion to dismiss has been stated thus:

> Because of the drastic consequences of denying an evidentiary hearing, on a motion to dismiss the complaint must be liberally construed in favor of the complainant and the motion should be granted only if under no interpretation of the facts alleged would the complainant be entitled to relief. 4/

The Union and the State stipulated that the facts alleged could be drawn from the complaint and from submissions included with the briefing schedule.

The complaint, as amended at the August 28, 1989, hearing, alleges State violations of Secs. 111.84(1)(a), (d) and (e), Stats. In amending its complaint, the Union noted that the alleged State violation of Sec. 111.84(1)(a), Stats., was derivative in nature. Thus, the legal issues posed here focus on Secs. 111.84(1)(d) and (e), Stats.

The Union noted at the August 28, 1989, hearing that the amended complaint does not pose any issue regarding bad faith or surface bargaining by the State. It follows from this that the amended complaint focuses on whether the terms of the Local Agreement are enforceable under either Sec. 111.84(1)(d) or (e), Stats. The issue of the enforceability of the terms of the Local Agreement is posed by Farrey's July 11, 1988, memo which terminated the Local

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2/ See County of Waukesha, Dec. No. 24110-A (Honeyman, 10/87), aff'd Dec. No. 24110-B (WERC, 3/88).

3/ See Village of River Hills, Dec. No. 24570 (WERC, 6/87), aff'd Dec. No. 87-CV-3897 (CirCt Dane County, 9/87), aff'd Dec. No. 87-1812 (CtApp, 3/88). The procedural history of the case is summarized in Village of River Hills, Dec. No. 24750-B (Greco, 4/88).

4/ Unified School District No. 1 of Racine County, Wisconsin, Dec. No. 15915-B (Hoornstra with final authority for WERC, 12/77), at 3.

Agreement as of 11:59 p.m. on July 30, 1988.

The Union has not established any basis upon which a State violation of Sec. 111.84(1)(d), Stats., could be found. Even assuming the Local Agreement is an independently enforceable collective bargaining agreement, Sec. 111.84(1)(d), Stats., can not make the terms of the Local Agreement, standing alone, enforceable. That section makes it an unfair labor practice for the State to "refuse to bargain collectively on matters set forth in s. 111.91 with a representative of a majority of its employes in an appropriate collective bargaining unit". "Collective bargaining" is defined in Sec. 111.81(1), Stats., to require "the state as an employer, by its officers and agents, and the representatives of its employes, to meet and confer . . . in good faith . . .". Sec. 111.81(1), Stats., further notes that the "duty to bargain . . . does not compel either party to agree to a proposal or require the making of a concession". Because the duty to bargain does not compel agreement, it follows that the terms of the Local Agreement, standing alone, are not enforceable under Sec. 111.84(1)(d), Stats.

With this as background, any possible violation of Sec. 111.84(1)(d), Stats., demands that the Union establish either that Farrey's July 11, 1988, memo constitutes a bad faith repudiation of a specific agreement to extend the Local Agreement until the negotiation of a successor, or that the State was under a legal obligation to honor the terms of the Local Agreement during the gap between the expiration of the Local Agreement and agreement on its successor. Neither line of argument can be persuasive on the present record. The Union has stipulated that it is not alleging that the State has bargained in bad faith. This stipulation forecloses any conclusion that the State, through Farrey's July 11, 1988, memo, issued a bad faith repudiation of a specific agreement to extend the term of the Local Agreement. Nor is it possible to conclude, on the present record, that the State was under a legal obligation to honor the terms of the Local Agreement during the gap between its expiration and agreement on its successor. Such a legal obligation assumes the existence of a contractual hiatus, and the Union's arguments assert that no contractual hiatus has occurred. As the Union puts it, the Local Agreement has "ongoing validity". This ongoing validity assumes that due either to the language of the Master Agreement, or to the reference in the Local Agreement that "(t)his agreement shall extend until a new local contract . . . has been negotiated", or both, the Local Agreement has not expired. These arguments presume that the terms of the Local Agreement are enforceable standing alone, and thus must arise under Sec. 111.84(1)(e), Stats.

The dispute thus focuses on Sec. 111.84(1)(e), Stats. For the State's action in terminating the Local Agreement to violate Sec. 111.84(1)(e), Stats., that agreement must be enforceable. Arguably, the Local Agreement can be enforceable on its own terms or by the terms of the Master Agreement.

There is no basis in the present record for a conclusion that the Local Agreement can be effective solely on its own terms. The Union and the State agree, and the Local Agreement specifically notes, that the Local Agreement is "authorized" by a master agreement. The Union cites no basis in the SELRA to ground a conclusion that the Local Agreement can be enforceable except as authorized by a master agreement. This is not to say the Local Agreement can not be effective. It is undisputed that the then effective master agreement authorized the negotiation of the Local Agreement in 1981, and that the Local Agreement has been effective from that date at least through July 30, 1988. The dispute posed here is whether the Local Agreement can be considered effective beyond July 30, 1988.

Some authorization in the Master Agreement must be present to make the Local Agreement effective beyond July 30, 1988. None, however, has been demonstrated by the Union. As preface to a discussion of this point, it is necessary to sketch the factual background. Bargaining on a successor to the Local Agreement began in September of 1986. This bargaining would have been authorized under the terms of the 1985-87 collective bargaining agreement between the WSEU and the State. The local negotiations between Oakhill and the Union continued through the nominal term of the 1985-87 collective bargaining agreement and its extension by the WSEU and the State. The local negotiations remained unresolved as of November 6, 1987, which is the effective date of the Master Agreement. The Local Agreement was continued in effect throughout this period. Farrey's memo terminated the Local Agreement as of July 30, 1988, during the nominal term of the Master Agreement.

Against this background, for the Local Agreement to be effective beyond July 30, 1988, it is necessary for the Union to show either that the Master Agreement specifically authorized the continuing effectiveness of the Local Agreement, or generally authorized the continuing effectiveness of the Local Agreement through its reference that: "This agreement shall extend until a new local contract . . . has been negotiated".

There is no basis in the record to conclude that the Master Agreement specifically authorized the continuing effectiveness of the Local Agreement. Each of the provisions of the Master Agreement cited by the Union authorize

negotiations, not a specific agreement. Article XI specifically underscores that the authorization involved is of negotiations by specifying procedures to govern circumstances "(i)n which no agreement is reached". There is no possibility of a factual dispute on this point, since the Union does not contend the State has bargained in bad faith. If the Master Agreement specifically authorized the continuing effectiveness of the Local Agreement, and the State repudiated that authorization, the repudiation would arguably constitute bad faith bargaining, and would, in any event, be actionable as a breach of the Master Agreement under the grievance procedure established in that agreement. In sum, the present record demonstrates no specific authorization in the Master Agreement for the continuing effectiveness of the Local Agreement, and poses no potential issues of fact on this point.

The sole remaining possible basis for the enforceability of the Local Agreement beyond July 30, 1988, is that the Master Agreement generally authorized the reference in the Local Agreement that: "This agreement shall extend until a new local contract . . . has been negotiated". This basis can not be made persuasive. Doing so would create a contract of indefinite duration, contrary to the provisions of the SELRA.

As preface to discussion of this point, it is necessary to note that the reference noted above can not be taken as a specific agreement by the Union and Oakhill to indefinitely extend the Local Agreement during the present negotiations. Doing so would make Farrey's July 11, 1988, memo the specific repudiation of an agreement reached during the course of the present bargaining. Such conduct would arguably constitute bad faith bargaining, and as noted above, the Union has acknowledged the present matter does not question bad faith bargaining on the State's part. The Union's argument on this point is, then, legal in nature and traces the enforceability of the reference noted above to its origin in 1981.

The Union's argument can not be accepted without making the Local Agreement a contract without any expiration date. The Local Agreement, by its terms, was made generally effective on the "date of signing", which was March 25, 1981. Certain provisions were specifically excepted, but were made effective "April 19, 1981". No expiration date is stated in the Local Agreement, which simply notes it is to remain effective "until a new local contract . . . has been negotiated". 5/

The absence of any expiration date in the Local Agreement can not be interpreted to create a contract of indefinite duration without violating the terms of the SELRA. Sec. 111.92(3), Stats., provides that "Agreements shall coincide with the fiscal year or biennium". Sec. 111.92(4), Stats., provides: "It is the declared intention under this subchapter that the negotiation of collective bargaining agreements . . . shall coincide with the overall fiscal planning and processes of the state". The Master Agreement recognizes the force of these provisions by providing a fixed duration which coincides with the State's biennium. Thus, it can not be persuasively asserted that the Master Agreement has generally authorized a reference in the Local Agreement which the SELRA does not authorize for a master agreement. Nor can the assertion be made persuasive by implying that the Local Agreement is assumed to expire with a master agreement, and that the reference extending its term is a specific agreement governing the present negotiations. As noted above, doing so would make the July 11, 1988, memo an arguably bad faith repudiation of a specific agreement and the Union has noted it is not asserting that the State has bargained in bad faith.

The Union's assertion that the Legislature's approval of the Master Agreement "breathed . . . new life" into the Local Agreement can not be accepted. The Legislature approved the language of the Master Agreement, which, as noted above, generally authorizes negotiations on the local level, but does not expressly effect any specific local agreement. The Union has not demonstrated how the Legislature's action regarding the Master Agreement can be viewed to make effective the specific terms of the Local Agreement.

In sum, the Union and the State agree that the core of the amended complaint is the enforceability of the terms of the Local Agreement beyond July 30, 1988. The amended complaint asserts the Local Agreement can be

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5/ Cf. to City of Sheboygan, Dec. No. 19421 (WERC, 3/82). The MERA and SELRA provisions on length of agreements are dissimilar (Cf. Sec. 111.70(3)(a)4, Stats., to Sec. 111.92(3), Stats). The Commission's comments from Sheboygan (at 8) are, however, relevant to this matter: "In analyzing the duration language in question, it is readily apparent that said language provides for an indefinite duration by providing that the agreement would stay in effect ". . . until a successor agreement is reached". The complete duration proposal in Sheboygan reads thus: "This Agreement shall be effective when signed by both parties and shall remain in full force and effect until its expiration date, December 18, 1981 or until a successor agreement is reached".

enforced under Secs. 111.84(1)(d) or (e), Stats. Even assuming the Local Agreement is enforceable as a collective bargaining agreement, it is not enforceable, by its terms, under Sec. 111.84(1)(d), Stats., since the duty to bargain does not compel the making of a specific concession. Because the Union does not contend that the State has bargained in bad faith, and because the Union contends the Local Agreement has ongoing validity, uninterrupted by any gap in its effectiveness, there is no issue posed under Sec. 111.84(1)(d), Stats., that the State was under a legal duty to honor the terms of the Local Agreement until a successor was negotiated. It follows that the record presents no legal or factual basis to ground the Union's allegation that the State has violated Sec. 111.84(1)(d), Stats.

Nor does the record present any legal or factual basis to ground the Union's allegation that the State has violated Sec. 111.84(1)(e), Stats. The Local Agreement is effective through the authorization of the Master Agreement. The Master Agreement generally authorizes negotiations at the local level, and does not expressly effect the specific terms of the Local Agreement. At the time the Master Agreement, by its terms, became effective, negotiations were occurring at the local level to reach a successor to the Local Agreement. Those negotiations broke down in July of 1988, and Oakhill management terminated the Local Agreement. This occurred during the nominal term of the Master Agreement. The Union has offered no persuasive basis to conclude the Master Agreement specifically authorized the effectiveness of the Local Agreement beyond July 30, 1988, or generally authorized such effectiveness through the reference in the Local Agreement that it would remain in effect until its successor was negotiated. No specific authorization for such an extension can be found on the face of the Master Agreement, and reading the cited reference from the Local Agreement to have that effect would make the Local Agreement a contract of indefinite duration, contrary to the terms of the SELRA. It follows that the record presents no legal or factual basis to ground the Union's allegation that the State has violated Sec. 111.84(1)(e), Stats.

Because the alleged violation of Sec. 111.84(1)(a), Stats., is derivative, the conclusions reached above regarding Secs. 111.84(1)(d) and (e), Stats., establish that no statutory violations can be found on the present record.

Before closing, it is necessary to limit the scope of the discussion entered above to the issue of the enforceability of the Local Agreement beyond July 30, 1988. The conclusions stated above have no bearing on whether the WSEU and the State or the Union and Oakhill management can extend an agreement beyond its nominal expiration date. The WSEU and the State have done so, and the Commission has recognized the validity of such agreements. 6/ Such agreements define the parties' rights and obligations during the period between the expiration of one contract and agreement on its successor. In the absence of such agreements those rights and obligations are unclear under current law, and have proven a fertile field for litigation. 7/ Extension of a contract beyond its nominal expiration date is, then, well founded in policy and in the Commission's case law.

The conclusion that reading the Local Agreement as the Union asserts would create a contract of indefinite duration contrary to the SELRA has, then, no bearing on whether bargaining parties can extend a contract beyond its nominal expiration date. The Local Agreement at issue here has no expiration date, and if read as the Union requests, would have none.

That the Master Agreement, by its terms, has expired has no bearing on the issues posed here. The Master Agreement has been extended by the WSEU and the State. As of July 31, 1988, the rights and obligations of the Union and Oakhill management were governed by the terms of the Master Agreement, including its grievance procedure. Given the extension of that agreement, this remains the case.

Dated at Madison, Wisconsin this 6th day of December, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Richard B. McLaughlin, Examiner

6/ State of Wisconsin, Department of Employment Relations, Dec. No. 23161-B, 23317-B (Roberts, 1/87), aff'd Dec. No. 23161-C (WERC, 9/87).

7/ See, for example, School District of Plum City, Dec. No. 22264-B (WERC, 6/87).