

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

THE WISCONSIN STATE EMPLOYEES	:	
UNION (WSEU), AFSCME, COUNCIL 24,	:	
AFL-CIO,	:	
	:	Case 266
Complainant,	:	No. 42024 PP(S)-154
	:	Decision No. 25987-A
vs.	:	
	:	
THE STATE OF WISCONSIN,	:	
	:	
Respondent.	:	
	:	

Appearances:

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

Mr. David Whitcomb, Legal Counsel, Department of Employment Relations, Division of Collective Bargaining, 137 East Wilson Street, P.O. Box 7855, Madison, Wisconsin 53707-7855, with Mr. Richard W. Henneger, Attorney for the Department of Natural Resources, appearing on behalf of the State of Wisconsin.

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The Wisconsin State Employees Union (WSEU), AFSCME, Council 24, AFL-CIO, filed a complaint with the Wisconsin Employment Relations Commission on April 7, 1989, alleging that the State of Wisconsin had committed Unfair Labor Practices within the meaning of Secs. 111.84(1)(a) and (c), Stats. On May 2, 1989, the Commission appointed Richard B. McLaughlin, a member of its staff, 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. Hearing on the matter was conducted in Madison, Wisconsin on June 21, 1989. At the close of that hearing, the WSEU was allowed to amend its complaint to allege that the State's conduct constituted a violation of Sec. 111.84(1)(d), Stats. A transcript of the hearing was provided to the Commission on July 10, 1989. The parties filed briefs and a reply brief or a waiver of the filing of a reply brief by September 14, 1989.

FINDINGS OF FACT

1. The Wisconsin State Employees Union (WSEU), AFSCME, Council 24, AFL-CIO, referred to below as the WSEU, is a labor organization which 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. The State also operates an agency known as the Department of Natural Resources, referred to below as the DNR, which maintains its offices at 101 South Webster Street, Madison, Wisconsin 53703.

3. The State and the WSEU are parties to a collective bargaining agreement which was in effect, by its terms, from November 6, 1987, to June 30, 1989. Article IV of that agreement is entitled "Grievance Procedure". Section 9 of the grievance procedure is entitled "Discipline", and Subsection 4/9/1 reads as follows:

The parties recognize the authority of the Employer to suspend, demote, discharge or take other appropriate corrective disciplinary action against employes for just cause. An employe who alleges that such action was not based on just cause, may appeal a demotion, suspension, discharge, or written reprimand taken by the Employer beginning with the Third Step of the grievance procedure . . .

4. Ronald Thiel was employed by the DNR as a Park Ranger 2 at Point Beach State Park throughout 1988. Bruce Braun, Deputy Secretary of the DNR, issued the following letter, dated May 19, 1988, to Thiel:

This letter is to advise you of your suspension without pay for a period of ten (10) days. The days of your suspension will be your scheduled work days during the weeks of July 10-16 and July 24-30, 1988.

This disciplinary action is based on the following incidents and your conduct which violated the Department of Natural Resources' Work Rules (Manual Code 9121.06(1)(b)-Neglecting job duties or responsibilities; 9121.06(1)(e)-Failure to provide accurate and complete information whenever such information is requested by an authorized person; 9121.06(2)(f)-Failure to observe the time limits for lunch, rest or coffee breaks or wash-up periods; and 9121.06(4)(b)-Possession of or use of alcoholic beverages or illicit controlled substances during work hours.

1. Since the summer of 1985, you have engaged in and permitted the consumption of alcoholic beverage by and with limited-term employees in Department facilities during normal work hours. These events occurred on the average of 1-2 times per week, and you were instrumental in furnishing the alcoholic beverages. This activity occurred anytime between 3:00 p.m. to 4:30 p.m.
2. Since at least 1985, you altered and falsified LTE Time Reports to accommodate favors to LTE employees. This was a regular occurrence with time sheets being altered nearly every pay period.
3. Almost on a daily basis, you and your limited term employees started work 30 minutes to 1 hour late and terminated work 30 minutes to 1 hour early.
4. During the Department's investigations into the problems at Point Beach State Forest, you told the interviewers that consumption of alcohol did not occur until after 4:30 in spite of a directive to be truthful. Virtually all other interviewed employees including Superintendent Ketchbaw admitted that alcohol was consumed during working hours.

Your classification is included in the Blue Collar Bargaining Unit which is covered by a collective Bargaining Agreement between the State of Wisconsin and Wisconsin State Employees Union, Council 24. If you believe this action was not based on just cause, you may appeal through that contractual grievance procedure.

Thiel filed a grievance regarding the contents of the May 19, 1988, letter.

5. A third step meeting regarding Thiel's grievance was conducted at Point Beach State Park on August 30, 1988. Thiel was present at this meeting as was Ronald Orth, a WSEU Field Representative, and Gerald Nelson, then employed by the DNR as an Employment Relations Specialist. WSEU representatives, including Orth, advocated Thiel's position at this meeting. Thiel played no active role in the meeting.

6. Between the third step meeting and December of 1988, Nelson and Orth communicated regarding Thiel's grievance. As a result of these communications, the contractual time limits for processing the grievance were extended to permit the State to investigate the matter. Orth also communicated with Thiel during this period to advise him on the status of the grievance. Sometime on or about December 5, 1988, Nelson phoned Orth. The State had completed its investigation by this time, and Nelson wished to make an offer of settlement regarding the Thiel grievance. Nelson made an offer of settlement, and he and Orth discussed settling the Thiel grievance for from fifteen to thirty minutes. At the end of that conversation, Nelson and Orth each believed a verbal understanding had been reached which would resolve the Thiel grievance. That understanding was that the State would, before Christmas of 1988, reimburse Thiel for the economic cost of the suspension, and that the WSEU would agree to accept a written letter of reprimand of Thiel. Nelson agreed to revise the letter of May 19, 1988, to effect their verbal understanding.

7. By the close of the phone conversation noted in Finding of Fact 6, Nelson understood Orth's concerns to focus solely on paragraph 2 of the May 19, 1988, letter. Nelson had the May 19, 1988, letter before him throughout that conversation, and had asked Orth to specify what portions of the letter were objectionable to Thiel and the WSEU. He did not know if Orth was referring to the letter during their conversation.

8. By the close of the phone conversation noted in Finding of Fact 6, Orth believed he had informed Nelson that the letter of reprimand should contain no reference to conduct on Thiel's part which could be considered illegal.

9. Nelson revised the May 19, 1988, letter and issued a copy of the revised letter, with Braun's signature, to Thiel. Attached to the revised letter was a copy of the original grievance including the following entry under the heading "Employer's Decision":

The 10 day suspension is hereby rescinded and replaced by the attached letter of reprimand. This action is being taken with the understanding that this will provide a final settlement regarding this grievance.

The revised letter of reprimand was dated December 6, 1988, and reads as follows:

This letter of reprimand is based on the following incidents and your conduct which violated the Department of Natural Resources' Work Rules (Manual Code 9121.06(1)(b)-Neglecting job duties or responsibilities; 9121.06(1)(e)-Failure to provide accurate and complete information whenever such information is requested by an authorized person; 9121.06(2)(f)-Failure to observe the time limits for lunch, rest or coffee breaks or wash-up periods; and 9121.06(4)(b)-Possession of or use of alcoholic beverages or illicit controlled substances during work hours.

1. Since the summer of 1985, you have engaged in and permitted the consumption of alcoholic beverages by and with limited-term employees in department facilities during normal work hours. These events occurred on the average of 1-2 times per week, and you were instrumental in furnishing the alcoholic beverages. This activity occurred any-time between 3:00 p.m. to 4:30 p.m.
2. Since at least 1985, you processed incorrect Time Reports for LTE employees. This was a regular occurrence with such incorrect time sheets being processed nearly every pay period.
3. Almost on a daily basis, you and your limited term employees started work 30 minutes to 1 hour late and terminated work 30 minutes to 1 hour early.
4. During the Department's investigations into the problem at Point Beach State Forest, you told the interviewers that consumption of alcohol did not occur until after 4:30 in spite of a directive to be truthful. Virtually all other interviewed employees including Superintendent Ketchbaw admitted that alcohol was consumed during work hours.

Your classification is included in the Blue Collar Bargaining Unit which is covered by a collective Bargaining Agreement between the State of Wisconsin and Wisconsin State Employees Union, Council 24. If you believe this action was not based on just cause, you may appeal to the contractual grievance procedure.

10. Sometime on or about December 12, 1988, Orth phoned Nelson. Orth informed Nelson that the terms of the December 6, 1988, letter were unacceptable to the WSEU and to Thiel. Specifically, Orth informed Nelson that the date of the reprimand was unacceptable, as was any implication that Thiel had engaged in illegal conduct. Orth informed Nelson that the December 6, 1988, letter was not acceptable to the WSEU and Thiel, and that it did not reflect Orth's understanding of what had earlier been agreed to. Nelson felt frustrated by Orth's position, and felt Orth had reneged on the earlier agreement.

11. In a letter to Nelson dated December 13, 1988, Orth stated the WSEU's position regarding the status of the Thiel grievance thus:

The Offer of Settlement in the above referenced case is unacceptable to Mr. Thiel for the following reasons:

- (1) The December 6, 1988 is not acceptable but May 19, 1988 would be.
- (2) In Item #2, second sentence...This was a regular occurrence with such incorrect time sheets being processed nearly every pay period. The main

objection is "being processed nearly every pay period."

(3) Item #3 in its entirety.

In my phone discussions with you, I indicated that it would not be acceptable to have anything in the Letter of Reprimand which would relate to any type of illegal activity. As I stated in our December 12th conversation, I apologize for not citing this item but I did not have the letter in front of me when we previous spoke.

The Letter of Reprimand would be acceptable with the changes as outlined above. There are other objectionable items within the letter, however, Mr. Thiel will accept these in order to expedite and resolve this issue.

If we do not hear from you by December 29, 1988, we will presume you have no interest in settling this matter and will proceed to appeal to arbitration.

Nelson did not respond to Orth's December 13, 1988, letter.

12. Sometime in the afternoon of December 13, 1988, Nelson phoned Thiel at Thiel's worksite at Point Beach State Park. Their conversation lasted a few minutes, and, at a minimum, included the following: Nelson asked Thiel if Thiel was aware of the position Orth was taking on Thiel's behalf; Thiel informed Nelson that Orth represented him; Nelson asked Thiel if Thiel had received a copy of the grievance settlement and if he was aware of the terms of that settlement; Nelson attempted, without success, to get Thiel to discuss the substance of the proposed settlement agreement, including the revised letter of reprimand; Nelson asked Thiel if Thiel was aware that if the settlement agreement was not acceptable, then Thiel would have to reimburse the State for the amount it had paid him as reimbursement for the economic harm he had incurred as a result of the suspension; and Nelson informed Thiel he felt Orth had reneged on an agreement.

13. Thiel was surprised to receive the December 13, 1988, phone call from Nelson, and after the call was over, recorded his recollection of the call so that he could discuss the matter with Orth. Thiel phoned Orth on December 14, 1988, and discussed his conversation with Nelson on the preceding day. Orth advised Thiel to put his recollection in letter form. Thiel did so, in a letter which reads thus:

Ron Orth has informed me to write down the discussion which took place with myself and Glen Nelson on 13th of Dec. 88 a 16:00 hrs.

Mr. Nelson called me at Pt. Beach. He ask if I knew Ron Orth and what I thought of him? He then stated it "doesn't really matter" Mr. Nelson said "That he and Ron had reached an agreement, Was I aware of this and did I agree with it. I told Mr. Nelson I was aware that a revised letter had been sent and my pay would be forth coming.

Mr. Nelson stated "that item #2 had been changed and thats what Ron Orth had ask for "and was this what I was going to settle for or else it would go back to the original letter for arbitration. He stated he had given back my pay and if I was agreeing with Ron Orth I would have to pay the money back along with lose of additional benifits.

He stated that Ron as far as he was concerned reneged on his deal.

I told Mr. Nelson I could not agree with the letter since it was not true. In ending he said, well Ron Orth Reneged on the agreement. Have a nice day and Goodby.

During the time item #2 was discussed and read to me I was ask if I was going to settle on this or was I in agreement with Ron Orth. I never told Mr. Nelson I agreed with Ron or disagreed. I only stated I didn't agree with what the letter said. I really felt that I was having pressure put on me to just say "ok" I'll just take what your giving me.

14. Nelson's phone conversation with Thiel on December 13, 1988, was likely to interfere with Thiel's processing of his grievance. Nelson did not

afford Orth an opportunity to participate in that conversation, and attempted to bargain the matter with Thiel individually. Nelson's conversation with Thiel on December 13, 1988, does manifest Nelson's personal frustration with Orth, but does not manifest anti-union hostility.

CONCLUSIONS OF LAW

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

2. Thiel, through his employment by the DNR, is an "Employee" within the meaning of Sec. 111.81(7), Stats.

3. The State is Thiel's "Employer" within the meaning of Sec. 111.81(8), Stats.

4. Nelson's conversation with Thiel on December 13, 1988, was likely to interfere with Thiel's processing of the grievance challenging his suspension. Because the processing of that grievance is a right protected by Sec. 111.82, Stats., the conversation constitutes a violation of Sec. 111.84(1)(a), Stats.

5. Nelson's conversation with Thiel on December 13, 1988, did not manifest anti-union hostility on Nelson's part. Thus, the conversation does not constitute a violation of Sec. 111.84(1)(c), Stats.

6. Nelson's conversation with Thiel on December 13, 1988, constitutes individual bargaining by the State in violation of Sec. 111.84(1)(d), Stats.

ORDER 1/

1. Those portions of the complaint asserting State violations of Sec. 111.84(1)(c), Stats., are dismissed.

2. To remedy its violation of Secs. 111.84(1)(a) and (d), Stats., the State, its officers and agents shall immediately:

a. Cease and desist from:

- (1). Interfering with the processing of Thiel's grievance by contacting Thiel in the absence of his chosen WSEU representative.
- (2). Attempting to bargain with Thiel regarding his grievance in the absence of his chosen WSEU representative.

b. Take the following affirmative action which the Examiner finds will effectuate the purposes and policies of the State Employment Labor Relations Act:

- (1). Notify employes by posting in conspicuous employe notice locations at Point Beach State Park and Thiel's present worksite, if he no longer works as Point Beach State Park, a copy of the notice attached to this Order and marked "APPENDIX A". This copy shall be signed by a responsible official of the State, shall be posted immediately upon receipt of a copy of this Order, and shall remain posted for a period of 30 days thereafter. Reasonable steps shall be taken to insure that this posted notice is not altered, defaced or covered by other material.
- (2). Notify the Wisconsin Employment Relations Commission within 20 days of this Order as to what steps the State has taken to comply with the Order.

Dated at Madison, Wisconsin, this 31st day of October, 1989.

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

(Footnote 1/ continued on page 7)

1/ continued

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.

"APPENDIX A"

As ordered by the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the State Employment Labor Relations Act, we notify our employees that:

1. WE WILL NOT interfere with Ronald Thiel's exercise of rights protected by Sec. 111.82, Stats., including Thiel's processing of a grievance through the procedure established in a collective bargaining agreement between AFSCME Council 24, Wisconsin State Employees Union, AFL-CIO, and the State of Wisconsin.
2. WE WILL NOT attempt to bargain with Ronald Thiel individually regarding the processing of his grievance, and will not attempt to confer with Ronald Thiel regarding the processing of his grievance in the absence of his chosen representative from AFSCME Council 24, Wisconsin State Employees Union, AFL-CIO.

Dated at _____, Wisconsin, this ____ day of _____, 1989.

The State of Wisconsin

By _____
Name

Title

THIS NOTICE MUST REMAIN POSTED FOR 30 DAYS FROM THE DATE STATED ABOVE AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

BACKGROUND

The WSEU, in the complaint initiating this matter, alleged that the State had committed unfair labor practices in violation of Secs. 111.84(1)(a) and (c), Stats. At the hearing, I informed the parties that their arguments and the evidence had raised potential issues regarding Sec. 111.84(1)(d), Stats., and I permitted the WSEU to amend the complaint accordingly.

THE PARTIES' POSITIONS

The WSEU starts its initial brief by noting that "(t)he dispositive facts are undisputed." Those facts establish, according to the WSEU, that Nelson contacted Thiel "unilaterally". The WSEU characterizes the status of current law on this point thus:

Dealing unilaterally with Employees in the face of a certified collective bargaining Agent is and continues to be unlawful; there has never been any doubt about this rule of law, nor have there been any deviations or exclusions.

The application of the law to the facts in this case is clear, the WSEU argues, and it follows that "(a)ppropriate remedial orders should/must be entered forthwith."

The State starts its initial brief by noting that "(i)n all material respects the facts are not in dispute." The State then contends that its "direct communication with the Complainant concerning the settlement of the Complainant's grievance did not constitute a per se violation of the Complainant's right to representation during settlement negotiations." No violation of the SELRA can be demonstrated on the facts of the present matter, according to the State, absent a showing that the State refused to bargain with the WSEU "on matters set forth in sec. 111.91, Stats.", or that Nelson's remarks to Thiel "in some way interfered with, restrained, or coerced Mr. Thiel in the exercise of the rights guaranteed him under SELRA." Because "there is no evidence that respondent refused to bargain" with the WSEU and because Nelson's conversation with Thiel amounted to no more than Nelson's urging Thiel to communicate with Orth regarding the settlement agreement, it follows, according to the State, that the WSEU has failed to prove the existence of any statutory violation on the present facts. A review of the record establishes, the State contends, that:

The record herein does not contain any evidence that the respondent's remarks during the telephone conversation complained of interfered with, restrained or coerced the complainant in the exercise of his rights under SELRA.

The State notes that a determination of coercion "is made on a case-to-case basis", and concludes that the present record establishes only that: "Mr. Nelson provided Mr. Thiel with information concerning the settlement negotiations, and satisfied himself that Mr. Thiel was aware of Mr. Orth's representations on his behalf." Beyond this, the State argues that: "(t)he complaint includes allegations in Paragraph 12 which remain wholly unsubstantiated by the record." Specifically, the State contends that the record fails to support any assertion that Nelson sought to have Thiel "back out of an agreement previously reached" or to "ridicule or demean Mr. Orth in the eyes of Mr. Thiel." The State concludes that the complaint should be dismissed.

In reply to the State's brief, the WSEU argues initially that "(t)he State interfered with, restrained and coerced Mr. Thiel in the exercise of his rights guaranteed in Section 111.82, Stats." The WSEU acknowledges that the parties do not dispute the facts of the present matter and that the law does not preclude the State from ever "questioning Employees about Union-related topics." However, the WSEU contends that a review of the record establishes that Nelson set a coercive tone for his phone conversation with Thiel by questioning Thiel's opinion of Orth, and then confirmed this coercive tone by informing Thiel that he "would possibly have to return the 10 days' worth of back pay, as well as possibly forfeit other benefits as well." Since Nelson was an official "closely related to the issue of Thiel's suspension", who had no reason to contact Thiel at work but used that contact to communicate a possible loss of benefits and pay, it follows, according to the WSEU, that "(e)ven if Nelson's call only mirrored his opinion as to the consequences of refusing the settlement, it carried with it a threat". Contending that Nelson felt frustrated with "what he thought would be a completed deal", the Union argues that Nelson's frame of mind makes it reasonable to infer that he called Thiel to urge him to accept the settlement, and not to determine if Thiel was aware of the status of attempts to settle the matter. Beyond this, the WSEU urges that "(t)he State ridiculed and attempted to demean Mr. Orth in the eyes of his represented, Mr. Thiel." The WSEU's next major line of argument is that "(t)he State committed an unfair labor practice when it by-passed the union and bargained directly with Mr. Thiel." The WSEU concludes by requesting "the entry of all appropriate remedial orders."

The State waived the filing of a reply brief.

DISCUSSION

The complaint poses alleged State violations of Secs. 111.84(1)(a), (c) and (d), Stats. Sec. 111.84(1)(a), Stats., makes it an unfair labor practice for the State to "interfere with, restrain or coerce state employes in the exercise of their rights guaranteed in s. 111.82." Sec. 111.82 guarantees

State employes the right to engage in certain "lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection."

The Wisconsin Supreme Court has observed that:

It is helpful to compare the wording of MERA and SELRA, whereupon we find that the rights guaranteed to employees under these acts are identical . . . It would be illogical to apply a different test to MERA than SELRA merely because a different group of protected persons are involved (municipal employees versus state employees). 2/

This observation has been reflected in the test applied by Commission examiners to determine an independent violation of Sec. 111.84(1)(a), Stats., for the test parallels that used to determine an independent violation of Sec. 111.70(3)(a)1, Stats. Applied to the facts at issue here, the test requires that the WSEU demonstrate that Nelson's phone conversation with Thiel was "likely to interfere with, restrain or coerce" Thiel in the exercise of rights protected by Sec. 111.84(2), Stats. 3/ This is an objective test which does not require proof that the State, through Nelson, intended to interfere with Thiel's exercise of a protected right. 4/

That Thiel's processing of a grievance through the contractual grievance procedure constitutes "lawful, concerted activit(y) for the purpose of collective bargaining" has not been, and can not be, disputed on the present record. The issue posed here is whether the December 13, 1988, phone conversation was likely to interfere with Thiel's exercise of that right.

Resolution of this issue does not require any determination of witness credibility. Finding of Fact 12 reflects Nelson's testimony regarding the conversation, and that testimony, in itself, is sufficient to establish conduct likely to interfere with Thiel's assertion of his grievance. Both the context and the content of the conversation related by Nelson manifest coercive connotations.

The most significant aspect of the context of the December 13, 1988, conversation is that Thiel had not played any active role in the presentation of his grievance up to that point. Orth served as Thiel's spokesman at the third step meeting. Thiel played no active role at that meeting. Nelson, throughout the period of time between that meeting and December 13, 1988, contacted Orth to discuss the grievance. Prior to December 13, 1988, Thiel did not directly discuss his grievance with Nelson, and did so on that date only after Nelson's unrequested phone inquiry at Thiel's worksite. Standing alone, the context of the December 13, 1988, conversation manifests an attempt by Nelson to circumvent Orth's representation of Thiel.

Beyond this, the content of the conversation related by Nelson manifests coercive connotations. In spite of the fact that Thiel had never played an active role in the presentation of his grievance, Nelson questioned Thiel regarding his awareness of Orth's representation, and attempted to get Thiel to discuss the merits of the proposed settlement agreement. Having failed to engage Thiel in such a discussion, Nelson informed Thiel that his failure to accept the proposed agreement would cost him financially, and further informed Thiel that Nelson felt Orth had reneged on an agreement. This conversation can not be persuasively characterized as anything other than an attempt by Nelson to isolate Thiel from Orth, and to pressure Thiel into accepting the proposed settlement agreement.

The State persuasively argues that this conversation can not be characterized as an attempt by Nelson to ridicule or demean Orth. The test noted above, however, does not require that Nelson ridicule or demean Orth to establish a violation of Sec. 111.84(1)(a), Stats. Nor can the conversation be characterized as Nelson's attempt to impart information to Thiel. While Nelson's inquiry regarding Thiel's awareness of Orth's representation of him

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

3/ See State of Wisconsin, Department of Administration, Dec. No. 15945-A (Michelstetter, 7/79), aff'd by operation of law, Dec. No. 15945-B (WERC, 8/79); State of Wisconsin, Department of Health and Social Services, Dec. No. 17218-A (Pieroni, 3/81), aff'd by operation of law, Dec. No. 17218-B (WERC, 4/81); State of Wisconsin, Dec. No. 19630-A (McLaughlin, 1/84), aff'd by operation of law, Dec. No. 19630-B (WERC, 2/84); State of Wisconsin, Department of Health and Social Services (DHSS), Division of Corrections (DOC), Dodge Correctional Institution (DCI), Dec. No. 25605-A (Engmann, 5/89), aff'd by operation of law, Dec. No. 25605-B (WERC, 6/89).

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

can arguably be characterized as gratuitous, this characterization is unpersuasive in light of the balance of the conversation. For Nelson to attempt to get Thiel to discuss the proposed settlement in the absence of his chosen representative is more than a gratuitous sharing of information. For Nelson to follow up this attempt by informing Thiel that Orth's actions would cost Thiel financially, and by informing Thiel that he felt Orth had reneged on an agreement can not be dismissed as informational or as gratuitous. Rather, both the context and the content of the conversation related by Nelson establish his attempt to stop the processing of Thiel's grievance by isolating Thiel from Orth and by pressuring Thiel into accepting the proposed agreement Orth had previously rejected.

It is not necessary to credit Thiel's testimony that he felt coerced by this conversation to determine that an employe in Thiel's position could reasonably reach that conclusion. It follows that the conversation was likely to interfere with Thiel's protected right to process a grievance, in violation of Sec. 111.84(1)(a), Stats.

Sec. 111.84(1)(c), Stats., makes it an unfair labor practice for the State to "encourage or discourage membership in any labor organization by discrimination in regard to hiring, tenure or other terms or conditions of employment." To establish a violation of this section, the WSEU must establish (1) that Thiel had engaged in activity protected by Sec. 111.84(2), Stats., (2) that the State was aware of that activity and was hostile to it, and (3) that the State, through Nelson, acted against Thiel, based at least in part on that hostility. 5/ Thiel's assertion of his grievance has already been noted to constitute activity protected by Sec. 111.84(2), Stats., and it is apparent that the State was aware of this activity. The WSEU has not, however, proven that the State bore the hostility necessary to establish a violation of Sec. 111.84(1)(c), Stats. That hostility, as the court noted, is "anti-union hostility". 6/ The WSEU has established, at most, that Nelson was upset by Orth's "reneging" on a settlement. There is no persuasive evidence in the record that Nelson held any animus toward the WSEU or toward Thiel for being represented by the WSEU. Rather, the record shows only that Nelson felt frustration with Orth personally for what Nelson viewed as Orth's change of position. Nelson's personal frustration with Orth does not rise to the "anti-union" hostility proscribed by Sec. 111.84(1)(c), Stats. Accordingly, no violation of that section has been found.

Sec. 111.84(1)(d), Stats., 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." Sec. 111.91(1)(b), Stats., makes "the adjustment or settlement of grievances or disputes arising out of any type of disciplinary action . . . a subject of bargaining." Read together, these statutes establish that the State had an obligation to bargain with the WSEU regarding Thiel's grievance. The issue posed here is not, however, whether the duty exists but whether the State violated its duty to bargain with "a majority representative" by bargaining individually with Thiel on December 13, 1988.

Nelson's testimony, standing alone, establishes that he attempted to bargain with Thiel individually. Nelson testified thus regarding his conversation with Thiel:

QNow, sir, what did you tell Mr. -- what is your recollection of what you said to Mr. Thiel on the 13th of December?

AMy recollection is I asked him whether or not he was aware of the representation that Mr. Orth had presented to me.

QOkay.

AAnd I also asked him if he had received his copy of the grievance settlement, that he was aware of what the settlement was, and that he was aware of what that settlement consisted of. Since Mr. Orth's contention over the phone to me was that he was going to renege on that, I thought he ought to -- Mr. Thiel ought to know that that was happening.

QOkay. Now, when you were asking him about Mr. Orth's position on this grievance or his representation on this grievance, what did he say to you?

AHe indicated that Mr. Orth represented him.

5/ See 122 Wis.2d at 140.

6/ Ibid., at 144.

QOkay. And in addition, other than saying did Mr. Orth represent him, did he say anything else about that?

ANo.

QOkay.

AI had to assume from his statement that he accepted whatever Mr. Orth did in his behalf.

QOkay. Now, did he indicate that he had not received a copy of the letter?

AIIt appears that he may not have received his copy yet.

QWell, did you discuss the content of that letter at all?

AI tried to discuss the content, but there was no -- he was not aware or was not talking about it.

QYou didn't read the letter to him, is that correct?

ANo, I did not.

QNow, in this letter, Mr. Thiel writes, "I would have to pay the money back along with lose additional benefits." Do you recall having discussed with Mr. Thiel anything relating to the backpay award -- the backpay or the loss of additional benefits?

AYes. I would have made that information available to him on the telephone. 7/

It is apparent from this testimony that Nelson attempted to get Thiel to discuss the substance of the settlement proposal in Orth's absence. If Nelson's purpose was to give information to Thiel, such discussion was unnecessary. As noted above, however, the context and content of this conversation establish that Thiel could reasonably perceive Nelson's purpose to be to isolate him from his representative, and to pressure him to accept a settlement proposal already rejected. The content of the passage cited above establishes that Nelson sought more than to impart information to Thiel. He sought to discuss the merits of the proposed settlement in Orth's absence, and this constitutes an attempt to bargain with Thiel individually.

Sec. 111.83(1), Stats., underscores the impropriety of the procedure used by Nelson to approach Thiel. That section provides:

Any individual employe . . . may present grievances to the employer in person, or through representatives of their own choosing, and the employer shall confer with said employe . . . in relation thereto if the majority representative has been afforded the opportunity to be present at the conference.

This section provides the State a defense against potential charges of individual bargaining, but makes that defense available only if the State affords the majority representative an opportunity to be present. In this case, the State urges that Nelson's "informational" purposes operate as a defense to the charge of individual bargaining, independent of the fact that Orth was not afforded an opportunity to be present at the December 13, 1988, conversation. As noted above, the record does not establish that Nelson approached Thiel for "informational" purposes. More significantly here, however, Sec. 111.83(1), Stats., establishes that, on the present record, the defense asserted by the State is not persuasive as a matter of law. It would be an anomalous result to conclude that although the law would require the State to afford the WSEU an opportunity to be present for the December 13, 1988, conversation if Thiel had not chosen to use a WSEU representative as his spokesman, the law permits the State to unilaterally contact Thiel since he had chosen to use a WSEU representative as his spokesman. This result is unpersuasive, and it must be concluded that Nelson's direct contact of Thiel on December 13, 1988, constitutes individual bargaining proscribed by Sec. 111.84(1)(d), Stats.

In sum, Nelson's December 13, 1988, conversation with Thiel constitutes a violation of Sec. 111.84(1)(a) and (d), Stats., but does not constitute a violation of Sec. 111.84(1)(c), Stats. It should be stressed that while the proposed agreement tentatively reached by Orth and Nelson to settle the Thiel grievance may present a source of considerable personal concern to each of

7/ Transcript at 59-60.

them, it is not necessary to resolve what they did or did not agree upon to address the issues posed here. The controlling consideration here is the propriety of the procedure utilized by Nelson to address his concern that Orth had reneged on an agreement. The record establishes that Nelson's direct contact of Thiel on December 13, 1988, interfered with Thiel's right to process his grievance and constituted an attempt to bargain with Thiel individually.

The record does not pose any remedial issues requiring extensive discussion. The cease and desist order should be self explanatory. The State has been ordered to post a notice to address any impact at the worksite Nelson's unilateral approach to Thiel may have had. The notice is tied to Thiel's situation, but should make it apparent to employees that the State can not approach them in the absence of their chosen representative during the processing of grievances. The WSEU has requested its costs of litigation. Whatever basis for an award of litigation costs exists in Commission case law is traceable to a concurring opinion in Madison Schools. 8/ That concurrence refers to "exceptional cases where an extraordinary remedy is justified." 9/ The present matter poses no such exceptional issues. Nelson chose the wrong procedure to voice his concerns over Orth's actions. The point of this litigation is, essentially, the establishment of the appropriate procedure, through a review of the procedure used by Nelson. An award of litigation costs on this record would be punitive in nature.

Dated at Madison, Wisconsin, this 31st day of October, 1989.

By _____
Richard B. McLaughlin, Examiner

8/ Dec. No. 16471-D (WERC, 5/81), cited with approval in Rock County; Dec. No. 23656 (WERC, 5/86).

9/ Cited in footnote 3/ at 9 of Rock County; Dec. No. 23656 (WERC, 5/86).