STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

THE WISCONSIN STATE EMPLOYEES UNION (WSEU), AFSCME, COUNCIL 24, AFL-CIO, Complainant, vs. STATE OF WISCONSIN, Respondent.	Case 269 No. 42504 PP(S)-157 Decision No. 26103-A

Appearances:
Mr. Richard V. Graylow, Lawton & Cates, S.C., Attorneys at Law, 214 West Mifflin Street, Madison, Wisconsin 53703-2594, at hearing and on briefs, and Mr. Chris Wolle, Law Clerk, on reply brief, appearing on behalf of the Complainant.
Mr. David C. Whitcomb, Legal Counsel, Department of Employment Relations, 137 East Wilson Street, Madison, Wisconsin 53703, appearing at hearing and on brief on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The Wisconsin State Employees Union (WSEU), AFSCME, Council 24, AFL-CIO, hereinafter Complainant or Union, having filed a complaint of unfair labor practices with the Wisconsin Employment Relations Commission on July 11, 1989, alleging that the State of Wisconsin, hereinafter Respondent or Employer, had violated Secs. 111.84(1)(a) and (e), Stats., by refusing to accept the terms of arbitration awards issued by Arbitrators Kerkman and Petrie regarding scheduling of vacation; and that the Commission, having appointed James W. Engmann, a member of its staff, on July 31, 1989, to act as Examiner and to make and issue Findings of Fact, Conclusion of Law and Order in this matter as provided in Sec. 111.07(5), Stats.; and the Respondent, having filed an answer to said complaint on August 15, 1989, in which it denied that it had violated Secs. 11.84(1)(a) and (e), Stats.; and a hearing on said complaint having been held on August 25, 1989, in Madison, Wisconsin, at which time the parties were afforded the opportunity to present evidence and make arguments as they wished; and a transcript of said hearing having been received on September 5, 1989; and the parties having filed briefs in this matter, the last of which was received on October 4, 1989; and the Examiner, having considered the evidence and arguments of the parties and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That the Complainant, the Wisconsin State Employees Union (WSEU), AFSCME, Council 24, AFL-CIO, hereinafter Complainant or Union, is a labor organization within the meaning of Sec. 111.81(12), Stats.; that said Union is the exclusive bargaining representative of a number of state employes whose positions were previously allocated by action of the Wisconsin Employment Relations Commission to certain statutorily created bargaining units; and that the Union's principal office is at 5 Odana Court, Madison, Wisconsin 53719.

2. That the Respondent, State of Wisconsin, hereinafter Respondent or Employer, is an employer within the meaning of Sec. 111.81(8), Stats.; that the Employer is represented for collective bargaining purposes by the Department of Employment Relations which has its principal office at 149 East Wilson Street, Madison, Wisconsin 53703; and that among its operational subdivisions, the Respondent operates a Department of Industry, Labor and Human Relations which,

among its operational subdivisions, operates a Division of Unemployment Compensation which, among its operational subdivisions, operates a Bureau of Local Operations.

3. That the Union and the Employer were at all times relevant to this matter parties to a collective bargaining agreement, including the most recent agreement which, by its terms, was in effect from November 6, 1989, to June 30, 1989; and that all collective bargaining agreements relevant to this matter provided a grievance procedure which culminated in final and binding arbitration.

4. That on April 14, 1986, T. Breber, manager of the Milwaukee-Central Office of the Division of Unemployment Compensation, hereinafter UC, issued a memorandum which read as follows:

> Because we will be operating at Base Staff levels most of the year the Milwaukee area policy on vacations will be as follows:
>
> Beginning with 4-15-86 and thereafter only one staff person from our three main components (i.e. adjudicators, adjudication support and claim services) can be off for any full week(s) or blocks of time.
>
> Overlaps of individual's days will be considered on case-by-case basis.
>
> No vacation or time off will be granted during weeks 52 and 1.
>
> I am sorry for any inconvenience but I will discuss this with you on an individual basis.

and that the policy on vacations contained in said memorandum, hereinafter Local Policy or April 1986 vacation policy, applied to staff members at the three Milwaukee offices and the Waukesha office only.

5. That on March 3, 1987, the Bureau of Local Operations sent a memorandum to local office managers regarding vacation scheduling; that said memorandum provided written guidelines governing scheduling of vacations and holiday leave; and that said memorandum, hereinafter Bureau Policy or State Policy, read in part as follows:

> The following guidelines will be used by UC Local Offices to guide 1987 vacation scheduling. We will review these guidelines and where appropriate, modify and communicate changes for 1988 by March 1, 1988.
>
> I.This memo provides the parameters wherein staff requests for annual leave are likely to be approved by UCLO Managers.
>
> The Bureau's production oriented staff are encouraged to schedule their vacation during those periods when we anticipate earned resources are likely to be insufficient to support base staff (base staff are other than seasonal/LTE).
>
> UCLO Managers will translate anticipated workload into staff needs. Such estimate will reflect historical patterns and unique local office situations.
>
> The greatest UCLO workload demand, historically, is in the December 15 though January 15 period. Therefore, the UCLO Manager shall not pre-approve in April, vacation or holiday leave for production staff for the week before Christmas, the weeks of Christmas and New Years, or the week following the New Year's holiday. (NOTE: When the actual need for this period is less than what was anticipated, the UCLO Manager may grant time off in a fashion acceptable to local staff. This is an ad hoc accommodation that may or may not be allowed in successive years.)
>
> Generally, UCLO Managers may not recall seasonal staff, hire LTE staff or schedule overtime to perform the work of a person who is on vacation. The Area Manager may temporarily assign year around staff from other offices to cover during the standard vacation period when such action is good management. Authorization for seasonal staff to cover vacation absences will be given only when the anticipated workloads are so high that year around staff would not be able to schedule earned vacation during the principal vacation period. The

UCLO Manager shall in no way compromise quality or timeliness objectives to accommodate vacation wishes.

II.UCLO Vacation Scheduling Guidelines

A.The principal vacation period for the bureau's production oriented UCLO staff, Unemployment Benefit Specialists, Employment Security Assistants, UC Associates and other clerical support staff is April 1 though November 15. The UCLO Manager will estimate staff hours and primary skills that are likely to be needed each week in the period. Beginning with 1988, this assessment will be shared with staff by February 21.

In accordance with this assessment and local vacation scheduling agreements, the UCLO Manager will approve vacation requests. If the office becomes "short staffed" because of unfilled vacancies or the workload exceeds original estimates, use of seasonal staff, LTE's and help from another office will be considered before cancelling an employe's pre-approved vacation. The Bureau Director's approval is required to unilaterally cancel vacation. (An employe may volunteer to reschedule or carry over vacation to meet an unexpected need.)

B.After considering anticipated workloads and total vacation time that must be accommodated, the UCLO Manager, as part of the April scheduling process, may extend the vacation period to as late as December 15. The Manager may also approve vacation requests for days prior to April 1. Area Manager approval is required when seasonal/LTE staff would be needed or retained to cover a vacation absence.

When scheduling outside the 4/1 - 11/15 period (prior to 4/1 and after 11/15), the UCLO Manager will use seniority as the basis to approve/ disapprove requests which are submitted at least two weeks prior to the desired time off unless all staff with contractual seniority rights have waived their right to a week so that a junior staff member may plan time off more than two weeks in advance.

C.In anticipation that a specific UCLO's workload may allow for some leave during the holiday season or to cover for inclement weather, UCLO staff shall be allowed to hold, and if necessary carry over, 16 hours of vacation leave.

6. That on May 17, 1986, a grievance was filed at the third step by the Union challenging that aspect of the Local Policy that no more than one employe would be allowed to take a full week of vacation at a time; that among other relief the Union sought removal of the Local Policy; that the matter was not resolved through the grievance procedure; that the grievance was submitted to arbitration; that on November 23, 1987, Joseph B. Kerkman was advised that he had been selected to serve as arbitrator in this matter; that a hearing was held on August 16, 1988; that the stipulated issue before the Arbitrator was as follows:

> Was the vacation policy, which was implemented in April, 1986, a violation of Article XIII, Section 6 of the collective bargaining agreement? If so, what is the remedy?

that Arbitrator Kerkman issued his award on August 23, 1988; that in his Discussion section, Arbitrator Kerkman stated in part as follows:

> There is also in evidence the state-wide policy which is different than the policy which remains in effect in Milwaukee and Waukesha. The state-wide policy as testified to by Robert M. Schmidt, Director of the Bureau of local operations of the Employer, requires that the Employer review week by week the number of employes it requires on the job, and then to permit those in excess of that minimum requirement to go on vacation, pursuant to their selection. The fact that the state-wide policy requires a week by week review and a determination as to the number of employes that may be off further convinces the Arbitrator that a

> blanket determination of no more than one employe per week is arbitrary. There is no showing in this regard which is persuasive to the undersigned that the Milwaukee and Waukesha offices are in different circumstances than the rest of the state. Furthermore, if the remainder of the state is in the position to make an evaluation as to the numbers required on the job and to permit the remainder of the staff to be on vacation in excess of one in number as a matter of policy, it would follow that a blanket determination without considerations of weekly work load is arbitrary, since the state-wide policy is an agreement assented to by the Employer.

and that the Arbitrator issued the following Award:

> 1. The vacation policy, which was implemented in April, 1986, violated Article XIII, Section 6 of the collective bargaining agreement.
>
> 2. The Employer is directed to rescind the policy of permitting only one adjudicator to take a full week's vacation at any one time.

7. That a second grievance was filed by the Union challenging that aspect of the Local Policy that no employe would be granted vacation during weeks 52 and 1, the weeks in which Christmas and New Year's fall; that the Union sought recission of the Local Policy; that the matter was not resolved through the grievance procedure; that said grievance was submitted to arbitration; that a hearing on said grievance was held on January 10, 1989, before William W. Petrie; that the agreed upon issue before the Arbitrator was as follows:

> (1)Was the vacation policy implemented by the Employer in April 1986 in violation of Article XIII, Section 6 of the collective bargaining agreement.
>
> (2)If the answer to the above is yes, what is the appropriate remedy?

that Arbitrator Petrie issued his award on May 4, 1989; that in a section of his award captioned "The Appropriate Remedy," Arbitrator Petrie wrote as follows:

> Since the April 1986 vacation policy was undertaken in violation of Article XIII, Section 6 of the labor agreement, the Employer will be directed by the undersigned to rescind the policy.
>
> In directing this remedy, the Arbitrator is not unmindful of the Employer's operational needs, rights, and responsibilities which continue throughout the year. The statewide policy which evolved from the parties' mutual settlement of prior grievances, however, affords substantial protection to the Employer's ability to satisfactorily exercise and carry out its contractual and statutory rights and responsibilities during holiday periods, and any individual absences or abuses of sick leave or leave of absence rights, can be appropriately addressed by the Employer in accordance with other sections of the labor agreement. (Emphasis in original)

and that the Arbitrator issued the following Award:

> Based upon a careful consideration of all of the evidence and argument advanced by the parties, it is the decision of the impartial arbitrator that:
>
> (1)The vacation policy implemented by the Employer in April of 1986 was undertaken in violation of Article XIII, Section 6 of the collective bargaining agreement.
>
> (2)The Employer is directed to rescind the policy.

8. That the Local Policy implemented in April 1986 has been rescinded by the Employer; that the Bureau Policy dated March 3, 1987, as amended, governs vacation in UC offices statewide; that neither Arbitrator Kerkman nor Arbitrator Petrie found the Bureau Policy dated March 3, 1987, to be violative of the collective bargaining agreement; that neither Arbitrator Kerkman nor Arbitrator Petrie ordered the Bureau Policy dated March 3, 1987, to be rescinded; that the Bureau Policy does not contain the elements grieved in the Kerkman and Petrie cases; and that by following the Bureau vacation Policy dated March 3, 1987, the Employer is not violating the terms of either the Kerkman or the Petrie arbitration awards.

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

CONCLUSION OF LAW

That the Respondent is not violating the terms of either the Kerkman arbitration award or the Petrie arbitration award and, therefore, the Respondent is not committing an unfair labor practice within the meaning of Secs. 111.84(1)(a) and (e), Stats.

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

ORDER 1/

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

Dated at Madison, Wisconsin this 15th day of November, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
James W. Engmann, 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, CONCLUSION
OF LAW AND ORDER

POSITIONS OF THE PARTIES

On brief the Complainant Union argues that the Employer violated the State Employment Labor Relations Act; that the Kerkman arbitration award was violated; that since at least August 23, 1988, the Employer was under arbitral order not to limit its vacation policies to one person off at a time; that the Petrie arbitration award was violated; that the refusal by the Employer to allow any employes off on vacation during certain parts of the year has been prohibited since at least May 4, 1989; that on or about January 19, 1989, a supposedly new vacation procedure was instituted by the Employer guiding 1989 vacation scheduling practices; that the procedure really was not new; that it contained elements previously held unlawful by both Arbitrators Kerkman and Petrie; that the procedure required that only one person be on vacation at any given time; that the procedure limited vacations to the period prior to the ending of week number 46, approximately November 20, 1989; and that the arbitrary and capriciousness of the Employer's allegedly "new" policy is readily apparent. The Complainant ask that appropriate remedial orders be entered.

On brief the Respondent Employer argues that the Respondent did not violate the State Employment Labor Relations Act; that the arbitration awards do not relate to the current Bureau Policy; that both awards are concerned with the Local Policy only, which was implemented in April 14, 1986; that both arbitration awards ordered the Employer to rescind the Local Policy; that the current Bureau Policy is set forth in a March 3, 1987 memorandum; that both awards contrast the April 14, 1986, Local Policy with the Bureau Policy; that Petrie's award reads as an unqualified endorsement of the March 3, 1987, Bureau Policy; that the Complainant's brief misstates the facts as they relate to an alleged January 1989 Policy; that said alleged Policy was not introduced into evidence; that the testimony shows that the March 3, 1987, Bureau Policy applies to the March 31, 1989 to April 1, 1990 period; that there is nothing in the record relating to one person on vacation or no vacation for the period of week 43 to the end of the year; that with respect to week 46, the change merely modifies the March 3, 1987, Bureau Policy by changing the normal preapproval vacation period; that the Bureau Policy does not prohibit vacation for any period but only states that preapproved will not be granted; and that Bureau Policy does not prohibit more than one person on vacation at a time.

The Respondent Employer also argues that the Local Policy of April 14, 1986, and the Bureau Policy of March 3, 1987, are manifestly different; that the March 3, 1987, Bureau Policy governs the whole Bureau and not one local office; that the March 3, 1987, Bureau Policy does not prohibit vacation approval for any period but merely provides that prior approval will not be granted during peak work load periods; that the March 3, 1987, Bureau Policy does not restrict the number of staff on vacation to one; that Local Policy, blanket prohibition and one staff only are the three points that the arbitrators were concerned about which lead them to rescind the April 14, 1986, Local Policy; that the basis for the awards no longer exists; that the testimony of the Complainant's witnesses do not support its contentions; that one witness testified that the disposition of his vacation request was governed by the March 3, 1987, Bureau Policy as amended, not the defunct April 14, 1986, Local Policy; and that the contractual validity of the March 3, 1987, Bureau Policy is not at issue.

In reply brief the Complainant Union argues that res judicata precludes relitigation of the validity of the vacation scheduling Policy; that the Commission has repeatedly held that the principle of res judicata applies to arbitration awards; that the parties, collective bargaining agreement, issue, relief sought and fact situation are the same in the present dispute as they were in the prior disputes; that, therefore, the outcome of the prior disputes, the Kerkman and Petrie awards, govern this dispute; that the Union seeks rescission of the March 3, 1987, Bureau Policy which was found arbitrary in the two arbitration awards; that the Employer's Policy, held to violate the collective bargaining agreement in the Kerkman and Petrie awards, is now more expansive, oppressive, arbitrary and capricious than before; that the current Bureau Policy amounts to the same as that previously voided by the arbitrators; that denial of vacation preapproval is a denial of vacation; that even though the "one employee on vacation" rule is apparently gone, the current Bureau Policy serves the same function of limiting vacation time options; that this same "anticipated workload" justification of the Employer was previously considered and rejected by the two arbitrators; that in Wisconsin it is presumed that circumstances, once proved, continue unchanged; that, as such, it is presumed that the arbitrary and capricious vacation scheduling policies of the Employer continue unchanged; and that no proof to the contrary has been presented.

DISCUSSION

In its complaint the Union alleges that the Employer has violated Secs. 111.84(1)(a) and (e), Stats. by refusing to accept the terms of arbitration awards issued by arbitrators Kerkman and Petrie regarding scheduling of vacation. In its answer the Employer denies said allegation.

Section 111.84(1)(e), Stats., states that it is an unfair labor practice for 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 or to accept the terms of an arbitration award, where previously the parties have agreed to accept such award as final and binding upon them.

The Union is not alleging a contract violation on a refusal to arbitrate; instead, the Union argues that the Employer is refusing to accept the terms of two arbitration awards on two aspects of the same vacation policy.

The two arbitration awards are very specific as to both the issue and the remedy. In the Kerkman award dated August 23, 1988, the Arbitrator dealt with the issue of whether the aspect of the Local Policy implemented in April 1986 which allowed no more than one employe at a time to take a full week of vacation violated the collective bargaining agreement. Arbitrator Kerkman found that it did. In doing so the Arbitrator compared the Local Policy with the Bureau Policy dated March 3, 1987. He found that the Bureau Policy, in effect throughout the state except in Milwaukee and Waukesha, required the Employer to review week by week the number of employes it required on the job, and then to permit those in excess of that minimum requirement to go on vacation. The fact that the Bureau Policy required a week by week review and determination as to the number of employes that may be on vacation convinced the Arbitrator that the Local Policy's blanket determination of no more than one employe on vacation per week was arbitrary. Therefore the Arbitrator ordered the Local Policy of permitting only one adjudicator to take a full week's vacation at any one time rescinded.

In the Petrie award dated May 4, 1989, the Arbitrator dealt with the issue of whether the aspect of the Local Policy implemented in April 1986 which did not allow any employe to take vacation during weeks 52 and 1 violated the collective bargaining agreement. Arbitrator Petrie found that it did. In doing so, the Arbitrator reviewed the Bureau Policy dated March 3, 1987. He found that said Bureau Policy afforded substantial protection to the Employer's ability to satisfactorily exercise and carry out its contractual and statutory rights and responsibilities during holiday periods. Therefore, the Arbitrator ordered the Employer to rescind the Local Policy.

The Union argues that the Bureau Policy of March 3, 1987, as amended January 19, 1989, 2/ contained the elements previously held violative of the collective bargaining agreement by Arbitrators Kerkman and Petrie.

2/ Although there is testimony as to this amendment, the amendment itself was not offered into evidence.

As to the Kerkman award regarding one employe on vacation at a time, the Union on reply brief may have abandoned this argument, stating at one point, "Finally, even though the 'one employee on vacation' rule is apparently gone, the current Policy nonetheless serves the same function of limiting vacation time options." In any case the record does not support an allegation that the Kerkman award has not been implemented. The Local Policy of April 1986 has been rescinded. The Bureau Policy, cited with approval by both Arbitrators, does not limit vacation to one employe at a time. Therefore, the Union has not met its burden of proving that the Employer violated Secs. 111.84(a) and (e), Stats., by refusing to accept the terms of the Kerkman award.

The Union argues that, as to the Petrie award regarding not allowing any employe off during certain weeks of the year, the Bureau Policy limits vacations to the period prior to week 46, approximately November 20, 1989. More accurately, however, the Bureau Policy does not prohibit vacations during any time period, as the Local Policy before Petrie did, but states that local UC managers "shall not pre-approve in April, vacations or holiday leave for production staff for the week before Christmas, the week of Christmas and New Years, or the week following the New Year's holiday." Indeed, the Bureau Policy is written so as to state how vacation time over the holidays is to be selected. But, the Union argues, denial of vacation preapproval is a denial of vacation. While its argument might be granted some weight if placed before an arbitrator, said argument was not placed before Arbitrator Petrie who, therefore, did not rule on the issue of denial of vacation preapproval. The Policy in place is not the Local Policy which totally banned vacations during the holiday period and, thus, is not the Policy ordered rescinded.

The Union also argues that res judicata precludes relitigation of the vacation scheduling policy. That is true as to the Local Policy before Arbitrator Petrie. He found the Local Policy violated the collective bargaining agreement and ordered it rescinded because the Local Policy ban on vacation during the Christmas and New Year holidays was arbitrary. If the Local Policy had not been rescinded or if the ban of no vacation during weeks 52 and 1 was still in effect, the principles of res judicata would apply. Said principle would prevent the Employer from arguing the merits as to that aspect of the Local Policy. Indeed the Employer would be in violation of Secs. 111.84(a) and (e), Stats., by not accepting the terms of the arbitration award, and this Examiner would order the Employer to do so.

But the Local Policy has been rescinded. The ban on vacations during weeks 52 and 1 is not operative. The arbitration award of Petrie has, therefore, been accepted by the Employer. Therefore, the Union has not met its burden of proving that the Employer violated Secs. 111.84(a) and (e), Stats., by refusing to accept the terms of the Petrie award.

In essence the Union is seeking a finding that the arbitration awards involving the Local Policy limit the Bureau Policy. There are several problems with this approach. First, the policies are different, so the principle of res judicata does not apply. Second, the Bureau Policy was in evidence in both cases and the Arbitrators spoke of them with approval. The Union did not seek a determination before the Arbitrators that the Bureau Policy violated the collective bargaining agreements. If the Union is seeking such a finding in this forum, it will be frustrated since such a decision need come from an arbitrator, not this Examiner.

What is before this Examiner is the question of whether the Employer has refused to implement the Kerkman and Petrie arbitration awards. The Employer has rescinded the Local Policy. It has rescinded the limitation of one employe on vacation for a week at a time and the prohibition of any employe taking vacations in certain weeks. Nor has the Employer taken these aspects of the Local Policy and placed them in the Bureau Policy.

For these reasons, I conclude that the Employer did not refuse to implement the arbitration awards of Kerkman and Petrie and therefore did not violate Sec. 111.84(e) and, derivatively, Sec. 111.84(a), Stats. As the Union presented little or no evidence as to an independent violation of Sec. 111.84(a), Stats., the complaint is dismissed in its entirety.

Dated at Madison, Wisconsin this 15th day of November, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____

James W. Engmann, Examiner