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 294 No. 44072 PP(S)-170 Decision No. 26642-C

Appearances:

Lawton & Cates, S.C., Attorneys at Law, 214 West Mifflin Street, Madison, Wisconsin 53703-2594, by Mr. Richard V. Graylow, appearing on behalf of the Complainant Union.

Ms. Teel D. Haas, Chief Legal Counsel, Department of Employment Relations, 137 East Wilson Street, Madison, Wisconsin 53703, appearing on behalf of the Respondent State.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On May 24, 1990, the Wisconsin State Employees Union (WSEU), AFSCME, Council 24, AFL-CIO, filed a complaint of unfair labor practice with the Wisconsin Employment Relations Commission alleging the State of Wisconsin had committed unfair labor practices in violation of Secs. 111.84(1)(a) and (c), Stats. Thereafter, hearing on the complaint was held in abeyance, pending efforts to settle the dispute, until October 4, 1990, when Karen J. Mawhinney was appointed by the Commission to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided for in Sec. 111.07(5), Stats. Examiner Mawhinney originally scheduled a hearing to be held on January 24, 1991, but said hearing was postponed and rescheduled to April 9 and 10, 1991, and again postponed and rescheduled to July 23 and 24, 1991. On July 17, 1991, the Commission substituted Thomas L. Yaeger as Examiner for Karen J. Mawhinney. Hearing on the complaint was held on July 23 and 24, 1991, and continued to August 2, 1991. A stenographic transcript of the hearing was made and provided to the parties by September 12, 1991. The last of the parties' post-hearing briefs was received by December 17, 1991. The Examiner having considered the evidence and arguments of the parties makes and issues the following

FINDINGS OF FACT

1. The Wisconsin State Employees Union (WSEU), AFSCME, Council 24, AFL-CIO, hereinafter Complainant, is a labor organization within the meaning of Sec. 111.81(12), Stats. Complainant is the exclusive bargaining representative for the Blue Collar and Non-Building Trades, Clerical and related, Technical, Security and Public Safety and Professional Social Services bargaining units described in Sec. 111.825, Stats., and maintains its office at 5 Odana Court, Madison, Wisconsin.

2. The State of Wisconsin, hereinafter Complainant, is the employer within the meaning of Sec. 111.81(8), Stats. Respondent operates the Dodge County Correctional Institution (DCI), Green Bay Correctional Institution (GBCI), and the Waupun Correctional Institution (WCI).

3. The Complainant and Respondent were parties to a collective bargaining agreement that was effective from November 6, 1987, to June 30, 1989. Subsequent to June 30, 1989, the terms of that agreement were extended by the parties until the successor agreement became effective on April 8, 1990. The 1987-89 collective bargaining agreement did not require the Respondent to permit an employe access to view his/her personnel file during his/her regularly scheduled work hours with no loss in pay, whereas the successor 1990-91 agreement did contain such a requirement:

1987-89

. . .

Section 14: Personnel Files

11/14/1 An employe shall, upon written request to his/her agency or department within a reasonable time, have an opportunity to review his/her personnel file(s) in the presence of a designated management representative. A Union representative may accompany the employe when reviewing his/her personnel file(s). Alternatively, an individual employe may authorize a designated grievance representative or an AFSCME Council 24 field representative to review the employe's personnel file(s) on the employe's behalf in the presence of a designated management representative. Such authorization must be in writing, must specifically identify the representative authorized to review the file(s) and must be provided to the agency or department within a reasonable time prior to the review of the file(s). However, neither employes nor their authorized representatives shall be entitled to review confidential pre-employment information or confidential information relating to promotions out of the bargaining unit.

. . .

1990-91

. . .

Section 14: Personnel Files

11/14/1 An employe shall, upon written request to his/her agency or department within a reasonable time, have an opportunity to review his/her personnel file(s) in the presence of a designated management representative during the employe's regular scheduled hours of employment without loss of pay. . . .

. . .

Also, Sec. 103.13, Stats., similarly requires the Respondent to permit employe inspection of his/her personnel file within seven days of a request to the employer to permit same.

4. During the summer of 1989, Complainant and Respondent were engaged

in bargaining for the successor collective bargaining agreement. During the course of that bargaining, one item being discussed by the parties was a proposal by Complainant that certain materials to which the employes did not have access, but which were contained in their personnel files be removed from the personnel files. At some point during discussion of that proposal, the chief negotiator for the state, Hunsicker, stated to Complainant negotiators that if employes wanted those materials out of their personnel files they should go in and remove the materials from the files. Sometime after that statement was made, Complainant advised its members that they should ask to see their personnel files and remove any outdated or irrelevant material that did not belong in the file.

5. The Complainant's actions in advising its members to review their personnel files and remove irrelevant and outdated material therefrom promoted some 106-109 employe requests at Dodge Correctional Institution (DCI) to review their personnel file. Similarly, at Green Bay Correctional Institution (GBCI) some 100-125 employes requested to view their personnel files. At GBCI, prior to August 1989, the normal procedure followed regarding employe requests to review their personnel file was that an employe would call for an appointment or would ask to view their personnel file on a payday when they came in to pick up their check. Third shift employes at GBCI would come in on their own time to view their personnel file. In the prior one and one-half to two year period before August of 1989, GBCI received approximately 20 to 30 individual employe requests to review their personnel file. Each employe would spend a few minutes examining the file, and in most instances, with the exception of the third shift, the employes examined their personnel files while in pay status. If they requested a union representative be present, one was made available during the viewing and that representative was also in pay status. At DCI, prior to August of 1989, approximately 75 percent of the employes came in on their own time to review their personnel files while the remaining 25 percent viewed their files while in pay status. A union representative was made available if requested, and the union representative was in pay status during the viewing. As it was at GBCI, the approximate 106 requests received from employes in August, 1989 at DCI to review personnel files was extraordinary as compared with the number of requests previously received.

6. In response to this extraordinary number of requests to review personnel files, the Respondent management at both GBCI and DCI advised employes who were requesting to view their personnel file as to what time of day they could be viewed. At DCI, personnel management scheduled personnel file viewing before the start of or after the end of the employe work shift because there was insufficient staff to relieve employes and/or union representatives from their duties and inadequate funds to call in employes on overtime to provide said relief. At GBCI, Respondent in a generic memo advised employes who had requested to see their personnel file that because it was impossible to figure out a schedule for employes, they could view them on their own time when the personnel office was open. This decision was made in part because the union representatives who were being requested to be present for the viewing would not be able to perform any duties at the institution other than reviewing personnel files. Respondent management at the two institutions, in determining how to handle the extraordinary number of requests to see personnel files in August of 1989, were acting in conformance with the memo they had been sent by the State Division of Corrections, Director of Human Resources. The Director, in his memo, advised institution Personnel Directors that employes had a right to review their personnel files; that the review must occur within a reasonable time after the date of the request; that the agency had the right to establish a fee for any copying of materials contained in the file; that the review, to the extent possible, should take place during the employe's shift; and that upon written request an authorized representative of

the employe could also have access to the file.

7. The Respondent's decision at GBCI and DCI in or about mid-August 1989, to schedule employes to view their personnel files during nonwork time did not have a reasonable tendency to interfere with, restrain, or coerce employes in the exercise of their rights guaranteed by Sec. 111.82, Stats., nor was Respondent's action motivated in part by any hostility it may have harbored against Complainants for their concerted action in requesting to view their personnel files.

8. Subsequent to Respondent's notification to employes that they would have to view their personnel files during nonwork hours grievances were filed contesting Respondent's actions. On August 14, 1989, in a labor management meeting, Mr. Kestin, Personnel Director at DCI, advised the union that because many grievances had been received on the subject the Respondent would treat them as group grievances, not individual grievances. On August 15, 1989, Kestin met with David Kindschuh and Allen Kuehn, Complainant union representatives. He advised them that the personnel file grievances would be heard as group grievances and that he, Kestin, had scheduled the third shift to meet on the group grievance and identified as union spokesperson Representatives Miller and Burns. On August 16, 1989, Kuehn, then Local 178 Secretary/Treasurer wrote to Kestin confirming the conversation that had taken place on August 15, 1989, regarding the personnel file grievances and in that correspondence indicated the union believed it was not the employer's prerogative to determine whether the grievances were group grievances or individual grievances under the parties afore referenced collective bargaining agreement. Believing he had to schedule a meeting on a group grievance and force the union's hand, on August 17, Kestin responded to Kuehn's memo and advised Kuehn that Respondent's position continued to be that these would be handled as a group grievance. He also indicated that Bill Burns and Tom Miller were selected at random to meet with the Respondent to discuss the group grievance. Complainant representatives never concurred with Respondent's position that the grievances should be treated as a group grievance and on August 23, 1989, Kestin advised Kuehn that Complainant Local 178's refusal to hear the grievances as a group grievance meant, from the Respondent's perspective, that the matter was concluded. Respondent premised its decision that the grievances should be treated as a group grievance on a prior grievance settlement agreement entered into between Respondent and Complainant Local 116 on February 17, 1982. That settlement agreement provided in pertinent part:

. . .

> Grievances involving like circumstances and facts that are identified as individual grievances instead of as a group grievance will have only one grievance heard at any step in the grievance process. The settlement reached on the grievance heard will be controlling on the unheard grievances. . . . This settlement is in no way precedent on any other matter.

. . .

Also, sometime during the discussions between Kestin and Complainant representatives, Kestin advised said representatives that he was mistaken in designating which Complainant representatives would be meeting with Respondent DCI management on the personnel file grievances.

9. Respondent's decision to treat the personnel file grievances as a group grievance and Kestin's mistaken designation of Complainant union

representatives with whom Respondent management would meet to discuss said grievances did not have a reasonable tendency to interfere with, restrain, or coerce employes in their exercise of their rights guaranteed by Sec. 111.82, Stats. Further, Respondent's decisions in this regard were not motivated in any respect by hostility toward Complainants because of their engaging in protected concerted activity.

10. In the August 15, 1989, meeting held in Kestin's office with Kuehn and Kindschuh from Complainant's Local 178, the issue of direct depositing of employes' paychecks in local banks was raised by Kestin. The issue arose at or near the end of the meeting when Kestin stated that the direct deposit of paychecks might have to be terminated because the institution staff was too busy handling personnel file reviews, and there might be insufficient time for them to handle the manual direct deposit. Subsequent to that meeting, on August 16th, Kuehn wrote a memo to Kestin as follows:

> As per our discussion on Aug 15, 1889 in your office regarding grievances on Personnel File(s). (sic) You indicated to myself and Dave Kindschuh that you may have to stop the direct deposit of employees (sic) paychecks to local banks and distribute them all at the institution, because of your staff being busy handling Personnel File(s) reviews.
>
> As I told you then and now again one can only take that as a threat. I think that statement was totally uncalled for in response to our members having the contractual and legal right to file grievances.
>
> Any question in regards to this please contact me.
>
> Allan Kuehn
> S/T Local 178

The following day Kestin wrote Kuehn a memo in response as follows:

> This memo is response to your August 16, 1989 memo regarding distribution of employees' (sic) paychecks. At the August 15, 1989 meeting, you were told that any study of paychecks is a separate issue from personnel files and/or grievances. DCI Management staff have never stopped employees from their contractual right to file a grievance.
>
> The process of direct depositing paychecks started with three banks and has increased to twelve. This function takes a great deal of time and it is something we routinely review as all other personnel office functions.
>
> We at Dodge have tried to be fair and consistent in dealing with Local 178. We were one of the first institutions to go to direct depositing of paychecks. Our Local Agreements have always been fair and in many cases used by other institution locals as a model.
>
> Before any changes in policies are made at DCI the issue would be discussed at a Labor/Management meeting.

Not withstanding the statement in Kestin's August 17, 1989, memo quoted above, there is no evidence the issue of direct deposit of paychecks was raised at the Labor Management meeting that was held on August 14, 1989, the day before the conversation between Kestin, Kuehn and Kindschuh took place.

11. Kestin's threatening comments to Kindschuh and Kuehn on August 15, 1989, to the effect that the Respondent might stop the direct deposit of employe paychecks, because Respondent staff was too busy handling personnel file reviews, did have a reasonable tendency to interfere with, restrain, and coerce employes in the exercise of their rights guaranteed by Section 111.82, Stats. Also, said comments were at least in part motivated by Kestin's hostility toward Complainant's members for engaging in protected concerted activity.

12. In January of 1989, the Deputy Record Custodian of the Division of Corrections notified DCI as to the records that were authorized for destruction during that year. On or about August 8 or 9, 1989, Complainant member Gross observed Kestin shredding materials that he knew came from employe personnel files. The materials shredded by Kestin were materials that had been previously identified as okay for destruction by division administrators. The destruction of these materials did not have a reasonable tendency to interfere with, restrain, or coerce employes in the exercise of their rights guaranteed by Sec. 111.82, Stats. Nor was the decision to destroy said documents motivated by hostility toward Complainants because of their engaging in protected concerted activity.

13. From at least November 17, 1983, it was the Department of Health and Social Services (Department of Corrections) policy, set forth in Administrative Directive AD-33.1, that fees set by law for providing copies to record requesters would be charged. That policy stated in pertinent part:

> (2) copies . . . (a) photocopy fees in general. If the record is in a form that can be photocopied, and the requester is not a state agency, the requester shall be assessed a fee of .15 cents for each page of photocopies produced in responding to the request. If the request is for no more than a total of ten pages of photocopies, however, the Record Custodian may waive the copy fee if the custodian deems the waiver to be in the public interest. In requests for more than 10 pages of photocopies the fee shall not be waived and the requester shall be assessed the full .15 cents per page fee for all pages. . . .

Notwithstanding the aforestated Administrative Directive, Respondent's policy at DCI was not to charge employes for copies of materials from their personnel files prior to August of 1989. However, in August, 1989, when DCI was receiving numerous employe requests to inspect their personnel file, the subject of charging for copies of materials contained in those files was raised by Kestin with Respondent Department of Corrections Personnel Management. As a consequence of those discussions Kestin discovered that DCI, by previously not charging employes for copies of materials from their personnel files, was not in conformance with Administrative Directive AD-33.1. Consequently, on August 23, 1989, Kestin in a memo to Kuehn stated:

> It has been brought to our attention by Madison that we have been incorrectly interpreting the Administrative Directive AD-33.1 (attached) on Open Records.

> Per p. 2a on page four of the Directive, we will immediately start collecting .15 cents per copy for photocopying of all open records requests. . . .

14. Kestin's August 23, 1989, memo to Kuehn wherein he advised the union of the change in prior practice regarding charging for copies of materials employes requested from their personnel file demonstrated Kestin's hostility toward Complainant members for engaging in the protected concerted activity of requesting to see their personnel files. Further, his conduct had a reasonable tendency to interfere with, restrain and coerce employes in the exercise of their rights guaranteed by Sec. 111.82, Stats.

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

CONCLUSIONS OF LAW

1. Complainants did not demonstrate by a clear and satisfactory preponderance of the evidence that Respondent's actions in scheduling employes to view their personnel files during nonwork time interfered with, restrained or coerced State employes in the exercise of their rights guaranteed by Sec. 111.82, Stats, or that said decision was motivated in any part by hostility toward Complainants for engaging in protected concerted activity, in violation of Sec. 111.84(1)(a) and (c), Stats.

2. Complainants did not demonstrate by a clear and satisfactory preponderance of the evidence that Respondent's actions in treating the personnel file grievances as a group grievance and initially designating Complainant representatives with whom it would meet interfered with, restrained or coerced State employes in the exercise of their rights guaranteed by Sec. 111.82, Stats., or that said decision was motivated in any part by hostility toward Complainants for engaging in protected concerted activity, in violation of Sec. 111.84(1)(a) and (c), Stats.

3. Complainants demonstrated by a clear and satisfactory preponderance of the evidence that Kestin's statements to Kuehn and Kindschuh regarding the continuation of direct depositing employe paychecks interfered with, restrained and coerced State employes in the exercise of their rights guaranteed by Sec. 111.82, Stats., and that said decision was motivated in part by hostility toward Complainants for engaging in protected concerted activity, in violation of Sec. 111.84(1)(a) and (c), Stats.

4. Complainants did not demonstrate by a clear and satisfactory preponderance of the evidence that Respondent's actions in shredding certain personnel documents contained in employe personnel files interfered with, restrained or coerced State employes in the exercise of their rights guaranteed by Sec. 111.82, Stats., and that said decision was not motivated in any part by hostility toward Complainants for engaging in protected concerted activity, in violation of Sec. 111.84(1)(a) and (c), Stats.

5. Complainants demonstrated by a clear and satisfactory preponderance of the evidence that Respondent's announced decision to commence charging DCI bargaining unit employes for copies of materials from their personnel files in August, 1989 interfered with, restrained and coerced State employes in the exercise of their rights guaranteed by Sec. 111.82, Stats., and that said decision was motivated in part by hostility toward Complainants for engaging in protected concerted activity, in violation of Sec. 111.84(1)(a) and (c), Stats.

ORDER 1/

1. That the instant complaint of unfair labor practices is dismissed as to the alleged violations pertaining to scheduling employes to view their personnel files during nonwork time, treating the personnel files as group grievances, initially designating union representatives with whom it would meet on the group grievance, and shredding certain personnel documents contained in DCI employe personnel files.

2. That Respondent State of Wisconsin, its officers and agents shall immediately

A. Cease and desist from:

(1) Charging DCI Security and Public Safety bargaining unit employes .15 cents per page for copies of 10 pages or less of personnel file documents and threatening to terminate the direct deposit of said employes' paychecks thereby interfering with, restraining or coercing Department of Corrections employes in the exercise of rights guaranteed by Section 111.82, Stats., for requesting to view their personnel files.

(2) Charging DCI Security and Public Safety bargaining unit employes .15 cents per page for copies of 10 pages or less of personnel file documents and threatening to terminate the direct deposit of said employes' paychecks thereby discriminating against Department of Corrections Security and Public Safety bargaining unit employes because of their exercise of rights guaranteed by Section 111.82, Stats., for requesting to view their personnel files.

B. Take the following affirmative action which the Examiner believes will effectuate the purpose and policies of the State Employees Labor Relations Act:

(1) Notify employes by posting in conspicous employe notice locations at the Dodge Correctional Institution a copy of the notice attached to this Order

(Find footnote 1/ on page 10)

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. Reaonable 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 3rd day of April, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Thomas L. Yaeger, 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.

"APPENDIX A"

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

1. We will not interfere with DCI Security and Public Safety bargaining unit employes' rights protected by Section 111.82, Stats., because of requests to view thier personnel files.

2. We will not discriminate against DCI Security and Public Safety bargaining unit employes because of their exercise of rights guaranteed by Section 111.82, Stats., because they request to view their personnel files.

Dated at _____ Wisconsin, this _____ day of _____, 1922.

The State of Wisconsin

By _____
Name

_____
Title

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Section 111.82, Stats., grants State employes the right to engage in certain "lawful, concerted activities for the purpose of collective bargaining or other mutual aide or protection." Section 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." To establish an independent violation of Sec. 111.84(1)(a), Stats., it must be shown by a clear and satisfactory preponderance of the evidence that Respondent's actions at DCI and GBCI were likely to or had a reasonable tendency to interfere with, restrain or coerce said employes in the exercise of their protected rights. 2/ Further, this standard does not require that Complainants establish that Respondent's actions were intended to interfere with Complainant's statutory rights. 3/

Section 111.84(1)(c), Stats., also makes it an unfair labor practice to "encourage or discourage membership in any labor organization by discrimination in regard to hiring, tenure or other terms and conditions of employment." The Commission has required any complainant alleging such a violation to prove that (1) he/she/it had engaged in conduct protected by Section 111.82, Stats., (2) the state was aware of that activity and was hostile to it, and (3) the conduct of the state or its agent(s) complained of was at least in part motivated by that hostility. 4/ An actual showing of encouragement or

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2/ 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); State of Wisconsin, Dec. No. 25987-A (McLaughlin, 10/89), aff'd by operation of law, Dec. No. 25987-B (WERC, 12/89).

3/ See State of Wisconsin, Dec. No. 25987-A (McLaughlin, 10/89), aff'd by operation of law, Dec. No. 25987-B (WERC, 12/89); The State of Wisconsin, Department of Industry, Labor and Human Relations, Dec. No. 11979-B (WERC, 11/75).

4/ State of Wisconsin, Department of Employment Relations v. Wisconsin Employment Relations Commission 122 Wis.2d 132, 140 (1985); State of Wisconsin, Department of Employment Relations, Dec. No. 25393 (WERC, 4/88); State of Wisconsin, Dec. No. 25987-A (McLaughlin, 10/89); State of Wisconsin, Department of Employment Relations, Dec. No. 25284-B

discouragement of membership is, however, not necessary. If the conduct could naturally and foreseably have an adverse effect on employe rights the Commission can infer encouragement or discouragement, of union membership, and further that discrimination designed to encourage or discourage union activities or support is clearly prohibited. 5/

Employe Review of Personnel Files

During negotiations for a successor agreement to the 1987-89 collective bargaining agreement Complainant union had a proposal on the table to require removal from an employe's personnel file any materials to which the employe did not have access. During the course of discussion of this proposal the Respondent's Chief Negotiator stated to Complainant's negotiators that employes wanting such materials removed from their personnel file should request to review their personnel file and remove the objectionable or outdated material themselves. This statement resulted in several hundred employes at DCI and GBCI making requests to review their personnel files. In the past, when employes had requested to review their personnel files at GBCI and DCI they were permitted to do so during work time and were paid while they were viewing their files. Furthermore, union representation was permitted, if requested by the employe, and the union representative was also released with pay to accompany the employe to view the personnel file. Complainant contends that the Respondent's decision at DCI and GBCI to schedule review of personnel files during nonwork time as a consequence of the numerous requests received to review personnel files in August of 1989, constituted an unfair labor practice in violation of Sec. 111.84(1)(a) and (c).

Respondent denies that the decision made by DCI and GBCI personnel management violated Sec. 111.84(1)(a) or (c). Respondent contends that there was no employe who was refused permission or access to see his or her personnel file. At GBCI employes were advised they could view their personnel file during their rest break or lunch breaks. At DCI, employes were scheduled to view their files between shifts. While some employes did not come in to review their file, they were not denied access to their files. Further, Respondent contends that while some employes were previously permitted to view their personnel file on work time, the evidence established that whether an employe was permitted to view his/her personnel file during working hours was a function of the work shift of the employe. Previously, employes working on third shift, when the personnel office was not open, were required to view their personnel file on nonwork time. Also, prior to the large number of requests received in August of 1989, the review of personnel files was handled on a very informal basis and employes would drop by the personnel office on their breaktime, lunch periods or just before or after the conclusion of their work shift to view their personnel files. It was only due to the large number of requests that were received in August of 1989, that Respondent determined that these requests could not be handled in the usual manner. Consequently, employes were scheduled to view their personnel files during nonwork time. Thus, notwithstanding that it was the policy and practice of Respondent to attempt to arrange for employes to view their personnel files during worktime, that policy/practice could not be followed in this instance because of the large number of requests which were received at one time. Respondent categorizes this as an extraordinary situation calling for extraordinary

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(Engmann, 5/90), aff'd, Dec. No. 25284-C (WERC, 11/90).

5/ Radio Officers Union v. NLRB, 347 US 17, 33LRRM 2417 (1954).

procedures, and the procedures that were adopted did not constitute a violation of Sec. 111.84(1)(a) or (c).

Respondent does not dispute that Complainants had both a contractual as well as statutory right to request a review of their personnel file and that their concerted exercise of that right in these circumstances was protected activity within the meaning of Sec. 111.82, Stats. Respondent, however, insists that its decision to require employes to view their personnel files on their own time was motivated soley by the large number of requests received during a very short period of time. It acknowledges that prior to this incident employes were permitted to review their personnel files during work hours, because there had been only a limited number of requests and it was able to accommodate the requests during work time. However, in this instance, it argues it was impossible to allow such a large number of employes to be viewing personnel files during work time because it had an insufficient number of employes available to perform the work of employes away from their work viewing their personnel files and/or was unwilling to schedule overtime to permit such coverage.

Also, the contract then in effect, by virtue of the extension that the parties had agreed to, did not require that the Employer allow employes to view their personnel files during work hours. However, as a consequence of the incidents arising in August of 1989, the language of that contract was amended and the successor agreement explicitly provided that an employe could review his/her personnel file "during the employees' regularly scheduled hours of employment without loss of pay." Prior to that change an employe had no contractual nor statutory entitlement to view his/her personnel file during work hours without loss of pay.

Thus, the issue presented is whether Respondent's decision in this instance to require employes to view their personnel files during nonwork time was likely to interfere with, restrain or coerce employes regarding the viewing of their personnel files. Complainant in this case has not proved by a clear and satisfactory preponderance of the evidence that Respondent's actions were likely to interfere with, restrain or coerce. Respondent presented sufficient business justification for its decision to require employes who were requesting to review their personnel files during nonwork time. The uncontradicted testimony of Employer witnesses was that they had never before experienced such a large number of requests to review personnel files and they had insufficient manpower to allow that viewing to take place as it had in the past. Further, employes could have arranged to come in on their lunch break or before the beginning of or at the end of their shift. Also, it was their concerted action of all making their requests at the same time that forced the State to change its procedures. Finally, Respondent's conduct did not constitute a promise of benefit or threat of reprisal for employes requesting to view their personnel files, rather, Respondent's action constituted a legitimate business decision warranted by the circumstances. Thus, Complainant has not established by a clear and satisfactory preponderance of the evidence that this employer decision constituted interference within the meaning of Sec. 111.84(1)(a), Stats.

Turning to whether the aforesaid Respondent conduct constituted a violation of Sec. 111.84(1)(c), Stats., it is undisputed by Respondent that these employe requests to review their personnel files was protected, concerted activity. Clearly, personnel management at DCI and GBCI were acutely aware of the employes' concerted action of all requesting at once to see their file and it was that action that caused it to change its procedures for allowing employes to view their personnel files. Clearly, this volume of requests would result in more work for Respondent personnel management at these two

institutions than they had encountered in recent memory with regard to the viewing of personnel files. As noted later herein, other actions taken by Respondent personnel management at DCI were motivated by its hostility toward Complainant representatives as a consequence of the receipt of the numerous requests to view personnel files and subsequent grievances concerning the resultant change in procedures regarding when the files could be viewed. However, Complainant has not established by a clear and satisfactory preponderance of the evidence that Respondent's hostility toward Complainant was a consideration in the DCI personnel management decision to deviate from its prior practice of allowing employes to view their personnel files on worktime. As noted above, the decision to schedule viewing during nonwork hours was a legitimate business decision. Further, this decision preceded and in fact generated the grievance dispute. Thus, there is no basis for inferring hostility played any role in this Respondent decision.

Group vs. Individual Grievances

Due to Respondent's decision respecting when the personnel files could be viewed, grievances were filed by those employes who were told they would have to view their personnel files during nonwork hours. After receiving the grievances, it was Respondent's position that it would not deal with them as individual grievances, but rather would treat them as a group grievance under the parties' collective bargaining agreement grievance procedure. Complainant argues that Respondent's decision to treat the personnel file grievances as a group grievance rather than meeting individually on each grievance and designating the union representatives with whom it would meet constituted a violation of Sec. 111.84(1)(a) and (c), Stats. It insists that it is the prerogative of the union not Respondent to determine when grievances will be filed and processed as group grievances rather than individual grievances as well as its spokesperson, and it is the duty of the Respondent to accept the determination made by Complainant. In the instant case, Respondent refused to meet individually on personnel file grievances. Further, Respondent's reliance upon a previous settlement of an earlier grievance is misplaced inasmuch as the terms of that settlement provide that "this settlement is in no way precedent on any other matter."

Respondent does not dispute that it refused to hear the grievances as individual grievances. It notes that this was in no way an attempt to stop or discourage employes from filing individual grievances, but merely a common sense approach to dealing with hundreds of grievances based upon the same facts. It was a fiscally responsible, efficient, and more effective manner of processing the grievances. Respondent points out that had the union wished to challenge the State's interpretation of its contract provisions regarding group versus individual grievances, it had every right to do so and could have made its challenge in the grievance arbitration procedure. However, because of the union's failure to pursue these grievances in that forum it should now be foreclosed from alleging that the State has violated the State Employment Labor Relations Act (SELRA). Concerning the second aspect of the union's allegations, i.e., that the Respondent representative Kestin originally designated the union representatives with whom he would meet on the group grievance, Kestin acknowledged his mistake as soon as he was made aware by Complainant and rescinded that portion of his memo. It was a mistake. It was corrected and Complainants did not adduce any evidence to establish that this mistake violated the provisions of Sec. 111.84(1)(a) or (c), Stats.

Complainant's actions in insisting upon hearing each grievance filed as an individual grievance rather than combining all the grievances into a group grievance was clearly an attempt on Complainant's part to influence the then ongoing contract negotiations as was the case when initially several hundred

employes requested to view their personnel files. If Complainants were successful in pursuing individual grievances, it would obviously result in considerably more work for Respondent personnel management at DCI and GBCI which Complainants no doubt hoped would in turn result in said management pressuring Respondent negotiators to resolve the issue relative to personnel files then on the table. Respondent, on the other hand, clearly had no interest in scheduling several hundred grievance meetings on grievances which were premised upon the same factual setting, i.e., Respondent's decision to schedule viewing of personnel files during nonwork time. However, the appropriateness of Respondent's reliance upon a previous grievance settlement to substantiate its position that the contract permitted its insistence that the grievances be treated as group grievances is a matter to be resolved in grievance arbitration. It is, however, unnecessary to resolve the correctness of the Respondent's position on that matter in order to determine whether a violation of Sec. 111.84 (1)(a) or (c), Stats., as alleged by Complainant, occurred.

Obviously, interference and/or discrimination complaint allegations most often are established through a series of inferences. Clearly, Respondent was motivated to not spend an inordinate amount of time processing grievances relative to a matter which had as its genesis Complainant's attempt to influence Respondent's behavior at the collective bargaining table. While this response would clearly not benefit Complainant's efforts to affect a change in Respondent's position at the bargaining table, the response does not rise to the level of illegal activity. In this case, Complainants have not proved by a clear and satisfactory preponderance of the evidence that Respondent's decision was anything more than what it alleges it to be, i.e., a common sense approach to handling several hundred grievances. How this interfered with, restrained or coerced DCI or GBCI employes has not been established.

The second aspect of the Complainant's charge regarding the processing of complaint grievances over the viewing of personnel files during nonwork time is that the Respondent committed an unfair labor practice when its Personnel Manager at DCI selected two union representatives at random to meet with the Employer to discuss the grievances. Complainant alleges that this conduct constituted a violation of Sec. 111.84(1)(a) and (c), Stats. The Respondent does not deny that Kestin designated two union representatives to meet with him to discuss the grievances. However, Kestin acknowledged that he had made a mistake and as soon as he was made aware that he did not have authority to designate union representatives he acted immediately to correct the mistake. It concludes therefrom that Kestin's conduct did not rise to the level of an unfair labor practice.

A review of the facts confirms that Kestin on August 17, 1989, did advise Kuehn that union Representative Burns and Miller were selected at random to meet on the group grievances. In that letter he also advised that if the union wished someone else to hear the group grievance other than Miller or Burns they should notify him within five days. Kestin's explanation as to why he designated the two union representatives in his correspondence regarding scheduling of the group grievance meeting rings with a great deal of credibility. Kestin was of the belief that because there was a dispute between the parties as to whether the grievances would be dealt with as a group or individually, he thought that it was his responsibility to schedule a grievance meeting and have the Complainants indicate they would refuse to meet on the grievances as a group grievance. Consequently, in the course of doing so, he identified union representatives to meet with him on the group grievance. This was after he had asked Complainant representatives who they wanted to hear the group grievance. Under this scenario, the purpose in designating union representatives was to be able to attempt to force the union's hand by at least

designating two union representatives with whom he could meet, and thus, shift the burden to the union to either refuse to proceed or go ahead with the meeting. In his letter, he also advised the union that while he had named two individuals they could choose whomever they wished and provided them with an opportunity to do so. The Examiner is persuaded these facts do not establish by a clear and satisfactory preponderance of the evidence that the Respondent's conduct violated Sec. 111.84(1)(a) and (c), Stats.

Direct Deposit of Paychecks

Complainant contends that in a meeting on August 15, 1989, between Kestin, Kuehn and Kindschuh, Kestin threatened to stop directly depositing employe paychecks in designated banks, savings and loans, credit unions, etc.. It contends that this practice had been followed for many years prior to August of 1989. It was only after the employes requested to see their personnel files that the Respondent began discussing termination of the direct deposit practice. Complainants contend that the timing of this threat establishes that the intent was to retaliate against Complainant members for engaging in protected concerted activity. Therefore, Complainant urges that the Respondent be found to have committed unfair labor practices within the meaning of Sec. 111.84(1)(a) and (c), Stats.

Respondent, to the contrary, believes that the facts do not support a finding of a violation of the law. Respondent notes that the only time a discussion took place with regard to the direct depositing of paychecks was on August 15, in the final two or three minutes of a meeting which lasted about thirty minutes. During the meeting, numerous issues were discussed including the grievances that had been filed concerning employes being told they would have to view their personnel files during nonwork time. Respondent acknowledges that Kestin did discuss with Kuehn and Kindschuh the possibility of "studying" the continuation of direct deposit because the program had grown so much and was taking so much of his staff's time each payday. Respondent notes that Kestin denied he made any kind of a threat to stop the direct deposit and when Complainant's witnesses were asked to describe Kestin's remarks and why they took them as a threat, they could only point to his demeanor. They said he was leaning back in his chair, speaking with kind of a "cocky attitude" and was using a tone of voice that the Complainant representatives did not like. Further, Kestin testified he told Kuehn and Kindschuh that the direct deposit study he was referring to was completely separate from the personnel file grievance or any other issue, and that before any change would take place, the matter would be discussed at the labor management meetings. Respondent concludes that even if Kestin's remarks could have been reasonably interpreted as some sort of "veiled threat" the fact is that the Employer never did anything to change the direct deposit program. Respondent finds it unreasonable to interpret these off the cuff remarks made during the last couple minutes of a meeting covering a wide range of subjects to constitute any kind of a real threat by the Employer. Therefore Respondent concludes that the conduct complained of did not violate Sec. 111.84(1)(a) and (c), Stats.

Respondent acknowledges Kestin told union representatives Kuehn and Kindschuh that his staff was spending a lot of time processing direct deposits and that there existed a possibility of "studying" the continuation of direct deposit. Respondent contends however, that the remarks of Kestin could not reasonably be construed as a veiled threat, and further that no action was taken at DCI to change the direct deposit program. However, the mere fact that DCI management took no action to modify or terminate the direct deposit program it does not end the inquiry as to whether Kestin's remarks could be interpreted as a threat. As noted earlier herein, the Respondent does not dispute that the

employes' request to view their personnel files was protected, concerted activity. Clearly, Respondent management at DCI was aware of these requests inasmuch as they were the ones responsible for responding and arranging for the review of the file. Further, the undersigned is persuaded that DCI management was antagonistic toward union representatives because of the large number of requests to view personnel files and the correspondingly large amount of time required to be spent by DCI personnel management in facilitating the reviews.

Further, the undersigned does not find credible Respondent's contention that a mere study was being proposed and that any such study would necessarily go through the labor management committee, thus minimizing the threatening aspects of Kestin's statements. The labor management committee had met the day before these remarks were made. Had Respondent management been seriously considering studying the direct deposit of paychecks and bringing the matter before the labor management committee why was it that there was no testimony establishing the subject was discussed the day before in the labor management meeting. The undersigned believes if the Respondent was seriously considering a study of direct deposit as alleged that it could have and would have been raised at the labor management meeting the day before the conversation took place between Kestin, Kindschuh and Kuehn. However, the record is devoid of any evidence that such was the case. It is more likely that Respondent agent Kestin was frustrated with having to process more than a hundred requests to view personnel files and all of the attendant problems, and that his off-the-cuff remarks concerning the direct deposit of paychecks were the outgrowth of those frustrations. Consequently, it seems reasonable to infer that the intent of Kestin in making the remarks would indicate his dissatisfaction with the union members behavior and to convey to them that if he was going to have to process all of these requests, he was going to make their life equally unpleasant by terminating the direct deposit of paychecks. Whether in fact Respondent management was seriously considering the termination of direct deposits of paychecks or not is irrelevant inasmuch as the message that was conveyed to Complainant representatives was that if the viewing of personnel file requests continued, management had the ability and determination to terminate the direct deposit practice. Consequently, under the circumstances surrounding this conversation, it is reasonable to infer that Kestin's remarks were intended to influence Complainants' conduct in requesting to view personnel files. As such, Kestin's remarks constituted interference in violation of Sec. 111.84(1)(a), Stats.

Also, inasmuch as Kestin's remarks were directed exclusively at union representatives and, presumptively, bargaining unit employes only, the threat constituted unlawful discrimination in violation of Sec. 111.84)1)(c), Stats.

Destruction of Personnel File Contents

Complainants contend that the destruction of a dues authorization card for correctional officer, Chevez, was an unfair labor practice. It references Section 20.921, Stats., providing for the payment of dues to employe organizations. It contends the State cannot unilaterally shred public documents authorized and created by statute. It believes doing so violated Sec. 111.84(1)(a) and (c), Stats.

Respondent does not dispute that Kestin destroyed certain documents contained in personnel files, including Mr. Chevez' dues authorization card. It does, however, deny Complainant's assertions that shredding the card was improper and illegal. It notes that the dues authorization card in question was one which had been executed at Chevez' prior work location in November of 1976, and that when Chevez transferred from the Waupun Correctional Institution to the Dodge Correctional Institution, a new authorization card had to be executed, and thus there was no reason to maintain the old card in his file.

Respondent contends that Kestin was doing nothing more than carrying out his responsibilities as the DCI records custodian. Respondent insists that even if employes believed that the Respondent was under a duty to show them documents from their personnel file which were being destroyed prior to destruction, there was no legal basis requiring Respondent to do so. For these reasons the Respondent concludes that the acknowledged destruction of documents taken from employes' personnel files did not violate Sec. 111.84(1)(a) and (c), Stats.

The evidence regarding this allegation clearly established that annually the Respondent's Department of Corrections, and before that Health and Social Services, Division of Corrections, notified its departmental record custodians that destruction of certain records was authorized to occur during that calendar year. That notice was generally sent out in January of the calendar year and in this particular case, the notice went out in January of 1989, pertaining to records that could be destroyed during that calendar year. Pursuant to that directive, Kestin, on or about August 8th or 9th was observed by a Complainant union member taking materials to the shredding machine at DCI. The observer was not able to identify the age of the documents which were being taken for shredding. Subsequent investigation by Complainant's members, which entailed going through the shredded material, uncovered that a union dues authorization card and a ranking from a cert request were among the materials shredded.

However, Complainants did not establish by a clear and satisfactory preponderance of the evidence that Kestin was doing anything other than complying with an annual directive to purge from employe personnel files certain outdated and unnecessary materials contained therein. The testimony of the Department Records and Forms Officer confirmed that Kestin, as Record Custodian at DCI, was responsible for complying with the record destruction directive. With regard to the dues authorization check-off card which had been shredded, the uncontradicted evidence is that the card was no longer valid inasmuch as the employe had changed work locations. Complainants have not established that there was anything inappropriate or illegal about the destruction of that card. Further, testimony established that the certification ranking that was shredded should not have been included in any personnel file under any circumstance. Consequently, if it was material which was not to be included in a personnel file, it does not automatically follow that this record came from an individual personnel file as alleged by Complainant. No one testified that this particular document came from a personnel file. Finally, Complainant offers no explanation as to how the destruction of these materials in any way interfered with or coerced employes in the exercise of protected, concerted activity or how it was unlawful discrimination to destroy these materials.

The Complainants also contend that the materials, prior to destruction, should have been shown to the employe from whose personnel file they were obtained. However, Complainants offer no statutory or contractual authority in support of its allegations nor any evidence that the Respondent has ever shown personnel file material scheduled for destruction to the employe before-hand. Further, as with the destruction itself, Complainants offer no explanation as to how or under what circumstances failure to show employes documents from their personnel file prior to the destruction of said documents constitutes interference or discrimination in violation of SELRA.

Charging DCI Employes For Copies Of Personnel File Material

Complainants contend that prior to August 1, 1989, its representatives were allowed to obtain from Respondent copies of written material contained in

their personnel files without being charged. This practice however was abruptly terminated on or about August 23, 1990, when, pursuant to a memorandum addressed to Local 178, President Kuehn, Respondent advised Complainant it would immediately start collecting 15 cents per page for photocopying related to all open record requests. Complainants insist that this change in prior practice was retaliatory and in violation of Sec. 111.84)1)(a) and (c), Stats.

To the contrary, Respondent insists that the change in procedure of charging for copies was not retaliation, but rather motivated by an intent to correct a past error and to make DCI's policy and practice of collecting copying fees consistent with the DHSS policy which had been in place for over six years. Respondent references statutes governing employe access to personnel files that provide the records custodian may charge a reasonable fee for making copies as long as the fee does not exceed the actual cost of reproduction. In this instance, the charge of 15 cents per page was not unreasonable nor did it exceed the actual cost of reproduction. Also, the Director of the Office of Human Resources only became aware of the prior practice at DCI at a time when DCI and other institutions received the aforesaid numerous requests from employes to view their personnel files and make copies. It was at the request of the institutions' superintendents that the Director of the Office of Human Resources for the Division of Corrections issued a memo explaining the Department's interpretation of the law concerning access to personnel files and charging fees for copying materials from those files. Prior to being so advised by the Director, Kestin acknowledged that he had not charged employes for copying materials even though he may have charged a copying fee to an employe attorney or representative when requests were made for numerous pages in excess of ten. Respondent concludes that it had a right to charge a fee for making copies and that its decision to direct Mr. Kestin to abide by departmental policy and commence charging employes for copying materials from their personnel file did not violate Sec. 111.84(1)(a) or (c), Stats.

The Examiner concurs with Respondent's analysis that statutorily it was authorized to collect a fee for making copies of materials contained in the employes' personnel file, and that there was a departmental policy in effect from at least 1983, authorizing the collection of photocopying fees from the requestor. However, the Examiner does not agree with Respondent's assertion that the decision to begin collecting photocopying fees from employes at DCI in August of 1989, did not constitute a violation of Sec. 111.84(1)(a) and (c), Stats. While the undersigned acknowledges that the Respondent had the right to adhere to its 1983 policy, the timing of its decision to do so creates an inference that the decision was intended to retaliate against Complainant for inundating DCI management with requests to review personnel files and in all probability with the hope of deterring Complainants from making further such requests and/or following through on actually viewing the personnel files. In fact, the evidence establishes in Respondent Exhibit 3 that of 109 requests to view personnel files received in August of 1989, only thirteen employes actually reviewed their personnel files. Further, the departmental policy in paragraph 2.a. provides that "if the request is for no more than a total of 10 pages of photocopies, however, the Record Custodian may waive the copy fee if the Custodian deems the waiver to be in the public interest...." Kestin's memo to Kuehn of August 23rd indicates that a 15 cent per copy charge will be made for "all" open record requests and does not indicate that the fee would be waived for requests of less than 10 pages of photocopying. While Respondents argue that Kestin was unaware of said departmental policy, he clearly was aware of the policy at the time that he sent out his August 23rd memo and could have provided in the memo that a charge would not be made for requests of 10 pages or less, and thus, would have minimized the impact of the decision to commence charging a fee.

The undersigned is persuaded that it is reasonable to conclude from the facts in this case that Respondent DCI management had no interest in waiving the photocopying fee in instances of 10 pages or less because of their obvious frustration with Complainants inundating them with more than a hundred requests to review personnel files and obviously creating significantly more work and inconvenience than they would have otherwise experienced. It is reasonable to infer here as with the direct deposit issue that Kestin was intent on showing the Complainants that he could make their lives difficult as well by charging them for all copies. Finally, there is no evidence that all institution employes, whether they be bargaining unit employes or not, were advised of the impending change in collecting fees. Rather, the memo was directed to the Local 178 president. Obviously this memo singled out Complainants at that time. Consequently, the Examiner is persuaded that the actions of Respondent in changing the practice at DCI regarding photocopying requests was motivated in part by hostility toward Complainants exercise of protected concerted activity and as such amounted to illegal interference and discrimination in violation of Sec. 111.84(1)(a) and (c), Stats.

Dated at Madison, Wisconsin this 3rd day of April, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Thomas L. Yaeger, Examiner

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