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-D

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.

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On April 3, 1992, Examiner Thomas L. Yaeger issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above matter wherein he concluded that the State of Wisconsin had committed unfair labor practices by certain conduct in violation of Secs. 111.84(1)(a) and (c), Stats., and wherein he also dismissed certain complaint allegations.

Complainant timely filed a petition with the Wisconsin Employment Relations Commission seeking review pursuant to Secs. 111.07(5) and 111.84(4), Stats., of those portions of the complaint which the Examiner dismissed. Thereafter, the parties filed written argument in support of and in opposition to the petition, and the briefing schedule was completed on July 27, 1992.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

ORDER 1/

1/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in

The Examiner's Findings of Fact, Conclusions of Law and Order are affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 15th day of September, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairperson

William K. Strycker /s/
William K. Strycker, Commissioner

Commissioner Herman Torosian did not participate in this case.

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detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefore personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to

Continued

1/ Continued

be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal serviceor mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

STATE OF WISCONSIN

MEMORANDUM ACCOMPANYING ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Background

During the summer of 1989, while the parties were bargaining a new collective bargaining agreement, employes represented by Complainant made requests to see their personnel files. The complaint in question alleges that the Respondent reacted to the employe requests in various ways which violated Secs. 111.84(1)(a) and (c), Stats. More specifically, Complainant alleges that Respondent: (1) failed to allow employes to inspect their personnel files while on paid status; (2) determined that grievances relating to access to personnel files would be handled as group grievances and further designated the union representatives who would speak on behalf of Complainant as to said group grievances; (3) threatened to discontinue direct deposit of paychecks; (4) destroyed material contained in personnel files; and (5) began charging employes for the cost of photocopying personnel file materials.

The Examiner concluded that the Respondent had committed unfair labor practices within the meaning of Secs. 111.84(1)(a) and (c), Stats., as to allegations (3) and (5), above. The Examiner dismissed allegations (1), (2) and (4).

In its petition for review, as amended by its subsequent supportive argument, Complainant argues that the Examiner erred by dismissing allegations (1) and (2).

Positions of the Parties

Complainant asserts that the Examiner erred by dismissing those portions of the complaint related to the circumstances in which employes were able to review their personnel files and the Respondent's decision to treat the resultant grievances as group grievances and to designate who could represent Complainant during the processing of same. Complainant argues that where, as here, the Examiner concluded that a representative of Respondent was motivated at least in part by anti-union animus as to the conduct in which the State of Wisconsin engaged, and where, as here, this same representative was involved in determining the Respondent's conduct as to allegations (1) and (2), it should follow that the same improper hostility was at least a part of the Respondent's motivation as to the conduct involved in allegations (1) and (2). Because of this incon-sistency in the Examiner's reasoning, Complainant urges the Commission to reverse the Examiner as to allegations (1) and (2), and to find the unfair labor practices alleged.

The Respondent urges the Commission to affirm the Examiner's dismissal of allegations (1) and (2). As to the allegation relating to the circumstances in which employes could examine their personnel file, Respondent asserts that the Examiner correctly determined that animus played no role in the response to the mass requests received from employes. Respondent notes that four individual representatives of the Respondent participated in the decision-making process as to how the Respondent would react to the employe requests. Under such circumstances, Respondent argues that no violation should be found to have occurred. Respondent asserts that even if it were erroneously concluded that one of these four representatives was improperly motivated by anti-union animus, there is no showing that the other three representatives were so motivated. Respondent argues that the Examiner had the benefit of seeing and hearing the various Respondent representatives and properly concluded that

hostility played no role in the pragmatic and practical decisions the Respondent had to make as to the employe requests.

As to the allegation regarding the "group grievance," Respondent asserts that the decision in question was not made by the individual as to whom the Examiner found animus to be present as to other decisions. Respondent contends that as there is no evidence that the actual decision-makers bore any animus toward the Complainant, the Examiner correctly dismissed this allegation.

Discussion

As to allegation (1), the Examiner reasoned in his decision as follows:

> 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 solely 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.
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> 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.
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> 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.

We have reviewed the record and determined that the Examiner correctly concluded that animus did not motivate Respondent as to the manner in which it permitted review of personnel files in the instant dispute. While we acknowledge that it could reasonably be concluded that the animus found to exist by the Examiner as to allegations (3) and (5) could have infected Respondent's decision-making process as to this complaint allegation, we are

satisfied that the record herein does not warrant such a conclusion. Therefore, we have affirmed the Examiner.

As to allegation (2), the Examiner reasoned in his decision as follows:

> 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.
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> 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.

We have reviewed the record and determined that the Examiner correctly concluded that animus did not motivate Respondent as to the manner in which it responded to the personnel file grievances. While we acknowledge that it could reasonably be concluded that the animus found to exist by the Examiner as to allegations (3) and (5) could have infected Respondent's decision-making process as to this complaint allegation, we are satisfied that the record herein does not warrant such a conclusion. Therefore, we have affirmed the Examiner.

Dated at Madison, Wisconsin this 15th day of September, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/

A. Henry Hempe, Chairperson

William K. Strycker /s/

William K. Strycker, Commissioner

Commissioner Herman Torosian did not participate in this case.