

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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WISCONSIN STATE EMPLOYEES UNION	:	
(WSEU), DISTRICT COUNCIL 24,	:	
AFSCME, AFL-CIO,	:	
	:	Case 318
Complainant,	:	No. 46952 PP(S)-187
	:	Decision No. 27255-A
vs.	:	
	:	
STATE OF WISCONSIN, DEPARTMENT OF	:	
EMPLOYMENT RELATIONS (DER),	:	
	:	
Respondent.	:	
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Appearances:

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

Mr. David C. Whitcomb, Chief Legal Counsel, Department of Corrections, State of Wisconsin, 149 East Wilson Street, Madison, Wisconsin 53707, appearing on behalf of Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On January 30, 1992, Wisconsin State Employees Union (WSEU), District Council 24, AFSCME, AFL-CIO, hereafter Complainant, filed a complaint of prohibited practice alleging that the State of Wisconsin, Department of Employment Relations (DER), hereafter Respondent, had violated Sec. 111.84 and 111.84(1)(a) and (c), Stats., in its creation and staffing of an Emergency Response Unit (ERU) at Columbia Correctional Institution (CCI). On May 6, 1992, the Wisconsin Employment Relations Commission, hereafter Commission, appointed Coleen A. Burns, a member of its staff, as Examiner to conduct the hearing on the complaint, and to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.07, Stats. The hearing on the complaint was held on June 10, 1992, at the Columbia Correctional Institution, Portage, Wisconsin. The record was closed on September 18, 1992, upon receipt of posthearing written argument.

Having considered the evidence and the arguments of the parties, the Examiner makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The Wisconsin State Employees Union (WSEU), District Council 24, AFSCME, AFL-CIO, hereafter the Union or Complainant, is a labor organization within the meaning of Sec. 111.81(12), Stats., and has its principal offices at 5 Odana Court, Madison, Wisconsin 53719.

2. The State of Wisconsin, hereafter the Respondent, is an employer within the meaning of Sec. 111.81(8), Stats., and is represented by the Department of Employment Relations which has its offices at 149 East Wilson Street, Madison, Wisconsin 53702.

3. At all times material hereto, the Complainant has been the exclusive collective bargaining agent for a number of state employes, including Correctional Officers employed at the Columbia Correctional Institution, hereafter CCI. CCI is a maximum security correctional institution operated and maintained by the State Department of Corrections, also referred to as DOC. On January 30, 1992, Complainant filed a Complaint with the Wisconsin Employment Relations Commission alleging that Respondent had violated Sections 111.84 and 111.84(1)(a) and (c), Stats., in the creation and maintenance of the Emergency Response Unit at CCI.

4. Kyle K. Davidson, Associate Warden-Security, is responsible for the oversight of the CCI security, including supervision of the Emergency Response Unit, hereafter ERU. The ERU, which was established shortly after the prison was opened in 1986, is a 48 person team which was created to respond to a variety of emergencies, including inmate disturbances at the prison or other correctional institutions, and hostage-taking. The ERU has specialized teams, such as sniper or forcible entry, and all ERU members receive specialized training. The ERU contains employes of the Respondent who are represented by the Complainant, as well as employes who are not represented by the Complainant. Each ERU member has a regular, permanently assigned duty not related to ERU. Since the creation of the ERU, at the beginning of each year, a sign-up sheet for ERU is posted at CCI. Employes who are not members of the ERU, but are interested in becoming so, have the right to sign the sign-up sheet. Whenever there is a vacancy in the ERU, employes are selected from the sign-up sheet on the basis of seniority. Employes selected for ERU must sign an Emergency Response Unit (ERU) Sign-up Agreement which states as follows:

I, \_\_\_\_\_, do hereby volunteer my services for a position on the Emergency Response Unit at Columbia Correctional Institution. I certify that I fully understand Columbia Correctional Institution's policies and procedures relating to the Emergency Response Unit.

In addition, I understand that by being a member of the Emergency Response Unit I could be relieved of duty from my regularly-scheduled post and be scheduled for Emergency Response Unit training. Also, my

regularly-Scheduled hours of work could be changed with a 24-hour advance notice to attend Emergency Response Unit training.

I fully understand that it is mandatory that I attend all scheduled Emergency Response Unit training sessions. When I am unable to attend a scheduled Emergency Response Unit training session, I will submit a letter stating the reasons for my absence to the Emergency Response Unit supervisors.

Employees accepted into the ERU must meet the following criteria:

CRITERIA FOR ACCEPTANCE, MAINTENANCE, AND REMOVAL FROM THE COLUMBIA CORRECTIONAL INSTITUTION EMERGENCY RESPONSE UNIT (ERU)

CRITERIA FOR ACCEPTANCE AND MAINTENANCE:

1. The Employee's record is to be free of any discipline for the past year.
2. The employee must be off of original probation
3. Ability to maintain 80% qualification with assigned weapons "strong side" and 70% "weak side."
4. Maintain positive evaluations from supervisors participating in training. Evaluation areas include: fire arms safety and skill, communication skills, acceptance of chain of command and leadership skills, and attitude.
5. Physical Fitness Standards: CCI's physical entry standards are listed below. Any person applying for ERU membership after April 8, 1991 must be able to meet the listed standards. Those persons presently on CCI's ERU are to consider themselves "grandfathered." If any "grandfathered" member is removed for any reason, that person's return to the unit will be contingent on their achieving the noted physical fitness standards.

AGE GROUP	SIT-UPS	PUSH-UPS	LEG RAISES	1.5 MILE RUN
UNDER 30 AND	35 REPETITIONS	25 REPETITIONS	25 REPETITIONS	14 MINUTES 30 SECONDS
30 - 39 AND	30 REPETITIONS	23 REPETITIONS	23 REPETITIONS	15 MINUTES 30 SECONDS
AGE GROUP	SIT-UPS	PUSH-UPS	LEG RAISES	1.5 MILE RUN
40 - 49 AND	23 REPETITIONS	17 REPETITIONS	17 REPETITIONS	16 MINUTES 30 SECONDS

50 AND  
AND OVER  
SECONDS

19 REPETITIONS      12 REPETITIONS      12 REPETITIONS      17      MINUTES  
30

CRITERIA FOR REMOVAL:

1. Insubordination: Immediate removal with no chance of reactivation.
2. Sick Leave Abuse: Member is to be counseled and warned of the consequences as they pertain to ERU. If abuse continues, will remove with the option of reapplying after one year.
3. Evaluations: Evaluations of a negative content are to be submitted to the ERU Commander, depending on the content and with the Associate Warden-Security's input and approval, proper action, to include removal, may result.
4. Disciplinary Action (Non-ERU): Any and all disciplinary proceedings are to be copied to the ERU Commander and should be looked at as they pertain to ERU. If any disciplinary action results in Leave Without Pay, immediate removal from ERU will result, with the one year option to remain open.
5. Late: Any member reporting late to ERU training will be in violation of Work Rule #14 and will be subject to disciplinary action. Two occurrences will result in removal with the one year resign option.
6. Absence: Two unexcused absences will result in removal from ERU with the one year resign option. An unexcused absence is an absence for which prior approval of the commander was not obtained.

Respondent developed the "Criteria for Acceptance, Maintenance, and Removal From the Columbia Correctional Institution Emergency Response Unit (ERU)" and the Columbia Correctional Institution Emergency Response Unit (ERU) Sign-up Agreement without any participation from the Union.

5. Complainant has not pled, and the parties have not litigated, the issue of whether or not the Respondent has refused to bargain collectively in violation of Sec. 111.84(1)(d), Stats.

Upon the basis of the above and foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSIONS OF LAW

1. The Examiner does not have jurisdiction to determine whether or not the Respondent has refused to bargain collectively in violation of Sec. 111.84(1)(d), Stats., and, therefore, the Examiner is without jurisdiction to determine whether or not Respondent has violated Sec. 111.84(1)(a) or (c) by refusing to bargain collectively with Complainant in violation of Sec.

111.84(1)(d), Stats.

2. The Respondent has not been shown to have committed any independent violation of Sec. 111.84(1)(a) or (c), Stats.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner issues the following

ORDER 1/

The instant complaint is hereby dismissed in its entirety.

Dated at Madison, Wisconsin this 17th day of November, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By \_\_\_\_\_  
Coleen A. Burns, Examiner

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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

(Footnote 1/ continued on page 6)

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1/ continued

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.

STATE OF WISCONSIN

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

POSITIONS OF THE PARTIES

Complainant

The complaining Union has been and continues to be the exclusive bargaining agent for all Correctional Officers working for the state, including those at the Columbia Correctional Institution (CCI). The Union has the right and duty to negotiate the wages, hours and conditions of employment of these employes, including most of the subjects found in the Emergency Response Unit (ERU) Sign-up Agreement and the Criteria for Acceptance, Maintenance and Removal From the Columbia Correctional Institution Emergency Response Unit. By unilaterally establishing the Emergency Response Unit (ERU) Sign-up Agreement and the criteria for acceptance, maintenance and removal from the Columbia Correctional Institution Emergency Response Unit (ERU), the Respondent has violated Sec. 111.84(1)(a) and (c), Stats.

Respondent

The Complaint alleges that Respondent has violated Sec. 111.84(1)(a) and (c) of SELRA. The Complaint does not allege that Respondent has violated Sec. 111.84(1)(d) of SELRA. Not only does the Complaint fail to allege a violation of Sec. 111.84(1)(d), but also, there is nothing in the record to suggest that the Complainant has ever attempted to bargain with the Respondent over any aspect of CCI's ERU. Moreover, the establishment of an ERU, as well as its deployment, is a management right under Sec. 111.90, Stats. SELRA neither prohibits management from exercising its management rights, nor requires management to bargain the establishment or deployment of ERU.

The Examiner is limited to the alleged violation of Sec. 111.84(1)(a) and (c), Stats. There is no evidence in the record to support a finding that the Respondent has violated either Sec. 111.84(1)(a) or Sec. 111.84(1)(c). The complaint should be dismissed with prejudice.

DISCUSSION

The Complaint, as filed, alleges that Respondent has violated "Section 111.84 and 111.84(1)(a)(c), Wis. Stats." Complainant has not pled, and the parties have not litigated, a claim that the Respondent violated Sec. 111.84(d), Stats., when Respondent developed and implemented the Criteria for Acceptance, Maintenance, and Removal From the Columbia Correctional Institution Emergency Response Unit (ERU) and the Columbia Correctional Institution Emergency Response Unit (ERU) Sign-up Agreement. Accordingly, the undersigned is without jurisdiction to determine whether or not Respondent has violated Sec. 111.84(1)(d), Stats. Having no jurisdiction to determine whether or not Respondent has violated its statutory duty to bargain, the Examiner does not have jurisdiction to determine a Sec. 111.84(1)(a) or (c) claim which derives from an allegation that Respondent has violated its statutory duty to bargain.

The Complainant does not argue, and the record does not establish, that there has been any violation of Sec. 111.84(1)(a) and/or (c), Stats., which is independent of Complainant's assertion that Respondent has violated its statutory duty to bargain. Accordingly, the Complaint has been dismissed in its entirety.

Dated at Madison, Wisconsin this 17th day of November, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By \_\_\_\_\_  
Coleen A. Burns, Examiner