STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN STATE BUILDING TRADES NEGOTIATING COMMITTEE and STEAMFITTERS LOCAL UNION NO. 394, Complainants, vs. STATE OF WISCONSIN, Respondent.	Case 316 No. 46805 PP(S)-185 Decision No. 27365-B

Appearances:
Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by Mr. John J
Mr. David J. Vergeront, Legal Counsel, Department of Employment Relations, on behalf of the State of Wisconsin.
Lawton & Cates, S.C., by Mr. Richard V. Graylow, on behalf of Wisconsin State

FINDINGS OF FACT ,
CONCLUSIONS OF LAW AND ORDER

Wisconsin State Building Trades Negotiating Committee and Steamfitters Local Union No. 394, hereinafter referred to as Complainants, having on December 30, 1991, filed a complaint with the Wisconsin Employment Relations Commission, alleging that the State of Wisconsin, hereinafter Respondent or the State, had violated Sections 111.84(1)(d) and (e), Stats. by unilaterally removing work and positions from the bargaining unit represented by Complainants; Wisconsin State Employees Union, AFSCME Council 24, AFL-CIO, hereinafter referred to as the Intervenor or WSEU, having filed a motion to intervene on March 26, 1992; the Commission having appointed Mary Jo Schiavoni, a member of its staff, to act as Examiner and to make and issue Finding of Fact, Conclusions of Law and Order in this matter as provided in Section 111.07(5), Stats.; the State having filed an Answer, Motion to Dismiss, and Affirmative Defenses, on November 23, 1992; Complainants having filed a motion to file a First Amended Verified Complaint on December 2, 1992; the Examiner having considered said motions and issued an order granting the Motion to Intervene, scheduling hearing on the Motion to Dismiss, and granting the Motion to Amend the Complaint on December 3, 1992; and hearing on said matter having been held on February 8, and March 31,

1993, in Madison, Wisconsin; and the transcript having been received on June 1, 1993, and the parties having completed their briefing schedule on August 9, 1993; and the Examiner, having considered the evidence and arguments of the parties and being fully advised in the premises, makes and issue the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Complainant Wisconsin State Building Trades Negotiating Committee, is a labor organization within the meaning of Section 111.81(12) which does not formally maintain business offices. Complainant Steamfitters Local Union No. 394 is also a labor organization within the meaning of Section 111.81(12). Its principal offices are located at 1214 Anne Street, Madison, Wisconsin. At all times relevant herein, Gary Hammen has occupied the position of Business Representative for the Steamfitters. He has also served as a member of the bargaining team for the Building Trades Negotiating Committee. As such, he has at all time relevant been a representative and agent of Complainants. Complainant Building Trades Negotiating Committee is the exclusive collective bargaining agent for all craft employes employed by the State. The groups of craft employes listed in the most recent collective bargaining agreement between the parties are as follows:

Asbestos Worker	Painter
Bricklayer and Mason	Plasterer
Carpenter	Plumber
Electrician	Sheet Metal Worker
Elevator Constructor	Steamfitter
Glazier	Terrazzo and Tile Setter
Lead Craftsworker	Welder

2. Wisconsin State Employees Union, AFSCME Council 24, AFL-CIO, is a labor organization within the meaning of Section 111.81(12) whose principle place of business is 5 Odana Court, Madison, Wisconsin. WSEU also represents certain employes of the State in a collective bargaining unit consisting of BLUE-COLLAR AND NON-BUILDING TRADES.

3. Complainant Wisconsin State Building Trades Negotiating Committee and the State have been parties to a series of collective bargaining agreements over a period of many years. As part of these agreements, the State recognizes the Committee as the exclusive collective bargaining representative for all craft employes. Some of the employes covered by these agreements work in the pipe trades and are members of Steamfitters Local 394.

4. The most recent 1992-1993 collective bargaining agreement between the State and the Complainants contains, in pertinent part, the following provisions:

ARTICLE II

Recognition and Union Security

Section 1 - Bargaining Units

The Employer recognizes the Union as the

exclusive collective bargaining agent for all Craft employes as listed below:

Asbestos Worker	Painter
Bricklayer and Mason	Plasterer
Carpenter	Plumber
Electrician	Sheet Metal Worker
Elevator Constructor	Steamfitter
Glazier	Terrazzo and Tile Setter
Lead Craftsworker	Welder

"Craft employe" means a skilled journeyman craftworker, including his/her apprentices and helpers, but shall not include employes not in direct line of progression in the craft.

Employes excluded from this collective bargaining unit are all office, blue collar, technical, security and public safety, clerical, professional, confidential, project, limited term, management, and supervisory employes. All employes are in the classified service of the State of Wisconsin as listed in the certifications by the Wisconsin Employment Relations Commission as set forth in this Section.

The parties will review all new unit classifications and if unable to reach agreement as to their inclusion or exclusion from the bargaining unit, shall submit such classifications to the Wisconsin Employment Relations Commission for final resolution.

The Employer shall notify the Union (Chairman of the Building Trades Negotiating Committee) and shall comply with the other provisions contained in Section 16.705, Wis. Stats., and Chapter ADM. 10, Wisconsin Administrative Code when planning to engage in the procurement of contractual services. The Employer agrees to meet with the Union to discuss alternatives to the intended contracting out if the Union requests such a meeting within twenty-one (21) calendar days after notification.

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ARTICLE III

Management Rights

It is understood and agreed by the parties that management possesses the sole right to operate its agencies so as to carry out the statutory mandate and goals assigned to the agencies and that all management rights repose in management, however, such rights must be exercised consistently with the other provisions of this Agreement.

Management rights include:

1. To utilize personnel, methods, and means in the most appropriate and efficient manner possible as determined by management.
2. To manage and direct the employes of the various agencies.
3. To transfer, assign or retain employes in positions within the agency.
4. To suspend, demote, discharge or take other appropriate disciplinary action against employes for just cause.
5. To determine the size and composition of the work force and to lay off employes in the event of lack of work or funds or under conditions where management believes that continuation of such work would be inefficient or nonproductive.
6. To determine the mission of the agency and the methods and means necessary to fulfill that mission including the contracting out for or the transfer, alteration, curtailment or discontinuance of any goals or services. However, the provisions of this Article shall not be used for the purpose of undermining the Union or discriminating against any of its members.

It is agreed by the parties that none of the management rights noted above or any other management rights shall be subjects of bargaining during the term of this Agreement. Additionally, it is recognized by the parties that the Employer is prohibited from bargaining on the policies, practices and procedures of the civil service merit system relating to:

1. Original appointments and promotions specifically including recruitment, examinations, certifications, appointments, and policies with respect to probationary periods.
2. The job evaluation system specifically including position classification, position qualification standards, establishment and abolition of classifications, assignment and reassignment of classifications to salary ranges, and allocation and reallocation of positions to classifications, and the determination of an incumbent's status resulting from position reallocation.

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ARTICLE IV

Grievance Procedure

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Section 2 - Grievance Steps

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Step Four: Grievances which have not been settled under the foregoing procedure may be appealed to arbitration by either party within fifteen (15) calendar days from the date of the agency's answer in Step Three, or the grievance will be considered ineligible for appeal to arbitration. The party to which unresolved third step grievances are appealed to arbitration is the Department of Employment Relations. If an unresolved grievance is not appealed to arbitration, it shall be considered terminated on the basis of the Third Step answers of the parties without prejudice or precedent in the resolution of future grievances. The issue as stated in the Third Step shall constitute the sole and entire subject matter to be heard by the arbitrator, unless the parties agree to modify the scope of the hearing.

For the purposes of selecting an impartial arbitrator, the parties or party, acting jointly or separately, shall request the Wisconsin Employment Relations Commission to appoint a staff member to serve as the impartial arbitrator of the grievance.

Where two or more grievances are appealed to arbitration, an effort will be made by the parties to agree upon the grievances to be heard by anyone arbitrator. On the grievances where agreement is not reached, a separate arbitrator shall be appointed for each grievance. The cost of the arbitrator and expenses of the hearing, including a court reporter if requested by either party, will be shared equally by the parties. Each of the parties shall bear the cost of their own witnesses, including any lost wages that may be incurred. On grievances where the arbitrability of the subject matter is an issue, a separate arbitrator shall be appointed to determine the question of arbitrability unless the parties agree otherwise. Where the question of arbitrability is not an issue, the arbitrator shall only have authority to determine compliance with the provisions of this Agreement. The arbitrator shall not have jurisdiction or authority to add to, amend, modify, nullify, or ignore in any way the provisions of this Agreement and shall not make any award which in effect would grant the Union or the Employer any matters which were not obtained in the negotiation process. The arbitrator shall render a decision within thirty (30) calendar days following the hearing or within thirty (30) calendar days of receipt of the briefs submitted by the parties.

The decision of the arbitrator will be final and binding on both parties to this Agreement.

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ARTICLE XII

General

Section 1 - Obligation to Bargain

This Agreement represents the entire Agreement of the parties and shall supersede all previous agreements, written or verbal. The parties agree that the provisions of this Agreement shall supersede any provisions of the rules of the Administrator, Division of Personnel and the Personnel Board relating to any of the subjects of collective bargaining contained herein when the provisions of such rules differ with this Agreement. The parties acknowledge that during the negotiations which resulted in this Agreement each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that all of the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. Therefore, the Employer and the Union, for the life of this Agreement, and any extension, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter referred to or covered in this Agreement, or with respect to any subject or matter not specifically referred to or covered in this Agreement, even though such subject or matter may not have been within the knowledge or contemplation of either or both of the parties at the time that they negotiated or signed this Agreement.

. . .

5. The State and the WSEU have also been a party to a series of collective bargaining agreements the most recent agreement being the November 3, 1991 to June 30, 1993 agreement. In that agreement, the parties added the following language to Article II, the Recognition and Union Security provision.

ARTICLE II

Recognition and Union Security

Section 1: Bargaining Unit

2/1/1 The Employer recognizes the Union as the exclusive collective bargaining agent for all employes, as listed below:

2/1/2 BLUE COLLAR AND NON-BUILDING TRADES (BC)

Classification	Pay Range
Heating Ventilating and Air Conditioning Specialist	13

6. Since at least 1974, it appears that both Steamfitters in the craft unit and Maintenance Mechanic 3's in the non-craft blue collar unit have performed various duties related to heating, ventilation and air-conditioning. The technology needed to perform these functions has changed significantly over the past twenty years so that more and more of these functions are delivered by computerized energy management systems.

7. The Steamfitter classification specification in existence since February of 1970 has remained unchanged. It provides as follows:

STATE OF WISCONSIN

Steamfitter P.R.

Class Description

Definition:

This is journeyman steamfitter work. Under general supervision, employes in this class perform steamfitting work at the journeyman level of skill, normally on a full-time basis; however, other related duties may also be assigned as necessary. In addition, positions in this class may also supervise and instruct apprentices, helpers and other assistants.

Examples of Work Performed:

Install, repair and replace steam pipes, valves, traps, fittings, connections and equipment.
Install heating and refrigeration systems.
Repair hot water tanks, autoclaves, sterilizers and other steam equipment.
May maintain, repair and calibrate the more complex thermostats, air conditioning controls and water meters.
May maintain and repair power house steam lines.
Perform gas and arc welding.
Direct and instruct apprentices, helpers and other assistants in the trade.
Keep records.
Make reports.

Qualifications

Required Knowledges, Skills and Abilities:

Thorough knowledge of the tools, equipment, materials, methods and practices of

the steamfitting trade.

Thorough knowledge of the occupational hazards and safety precautions related to the steamfitting trade.

Ability to read, interpret and work from plans, involved drawings and sketches; ability to supervise and instruct apprentices, helpers and other assistants in the trade.

Skill in the use of all tools common to the steamfitting trade.

Good physical condition, manual dexterity and dependability.

8. A typical position description for a Steamfitter is as follows:

POSITION DESCRIPTION
Steamfitter

POSITION SUMMARY

Repair, install, and maintain heating and ventilating equipment, steam distribution systems and equipment, including high and low pressure steam according to manufacturer's instructions, design specifications, user requirements and applicable codes.

GOALS AND WORKER ACTIVITIES

35% A. Repair, maintain, remodel and install steam distribution and condensate return systems.

A1. Equipment to include high, medium, and low pressure steam systems, reducing stations, valves, valve operators, steam traps, strainers, etc.

A2. The ability to read and interpret building and heating systems blueprints relating to steam distribution.

20% B. Repair, maintain, remodel and install heating and ventilating equipment and systems.

B1. Equipment to include ventilating units, steam absorption units, booster coils, heat exchangers, thermostats and other sensing units, dampers, flow control valves, filters, etc.

20% C. Repair, maintain, remodel and install other building equipment.

C1. Equipment to include steam kitchen equipment, pumps of all types, air compressors, condensors, evaporators, water heaters, tube bundles, furnaces, boilers, water and steam coils, cooling towers, etc.

10% D. Performance of gas and arc welding as necessary and in accordance with code requirements to service above noted equipment and systems; welder certification as

necessary.

5% E. Repair, maintain, remodel and install air gas lines, pneumatic controls and systems, refrigeration lines, etc.

5% F. Operation of a computerized energy management system (JC-85/40).

F1. Interpret data

F2. Adjust field equipment

F3. Repair or modify equipment to enable the system to perform per specifications.

5% G. Miscellaneous Duties

G1. Maintain and submit time and material cost records and work order forms.

G2. Other duties as assigned.

9. The Maintenance Mechanic 3 position in April of 1973 was as follows:

Maintenance Mechanic 3 SR 3-10

Class Description

Definition:

This is a highly specialized and/or lead mechanical maintenance and repair work. Employes in this class repair and maintain the most complicated and intricate mechanical equipment associated with heating, ventilating, air conditioning, refrigeration, boiler operation, fuel storage and dispensing and electrical systems. Employes in this class may also function independently on a shift responsible for an entire mechanical maintenance operation in an institution, or for an assigned area of a complex operation. Work at this level is performed under the minimal supervision of a program supervisor or administrator.

Examples of Work Performed:

Assigns work, keeps time records, and inspects work when completed.

Performs or coordinates the inspection, repair and maintenance functions on heating and ventilating equipment including boilers, furnaces and their control units.

Maintains and repairs refrigeration and fuel storage units, including pumps and valves.

Performs or guides the inspection, repair and maintenance of pumps, sludge rakes, chlorinators and sewage disposal equipment and

their controls.

Performs or leads in the installation and repair of air conditioners and climate control devices.

Performs or guides in the maintenance and replacement of electrical units such as motors, switches and outlets.

Performs or leads in the installation and repair of kitchen and laundry equipment and appliances.

Performs or guides in the welding and metal fabrication of new equipment.

Requisitions supplies and recommends equipment for purchase.

Other assigned work may include tasks not specifically enumerated above which are of a similar kind and level.

Qualifications

Required Aptitudes, Knowledges, Skills, and Personal Characteristics:

High degree of mechanical aptitude.

*Knowledge of the operation, maintenance and minor repair of the electrical, plumbing, heating, refrigeration, air conditioning, and other mechanical systems and apparatus commonly used in office and institutional buildings and building complexes.

Skill in making repairs and adjustments to the mechanical devices, valves, booster pumps, fans, compressors, condensers, and switches which control such systems.

Ability to operate various types of power and hand machinery and tools used in mechanical maintenance work.

Alertness in noting for necessary action malfunctions and possible unsafe conditions in mechanical equipment.

Reliability, sense of responsibility, and initiative to work productively for sustained periods without supervision.

Self reliance and initiative to solve most problems of a recurrent type without frequently involving higher supervision.

*Knowledge of occupational hazards and safety precautions in the maintenance and use of building mechanical systems, and carefulness and alertness in observing safety measures.

*Capacity to use sound independent judgment in an emergency.

Helpful, cooperative attitude toward supervisor and co-workers.

*Capacity, flexibility, and willingness to continually learn and apply new and changing methods and procedures required by changes in assigned facilities, equipment, technology, and work priorities and standards.

*Willingness and adaptability to work

under unpleasant conditions such as in dusty or dirty areas, or in extreme heat, or cold.

*Physical ability to perform manual labor, to climb, bend, crawl, etc.

*Essential for entry into the class

Training and Experience:

Five years of mechanical maintenance work experience, including three years performing progressively responsible and complex repairs to heating, ventilating, refrigeration, or other mechanical building equipment and systems.

Note: If special skills or knowledges needed to maintain, repair, or fabricate particular equipment are essential to successful performance in a particular position, an option limited to that area of work may be established and up to three years of specialized experience may be required.

10. From 1973 to the present, in particular in the mid to late 1980s, Maintenance Mechanic 3's began to perform more duties relating to the operation, maintenance repair, installation and calibration of electrical, pneumatic, and digital controls for a wide variety of energy management systems. On job sites where there were both Steamfitters and Maintenance Mechanic 3's, the duties of the Maintenance Mechanic were much more circumscribed that on job sites where no Steamfitters were employed. Clearly by 1990, there was a substantial overlap in job duties between Steamfitters and Maintenance Mechanic 3's with Steamfitter employes attempting to preserve their work jurisdiction on the job sites where both classifications were employed.

11. Position descriptions for Maintenance Mechanic 3's and Engineering Technician 4, in particular those of Gregory Galecki and Michael Traynor, indicate that since 1987 and 1989, Maintenance Mechanic 3's and Engineering Technician 4's have been engaged in monitoring, testing, adjusting, and repairing pneumatic and electrical controls and equipment for commercial heating and air conditioning according to specifications using handtools, test equipment, and a JC-85 computer and power tools.

11. During the bargaining for the Intervenor's predecessor contract, the State at the Intervenor's request, agreed to conduct a survey regarding the possible reclassifications of certain Maintenance Mechanic 3 positions. In early 1990 or 1991, the State undertook such a survey, and examined the Maintenance Mechanic class specifications to determine whether or not these classifications were outdated, in need of revisions, or modifications. The State did not, in the initial phases, review the class specifications of the Steamfitter classification, nor did it audit particular Steamfitters or look at the Steamfitter's field work. It did consider the possibility that a new classification would develop from the survey, and from the outset, determined that if such a new classification were created, it would place the position in the bargaining unit represented by the Intervenor. Once the new HVAC classification was published in draft form in July of 1991, the State did consider the Steamfitter specification classification in response to objections that were being voiced at the bargaining table by the Complainants in October of 1991. The final revised version of the new HVAC/Refrigeration Specialist classification specification was adopted in February of 1992. It is as follows:

STATE OF WISCONSIN
POSITION STANDARD

HEATING, VENTILATING, AIR CONDITIONING (HVAC)
AND/OR
REFRIGERATION SPECIALIST

I. INTRODUCTION

A. Purpose of This Classification Specification

This classification specification is the basic authority [under Wis. Admin. Code ER 2.04] for making classification decisions relative to present and future HVAC and/or Refrigeration Specialist positions. Positions allocated to this series are primarily responsible for providing specialized HVAC and/or refrigeration work. This classification specification will not specifically identify every eventuality or combination of duties and responsibilities of positions that currently exist, or those that result from changing program emphasis or organizational structures in the future. Rather it is designed to serve as a framework for classification decision-making in this occupational area.

B. Inclusions

This classification encompasses positions which function as system experts in the HVAC and/or refrigeration area. These positions must spend a significant portion of time (typically 90% or more) performing advanced work on HVAC and/or refrigeration equipment and systems. This classification is limited only to those few positions which are specifically assigned to perform advanced systems setup, monitoring, adjustment and control; troubleshooting, repair and systems modification; planning and coordinating HVAC and/or refrigeration projects; and would typically guide Maintenance Mechanics in the maintenance and repair of sophisticated HVAC and/or refrigeration equipment systems. The more routine adjustment, maintenance and repair to the systems is typically performed by positions allocated to the Maintenance Mechanic series, however, some routine work may be done by these types of positions as an incidental portion of their primary function as systems experts.

C. Exclusions

Excluded from this series are the following types of positions:

1. Maintenance Mechanic positions whose work

may include HVAC and/or refrigeration repair and maintenance, but are not assigned advanced systems control work involving significant portion of the time.

2. Facility Repair Worker positions whose work includes building and facility maintenance;

3. Engineering Specialist positions whose work is primarily responsible for specific aspects of a larger architecture/engineering management program;

4. Equipment Fabricator, Mechanician and Instrument Maker positions whose work includes machining parts and instruments.

5. All other positions which are more appropriately identified by other series.

D. Entrance Into This Classification

Employes typically enter this classification by competitive examination. Reclassification into this classification will be permitted only when it can be demonstrated that the change in duties and responsibilities justifying the class change are a logical and gradual outgrowth of the original position's previous duties and responsibilities.

E. Classification Factors

Individual position allocations are based upon the ten Wisconsin Quantitative Evaluation System (WQES) factors: Knowledge; Discretion; Complexity; Effect of Actions; Consequence of Error; Personal Contacts; Physical Effort; Surroundings; Hazards; and Leadwork/Supervisory Responsibilities. Please refer to the WQES Master Guidecharts for explanations of each of these factors and their corresponding levels.

F. How To Use This Classification Specification

This classification specification is used to classify Technical Bargaining Unit positions as described under Section B of this classification specification. In most instances, positions included in this series will be clearly identified by the classification definition which follows below in Section II. However, a position may evolve or be created that is not specifically defined by the classification definition. In classifying these positions, it would be necessary to compare them to the classification definition based on the factors described in Section E of the classification

specification.

II. DEFINITION

HEATING, VENTILATING, AIR CONDITIONING (HVAC) and/or REFRIGERATION SPECIALIST

This is advanced level HVAC and/or refrigeration work performed under minimal supervision. Employes in this class troubleshoot, repair, adjust, modify and remodel sophisticated HVAC and/or refrigeration control systems (pneumatic, electric and electronic) and related mechanical and electronic equipment. These positions are responsible for the most specialized and technically advanced environmental controls and typically lead Maintenance Mechanics in the more routine maintenance and repair of the systems or perform this work incidental to their primary function as the systems expert. These controls are used to balance elements such as outside vs. inside temperature, humidity and air velocity, taking into consideration factors such as time of day usage, system capabilities and energy efficiency. In addition, these employes may be responsible for the design, development, operation and ongoing maintenance of a computerized energy management system used to monitor and control heating and air conditioning systems and report and make recommendations on energy conservation procedures, controls and activities.

Representative Positions

University of Wisconsin River Falls

Acts as a consultant to contractors and engineers when changes or additions are being made to the HVAC system. Operates, repairs and performs preventative maintenance on all pneumatic controls including installation of new controls on remodeling projects and energy projects. This includes reviewing specifications, designing systems, setting up reset schedules for more efficient systems, and providing data reports to provide a comfortable environment. Programs and operates the campus energy management computer.

University of Wisconsin Hospital and Clinics

Installs, programs and modifies computerized digital control system. Troubleshoots, edits, assembles, adjusts, modifies and loads control strategies to efficiently manage HVAC units, chillers, towers, pumps and heat exchangers. Troubleshoots and replaces faulty electronic and pneumatic hardware. Recommends and sets up program schedules for HVAC equipment and lighting to conserve energy. Trains operators on workstation procedures used to monitor and control the facility.

III. EXAMPLES OF WORK PERFORMED

Heating, Ventilating, Air Conditioning (HVAC) and/or Refrigeration Specialist

Review computer output and individual complaints to locate, identify and troubleshoot controls, equipment, and system malfunctions.
Disassemble and inspect malfunctioning controls or equipment to determine source of problem and decide on appropriate action to correct the problem.
Layout new and remodel old control systems.
Redesign existing controls and equipment for maximum efficiency.
Balance air and water flow distribution to optimize system performance.
Read printouts and interpret the information provided to make changes to the computer programs which control the operation of fans, chillers, pumps, dampers, and controls.
Assist in the determination to incorporate existing systems with new equipment.
Determine energy management savings and conservation.
Find and repair leaks in gas refrigerant units.
Maintain and repair pneumatic and electronic control systems.

Perform HVAC and/or refrigeration systems analysis to recognize systems malfunctions, interpret complex schematic diagrams and make appropriate repairs or adjustments to complete system.
Review plans and specification for new and remodeling projects and recommend changes and/or modifications.
Start and stop chillers as required to meet seasonal cooling requirements.

IV. QUALIFICATIONS

The qualifications required for these positions will be determined at the time of recruitment. Such determinations will be made based on an analysis of the goals and worker activities performed and by an identification of the education, training, work or other life experience which would provide reasonable assurance that the knowledge and skills required upon appointment have been acquired.

13. Complainants and the State engaged in negotiations from May of 1991 until tentative agreement on or around December 10, 1991, and final legislative approval on or around February 2, 1992, which resulted in the collective bargaining agreement referred to in Finding of Fact 4 above. The Chief Negotiator for the State was Frederick J. Bau. Gary Hammen was a member of the Complainants' bargaining team along with James Elliott, President of the Milwaukee Building Trades Council. From October of 1991 when Complainants discovered the draft HVAC classification specification, on at least five separate occasions during bargaining, Complainants raised the issue of the new classification with the State. The Complainants felt that the positions should have been created as a Steamfitter position, and become covered by the Building Trades collective bargaining agreement. They objected to the State's award of work which they believe falls within their work jurisdiction to non-craft employes in the WSEU bargaining unit. The State told them the positions had been created through the bargaining process between the State and the Intervenor. It indicated that the classifications in question had been historically part of the collective bargaining agreement with the Intervenor and were not building trades positions.

14. Bau indicated that the State would not agree to the Complainants' proposal and would be unable to come to any different conclusions from those which had been reached in the WSEU contracts. From Bau's perspective, he told Complainants' that the bargaining table was not the place for either a classification matter or a jurisdiction matter and suggested that the Complainants take the matter to the WERC or another forum. During the course of negotiations, the Complainants made a proposal to delete the language in the Management Rights provision of the collective bargaining agreement which prohibits the State from negotiating matters such as original appointments, promotions, job evaluations, position classification, position qualification standards, establishment and abolition of classifications and the classification system. This proposal and the new HVAC position were effectively abandoned after the second to the last bargaining session of the parties. Neither item was included in the new agreement. No new language regarding work jurisdiction or work preservation was included in said agreement either.

15. The instant complaint was filed by the Complainants on December 30,

1991. It was not verified. A grievance contesting the performance of work by a HVAC/Refrigeration Specialist, Tony Brown, was filed thereafter on September 16, 1992, by Robert D. Decker, a Steamfitter, after the filing of the initial complaint. The grievance states, in pertinent part, the following:

> "The installation of Refrigeration, Heating and Air Conditioning Equipment and Piping which has historically been the work of the Steamfitter, which falls under the Building Trades Bargaining Unit, has been assigned to Tony Brown who is a HVAC Specialist. This undermines the union and discriminates against it members. It also, undermines the wages paid the Steamfitter, by allowing persons from another Bargaining Unit to do this work at a lesser wage rate. This undermines the Building Trades Wage Rate and the Prevailing Wage Rate."

As "relief sought" the grievance reads as follows: "We want the work immediately assigned to the proper Classification and Bargaining Unit, that being the Steamfitters and the Building Trades Unit." The grievance was processed through the second step of the grievance procedure, when the Complainants chose not to appeal to the third step. Complainants did not exhaust their grievance arbitration procedure regarding said grievance.

16. At hearing, Intervenor WSEU with concurrence from the Respondent State moved to defer and/or dismiss the complaint allegations arguing that the parties had agreed to resolve such matters exclusively through the grievance and arbitration procedures set forth in the 1992-93 agreement between Complainant and Respondent. Such motions were taken under advisement. All parties' post-hearing briefs contained arguments relating thereto.

17. The collective bargaining agreement between Complainants and the State contains an exception to the final and binding grievance arbitration procedures set forth, namely Paragraph 4 of Article II, Section 1, which empowers the Commission to make determinations on new unit classifications where the parties disagree as to their inclusion and exclusion from the bargaining unit through unit clarification proceedings. This is the exclusive venue to raise unit placement issues pursuant to the parties' agreement.

18. Complainants have proceeded in the wrong forum insofar as the Complaint contains allegations regarding Respondent State's placement of the HVAC/Refrigeration Specialist in the Intervenor WSEU's blue-collar bargaining unit or the removal of Steamfitter positions from the Building Trades unit.

19. Insofar as the allegations involve the wrongful or unilateral removal of work from Complainant's unit, it is highly probable that the submission of this aspect of the dispute to the grievance arbitration process pursuant to Article IV - Section 2 - Step 4 of the parties' collective bargaining agreement would result in an award constituting an interpretation and application of the 1992-93 agreement that would fully resolve Complainant's claims that Respondent State violated its duty to bargain by unilaterally removing work from Complainants' bargaining unit.

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

CONCLUSIONS OF LAW

1. Because the collective bargaining agreement provides that the Commission in a unit clarification proceeding has jurisdiction to resolve the

unit placement allegations set forth in the complaint, Complainants are in the wrong forum regarding these allegations, and therefore it is inappropriate for the Examiner to consider said allegations in the instant unfair labor practice proceeding.

2. In view of Finding of Fact 19 with respect to the Section 111.84(1)(d) allegation, it is appropriate to defer the disputed matters set forth in Finding of Fact 19 to the parties' contractual grievance arbitration procedure for resolution of the related contractual interpretation and application which should also resolve the claimed violation of Section 111.84(1)(d).

3. Complainants did not exhaust or attempt to exhaust the grievance arbitration procedure with respect to its claim of wrongful assignment and/or removal of unit work as a breach of the parties' collective bargaining agreement and therefore, the Examiner will not assert the jurisdiction of the Commission to determine whether or not Respondent State committed an unfair labor practice within the meaning of Section 111.84(1)(e), Stats.

Based upon the above and foregoing Findings of Fact and Conclusions of Law, the Examiner issues the following

ORDER 1/

1. The portion of the Complaint alleging improper unit placement by Respondent State in violation of Section 111.84(1)(d) and (e) is hereby dismissed.

(Footnote 1/ appears on the next page.)

2. The portion of the Complaint alleging unilateral wrongful assignment of bargaining unit work in violation of Section 111.84(1)(d) is hereby deferred to the parties' 1992-1993 grievance arbitration procedure. Further Commission action with respect to this claim is hereby held in abeyance. The Examiner will dismiss this aspect of the instant matter on motion of Complainant or Respondent upon a showing that the subject matter of the claimed violation of Section 111.84(1)(d), Stats. has been resolved in a manner not clearly repugnant to the underlying purposes of the State Employment Labor Relations Act. The Examiner will proceed to the merits regarding this allegation on the motion of

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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 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.

This decision was placed in the mail on the date of issuance (i.e. the date appearing immediately above the Examiner's signature).

Complainants or Respondent State showing that said claim has not and will not be resolved in a fair and reasonably timely fashion on the merits through contractual grievance arbitration. 2/

3. The portion of the Complaint alleging unilateral wrongful assignment of bargaining unit work in violation of Section 111.84(1)(e) is dismissed.

Dated at Madison, Wisconsin this 6th day of October, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Mary Jo Schiavoni /s/
Mary Jo Schiavoni, Examiner

2/ Brown County, Dec. No. 19314-B (WERC, 6/83), p. 9.

STATE OF WISCONSIN

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

Complainant filed the initial complaint on December 30, 1991. It was not verified. Respondent State moved to dismiss on this basis as well as other grounds to be discussed below. Intervenor moved to intervene in this matter. Complainant requested permission to file a First Amended Verified Complaint. In Dec. No. 27365-A, this Examiner granted Intervenor permission to intervene, the Complainant permission to file a First Amended Verified Complaint, and set the remainder of Respondent State's Motions to Dismiss for hearing. Hearing was held on February 8 and March 31, 1993, in which the undersigned heard Respondent State and Intervenor's Motions to Dismiss on jurisdictional and procedural grounds and the underlying merits of the dispute.

POSITIONS OF THE PARTIES

Complainants

Complainants maintain that the Steamfitter trade as it is universally understood encompasses plumbing and pipe fitting as related to the fabrication, assembly, installation, repair, servicing and maintenance of all refrigeration, air conditioning, heating and/or other piping systems. The requirements to become a journeyman Steamfitter are quite extensive requiring a term of apprenticeship of a minimum of five years with another journeyman Steamfitter and not less than 8,000 hours of training. Complainants point out that the State has employed Steamfitters in the classified service for many years in a craft unit recognized under Section 111.825(1)(c), Stats. Noting that the Steamfitter classification specification has not been revised since 1970, but that the State expects successful applicants to be well versed in all aspects of heating, ventilation, refrigeration and air conditioning systems, Complainants allege that the class specifications contain the broadest definition of Steamfitter duties. The State also develops employe position descriptions and publishes an employment bulletin within which it details specific duties of the position which is posted and available. These position descriptions more specifically delineate the duties of each individual employe.

Acknowledging that the State as an employer has also employed a group of non-craft employes classified as Maintenance Mechanics who are represented in a blue collar unit by Intervenor since the early 1970s, Complainants argue that initially their duties were dissimilar from those of steamfitters involving only the ability to change filters. Over time, the Maintenance Mechanics assumed more and more job duties which were related to the Steamfitting trade. According to Complainants, even through 1989, only Steamfitters worked on control systems or would redesign a control system. Maintenance Mechanics were not allowed to open any systems. The Complainants maintain that, at least on the Madison campus until 1989, Maintenance Mechanics simply assisted Steamfitters and never performed substantive Steamfitter work. Complainants allege that all of the duties found in the State's newly created class specification of HVAC/Refrigeration Specialist are duties traditionally assigned to Steamfitters, and recognized as Steamfitter work, with the single exception of supervising Maintenance Men. Complainants assert that although the class specification for Maintenance Mechanic 3 existed prior to 1989, no Maintenance Mechanic performed the work described therein in Madison or at University Hospital.

The Complainants allege that only at the time of implementation and award

of the HVAC classification to certain employes did those former Maintenance Mechanic 3's have their duties changed to further infringe upon the Steamfitter craft jurisdiction. With the implementation of the new HVAC/Refrigeration Specialist Classification, non-craft employes who are now reclassified, perform the work themselves rather than call a Steamfitter.

In creating the new classification, the Complainants stress that Respondent State had already determined to place the position in the Intervenor's blue collar unit with no consideration being given to placing the new position in the craft unit and no comparison being made to the Steamfitter class specifications until the Complainants complained about it. The result of the creation of the new classification, beyond denial and at the very least, has been to create an overlap with Steamfitters' duties as reflected by the Steamfitter class specification, the apprenticeship standards, and the job postings for Steamfitters.

The Complainants stress that in late 1991 when they became aware of the new classification and the job duties contained within, they objected at negotiations for their 1992-1993 agreement. According to Complainants, on no less than five occasions, both before implementation of the new classification and after, the Complainants brought their objections and concerns to the bargaining table and demanded that the State bargain over the implementation of this survey and class specification because it infringed on traditional craft jurisdiction. The Complainants contend that at no time did the State agree to bargain over the implementation of the new classification. To the contrary, the State repeatedly responded that the subject was something that the State would not address at negotiations, the concern would not be remedied at the bargaining table, and indicated that Complainants should take the problem elsewhere. Complainants maintain that the State has not disputed that it refused to bargain about this issue, nor did it refute this fact at hearing. By the time the subject had arisen in negotiations, the decision had already been made. Receiving no satisfaction and being told to take their complaint elsewhere, Complainants maintain that they then filed the instant unfair labor practice complaint.

In Complainants' view the record established that there is a substantial overlap between the duties of Steamfitters and the duties performed by the new HVAC/Refrigeration Specialists. The work is almost identical and no reliable distinction can be found in describing the difference between the two positions. Complainants argues that the new classification is not an outgrowth of the Maintenance Mechanic series of positions but an attempt by the State to carve out a separate classification from the Steamfitter trade and to place it into the non-craft, blue-collar bargaining unit.

Complainants claim that the State has refused and continues to refuse to bargain over a mandatory issue. Likening the State's decision to create the HVAC classification and assign it to another bargaining unit to the subcontracting cases, Complainants argue that the State is simply substituting one group of employes for another in performing the work. Citing federal precedent, specifically University of Chicago v. NLRB, 514 F2d 942, 949 (7th Cir. 1975), the Complainants argue that the decision to transfer certain types of work from one local union to another local union, both of which represented certain of the employer's employes was a mandatory subject of bargaining. Complainants assert that the State does not dispute that it failed to bargain with them over the decision to determine what duties the HVAC/Refrigeration Specialist would perform, and in what bargaining unit the duties would be performed.

In response to anticipated State arguments that the Sate is prohibited from bargaining over the issue in question, Complainants stress that they did

not request bargaining over whether the newly established HVAC classification belongs in the craft unit or the non-craft blue collar unit, but rather requested bargaining over whether any new classification could consume long-recognized Steamfitter duties. Complainants are not even arguing that the State cannot establish the new classification, but simply that it cannot transfer Steamfitter duties to the new classification and then place it in a different bargaining unit. In Complainants' view, the prohibition against bargaining found in Section 111.91, Stats., does not apply to these factual circumstances. In this case, Complainants insist that they have requested that the State bargain about an infringement on their work jurisdiction and the State has refused to bargain.

Complainants also assert that the State is in violation of the parties' collective bargaining agreement by its failure to review the new HVAC/ Refrigeration Specialist classification at the Union's request, pointing to the express language in Article II, Section 1. The plain meaning of the language is that if and when new "unit classifications" are created, the State has a duty to bargain about them with the Complainants.

In response to State contentions that the Commission is without jurisdiction to decide the Section 111.84(1)(e) claim, since the Complainants failed to exhaust the contractual grievance procedure, Complainants maintain that the issue for determination is not a question for an arbitrator but, as the contract provides, for the Wisconsin Employment Relations Commission. An arbitrator would not have jurisdiction over the dispute. In Complainants' view the WERC is the final arbiter for the violation asserted, not an arbitrator. Many, if not most arbitrators when presented with the question, have refused to decide whether the statutory duty to bargain has been violated. Complainants cite cases for the proposition that deferral is not required where the parties have waived the arbitration provision. As additional arguments, Complainants maintain that because the State never moved to defer to arbitration, never submitted exhaustion as an affirmative defense, and never offered to arbitrate, it has waived its opportunity to claim that arbitration is the proper forum. Because the State refused to discuss the matter at negotiations, it follows that it failed to offer to take the issue to the WERC.

According to Complainants, the question presented in this case is more than whether the language in Article II, Section 1 is construed in their favor, it is whether or not the creation of the new classification and the granting to it of certain job duties, in these circumstances, constitutes a mandatory subject of bargaining. The issue requires a statutory construction in addition to a contractual interpretation. Complainants also contend that deferral is inappropriate because the case involves an important issue of law, an issue of first impression, whether the State has a mandatory duty to bargain over the creation of a new classification which causes an undeniable overlap of duties between that new classification and a long-recognized building trades craft. Complainants assert that the decision is of paramount importance and requires a Commission determination on whether this subject triggers a duty to bargain.

Even assuming that the breach of a collective bargaining agreement allegation falls victim to failure to exhaust internal grievance procedure claims, the refusal to bargain allegation should not be dismissed because there is no contractual remedy for such a claim, and exhaustion is logically unattainable. Noting that the grievance was not even filed until after the prohibited practice complaint was filed and was withdrawn so as to avoid duplicate consideration, Complainants argue that the failure to exhaust internal remedies argument must be rejected because 1) a party cannot exhaust a procedure which does not cover the type of dispute in question; and 2) no grievance had been filed at the time the prohibited practice complaint was brought, so there was nothing to exhaust. Complainants submit that they are

free to choose the forum in which they charge a violation of state law and have chosen the WERC.

With respect to Respondent and Intervenor allegations that the "zipper clause" within the parties' collective bargaining agreement bars the Commission's consideration of the matter, Complainants argue that for the opposing parties to prevail on such a claim, they must show that the matter was fully discussed and consciously waived. Citing National Labor Relations Board precedent, 3/ Complainants argues that even where a waiver clause is stated in sweeping terms, if from an evaluation of the negotiations it appears that the particular matter in issue was not fully discussed or consciously explored, the zipper clause does not create a waiver. This standard is not met in this case. According to Complainants, the matter was far from fully discussed. Every time the Complainants brought the matter to a discussion, it was immediately dismissed by the State's negotiators and made clear that they would not discuss it. Moreover, the Complainants never yielded or waived their interest in the matter. They never stopped protesting the creation of the new classification and its placement in the AFSCME unit.

With respect to the merits, Complainants are certain that the evidence reflects that the duties assigned to the new classification belong to the Steamfitter craft, plain and simple. They stress that there is no doubt that the State has a duty to bargain over the placement of those duties, even if only some of them are involved, and its refusal to do so violates SELRA.

Respondent State

Respondent State first questions the jurisdiction of the WERC on the grounds that it did not and does not now procedurally have jurisdiction over the instant complaint. Pointing out that it is undisputed that Complainants did not file a verified complaint when they initially filed a document identified as the initial complaint on December 30, 1991, Respondent takes issue with the Examiner's ruling that such failure to file at that time was not fatal to the WERC's jurisdiction.

Looking at the WERC form for complaints reveals that it contains standard language, which includes "Notary Seal", a clear indication in Respondent's view that verification is required. To hold otherwise, it asserts, sends the wrong message regarding compliance with the statutes, forms, and administrative code provisions enacted pursuant to the statutes. Citing ERB 22.02, Respondent argues that it is mandated that a facsimile of the WERC's form must be used and the original must be verified. According to Respondent State, the filing of a verified complaint is jurisdictional to the WERC proceeding and conducting a hearing. If a verified complaint is not filed the WERC cannot act. Respondent argues that the amended and verified complaint filed on or about December 3, 1992, does not create jurisdiction back to December 30, 1991. It submits that if the action was not statutorily commenced at the point furthest back in time, an amended pleading cannot cure that defect. Any new action stemming from the amended verified complaint must be dismissed as it commenced more than one year from the alleged conduct which constituted the unfair labor practice.

The State insists that the ultimate question for resolution is whether the HVAC/Refrigeration Specialist classification specification is a "new unit classification" pursuant to page 3, paragraph 4 of Article II, Section 1. If the answer is in the negative, there cannot be a violation of either Secs. 111.84 (1)(d) or (e), Stats. Relying upon record evidence provided by

3/ Unit Drop Forge Div., Eaton, Yale and Towne, Inc., 68 LRRM 1129, 1131 (1968) and Rockwell International Corp., 109 LRRM 1366, 1367 (1982).

the State's survey coordinator, the State maintains that certain non-Steamfitter positions in state service have been performing HVAC and related duties as far back as the creation of the "old" class specification twenty years ago. It claims that the duties performed by the former Maintenance Mechanic 3 positions are the same duties performed by positions which were reallocated to HVAC Refrigeration Specialists as a result of the survey. Under no construction of the record evidence can the HVAC/Refrigeration Specialist be found to be a "new unit classification."

In this same vein, the State argues that commonly-accepted meaning and statutory references are crucial in establishing that the HVAC position is not a "new unit classification". While Respondent State concedes that the class specification in dispute is "new" in that it did not exist prior to February 9, 1992, Respondent argues that the term "unit" means "bargaining unit". Citing the Section 230.09(1), Stats., statutory mandate and applicable provisions of the Wisconsin Administrative Code which provide that the State Department of Employe Relations has the authority to allocate positions to an appropriate classification and to establish, modify or abolish classifications as the needs of the service require, the State submits that it enjoys exclusive jurisdiction over such matters. It stresses that Section 111.91(2),(b)2 Stats., prohibits bargaining on certain matters, including policies, practices and procedures of the "civil service merit system" and in particular "position classification", "establishment and abolition of classification, and allocation and reallocation of positions to classifications." According to the Respondent State, it is clear that a "new unit classification" is a newly-created class specification used to classify positions which perform duties that belong in a particular collective bargaining unit represented by a particular bargaining unit representative --- here, the Complainants. In the State's view, the duties performed by the positions classified pursuant to the new class specification are not duties which have been performed by Steamfitters, and the new classification is not a "new unit classification."

Respondent is adamant in its contention that the "old" class specifications for positions now reallocated as HVAC/Refrigeration Specialists clearly establish that non-Steamfitter positions have performed the disputed duties since April of 1973. Stressing that the Complainants' Business Agent does not dispute that the "old" Maintenance Mechanic 3 series lists duties which he claims are "Steamfitter" duties, the Respondent asserts that DER does not put duties into a class specification unless the position is in fact performing those duties. According to the State, it is fair to conclude that the Steamfitter class specification and the "old" Maintenance Mechanic class specification existed side by side for about 19 years. In the State's view, Complainants' silence, inaction, and acquiescence over the years undermines any contention that such duties are exclusively to be performed by Steamfitters. There is no credible evidence that the HVAC/Refrigeration Specialist positions only recently started performing alleged Steamfitter duties with the implementation of the survey on February 9, 1992 or that those positions only started performing alleged Steamfitter duties shortly before July of 1991. The past practice is one of shared responsibilities.

Addressing the merits of the refusal to bargain and breach of contract allegations, Respondent points to the most recent collective bargaining agreement between the parties to refute these claims. According to the State, on five separate occasions the Complainants brought their concerns to the bargaining table and on each occasion the State took the position that this was Intervenor's work and Complainant could pursue this before the Commission. At the same time Complainants attempted to address the problem by proposing to delete the Management Rights language from the contract which related to the State's rights and authority to create and abolish classifications and determine status resulting from position reallocations. Not only were the

Complainants seeking to bargain on a prohibited subject of bargaining, but their efforts highlight the fact that the State has the absolute right to create the HVAC/Refrigeration Specialist classification, to assign and reassign classifications to salary ranges, and to allocate and reallocate positions to classifications and to determine an incumbent's status resulting from positions reallocation. There is no other reason, the Respondent asserts, why Complainants would seek to limit the State's authority. Complainants' conduct at the table closes the door on these arguments because it dropped its proposal to delete the above-referred to management rights language at or after the second-to-the-last negotiation session and stopped mentioning the HVAC/Refrigeration Specialist matter at or around the same time. The current agreement contains no mention of any language regarding non-Steamfitters performing Steamfitter work. In sum, the State argues that Complainants brought the matter up on several occasions; Respondent indicated that it did not agree and would not agree to Complainants' position that the work was exclusively Steamfitter work; and eventually, Complainants dropped their demands and entered into a collective bargaining agreement.

More importantly, in Respondent State's view, the agreement contains a very strong, clear and expansive "zipper clause" that leaves no doubt that Complainants had their chance at the table. The State maintains the Complainants have waived any rights to bargain about the HVAC classification and related issues because they raised and abandoned those topics during bargaining and signed an agreement containing such a zipper clause. Complainants, in the opinion of the Respondent, are contractually precluded from proceeding herein and the State is not required to bargain over the matter.

In response to Complainants' assertions, Respondent argues that Complainants' entire case is based upon what a few employes employed in Madison claim to be the case. This limited testimony is far outweighed by the other evidence. In response to Complainants' arguments that Respondent State's action are analogous to subcontracting out the work, the State insists that subcontracting does not arise if positions within State service continue to perform the same duties under a new classification specification. Respondent also claims that there is no law to support such a contention.

The State requests that the instant complaint be dismissed in its entirety.

INTERVENOR

Intervenor WSEU notes that the instant litigation challenges the unit placement of those classified in the HVAC series. This, it argues, should be accomplished by a unit clarification, not a complaint case. The instant case, in the Intervenor's view, is also an attempt to resurrect a grievance declared dead long ago, and to arbitrate same which cannot be done in the instant forum.

According to the Intervenor, there is no substance to the failure to bargain charge because Complainants sought to include the HVAC/Refrigeration Specialists within their bargaining unit and failed to do so. The State bargained by dealing with Complainants' proposal on the merits; it simply failed to acquiesce to their demands. In the alternative, Intervenors assert that the Complainants waived their demand to bargain over the issue when they subsequently reached tentative agreement with the State and ratified same without language preserving their position vis-a-vis the HVAC classification. Intervenor insists that the State was ready, willing, and able to proceed to arbitration on this issue but that the Complainants chose not to proceed to arbitration.

Arguing in the alternative, the Intervenor WSEU claims that if the merits are addressed, the result is the same. HVAC is not a "new" classification because the work currently being performed by HVACs has historically been performed by Maintenance Mechanics or by other employes in the blue collar or technical bargaining unit represented by the Intervenor for many, many years.

Intervenor asserts that the doctrine of deferral requires dismissal. Citing WERC adoption of the NLRB's Collyer Insulated Wire 4/ doctrine, Intervenor stresses that all three primary requirements for deferral are satisfied. The dispute arises within the confines of a long and productive bargaining history. Both parties indicate a willingness to resort to arbitration. Lastly, the contract and its meaning must be the center of the dispute. Intervenor stresses that the Complainants did pursue a grievance under their collective bargaining agreement but abandoned it after the second step of the grievance procedure. The dispute is one of contract interpretation best decided by an arbitrator and not the WERC. Once the arbitrator resolves the contract interpretation issue, it will become clear whether the State has a contractual duty to bargain over the HVAC classification.

Intervenor avers that the "exhaustion of remedies" doctrine also requires dismissal. Because the Complainants failed to exhaust the grievance/arbitration procedures established in their collective bargaining agreement with the State, dropping a grievance at the third step, the WERC should not entertain the allegations contained therein. Because they have failed to timely pursue the grievance, it should be considered resolved based upon the State's last response denying the grievance.

In response to Complainant's argument that the State's action in unilaterally creating the HVAC classification and transferring traditional steamfitter work to that classification is tantamount to "subcontracting", Intervenor maintains that this argument stretches the traditional definition of subcontracting. In Intervenor's view, the State is merely assigning work to qualified employes within its managerial prerogatives as set forth in the management rights clause of the parties' agreement. It is not subcontracting with a separate business entity and has no duty to bargain over this assignment of work.

WSEU, like the State, also contends that the express language of the collective bargaining agreement creates a blanket waiver of the duty to bargain and that the allegations contained in the complaint cannot survive this language. Intervenor further asserts that the Complainant's failure to pursue the classification issue at the bargaining table creates a waiver of the State's duty to bargain over the same issue. Where Complainant is rebuffed at the table and fails to pursue the issue to the fullest extent, a waiver must be found or Complainant would be free to resurrect any issue on which it failed to achieve its bargaining goals during the term of the agreement.

Moreover, Intervenor maintains that the relevant facts do not support the merits of Complainant's arguments because the HVAC/Refrigeration Specialist specification is not a "new" classification but rather an outgrowth of a series of Maintenance Mechanic duties. According to Intervenor WSEU, HVAC and its predecessors have been around for a long time at many of the State's job locations. The classification is not of recent origin, having existed since at least April of 1973. It is simply not a "new" classification. In any event, the duty to bargain over new unit classifications only applies when a newly-created classification belongs in the same bargaining unit.

4/ 192 NLRB 837, 77 LRRM 1931 (1971).

WSEU stresses that the HVAC classification does not improperly encroach upon any Steamfitter duties. It notes that neither the Steamfitter class specification or the collective bargaining agreement between the State and the Complainants contains a clause which guarantees Steamfitters the exclusive right to perform work listed in the Steamfitter class specification. Unless the State agrees to such a proposition, Steamfitters must coexist with other classifications which also possess the right to perform such work, namely the HVAC classification.

Arguing in the alternative, WSEU contends that if the State does have a duty to bargain, it has fulfilled that duty by its behavior in negotiations. It has done so by addressing the matter in negotiations, by responding to the grievance filed by Steamfitter Bob Decker, and by evincing a willingness to arbitrate.

Based upon this rationale, the Intervenor also requests that the complaint be dismissed.

DISCUSSION

Respondent State argues that Complainants are bound by the filing of their original unverified complaint, so that the action is now untimely. The Examiner has rejected that argument in Decision No. 27365-A and declines to reconsider Respondent's objection at this time.

Intervenor, with the concurrence of the Respondent State, argues that the Commission should refuse to assert jurisdiction over the dispute, or in the alternative, defer the matter to the parties' grievance arbitration procedure. Frankly, this Examiner doubts whether the Intervenor WSEU, which is not a party to the collective bargaining agreement in question, has standing to advance these arguments. Since, however, Respondent State has joined in the Intervenor's motions on the record at the hearing, it is unnecessary to make such a determination. The Examiner will entertain these arguments as if Respondent State had advanced them.

The parties' collective bargaining agreement does contain a procedure providing for final and binding arbitration, Article IV, Section 2, Step 4. The parties, however, have expressly created an exception to this agreed-upon final and binding arbitration procedure, Paragraph 4 of Article II, Section 1. This provision states that the parties will review all new unit classifications and if unable to reach agreement as to their inclusion or exclusion from the bargaining unit, "shall submit such classifications to the Wisconsin Employment Relations Commission for final resolution." Therefore, contrary to the contentions of the Intervenor and the State, it is evident that an arbitrator does not have jurisdiction over such a dispute. The parties gave the WERC final authority in this regard through the unit clarification process. They clearly anticipated situations where they may not be able to agree as to whether a newly-created classification is to be included in or excluded from the bargaining unit. The language directly addresses this possibility and provides the sole method for resolution of disputes involving unit placement. Review of the Respondent State's decision to place the HVAC/Refrigeration Specialist classification in the blue-collar unit represented by Intervenor WSEU including the allegations in the complaint and the evidence adduced at hearing, must be achieved by way of unit clarification before the Commission and not through arbitration.

Furthermore, this review of the disputed classification through unit clarification process, and not through the instant complaint proceedings, will fully resolve all issues related to Complainant's unit disposition claims including the allegation that Respondent State is unilaterally removing

positions from the bargaining unit. Unit clarification is the bargained-for proceeding for resolution of unit placement issues, not an unfair labor practice proceeding before an examiner. 5/

Absent a showing that Respondent State is effectively repudiating the parties' collective bargaining agreement by the wholesale removal of unit positions, which is clearly not the case before this Examiner, the parties should be held to their contractually negotiated procedure, a unit clarification proceeding, to resolve these allegations. Complainant is making its arguments in the wrong forum and the allegations of the complaint which relate to improper unit placement or the removal of bargaining unit positions are not properly before this Examiner. By express inclusion of Article II, Section 1, Paragraph 4 into their collective bargaining agreement, the parties have waived any right to resort to an unfair labor practice proceeding for disposition on the unit placement issue. Therefore, the allegations of the complaint which relate to unit placement or the removal of positions from the bargaining unit are dismissed.

The complaint, however, in the view of this Examiner, also contains allegations of wrongful or improper assignment of Complainant's bargaining unit work. These allegations do not, contrary to Complainant's assertions, fall within the exception to the grievance arbitration provision, Paragraph 4 of Section 1 of Article II which deals exclusively with unit placement issues. Both the Section 111.84(1)(d) and (e) claims of wrongful assignment of work duties involve matters which are arguably addressed in the collective bargaining agreement and subject to its final and binding arbitration clause. The agreement contains a management rights clause and various other provisions which set forth the respective contractual rights of the parties.

Generally speaking, where the parties have bargained a procedure for final and binding impartial resolution of disputes over contractual compliance, the Commission generally will not assert its statutory jurisdiction under Sec. 111.84(e), Stats., to resolve breach of contract claims because of the presumed exclusivity of the contractual procedure and a desire to honor the parties' agreement. 6/ It is evident that Complainants have not exhausted the grievance arbitration procedure with respect to the work assignment allegations. They did not process Bob Decker's grievance to arbitration.

Given the position of Respondent State at the hearing in concurring with Intervenor's Motions, the Examiner is unwilling to conclude that the State has waived its contractual right to proceed to arbitration before an arbitrator on this portion of the instant complaint. To hold otherwise, allows the parties to circumvent their agreed-upon dispute resolution procedures and is contrary to Commission policy. Accordingly, the undersigned declines to assert the Commission's jurisdiction regarding the Section 111.84(1)(e) breach of contract allegation insofar as it relates to job assignment or work duties.

5/ Because there are no time limits to the filing of a unit clarification proceeding before the Commission, this forum is still available to Complainants.

6/ State of Wisconsin, Dec. No. 20830-B (WERC, 8/85).

With respect to the Section 111.84(1)(d) allegation, as it relates to improper job assignment of Steamfitter bargaining unit work, disposition on the merits in the arbitral forum will in all probability resolve the underlying statutory issue in a manner not repugnant to SELRA. 7/ Accordingly, deferral of this portion of the complaint is appropriate provided the Respondent State agrees to the filing of a grievance and to waive procedural objections which might bar a determination on the merits.

Dated at Madison, Wisconsin this 6th day of October, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Mary Jo Schiavoni /s/
Mary Jo Schiavoni, Examiner

7/ Brown County, Ibid., p. 13, where the Commission held:

> Sec. 111.70(3)(a)4 refusal to bargain allegations will be referred to the contract grievance arbitration forum in appropriate cases in which the Respondent objects to Commission exercise of jurisdiction in the matter. Such deferral advances the statutory purpose of encouraging voluntary agreements by not undercutting the method of dispute resolution agreed upon by the parties in their collective bargaining agreement. Indeed, if the Commission were to indiscriminately hear and decide every claim that a party's alleged deviation from a contractually specified standard is an unlawful unilateral change refusal to bargain, it would undermine the Commission's longstanding policy of ordinarily refusing to exercise its Sec. 111.70(3)(a)5, Stats., jurisdiction absent exhaustion of contractual grievance procedures.
>
> In sum, because Respondent has consistently urged WERC deferral of the disputed claim of unlawful unilateral change in overtime assignment procedures to the contract grievance arbitration procedure and because there is a substantial probability that submission of the merits of that dispute to that arbitral forum will resolve the claim in a manner not repugnant to MERA, deferral is appropriate in this aspect of the case.