STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by Mr. John J. [illegible] Steamfitters Local Union No. 394.

Mr. David J. Vergeront, Legal Counsel, Department of Employment Relations, 137 East Wilson Street, P.O. Box 7855, Madison, Wisconsin 53707-7855, on behalf of the State of Wisconsin.

Lawton & Cates, S.C., by Mr. Richard V. Graylow, 214 West Mifflin Street, Madison, Wisconsin 53701-2965, on behalf of Wisconsin State Employees Un[illegible]

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

On October 6, 1993, Examiner Mary Jo Schiavoni issued Findings of Fact, Conclusions of Law and Order in the above matter dismissing alleged violations of Sec. 111.84(1)(e), Stats. and Sec. 111.84(1)(d), Stats. (in part) and deferring a portion of the alleged violation of Sec. 111.84(1)(d), Stats. to grievance arbitration.

Complainants timely filed a petition with the Wisconsin Employment Relations Commission on October 26, 1993 seeking review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.84(4), Stats.

The parties thereafter filed written argument and the matter became ripe for Commission consideration on January 24, 1994 when Complainants advised the Commission that they would not be filing a reply brief.

Having reviewed the record, the Examiner's decision and the parties'

positions on review, the Commission makes and issues the following

ORDER 1/

A. Examiner Findings of Fact 1 - 3 are affirmed.

B. Examiner Finding of Fact 4 is modified through addition of the underlined words and deletion of the bold faced words:

> 4. The **most recent** 1990-1991 and 1992-1993 collective bargaining agreements between the State and the Complainants contain, in pertinent part, the following provisions:

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

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

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

(a) Proceedings for review shall be instituted by serving a petition therefore personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial

(Footnote Continued on pages 3 and 4)

1/ (Continued)

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

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

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

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

(Continued on Page 4)

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.

1/ (Continued)

. . .

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

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

receipt by the Court and placement in the mail to the Commission.

> 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.
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> 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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> . . .
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> ARTICLE III
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> Management Rights
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> 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.
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> Management rights include:
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> 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 (sic) 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 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.
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> . . .

C. Examiner Finding of Fact 5 is affirmed.

D. Examiner Finding of Fact 6 is modified through deletion of the bold faced words:

> 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.

E. Examiner Findings of Fact 7 - 12 are affirmed.

F. Examiner Findings of Fact 13 is modified through addition of the underlined words and deletion of the bold faced words:

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 May **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 Complainants the positions had been created through the bargaining process between the State and the Intervenor and that Complainants should file a unit clarification petition with the Wisconsin Employment Relations Commission. 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.

G. Examiner Findings of Fact 14 - 16 are affirmed.

H. Examiner Findings of Fact 17 - 19 are set aside.

I. Examiner Conclusions of Law 1 - 3 are set aside and the following Conclusions of Law are issued:

1. Because the 1990-1991 and 1992-1993 bargaining agreements between Complainants and the State contain a provision for final and binding arbitration of alleged violations of said agreements, the Wisconsin Employment Relations Commission will not exercise its jurisdiction over the allegation that the State violated the terms of the agreements and thereby violated Sec. 111.84(1)(e), Stats.

2. Because the issues of the appropriate unit placement of the HVAC Specialist and loss of unit work are covered by the terms of the 1990-1991 and 1992-1993 bargaining agreements between the Complainants and the State, the State did not have a duty to bargain further on those issues during the term of those agreements,

and therefore did not violate Sec. 111.84(1)(d), Stats.

3. When bargaining the successor to the 1990-1991 bargaining agreement between Complainants and the State, the State did not violate Sec. 111.84(1)(d), Stats. by the manner in which it responded to the issue of the appropriate unit placement of the HVAC Specialist and bargained over issues of loss of unit work.

J. Examiner's Order is set aside and the following Order is issued:

The complaint is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin this 3rd day of August, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Herman Torosian /s/
Herman Torosian, Commissioner

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

Chairman A. Henry Hempe did not participate.

STATE OF WISCONSIN

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

The Pleadings

In their initial unfair labor practice complaint filed December 30, 1991, Complainants allege the State violated its duty to bargain and the parties' contract by unilaterally removing work and/or positions from the craft unit Complainants represent for the purposes of collective bargaining.

Prior to hearing on March 26, 1992, AFSCME moved to intervene in the complaint proceeding as the collective bargaining representative of the employes performing the disputed work.

On November 23, 1992, the State filed an answer denying any illegal conduct and a motion to dismiss the complaint. The motion to dismiss asserted that: (1) the Commission lacked subject matter jurisdiction over the complaint because the complaint was not signed and sworn to as required by ERB 2.01 (sic); (2) a provision of the bargaining agreement between Complainants and the State regarding "new unit classifications" also deprived the Commission of subject matter jurisdiction; and (3) Complainants do not allege that they ever asked the State to bargain.

On December 2, 1992, Complainants filed a response to the State's motion as well as a "First Amended Verified Complaint."

The Examiner's Decision

In an Order issued December 3, 1992, the Examiner granted AFSCME's motion to intervene because she concluded AFSCME had demonstrated "a satisfactory showing of interest in the controversy as required by ERB 2.09 (sic)." She therein denied the motion that the initial complaint be dismissed due to the absence of a verified complaint. She determined that dismissal was not appropriate because Complainants had exercised the right to amend the complaint by filing a verified version. Lastly, she declined to rule on the remaining portions of the motion to dismiss until the scheduled hearing had been completed.

Following hearing, the Examiner issued Findings of Fact, Conclusion of Law and Order.

To the extent Complainants were alleging the State had improperly placed the HVAC/Refrigeration Specialist in the AFSCME unit or had improperly removed Steamfitter positions from the craft unit, the Examiner concluded it was "inappropriate" to consider these allegations because the Complainants and the State had contractually agreed to use the Commission's unit clarification process to resolve such disputes.

As to Complainants' duty to bargain allegations of "wrongful or unilateral removal of work" from Complainants' unit, the Examiner concluded it was appropriate to defer this portion of the dispute to the grievance arbitration process in the contract between Complainants and the State.

Lastly, as to Complainants' breach of contract claim, the Examiner concluded that Complainants had failed to exhaust the parties' grievance arbitration process and that she therefore would not assert jurisdiction over the contract claim.

Given the foregoing, the Examiner dismissed the alleged violation of Sec. 111.84(1)(e), Stats. in its entirety as well as that portion of the Sec. 111.84(1)(d), Stats. allegation as to "improper unit placement." She retained jurisdiction over the portion of the Sec. 111.84(1)(d), Stats. allegation related to "unilateral wrongful assignment of bargaining unit work" pending notice from Complainants or the State as to whether and how the merits of the allegations had been resolved through grievance arbitration.

Positions of the Parties on Review

Complainants

Complainants argue the State, without notice or bargaining with Complainants, created and inappropriately assigned to the AFSCME unit a new classification called HVAC/Refrigeration Specialist. By this action, the State unilaterally removed work from the craft bargaining unit in violation of its duty to bargain and the contract thereby violating Secs. 111.84(1)(d) and (e), Stats.

The Examiner refused to determine the unfair labor practice claims, instead determining that both claims should be deferred to the grievance procedure. This is in error since deferral is legally inappropriate.

In deferring the complaint to other forums, the Examiner ignored the fact that the State refused to bargain over a mandatory subject. Neither arbitration nor a unit clarification hearing can remedy the State's statutory violations which arise not from the collective bargaining agreement but from the State's obligation under law. Neither unit clarification nor arbitration reaches the issue of whether the State may remove work from the craft unit without bargaining. They are inappropriate forums.

More specifically, Complainants assert it is clear that removal of bargaining unit work is a mandatory subject of bargaining and that the State refused to bargain over the decision to transfer steamfitter work to another bargaining unit. Deferral of the duty to bargain dispute to arbitration is inappropriate because: (1) the collective bargaining agreement does not contain a provision which addresses the transfer of work to another unit; (2) the State has not agreed to proceed to arbitration; (3) no contract was in effect when the refusal to bargain occurred; (4) the State's duty to bargain

involves important issues of law and policy; and (5) AFSCME would not be a participant in any arbitration proceeding.

Given the foregoing, Complainants ask the Commission to: reverse the Examiner, conclude the State breached its duty to bargain, order the State to return the work in dispute to the bargaining unit, and make any affected employes whole.

The State

The State contends the complaint should be dismissed in its entirety. It argues no duties were removed from Complainants' unit and thus there is no relevant duty to bargain issue to be resolved. Further, the State argues there was bargaining on the issue of work transfer and that Complainants ultimately withdrew their proposal and signed a contract. Thus, the State contends it met any duty to bargain it had.

As to the issue of deferral, the State asserts that Complainants abandoned a grievance challenging the State's conduct and thereby conceded that there was no contract violation.

Lastly, the State argues the complaint should have been dismissed on procedural grounds that Complainants did not file a verified complaint until the statute of limitations had expired.

Given the foregoing, the complaint should be dismissed.

AFSCME

AFSCME argues the complaint should be dismissed in its entirety. It contends the Examiner erred by deferring any part of the dispute to grievance arbitration. AFSCME asserts that Complainants abandoned a grievance and thereby should be precluded from further litigation of same.

DISCUSSION

The Complaint

We first examine the State's contention that the Examiner erred by failing to dismiss the complaint because it was not verified to comply with ERB 22.02(1) 2/ until the statute of limitations had expired.

In State of Wisconsin, Dec. No. 15716-B (Davis, 4/78), aff'd in pertinent part Dec. No. 15716-C (WERC, 10/79), the Commission concluded the filing of a complaint which was signed but not notarized by Complainant's attorney was

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2/ ERB 22.02(1) provides in pertinent part that the original of a complaint should be "signed and sworn to before any person authorized to administer oaths or acknowledgements."

sufficient to toll the statute of limitations. The Commission further concluded that where the complaint was subsequently amended to include the verification, and no prejudice had been established as to the original complaint's noncompliance with ERB 22.02(1), dismissal was not appropriate.

The Examiner properly applied the holding of State of Wisconsin to the instant complaint. The absence of a verification does not deprive the Commission of jurisdiction over the complaint and is sufficient to toll the statute of limitations pending compliance with the requirements of ERB 22.02(1).

Violation of Contract

We have consistently held that where an exclusive collective bargaining representative of employes has bargained an agreement with the employer which contains a procedure for final impartial resolution of disputes over contractual compliance the Commission generally 3/ will not assert its statutory complaint jurisdiction over any breach of contract claims covered by the contractual procedure because of the presumed exclusivity of the contractual procedure and a desire to honor the parties' agreement. State of Wisconsin, Dec. No. 20830-B (WERC, 8/85). The 1990-1991 and 1992-1993 contracts between Complainants and the State contain final and binding arbitration provisions applicable to alleged contract violations and Complainants have not presented any persuasive basis as to why we should depart from our general rule and assert our breach of contract jurisdiction. Thus, we will not assert jurisdiction over Complainants' allegation that the State's conduct violated a collective bargaining agreement and thereby constituted an unfair labor practice under Sec. 111.84(1)(e), Stats. We have modified the Examiner's Conclusion of Law in this regard to better reflect the basis for our action.

Refusal to Bargain

The duty to bargain during the term of an agreement does not extend to matters already covered by the agreement. 4/ As to such matters, the parties

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3/ Exceptions to this policy include but are not necessarily limited to instances where: (1) the employe alleges denial of fair representation, Wonder Rest Corp., 275 Wis.2d 273 (1957); (2) the parties have waived the arbitration provision, Allis Chalmers Mfg. Co., Dec. No. 8227 (WERB, 10/67); and (3) the party who allegedly violated the contract ignores and rejects the arbitration provisions in the contract, Mews Ready-Mix Corp., 29 Wis.2d 44 (1965).

4/ State of Wisconsin, Dec. No. 23161-C (WERC 9/87); State of Wisconsin, Dec. No. 13017-D (WERC, 5/77); State of Wisconsin, Dec. No. 24747-A (Shaw, 12/88); aff'd by operation of law, Dec. No. 24747-B (WERC, 1/89); State of Wisconsin, Dec. No. 17790-C (Davis, 7/81), aff'd by operation of law, Dec. No. 17790-C (WERC, 7/81), aff'd CirCt Dane, Case No. 81 CV 4079 (9/84).

have struck a bargain on which they are entitled to rely.

Here, in May 1991, during the term of the parties' 1990-1991 contract, Complainants sought to bargain over the bargaining unit status of a proposed HVAC classification and the work performed by said classification.

The parties' 1990-1991 contract contained 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.

. . .

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:

. . .

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.

. . .

Through Articles II and III, the parties had already bargained over the matters Complainants wished to address. Through their bargain in Article II, they addressed the subject of "contracting out" and they established a process by which disputes over the inclusion or exclusion of new classifications in the craft unit were to be resolved. Through their bargain in Article III, they established their respective rights as to "transfer" or "alteration" of services, and further agreed such rights were not to be subjects of bargaining during the term of the agreement.

Given the foregoing, we are satisfied that during the term of the 1990-1991 contract, the State had no duty to bargain over the matters Complainants wished to address as to the HVAC Specialist and thus that the State did not violate Sec. 111.84(1)(d), Stats.

The parties did bargain over the HVAC Specialist issues with respect to "contracting out," "transfer" and "alteration" of services when negotiating a successor to the 1990-1991 contract and ultimately agreed to continue the pertinent Article II and III language in the 1992-1993 agreement. 5/ Thus, we are also satisfied that the State did not violate its duty to bargain as to these HVAC Specialist issues during the negotiations for a successor contract.

As to the issue of the unit placement of the HVAC Specialist position, the State refused to place said position in Complainants' unit and only responded to Complainants' request to do same by stating that the position had

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5/ It is noteworthy that a grievance under the 1992-1993 contract challenging the status of the HVAC Specialist cites Article II, Section 1 and Article III, Section 6 as the contract provisions allegedly violated.

been placed in the Intervenor's unit and that the proper forum for Complainants to challenge the placement of the HVAC Specialist position was through a unit clarification proceeding before the Wisconsin Employment Relations Commission.

Section 111.825(3), Stats. gives the Commission exclusive jurisdiction to determine whether employes are in the appropriate statutorily established bargaining unit. State of Wisconsin, Dec. No. 11243-K (WERC, 7/83). Thus, we think it clear that as to the issue of whether the HVAC Specialist position should be placed in the "Building trades crafts" unit, the State did not have a duty to bargain with Complainants over that matter. Therefore, when the State: (1) rejected Complainants' demand that the HVAC Specialists be moved to the "craft" unit from the unit represented by Intervenor; and (2) advised Complainants that the unit placement issue could be challenged through a unit clarification proceeding, the State did not breach its duty to bargain.

We have made the appropriate modifications in the Examiner's Findings, Conclusions and Order to reflect our rationale and view of the record.

Given the foregoing, we have dismissed the complaint in its entirety.

Dated at Madison, Wisconsin this 3rd day of August, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Herman Torosian /s/
Herman Torosian, Commissioner

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

Chairman A. Henry Hempe did not participate.