STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

THE WISCONSIN STATE EMPLOYEES UNION (WSEU), AFSCME, COUNCIL 24, AFL-CIO,		
Complainant,	:	Case 303 No. 44671 PP(S)-175
vs.	:	Decision No. 27511-A
STATE OF WISCONSIN,		
Respondent.		

Appearances:

Mr. Richard V. Graylow, Lawton & Cates, S.C., Attorneys at Law, 214 West Mifflin Street, P.O. Box 2965, Madison, Wisconsin 53701-2965, appearing on behalf of the Wisconsin State Employees Union (WSEU), AFSCME, Council 24, AFL-CIO.

Mr. Thomas Kwiatkowski, Senior Labor Relations Specialist, Division of Collective Bargaining, Department of Employment Relations, 137 East Wilson Street, P.O. Box 7855, Madison, Wisconsin 53707-7855, appearing on behalf of the State of Wisconsin.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Wisconsin State Employees Union (WSEU), AFSCME, Council 24, AFL-CIO, filed a complaint with the Wisconsin Employment Relations Commission on October 10, 1990, alleging that the State of Wisconsin had committed unfair labor practices within the meaning of Secs. 111.84(1)(a) and (c), Stats. In a letter to the parties dated October 11, 1990, Peter G. Davis, General Counsel of the Commission, informed the parties that "it will be assumed that all parties agree that a hearing should not be scheduled until settlement efforts have ended." Such efforts ultimately proved unsuccessful, and on December 18, 1992, the Commission appointed Richard B. McLaughlin, a member of its staff, to act as Examiner to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.84(4), and Sec. 111.07, Stats. On February 11, 1993, the State of Wisconsin filed its answer to the complaint. Hearing on the matter was conducted in Madison, Wisconsin, on March 5, 1993. The parties entered their closing arguments at the hearing, and did not file written briefs. In a letter filed with the Commission on March 10, 1993, counsel for the Wisconsin State Employees Union (WSEU), AFSCME, Council 24, AFL-CIO, supplied citations for cases cited his closing statement. A transcript of the hearing was supplied to the Commission on March 31, 1993.

FINDINGS OF FACT

1. The Wisconsin State Employees Union (WSEU), AFSCME, Council 24, AFL-CIO, referred to below as the WSEU, is a labor organization which represents certain employes of the Kettle Moraine Correctional Institution (KMCI). Local 163, which is affiliated with the WSEU, is the Local Union which represents certain employes of KMCI who serve as Correctional Officers. The WSEU maintains its offices at 5 Odana Court, Madison, Wisconsin.

2. The State of Wisconsin, referred to below as the State, is an employer which has delegated responsibility for collective bargaining purposes to the Department of Employment Relations (DER), which maintains its offices at 137 East Wilson Street, Madison, Wisconsin 53707-7855.

3. The WSEU and the State are parties to a collective bargaining agreement in effect, by its terms, from November 6, 1987, to June 30, 1989, and another such agreement in effect, by its terms, from April 8, 1990, to June 30, 1991. Each of these agreements is an example of what is referred to below as a Master Agreement. Each of these agreements contain a formal grievance procedure, and each of these agreements authorize the negotiation of local agreements. KMCI management and Local 163 are parties to a local agreement, which is referred to below as the Local Agreement, and which was in effect at all times relevant to this proceeding. The Local Agreement contains provisions governing the assignment of overtime and the scheduling of specialized training.

4. Terry Klumpyan is presently classified as a Correctional Officer II. In 1990, Klumpyan was classified as a Correctional Officer III. He has been employed by the State at KMCI since 1980. In 1989, Klumpyan served as the Secretary of Local 163, and Robert Peters served as its President. Klumpyan was, as of March 5, 1993, the Chief Steward of Local 163.

5. KMCI has, at all times relevant to this proceeding, maintained an organization known as the Emergency Response Unit (ERU). Klumpyan was asked, when he was first employed at KMCI, to be a member of the ERU. The ERU is responsible for responding to crises which may occur at KMCI. Klumpyan has been, and is, trained as a marksman to perform as a sniper. The ERU is staffed to operate on a twenty-four hours per day, seven days per week basis. In 1989, Local 163 represented roughly thirty employes who served on the ERU. In 1989, Captain Beck served as the Commander of the ERU. In 1989, the ERU was incorporating employes known as Marksman Observers into its structure. Such employes work in tandem with a Marksman. The Marksman directs the activities of the Marksman Observer, who is expected to handle communication equipment and equipment other than the Marksman's weapon and its ammunition. The Marksman Observer is also armed, and is expected to defend the Marksman and the Marksman's weapon.

6. Captain Patrick Arntz has been employed at KMCI since roughly 1988. He has served as Marksman Observer Commander at all times relevant to this proceeding. Arntz' immediate supervisor, in 1990, was Captain Beck. Arntz authored a memo to Beck dated "11-5-89", headed "Re: Sgt. Klumpyan, Marksman", which reads thus:

> The E.R.U. program at K.M.C.I. is one of the best investments this or any Institution can make in the safety and security of it's (sic) staff and inmates. The program here is active, current and is building in to a first class Tactical Team.
>
> The Marksman/Observer program, as part of this team, is

currently attempting to build in to the best Team within the E.R.U. program and I am hopeful, the best in the State. We and C.C.I. are the only Marksman/Observer Teams in the D.O.C. This is a highly specialized field of the total program, and I am proud to be a part of it. The teamwork, consistency, and dedication between members and the two Institutions is essential if we are to be a viable force.

In the last two or three months, I have noticed that it is becoming more difficult to maintain and build upon the team concept that the Unit must have. Gaining momentum, training, and building a well organized team with credibility seems to be becoming more difficult. Because of this, I have evaluated what I considered to be the causes of the difficulties.

Problems that I have pinpointed most recently have all revolved around a single individual. Sgt. Klumpyan is at the root of the most serious and seemingly insolvable problems. While these problems do not appear to mean much from afar nor seem like pressing issues, they have eaten away at the Teams (sic) cohesiveness and are polarizing the team. Examples of the problem are listed below;

1) There was a "Chain of Command" problem involving the Sgt. and the Security Director. While this may not seem as a large problem for the Team, it became one. As Team Commander, I must expect all members to know and use the Chain of Command. It is mandatory for the business we are in! The Team is aware of his actions and were not impressed. This type of action destroys credibility, and my confidence as a Commander to trust his judgement under stress.

2) An eight hour training session was scheduled for the Team. Those Team Members that needed replacing were going to be replaced on the schedule, the rest were going to work their normal shift. A threat of grievances was brought forward by Sgt. Klumplyan (sic), under the label of a warning. That it was not him but unidentified others that were going to grieve the issue. In difference (sic) to the Sgt. and with keeping with a fair play attitude, it was decided with Union input that the training would be held to four hour sessions.

3) Training sessions were scheduled in two, four hour blocks. I was notified that Sgt. Klumpyan now plans to grieve this process. The reason for his grieving this issue is that an unmentioned staff member would now fight this process. He will also go to bat for this individual as he feels it is his job to do so.

The above issues have polarized the team and members have spoken out against Sgt. Klumpyan's positions. My opinion and observations on the above examples are as follows:

1) Sgt. Klumpyan's apparent lack of respect for the Chain of Command does not lend itself to the needs of the team concept and can in fact be dangerous.

2) Sgt. Klumpyan has let us know where his loyalties are. He has put us on notice that he will not support the team if anyone outside the team feels it should be challenged.

3) Sgt. Klumpyan has set himself in a position of "wearing two hats". His loyalties to the Team can be jeopardized by anyone outside the Team. This is and will continue to create friction within the Team. They are presently vocally against his maneuvering and it is creating animosity within the Team.

4) With all the inherent problems of scheduling your time, my time and the time of eight members on three different shifts and many different rotations, this type of inside fighting becomes very counterproductive and is in fact destructive.

5) Sgt. Klumpyan wishes to continue in both veins, to support those who challenge our efforts and remain a marksman. I believe he can not (sic), we can not (sic) allow him to, and still maintain credibility with the rest of the Team and with him.

As I have stated before, anyone can create dissention (sic) from outside the Team and that can be dealt with, but I will not allow it inside the Team. The need for the Team and the time and effort put into it are too great to allow its being hampered by someone wishing to use it for what ever reason. Sgt. Klumpyan can not (sic) "serve two masters" and will not make a choice. I will make it for him. He is harming the Team----He is off the Team.

7. On roughly November 6, 1989, Klumpyan was removed from the ERU. Local 163 responded by filing a grievance over Klumpyan's removal from the ERU. The grievance was processed, without any resolution, through the steps of the grievance procedure, and was appealed to grievance arbitration in the summer of 1990.

8. The State assigned Allen Cottrell, a Senior Labor Relations Specialist, to serve as its advocate in the grievance. Ronald Orth, a WSEU Field Representative, served as the WSEU's advocate in the grievance. From the time of their assignment to serve as advocates, Cottrell and Orth discussed

whether the matter could be resolved informally. In roughly July of 1991, the parties reached a tentative agreement to settle the grievance. Details of the settlement were worked on between July and October of 1991. In October of 1991, the parties executed the following "SETTLEMENT AGREEMENT":

> Whereas the Grievant, Terry Klumpyan, and the Wisconsin State Employees Union have filed a grievance alleging violation of Article III and Article XI, Section 1, of the Agreement between the parties, have processed this grievance through the contractual grievance procedure, and appealed the matter to arbitration on July 26, 1990, the parties hereby agree that the above-referenced matter has been settled in all respects on the following basis:
>
> 1. The Employer agrees to reinstate the grievant to the ERU Team following receipt of the original copy of the signed Settlement Agreement.
>
> 2. The Employer agrees to compensate the Grievant by the amount of overtime pay he would have earned in ERU training that involved overtime hours for which he would have been eligible. Payroll records indicate that amount of hours to be approximately 121.125. Such payment will be made as soon as administratively possible, following receipt of the signed original copy of this Settlement Agreement, at the Grievant's pay rate in effect at the time the overtime would have occurred.
>
> 3. The Union and the Grievant agree to withdraw the appeal to Arbitration of Employer's Case number 8956.
>
> 4. Overtime hours will be paid as follows:
>
> a. 60.5625 hours at $12.71 base ($19.065 O.T. rate)
>
> b. 60.5625 hours at $11.50 base ($17.25 O.T. rate)

> This Settlement shall not constitute a precedent for any other cases.
>
> Implementation of the terms of this Settlement will commence upon receipt by the Employer of the original signed copy of this Settlement Agreement.

Cottrell drafted the settlement agreement, and originally proposed including a paragraph in the agreement which indicated that the agreement represented a final settlement in any and all forums where the issue may be addressed. The WSEU would not agree to the insertion of this paragraph, and noted that it was not willing to withdraw the then-pending complaint, originally filed with the Commission on October 10, 1990.

9. The complaint filed by the WSEU contains the following request for relief:

> WHEREFORE, the Complainant respectfully requests the entry of remedial orders whose terms and conditions:
>
> a. Adjudicate the conduct upon which the Complaint is based as unlawful and in violation of SELRA;
>
> b. Direct the State to cease and desist;
>
> c. Direct the posting of conspicuous compliance notices;
>
> d. Direct the return of Klumpyam (sic) to the ERU;
>
> e. Direct the State to pay this Union's costs, disbursements and expenses including attorney's fees.

The complaint remained active after the execution of the Settlement Agreement noted in Finding of Fact 8 above, and subject to a conciliation effort by a Commission staff member. In a letter to Richard V. Graylow, Counsel for the WSEU, dated February 28, 1992, Teel D. Haas, the Chief Legal Counsel of DER, stated:

> A settlement agreement in the companion grievance to the above ULP case was reached in October 1991. A copy of the settlement agreement is attached for your information.
>
> Based on the provisions in the settlement agreement, Allen Cottrell, in our Division of Collective Bargaining, thought the entire matter had been settled, including the allegations in the ULP. According to

> Mr. Cottrell, Mr. Klumpyam (sic) has been put back on the ERU, and has been paid for all back-pay and overtime pay.
>
> If there are any issues which still remain under the ULP, please let me know what those issues are, so we can determine whether it will be necessary to go to hearing on this case.

In a letter to Orth dated June 3, 1992, Graylow stated:

> Be advised that the Wisconsin Employment Relations Commission (WERC), more specifically Mr. Doug Knutson, (sic) has indicated that Columbia (sic) has apparently returned Mr. Klumpyan to the ERU and have (sic) been made whole. If this is in fact the case, what further remedy does he seek? Please advise.

The WSEU was not willing to withdraw its complaint based on the settlement agreement noted in Finding of Fact 8 above. In a letter to Graylow dated November 20, 1992, Haas stated:

> I have received your letter to chairman Hempe, dated September 22, 1992, indicating that you are requesting that the above case be set for hearing. I am writing you because I do not believe that a hearing is really necessary in this case.
>
> As noted in the Settlement Agreement which I sent you with my letter dated February 28, 1992, Mr. Klumpyam (sic) was reinstated to the ERU at KMCI in October 1991, and was paid all back-pay for the period of time he was not assigned to the ERU. Based on the remedy which Mr. Klumpyam (sic) has already received, what issue or remedy still remains which would justify taking up the Commission's time, as well as the time of two attorneys and several witnesses for a hearing? It seems unreasonable and wasteful of the state's limited resources to pursue a hearing in this particular case, even though I am fully aware that your client has a right to request such a hearing.
>
> The only possible remedy I can think of that your client has not already received as a result of the settlement agreement on his grievances is some kind of "cease and desist" notice that the Commission often issues when it finds that an unfair labor practice has been committed. If the State is willing to agree to post a cease and desist notice, such as the "standard" notice which is attached, would that meet your client's concerns?

> I hope that you will discuss this possible resolution with your client to see if this resolution is agreeable and will eliminate the need to schedule a hearing. I will pursue this further with my clients in the meantime also.

The notice referred to in the letter reads thus:

> As agreed upon through a settlement agreement, and in order to effectuate the policies of the State Employment Labor Relations Act, we notify our employees that:
>
> 1. We will not interfere with the rights of KMCI Security and Public Safety bargaining unit employees to engage in protected union activities;
>
> 2. We will not discriminate against KMCI Security and Public Safety bargaining unit employees because of their exercise of rights guaranteed by Section 111.82, Wis. Stats.
>
> Dated at Madison, Wisconsin, this ____ day of _____, 1992.
>
> The State of Wisconsin
>
> By:_____
> (name)
>
> _____
> (title)

Hearing on the complaint was conducted in Madison, Wisconsin, on March 5, 1993. At that hearing, Thomas Kwiatkowski, Counsel for the State, made the following offer, based on the offer stated in Haas' November 20, 1992, letter, to settle the matter:

> (W)e would strike the first preamble paragraph and instead state, "Whereas the combined statements and actions of the Kettle Moraine Correctional Institution with respect to . . . Klumpyan's removal from the Emergency Response Unit in 1989 may have created the perception or had the impact of inhibiting its employees in the exercise of protected concerted activity, Kettle Moraine Correctional Institution hereby notifies its employees that --" and then 1 and 2 as they are on Exhibit 2, Page 3 1/ would continue, and that this notice would be posted at Kettle Moraine Correctionl (sic) Institution for 30 days.

The WSEU did not accept the offer, but did indicate that the offer might be acceptable if the order stated that "In fact, the actions of KMCI did violate

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1/ Exhibit 2, Page 3 is the order attached to Haas' November 20, 1992, letter.

SELRA".

10. Shortly before Klumpyan's removal from the ERU, Arntz had attempted to schedule a training session for ERU members. The ERU was attempting to incorporate Observers into its Marksman teams, and Arntz thought such training was vital. He originally scheduled such training for an eight hour shift. Klumpyan learned of the anticipated training, and determined that it would, in his opinion, violate the terms of the Local Agreement regarding overtime. He advised KMCI management that a grievance would be filed if the training was held. Arntz learned of this, cancelled the training session, and consulted his superior officers. The overtime problem was discussed by Local 163 and KMCI representatives, including Peters and Beck. At a minimum, the parties agreed such training, if incorporated in a future Local Agreement, would be permissible if scheduled in four hour blocks. Arntz believed scheduling the training in four hour blocks had been accepted by KMCI and Local 163 as a means to avert a grievance. Arntz rescheduled the training in four hour blocks. Klumpyan again indicated to KMCI representatives that the training would require overtime payment, and could result in a grievance if held without such payment. Arntz learned of Klumpyan's views, and also observed Klumpyan and another ERU team member arguing about the training during work hours.

11. Arntz and other KMCI management were aware that Klumpyan was an active member of Local 163, and that he would file a grievance or grievances on behalf of Local 163 if the scheduled ERU training violated, in his opinion, the terms of the Local Agreement. Arntz was aware that Klumpyan claimed any grievance he filed was, if filed by Klumpyan, processed on behalf of other employes of KMCI represented by Local 163. Arntz viewed the threat of grievances related to the scheduled ERU training as well as Klumpyan's advocacy of such grievances, as divisive to the team-building process Arntz hoped to engender within the ERU. Arntz acted to remove Klumpyan from the ERU based, in part, on his hostility toward Klumpyan's advocacy. Klumpyan has no history of discipline, and has received evaluations noting his work performance is satisfactory or better. Klumpyan's removal from the ERU had a reasonable tendency to interfere with, restrain or coerce KMCI employes in their exercise of lawful, concerted activities.

CONCLUSIONS OF LAW

1. Terry Klumpyan is an "Employe" within the meaning of Sec. 111.81(7), Stats.

2. The WSEU is a "Labor organization" within the meaning of Sec. 111.81(12), Stats.

3. KMCI is an administrative part of the Department of Corrections, which is itself an administrative part of the State of Wisconsin, which is an "Employer" within the meaning of Sec. 111.81(8), Stats.

4. The issuance of Arntz' November 5, 1989, memo and Klumpyan's removal from the ERU on November 6, 1989, had a reasonable tendency to interfere with, restrain or coerce KMCI employes in the exercise of their rights guaranteed in Sec. 111.82, Stats., in violation of Sec. 111.84(1)(a), Stats.

5. The issuance of Arntz' November 5, 1989, memo and Klumpyan's removal from the ERU on November 6, 1989, constitutes discrimination in regard to conditions of employment in violation of Sec. 111.84(1)(c), Stats.

ORDER 2/

2/ Any party may file a petition for review with the Commission by following

1. To remedy its violation of Secs. 111.84(1)(a) and (c), Stats., the State of Wisconsin, its officers and agents shall immediately:

a. Cease and desist from:

(1). Discriminatorily removing any employe from the Emergency Response Unit, or in any like manner interfering with, restraining or coercing employes in the exercise of their rights guaranteed under Sec. 111.82, Stats., including the right to file grievances.

b. Take the following affirmative action which the Examiner finds will effectuate the purposes and polices of the State Employment Labor Relations Act:

(1). Notify employes represented by the WSEU employed at the KMCI, by posting the attached APPENDIX A in places where notices to such employes are customarily posted and take reasonable steps to assure that the notice remains posted and unobstructed for a period of thirty days.

(2). Notify the Wisconsin Employment Relations Commission within twenty days of the date of this Order as to what steps the State has taken to comply with this Order.

Dated at Madison, Wisconsin, this 23rd day of April, 1993.

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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.

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Examiner

APPENDIX A

NOTICE TO EMPLOYEES
OF THE KETTLE MORAINE CORRECTIONAL INSTITUTION
REPRESENTED BY THE WISCONSIN STATE EMPLOYEES UNION
(WSEU), AFSCME, COUNCIL 24, AFL-CIO

As ordered by the Wisconsin Employment Relations Commission, and in order to remedy violations of the State Employment Labor Relations Act, the State of Wisconsin, and its Kettle Moraine Correctional Institution, notifies you as follows:

1. We will not discourage membership in the Wisconsin State Employees Union, (WSEU), AFSCME, Council 24, AFL-CIO, or any other labor organization of our employes, by removing any employe from the Emergency Response Unit, or by discriminating against any employe with regard to their conditions of employment based, even in part, on their assertion of rights protected by the State Employment Labor Relations Act, such as the right to file a grievance.

2. We will neither interfere with the rights of employes represented by the Wisconsin State Employees Union, WSEU, AFSCME, Council 24, AFL-CIO, to engage in protected union activities nor discriminate against any such employee because of their exercise of rights guaranteed by the State Employment Labor Relations Act.

THE STATE OF WISCONSIN

By _____
Name

_____
Title

_____
Date

THIS NOTICE IS TO REMAIN POSTED FOR 30 DAYS AND IS NOT TO BE COVERED OR OTHERWISE OBSTRUCTED OR DEFACED.

STATE OF WISCONSIN

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

The Complaint alleges Klumpyan's removal from the ERU violated Secs. 111.84(1)(a) and (c), Stats. In its answer, the State entered two affirmative defenses. The first is that the amount of time Klumpyan "was engaged in union activity as that time impacted his ability to perform the job for which he was hired" is the concern which led to his removal from the ERU. The second is that the complaint is both moot and advanced in bad faith. Both the complaint and the answer seek reimbursement of attorney fees and costs.

THE PARTIES' POSITIONS

The WSEU's Position

The WSEU contends the complaint "could have been and should have been decided in the pleadings . . . (i)t's open and shut classical interference." The WSEU contends that it is undebatable that Klumpyan and the other members of Local 163 have the right to file grievances, even if the assertion of that right causes feelings to run high. The pleadings alone, according to the WSEU, establish that Klumpyan was removed from the ERU, at least in part due to his attempt to assert the protected right to file a grievance. To the extent the pleadings do not fully address this point, the WSEU contends that Arntz' testimony and his November 5, 1989, memo establish action taken in retaliation for Klumpyan's threat to grieve the training session.

Acknowledging that Arntz was in a tough position to schedule training while avoiding unnecessary overtime costs, and contending that there was "no operational need" to remove Klumpyan from the ERU, the WSEU contends that Arntz resolved his difficulty in scheduling by removing the obstacle which threatened to impose overtime costs on his scheduling efforts. After this point, and after the grievance had been processed to arbitration, the State's efforts, according to the WSEU, turned "into a damage control mode." The damage control effort led to the resolution of the grievance, and, the Union contends, demonstrates that KMCI never had any basis for removing Klumpyan from the ERU other than Arntz' desire to rid the ERU of the threat of grievances.

The WSEU contends that the absence of any language waiving the complaint is crucial to the need for advancing the complaint. More specifically, the WSEU argues that although Klumpyan has been made monetarily whole, the WSEU and Local 163 are "entitled to an adjudication under SELRA." That determination, and any remedy which flows from it, are the essence of the issues posed here, the Union concludes.

The State's Position

The State notes that the WSEU's contention that the case could have been disposed of on the pleadings is belied by its conduct in bringing the matter to hearing, and does no more than establish "things are not as clear as they appear on the surface". Contending the WSEU has acknowledged the credibility of Arntz' testimony, the State notes that Arntz issued the memo, and removed Klumpyan from the ERU on the good faith belief that in spite of a resolution reached by KMCI and Local 163, Klumpyan insisted on pursuing a grievance. That the WSEU did not rebut Arntz' testimony on this resolution until after it had rested its case in chief is a telling point, the State concludes. Even if Arntz acted on the mistaken belief that a resolution had been reached, the State argues that his actions do not violate SELRA, since he acted against Klumpyan in the good faith belief that Klumpyan was pursuing a purely personal agenda which threatened the cohesiveness of the team. That Arntz cancelled the first training session and consulted his superior officers before scheduling the second session establishes, according to the State, that Arntz acted reasonably, without any intent to punish Klumpyan for the assertion of protected rights.

The State's next major line of argument is that the absence of any waiver of the complaint in the grievance settlement agreement is an irrelevant point. The State notes it has never asserted such a waiver took place. Rather, the State contends that the grievance settlement set the stage for Haas' settlement offer of November 20, 1992, and Kwiatkowski's settlement offer of March 5, 1993.

The State contends that its settlement proposals, coupled with the settlement of the grievance "fulfilled the objectives of the State Employment Labor Relations Act." This is, the State notes, the essence of its second affirmative defense. The State contends that the complaint, viewed against this background, constitutes a frivolous action, which, in light of the State's good faith offers of settlement, is nothing more than harassment. An examination of the relief requested in the complaint demonstrates, the State asserts, that it has offered the Union essentially everything the complaint seeks, short of fees and costs. In light of the settlement proposals and the WSEU's continuation of the complaint, the State concludes that any award of fees and costs must be made to the State, not to the WSEU.

The State concludes that the complaint should be dismissed, and that the State's affirmative request for relief should be granted.

DISCUSSION

The State's affirmative defenses assert the complaint lacks merit and was asserted in bad faith. Each defense turns on the complaint's merit, which must be addressed first.

Secs. 111.84(1)(a) and (c), Stats., enforce rights stated in Sec. 111.82, Stats., which grants State employes "the right of self-organization and the right . . . to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection." There is no dispute that the Master Agreement provides a grievance procedure, and that Klumpyan's statement that he would file a grievance or grievances is a lawful, concerted activity for the purpose of collective bargaining. In any event, the rights granted in Sec. 111.82, Stats., parallel those granted by Sec. 111.70(2), Stats., to municipal employes, and it is settled law that the filing of a

grievance constitutes lawful, concerted activity. 3/

Sec. 111.84(1)(a), Stats., makes it an unfair labor practice for the State to "interfere with, restrain or coerce state employes in the exercise of their rights guaranteed in s. 111.82." To establish an independent violation of that section, the WSEU must show, by a clear and satisfactory preponderance of the evidence, that the actions of KMCI management in removing Klumpyan from the ERU were likely to or had a reasonable tendency to interfere with, restrain or coerce KMCI employes in the exercise of their rights under Sec. 111.82, Stats. 4/ Intent is not an element of proof under Sec. 111.84(1)(a), Stats. 5/

An independent violation of Sec. 111.84(1)(a), Stats., is the violation each party has contended could be established through a ruling on the pleadings. Arntz' November 5, 1989, memo is, however, the basis upon which the violation must be found. At Section 2) of the fourth paragraph of the letter, Arntz notes "(a) threat of grievances was brought forward by Sgt. Klumpyan", thus honing the memo in on the exercise of a protected right. At Section 3) of the "opinion and observations" portion of the memo, Arntz states that Klumpyan "has set himself in a position of 'wearing two hats'." In the final paragraph of the letter Arntz asserts that Klumpyan cannot "'serve two masters' and will not make a choice." Arntz concludes "I will make (the choice) for him . . . He is off the Team."

That Klumpyan or any other member of Local 163 could reasonably read the memo to assert that Klumpyan's statement that he would file a grievance is the source of the problem and that the two hats he was accused of wearing were that of WSEU member and that of Marksman is established on the face of the memo. Whether Arntz intended the memo to have that effect is irrelevant to the analysis required by Sec. 111.84(1)(a), Stats. That any employe made aware of his removal from the Marksman Team could reasonably conclude that the removal was a result of the stated intent to file a grievance is neither disputed nor disputable. The removal of Klumpyan from the Team would, inevitably, serve to set an example to other employes of what could happen if a grievance was filed, or threatened to be filed. Such conduct does have a reasonable tendency to interfere with or restrain employes in the assertion of the protected right to file a grievance. It follows that the issuance of Arntz' memo, and Klumpyan's subsequent removal from the ERU, constitute an independent violation of Sec. 111.84(1)(a), Stats.

Sec. 111.84(1)(c), Stats., makes it an unfair labor practice for the State to "encourage or discourage membership in any labor organization by discrimination in regard to hiring, tenure or other terms or conditions of employment." There is no dispute that ERU membership is a condition of Klumpyan's employment. To establish a violation of this section, the WSEU must establish, by a clear and satisfactory preponderance of the evidence, the following elements of proof:

(1) Klumpyan had engaged in protected concerted activity;

(2) KMCI management was aware of, and hostile to,

3/ See Cedar Grove-Belgium Area School District, Dec. No. 25849-B (WERC, 5/91).

4/ State of Wisconsin, Dec. No. 26642-C (Yaeger, 4/92), aff'd, Dec. No. 26642-D (WERC, 9/92).

5/ Ibid.

Klumpyan's exercise of such activity; and

(3) Klumpyan's removal from the ERU was based, at least in part, upon this hostility. 6/

That Klumpyan had engaged in lawful, concerted activity and that KMCI management was aware of this is alleged in Sections 7 and 8 of the WSEU complaint, and acknowledged in Section 1 of the State's answer. That KMCI was hostile to this activity and removed Klumpyan from the ERU based, at least in part, on this hostility was alleged by the WSEU in Section 14 of the complaint, and contested in Section 2 of the State's answer and by the State's first affirmative defense.

Arntz is the key individual regarding the awareness and hostility of KMCI management toward Klumpyan's exercise of concerted activity. Arntz was the sole KMCI management employe called to testify by the WSEU, and was the author of the document which codified Klumpyan's removal from the ERU. KMCI management stood behind his actions, but Arntz was the initiator of the actions. Analysis of the awareness and hostility of KMCI toward Klumpyan's activities must, therefore, start with Arntz.

The State has forcefully argued that Arntz was not aware that Klumpyan was advancing anything beyond a personal agenda in threatening to grieve Arntz' scheduling of the training. 7/ That Arntz was sincerely interested in getting on with the training and with the team-building which was to solidify Marksmen with their Observers is apparent throughout Arntz' testimony. The depth of Arntz' concern on this point or the need for such training is neither disputed nor disputable. Beyond this, Klumpyan was a more combative witness than Arntz. Arntz' testimony that his concerns with Klumpyan's conduct date from a confrontation between Klumpyan and another Marksman stands, as a matter of testimony, essentially unrebutted. That Arntz was concerned that Klumpyan was upsetting what Arntz understood to be an agreement between representatives of Local 163 and KMCI management on splitting the training into four hour blocks is, at a minimum, plausible. As noted above, this makes the State's contention that Klumpyan was advancing a personal agenda a forceful point.

The need for overtime payment under the Local Agreement was, ultimately, the basis of the concerns raised by Klumpyan. That overtime is provided in the Local Agreement establishes that the source of Klumpyan's concern was a matter of collective concern. Whether Klumpyan had seized on a matter of collective concern to advance a purely personal agenda is the factual issue posed here.

Arntz' awareness that something more than a personal agenda was in fact involved in Klumpyan's conduct is, however, established in Arntz' November 5, 1989, memo. In Section 2 of the fourth paragraph of the memo, Arntz notes that Klumpyan asserted he was acting on behalf of "unidentified others" regarding the eight hour training. In the following section, Arntz notes Klumpyan would grieve the four hour training on behalf of "an unmentioned staff member" because Klumpyan "feels it is his job to do so." In the "opinion and observations" section of that memo, Arntz makes repeated reference to Klumpyan's advancing something more than personal concerns. In Section 2), he notes that Klumpyan "has put us on notice that he will not support the team if anyone outside the team feels it should be challenged." In Section 3) he notes

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6/ State of Wisconsin, Department of Employment Relations v. Wisconsin Employment Relations Commission, 122 Wis.2d 132, 361 N.W.2d 660 (1985).

7/ Conduct which manifests and furthers purely individual concerns is not concerted activity, City of Lacrosse, Dec. No. 17084-D (WERC, 10/83).

that Klumpyan's "loyalties . . . can be jeopardized by anyone outside the Team." At Section 5), he notes that Klumpyan continues "to support those who challenge our efforts". None of these references can be read in the singular. It is apparent from the memo that Arntz was most concerned by a split in loyalties between Klumpyan, as a Team member, and unnamed employes, possibly non-Team members, he spoke for. The memo is closer in time to Klumpyan's expulsion from the ERU than was Arntz' testimony. Beyond this, the memo is not clouded by the subsequent litigation and Arntz' or KMCI's interest in that litigation. The memo establishes that Arntz was aware that Klumpyan advanced himself as the representative of other employes.

The issue of Arntz' hostility to Klumpyan's opposition to the training is also made problematic by the State's argument that Arntz was not interested in cutting off Klumpyan's concerted activity, but in assuring that the Team functioned efficiently.

That loyalty to the Team was a significant factor in Arntz' motivation to expel Klumpyan from the Team is established by the record. That overtime payments might make the extended training session Arntz sought more difficult, if not impossible, to hold prompted much of Arntz' concern. However, both the memo's content and the context surrounding its issuance manifest that Arntz was hostile to Klumpyan's assertion of a protected right.

Although the memo refers generally to problems arising within the Team over a two to three month period, there is no persuasive evidentiary basis to make this general reference concrete. Klumpyan has no disciplinary record, and has a history of satisfactory or better evaluations. There is no persuasive evidence of dissension within the team prior to the confrontation between Klumpyan and another Marksman immediately prior to Klumpyan's removal from the Team. Thus, the general reference to problems is rooted only in the scheduling of the training, and Klumpyan's role in making that scheduling more difficult. Arntz' response to Klumpyan's threat of grieving the training was swift and sure. His removal from the Team was not prefaced by any warning and can be seen to have been caused by nothing other than Klumpyan's stated willingness to grieve the scheduling of the training.

Any doubt on whether this hostility to the filing of a grievance is a violation of Sec. 111.84(1)(c), Stats., is rooted in the State's contention that Arntz acted in the belief that representatives of Local 163 and KMCI had resolved Klumpyan's concerns in a meeting held after Arntz cancelled the eight hour training session. Arntz' scheduling of two four hour sessions was, under this view, taken in good faith reliance on an agreement reached between Local 163 and KMCI representatives. This contention has persuasive force, and the State persuasively questions why Peters' testimony that no such agreement had been reached came after, not before, Arntz' testimony.

The State's arguments cannot, however, be accepted. Without regard to whether an agreement had been reached to schedule the training in four hour blocks, it is apparent Arntz chose to expel Klumpyan from the ERU without verifying the existence of the agreement. More significantly here, Arntz' memo expelling Klumpyan was not as narrowly crafted as was his testimony. This is not to say his testimony was incredible. Rather, this is to say his testimony highlighted only part of his concerns. The memo is not restricted to Arntz' concern that Klumpyan personally sought to overturn a settlement agreement. Rather, as noted above, the memo speaks to Klumpyan's assertion of the views of other employes.

The memo cannot be persuasively read to restrict Arntz' concerns to Klumpyan's overturning a settlement agreement. Rather, he directed the memo against Klumpyan's assertion of the interests of other employes, particularly non-Team members. It is irrelevant whether Arntz sought to act against

Klumpyan as an official of Local 163. It is apparent he acted, at least in part, in hostility to Klumpyan's assertion of a protected right. This is the type of hostility proscribed by Sec. 111.84(1)(c), Stats., since it inevitably discourages "membership in any labor organization". That the memo is generally directed to unspecified "(p)roblems" of several months' duration, and to Klumpyan's "loyalties" underscores the conclusion that Arntz' motivation in expelling Klumpyan from the ERU ran beyond a narrow concern focused on the integrity of an agreement reached by representatives of Local 163 and KMCI.

It follows, then, that the WSEU has met the elements of proof required under Sec. 111.84(1)(c), Stats.

The WSEU seeks a remedy composed of five elements. The adjudication sought by Section a of the remedial request of the complaint has been met by the processing of the complaint. The cease and desist order and the posting of compliance notices is typically granted by the Commission in cases of this type. Klumpyan's return to the ERU has been met by the settlement of the grievance. The only portion of the request requiring comment here is the WSEU's request for fees and costs.

The Commission's law on this point is evolving. Until Madison Schools, Dec. No. 16471-D (WERC, 5/81), the Commission did not indicate a willingness to grant such requests. By Rock County, Dec. No. 23656 (WERC, 5/86), however, the Commission adopted the rule originally proposed in Commissioner Torosian's

concurring opinion in Madison Schools. Torosian limited the remedy to "exceptional cases where an extraordinary remedy is justified." 8/ The standard mentioned in that case, which has been cited with approval, was whether the defenses advanced were "'debatable' rather than 'frivolous'." 9/

The WSEU's request for fees and costs is unpersuasive against this standard. At least a significant portion of its remedial request was granted in the grievance settlement. Nor does the State's answer manifest frivolous claims. The answer in effect acknowledged a violation of Sec. 111.84(1)(a), Stats., and its first affirmative defense put the alleged Sec. 111.84(1)(c), Stats., violation in question. Its defense of Arntz' motivation in expelling Klumpyan is, at a minimum, debatable. There is, then, no basis for this aspect of the WSEU's remedial request.

This prefaces the State's second affirmative defense, which puts the WSEU's good faith in advancing the complaint into question. The State claims the matter alleged in the complaint is moot. In determining whether a case is moot, the Commission applies standards set forth by the Wisconsin Supreme Court in WERB v. Allis Chalmers Workers Union Local 248, UAWA-CIO, 252 Wis. 436, 32 N.W.2d 190 (1948). The Court characterized a moot case thus:

> (A) judgment upon some matter which when rendered for any cause cannot have any practical legal effect upon the existing controversy. 10/

The State urges that the grievance settlement agreement, as subsequently expanded, effectively granted the WSEU everything it could reasonably expect from this litigation.

The State's argument ignores that the settlement agreement and the subsequent proposals did not address the underlying cause for Klumpyan's removal from the ERU. At all times relevant to this matter, the issue of whether KMCI removed Klumpyan from the ERU for his threatened assertion of protected rights has remained open. As noted above, the pleadings put at issue whether KMCI violated Sec. 111.84(1)(c), Stats. Both of the settlement proposals placed into evidence stop short of acknowledging that Arntz acted toward Klumpyan based, in part, on hostility toward Klumpyan's stated willingness to grieve the training schedule. The litigation does, then, have a legal effect upon the existing controversy, and is not moot.

8/ Dec. No. 16471-D at 12.

9/ Ibid., for the original cite. The Commission cited the standard in Wisconsin Dells School District, Dec. No. 25997-C (WERC, 8/90) at 7.

10/ 252 Wis. at 440-441, cited in City of Brookfield, Dec. No. 25843-A (WERC, 8/89) at 10.

The State urges that the legal effect this adjudication has on the controversy is not a "practical" legal effect, since the State offered to do virtually everything the WSEU requests from the Commission. It is true that the State made Klumpyan whole, and did offer to cease and desist from the questioned activity, and to post compliance notices. The offer, however, ignores that the underlying basis for the remedy remained, until this litigation, unresolved. At a minimum, this means the notice offered by the State did not state or acknowledge the underlying statutory violations. Beyond this, the State's contention ignores the interest, apart from monetary relief, a litigant has in a determination of the cause of the action. 11/ Beyond this, the State's view of mootness has certain undesirable implications on future cases. The Allis Chalmers Court addressed those implications thus:

> To dismiss enforcement proceedings . . . on the grounds that the cessation of the activities which gave rise to the order make it moot would invite circumvention of the established policy of the state. Rather than comply with the entirety of an order of the board, a union or an employer would know that he could wait until enforcement proceedings were begun, then desist from the unfair labor practice in question and move to dismiss the proceedings as moot, thereby evading the authority of the board. 12/

While the practical impact of this litigation may be only to alter the words of the compliance notice and the source of that notice, this impact cannot be dismissed as irrelevant, as the State urges.

This is not to dismiss the State's affirmative defense as without persuasive force. The State appropriately notes that Klumpyan has been made whole, and that the WSEU's request for fees and costs represents more boilerplate pleading than a serious request under the current state of the law. The strength of the State's contention that the matter is moot is, however, rooted in the Sec. 111.84(1)(a), Stats., violation, which is arguably fully addressed in the pleadings and by the proposed settlement offers. The pleadings and those offers, however, leave the Sec. 111.84(1)(c), Stats., violation in dispute. The second affirmative defense cannot, then, be accepted. The case is not moot.

This conclusion in effect addresses the State's contention that the complaint has been advanced in bad faith. Even if the WSEU had been unable to prove the alleged Sec. 111.84(1)(c), Stats., violation, there is no evidentiary basis to question the WSEU's motivation in bringing the action. If the complaint had been advanced to harass the State, the record shows no benefit to the WSEU for doing so. If the complaint were one of many asserted to exhaust

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11/ For a discussion of this point, see Watkins v. ILHR Department, 69 Wis.2d 782, 233 N.W.2d 360 (1975) at 793-796.

12/ 252 Wis. at 443.

the State's resources to secure an advantage in bargaining or on some disputed point, the purpose of the litigation could more readily be questioned. In this case, the record indicates only that the WSEU acted to get the statutory determination it reserved the right to assert during the settlement discussions on Klumpyan's grievance.

Dated at Madison, Wisconsin, this 23rd day of April, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Examiner