STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

1199W/UNITED PROFESSIONALS FOR QUALITY HEALTH CARE, Complainant, vs. STATE OF WISCONSIN, DEPARTMENT OF EMPLOYMENT RELATIONS, DEPARTMENT OF CORRECTIONS, and STEPHEN SARGEANT, Respondents.	Case 343 No. 49320 PP(S)-198 Decision No. 27708-A

Appearances:

Ms. Carol L. Rubin, Kelly and Haus, Attorneys at Law, 148 East Wilson Street, Madison, Wisconsin 53703-3423, appearing on behalf of 1199W/United Professionals for Quality Health Care, referred to below as the Union.

Mr. David J. Vergeront, Legal Counsel, State of Wisconsin Department of Employment Relations, 137 East Wilson Street, P.O. Box 7855, Madison, Wisconsin 53707-7855, appearing on behalf of the State of Wisconsin, Department of Employment Relations, Department of Corrections, and Stephen Sargeant, collectively referred to as the State.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Union filed a complaint of unfair labor practices with the Wisconsin Employment Relations Commission (the Commission) on May 25, 1993, 1/ alleging that the State had committed unfair labor practices within the meaning of Secs. 111.84(1)(a), (c), (d) and (e), Stats. The Commission mailed a copy of the complaint to the State. The cover letter is dated June 1 and

1/ References to dates are to 1993, unless otherwise noted.

states:

> . . . (A) member of the Commission's staff . . . will contact you or your representative and the Complainant(s) in the near future to ask whether the parties are willing to participate in settlement discussions . . . The parties have a right to a hearing within 40 days of the filing of the complaint. If you or the Complainant(s) do not wish to have settlement discussions delay the scheduling of a hearing, you or the Complainant(s) should write . . . and ask that a hearing be scheduled . . .

In a letter filed with the Commission on June 11, the Union stated: "We do not wish to have the settlement discussions delay the hearing." In a letter filed with the Commission on June 30, the Union noted its filing of the June 11 letter, stated ". . . we wanted a hearing promptly scheduled in this matter, and did not want to waive our right to a hearing within 40 days" and again requested a hearing. On July 2, 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 July 2, I set hearing for July 15 and 16. On July 8, the State filed a Motion to Dismiss and/or Strike and Alternatively to Postpone Hearing. Among the bases for its motion, the State asserted that the "WERC lacks jurisdiction because Complaintant (sic) has not filed a verified complaint . . ." On July 9, the Union filed a verified complaint. In a letter to the parties dated July 9, the Commission stated:

> In response to Mr. Vergeront's July 8, 1993 motions, the Commission has directed Examiner McLaughlin to utilize the July 15, 1993 hearing date to hear evidence and argument as to the motions. Following receipt of the evidence and arguments (including subsequent receipt of written argument if he deems it appropriate), the Examiner will then (absent some mutual agreement by the parties as to how to proceed) rule upon the motions prior to further proceedings.

On July 12, the State filed a Motion to Quash Subpoena. Hearing on the motions was convened on July 15, but was continued because the court reporter scheduled to transcribe the hearing did not appear, and no alternate could be found. Hearing was conducted on July 16. The parties submitted evidence and oral argument on the motions, and at the close of the hearing I ruled on the pending motions. I dismissed the State's motions that the Commission lacked jurisdiction over the matter, but granted the State's motion to adjourn the hearing, noting both that Sargeant was a necessary, but unavailable, party and that a series of procedural irregularities in setting the matter for hearing had

effectively denied the State the ability to prepare for hearing on July 15 and 16. In light of these determinations, the motion to quash became moot. At the close of the hearing, further hearing dates were discussed and the State was directed to file an answer to the complaint by July 26.

The State filed its answer to the complaint on July 26. Hearing on the complaint was conducted on August 18, September 9, November 23, November 24, January 24, 1994, January 25, 1994, and March 22, 1994. A transcript of each of those days of hearing was provided to the Commission by April 1, 1994. The parties filed a series of briefs, the last of which was received by the Commission on September 19, 1994.

FINDINGS OF FACT

1. 1199W/United Professionals For Quality Health Care, referred to below as the Union, is a labor organization which represents a bargaining unit composed of professional patient care employes of the State of Wisconsin who are employed by various departments and at various locations throughout the State of Wisconsin. The Union maintains its offices at 1619 Monroe Street, Madison, Wisconsin 53711. At all times relevant to this complaint, Ruth Robarts served as the Union's Executive Director; Carol Booth-Parks served as the Union's Vice-President; and Helen Marks Dicks served under an employment contract as a regular part-time employe to provide legal and consulting services to the Union.

2. The State of Wisconsin, as an employer, is represented by the Department of Employment Relations, referred to below as DER. DER represents the State for purposes of collective bargaining and labor relations, and maintains its principal offices at 137 East Wilson Street, P.O. Box 7855, Madison, Wisconsin 53707-7855. The Department of Corrections, referred to below as DOC, is an agency of the State which employs a number of individuals represented by the Union, including professional patient care employes at the Waupun Correctional Institution, referred to below as WCI. Stephen Sargeant has, at all times relevant to this complaint, been employed by DER as a Senior Labor Relations Specialist.

3. The State and the Union have been parties to a series of collective bargaining agreements. One of those agreements was in effect, by its terms, from April 4, 1992, to June 30, 1993. Among its provisions are the following:

ARTICLE II

Union Recognition

Section 1 Recognition and Union Security

A. The Employer recognizes District 1199W/United Professionals for Quality Health Care as the exclusive bargaining agent for all employes in the following classifications:

Classification . . .

Developmental Disabilities Coordinator
Developmental Disabilities Specialist
Dietician 1
Dietician 2
Dietician 3

Handicapped Childrens Specialist 1
Handicapped Childrens Specialist 2

Nurse Clinician 1
Nurse Clinician 2
Nurse Clinician 3

Nurse Clinician 4

Nursing Consultant 1
Nursing Consultant 2

Nursing Instructor 1
Nursing Instructor 2

Nursing Specialist 1
Nursing Specialist 2

Occupational Therapist 1
Occupational Therapist 2
Occupational Therapist 3

Physical Therapist 1
Physical Therapist 2
Physical Therapist 3

Physician Assistant 1
Physician Assistant 2

Public Health Educator 1
Public Health Educator 2
Public Health Educator 3

Public Health Nurse 1
Public Health Nurse 2
Public Health Nurse 3

Public Health Nutritionist 1
Public Health Nutritionist 2
Public Health Nutritionist 3

Speech/Audiology Therapist 1
Speech/Audiology Therapist 2
Speech/Audiology Therapist 3

Therapies Consultant

Therapist 1
Therapist 2
Therapist 3

. . .

Section 17 Notice to District 1199W/UP President

The following information will be sent in a timely manner to the UP President:

. . .

7. Notice of Worker's Compensation Claims.
8. Notice of 230.36 Injury Reports.

. . .

ARTICLE V
Wages

Section 1 Wage Adjustment

A. 1991-1992

. . .

1. General Wage Adjustment: Effective the first day of the pay period following the effective date of the Agreement, the Employer will increase the June 30, 1991 base wage rate of each employe, who has completed the original six month probationary period, by one percent (1.0%)

. . .

2. Market Adjustment: Effective the first day of the pay period following the effective date of the Agreement, the Employer will make a one time adjustment, based upon Appendix B and the employe's years of service as of June 30, 1991, to the base wage rate of each employe in the following classisfications (sic):

Nurse Clinician 1, 2, 3, 4

Occupational Therapist 1, 2, 3

Physical Therapist 1, 2, 3

Speech/Audiology Therapist 1, 2, 3

. . .

B. 1992-1993

. . .

1. General Wage Adjustment: Effective June 28, 1992, the Employer will increase the current base wage rate of each employe, who has completed the original six month probationary period, by two and three quarters percent (2.75%).

. . .

Section 5 Market/Wage Surveys

The Employer during the life of the Agreement will conduct market/wage surveys for those classifications not included in Section 1, A.2., above.

This agreement includes, at Article IV, a grievance procedure which culminates in arbitration. The parties extended the duration of this agreement to cover the period of time from its nominal termination date until their execution of a successor agreement. Frederick Bau served as DER's chief spokesperson for the negotiation of this agreement. Sargeant served as DER's chief spokesperson for the negotiation of its successor. Although the Union utilized a number of spokespersons, Robarts served as the chief spokesperson for the negotiation of each agreement.

4. Union and State concerns with the compensation of nurses in light of market conditions was a focal point in collective bargaining for the 1992-93 agreement and its successor. On an ongoing basis, the State attempts to systematically define appropriate comparables external to State service relevant to the compensation of Union-represented employes and to study internal wage levels and differentials for the various classifications of employes represented by the Union. The Union was actively interested in the course of these efforts, and in providing input into those efforts. Such efforts date from at least the summer and fall of 1992 through the collective bargaining for a successor to the 1992-93 agreement. For example, Robarts, in a letter dated November 20, 1992, to Leann White, a Classification and Compensation Analyst for DER, supplied a list of institutions, throughout the United States, which employed "healthcare professionals who perform the same work as healthcare professionals" represented by the Union. Also in November of 1992, the Union shared information with DER which assisted DER in determining that a raised minimum rate (RMR) should be implemented for the entire Nurse Clinician Classification to address potential problems in the recruiting of new employes. In a fax issued to Sargeant dated December 7, 1992, Robarts requested the following:

> Please provide the Union with the following information as soon as possible:
>
> HOSPITAL DATA:
>
> 1) Copies of the audited financial statements for the three most recent years for the University of Wisconsin Hospital and Clinics.
>
> 2) Copies of the three most recent years of final budgets for the University of Wisconsin Hospital and Clinics.
>
> 3) A copy of the proposed budget for the University of Wisconsin Hospital and Clinics for the coming fiscal year.
>
> 4) A copy of the University of Wisconsin Hospital and Clinics most recent five (or ten) year plan, and any progress reports or updates to that plan.
>
> 5) Utilization data for the University of Wisconsin Hospital and Clinics which should include but not be limited to: inpatient bed count for each of the past three years broken down by bed type; patient days and admissions for each of the past three years broken down both by bed type and payor mix, and the number of outpatient visits for each of the past three

years.

6) Copies of the three most recent years of IRS Form 990's (tax returns) for the University of Wisconsin Hospital and Clinics. Should the University not file and IRS Form 990, please provide the following information instead:

   a) The compensation of the top five administrators or officers for each of the three most recent years;

   b) The five major contractors for professional services at the facilities and for each contractor the dollar amount of services provided for each of the past three years.

7) An organizational chart showing where the University of Wisconsin Hospital and Clinics fits in relationship to the state and which shows any subsidiaries or affiliates of University of Wisconsin Hospital and Clinics.

8) If within the past two years there has been a bond offering by the University of Wisconsin Hospital and Clinics, we request a copy of the preliminary of final official statement, and the application.

UNIVERSITY DATA:

1) Copies of the University of Wisconsin's audited financial statements for the two most recent years.

STATE DATA:

1) Copies of the State of Wisconsin's Comprehensive Annual Financial Reports (audited financial statements) for the two most recent years.

2) Copies of State of Wisconsin's final budget for the two most recent years.

3) A copy of State of Wisconsin's proposed budget for the upcoming fiscal year.

4) The most recent interim budget report for the current fiscal year.

5) A copy of State of Wisconsin's most recent bond prospectus (General Obligation Bonds).

6) Any recent public statements, press releases, testimony, etc. by the Governor or his leading budget director relating to Wisconsin's budgetary situation.

Sargeant did not respond to Robarts regarding this request. Robarts asked Sargeant about the request in mid to late January, and understood Sargeant to be awaiting a "hard-copy" follow up to the fax. Sargeant, in response to Robarts' questions, stated he would forward her information requests to the relevant agencies. In a letter to Robarts dated January 25 the Legal Counsel for the Department of Administration stated the following:

> Mr. Steve Sargeant of the Department of Employment Relations recently forwarded a copy of your public records request to our department, asking us to reply directly to certain parts of your request.
>
> The Comprehensive Annual Financial Report for the fiscal year ended June 30, 1990 consists of 137 pages; for 1991, it is 162 pages long.
>
> Wisconsin's last budget was published as 1991 WisAct 269, consisting of approximately 282 pages. The proposed budget has not been published yet. We do not have interim budget reports.
>
> The most recent bond prospectus consists of approximately 100 pages.
>
> We do not maintain the Governor's records and we are not aware of any recent publications by our budget director relating to the current budget.
>
> At 15 cents per page, 680 pages of documents come to a total of $102.00. Please remit this amount payable to the Department of Administration and we will arrange to send you the documents.

Sometime in early to mid February, Sargeant stated to Robarts his belief that the "reality" of hiring

for the State was that "90%" of new-hires were in-state applicants. Robarts responded in a letter to Sargeant dated February 23, which states:

> The Union requests the following information in preparation for negotiations.
>
> 1. Recruitment materials for all job classifications in the bargaining unit for all employing units for 1991-1993 including:
>
>   a. all recruitment events attended by the employer with dates and locations;
>   b. budgets for recruitment for all employing units;
>   c. all publications used for recruitment purposes, with copies of advertisements or articles;
>   d. all other materials or information which the State will rely on in 1993/95 negotiations with the Union to explain or describe recruitment for this bargaining unit for any job classification;
>
> 2. All materials and information which the State will rely on in 1993/95 negotiations to explain or describe vacancy rates and/or retention for any job classification in the bargaining unit; and
>
> 3. Materials which are the source of statistics offered at our informal meeting on February 16, 1993 to show that 90% of all PPCU employees were recruited from Wisconsin in 1991-93 (or whatever the relevant time period was).

In a letter to Sargeant dated March 8, Robarts stated:

> Please send the Union copies of Workers' Compensation Claims and 230.36 Injury Reports for members of the bargaining unit who work for the Department of Corrections for 1991-1993. There has been no compliance with Article II, Section 17 (7) and (8) by Corrections during this contract period.

In a letter to Sargeant dated April 1, Robarts summarized the status of the Union's information requests thus:

> On December 7, 1992 the Union requested materials relating to the budget of the State, the University of Wisconsin and the University of Wisconsin Hospital and Clinics.
>
> About 6 weeks later, you forwarded the requests to the agencies (see attached). The UWHC has complied with its part of the request.

> As you know, the DOA replied with a letter on January 25 claiming that the requested copies would cost the Union $102.00. In fact, all of the requested documents were publicly available for no cost, except for one which cost $15.00.
>
> We are disappointed by this kind of response and the unnecessary assessment of costs to the Union.
>
> We request a copy of all bills from DOA and DER for copies provided to all of the State employee unions in 1991-93. We also request copies of all information requests from the same unions for the same period.

In a letter to Sargeant dated April 26, Robarts stated the following:

> The Union asserts its right to request public records under ch. 19, Wis. Stats., and will make all its requests to DER in the future under both open Records and SELRA in order to avoid further misunderstandings.
>
> In regard to your request that the Union clarify its request of February 23 for information regarding recruitment, we remind you that the motive for the request cannot be a factor in the State's decision to provide information under ch. 19. See cases and Department of Justice policies interpreting the Open Records law. In addition, a response is due "as soon as practicable and without delay" or within ten business days. Finally, denials of written requests must be in writing. Sec. 19-35(4) (b), Wis. Stats. In view of the fact that we have previously received altered records through DER Attorney Teel Haas in other circumstances, we also remind the DER that alteration of public records is a criminal offense, pursuant to sec. 943.38, Wis. Stats., and a violation of the Code of Professional Responsibility for attorneys.
>
> We therefore repeat our request of February 23, with some modification to ease the administrative burden, and look forward to receiving the information in a timely manner:
>
> 1. Recruitment materials for all job classifications in the bargaining unit for all employing units for 1991-1993

including:

a. all recruitment events attended by the employer with dates and locations;

b. year-to-date expenses for recruitment for all employing units;

c. year-to-date expenses for publications used for recruitment purposes, with copies of advertisements or articles;

d. all other materials or information which the State will rely on in 1993/95 negotiations with the Union to explain or describe recruitment for this bargaining unit for any job classifications,

At the same time we agree to suspend our request for billing information for costs of copies to bargaining unit representatives.

Sargeant responded in the following letter to Robarts dated May 10:

Pursuant to your letter dated April 26, 1993, requesting information regarding recruitment, this agency has directed the state agencies which are affected by your request to furnish all available information listed in your letter. The agencies are currently determining what information they have. Since several agencies are involved and given the scope of your request it will take more than ten (10) work days to process your request. All agencies have been asked to handle your request as quickly as is administratively possible. As a consequence of your request should an administrative burden occur which results in more than a nominal cost to an agency, the actual and necessary costs of locating and copying the information requested will be passed on to your organization. It is our understanding that in the event it appears that costs will be charged you desire an estimate prior to the processing of your request. Please let us know if you require further assistance in processing the request mentioned in this letter, or if there are problems with previous requests for information. It is this agency's

> understanding that all earlier requests for information have been satisfied or withdrawn.

Jack Kestin is employed by DER as an Employment Relations Specialist 2. He assists DOC in its personnel relations, including those involving Union represented employes. Sargeant had referred the Union's request for Worker's Compensation filings to Kestin. Kestin referred the request to DOC payroll personnel who responded that no such filings existed. Kestin relayed this to Sargeant who relayed it to the Union. The Union was aware such filings existed and requested the help of the office of State Senator Fred Risser to obtain the information. Sargeant responded to the inquiries of Risser's office, in the following letter dated May 17:

. . .

> Beyond the request itself is the matter of erroneous presumption of contractual violation stated by Ms. Robarts with respect to Article II, Section 17 (7) and (8). There is no contractual requirement to provide information regarding claims or reports which have not been filed. Ms. Robarts presumed there were reports which had not been forwarded. This assumption was, and continues to be incorrect.
>
> Finally, the request for help from Ms. Marks Dicks to your office is misdirected. Had Ms. Dicks discussed this matter with Ms. Ruth Robarts . . . she would have been aware that Ms. Robarts was verbally informed as to the status of Workers' Compensation Claims and s. 230.36 Injury Reports (no filings) almost immediately following the receipt of the request itself. Unlike open records requests, requests made in preparation for bargaining under SELRA do not require a formal written response.

Sargeant mailed a copy of this letter to Robarts with a cover letter detailing his position to the Union. The status of the information requests noted above and others made by the Union was summarized thus by Dicks in a letter to Sargeant dated May 18:

> In your letter of May 10, 1993, you state your understanding that all Union information requests have been satisfied or withdrawn. The Union disagrees.
>
> Our records show these incomplete or unsatisfied information requests:

January 15: Wage surveys per Article V, Sec. 5 - information provided

January 15:	Comparables for job classifications - no information provided.
February 23:	Recruitment information - partially provided
March 8:	Workers Compensation/230.36 information per Article II - no information provided.
May 13:	DOC staff allocations - no information provided

. . .

Dicks pressed the Union's request for Worker's Compensation filings in a letter to Sargeant dated May 25. Kestin again referred the matter to DOC personnel but this time contacted management personnel, who were aware that such filings did exist. Kestin informed Sargeant, and assembled the data. Sargeant and Kestin supplied the data to the Union under a June 9 cover letter which states:

> Enclosed please find the Worker's Compensation Claim forms . . . requested by UPQHC. The Department of Employment relations, as well as the employment relations personnel at DOC, were originally led to believe that no forms had been filed. Upon further checking, Mr. Jack Kestin . . . was informed that claims had been filed. As a result the Department of Corrections has compiled the forms enclosed. On behalf of the Department of Corrections and the Department of Employment Relations, we apologize for any inconvenience this unintentional delay may have caused.

Kestin researched the Union's staff allocation request, referring the point to DOC personnel. He concluded the request would require a voluminous and costly computer printout. He informed the Union of his conclusions in mid-June, and understood that the Union would discuss the matter with DOC personnel. The Union secured the information, in a mutually agreeable form, some time later. The Article V, Section A, 5, Market/Wage survey, referred to below as the Survey, was treated by the State as a survey of market conditions external to State wage and benefit levels. White had primary responsibility for acquiring the data necessary to this survey. She did so over several months. The State provided the results of this survey to the Union in June of 1993. This survey was the first of its type provided to any of the unions with which the State bargained for a contract covering the 1993-1994 biennium. The Union did not

view the results thus submitted to comply either with the contract or with its information requests. The Union believed the State had committed to perform not just a wage and market analysis of external employers, but also an internal survey on whether the State's various classifications appropriately reflected and compensated employes for differences in skill levels, etc. The State never performed such a survey, and DER representatives did not believe the State committed itself to perform such a survey. The State performs external wage/market surveys which affect the unions which bargain with the State. Agencies of the State supplied the Union with sufficient recruitment information for collective bargaining to proceed, but the Union is unsure if the data it has received reflects whatever prompted Sargeant to indicate the State recruited overwhelmingly on an intra-state basis. Between December of 1992 and July, the Union made roughly twenty information requests of the State.

5. The Union originally hired Dicks in late September of 1992 to deal with a backlog of grievance arbitration cases. Dicks attempted to informally settle a number of grievances with DER representatives. A number of those grievances were resolved. Bau and Dicks reached a general understanding on the Riggert grievance sometime late in 1992. The Riggert grievance affected the University of Wisconsin Hospital and Clinics (UWHC). Bau signed and sent to Dicks a written statement of the settlement agreement covering Riggert dated December 14, 1992. Included in that letter were settlement agreements covering Riggert and three other grievances. Paragraph 3 of Bau's December 14, 1992 draft called on the Union to "provide to the Employer a list of those employes who have worked Thursday night shift hours since January, 1990, and have not received weekend premium pay in accordance with Article VII, Section 6 of the agreement." Dicks considered the provision of make-whole relief to be beyond the Union's ability to effect, and a basic duty of an employer. She phoned Bau to discuss this point, which had yet to be expressly addressed. After reaching what she thought was a mutual accommodation, Dicks rewrote the settlement agreement, signed it and mailed it to Bau, with a cover letter dated January 13. Paragraph 3 of her draft of the settlement agreement reads thus:

> 3. Within 2 weeks of the effective date of this agreement, the Employer and the Union shall announce a 60 day period in which all employes of UWH who:
>
> 1) have Saturday/Sunday as their weekend off;
>
> 2) have worked any of those weekend hours since January, 1990, and;
>
> 3) have not received premium weekend pay in accordance with Article VII, Section 6 of the agreement,

> shall notify the Employer. If possible, the employe shall give the dates and hours worked for which they claim benefits. If the employe does not have the hours and dates worked, UWHC personnel will facilitate a record search for those employes making such claim.

Bau disagreed with Dicks' insertion of any reference to "Saturday/Sunday." Bau considered that "Friday/Saturday" would have been the appropriate reference. A companion grievance to Riggert, also under discussion by Bau and Dicks, did involve Saturday/Sunday as the weekend off. Bau redrafted the Riggert settlement agreement and sent it to Dicks with a cover letter dated February 23. He changed the reference in Dicks' Paragraph 3 to read "Friday/Saturday", but renumbered that paragraph as Paragraph 4, and included the following as Paragraph 3:

> 3. The parties agree that effective March 1, 1993, employes shall not be eligible for weekend premium pay in accordance with Article VIII, Section 6 C of the agreement for Thursday night Shift hours worked.

Bau did not discuss these changes with Dicks prior to sending the letter. Dicks resubmitted her earlier draft, and stated in the March 5 cover letter to her proposal the following:

> I am enclosing a corrected copy of the settlement offer on John Riggert. I am appalled by your intentional changing of our agreement. We settled in December. This should not have become an ongoing exchange.
>
> This corrected settlement agreement . . . deletes your section 3. We will <u>not</u> agree to any change in the language or in its interpretation except at master negotiations.

Bau responded in a letter to Dicks dated March 17, which rejected Dicks' proposal and suggested that "the arbitrator initially selected to hear the case . . . be contacted for available dates for hearing." The reference to "Saturday/Sunday" in Dicks' proposals was inaccurate, reflecting her inadvertent submission of the language relevant to the companion case. Bau inserted the "sunset" proposal after consultations with UWHC management. Also included in the backlog of grievances handled by Dicks were the Hubbard and Muehl grievances. Dicks and Bau resolved the Hubbard grievance, and Dicks believed the Muehl grievance had also been resolved. The Muehl grievance had not, at that point, been appealed to arbitration. Dicks understood Bau's position to be that when

the Union appealed the Muehl grievance to arbitration, the matter could be formally resolved. Dicks directed the appropriate representatives to take this action, then contacted Bau and learned that the Muehl grievance had been assigned to another DER representative, Donna Biddle. Biddle would not agree to resolve the Muehl grievance, and formally detailed her position to Dicks in a letter dated February 12, noting that the Muehl grievance "is not the same circumstance as . . . Hubbard." She also raised substantive arbitrability objections. The Riggert and Muehl grievances have been appealed to arbitration. While attempting to schedule Muehl for arbitration, Dicks learned that DER was attempting to schedule grievance arbitrations after July 1, because DER had encumbered all of the funds earmarked for that purpose. In response to this and to concerns relating to the "unsettling" of grievances, Robarts and Dicks met with Glen Blahnik, DER's Assistant Administrator of the Division of Collective Bargaining. The meeting took place some time in March or April. Blahnik stated that budget cuts had reduced funds available for grievance arbitration to the point that he did not believe DER could arbitrate grievances prior to the start of the new fiscal year. Robarts and Dicks requested documentation of DER's budgetary problems. Blahnik supplied them with a spread sheet detailing expenditures related to the arbitration process. DER informed each of the unions with which it had a labor agreement that it would not arbitrate grievances until the commencement of a new fiscal year. Perhaps two grievances were affected by this lack of funds. Blahnik did not take any action regarding the Muehl or Riggert grievances. He understood that his staff felt that settlements with the Union needed to be in writing and that getting that writing accomplished was a laborious process.

6. The State employs, at WCI, professional patient care providers represented by the Union. Such employes are staffed on a 24 hours per day, 7 days per week basis. To assist in this scheduling the State has employes fill a "weekender" position. An employe in this position works forty hours between 6:00 a.m. on Friday and 6:00 p.m. on Monday. Due to approved leaves of weekender nurses, WCI was required to use non-weekender nurses, such as Patty Schepp, to fill in weekend hours. In 1991, WCI employes sought and received WCI management approval for the payment of overtime for such hours. When DER personnel learned of this payment, they informed WCI that its payment of overtime violated the then governing labor agreement, and that any amounts paid out should be recovered from the employes. The Union filed a grievance which is referred to below as the Weekender grievance. Mary Janssen, who is employed at WCI as a Nurse Clinician 2, served as the Steward for this grievance. Dicks served as the Union's advocate at the arbitration level. The Weekender grievance was heard on February 9. Sargeant served as one of DER's advocates at the arbitration level. In January, Sargeant discussed the Weekender grievance with Robarts several times. Sargeant initiated those discussions. Sargeant felt that the Weekender grievance exemplified how local discussions could lead to actions which violated the master labor agreement between the State and the Union. He felt that Robarts, as Spokesperson for the Union at the master contract level, had an obligation to see that such instances did not arise or interfere with the negotiation of the master agreement. Because he felt bargaining history in which Robarts was actively involved undercut the merit of the Weekender grievance, he objected to the Union's continued assertion of the Weekender grievance. In his view, that assertion undercut the reliability of Robarts as the Chief Spokesperson at the master contract level. Robarts did not share Sargeant's

view of the merit of the Weekender grievance or on the implications of that grievance on master contract negotiations. She reviewed the grievance and Union records of bargaining history, and assigned the matter to Dicks to litigate. She viewed Sargeant's expressed views on the matter as a thinly veiled threat to hold progress at the master contract level hostage to the Union's assertion of the Weekender grievance. She responded to Sargeant's attempts to discuss the matter in January by referring Sargeant to Dicks. Prior to the commencement of the hearing on the Weekender grievance, Sargeant asked Schepp and Dicks if they would discuss settling the matter informally. During the course of those discussions, Sargeant informed them that the State would appeal an adverse ruling to circuit court; that Dicks and Sargeant could leave the WCI work environment but that Schepp would have to remain to deal with any hard feelings caused by the grievance; and that a voluntary settlement would be preferable to the aftermath of litigation. He offered to drop the State's request for reimbursement for wrongfully paid overtime, provided no overtime was paid to employes after DOC announced the cessation of such payment. Schepp and Dicks declined the offer, and the case was heard. Sometime after this, Sargeant, at a meeting with Robarts on ground rules for then-upcoming collective bargaining referred to the litigation as a "circus," "garbage" and "crap." On June 4, the Arbitrator of the Weekender grievance issued his decision. The decision states, among other points, the following:

> The evidence about the parties' bargaining that led to the adoption of Article VII, Section 7, shows that . . . the Union asked . . . the Employer a series of questions relating to the operation of Article VII, Section 7 . . . After the following question was asked by the Union, the Employer made the following response:
>
> > Question 6: Do you trade weekends with the weekend person? Who gets the differential?
> >
> > Answer: Only nurses who are classified as Nurse Clinician-Weekend Nurse are eligible . . .
>
> The question and answer reproduced above are the ones most directly related to the dispute about interpretation presented in this case. The evidence about bargaining history does not show that this subject was further refined to a discussion about long-term fill-ins for Weekend Nurses . . . The parties intended that the Weekend Differential would be paid only to those who have bid for and have been appointed to the special position of Weekend Nurse . . .
>
> AWARD
>
> The grievance is sustained in part and denied in part. Under Article

> VII, Section 7, of the labor agreement, non-Weekend Nurses filling-in for Weekend Nurses are not entitled to the Weekend Differential, except when they have been induced to accept an assignment to such fill-in work by a promise that they will receive the Weekend Differential. Because the Employer thus induced the grievants to fill in . . . between August 14, 1991, and September 17, 1991, the Employer shall pay them the Weekend Differential for their weekend work during that period.

The State did not appeal this decision into circuit court.

7. On March 1, Gloria Thomas was assigned to WCI as Acting Health Service Unit Manager. The WCI Health Service Unit is referred to below as the Unit. The Unit provides health care services to inmates at WCI. Immediately prior to this assignment, Thomas worked in the central office of DOC in its Bureau of Health Services. Thomas assumed the position on an acting basis because the State had discharged the predecessor Unit Manager, and had not yet found a permanent replacement. In February, the Unit was, in relevant part, staffed from Monday through Friday thus:

FIRST SHIFT 6:00AM/4:00PM	SECOND SHIFT 2:00PM/10:00PM	THIRD SHIFT 8:30PM/6:30AM
Wendy Polenska Mary Janssen Holly Meier	Sydney Smith	Patty Schepp

Weekend coverage was, at this time, provided by weekender Nurses Beth Dittman and Tom Edwards. Weekender coverage limited overtime usage, and permitted employes to plan their time off with considerable certainty. As of the arrival of Thomas on March 1, the Unit was .5 of a full time equivalent position short of fully staffed. Dittman took maternity leave from her position effective March 1 through August 26. Thomas found it difficult to fill the gaps caused by these shortages. On or about March 15, she posted a work schedule for April. She posted this schedule in pencil, and made changes to that schedule throughout March. Prior to this schedule, work schedules had been posted in ink. The March 15 schedule and subsequent changes virtually eliminated the 10-hour shifts formerly provided for first shift nurses, required non-weekender nurses to provide weekend coverage, and worked certain first shift hours staffing the infirmary with only one employe. These changes produced turmoil within the Unit. Unit members filed six to seven grievances regarding Thomas' schedule changes. Janssen was quite upset with the schedule when it was changed to require her to work the weekend of April 10 and 11. She learned of this

change from other employes, who knew how upset she would be. In a memo to Thomas dated March 17, Janssen asked to receive the Easter weekend off. She had planned, months before, to spend the weekend with her mother. Janssen took steps to cover her shifts on the Easter weekend. Schepp offered to work some of those hours for her. After submitting the March 17 memo, Janssen verbally informed Thomas she would not work the weekend she had planned to take vacation. Thomas and Janssen periodically argued about this point in late March. Thomas understood that her schedule had provoked considerable resentment among several employes, and particularly Janssen. Thomas reported her difficulties with staff to her supervisor, Linda Kleinsteiber, who responded by issuing the following memo, dated March 26, to Unit staff:

> It has come to my attention that there have been some major scheduling problems for weekend coverage due to a vacancy. I have been told that staff have publically (sic) declared they will call in sick for their weekend shifts and won't be available by phone.
>
> Sick call-ins for scheduled weekends will be viewed very suspiciously and people will be required to bring physician verification of illness. If we don't find these satisfactory the disciplinary process will be initiated.
>
> In addition, we do not wish to face this same difficulty every time we have a vacancy in the weekender program due to resignation, sick leaves, maternity leaves, etc. If we cannot come to satisfactory resolution of this problem through cooperation of staff in scheduling we will seriously consider giving 30 days notice to the Union and eliminate the weekender program whereby all staff would then rotate to cover the weekends on a routine basis. I have contacted UPQHC central staff to solicit their cooperation in resolving these matters.

The turmoil over work schedules continued to simmer throughout March and early April. By late March, the scheduling grievances had reached the third step of the grievance procedure. On March 31, 1993, Dicks, who represented the Union for these grievances, met with Kestin. Schepp, Polenska, Meier and Janssen also attended this meeting. The Union proposed a schedule, to be effective the middle of the week preceding Good Friday, to supplant that posted by Thomas. The Union's schedule involved Unit employes covering weekends on a voluntary basis. Kestin thought the proposal represented a productive effort, and stated he would pass it on to DOC management. He did so, but the personnel who wanted to review the schedules requested time to do so. They did not respond to Kestin until roughly one week after he had submitted the proposal to them. DOC determined the schedules created too much overtime, and rejected the proposal. Their review of the schedules had, in any event, taken them beyond the initial implementation date proposed by the

Union. Dicks tried, without success, to discuss the substance of this proposal with Kestin between the March 31 meeting and the Easter weekend. She did see him during collective bargaining sessions, but Kestin would not discuss the matter because Sargeant had instructed his bargaining team members to discuss only subjects related to the bargaining of a new contract on the dates set aside for that purpose. On April 2, both Janssen and Kleinsteiber attended a seminar in Milwaukee. Janssen approached Kleinsteiber, who documented the conversation thus in a memo dated April 5:

> . . . She was quite angry and asked me how long I was going to let Gloria at WCI to screw things up. I asked her what she was talking about and she said Gloria had scheduled her to work over Easter Weekend. I told her that Gloria had discussed the schedule with me and I approved it. She told me there was no way she was working that weekend, that it was her mothers birthday and that she would call in sick, so as not to work that weekend . . .

Janssen was involved in civil litigation involving an inmate. The course of that litigation relevant here was summarized thus in a April 8 memo authored by the Registrar of WCI:

> On April 5, 1993 I went to the health services unit to have . . . Janssen read and sign the documents. She was scheduled to work but was not there. On April 6, 1993 I called over to see if she was at work and she was. I took the documents to her to review and sign. She was busy when I arrive (sic) and asked if I could leave them for her to review and she was to call me when she was ready to sign them. She didn't call that day. I went to the health services unit on April 6, 1993 to copy some records on another case. I talked to Nurse Janssen regarding the . . . case. She had taken the documents home to review and had forgotten to bring them back with here. I told her the following day would be fine. I again called the health services unit on April 7, 1993 to see if she was at work. She was and I went over for her to sign the documents and get them to mail back to you. She had the answer to the first request for production of documents. She thought she had left the response to the first set of written interrogatories in her car. I had her sign what was there and told her to call when she returned from her car. I didn't here (sic) from her but called later in the day. She did check her car and found they were not there. She gave a message . . . that she couldn't find them and they must be at home. I later saw her in the lobby. She said that she didn't know what to do, that she was going to the doctor

> and would not be back to work until friday (sic).

Janssen is in her late 50's, and has high blood pressure. Late in her shift on April 7, she experienced pain in her neck and head. A co-worker ran an EKG on her. A WCI physician looked at the EKG and directed Janssen to see her personal physician. She saw her personal physician after the close of her work day. He ran an EKG, found the results to be normal, but did note her blood pressure was high. He prescribed medication, and issued her an excuse from work effective from Friday through the following Monday. Janssen was not scheduled to work on Thursday, April 8, but was scheduled to work one-half of Good Friday, April 9, and eleven hours on April 10 and 11. The Registrar's April 8 memo details her view of the implications of Janssen's absence thus:

> I called Mr. Oestriech and told him about the situation. I thought we could stop after work at her house of (sic) before coming to work on the 8th to get the papers and her signature. He thought of Cpt. Garro who lives close to Nurse Janssen and is also a notary. Cpt. Garro stopped at her home the evening of the 7th and found no one home. She then stopped before work today to have her sign the documents and would bring them to me to send to you. Nurse Jansses (sic) told Cpt. Garro that she could not find them in her house, that they had been lost.
>
> The nursing staff at the health services unit do not expect Nurse Janssen to return until monday (sic) although she is scheduled today and friday (sic). There is some type of disagreement with the new supervisor as to the scheduling.
>
> I then called you to see if we could use the copy you sent. Warden McCaughtry is in today and he can re-sign the copy. Either Cpt. Garro or myself can drive to Nurse Janssen's home and have her sign the copy. This could be mailed out later today and you should have it by monday (sic) as these documents are due to be filed in Dodge County on monday, (sic) April 11, 1993 . . .

On April 8, Schepp called in sick. She had been, since April 5, experiencing headaches and nose bleeds while at work. She had another nurse take her blood pressure while at work and discovered it was high. She then consulted her doctor who prescribed medication to reduce her blood pressure.

8. In a letter to Ken J. Sondalle, dated April 12, Sharon Zunker, the Director of the Bureau of Correctional Health Services for DOC, stated the following:

On April 9 about 10 a.m. Steve Kronzer, acting for you, came to me and asked that I order the subject person into work at Waupun Correctional Institution (WCI), so that she could sign some legal papers that needed to be at the Department of Justice by April 12. These papers had been given to Nurse Janssen to sign earlier in the week, but she somehow had failed to take care of them. The papers involve an inmate legal action in which the WCI Warden and Ms. Janssen are named.

Nurse Janssen was scheduled to work April 8 and April 9, but called in sick on April 8 and said she wouldn't be back at work till April 12. I apprised Steve of this and he asked that I order Ms. Janssen in to sign the papers. The attached copy of an April 8 memo from Pam Knick details prior attempts to get the papers signed.

I called Nurse Janssen at home at or about 10:30 a.m., and spoke to her. Valerie Clemen was sitting in my office and heard both sides of the conversation because I used the speaker phone. I told Nurse Janssen that we were on speaker and that Ms. Clemen was with me. I explained the reason for the call, and asked if she would go to WCI to sign the papers. She said she thought someone would bring them to her, that she was under a doctors care and that her husband had the car and was not home. I then gave her a direct order to report to Pam Knick's office by 1 p.m. on that day to sign the papers. I told her that failure to do so would be insubordinate and that discipline could result. I informed her that she was responsible for getting to the work site. I repeated the order, made certain that she knew who I was and that I had the authority to issue the order.

It is my understanding from later conversations with Warden McCaughtry, his assistant, and with Steve Kronzer that Nurse Janssen called the Warden's office later in the day and offered to sign the papers if someone brought them to her and notarized them, or drove her to WCI. When I was told this by the Warden's Assistant, I said that it was up to them if they wanted to send someone to Nurse Janssen's home since I had no one that I could reasonably send. Nurse Janssen did <u>not</u> report to WCI at 1 p.m. as ordered. Later in that day, someone from WCI went to her home to get the papers signed.

> ER was aware of the situation because Helen Dicks, apparently acting as a Union Rep., called Mike Frahm, who then spoke to me.
>
> It is my belief that Nurse Janssen was insubordinate, and that we should follow through with the corrective process.

In a letter dated April 12, Thomas filed a complaint with the Department of Regulation and Licensing concerning Janssen's conduct as a Nurse. Among other allegations, Thomas asserted: "I have concerns whether whe (sic) is adequately utilizing the nursing process and whether she uses punishment as an intervention." The Department ultimately dismissed this complaint without sustaining any of Thomas' charges. On April 13, Janssen returned to work. On April 14, Thomas issued her a memo summoning her "to be in my office . . . on April 15, 1993, to discuss a possible violation of Department Work Rule 1." That work rule governs "(D)isobedience, insubordination, inattentiveness, negligence, or refusal to carry out written or verbal assignments, direction, or instructions." The memo focused on "your failure in signing legal documents," and noted "(d)iscipline may be taken as a result of the interview." The memo also noted she was "entitled to the presence of a designated Union grievance representative or a union staff person at the interview." Janssen phoned Dicks, in an attempt to secure her as a representative. Dicks was scheduled for collective bargaining on April 15, and asked Janssen to ask Thomas to reschedule the April 15 meeting. Thomas refused to do so. Upon learning this, Dicks contacted Kleinsteiber who also declined to reschedule the meeting. Dicks then contacted the one of the lead administrators of the Personnel Department at DOC. Dicks supplied that representative with the dates she would be available, and understood that representative to have approved the rescheduling of the meeting. Thomas and Kleinsteiber held the investigatory meeting on April 15, without Dicks. Thomas and Kleinsteiber informed Janssen she could use Polenska as her representative. Janssen did so. Polenska is not a Union Steward, and has no experience representing employes in disciplinary settings. Sondalle, the Administrator of Program Services for DOC, sent Janssen the following letter dated April 16:

> You were absent from work from April 8 to April 12. The week prior to that you told several people including Gloria Thomas and Linda Kleinsteiber that there was no way you were going to work that weekend because it was your mothers's birthday. You also stated you would call in sick for your scheduled days to work.
>
> All staff were notified that sick call in's for that weekend would be questioned and a medical excuse would be required from all persons calling in sick. You brought a brief note from your physician indicating you should be excused from work until April 13, 1993.

> Due to the fact that you stated to your supervisor and others that you would not report to work that weekend and that you would call in sick, we do not view this medical excuse as valid and your use of sick leave is not approved.
>
> The time you missed work between April 7, 1993 and April 13, 1993 will be viewed as unauthorized leave without pay.

In a memo dated April 21, Thomas directed Janssen to appear at a "pre-disciplinary" hearing on April 26. In a memo dated April 23, Janssen requested the opportunity to discuss the pre-disciplinary hearing "during working hours" with a "designated Union representative." Janssen again tried to secure Dicks as her representative. Thomas and Kleinsteiber conducted the April 26, hearing without Dicks. Janssen used, at this meeting, a Union Steward from Dodge Correctional Institution. Prior to using this representative, she unsuccessfully requested to reschedule the meeting to secure Dicks as her representative. In a memo to Zunker dated April 26, headed "Constraint on Management's Right to Utilize Personnel," Thomas stated:

> Some nurse clinicians have obtained notes from doctors placing limitations on hours of work. The limitations place contraints (sic) on managements (sic) right to utilize personnel, methods and means in the most appropriate and efficient manner possible as determined by management. The following is a list of nurse clinicians with limitations or other leave:

The memo detailed the limitations of Polenska, Janssen, Schepp, Dittman and Meier. The memo concluded thus:

> I have seen no detailed information surrounding these limitations. I view some of these limitations as possibly contrived. I view some of the staff's behavior as background noise in an attempt to divert attention away from themselves and further discovery of practice violations. To accept these limitations without further inquiry, will further permit management to abrogate its rights in this area.

In a memo to Zunker dated April 29, Thomas recommended Janssen receive "a 3-day suspension" for "abuse of sick leave."

9. Schepp's use of sick leave on April 8 was her first in roughly five years. Thomas determined to discipline Schepp for sick leave abuse, and to deny her the use of sick leave. In doing so, Thomas withheld the time sheets necessary for the issuance of Schepp's check for that pay period. Schepp did not receive her copy of the time sheet, and asked Thomas verbally and through memos where her time sheet was. Thomas did not respond until Schepp reached her by phone. Schepp understood Thomas' responses in this conversation to be to the effect that Thomas took Schepp's filing of a grievance personally, and that she need not divulge to Schepp why she withheld the time sheets. Schepp's husband also phoned Thomas regarding the check. Schepp ultimately contacted Dittman, then on maternity leave, and asked her to help her get her check. Dittman called Thomas about the incident. Thomas refused to discuss the merits of Schepp's situation with Dittman, even after Dittman noted she continued to be a Union Steward. Thomas summarized her own view of these incidents in a memo to Zunker dated April 23, which states:

> I have received another threat. Today . . . Patty Schepp's husband, telephoned to tell that he had just brought this (sic) wife from the doctor, he would be leaving a note for me up front, and Patty had better receive her check next week. I asked whether he was threatening me; he said he was just saying that she had better get her check. I again asked whether he was threatening me; he repeated that she had better get her check. I told him that if he were threatening me, I would report him . . .
>
> Patty telephoned me demanding and raising her voice in a hostile tone that I give her a reason why I didn't turn in her time sheet. She said that she wanted an explanation now since she had asked twice . . . I told her she would be getting a check. She said that she had to pay her mortgage and was expecting to have the overtime on this check. When she continued to be demanding stating that she wanted an answer now, I told her some of this could be covered in the investigation of use of sick leave on April 8, 1993 and I told her I would end this conversation. She asked whether she was going to be investigated; I said yes . . .
>
> I also received a telephone call from Beth Dittman today; she asked me why I had not turned in Patty's time sheet. She said that I had no right not to turn in Patty's time sheet. I asked whether or not she was still on Maternity Leave and if so why was she calling me about this. She said that she was Patty's union representative and she was still active with the union. I told her I was ending the conversation.

On April 23, Schepp, under physician's orders, took a medical leave of absence. She returned to work August 18. Thomas summoned Schepp to an investigatory meeting set for April 27, regarding the alleged abuse of sick leave and regarding the threats Thomas perceived from her conversation with Schepp's husband. Dicks intervened, and with Kestin's assistance, had this meeting cancelled. Thomas attempted to get the meeting rescheduled, but failed to convince DOC management to support her.

10. On May 7, Kestin met with Dicks, Schepp, Janssen, Meier and Dittman, to discuss the grievances concerning work schedules, Janssen's discipline and Schepp's discipline. Kestin addressed each grievance, starting with Janssen's. He noted Janssen's was significant, involving DOC's ability to control its work force. When it was apparent nothing could be done voluntarily on Janssen's, the parties discussed Schepp's. Kestin was surprised by the facts surrounding Schepp's, and distinguished Schepp's from Janssen's due to the insubordination he saw in Janssen's. The Union representatives perceived Kestin's tone and demeanor as combative and badgering toward Janssen. Janssen left the room when the discussion of her grievance ended. She returned to the room several times, leaving as she became more and more upset. At some point she began to experience headaches and dizziness. Ultimately, feeling extremely weak, she left the room. While outside the room, an employe not involved in the meeting observed her condition, entered the meeting room and informed the participants noted above that Janssen was ill. Ultimately, Janssen was taken from the facility in an ambulance.

11. The State ultimately determined to grant Schepp's grievance, and to make her whole for her loss of sick leave. The State may not, however, have made her whole for overtime lost due to the original denial of sick leave.

12. On May 11, Terri Landwehr, the Administrator of the Division of Program Services for DOC, advised Janssen of a three day suspension from work to be served on June 1 through June 3. Landwehr determined the level of discipline to be imposed on Janssen with input from Zunker and Thomas. Kestin played no role in the determination of the level of Janssen's discipline. Landwehr was aware that negotiations were not going well, and believed that the action of Unit nurses challenging Thomas' schedule had to be forcefully addressed.

13. The 1992-93 labor agreement became effective April 4, 1992, but wage increases due under its terms were not paid until sometime in May of 1992. Shortly after the pay increases were implemented the Union became aware that Union represented reinstated employes were not receiving the wage increases they had expected. "Reinstated employe" can refer to a person who has left active State service for another job, to pursue further education, for personal reasons etc., but returns to active State employment, in a comparable position, within a period of time set by the Administrative Code. "Reinstated employe" can also refer to an employe who has left one classification for another, then returns within a period of time set by the Administrative Code. The Union grieved the payment of wage increases for such employes because the State's implementation of the 1992-93 labor agreement did not pay such employes all the wage increases which accrued

during the term of the agreement unless the reinstated employe was in pay status as of June 30, 1991. In early October of 1992, Robarts and Booth-Parks met with Sargeant and other DER representatives. They discussed a number of points including the reinstated employe grievance, and the Union's view that DER had changed established past practice regarding such payments. Sargeant informed Robarts that individual union members were individually contacting the administrative heads of DER about matters subject to collective bargaining such as wage increases and the pay due reinstated employes. Sargeant informed Robarts that he had indicated to DER administrators that the Union would approach collective bargaining in a cooperative manner and that the calls, which he viewed to be harassing, made him appear foolish. Sargeant became agitated during this meeting. In response to Robart's statement that DER had upset established practice regarding reinstated employes, Sargeant stated that the Union had bargained too long in the prior set of negotiations, and DER, tired of being jerked around by Union leadership, determined to change the practice. At roughly this period of time, Sargeant assisted Robarts in resolving a grievance at UWHC involving a voluntary demotion. Sargeant, in February or early March of 1993, directed Kathy Kopp, a DER Compensation Analyst, to prepare sample wage implementation language for the Union's review. Sargeant and Kopp offered to meet with the Union to explain such language in an attempt to head off disputes regarding the implementation of any wage increases agreed to in the bargaining for a 1993-94 labor agreement. The Union initially accepted this offer. Two meetings were set, but were cancelled at the Union's request.

14. Article V, Section 1, Subsections A through C of the 1989-91 labor agreement reads thus:

> A. Effective the first day of the pay period following the effective date of this Agreement, the Employer will increase the then current wage rate of each employe who has completed the original six month probationary period by . . .
>
> B. Effective July 1, 1990, the Employer will increase the then current wage rate of each employe who has completed the original six month probationary period by . . .
>
> C. Effective March 10, 1991, the Employer will increase the then current wage of each employe who has completed the original six month probationary period by . . .

Bargaining for the 1992-93 agreement was long and acrimonious. In a proposal dated December 19, 1991, the State made an offer it indicated was its final position. The wage implementation language in that offer referred, in several provisions, to "the current base wage rate of each employe" or an equivalent expression. The Union advised the State that it considered this position to incorporate seniority based wage increases which would have accrued to employes

between that offer and the State's prior offer of June, 1991. The State responded by altering the reference to "the current base wage rate of each employe" to the "6-30-91 base wage rate of each employe." Any equivalent expressions were similarly amended. The Union submitted that offer to its membership for a ratification vote, without any bargaining committee recommendation. The membership voted to ratify the agreement. Prior to the ratification vote, UWHC management issued its employes a worksheet indicating "the impact of the proposed contract on your pay." At least one of those worksheets assumed reinstated employes would receive all contractual wage increases whether or not the increase accrued to the unit while the individual was in active status. Geri Cross-Madsen, a Nurse Clinician III, reinstated to UWHC in January of 1992. She was informed during the recruitment leading to her reinstatement, that negotiated increases would apply to her. UWHC management views paying reinstated employes the increases which accrue in their absence from active status as a useful recruitment tool. A number of UWHC managers actively support the grievance initiated by Cross-Madsen concerning pay for reinstated employes. UWHC has, under past agreements, paid reinstated employes as the Cross-Madsen grievance seeks.

15. Kopp drafted the implementation bulletin upon which DER bases its denial of the Cross-Madsen grievance. That bulletin is dated April 2, 1992, and states, among other points:

> To be eligible for the General Wage Adjustment, an employe must have been in the Patient Care bargaining unit on both June 30, 1991 and April 5, 1992 OR be in the bargaining unit on April 5, 1992 and have been restored to a position in the bargaining unit between June 30, 1991 and April 5, 1992, inclusive.

She reviewed the administrative code and the labor agreement in drafting the bulletin. She discussed the bulletin only with Bau and her immediate supervisor before issuing it. Sargeant and Kopp offered to meet with the Union to discuss wage implementation language in an effort to head off any dispute in the 1993-94 bargaining similar to that involving reinstated employes under the 1992-93 agreement. Kopp drafted sample language and she and Sargeant offered to meet with the Union to discuss it. The Union declined this offer. Under ground rules for the 1993-94 bargaining agreed to by the State and the Union, the parties started negotiations in early April. The State agreed to pay up to sixteen Union negotiators for twenty-four bargaining sessions.

16. Thomas' refusal to speak with Dittman as Schepp's representative has a reasonable tendency to interfere with employe exercise of lawful, concerted activity. Thomas' and DOC management's handling of Schepp's and of Janssen's discipline for sick leave abuse/insubordination was motivated in part by hostility toward Schepp's and Janssen's exercise of lawful, concerted activity.

CONCLUSIONS OF LAW

1. Employes represented by the Union are each an "Employe" within the meaning of Sec. 111.81(7), Stats.

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

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

4. DER's refusal to respond to the Union's December 7, 1992 fax and to the Union's requests for the information on which Sargeant based his statement that the State predominately recruits patient care professionals from an intra-State pool of applicants violates Secs. 111.84(1)(a) and (d), Stats.

5. Thomas' refusal to treat Dittman as Schepp's representative had a reasonable tendency to interfere with the rights stated by Sec. 111.82, Stats., in violation of Sec. 111.84(1)(a), Stats.

6. DOC's discipline of Schepp and Janssen for sick leave abuse/insubordination was motivated, in part, by hostility toward each employe's exercise of rights stated by Sec. 111.82, Stats., and thus violated Secs. 111.84(1)(a) and (c), Stats.

ORDER 2/

2/ 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

(footnote continued on Page 31)

1. Sargeant is dismissed as an individually named Respondent.

2. Allegations of any violation of Sec. 111.84(1)(e), Stats., are dismissed.

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

a. Cease and desist from:

(1) Refusing to treat a fax as an appropriate means for the Union to make an information request.

(2) Refusing to promptly respond to Union requests for information. Such a response need not supply information for overbroad Union requests, nor for information which is not relevant and reasonably necessary for collective bargaining purposes, nor for requests not made in good faith. However, if the State does not intend to supply the requested information, the State must provide the Union with a prompt response stating its refusal and the basis for it.

(3) Refusing to discuss grievances or potential grievances with authorized Union representatives.

2/ (footnote continued from Page 30)

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).

(4) Disciplining Union represented employes at WCI based in part on hostility toward such employes' exercise of 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) Make whole with interest 3/ Schepp and Janssen for the wages and benefits each would have earned but for their discipline for sick leave abuse/insubordination. Each employe's personnel file(s) shall be expunged of any reference to the discipline. If an arbitrator has found, or finds after the issuance of this Order, that DOC had just cause to discipline Janssen, a copy of that award may be included in her personnel file(s).

(2) Notify Union-represented employes employed at WCI, 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.

3/ The applicable interest rate is the Sec. 814.04(4), Stats., rate in effect at the time the complaint was initially filed with the agency. The instant complaint was filed on May 25, 1993, and refiled on July 9, 1993, when the Sec. 814.04(4) rate was "12 percent per year." See generally Green County, Dec. No. 26798-B (WERC, 7/92).

(3) 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 January, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

APPENDIX A

NOTICE TO EMPLOYEES
OF THE WAUPUN CORRECTIONAL INSTITUTION
REPRESENTED BY DISTRICT 1199W/UNITED PROFESSIONALS
FOR QUALITY HEALTH CARE

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, its Department of Corrections and its Waupun Correctional Institution, notifies you as follows:

1. We will not discourage membership in District 1199W/United Professionals for Quality Health Care, by refusing to deal with their authorized representatives as the representative of individual employes of the Waupun Correctional Institution.

2. We will not discipline any employe of Waupun Correctional Institution based in part on their assertion of rights protected by the State Employment Labor Relations Act, such as the right to file a grievance.

3. We will make Patty Schepp and Mary Janssen whole for discipline which has been found by the Wisconsin Employment Relations Commission to have been based in part on 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

THE PARTIES' POSITIONS

The Union's Initial Brief

The Union's initial focus is on the State's "dramatic change in the payment of wages of a segment of the bargaining unit." This change was, the Union contends, attributable to the State's view that "the Union had bargained too long in negotiating the prior contract." The segment of the unit affected was "reinstated employees" at the UWHC. Contending that "the well-established practice at UWHC was that reinstated nurses were given whatever pay increases other nurses had received so reinstated nurses were caught up with other employees," the Union concludes that the State's abrogation of this practice violated both Secs. 111.84(1)(a) and (c), Stats.

The Union's next major line of argument is that the state engaged in a pattern of interference and retaliation regarding the terms and conditions of employment of various employes who engaged in concerted activity. More specifically, the Union points to employes at WCI "who vigorously supported Patty Schepp's grievance and arbitration . . . who objected to and filed a series of grievances against local management, and who were supportive of the Union during the course of bargaining." These employes "and only those employees," according to the Union, "began to experience drastic, adverse changes in working conditions."

The specific conduct pointed to by the Union includes: Sargeant's threats of retaliation against the Union and Schepp if the Schepp arbitration was litigated; Sargeant's promulgation of bargaining rules forbidding the discussion of grievances during dates reserved for contract negotiations; DER and DOC's retaliation against WCI employes for filing grievances regarding scheduling practices and protesting the slow pace of contract negotiations; DER's and DOC's "particularly intense" retaliation against Mary Janssen; and the State's conduct to prevent Dicks from actively representing WCI employes.

The Union's next major line of argument is that the State consistently failed to provide "relevant and reasonably necessary" information demanded "in good faith" by the Union. More specifically, the Union urges the State ignored, or unreasonably delayed its response to the Union's December 7, 1992 request for budget information; to the Union's request for recruitment information supporting Sargeant's position that the State overwhelmingly recruited nurses from within Wisconsin; to the Union's request for safety information concerning DOC employes; and to the "internal survey on all job classifications" which had been "promised" to the Union during the negotiations for a 1991-93 contract.

The Union's next major line of argument is that DER engaged in a pattern of refusing to "process grievances and arbitrations in a timely and reasonable manner." Specifically, the Union asserts DER representatives reneged on settlements reached in the Riggert and Muehl grievances. Beyond this, the Union contends the State refused to arbitrate grievances due to budgetary restrictions. If there was a budgetary problem, the Union asserts "the State had an obligation to adjust their budgets, shift funds from one program to another, or allocate additional resources in order to continue to fulfill their obligations under the law."

The Union concludes that the State has violated Secs. 111.84(1)(a),(c),(d) and (e), Stats., and requests that "the Examiner issue an Order granting all forms of relief requested in the Complaint, including whatever additional relief the Examiner deems to be just and proper under the circumstances."

The State's Response

The State contends that Sec. 111.07(14), Stats., bars consideration of the Union's assertion that it violated the rights of reinstated employes to wage increases implemented while they were not actively employed by the State. Relevant contract language and the bulletin which effected it precede the May 25, 1993 filing of the complaint by more than one year, thus making the rights of reinstated nurses an issue "the Examiner is without jurisdiction to resolve."

Even if the allegations were timely, the State asserts the allegations of the complaint on this point lack merit. That Sargeant had nothing to do with the issue is, the State contends, apparent. Beyond this, the State contends that even if Sargeant's comment that the Union had "bargained too long" was relevant, it fails to establish any violation of SELRA since:

1. Complainant could have had different contract language but wouldn't consider it.

2. The contract language was agreed to by Complainant.

3. The contract language was a departure from the language of the previous contract and Complainant knew it.

The State concludes the record will not support any of the Union's allegations concerning the rights of reinstated employes.

The State then contends that it did not violate any of the rights of WCI employes regarding

the preparation of work schedules or the processing of grievances. More specifically, the State contends that Sargeant accurately concluded that the Weekender grievance was "garbage," since it flew in the face of clear bargaining history. This is confirmed, the State avers, by the Arbitrator's conclusions. That Sargeant proposed a settlement essentially tracking the Arbitrator's conclusions establishes, the State concludes, the absence of any improper intent on his part.

Beyond this, the State contends there was no broader intimidation of WCI employes. Thomas knew nothing of the grievance, and thus couldn't have crafted a schedule to retaliate for its assertion, according to the State. The State asserts that any schedule changes at WCI arose solely for bona fide staffing shortages, and coincided with the Schepp arbitration simply because the staffing shortages came to a head at about the same time as the Schepp arbitration. The State summarizes the record on this point thus:

> The record in this regard shows no retaliation whatsoever. The . . . schedule changes . . . were necessary because of "person power" shortages. The record also shows that Respondents had the right to make schedule changes. The record further shows that Respondents' schedule changes had no effect on the two male nurses but neither did the changes suggested by Complainant. And the record shows that management personnel, as high up as the Department Secretary, interceded on behalf of Patty Schepp . . .

The State then denies that any coercion, by administrative personnel, was directed specifically at Mary Janssen. Union assertions ignore, according to the State, that Janssen "openly flouted management when she stated . . . that she was not going to work scheduled shifts during the Good Friday/Easter weekend." Beyond this, the State asserts that the evidence will not support a conclusion that Thomas or Kestin acted toward Janssen in any fashion not warranted under then-existing conditions.

Noting that the "right to union representation is not unrestricted," the State argues that "the labor agreement is controlling" on the scope of the rights asserted in this case. A review of the record establishes, the State contends, that "Ms. Dicks did not meet the contractual language" and that "there was a contractually-designated grievance representative in attendance" at all relevant times. The State concludes that "there was no violation of SELRA."

The pattern of conduct the Union attributes to the State ignores, according to the State, that "(u)nit employes at Waupun intentionally challenged and baited Ms. Thomas to thwart her efforts to put management back in charge."

While acknowledging that there "is no question that a union is entitled to information

necessary for collective bargaining and/or contract administration", the State argues that it has not committed any violation of SELRA in response to the Union's various requests for information. The sheer volume of requests suggests, according to the State, "notice of excess" and "an ulterior motive -- requests for harassment or confrontational purposes." The State asserts that the requests, being made both as SELRA and open records requests, further confused the process. Regarding the December, 1992 request, the State notes it appropriately sought reimbursement for copying costs. Nor does Sargeant's delay in responding indicate any intent to punish the Union, according to the State. Beyond this, the State asserts it fully met the Union's request for recruitment information. That Sargeant did not promptly reply for the requested safety information manifests, according to the State, "a miscommunication between Respondent DOC and DOC's own staff." Noting the Union received a written apology on the point, coupled with the submission of the requested data, demonstrates, the State concludes, the absence of any legal violation. Regarding the "internal survey," the State argues:

> Complainant has failed to prove that there was a meeting of the minds for Respondents to conduct an "internal survey." The language of the labor agreement is absolutely clear -- Respondents were to conduct a "wage/market survey" "during the life of the Agreement" . . . There is no dispute that Respondents did conduct such a survey during the "term of the Agreement" and did present the survey results to Complainant during the "term of the Agreement" . . .

It follows, the State concludes, that it committed no violation of SELRA.

That Dicks and Bau disputed the terms of grievance settlement proposals establishes only that there was never an agreement for the State to renege on. In the absence of clear proof of a "meeting of the minds" on the grievance settlements, the State concludes that there can be no finding of any legally improper conduct on its part.

That the State postponed hearing various grievances until the start of a new fiscal year reflects, to the State, no more than public sector budgeting realities. According to the State, the delay caused no more than a minor scheduling inconvenience.

Viewing the record as a whole, the State concludes that the litigation reflects no more than the deterioration in a relationship which Sargeant initially hoped would be productive. That deterioration, according to the State, is attributable to the Union's confrontational tactics, not to unfair labor practices by the State.

The State asserts that however the record is viewed, Sargeant "was at all times acting as

Chief Negotiator and Chief Spokesperson for the State." It follows, according to the State, that he should be dismissed as a named respondent. The State concludes that the complaint should be dismissed and that "Respondents be awarded reasonable attorneys fees and costs."

The Union's Response

The Union asserts that the State should be estopped from asserting the complaint does not timely challenge the State's conduct regarding reinstated employes. The implementation bulletin was unilaterally promulgated, the Union notes, and the underlying contract language was susceptible to interpretations other than the State's. More significantly, the Union notes that it was not put clearly on notice that the State would not rectify the denial of payment until October of 1992. Sargeant's motivation in orchestrating this denial is, the Union asserts, apparent. Beyond this, the Union argues that the State's implementation of the contract language flies in the face of established past practice, the Administrative Code, and the SELRA. That the State did not object to the receipt of evidence bearing on the application of the collective bargaining agreement to this issue makes it appropriate, according to the Union, to consider the State's conduct under Sec. 111.84(1)(e), Stats.

That an Arbitrator entered findings consistent with some of Sargeant's statements concerning the Weekender grievance is only marginally relevant to the complaint's allegations, the Union argues. The State's inordinate attention to this point obscures, the Union contends, that Sargeant made intimidating remarks concerning the litigation to Robarts and to Dicks. Sargeant's testimony, according to the Union, consistently understates the level of antagonism he bore toward the Union.

Beyond this, the Union contends that Thomas acknowledged the role Schepp's grievance played in her withholding of Schepp's pay sheets. Further evidence demonstrates, the Union argues, that Schepp and Janssen were each disciplined, at least in part, for their activity in challenging Thomas' promulgation of work schedules. Sargeant's overbroad banning of grievance processing during negotiations only exacerbated the difficulties at WCI.

The Union denies that Janssen ever represented she would not report for work over the Easter weekend. There was, the Union concludes, no basis for the State's "most extraordinary" treatment of Janssen, including the excessive punishment for her use of sick leave; Thomas' filing of a complaint with the Board of Nursing; and Kestin's verbal abuse of Janssen during a grievance meeting. The State's purported concern for her abuse of sick leave and for her health are, to the Union, contrivances.

Janssen's right to the use of an advocate of her choice is, according to the Union, both contractual and statutory. The merit of its view of the contract is, according to the Union, demonstrated by Ezlarab's agreement to postpone the meeting Thomas "was vindictive enough to hold . . . anyway."

Contrary to the State's protestations, the Union asserts that Thomas was not attempting to assert basic management rights over the WCI work place. The Union contends that she acted to crush the legitimate and concerted reaction to the extremes of her use of administrative power.

The Union then contends that the State has offered no persuasive rebuttal to the Union's allegations that it failed to timely produce information relevant and reasonably necessary for collective bargaining. Sargeant's refusal to respond to the December 7, 1992, fax is, according to the Union, baseless. Beyond this, the Union notes that recruitment and safety information was only belatedly provided after the Union had sought the information through non-DER sources, including the filing of this complaint. A review of the record establishes, according to the Union, that the State was well aware of the survey the Union sought, and has simply refused to comply with its known obligation to prepare and distribute it.

That "only a few grievance arbitrations" may have been affected "by the State's blanket refusal to proceed to arbitrate for more than three months" misses the point of this litigation, according to the Union. The arbitration process is sufficiently bogged down without this short-sighted policy. To accept the State's defense of its actions only encourages the State to use budget policy as a convenient dodge for a statutory obligation.

The State's contention that the Union caused the confrontation characterizing this litigation is, the Union contends, belied by the fact that the State has not filed any allegation of unfair labor practices against the Union and by the State's failure to submit relevant evidence.

Dismissing Sargeant as an individual has, according to the Union, "no legal basis." Since Sargeant's individual conduct is at the root of much of the complaint's allegations, the Union urges that it "is appropriate that he individually, as well as DER and DOC, be found to have violated SELRA."

DISCUSSION

Sargeant's Status As An Individually Named Respondent

Throughout the processing of the complaint the State has moved to dismiss Sargeant as a Respondent. The motion was denied, as a matter of pleading, because identifying him as a party meant only that he acquired individual rights of participation in the litigation 4/ and that the Union viewed him to have, potentially, independent liability for his conduct. Permitting the Union to name him a Respondent recognized the liberal joinder of parties anticipated by the SELRA, 5/ and set the evidentiary stage for whether independent liability could be proven.

The record is closed and the issue is no longer whether Sargeant, as a matter of pleading, should be a named Respondent. The State contends he has acted only as its agent.

4/ See City of La Crosse et al., Dec. No. 17076-B, 17084-C (WERC, 4/82).

5/ See Sec. 111.07(2)(a), Stats., made applicable by Sec. 111.84(4), Stats.

The State's motion is persuasive. Sargeant has never asserted an independent interest in the litigation. More significantly, the record does not establish that the allegations against him point to conduct on his part other than as chief spokesman for DER. The Union asserts that his conduct is at the root of many of its allegations. This can be granted, but does not address the motion. The issue is not whether the Commission can remedially direct Sargeant to take corrective measures for his conduct. This authority is apparent 6/, but operates toward Sargeant as the State's agent. Including him as a party presumes that the Commission could take remedial action against him personally. Put more directly, it presumes that if monetary make-whole relief is appropriate, the relief could be taken from his individual assets. Since there is no basis to conclude Sargeant acted toward the Union in any other capacity than as the State's agent, there is no basis to continue his status as a named Respondent.

General Legal Standards

The complaint alleges State violations of Secs. 111.84(1)(a), (c), (d) and (e), Stats. Subsection (d) enforces the duty to bargain in good faith. The duty is broad, and the standards which define it are fact-driven. This makes it impossible to state a standard before examining a specific allegation. General considerations do govern the remaining subsections.

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." Sec. 111.82 guarantees State employes the right to engage in certain "lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection."

The Wisconsin Supreme Court has observed that:

> It is helpful to compare the wording of MERA and SELRA, whereupon we find that the rights guaranteed to employees under these acts are identical . . . It would be illogical to apply a different test to MERA than SELRA merely because a different group of protected persons are involved (municipal employees versus state employees). 7/

6/ Sec. 111.07(4), Stats.

7/ State of Wisconsin, Department of Employment Relations v. Wisconsin Employment Relations Commission, 122 Wis.2d 132, 143 (1985).

This observation has been reflected in the test applied by Commission examiners to determine an independent violation of Sec. 111.84(1)(a), Stats., for the test parallels that used to determine an independent violation of Sec. 111.70(3)(a)1, Stats. The test requires that the Union demonstrate that complained of conduct was "likely to interfere with, restrain or coerce" Union-represented employes in the exercise of rights protected by Sec. 111.84(2), Stats. 8/ This is an objective test which does not require proof that the State intended to interfere with the exercise of protected rights. 9/

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." To establish a violation of this section, the Union must establish (1) that Union represented employes engaged in activity protected by Sec. 111.82, Stats., (2) that the State was aware of the activity and was hostile to it, and (3) that the State acted toward those employes, based at least in part, on that hostility. 10/

Sec. 111.84(1)(e), Stats., makes it an unfair labor practice for the State to violate "any collective bargaining agreement previously agreed upon by the parties . . ." The Commission has, however determined that:

> (W)here 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(l)(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. 11/

8/ See State of Wisconsin, Department of Administration, Dec. No. 15945-A (Michelstetter, 7/79), aff'd by operation of law, Dec. No. 15945-B (WERC, 8/79); State of Wisconsin, Department of Health and Social Services, Dec. No. 17218-A (Pieroni, 3/81), aff'd by operation of law, Dec. No. 17218-B (WERC, 4/81); State of Wisconsin, Dec. No. 19630-A (McLaughlin, 1/84), aff'd by operation of law, Dec. No. 19630-B (WERC, 2/84); State of Wisconsin, Department of Health and Social Services (DHSS), Division of Corrections (DOC), Dodge Correctional Institution (DCI), Dec. No. 25605-A (Engmann, 5/89), aff'd by operation of law, Dec. No. 25605-B (WERC, 6/89).

9/ See The State of Wisconsin, Department of Industry, Labor and Human Relations, Dec. No. 11979-B (WERC, 11/75).

10/ 122 Wis.2d at 140.

11/ State of Wisconsin, Dec. No. 25281-C (WERC, 8/91) at 12.

The Commission has noted that this policy has exceptions including:

> instances where (1) the employe alleges denial of fair representation . . . (2) the parties have waived the arbitration provision . . . and (3) the party who allegedly violated the contract ignores and rejects the arbitration provisions in the contract. 12/

Application Of Governing Legal Standards To The Facts

As preface to the application of the law to the facts, it is appropriate to apply the Commission's standards governing the application of Sec. 111.84(1)(e), Stats., since they cut across all of the Union's allegations. The 1992-93 agreement was in effect at all times relevant here, and provided for grievance arbitration. While the Union notes some evidence on the grievances' merit has been brought into this record, neither party has waived the arbitration provision, nor has the State rejected it. There is, then, no basis for the assertion of Commission jurisdiction over the alleged violations of Sec. 111.84(1)(e), Stats. The Union has noted that the State was unwilling, at the close of the 1992-93 fiscal year, to arbitrate grievances. That allegation is relevant to allegations discussed below, but provides no basis for the assertion of Commission jurisdiction sought by the Union. Assertion of statutory jurisdiction outside of the exceptions recognized by the Commission only undermines hard-fought for contractual rights.

The remaining allegations are grouped by the general area of alleged improper conduct. Legal standards more specific than those stated above are subsumed in that grouping.

The Duty To Supply Information

The Commission has stated the standard governing union requests for information thus:

> Intertwined with the duty to bargain in good faith is a duty on the part of an Employer to supply a labor organization . . . upon request, with sufficient information to enable the labor organization to understand and intelligently discuss issues raised in bargaining . . . Information requested by a labor organization must be relevant and

12/ State of Wisconsin (Department of Health and Social Services), Dec. No. 20830-B (WERC, 8/85) at 9.

> reasonably necessary to its dealings in its capacity as the representative of the employes. 13/

Beyond this, "wage and related information is presumptively relevant so that the Union need not explain its specific need for such information." 14/ The Union's right to information is not, however, absolute, and is determined on a case-by-case basis as is the type of disclosure that will satisfy that right. 15/

As preface to applying these considerations, it is necessary to note that the duty to supply information flows from the duty to bargain. Thus, any violation of Sec. 111.84(1)(a), Stats., is derivative. Sec. 111.84(1)(c), Stats., is also relevant, if a refusal to supply information is based, at least in part, on anti-Union hostility. Sec. 111.84(1)(d), Stats., concerns will be addressed first.

The Union's allegations start with the December 7, 1992 request. The record establishes that Sargeant did not respond to the Union's original request, which was made by fax. As noted above, the duty to supply information is triggered by a good faith request. That the December 7, 1992 request was made by fax reflects the state of current technology, but has no bearing on the duty. The request was made, and the State did not respond. The failure to respond "will be equated with a refusal." 16/ The remedy for this refusal is a cease and desist order.

Beyond this, no violation of Sec. 111.84(1)(d), Stats., has been proven regarding the information sought initially by the December 7, 1992 letter. The Union received the data it sought. The Union has questioned whether it received the data with due promptness. The record shows, at most, the data was not received as quickly as the Union wished. There is no persuasive evidence any delay adversely impacted bargaining. More significantly, the Union has not established the material requested meets the "relevant and reasonably necessary" standard. How any of the requested data affected any bargaining proposal is undemonstrated. Bargaining had not, at this point, commenced. The State does not appear to have made a wage proposal, much less any claim of inability to pay. There was, then, no pending issue on the financial ability of the State to pay any Union offer.

The Commission has noted the State is not obligated "to turn over . . . to the union upon an

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13/ State of Wisconsin, Dec. No. 17115-C (WERC, 3/82) at 4-5.

14/ Ibid.

15/ Milwaukee Board of School Directors, Dec. No. 24729-A (Gratz, 5/88), aff'd Dec. No. 24729-B (WERC, 9/88).

16/ Dec. No. 24729-A at 10.

overbroad request to provide all information . . . which the employer . . . used in formulating its initial wage offer." 17/ This language is applicable here, for the State had yet to make an initial offer. The general background on the financial health of UWHC and the State sought in the December 7, 1992 letter was background for the Union's review of the upcoming negotiations. It was not, however, relevant to any demonstrated bargaining issue. That the Union may have been interested in the data for its own strategy can be granted. The data was, however, available to the Union through a Public Records request. The State was not, as a matter of their duty to bargain, obligated to supply the information. The request, in effect, treated DER as the compiler of data relevant to the Union's formulation of its own bargaining strategy. The duty to bargain does not stretch that far.

The Union's request for survey information concerned its belief that the State committed itself, under Article V, Section 5, to two surveys: one was a study of positions external to State service, one was a study of internal positions. The Union believed that Sargeant understood this throughout bargaining. Whatever the State committed to under Article V, Section 5, is, however, a matter of contract, not of the duty to bargain. The State has not prepared an internal study, and thus had no information to supply. The Union asserts Sargeant should have told them there was no internal study. At most, however, the message the Union contends Sargeant should have responded to is that the Union sought information regarding pending "surveys." That Sargeant understood the request for "wage/market surveys" as White's external analysis rather than as an external/internal analysis is, standing alone, less than convincing proof he misled the Union regarding the status of an internal survey. DER supplied the Union with the external survey as soon as it had been prepared, and before any other labor organization received relevant surveys. In sum, issues surrounding the compliance of the State with the survey or surveys mandated by Article V, Section 5, raise issues of contract interpretation, not of the duty to bargain.

Sargeant triggered the requests of February 23 and of April 26 by his remark that the State overwhelmingly recruited employes intra-state. The Union ultimately received the recruitment information it sought, except that Sargeant never confirmed that the Union had the data he based his remark on. The Commission addressed an analogous situation thus:

> (T)he State was not obligated to <u>prove</u> that its offer was fair, equitable or justifiable as the Union apparently demanded. If an employer merely relies on its general impression of the state of the economy, (etc.) . . . then a mere statement of same is sufficient and no production of materials is necessary. Nor is an employer obligated to turn over its file to the union upon an overbroad request to provide all information, documents and materials which the employer had used in formulating its initial wage offer. But when a

17/ Dec. No. 17115-C at 5.

> party, as here, conducts a wage survey and then informs the other party that it relies, at least in part, on such survey in justifying its wage offer, the survey since it is tied to the wage offer, becomes relevant to the negotiations and the party is obligated to supply such information upon request. 18/

Sargeant's comment has not been related to any bargaining proposal. It could, however, reasonably have been viewed as a statement of the State's view of the "reality" underlying its analysis of any wage proposal. This, coupled with the State's prior actions regarding hiring employes above the minimum rate, does make recruitment information relevant and reasonably necessary for bargaining. The two formal requests are arguably, however, overbroad and premature. As noted in the passage above, the State is not required to prove its position. The February and April appear to seek such proof. Only Paragraph 3 of the February 23 letter is directly related to Sargeant's comment. Against this background, had he responded that the comment was anecdotal, or based on his personal perception, no further information disclosure would have been necessary. He did not, and the Union thus became entitled to know the basis for the potentially significant comment. The Order addresses this by incorporating into the cease and desist order the need for a prompt response to any request for information.

The request for Workers Compensation information reflects information required by the 1992-93 labor agreement. This arguably poses only an issue of contract interpretation, but the information is also arguably necessary and relevant to then on-going bargaining on safety issues. The information thus poses an issue under the statutory duty to bargain. While the Union was put to an inordinate delay in receiving the information, the evidence shows the delay was traceable to a good faith mistake. The Union received the data when the mistake was discovered. There has been, then, no proven violation of the duty to bargain.

The final area of information disclosure concerns "DOC staff allocation information." The record establishes that the Union was informed initially that its request would result in a massive and expensive computer print-out. After receiving this information, State and Union representatives worked on a means to exchange the information in a more reasonable form. There is no basis to support a finding that the State violated the duty to bargain regarding the disclosure of this data.

Nor will the record support a finding that the State's conduct violated Sec. 111.84(1)(c), Stats. Since then-ongoing collective bargaining reflects concerted activity known to the State, the issue posed is whether any delay in disclosing information or responding to the Union is traceable, in part, to hostility toward Union bargaining efforts. The Union points to a remark by Sargeant that he could make it easy or hard for the Union to obtain information. That remark could point toward

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18/ Dec. No. 17115-C at 5.

proscribed hostility, or could merely reflect that bargaining works better when parties cooperate.

That the Union has not linked the remark to conduct indicating proscribed hostility makes it impossible to find a violation of Sec. 111.84(1)(c), Stats. That the State complied with overbroad information requests significantly undercuts the Union's assertion of proscribed hostility. That DER did not seek to have the Union justify the breadth of its requests underscores this point. 19/ That the inflammatory reference in Robarts' April 26 letter did not halt the flow of information also undercuts the Union's assertions. The underlying validity of the references is irrelevant here. If the underlying incident was true, the reference was superfluous. If the underlying incident was false, the reference was in bad faith. In either event, DER could have made an issue of the reference, thus obstructing the flow of information. That it did not points to good faith on its part. Beyond this, the difficulty in obtaining the Workers Compensation data supports a finding that the State acted, if not efficiently, in good faith. Even if Kestin's and Sargeant's written apology is ignored, it is impossible to account for Sargeant's letter to Risser's office under the Union's theory. That letter is consistent with the information Sargeant conveyed to the Union, and consistent with a conclusion that Sargeant was caught in a good faith mistake. It is not apparent what DER could hope to gain by misleading an official from a legislative body DER must answer to.

The Union has contended that it is entitled to the information it sought at no cost. This contention is not supported under Commission case law:

> Because the (union) requested the (employer) to compile certain relevant information to assist it in collective bargaining and contract administration, the (employer) could in good faith require the Union to bear a reasonable charge to cover the costs of gathering and compiling the data. 20/

The issue of costs is potentially complex, but those complexities are not posed by the Union's blanket assertion that any cost for the disclosure of information is inappropriate. For example, the Workers Compensation information required under the contract could, arguably, be supplied

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19/ Where the Union seeks information beyond that relevant to wages and benefits, "the burden is on the exclusive representative in the first instance to demonstrate the relevancy and necessity of said information to its duty to represent unit employees." Dec. No. 24729-A at 10.

20/ Outagamie County (Sheriff's Department), Dec. No. 17393-B (Yaeger, 4/80) at 4, aff'd by operation of law, Dec. No. 17393-C (WERC, 4/80). See also Racine Unified School District, Dec. No. 23094-A (Crowley, 6/86), aff'd by operation of law, Dec. No. 23094-B (WERC, 7/86).

without cost if it is assumed necessary costs were incorporated in the bargaining for the governing contract provision. However, the costs of compiling data for negotiations poses a dissimilar issue. In this case, the Union's manifold requests put DER in the position of compiling a considerable body of data for the Union. That data was unrelated to a specific bargaining proposal of joint concern. Much of the data was requested for no more than

background research for the Union's own proposals. As noted above, DER could have assessed the Union a reasonable charge for the costs of the compilation effort. Any other conclusion would afford the Union an unchecked right to push its data compilation costs onto the State. This makes the right to compel information less a right than a weapon.

The Union has noted it was able to secure certain information at no cost. This may reflect the diligence or persuasive power of the requesters, but does not affect the issues posed here. If the State provided information to the public or to other unions at no cost, then charged the Union for a similar request, the discrimination involved would implicate the Sec. 111.84(1)(c), Stats., analysis. No such allegation has, however, been proven. In the absence of such proof, the Union's blanket assertion that no cost may be levied against it must be rejected.

Before closing, it is necessary to note that the Commission does not have independent jurisdiction to enforce Wisconsin's Public Records Law. 21/ The discussion above addresses only SELRA based issues.

The State's Refusal To Arbitrate

DER, in the final quarter of the 1992-93 fiscal year, informed the Union it could not fund arbitrations until after the close of the fiscal year. DER made a similar announcement to each of the unions it bargains with. The Union does not challenge DER's contention that budgeted funds for arbitration were fully encumbered. As a matter of fact, then, it is impossible to find DER's conduct violated Secs. 111.84(1)(a)(c) or (d), Stats.

The Union's allegations operate not, however, as a matter of fact, but of law, focusing primarily on Sec. 111.84(1)(e), Stats. To illustrate, the Union requested written proof of DER's assertion of a fiscal plight, but ignored the proffered information, since it was irrelevant to the Union's position that DER was obligated to arbitrate without regard to if or why the budgeted funds had been exhausted.

The Union forcefully notes that upholding the State's position may have dire consequences. The most dire implications asserted by the Union are not, however, posed on the current facts. DER did not refuse to arbitrate the grievances, but refused to arbitrate them until funding from its next fiscal year became available. At the time of this refusal, it is unlikely that any of the parties to the arbitration could have scheduled an arbitration prior to the close of the 1992-93 fiscal year. Dicks estimated that perhaps two cases were affected by the delay.

21/ Moraine Park Technical College et al., Dec. No. 25747-B (McLaughlin, 3/89), aff'd Dec. No. 25747-D (WERC, 1/90).

The consequences pointed to by the Union do not warrant adopting its position. The Union assumes that its position has no adverse consequences, but this is not necessarily true. Its position on this point parallels its position that no costs should be levied for data compilation. In each case, however, the unfunded liability the Union creates can turn a right into a weapon. The cost of arbitration, as any other cost, can be used by employers, unions or employes as a self-help tool. 22/ The statutory duty to bargain and to arbitrate do not contemplate the use of the arbitration process as anything other than as a forum for dispute resolution.

Nor does rejecting the per se violation approach of the Union leave employes without a contract enforcement forum. A refusal by DER to arbitrate makes the forum of Sec. 111.84(1)(e), Stats., available to the Union. 23/ Whether DER agrees to arbitrate or not, a contractual dispute can be heard.

In sum, DER's refusal to arbitrate did not violate Secs. 111.84(1)(a)(c)(d) or (e), Stats. Enforcement of the duty to arbitrate cannot be applied as an unrestricted right, but must be addressed on the facts of each case.

The Riggert/Muehl Settlements

Without belaboring the standards for violations of Secs. 111.84(1)(a)(c) and (d), Stats., it can be stated that none of these subsections is violated by a good faith disagreement. The issue posed here is whether the State acted in bad faith on two settlements.

The Union's attempt to portray the State's conduct as part of a wide ranging effort to punish the Union for its bargaining conduct is unpersuasive. Each settlement unravelled at a point when bargaining on the master contract was still in preparatory meetings. No link between these settlements and bargaining is apparent. Bau was DER's spokesman for the 1992-93 negotiations, and arguably could have brought the acrimony from those negotiations into his processing of these grievances. Even if this is the case, treating his unravelling of the Riggert settlement as bad faith ignores his settlement of three other grievances arising at the same time. Similarly, the Union unpersuasively isolates Muehl as bad faith conduct by ignoring the Hubbard settlement. The Union persuasively notes Bau's insertion of Paragraph 3 in his February 23 draft of the Riggert settlement "reached" to a point he could not have reasonably expected the Union to follow. Here too, however, the Union unpersuasively points to unprovoked bad faith on Bau's part by ignoring that Dicks' inadvertent proofreading error could reasonably have been perceived by Bau as an unacceptable "reach."

22/ Cf. Mahnke v. WERC, 66 Wis. 2d 524 (1975). A union's duty to fairly represent employes does not, standing alone, require it to arbitrate grievances without regard to cost.

23/ See authority cited at Footnote 12/ above.

The record will support no finding beyond a good faith disagreement between Bau and Dicks on each grievance.

DER And DOC Conduct Toward Nurses At WCI

Thomas' refusal to deal with Dittman as Schepp's representative poses no significant factual or legal issue regarding an independent violation of Sec. 111.70(3)(a)1, Stats. Her refusal to deal with Dittman undercut any significance to Union representation. Schepp could reasonably have perceived Union assistance as ineffective, thus reasonably tending to discourage her from the use of her bargaining agent. That difficult contract negotiations were ongoing underscores the point. Other union members could reasonably have perceived Thomas' action as an object lesson in the futility of using the bargaining agent.

DOC's handling of Dicks' attempt to represent Janssen arguably poses potentially significant issues of independent violations of Sec. 111.84(1)(a), Stats. Those issues, will not, however, be addressed here. The parties' labor agreement addresses representation in the disciplinary process. Agreement provisions must be respected. Differences over the scope of those rights should be left to the forum selected by the parties. 24/ At a minimum, it should be noted that SELRA does not specifically address issues of whether an employe is entitled to delay investigatory proceedings to secure an advocate of the employe's choice. This is, presumably, why parties negotiate specific rights of representation. The statutory rights guard the institutional relationship by which more specific rights may be created.

That Sec. 111.84(1)(a), Stats., is derivatively violated when a Sec. 111.84(1)(c), Stats., violation is proven provides a means by which the Union's allegations can be addressed without interfering with a contractual determination of the scope of Janssen's right to select an advocate. DOC's refusal to delay the investigatory process to permit Dicks to advocate for Janssen thus becomes relevant not as an issue of representation, but as evidence relevant to DOC motivation toward Janssen.

The dispute on the application of Sec. 111.84(1)(c), Stats., is brought to a focus by Janssen's and Schepp's discipline. Janssen's poses more difficult points, since she played a key role in it. Her sick leave abuse was, in DOC's view, as insubordinate as her conduct regarding the interrogatories. That her conduct impacts Work Rule 1 cannot be persuasively denied. From April 5 through April 12 she turned the signing of interrogatories into an adventure. Whether or not her conduct was insubordinate, it was negligent. More significantly, the record establishes she told DOC administration she would not work the Easter weekend. She acknowledges this, but denies

24/ This is not an issue of deferral, see Dec. No. 25281-C at 12.

threatening to use sick leave to cover the absence. The distinction, if any, is not significant on this record. While the record may be less than definitive on precisely what words she used in advising DOC she would not work over the Easter weekend, it establishes she refused to work repeatedly and forcefully. The strongest indicator of this is her own testimony. She testified that she was pleased to see Thomas come to WCI, then testified that within a short time, Thomas was badgering her about not working the Easter weekend. It is unnecessary to credit Thomas' testimony to note that Janssen's provides no explanation of how Thomas came to believe her refusal to work was worth discussing.

Other witness testimony establishes the conflict between Thomas and Janssen was a mutual effort, and reinforces a conclusion that Janssen did make inflammatory statements to DOC management. Other Unit employes informed Janssen of the schedule changes affecting her Easter weekend because they knew she would be upset. Schepp confirmed that she offered to cover Janssen's weekend shifts. The Union's avowed and urgent interest to have a new schedule in place before the Easter weekend is difficult to understand without reference to the significance of the weekend to Janssen. In sum, the weekend was significant to Janssen, whose testimony treats the point as if only Thomas was concerned about it. It is a more persuasive reading of the evidence to conclude that Janssen and other Unit employes viewed the schedule changes as an outrage. There is no persuasive evidence Janssen responded to this outrage with less than a counter-attack.

The May 7 meeting at WCI brought the scheduling and disciplinary matters to a head, and serves as a starting point to examine DOC's motivation in disciplining Schepp and Janssen. The Union portrays the meeting as the culmination of a pattern of discrimination flowing from the Weekender grievance and traceable to State hostility toward the slow progress of negotiations. This view is without persuasive evidentiary support.

There is no link between the Weekender grievance and Thomas' work schedules. Thomas, a DOC employe, had no demonstrated personal or institutional link to Sargeant, a DER employe. The Union has not shown Thomas knew anything about the Weekender grievance. How the schedules could be considered retaliation for the grievance is not apparent. Against this stands undisputed evidence of unplanned for, if known, vacancies in Unit staffing, and Thomas' lack of experience with Unit staffing.

Nor has the Union demonstrated Sargeant's anger toward the Weekender grievance manifested proscribed animus. It is apparent Sargeant thought Robarts' assertion of the grievance undercut her credibility as a negotiator, since she was a player in the bargaining history he thought undercut the grievance's merit. This anger led Sargeant to brand the grievance "crap" etc. That the Arbitrator's award confirmed his view of the impact of bargaining history establishes his opinion was more than a pretext. Robarts did not share his view of bargaining history. The comparative merit of these conflicting views is irrelevant here. The issue is Sargeant's good faith. What hostility the Union has demonstrated is personal between Sargeant and Robarts, not institutional between Sargeant and the Union, as Sec. 111.84(1)(c), Stats., requires.

Nor does Sargeant's conduct at the grievance hearing support a finding of proscribed hostility. Sargeant offered to settle the grievance along lines ultimately sketched by the Arbitrator. That he warned Dicks and Schepp that DER could or would appeal the grievance, and that he highlighted to Schepp that she, unlike the advocates, would have to live in the work place aftermath of the arbitration affords no reliable indication of anti-Union hostility. The statements are no more than factual. Litigation seldom creates warm feelings between litigants. To find proscribed hostility based on Sargeant's settlement statements would limit the range of allowable speech in bargaining contexts to the point that discussion would be barren.

Nor can the Union's assertion of broad anti-Union animus based on then-ongoing bargaining persuasively explain the scheduling changes. What DER gained at the bargaining table, in talks affecting over one-thousand employes spread throughout Wisconsin, by altering the schedules of a handful of nurses at WCI is not apparent. The Union points out that the schedule alterations did not affect Smith or Edwards, the only two Unit nurses who did not testify at the Weekender grievance hearing. This ignores that Smith was named as a grievant, and that the Union's proposed schedule, like Thomas', did not alter Smith's or Edwards' hours.

The May 7 grievance meeting does not, therefore, reflect the culmination of a pattern of discriminatory conduct based on then on-going negotiations. It sets the scene, however, for an analysis of the discipline meted to Schepp and Janssen.

Testimony of Union witnesses that Kestin was aggressive toward Janssen can be accepted, but does not establish that Kestin somehow berated Janssen into a collapse. Dicks' testimony notes that Kestin reacted in surprise to the facts surrounding Schepp's case, and sought to distinguish it from Janssen's. This reliably accounts for a point apparent from each testifying witness -- Kestin was prepared to forcefully address a situation perceived by DOC as an insurrection. The stress from this encounter is apparent from any account of the meeting. That stress cannot, however, be considered Kestin's sole responsibility. The evidence establishes Kestin, no less than any other participant, was shocked by Janssen's collapse. The view that he maliciously precipitated it is implausible. No testifying witness viewed Dicks as anything other than a forceful and skilled advocate. That she would stand by while a person she represented was abused to the point of collapse is unlikely. No more likely is that Janssen's co-workers, all professional health care providers, would passively watch Janssen's physical condition deteriorate to the point of collapse. Janssen's testimony establishes she accepts help reluctantly and did her best to hide her failing strength. This, read in light of the testimony of the meeting's participants, establishes that Kestin was shocked when the meeting and Janssen's physical condition spun out of control.

Standing alone, the events of May 7 would not support the finding of any unfair labor practice. The events do not, however, stand alone. Kestin, on May 7, advocated decisions reached by DOC management without his input. The decisions Kestin advocated are the source of the dispute concerning Sec. 111.84(1)(c), Stats. As preface to examination of this point, it is important

to underscore that Kestin, on May 7, started to separate the Schepp from the Janssen grievance. The decisions he advocated, however, had not done so. Examination of the motivation for the discipline must start with this fact.

Three elements, set forth above, establish a violation of Sec. 111.84(1)(c), Stats. "Protected activity" refers to the "lawful, concerted" activity established in Sec. 111.84(2), Stats., and enforced by the subsections of Sec. 111.84(1), Stats. That Janssen and Schepp were part of the processing of good faith grievances concerning their work schedules and their discipline establishes their involvement in protected activity the State was well aware of. 25/ The element crucial to the operation of Sec. 111.84(1)(a), Stats., in this case is whether the discipline reflects hostility toward that lawful, concerted activity.

The record establishes Thomas' hostility toward Schepp's exercise of protected activity. There is no reason to doubt Schepp's testimony that Thomas stated she took the grievances as a personal affront. Thomas' testimony does not effectively deny this, and her curt response to Dittman supports Schepp.

The hostility of Thomas and other DOC management to Janssen's exercise of protected activity raises more complex questions. At a minimum, it is apparent that Thomas took great offense at Janssen's opposition to the work schedules, and communicated that offense to her supervisors. Kleinsteiber's March 26 memo establishes that Thomas had convinced her that Thomas was facing a job action. Janssen fueled the fire when she saw Kleinsteiber at a seminar in Milwaukee on April 2. By April 8, with some assistance from Janssen, Thomas had passed on to DOC management a view that the Unit was being torn apart by Janssen's conduct. The Registrar's April 8 memo demonstrates that the intra-Unit dispute was common knowledge. Thomas' stark view of the turmoil gathered momentum and urgency as events on the Unit evolved through the first week of April. By Good Friday, DOC was prepared to act on the assumption that Janssen was part of a concerted effort to disrupt the Unit.

The depth of hostility involved on Thomas' part is significant. On April 12, Thomas made allegations against Janssen which could have cost Janssen her nursing license. Those allegations had not, however, been significant enough to warrant any discipline. Beyond this, it is apparent some of the information passed from Thomas to DOC management was inaccurate. The Registrar's April 8 memo, Zunker's April 12 and Sondalle's April 16 memos all assume, wrongfully, that Janssen was scheduled to work April 8. Thomas was the source of that information.

This sets the background to Janssen's discipline. The investigatory meetings preceding and following the discipline only underscore the theme that Thomas and Kleinsteiber wanted to push the matter to a swift conclusion to barricade the broadening turmoil on the Unit. Their refusal to reschedule the meetings to permit Dicks' attendance underscores the impetus.

This impetus led to discipline colored by hostility toward Janssen's exercised of protected rights. The decision to discipline Janssen was made by Thomas, Zunker and Landwehr. Contrary

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

to the Union's assertion, it is not apparent these individuals shared the same view of the discipline, somehow viewing it as appropriate punishment for the difficulties of then-ongoing bargaining. Rather, each of these administrators was concerned with suppressing what they perceived as an insurrection. Thomas' April 26 memo to Zunker establishes she viewed much of the Unit's opposition to her as an affront to management's authority.

Landwehr did not necessarily mirror Thomas' views. Her hostility toward the conduct at issue has, however, been demonstrated. Her characterization of Janssen's six to nine 26/ day loss of pay as less than a severe level of discipline unpersuasively attempts to understate DOC's response. Her testimony that the "fevered pitch" of bargaining served as a relevant factual backdrop to the discipline does not, as the Union asserts, indicate she attempted to punish Janssen for the Union's bargaining tactics. Rather, it underscores her view that Janssen's insubordinate acts required severe punishment for the good of the Unit's operation. This view, however, manifests proscribed hostility. Any insubordination is personal conduct by Janssen. Landwehr's discipline severely punished her, at least in part, for the perceived disobedience of the entire Unit. This made Janssen a scapegoat for the collective interests the work schedule grievance advanced. Janssen was, then, punished, at least in part, for asserting group interests.

Janssen's discipline, as Schepp's, violates Sec. 111.84(1)(c), Stats. Whatever contribution Janssen made to escalating Unit tensions, neither her nor Schepp's conduct have been shown to be unlawful. If either was orchestrating a job action for Easter weekend, 27/ then presumably both fabricated their medical releases. There is no persuasive evidence either did. Significantly, there is no persuasive evidence DER was concerned with verifying this prior to their linking of Schepp and Janssen as violators of Kleinsteiber's March 26 memo. In any event, DER's resolution of Schepp's discipline belies the assertion of a joint fabrication of medical excuses. Beyond this, it is not immediately apparent that insubordinate conduct is unlawful conduct. Even assuming it is, there is no persuasive basis to conclude Janssen acted in so insubordinate a fashion as to strip herself of the protection of Sec. 111.82, Stats. She was treated as insubordinate, yet the record shows, until Zunker's April 12 letter, no direct order she violated. Her violation of that order presumes her medical excuse was fabricated, yet the record, as noted above, is weak on this point. DOC's response was less one of verification than of summary discipline. More significantly, there is no persuasive evidence establishing she failed to cover her absence on Easter weekend. At a minimum, she prospectively lined up such coverage. Lack of record clarity on whether she delivered the coverage cuts against the State. If DOC had a basis to believe it faced a job action on Easter weekend, the lack of coverage of Janssen's or Schepp's shifts is significant proof.

Nor is there persuasive evidence that either Janssen or Schepp's conduct was not concerted.

26/ Dicks' testimony (Transcript at 448), unlike the Union's brief, indicates Janssen suffered the loss of nine days of pay.

27/ Cf. Sec. 111.89, Stats.

Schepp's attempt to seek Dittman's representation is clearly concerted activity. Insubordinate conduct is arguably not concerted, but Janssen's conduct cannot be persuasively put in this light. Her personal concerns with the work schedule extended throughout the Unit. Whatever concerns DOC had with Janssen's individual health problems were made concerted by DOC's treatment of the various health problems of Unit members as a group revolt. The absence of proof of such a revolt leaves only concerted activity in its wake.

The remedy for this violation includes make-whole relief coupled with the posting of a notice to address any chilling effect on the assertion of collective rights the discipline may have had. The remedy as applied to Schepp requires little elaboration. The State has made her whole for the lost day of sick leave. The Order does not require any double payment for any lost time. However, the record indicates she may have lost overtime due to DOC's action. The Order requires that she be compensated for any such loss. Beyond this, she is entitled to interest on the amount of money paid to her for her loss, whether that payment is traceable to DOC action prior to or following the Order.

Janssen's situation again poses more difficulty. Her make whole relief parallels Schepp's. A determination must be made regarding whether she lost six or nine paid days. Any lost sick leave should be restored to her sick leave account. Any out of pocket loss should be paid her, with interest. The ongoing arbitration poses potential remedial problems. If an award has been, or is, entered affording her make-whole relief, then the make-whole provisions of this Order do not require any double payment for amounts awarded by an arbitrator. She is, however, entitled to interest on the amount paid her for out-of-pocket losses. Thus, if an arbitrator awarded her three days pay without interest, this Order requires no further compensation for the lost pay, but does require that interest be paid on that amount.

The situation is more complex if an arbitrator has found, or finds, DOC had cause to discipline Janssen. Such a finding has no impact on the financial aspects of the Order. The reason is that the institutional and legal implications of the finding of a Sec. 111.84(1)(c), Stats., violation stand without regard to the contractual determination.

That this record shows Janssen may have violated Work Rule 1 interjects an element of difficulty which cannot, however, be ignored. To address that difficulty, the Order permits DOC to include in her personnel file a copy of any arbitration award addressing the issue of cause for her discipline. This amounts to the inclusion of written counseling regarding the potential impact of negligent or insubordinate conduct. Under the Order no other reference to the discipline should remain in her personnel file. It should be stressed that the inclusion of an arbitration award in her file should not be viewed as any basis for the imposition of future discipline. The purpose of the make-whole ordered here is to start the WCI/Janssen relationships "fresh." Discipline drawing on the events of April for anything other than notice brings with it the taint of the unfair labor practices found here.

The Reinstated Employes' Pay Dispute

Discussion of this issue must start with the State's assertion that the Union's allegations on this issue are untimely. The timeliness of complaints of unfair labor practices under SELRA is governed by Sec. 111.84(4) and Sec. 111.07(14), Stats., which, read together, provide:

> The right of any person to proceed under this section shall not extend beyond one year from the date of the specific act or unfair labor practice alleged.

The use of "shall" in this provision underscores that the provision is jurisdictional. The Union's assertion that the State can be estopped from asserting the argument is, then, unpersuasive.

Because the complaint refers to events outside of the one year limitations period, its timeliness is governed by the principles of Bryan Mfg. Co. 28/ In that case, the United States Supreme Court posited two situations which pose the relevant considerations here:

> . . . The first is one where occurrences within the . . . limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose Sec. 10(b) ordinarily does not bar such evidentiary use of anterior events. The second situation is that where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There the use of the earlier unfair labor practice is not merely "evidentiary," since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is timebarred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice. 29/

The Bryan analysis, read in light of the statutory provisions governing this complaint, requires two

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28/ Cited by Dec. No. 25747-B at Footnote 11 and accompanying text, aff'd Dec. No. 25747-D.

30/ Local Lodge No. 1424 v. National Labor Relations Board (Bryan Mfg. Co.), 362 US 411 (1960), 45 LRRM 3212 at 3214-3215.

determinations. The first is to isolate the "specific act alleged" to constitute the unfair labor practice. The second is to determine whether that act "in and of (itself) may constitute, as a substantive matter" an unfair labor practice.

The only act the Union has isolated which falls within the one year limitations period is Sargeant's comment in October of 1992 that the State changed its practice on reinstated employes because the Union had bargained too long. The comment, standing alone, says no more than that protracted bargaining can have adverse consequences. The comment may point to an unfair labor practice, however, if taken as an indicator of the motivation for DER's determination to cut off the entitlement of certain reinstated employes to certain wage increases. Reading the comment this way, however, requires recourse to events outside of the one year limitations period. This brings Sargeant's comment within the second Bryan example, and establishes that the complaint's allegations are untimely.

Even assuming that the State took action to implement the April 2, 1992 bulletin within the one year limitations period does not warrant the finding of any unfair labor practice. The comment could be viewed as an independent violation of Sec. 111.84(1)(a), Stats., presuming that the threat of retaliation would chill Union bargainers from "bargaining too long." Sargeant did make the remark while angry. To conclude this comment, standing alone, violates Sec. 111.84(1)(a), Stats., would reign in the freedom of bargainers to speak as freely as possible. It is, against this background, important that the context of the remarks reflect a coercive setting. The evidence does not support this. Booth-Parks' testimony was remarkably balanced. She testified that she was unsure if Sargeant or some other DER representative made the remark. In any event, she took Sargeant's comments as the "very forceful" statement of a negotiator who "is never low key." 30/ Her individual response is not the determining factor here, because that response may reflect only her personal ability to shed unreasonable comments. On this record, however, I am persuaded her view of the comments reflects a reasonable, third person view of the context and content of the remarks. The record will not, then, support the finding of an independent violation of Sec. 111.84(1)(a), Stats.

The State asserts that the April 2, 1992 bulletin accurately put into place the language of Article V. The Union counters that the bulletin improperly ignores past practice. Each argument highlights that the dispute is contractual. This precludes a violation of Sec. 111.84(1)(d), Stats., since bargaining is waived as to subjects covered in a labor agreement. 31/ As noted above, it is inappropriate, under Commission case law, to assert the Commission's jurisdiction under Sec. 111.84(1)(e), Stats.

30/ Transcript at 907.

31/ Racine Unified School District, Dec. No. 18848-A (WERC, 6/82).

Sec. 111.84(1)(c), Stats., is the sole basis on which the reinstated employe pay dispute can be made an unfair labor practice. 32/ The record will not, however, support such a finding. That Sargeant's remark may indicate proscribed hostility can be granted. A violation of this section rests, however, on whether conduct the remark points to supports this conclusion.

A review of Sargeant's and DER's conduct does not, however, make a finding of proscribed hostility more persuasive than a finding of deep, but good faith, disagreement. The Union's view of the remark ignores that Sargeant and Kopp attempted to meet with the Union to discuss wage implementation language in an attempt to head off a similar disagreement in the 1993-94 bargaining. Robarts rejected that effort. Beyond this, any hostility in Sargeant's remarks would have to be a residue of Bau's experience with the Union. If DER wished to act on the hostility rooted in that experience, it is unclear why it substituted Sargeant for Bau. Nor is it clear why a hostile DER would agree to extend the 1992-93 agreement while 1993-94 bargaining proceeded. Nor is it clear why a hostile DER would agree to pay up to sixteen Union negotiators for twenty four meetings to resolve the 1993-94 labor agreement. There is no solid record support for the inference the Union seeks to have drawn based on Sargeant's October, 1992 remarks.

In sum, even if the reinstated employe pay dispute is timely, it has no merit as a statutory matter. Its merit lies in the labor agreement, and the interpretation of that agreement lies with an arbitrator.

Dated at Madison, Wisconsin, this 23rd day of January, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

32/ Whether DER's position violates the Administrative Code is a relevant fact here, but does not afford an Examiner independent jurisdiction to interpret the Code as the Union seeks.