STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

| | |
|---|---|
| THE WISCONSIN STATE EMPLOYEES UNION (WSEU), AFSCME, COUNCIL 24, AFL-CIO,<br><br>Complainant,<br><br>vs.<br><br>THE STATE OF WISCONSIN,<br><br>Respondent. | Case 300<br>No. 44498 PP(S)-0173<br>Decision No. 28104-A |

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Mr. P. Scott Hassett, Lawton & Cates, S.C., Attorneys at Law, 214 West Mifflin Street, P.O. Box 2965, Madison, Wisconsin 53701-2965, appearing on behalf of the Complainant.

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

On August 29, 1990, the Wisconsin State Employees Union, Council 24, AFL-CIO, filed a complaint with the Wisconsin Employment Relations Commission alleging that the State of Wisconsin had violated Sections 111.84(1)(a) and (1)(c), Stats., by using an improper basis for calculating the payment of retroactive wages for the parties' 1989-1990 collective bargaining agreement. By answer filed with the Commission on October 11, 1990, the State denied the allegations and sought dismissal of the complaint. After the parties were unsuccessful in their attempts to conciliate the matter, the Commission on July 6, 1994, appointed David E. Shaw, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order, as provided for in Sec. 111.07, Stats. Hearing in the matter was scheduled for November 30, 1994; rescheduled for June 19, 1995; and held on September 10, 1996, in Madison, Wisconsin, with a stenographic transcript being available to the parties by September 27, 1996. At hearing, the State moved to dismiss the complaint, on which motion the Examiner reserved ruling. Also at hearing, Complainant amended its complaint to include

an allegation that the State's actions violated Section 111.84(1)(d), Stats. The parties waived their right to file written argument. Having considered the evidence and the arguments of the parties, the Examiner now makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Complainant Wisconsin State Employees Union, Council 24, AFL-CIO, hereinafter the "Union", is a labor organization within the meaning of Sec. 111.81(12), Stats., with offices at 8033 Excelsior Drive, Madison, Wisconsin. At all times material to this proceeding, Martin J. Beil has been Executive Director of the Union with responsibilities that included representing the Union in collective bargaining with the State of Wisconsin.

2. Respondent State of Wisconsin, hereinafter "the State", is an employer within the meaning of Sec. 111.81(8) Stats., with principal offices for its employment relations representative, the Department of Employment Relations, at 137 East Wilson Street, Madison, Wisconsin.

3. The State recognizes the Union as the exclusive collective bargaining representative of those state employes whose classifications, as of the 1989-91 biennium, were allocated to the following statutorily created bargaining units: Blue Collar and Non-Building Trades; Clerical and Related; Technical; Security and Public Safety; Professional Research, Statistics, and Analysis; and Professional Social Services.

4. The parties previously had reached biennial collective bargaining agreements affecting the units identified in Finding of Fact 3 for the periods 1981-83, 1983-85, 1985-87 and 1987-89. Those agreements contained a variety of treatments of wage increases and retroactivity structures, including uniformity between wage increase structures and retroactivity structures and divergence between same. The 1987-89 collective bargaining agreement between the parties provided for a variety of across-the-board wage increases affecting the various units. For the first year, the Blue Collar unit received an increase of .184 cents per hour, with the remaining units receiving 2.1%. Employes in all units, including the Blue Collar unit, received a lump sum retroactive wage payment based on a 2.1% increase in base pay under the 1987-89 agreement.

5. The parties began negotiations for a 1989-1991 agreement in April of 1989, and near the end of December of 1989, had reached tentative agreement in all of the units except the Blue Collar and Clerical units. It was discussed and agreed at that time that there would be full retroactivity on the across-the-board increases only. On or about March 14, 1990, the State's Division of Collective Bargaining prepared a written proposal which reflected the tentatively agreed-upon across-the-board increases of 3.75% for 1989 and 4.25% for 1990 for members of the Security and Public Safety and Professional Social Services units, and, for the Technical unit, increases of .372 cents per hour the first year and 4.25% the second year. The proposal also reflected retroactive wage payments of 3.75% "in all of the WSEU bargaining units. . .".

6. By April 8, 1990, the parties reached a tentative agreement for a successor collective bargaining agreement affecting all units for the 1989-1991 biennium. For the Clerical; Security and

Public Safety; Professional Research, Statistics and Analysis; and Professional Social Services units, the agreement contained across-the-board increases of 3.75% for 1989-90 and 4.25% for 1990-91. For the Blue Collar unit, the agreement provided for an increase of .336 cents per hour the first year and 4.25% the second year. For the Technical unit, the agreement provided for an increase of .372 cents per hour the first year and 4.25% the second year. Other than the December, 1989 agreement that there would be full retroactivity on the across-the-board increase, the parties did not specifically discuss the details of retroactivity. In holding the ratification vote among the Union's members, Beil and the Union's bargaining team presented to the members of the Technical and Blue Collar units their understanding that the first year retroactivity payment was to be based on cents-per-hour.

7. Collective bargaining agreements between the parties are ratified by the Union's membership and then by the Wisconsin Legislature, after it is approved by the Legislature's Joint Committee on Employment Relations (JOCER). On or about May 3, 1990, the Division of Collective Bargaining prepared and submitted to JOCER a draft of the tentative agreement referenced in Finding of Fact 6. Said draft reflected retroactive pay for all units calculated on the basis of 3.75%. Following the ratification meetings with the Union's membership, Beil became aware that the State was basing the retroactivity payment for all units on a percentage increase.

8. On June 3, 1990, JOCER voted to ratify the 1989-90 agreement and that vote was taken on a document within which it was indicated that the retroactive pay for members of the Technical and Blue Collar units was based on the application of 3.75% to their respective base rates.

9. On July 16, 1990, Beil wrote to Chad Spawr, Administrator of the DER's Division of Collective Bargaining as follows:

> As you are aware, we have been meeting on an ongoing basis for the last eight weeks to correct discrepancies and miscalculations of both retroactivity and new rates resulting from the recently concluded collective bargaining process. In those meetings, we seem to have resolved several problems, however, it is apparent to me that there exists a major problem in two units as it applies to retroactivity.
>
> In the technical and blue collar units, although the first year wage increase was at cents per hour, the retroactivity is calculated on the application of 3.75% to the base rate. As we have discussed several times, that is not our understanding of the agreement. This application of the percentage flies in the face of our intent to provide some additional dollars to the lowest paid employes. To that end, we demand that in the blue collar and technical bargaining units that adjustments be made to reflect the agreement - that is, blue collar .336 per hour and technical .372 per hour. This adjustment should

be made by the July 26, 1990 payroll. If the adjustment is not made, we will initiate appropriate proceedings with the Wisconsin Employment Relations Commission to secure the agreed upon retroactivity rate.

The State subsequently made the retroactivity payments in all of the units calculated on the basis of 3.75%.

10. There existed a misunderstanding between the State and the Union with regard to the manner in which retroactivity payments were to be calculated in the Blue Collar and Technical bargaining units for the first year of the 1989-1991 Agreement. The parties became aware of that misunderstanding after the Union's membership had ratified the tentative agreement, but prior to the State's completion of the ratification process. Being aware of the dispute, the State ratified the tentative agreement with its version of the manner in which retroactive pay was to be calculated. The parties then executed their 1989-1991 Agreement.

11. The 1989-1991 Collective Bargaining Agreement between the State and the Union contained, in relevant part, the following provisions:

**ARTICLE XII**

**Wages**

**Section 1: Wage Adjustments**

**12/1/1** The Employer agrees to provide all employes covered by this Agreement the following general wage adjustments:

**12/1/2 (A) Blue Collar**

(1) First Fiscal Year

The Employer will, effective on the first day of the pay period following the effective date of the Agreement, increase the then current base pay of each employe by thirty-three and six-tenths ($0.336) cents per hour.

(2) Second Fiscal Year

The Employer will, effective July 1, 1990, increase the then current base pay of each employe by four and twenty-five hundredths percent (4.25%).

**(B) Technical**

(1) First Fiscal Year

The Employer will, effective on the first day of the pay period following the effective date of the Agreement, increase the then current base pay rate of each employee by thirty-seven and two tenths ($0.372) cents per hour.

(2) Second Fiscal Year

The Employer will, effective July 1, 1990, increase the then current base pay of each employe by four and twenty-five hundredths percent (4.25%).

. . .

**12/1/4 Retroactive Wage Payments**

Eligible employes shall receive a lump sum retroactive wage payment in an amount equal to three and seventy-five hundredths percent (3.75%) of the eligible employe's base pay rate on July 2, 1989 times the number of his/her hours in pay status in all of the WSEU's bargaining units between July 2, 1989, and the effective date of the 1989 wage adjustment specified in Article XII, Sections 1 and 2, of this Agreement.

. . .

By said provisions set forth above, the parties' 1989-1991 Collective Bargaining Agreement addressed the issue of how retroactive payments on the across-the-board increase for the first year were to be calculated in the Blue Collar and Technical bargaining units.

12. The State's payment of retroactive pay in the Blue Collar and Technical bargaining units for the first year of the 1989-1991 Agreement with the Union based upon a percentage, rather than in cents-per-hour, did not have a reasonable tendency to interfere with, restrain or coerce employes in those units in the exercise of their rights guaranteed in Sec. 111.82, Stats.

13. The State's payment of retroactive pay in the Blue Collar and Technical bargaining units for the first year of the 1989-1991 Agreement with the Union, based upon a percentage, rather than in cents-per-hour, was based upon the State's understanding of what had been tentatively agreed to in that regard, and was not based upon anti-union animus.

Based upon the foregoing Findings of Fact, the Examiner makes the following

## CONCLUSIONS OF LAW

1. By making retroactivity payments under the parties' 1989-1991 Agreement to its employes in the Blue Collar and Technical bargaining units based upon the application of a percentage to the base rates, rather than the cents-per-hour across-the-board increase for the first year of the Agreement, the Respondent State of Wisconsin, its officers and agents, did not interfere with, restrain or coerce state employes in the exercise of their rights guaranteed in Sec. 111.82, Stats., within the meaning of Sec. 111.84(1)(a), Stats., and did not discriminate against State employes within the meaning of Sec. 111.84(1)(c), Stats.

2. The issue of the manner in which retroactivity payments were to be calculated and paid for the first year of the parties' 1989-1991 Agreement, is covered by the provisions of that Agreement, and therefore, the Respondent State, its officers and agents, did not refuse to bargain collectively with regard to that subject within the meaning of Sec. 111.84(1)(d), Stats.

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

## ORDER 1/

That the complaint filed in this matter be, and hereby is, dismissed.

Dated at Madison, Wisconsin, this 31st day of January, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By David E. Shaw /s/
David E. Shaw, Examiner

(Footnote 1/ appears on the next page.)

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

> (5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

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

THE STATE OF WISCONSIN

## MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The Union alleges in this complaint that the State violated Sections 11.84(1)(a), (c) and (d) by calculating the retroactive payment for the 1989-91 collective bargaining agreement affecting the Technical and Blue Collar units on the basis of a percentage increase, rather than on the basis of cents per hour. The positions of the parties were reflected in the respective pleadings and brief opening statements; neither party made a closing statement, nor accepted the opportunity to file a written brief.

### Legal Standards

The complaint alleges State violations of Secs. 111.84(1)(a), (c) and (d), Stats. Subsection (d) enforces the broad duty to bargain in good faith. Because definitional standards for finding a violation of that subsection are essentially fact-driven, it is impossible to state a firm standard before examining a specific allegation. 2/ General considerations do govern the remaining subsections.

Section 111.84(1)(a), Stats., makes it an unfair labor practice for the State as an employer "to interfere with, restrain or coerce state employes in the exercise of their rights guaranteed in s. 111.82." Section 111.82, Stats., 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 Commission has consistently held that it will find interference on the part of an employer in the following circumstances:

> Violations of Sec. 111.70(3)(a)1, Stats., occur when employer conduct has a reasonable tendency to interfere with, restrain or coerce employes in the exercise of their Sec. 111.70(2) rights. If, after evaluating the conduct in question under all the circumstances, it is concluded that the conduct had a reasonable tendency to interfere with the exercise of Sec. 111.70(2) rights, a violation will be found even if the employer did not intend to interfere and even if the employe(s) did not feel coerced or was not in fact deterred from exercising Sec. 111.70(2) rights. 3/

---

2/ State of Wisconsin, Decision No. 27708-A (McLaughlin, 1/95).

3/ Jefferson County, Dec. No. 26845-B (WERC, 7/92), aff'd 187 Wis. 2d 647 (Ct.App. 1994), citing WERC v. Evansville, 69 Wis. 2d 140 (1975) and Beaver Dam Unified School District, Dec. No. 20283-B (WERC, 5/84); City of Brookfield, Dec. No. 20691-A (WERC, 2/84); Juneau County, Dec. No. 12593-B (WERC, 1/77).

While the above holding references statutory provisions of the Municipal Employment Relations Act (MERA), those provisions are substantively identical to Secs. 111.84(1)(a) and 111.82 of SELRA, respectively, and the same test for whether interference occurred applies under both statutes. 4/

Section 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 by a clear and satisfactory preponderance of the evidence that (1), the represented employes engaged in activity protected by Section 111.82, Stats.; (2), that the State was aware of, and hostile towards, the activity, and (3), that the State acted toward those employes, based at least in part, on that hostility. 5/

DISCUSSION

In its initial complaint, the Union alleged employer interference and discrimination. There was, however, no evidence adduced at hearing to support these allegations, and thus, they have been dismissed.

At hearing, the Union amended its complaint to also allege a refusal to bargain in good faith. The pertinent facts are relatively straight-forward. The parties bargained and reached tentative agreement in some units by the end of 1989 and in all of the units by April of 1990. The tentative agreement provided for a cents-per-hour across-the-board wage increase for the year 1989-1990 and a percentage increase for the year 1990-1991 in the Blue Collar and Technical bargaining units. Both parties ratified the tentative agreement; however, there was a dispute as to the manner in which retroactive payment was to be calculated. The Union's Executive Director, Beil, testified that it was his understanding that retroactive payments in the Blue Collar and Technical units were to be based on cents-per-hour and that was what he presented to the membership for the ratification vote. The State contends that there was no such understanding and that it followed the same method of calculating retroactive payment as was used in the parties' previous agreement.

Beil testified that he based his understanding on the fact that the Union's focus during the negotiations had been to address pay disparities affecting the lower-paid workers among his members, a stratagem which would have been advanced by basing resultant increases on cents-per-hour rather than percentages; and that given the lateness of the ratification, the overwhelming part of the contract year would be covered by the retroactive payment. Beil also testified that when tentative agreement was reached in most of the bargaining units in December of 1989, there were some discussions about retroactivity and agreement was reached that it would be on the across-the-

---

4/ State of Wisconsin v. WERC, 122 Wis. 2d 132, 143 (1985).

5/ Ibid., 122 Wis. 2d at 141-144.

board increase only. Beil testified that the Union could not make a specific proposal on retroactivity at that time, since the Blue Collar team had rejected the settlement and negotiations in that unit continued. Beil testified that when tentative agreement was reached in the Blue Collar unit in April of 1990, the Union "assumed" the retroactivity payment in the Blue Collar and Technical units would be in cents-per-hour, but that the specific language had not been drafted when he took the settlement to the membership. Beil conceded, however, that it was his "understanding that it was understood" that retroactivity would be in cents-per-hour, but that he "didn't have anything in writing to that effect."

While the circumstances provide some justification for the Union team's understanding that the retroactivity payment would be in the same form as the across-the-board increases in these units, that same understanding cannot necessarily be imputed to the State's bargaining team. The evidence indicates that the State did submit a written draft in March of 1990 that included a provision specifying that retroactivity payments would be "three and seventy-five hundredths percent (3.75%). . .in all WSEU bargaining units. . .", i.e., the same approach taken in the parties' previous agreement, even though the across-the-board increases in some units the first year of that agreement had also been in the form of cents-per-hour. Since it appears that the matter was not specifically addressed after the State submitted its proposal, the State also had reason to believe there was an understanding that retroactivity would be based on a percentage.

It appears from the evidence that both parties had reason to believe their respective understanding was correct, and that because the parties did not specifically discuss the matter of how retroactivity payments would be calculated, there was a good faith misunderstanding on that point. That being the case, the Union has not shown that the State intentionally misled the Union or otherwise bargained in bad faith in this regard. Under the circumstances, once the Union became aware that there was a dispute regarding the form of the retroactivity payments in these two units, it was faced with either nullifying its ratification vote and notifying the State that there was not a settlement, or going ahead with the ratification votes based upon each party's respective understanding. Having selected the latter option, the parties executed an agreement that included a provision specifically addressing the matter of retroactivity payments. While there continued to be a dispute, it was as to the interpretation and application of that

provision of their agreement, and no longer a matter for negotiations. 6/ For all of these reasons, the Examiner has found no violation by the State of its duty to bargain in good faith with respect to the retroactive payments in the Blue Collar and Technical bargaining units for the 1989-90 year.

Dated at Madison, Wisconsin, this 31st day of January, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By David E. Shaw /s/
David E. Shaw, Examiner

---

6/ State of Wisconsin, Decision No. 23161-C (WERC, 9/87); City of Beloit, Decision No. 27990-C (WERC, 7/96).