STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

THE WISCONSIN STATE EMPLOYEES UNION (WSEU), AFSCME, COUNCIL 24, AFL-CIO, Complainant

vs.

STATE OF WISCONSIN, Respondent

Case 380
No. 51615
PP(S)-229

Decision No. 28222-B

Appearances:

Lawton & Cates, S.C., Attorneys at Law, 214 West Mifflin Street, Madison, Wisconsin 53701-2965, by **Mr. John C. Talis**, on behalf of Wisconsin State Employees Union, AFSCME, Council 40, AFL-CIO.

Mr. Howard I. Bernstein, General Counsel, Wisconsin Department of Workforce Development, P.O. Box 7946, Madison, Wisconsin 53707-7946, on behalf of the State of Wisconsin.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On September 29, 1994, Wisconsin State Employees Union, AFSCME, Council 24, AFL-CIO, filed a complaint of unfair labor practices with the Wisconsin Employment Relations Commission, wherein it alleged that the State of Wisconsin, by its Department of Industry, Labor and Human Relations, had violated Secs. 111.84(1)(a) and (c) of the State Employment Labor Relations Act (SELRA) by designating an employe as a supervisor in order to avoid having to lay off that individual in accord with the provisions of the parties' collective bargaining agreement and by placing that same individual in another bargaining unit position and having him perform bargaining unit work. On February 28, 1995, Respondent State of Wisconsin filed its answer wherein it denied certain of the facts alleged in the complaint and denied that its actions violated SELRA.

Jane B. Buffett, a member of the Commission's staff, was appointed as Examiner in the matter and hearing was set for March 14, 1995, was subsequently rescheduled and thereafter indefinitely postponed. Due to the unavailability of Examiner Buffett, David E. Shaw, a member of the Commission's staff, was appointed as Examiner to make and issue Findings of Fact, Conclusions of Law and Order in the matter.

Hearing was held before the Examiner on December 4, 1996, in Madison, Wisconsin. The Union amended its complaint at hearing to also allege violations of Sec. 111.84(1)(e), Stats. A stenographic transcript was made of the hearing and the parties submitted post-hearing briefs and reply briefs by February 6, 1997. In its reply brief, Respondent raised for the first time the allegation that the complaint was untimely under Sec. 111.07(14), Stats. On February 19, 1997, Complainant filed a motion to strike that portion of Respondent's reply brief that asserted the timeliness defense. Respondent was given the opportunity to respond to the motion, but did not do so. On March 11, 1997, the Examiner issued a written ruling denying Complainant's motion to strike, but permitting Complainant to respond to Respondent's untimeliness claim and/or submit further evidence in that regard. On April 4, 1997, Complainant filed a written response to the claim that the complaint was not timely filed.

The Examiner, having considered the evidence and the arguments of the parties, now makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Complainant Wisconsin State Employees Union, AFSCME, Council 24, AFL-CIO, hereinafter "the Union", is a labor organization with its principal offices located at 8033 Excelsior Drive, Suite "B", Madison, Wisconsin 53717-1903. The Union is the exclusive collective bargaining representative for state employes in a number of statutorily-created bargaining units, including the Professional Social Services bargaining unit represented by the Union and its affiliated Local 2748.

2. The Respondent State of Wisconsin, hereinafter the "State", is an employer and is represented in collective bargaining by its Department of Employment Relations, which has its offices located at 137 East Wilson Street, Madison, Wisconsin.

3. At all times material herein, the State's Department of Industry, Labor and Human Relations (DILHR) was an independent agency having statutorily described duties and responsibilities which included maintaining and operating Job Service offices at different locations in Job Service districts around the state. In 1992, DILHR employed an individual, Richard Seidemann, in a Job Service Supervisor 2/Labor Market Analyst position in its Manitowoc office in its Lake Michigan District.

In mid-1992, the Job Service began reorganization of Labor Market Analyst (LMA) staff and the plan called for a total of eleven LMA's - one per Job Service District. There were eleven LMA's at the time, not including Seidemann. Seidemann's position was declared surplus and was to be eliminated. That reorganization plan began being implemented in March of 1993. Also in 1993, due to reorganization and funding cuts, a number of the positions in the Manitowoc office were selected to be eliminated. Those positions were in the Professional Social Services bargaining unit represented by the Union and its affiliate, Local 2748. The Manitowoc Job Service office is in the same District, or employing unit, as the offices in Door, Kewaunee and Sheboygan counties.

4. In March of 1993, the individual holding the position of ES/UI Workshop Coordinator in DILHR's Sheboygan Job Service office, Eduardo Saenz, transferred out of that position and office. At that time, a Job Service Counselor in that office, Judy Puetz, who was a Job Service Counselor 3 (JSC-3) then in a 50-percent time position, requested to become full-time in the ES/UI Coordinator position being vacated by Saenz. Saenz spent one day training Puetz in the position before the supervisor of the Sheboygan office, Michael Rosecky, advised Puetz she would no longer be trained for the position.

On March 29, 1993, the Supervisor in the Sheboygan Job Services Office, Michael Rosecky, held a staff meeting in the Sheboygan office at which he announced that Seidemann was going to be assigned to the ES/UI Coordinator position starting April 5, 1993. The steward for Local 2748 in that employing unit was, and is, Patricia Van Rooy, who is also employed in the Sheboygan Job Service office. Van Rooy asked Rosecky if the position was going to be posted at a Job Service Specialist 3 (JSS-3) level and Rosecky replied in the affirmative.

On April 3, 1993, the Director of the Lake Michigan District, Diane Knutson, requested that the Administrator of the Jobs, Employment and Training Services (JETS) Division, June Suhling, temporarily assign Seidemann to the ES/UI Workshop Coordinator position in the Sheboygan office for a period from April 5, 1993 to August 1, 1993.

On April 5, 1993, Seidemann was temporarily assigned to the ES/UI Workshop Coordinator position in the Sheboygan office on a full-time basis, with such temporary assignment to end on August 1, 1993. At that time, there was a Job Service Counselor in the Sheboygan office working 50 percent time and there were two JSS-2's in the Manitowoc office whose positions were reduced to 50 percent time (Yost and Butts) in permanent positions, one JSS-2 (Jacobs) who was to be reduced to 50 percent time in a project position, and one JSS-2 (Sweetman) who was to be laid off, all to be effective January 1, 1994.

On or about April 21, 1993, the following "DILHR Transfer Opportunities" bulletin was posted, which read in relevant part:

DILHR TRANSFER OPPORTUNITIES
DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS
ARTICLE 7 TRANSFERS

The Department of Industry, Labor and Human Relations has the following vacancies available for transfer. Questions regarding the duties and responsibilities of these positions should be directed to the supervisor listed. Interested employes with the same classification as listed may post by notifying DILHR Personnel in writing. The postings are to be received by DILHR Personnel no later than APRIL 28, 1993.

. . .

93-0919 Job Service Specialist 3 - Workshop Coordinator
JETS Div.; Lake Michigan Employing Unit
934 Michigan Ave.; Sheboygan
Normal Shift
Supervisor: Mike Rosecky - Phone 414-459-3770
Schedule 12 Range 4

No one signed the posting for the Workshop Coordinator position in Sheboygan. None of the employes classified as JSS-2 in the Manitowoc or Sheboygan office were eligible to sign for the position as it was posted at the JSS-3 classification level. The former incumbent, Saenz, was classified as a JSS-3 when he was in the position, but also had additional responsibilities with regard to veterans that the position would no longer have. Saenz' predecessor in the position had been classified at the JSS-2 level. There are other individuals in the Workshop Coordinator positions throughout the State that are classified at the JSS-1 or JSS-2 levels, including Yost, who transferred into the 50 percent time Workshop Coordinator position in the Manitowoc office when the incumbent, Sweetman, was laid off.

5. A grievance was filed in April of 1993 protesting the posting of the Sheboygan Workshop Coordinator position at the classification level of JSS-3. The State and the Union were parties to a Collective Bargaining Agreement covering the employes in the bargaining unit represented by the Union, which Agreement contained transfer rights provisions under Article VII and provisions for final and binding arbitration of grievances in Article VI.

6. Seidemann remained employed in the Workshop Coordinator position in the Sheboygan Job Service office on a full-time basis as a temporary assignment from April 5, 1993 to August 1, 1993. On May 21, 1993, Seidemann requested a voluntary demotion from Job Service Supervisor 2 to the Workshop Coordinator position on a permanent basis. His request was denied,

however, on August 2, 1993, Seidemann was assigned to stay in the Workshop

Coordinator position on an acting basis until September 15, 1993. On August 6, 1993, the JETS Division Administrator, Suhling, requested a 45-day extension to Seidemann's acting assignment. On October 21, 1993, Suhling requested that Seidemann's acting assignment in the position be extended to the end of 1993. On December 29, 1993, Suhling again requested an extension of Seidemann's acting assignment in the position through March 31, 1994.

Seidemann remained in the Workshop Coordinator position in the Sheboygan office on an acting basis until February 9, 1994 when he took voluntary demotion to a different position.

7. On January 1, 1994, Butts and Yost were reduced to 50 percent time in permanent positions, Jacobs was reduced to 50 percent time in a project position and Sweetman was laid off in the Manitowoc Job Service office.

On January 28, 1994, Van Rooy filed a grievance protesting, in part, the reduction of Butts, Yost and Jacobs to part-time and the layoff of Sweetman in the Manitowoc office while Seidemann continued to be employed full-time in the Workshop Coordinator position in the Sheboygan office and requesting that Seidemann be removed from the position and that it be reposted at a classification level of JSS-1 or JSS-2 in order to allow represented employes to post for the position. In April of 1994, Puetz was assigned the duties of the position on a full-time basis in her classification level of JSC-3.

8. While Seidemann was in the ES/UI Workshop Coordinator position in the Sheboygan Job Service office he performed essentially the same functions and duties as the former incumbents in the position with the exception that he did not have the additional responsibilities and duties regarding veterans that Saenz had in the position.

9. On September 29, 1994, the Union filed the instant complaint of unfair labor practices with the Commission wherein it alleged, in relevant part:

COUNT NO. ONE (1)
SEIDEMANN AS A SUPERVISOR

> 9. At all times material hereto DILHR employed an individual identified as Mr. Richard Seidemann.
>
> 10. In order to protect Seidemann from layoff under the terms and provisions of said CBA, DILHR unilaterally and unlawfully classified Seidemann and the position occupied by him as "supervisory". See Section 111.81(19), Wis. Stats. (1991-92).

11. Seidemann never was nor has he been a "supervisor" as a matter of fact or law.

12. The most recent of the layoffs referred to herein in Paragraph No. Nine (9), supra., occurred on or about February 1, 1994.

13. Seidemann was protected from layoff then and thereafter as a "supervisor."

14. Employees exclusively represented by this Union were in fact laid off.

15. The (in)action(s) of the State as described herein is unlawful and in violation of the State Employment Labor Relations Act (SELRA); more specifically Sections 111.84(1)(a) and (1)(c), Wis. Stats. (1991-92).

COUNT NO. TWO (2)
SEIDEMANN AS A NONSUPERVISOR

16. Paragraphs One (1) through Fifteen (15) of the instant Complaint are expressly incorporated by reference herein to have the same force and effect as though set out at length.

17. From time to time, said Seidemann routinely and habitually performed bargaining unit work.

18. For example, by way of illustration rather than limitation, said Seidemann performed bargaining unit work on a routine, habitual basis during January and February, 1994.

19. Assuming Seidemann was and continues to be a "supervisor" as a matter of fact and law allowing him to perform bargaining unit work on a routine, habitual basis was/is unlawful and in violation of SELRA; specifically Section 111.84(1)(a) and (1)(c).

At hearing on December 4, 1996, the Union orally amended its complaint and requested that the Commission adjudicate the pending grievances as allegations of violations of Sec. 111.84(1)(e), Stats.

10. On February 28, 1995, the State filed its answer to the Union's September 29, 1994 complaint, denying it had committed any unfair labor practices and asserting various facts. Said answer did not contain any assertion that the complaint was untimely under Sec. 111.07(14), Stats. The State made such an assertion for the first time in its post-hearing reply brief filed on February 6, 1997. Thereafter, on February 19, 1997, the Union filed a motion to strike the State's "statute of limitations argument" from its reply brief asserting the State had waived such a defense by its failure to assert it before that time. The State was given the opportunity to respond to the motion to strike, but did not do so. On March 11, 1997, the Examiner denied the Union's motion to strike and offered the Union the opportunity to respond to the State's assertion that the complaint was untimely and to offer additional evidence in that regard if the Union desired to do so. On April 4, 1997, the Union filed its response.

11. Employing Seidemann in an acting assignment in the ES/UI Workshop Coordinator position in the Sheboygan Job Service office and acting to extend that assignment in October and December of 1993 did not have a reasonable tendency to restrain or coerce the bargaining unit employes in the exercise of their rights guaranteed in Sec. 111.82, Stats.

12. In employing Seidemann in the ES/UI Workshop Coordinator position in the Sheboygan Job Service office in an acting assignment and extending that acting assignment in October and December of 1993, the State was not motivated by anti-union animus or hostility towards represented employes exercising their transfer rights under the parties Collective Bargaining Agreement.

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

CONCLUSIONS OF LAW

1. The Respondent State of Wisconsin, by asserting for the first time in its post-hearing reply brief that the instant complaint was untimely filed under Sec. 111.07(14), Stats., did not waive its right to rely on such defense.

2. Section 111.07(14), Stats., limits the Commission's subject matter jurisdiction over complaints of unfair labor practices filed under the State Employment Labor Relations Act.

3. The allegations in the instant complaint that the Respondent State of Wisconsin violated Secs. 111.84(1)(a) and (c), Stats., by temporarily placing Richard Seidemann, who had been in a supervisory position, in the vacant ES/UI Workshop Coordinator position in the Sheboygan Job Service office on April 5, 1994, by its decision to post the vacancy in the ES/UI Workshop Coordinator position in the Sheboygan Job Service office at the classification level of

JSS-3, by its action in doing so on April 21, 1994, and by taking action on August 2 and September 15, 1994 to extend Seidemann's acting assignment, are untimely under Sec.

111.07(14), Stats., and therefore, the Commission does not have jurisdiction to decide those allegations.

4. The Respondent State of Wisconsin, its agents and officers, by employing Richard Seidemann, who had previously held a supervisory position, in an acting assignment in the ES/UI Workshop Coordinator position in the Sheboygan Job Service office from September 28, 1993 until February 9, 1994, and by taking action on October 21, 1993 and December 29, 1993 to extend that acting assignment, did not commit independent violations of Sec. 111.84(1)(a), Stats., and did not violate Sec. 111.84(1)(c), Stats.

5. It would not be appropriate to assert the Commission's jurisdiction to consider allegations of violations of Sec. 111.84(1)(e), Stats. in this case.

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

ORDER

The instant complaint is hereby dismissed in its entirety.

Dated at Madison, Wisconsin, this 22nd day of October, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

DEPARTMENT OF EMPLOYMENT RELATIONS (DILHR)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER

The Union has alleged that the State committed independent violations of Sec. 111.84(1)(a), Stats., and also violated Sec. 111.84(1)(c), Stats., by placing a supervisor, whose position was to be eliminated as surplus, in a bargaining unit position and by deciding to post, and posting, the vacancy in the position at a classification level of JSS-3 which resulted in the inability of certain bargaining unit members to transfer into the position and thereby retain full-time employment when their positions were to be reduced or eliminated. The Union also amended its complaint at hearing and requested that the Examiner decide the pending grievances as violations of Sec. 111.84(1)(e), Stats. The Union also asserts that the State, by waiting until its reply brief to raise a timeliness issue, has waived its right to rely on that defense.

The State has denied it committed any unfair labor practices with regard to the placement of a former supervisor in a bargaining unit position on a temporary basis and asserted that the position was correctly classified at a JSS-3 level for posting, that the position was properly posted in accord with contractual requirements and that no one posted into the position. The State objects to the Commission asserting its jurisdiction as to any alleged violations of Sec. 111.84(1)(e), Stats. The State also asserted for the first time in its reply brief that the complaint was untimely under Sec. 111.07(14), Stats., and that, therefore the Commission is without jurisdiction to consider the allegations.

POSITIONS OF THE PARTIES

Complainant Union

The Union asserts that it has demonstrated that the State's decision to provide a position to Seidemann violated Section 111.84(1)(a) and (c), Stats., and further asserts that an adverse inference must be drawn against the State based upon its failure to call Seidemann as a witness.

With regard to the alleged violation of Section 111.84(1)(a), Stats., the Union notes that the Commission has held that where conduct "has a reasonable tendency to interfere with, restrain or coerce employes in the exercise of their. . .rights" it will find an independent violation of that Section even if the employer had no intent to violate that provision and even if the affected employes were not actually coerced in the exercise of their rights, similar to the holdings of the National Labor Relations Board (NLRB) under the National Labor Relations Act.

The Union asserts that placing Seidemann, a former supervisor, in the ES/UI Workshop Coordinator position when four represented employes who could perform that work were underemployed or unemployed had "an inherently destructive effect on protected rights." If the Union were unable to prevent the State from manipulating the civil service classification process so as to give supervisors first opportunity at vacant bargaining unit positions, this would have a reasonable tendency to interfere with employe's protected rights in that its inability to prevent conduct of that type makes it appear feeble and ineffective in the eyes of the employes, particularly where the affected employes are already on layoff or in reduced time positions. The Union is therefore likely to suffer a decline in membership and participation in the specific collective activities set forth in Section 111.82, Stats.

With regard to Section 111.84(1)(c), Stats., the Union notes that in the usual case, in order to demonstrate a violation, it must be shown that (1) the employe has engaged in protected, concerted activity; (2) the employer was aware of said activity and hostile thereto and (3) that the employer's action was based, at least in part, on this hostility. In this case the elements of the claim must be modified to address the facts of this case, i.e. the elements of the claim are (1) whether a vacant represented position existed; (2) whether there were under- or unemployed represented employes who wished to transfer to the vacancy; (3) whether the employer was aware of those represented employes' transfer rights, and hostile to the exercise of those rights; and (4) whether the employer's conduct in classifying the position at a level which would destroy those transfer rights was motivated, at least in part, by that hostility. The Union does not contend that the State had specific animus toward any of the individual laid off employes due to specific protected activities; rather, it contends that the State wished to discourage membership in the Union by discriminating in regard to terms and conditions of employment, i.e. that the State wished to place a former supervisory employe in the Sheboygan ES/UI Workshop position and thereby prevent represented employes from transferring into the position by posting the position as a JSS-3 rather than as a JSS-2.

There can be no dispute that the ES/UI Workshop Coordinator position was vacant and that Yost and other underemployed/unemployed unit employes would have transferred to the position had it been posted at the JSS-2 level. It is also apparent that the State was aware of, and hostile toward, those employes' transfer rights. The posting stated that an employe must have "the same classification as listed" to apply for the position. By listing the position as a JSS-3, the State knew that Yost and others would be excluded from any possibility of transfer. The State's hostility toward those transfer rights, as well as its partiality toward Seidemann, is demonstrated by the fact that it initially began training a bargaining unit employe in the position and then terminated that training when it realized it needed the position for Seidemann, and by advising the Union prior to the position even being posted that Seidemann would be given the position at a JSS-3 level. The prior incumbents had held the position at a JSS-2 level and the uncontroverted evidence is that the work performed by a prior incumbent was identical to that performed by Seidemann. Further, the undisputed evidence is that the ESS/UI Workshop

Coordinator position in other areas of the state in offices similar in size to Sheboygan and larger, are filled at a JSS-2 level. The State's witnesses conceded on cross-examination that they lacked any direct knowledge of the work performed by Seidemann. The classification specialist who purportedly classified the position at JSS-3 level was not called to testify and no position description for Seidemann's work in the position was ever drafted. All of the above demonstrates the State's partiality towards Seidemann and its determination to classify the position at a JSS-3 level to ensure that he was placed in the position, despite classification rules. Lastly, the decision to classify the position at a JSS-3 level was motivated, at least in part, by hostility toward the represented employes' transfer and other rights.

The Union also asserts that the State's failure to call Seidemann as a witness requires that an evidentiary inference be drawn against the State; i.e. that his testimony would have corroborated that of Van Rooy and Yost that the duties of the position were at a JSS-2 level. Citing, CARR V. AMUSEMENT INC., 47 Wis. 2d 368, 375, 376 (1970); STATE EX. REL. PARK PLAZA SHOP. CENTER V. O'MALLEY, 59 Wis. 2d 317, 318 (1973).

In its reply brief, the Union contends that the State did not differentiate between the claims at issue and incorrectly asserted that the Union "must show that the Employer was motivated, at least in part, by anti-Union hostility." The Union need not prove intent to violate protected rights in order to show an independent violation of Sec. 111.84(1)(a), Stats. Placing Seidemann in the position to the exclusion of represented employes' transfer rights constituted at least two types of independent violations. First, placing a former supervisor in a bargaining unit position to the exclusion of represented employes at a time when they are unemployed or underemployed is "inherently discriminatory or destructive. . ." Citing, N.L.R.B. V. ERIE RESISTOR, 373 U.S. 221 at 228 (1973). Such conduct clearly detracts from the likelihood that those employes will be willing to "join or assist labor organizations. . ." Section 111.82, Stats. Similar effects would occur with regard to employes currently working full-time upon seeing that the Union cannot protect their transfer rights from encroachment by supervisors. Secondly, the "reasonable invocation" of a right under a labor agreement by an individual employe constitutes protected activity whether the right is raised by a formal grievance or by informal complaints. Citing, N.L.R.B. V. CITY DISPOSAL SYSTEMS, 465 U.S. 822 (1984). Reducing the number of bargaining unit employes or the amount of time they work has an inherent tendency to reduce the invocation of such rights which constitutes collective activity taken "for purpose of collective bargaining or other mutual aid and/or protection." Id., 465 U.S. at 830. Thus, substituting a former supervisor in a represented position "restrains" collective activity in violation of Section 111.84(1)(a), Stats. The Union further contends that the State's asserted bases for rebutting a finding of an intent to discriminate in violation of 111.84(1)(c), Stats., are not persuasive. The fact that Rosecky felt the position was "important" does not justify classifying it at a JSS-3 rather than a JSS-2 level. A JSS-2 can do "important" work and there was no evidence presented that Seidemann's position "led other placement specialists" or directed a "specialized program area" or otherwise qualified as a JSS-3

position. It is essentially

undisputed that Seidemann's position was identical to that of the prior JSS-2 incumbents and that JSS-2's fill the same positions around the State. The State's challenge of the validity of the testimony of Van Rooy and Yost as "anecdotal" must also fail. Both Van Rooy and Yost had an opportunity to observe the nature of Seidemann's duties and the State failed to call Seidemann as a witness, stipulated that he had no written job description, and effectively conceded that the work he performed was done by JSS-2's throughout the State. Thus, the State is hardly in a position to claim the Union's proof was inadequate. Third, the State's assertion that its conduct should be immunized because it did not permit Seidemann to permanently demote into the unit position is "puzzling" and the State cited no case law for its proposition. Whether or not it was designated permanent, Seidemann was in the position from April of 1993 to February of 1994 when other, represented employes were laid off or underemployed. Thus, those employes were discriminated against in violation of Section 111.84(1)(c), Stats. Finally, by failing to address the fact that it did not call Seidemann as a witness, the State thereby concedes that an adverse inference should be drawn against it as a matter of law.

In response to the State's assertion of an untimeliness defense in its reply brief, the Union asserts that the State's failure to raise the defense prior to that point constituted a waiver of its "statute of limitations" defense. The Union asserts that Sec. 111.07(14), Stats., is not a statute limiting the Commission's subject matter jurisdiction; rather, it is a "statute of limitations" and thus can be waived. Citing MILWAUKEE COUNTY VS. LABOR & INDUSTRY REVIEW COMMISSION, 113 Wis. 2d 199, 205 (Ct. App. 1983). Since the State did not raise the defense prior to or at hearing, it waived the defense. The Union also notes that Seidemann was apparently extended in the position on a number of occasions, including October and December of 1993, well within one year prior to the filing of the complaint. The Union also asserts that until the layoffs occurred (December of 1993), it was not aware of the tangible detriment to the employes that would support its unfair labor practice charges. Lastly, the Union asserts that each day Seidemann continued to be employed in the position constituted a continuing violation. He remained in the position until February of 1994, well within the one year statute of limitations.

Respondent

The State first asserts that the Union has failed to sustain its burden of proof to show that the posting of the vacant ES/UI Workshop Coordinator position at the JSS-3 classification constituted an unfair labor practice. As the Complainant, the Union has the burden of proof in the matter and Section 111.07(3), Stats. requires that "it shall be required to sustain such burden by a clear and satisfactory preponderance of the evidence." In this case, it requires the Union to prove that the State was motivated, at least in part, by anti-union hostility. Citing, EMPLOYMENT RELATIONS DEPARTMENT V. W.E.R.C., 122 Wis 2d 132, 142 (1985). The sum total of the Union's case is the evidence that some Workshop Coordinator positions are filled at the JSS-2 level and the assertion that the State should have done so in this case. The only apparent basis for the assertion

that anti-union hostility influenced the posting decision is the

argument that the State was "protecting" Seidemann after the elimination of his supervisory position, however, that argument fails to account for the fact that Seidemann's request to demote into the position was denied and that the position was eliminated by April of 1994.

The State asserts that it has presented evidence that its decision to post the position at the same level as the former incumbent, i.e. JSS-3, was reasonable and rational. The local office supervisor felt that it was important to maintain good production results from the position, and such results are more likely from an experienced employe who has achieved the higher civil service classification. The fact that the prior incumbent had been classified at that level demonstrates that the work available for the position justified the higher classification. Finally, the decision was not made at the sole discretion of the local supervisor, but was reviewed and approved by the Department's Bureau of Personnel. Testimony from the Union's witness that the position could have been filled at the JSS-2 classification based upon her observation of the work Seidemann performed while in the position, does not capture distinctions as to the level of independent responsibility and initiative exercised by an individual, the type of factor that distinguishes between a JSS-2 and a JSS-3. The issue is not whether the vacancy could have been posted at a JSS-2 level; rather, it is whether or not the State committed an unfair labor practice by taking an action motivated by anti-union hostility. The Union has failed to provide evidence of such hostility. The State concedes that its actions were not the only possible way to react to the situation; however, it is clear that its actions were not based on any improper anti-union motivation.

In its reply brief, the State asserts that the allegations relating to the posting of the vacant Workshop Coordinator position are untimely under Section 111.07(14), Stats. and 111.84(4), Stats. The position was posted at a JSS-3 level on April 21, 1993. Complainant describes the focus of its complaint as "the Employer's decision to provide a vacant position to a former supervisor and to prevent unemployed or underemployed employes from transferring to that position." Those alleged actions took place on or before April 21, 1993, and the instant complaint was filed on September 29, 1994. Thus, the Commission does not have jurisdiction to consider any issues relating to the temporary assignment of Seidemann to the position or the decision to post the position at the JSS-3 level.

The State also asserts that the Union has failed to establish the anti-union animus element of the unfair labor practice charge. The Union argues that hostility toward union members in general may be inferred solely because the posting of the position as a JSS-3 resulted in no mandatory postings from represented employes at that level while there were employes at the JSS-2 level who could have posted to it as a JSS-2 vacancy. There must, however, be some factual basis for an inference to be drawn, and in each of the three Commission decisions cited by the Union, the fact situation presented the type of specific basis for a finding of anti-union hostility that is lacking in this case. This case does not involve disciplinary action of any kind and there is no ongoing dispute

over any labor management issue. The Union has simply

focused on a management decision as to the posting of a vacant position and a temporary assignment to the position, and argued that management hostility may be inferred because different decisions were not made. Following this standard would allow the use of an unfair labor practice complaint to challenge any management decision solely because the decision may have an adverse effect on represented employes, and this would clearly be beyond the scope of SELRA. The State also asserts that no adverse inference arises from the fact that Seidemann was not called as a witness. The issue involved Seidemann's temporary assignment in the posting of the vacancy and the people who took those actions were called as witnesses. Seidemann had no involvement in those decisions and could provide no relevant evidence. Lastly, the State asserts that, while a valid unfair labor practice charge could result from the intentional misuse of a position classification system by a hostile supervisor, the facts in this case do not justify the Union's argument as to how the vacant position should have been classified. The issue is whether there was any improper motivation in the making of the decisions. The State has explained the basis for its decisions and the Union presented no basis for questioning the motivation of these transactions, other than pointing out that they could have been done differently.

DISCUSSION

Section 111.07(14), Stats.

The first issue that must be addressed is the effect of the State's assertion of untimeliness pursuant to Sec. 111.07(14), Stats., which it raised for the first time in its post-hearing reply brief. The Union takes issue with the Examiner's interlocutory ruling that the provision is one of subject matter jurisdiction and that therefore its application is not waivable. In support of its position, the Union cites MILWAUKEE COUNTY V. L.I.R.C., 113 Wis. 2d 199 (Ct.App. 1983), a decision wherein the Court held that then Sec. 111.36(1), Stats., (now Sec. 111.39(1)) to be a statute of limitations, and thus waivable, as opposed to limiting the subject matter jurisdiction of the Labor and Industry Review Commission (LIRC). It is noted that the Court's holding did not include every such statute within Chapter 111 of the statutes. Rather, the Court specifically addressed Sec. 111.36(1), Stats., and, in part, relied upon that provision's legislative history in reaching its decision. 113 Wis.2d at 204-205. For those reasons, the Examiner does not consider the decision in MILWAUKEE COUNTY to require a finding that Sec. 111.07(14) is a "statute of limitations".

The Union also disagrees with the Examiner's reading of STATE OF WISCONSIN, Dec. No. 20909-B (WERC, 7/85), as holding that Sec. 111.07(14) is jurisdictional. The Examiner would agree that better precedent exists than the case he cited in his letter ruling on the Union's motion to strike and that the case cited refers to Sec. 111.07(14) Stats., as a "statute of limitations".

Section 111.70(14), Stats., applies to the unfair labor practice complaints filed under the Wisconsin Employment Peace Act (WEPA), the Municipal Employment Relations Act (MERA), and the State Employment Labor Relations Act (SELRA), the latter pursuant to Sec. 111.84(4), Stats. Thus, Commission decisions in cases arising under WEPA and MERA involving the application of Sec. 111.07(14) are precedential. While the Commission has often referred to Sec. 111.07(14) as a "statute of limitations", it has treated the provision as limiting the Commission's jurisdiction to hear and decide complaints of unfair labor practices. In its decision in RETAIL STORE EMPLOYEES UNION, Dec. No. 8409-C (WERC, 6/68), a case arising under WEPA, the Commission held that:

> While the Wisconsin Employment Relations Commission has concurrent jurisdiction with State and Federal Courts with respect to proceedings involving alleged violations of collective bargaining agreements and while the statutes of limitation governing such actions before State and Federal Courts do extend beyond the one year period provided in Section 111.07(14), the Commission's jurisdiction to determine whether an unfair labor practice has been committed in the alleged violation of the collective bargaining agreement is specifically limited by Section 111.07(14) and can be only applied to those actions which occur within one year from the date of filing of unfair labor practice complaint.
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> (At pp. 8-9)

More importantly, the facts in this case do not support the finding of waiver even under the decision in MILWAUKEE COUNTY, supra. In its decision in MILWAUKEE COUNTY, the Court, while noting that the County had expressly waived the timeliness issue before the L.I.R.C. examiner, held that the County had waived its right to rely on Sec. 111.36(1), Stats., on appeal because it did not raise the matter in its petition for review to the circuit court, not because of its earlier express waiver:

> Having determined that sec. 111.36(1), Stats. (1977), is a statute of limitations, we must next determine whether a defense based on it may be waived before the hearing examiner. We hold that it can be waived.
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> We need only examine the County's pleadings before the circuit court to resolve this question. . .
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> The County did not raise the issue of subject matter jurisdiction or the defense of statute of limitations.

> It is well-settled law that the affirmative defense of statute of limitations must be raised in a pleading or by a motion, or be deemed waived. In order for the County to take advantage of the defense of statute of limitations it must plead this defense in its petition for review. Our review of the County's petition for review leads us to conclude that the County did not plead the defense and therefore waived it. We also note, as stated above, that the County specifically waived this defense in the stipulation before the hearing examiner.
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> (113 Wis. 2d at 205-206) (Footnotes omitted).

One can reasonably imply from the Court's decision, that had the County raised the timeliness defense in its petition for review to the Circuit Court, it would not have been deemed to have waived the defense.

Unlike the situation in MILWAUKEE COUNTY, the State did not expressly waive the effect of Sec. 111.07(14), Stats., and did raise that defense while the matter was still pending before the administrative agency. ERC. 22.03(5), Wis. Adm. Code, provides, in relevant part, as follows regarding the amendment of an answer:

> . . .During the hearing and prior to the issuance of the order, the respondent may amend the answer where the complaint as been amended, within such period of time as may be fixed by the commission, or by the commission member or examiner authorized to issue and make findings and orders. Whether or not the complaint has been amended, the answer may, upon motion granted, be amended upon such terms and within such period as may be fixed by the commission, commission member or examiner, as the case may be.

Although the State did not raise the issue of timeliness in the form of a motion to dismiss, form will not be placed over substance with regard to pleadings before the Commission; rather, the Examiner is concerned with whether the manner in which the defense is raised prejudices the opposing party's ability to respond. While the State unexplainedly waited until its post-hearing reply brief to raise the issue of timeliness, the record was still open and the Union was given the opportunity to respond in the form of additional evidence and/or argument on that point, and in fact did submit additional argument relying on certain facts which are not disputed in the record. For these reasons, the Examiner has concluded that even if Sec. 111.07(14), Stats., is waivable, the State has not waived its right to rely on such a defense in this case.

The record indicates, and the Examiner has found, that the decision to place Seidemann in the ES/UI Workshop Coordinator position in the Sheboygan Job Service office on a temporary assignment was made prior to April 5, 1993, more than a year prior to the filing of the instant complaint. Likewise, the decision to post that position at a classification level of JSS-3, and the

posting itself, took place in April of 1993, again more than one year prior to the filing of the complaint. The same is true of those actions of the State in extending Seidemann's acting assignment in the position in August of 1993. Thus, the allegations that the State violated SELRA by those decisions to place Seidemann in the position on a temporary or acting basis and the posting of the position at a JSS-3 level are untimely under Sec. 111.07(14), Stats., and therefore have been dismissed. The actions of the State on October 21 and December 29, 1993 in extending Seidemann's assignment in the position, as well as his presence in the position while bargaining unit personnel were laid off or reduced to part-time during the one year period prior to the filing of the complaint, are discussed below.

Section 111.84(1)(a)

The Union asserts that the State committed independent violations of Sec. 111.84(1)(a), Stats., by placing Seidemann in the ES/UI Workshop Coordinator position and keeping him there while bargaining unit employes were attempting to exercise their contractual transfer rights in order to avoid being laid-off or reduced in time. Sec. 111.84(1)(a), Stats., provides that it is an unfair labor practice for an employer:

> To interfere with, restrain or coerce employes in the exercise of their rights guaranteed in s. 111.82.

The rights guaranteed to State employes under Sec. 111.82 of SELRA are identical to those rights guaranteed to municipal employes under Sec. 111.70(2) of the Municipal Employment Relations Act (MERA), and Sec. 111.84(1)(a) of SELRA is identical to Sec. 111.70(3)(a) of MERA. Therefore, the Wisconsin Supreme Court has held that the same test for finding a violation under MERA applies to cases arising under SELRA. STATE OF WISCONSIN V. WISCONSIN EMPLOYMENT RELATIONS COMMISSION, 122 Wis. 2d 132, 143 (1985). The Commission held in a case arising under MERA that:

> 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.
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> JEFFERSON COUNTY, Dec. No. 26845-B (WERC, 7/92), aff'd. 187 Wis. 2d 647 (Ct.App. 1994). (Footnotes omitted).

The Union asserts that placing a former supervisor in a vacant bargaining unit position to the exclusion of represented employes when the latter are reduced to part-time or laid-off is "inherently discriminatory or destructive." Citing, N.L.R.B. v. ERIE RESISTOR CORP., 373 U.S. 221, 227-28 (1963). The Union's reliance upon ERIE RESISTOR is misplaced. In that case, the employer granted super-seniority to replacement workers and strikers who had returned to work during a strike, which operated to the detriment of the employes who remained on strike. The Court upheld the NLRB's findings that such action both interfered with the rights of employes to engage in concerted activities protected by Sec. 7 of the National Labor Relations Act, including the right to engage in a strike, and also constituted discrimination in terms of employment so as to discourage participation in concerted activities. The Court also upheld the NLRB's finding that such conduct "carried its own indicia of intent". There has been no showing that the State was acting to reward an individual for not being a member of the Union or for refusing to participate in protected, concerted activities, nor has it been shown that the State was acting to punish employes for attempting to engage in concerted activities, such as exercising their contractual transfer rights. The Union correctly notes that "intent" is not required to find interference; however, the Union also asserts that the Examiner should find that the State's actions, on their face, were so "inherently destructive" of the employe's rights to exercise their contractual transfer rights that by its nature it has a reasonable tendency to interfere with those rights. The Examiner notes that Seidemann was placed in the position temporarily, and that the position was posted, albeit at the JSS-3 level, so that represented employes who were eligible could exercise their transfer rights. Employes classified at the JSS-3 level are in the bargaining unit represented by the Union and the record indicates that the prior incumbent in the ES/UI Workshop Coordinator position had been classified as a JSS-3. Therefore, the State's actions did not preclude bargaining unit employes in general from exercising their contractual rights. Those actions also did not rise to the level of the conduct of the employer under consideration by the NLRB and the Court in ERIE RESISTOR, supra.

There is also no evidence that the Union was helpless to meaningfully challenge the State's actions or that it would necessarily be perceived as such by the employes it represents. The parties' Agreement contains a provision for final and binding arbitration of grievances arising under the Agreement. The record indicates that the Union grieved the State's action in posting the position at a JSS-3 level in April of 1993 and in January of 1994 grieved the reduction of Butts, Yost and Jacobs to part-time and the layoff of Sweetman while Seidemann remained in the position on a full-time basis. Those grievances were pending at time of hearing and there is no evidence in the record indicating that the grievance procedure had broken down with respect to those grievances. Should the Union prevail in the arbitration of those grievances, a backpay remedy would be a likely remedy for the employe who would have had the contractual right to transfer into the position, to the extent that employe suffered a financial loss due to the State's actions.

The Union also argues that reducing the number of represented employes or the amount of time they work has an "inherent tendency" to reduce the number of invocations of contractual rights by employes, i.e. engage in protected activity, and therefore restrains collective activity in violation of 111.84(1)(a), Stats. That argument is not well taken. It does not necessarily follow (and is not necessarily even likely) that fewer employes will result in fewer grievances or complaints being filed. Acceptance of that argument would also mean that an employer would be guilty of committing an independent violation of Sec. 111.84(1)(a), Stats., every time it was found to have violated a collective bargaining agreement by laying off employes or reducing their work time. The Examiner is not aware of any case law that suggests that is the case.

For the foregoing reasons the Examiner has concluded that the Union has failed to show by a clear and satisfactory preponderance of the evidence that the State's actions in extending Seidemann's acting assignment in the ES/UI Workshop Coordinator position and continuing to employ him in the position in that manner while employes represented by the Union were reduced to part-time or laid off, had a reasonable tendency to interfere with their exercising their rights under Sec. 111.82, Stats. Therefore, those allegations have been dismissed.

Section 111.84(1)(c)

Section 111.84(1)(c), Stats. provides, in relevant, part, that it is an unfair labor practice for an employer:

> (c) To encourage or discourage membership in any labor organization by discrimination in regard to hiring, tenure or other terms or conditions of employment.

In order to establish a violation of Sec. 111.84(1)(c), Stats., a complainant must establish by a clear and satisfactory preponderance of the evidence that (1) the employe had engaged in protected, concerted activity, (2) that the employer was aware of said activity and hostile thereto, and (3) that the employer's action was based, at least in part, upon said hostility. STATE OF WISCONSIN, DEPT. OF EMPLOYMENT RELATIONS V. WISCONSIN EMPLOYMENT RELATIONS COMMISSION, 122 Wis. 2d 132 (1985).

While the Union concedes that it does not contend that the State had animus toward any of the laid-off or under-employed employes due to their engaging in specific protected activity, it does assert that the requisite animus for finding discrimination was the State's hostility toward the exercising of contractual transfer rights by such employes. The Union asserts that such hostility may be inferred from the State's actions in posting the ES/UI Workshop Coordinator position at the JSS-3 classification level without being able to justify doing so, and by placing and continuing Seidemann in the position at a time when represented employes were attempting to exercise their contractual transfer rights so as to avoid being laid off or reduced to part-time.

Animus may appropriately be inferred where it can be reasonably drawn from the facts. STATE OF WISCONSIN, 122 Wis. 2d at 142-143. As explained above, the State's decision to post the vacancy at a classification level of JSS-3, and the posting itself, took place more than one year prior to the filing of the complaint and the allegations regarding those actions have been dismissed on that basis. However, while actions occurring more than one year prior to the filing of the complaint cannot themselves constitute the violation, they may be used to shed light on the employer's motive regarding later actions that occurred within the statutory one-year period; in this case, the decisions in October and December of 1993 to extend Seidemann's acting assignment. MORAINE PARK TECHNICAL COLLEGE, Dec. No. 25747-A (WERC, 1/90). The Examiner concludes, however, that the facts in the record are not sufficient to support an inference of anti-union animus. As noted previously, JSS-3's are in the bargaining unit represented by the Union, and the State's actions in deciding to post the vacant Workshop Coordinator position at a classification level of JSS-3 and the posting implementing that decision did not preclude all represented employes from exercising their contractual transfer rights regarding that position. Assuming, arguendo, that the State's intent was to protect Seidemann from layoff, such partiality does not necessarily translate into anti-union animus or hostility toward the exercise of represented employes' contractual transfer rights. As also noted previously, there is no evidence to show that the State was attempting to reward Seidemann for not engaging in protected activity or to punish employes who had or desired to engage in such activity. While it is possible that the State's actions regarding Seidemann violated employes' contractual rights, there is not a sufficient basis in the record to support a finding that the State took those actions for the purpose of discouraging represented employes from attempting to exercise those rights or to decrease the number of represented employes. For these reasons, the allegation of a violation of Sec. 111.84(1)(c), Stats., has been dismissed.

Section 111.84(1)(e)

The Union orally amended its complaint at hearing to allege violations of Sec. 111.84(1)(e), Stats. In doing so, the Union requested that the Examiner rule on the alleged contractual violations raised in the grievances filed regarding the posting of the ES/UI Workshop Coordinator position at a JSS-3 level in April of 1993 and the continuation of Seidemann in the position when represented employes had been laid-off or reduced to part-time in January of 1994. The issue of the timeliness of the allegations regarding the posting aside, the Union and the State are parties to a Collective Bargaining Agreement that contains provisions for transfer rights and for the final and binding arbitration of disputes regarding an alleged violation of provisions of the Agreement. There has been no showing that the parties' contractual grievance procedure has broken down, or any other basis for departing from the Commission's general rule that it will not assert its jurisdiction over alleged breach of contract violations where such claims are covered by a contractual grievance procedure containing procedures for the final impartial resolution of such disputes. In circumstances such as here, the Commission will not assert its jurisdiction over such breach of contract claims. STATE OF WISCONSIN, Dec. No.

27365-C (WERC, 8/94), citing, STATE OF WISCONSIN, Dec. No. 20830-B (WERC, 8/85). Therefore, those allegations have also been dismissed in this proceeding.

Dated at Madison, Wisconsin, this 22nd day of October, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

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