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-C

Appearances:

Lawton & Cates, S.C., by **Attorney John C. Talis,** 214 West Mifflin Street, Madison, Wisconsin 53701-2965, appearing 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, appearing on behalf of the State of Wisconsin.

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

On October 22, 1997, Examiner David E. Shaw issued Findings of Fact, Conclusions of Law with Accompanying Memorandum in the above matter wherein he concluded that: he did not have subject matter jurisdiction over certain allegations in the complaint; it was not appropriate to assert jurisdiction over other complaint allegations; and Respondent had not violated Sec. 111.84 (1)(a) or (c), Stats., to the extent he had jurisdiction over said complaint allegations. Given the foregoing, he dismissed the complaint.

Complainant timely filed a petition with the Commission seeking review of the Examiner's decision pursuant to Secs. 111.84(4) and 111.07(5), Stats. The parties thereafter filed written argument in support of and in opposition to the petition, the last of which was received May 5, 1998.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issues by the Commission and its staff, footnote text is found in the body of this decision.

Having considered the matter and being fully advised in the premises, the Commission makes and issues the following

ORDER

A. The Examiner's Findings of Fact are affirmed.

B. The Examiner's Conclusions of Law 1-3 are reversed and the following Conclusions of Law are made:

1. Section 111.07(14), Stats. (which is made applicable to this proceeding by the terms of Sec. 111.84(4), Stats.) is a statute of limitations which can be waived when not properly raised by a party as an affirmative defense.

2. Respondent State of Wisconsin waived its right to assert Sec. 111.07(14), Stats. as an affirmative defense by failing to raise the defense until it filed its reply brief with the Examiner. Therefore, the Commission does have jurisdiction to determine all alleged violations of Secs. 111.84(1)(a) and (c), Stats.

C. The Examiner's Conclusion of Law 4 is affirmed as renumbered and modified as follows:

3. Respondent State of Wisconsin did not violate Secs. 111.84(1)(a) or (c), Stats.

D. The Examiner's Conclusion of Law 5 is affirmed as renumbered to Conclusion of Law 4.

E. The Examiner's Order dismissing the complaint is affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 24th day of July, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/
James R. Meier, Chairperson

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

State of Wisconsin

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

THE PLEADINGS

Complainant alleged that the Respondent committed independent violations of Sec. 111.84(1)(a), Stats., and 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 unit 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. Complainant amended its complaint at hearing and requested that the Examiner decide certain pending grievances as violations of Sec. 111.84(1)(e), Stats.

Respondent 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. Respondent objected to the Commission asserting its jurisdiction as to any alleged violations of Sec. 111.84(1)(e), Stats.

THE EXAMINER'S DECISION

As to the issue of whether certain complaint allegations were untimely, the Examiner concluded that Sec. 111.07(14), Stats., limited the Commission's subject matter jurisdiction and could not be waived. He further concluded that even if Sec. 111.07(14), Stats., is statute of limitations, Respondent State of Wisconsin had not waived its right to raise the defense of untimeliness. Given his determination, the Examiner concluded that he did not have jurisdiction over the alleged violations which occurred more than one year prior to the filing of the complaint.

As to the Secs. 111.84(1)(a) and (c), Stats., complaint allegations which he found to be timely, the Examiner held as follows:

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 their 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 Section 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 it 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 with 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 discriminating 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 VS. 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.

Lastly, the Examiner concluded that it was not appropriate to exercise jurisdiction over the alleged violations of Sec. 111.84(1)(e), Stats., because there had been no showing that the breach of contract claims were not subject to the parties' contractual grievance arbitration procedure.

POSITIONS OF THE PARTIES ON REVIEW

Complainant

Complainant contends the Examiner erred when he concluded Respondent had not violated Secs. 111.84(1)(a) and (c), Stats. It requests that the Examiner be reversed.

As to the Examiner's analysis of the impact of Sec. 111.07(14), Stats., on the timeliness of the allegations in the complaint, Complainant asserts the Examiner erred when he concluded that Sec. 111.07(14), Stats., restricts the Commission's subject matter jurisdiction and cannot be waived. Complainant argues that Sec. 111.07(14), Stats. is a statute of limitations which can be and was waived by Respondent. Thus, Complainant asserts that all complaint allegations were properly before the Examiner and that he erred by dismissing certain allegations as untimely.

Turning to the merits of the alleged violations of Secs. 111.84(1)(a) and (c), Stats., Complainant argues that by giving a supervisor a unit job to protect him from layoff and intentionally classifying and posting that job at a level which deprived unemployed and under-employed unit employes of the right to transfer into the position, Respondent engaged in conduct inherently destructive of rights protected by the State Employment Labor Relations Act. Complainant further argues that the facts established by the record are also sufficient to support the inference that Respondent was motivated at least in part by a desire to destroy the transfer rights of union represented employes. Therefore, Complainant urges the Commission to reverse the Examiner's dismissal of these complaint allegations.

Respondent

Respondent contends the Examiner properly analyzed the issues before him and urges affirmance of his decision in its entirety.

Respondent asserts the Examiner properly found certain complaint allegations to be untimely and others to be unsupported by the record. Respondent argues that its actions were consistent with and premised on doing all that is possible to protect all employes from the

adverse consequences of reorganization due to funding cuts and that there is no evidence that its actions were improperly motivated. Thus, Respondent contends that there is no basis in the record for concluding that it violated Secs. 111.84(1)(a) or (c), Stats.

DISCUSSION

We reverse the Examiner's conclusion that Sec. 111.07(14), Stats. is not a waivable statute of limitations. We affirm his dismissal of the complaint in its entirety.

As to Sec. 111.07(14), Stats., the Examiner and the parties correctly view the issue on review as one of determining whether this statute restricts the subject matter jurisdiction of the Commission (and cannot be waived) or whether it is a statute of limitations (which can be waived). As the Examiner pointed out in his quotation from RETAIL STORE EMPLOYEES UNION, DEC. NO. 8409-C (WERC, 6/68), the Commission has sometimes been less than precise when discussing whether this statutory provision is or is not a statute of limitations. However, as a general matter, we have historically referred to this provision as a statute of limitations. HARLEY-DAVIDSON MOTOR COMPANY, DEC. NO. 7166 (WERC, 6/65); CITY OF MADISON, DEC. No. 15725-B (WERC, 6/79); MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 21050-F (WERC, 11/84); STATE OF WISCONSIN, DEC. NO. 2O909-B (WERC, 7/85); STATE OF WISCONSIN, DEC. NO. 21980-C (WERC, 2/90) AFF'D CT. APP, DIST. 1 NO. 91-2324 (UNPUBLISHED, 6/93); STATE OF WISCONSIN, DEC. NO. 6676-B (WERC, 4/91). Our reference to Sec. 111.07(14), Stats. as a statute of limitations conforms to the holdings of Wisconsin courts who have also viewed this statutory provision as a statute of limitations. TULLY V. FRED OLSON MOTOR SERVICE CO. 27 WIS. 2D 476 (1965); WHITE V. RUDITYS, 117 WIS. 2D 130 (1983). Given all of the foregoing, we are satisfied that Sec. 111.07(14), Stats., is a statute of limitations and reverse the Examiner's conclusion to the contrary.

Having determined that Sec. 111.07(14), Stats., is a statute of limitations, the issue then becomes one of determining whether Respondent waived its right to assert the statute by first raising this affirmative defense in its post-hearing reply brief to the Examiner. We conclude that Respondent's tardiness in raising this defense does constitute a waiver of the defense.

Affirmative defenses are to be raised in the answer to the complaint. ERC 22.03(4)(b). Good cause is required by ERC 22.03(5) for the amendment of an answer prior to hearing. Here, Respondent sought, in effect, to amend its answer after the hearing.

We acknowledge ERC 22.03(5) also contains general language allowing an Examiner to grant a motion to amend an answer "upon such terms, and within such period as may be fixed ..." This portion of ERC 22.03(5) is generic enough to allow for post-hearing amendments to an answer. However, there is nothing in this record which would warrant an exercise of discretion under ERC 22.03(5) to allow Respondent to amend its answer after the hearing was concluded by raising the statute of limitations as a defense. As a general matter, issues should be raised and/or litigated prior to or during the hearing. As a general matter, allowing new issues to be raised post-hearing (at least where no reason is presented as to why the issue could have been raised prior to or during the hearing itself) necessarily delays the ultimate disposition of the complaint and thus is contrary to Sec. 111.80(4), Stats., which expresses the State of Wisconsin's policy interest in having the Wisconsin Employment Relations Commission serve as a

"convenient, **expeditious** and impartial tribunal . . ." Given all of the foregoing, we conclude that Respondent was not entitled to amend its answer after the hearing and thus waived its ability to raise Sec. 111.07(14), Stats. as an affirmative defense.

Turning to the merits of the complaint, we find no violation of either Sec. 111.84(1)(a) or (c), Stats.

The primary thrust of Complainant's argument is that Respondent's conduct was "inherently destructive" of rights protected by the State Employment Labor Relations Act (SELRA) and thereby violative of Sec. 111.84(1)(a), Stats. Secondarily, Complainant asserts that there is sufficient evidence in the record to support a finding that Respondent acted at least in part out of animus toward the exercise of rights protected by SELRA and thereby violated Sec. 111.84(1)(c), Stats. EMPLOYMENT RELATIONS DEPT. V. WERC, 122 WIS. 2D 132 (1985).

As a general matter, the "inherently destructive" theory is more applicable to alleged discrimination (Sec. 111.84(1)(c), Stats.; Sec. 111.70(3)(a)3, Stats.-FENNIMORE SCHOOL DISTRICT, DEC. NO. 12790-B (WERC, 12/78); Sec. 8(a)(3) of the National Labor Relations Act-NLRB V. GREAT DANE TRAILERS, INC. 388 US 26 (1967) note 6) than independent interference violations (Sec.111. 84(1)(a), Stats.; Sec. 8 (a)(1) of the National Labor Relations Act). However, whether viewed as a theory in support of an alleged violation of Sec. 111.84(1)(a) or (c), Stats., we do not find that the Respondent acted in an "inherently destructive" manner.1/

1/As the Examiner properly concluded (and the Complainant does not contest on review), the question of whether the Respondent's conduct violated the contractual rights of employes is not properly before us given the applicability of the contractual grievance arbitration procedure to such issues. Thus, we express no opinion on that topic when evaluating whether the conduct was "inherently destructive."

As reflected in the Examiner's Findings of Fact which we have affirmed, the Respondent's conduct consisted of the following actions:

> 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 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 (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 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 of 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.

In our view, the foregoing Findings reflect that the Respondent acted in a rational manner when reorganizing employe resources in response to funding cuts. While it can be argued that the position Seidemann filled could have been classified at a JSS-2 level instead of a JSS-3, there is credible support in the record for the proposition that the JSS-3 classification was rationally related to the position's responsibilities. In addition, the JSS-3 classification is within the bargaining unit and employes represented by Complainant in the JSS-3 classification thus had the opportunity to bid for the position Seidemann ultimately filled on a temporary basis. Thus, while the JSS-3 classification made JSS-2 employes on full or partial layoff ineligible for the position, the position remained a bargaining unit transfer opportunity. 2/ Given all of the foregoing, while we acknowledge the frustration and suspicion which JSS-2 employes may well have harbored, we find the facts fall well short of establishing "inherently destructive" behavior by Respondent.

2/ On review, Complainant asserts the Examiner erred by stating in his Memorandum that "represented employes who were eligible could exercise their transfer rights." The Examiner did not err. Complainant erroneously equates the Examiner's statement with a Finding that there were, in fact, eligible JSS-3 employes who could have posted for the job. The Examiner did not make such a Finding, presumably because the record does not definitively establish whether such employes did or did not exist. While the Complainant cites the testimony of one of its witnesses as creating an inference that there were no eligible employes at the JSS-3 level, we do not find that inference sufficient to warrant the Finding sought by Complainant.

The Complainant urges otherwise and points to certain testimony of one of its witnesses as creating an inference that there were no eligible employes at the JSS –3 level. However, we do not find the testimony in question compels the inference Complainant urges. Thus we do not make the Finding sought by Complainant.

Our review of the record also satisfies us that Respondent did not act out of animus toward the exercise of SELRA rights. While Respondent's conduct may or may not have been consistent with the parties' collective bargaining agreement, there is no persuasive evidence that Respondent was hostile to efforts by unit employes to pursue rights they believed they had under the contract. Indeed, as reflected in Finding of Fact 7, it can well be argued that it was Respondent's responsiveness to the exercise of those rights (through the filing of the January 1994 grievance) which ultimately prompted Seidemann's departure.

Given all of the foregoing, we find no violations of Sec. 111.84(1)(a) or (c), Stats., and affirm the Examiner's dismissal of the complaint in its entirety.

Dated at Madison, Wisconsin this 24th day of July, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/
James R. Meier, Chairperson

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

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