

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**STEVE PRELLER**, Complainant

vs.

**STATE OF WISCONSIN, DEPARTMENT OF  
EMPLOYMENT RELATIONS; UNIVERSITY  
OF WISCONSIN SYSTEM; UNIVERSITY OF  
WISCONSIN-MADISON; CHANCELLOR  
DAVID WARD; JAMES STRATTON; UW  
HOSPITAL & CLINICS SUPERINTENDENT  
GORDON DERZON; UWHC PUBLIC  
AUTHORITY GOVERNING BOARD; GREG  
KRAMP; RENAE BUGGE; NEAL  
SPRANGER; DON KLIMPEL; BOB SCHEUER;  
FRANCIS CLIFTON**, Respondents,

and

**LOCAL 171, WISCONSIN  
STATE EMPLOYEES UNION, COUNCIL 24, AFSCME,  
AFL-CIO**, Intervenor.

Case 428  
No. 54553  
PP(S)-264

**Decision No. 28936-B**

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Appearances:

**Mr. Steve Preller**, on behalf of himself.

**Mr. David J. Vergeront**, Chief Legal Counsel, Department of Employment Relations, on behalf  
of the State of Wisconsin.

Lawton & Cates, S.C., by **Mr. P. Scott Hassett**, on behalf of Local 171, Wisconsin State  
Employees Union, AFSCME, Council 24, AFL-CIO.

No. 28936-B

**FINDINGS OF FACT,**  
**CONCLUSION OF LAW, AND ORDER**

**Amedeo Greco, Hearing Examiner:** Complainant Steve Preller ("Preller"), filed an unfair labor practices complaint with the Wisconsin Employment Relations Commission ("Commission"), on October 21, 1996, alleging that the State of Wisconsin ("State"), and certain individually named representatives and entities had committed unfair labor practices within the meaning of the State Employment Labor Relations Act ("SELRA"), by retaliating and discriminating against him because of his concerted, protected activities. The State filed its Answer on December 11, 1996. The Commission on December 11, 1996, appointed the undersigned to issue and make Findings of Fact, Conclusion of Law, and Order as provided for in Section 111.07(5), Wis. Stats.

Intervenor Local 171, Wisconsin State Employees Union, AFSCME, AFL-CIO ("Council 24"), filed a motion to intervene which was granted over Preller's objection. 1/ Hearing was held in Madison, Wisconsin, on March 19-21, 1997. Preller and the State thereafter filed briefs and Preller filed a reply brief which was received by December 14, 1997. Council 24 did not file a brief.

Having considered the arguments and the record, I make and file the following Findings of Fact, Conclusions of Law, and Order.

**FINDINGS OF FACT**

1. Preller, an employe under Section 111.81(7), Stats., at all times material herein has been employed by the State as a Hospital Supply Clerk at the University of Wisconsin Hospital & Clinics ("University Hospital"), in Madison, Wisconsin. Preller resides at 135 South Marquette Street, Apartment #1, Madison, Wisconsin, 53704.

2. The State, an employer under Section 111.81(8), Stats., at all times material herein has operated University Hospital where it employs Director of Classified Personnel James Stratton, Supervisor Francis Clifton, Supervisor Douglas Baez, Supervisor Ronald James Gallitz, Director of Central Services Don Klimpel, Assistant Director of Central Services Robert Scheuer, Executive Director Greg Kramp, Labor Relations Director Renae Buggae, Liaison Officer Neal Spranger, and Superintendent Gordon Derzon. David Ward is the Chancellor of the University of Wisconsin's Madison campus. At all times material herein, they have acted on the State's behalf and have served as its agents. The Department of Employment Relations, the University of Wisconsin System, the University of Wisconsin-Madison, and the UWHC Public Authority Governing Board are all entities of the State.

3. Council 24, a labor organization, represents for collective bargaining purposes Preller and some of the employees employed by the State at University Hospital. At all times material herein, Carl Hacker has served as Council 24's Assistant Director and has acted on its behalf.

4. Preller has engaged in extensive concerted, protected activities relating to his employment status at University Hospitals. He has served as an officer of Council 24; he has filed grievances under the collective bargaining agreement between the State and Council 24; he has filed disability accommodation requests; he has filed safety complaints; he has filed wage complaints with the State of Wisconsin which resulted in payment of about \$300,000 to bargaining unit employees; and he has filed several unfair labor practice cases against the State. In one of those cases, now before the Commission, it was determined that the State violated Section 111.82 of the State Employment Labor Relations Act ("SELRA"), when it, *inter alia*, improperly blamed Preller and other employees for bringing about a change in the State's policy relating to the wearing of smocks at work. See STATE OF WISCONSIN, Dec. No. 28937-A (Greco, 9/97). The State and its agents throughout this time have been aware of most, if not all, of Preller's concerted, protected activities.

5. University Hospital on April 17, 1995, adopted a new Attendance and Punctuality Policy which stated, *inter alia*:

This policy applies to all classified employees of the UWHC and prohibits excessive absenteeism, excessive tardiness and sick leave abuse. Hospital employment assumes a commitment to regular attendance. Employees are expected to report for duty as scheduled and to notify the designated departmental representative in a timely manner whenever they are unable to do so. Supervisors will provide a copy of this policy to new employees at the time of hire and will explain to the employee that failing to work as scheduled or failing to report on time detracts from the effectiveness of hospital operations and adversely affects patient care. Employees are responsible for reading and understanding this policy. If an employee does not understand any part of this policy, questions to clarify an understanding should be addressed to the department manager or to the Human Services Department. This policy will be applied equitably and in conjunction with University of Wisconsin Employee Work Rules.

...

**Review:**

It will be the responsibility of each designated departmental representative or the appropriate supervisor to monitor the attendance record of each employee and to determine through a review process whether excessive absenteeism, excessive tardiness or sick leave abuse exists. A review of an employee's attendance or punctuality may be initiated if any of the following circumstances exist:

- A. three (3) unscheduled absences of any length in any 12 week period, including for reasons of illness or personal business,
- B. any "O" sick leave balance,
- C. the use of unscheduled leave under false pretenses,
- D. a pattern of unscheduled absence in conjunction with:
  - \* scheduled days off,
  - \* legal holidays,
  - \* weekends,
  - \* same days of the week,
- E. unscheduled absences:
  - \* immediately following discipline,
  - \* after working a double shift,
  - \* after working overtime,
  - \* after having a leave request denied,
  - \* under any other suspicious circumstance as determined by a department manager,

- F. tardiness on three occasions within a 12 week period (Tardiness is defined as failing to report promptly, ready to work, at the scheduled starting time of the shift or taking unauthorized extended rest or meal periods.)

If a review of an employee's attendance is initiated, the manager must take into consideration any mitigating circumstances before determining that possible excessive absenteeism, excessive tardiness or sick leave abuse exists. Discipline is NOT to be automatically applied until the following procedure is followed.

The manager should arrange for a pre-disciplinary investigation (PDI) meeting with the employee whose record is being reviewed. For represented employees a union representative may be present. The attendance or tardiness record is to be discussed with the employee in an attempt to determine if there is mitigating reason for the poor record or possible abuse. The manager must be willing to work with the employee to resolve whatever circumstances are adversely affecting the attendance record.

**Progressive Discipline:**

- A. If, after the PDI, the manager determines that a violation of policy exists and that discipline is appropriate, progressive discipline is to be applied according to the following schedule:
- \* 1st violation - verbal reprimand,
  - \* 2nd violation - written reprimand,
  - \* 3rd violation - 2 day suspension,
  - \* 4th violation - 5 day suspension,
  - \* 5th violation - termination.
- B. These progressive steps will be taken in the order listed in all cases except where the manager determines that a violation is serious enough to warrant a higher level of discipline. Examples of serious violations include: no call, no show, or leaving work without authorization.
- C. Absences covered under the Federal or State Family Medical Leave laws may not be used as a basis for discipline.

- D. Consultation with the employment relations staff in the Human Resources Department is required before suspending or terminating an employee for violation of this policy or any other work rules relating to attendance.

...

6. By memo dated May 6, 1996, Employment Relations Specialist Phillip Moss informed various supervisory personnel that University Hospital henceforth would follow a new attendance policy which provided, *inter alia*:

**Clarification regarding combining unexcused absences and tardiness for progressive discipline.**

As noted in policy 9.13, Attendance and Punctuality, a review of an employees attendance record may occur after three unscheduled absences OR three instances of tardiness in a twelve week period. Absences and tardiness should NOT be combined for review purposes. In other words, two instances of tardiness and one unexcused absence should not be counted as the three required for review.

If, however, after the review, discipline is warranted, unexcused absenteeism or tardiness can be used to progress to the next step of discipline under the "theme" of attendance and punctuality. In other words, if you have already given someone a letter of discipline for unexcused absences and now determine that the individuals' tardiness record requires discipline, you may move to the next progressive step of a two day suspension.

Use caution, however, to make sure that the crime fits the penalty. Disciplining for being only a few minutes late three times in a twelve week period may not warrant progressing to the next step; especially if the step involves a suspension. You may want to consider separate discipline tracks or discipline only if the tardiness becomes chronic.

The policy - which was never formally communicated to all employees in written form - was explained to employees, including Preller, at their pre-disciplinary investigatory meetings.

7. In determining whether to discipline employees for violating its attendance policy, the State looks into whether any mitigating factors - such as a doctor's note, car problems, illnesses, etc. - exist and whether they serve to excuse a given tardiness or absence. If an employe is tardy or absent, the State looks at the next 12 weeks to determine whether any discipline is warranted. If an employe is late or absent during that subsequent 12 week period,

the employe is reviewed again for another 12 weeks, thereby producing another "rolling" review period. Employes were initially told that tardiness and absenteeism had two separate disciplinary tracks, but the State via Moss' aforementioned memo now treats tardiness and absenteeism as being on the same disciplinary track once review has been triggered. Back-to-back infractions are sometimes considered as one occurrence and they at other times are considered as two separate infractions, which is what Supervisor Baez did with Preller when Preller was absent on October 3, 1996, and October 4, 1996. Baez's treatment of Preller was consistent with the way some other employes were treated when they had back-to-back absences or tardinesses.

8. The State has a flex-time policy which enables employes to start and end their work days on a fixed schedule before and/or after the regularly-scheduled work day. The State did not discriminate against Preller when it refused Preller's oral request for flex time because he wanted to start and end his work day at different times on different days or, as Scheuer testified: "He wanted to come and go when he wanted." The State nevertheless has accommodated Preller by giving him time off to perform union-related business and it also has excused some of his tardinesses.

9. The State in early 1995 excused all of Preller's past tardinesses - as it did with all other University Hospital employes - when it implemented a new absenteeism/attendance policy. The State separately excused about 30 or so of Preller's other tardinesses in 1995-1996.

10. Preller has an extensive history of tardiness. He was late on the following dates in the following amounts: June 22, 1995, 36 minutes; June 27, 1995, 32 minutes; June 29, 1995, 26 minutes; July 3, 1995, 6 minutes; July 5, 1995, 5 minutes; July 6, 1995, 4 minutes; July 11, 1995, 5 minutes; July 12, 1995, 12 minutes; July 15, 1995, 23 minutes; July 18, 1995, 3 minutes; July 27, 1995, 10 minutes; July 31, 1995, 10 minutes; August 5, 1995, 2 minutes; August 6, 1995, 44 minutes; August 17, 1995, 5 minutes; August 18, 1995, 1 minute; August 21, 1995, 8 minutes; August 24, 1995, 4 minutes; August 26, 1995, 1 minute; August 27, 1995, 3 minutes; August 30, 1995, 3 minutes; September 1, 1995, 6 minutes; September 6, 1995, 3 minutes; September 12, 1995, 1 minute; September 17, 1995, 6 minutes; September 19, 1995, 12 minutes; September 20, 1995, 1 minute; October 3, 1995, 5 minutes; October 4, 1995, 1 minute; October 5, 1995, 3 minutes; October 8, 1995, 3 minutes; October 23, 1995, 2 minutes; October 25, 1995, 38 minutes; October 29, 1995, 6 minutes; November 2, 1995, 1 minute; November 3, 1995, 5 minutes; November 5, 1995, 12 minutes; November 6, 1995, 37 minutes; November 8, 1995, 3 minutes; November 9, 1995, 6 minutes; November 22, 1995, 4 minutes; November 30, 1995, 34 minutes; December 4, 1995, 37 minutes; December 6, 1995, 73 minutes; December 7, 1995, 7 minutes; December 18, 1995, 29 minutes; December 26, 1995, 37 minutes; January 3, 1996, 43 minutes; January 10, 1996, 8 minutes; January 15, 1996, 22 minutes; January 20, 1996, 19 minutes; January 29, 1996, 15 minutes; January 31, 1996, 16 minutes; February 5, 1996, 67 minutes; February 16, 1996, 7 minutes; February 20, 1996, 8 minutes, and February 28, 1996, 9 minutes.

11. The State on July 27, 1995, and August 18, 1995, issued oral warnings to Preller because of his repeated tardiness and repeated violations of its attendance policy and it on November 10, 1995, and March 15, 1996, issued written reprimands to Preller because of his repeated tardiness and repeated violations of its attendance policy.

12. The State on June 11, 1996, suspended Preller without pay for 2 days because he was tardy five times in a 10-week time frame without providing any mitigating circumstances. Supervisor Clifton informed Preller of that suspension via a June 11, 1996, memo which stated:

...

Pursuant to the results of a pre-disciplinary investigation (PDI) held on 06/06/96, this letter is to notify you that you are in violation of UW Work Rules II.A. (Failure to Report Promptly), IV.J. (Failure to Exercise Good Judgment), Central Services Administrative Standards, and UW Hospital & Clinics Policy & Procedure 9.13 (Attendance and Punctuality).

You have been tardy for work 5 times in 10 weeks (03/18/96-5/25/96). These tardy occurrences were for an average of 13.4 minutes each with one of 35 minutes.

As stated at the PDI, you have an extensive history of tardiness. As I offered before, I am willing to discuss moving your start time 30 minutes later if that would allow you to report to work on time. At the PDI you said you believed you were being treated differently than your coworkers due to your union activities. As I explained, that is not the case. All employees in this department are treated as equitably as possible.

Previously three PDIs were held for your tardiness (08/18/95, 12/20/95, and 03/14/96). These resulted in one warning, one verbal reprimand, and one written reprimand. In the past you have admitted you have a problem and said you would report to work on time. You have been given more than ample opportunity, yet there is still a tardiness problem.

On 03/15/96 you received a written reprimand for excessive tardiness. Therefore you will now be suspended for two days without pay. The dates of your suspension will be Tuesday 6/25/96 and Thursday 6/27/96. Future violations of the Work Rules, Administrative Standards, and/or Policies & Procedures may result in more severe disciplinary action. This could include a further suspension without pay or termination of your employment.



As your employer we expect you to be on the job as scheduled. By not reporting for work on time, you negatively affect our ability to provide the highest standard of quality patient health care.

13. The State on November 11, 1996, suspended Preller for five days because he subsequently had three unscheduled absences during a 12-week time frame without offering any acceptable mitigating circumstances. Supervisor Baez informed Preller of said suspension via a November 11, 1996 memo, which stated:

Pursuant to the results of a pre-disciplinary investigation (PDI) meeting held on 10/24/96, this letter is to notify you that you are in violation of UW Work Rules II.B. (Unexcused or Excessive Absenteeism) and IV.J. (Failure to Exercise Good Judgement) in conjunction with UW Hospital & Clinics Policy and Procedure 9.13 (Attendance and Punctuality), and Central Services Administrative Standards. During the period July 16, 1996 through October 4, 1996 (12 weeks) you incurred four unscheduled absences as follows:

07/16/96	sick	
08/20/96	sick	conjunction with days off
10/03/96	sick	conjunction with days off
10/04/96	sick	conjunction with days off

You declined union representation during this meeting and you stated you would represent yourself.

While you refused to answer questions during this meeting, you stated you would submit written answers to my questions at a later date. I agreed to give you until 10/28/96 to respond to the investigation questions and provide mitigating information for consideration in making a disciplinary decision. As I stated at the meeting, your 07/16/96 absence is excused due to satisfactory medical documentation provided by Employee Health Service. Your written answers did not provide any mitigating information (e.g. medical documentation, etc.) concerning your other unscheduled absences.

The remaining three unscheduled absences are unexcused. The absence of 08/20/96 occurred following a day off and preceded another day off. This gave you three days off in a row. The absences of 10/03/96 and 10/04/96 were in conjunction with days off and approved leave time. These two dates preceded nine days off and therefore created eleven consecutive days off from work.

Previously, you received the following discipline for work rule violations in conjunction with UWHC Policy and Procedure 9.13 and Central Services Administrative Standards:

07/27/95	Verbal Reprimand
08/18/95	Verbal Warning
11/10/95	Written Reprimand
12/26/95	Verbal Reprimand
03/15/96	Written Reprimand
06/11/96	Two Day Suspension

You are suspended from work without pay for five days. The dates of your suspension are 11/18/96, 11/19/96, 11/20/96, 11/21/96, and 11/22/96 (Monday-Friday).

Future violations of the UW Classified Work Rules in conjunction with UW Policy and procedure 9.13 and/or CS Administrative Standards may result in additional progressive discipline. Please be aware that per UWHC Policy & Procedure 9.13 the next progressive disciplinary level is discharge from employment. Please note that the opportunity to provide written responses is highly irregular and should not be considered an exception. As was stated in the meeting notice, "you are required to fully and completely answer the questions put to you" during investigatory meetings.

This action is appealable through provisions contained in the WSEU collective bargaining agreement.

14. The State had valid, non-discriminatory business reasons for disciplining Preller on all of the aforementioned occasions and it did so pursuant to its established absentee policy which it has administered in a non-discriminatory way. Preller has grieved both of his suspensions under the contractual grievance/arbitration procedure.

15. Preller has not been subjected to disparate treatment and the State has not discriminated or retaliated against Preller because of his concerted, protected activities. The State has meted out similar discipline to other similarly situated violators of its absentee policy.

### **CONCLUSION OF LAW**

Respondent State of Wisconsin and its agents did not discriminate and/or retaliate against Steve Preller because of his concerted, protected activities when they suspended him on June 11, 1996, and November 11, 1996, and they thus did not violate Section 111.84(1)(c) of the State

Employment Labor Relations Act, or any other section of the State Employment Labor Relations Act.

Upon the basis of the above Findings of Fact and Conclusion of Law, I make and issue the following

**ORDER**

IT IS ORDERED that the complaint allegations herein be, and they hereby are, dismissed in their entirety.

Dated at Madison, Wisconsin, this 2nd day of February, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Amedeo Greco /s/

Amedeo Greco, Examiner

**DEPARTMENT OF EMPLOYMENT RELATIONS**  
**(UW HOSPITAL & CLINICS)**

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

**POSITIONS OF THE PARTIES**

Preller argues that the State twice suspended him in part because of his concerted, protected activities in violation of Section 111.84(1)(a), Stats. 2/ Acknowledging that he cannot provide a "smoking gun", Preller claims that the State's discriminatory motive can be seen in its "pattern of anti-union animus" against other employees and its "unequal treatment" of him here which is partly evidenced by the fact that the State changed its absentee rules so that it could suspend him over conduct which otherwise would not have triggered a suspension. He also argues that the critical time period here covers his two suspensions when the State discriminated and retaliated against Union adherents and when it held him "to a much higher standard of conduct than other employees. . ." similarly situated, i.e., Leanne McGuire, Kim Johnson and Brian Stewart. He thus contends that he has met all of the criteria needed to prove his case, i.e., that he engaged in concerted, protected activities; that the State was aware of those activities; that the State bore animus against him because of those activities; and that the State's stated reasons for suspending him were pretextual in nature in order to hide its illegal, retaliatory motive. As a remedy, Preller requests that his suspensions be overturned; that he be made whole for the lost pay he has suffered because of those suspensions; and that the State be ordered to post an appropriate remedial notice.

The State, in turn, contends that Preller has failed to meet his burden of proof because his own "lack of credibility undermines his testimony"; because its attendance policy "was applied fairly"; and because said policy "was not used to discriminate against Complainant because of his union activities."

**DISCUSSION**

To prevail on his claim, Preller must show that: (1), he engaged in concerted, protected activities; (2), the State and its agents were aware of those activities; (3), the State and its agents bore animus against Preller because of those activities; and (4), Preller was discharged at least in part because of those activities. See, TOWN OF SPIDER LAKE, Dec. No. 28038-A, aff'd by operation of law, Dec. No. 28038-C (WERC, 2/95).

As related above in Finding of Fact No. 4, supra, Preller engaged in extensive protected, concerted activities and the State and its agents were aware of most, if not all, of those activities. Preller therefore has met the first two requirements of his claim.

However, there is no direct evidence that the State and its agents ever bore any animus against Preller because of those activities, which is the third critical component he must prove. Preller himself thus concedes that there is no, in his words, "smoking gun" to support his claim. He therefore argues that an inference should be drawn to that effect because the State has not applied its attendance policy fairly against him; because the State has demonstrated its anti-union bias in its other dealings with other employees; and because back pain caused him to be late or absent on all of the occasions which led to his five-day suspension. 3/

As related in Finding of Fact No. 10, supra, Preller has a dismal attendance record since he was late to work on about 54 separate occasions before he was suspended. Preller's extensive history of tardiness seems to reflect nothing less than a fundamental inability -- or refusal -- on his part to recognize one of the iron rules of the employe-employer relationship: employes must show up and report to work on time. When employes violate that rule and do not report to work on time, they can be properly disciplined and/or discharged over their failure to do so.

The State's attendance policy covers such situations by providing for counseling and for progressive discipline for repeat offenders. Moreover, the State properly applied said policy here because it suspended Preller for two days after he was late on five occasions and because it subsequently suspended him for five days after he had three unscheduled absences during a 12-week time frame without any acceptable mitigating circumstances. Clifton thus credibly testified: "I believe I disciplined [Preller] within the realm of the policy as it applied to his absences." I also credit Scheuer and Klimpel's testimony that they never discriminated against Preller and that they never directed anyone else to discriminate against Preller because of his concerted, protected activities. I further credit Moss' testimony that the absenteeism policy set forth in Finding of Fact 5, supra, was not developed for the purpose of singling out Preller because of said activities.

Preller nevertheless claims that the State's policy as applied to him was discriminatory because the State did not discipline employes McGuire, Johnson and Stewart even though they had similar absentee problems. Preller thus argues: "In the 12-week periods for which they do not receive discipline, their absences or tardiness exceeds that standard" applied to him, i.e., that he was first suspended for having five tardinesses and then two tardinesses in 12-week periods.

In his initial complaint, Preller claimed that at least 10 employes between April 17, 1995, through June 11, 1996, had absentee records similar to his and that none of them were disciplined in the manner he was and that at least 5 employes between April 17, 1995, through June 11, 1996, had absentee records similar to his and that none of them were disciplined in the

manner he was. Preller now has narrowed the scope of his complaint by claiming that only three employees fit into this mold.

No attendance policy, of course, is perfect and it therefore is not surprising if there are some differences in how such a policy is applied. Here, given the large number of employees employed at University Hospital and the unique nature of their own individual circumstances, it is to be expected that some differences will appear as to how individual employees are disciplined since employees under the State's policy are not disciplined if there are mitigating circumstances. However, since neither McGuire, Johnson or Stewart testified here, it is somewhat difficult to fully understand their own circumstances and any mitigating factors in their favor.

Subject to this *caveat*, the record nevertheless shows - through Supervisor Gallitz's testimony which I fully credit - that Stewart received two verbal warnings and a letter of reprimand. Gallitz also testified that he did not discipline Stewart for his other absences - even though he deserved to be disciplined under the State's policy - because, in Gallitz's words: "I was overrun with events and did not get to it."

Johnson received a verbal warning, a letter of reprimand, a two-day suspension and he now is on track to be suspended for five days. Asked why Johnson was not disciplined more severely over other infractions, Gallitz replied: "Basically for the same reason I gave Mr. Stewart. There was a time when I was busy trying to just keep the department running. We have an 80 percent turnover in ORSS and we had people missing in decontamination and other trouble. I had to devote more of my time to take care of primary operating issues."

McGuire received a five-day suspension, a two-day suspension, a letter of reprimand and verbal warnings. Gallitz testified that McGuire also did not receive harsher discipline because he was too busy working on other matters.

I credit all of Gallitz' testimony because he testified in a highly credible fashion and because the record otherwise fully supports his testimony. Hence, there is no proof that Preller was treated differently than Stewart, Johnson and McGuire because of his concerted, protected activities. Rather, he was treated differently because a different supervisor was too busy working on other operational matters. Absent any discriminatory motive, that does not constitute a violation of Section 111.82 of SELRA. It, instead, only means that certain employees received a break because their supervisor was too busy to write them up. Since the State otherwise has tried to apply its absentee policy in an even-handed way, such minor deviations cannot be given the discriminatory tag that Preller tries to hang here.

Preller also claims in his reply brief: "The employer has been found guilty of retaliating against the complainant for union activity (Case 29) during the same period as this complaint. . ."

Nothing is further from the truth. I in fact concluded in that case, at page 7, that: "4. Respondent State of Wisconsin did not retaliate or discriminate against Preller or any other employes because of their concerted, protected activities. . ." STATE OF WISCONSIN, supra, Decision No. 28937-A (9/97). The key word here is "not".

Preller also argues that the State's discriminatory motive against him can be seen in the way that various supervisors have treated other employes. Fellow employe Marfilius, for example, testified here that Supervisor John Kusenberger told him in December, 1995, that "I have no use for you union guys", as Kusenberger then referred to Marfilius, Preller and fellow employe Craig Marchant "by name". Kusenberger is no longer employed by University Hospital and he did not testify. Marfilius also testified that Supervisor Spranger told him in March, 1997 when he served Spranger with a subpoena: "You better be careful. We're watching you." Even if true, these statements standing alone are insufficient to prove that Preller's two suspensions were based on union animus since: (1), Kusenberger played no role in the decision to suspend Preller; and (2), Spranger's statement to Marfilius - which Spranger denied - did not involve Preller.

The bottom line here thus is a simple one: there is no proof that the State discriminated or retaliated against Preller because of his concerted, protected activities when it twice suspended him over his repeated violations of its legitimate absentee policy. Instead, said suspensions were only based upon Preller's steadfast refusal to adhere to the State's reasonable absentee policy, one which has been administered in a non-discriminatory manner.

The complaint is therefore dismissed in its entirety.

Dated at Madison, Wisconsin, this 2nd day of February, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Amedeo Greco /s/

Amedeo Greco, Examiner

**ENDNOTES**

1/ Council 24 was allowed to intervene because it is a party to the collective bargaining contract which gave rise to part of this dispute.

2/ The original complaint herein also asserted that the State discriminated against David R. Marfilus, one of Preller's co-workers. Marfilus subsequently withdrew from this and another related unfair labor practice proceeding. As a result, none of Marfilus' allegations are addressed.

3/ Absent any medical documentation showing that he in fact suffered back pain on the days in issue, I find no merit to this claim.



