STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

STEVE PRELLER, Complainant,

vs.

STATE OF WISCONSIN, DEPARTMENT OF EMPLOYMENT RELATIONS; UW HOSPITAL & CLINICS; UW HOSPITAL & CLINICS SUPERINTENDENT GORDON DERZON; UWHC PUBLIC AUTHORITY GOVERNING BOARD; GREG KRAMP; RENAE BUGGE; NEAL SPRANGER; DON KLIMPEL; BOB SCHEUER, Respondents.

Case 430
No. 54593
PP(S)-263

Decision No. 28938-B

Appearances:

Mr. Steve Preller, 135 South Marquette Street, Apartment 1, Madison, Wisconsin 53704, on behalf of himself.

Lawton & Cates, S.C., by **Mr. P. Scott Hassett** and **Ms. Ellen E. Schmitz**, 214 West Mifflin Street, P.O. Box 2965, Madison, Wisconsin 53701-2965, on behalf of Local 171, Wisconsin State Employees Union, AFSCME, Council 24, AFL-CIO.

Mr. David J. Vergeront, Chief Legal Counsel, Department of Employment Relations, 137 East Wilson Street, P.O. Box 7855, Madison, Wisconsin 53707-7855, on behalf of the State of Wisconsin and the individually-named Respondents.

FINDINGS OF FACT, CONCLUSIONS 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 November 1, 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 interfering with his right to file and process grievances and by discriminating against him because of his concerted, protected activities. Said complaint was co-signed by fellow employe David Marfilius who since has been dismissed as a

named party pursuant to his motion to dismiss. The Commission on December 11, 1996, appointed the undersigned to issue and make Findings of Fact, Conclusions of Law, and Order as provided for in Section 111.07(5), Wis. Stats. The State of Wisconsin filed its Answer on December 10, 1996.

Intervenor Local 171, Wisconsin State Employes Union, AFSCME, Council 24, AFL-CIO, ("Council 24"), filed a motion to intervene on December 10, 1996, which was granted over Preller's objection on January 6, 1997.

Hearing was held in Madison, Wisconsin, on January 6, 1997, January 7, 1997, and July 23, 1997. Preller on March 3, 1997, moved to reopen the record so that he could litigate certain matters which arose since the close of the January 7, 1997, hearing. I granted said motion and a reconvened hearing was held on July 23, 1997.

Preller on March 20, 1997, moved to amend his complaint by naming Council 24 as a named Respondent and by charging that it had violated Section 111.84(2) of SELRA. After said motion was granted on July 23, 1997, Preller stated at hearing that he did not want to proceed against Council 24 that day. He therefore was allowed to withdraw his motion with prejudice after I informed him that he had to either proceed that day against Council 24 or withdraw his motion with prejudice. He chose the latter course.

Preller, the State, and Council 24 thereafter filed briefs and Preller filed a reply brief that was received by May 9, 1998.

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, at all times material herein an employe under Section 111.81(7), Stats., was employed as a Hospital Supply Clerk at the University of Wisconsin Hospital & Clinics ("University Hospital"), in Madison, Wisconsin, before he was terminated on or about May 13, 1997. Preller resides at 135 South Marquette Street, Apartment #1, Madison, Wisconsin, 53704. Preller was a member of the Union's bargaining team and a member of the Union's Executive Board at University Hospital. Preller over the years has engaged in extensive concerted, protected activities which have included the filing of grievances and the filing of unfair labor practice complaints against the State and various State representatives. He also has been an outspoken critic of Council 24's current leadership. The State and its representatives have known about all of some of said activities.

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 Central Services Don Klimpel, Assistant Director of Central Services Robert Scheuer, Executive Director Greg Kramp, Labor

Relations Director Renae Bugge, Liaison Officer Neal Spranger, and Superintendent Gordon Derzon. At all times material herein, they have acted on the State's behalf and they have served as its agents. The Department of Employment Relations, University Hospital, and the UWHC Public Authority Governing Board are all entities of the State. For purposes of clarity, all of the Respondents are collectively referred to as "the State".

3. Council 24, a labor organization, represents for collective bargaining purposes Preller and certain employes employed by the State at University Hospital. At all times material herein, Martin Beil has served as Council 24's Executive Director and Carl Hacker has served as Council 24's Assistant Director. In said capacities, both Beil and Hacker have served as agents for Council 24 and they have acted on its behalf. Council 24 in 1996 reorganized its locals at University Hospital so that new leaders were placed in Union offices.

4. Council 24 and Preller over the years have developed a difficult relationship which, in part, stems from Preller's claims - and the claims of other University Hospital employes - that Council 24 is not properly representing the employes in University Hospital. Preller and said other employes have protested some of Council 24's actions as they related to their bargaining unit.

5. Council 24 and the State of Wisconsin were privy to a 1995-1997 collective bargaining agreement which stated in Article IV, Section 1:

> **Section 1: Definition**
>
> **4/1/1** A grievance is defined as, and limited to, a written complaint involving an alleged violation of a specific provision of this Agreement.
>
> . . .
>
> **4/1/3** An employe may choose to have his/her designated Union representative represent him/her at any step of the grievance procedure. If an employe brings any grievance to the Employer's attention without first having notified the Union, the Employer representative to whom such grievance is brought shall immediately notify the designated Union representative and no further discussion shall be had on the matter until the appropriate Union representative has been given notice and an opportunity to be present. Individual employes or groups of employes shall have the right to present grievances in person or through other representatives of their own choosing at any step of the grievance procedure, provided that the appropriate Union representative has been afforded the opportunity to be present at any discussions and that any settlement reached is not inconsistent with the provision of this Agreement.

6. Article IV of said contract also stated in pertinent part:

. . .

Section 2: Grievance Steps

4/2/1 The Employer representative at any step of the grievance procedure is the person responsible for that step of the procedure. However, the Employer may find it necessary to have an additional Employer representative present. The Union shall also be allowed to have one additional representative present in non-pay status. Only one person from each side shall be designated as the spokesperson. By mutual agreement, additional Employer and/or Union observers may be present.

4/2/2 Pre-Filing Step: When an employe and his/her representative become aware of circumstances that may result in the filing of a Step One grievance, it is the intent of the parties that, prior to filing a grievance, the Union Representative will contact the immediate supervisor of the employe regarding the matter in a mutual attempt to resolve it. The parties are encouraged to make this contact by telephone. The State's DAIN line facilities will be used whenever possible.

4/2/3 Step One: Within twenty-one (21) calendar days of receipt of the written grievance or within twenty-one (21) calendar days of the date of the supervisor contact provided for in 4/2/2, whichever is later, the designated agency representative will schedule a hearing and respond to the Step One grievance. If the designated agency representative determines that a contact with the immediate supervisor has not been made, the agency representative will notify the Union and may hold the grievance in abeyance until such contact is made. By mutual agreement of the parties, the parties are encouraged to hold grievance hearings by telephone or video conferencing. The State's DAIN line facilities will be used whenever possible.

4/2/4 Step Two: If dissatisfied with the Employer's answer in Step One, to be considered further, the grievance must be appealed to the appointing authority or the designee (i.e., Division Administrator, Bureau Director, or personnel office) within fourteen (14) calendar days from receipt of the answer in Step One. Upon receipt of the grievance in Step Two, the department will provide copies of Step One and Step Two to the Division of Collective Bargaining of the Department of Employment Relations as soon as possible. Within twenty-one (21) calendar days of receipt of the written grievance, the designated agency representative(s) will schedule a hearing with the employe(s) and a representative of Council 24 (as Council 24 may elect) and respond to the Step Two grievance, unless the time limits are mutually waived. By mutual agreement of the parties, the parties are encouraged to hold grievance hearings by telephone or video conferencing. The State's DAIN line facilities will be used whenever possible.

. . .

Section 8: Processing Grievances

4/8/1 The grievant, including a Union official in a Union grievance, will be permitted a reasonable amount of time without loss of pay to process and investigate a grievance through Step Three (including consultation with designated representatives prior to filing a grievance) during his/her regularly scheduled hours of employment. The employe's supervisor will arrange a meeting to take place as soon as possible for the employe with his/her Union representative through the Union representative's supervisor.

4/8/2 Designated grievance representatives will also be permitted a reasonable amount of time without loss of pay to process grievances through Step Three (including consultations) in their jurisdictional areas during their regularly scheduled hours of employment. Only one designated grievance representative will be permitted to process any one grievance without loss of pay as above. Further in a group grievance, only one grievant, appearing without loss of pay, shall be the spokesperson for the group. (Group grievances are defined as, and limited to, those grievances which cover more than one employe, and which involve like circumstances and facts for the grievants involved). Group grievances must be so designated at the First step of the grievance procedure and set forth a list of all employes covered by the grievance.

4/8/3 The grievance meeting as provided in the Pre-Filing Step and Step One and Two above shall be held during the grievant's regularly scheduled hours of employment unless mutually agreed otherwise. The Employer shall designate the time and location for Pre-Filing, First and Second step grievance hearings. The grievant's attendance at said hearings, including reasonable travel time to and from the hearing, shall be in pay status.

4/8/4 The designated grievance representative shall be in pay status for said hearing and for reasonable travel time to and from said hearing provided that the hearing occurs during his/her regularly scheduled hours of work. If the grievant and/or the designated representative has a personally assigned vehicle, he/she may use that vehicle, without charge, to attend such grievance meetings, except that in the State Patrol, a designated grievance representative may only use his/her vehicle to attend a grievance hearing if the hearing occurs during his/her regularly scheduled hours of work.

4/8/4A (BC, ASU, T, SPS) The Pre-Filing Step and Step One of the grievance procedure will be held on the grievant's and the grievant's representative's work time if the work time is on the same or overlapping shift. It is understood that the grievance
time limits may have to be extended to accommodate this provision and that work schedules need not be changed.

4/8/5 The Employer is not responsible for any compensation of employes for time spent processing grievances outside their regularly scheduled hours of employment. The Employer is not responsible for any travel or subsistence expenses incurred by grievants or Union representatives in the processing of grievances.

7. Council 24 and the State agreed to the pre-filing step set forth above in Article 4, Section 2, in their 1995 collective bargaining negotiations in order to cut down on the filing of needless grievances. The parties then agreed that the pre-filing step was required in all non-disciplinary matters.

8. After said contract was agreed to, Council 24 Executive Director Beil and Alan C. Cottrell from DER's Division of Collective Bargaining by letter dated December 4, 1995, informed Council 24's local union presidents and various State agency Employment Relations Representatives:

> Because questions concerning the 95/97 Agreement's revised Grievance Procedure have been raised, we are issuing this Joint Memorandum reemphasizing the intent of the parties in restructuring the process.
>
> During negotiation of the 95/97 Agreement, numerous problems and concerns were raised by the parties over the operation of the grievance process. These included, but were not limited to, timely processing and responding to grievances, duplicate grievances adding unnecessary volume, lack of substantive handling at the 1st step, insufficient time for steward investigations, "frivolous" grievances being filed, etc. A great deal of time was devoted to discussion of the identified concerns and issues which resulted in the revised process. The preliminary intent of the parties was that the outcome should be one that focused on "problem solving" and "conflict resolution" rather than on who is right and who is wrong.
>
> In order for this revised process to achieve the desired result of greater problem resolution and avoidance of filing unnecessary grievances, it is essential that the parties to this process fully utilize the Pre-Filing Step in the spirit of its intent. Only by giving this revised process the benefit of a true test will we be able to make a truly informed decision as to its continuation for the 1997-1999 Master Agreement. It is our expectation that such an effort will be made.
>
> Thank you for all your help in achieving success with our new Grievance Procedure.

. . .

9. Pursuant to Article 4, Section 2, of the contract, all non-disciplinary grievances under the 1995-1997 contract have been held in abeyance until the pre-filing step has been held. All such pre-filing steps have been conducted between State and Council 24 representatives without any individual employes being present. The pre-filing step has reduced the number of grievances filed by over 100 between July, 1996 and December, 1996. The following chart (Joint Exhibit 6), shows the differences between the new and former grievance procedures:

WSEU GRIEVANCE PROCEDURE

NEW PROCEDURE	OLD PROCEDURE
Formal First Step Grievances must be presented no later than thirty (30) calendar days from the date the grievant first became aware of the cause of such grievance.	Grievances must be presented to the first step of the grievance procedure no later than thirty (30) calendar days from the date the grievant first became aware of the cause of such grievance.
Pre-Filing Contact After an employee and a steward have met regarding a possible grievance and they believe a grievance needs to be pursued, before a formal first step grievance is scheduled and heard, the steward must first contact the immediate supervisor (or the most appropriate supervisor in the case of a union grievance) regarding the matter in a mutual attempt to resolve it. The supervisor should talk with the steward by phone or in person regarding the concern in a mutual attempt to resolve it. If a phone conversation with the steward is not appropriate to address the concerns, schedule a meeting with the steward during his/her regularly scheduled hours of employment. If a meeting cannot be held within seven (7) calendar days, the supervisor should notify the steward and discuss how to proceed. NOTE: while the language does not require the employee's presence at a Pre-filing meeting, if the steward requests that the employee attend, a meeting should be schedule as soon as possible during the employee's and steward's regularly scheduled hours of employment.	**First Step Grievance** Within seven (7) calendar days of receipt of the Step One grievance, the supervisor will schedule, hear and answer the Step One grievance.

First Step Grievance Once the Pre-filing contact occurs, or after the first step grievance is filed (whichever is later), the Department Head (or designee) has 21 calendar days to schedule hear and answer the step one grievance. NOTE: if a formal first step grievance is received and it is determined that the Pre-filing contact has not occurred, the Department Head (or designee) will notify the steward and may hold the grievance in abeyance until the Pre-filing contact occurs.	**Second Step Grievance** If the Union is dissatisfied with the Step One answer, the grievance may be appealed to Step Two within seven (7) calendar days from receipt of the answer in Step One. Within seven (7) calendar days of receipt of the Step Two grievance, the supervisor will schedule, hear and answer the Step Two grievance.
Second Step Grievance If the union is dissatisfied with the Step One answer, the grievance may be appealed to Step Two within fourteen (14) calendar days from receipt of the answer in Step One. Within twenty-one (21) calendar days of receipt of the Step Two grievance, Human Resources will schedule, hear and answer the Step Two grievance.	**Third Step Grievance** If the Union is dissatisfied with the Step Two answer, the grievance must be appealed to Step Three within seven (7) calendar days from receipt of the answer in Step Two. Within twenty-one (21) calendar days of receipt of the Step Three grievance, Human Resources will schedule, hear and answer the Step Three grievance.
Third Step Grievance Grievances which have not been settled under the foregoing procedure may be appealed to arbitration by either party within thirty (30) calendar days from the Step Two answer. Grievances involving discharge must be appealed within fifteen (15) calendar days of the Step Two answer.	**Fourth Step Grievance** Grievances which have not been settled under the foregoing procedure may be appealed to arbitration by either party within thirty (30) calendar days from the Step Three answer. Grievances involving discharge must be appealed within fifteen (15) calendar days of the Step Three answer.

10. Preller filed three separate, written grievances on October 1, 1996; October 22, 1996; and November 5, 1996.

A. The October 1, 1996, grievance stated in pertinent part:

. . .

On 10/1/96 grievant was not given grievance processing time as provided in 4/8/1. Grievant was acting on his own behalf as clearly provided in 4/1/3. Designated grievance reps are set up with processing time the same shift they request it. The employer is discriminating against employes who are not grievance reps. Time to process this grievance also was denied because the employer said it "didn't want to infringe on the rights of the "new" union.

Relief – Employer cease and desist and allow employees to exercise contractual rights under 4/1/3 and 4/8/1. Pay grievant ½ hour pay and benefit.

. . .

B. The October 22, 1996, grievance stated in pertinent part:

. . .

ACCO system alarm has been set at an unacceptably high volume.

I waive the pre-filing step and want the grievance heard ASAP because Bob Scheuer has already done all he can to resolve the issue without success and I do not want the union to represent me in this matter.

Relief sought

Set alarm at an audible, but reasonable level of volume.

. . .

C. The November 5, 1996, grievance related to Preller's claim that the state was not properly assigning overtime.

11. In filing said three grievances, Preller did not contact any Union steward ahead of time and he similarly did not provide any copies of said grievances to any Council 24 representatives before he filed them. Council 24 did not receive copies of said grievances until Labor Relations Director Bugge supplied same to Council 24 representatives on November 12, 1996.

12. Preller by letter dated September 30, 1996, informed Assistant Director of Central Services Scheuer:

. . .

1)Under Article 4/8/1 I am requesting adequate grievance processing time to investigate and process several grievances as a grievant or as a Union official in a union grievance. I estimate I need at least 2 hours to begin with.

Please note that since I am not requesting this as a union designated grievance representative, any and all agreements or understandings with Council 24, or its staff, that may have limited or restricted the scheduling of my grievance processing time in the past do not apply. Although I remain willing to work out the scheduling with Doug and yourself, it is important that there be no undue delay in responding to my request.

2) As part of the investigation for one of the grievances, under the provisions of Article IV of the Central Supply Overtime Scheduling local agreement, I request to review C.S. overtime scheduling records for the last 30 days for the Materials Distribution work unit.

3) Since I want to file the overtime grievance Tuesday evening in order to preserve time limits, I request that I receive at least enough processing time on Tuesday evening to review the overtime records and write up that grievance.

. . .

13. Scheuer by letter dated October 1, 1996, informed Preller:

. . .

It is unclear whether you have the contractual right to represent yourself in a grievance investigation. An investigation is being made as to your rights in this type of matter as a union member (as opposed to a union steward).

You stated a concern to preserve time limits in filing of a possible grievance. I will extend the time limits in this case to allow you sufficient time to conduct your grievance investigation and file your grievance if it is determined you have the right to do so.

I will give you an answer as soon as possible concerning this matter.

14. Labor Relations Director Bugge informed Preller by letter dated October 10, 1996:

. . .

I am writing in response to your recent queries regarding an individual employee's ability to investigate, process, and initiate grievances, without a designated union representative. After reviewing the collective bargaining agreement and bargaining history, I've concluded that the following provisions address your questions.

> Section 4/1/3 allows individual employees the right to "present grievances in person or through representatives of their own choosing", provided the appropriate Union representatives are afforded the opportunity to be present at any discussions. This provision allows you as an individual employee to file a grievance at the appropriate step of the procedure.
>
> Section 4/2/3 requires the agency representative to notify the Union and provides for the agency to hold the grievance in abeyance until a pre-filing contact is made whenever a pre-filing contact is appropriate.
>
> Section 4/2/2 requires a Union representative to contact the supervisor in a mutual attempt to resolve the matter. There is no provision allowing an individual employee to initiate the pre-filing contact with the supervisor.

Based on the above, an individual employee can file first step grievances. On receipt of an individual grievance, the UWHC will notify the Union representative and hold the grievance in abeyance until the pre-filing requirement is satisfied. Grievances related to suspension, discharge, or demotion begin at the second step of the procedure and are not subject to the pre-filing requirement. Grievances on those topics will be processed beginning at the second step and will include Union representatives as required by 4//1/3.

> Section 4/8/1 allows a "grievant" a reasonable amount of time without loss of pay to process and investigate a grievance. This provision specifies grievant, not employee, so does not apply until after the first step grievance is filed.

Based on this provision, a grievant can receive reasonable time off without loss of pay to investigate and process a grievance. This time will be allowed after the pre-filing requirement is satisfied and before the first step grievance meeting is held, and

will continue as appropriate throughout the grievance procedure.

I hope that the above adequately explains how we will treat individual grievances and requests for processing time. If you have further questions in this regard, please feel free to contact me.

. . .

Bugge at about that time told Preller that the Union should hold a pre-filing step within 21 days.

15. Preller by letter dated November 6, 1996, informed Bugge:

. . .

I am writing to document recent discussions I've had with you about the hospital's refusal to hear several first step grievances that I have filed.

In order to protect my time limits I've recently filed the oldest of these grievances, filed on October 1st, to the 2nd step of the grievance procedure. Thus far you have refused to hear grievances I've filed at the first step, including this one. You claim to have informed the union of the filing of these grievances and that you cannot proceed until they proceed with a grievance pre-filing step which you claim only they can hold.

Under Wisconsin's Open Records law I, by this letter, request the right to inspect and obtain, if necessary, a copy of the following record(s):

* all records, including e-mail, fax, and computer records, of your notification to the Wisconsin State Employees Union that I had filed 1st step grievances on October 1st, October 22nd, and October 25th without union representation (Article 4/1/3 of the labor agreement).

* all records, including e-mail, fax, and computer records, of your notification to the Wisconsin State Employees Union that I had filed 1st step grievances on October 1st, October 22nd, and October 25th and that no contact for a pre-filing step had been made with the immediate supervisor (Article 4/2/3 of the labor agreement).

Contrary to your belief that some discussion or communication from the union would occur at yesterday's scheduled 2nd step grievance hearings to resolve this problem, none did. Therefore, I again demand that you meet your responsibility under the contract to schedule and hear the first step of the grievance process.

Specifically, I'd like to point out to you that the language in 4/2/3 of the contract says that the employer "***may*** hold the grievance in abeyance until such contact is made" (emphasis added). Therefore, any claim by you that the contract prohibits you from proceeding to hear the first step of the grievance is clearly incorrect.

Absent any written evidence that the union has either an interest or intention to hold pre-filing steps on these grievances I fail to see why you expect them to do so. Their failure to hold a pre-filing step more than 35 days after the oldest grievance was filed is also unpersuasive. Once again, in addition to the unfair labor practice already filed, I lodge a strenuous complaint with your attempt to force me to use the union to resolve grievances in which I do not want them to represent me, of which they have no knowledge, and which they did not investigate.

I wish to represent myself at all steps of the grievance procedure for the 3 pending grievances referenced above. I am not interested in having the union hold a pre-filing step for me on these grievances and I don't believe the union is interested either, nor does it make any sense to do so.

Any further delay by the employer in hearing and answering these grievances at each step of the grievance procedure within the contractual time limits will be regarded by myself as a further violation of my rights to engage in concerted activity and an unfair labor practice as defined by Wisconsin State Statute.

A comprehensive written response to this letter informing me of your intentions might assist me in avoiding the filing of repetitive grievances and amendments to pending unfair labor practice complaints each time this problem occurs. Thanks for your prompt attention to this matter.

16. Bugge by letter dated November 12, 1996, informed Preller:

. . .

I am writing in response to your November 6, 1996 letter requesting documentation of communications between me and WSEU representatives regarding grievances filed by you on October 1, 22 and 25 and any pre-filing contacts which may have been conducted regarding those grievances. My communications with WSEU and Local 1942 representatives, like my communications with you, are typically conducted in person or by telephone. I have not created records documenting communication related to these grievances. I have, however, provided Diana Miller with copies of your grievances. It is my understanding based on conversations with Diana Miller and Karl Hacker that pre-filing contacts will be initiated on those grievances where the union considers such contact to be appropriate. The hospital is not involved in making that determination.

To facilitate the pre-filing step when filing future individual grievances, please send the last copy of the grievance packet (orange copy) to Local 1942 or WSEU representatives. Providing the grievance directly to the union will expedite a pre-filing contact and facilitate the grievance process.

While the procedures for you, as an individual, to investigate, file, and pursue grievances are somewhat different than those you followed as a union representative, I will work with you and the union to clarify these procedures and resolve contract interpretation issues. I remain confident that your contract interpretation and enforcement concerns can be resolved.

. . .

17. Preller by letter dated January 14, 1997 informed Executive Director Kramp:

. . .

Contrary to your letter received over a month ago (copy attached) stating that you or Renae Bugge would respond to me as soon as possible regarding answers to 2nd step grievances heard by Neal Spranger on November 5th; I have received nothing from either of you. As you know, 2nd step grievances are to be heard and answered within 21 days.

I find it interesting to contrast the lack of response from UWHC Human Resources to a concern raised by one of its employees with the response from the Department of Employment Relations on a different, but equally contentious matter. Rather than simply failing to respond as your department does, DER wrote back to me within a few days clearly and concisely stating what they intended to do on the matter at hand and why. While DER and I still have a disagreement, at least I can appreciate the professional manner in which they responded. How disappointing that I or any other employee cannot say the same of their own employer.

I guess this just proves that the union was right when we predicted that the imposition of a public authority on UWHC would not solve internal problems such as poor employee relations and disregard of the labor agreement. Again I ask that you answer the grievances you have already heard on November 5th. However, any response at all from you would be better than what I've gotten so far.

On another matter, Neal Spranger returned the white employee copy of a grievance I filed at the second step on 11/25/96. As you can see from the attached copy, in the space reserved for the employer answer a brief note was written purporting to withdraw the grievance under the signature of Diana Miller. Please be informed of the following in regard to this grievance and any and all others in which I represent myself:

* I have not chosen to withdraw this grievance and want you to fulfill the contract language in Article 4/1/3 that allows me to represent myself at all grievance steps. I expect that UWHC will schedule, hear, and answer all grievances as provided for in Article 4/1/3.

* Although a pre-filing step was done by Leatha Jenkins, she was unable to fix the problem.

* I spoke to her prior to the first of the year, and stated to her that her efforts had not addressed my concern, and that I would be proceeding with the grievance to the next step. She was very clear with me that she could do nothing further to fix the alarm at the pre-filing step and made no claim that she had settled the grievance. In any event, since I filed this grievance I am the person who determines whether the grievance has been resolved. It has not.

* Other than the discussions with Leatha Jenkins, no one from the union has communicated to me about this grievance. Absent either a cover letter from HR or communication from the union explaining who is doing what in this matter and for what reason, I can't even verify whether Diana Miller or the union had anything to do with the copy returned to me. I have no intention of guessing.

Consider this letter notice from the grievant that he has not withdrawn this grievance; that the grievance has not been settled to my satisfaction at the pre-filing step; and should proceed to be heard at the 2nd step of the grievance procedure as provided in Article 4/1/3 and 4/2/4. Based on Renae Bugge's statements at the recent ULP hearings I expect that there will be no concern raised by the employer regarding time limits due to the delayed pre-filing step. I'd appreciate a prompt written response from you either scheduling this grievance or explaining to me why you will not do so.

I find it ironic that there is no operational reason to have an alarm this loud and that there is a simple mechanical solution requiring nothing more than a few minutes of work time to accomplish, yet we just can't get the UWHC bureaucracy to function well enough to solve even this minor problem. Failure to solve simple

problems like this again shows that the public authority is a miserable failure in improving internal hospital processes.

. . .

18. Preller throughout this time complained to various AFSCME officials over various matters, including the processing of grievances. By letter dated October 21, 1996, he informed AFSCME International Union President Gerald McEntee:

Dear President McEntee,

On September 24, 1996 you were sent requests and petitions from over one quarter of the eligible union members of Local 1492 requesting that a local membership meeting be held immediately. At a Wisconsin State Employees Union Executive Board meeting on October 18th, Council 24 Executive Director Marty Beil was unable to tell me when a membership meeting would be scheduled.

Local 1492 was chartered on July 1, 1996. Appendix C of the AFSCME International constitution provides that the model constitution for local unions found there "shall be binding on any local union which has not adopted a local constitution of its own. . ." That constitution states in Article V, Section 1 that regular meetings of the local will be held "once each month".

As you and Paul Booth, AFSCME Director of Field Services have been informed in writing previously, Mr. Beil has assumed the role and function of Local 1492's members while refusing to carry out the appropriate steps to implement the local or hold monthly membership meetings and election of local officers. You have also been informed that Mr. Beil is engaging in a fiction that this is a brand new, unorganized local requiring him and his staff to engage in a twisted concept of organizing as a prerequisite to allowing members their rights, when in fact Local 1492 is being spun off of two, well-organized, existing locals.

Based on the high level of organization that already exists within Local 1492, if Mr. Beil had carried out his duties to implement this local properly we would already have elected officers and monthly membership meetings. Mr. Beil's actions and AFSCME International's acquiescence in them have denied the members of Local 1492 the following rights guaranteed by the union's own constitution and that constitution's Bill of Rights for Union members:

-right to monthly membership meetings
-freedom of speech
-right to run for and hold local office
-election of local officers

-right to full participation, through discussion and vote, in the decision-making process of the union

-right to set the dues level for the local union (this was done by Mr. Beil on September 29th)
-imposition of a defacto administratorship on Local 1492 without just cause or due process

In addition to being violations of the union's constitutions, I believe that Mr. Beil's actions violate state and federal laws protecting the rights of union members. Furthermore, his recent removal of all experienced stewards has created a situation in which the union is failing to meet its legal duty of fair representation.

Since you have not responded to my letter of September 24th, I am requesting that you respond to me in writing by October 28th specifically detailing what the union will do to remedy these problems and by what date. Absent a meaningful response from you by that date, I will conclude that AFSCME does not intend to grant us appropriate and timely relief and that I have exhausted all meaningful avenues for remedy of these problems within the union.

. . .

19. Preller by letter dated November 18, 1996, informed Council 24 Assistant Director Hacker:

. . .

You are shown receiving a copy of a letter sent to me by Renae Bugge dated November 12, 1996 in response to my complaint and request to her to proceed with the grievance process. She states in the letter that Council 24 has expressed a desire to hold a pre-filing step for the 3 grievances I have filed on October 1, 22 and 25th and for which I have chosen to represent myself. As you know, you have not scheduled pre-filing steps for any of these grievances. This means that it will be at least 56 days for the oldest and 34 days for the youngest grievance that they have not been heard and answered.

Please be advised of the following:

1) I have filed these grievances on my own because I do not feel confident in having Diana Miller or the inexperienced stewards you have appointed for Local 1942 represent me.

2) The contract provides that I have the right to represent myself at all steps of the grievance procedure.

3) I dispute the employer's interpretation of the contract in this matter. Based on information from 2 members of the bargaining team, it is clear that the pre-filing step was never discussed or intended by the parties to be an obstacle to individuals representing themselves. Either an individual has the right to represent himself at the pre-filing step where he is presenting the grievance himself; or if the pre-filing step can only be exercised by the union, then it is an optional step not required when the union does not represent the grievant.

4) Not withstanding my opinion, if the union believes it needs to hold a pre-filing meeting, then it should do so without further delay so the process can move forward.

5) If you have told Renae Bugge that you intend to initiate pre-filing steps, then your failure to do so is delaying the process and denying me the ability to exercise my rights to represent myself. You have delayed so long that I am having to file these grievances to the next step of the process to protect my time limits.

Based on the foregoing, I request an immediate written response from you explaining what your position is on this matter and what date the pre-filings will be heard if you intend to initiate them.

If, as the employer states, you are responsible for any of the delay in processing these grievances I believe that you are failing to represent me properly as required under the law. Furthermore, I believe that your failure to schedule and hold pre-hearing steps, after telling the employer you intended to do so, is a deliberate action on your part to interfere with my contractual rights and my rights to engage in concerted activity under state and federal law and I ask you to cease and desist.

Please be aware that I am not agreeable to any "understandings" you may have with the employer to allow unlimited and unwritten extensions of grievance process time limits. I expect that you will carry out any steps of the process for which you are responsible within the time limits and without undue delay.

I suspect that your inability to meet your representational obligations is largely due to your refusal to allow the most experienced stewards at the hospital to function as stewards. Your takeover of Local 1942 to further your own political agenda does not excuse your failure to represent me or your interference with my rights to engage in concerted activity.

• • •

20. Preller by letter dated January 14, 1997, informed Union Staff Representative Diana Miller:

. . .

Please be informed of the following:

* Neal Spranger placed the attached employee copy of a grievance I filed, in which I have chosen to represent myself, in my mailbox today. There was no cover letter from the employer, nor have you communicated to me on this matter, so I have no way of knowing whether what purports to be a withdrawal of the grievance under your signature is legitimate.

* I have not chosen to withdraw this grievance and want to proceed to the next step of the grievance procedure presenting the grievance in person as provided for in Article 4/1/3.

* Although a pre-filing step was done by Leatha Jenkins, she was unable to fix the problem.

* I spoke to her prior to the first of the year, and stated to her that her efforts had not addressed my concern, and that I would be proceeding with the grievance to the next step. She was very clear with me that she could do nothing to fix the alarm at the pre-filing step. In any event, since I filed this grievance I am the person who determines whether the grievance has been resolved. It has not.

* This problem could easily be fixed with a simple mechanical solution. Failure to do so by the employer constitutes violations of Article 9 of the contract.

Based on the information provided above I have the following questions:

If you still intend to attempt to withdraw this grievance, I'd like a written explanation from you about why the union believes it has the right to interfere with my rights under Article 4/1/3 and Wisconsin State Stats 111.83.

How did you determine to withdraw my grievance without discussing it with me or investigating the grievance? My discussions with Leatha Jenkins were not about the specifics of the grievance, but rather why Karl Hacker hadn't gotten a pre-filing step scheduled, so there has been no investigation of my grievance by the union.

Please be informed that absent any further corrective action on the union's part, the union has failed to carry out its legal responsibilities to me under the union's constitutions and the law, to enforce the contract and meet your contractual requirements to me as a member of the bargaining unit.

. . .

21. Miller by letter dated January 27, 1997, informed Preller:

. . .

RE: GRIEVANCE #96-2151

This is to respond to your letter dated January 14, 1997. A grievance was filed by you on 11-25-96 and numbered 96-2151 regarding a health and safety issue. Leatha Jenkins conducted a pre-filing with Don Klimpel to discuss and resolve the issue raised in the grievance. Basically, you stated in the grievance that the ACCO system alarm had been set at an unacceptably high level. Mr. Klimpel provided Leatha with documentation from William J. Deppen M.S. concerning the noise levels. Mr. Deppen is a Certified Occupational Hearing Conservationist COHC #28641. Leatha Jenkins provided you a copy of the document which dealt with the issue raised in your grievance. Another copy is provided with this letter.

The grievance was withdrawn by me on January 14, 1997 with a notation that the issue was settled at the pre-filing step by Leatha Jenkins. In addition, this issue was researched by Council 24 and found to be in compliance with the Department of Commerce guidelines. Since grievances are owned by the Union, I have the authority on behalf of the Union to withdraw them.

22. Local 1492 President Leatha Jenkins by letter dated February 12, 1997, informed Preller:

. . .

I have been assigned steward for the above referenced grievances. I am requesting the following from you to enable me to do a proper job of representing you:

* Grievance #96-2153 regarding grievance processing time, please give me copies of any and all correspondence you have to substantiate your claim that the Employer has violated the contract.

* Grievance #96-2151 regarding health and safety issues has been withdrawn by Diana Miller, Staff Representative.

* Grievance #96-2152 regarding overtime, please submit to me all of the documentation you have to substantiate your claim that the Employer has violated the contract by allowing employees to work repeated in some cases almost daily overtime. This would include copies of time cards and schedules to demonstrate that the overtime was scheduled.

I need this documentation no later than Monday, February 17, 1997. Once I receive all of the necessary documentation, I will schedule a pre-filing meeting with the appropriate person.

. . .

23. Preller by letter dated April 3, 1997, informed Jenkins:

. . .

This letter will serve as my response to your letter of February 12th, 1997.

Grievance #96-2153:

As we discussed when we met on February 12th or thereabouts, this grievance has already been heard at the 2nd step of the grievance procedure in November of 1996. Therefore I am at a loss to understand what information you need and why you need it when we are simply waiting for an answer from the employer which is now approximately 5 months overdue.

As we also discussed at the meeting, I represented myself at the 2nd step on this grievance, not the union. You are not my steward on this grievance, since I am representing myself. Therefore, I fail to understand your statement in the letter that you are requesting information on this grievance, "to enable me to do a proper job of representing you."

Please clarify your request if I have misunderstood you or if you require information for some other purpose.

Grievance #96-2151:

Although your letter states that this grievance has been withdrawn by Diana Miller, you discussed the specifics of the grievance with me and stated that you would see if anything could be done to reduce the volume of the alarm. I explained to you the fact that the alarm did not violate Department of Commerce noise standards is not relevant to the grievance. The grievance does not claim that it violates those standards, nor is that required in order for this to be a violation of Article 9 of our contract.

This was the first time that anyone from the union had investigated or inquired about the specifics of the grievance and I have to admit that I was perplexed, but pleased that you were going to pursue the matter, even though Diana Miller had withdrawn the grievance.

Unfortunately, even though I requested a meeting with you about 3 weeks ago to discuss all of these matters, no meeting has been scheduled and I have not heard anything from you on this specific grievance.

Grievance #96-2152:

As we discussed at our meeting on or about February 12th, you are demanding from me "all of the documentation you have to substantiate your claim that the Employer has violated the contract by allowing employees to work repeated, in some cases, almost daily overtime." As I told you at the time, the employer will not allow me to work time to process grievances until they reach the 1st step of the grievance procedure. Therefore, the only way I could provide the information you want is to spend a lengthy amount of my own time to sort through my records and make copies for you.

I stated at our meeting that I would provide you with a **few** examples of time cards showing the problem and they are attached to this letter. On March 17th, numerous copies of Central Supply time cards were provided from me to Scott Hassett, Council 24's lawyer, in response to a WERC order pertaining to unfair labor practice hearings heard that week. Those time cards will provide at least some of the information you are seeking and you can obtain those records from Mr. Hassett.

While I would be happy to provide copies of any documents I have that would help you hold the pre-filing step on this grievance, it is not reasonable to expect me to spend a large amount of my own time to do so; especially when the contract clearly provides that you, as the steward, have the right to "process and

investigate a grievance through Step 3. . .during his/her regularly scheduled hours of employment" (Article 4/8/1) without loss of pay.

In fact, I was under the impression that it was the legal responsibility of the union to investigate grievances for the members of the bargaining unit, not the other way around. During our meeting on or about February 12th, I provided ample explanation to you about the nature of the problem, namely, that other employees are allowed to come in to work as much as 45 minutes before the start of their shift and that overtime was not offered according to the local agreement covering overtime scheduling in Central Supply.

I'm requesting the following from you:

1) Please investigate and remedy as soon as possible the delay in scheduling a meeting between you and myself. In the past, most meetings with stewards were scheduled by the next work shift that both the steward and the grievant worked. A three week delay violates the contract and makes the grievance procedure meaningless. I want to file a grievance on the delay.

2) If you are unable to get a meeting scheduled in a timely manner, please respond in writing to all of the concerns raised in this letter.

3) As I emphatically stated at our meeting on or about February 12th, I want to be involved at all pre-filing meetings you hold with management on my grievances. So please let me know when you will be scheduling a pre-filing on #96-2151 and #96-2152.

. . .

In said reply, Preller did not supply all of the information sought by Jenkins in her earlier February 12, 1997, letter referenced in Finding of Fact No. 22, supra.

24. In response to Preller's October 22, 1996, grievance referenced in Finding of Fact No. 10, supra, dealing with the noise levels of certain alarms, Dr. William J. Deppen, a certified Occupational Hearing Conservationist, conducted a noise test of said alarms and subsequently prepared the following report:

. . .

Date sent:	11 Nov 1996 11:03:17 –0500 (CDT)
From:	William DEPPEN William Deppen @ ccmail.adp.wisc.edu
Subject:	dB-A levels
To:	rc.scheuer@uwmsg.hosp.wisc.edu
Copies to:	Keith Burdick

Bob,

Noise levels measured Friday afternoon 11/8 with a calibrated Larson-Davis Labs Model 700 Type 2 integrated sound level meter & dosimeter were as follows. All sampling was performed at standing ear height in D6/140 Central Services.

Alarm near entry door = 78.5 dB-A slow
Alarm for 'detergent low' = 74.5 dB-A slow

Background noise levels in this room prior to my activating any alarms were 62.0 dB – A slow with intercom speaker music playing. The Department of Commerce established the eight-hour time weighted averaged exposure level to noise at 90.0dB – A slow with a 'take action' level at or above 85.0 dB-A slow.

I welcome any questions you may have on any aspect of this sampling and can be reached directly at 2-9179.

. . .

25. A pre-filing step regarding Preller's claim that the alarm bell was too loud was held on January 14, 1997, between Council 24 and State representatives. Preller was not allowed to attend said meeting pursuant to the practice developed between the State and Council 24 to the effect that affected employes do not attend pre-filing steps. Council 24 ultimately determined that said grievance was without merit and withdrew it because of Dr. Deppen's finding that the alarm bell complied with applicable noise levels. The State refused to let Preller process said grievance on his own after Council 24 unilaterally withdrew it over his objection. A past practice has arisen over the last 29 years or so to the effect that Council 24 controls any grievance once it has been filed and that, as a result, Council 24 retains the right to determine whether a grievance should be processed further.

26. No pre-filing steps were held regarding Preller's other two grievances because he refused to supply Council 24 with requested information.

27. Preller by letter dated November 18, 1996, informed Labor Relations Director Bugge:

. . .

By the time this reaches you, you should have received or will soon receive a 2nd-step grievance on the 5-day suspension I recently received. Based on your October 10th letter to me I request that you set up adequate processing time for me to prepare, investigate and process this grievance.

> Specifically, I need to meet with the following individuals who have information necessary to the presentation of my grievance: Pat Wilkinson, Mark Howard, and Dave Marfilius. I request that you set up sufficient time for me to meet with these individuals on work time, to be scheduled as soon as possible when I return to work on November 25th.
>
> Megan John will soon be receiving an open records request for information needed for this grievance. I ask that you inform her that I should be scheduled sufficient work time, in a timely manner, to view those records and indicate if copies are needed.
>
> Finally, since it is necessary for me to file other grievances (unheard at the the 1st step of the grievance procedure) to the 2nd step in order for me to preserve my time limits, I would like to know if the employer will now allow processing time as provided in Article 4/8/1 for those grievances at 2nd step of if you will continue to exceed time limits to hear those grievances and deny me processing time using the union's failure to schedule pre-filing steps as an excuse.

. . .

27. The State denied Preller's aforementioned request for paid processing time regarding his grievances.

28. Preller on December 18, 1996, signed and submitted to the State an "Appeal to Arbitration" wherein he requested that he be allowed to proceed to arbitration over his October 1, 1996, grievance relating to the State's refusal to allow him processing time to investigate his grievances.

29. At all times material herein, the State has been ready, able and willing to meet with Preller at the first steps of the grievance procedure once the pre-filing step has been held. The State has failed to meet with Preller over two of his grievances because Council 24 has not yet asked for a pre-filing step where its representatives could meet with the State's representatives to informally discuss Preller's complaints.

Upon the basis of the aforementioned Findings of Fact, I hereby make and issue the following

CONCLUSIONS OF LAW

1. Respondents did not retaliate or discriminate against Steve Preller because of his concerted, protected activities and they did not violate Section 111.84(1)(c), nor any other section, of the State Employment Labor Relations Act.

2. Respondents did not violate Sections 111.83(1) or 111.84(1)(a), nor any other section, of the State Employment Labor Relations Act by refusing to grant Steve Preller paid processing time to investigate his complaints before they were reduced to writing and submitted as a formal grievance.

3. Respondents did not violate Sections 111.83(1) or 111.84(1)(a), nor any other section, of the State Employment Labor Relations Act by refusing to hear the merits of Steve Preller's grievance after Council 24 withdrew it.

4. Respondents did not violate Sections 111.83(1) or 111.84(1)(a), nor any other section, of the State Employment Labor Relations Act by failing to hear Steve Preller's grievances before a pre-filing step was held and/or by not scheduling such pre-filing steps earlier.

Upon the basis of the aforementioned Findings of Fact and Conclusions of Law, I hereby issue and make the following

ORDER

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

Dated at Madison, Wisconsin, this 17th day of July, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Amedeo Greco /s/
Amedeo Greco, Examiner

DEPARTMENT OF EMPLOYMENT RELATIONS

MEMORANDUM ACCOMPAYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

POSITIONS OF THE PARTIES

Preller asserts that the State violated Sections 111.83(1) and 111.84 of SELRA by: (1), refusing to hear his three grievances in a timely fashion and by refusing to hear them until after a pre-filing step is held; (2), refusing to grant him paid processing time to investigate said grievances; and (3), not hearing the merits of his grievance after Council 24 withdrew it. He also maintains that the State throughout this time discriminated against him because of his concerted, protected activities. As a remedy, Preller seeks a cease and desist order which requires the State to honor his right to grieve on his own behalf.

The State contends that the "contract requires that a pre-filing step must be held" and that it cannot be faulted over Council 24's failure to schedule such a pre-filing step because "nothing in the record. . .indicates that [Preller] triggered the pre-filing step"; that Preller was not entitled to "time off with pay to process and investigate" his complaints because such processing time is not given until a written grievance has been filed, which has not been done here; and that the State cannot be faulted for the way it has responded to Preller when he himself must bear responsibility for some of the delay that has occurred.

Council 24 contends that it and the State can properly insist upon a pre-filing step being held before it processes any written grievances; that any delays in scheduling pre-filing steps were caused entirely by Preller; and that it has the right to refuse to process grievances after it has withdrawn them because: "Under applicable law and past practice, the Union, not the individual employe, controls the grievance."

DISCUSSION

While the great bulk of this case deals with other issues, Preller also asserts that the State's actions herein have been discriminatory in nature because of the State's animus against his concerted, protected activities and its desire to protect Council 24's bargaining status. I disagree. This record is totally barren of any union animus and/or any attempt by Respondents to discriminate against Preller because of said activities. This complaint allegation therefore is dismissed in its entirety.

Preller also complains that the State acted unlawfully when it refused to grant him paid processing time to investigate his grievances.

The problem with this claim is that there is no independent statutory right under SELRA for such paid processing time. As a result, any such right must be created by contract in collective bargaining negotiations. Here, paid processing time is provided for in Article IV, Section 8, of the contract which, as related in Finding of Fact No. 6, supra, states:

> **4/8/1** The grievant, including a Union official in a Union grievance, will be permitted a reasonable amount of time without loss of pay to process and investigate a grievance through Step Three (including consultation with designated representatives prior to filing a grievance) during his/her regularly scheduled hours of employment. The employe's supervisor will arrange a meeting to take place as soon as possible for the employe with his/her Union representative through the Union representative's supervisor.

. . .

There is nothing in this language or in the separate proviso relating to the pre-filing step that mandates paid processing time at the pre-filing step. To the contrary, it is clear that paid processing time becomes available only after a written grievance has been filed since Article IV, Section 1, earlier defines a grievance as: "a written complaint involving an alleged violation of a specific provision of this Agreement." (Emphasis added). By virtue of this definition – which is not changed in any other part of the contract and which therefore carries over to the remainder of the contract – the subsequent reference to "grievance" in Article IV, Section 8, is to a written grievance. Indeed, the December 4, 1995, letter from Council 24 Executive Director Biel and DER official Cottrell referenced in Finding of Fact No. 8, supra, recognized that the pre-filing step does not constitute a written grievance by stating:

. . .

> "The parties recognized that there will continue to be a need to file written grievances, however, with this new process, we believe that honest, timely and in-depth discussions will solve problems here-to-fore addressed in formal written appeals that sometimes only exacerbated the issue."

. . .

That is why Council 24 Assistant Executive Director Hacker testified that Council 24 does not consider the pre-filing step to constitute a written grievance for the purpose of receiving processing time, a view concurred in by the State. That being so, there is no merit to Preller's claim that the State unlawfully denied him paid processing time.

Preller next maintains that the State unlawfully refused to hear his alarm bell grievance after the Union unilaterally withdrew it over his objection. As related in Finding of Fact No. 24, supra, a certified hearing expert investigated Preller's grievance and reported that the alarm bells were set within lawfully established noise levels. Since there is no contract provision requiring the State to maintain lower noise levels, Council 24 obviously did not abuse its broad discretion in dropping Preller's grievance.

Preller nevertheless asserts that he has the right to pursue grievances on his own up to and including arbitration over Council 24's objection pursuant to Judge Sarah B. O'Brien's decision in STEVE PRELLER V. JON LITSCHER, Case No. 97 CV 729 (4/10/98). There, Judge O'Brien ruled that Preller had the right to arbitrate his 5-day suspension over Council 24's objection.

In doing so, Judge O'Brien ruled at p. 5: "Neither the State nor case law support plaintiff's position that he has a right to proceed to arbitration without union involvement and with a representative of his own choosing. Surprisingly, however, the language of the Agreement does give him this right." She then went on to find, at p. 7, that Preller "is entitled to proceed through every step of the grievance procedure, including arbitration, with a representative of his choosing, union or not."

It is well established that – absent discriminatory or other unlawful reasons not found here – a union exercises wide discretion in determining whether to advance a grievance through the grievance procedure up to, and including, arbitration because it is the union, not the employe, who "owns" the contract. See VACA V. SIPES, 386 U.S. 171 (1967). That being so, clear contract language is needed to supersede said discretion and to grant employes the unfettered right to advance their individual grievances through a grievance procedure in the manner argued by Preller.

As related in Finding of Fact 5, supra, the contract here states at Section 4/1/3: "An employe may choose to have his/her designated union representative represent him/her at any step of the grievance procedure. . .Individual employes or groups of employes shall have the right to present grievances in person or through other representatives of their own choosing at any step of the grievance procedure. . ." Judge O'Brien seized upon that proviso in support of her finding, at p. 7, that:

> "Plaintiff is entitled to proceed through every step of the grievance procedure, including arbitration, with a representative of his choosing, union or not."

The question of who represents an employe at each grievance step, however, is a separate question of whether an employe has the unilateral right to advance his/her grievance over Council 24's objection. Here, there is no contract language that expressly gives individual employes the right to advance their grievances over the Union's objection. In addition, Steps 1-3 of the grievance procedure refer to "parties" – i.e., the State and Council 24 – thereby indicating that the "parties"

control the grievance arbitration procedure and not individual employes. The contractual reference to an employes' right to

"present grievances in person or through other representatives of their own choosing at any step of the grievance procedure. . ." therefore can be construed to mean than that an employe gets to select his/her grievance representative only after Council 24 has agreed to advance and process his/her grievance.

The parties' contract, then, does not clearly and unequivocally waive Council 24's right to determine whether grievances should be advanced beyond the first step.

In addition, I credit Hacker's testimony that a past practice – which Judge O'Brien did not consider – has arisen over the last 29 years to the effect that once a first step grievance has been filed, it "becomes a product of the Council 24 office. . .We own the grievances technically." This past practice demonstrates how the State and Council 24 have interpreted and applied their collective bargaining agreements over the years and it shows that, as a matter of binding past practice, Council 24 retains the right to drop grievances after the first step. Preller's contrary claim thus is without merit.

Left for consideration is Preller's claim that the State acted unlawfully when it failed to schedule pre-filing steps in a more timely fashion and when it refused to consider the merits of his grievances until a pre-filing step has been held. Preller maintains that the State violated his rights under Section 111.83(1) of SELRA which provides in pertinent part:

> "Any individual employee, or any minority group of employees in any collective bargaining unit, may present grievances to the employer in person, or through representatives of their own choosing, and the employer shall confer with said employee or group of employees in relation thereto if the majority representative has been afforded the opportunity to be present at the conference."

Preller thus contends in his March 4, 1997, brief: "a union cannot negotiate a provision in its contract that limits or denies the right of employees to choose their own representative in the grievance procedure."

Here, the State and Council 24 agreed in their 1995 negotiations upon the pre-filing step spelled out in Article IV, Section 2, of the contract and which is set forth in Finding of Fact No. 6, supra, in order to facilitate the resolution of employe complaints. This step has worked well, as Hacker testified that the pre-filing step has resulted in about 100 fewer grievances being filed over a six-month period. Given the huge backlog of pending arbitration cases (Hacker testified that about 1,000 are now pending), the parties hardly can be faulted by establishing a mechanism which tries to resolve employe complaints as quickly and as informally as possible.

However, this laudable objective has been hindered by delays in scheduling pre-filing steps

and by not yet holding pre-filing steps on two of Preller's complaints. Hacker credibly testified that some of these delays were caused by creating a new union local at University Hospital; by the problems

encountered by the local union's new and inexperienced officers; and by the problems caused when University Hospital was created as a new legal entity. In addition, Preller himself helped create some of this delay by failing to immediately supply Council 24 with copies of his three grievances; by failing to notify his local union steward that he was filing those grievances; and by failing to provide Council 24 official Jenkins with all of the information she requested of him in her February 12, 1997, letter referenced in Finding of Fact 22, supra. All this is why the State maintains that Preller "tried everything he could to keep the Union away from his grievances."

Preller's refusal to work more closely with Council 24 really goes to the very heart of this dispute. For as reflected in Preller's October 21, 1996, letter to AFSCME International President McEntee (Finding of Fact No. 18, supra.), it is clear that Preller has no confidence in Council 24's leadership. Indeed, his November 18, 1996, letter to Council 24 Assistant Director Hacker (Finding of Fact No. 19), states: "(1) I have filed these grievances on my own because I do not feel confident in having Denise Miller or the inexperienced stewards you have appointed for Local 1942 represent me." His subsequent January 14, 1997, and April 3, 1997, letters to local Council 24 officers (Findings of Fact Nos. 20 and 23), reveal that he wants to process his grievances in the way he chooses and that Council 24 must stand out of his way. If Preller's position is adopted, that in effect will enable him to create a mini-union within Council 24, one that hopes to process and arbitrate grievances completely on its own with all of the same privileges and rights that Council 24 enjoys as the exclusive collective bargaining representative.

Once that fundamental point is understood, it becomes clear that the real battle here is between Preller and Council 24, and not the State. However, Preller chose not to name Council 24 as a named party, thereby leaving the State to hold the bag.

Trying to ascertain the parameters of a proper time frame to consider individual employe grievances is not easy because there are so many variables to consider in establishing the date that a pre-filing step must be held. Here, though, Labor Relations Manager Bugge testified that she believes such pre-filing steps under normal circumstances should be held no later than 21 calendar days of when an employe first brings a complaint to the union. In addition, Council 24 and the State have agreed in Article IV, Step One, of the contract that first step grievances must be heard within 21 calendar days of their receipt. If that can be done for written grievances, there is no reason why such a time deadline cannot be followed for the more informal complaints arising at the pre-filing step.

Here, though, the State was merely complying with the provisions of its contract with Council 24 and it had no control over whether and/or when Council 24 would ask for a pre-filing

step – a necessary prerequisite under the contract before a written grievance can be considered at the first step of the grievance procedure. In addition, since a certified audio expert was called in at the pre-filing step to determine whether there was merit to Preller's complaint that certain alarms were too loud, the delay in holding the step in that matter is readily understandable.

In this connection, the Commission ruled in MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 11280-B (WERC, 12/72) that a municipal employer did not act unlawfully when it failed to provide a prompt hearing over an individual employe's grievance because the Municipal Employment Relations Act ("MERA"), "merely requires the Municipal Employer to confer with an individual employe or minority group of employes on grievances presented to the municipal employer. . ." and that even absent any contractual right to do so, "individual employes would still have a right to present a grievance to the employer, and the employer would still have an obligation to confer with the grieving employe with respect thereto." (Emphasis in original) Id., at 2-3.

The Commission subsequently addressed this issue in COLUMBIA COUNTY, DECISION NO. 22683-B (WERC, 1/87), wherein it ruled that a muncipal employer violated MERA when it failed to notify a union that it was meeting with an employe to discuss her individual grievance. In doing so, the Commission stated:

> That provision [i.e. Section 111.70(4)(d)1, of MERA] does not impose an affirmative obligation that the Employer meet and confer with employes and their representatives about grievances; rather, it is intended "to permit employees to present grievances and to authorize the employer to entertain them without opening itself to liability for dealing directly with employes in derogation of the Sec. 111.70(3)(a)4, Stats. duty to bargain only with the exclusive bargaining representative." GREENFIELD SCHOOLS, DEC. NO. 14026-B (WERC, 11/77), citing EMPORIUM CAPWELL CO. V. WESTERN ADDITION COMMUNITY ORGANIZATION, 420 U.S. 50, 61 n.12 (1975). Id. at 10.

In so ruling, the Commission cited EMPORIUM CAPWELL CO., SUPRA, wherein the United States Supreme Court construed analogous language found in Section 9(a) of the National Labor Relations Act, as Amended. The Court there found in footnote 12:

> "Respondent clearly misapprehends the nature of the 'right' conferred by this section. The intendment of the proviso is to permit employes to present grievances and to authorize the employer to entertain them without opening itself to liability for dealing directly with employes in derogation of the duty to bargain only with the exclusive bargaining representative, a violation of ss. 8(a)(5). . .The Act nowhere protects this 'right' by making it an unfair labor practice for an employer to refuse to entertain such a presentation, nor can it be read to authorize resort to economic coercion."

The Commission's rulings in MILWAUKEE BOARD OF SCHOOL DIRECTORS and COLUMBIA COUNTY are applicable here because the language of Section 111.70(4)(d) of MERA which those decisions construed closely parallels the language found in Section 111.83(1) of SELRA.

Moreover, Section 111.84(1)(a) makes it an unfair labor practice "To interfere with, restrain or coerce employes in the exercise of their rights guaranteed in s. 111.82." Notably absent from this proviso is any reference to Section 111.83, thereby showing that Section 111.84's definition of an unfair labor practice does not cover Section 111.83. As a result, and because the Commission in COLUMBIA COUNTY adopted the reasoning set forth in footnote 12 of EMPORIUM CAPWELL which found that an employer's failure to meet with an individual grievant did not constitute an unfair labor practice, I conclude that the State did not violate Section 111.84 of SELRA when it did not hear Preller's individual grievances on a more timely basis and when it refused to hear said grievances until the pre-filing step had been conducted.

For all the aforementioned reasons, the complaint is therefore dismissed in its entirety.

Dated at Madison, Wisconsin, this 17th day of July, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Amedeo Greco /s/
Amedeo Greco, Examiner

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