STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

STEVE PRELLER, Complainant,

vs.

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

Case 430
No. 54593
PP(S)-263

Decision No. 28938-C

Appearances:

Mr. Steve Preller, 135 South Marquette Street, Apartment 1, Madison, Wisconsin 53704, appearing on his own behalf.

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

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

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

On July 17, 1998, Examiner Amedeo Greco issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above matter wherein he concluded that the above named Respondents had not committed any unfair labor practices within the meaning of the State Employment Labor Relations Act. He therefore dismissed the complaint.

Complainant timely filed a petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's decision pursuant to Secs. 111.84 (4), Stats. and 111.07(5), Stats. The parties thereafter filed written argument in support of and in opposition to the petition, the last of which was received November 18, 1998.

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

ORDER

A. Examiner Findings of Fact 1-6 are affirmed.

B. Examiner Findings of Fact 7-9 are set aside.

C. Examiner Findings of Fact 10-23 are renumbered Findings of Fact 7-20 and affirmed.

D. Examiner Finding of Fact 24 is set aside.

E. Examiner Finding of Fact 25 is renumbered Finding of Fact 21 and amended to read:

> 21. A pre-filing step meeting regarding Grievance #96-2151 was held on January 14, 1997 between representatives of Intervenor and Respondent State. Intervenor then withdrew this Grievance. Respondent State then refused to allow Complainant to process the Grievance any further.

F. Examiner Finding of Fact 26 is set aside.

G. Examiner Findings of Fact 27-29 are renumbered Findings of Fact 22-25 and affirmed.

H. Finding of Fact 26 is hereby made:

> 26. On December 10, 1997, Dane County Circuit Court Judge Sarah B. O'Brien issued a decision in litigation between Complainant, Respondent State, and Intervenor. In her decision, she interpreted the collective bargaining agreement at issue in this complaint proceeding as allowing Complainant to:
>
> > . . . proceed through every step of the grievance procedure, including arbitration, with a representative of his own choosing, union or not.

I. Finding of Fact 27 is hereby made:

27. Respondents were not hostile toward Complainant based on his exercise of his rights under the State Employment Labor Relations Act.

J. Examiner Conclusion of Law 1 is amended to read:

1. Respondents did not commit unfair labor practices within the meaning of Secs. 111.84(1)(a)(b)(c) or 111.84(3), Stats.

K. Examiner Conclusion of Law 2 is set aside.

L. Examiner Conclusions of Law 3-4 are reversed and the following Conclusion of Law is made:

2. Respondent State of Wisconsin committed unfair labor practices within the meaning of Sec. 111.84(1)(e), Stats., by refusing to allow Complainant to process Grievances #96-2151, #96-2152, and #96-2153 through the contractual grievance procedure and, if necessary, to grievance arbitration.

M. Examiner's Order is affirmed to the extent it dismissed those complaint allegations encompassed by Conclusion of Law 1, above.

N. Examiner's Order is reversed to the extent it dismissed those complaint allegations encompassed by Conclusion of Law 2, above, and the following Order is made:

ORDER

1. Respondent State of Wisconsin, its officers and agents, shall cease and desist from violating the 1995-1997 collective bargaining agreement by failing to allow individual employes to process grievances on their own behalf or through representatives of their own choosing up to and including arbitration.

2. Respondent State of Wisconsin shall immediately take the following affirmative action to effectuate the purposes of the State Employment Labor Relations Act:

A. Upon request from Complainant, process Grievances #96-2151, #96-2152, and #96-2153 through all steps of the contractual grievance procedure including, if necessary, grievance arbitration.

B. Notify all employes represented for the purposes of collective bargaining by Intervenor by posting, in conspicuous places on its premises where said employes work, copies of the Notice attached hereto and marked Appendix A. The Notice shall be signed by an official of Respondent State of Wisconsin and shall remain posted for 30 days. Reasonable steps shall be taken to ensure that said Notices are not altered, defaced or covered by other material.

C. Within 20 days of the date of this Order, notify the Wisconsin Employment Relations Commission in writing of the action taken to comply with this Order.

Given under our hands and seal at the City of Madison, Wisconsin this 24th day of May, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

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

I concur in part and dissent in part.

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

"APPENDIX A"

NOTICE TO ALL EMPLOYES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the State Employment Labor Relations Act, we hereby notify our employes that:

1. WE WILL NOT violate the 1995-1997 contract with AFSCME Council 24 Specialists by refusing to allow employes to process grievances on their own behalf or through representatives of their own choosing, up to and including arbitration.

_____ _____

State of Wisconsin Date

THIS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL.

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

THE PLEADINGS

In his complaint, Complainant alleges that Respondents have engaged in activity "purposefully designed to obstruct the right of complainants, as provided in the contract, to engage in concerted activity, to investigate and present grievances, and to process those grievances on work time without union assistance or representation." and thereby violated Secs. 111.84(1)(a)(b)(c) and (e) and 111.84(3), Stats.

In their answer, Respondents deny having committed any of the alleged unfair labor practices.

Wisconsin State Employees Union, Council 24, AFSCME, AFL-CIO moved to intervene as Complainant's bargaining representative and the Examiner granted that motion.

THE EXAMINER'S DECISION

The Examiner concluded that Respondents had refused: (1) to allow Complainant to use work time to investigate issues prior to the filing of a formal grievance; (2) to further process a grievance filed by Complainant after Council 24 withdrew the grievance; (3) to allow Complainant to process grievances until after a pre-filing step meeting had been held; and (4) to conduct pre-filing step meetings until advised by Council 24 that Council 24 was prepared to schedule and conduct such meetings. He determined that none of these actions were taken out of hostility toward Complainant's concerted protected activity and that all of these actions were consistent with the collective bargaining agreement between the State of Wisconsin and Council 24 and with Complainant's rights under Sec. 111.83, Stats. Therefore, the Examiner dismissed the complaint.

The Examiner reasoned as follows:

> 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 recognize 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 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 for 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 municipal 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.

POSITIONS OF THE PARTIES ON REVIEW

Complainant's Initial Brief

Complainant contends the Examiner made errors of fact by: (1) making Findings regarding a matter as to which only opinion testimony was offered by Intervenor and no rebuttal from Complainant was deemed necessary by the Examiner; (2) failing to include certain facts in his Findings; and (3) making Findings that are not supported by the record evidence.

More specifically, Complainant contends that the Examiner improperly persuaded Complainant not to offer rebuttal evidence to the "opinion" testimony of Intervenor witness Hacker regarding the right of individual employes to process grievances over Council 24's objection. Complainant asserts that it was unfair for the Examiner to so act because the Examiner then used Hacker's unrebutted testimony as the basis for a Finding that Council 24 has a long standing practice of retaining the right to determine whether a grievance can be processed further or withdrawn or settled. Had he been allowed to provide rebuttal evidence, Complainant asserts that he would have been able to establish that there is no consistent practice of Council 24 control because grievances have not historically been withdrawn without a grievant's approval and grievances have been processed by individuals or an individual's non-Council 24 representative.

Complainant argues the Examiner erred by finding that the State and Council 24 "agreed that the pre-filing step was required for all non-disciplinary matters." Complainant asserts the record contains no evidence that the parties ever met, discussed or agreed to this proposition.

Complainant alleges the record does not support the Examiner's finding that "All such pre-filing steps have been conducted between State and Council 24 representatives without individual employes being present" or that the pre-filing step has reduced the number of grievances filed.

Complainant further alleges that the Examiner erred when he found that pre-filing steps were not held as to matters raised by Complainant because Complainant failed to provide requested information.

Complainant argues the Examiner erred by failing to address issues raised by Complainant.

Complainant contends that the Examiner should have but did not determine the propriety of the State's refusal to hear a 5 day suspension grievance at the 2nd step and to answer a different grievance after 2nd step meeting was held.

Complainant asserts the Examiner erred by failing to follow the decision of Judge O'Brien regarding the right of an employe to process grievances over the objection of Council 24.

Complainant alleges that the Examiner incorrectly limited the applicability of Judge O'Brien's decision to the instant complaint proceeding. Complainant argues that by holding that an individual employe has the right to arbitrate grievances despite Council 24's objection, the Judge necessarily also concluded that individual employes can process grievances though the steps of the grievance procedure leading up to arbitration.

Complainant alleges the Examiner erred by concluding that the State acted properly by refusing to process grievances until the pre-filing step was completed.

Complainant asserts the Examiner failed to consider the applicable contract language which states that the State "may" hold a grievance in abeyance when Council 24 fails to contact the State to schedule a pre-filing meeting. Thus, Complainant asserts the Examiner improperly concluded that the contract left the State with no choice but to hold the grievances in abeyance at the pre-filing stage.

Complainant asserts the Examiner's decision was improperly influenced by the Examiner's frustration with the decision of Complainant not to pursue unfair labor practice allegations against Council 24.

Complainant contends that his reasons for not pursuing Council 24 are irrelevant to the merits of his case against the State and should not have had any influence on the Examiner.

Respondent State's Response

The State asserts that the Complainant is not entitled to process grievances as to which the pre-filing step has not been held.

The State contends that it acted in full compliance with the intent of the parties' contractual agreement by refusing to process the grievances Complainant filed until Council 24 could participate in the pre-filing step. The State argues that the use of the word "may" in Article 4/2/3 must be viewed in light of the subsequent joint letter from the State and Council 24 stating that it is "essential" that the pre-filing step be used.

The State asserts that the pre-filing step was specifically designed to reduce the filing of frivolous grievances and that Complainant's attempt to circumvent the parties' agreement as to his frivolous claims demonstrates the value of the pre-filing step.

The State alleges the contract language and supporting testimony make clear that a pre-filing step must be held before a matter can become a grievance. It argues that the Complainant failed to trigger the pre-filing step because he did not contact the appropriate union representative.

Intervenor Council 24's Response

Council 24 asserts that the Examiner did not err when concluding that Respondent State did not violate the State Employment Labor Relations Act by waiting for the pre-filing step to be completed before allowing a non-disciplinary contractual issue to move to Step 1 of the grievance procedure.

Council 24 argues that the contractual language and the practice of Respondent fully support the Examiner's conclusion that the State was entitled to insist that the pre-filing step be held before a matter became a 1st step grievance. Council 24 further asserts that because the pre-filing step must occur before a contractually recognized "grievance " exists, contractual provisions related to the processing of grievances are inapplicable to matters which have not proceeded through the pre-filing step and thus cannot be violated.

Council 24 alleges the Examiner correctly concluded that the contract does not allow individual employes to advance or process grievances over Council 24's objection.

Council 24 asserts that the Examiner properly relied on Hacker's testimony to establish that Council 24 controls all grievances and has the unrestricted right to withdraw any grievance, which it concludes, lacks merit. Accordingly, Council 24 asserts the Examiner correctly concluded that the State did not violate applicable law by refusing to process grievances, which had been withdrawn.

Council 24 concurs with the State's view that Complainant's grievances were frivolous and establishes the need for the pre-filing step.

Council 24 asserts there is nothing in the record to support the Complainant's accusation that the Examiner's decision was tainted by frustration.

Given all of the foregoing, Council 24 asks that the Examiner be affirmed.

Complainant's Reply Brief

Complainant notes that the State and Council 24 have conspicuously failed to respond to the Complainant's arguments about the impact of Judge O'Brien's decision on this case.

Complainant reiterates his view that O'Brien's decision requires a conclusion that the State violated the State Employment Labor Relations Act by: (1) refusing to hear the Complainant's 5 day suspension grievance; (2) refusing to answer another grievance following a 2nd step meeting where the Complainant represented himself; and (3) refused to allow Complainant to proceed to the 1st step and represent himself as to three other grievances.

Complainant asserts that the State and Council 24 inaccurately continue to view this case as limited to the 3 grievances which did not proceed to the 1st step.

As noted earlier, Complainant argues this case also involves the State's conduct as to the suspension grievance and the 2nd step refusal to answer.

Complainant contends that the merit or lack thereof of the various grievances is irrelevant to the issues being litigated.

Complainant asserts his complaint raises issues of interference by the State with the right of the Complainant to engage in the concerted activity of pursuing grievances through representatives of his own choosing. Complainant argues that Judge O'Brien concluded the contract gives him that right without regard to the underlying merits of the grievances themselves.

Complainant denies that he refused to use the pre-filing step.

Complainant contends that he requested Council 24 to proceed with the pre-filing steps and provided Council 24 with the information needed to do so. Complainant alleges that Council 24 simply failed to schedule pre-filing meetings and the State used that failure to prevent the Complainant from pursuing his grievances at the 1st step.

Given all of the foregoing, Complainant asks that the Examiner be reversed.

DISCUSSION

Both Sec. 111.83(1), Stats., and Judge O'Brien's decision as to Complainant's rights under the contractual grievance procedure have major impacts on this litigation. We begin with a discussion of that impact.

Section 111.83(1), Stats.

Section 111.83(1), Stats., provides in pertinent part:

> Any individual employe, or any minority group of employes in a 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 employe or group of employes in relation thereto if the majority representative

> has been afforded the opportunity to be present at the conference. Any adjustment resulting from such a conference may not be inconsistent with the conditions of employment established by the majority representative and the employer.

This same statutory language is found at Sec. 111.70(4)(d)1, Stats., in the Municipal Employment Relations Act (MERA). While the Commission has not extensively discussed Sec. 111.83(1), Stats., in prior cases, we have a long standing interpretation of Sec. 111.70(4)(d) 1, Stats. Given the parallel statutory language and the common policies behind both SELRA and MERA, we find the interpretation of Sec. 111.70(4)(d)1, to be instructive and applicable to the interpretation which should be given Sec. 111.83(1), Stats. STATE V. WERC, 122 WIS. 2D 132 (1985).

In MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 11280-B (WERC, 12/72), we stated the following as to the relationship between a contractual grievance procedure and the above quoted statutory language:

> Said statutory provision merely requires the Municipal Employer to confer with an individual employe or minority group of employes on grievances presented to the municipal employer. The provision implements Section 111.70(2) granting a "right" to employes to refrain from engaging in concerted activity for the purpose of collective bargaining. The right to present grievances and the duty of the employer to confer on those grievances, as required in the above quoted provision, does not grant the grievant involved the grievance procedure negotiated in the collective bargaining agreement between the Union and the Municipal Employer.

As evidenced by the above-quoted portion of MILWAUKEE, the **statutory opportunity** for individual employes to meet directly with their employer is separate and **distinct from** any such **contractually bargained opportunity**. The statutory opportunity to meet directly with the employer cannot be limited by a collective bargaining agreement. However, a union and employer have no obligation to bargain a contract which will give individual employes the right to independently process contractual grievances. The employe's statutory opportunity to meet with the employer is separate and distinct from the question of whether the employe has a contractual opportunity to meet with an employer over contractual grievances.

Given the foregoing, to the extent Complainant relies on Sec. 111.83(1), Stats., as the basis for his claims that Respondent State violated SELRA by failing to take certain action as to contractual grievances filed under the contractual grievance procedure, said allegations are without merit. On the other hand, Complainant is free to exercise his right under Sec. 111.83(1), Stats., to present matters of concern directly to Respondent State.

Judge O'Brien's Decision

In November 1996, Complainant was suspended for 5 days by Respondent State. A grievance was filed. Intervenor Council 24 ultimately elected not to arbitrate the grievance. Respondent State refused Complainant's request to arbitrate the suspension through his own representative. Complainant then filed a lawsuit seeking to compel Respondent State to arbitrate the suspension. Intervenor Council 24 was allowed to intervene.

In a December 10, 1997 Decision and Order (Case No. 97 CV 729), Judge O'Brien ruled that Complainant had no independent statutory or constitutional right to arbitrate the suspension grievance. However, she further concluded that under the contract between Respondent State and Intervenor Council 24, Complainant

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

Judge O'Brien ordered Respondent State to arbitrate the 5 day suspension with Complainant and a representative of his own choosing.

On April 10, 1998, Judge O'Brien denied Respondent and Intervenor's request for reconsideration.

On October 12, 1998, the Court of Appeals District IV (Case 98-2049) concluded that Judge O'Brien's Order was not appealable and therefore dismissed Intervenor's appeal.

In WAUKESHA COUNTY, DEC. NO. 24110-B (WERC, 3/88), the Commission affirmed an Examiner's conclusion that where a circuit court had decided the issues pending before him, the doctrine of res judicata precluded him from proceeding to resolve those same issues.

Applying WAUKESHA, we conclude that to the extent Judge O'Brien has entered a final judgment in litigation involving the same parties as to one of the issues presented in this complaint (i.e. Complainant's contractual right to process grievances), her decision was binding on the Examiner and now binds us.

Thus, as a general matter, to the extent that Respondents have refused to allow Complainant to exercise his contractual right to process grievances over Intervenor's objection or without Intervenor's participation, Respondents have violated the contract and thus committed unfair labor practices within the meaning of Sec. 111.84(1)(e), Stats. Therefore, we have reversed the Examiner's Conclusions of Law 3-4 which hold to the contrary.

These violations include Respondent's refusal to process Complainant's grievances until the Intervenor has conducted a "pre-filing" step with Respondent State. Judge O'Brien's decision makes clear that Complainant has a right to process grievances ". . . through **every step** of the grievance procedure . . . union or not." The "pre-filing" step is a step of the grievance procedure.

To remedy these contractual violations, we have ordered Respondent State, its officers and agents, to cease from such violations and to specifically process Grievances #96-2151, #96-2152, and #96-2153 with Complainant through the contractual grievance procedure and, if necessary, through arbitration. We have not ordered Respondent to provide a second step answer as to the 5 day suspension grievance inasmuch as that matter is already proceeding to arbitration pursuant to Judge O'Brien's decision.

We know turn to the remaining issues on review.

Examiner Conclusion of Law 1 states:

> 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.

As reflected in STATE V. WERC, 122 WIS.2D 132 (1985), Sec. 111.84(1)(c), Stats., is violated if Respondent State of Wisconsin takes action against an employe which is motivated in whole or in part by hostility toward the exercise of the employe's rights under SELRA.

Although the Examiner should have but did not make any formal Finding of Fact as to the question of whether Respondents were hostile toward Complainant's exercise of SELRA rights, in his Memorandum he did state:

> This record is totally barren of any union animus and/or any attempt by Respondents to discriminate against Preller.

We concur with the Examiner's view of the evidence and have made a Finding of Fact to that effect. Based on our Finding, we affirm Conclusion of Law 1.

Examiner Conclusion of Law 2 states:

> 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.

The Examiner concluded that there is no statutory right to paid time to process and investigate grievances. We concur with his view of the law in this regard.

The Examiner then went on to examine the contract between Respondent and Intervenor to determine whether Complainant had any contractual right to paid processing time and concluded that he did not.

Because the right to use paid work time to investigate or process grievances exists only if created by a collective bargaining agreement, the only provision of SELRA potentially violated by Respondents' refusal to give Complainant such time is Sec. 111.84(1)(e), Stats., which makes it an unfair labor practice to ". . . violate any collective bargaining agreement . . ." Where, as here, the collective bargaining agreement contains provisions for enforcing its terms, we generally presume the contractual enforcement mechanism to be exclusive and will not assert our statutory jurisdiction over alleged violations of collective bargaining agreements. STATE OF WISCONSIN, DEC. NO. 20830-B (WERC, 8/85); STATE OF WISCONSIN, DEC. NO. 25281-C (WERC, 8/91). Complainant did file a grievance over the issue of paid time to process grievances (#96-2153) and sought to arbitrate the grievance. In their Answer, Respondents raise the existence of grievance arbitration as an affirmative defense. Therefore, given the exclusivity of the grievance arbitration process as the mechanism for determining violations of contract and given our Order that Respondent State proceed to process and, if necessary, arbitrate Grievance #96-2153, we do not assert our jurisdiction over the merits of this alleged violation of Sec. 111.84(1)(e), Stats., and we have modified Examiner's Conclusion of Law 2 accordingly.

Dated at Madison, Wisconsin this 24th day of May, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/

James R. Meier, Chairperson

Paul A. Hahn /s/

Paul A. Hahn, Commissioner

Department of Employment Relations

COMMISSIONER HEMPE'S CONCURRENCE IN PART AND DISSENT IN PART

The majority agrees with the Examiner that the Respondent-State did not violate any of the Complainant's rights arising under the State Employment Labor Relations Act (SELRA) set forth in Ch. 111.80 *et seq.*, Stats.

I concur.

However, the Examiner had further concluded that the Respondent-State did not violate the Complainant's rights arising under the master labor agreement between the State and Council 24. Although the majority expresses neither agreement nor disagreement with the merits of this view, it nonetheless reverses it. Its action is based on its deference to an earlier Dane County Circuit Court decision involving the same parties and the identical issue (but different cause of action) in which the Court found a violation by the State of complainant's contractual rights. I find the majority's rationale as to this issue both unpersuasive and procedurally flawed. In my opinion the Examiner should have been affirmed as to all his conclusions.

Although the apparent doctrinal basis for the demonstrated deference is res judicata, the majority does not specify on what part of the doctrine it relies, *claim preclusion* or *issue preclusion*. The distinction is important and not a matter of formalistic pontification, for although both were once deemed part of the same general doctrine of res judicata, each is now regarded as an independent preclusion concept. NORTHERN STATES POWER CO. V. BUGHER, 189 WIS.2D 541, 525 N.W.2D 723 (1995).

Thus the term res judicata has become a term of limited usefulness, replaced by the term "*claim preclusion.*" NORTHERN STATES POWER CO. V. BUGHER, SUPRA. "In order for claim preclusion or estoppel by record to apply there must be an identity of parties or their privies *and an identity of claims in the two cases.*" (Emphasis supplied) LINDAS V. CADY, 189 WIS.2D 547, 558, 515 N.W 2D 458 (1994).

"Issue preclusion, on the other hand, is designed to limit the relitigation of *issues* that have been actually litigated in a previous action." (Emphasis supplied) LINDAS V. CADY, SUPRA. It " . . . is a doctrine designed to limit the relitigation of issues that have been contested in a previous action between the same or different parties. MICHELLE T. V. CROZIER, 173 WIS.2D 681, 687, 495 N.W.2D 327 (1993).

Inasmuch as there is no identity of claims in the instant matter, but appears to be an identity of issues, I conclude the majority is attempting to assert its reliance on the doctrine of *issue preclusion.*

But the issue of judicial reconsideration requires a compromise in each case of two opposing policies: the desirability of finality and the public interest in reaching the right result. CIVIL AERONAUTICS BOARD V. DELTA AIRLINES, 367 U.S. 316, 6 L. ED. 2D 869, 81 S.CT. (1961). Consistent with this expression, for instance, it has been held that a determination of issues in an action between private parties cannot bar a contest to vindicate the public interest." NEW YORK STATE LABOR RELATIONS BOARD V. HOLLAND LAUNDRY, INC., 294 N.Y. 480, 63 N.E.2D 68 (1945).

In WISCONSIN, also, "(f)ormalistic requirements have been gradually abandoned in favor of a looser, equity-based interpretation of the doctrine." MICHELLE T. V. CROZIER, SUPRA, 688. "In MICHELLE T., we noted that the more modern approach to issue preclusion requires courts to conduct a 'fundamental fairness' analysis. Under this analysis, courts consider an array of factors in deciding whether issue preclusion is equitable in a particular case." LINDAS V. CADY, 183 WIS. 2D. 547, 559, 515 N.W.2D 458 (1994).

As stated by the Wisconsin Supreme Court, "(c)ourts may consider some or all of the following factors to protect the rights of all parties to a full and fair adjudication of all issues involved in the litigation:

(1) Could the party against whom preclusion is sought as a matter of law obtained a review of the judgment?

(2) Is the question one of law that involves two distinct claims or intervening contextual changes in the law?

(3) Do significant differences in the quality or extensiveness of proceedings between the two courts warrant relitigation of the issue?

(4) Have the burdens of persuasion shifted such that the party seeking preclusion had a lower burden of persuasion in the first trial than in the second? or

(5) Are matters of public policy and individual circumstances involved that would render the application of collateral estoppel to be fundamentally unfair, including inadequate opportunity or incentive to obtain a full and fair adjudication in the initial action? MICHELLE T. V. CROZIER, SUPRA, 688-89; factors reasserted in LINDAS V. CADY, SUPRA, 561.

"Such determination of fundamental fairness is a matter of discretion to be determined by the trial judge on a case-by-case basis." MICHELLE T. V. CROZIER, SUPRA, 698. Thus, "(t)he weight given to each factor and the ultimate determination of whether issue preclusion should be applied must be done on a case-by-case basis." AMBER J. F. V. RICHARD B., 205 WIS.2D 510, 520, 557 NW2D 67, 88 (1996).

In the instant case the majority has not conducted any such fundamental fairness analysis. Instead it relies solely on an eleven-year old opinion of this agency. WAUKESHA COUNTY, DEC. NO. 24110-B (WERC, 3/88). The majority describes this case as holding that where a circuit court had decided the issues pending before it the doctrine of res judicata precluded this agency from proceeding to resolve those same issues.

But the majority's reliance is misplaced. Unlike the instant matter, the WAUKESHA case involved not only the same issues and parties as the matter in Circuit Court, *but the identical causes of action*. Thus, unlike the instant matter, in WAUKESHA what this Commission decided was a matter of *claim preclusion*, not *issue preclusion*.

Under the circumstances, it is a moot question as to what the majority might have concluded had it applied the five-factor test noted above. Had it done so, however, several considerations should have been included as critical to that review:

1) As the examiner noted, it is well established that 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 employee who owns the grievance. VACA V. SIPES, 386 U.S. 171, 17 L.ED. 842, 87 S.CT. 903 (1971); MAHNKE V. WERC, 66 WIS. 2D 524, 225 NW2D 617 (1975).

2) The Circuit Court decision to which the majority defers upsets that well-established principle, contrary to the expressed intent of both the Respondent-State and the Wisconsin State Employes Union (hereinafter Union), as duly verified in the sworn testimony taken in this matter.

3) The principle and issue in question is a matter of major public policy.

4) An erroneous resolution of the issue in question may have a major impact in the future labor relations between the Respondent-State and the Wisconsin State Employes Union (hereinafter Union).

5) As found by the Examiner, the contract language interpreted by the Circuit Court admits of an alternate, more plausible interpretation that is:

   a) consistent with the aforesaid principle;
   b) consistent with the language of the labor agreement;
   c) consistent with the testimony of bargaining representatives of both the Respondent-State and the Union as to their intent when negotiating their labor agreement.

6) The alternate interpretation described in (5), above, was neither considered nor discussed in the Circuit Court's opinion.

7) The losing party attempted to appeal the Circuit Court decision, but was frustrated in obtaining a review on the merits.

8) The courts have long-accorded recognition to the WERC for its "special competence" in the area of collective bargaining. WEST BEND EDUCATION V. WERC, 121 WIS.2D 1, 13, 357 N.W.2D 534, 540 (1984); cited with approval in RACINE EDUCATION ASSOCIATION V. WERC, 214 WIS. 2D 352, 367, 571 NW2D 887, 890 (WIS. APP. 1997).

9) The expertise of this agency would be helpful in reaching "the right result" herein.

Had the majority applied a "fundamental fairness" test that included consideration of these factors, I believe it likely that it would have found the application of the doctrine of issue preclusion fundamentally unfair and ultimately affirmed the Examiner's decision that the Respondent-State did not violate the Complainant's contractual rights.

The process, in my view, is legally mandated. The result, in my view, is both equitable and just.

Dated at Madison, Wisconsin this 24th day of May, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

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