STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN STATE EMPLOYEES UNION (WSEU), AFSCME, COUNCIL 24, AFL-CIO, Complainant, vs. STATE OF WISCONSIN (DER) (CORRECTIONS), Respondent.	Case 434 No. 54795 PP(S)-268 Decision No. 29005-A

Appearances:

Mr. P. Scott Hassett, Lawton & Cates, S.C., Attorneys at Law, 214 West Mifflin Street, Madison, WI 53703-2965, on behalf of Complainant Union.

Mr. Mark J. Wild, Legal Counsel, State of Wisconsin, DER, 137 East Wilson Street, P.O. Box 7855, Madison, WI 53707-7855, on behalf of Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING MOTION TO DISMISS

The Wisconsin State Employees Union (WSEU), AFSCME, Council 24, AFL-CIO filed a complaint on January 22, 1997 wherein it alleged that State of Wisconsin (DER)(Corrections) without negotiating with the Union, had unilaterally implemented a revised Arrest and Conviction Policy, Executive Directive 42 (ED 42) which set forth terms and conditions of employment for employees of the Department of Corrections and which constituted a change in terms and conditions of employment, all in violation of Sec. 111.91(1), Stats., past practice and the labor contract between the Union and Respondent. On February 17, 1997, the Wisconsin Employment Relations Commission appointed Sharon A. Gallagher, a member of its staff, to act as examiner in the matter. On March 4, 1997, Respondent filed its Answer in this matter. Hearing was scheduled for and held on March 17, 1997 at Madison, Wisconsin. A stenographic transcript of the proceedings was made and received by April 7, 1997. In both its Answer and at the hearing herein, Respondent moved to dismiss the complaint on various grounds and also moved to defer this case to grievance arbitration, which motions the Examiner took under advisement to be dealt with in this decision. The parties submitted their written briefs by June 2, 1997, which were exchanged by the Examiner.

The Examiner, having considered the relevant evidence and argument as well as the briefs herein and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order Granting Motion to Defer.

FINDINGS OF FACT

1. The Wisconsin State Employees Union (WSEU), AFSCME, Council 24, AFL-CIO (hereafter Union) is a labor organization as defined in Sec. 111.81(12), of the State Employment Relations Act (SELRA), with its offices located at 8033 Excelsior Drive, Madison, Wisconsin 53717-1903. The Union is the exclusive bargaining agent for the State employes in a number of statutorily created bargaining units. At all times material, the Executive Director of the Union has been Martin Beil. At all times material, Ronald Orth has been employed by the Union as a Staff Representative responsible for representing certain bargaining unit employes employed at the State's correctional institutions.

2. At all times material, State of Wisconsin, Department of Employment Relations (Corrections) (hereafter Respondent or DER) was the employer of members of various locals (affiliated with AFSCME Council 24, AFL-CIO) working at the correctional institutions under the supervision of the Department of Corrections. For collective bargaining and labor relations matters, the State of Wisconsin is represented by DER, which has its offices located at 137 East Wilson Street, Madison, Wisconsin 53707. At all times material hereto, Jon Litscher has been Secretary of DER. The Wisconsin Department of Corrections (hereafter DOC) is an independent State agency with statutorily-described duties and responsibilities. The Secretary of DOC at all times material hereto has been Michael Sullivan.

3. The 1995-97 collective bargaining agreement between the Union and Respondent contains a grievance arbitration provision which provides for final and binding arbitration of disputes over alleged violations of specific terms of the contract. The contract also contains the following provisions relevant hereto:

> ARTICLE III
>
> Management Rights
>
> **3/1/1** It is understood and agreed by the parties that management possesses the sole right to operate its agencies so as to carry out the statutory mandate and goals assigned to the agencies and that all management rights repose in management, however, such rights must be exercised consistently with the other provisions of this Agreement. Management rights include:
>
> A. To utilize personnel, methods, and means in the most appropriate and efficient manner possible as determined by management.
>
> B. To manage and direct the employes of the various

agencies.

C. To transfer, assign or retain employes in positions within the agency.

D. To suspend, demote, discharge or take other appropriate disciplinary action against employes for just cause.

E. To determine the size and composition of the work force and to lay off employes in the event of lack of work or funds or under conditions where management believes that continuation of such work would be inefficient or nonproductive.

F. To determine the mission of the agency and the methods and means necessary to fulfill that mission including the contracting out for or the transfer, alteration, curtailment or discontinuance of any goods or services. However, the provisions of this Article shall not be used for the purpose of undermining the Union or discriminating against any of its members.

3/1/2 It is agreed by the parties that none of the management rights noted above or any other management rights shall be subjects of bargaining during the term of this Agreement. Additionally, it is recognized by the parties that the Employer is prohibited from bargaining on the policies, practices and procedures of the civil service merit system relating to:

. . .

B. The job evaluation system specifically including position classification, position qualification standards, establishment and abolition of classifications, and allocation and reallocation of positions to classifications.

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ARTICLE XI

Miscellaneous

. . .

Section 7: Work Rules

11/7/1 The Employer agrees to establish reasonable work rules. These work rules shall not conflict with any provisions of this Agreement. Newly established work rules or amendments to existing work rules shall be reduced to writing and furnished to the Union at least seven (7) calendar days prior to the effective date of the rule. The reasonableness of the newly established work rule(s) or amendment(s) to existing work rule(s) may be grieved beginning at the Second Step of the grievance procedure.

11/7/2 For purposes of this Article, work rules are defined as and limited to:

> "Rules promulgated by the Employer within its discretion which regulate the personal conduct of employes as it affects their employment except that the Employer may enforce these rules outside the normal work hours when the conduct of the employe would prejudice the interest of the State as an Employer".

11/7/3 It is understood that records of work rule violations which did not involve criminal violations will be removed from the employe's personnel file(s) if there are no other violations within twelve (12) months after the violations.

11/7/4 Work rules are to be interpreted and applied uniformly to all employes under like circumstances. The reasonableness of work rules, which includes both the application and interpretation, may be challenged through the grievance procedure contained in this Agreement.

11/7/5 New or revised written policies that reference disciplinary consequences for failure to comply with the policies will be provided to the Union at the same time that they are distributed to affected employees.

. . .

Section 27: Arrest/Conviction Record

11/27/1 The pre-employment arrest/conviction record of a current bargaining unit employe with permanent status shall not be used by the Employer as a basis for removing the employe from his/her existing position or disallowing movement to another position unless the Employer can demonstrate that the employe falsified or withheld information or there is a substantial relationship between the arrest/conviction and the circumstances of the employe's existing position or the position to which the employe requests to move that is detrimental to the Employer.

4. On April 8, 1996 Corrections Secretary Sullivan issued Executive Directive 43 (ED 43), a revised Arrest and Conviction Policy which DOC employees were required to sign and return to their supervisors and which purported to cover both applicants for positions in DOC as well as current employees. ED 43 reads in relevant part as follows:

. . .

SUBJECT: **Work Rules**

I. Background

The Department of Corrections has work rules that regulate the conduct of employees. The DOC work rules are established so that the Department can serve the public efficiently and effectively. If a work rule is violated, disciplinary action, including discharge, may be taken. Work rules apply to off-duty employee conduct which adversely effects the ability of the Department to carry out its mission.

II. Policy

The work rules are not intended to restrict the rights of employees, but rather to advise employees of prohibited conduct. The Department of Corrections will apply the work rules in a fair and equitable manner on a case by case basis.

. . .

PROHIBITED CONDUCT

A. PERSONAL ACTIONS AND APPEARANCE

1. Insubordination, disobedience, or failure to carry out

assignments or instructions.

2. Failure to follow policy or procedure, including but not limited to the DOC Fraternization Policy and Arrest and Conviction Policy.
3. Inattentiveness, sleeping or engaging in unauthorized personal activities.
4. Negligence in performance of assigned duties.
5. Unauthorized disclosure of confidential information or records.
6. Falsifying records, knowingly giving false information, or knowingly permitting, encouraging or directing others to do so. Failing to provide truthful, accurate and complete information when required.
7. Making false, inaccurate or malicious statements about employees, inmates, offenders or the Department.
8. Falsifying employment applications or records, or omission of fact.
9. Failure to comply with health, safety and sanitation rules, regulations, or practices.
10. Failure to comply with regulations such as no smoking, no eating or drinking, or building evacuation.
11. Violating a criminal statute or ordinance, or other regulation having the force and effect of law.
12. Threatening, attempting, or inflicting bodily harm to another person.
13. Intimidating, interfering with, harassing (including sexual or racial harassment), demeaning, or using abusive language in dealing with others.
14. Horseplay, practical jokes, or other disruptive or unsafe behavior.
15. Unauthorized possession of weapons.
16. Reporting for work or while at work manifesting evidence of having consumed alcoholic beverages or illegal drugs or possessing such items while on duty.
17. Gambling while on duty.
18. Unauthorized solicitation while on duty.
19. Failure to submit upon request to the inspection of packages or containers taken from or into work premises.
20. Driving a state vehicle without a valid driver's license.
21. Failure to comply with or violating any rule,

regulation or order of a professional licensing agency when the license is related to the employee's position.

22. Requesting, retaining, or failing to report the offer of a bribe or gratuity.

5. Also on April 8, 1996, Secretary Sullivan issued Executive Directive 42 (ED 42), which is referred to in Work Rule 2 of ED 43. Copies of ED 42 were distributed to current DOC employes who were required to sign and return them to their supervisors. ED 42 reads in relevant part as follows:

. . .

DEPARTMENT OF CORRECTIONS POLICY REGARDING THE EMPLOYMENT OR RETENTION OF INDIVIDUALS HAVING AN ARREST OR CONVICTION RECORD

I. BACKGROUND

The Department of Corrections recognizes its responsibility to comply with the provisions of Wisconsin's Fair Employment Act. The Act prohibits discrimination against job applicants and current employees because of arrest or conviction records. . . .

. . .

II. POLICY STATEMENT

To help ensure that the Department meets its mission and at the same time complies with the Wisconsin Fair Employment Act, it is Department policy that records of pending criminal charges and convictions be considered in employment decisions only when the circumstances of the pending charge or conviction are substantially related to the job. Municipal ordinance violations may be considered. Additionally, being under the custody, control or supervision of a federal, state or local law enforcement agency or having a felony conviction record may restrict employment in certain classifications or restrict the performance of regularly assigned duties and responsibilities.

. . .

III. DEFINITIONS

A. Arrest record includes, but is not limited to, information indicating that an individual has been

questioned, apprehended, taken into custody or detention, held for investigation, arrested, charged with, indicted or tried for any felony, misdemeanor or other offense pursuant to any law enforcement or military authority. (See s. 111.32(1), Stats.)

B. Conviction record includes, but is not limited to, information indicating that an individual has been convicted of any felony, misdemeanor or other offense, has been adjudicated delinquent, has been less than honorably discharged, or has been placed on probation, fined, imprisoned or paroled pursuant to any law enforcement or military authority. (See s. 111.32(3), Stats.)

C. Employe means any person who receives remuneration for services rendered to the Department of Corrections under an employer-employe relationship. (See s. ER 1.02(10), Wis. Adm. Code.)

IV. PROCEDURE

A. APPLICANTS. This procedure applies to all permanent, project and limited term appointments, including new hires, promotions, demotions, transfers, permissive reinstatements, reassignments, temporary and acting assignments. However, current employees will not be subject to a security check with the implementation of this policy, unless the employee is being appointed to a position or is receiving a temporary or acting assignment to a position which has different "job related offense factors" than his/her current position.

1. General Provisions.

Applicants who are certified will be required to complete an application supplement regarding pending charge and conviction information. The application supplement must be filled out accurately and completely prior to the employment interview. Applicants who fail to complete the form or who provide inaccurate information will not

be considered for hire.

In addition, before an offer of employment is made, a security check will be conducted on applicants who are selected for appointment.

If the security check or application supplement indicates a pending charge or conviction record, the Bureau of Personnel and Human Resources shall make the substantial relationship determination in accordance with this policy. If there is a substantial relationship between the pending charge or conviction record, the applicant may not be hired.

2. Specific Positions.

a. Officers and Related Security Positions.

Applicants for officer positions or for other positions which require possession of firearms, who have a felony conviction record, may not be considered for hire unless they have met the requirements of s. 941.29, Stats. The records of applicants with a pending charge or nonfelony conviction will be reviewed to determine if there is a substantial relationship between the circumstances of the crime and the duties and responsibilities of the job. If there is a substantial relationship, then the applicant may not be considered further for hire.

Current employees who hold these positions and who are convicted of a felony shall be removed from their positions unless they meet the requirements of s. 941.29, Stats.

b. Agents and Related Positions.

Applicants for agent, corrections field supervisor, assistant and deputy regional chief, or regional or sector chief positions

who are on probation or parole or otherwise under the supervision of a federal, state or local law enforcement agency or correctional agency may not be considered for hire.

B. CRIMINAL ACTIVITY OF CURRENT EMPLOYES

If an employe is charged or arrested, convicted or sentenced for criminal conduct, the employee shall notify his or her supervisor before the start of the employee's next shift. Failure to notify will be considered a work rule violation.

A current employee who is charged with or convicted of an offense occurring on or off duty may be subject to discipline for the conduct which gave rise to the pending charge or conviction. Disciplinary action based on the underlying misconduct may proceed prior to charges being filed or a conviction being obtained.

V. NEXUS BETWEEN POSITIONS/CLASSIFICATIONS AND OFFENSES

A person may not be discriminated against on the basis of a pending charge or conviction record unless there is a substantial relationship between the circumstances of the criminal offense and the circumstances of the job. (See s. 111.335, Stats.) This test emphasizes a review of the circumstances which foster criminal activity, for example, the opportunity for criminal behavior. In determining the relationship between the job and the offense, the appointing authority shall look at the impact of the offense or the charge on the department's operations and interests.

A. JOB RELATED OFFENSE FACTORS

In determining whether or not the circumstances of a pending charge or conviction are substantially related to the circumstances of a job the following job related offense factors are considered:

1. The job

   a. the nature and scope of the job's public, inmate or client contact;

   b. the nature and scope of the job's discretionary authority and degree of independence in judgment relating to decisions or actions which affect the care and custody of inmates, the commitment or expenditure of funds;

   c. the opportunity the job presents for the commission of offenses;

   d. the extent to which acceptable job performance requires public, inmate or client trust and confidence;

   e. the amount and type of supervision received in the job; and

   f. the amount and type of supervision provided to subordinate staff, if any.

2. The Offense

   a. whether the elements of the offense (as stated in the statute or ordinance the employee is charged under or convicted of) are substantially related to the job duties;

   b. whether the circumstances of the pending charge or conviction arose out of an employment situation;

   c. for current employes, whether the conduct giving rise to the pending charge or conviction occurred during the working hours, on state property or involved the use of state property or involved other state employes or

clients;

d. whether intent is an element of the offense; and

e. whether the offense was a felony, misdemeanor or other.

B. ADDITIONAL CONSIDERATIONS

1. Effective April 8, 1996, current DOC employees who supervise inmates or clients (for example, officers, social workers, recreation leaders, industry specialists and probation and parole agents) and who are under the custody, control or supervision of a federal, state or local law enforcement agency, including a jail sentence with Huber privileges under s. 303.08, Wis. Stats., are considered unfit for duty on the grounds that the circumstances of the custody, control or supervision negatively impact on the department's operations and interests and on the employees' ability to effictively (sic) perform their duties and responsibilities.

   In situations involving jail sentences with Huber privileges under s. 303.08, Wis. Stats., employees may be placed on leave without pay status. Employees who are granted a leave of absence may use vacation or holiday leave or compensatory time as a substitute for leave without pay. Sick leave may be used only if the individual is serving jail time in an inpatient AODA treatment program or a mental health facility.

2. Having a felony conviction record may restrict or affect employment in certain classifications (for example, officer).

C. OFFICER AND RELATED POSITIONS AND AGENT AND RELATED POSITIONS

Appendix 1 contains the listing of offenses which have been determined to be substantially related to officer, agent and related positions for the purposes of this policy. This listing is based on current classification titles and work assignments.

As position classification titles, functions and work environments are created or changed, this listing should be used as a guideline to illustrate the nexus standard. The listing of job functions does not identify every duty and responsibility assigned but identifies those to which there is a nexus with a related offense.

Similarly, the listing of related offenses is based on Wisconsin statutes. It is not intended to be exhaustive. The list is subject to change as criminal statutes are amended. Crimes which occur in different jurisdictions may be titled or defined differently but still may be substantially related to the position.

D. EXAMPLES OF POSITIONS/ CLASSIFICATIONS & RELATED OFFENSES

Appendix 2 sets forth examples which illustrate the nexus standard.

. . .

6. On February 2, 1995 Complainant's then-attorney, Richard V. Graylow, sent a letter to Secretary Sullivan regarding the then-proposed DOC Arrest and Conviction Policy which read in relevant part as follows:

. . .

I represent the Wisconsin State Employees Union (WSEU) and write to you on its behalf. Your DOC Arrest and Conviction Policy, Draft Exec.Order #42 has been referred to me for comment and reply.

By Collective Bargaining Agreement (CBA), the Department of Corrections (DOC) has the right to establish and enforce reasonable work rules. Said Policy appears to be a work rule and was apparently drawn as same. This Union is of the opinion that same is not reasonable as written or potentially as applied.

It will be challenged on a case-by-case basis in the future.

This Union's failure to challenge the reasonability of same as

> written at this time is not to be construed as a waiver of its right to do so in subsequent proceedings.
>
> . . .

By letter dated June 6, 1995 Complainant's then-President Elmer P. Karl stated that the proposed DOC Arrest and Conviction Policy (which later became ED 42) was

> . . . a direct and flagrant violation of the employe's Constitutional Rights as an American citizen and a citizen of the State of Wisconsin. . . . The Constitution does not delineate between state employees and non-state employees in affording protection. It is wrong to believe (as the proposed policy states), that state employes are any less entitled to the rights and privileges guaranteed by the Constitution of the United States or the State of Wisconsin. . . . I suggest that the proposed policy be discarded and a policy that is both prudent and appropriate be developed by a committee consisting of both Labor and Management representatives.

Neither DER nor DOC management responded to the above-quoted letters from Graylow and Karl.

7. In its complaint, the Union failed to allege any violation of Sec. 111.84, Stats. Rather, it alleged that Respondent had unilaterally changed terms and conditions of employment by implementing ED 42 without first bargaining with the Union and that such failure to negotiate violated ". . . Section 111.91(1), Stats., past practice and the contract between the parties."
As a remedy herein, the Union sought inter alia an Order requiring Respondent to bargain with the Union regarding any changes in the DOC Arrest and Conviction Policy, an order that Respondent post a notice and cease and desist from its illegal activities in the future.

8. In its Answer, Respondent asserted several affirmative defenses -- that ED 42 merely constitutes a work rule which the Employer has the contractual right to establish and enforce without prior negotiations thereon; that the Union should have challenged ED 42 in the grievance procedure, as Article XI, Section 7 allows the Union to grieve the reasonableness of work rules; and that therefore, the WERC lacks jurisdiction to determine the allegations of the complaint. The Respondent also noted that the Union has not exhausted the grievance procedure regarding the content of ED 42 and 43, that neither party has waived arbitration of disputes in this area and that Respondent has not refused to arbitrate such disputes. In addition, Respondent asserted that ED 42 is a position qualification standard which is not subject to bargaining pursuant to Sec. 111.91(2)(b), Stats. Finally, Respondent stated that ED 42 has not affected a change of any terms and conditions of employment at DOC because it is consistent with both past practice and the labor agreement.

9. Prior to the issuance of ED 42 and 43, only DOC employes who were arrested were required to report this to their supervisors; employes who were arrested and then convicted but

released on probation or given Huber law release privileges were allowed to work all the straight time and overtime that they were entitled to at DOC with full knowledge of their supervisors and without being disciplined therefor. After the issuance of ED 42 and 43,

employes at several institutions of DOC were required to notify their supervisors whenever they made any contact with any law enforcement agency; that under newly revised ED 42, that if a DOC employe is arrested and convicted and released on probation or under Huber law privileges he/she has not been allowed to continue to work either straight time or overtime hours at DOC and can be terminated immediately pursuant to ED 42.

10. Between April 21, 1996 and August 28, 1996, various local unions of Complainant submitted nine grievances at various correctional institutions regarding the issuance and implementation of ED 42 and/or 43. Three of these grievances generally challenged DOC's issuance of both ED 42 and 43; five grievances specifically challenged ED 42 and 43; and one grievance challenged only ED 42. All of these grievances asserted ED 42 and/or 43 were unreasonable and they all sought the recision or abrogation of these Executive Directives. In addition, the Union has filed (and is holding in abeyance) two grievances over the application of ED 42 and 43 to unit employes Fleischfresser and Poznanski who have been disciplined for violation of the newly revised ED 42 and 43.

11. ED 43 contains "Work Rules" as defined in Article XI Section 11/7/2; the failure to follow policy or procedure including the DOC Arrest and Conviction Policy constitutes "prohibited conduct" under ED 43; disciplinary action, including discharge, may be taken for violation of such rules while off-duty if the off-duty conduct adversely affects the ability of the DOC to carry out its mission. Because ED 42 is incorporated by specific reference into ED 43, ED 42 primarily contains work rules.

12. Because Article XI Section 11/7/1 states that Respondent has the right to establish "reasonable work rules" and grants Complainant the right to grieve the reasonableness of such work rules including "both the application and interpretation" thereof, Respondent's April 8, 1996 establishment and implementation of ED 42 did not constitute an unlawful unilateral change in terms and conditions of employment of unit employes.

Upon the basis of the above and foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. The effective collective bargaining agreement at Article XI grants Respondent the right to establish reasonable work rules.

2. ED 42 and 43 constitute Work Rules as defined in Article XI of the parties' labor agreement.

3. WERC has jurisdiction to determine whether Respondent has committed unfair labor practices within the meaning of Secs. 111.84 and 11.91, Stats.

4. Respondent did not violate Sec. 111.91(1) as alleged in the complaint or any other provision of SELRA by unilaterally implementing ED 42 on April 8, 1996 without first bargaining with Complainant thereon because the parties already bargained regarding Respondent's power to establish reasonable work rules by including Article XI in the labor agreement.

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

ORDER 1/

Respondent's Motion to Defer this case to grievance arbitration is denied. Respondent's

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1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats. Provides:

> (5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last-known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with
> (Continued)

Motion to Dismiss is granted and the Complaint is hereby dismissed in its entirety.

Dated at Oshkosh, Wisconsin this 18th day of August, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Sharon A. Gallagher, Examiner

1/ (Continued)

> the commission shall run from the time that notice of such reversal or modification is mailed to the last-known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

This decision was placed in the mail on the date of issuance (i.e. the date appearing immediately above the Examiner's signature).

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Briefs:

Complainant:

Complainant observed that although ED 42, as issued, was labeled a policy by Respondent, it dealt extensively with arrests, contacts, and/or convictions of current employes during their employment and it substantively changed the existing terms and conditions of employment of current DOC employes. The action of issuing ED 42 without first bargaining thereon with Complainant constituted an unlawful unilateral change given the silence of the contract on the subject. Complainant noted that the only provision of the contract which addresses arrests and convictions is 11/27/1 which concerns pre-employment arrest and conviction records of current employes and their use and impact during the employment relationship. In contrast, ED 42 purports to regulate the affect of unlawful activities by current employes during the employment relationship and changes long-standing past practice regarding employes' ability to work straight time and overtime while on probation with Huber law privileges. In addition, ED 42 also purports to regulate when employes are expected to report contacts with law enforcement officers and the effect of an employe's being placed on probation for a conviction of a criminal offense. In each of these areas, Complainant contended ED 42 affected a unilateral change in the longstanding past practice of the parties that is neither addressed by the contract nor was same negotiated with the Union.

Therefore, the Complainant urged that the remedy in this case must be to declare that ED 42 is invalid, citing United Baking Co., 43 LA 337, 338 (Kreimer, 1964). Complainant also asserted that where, as here it was discovered after the instant hearing that several local unions affiliated with Complainants had actually grieved ED 42, such grievances should be considered as demands for negotiation on the subject of arrests and convictions, thus supporting the Complainant's request for a bargaining order in this case.

Complainants also contended that the facts of this case failed to support Respondent's motions to defer this case to arbitration or dismiss the complaint. In this regard, Complainant noted that ED 43 was made effective on March 28, 1986 and was labeled as "Work Rules" while ED 42 was made effective on April 8, 1996 and labeled a "policy". The Union argued that if Respondent had intended ED 42 to constitute a work rule it could easily have labeled it as such. Complainant also observed that Attorney Graylow's letter merely sought to preserve Complainant's rights to challenge ED 42 under the contract and did not constitute a waiver of Complainant's legal rights in this or any other appropriate forum.

Complainant urged that the issue whether ED 42 is a policy or a work rule should not be relevant in this case. Rather, Complainant asserted that where a contract is silent on a

subject, allegations that an employer has made unilateral changes in terms and conditions of employment is such an important area of the law and policy that the WERC should retain jurisdiction to decide the prohibited practice and should not defer such a case to grievance arbitration, citing City of Wauwatosa, Dec. No. 28497-A (Gallagher, 8/96). Therefore, Complainant sought denial of Respondent's Motion to Defer and an Order setting aside ED 42, requiring Respondent to bargain over the issues involved and stating that Respondent had violated the Statute.

Respondent:

Respondent urged that in this case the answer to the question whether ED 42 is a work rule or a policy must be determined before inquiring whether Respondent committed a prohibited practice by implementing ED 42 on April 8, 1996. Respondent contended that if ED 42 is a work rule, then Article XI Section 7 of the contract (which states that Respondent may make reasonable work rules so long as they do not conflict with the contract) would control and Complainant's sole remedy would be to grieve the reasonableness of ED 42 as a work rule. In Respondent's view, if ED 42 is a policy, then the Commission could decide whether Respondent committed a prohibited practice by implementing ED 42 without first negotiating it with the Union.

Respondent pointed to Complainant Attorney Graylow's letter of February 2, 1995 as proof that Complainant had admitted that ED 42 and 43 were work rules. Respondent noted that ED 43 on its face incorporates ED 42 by reference as a work rule and that ED 42 states that a violation of its terms may result in disciplinary action, thus requiring a conclusion that both ED 43 and 42 are work rules. The fact that several local unions filed grievances challenging the reasonableness of ED 42 and/or 43 also provided proof, in Respondent's view, that ED 42 is a work rule. Respondent noted that DOC's work rules in effect prior to April 8, 1996 had prohibited illegal off-duty conduct of employes and that Arbitrator Petrie confirmed the propriety of employe discipline for off-duty misconduct issued before ED 42 and 43 were implemented. Respondent also noted that other policies have been listed as prohibited by work rules, regarding which employes have regularly been required to sign a form acknowledging that they have received and read DOC work rules, and the Union has not filed complaints thereon. Respondent argued that, in any event, ED 42 has been applied prospectively and that it has not resulted in any changes in wages, hours or terms and conditions of employment of unit employes.

Therefore, Respondent sought an order stating that it had not committed any prohibited practices and dismissing the complaint in its entirety.

Reply Briefs:

Complainant filed its reply brief with the Examiner on May 20, 1997; Respondent filed its reply brief herein on June 2, 1997.

Complainant:

The Complainant argued that ED 42 should not be considered a work rule as Respondent had labeled it a policy. Furthermore, Complainant asserted that the February 2, 1995 letter of Attorney Graylow did not constitute a waiver of the Union's right to bargain regarding ED 42. The Union stated that although ED 42 can be seen as unreasonable, ED 42 actually changes terms and conditions of employment for unit employes on a subject not covered by the collective bargaining agreement, and therefore must be considered an unlawful unilateral change. In support of its contention that such unilateral change has been made the Union noted that employes such as Poznanski and Fleishfressor are now at risk of losing their jobs due to the establishment and application of ED 42 to their employment relationships. In the Union's view, Respondent's actions against current employes have effectively done away with the "nexus test" which was in place prior to the issuance of ED 42 and 43, replacing the latter test with a presumption against the employe's fitness for duty if convicted and placed on probation. Based upon all of the arguments it made in its prior brief and reply brief, Complainant requested that ED 42 be set aside.

Respondent:

Respondent argued that because ED 42 establishes standards of personal conduct for employes which, if not followed, will subject employes to discipline including discharge, ED 42 must be held to constitute a work rule. Respondent then cited and discussed at length Chicago Tribune Co. v. NLRB, 974 F.2d 933, 141 LRRM 2209 (7th Cir. 1992). Respondent argued that several sections of the master agreement (11/7/1 through 11/7/5) specifically grant Respondent the discretion to establish reasonable work rules. Respondent contended that even if the undersigned finds that ED 42 constitutes a term and/or condition of employment that is subject to mandatory bargaining, Complainant should be found to have waived its right to bargain with respect to the establishment of work rules affecting the personal conduct of employes by its agreement to the provisions contained in Article XI of the collective bargaining agreement. Respondent therefore renewed its previous request for denial and dismissal of the prohibited practice complaint in its entirety.

Discussion:

Section 111.84(1)(d) of the State Employment Relations Act provides, in relevant part, that it is an unfair labor practice for the State:

> to refuse to bargain collectively on matters set forth in s. 111.91(1) with a representative of a majority of its employes in an appropriate

collective bargaining unit. . . .

At Section 111.81(1), Stats., "collective bargaining" is defined to mean

> . . . the performance of the mutual obligation of the State as an employer, by its officers and agents, and the representatives of its employes, to meet and confer at reasonable times, in good faith, with respect to the subjects of bargaining provided in s. 111.91(1) with the intention of reaching an agreement, or to resolve questions arising under such an agreement. . . .

In the instant case, the Complainant has specifically alleged only a violation of Section 111.91(1), Stats. That section provides in pertinent part

. . .

> Subjects of bargaining. (1)(a) Except as provided in paras. (b) to (e), matters subject to collective bargaining to the point of impasse are wage rates, consistent with sub. (2), the assignment and reassignment of classifications to pay ranges, determination of an incumbent's pay status resulting from position reallocation or reclassification, and pay adjustments upon temporary assignment of classified employes to duties of a higher classification or downward reallocations of a classified employe's position; fringe benefits consistent with sub. (2); hours and conditions of employment.
>
> (am) In collective bargaining units specified in s. 111.825(1m), the right of the employer to transfer employes from one position to another position and the right of employes to be transferred from one position to another position is a subject of bargaining.
>
> (b) The employer shall not be required to bargain on management rights under s. 111.90, except that procedures for the adjustment or settlement of grievances or disputes arising out of any type of disciplinary action referred to in s. 111.90(3) shall be a subject of bargaining.
>
> (c) the employer is prohibited from bargaining on matters contained in sub. (2) (cm). Except as provided in sub. (2)(g) and (h) and ss. 40.02(22)(e) and 40.23(1)(f)4., all laws governing the Wisconsin Retirement System under ch. 40 and all actions of the employer that are authorized under any such law which apply to non-represented individuals employed by the state shall apply to similarly situated

employes, unless otherwise specifically provided in a collective bargaining agreement that applies to those employes.

(d) Demands relating to retirement and group insurance shall be submitted to the employer at least one year prior to commencement of negotiations.

(e) the employer shall not be required to bargain on matters related to employe occupancy of houses or other lodging provided by the state.

The central issue in this case is whether Respondent's implementation of ED 42 on April 8, 1996 constituted a unilateral change of terms and conditions of employment of unit employes in violation of Sec. 111.91(1), Stats. 2/ In my view, there is no question that ED 42 is a work rule and that Respondent was therefore privileged to implement ED 42. 3/ ED 43 clearly defines and lists work rules applicable to DOC employes. In this regard, I note that ED 43 clearly states that the Department of Corrections may regulate employe conduct both on and off duty through its work rules, so long as the off-duty conduct adversely affects the ability of the Department to carry out its mission; that if an employe violates a work rule, an employe may be subject to disciplinary action, including discharge; and work rule 2 contained in ED 43 specifically states that an employe's "failure to follow policy or procedure, including but not limited to the DOC Fraternization Policy and Arrest and Conviction Policy" constitutes prohibited conduct which may subject an employe to disciplinary action.

The specific reference in ED 43 to the DOC Arrest and Conviction Policy incorporates that document into the work rules by reference, making it clear that ED 42 is primarily a work rule. Furthermore, ED 42 defines such terms as arrest record, conviction record and who shall be covered by the arrest/conviction policy. ED 42 also attempts to define the nexus between an employes' position and the offense for which he/she has been arrested or convicted which must be present before an employe's arrest/conviction record may be used by the State. Finally, ED 42 lists various examples of positions/classifications and related offenses which may result in the State's taking an adverse action against the employe for an arrest or conviction.

It is axiomatic that an employer's duty to bargain during the term of a labor contract extends to all mandatory subjects of bargaining except those which are covered by the labor agreement or as to which the labor organization has waived its right to bargain either through bargaining history or specific contract language. Where a contract addresses a particular subject, that contract will determine the parties' respective rights during the term of that agreement and both parties are

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2/ Complainant has conceded that ED 42 was issued in accord with sections 11/7/1 to 11/7/5. In addition, no evidence was presented to the contrary.

3/ It is also clear that the contract would allow the Complainant/Union to grieve whether ED 42 is a reasonable work rule, whether it discriminates against or undermines the Union, whether ED 42 conflicts with any other provisions of the parties' labor agreement, and whether ED 42 has been applied uniformly to employes in like circumstances.

entitled to rely upon the bargain they have struck on that subject. 4/ In the instant case, the parties clearly agreed to allow the Respondent to establish reasonable work rules. Thus, Complainant can be said to have waived its right to bargain regarding work rules and Respondent can rely upon the contract in this regard. 5/ For all of the reasons stated herein, I find that Respondent had no duty to bargain regarding the implementation of ED 42 and the complaint shall be dismissed in its entirety.

Dated at Oshkosh, Wisconsin this 18th day of August, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Sharon A. Gallagher /s/
Sharon A. Gallagher, Examiner

4/ See, e.g., City of Madison (Fire Department), Decision No. 27757-B (WERC, 10/94); Cadott School District, supra; City of Richland Center, Decision No. 22912-B (WERC, 8/86); Brown County, Decision No. 20623 (WERC, 5/83); Racine Unified School District, Decision No. 18848-A (WERC, 6/82).

5/ The Respondent also argued that the February 2, 1995 letter of Complainant Attorney Graylow constituted a waiver of the Union's right to file unfair labor practice charges regarding the implementation of ED 42. As I have found that no violation of the statute has occurred here, I find it unnecessary to address this allegation. In addition, as I have found ED 42 constitutes a work rule which Respondent was priveleged under these circumstances to establish, I need not address Respondent's motion to defer this case to arbitration.