STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

STEVE PRELLER, Complainant,

vs.

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

and

WISCONSIN STATE EMPLOYEES UNION (WSEU), COUNCIL 24, AFSCME, AFL-CIO, Intervening Respondent.

Case 440
No. 55132
PP(S)-274

Decision No. 29143-A

Appearances:

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

Mr. 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 Respondents.

Lawton & Cates, S.C., Attorneys at Law, by **Mr. P. Scott Hassett** and **Mr. Bruce M. Davey**, 214 West Mifflin Street, P.O. Box 2965, Madison, Wisconsin 53701-2965, appearing on behalf of Intervening Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Steve Preller filed an unfair labor practices complaint with the Wisconsin Employment Relations Commission (Commission), on April 30, 1997, alleging that the Respondents had

committed unfair labor practices within the meaning of the State Employment Labor Relations Act (SELRA), by retaliating against him because of his exercise of lawful, concerted activity. In the cover letter accompanying his complaint, Preller noted "my written objection to . . . a motion to intervene by the Wisconsin State Employees Union . . . " On May 20, 1997, after attempting to reach the parties by phone, I mailed a copy of the complaint and its cover letter to counsel for the Wisconsin State Employees Union, (WSEU) and asked if WSEU wished to be a "party in interest" to this litigation. On May 23, 1997, WSEU filed a Notice of Motion and Motion to Intervene. On June 20, 1997, I conducted a conference call to address WSEU's motion. I summarized the results of that conference in a letter dated June 20, 1997, which states:

> I write to confirm our conference call of June 20, 1997, and to state the procedures which, in my opinion, flow from it.
>
> The Union's Motion to Intervene is governed by Sec. 111.07(2)(a), Stats., made applicable by Sec. 111.84(4), Stats. The Commission's rules touch on the issue at ERC 20.12(2). Sec. 111.07(2)(a), Stats., states "(a)ny other person claiming interest in the dispute . . . shall be made a party upon application." ERC 20.12(2) permits intervention "upon terms as . . . the individual conducting the proceeding may deem appropriate."
>
> I read these provisions to point to the Union's participation, as a party, based on a claim of an interest in the matter. Thus, I did not adopt Mr. Vergeront's suggestion that a bifurcated hearing procedure be set up to determine the merit of the Union's requested intervention. My preference is to point any person claiming an interest as a party toward a single hearing at which the merit of each party's claim will be tested.
>
> Mr. Hassett has agreed to file a pleading on the Union's behalf by June 27, 1997. The pleading will state the Union's interest in the matter and the Union's determination to assert that interest as a Complainant or as a Respondent. When this pleading has been received, amendments to the complaint and an answer may be filed. I will not set a time for these responses until each of you has had an opportunity to review the Union's pleading.
>
> I will also confirm that each of you has agreed to hold August 19, 1997, available for hearing this matter. I will send a notice of hearing after receipt of the Union's pleading.
>
> . . .

On June 30, 1997, WSEU filed its answer as an Intervening Respondent. On July 3, 1997, the Commission formally appointed me to act as Examiner to make Findings of Fact, Conclusions

of Law and Order in this matter. On July 22, 1997, Respondents filed their answer to the complaint. On August 5, 1997, Intervening Respondent filed a motion to dismiss the complaint. On August 19, 1997, hearing on the complaint was conducted in Madison, Wisconsin. A transcript of that hearing was filed with the Commission on September 22, 1997. The parties filed briefs and reply briefs by February 3, 1998.

FINDINGS OF FACT

1. Steve Preller was, at all times relevant to this complaint, an employe of the State of Wisconsin working at the University of Wisconsin Hospital and Clinics (UWHC) in its Central Services Department. At all times relevant to this complaint Preller has been classified as a Hospital Supply Clerk. That position is allocated to the Technical bargaining unit. Local 1942 of the Wisconsin State Employees Union, Council 24, AFSCME, AFL-CIO (WSEU) serves as the exclusive collective bargaining representative of this unit.

2. The Department of Employment Relations (DER) is a division of the State which represents the State's interests as an employer with its employes. The University of Wisconsin Hospitals and Clinics Authority (UWHCA) is an entity created by the Wisconsin Statutes to, among other things, manage the University of Wisconsin Hospitals and Clinics and their employes. Gordon Derzon is the Superintendent of UWHCA; Greg Kramp is its Executive Director; and Renae Bugge is its Labor Relations Director. Neal Spranger Serves UWHCA as a Labor Relations Consultant and a liaison to several of its departments including its Central Services Department. Don Klimpel serves UWHCA as the Director of its Central Services Department and Bob Scheuer serves as its Assistant Director. For the purposes of addressing this complaint, the Respondents are collectively referred to below as the State.

3. WSEU and the State have been parties to a series of collective bargaining agreements governing the bargaining unit of which Preller was a member. DER has represented the State during those negotiations. The last of those agreements was in effect, by its terms, from November 26, 1995 through June 30, 1997. This agreement is referred to below as the 1995-97 agreement. WSEU and the UWHCA were, at all times relevant to this proceeding, bargaining a successor to the 1995-97 agreement. Among the provisions contained in the 1995-97 agreement were the following:

ARTICLE II

Recognition and Union Security

. . .

Section 5: Union Activity

2/5/1 Bargaining unit employes, including Union officers and representatives shall not conduct any Union activity or Union business on State time except as specifically authorized by the provisions of this Agreement.

. . .

Section 10: Mail Service

2/10/1(BC,T,SPS,PSS) Local Unions shall be allowed to use the existing inter-departmental and/or intra-departmental mail system(s) of the State of Wisconsin for a maximum of two membership mailings per month to members of their respective locals. Local Unions shall be allowed to use intra-institutional mail service (if available). Such mailings must be of a reasonable size and volume and prepared by the local Union in accordance with prescribed mail policy. The Employer shall be held harmless for the delivery and security of such mailings. The content of such mailings shall relate to the matters listed below:

A. Union recreational and/or social affairs;

B. Union appointments;

C. Union elections;

D. Results of Union elections;

E. Union meetings;

F. Rulings or policies of the International Union or other Labor Organization with which the Union is affiliated;

G. Reports of Union Standing Committees.

. . .

2/10/2 No political campaign literature or material detrimental to the Employer or the Union shall be distributed.

. . .

4. WSEU supplied to its members working at UWHCA facilities a document entitled "AFSCME Council 24, WSEU Members' Contract 'Issues' Forms for UW Hospitals & Clinic Authority Board Employees 1997-99 Contract Year." That form is referred to below as the Issue Survey, and sought from WSEU members a detailed statement of any issue which a bargaining unit member believed should be addressed in the then-upcoming bargaining sessions. The Issue Survey stated that any response "must be returned to Council 24 NO LATER than DECEMBER 31, 1996" and stated that it "MUST be submitted to the local president or local contract issue committee."

5. Preller has played an active role in the WSEU, prior to and after the formation of a separate local, Local 1942, to represent certain employes of UWHCA. He was, for example, a steward during the term of the 1995-97 agreement. He also served as a WSEU representative during labor/management meetings conducted during the term of that agreement. Preller has also played an active role in a longstanding, but loosely-knit group of activists within WSEU known as the Union Democracy Coalition (UDC). When the State reorganized the UWHC to create the UWHCA, the WSEU responded by forming a separate local union to represent certain UWHCA employes, including employes in Preller's classification. Preller and other activists felt that the WSEU formed this local without sufficient participation of unit employes, and organized the UDC to voice their concerns. Preller's relationship with the State and with the WSEU has involved conflict. At the time of hearing on this complaint, Preller was party to four complaints before the Commission, one action in Dane County Circuit Court, three complaints before the Personnel Commission, and at least one grievance. The WSEU did not represent Preller in any of the complaints before the Commission or the Personnel Commission, and intervened in opposition to Preller's action in Circuit Court. Preller and WSEU representatives have disagreed about representation issues surrounding the litigation of his grievances. Sometime in the fall of 1996, WSEU removed Preller as a Steward for his Local. In May of 1997, the State terminated Preller's employment.

6. Preller and other members of the UDC serve on the negotiations team which is attempting to negotiate with the UWHCA a successor to the 1995-97 agreement. Preller serves as the team's chair. In the Spring of 1997, the UDC published a four page document entitled "Contract Bargaining Survey - 1997." This document is referred to below as the Bargaining Survey. The Bargaining Survey included the following introduction:

> Our labor agreement with the hospital expires June 30, 1997. This will be our first contract negotiations with the Public Authority. This means that we not only need to bargain improvements we want in current wages, benefits and working conditions; but we also need to ensure that we maintain current contract protections and past practice in the changeover to our new hospital unit. On the plus side, our negotiations can focus solely on the needs, preferences and priorities of members at the hospital, instead of statewide.
>
> Negotiating a contract always involves trade-offs & compromises. As much as we'd like to win every demand, such will not be the case. Therefore, the bargaining team must set priorities & fight for a set of demands that our members view as most important. We are asking you to help us set those priorities by completing the following survey.
>
> **Please read & fill out the survey. Return it to any of the bargaining team members (Gary Howards, Steve Preller, Mike Regan, Mary Rom, Pat Wilkinson) or mail it to 515 S. Brooks St., Madison, WI 53715**. . . .

Two pages of the Bargaining Survey sought detailed information from members on bargaining issues. The first portion of that section of the Bargaining Survey stated:

> Please answer the following questions:
>
> 1) What would you consider to be a fair wage increase in this contract (please list a specific figure for the total compensation increase for both years of the next contract)?
> 2) What wage increase must we negotiate so that you would vote to approve this contract?
> 3) Across-the-board pay increases typically take one of two forms: cents-per-hour (everyone gets the same increase) or percentage (higher paying jobs get a larger raise than lower paying jobs). Which do you prefer? (Please check one): ___Cents-per-hour. ____Percentage. ____ Percentage, but with a minimum cents per hour *(for example, 5% or 50 cents per year, whichever is larger).*
> 4) If you had to choose, is an increase in wages or an increase in benefits more important? (circle your choice)
> 5) Other comments?

The Bargaining Survey then asked members to rank, with an alphanumeric code, the importance of thirty-three specific types of bargaining demands. The specific demands were grouped by the major headings "Economic Demands" and "Language Demands." The major headings were broken down into the following sub-headings: Wages; Benefits; Maintain State Employee Status/Benefits; Job Security; Transfers; Work Rules; Grievance Procedure/Contract Enforcement; Union Security; Education; and Miscellaneous. The final page of the Bargaining Survey stated matter of an organizational nature, including a section which sought from members a written commitment to undertake any or all of a list of fourteen actions such as "Wear a Union button or other insignia/symbol at work;" "Picket or participate in some other action at my work site;" "Help organize a picket or other action;" or "Organize a phone tree for my work unit." Members of the UDC distributed the Bargaining Survey. The distribution of the Bargaining Survey was not done in a systematic fashion. Preller, for example, handed some Bargaining Surveys out to individuals, and placed some Bargaining Surveys in employe mail boxes maintained by the State and UWHCA as the end-point of an Interdepartmental Mail system, which is referred to below as Inter-d mail. He did not, however, distribute the Bargaining Survey through the Inter-d mail. The UDC did not attempt to secure the approval of the Local Union before distributing the Bargaining Survey. At the time the Bargaining Survey was distributed, the Local Union's administrative structure had yet to be finalized.

7. Inter-d mail at UWHCA is a system for handling bulk mail which arrives at UWHCA facilities either inter-departmentally or through the U.S. Postal Service. Under that system, UWHCA employes receive mail centrally, then deliver it to the department of an addressee or to the addressee's departmental mail box. Over a number of years the individual mail boxes which serve as the end-point of this system have been used as mail drops by

individual employes to announce social events, fund raisers or other items of personal interest. Preller, for example, had distributed a UDC prepared newsletter, entitled "The UWHCA Spotlight" and dated "March 1997" in the same fashion as he distributed the Bargaining Survey.

8. One of the managers at Central Services noticed that the Bargaining Survey had been placed in employe mail boxes, and phoned Spranger. Spranger went to Central Services, reviewed the Bargaining Survey and concluded it stated material detrimental to the UWHCA and to WSEU. He then phoned Diana Miller, who is a WSEU Staff Representative. Miller asked Spranger to fax her a copy of the Bargaining Survey. Spranger did so. After consulting with other WSEU representatives, Miller phoned Spranger and advised him that the Bargaining Survey was not a WSEU publication and should be removed from the mail boxes. Spranger then proceeded to remove the Bargaining Survey from Central Services mail boxes.

9. The Issue Survey was distributed by WSEU to its members through the U.S. Postal Service. After the Bargaining Survey had been removed from Central Services mail boxes, UDC members altered its contents and presented it at a meeting of Local 1942. Local 1942 authorized its issuance as a union-sponsored document. In June of 1997, it was distributed to members of Local 1942 through the U.S. Postal Service. Preller prepared the revised Bargaining Survey for mailing and mailed it. At the time of hearing on the complaint, Local 1942 had authorized reimbursing Preller's expenses, but had not yet paid him.

10. One of the complaints mentioned in Finding of Fact 5 involved a complaint before the Commission initiated by Preller and David Marfilius against a number of individually named respondents including the State. Marfilius and Preller secured from the Commission subpoenas to secure the attendance of certain UWHCA personnel. Preller and Marfilius split the subpoenas between themselves. Preller served his portion of these subpoenas at UWHCA facilities during the course of a work day. Preller believed, after a conversation with Marfilius, that UWHCA administrators had informed Marfilius that he could not serve subpoenas during his rest breaks. Based on this belief, Preller discussed the issue with Bugge, and understood that he would not be allowed to serve subpoenas on his break time. Based on this understanding, Preller issued a letter, dated March 12, 1997, to Bugge which states:

> This is a request for records under Wisconsin's Open Records law.
>
> . . .
>
> Mr. Marfilius was told that employees were not allowed to hand out subpoenas on their break time because rest breaks were paid work time. I request that you provide confirmation of what the hospital policy is on this matter in writing to me prior to the WERC hearing on March 18th . . .
>
> Pursuant to Wisconsin's Public Records Law, the undersigned requests by this letter the right to inspect and obtain, if necessary, a copy of the following record(s):

> . . . any and all UWHC work rules or policies which limit the activities of employee's while on rest breaks. This specifically includes, but is not limited to, limitations on employees handing out subpoenas on rest breaks . . .

Bugge responded in a letter dated March 26, 1997, which states:

> I have received your March 12, 1997 records request. There are no documents fitting your request. At the hearing last week we discussed the Hospital's policy regarding employees processing subpoenas on paid time, and I have nothing further to add at this time.

Marfilius did serve a subpoena on Spranger before being informed the UWHCA did not consider this an appropriate use of paid time. Spranger was not on break when he received the subpoena and did not believe Marfilius was on break.

11. UWHCA maintains a written policy concerning "Preparing and Distributing Mail." That policy does not address use of mail boxes as drop boxes for personal communications or the conditions under which material will be removed from mail boxes. UWHCA, at all times relevant to this matter, maintained written work rules, which include the following:

> **PROHIBITED CONDUCT**
>
> Engaging in one or more of the following forms of prohibited conduct . . . may result in disciplinary action . . .
>
> **I. Work Performance**
>
> A. Insubordination, including disobedience, or failure or refusal to carry out assignments or instructions.
> B. Loafing, loitering, sleeping or engaging in unauthorized personal business.
>
> . . .
>
> **II. Attendance and Punctuality**
>
> . . .
>
> C. Failure to observe the time limits and scheduling of lunch, rest or wash-up periods.

. . .

III. Use of Property

A. Unauthorized or improper use of University property or equipment including vehicles, telephone or mail service.

. . .

IV. Personal Actions and Appearance

. . .

B. Threatening, intimidating, interfering with, or using abusive language towards others . . .
G. Unauthorized solicitation for any purpose . . .

These work rules do not constitute the entire list of violations for which employees may be disciplined. Other rules are provided by statutes, by Administrative code, and by administrative procedures established by management. Violations of these rules can also result in appropriate disciplinary action. . . .

11. Preller's preparation and distribution of the Bargaining Survey is lawful, concerted activity. In the absence of appropriate prohibition, Preller's attempt to serve subpoenas concerning litigation before the Commission is lawful, concerted activity. None of the Respondents was hostile to Preller's exercise of lawful, concerted activity.

CONCLUSIONS OF LAW

1. Preller was, at all times relevant to the litigation of this complaint, an "Employe" within the meaning of Sec. 111.81(7), Stats.

2. WSEU is a "Labor organization" within the meaning of Sec. 111.81(12), Stats.

3. The State is an "Employer" within the meaning of Sec. 111.81(8), Stats. Each individually named Respondent has, at some point relevant to the allegations of the complaint, acted as an agent of the State.

4. None of the Respondents violated Sec. 111.84(1)(a), (b) or (c), Stats., or Sec. 111.84(3), Stats., when the Bargaining Survey was removed from UWHCA employe mail boxes or when Preller was informed he would not be permitted to serve subpoenas on work time.

ORDER

The complaint is dismissed.

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

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Richard B. McLaughlin /s/
Richard B. McLaughlin, Examiner

DEPARTMENT OF EMPLOYMENT RELATIONS

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

THE PARTIES' POSITIONS

The Complainant's Initial Brief

After a review of the facts, the Complainant argues that the Employer "has no work rules governing employee activity on break time and does not limit employee activity on breaks, except in this case." In the absence of a "legitimate reason" to prohibit the service of subpoenas on break time, the Employer's "action must be seen for what it is, interference with . . . SELRA rights."

Nor can the Employer's motion to dismiss this portion of the complaint be granted. Since Complainant and Marfilius shared an interest in Marfilius' service of the subpoenas, and since Complainant's right to distribute subpoenas after the Employer's prohibition has been obstructed, it follows that Complainant continues to have an interest in this portion of the complaint.

A review of the evidence establishes that the Employer's removal of the Bargaining Survey from employe mailboxes must also be considered a SELRA violation. The placement of material in a mail slot cannot be considered use of the Inter-d mail system. Beyond this, Complainant urges that use of mail slots as an informal means of employe communication has been unregulated for many years. Because there are no work rules or contract provisions limiting the use of employe mail boxes, the Employer has no valid basis, beyond the WSEU's request, to support its removal of the Bargaining Survey. The evidence manifests that the actual reason for the removal of the Bargaining Survey was to curb the activities of the UDC. This reason will not withstand scrutiny under SELRA.

Nor can the Union's motion to dismiss be granted. Doing so would restrict an employe's right to bring an unfair labor practice to disciplinary matters. Neither the SELRA nor Commission case law will support such a result.

Complainant concludes that the Employer ban on the service of subpoenas during break time coupled with its removal of the Bargaining Survey from employe mail boxes establish violations of Secs. 111.84(1)(a), (b), (c) and 111.84(3), Stats. A review of the record establishes that the Employer and the Union have acted in concert "to limit all concerted activity in the work place to only those activities which the certified bargaining agent and the employer find acceptable . . ." The ban on subpoenas is "a direct challenge to the complaint procedure in SELRA." As a remedy, the Complainant asks for an appropriate cease and desist order, the posting of appropriate compliance notices and an award to the Complainant of the fees and costs "incurred in bringing this case to hearing."

The State's Response

After a review of the facts, the Employer asserts that the Bargaining Survey is not "a piece of social literature," but a union generated document. As such, it "is regulated by . . . SELRA, the labor agreement and (Employer) work rules."

WSEU is the certified exclusive bargaining representative for a bargaining unit of employes including Complainant. As a matter of law, the State has a duty to bargain with WSEU and to comply with the labor agreement negotiated by them. The State urges that the governing labor agreement precludes "union activity or union business on state time" except as authorized by the agreement. Since the Bargaining Survey must be read as an example of union activity, the State contends that the agreement precludes its distribution on paid time. Beyond this, the State contends that the distribution of the Bargaining Survey violates agreement provisions concerning the use of Inter-d mail service. Beyond this, the Employer contends the substance of the Bargaining Survey violates agreement provisions concerning the "type of literature which can be distributed."

Even in the absence of an agreement, work rules preclude the distribution of the Bargaining Survey through Inter-d mail. If the Bargaining Survey is union business, it must comply with the agreement. If the Bargaining Survey is personal business, its distribution was subject to State approval. There "is no proof that Complainant sought or received permission" from the State, and thus no basis to conclude the distribution of the Bargaining Survey was approved. The Local Union eventually approved the Bargaining Survey. That approval led, however, to distribution through first class mail. This distribution underscores the validity of the assertion that neither the labor agreement nor relevant work rules authorize distribution of the Bargaining Survey through Inter-d mail.

Complainant's contention that his statutory rights were violated by the State's regulation of subpoena service "is an absolute fraud upon the WERC." The evidence shows only that Complainant had served his subpoenas by the time the State allegedly stopped Marfilius from doing so. That Marfilius was stopped from doing so is unproven, resting solely on "rank hearsay."

Even if the allegations of the complaint can be considered valid, the State contends that the labor agreement and relevant work rules preclude the service of subpoenas on paid time.

Viewing the record as a whole, the State concludes that "the Complaint must be dismissed on its merits."

The WSEU's Response

WSEU stresses that it "intervened primarily to address and clarify the issue of who has standing to bring unfair labor practices against the employer and in what situation." A review of the evidence will not support a conclusion that the Complainant should be considered to have

standing to assert the allegations of the complaint. The interest advanced by the Complainant regarding the Bargaining Survey cannot be meaningfully distinguished from those of Local 1942 or Council 24. Those interests fall short of the sort of disciplinary or compensation issues which "would directly affect" the interest of the Complainant as an individual. To permit an individual to assert the interests noted in the complaint would "(lead) to superfluous litigation and (undermine) the ability of the Union to responsibly perform its duties as the exclusive bargaining representative."

More specifically, WSEU contends that the distribution of the Bargaining Survey does not comply with the labor agreement. Nor can this proscription be avoided by labelling the placement of the Bargaining Survey in mailboxes individual "concerted activity." Doing so would eviscerate contractual duties and undercut the bargaining process which is designed to create those duties. Complainant, no less than WSEU or Local 1942, is bound by the contract and thus bound to distribute the Bargaining Survey through first class, not Inter-d, mail.

Complainant's Response

Complainant stresses that the complaint "concerns the right of an individual to engage in concerted activity that is not 'official' union activity." The Respondents have "greatly confused" this otherwise simple matter.

That Bugge informed Complainant he could not serve subpoenas on break time establishes, independent of any hearsay, the existence of a significant dispute. That Complainant or any other employe may in the future need to use this right should preclude the granting of the motion to dismiss.

Complainant challenges the State's contention that break time must be considered work time since it is paid for by the State. Nor can the labor agreement be considered to regulate the service of subpoenas on break time, since Complainant served the subpoenas as an individual, "not as an agent of the union."

Nor can work rules be considered to proscribe serving subpoenas on break time. The work rules cited by the State govern work performance, not the service of subpoenas. Whether Complainant served his subpoenas while on work time is governed by work rules, but those rules cannot be enforced in this forum.

Threshold to any analysis of the distribution of the survey is whether Complainant's use of the mail slot as a drop box can be considered to constitute use of Inter-d mail. That the State had not, prior to the Bargaining Survey, chosen to regulate this use of mail slots must be considered a significant point.

Even if the distribution of the Bargaining Survey constitutes use of the Inter-d system, the labor agreement is inapplicable. Since Complainant acted as an individual, not as an agent of Local 1942, Section 2/10/1 of the agreement is inapplicable. Nor can the Bargaining Survey

be considered comparable to the bargaining demand form distributed by Local 1942. The documents seek different information to be used for differing purposes. That the State has a duty to bargain with WSEU cannot obscure that it also has a duty to avoid interference with the formation or operation of labor organizations, whatever its opinion of those organizations.

Beyond this, Complainant argues that the assertion that the Bargaining Survey was done on work time has no support in the record. Nor can any such support be found for the assertion that the Bargaining Survey "is detrimental to the Union." The Bargaining Survey cannot be considered anything more than a manifestation of concerted activity by an individual employe.

The State assertion that existing work rules warranted removal of the Bargaining Survey from the mail boxes is unsubstantiated. To accept the State's reading of its rules could lead only to the absurd conclusion that "nothing is permitted unless specifically authorized by the employer." Since "we all know that in the real world it works exactly the opposite," the State's position must be rejected.

The Union's motion, as the State's, blurs the line "between activity taken as an agent of the union and concerted activity by an individual." The WSEU's narrow view that only "discipline or property rights" can support the standing of an individual to bring an unfair labor practice eviscerates significant individual rights.

Although their reasons differ, the WSEU and the State share an interest in stifling the legitimate exercise of "legally protected concerted activity."

DISCUSSION

Background

The complaint alleges Respondent violations of Secs. 111.84(1)(a), (b), (c) and 111.84(3), Stats. There is no argument the individually named Respondents have acted as individuals in causing or sanctioning the alleged violations. Thus, the allegations will be treated as common to each Respondent, and the Respondents are collectively treated as the State. The allegations turn on two core sets of circumstances. The first involves the removal of the Bargaining Survey from employe mail boxes. The second involves the State's action to prevent WERC issued subpoenas from being served at UWHCA facilities during work time.

The WSEU has intervened as a Respondent, but limits its interest to the Bargaining Survey. Preller's relationship with the WSEU may be complex, but for the purposes of this litigation poses no independent issues. The alleged unfair labor practices are State violations. WSEU conduct may have an impact on determining those allegations, but does not pose issues beyond the statutory provisions noted above.

Both the State and the WSEU have posed motions to dismiss. The State's can be subsumed in a discussion of the merits. The WSEU motion concerns Preller's standing to bring the complaint and poses a threshold issue to the examination of the allegations of the complaint.

The WSEU Motion to Dismiss

WSEU notes that the SELRA and the Commission's rules require a complainant be a "party in interest" to bring a complaint before the Commission. WSEU contends that the removal of the Bargaining Surveys neither affected Preller's rights nor harmed him in any way. Beyond this, WSEU contends granting Preller standing undermines its interest as the exclusive bargaining representative for his unit.

To have standing to assert the complaint, Preller must be considered a "party in interest." This requirement is stated in the Administrative Code at ERC 22.02(1), but has statutory roots traceable to Chapters 111 and 227, Stats. More specifically, Sec. 111.07(2), Stats., which is made applicable to this proceeding by Sec. 111.84(4), Stats., establishes the requirement. Because a complaint under SELRA is also a contested case under Sec. 227.01(3), Stats., the standards of that Chapter also serve to establish the requirement.

The issue posed by the WSEU motion is not whether Preller in fact has the interest he claims, but whether Preller can plausibly assert an independent interest in the subject matter of the complaint. See BROWN COUNTY, DEC. NO. 27553-A (MCLAUGHLIN, 2/93), AFF'D BY OPERATION OF LAW DEC. NO. 27553-E (WERC, 10/94). The Commission has recognized the standing of individual employes to litigate complaints under the procedures of Sec. 111.07(2), Stats. CITY OF NEW BERLIN, DEC. NO. 7293 (WERC, 3/66); WEYAUWEGA JOINT SCHOOL DISTRICT, DEC. NO. 14373-B (HENNINGSEN, 6/77), AFF'D IN RELEVANT PART, DEC. NO. 14373-D (WERC, 7/78). The issue thus posed is whether Preller can assert an interest independent of the WSEU regarding the Bargaining Survey.

To distinguish the interests of Preller and the WSEU on this point, Sec. 227.42(1), Stats., provides relevant guidance. That section establishes the nature of an interest sufficient to support an independent right to a hearing under Chapter 227. The standards set forth at Subsections (a) through (d) are instructive here. Preller asserts he enjoys rights to communicate with fellow employes under Sec. 111.82, Stats., which were undercut by the State's removal of the Bargaining Survey from employe mailboxes. This interest is substantial. Both WSEU and the State contend this form of communication is regulated by contract. If the interest involved is significant enough to be addressed in collective bargaining and codified in a labor agreement, it must be considered "substantial." Beyond this, it is apparent that the legislature established a right to "lawful, concerted activities" in Sec. 111.82, Stats. Thus, there is evidence the legislature has viewed the employe-to-employe communication posed here as an interest worthy of protection. That Preller worked with other employes to create and to distribute the Bargaining Survey establishes that its removal from employe mailboxes affected him more directly than unit employes generally. Finally, it is apparent that the parties to this litigation dispute the existence and legal significance of Preller's interest in the distribution of the Bargaining Survey. This states a "dispute of material fact." Thus, it follows that Preller advances a plausible claim under the SELRA, and that he is a "party in interest" to this litigation.

The WSEU contends that the assertion of Preller's individual interests undermines its collective interest as the majority representative of the unit. This may be the case, but cannot be judged without viewing the evidence. Rights granted in Sec. 111.82, Stats., are rights granted "(e)mployes" from which the WSEU derives its interest as a bargaining agent. Thus, it is necessary to determine the existence and scope of any conflict between Preller's individual rights and the institutional rights of his bargaining representative. Cf. CITY OF MENASHA, DEC. NO. 13283-A (WERC, 2/77).

In sum, the WSEU motion that Preller lacks standing to assert the complaint must be denied.

Applicable Legal Standards

The complaint alleges Respondent violations of Secs. 111.84(1)(a), (b), (c) and 111.84(3), Stats. Sec. 111.84(1)(a), Stats., makes it an unfair labor practice for the State to "interfere with, restrain or coerce state employes in the exercise of their rights guaranteed in s. 111.82." Sec. 111.82, Stats., guarantees State employes the right to engage in certain "lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection."

The Wisconsin Supreme Court has observed that:

> It is helpful to compare the wording of MERA and SELRA, whereupon we find that the rights guaranteed to employees under these acts are identical . . . It would be illogical to apply a different test to MERA than SELRA merely because a different group of protected persons are involved (municipal employees versus state employees). STATE OF WISCONSIN, DEPARTMENT OF EMPLOYMENT RELATIONS V. WISCONSIN EMPLOYMENT RELATIONS COMMISSION, 122 WIS.2D 132, 143 (1985).

This observation has been reflected in the test applied by Commission examiners to determine an independent violation of Sec. 111.84(1)(a), Stats., for the test parallels that used to determine an independent violation of Sec. 111.70(3)(a)1, Stats. The test requires that the Union demonstrate that complained-of conduct was "likely to interfere with, restrain or coerce" employes in the exercise of rights protected by Sec. 111.84(2), Stats. See STATE OF WISCONSIN, DEPARTMENT OF ADMINISTRATION, DEC. NO. 15945-A (MICHELSTETTER, 7/79), AFF'D BY OPERATION OF LAW, DEC. NO. 15945-B (WERC, 8/79); STATE OF WISCONSIN, DEPARTMENT OF HEALTH AND SOCIAL SERVICES, DEC. NO. 17218-A (PIERONI, 3/81), AFF'D BY OPERATION OF LAW, DEC. NO. 17218-B (WERC, 4/81); STATE OF WISCONSIN, DEC. NO. 19630-A (MCLAUGHLIN, 1/84), AFF'D BY OPERATION OF LAW, DEC. NO. 19630-B (WERC, 2/84); STATE OF WISCONSIN, DEPARTMENT OF HEALTH AND SOCIAL SERVICES (DHSS),

DIVISION OF CORRECTIONS (DOC), DODGE CORRECTIONAL INSTITUTION (DCI), DEC. NO. 25605-A (ENGMANN, 5/89), AFF'D BY OPERATION OF LAW, DEC. NO. 25605-B (WERC, 6/89). This is an objective test which does not require proof that the State intended to interfere with the exercise of protected rights. See THE STATE OF WISCONSIN, DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS, DEC. NO. 11979-B (WERC, 11/75).

Sec. 111.84(1)(b), Stats., makes it an unfair labor practice for the State to "dominate or interfere with the . . . administration of any labor or employee organization." To establish a violation of this section, Preller must demonstrate that the State's conduct "threatened the independence of the Union as an entity devoted to the employes' interests as opposed to the Employer's interest. See STATE OF WISCONSIN, DEC. NO. 25393 (WERC, 4/88) AT 17.

Sec. 111.84(1)(c), Stats., makes it an unfair labor practice for the State to "encourage or discourage membership in any labor organization by discrimination in regard to hiring, tenure or other terms or conditions of employment." To establish a violation of this section, Preller must establish (1) that he was engaged in activity protected by Sec. 111.82, Stats., (2) that the State was aware of the activity and was hostile to it, and (3) that the State acted toward him, based at least in part, on that hostility. 122 WIS.2D AT 140.

Sec. 111.84(3), Stats., makes it an unfair labor practice "for any person to do or cause to be done on behalf of or in the interest of employers or employes, or in connection with or to influence the outcome of any controversy as to employment relations, any act prohibited by subs. (1) and (2)."

Application of the Legal Standards to the Bargaining Survey

The Alleged Violation of Sec. 111.84(1)(a), Stats.

Viewed apart from the collective bargaining relationship, Preller's contention that the Bargaining Survey represents the lawful, concerted activity of his discussion of workplace issues with his fellow employes is persuasive. Thus, the preparation and distribution of the Bargaining Survey can be viewed as lawful, concerted activity. An analysis of Sec. 111.84(1)(a), Stats., however, demands a review of all the relevant circumstances to determine the existence of State interference with concerted activity.

A review of the relevant circumstances will not support a finding of interference. The Bargaining Survey was not a personal communication between co-workers. The Bargaining Survey was a document intended to shape and inform the collective bargaining process. Through the Bargaining Survey, Preller and other bargaining team members sought to determine what to demand at the bargaining table, how to demand it and how members would assist in enforcing those demands. The Bargaining Survey, no less than the Issue Survey, was a document directly bearing on then ongoing negotiations.

This does not make the Bargaining Survey something other than concerted activity. It does, however, underscore that the individual interest Preller seeks to assert in that activity cannot be assessed in isolation from the interest of the WSEU and the State in the statutory duty to bargain. The Commission has declined to view individual rights in isolation from the statutory duty to bargain. Cf. CITY OF MENASHA, DEC. NO. 13283-A (WERC, 2/77). Doing so in this case would cause unnecessary conflict between Preller's individual rights and those of the WSEU as his bargaining representative.

The manifestations of that unnecessary conflict are apparent. The labor agreement would not appear to permit WSEU distribution of the Bargaining Survey as Preller attempted. The issuance of the Issue Survey and the June, 1997, issuance of the Bargaining Survey underscore this. To accept Preller's assertion of interference would permit any individual employe the ability to trump any contract provision with which the individual disagreed. That Preller and the bargaining team did not wish to be encumbered by the duties negotiated by the State and the WSEU is apparent. How a bargaining team can associate itself with the statutory duty to bargain when negotiations are desired, then use individual rights to disassociate itself from the statutory duty to bargain when communications with the unit are undertaken is less apparent. There is no persuasive reason to apply Preller's individual rights under Sec. 111.82, Stats., to void unwanted, but negotiated, obligations. That Preller did not use Inter-d mail can arguably address the impact of Section 2/10/1, but cannot address the impact of 2/5/1. Spranger's concerns with the "detrimental" effects of the Bargaining Survey under Section 2/10/2 play no role in this conclusion.

Nor is it apparent how the State could have honored its statutory duty to bargain if Preller's view of interference is accepted. Had the State left the Bargaining Survey in the mailbox, the action would have granted to the bargaining team under a UDC banner greater latitude than the same team could exercise under the WSEU banner. It is not immediately apparent how the State could have ignored the Bargaining Survey without opening itself to a Sec. 111.84(1)(d) or (e), Stats., complaint from the WSEU.

The State's actions did no more than force Preller to work through the WSEU to issue the Bargaining Survey. There is no persuasive basis to view this as anything other than an appropriate result, which balanced Preller's individual and the WSEU's collective interest in the issuance of the document.

It may be that conflict between individual rights under Sec. 111.84(1)(a), Stats., and collective rights under Sec. 111.84(1)(d), Stats., can warrant finding interference in situations of conflict between individual employes and their bargaining representatives. The facts posed here do not, however, pose such a situation. The policy declaration of Sec. 111.80, Stats., points toward a harmonization of a number of conflicting interests through the collective bargaining process. That process points to a negotiated agreement as its culmination. To find interference on the facts posed here would create an unnecessary and irreconcilable conflict between individual organizational rights and collectively bargained duties.

The Alleged Violation of Sec. 111.84(1)(b)

Nor can a violation of Sec. 111.84(1)(b), Stats., be found on this record. It is not apparent if Preller considers the UDC an "employe organization" independent of Local 1942. In either event, the action questioned by the complaint is the removal of a single document from employe mailboxes. The document was later distributed to members of Local 1942 with no apparent interference from the State. Spranger's conduct cannot be considered anything more than concern with the distribution of a single document. This cannot persuasively be considered conduct threatening the independence of either Local 1942 or the UDC as a vehicle of employe advocacy.

The Alleged Violation of Sec. 111.84(1)(c)

Nor can a violation of Sec. 111.84(1)(c), Stats., be found on this record. While the preparation and distribution of the Bargaining Survey can be seen as concerted activity, the record falls short of establishing State hostility toward it. Even if such hostility could be inferred, there is no basis to find effective State action, adverse to Preller, which manifests that hostility. The removal of the survey from mailboxes, if considered significant in itself, cannot explain why the State would idly permit the distribution of the Bargaining Survey through Local 1942. While it is arguable that the removal of the document could be viewed as part of a chain of events culminating in discipline against Preller, no event other than the removal of the document is posed here. To prove the State acted toward Preller based on hostility toward his advocacy role in the UDC or Local 1942, evidence beyond that submitted here must be adduced.

The Alleged Violation of Sec. 111.84(3)

A violation of Sec. 111.84(3), Stats., can be based on conduct undertaken on the State's or the WSEU's behalf. Such conduct must, however, constitute "any act prohibited by subs (1) and (2)." No such conduct has been proven here. That the WSEU sought the removal of a document from employe mailboxes which it declined to distribute in that fashion cannot be considered a SELRA violation.

In sum, Spranger's removal of the Bargaining Survey from employe mailboxes cannot be considered a basis upon which to found a violation of the SELRA.

Application of the Legal Standards to Subpoena Service

The Alleged Violation of Sec. 111.84(1)(a), Stats.

Some preface to the parties' dispute on this point is appropriate. The "subpoena power of the Commission and its examiners in unfair labor practice . . . proceedings is derived from

Secs. 111.07(2)(b), 227.46(1)(b), and 885.01(4), Stats." See MARATHON COUNTY ET AL., DEC. NO. 25757-C (WERC, 3/91) AT 38. The parties' dispute cannot alter this, nor can it make the Commission the ultimate source for the enforcement of a subpoena. See SEC. 885.12, STATS. A finding of unfair labor practices can, however, arguably open an administrative means to secure the attendance of witnesses.

The parties' dispute on this point has troublesome implications. The implications flow from the broad scope of the dispute. The State points to general work rules to ground any refusal to deny the service of a subpoena on paid time, whether that time is paid work time or paid break time. Preller responds that Sec. 111.82, Stats., rights are broad enough to make a work-rule based denial of subpoena service an unfair labor practice.

Sec. 111.84(1)(a), Stats., is inevitably a fact driven standard. The broad implications argued by the parties must, then, be given a solid factual footing. That footing does not exist in this case. Preller persuasively notes the State's purported work rules tenuously apply to the service of subpoenas. The final paragraph of those rules notes that statute can provide an additional basis for workplace regulation. This is, however, a two-edged sword. Statutes can also supply a limitation on the State's disciplinary interest. Preller's arguments, however, are similarly unpersuasive in their breadth. Do Sec. 111.82, Stats., rights grant an employe the right to enter a closed door meeting to serve the participants with a subpoena? The State, as an employer, has the right to regulate its workplace to assure the productivity of that workplace.

Thus, this allegation cannot turn on the broad implications argued by the parties. More to the point, an examination of the facts underlying the parties' arguments will not support a finding of a Sec. 111.84(1)(a), Stats., violation. The evidence shows that Preller successfully served the subpoenas he sought to serve, and that Bugge offered to serve any other subpoenas for him. It is apparent Bugge asserted a rule sufficient to deny Preller future access to other employes on break time. Beyond this the record is sketchy at best. Marfilius may or may not have been on break time when he served Spranger. It is not apparent when Preller served his subpoenas, or where or how he may do so in the future.

Against this background, there is no reliable basis to conclude the State did anything beyond asserting a legitimate interest in regulating the workplace. It is not apparent that Preller's litigation of his complaint suffered in any way. It is, then, impossible to find that the State acted in a fashion which can reasonably be expected to interfere with his exercise of lawful, concerted activity. This is not to say the State's assertion of general work rules can, standing alone, defeat any work site service of a Commission subpoena. Rather, the scope of the State's authority to deny the service of a subpoena must be determined on a case-by-case basis. The facts of this case are insufficient to invoke the broad right Preller asserts.

The Alleged Violation of Sec. 111.84(1)(b), Stats.

The same factual infirmities which preclude finding a violation of Sec. 111.84(1)(a), Stats., preclude finding a violation of this section. Even assuming that litigation involving

Preller as an individual can be fit within this section, some proof of conduct hampering that litigation is necessary. The evidence shows only that Bugge asserted a rule broad enough to affect future attempts to serve subpoenas. Standing alone, the State's attempt to regulate the on-site conduct of its employes regarding the service of legal process cannot establish the level of interference contemplated by this section.

The Alleged Violation of Sec. 111.84(1)(c), Stats.

Presuming the effected or attempted service of subpoenas is lawful, concerted activity, the record fails to demonstrate State motivation beyond a desire to assure that its employes work on work time. Whether the State can bar service of a subpoena by an employe on break time on another employe on break time is posed not by evidence, but by the parties' arguments. Thus, there is no basis to infer the proscribed hostility which underlies two of the three elements to the operation of this section.

The Alleged Violation of Sec. 111.84(3), Stats.

Because there is no demonstrated violation of any provision of Sec. 111.84(1) or (2), Stats., there can be no finding of a violation of Sec. 111.84(3), Stats.

In sum, the record fails to establish any State unfair labor practice, and the complaint has been dismissed.

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

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Richard B. McLaughlin /s/
Richard B. McLaughlin, Examiner

RBM/mb
29143-A.WP1