STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN ASSOCIATION OF PROFESSIONAL CORRECTIONAL OFFICERS, MARY BOBIAK, NEIL KAPTON and ROGER LUDER, Complainants,

and

DEPARTMENT OF EMPLOYMENT RELATIONS (DEPARTMENT OF CORRECTIONS – COLUMBIA CORRECTIONAL INSTITUTION), and WISCONSIN STATE EMPLOYEES UNION, AFSCME COUNCIL 24, AFL-CIO, Respondents.

Case 511
No. 59813
PP(S)-318

Decision No. 30167-A

Appearances:

Ms. Sally A. Stix, Attorney at Law, 7609 Elmwood Avenue, Suite 202, Middleton, Wisconsin 53562, on behalf of Complainants.

Mr. David J. Vergeront, Chief Legal Counsel, Department of Employment Relations, State of Wisconsin, 345 West Washington Avenue, P.O. Box 7855, Madison, Wisconsin 53707-7855, on behalf of the Respondent, Department of Employment Relations.

Lawton & Cates, S.C., Attorneys at Law, by **Mr. P. Scott Hassett**, Ten East Doty Street, Suite 400, P.O. Box 2965, Madison, Wisconsin 53701-2965, on behalf of Respondent, Wisconsin State Employees Union, AFSCME Council 24, AFL-CIO.

ORDER GRANTING MOTION TO AMEND COMPLAINT DENYING MOTIONS TO DISMISS, AND REQUIRING COMPLAINANTS TO MAKE COMPLAINT MORE DEFINITE AND CERTAIN

On March 27, 2001, Complainants Wisconsin Association of Professional Correctional Officers, Mary Bobiak, Neil Knapton and Roger Luder, hereinafter the Complainants, filed a complaint with the Wisconsin Employment Relations Commission wherein they alleged that the Respondents had committed unfair labor practices under the State Employment Labor Relations Act (SELRA) by denying individual employees the right to present grievances through a representative of their own choosing under Sec. 111.83(1), Stats. On May 2, 2001, each of the Respondents filed a motion to dismiss the complaint for failure to state a claim against the respective Respondent.

On May 22, 2001, Complainants filed responses to the respective motions to dismiss, including a motion to amend the complaint in response to Respondent Department of Employment Relations' (DER) motion, and making a number of factual and legal assertions in both responses.

By June 14, 2001, Respondent Wisconsin State Employees Union, AFSCME Council 24, AFL-CIO (WSEU), filed a response renewing its motion to dismiss for failure to state a claim and also making a number of factual and legal assertions. By June 15, 2001, Respondent DER filed a response renewing its motion to dismiss for failure to state a claim and making a number of factual and legal assertions.

Having considered the pleadings and arguments of the parties, the Examiner makes and issues the following

ORDER

1. Respondent Department of Employment Relations' motion to dismiss is denied.

2. Respondent Wisconsin State Employees' Union, AFSCME Council 24, AFL-CIO's motion to dismiss is denied.

3. Complainants' motion to amend the complaint to include the allegations in paragraphs 8 and 9 of its response to Respondent Department of Employment Relations' motion to dismiss is granted.

4. Complainants are ordered to make the complaint more definite and certain, within fourteen (14) days of the date of this order, by specifying in sufficient detail with regard to the grievances they alleged were filed by or on behalf of the individual complainants, when and with whom those grievances were filed so as to enable Respondents to identify those grievances; by making clear that they are alleging that the grievances were filed pursuant to the

individual complainants' rights under Sec. 111.83(1), Stats., or pursuant to their contractual rights under the applicable collective bargaining agreement, or both; and by specifying the section(s) of SELRA that applies to labor organizations and which it alleges Respondent WSEU has violated.

Dated at Madison, Wisconsin this 29th day of June, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

David E. Shaw /s/

David E. Shaw, Examiner

DEPARTMENT OF EMPLOYMENT RELATIONS (CORRECTIONS)
WISCONSIN STATE EMPLOYEES UNION, AFSCME COUNCIL 24, AFL-CIO

MEMORANDUM ACCOMPANYING ORDER GRANTING MOTION TO AMEND COMPLAINT, DENYING MOTIONS TO DISMISS, AND REQUIRING COMPLAINANTS TO MAKE COMPLAINT MORE DEFINITE AND CERTAIN

Complainants filed a complaint with the Commission wherein they alleged that the Department of Employment Relations (DER), through the State's employing institution (Columbia Correctional Institution) and the Wisconsin State Employees' Union, AFSCME Council 24, AFL-CIO (WSEU), had violated Secs. 111.84(1)(a) and (c), Stats., by denying the individual complainants their right to present a grievance under Sec. 111.83(1), Stats.

DER subsequently filed a motion to dismiss for failure to state a claim under SELRA. DER noted that the only allegation of State action in the complaint was that the personnel manager at Columbia Correctional Institution (CCI) had notified WSEU's representative at the institution that Complainant Luder had filed a grievance, which DER asserts is consistent with the State's obligations under Sec. 111.83(1), Stats. UW HOSPITAL & CLINICS BOARD, DEC. NO. 29784-D (WERC, 11/00). DER further asserted that the complaint contained no allegation that the State refused to meet and confer with Luder or the employee on whose behalf he filed a grievance.

Complainant filed a response to DER's motion to dismiss, or in the alternative, a motion to amend the complaint. Complainants asserted the following as facts in their response:

1. The initial grievance Complainant Luder filed in September, 2000, was ignored by Columbia Correctional Institution's ("CCI") management except to notify the WSEU that a grievance had been filed.

2. Complainant Luder filed another grievance complaining that CCI management failed and refused to discuss the other grievances he filed. That grievance, too, was ignored by CCI management.

3. CCI management, specifically personnel manager Bruce Schneider, informed WSEU that Complainant Luder filed a grievance, but failed and refused to meet and confer with Complainants regarding the grievance.

Complainants asserted that DER misinterprets U.W. HOSPITAL AND CLINICS BOARD, supra, in asserting that the State employer's only obligation when someone other than a union representative files a grievance, is to notify the union that a grievance has been filed. What the Commission stated in that case was ". . . the statutory opportunity for individual employees to meet directly with their employer is separate and distinct from any such contractually bargained opportunity. The statutory opportunity to meet directly with the employer cannot be limited by a collective bargaining agreement." Further, the Commission stated that while "a union and employer have no obligation to bargain a contract which will give individual employees the right to independently process contractual grievances," where a union and employer do so bargain "employees have the right to process grievances on their own or with a representative of their own choosing. . ."

Complainants also moved to amend their complaint to assert the following:

> 8. Once an individual is given "the right to independently process contractual grievances," as in this instance, 1/ the employer is obligated to engage in the grievance process, and the "agency representative will schedule a hearing. . ."
>
> 9. The employer failed and refused to abide by the collective bargaining agreement and the statutory right of Complainants to file and process grievances when it failed and refused to schedule a hearing with Complainants pursuant to the grievance procedure and its statutory obligation.
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> . . .

1/ Article IV, 4/1/2 "The grievance shall be presented to the designated supervisor involved in quadruplicate (or mutually agreed upon forms furnished by the Employer to the Union and **any prospective grievant**) and signed and dated by the **employee(s)** and/or Union representative," 4/2/6 "Step Two: . . .Within twenty-one (21) calendar days of receipt of the written grievance, the designated agency representative(s) will schedule a hearing with the employe(s**) and his/her representative(s) and a representative of Couuncil 24.** . ." (Emphasis mine.) 2000-2001 Agreement between the State of Wisconsin and AFSCME Council 24 Wisconsin State Employees Union.

DER responded that Complainants have not alleged that any of them requested a meeting with the State employer. The only allegation is that grievances were filed; however, the right under Sec. 111.83(1), Stats., does not become operative until there is a request for a hearing on the "grievance". DER questions how the employer is to know the grievance is a

statutory "grievance" where, as here, it is filed on a contractual grievance form. Complainant's response only alleges that two grievances were filed – one in September, 2000 with Luder as the grievant and Bobiak as the employee's representative; and one in November, 2000, by Luder alleging a violation of the bargaining agreement. Both were filed on a standard contractual grievance form. The September grievance was processed as a contractual grievance, and the November grievance specifically alleges a violation of contract provisions and under "relief sought", states "Read the contract. . .answer this Grievance."

Although Complainants do not allege that the grievances were filed under the bargaining agreement, it is clear that Complainants filed contractual grievances on contractual grievance forms, which do not constitute statutory grievances. The two are separate and distinct and separate filings are required. The filing of one does not constitute a filing of the other and they are not interchangeable. U.W. HOSPITAL AND CLINICS BOARD, supra. There is no proof that Complainants filed a statutory grievance. If they are contractual grievances, there has been no violation. The September grievance has been appealed to arbitration and there is no allegation that Complainants have complied with the contractual process so as to entitle them to a hearing on the November grievance. If it is a contractual grievance, the Union, not Luder, is the party who controls the grievance and the scheduling of any hearing on it. As it is clear from the pleadings that Complainants did not notify the Union under Sec. 4/1/3 of the bargaining agreement, the employer was fully warranted in not meeting with the grievants, as in that circumstance, "no further discussion (may) be had on the matter until the appropriate Union representative has been given notice and an opportunity to be present."

The contractual language cited by Complainants in footnote 1 of their response has no bearing on any right under Sec. 111.83(1), Stats., as it applies to the contractual grievance procedure. The phrase "and his/her representative(s) and a representative of Council 24. . ." in sec. 4/2/9 does not refer to a statutory "grievance" and does not reference the same "representative" as found in Sec. 111.83(1), Stats.; rather, it refers to a "representative" as defined in the bargaining agreement, e.g., a union steward. Luder would not be a "representative" under the agreement unless he was a designated Union representative, and if he was, it would be a contractual grievance, not a statutory grievance. Even if Complainants are now alleging that the two grievances also triggered the contractual grievance process, they have failed to allege necessary conditions of a "pre-filing" under secs. 4/2/1 – 4/2/4 and filing at the first step within 30 days from when the grievant first became aware. Sec. 4/2/7.

WSEU also filed a motion to dismiss for failure to state a claim under SELRA. In support of its motion, WSEU noted that the complaint alleged that Luder, as a Wisconsin Association of Professional Correctional Officers (WAPCO) representative, filed two grievances and then was advised he could not do so by WSEU Local 3394 President Bergland. In that regard, WSEU asserted that Luder was not a designated shift steward pursuant to sec. 4/6/6 of the collective bargaining agreement. WSEU also asserted that the complaint alleged

that Bergland advised an individual grievant (Complainant Knapton) that if he wanted to file a union grievance, he had to submit the grievance with the designated union steward's signature. The right to present grievances under Sec. 111.83(1), Stats., is separate and distinct from grievance procedural rights afforded under the collective bargaining agreement. Complainants' rights under Sec. 111.83(1), Stats., do not give them access to the grievance procedures and arbitration provisions in the agreement. STATE OF WISCONSIN, DEC. NO. 28938-C (WERC, 5/99); MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 11280-B (WERC, 12/72). Here, Complainants have attempted to use the contractual grievance procedure in the agreement between the State and WSEU. Such a grievance must be processed by WSEU and must be signed by a designated union steward under sec. 4/6/6 of the agreement. As acknowledged in the complaint, Luder had been removed as a WSEU shift steward on September 13, 2000 and was therefore not a designated union representative when he attempted to file grievances under the collective bargaining agreement.

Complainants responded to WSEU's motion to dismiss asserting that even if the statutory opportunity to bring a grievance is separate and distinct from the contractual opportunity to bring a grievance, it does not mean that an employee or his chosen representative cannot follow the contractual procedure in the absence of an established procedure for statutory grievances. Sec. 111.83(1), Stats., does not state a procedure defining a "meet and confer" session. Using the same method to present grievances as in the agreement, only with a different signature, is practical. While an employee may not have access to the full contractual procedure when presenting a statutory grievance, the statute implies that contractual matters may be discussed, as it requires that any adjustment reached be consistent with the bargained conditions of employment. Therefore, advising a member that his grievance cannot be heard unless it is submitted through the Union clearly is interference and coercion with the employee's rights.

Further, while U.W. HOSPITALS AND CLINICS BOARD, supra, held that statutory and contractual opportunities to present grievances are separate and distinct and that there is no obligation to give employees individual access to the contractual grievance procedure, the bargaining agreement in this case does give individual employees access to the grievance procedure. Contrary to the assertion that any grievance must be signed by a union steward under sec. 4/6/6, that provision merely requires the Union to provide the employer with a list of stewards, who then may file grievances under sec. 4/7/1. Section 4/1/2 permits individual employees to bring grievances to the employer without notifying the Union in advance, and is not restricted to situations where that employee is the aggrieved party, i.e., the employee who presents the grievance can act as the chosen representative of the aggrieved employee. Section 4/1/3 merely requires that the Union be notified and have the opportunity to be present, but does not give the Union control of the grievance. The existence of "grievance representatives" under 4/6/6 may not be interpreted to make secs. 4/1/2 and 4/1/3 ineffective.

Complainants conclude that it would be impractical, under either the statutory or contractual opportunity to present a grievance, to demand the use of a completely separate procedure when an individual or his chosen representative presents a grievance. Labor relations depend upon speed and regularity in processing employee complaints and that is the basis for adopting a grievance procedure. Especially at the lower levels, this justifies having a common procedure in order to avoid having three different meetings on the same issue, i.e., under the statute and under a sec. 4/1/3 grievance and a sec. 4/7/1 grievance. To instruct an employee to choose only the method that makes the Union the chosen representative when an employee is entitled to select any of those methods, clearly violates Secs. 111.84(1)(a) and (b), Stats.

WSEU responded that Complainants attempt to construct a contractual basis for individual access to the Union grievance procedure by misinterpreting secs. 4/6/6 and 4/7/1 of the bargaining agreement and ignoring Section 2: Grievance Steps (Secs. 4/2/1 – 7). While Complainants argue a designated grievance representative is not necessary under secs. 4/1/2 and 4/1/3, those provisions must be read in conjunction with the next section. Under sec. 4/2/1, Union representatives must initiate contact with the supervisor at the pre-filing step, and the grievance cannot proceed under sec. 4/2/2 until the Union has made such a contact with the supervisor. Of necessity, Complainants ignore those provisions in arguing that individuals or "non-designated" representatives can "hijack" the Union's grievance procedure. As it is undisputed that Luder is not a designated union representative, and that no designated representative was involved on behalf of the other Complainants, the motion to dismiss should be granted.

DISCUSSION

The complaint alleges that the State employer and WSEU violated Secs. 111.84(1)(a), (b) and (c), of the State Employment Labor Relations Act (SELRA). 1/ Pursuant to

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1/ Complainants do not cite the appropriate provisions of SELRA with regard to Respondent WSEU's alleged violations and have been ordered to clarify their complaint in that regard.

Sec. 111.84(4), Stats., Sec. 111.07, Stats., governs the procedures by which unfair labor practice complaints are to be heard. Chapter 227 of the Wisconsin Statutes states the general framework for administrative agency proceedings.

The Commission is an "agency" under Sec. 227.01(1), Stats., thus making this proceeding an "agency proceeding." Sec. 227.01(3), Stats., defines a "contested case." To be a contested case under Sec. 227.01(3), Stats., the proceeding must involve a controverted, substantial interest which will be determined or adversely affected by a decision or order after a hearing required by law. In this case, the Complainants are seeking an order requiring the State employer to meet with the individuals and their chosen representative with regard to their grievances and without Union input or involvement, which both DER and WSEU oppose in this case. The Complainants' interest is "substantial" and is "controverted by another party." As Sec. 111.07(2)(a), Stats., mandates hearing of alleged unfair labor practices, this matter constitutes a "contested case" as defined by Sec. 227.01(3), Stats.

Dismissing a contested case prior to hearing is appropriate only in limited circumstances:

> Dismissal prior to evidentiary hearing would be proper if based on lack of jurisdiction, lack of timeliness and in certain other cases. . .(I)t would be a rare case where circumstances would permit dismissal of the proceedings prior to the conclusion of a meaningful evidentiary hearing on other than jurisdictional grounds or failure of the complaint to state a cause of action.
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> 68 OAG 31, 34 (1979).

In that regard, the Commission has held that:

> Because of the drastic consequences of denying an evidentiary hearing, on a motion to dismiss the complaint must be liberally construed in favor of the complainant and the motion should be granted only if under no interpretation of the facts alleged would the complainant be entitled to relief.
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> UNIFIED SCHOOL DISTRICT NO. 1 OF RACINE COUNTY, WISCONSIN, DEC. NO. 15915-B (Hoornstra with final authority for WERC, 12/77), at 3; RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 27982-B (WERC, 6/94).

While those cases involved the Municipal Employment Relations Act (MERA), Sec. 111.07 Stats. governs the procedures in prohibited practice and unfair labor practice cases under both MERA and SELRA, respectively. Thus, the Commission's rationale in its decisions in those cases is applicable in cases under SELRA as well.

In this case, Complainants have alleged that they have both a statutory right under Sec. 111.83(1), Stats., and a contractual right under the applicable bargaining agreement, to present grievances to their employer by themselves as individual employees, or by their chosen representative. They allege that grievances were filed by certain individuals, and appear to

allege that the grievances were submitted pursuant to both their statutory right and a contractual right to do so. They further allege WSEU has interfered with their rights in those regards in advising Complainants they must resubmit the grievance through a designated Union grievance representative. Complainants allege that the State employer failed and refused to schedule a hearing with Complainants on their grievances, thereby violating their rights under the statute and under the collective bargaining agreement in violation of Secs. 111.84(1)(a) and (b), Stats. If proved, those allegations would establish violations of Complainant's rights under SELRA. U.W. HOSPITALS AND CLINICS BOARD, supra.

In support of its motion to dismiss, DER has alleged that the grievances Complainants filed were filed as "contractual" grievances under the contractual procedure, and not as statutory grievances, and that the September 23, 2000 grievance was processed under the contractual grievance procedure and is presently pending arbitration. Those are factual allegations that are not contained in the complaint. DER has asserted that Complainants have not alleged that they have complied with the procedural requirements of the contractual grievance procedure so as to entitle them to a "hearing" with the employer on the grievance. Being required to liberally construe the allegations in the complaint, such an allegation may be inferred from the claim that they have a contractual, as well as a statutory, right to a hearing on their grievances. Whether Complainants have complied with such requirements as there are, is a mixed question of law and fact.

DER also asserted that the grievances cannot be filed as both contractual and statutory grievances in a single filing. That also is a mixed question of law and fact. DER asserted that Complainants do not allege that they requested a hearing with the employer, and that absent such a request, there can be no refusal by the employer, and thus no violation of their rights under Sec. 111.83(1), Stats. Whether the filing of the grievances constitutes a request for a meeting or a hearing under Sec. 111.83(1), Stats., is again a mixed question of law and fact.

In support of its motion to dismiss, WSEU asserts that individuals do not have access to the contractual grievance procedure without the Union. Again, this is a mixed question of law and fact.

Given that the amended complaint states possible causes of action against both Respondents, and that there are issues of both fact and law raised in the amended complaint and the motions to dismiss, hearing in the matter is required and the motions to dismiss have been denied. However, while the complaint alleges that Complainants filed grievances, it fails to provide any specificity as to when and with whom, and there has been confusion as to which grievances the complaint references. Complainants therefore have been directed to make their

complaint more definite and certain in those regards, as well as to clarify whether they are asserting that the grievances were filed under the statute, or under the collective bargaining agreement, or both.

Dated at Madison, Wisconsin this 29th day of June, 2001.

David E. Shaw /s/
David E. Shaw, Examiner

DES/gjc
30167-A-doc.