STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN ASSOCIATION OF PROFESIONAL CORRECTIONAL OFFICERS, MARY BOBIAK, NEIL KNAPTON and ROGER LUDER, Complainants,

vs.

DEPARTMENT OF EMPLOYMENT RELATIONS (DEPARTMENT OF CORRECTIONS – COLUMBIA CORRECTIONAL INSTITUTION), WISCONSIN STATE EMPLOYEES UNION, AFSCME COUNCIL 24, AFL-CIO and its affiliate LOCAL 3394, Respondents.

Case 511
No. 59813
PP(S)-318

Decision No. 30167-B

Appearances:

Ms. Sally A. Stix, Attorney at Law, 1800 Parmenter Street, Suite 204, 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 State.

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 Unions.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

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 Respondent Wisconsin Department of Corrections, hereinafter DOC, and the Respondent Wisconsin State Employees Union, AFSCME Council 24, AFL-CIO, hereinafter WSEU, and its affiliate Local 3394, had committed unfair labor practices within the meaning of Sec. 111.84(1)(a) and (c) of 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, Complainant filed responses to the respective motions to dismiss, including a motion to amend the complaint. Thereafter, Respondents filed their responses and renewed their respective motions to dismiss.

On June 29, 2001, the Commission appointed the undersigned, David E. Shaw of the Commission's staff, to make and issue Findings of Fact, Conclusions of Law and Order in the matter. On that date the Examiner issued his Order Granting Motion to Amend Complaint, Denying Motions to Dismiss, and Requiring Complainants to Make Complaint More Definite and Certain.

On July 13, 2001, Complainants filed their amended complaint in compliance with the Examiner's Order, and wherein it additionally alleged that Respondent WSEU's actions had violated Secs. 111.84(2)(a) and (b) of SELRA. Thereafter, Respondents filed their respective answers denying that they had committed unfair labor practices and raised certain affirmative defenses.

On September 19, 2001, a hearing was held before the Examiner in Madison, Wisconsin. A stenographic transcript was made of the proceeding and the filing of post-hearing briefs was completed by December 21, 2001.

Having examined the evidence and the arguments of the parties, the Examiner now makes and issues the following Findings of Fact, Conclusions of Law and Order.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

FINDINGS OF FACT

1. The State of Wisconsin is the State Employer and is hereinafter referred to as "the State" or "Employer". The State's Department of Employment Relations (DER) is statutorily designated to represent the interests of the State for purposes of conducting labor relations involving state employees. DER has its offices at 345 West Washington Avenue, Madison, Wisconsin 53707-7855.

2. The Department of Corrections, hereinafter "DOC", is a department of the State and has its offices located at 149 East Wilson Street, Madison, Wisconsin. DOC's responsibilities include maintaining and operating correctional facilities at various locations in the State, including the Columbia Correctional Institution (CCI), at Portage, Wisconsin. Bruce Schneider has been the Human Resources Director at CCI since 1990, except for two years when he left in 1998 and went to the Wisconsin Veteran's Home, returning to CCI in August of 2000. Schneider has held various positions at various facilities in DOC since 1976 before becoming Human Resources Director at CCI. At all times material herein, Thomas Garcia has been employed by DOC in its Bureau of Personnel and Human Resources, located in Madison, Wisconsin and represents the CCI at Step 2 of the contractual grievance procedure. At all times material herein, David Whitcomb has been employed by DOC as Legal Counsel for the Department.

3. Wisconsin State Employees Union, AFSCME, Council 24, AFL-CIO (WSEU) is a labor organization with offices at 8033 Excelsior Drive, Suite "C", Madison, Wisconsin 53717-1903. WSEU is the collective bargaining representative of employees of the State of Wisconsin who are in the Security and Public Safety (SPS) collective bargaining unit including those employees in the SPS bargaining unit at CCI. The DOC positions of Correctional Officer and Correctional Sergeant are included in the SPS collective bargaining unit. Local 3394 is the local affiliate of WSEU at CCI. Raymond Berglund has been employed at CCI as a Corrections Officer since 1986 and in 1998 was appointed Vice-President of Local 3394 when the incumbent left the position, and became President of Local 3394 when the incumbent, Roger Luder, resigned in 1999. Berglund has never received any training in filing or processing grievances, nor has he filed any grievances as a Union official.

At all times material herein, Mel Elgersma, Gary Hausen and Harvey Hoeft have been WSEU Field Representatives assigned to represent bargaining unit employees at CCI at Step 2 grievances.

4. The Wisconsin Association of Professional Correctional Officers, hereinafter "WAPCO", is a labor organization with its offices in c/o Attorney Sally A. Stix, 1800 Parmenter Street, Middleton, Wisconsin. WAPCO's membership includes individuals employed as Correctional Officers or Correctional Sergeants at CCI.

5. Mary Bobiak is an individual residing in Wisconsin who has been employed by the State at CCI for approximately six years, currently in the position of Corrections Sergeant on third shift in Housing Unit 6.

Neil Knapton is an individual residing in Wisconsin who at all times material herein has been employed by the State at CCI in the position of Correctional Sergeant on the third shift.

Roger Luder is an individual residing in Wisconsin who has been employed by the State at CCI since 1986 and currently holds the position of Correctional Sergeant on second shift in Housing Unit 6.

Luder and Knapton are both members of WAPCO and active in that organization. Luder became actively involved in WAPCO in early 2000, and accepted a nomination for Vice-President in WAPCO in the fall of 2000. Bobiak has not been a member of, or active in, WAPCO.

Bobiak, Knapton and Luder are in the SPS bargaining unit represented by WSEU, and its affiliate Local 3394.

6. The State and WSEU are parties to a collective bargaining agreement that sets forth the wages, hours and conditions of employment for the employees in the bargaining unit represented by WSEU, including the SPS bargaining unit. Said agreement covered the period from May 20, 2000 through June 30, 2001, and included the grievance procedure, which provides, in relevant part, as follows:

GRIEVANCE PROCEDURE

SECTION 1: Definition

4/1/1 A grievance is defined as, and limited to, a written complaint involving an alleged violation of a specific provision of this Agreement.

4/1/2 Only one (1) subject matter shall be covered in any one (1) grievance. A grievance shall contain a clear and concise statement of the grievance by indicating the issue involved, the relief sought, the date the incident or violation took place, and the specific section or sections of the Agreement involved. The grievance shall be presented to the designated supervisor involved in quadruplicate (on mutually agreed upon forms furnished by the Employer to the Union or any prospective grievant) and signed and dated by the employe(s) and/or Union representative.

4/1/3 If an employe brings any grievance to the Employer's attention without first having notified the Union, the Employer representative to whom such grievance is brought shall immediately notify the designated Union representative and no further discussion shall be had on the matter until the appropriate Union representative has been given notice and an opportunity to be present.

. . .

SECTION 2: Grievance Steps

4/2/1 Pre-Filing: When an employe(s) and his/her representative become aware of circumstances that may result in the filing of a Step One grievance, it is the intent of the parties that, prior to filing a grievance, the Union representative will contact the immediate supervisor of the employe to identify and discuss the matter in a mutual attempt to resolve it. The parties are encouraged to make this contact by telephone. The State's DAIN line facilities will be used whenever possible.

4/2/2 If the designated agency representative determines that a contact with the immediate supervisor has not been made, the agency representative will notify the Union and may hold the grievance in abeyance until such contact is made.

4/2/3 The Employer representative at any step of the grievance procedure is the person responsible for that step of the procedure. However, the Employer may find it necessary to have an additional Employer representative present. The Union shall also be allowed to have one additional representative present in non-pay status. Only one (1) person from each side shall be designated as the spokesperson. By mutual agreement, additional Employer and/or Union observers may be present.

4/2/4 All original grievances must be filed in writing at Step One or Two, as appropriate, promptly and not later than thirty (30) calendar days from the date the grievant first became aware of, or should have become aware of, with the exercise of reasonable diligence, the cause of such grievance.

4/2/5 Step One: Within twenty-one (21) calendar days of receipt of the written grievance or within twenty-one (21) calendar days of the date of the supervisor contact provided for in 4/2/1, whichever is later, the designated agency representative will schedule a hearing and respond to the Step One grievance. By mutual agreement of the parties, the parties are encouraged to hold grievance hearings by telephone or video conferencing. The State's DAIN line facilities will be used whenever possible.

4/2/6 Step Two: If dissatisfied with the Employer's answer in Step One, to be considered further, the grievance must be appealed to the appointing authority or the designee (i.e., Division Administrator, Bureau Director, or personnel office) within fourteen (14) calendar days from receipt of the answer in Step One. Upon receipt of the grievance in Step Two, the department will provide copies of Step One and Step Two to the Bureau of Collective Bargaining of the Department of Employment Relations as soon as possible. Within twenty-one (21) calendar days of receipt of the written grievance, the designated agency representative(s) will schedule a hearing with the employe(s) and his/her representative(s) and a representative of Council 24 (as Council 24 may elect) and respond to the Step Two grievance, unless the time limits are mutually waived. The Employer and the Union agree to hear Step Two grievances on a regular schedule, where possible, at the work site or mutually agreed upon locations. By mutual agreement of the parties, the parties are encouraged to hold grievance hearings by telephone or video conferencing. The State's DAIN line facilities will be used whenever possible.

4/2/7 Step Three: Grievances which have not been settled under the foregoing procedure may be appealed to arbitration by either party within thirty (30) calendar days from the date of the agency's answer in Step Two, or from the date on which the agency's answer was due, whichever is earlier, except grievances involving discharge, which must be appealed within fifteen (15) calendar days from the agency's answer in Step Two, or from the date on which the agency's answer was due, whichever is earlier, or the grievance will be considered ineligible for appeal to arbitration. If an unresolved grievance is not appealed to arbitration, it shall be considered terminated on the basis of the Second Step answers without prejudice or precedent in the resolution of future grievances. The issue as stated in the Second Step shall constitute the sole and entire subject matter to be heard by the arbitrator, unless the parties agree to modify the scope of the hearing.

. . .

SECTION 6: Number of Representatives and Jurisdiction

. . .

4/6/4 (BC, T, PSS, LE) Each local Union or each chapter of a statewide local Union (for PSS and Department of Transportation SPS only) may appoint one chief steward whom the designated grievance representative of the local or chapter may consult with by telephone pursuant to the provisions of Article II, Section 9 (Telephone Use) in the event the grievance representative needs advice in interpreting the Agreement or in handling a grievance.

4/6/4A (AS) Each local Union may appoint chief stewards, and shall furnish to the Employer, in writing, the name of the Chief Steward for each respective jurisdictional area. The grievance representative of the local may consult with his/her appropriate jurisdictional area Chief Steward by telephone pursuant to the provisions of Article II, Section 9 (Telephone Use) in the event the grievance representative needs advice in interpreting the Agreement or in handling a grievance.

4/6/5 In those instances where there is not a designated grievance representative from an employe's bargaining unit available in the same building, a designated grievance representative from another WSEU represented bargaining unit or local Union within the same building shall be allowed, pursuant to Paragraph 4/8/1, to cross bargaining unit or local Union lines so as to provide general representation. Such substitute grievance representative shall obtain approval from his/her supervisor prior to providing such substitute representation.

4/6/6 (BC, T, PSS, LE) The Union shall furnish to the Employer in writing the names of the grievance representatives, and their respective jurisdictional areas within thirty (30) calendar days after the effective date of this Agreement. Any changes thereto shall be forwarded to the Employer by the Union as soon as the changes are made.

. . .

SECTION 7: Union Grievances

4/7/1 Union officers and stewards who are members of the bargaining unit shall have the right to file a grievance when any provision of this Agreement has been violated or when the Employer interpretation of the terms and provisions of this Agreement leads to a controversy with the Union over application of the terms or provisions of this Agreement.

. . .

SECTION 9: Discipline

4/9/1 The parties recognize the authority of the Employer to suspend, demote, discharge or take other appropriate corrective disciplinary action against employes for just cause. An employe who alleges that such action was not based on just cause may appeal a demotion, suspension or discharge taken by the Employer beginning with the Second Step of the grievance procedure. A grievance in response to a written reprimand shall begin at the step of the grievance procedure that is appropriate to the level of authority of the person signing the written reprimand, unless the parties mutually agree to waive to the next step. Any letter issued by the department to an employe will not be considered a written reprimand unless a work rule violation is alleged or it is specifically identified as a letter of reprimand.

. . .

Said agreement also contains the following provisions:

ARTICLE XI

MISCELLANEOUS

SECTION 1: Discrimination

. . .

11/1/3 There shall be no discrimination based on Union or non-Union affiliation.

. . .

7. Prior to their 1997-1999 agreement, the wording in Article IV in collective bargaining agreements between WSEU and the State read, in relevant part, as follows:

ARTICLE IV
Grievance Procedure

Section 1: Definition

4/1/1 A grievance is defined as, and limited to, a written complaint involving an alleged violation of a specific provision of this Agreement.

4/1/2 Only one (1) subject matter shall be covered in any one grievance. A grievance shall contain a clear and concise statement of the grievance by indicating the issue involved, the relief sought, the date the incident or violation took place, and the specific section or sections of the Agreement involved. The grievance shall be presented to the designated supervisor involved in quadruplicate (on mutually agreed upon forms furnished by the Employer to the Union and any prospective grievant) and signed and dated by the employe(s) and/or Union representative.

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

. . .

Section 2: Grievance Steps

. . .

4/2/2 Step One: Within seven (7) calendar days of receipt of the written grievance from the employe(s) or his/her representative(s), the supervisor will schedule a meeting with the employe(s) and his/her representative(s) to hear the grievance and return a written decision to the employe(s) and his/her representative(s).

4/2/3 Step Two: If dissatisfied with the supervisor's answer in Step One, to be considered further, the grievance must be appealed to the designated agency representative within seven (7) calendar days from receipt of the answer in Step One. The appropriate agency representative(s) will meet with the employe(s) and his/her representative(s) and attempt to resolve the grievance. A written answer will be placed on the grievance following the meeting by the appropriate agency representative and returned to the employe(s) and his/her representative(s) within seven (7) calendar days from receipt of the appeal to the agency representative.

4/2/4 Step Three: If dissatisfied with the Employer's answer in Step Two, to be considered further, the grievance must be appealed to the appointing authority or the designee (i.e., Division Administrator, Bureau Director, or personnel office) within seven (7) calendar days from receipt of the answer in Step Two. Upon receipt of the grievance in Step Three, the department will provide copies of Steps One through Three to the Division of Collective Bargaining at the Department of Employment Relations as soon as possible. The designated agency representative(s) will meet with the employe(s) and his/her representative(s) and a representative of Council 24 (as Council 24 may elect) to discuss and attempt to resolve the grievance. Following this meeting the written decision of the agency will be placed on the grievance by the Appointing Authority of the agency and returned to the grievant, his/her representative and Council 24 representative within twenty-one (21) calendar days from receipt of the appeal to Step Three. By mutual agreement of the parties' Third Step representative the parties may hold a Third Step grievance hearing by telephone conference. The State's DAIN line facilities will be used whenever possible.

. . .

8. The normal procedures followed at CCI in filing a grievance under the current grievance procedure is to have a designated steward from Local 3394 fill out a "pre-filing" form and contact the supervisor involved to attempt to resolve the matter. If the matter is not resolved at the pre-filing step, the steward then will fill out form DER-25 entitled "EMPLOYE CONTRACT GRIEVANCE REPORT" and sign his/her name in the box on the form headed "Employe Representative's Signature". The steward keeps a copy for the grievant, a copy for himself/herself and places the completed grievance form in an envelope addressed to Schneider and leaves the envelope in the supervisors' mail in the Captain's office. When Schneider receives the grievance, he reviews it to make sure it has been filled out properly. If the form has been properly completed, Schneider contacts the steward who signed the grievance as the "employe's representative" to arrange a Step 1 meeting. If that steward has not heard from Schneider and it is nearing twenty-one (21) days since the grievance was filed, the steward will contact Schneider. If the grievance has not been filled out properly, including if it has not been signed by a designated steward, Schneider contacts Local 3394 and advises whoever he contacts of the grievance and the deficiency, and turns the grievance form over to the Local to correct the problem.

9. Form DER-25 (Rev. 12-80) is entitled "Employe Contract Grievance Report" and contains a box that directs the person filling out the form to indicate the article and section of the labor agreement that is alleged to have been violated. The form contains the following instructions:

INSTRUCTIONS

> Individual employes have the right to present grievances in person or through representatives of their own choosing at any step of the grievance procedure.
>
> In the event that the employe is not satisfied with the supervisor's written decision, or if the supervisor does not return an answer within the time limits set out in the collective bargaining agreement, to be considered further, the grievance must be appealed to the next higher step or appealed to arbitration within the time limits set forth in the agreement.
>
> ***See your collective bargaining agreement for time limits for presenting and acting on grievances. Failure to observe these time limits will result in loss of appeal rights. These time limits may be extended only by mutual agreement.***

This form is issued by the State and is used by all of the labor organizations that represent employees of the State. The form is also used by non-represented administrative employees at CCI who have their own non-contractual grievance procedure. When those employees submit the form, they either cross out "Employee Contract Grievance Report" and indicate they are not represented, or in some manner indicate it is not a contractual grievance.

10. Bobiak has served as Secretary for Local 3394 and became a steward for Local 3394 in early 1998. She was given approximately three hours of training by a WSEU field representative regarding the forms to be used, how grievances were filed – what could and what could not be grieved and the steps of the contractual grievance procedure. During her tenure as a steward for Local 3394, Bobiak filed and processed approximately 25 grievances.

11. Luder had been active in WSEU since 1989, when he became a steward, and has also served as Chief Steward and as President of Local 3394. As a steward for Local 3394, Luder received training in filing grievances and filed and processed approximately 100 grievances through the contractual grievance procedure.

12. On August 23, 2000, Luder filed a grievance on behalf of Bobiak regarding discipline she received for violating the CCI smoking and break policy. The grievance was filed on form DER-25, and Luder signed his name in the box headed "Employe Representative's Signature." The grievance alleged violations of provisions of the collective bargaining agreement. Luder filed the grievance at Step 2 because it involved discipline, sending it to Garcia with a copy to Hausen and a copy to Bobiak, the normal procedure for disciplinary grievances.

13. On September 7, 2000, Bobiak received a letter from Berglund informing her that she was no longer a steward for Local 3394. There was no explanation given in the letter as to why she had been terminated from the steward position. Bobiak was terminated as a steward due to a disagreement between herself and Local 3394's Executive Board.

Luder received the following letter of September 13, 2000 from Berglund removing him from his position as steward for Local 3394, which letter in relevant part, reads as follows:

> Dear Roger,
>
> It has come to my attention that you have accepted a position on the WAPCO Executive Board. Because of the conflict of interest you have created you are hereby terminated from any responsibilities as a shift steward. Please return to Chris Wech any keys or materials that are the property of Local 3394.

Sincerely,

Raymond Berglund /s/
Raymond D. Berglund
President, Local 3394

14. On September 23, 2000, Bobiak filed a grievance on behalf of Luder regarding a one-day suspension he received for violating CCI's smoking and break policy. The grievance was filed on form DER-25 and Bobiak signed her name in the box headed "Employe Representative's Signature." The grievance alleged violations of provisions of the collective bargaining agreement. Bobiak filed the grievance at Step 2, sending the grievance to Garcia with copies to Hausen, to Local 3394's Chief Steward, and to Luder.

15. On or about September 29, 2000, with advice from Hausen, Berglund sent Luder a letter, which reads, in relevant part, as follows:

> Dear Roger,
>
> It has come to the attention of the Executive Board that you have filed a grievance for Mary Bobiak. The Executive Board has no problem with you representing someone in the local, however you no longer can file grievances per WSEU 4/6/6.
>
> If you or another member of Local 3394 wish to file a grievance please refer to the Union bulletin board or the Supervisor's bulletin board to find out who the appropriate shift stewards are.
>
> Any future 2nd Step grievances mailed to the Department of Employment Relations without a designated Local 3394 representative's signature **will not** be honored by DER. It will be returned to the local.
>
> Sincerely,
>
> Raymond Berglund /s/
> Raymond D. Berglund
> President, Local 3394

Bobiak received a letter from Berglund that was essentially identical to the letter Luder received. Berglund also informed Schneider that because Luder and Bobiak were no longer stewards, they could not sign the grievance forms as the employee's representative and that if they did, the grievances would have to be resubmitted with a designated steward's signature.

16. Berglund received, and Schneider was copied on, the following letter from Bobiak of October 2, 2000, which letter reads, in relevant part, as follows:

> Dear Ray,
>
> Enclosed please find a copy of page (1) of the Wisconsin State Statutes Chapter 111.83. I respectfully direct your attention to paragraph (1), sentences 2 and 3. As Council 24, in the person of Field Rep. Garry Hausen, is afforded the opportunity to be present per WSEU 4/2/6 at any Step 2 Grievance Hearing, the right of the majority representative is protected.
>
> With regard to WSEU 4/6/6, its purpose is to protect an employee from unqualified representation forced upon the employee by the employer. WSEU 4/6/6 does not, by State Statute cannot, stop an individual from filing a grievance or acting as a representative at the request of another employee.
>
> In the event a Step 1 Grievance is filed at CCI by an individual other than a designated Local 3394 Grievance Representative, the requirement, as outlined in State Statutes Chapter 111.83(1) and further documented in WSEU 4/1/3, will be met by supplying a copy of the grievance to the Local 3394 Chief Steward. The employer shall afford the majority representative (Local 3394) the opportunity to be present at any conference regarding the grievance providing the requirements of WSEU 4/8/3 are met.
>
> Any future Step 2 grievances mailed to DER without a designated Local 3394 representative's signature remain completely valid and must be honored by DER, providing a copy of said grievance is supplied to the WSEU, specifically Garry Hausen, at the same time. Any Step 2 grievance returned to Local 3394 for lacking a designated Local 3394 representative's signature would constitute an Unfair Labor Practice as addressed in Wisconsin State Statutes Chapter 111.84.

Sincerely,

Mary S. Bobiak /s/
Mary S. Bobiak

cc: Bruce Schneider
Shift Captains
Roger Luder

Berglund showed Hausen and his Executive Board Bobiak's October 2, 2000 letter. Hausen advised Berglund that the statute had no bearing on the way grievances were handled under the contract and that he should ignore the letter. Berglund never responded to Bobiak, nor did Schneider. Bobiak expected, but did not seek, a response from either of them.

17. A Step 2 hearing was held on both Bobiak's August 23, 2000 grievance and Luder's September 23, 2000 grievance, with Hausen present for WSEU and Garcia present for CCI. Luder's grievance was scheduled to be heard at 9:30 a.m. and Bobiak's was scheduled to be heard at 10:00 a.m. The steward who filed the grievance is normally present at Step 2 to assist the WSEU Field Representative. The notice of the hearings to Bobiak and Luder indicated that the designated representative was "TBD" (to be determined). In the case of Bobiak's and Luder's grievances, Dylan Radtke, then a designated steward for Local 3394, was present to assist Hausen, although he had not been previously involved in the grievances. Bobiak came early so she could be present, and assisted Luder when his grievance was heard. Luder stayed after his grievance was heard and assisted Bobiak when her grievance was heard. WSEU has processed both Bobiak's August 23, 2000 grievance and Luder's September 23, 2000 through the contractual grievance procedure and notified CCI that it wanted to proceed to arbitration on them, although Bobiak's grievance did not go to arbitration. Bobiak has received notice of the arbitration for Luder's September 23, 2000 grievance and is listed as the steward.

18. On or about November 6, 2000, at Knapton's request, Luder filed a grievance on behalf of Knapton regarding the amount of sick leave he had been given. The grievance was filed on form DER-25 and Luder signed his name in the box headed "Employe Representative's Signature." The grievance alleged violations of provisions of the collective bargaining agreement. Luder gave a copy to Knapton, kept a copy for himself and left the original in the Captain's office for Schneider. Luder did not first complete the pre-filing step of contacting Knapton's supervisor to discuss the matter.

CCI's Human Resources Department is provided with a list of its designated stewards by Local 3394 and the list is updated whenever there is a change. Schneider was aware at the time he received Knapton's grievance that Luder was no longer a steward for Local 3394. Schneider contacted Berglund and informed him he had received a grievance that Luder had signed as Knapton's representative. Berglund picked up the grievance from Schneider and told him that he would handle it and get back to him. Berglund then gave the grievance back to Knapton and verbally advised him he could only file a grievance if he had a designated steward sign the grievance and also gave him the following letter of November 15, 2000:

> Dear Brother Knapton:
>
> Mr. Schneider has brought to my attention that you filed a grievance with Roger Luder as your union representative. Roger Luder is no longer a designated union steward of this Local.
>
> Because all grievances are the property of Local 3394 the Local has the right to be present at all grievance steps to insure that the master agreement is not violated.
>
> The three designated union stewards on second shift are Stan Maday, Dylan Radtke, and Dave Lipinski.
>
> Please resubmit your grievance with one of three designated union steward's signature in the appropriate block on the form.
>
> Sincerely,
>
> Raymond Berglund /s/
> Raymond D. Berglund
> President, Local 3394

Among others, Berglund copied Schneider and Luder on his letter to Knapton and Knapton showed Luder the letter or a similar note from Berglund. No further action was taken on the grievance thereafter by WSEU, Local 3394, Knapton or CCI, and Luder has had no further involvement in the grievance.

19. On or about November 22, 2000, Luder filed a grievance on his own behalf on form DER-25 and left blank the box headed "Employe Representative's Signature." The grievance alleged violations of Article XI, Miscellaneous, Section 1: Discrimination, Secs. 1-6, and alleged as to the facts:

> Grievant alleges discrimination based upon his union affiliation. Grievant was removed as a steward for Local 3394 based upon his acceptance of the nomination for the Vice-President's position with the Wisc. Assoc. of Professional Correctional Officers. Now, local union officials and management conspire to deprive Grievant or rights guaranteed him under Wisc. State Statute S.111.83(1).

The grievance sought as relief:

> "Read The contract.
>
> Read The statute.
>
> Answer This Grievance."

Luder put the grievance in an envelope addressed to Schneider, and left it in the Captain's office at the end of his shift at 10:00 p.m., as is normal procedure for filing a grievance. Schneider received Luder's grievance and notified Berglund and DOC's Legal Counsel, David Whitcomb. Whitcomb directed Schnieder to hold on to the grievance and advised him to do nothing, as he was having discussions with WAPCO's counsel. Neither Schneider nor Berglund discussed the grievance with Luder and Luder made no further attempt to contact either of them regarding the grievance. No further action was taken on Luder's November 22, 2000 grievance by CCI or by Local 3394 or WSEU.

20. At all times material herein, neither Bobiak nor Luder understood the term "grievance" in Sec. 111.83(1), Stats., to be referring to something other than a grievance filed under a collective bargaining agreement and utilizing the grievance procedure in that agreement. At no time did Bobiak or Luder advise Schneider or Berglund that the grievances they filed were other than contractual grievances.

21. Bobiak's grievance of August 23, 2000, Luder's grievance of September 23, 2000, Knapton's grievance of November 6, 2000 and Luder's grievance of November 22, 2000, were filed as contractual grievances under the 2000-2001 collective bargaining agreement between the State and WSEU and were subject to the grievance procedures contained in that agreement. Both Schneider and Berglund viewed those grievances as having been filed under the contractual grievance procedure.

22. The 2000-2001 collective bargaining agreement between the State and WSEU does not provide individual employees the right to file and process a contractual grievance by themselves or by a representative of their own choosing, rather than a designated steward of the local union.

23. At the time Bobiak's grievance of August 23, 2000 and Luder's grievance of September 23, 2000 were processed to a Step 2 hearing and the notice of the Step 2 hearing was sent to those involved, Bobiak and Luder were no longer designated stewards of Local 3394.

24. Knapton's November 6, 2000, grievance, signed by Luder as the "employe's representative", and Luder's November 22, 2000 grievance that had no signature of the "employe's representative", lacked both the pre-filing step and the signature of a designated steward of Local 3394, and therefore did not comply with the contractual grievance procedure in the 2000-2001 collective bargaining agreement between the State and WSEU.

25. DOC's actions in not notifying Bobiak of the Step 2 hearing on Luder's September 23, 2000 grievance and not notifying Luder of the Step 2 hearing on Bobiak's August 23, 2000 grievance, were based on valid business reasons and not on animus toward their having engaged in protected activity, and did not have a reasonable tendency to interfere with the exercise of their rights under Sec. 111.82, Stats.

26. Schneider's actions in notifying Local 3394 he received Knapton's November 6, 2000 grievance signed by Luder, and taking no further action on the grievance after giving it to Berglund to correct the procedural defciencies, were not based on animus toward Knapton's or Luder's having engaged in protected activity and did not have a reasonable tendency to interfere with the exercise of their rights under Sec. 111.82, Stats.

27. Schneider's actions in notifying Berglund he received Luder's November 22, 2000 grievance filed by Luder and taking no further action on the grievance, were not based on animus toward Luder's having engaged in protected activity and did not have a reasonable tendency to interfere with the exercise of Luder's rights under Sec. 111.82, Stats.

28. The Respondent Unions had legitimate business reasons for notifying Bobiak and Luder that they could no longer file grievances under the collective bargaining agreement and notifying DER of same, as they had previously been removed as stewards for Local 3394, and therefore, such actions did not have a reasonable tendency to interfere with the exercise of Bobiak's or Luder's rights under Sec. 111.82, Stats., and did not coerce or intimidate Bobiak and Luder in the enjoyment of their legal rights, including those under Sec. 111.82, Stats.

29. Berglund's actions in advising Knapton he had to refile his November 6, 2000 grievance with the signature of a designated steward from Local 3394 if he wanted the grievance to be accepted and processed, and taking no further action on the grievance when Knapton did not do so, were consistent with the requirements of the contractual grievance

procedure, did not have a reasonable tendency to interfere with the rights of Knapton or Luder under Sec. 111.82, Stats., and did not coerce or intimidate Knapton or Luder in the enjoyment of their legal rights, including those under Sec. 111.82, Stats.

30. Luder could not reasonably expect Respondent Unions to process his November 22, 2000 grievance, and their inaction after Berglund had been notified by Schneider that Luder had filed the grievance did not have a reasonable tendency to interfere with Luder's exercise of his rights under Sec. 111.82, Stats., nor did it coerce or intimidate Luder in the enjoyment of his legal rights, including those under Sec. 111.82, Stats.

31. On July 13, 2001, Complainants filed an amended complaint with the Commission which alleged in relevant part, as follows:

> 3. What are the facts which constitute the alleged unfair labor or prohibited practices?
>
> A. In or about September 2000, Roger Luder, a WAPCO representative, filed two grievances, one each on behalf of Neil Knapton and Mary Bobiak.
>
> B. In or about September 2000, Bobiak filed one grievance on behalf of Luder.
>
> C. These grievances were in regard to the facility's smoking policy and its effect on the housing staff. The union has advanced these grievances.
>
> D. In a letter dated September 13, 2000, WSEU notified Luder he was being terminated as shift steward because of his involvement with WAPCO.
>
> E. In letters dated September 29, 2000, Local 3394 President, Raymond Berglund informed Luder and Bobiak that they were not able to represent employees or present grievances to their employer Columbia Correctional Institution, Personnel Manager, Bruce Schneider.
>
> F. In a letter dated October 2, 2000, Bobiak wrote Berglund informing him of her belief that minority union members have the right to present grievances by statute and also by contract. Bobiak sent a copy of the Berglund letter to Schneider.

G. On or about November 6, 2000, Luder filed another grievance on behalf of Knapton when Knapton received only eight hours of sick pay when he was entitled to sixteen.

H. In a letter to Knapton dated November 15, 2000, Berglund stated, "Mr. Schneider has brought to my attention that you filed a grievance with Roger Luder as your union representative. . .Please resubmit your grievance with one of the three designated union steward's signature in the appropriate block on the form."

I. On or about November 22, 2000, Luder filed a grievance on behalf of himself alleging discrimination based upon his union affiliation. Luder received no response of any sort regarding this grievance.

J. There is only one form (DER-25) available for employees to file grievances with their employer stating in its instructions, "Individual employees have the right to present grievances in person or through representatives of their own choosing at any step of the grievance procedure."

K. Once an individual is given "the right to independently process contractual grievances," as in this instance, the employer is obligated to engage in the grievance process, and the "agency representative will schedule a hearing. . ."

L. The employer failed and refused to abide by the collective bargaining agreement and the statutory right of the 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.

M. The September grievances and the November 6, 2000 grievance were presented as both statutory and contractual grievances.

N. The grievances were sealed in an envelope, addressed to Schneider and left at the captain's office, per normal procedure.

O. The November 22, 2000 grievance was presented as a statutory grievance. The grievance was sealed in an envelope, addressed to Schneider and left at the captain's office, per normal procedure.

32. At hearing in this matter, factual stipulations were reached between Complainants and Respondent Unions, which included the following:

Facts:

1. On or about August 23, 2000, Luder filed a grievance regarding the CCI smoking and break policy on behalf of Mary Bobiak.

2. On or about September 23, 2000, Bobiak filed a grievance regarding the CCI smoking and break policy on behalf of Luder.

3. WSEU moved the grievances in paragraphs 1 and 2 above, through the grievance procedure and notified CCI it wanted to arbitrate them.

and between Complainants and Respondent State, which included:

Facts:

1. WSEU notified CCI it wanted to arbitrate the smoking and break policy grievances filed on behalf of Roger Luder and Mary Bobiak.

33. Complainants' post-hearing brief contains the following footnote at page 6:

3/ WSEU's representative at the hearing noted he had no conversations or even saw Exhibit 10 prior to the filing of the formal complaint. (Tr. at 107). Additionally, the discussion ocurring with Luder's (WAPCO's) representative occurred prior to Luder filing a grievance and resulted in an unfulfilled promise by Whitcomb to deal with the matter in the future.

Complainants' counsel, Sally Stix, did not testify at hearing to the facts alleged in the last sentence of that footnote, nor was WSEU's counsel, Scott Hassett, under oath when he made the statement at hearing alluded to in the first sentence of the footnote.

Complainants' post-hearing brief also contained the following allegations:

A. Local 3394, WSEU Council 24 violated the rights of the Complainants by:

1. Assuring any grievances filed by Luder and Bobiak and sent to the Department of Employee Relations would not be honored. (ss. 111.84(2)(b))

2. Not advancing Bobiak's grievance, where Luder acted as her representative, to arbitration despite its similarities to Luder's grievance. (ss. 111.84(2)(a))

3. Having Knapton's grievance put on hold by CCI because it was signed by Luder. (ss. 111.84(2)(b))

4. Requiring Knapton to re-file his grievance if he wanted it to be heard. (ss. 111.84(2)(a))

5. Not taking any action on Luder's self-filed grievance once notified by CCI it had been filed. (ss. 111.84(2)(a))

B. The Department of Corrections, Columbia Correctional Institution, violated the rights of the Complainants by:

1. Not notifying Luder's chosen representative (Bobiak) of his step two grievance meeting (re: discipline for smoking) to assure her presence. (ss. 111.84(1)(a) and (c))

2. Not notifying Bobiak's chosen representative (Luder) of her step two grievance meeting (re: discipline for smoking) to assure his presence. (ss. 111.84(1)(a) and (c))

3. Not proceeding on Knapton's grievance at Berglund's behest because of Luder's signature, either within the contractual grievance procedure or in a statutory grievance procedure. (ss. 111.84(1)(a) and (c))

4. Taking no action on Luder's discrimination grievance, either within the contractual grievance procedure or in coordination with Berglund, or in a statutory grievance procedure. (ss. 111.84(1)(a) and (c))

C. The collective bargaining agreement language along with the mutually agreed upon DER-25 form, incorporates the rights found in ss. 111.83(1), Stats., into the collective bargaining agreement.

D. The Respondents discriminated against employees sympathetic to WAPCO by accepting and processing grievances filed by a chosen representative without WAPCO affiliation and rejecting or not proceeding with grievances filed by chosen representatives or individuals with WAPCO affiliation.

34. Complainants' allegations that the Respondent Unions violated Complainants' rights under SELRA in violation of Sec. 111.84(2)(a), Stats., by "Not advancing Bobiak's grievance, where Luder acted as her representative, to arbitration despite its similarities to Luder's grievance", and by advancing Luder's September 23, 2000 grievance and allowing Bobiak to act as his representative, were not raised in either Complainants' initial complaint or their amended complaint, nor were they raised at hearing, but were raised for the first time in Complainant's closing brief filed after the close of hearing.

Based upon the above and foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. Wisconsin Association of Professional Correctional Officers is a labor organization within the meaning of Sec. 111.81(12), Stats.

2. AFSCME Council 24, Wisconsin State Employees Union, AFL-CIO, and its affiliated Locals, are labor organizations within the meaning of Sec. 111.81(12), Stats.

3. The State of Wisconsin is the employer within the meaning of Sec. 111.81(8), Stats., and the Department of Employment Relations has the statutory authority to represent the interests of the State of Wisconsin in labor relations matters involving State employees.

4. The Department of Corrections is a department of the State of Wisconsin.

5. The allegations raised in the Complainants' post-hearing brief that the Respondents had engaged in discriminatory conduct within the meaning of Sec. 111.84(1)(c) and Sec. 111.84(2)(a) and (b), Stats., respectively, based upon post-hearing events and upon their treatment of Bobiak, as compared to the treatment of Knapton and Luder, were untimely raised, and it would violate Respondents' due process rights to adjudicate those allegations in this proceeding.

6. The 2000-2001 Collective Bargaining Agreement between Respondent WSEU and Respondent State does not provide individual employees the right to file and process a grievance under the contractual grievance procedure by themselves or by a representative other than a designated representative of the Respondent Unions.

7. The actions of the State, through its officers and agents at the Department of Corrections, in not formally notifying Luder of the Step 2 hearing on Bobiak's August 23, 2000 grievance, and in not formally notifying Bobiak of the Step 2 hearing on Luder's September 23, 2000 grievance, did not violate the rights of Bobiak and Luder under Sec. 111.83(1), Stats., and did not violate Secs. 111.84(1)(a) and (c), Stats.

8. The actions of the State, through its officers and agents at the Department of Corrections, in treating the November 6, 2000 grievance of Knapton and the November 22, 2000 grievance of Luder as grievances filed under the contractual grievance procedure contained in the collective bargaining agreement referenced in the above Conclusion of Law 6, and by handling them as procedurally deficiently-filed grievances under that agreement, did not violate Knapton or Luder's rights under Sec. 111.83(1), Stats., and did not violate Secs. 111.84(1)(a) or (c), Stats.

9. The actions of Respondent Unions, their officers and agents, in removing Bobiak and Luder as stewards of Local 3394, and in notifying the Department of Employment Relations that Bobiak and Luder were no longer stewards of Local 3394 and did not have the authority to file grievances under the collective bargaining agreement, did not violate Complainant's rights under Sec. 111.83(1), Stats., and did not violate Sec. 111.84(2)(a) or (b), Stats.

10. The actions of Respondent Unions, their officers and agents, in advising Knapton that he had to refile his November 6, 2000 grievance with the signature of a designated steward of Local 3394, and by not having the grievance processed further until he did so, did not violate Knapton's or Luder's rights under Sec. 111.83(1), Stats., and did not violate Secs. 111.84(2)(a) or (b), Stats.

11. By taking no action on Luder's November 22, 2000 grievance, the Respondent Unions, their officers and agents, did not violate Luder's rights under Sec. 111.83(1), Stats., and did not violate Sec. 111.84(2)(a), Stats.

12. The foregoing actions or inaction by Respondent State, its officers and agents, and by Respondent Unions, their officers and agents, did not violate the rights of Complainant Wisconsin Association of Professional Correctional Officers under SELRA.

Based upon the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER

1. The Bobiak affidavit attached to Complainant's post-hearing brief and footnote 3 in Complainant's post-hearing brief are stricken from the record.

2. The complaint of unfair labor practices against Respondent State of Wisconsin and Respondents Wisconsin State Employees Union and its affiliate Local 3394 are dismissed in their entirety.

Dated at Madison, Wisconsin, this 8th day of April, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

David E. Shaw /s/

David E. Shaw, Examiner

STATE OF WISCONSIN
(DEPARTMENT OF CORRECTIONS)
WISCONSIN STATE EMPLOYEES UNION

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complainants originally alleged that the State (DOC) and WSEU/Local 3394 had violated their rights under Sec. 111.83(1), Stats., by informing a WAPCO representative (Luder) that he could not represent two employees on whose behalf he had filed grievances (Bobiak and Knapton), or present their grievances to their employer (CCI/Schneider), and by Local 3394 President Berglund advising Knapton that he would have to resubmit his grievance with the signature of a designated steward from the Local.

DER and WSEU moved to dismiss the complaint for failure to state a claim against the respective Respondents. Complainants responded and also moved to amend their complaint. The motions to dismiss were denied and the motion to amend the complaint was granted.

Complainants filed an amended complaint alleging certain facts, as set forth in Finding of Fact 31, and asserting that by their actions, Respondent State and Respondent Unions had violated Complainant's rights under Sec. 111.83(1), Stats., and thereby violated Secs. 111.84(1)(a) and (c) and 111.84(2)(a) and (b), Stats., respectively. Contained in the allegations was the assertion that the individuals Bobiak, Knapton and Luder had the right under both the statute and under the collective bargaining agreement to file and process grievances.

Respondents filed their respective answers denying that they had violated Complainant's rights under SELRA and raising certain affirmative defenses. Specifically, the State asserted that Complainants had failed to comply with the contractual requirements for filing a grievance under the collective bargaining agreement and that Complainants had at no time advised the State's agents that the grievances filed by Complainants were statutory grievances. WSEU asserted as an affirmative defense that it was pursuing Complainants' "legitimate contractual grievances", and that Complainants can only pursue statutory grievances with a representative of their own choosing and cannot access the contractual grievance procedure unless represented by a designated representative, pursuant to the terms of the collective bargaining agreement.

Complainants

Complainants first assert that permitting the existence of minority unions and individual participation are fundamental distinguishing features of Wisconsin's labor law, vis-à-vis federal labor law. Section 111.83(1), Stats., gives an exclusive representative absolute power over bargaining, but not grievances. Even if a minority union or an individual and his/her representative are not entitled to control the negotiated grievance procedure, or to demand an identical procedure, they may not be completely prevented from participating in the process with deference only to the majority. Allowing a majority union to completely control the grievance process allows for the possibility of the majority to ignore complaints of employees sympathetic to a minority union or adverse to union membership. To justify such actions, Respondents would have to assert that an employee has no guaranteed right by statute or contract to file a grievance on a contractual matter on behalf of himself with the expectation that the grievance would receive some sort of unbiased attention. Such a restrictive grievance procedure, even under a judicially-created binary grievance system, is so contrary to the intent of Sec. 111.83(1), Stats., it should not stand.

Next, Complainants assert that a binary grievance system of contractual and statutory grievances is not contemplated by Wisconsin statutes. The language of Section 111.83(1), Stats., regarding the right to file a grievance does not stand alone. It is part of a broader statement defining the roles of the numerous parties in drafting and living under a collective bargaining agreement. The statute has been interpreted, relying in part, on federal labor statutes that have different language, in a way which severs the grievance clause of the statute from the rest, thus limiting it to a right to file a grievance in a severely limited one-step procedure differing from the procedure the majority union negotiated. This statutory clause should not be so construed through the use of inapposite federal law to limit the rights of individual employees and minority unions to enjoy the rights gained for them by the majority union in its role as the exclusive bargaining agent. The instant complaint demonstrates the problems with such a system, and justifies reconsideration of the Commission's interpretation of Sec. 111.83(1), Stats.

The creation of a binary grievance system through the interpretation of Sec. 111.83(1), Stats., giving the majority union not only exclusive bargaining power, but near-exclusive grievance representational rights, results in the need for the Commission to define the interplay that provision has on the relationships between majority unions, employers, minority unions, and individual employees, and to define the workings of a binary grievance system. Further, while a union and an employer may have no obligation to negotiate a contract giving an employee an independent right to process grievances, they should have an obligation to negotiate a contract which makes specific it excludes an individual from having an independent right to process a grievance or from choosing their own representative to work with the union to process a grievance. Where the union and employer wish to exclude the right to

independently process grievances or deny independent participation in a grievance, the exclusion must be uniform and without discrimination. The employer in such situations should have clear procedures in place to deal with the statutory grievance, and has an independent duty to speak first with the employee, giving notice to the union, when an ambiguous grievance is filed.

Complainants next assert that the incorporation of an issue into the contract cannot and should not exclude it from being the subject of a statutory grievance. While it is clear an employee cannot bargain with an employer, being able to grieve and to seek a solution to a problem should not be discouraged or limited. A rule allowing all issues somehow relating to the contract to be the subject of a contractual grievance only, opens the door for an employer and/or a union to include items in the contract specifically to limit an employee's right.

While the language of the agreement which correlated to Sec. 111.83(1), Stats., was removed from the agreement for the purpose of limiting the rights of individual employees and minority unions to the greatest extent possible, the language still specifies that grievances are filed on mutually-agreed upon forms (4/1/2). This form, DER-25, states: "Individual employes have the right to present grievances in person or through representatives of their own choosing at any step of the grievance procedure." Nothing on the form or in the agreement notes that the form is modified by provisions of the agreement. DER-25 exists as an agreement between WSEU and the State that an employee may choose his/her own representative. The form has been maintained and used regardless of changes in the agreement, and is perhaps the most significant basis for Luder's and Bobiak's understanding that the agreement incorporated the rights guaranteed in Sec. 111.83(1), Stats. Such an incorporation of rights is also evidenced by Schneider's lack of understanding of the difference between a contractual and a statutory grievance. As a trained personnel manager, he did not think there was any procedure other than the contractual procedure for a unionized employee to bring a grievance to his attention.

Even absent the statutory language previously found in the agreement, the agreement references a "union representative" (4/1/2, 4/1/3, 4/2/1), a "representative of Council 24" (4/2/6), and an "employee's representative" (4/2/1, 4/2/6). The agreement also delineates situations where only union officials maintain the right to file a grievance, i.e., union grievances regarding violations of the agreement and employer interpretations (4/7/1). Those situations do not include an individual grievant (4/8/1). Thus, the situations where a non-designated representative may present grievances are limited to those where an aggrieved employee has chosen his own representative, as did Bobiak, Luder and Knapton.

Based upon the language in the agreement, all of the grievances in issue were procedurally sufficient and should have been honored and processed by the Unions and CCI. The grievance Luder filed on behalf of Bobiak was correctly filed at Step Two of the grievance

procedure, as it involved discipline, and Luder was a designated steward at the time of filing. The grievance Bobiak filed on behalf of Luder was also procedurally sufficient. While CCI properly waited for a union representative before proceeding, copies of the grievance had been sent to the Union, so it had the required notice. The Knapton grievance filed by Luder should not have been rejected by the Unions and CCI. Copies were sent to the Union giving it notice a designated steward was not involved. The grievance filed by Luder with no representative, was also procedurally sufficient and while the CCI notified the Union that the grievance had been filed lacking a signature, Luder had signed and dated the grievance, but both the Unions and CCI chose to disregard it.

According to Complainants, they are not attempting to "hijack" the contractual grievance procedure, but are merely trying to gain the right to participate. There is no dispute that the union and employer have ultimate ownership of the contractual grievance procedure and the grievances filed under it, however, this ownership is not so absolute as to deprive individual employees and minority unions of their statutory rights. Section 111.83(1) clearly delineates between situations where the majority union has absolute control (bargaining) and situations where the majority union does not have absolute control (grievances). The majority of the case law deals with situations where employees have sought the right to control the grievance procedure for purposes of bargaining under the guise of a grievance, however, that is not the case here.

Complainants seek to serve as an employee's representative in the grievance procedure, acting in a capacity equivalent to a steward to advocate for the employee. They do not ask for the right to independently process grievances, but for the right to participate in the processing of grievances while the Union still retains ultimate control. This allows for the Union to control a grievance while affording an employee a choice of the person most intimately involved to handle the grievance. Such a right of participation creates at most a negligible burden on the union and employer, while conferring a meaningful right on the employee. There is no need to worry over a "slippery slope" developing if the right of employees to choose their own representative to bring a grievance within the bargained procedure is narrowly tailored to extend only to participation equivalent to that of a designated rank and file representative or steward.

With regard to the testimony regarding the workings and history of the contractual grievance procedure, the testimony of Luder and Bobiak should be given greater weight than that of Berglund. Berglund testified that he never received steward's training and that matters concerning grievances were handled by the stewards and chief steward. As both Luder and Bobiak had been stewards, and Luder also a chief steward, their testimony as to their understanding of the procedure under the agreement, as it operated at CCI, should be considered valid. Any argument by WSEU that Local 3394 and CCI's practices are contrary to the agreement would not be reasonable, as it had a representative continually involved with Local 3394 and no objection to such practices was mentioned at hearing.

Complainants assert that the Unions and CCI discriminated against the Complainants in violation of their contractual right to choose a representative. When Bobiak acted as an employee representative for Luder, though no longer a steward, the grievance she filed on his behalf was accepted as valid and processed through arbitration. She was allowed to act as his representative at every step, either by invitation or by force of her own will. When Luder filed a grievance for Bobiak, he was allowed to act as a representative by force of his own will, after being removed as a steward, however, the discipline grievance Luder filed for Bobiak was not processed beyond Step 2 despite its similarity to the grievance Bobiak filed for Luder. When Luder filed a grievance for Knapton, it was rejected, and Knapton was told to refile the grievance, despite not being contractually required to do so. When Luder filed a grievance for himself without even listing a representative, the grievance was ignored. Of Luder, Bobiak and Knapton, only Bobiak, who is not associated with WAPCO, was able to act as a representative, while both Luder and Knapton, with significant contacts with WAPCO, were not, this is clear evidence of discrimination under SELRA. 1/

1/ These allegations will not be considered as they were untimely raised in Complainants' post-hearing brief.

Complainants assert that Local 3394, by rejecting Knapton's grievance filed by Luder and requiring it to be refiled with a Local 3394 steward as a representative before it would be heard, was forcing Knapton to choose the majority union as his representative if he wanted his grievance heard. No employee sympathetic to a minority union should be forced to reject the minority union in order to have the majority union advocate for his contractual rights, especially if the employee has no independent right to have his own representative help the majority union assert his rights. Because Berglund made the determination that refiling was necessary before Schneider could hear the grievance, Knapton and Luder were precluded from even having the limited "meet and confer" right afforded by the statutory grievance procedure, regardless of the fact that no one at CCI or connected to this complaint aside from Hausen, understood the distinction.

Luder's grievance alleging discrimination against him by both the Unions and CCI, specifically requested that his grievance be answered, however, both ignored his requests, in violation of his contractual and/or his statutory rights. Contractually, the grievance should have been discussed by Luder and CCI, with the Union being given the opportunity to attend (4/1/3). Nothing in the agreement allows the Union and CCI to simply ignore the grievance. Further, the agreement provides that no employee should be discriminated against on the basis of union affiliation (11/1/3). Presuming the Union's conduct was legitimate because it should not be forced to advocate against itself, the grievance could then only be a statutory one. Despite Schneider's lack of knowledge regarding Sec. 111.83(1), as a trained personnel manager, he should have known the grievance would not, or could not, be brought by the

Unions. Schneider should have made an effort to meet and confer with Luder, and his refusing to do so left Luder with only the one option of filing a complaint with the Commission.

If a union and an employer are unwilling to allow their negotiated procedure to be used by employees and their chosen representatives for minority unions, they must expressly reserve such a right to themselves and must establish an alternative procedure and make it known. A binary grievance procedure does not automatically exist, but arises only when a union and employer refuse to allow employees independent access to the negotiated grievance procedure. Even if a union and employer may exclude others from using their procedure, they do not have the right to exclude others unless they make the exclusion clear and maintain the exclusivity in a non-discriminatory form. They should not be able to exclude grievances unless separate procedures are established for handling statutory grievances, and those procedures made clear. The Unions and the State failed on both points. Bobiak's letter to Berglund, copied to Schneider, made clear that it was her understanding that the contract allows an employee to file a grievance and that the contract and statute operate as one. The Union's solution was not to explain that the contractual grievance procedure excludes its membership from independent access to the grievance procedure, but to instead remain silent. Schneider improperly relied on Berglund to make the determinations regarding the grievances, thus allowing Berglund to effectively discontinue Knapton's grievance. Further, the exclusion was not universally adhered to, as Bobiak was allowed to act as steward at Luder's arbitration without objection, while Luder's participation was objected to when he so much as signed a Step 1 grievance. 2/

2/ Complainants attached an affidavit from Bobiak to their brief in this matter regarding the September 25th, 2001 arbitration of Luder's September 23, 2000 grievance and her involvement. Both Respondents WSEU and the State objected to the post-hearing submission and allegations based on that submission, and moved they be stricken and not considered, which motions were granted.

When unionized employees are excluded from the negotiated grievance procedure, they should have a clear statutory procedure in place when desiring to present a grievance to their employer. This would assure personnel managers are aware they have an obligation to speak with employees who make a request and that a grievance is being filed outside the contractual procedure. Schneider, unaware of the statutory requirements, chose to speak only to the Union and ignore the employees. Further, the possibility for confusion on the part of an employee was significant. There was no procedure other than the negotiated one for an employee to follow, and only one form existed for the filing of grievances. That form incorporated the statutory right to choose one's own representative. An employer should not be able to claim as a defense confusion as to what an employee was requesting, when it was solely and exclusively within its power to establish a clear procedure. What the procedure is, is solely under the employer's control, as it is not permitted to bargain with individual employees or minority unions under Sec. 111.83(1), Stats., and if any negotiations regarding

the procedure took place with the majority union, it would constitute a contractual, rather than a statutory procedure.

Respondent State (DER/DOC)

The State notes that Complainants alleged violations of Sections 111.84(1)(a) and (c), Stats., and notes the legal standards for establishing such violations.

The State asserts that the facts do not support the allegation that Complainants' rights under Sec. 111.83(1), Stats., have been violated. While Complainants enjoy rights under Sec. 111.83(1) to present a statutory grievance, i.e., to meet and confer, the "totality of the record" demonstrates that under the circumstances in this case, their rights in that regard were not violated. To establish a violation, there must be proof of notice provided to the employer that Complainants' actions constituted an attempt to exercise their rights under Sec. 111.83(1). At a minimum, there must be credible evidence from which an employer can reasonably conclude that an employee intends to, and is attempting to, exercise his/her statutory rights. The mere existence of the right does not automatically mean that a violation occurs when the right is not honored; "something" must first trigger the right or "put it in play". Implicit in an employee's filing a statutory grievance which triggers rights is that the employee: (1) knew of the existence of a statutory grievance; (2) intended to file a statutory grievance; and (3) provided the employer reasonable notice that he/she was filing a statutory grievance. Complainants did not establish any of those elements.

There is no dispute that Complainants had no intent to file a statutory grievance. Both Bobiak and Luder testified they knew nothing about a "statutory" grievance. Luder testified that he still could not say that he understood the difference between a statutory grievance and a contractual grievance, and that everything he had always worked with had been the union contract. (Tr. 33-34). Bobiak's grievance was filed by Luder when he was still a designated steward, and both the September Luder grievance and the Bobiak grievance are being processed and taken to arbitration by WSEU and Complainants have "raised no fuss" regarding them. Comparing Bobiak's and Luder's grievances with Knapton's grievance and the November Luder grievance shows there is no difference, and nothing on the documents indicate they are anything other than contractual grievances. Given this, and the fact that the Complainants did not know of the existence of a grievance other than a contractual grievance, it is clear that they intended to file a contractual, not a statutory, grievance.

Even if one assumes that Complainants intended to initiate their rights under Sec. 111.83(1), the facts and circumstances do not support a conclusion that DOC had notice, or was reasonably placed on notice, that they were exercising their statutory rights. It is uncontradicted that the Union represents all of the employees; that the labor agreement provides for a specific procedure and process for grievances; that all of the grievances at issue

were filed on the standard contractual grievance form; that none of those grievances contained any language that the grievance was statutory, rather than contractual; and that no one told Schneider that the grievances at issue were other than contractual grievances. There was absolutely nothing which could cause Schneider to conclude that the grievances were statutory grievances, and his actions confirmed his belief that they were contractual. The grievances were non-disciplinary, which requires a pre-filing step as a precondition, and in accord with the contract and past practice, Schneider held the grievances and contacted a union official to point out the deficiencies – there was no pre-filing and no "designated" employee representative. It is uncontradicted that this is how Schneider has handled similar situations in the past.

The assertion that Bobiak's letter to Berglund provided DOC notice that such grievances were statutory, also fails. The letter was directed to Berglund, not Schneider, and there is no linkage between that letter and any specific grievances. As in the past, future contractual grievances might well contain deficiencies and it would not be reasonable to assume that all future Step 1 grievances "filed at CCI by an individual other than a designated Local 3394 Grievance Representative" are statutory grievances. Such deficiencies are not synonymous with a statutory grievance. Further, even after Bobiak sent the letter, neither she nor Luder knew there were two types of grievances; all they knew was that any employee had a right to file a grievance.

Complainants also cannot rely on the wording of Luder's November grievance. Under the circumstances, an employer would be at a loss to know what Luder was saying. He alleges the Union is discriminating against him, yet acknowledges that the contract does not provide for grievances for violations by the Union. (Tr. 60). Further, the grievance is deficient, as there is no signature by a designated representative. On its face, the grievance does not indicate that the Union was notified as required by Sec. 4/1/3. Also, since it was non-disciplinary and there was no pre-filing, Sec. 4/2/2 requires that the Union must be advised and the matter must be held in abeyance. Third, nothing in the wording of the grievance indicates that Luder was asking for a "meet and confer" session under a statutory grievance. In fact, any complaint he was alleging was that his right had been denied in the past, since there could be no alleged violation pursuant to notice provided by Luder's grievance, until after it had been submitted. Fourth, if this was a statutory grievance, it should have stated so in some manner. The reason Luder did not do so, is because he did not intend either the Knapton grievance or his grievance to be statutory grievances. As to his November grievance, while Luder testified, "I wanted to talk directly with Bruce Schneider on this", he did not follow up by communicating with Schneider in writing or in person. If Luder truly wanted to talk directly with Schneider, he failed to pursue those logical options.

It is only logical and reasonable to conclude that if someone intends to file a statutory grievance, there will be some indicia of that intent, but none exist in this case. A grievance filed on a standard contractual grievance form, without anything else, does not constitute notice that it is a statutory grievance.

In UW HOSPITAL AND CLINICS BOARD, DEC. NO. 29784-D (WERC, 11/00), the Commission made it absolutely clear that a statutory grievance and a contractual grievance are "separate and distinct" and are not interchangeable; one does not stand as a substitute for the other. Because of the difference, it is imperative that a grievant clearly indicate that he/she is filing a statutory grievance. The need for distinguishing between a statutory grievance and a contractual grievance was explained in a case involving a somewhat similar situation where the grievant had filed a grievance on DER-25. In PICHELMANN V. UW-MILWAUKEE, ET AL., DEC. NO. 30124-C (Nielsen, 10/01), the Examiner stated:

> "The distinction between the two is absolutely necessary, since the negotiated grievance procedure may contain limits on the rights of employees to control the presentation of their grievances, while the statutory grievance procedure may not be limited by agreement between the Union and the Employer."

An employer must be reasonably apprised of the type of grievance it is dealing with in order to know what rights are involved, so that it can proceed in the appropriate manner. In the absence of reasonable notice, it must be presumed that the grievance is a contractual grievance. Grievants should not be allowed to transform a contractual grievance into a statutory grievance at their whim, because they do not like the way things are going. PICHELMANN, supra. For these reasons, the Knapton grievance and the Luder November grievance must be presumed to be contractual grievances.

The State also asserts that the Complainants' rights under the labor agreement were not violated. Neither the Knapton grievance, nor Luder's November grievance, were disciplinary grievances, and they were both deficient because there had been no pre-filing steps for either grievance and a designated representative had not signed the grievance forms. Section 4/1/3 requires that the employer representative shall immediately notify the designated union representative and have no further discussion on the matter until the appropriate union representative has been given notice and an opportunity to be present. Absence of a steward's signature indicates the Union had no knowledge of the grievance, so Schneider called Berglund and had no further discussions with the grievants as required. Luder's grievance was also deficient in that it did not constitute a "grievance" under 4/1/1, as alleging discrimination by the Union does not constitute an alleged violation of a provision of the contract, as even Luder conceded. This was a dispute between the Union and a member of the bargaining unit. Also, Schneider was advised by DOC's counsel to do nothing while he was consulting with WAPCO's or DER's or WSEU's counsel. Last, the Union, not the employee, owns the

contractual grievance. VACA V. SIPES, 386 U.S. 171 (1971); MAHNKE V. WERC, 66 Wis. 2D 524 (1975). Thus, an employer must follow the contractual grievance procedure, not do what the employee wants.

The State also asserts that since the language that was virtually identical to that of Sec. 111.83(1), Stats., was removed from the agreement several contracts ago, the agreement no longer provides an alternative to a contractual grievance.

In response to Complainants' brief, the State asserts that Complainants acknowledge that the law does not support their positions in this case, as they argue that the Commission should reverse its holding in UW HOSPITAL AND CLINICS, supra. That recent holding reaffirmed a prior decision, thereby reflecting the Commission was well aware of what it was doing. As UW HOSPITAL AND CLINICS remains the law, Complainants' action must be dismissed.

As to the affidavit from Bobiak attached to Complainants' post-hearing brief, the record in this matter was closed at the end of the hearing, absent any agreement to the contrary, nothing that occurred post-hearing can be entered into the record. Nothing can be introduced as evidence without Respondents having the right to cross-examine on it. Thus, the affidavit must be stricken, and not considered. Similarly, the last sentence of footnote 3 of Complainants' brief should be stricken. Complainants' counsel did not testify at the hearing as to when she may have had a conversation with DOC's legal counsel, and therefore may not now make factual assertions in that regard.

Complainants' "after the fact" contention that certain language in form DER-25 incorporates the rights under Sec. 111.83(1), Stats., is without merit. DER-25 was last revised in December of 1980 at which time the language in question was in the labor agreements. Since at least 1995, that language is no longer found in the labor agreement. The language in DER-25 is virtually identical to the language that was removed from the labor agreement and is different than the language of the statute, because it references "any step of the grievance procedure", and not a one-time "meet and confer" procedure. Thus, it is clear that the language in DER-25 was based on contract language, rather than statutory language, and that when that language was removed from the contract, it was effectively removed from the form. The language in the form is now at odds with the controlling language of the labor agreement, and the failure to remove it is simply a clerical/administrative error. Regardless, the presence of that language in DER-25 does not place the employer on notice whether a grievance filed on the form is a statutory grievance or a contractual grievance.

Complainants assert in their brief that both Respondents discriminated against WAPCO-affiliated employees who filed grievances. The facts cited in support of that contention do not support a violation of Sec. 111.84(1)(c), Stats. First, the stipulation agreed to by

Complainants and WSEU (Jt. Ex. 12 at item 8), states that Luder claims he was discriminated against by WSEU, not DOC, "due to union affiliation." Second, there is absolutely no proof of "hostility toward the protected activity." The fact that the Employer did not process the grievance does not mean that there was hostility. Proof that the Employer had a legitimate business reason for not processing the grievance – a belief that the grievance was contractual and deficient under the contract – further undermines Complainants' contention.

Finally, the State asserts that the onus must be on the employee to communicate to the employer what type of grievance he/she is filing. There is no obligation on the part of an employer to advise employees of their rights under Sec. 111.83(1), Stats. Similarly, there is no obligation on the part of an employer to ask an employee when he/she filed the grievance on a contractual grievance form what type of grievance it is. It is the employee who must disclose to the employer what he/she intends – a statutory or a contractual grievance.

WSEU

WSEU denies it has violated Sec. 111.84(2), Stats., and asserts that Complainants have admitted that they are asking the Commission to change existing law which distinguishes between statutory and contractual grievances. The law in that regard is clear and well-settled and was recently again cited with approval in PICHELMANN V. UW-MILWAUKEE, ET AL., supra. WSEU incorporates its legal arguments previously set forth in its pre-hearing motion to dismiss, and also adopts those arguments by Respondent State as relates to the distinctions between a contractual and a statutory grievance.

As to issues specific to the Unions, WSEU first asserts that the Commission has no jurisdiction over the Unions under Sec. 111.84(2)(a) or (b), Stats., the only violations alleged by Complainants against WSEU and Local 3394 in either the complaint or Complainants' brief. The first sentence of Section 111.84(2) states that: "It is an unfair practice for an employee individually or in concert with others. . ." As the Unions are not an "employee", as defined in Sec. 111.81(7), Stats., but are rather "persons" under Sec. 111.02(10), Stats., they are exempt from claims under Section 111.84(2), Stats. Thus, the claims should be dismissed against the Unions on that basis.

Complainants' brief calls for "reconsideration" of the Commission's interpretation of Section 111.83(1), Stats., thus acknowledging the distinction between contractual and statutory grievances that prevent Complainants' involvement as designated contractual representatives. Complainants disingenuously claim that they simply want to ride along on a grievance as an employee advocate, "equivalent to a steward", and provide an employee a "choice of the person most intimately involved or trusted to handle the grievance." One of the Complainants is WAPCO, a rival union that attempted to decertify WSEU, and two other Complainants are activists in WAPCO. In spite of their protestations, this is simply an attempt by Complainants to hijack and interfere with bargained-for contractual rights of WSEU.

While Complainants assert that a "binary" grievance system was not contemplated by Sec. 111.83(1), Stats., that is not the point. That provision guarantees that any employee, regardless of union affiliation, can bring a grievance to the employer, and that they can do so with any chosen representative. That is what has always been guaranteed, and it has never been changed. It stands alone regardless of any other rights that might be obtained or relinquished through a collective bargaining agreement obtained by a majority representative. Those contractual rights are entirely separate, and this principle has been repeatedly upheld by the Commission. The basic statutory right has no reason to "contemplate" contractual rights, other than to refrain from interfering with them. It does not provide statutory grievants with access to contractual procedures. The recent decision in PICHELMANN, supra., is instructive, as it also concerned a dispute over representation in the grievance procedure. The Examiner concluded in that case that WSEU owns the grievance, and noted that a statutory grievance is completely distinct from the negotiated procedure and that "the distinction between the two is absolutely necessary. . ." PICHELMANN. at p. 35-36.

WSEU asserts that there are no contractual rights to undesignated representation. Form DER-25 is not a contract and confers no rights in itself. Both the State and Complainants acknowledge that it is an archaic form and no longer reflects current contract language. Complainants also rely on contract language that presumably distinguishes employee representation from union representatives. However, the terms "grievance representatives" are used interchangeably with "stewards" in Sections 4/6/4-A, 4/6/5 and 4/6/6. In both intent and practice, contractual grievance "representatives" have always been designated union stewards, as was acknowledged by Luder. Any ambiguities in that regard were dealt with by the elimination of the "representative of their own choosing" language that had been in prior contracts.

Complainants erroneously assert that contractual matters can only be processed through a contractual grievance, implying that WSEU and the State could address various items in the contract and thereby exclude minority voices from its subject matter in a statutory claim. There are no limitations on the subject matter for a statutory grievance.

Even assuming that Complainants alleged a cause of action under Sec. 111.84 against the Unions, the allegations are based on the actions or non-actions of the Local's president at the time, Berglund. However, Berglund did nothing more than was appropriate under the contract and past practice. Luder and Bobiak had been removed by the Local as stewards and Berglund was obligated to notify them that they were no longer designated stewards under Section 4/6/6 of the agreement, and could no longer file union grievances. When Luder later filed a grievance on behalf of Knapton, Berglund advised Knapton that Luder was not a designated steward, and also told him, in person and in writing, that he had to have the grievance signed by a designated steward and who they were on his shift. This is hardly an onerous burden on Knapton, yet he never followed up on Berglund's advice.

Any assertion that Knapton was filing a statutory grievance and that Berglund somehow interfered by requiring a designated steward to sign the form, is absurd. Complainants acknowledged that they were unaware of what a statutory grievance was at the time, and there was nothing on the grievance itself to indicate it was statutory. WSEU asserts that the entire matter was simply a "set-up" by Bobiak and Luder. Bobiak wrote a letter to Berglund, and copied Luder, with her erroneous interpretation of the law and threatened unfair labor practice proceedings if any grievances were returned for lacking a designated representative's signature. Shortly thereafter, Luder filed a contractual grievance on behalf of Knapton, and when it was rejected, WAPCO filed charges. Bobiak's legal interpretation was wrong, and Berglund was so advised by WSEU Field Representative Gary Hausen. Thus, Berglund did not respond to Bobiak's letter and had no obligation to do so.

The legal basis for Complainants' allegation that the Unions violated Luder's contractual and statutory rights by "ignoring" his November 22 grievance is unclear. Luder filed the grievance against the Unions, and even admitted in hearing that he was not aware of any contractual basis to file a grievance against the Union. Complainants' claim that "the contract does not allow for the union and an employer to simply ignore the grievance without a word to the employee", is preposterous. The Union has no obligation to address grievances directed against itself that are frivolous on their face.

Finally, WSEU asserts that any claims relating to Bobiak's alleged attendance and status at an arbitration must be disregarded. Complainants have added entirely new charges based on an affidavit submitted by Bobiak concerning events that took place after the close of hearing. Complainants allege that Bobiak was able to continue her involvement in a grievance longer than Luder, and that, since he was more obviously involved in WAPCO, there must be discrimination by WSEU. There is no notice of these charges set forth in either the original complaint or the subsequent amendment. WSEU has been denied due process in that it has had no opportunity to prepare a defense, cross-examine witnesses, or offer rebuttal to charges that were never alleged in the pleadings, or during the hearing. The affidavit is itself of dubious value, as a steward has no status or capacity at an arbitration. However, Respondents should not have to address this and the affidavit and any claims relating to it should be disregarded.

Complainants' Reply

Complainants first respond to WSEU. Regarding the assertion that the Commission lacks jurisdiction over unions under Sec. 111.84(2), Stats., Complainants assert that a union is a group of employees acting in concert with others, and therefore is covered by Sec. 111.84(2), Stats. ACHARYA V. AFSCME, COUNCIL 24, 146 WIS. 2D 693, 695 (Ct.App. 1988); WRIGHT V. AFSCME COUNCIL 24 AND THE STATE OF WISCONSIN, DEC. NOS. 29448-C, 29495-C, 29496-C, 29497-C (WERC, 8/00) at page 22.

Complainants assert that they are seeking to change or better define existing law, and addressing the need to clarify the placement of rights and duties. A minority union or other group of employees has an interest in being treated fairly by the majority union if they are excluded from the contractual procedure. This is not a case of unsatisfied employees seeking to wrest their grievance from the union when things do not go their way, as in PICHELMANN, supra. Rather, it is a case of employees trying to assure that co-workers receive fair and adequate representation despite political disputes. As to the claim that Complainants' position is "disingenuous", both their testimony as to their desired role in the grievance procedure and their actions when allowed to participate indicate that they are not attempting to supplant WSEU. WSEU's knee-jerk reaction to anything involving WAPCO ignores the reality that Bobiak has no affiliation with WAPCO, and that both Luder and Knapton are still members of WSEU.

Complainants assert that the right to "undesignated" and "non-designated" representation exists in the contract. While the Union points to instances in the contract where "grievance representatives" have the same meaning as "stewards", it does not explain how that changes the meaning of clauses referencing more than one type of representative. WSEU also does not dispute the contractual ability of an employee to file a grievance without a steward's signature. Complainant concludes that the WSEU and the State should not be allowed to negotiate an agreement which recognizes and allows for a right to be enjoyed by employees, through direct contractual language or the creation and use of a mutually-agreed upon form, and then deny that right to employees they do not like who try to exercise it.

Complainants reassert that WSEU interfered with the Complainants' rights. Even if making Knapton refile a grievance in order to have it processed was not an onerous burden, it was still wrong. Knapton's grievance complied with the contract and thus triggered the duty on the part of the Employer, who in turn passed the duty on to the Union, to start the pre-filing step of the procedure. If the grievance is a contractual one, it is being held in abeyance by Schneider who is waiting for the Union to act. Requiring Knapton to affirmatively reject his chosen representative, a WAPCO supporter, for a WSEU one, instead of appointing a representative to meet with Schneider, interfered with Knapton's rights.

Complainants deny that this matter was a "set-up" by Bobiak and Luder. Unfair labor practice charges could have been easily avoided had Berglund only responded to Bobiak to tell her why her interpretation of the law was erroneous. Also, Bobiak, a non-steward at the time, was allowed to file the grievance for Luder, but Luder, also a non-steward, was not allowed to file a grievance for Knapton. It was when Luder was not only denied representing Knapton, but had his own grievance ignored, that charges were filed by the Complainants, with WAPCO joined because of Luder's belief that the actions of WSEU and DOC were motivated by the presence of WAPCO. No evidence supports the allegation of a WAPCO conspiracy, especially since Bobiak is not a WAPCO supporter.

Luder's rights were also violated when his second grievance was ignored. If the grievance was only contractual, the Union should have pressed it. The grievance was against DOC as well as the Union, and alleged discrimination on the basis of union affiliation, in violation of the contract (11/1/3). The Employer is obligated to punish those who discriminate and the Union has the duty to compel the Employer to do so. There is no evidence to support the claim that the grievance was ignored because it was frivolous.

With regard to Bobiak's attendance at the Luder arbitration, Bobiak testified at hearing she was invited to attend as a steward and as to her intention to attend. Respondents had the opportunity to rebut that evidence and it is likely that the Unions received the same notice regarding the arbitration. As Bobiak's attendance, or at least the invitation to attend, is directly tied to facts in the amended complaint, there is no reason to view the allegation as a denial of due process. Even if Bobiak's affidavit is disregarded, testimony still establishes that she was allowed to attend as Luder's representative. The assertion that Bobiak's presence at the arbitration was of little value because a "steward or representative has no status or capacity at an arbitration. . ." misses the point. That Bobiak, a non-supporter of WAPCO, had a continued union role, as compared to Luder's treatment, shows favor. It also shows the genuineness of Bobiak's and Luder's requested role in the procedure, i.e., to assist the WSEU representative.

In response to the State, Complainants first assert that the standards the State advocates in order to establish a legitimate statutory grievance are overly burdensome, and would only make the exercise of rights guaranteed under Section 111.83(1), Stats., more difficult. The State would make the exercise of those rights dependent upon the employee's ability to correctly interpret the law to understand the differences between statutory and contractual grievances, choose the appropriate route to pursue the matter, and then convince the employer that the filing is pursuant to a correct understanding of the law. Requiring a layperson to have this level of knowledge is unreasonable. A request for action or submitting a form containing a dispute, regardless of the use of words such as "statutory", "meet and confer", or even "grievance", should be all that is required to put the matter in play for the employer to address the employee's concerns or to channel the request in the appropriate direction.

Complainants' lack of legal education does not void their intent to exercise their rights guaranteed under Sec. 111.83(1). The inference that because Complainants were unaware of a statutory grievance, the grievance must have been contractual, is not sound. Complainants' understanding was that there were grievances, without any sort of distinction, and believed that grievance rights stemmed from both the statute and the contract. It is inappropriate to define the grievance as "statutory" or "contractual" based upon Complainants' awareness of the existence of "statutory" and "contractual" grievances. If the status of each grievance as either statutory or contractual must be determined, it should be based on other factors than an employee's knowledge of the law.

Bobiak's letter to Luder, copied to Schneider, gave Schneider reasonable notice that statutory rights to file a grievance would be exercised. As a presumptively trained and qualified personnel manager, Bobiak's letter should have led Schneider to question grievances "deficiently" filed within a short time of receiving it. Instead of simply asking the employee what his intent was, Schneider chose to deal with the grievances in a manner which gave WSEU power to do what it wished with the grievances. An employer cannot avoid responsibility for dealing with a complaint by passing it to someone who ignores it. By statute and by contract, the Employer has a responsibility of notifying the Union and then proceeding once the Union is afforded the opportunity to be present. It was also the normal procedure for the Employer to schedule the time the grievances were to be discussed. As the State acknowledged, the language of Luder's November grievance also provides notice. The grievance was not only filed against the Union, but against management as well. As to claims that the wording accusing both management and the Union of acting contrary to Sec. 111.83(1), Stats., would be too confusing for a trained personnel manager to understand, upon receiving a request for action which is not clear, the employer being the more knowledgeable and in the more controlling position, should be required to ask the employee. It would be remarkable if an employer's ignorance as to the law regarding grievances under SELRA, constituted a defense for non-compliance with the law.

The real question is which party bears responsibility. Since the employer controls the workplace, it should bear the responsibility of putting procedures in place. Here, the Employer was so fixated on its negotiated procedure for contractual grievances, it all but turned a blind eye to any other claim of rights, despite a lack of clarity. Form DER-25, the Union's and the Employer's agreed-upon use of the form, and the absence of any other process available or cognizable to the Employer and employees alike, created a problem that could only be avoided by the Employer directly asking grievants their intent. Where a union and employer choose to sever their contractual procedure from a statutory one, the employer should bear the burden of establishing alternative procedures and making them known, thus preventing the employer from having to be a mind-reader and preventing an employee from having to be a lawyer. In this case, it was not Complainants who were trying to convert their grievance after something occurred which they did not like, it was the Employer, who instead of asking, and in the absence of any clear or alternate procedures, converted the grievance into a contractual one, thus choosing the majority union over the individual and WAPCO.

Complainants dispute the assertion that because the grievances of Knapton and Luder were submitted on form DER-25, the only possible inference is that they were contractual. There was no other form or process for an employee to submit a grievance to the employer, especially as personal contact was limited due to different work shifts. Notice was provided by Bobiak's letter stating a grievance filed without proper signatures should be honored and citing Sec. 111.83(1), Stats. Given that there was no alternative process and that there was notice that lack of proper signatures could indicate statutory grievances, those grievances cannot be presumed to be *de facto* contractual.

Complainants also respond to certain points in the State's brief. First, this case involves the existence of two systems and the need for clarification, tests, and burdens to be clearly established, especially when the circumstances in the workplace result in no person understanding or knowing that the systems are separate and distinct. As such, UW HOSPITAL AND CLINICS, supra. does not justify dismissal of this case.

Second, even if Bobiak's affidavit is stricken, her testimony remains valid. Also, if part of footnote 3/ in Complainants' brief is to be stricken, all of it should be.

Complainants reassert that the language of DER-25 cannot be ignored. By maintaining the form, despite removing the language from the contract, WSEU and the employer created the appearance of maintaining the *status quo*. While the State asserts DER-25 is at odds with the labor agreement, it does not specify how or where the conflict occurs. To the contrary, DER-25 adds rights, either contractually or by incorporating statutory rights into the contractual procedure. The assertion that the form's maintenance is an administrative error is questionable, as such an error would have had to occur for over five years and over the course of several agreements. The language on the form contributed to Complainants' understanding of their rights. To allow Respondents to now assert that those rights do not exist despite the continued use of the form is contrary to the plain language of DER-25.

Contrary to the State's assertion, it did show hostility toward a protected activity. Rather than asking or trying to determine what dispute was taking place in the workplace, the Employer chose to deal with the majority representative, rather than with the individual employee and his chosen representative. Schneider's willingness to disregard Luder's discrimination grievance is even worse. Schneider not only contacted the majority representative to notify it that the grievance existed, but called DOC's legal counsel and followed his advice to ignore the grievance. To only deal with the majority representative to the extent that the individual minority-union employees are completely ignored and not communicated with, should be sufficient to show hostility toward protected activity.

An employee should not have to be a lawyer in order to have their grievance heard. Employees make their complaint known, and expect it to be heard. Employers are then required to notify employees of a gamut of rights because they are in the controlling position. Here, the Employer provided means for contractual grievances to be heard when filed by the majority representative, but provided nothing to assure the right of an employee to present a statutory grievance, including adequately training its personnel manager. An employee should only have the responsibility to communicate the substance of the grievance they are filing, but the employer should have the parallel responsibility to provide a channel for separate and distinct types of grievances. To favor one over the other, including presuming ambiguous requests are contractual, discriminates against, and is hostile to, individual and minority union employee rights.

Complainants assert that the evidence is sufficient to show that the DOC's conduct violated Sec. 111.84(1)(a), Stats. Schneider's ignoring the grievance and inappropriately concluding they were contractual, had a chilling effect on employees attempting to pursue a grievance directly with the Employer, thus interfering with the exercise of their rights. Both a threat and a promise can be inferred. The benefit was promised (having a grievance heard) for dealing with the majority representative and a threat made (not having a grievance heard) if one acted without the majority. Leaving it up to WSEU to notify Complainants of the situation and move things along only served to reinforce the message.

Similarly evident is a violation of Sec. 111.84(1)(c), Stats. After prior notice requesting that they be honored, grievances were presented with a non-WSEU representative's signature or lacking a WSEU representative's signature. Schneider ignored the possibility that employees may assert rights as individuals and as minority union members and converted the grievances into a method he preferred, i.e. one with the WSEU as a representative. The effect of Schneider's unwarranted actions was that the Employer dealt only with the majority representative, and excluded the minority representative or individual employee.

DISCUSSION

Complainants alleged in their brief that the State/DOC violated the rights of Bobiak, Luder and Knapton under Sec. 111.83(1), Stats., in violation of Secs. 111.84(1)(a) and (c), Stats., by certain actions or inaction.

Complainants also allege that the Unions violated the rights of Bobiak, Knapton and Luder under Sec. 111.83(1), Stats., thereby violating Secs. 111.84(2)(a) and (c), Stats., by certain actions, including:

. . .

2. Not advancing Bobiak's grievance, where Luder acted as her representative, to arbitration despite its similarities to Luder's grievance.

. . .

Complainants also allege in their brief that both the State and the Union "discriminated against employees sympathetic to WAPCO by accepting and processing grievances filed by a chosen representative without WAPCO affiliation and rejecting or not proceeding with grievances filed by chosen representatives or individuals with WAPCO affiliation." (Paragraph D)

Both Respondents have moved to strike the Bobiak affidavit attached to Complainants' post-hearing brief and factual assertions in the second sentence in footnote 3 of Complainants' brief 3/, and the Respondent Unions assert that the heretofore unmade allegations of discrimination based on the affidavit or Bobiak's being allowed to attend the arbitration of Luder's September 23 grievance should not be considered.

3/ In Complainants' post-hearing "Closing Brief" they asserted, in part, as follows concerning Luder's November 22 grievance:

> *Upon receiving the grievance, Schneider notified Berglund and David Whitcomb (Whitcomb), the Department of Correction's (DOC) attorney at the time. (Tr. at 104). Schneider was directed by Whitcomb to put the grievance on hold while he had a discussion over the issue internally and with the legal representatives for WSEU and WAPCO. 3/*
>
> . . .
>
> ---
>
> *3/ WSEU's representative at the hearing noted he had no conversations or even saw Exhibit 10 prior to the filing of the formal complaint. (Tr. at 107). Additionally, the discussion ocurring with Luder's (WAPCO's) representative occurred prior to Luder filing a grievance and resulted in an unfulfilled promise by Whitcomb to deal with the matter in the future.*
>
> ---

Complainants do not defend the submission of the affidavit or the factual assertions in footnote 3 of their brief, other than to assert that there is still Bobiak's testimony to consider, and that if the second sentence of footnote 3 is stricken, the first sentence regarding WSEU counsel's statement at hearing should also be stricken.

The pleadings in this matter, both the initial complaint and the amended complaint, contain no allegations of discrimination based upon how Bobiak was treated as compared to Luder and Knapton, nor did Complainants make such allegations in their opening statement at hearing. Complainants did not move to amend their complaint further, nor did they request to reopen the hearing. Bobiak did testify at hearing that she had received a notice of the upcoming arbitration of Luder's September 23, 2000 grievance, and that she was listed as steward of record for that grievance on the notice. Bobiak also testified that her grievance of August 23, 2000 was not going to arbitration. However, there was no reason for Respondents to assume or infer from Bobiak's testimony that Complainants were now alleging discrimination based upon what had occurred with regard to those two grievances following the Step 2 hearing on those grievances or based on how Bobiak was treated as opposed to Luder or Knapton. That is especially the case in light of the stipulations reached at hearing between Complainants and WSEU and Complainants and DER with regard to the Union's seeking arbitration of those grievances. By waiting until their post-hearing brief to make those allegations, Complainants effectively denied Respondents the opportunity to present evidence in their defense. To assert jurisdiction over those allegations at this point in the proceeding

would violate Respondents' due process rights and the principles of fair play. 4/ For that reason, Bobiak's post-hearing affidavit and

---

4/ RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 20941-B (WERC, 1/85), citing, GENERAL ELECTRIC V. WERB, 3 WIS. 2D 227, 243 (1958). See also, WHITE LAKE JT. SCHOOL DISTRICT NO. 2, DEC. NO. 12623-A (Schurke, 9/75), aff'd by operation of law.

---

footnote 3/ in Complainant's brief have been stricken and the allegations of discrimination based upon what occurred after the Step 2 hearings with regard to Bobiak's August 23 grievance and Luder's September 23 grievance and the treatment of Bobiak as opposed to the treatment of Knapton and Luder are not considered in this decision.

Section 111.83(1), Stats.

Complainants make a number of general arguments regarding their rights, and Respondents' obligations, under Sec. 111.83(1), Stats. First, Complainants assert that the Examiner should interpret that statutory provision to provide individual employees the right to present and process grievances on their own or by a representative of their choosing, utilizing the grievance procedure contained in the collective bargaining agreement between the Employer and the majority representative of the employees. Complainants concede there is case law to the contrary, but assert that under the circumstances in this case, i.e., only one grievance form is used and one procedure available for filing grievances, the Examiner should find such a right. The case law is indeed to the contrary. The Commission has long and consistently held that the statutory right to present grievances under both MERA 5/ and SELRA 6/ does not include the right to utilize the contractual grievance procedure. As the

---

5/ MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 11280-B (WERC, 12/72).

6/ UW-MILWAUKEE (GUTHRIE), DEC. NO. 11457-E (Schurke, 12/75); reversed upon other grounds, DEC. NO. 11457-F (WERC, 12/77); UW HOSPITAL AND CLINICS, DEC. NO. 28938-C (WERC, 5/99); UW-HOSPITAL AND CLINICS BOARD, DEC. NO. 29784-D (WERC, 11/2000).

Commission stated in its recent decision in UW-HOSPITAL AND CLINICS BOARD:

> Given the parallel statutory language and the common policies behind both SELRA and MERA, we find the interpretation of Sec. 111.70(4)(d)1, to be instructive and applicable to the interpretation which should be given Sec. 111.83(1), Stats. STATE V. WERC, 122 WIS.2D 132 (1985).

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

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

As evidenced by the above-quoted portion of MILWAUKEE, the statutory opportunity for individual 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. However, a union and employer have no obligation to bargain a contract which will give individual employees the right to independently process contractual grievances. The employee's statutory opportunity to meet with the employer is separate and distinct from the question of whether the employee has a contractual opportunity to meet with an employer over contractual grievances.

Dec. No. 29784-D (at p. 20).

In its subsequent decisions, the Commission has not indicated any exceptions to its holding in MILWAUKEE BOARD OF SCHOOL DIRECTORS, cited above. Thus, to the extent Complainants argue that the facts of this case dictate a different result, the Commission's most recent decision in UW-HOSPITAL AND CLINICS BOARD, DEC. NO. 29784-D, does not permit such a conclusion. 7/ Further, Complainants' argument that if Sec. 111.83(1), is not construed

---

7/ See UW-MILWAUKEE, DEC. NOS. 29775-F, 29776-F (McLaughlin, 2/02), for a similar conclusion.

---

to provide individuals access to the contractual grievance procedure, they will effectively be precluded from independently raising issues concerning matters covered by the collective bargaining agreement, is erroneous. The statute contains no limitation on the nature of issues that may be raised in a grievance presented pursuant to Sec. 111.83(1), and the wording of the last sentence of that provision assumes the possibility that the issue raised could concern a matter covered by a collective bargaining agreement. 8/ Complainants' argument also ignores the fact that the majority representative's exclusive bargaining representative status requires it to fairly represent all of the members of the bargaining unit, regardless of their affiliation with a minority union.

8/ ". . .Any adjustment resulting from such a conference may not be inconsistent with the conditions of employment established by the majority representative and the employer."

Complainants also assert that if Sec. 111.83(1), Stats., does not provide individuals or a minority group of employees with access to the contractual grievance procedure, and the contractual grievance procedure does not permit individual employees to file and process grievances, the employer must provide a separate procedure for presenting such statutory grievances and make that procedure known to its employees. Complainants overstate the employer's obligations under the statute. As the Commission stated in MILWAUKEE BOARD OF SCHOOL DIRECTORS, *supra*., "Said statutory provision merely requires the [employer] to confer with an individual employe or minority group of employes. . ." The provision provides no rights or obligations beyond the right/duty to "meet and confer". It simply provides a venue in which an individual employee or minority group of employees may present a grievance to their employer without going through their majority representative and a defense for the employer against a charge of individual bargaining from the majority representative. UW-MILWAUKEE, DEC. NO. 29775-F, 29776-F (At p. 62).

Complainants' Rights Under the Agreement

Complainants assert that the "September grievances" (Bobiak's and Luder's smoking grievances) and Knapton's November 6 grievance filed by Luder were presented as both statutory and contractual grievances, and that the collective bargaining agreement gives individual employees the right to independently process contractual grievances by themselves or by a representative of their own choosing. Complainants cite wording in the grievance form DER-25, as well as in Secs. 4/1/2, 4/1/3, 4/2/1, 4/2/6 of the collective bargaining agreement, in support of their claim. While the wording on the grievance form and in those contractual provisions would otherwise provide some basis for Complainants' claim, there is overriding evidence to the contrary.

The wording in Sec. 4/1/3 of prior agreements contained language similar to that which the Commission had previously interpreted to provide individual employees or groups of employees the right to file and process grievances through the contractual grievance procedure. 9/ The 1993-1995 agreement between the State and WSEU contained the following wording in Sec. 4/1/3 of Article IV, Grievance Procedure:

9/ UW-MILWAUKEE (HOUSING DEPARTMENT), DEC. NO. 11457-E; aff'd DEC. NO. 11457-H (WERC, 5/84); UW-HOSPITALS AND CLINICS BOARD, DEC. NO. 29784-D (WERC, 11/00).

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

It is undisputed that the parties to the agreement, i.e., the Respondents State and WSEU, revised the wording of Sec. 4/1/3, eliminating the above-emphasized wording, with the intent of not permitting employees to file and process grievances through the contractual grievance procedure by themselves or by a representative other than a designated agent of WSEU. Both the State and WSEU assert that as a result of that revision of Sec. 4/1/3, individual employees or groups of employees no longer have the right to file and process a grievance by themselves or by a representative other than a designated steward. While the wording of DER-25 and the wording of the provisions of the grievance procedure cited by Complainants creates some ambiguity in the wording of the agreement, as the examiner in UW HOSPITALS AND CLINICS 10/ noted:

10/ DEC. NO. 28072-A (Nielsen, 3/95), aff'd in relevant part, DEC. NO. 28072-B (WERC, 8/97).

> "Where the parties to a contract agree on the meaning of an ambiguous provision, and their agreement on that meaning is not a subterfuge to hide an arbitrary, capricious, discriminatory or bad faith course of action, their understanding must be given controlling weight in interpreting the contract. This is a fundamental precept of contract law in the field of labor relations."
>
> (At p. 18).

Complainants assert that other individual employees have been permitted to file and process grievances on their own or with representatives of their own choosing, while they have been treated differently by Respondents because of their affiliation with WAPCO. However, the evidence presented at hearing is not sufficient to support a conclusion that other employees have been permitted to file and process grievances without the signature of a designated steward under the present wording in Sec. 4/1/3. While Luder testified it had been his understanding that anyone could file a grievance, he conceded on cross-examination that "traditionally" when the grievance forms were filed, they were signed by a designated representative "who was also a union steward." (Tr. 54). Bobiak's testimony consisted of hearsay as to one grievance she had been told had been filed by an individual employee. Even if the grievance had been submitted by that individual, there was no evidence offered as to what subsequently occurred regarding the grievance. Conversely, Schneider, whose office receives all of the Step 1 grievances (and copies of Step 2 grievances) submitted at CCI, testified that in his years as Human Resources Director at CCI (1990-98 and 2000 to present) it was always the practice to have a designated union representative sign a bargaining unit member's grievance (Tr. 107), and that when a grievance was submitted without the proper names, he would contact the Local's President of chief steward and have them take care of it. (Tr. 101-102). Thus, Complainants have not been able to demonstrate that the parties to the collective bargaining agreement, the State and WSEU, have applied the present wording of the contractual grievance procedure in a manner that permitted individual employees to file and process grievances without the signature of a designated steward, i.e., differently from how Complainants were treated. 11/

11/ As discussed above, as a result of Complainants' failure to timely allege that Respondents' treatment of Bobiak with regard to Luder's smoking grievance evidenced discrimination against Luder and Knapton, they are precluded from relying on the treatment of Bobiak as evidence in this regard.

Alleged Violations by Respondent Unions

Complainants allege that WSEU and Local 3394 interfered with the exercise of their rights under Sec. 111.83(1), Stats., and the collective bargaining agreement in violation of Secs. 111.84(2)(a) and (b), Stats. The Respondent Unions assert that Sec. 111.84(2), Stats.,

applies only to an "employee", and that they do not meet the definition of "employee" set forth in Sec. 111.81(7), Stats.; rather, they are "persons", as defined in Sec. 111.02(10), Stats. Respondent Unions' argument is novel, but unpersuasive. Sec. 111.84(2), Stats., provides "(2) It is unfair practice for an employee individually or in concert with others:"

As Complainants point out, a union by definition consists of employees acting in concert with one another. Further, as Complainants also point out, both the Commission 12/ and the courts 13/ have construed Sec. 111.84(2), Stats., to apply to unions. Thus, it is

---

12/ WRIGHT V. AFSCME COUNCIL 24 AND STATE OF WISCONSIN, DEC. NOS. 29448-C, 29495-C, 29496-C, 29497-C (WERC, 8/00).

13/ ACHARYA V. AFSCME COUNCIL 24, WSEU 146 WIS. 2D 693, 695 (Ct. of App. 1988).

---

concluded that the Commission has jurisdiction to adjudicate allegations of violations of Sec. 111.84(2), Stats., by the Respondent Unions.

In their brief, Complainants allege that the Respondent Unions have violated Secs. 111.84(2)(a) and (b), Stats., by the following:

> A.
>
> 1. Assuring any grievances filed by Luder and Bobiak and sent to the Department of Employee Relations would not be honored. (ss. 111.84(2)(b))
>
> 2. Not advancing Bobiak's grievance, where Luder acted as her representative, to arbitration despite its similarities to Luder's grievance. (ss. 111.84(2)(a))
>
> 3. Having Knapton's grievance put on hold by CCI because it was signed by Luder. (ss. 111.84(2)(b))
>
> 4. Requiring Knapton to re-file his grievance if he wanted it to be heard. (ss. 111.84(2)(a))
>
> 5. Not taking any action on Luder's self-filed grievance once notified by CCI it had been filed. (ss. 111.84(2)(a))
>
> . . .

D. The Respondents discriminated against employees sympathetic to WAPCO by accepting and processing grievances filed by a chosen representative without WAPCO affiliation and rejecting or not proceeding with grievances filed by chosen representatives or individuals with WAPCO affiliation. 14/

14/ As previously set forth above, paragraph A 2 and paragraph D, to the extent that it references the treatment of Bobiak beyond that alleged in the complaint and amended complaint, have been untimely raised, and are not addressed herein.

Sec. 111.84(2), Stats., provides:

> **(2)** It is unfair practice for an employee individually or in concert with others:
>
> (a) To coerce or intimidate an employee in the enjoyment of the employee's legal rights, including those guaranteed under s. 111.82.
>
> (b) To coerce, intimidate or induce any officer or agent of the employer to interfere with any of the employer's employees in the enjoyment of their legal rights including those guaranteed under s. 111.82 or to engage in any practice with regard to its employees which would constitute an unfair labor practice if undertaken by the officer or agent on the officer's or agent's own initiative.

Alleged Violations of Sec. 111.84(2)(a)
Knapton Grievance

Complainants assert that Berglund's advising Knapton that he would have to refile his November 6, 2000 grievance with the signature of a designated steward if he wanted it processed, interfered with Knapton's and Luder's rights under Sec. 111.83(1), Stats., thereby violating their rights under Sec. 111.82, Stats., as well as violating their rights under the collective bargaining agreement. Complainants assert that the grievance was filed as both a statutory grievance and as a contractual grievance.

As has been determined above, Knapton's right to file and/or process a grievance independent of the majority representative is solely dependent upon his rights under Sec. 111.83(1), as the contract does not provide that right. If the grievance is filed as a contractual grievance, it must comply with contractual requirements set forth in Article IV in

order to be processed. 15/ Knapton's grievance was signed by Luder as the employee

---

15/ Unless it can be shown that other employees have been permitted to file and process grievances despite having similar deficiencies. However, Complainants have not been able to establish that is the case.

---

representative, and not by a designated Union steward, as the State and WSEU have interpreted 4/1/2 and 4/1/3 to require. Further, as Knapton's grievance did not involve discipline, 4/2/1 requires that a "pre-filing" step take place prior to submitting a written grievance at Step 1. Sec. 4/2/1 requires that the "Union representative" contact the employee's immediate supervisor to identify and discuss the matter in an attempt to resolve it. There was no pre-filing step completed prior to the filing of Knapton's grievance. Thus, the grievance was deficient in at least two respects. Schneider informed Local 3394 President Berglund of those deficiencies. Berglund then advised Knapton verbally and in writing of what he needed to do to correct it, i.e., that he needed to refile the grievance with the signature of one of the Local's designated stewards whom Berglund identified for Knapton. The record indicates that this is how grievances have been handled in the past when they have been deficient, i.e., Schneider notifies the Union and returns the grievance to the Union to have the deficiency corrected. Complainants assert that an employee sympathetic to a minority union should not be forced to reject the minority union in order to have the majority representative advocate for his contractual rights. Beglund did not advise Knapton that he had to "reject" WAPCO, he only advised him what he needed to do to comply with the contract. Advising Knapton of what he needed to do in order to file a grievance under the contractual grievance procedure does not have a reasonable tendency to interfere with his rights under Sec. 111.82, Stats., and does not constitute a violation of Sec. 111.84(2)(a), Stats.

Complainants assert Knapton's grievance was also filed as a statutory grievance under Sec. 111.83(1), Stats., and that Berglund's advising Knapton he would have to file the grievance through the majority representative violated Knapton's rights under that statutory provision. Sec. 111.83(1), provides:

> **111.83 Representatives and elections. (1)** Except as provided in sub. (5), a representative chosen for the purposes of collective bargaining by a majority of the employees voting in a collective bargaining unit shall be the exclusive representative of all of the employees in such unit for the purposes of collective bargaining. Any individual employee, or any minority group of employees in any collective bargaining unit, may present grievances to the employer in person, or through representatives of their own choosing, and the employer shall confer with said employee or group of employees in relation thereto if the majority representative has been afforded the opportunity to be present at the

conference. Any adjustment resulting from such a conference may not be inconsistent with the conditions of employment established by the majority representative and the employer.

As discussed above, that provision does not provide employees with the right to independently, or through a representative of their choosing, file and process grievances under a collective bargaining agreement. Such a right must come from the agreement itself, as the right to present a grievance under Sec. 111.83(1) is separate and distinct from grievances filed under the collective bargaining agreement.

Further, Complainants assertion that Knapton's grievance was also a statutory grievance is not supported by the evidence. The grievance was filed on form DER-25, entitled "EMPLOYE CONTRACT GRIEVANCE REPORT", alleged violations of provisions of the collective bargaining agreement, and did not indicate in any manner that it was something other than a contractual grievance. Complainant's assertion that Bobiak's letter of October 2, 2000 put Berglund, and thereby the Union, on notice that grievances subsequently filed without the signature of a designated steward were being filed as statutory grievances, is not persuasive. Bobiak's letter makes clear it was her belief that Sec. 111.83(1) provides individual employees with the independent right to file and process grievances under the contractual grievance procedure without going through the majority representative. The testimony of Bobiak and Luder further makes clear that was their belief at the time, both of them testifying they had only become aware that there was a difference between a statutory grievance and a contractual grievance shortly before the hearing in this matter, almost a year later.

In sum, the evidence demonstrates that at the time Knapton's grievance was filed, the individual Complainants were not seeking to "meet and confer" pursuant to Sec. 111.83(1), Stats., rather they were seeking to file and process the grievances through the contractual grievance procedure with the representative of their own choosing, rather than through the majority representative. 16/ That is a right they do not have under SELRA.

16/ While Complainants assert they really are only asking that an employee be able to have a representative of their own choosing available to assist them, and are not seeking to displace the designated steward or WSEU representative in the steps of the procedure, Bobiak's letter indicates otherwise. The letter asserts that the interests of WSEU and Local 3394 would be adequately protected by the WSEU field representative's right to be present at Step 2 hearings and by supplying a copy of any grievance filed by someone other than a designated steward to the Local. Further, Berglund's letters to Bobiak and Luder of September 29, 2000 indicated the Local had "no problem with you representing someone in the Local", but that they could no longer file grievances.

Luder's November 22 Grievance

Complainants also allege that the Respondent Unions' inaction on Luder's November 22, 2000 grievance, once they were notified by Schneider that it had been filed, also interfered with Luder's rights under Sec. 111.83(1), Stats., in violation of Sec. 111.84(2)(a), Stats. In that regard, Complainants assert that Luder's grievance was filed as a statutory grievance, and that the Respondent Unions and State should have realized this and could not choose to just ignore it.

There are several problems with Complainant's assertions. The first being, that if it indeed was a statutory grievance, the Unions had no obligation to do anything under Sec. 111.83(1); rather, they only had the right to be present at any conference on the grievance. Secondly, as noted previously, Luder conceded in his testimony that he was not aware of the difference between a "statutory" grievance and a "contractual" grievance and was simply filing a grievance the same as he had in the past. Also as noted previously, both Bobiak and Luder believed at the time that Sec. 111.83(1) provided individual employees the right to file and process grievances under the contract without going through the majority representative.

In other words, Luder's intent was to file a contractual grievance, which he ultimately did by submitting the grievance on form DER-25 and alleging a violation of the collective bargaining agreement. However, the grievance lacked the signature of a designated steward and alleged discrimination against Luder by the Respondent Unions based on his being removed as a steward for Local 3394 and their conspiring with management to deprive him of his rights under Sec. 111.83(1). Ostensibly the latter referred to his being told he could not file grievances on behalf of employees since he was not a steward, and management's not processing grievances signed by Luder. Luder could not reasonably expect the Union would process the grievance under the contract, and the Unions could reasonably conclude that they were not expected to take action on the grievance, and they had no obligation to do so.

Alleged Violations of Sec. 111.84(2)(b)

Complainants assert that the Respondent Unions violated Sec. 111.84(2)(b), Stats., by taking steps to assure that any grievances filed by Luder and Bobiak would not be honored by DER, and by having CCI put Knapton's grievance on hold because it was signed by Luder.

The evidence establishes that Bobiak was removed as a steward for Local 3394 because of some disagreement between herself and the Local's Executive Board. There is no allegation that this was done improperly or because of any connection with WAPCO. 17/

17/ Complainants in fact assert that Bobiak had no affiliation with WAPCO and her testimony supports this.

The evidence also establishes that Luder was removed as a steward for Local 3394 based on the Local's belief that he had accepted a position on WAPCO's Executive Board. 18/

18/ Luder's grievance (Jt. Exhibit 10) states he had accepted a nomination for vice-president of WAPCO.

No provision in SELRA, that the Examiner is aware of, requires a union to retain an individual as a union official who has accepted a position as an official in a rival union. Luder's being removed as a steward for the Local was a reasonably forseeable consequence of his accepting a position in WAPCO, and could not reasonably be viewed as having a reasonable tendency to interfere with his rights under Sec. 111.82, Stats. Even if it did, the Union had a valid business reason for taking such action.

It follows that if Bobiak's and Luder's removal as stewards is not a violation of SELRA, removing the authority they had as stewards, i.e., to file grievances as designated stewards for the Local, is also not a violation. Thus, notifying them and DER that they no longer had the authority to file grievances and taking steps to assure that DER would not honor such grievances if they did, also is not a violation.

With regard to having CCI put Knapton's grievance on hold, as discussed previously, the grievance was filed as a contractual grievance and was deficient in that it lacked the signature of a designated steward and there had been no pre-filing step. The grievance was treated the same as other procedurally deficient grievances – Schneider notified the Local, someone from the Local (Berglund) picked up the deficient grievance and took steps to have the deficiencies corrected, i.e., informed Knapton what he needed to do if he wanted the grievance accepted and processed under the collective bargaining agreement. As Berglund's actions with regard to so advising Knapton have not been found to constitute interference in violation of Sec. 111.84(2)(a), Stats., to the extent his actions caused CCI to take no further action until and unless the grievance was properly submitted would not violate Sec. 111.84(2)(b).

Alleged Violations By Respondent State (DOC)

The Complainants assert in their brief that the Respondent State, through its agents at CCI have interfered with their rights under Sec. 111.82, Stats., and have discriminated against them based on the exercise of those rights, in violation of Secs. 111.84(1)(a) and (c), Stats., by the following:

B.

1. Not notifying Luder's chosen representative (Bobiak) of his step two grievance meeting (re: discipline for smoking) to assure her presence.

2. Not notifying Bobiak's chosen representative (Luder) of her step two grievance meeting (re: discipline for smoking) to assure his presence.

3. Not proceeding on Knapton's grievance at Berglund's behest because of Luder's signature, either within the contractual grievance procedure or in a statutory grievance procedure.

4. Taking no action on Luder's discrimination grievance, either within the contractual grievance procedure in coordination with Berglund, or in a statutory grievance procedure.

Sec. 111.84(1), Stats., provides that it is an unfair labor practice for an employer individually or in concert with others:

(a) To interfere with, restrain or coerce employees in the exercise of their rights guaranteed under s. 111.82.

. . .

(c) To encourage or discourage membership in any labor organization by discrimination in regard to hiring, tenure or other terms or conditions of employment. This paragraph does not apply to fair-share or maintenance of membership agreements.

. . .

Those provisions of SELRA are substantively identical to Secs. 111.70(3)(a)1 and 3, respectively, of the Municipal Employment Relations Act (MERA) and both the Commission and the Wisconsin Supreme Court have concluded on that basis that it is appropriate to apply precedent arising under provisions of MERA to cases arising under similar provisions of SELRA. STATE V. WERC, 122 WIS. 2D 132, 143 (1985); AFSCME COUNCIL 24 AND STATE OF WISCONSIN, DEC. NO. 29448-C (WERC, 8/00).

With regard to "interference", the Commission has found a violation of Sec. 111.70(3)(a)1, Stats., occurs when employer conduct has a reasonable tendency to interfere with, restrain or coerce employees in the exercise of their Sec. 111.70(2) rights. WERC v. EVANSVILLE, 69 WIS. 2D 140 (1975). If, after evaluating the conduct in question under all the circumstances, it is concluded that the conduct had a reasonable tendency to interfere with the exercise of Sec. 111.70(2) rights, a violation will be found even if the employer did not intend to interfere and even if the employee(s) did not feel coerced or was not in fact deterred from exercising Sec. 111.70(2) rights. BEAVER DAM UNIFIED SCHOOL DISTRICT, DEC. NO. 20283-B (WERC, 5/84); CITY OF BROOKFIELD, DEC. NO. 20691-A (WERC, 2/84); JUNEAU COUNTY, DEC. NO. 12593-B (WERC, 1/77).

A violation of Sec. 111.70(3)(a)(1), Stats., may be established by a showing of a threat of reprisal or a promise of benefit which would tend to interfere with, restrain or coerce employees in the exercise of their rights. CITY OF BEAVER DAM, DEC. NO. 20282-B (WERC, 5/84). Employer conduct which may well have a reasonable tendency to interfere with employee exercise of Sec. 111.70(2) rights will not be found to violate Sec. 111.70(3)(a)1, Stats., if the employer had valid business reasons for its actions. CEDAR GROVE-BELGIUM AREA SCHOOL DISTRICT, DEC. NO. 25849-B (WERC, 5/91).

To establish a finding of "discrimination", in violation of Sec. 111.84(1)(c), Stats., a complainant must establish, by a clear and satisfactory preponderance of the evidence, (1) that complainant was engaged in activity protected by Sec. 111.82, Stats., (2) the State was aware of the activity and was hostile to it, and (3) that the State acted toward complainant, based at least in part, on that hostility. STATE v. WERC, 122 WIS. 2D at 140; AFSCME COUNCIL 24 AND STATE OF WISCONSIN, DEC. NO. 29448-C, *supra*.

Failure to Notify Bobiak and Luder of Step 2 Meeting

Complainants assert that DOC's failure to notify Bobiak of the Step 2 hearing on Luder's September 23 grievance and its failure to notify Luder of the Step 2 hearing on Bobiak's August 23 grievance, interfered with Bobiak's and Luder's rights under Sec. 111.83(1), Stats., to present grievances by representatives of their own choosing. The assertion is again predicated on the assumption that Sec. 111.83(1) provides individual employees with rights under the contractual grievance procedure. As previously concluded, that assumption is not valid. Thus, their rights under the grievance procedure are controlled by that procedure. Both Bobiak and Luder had been removed as stewards for the Local by that

time and no longer had a role in the grievances under the contractual grievance procedure. 19/ The Local had notified DOC that they were no longer stewards and therefore could not file grievances under the agreement. Thus, it is concluded that DOC's failure to notify Bobiak and Luder of the Step 2 meeting on the respective grievances was consistent with its obligations under the contractual grievance procedure and therefore did not interfere with their rights under Sec. 111.83(1), Stats.

19/ That they were allowed to participate in the Step 2 meeting to the extent they did was consistent with Berglund's September 29th letter. It is noted that both did in actuality receive notice of the Step 2 meeting, as they each received notice of the meeting on their own grievance, which notice included all of the grievances that would be heard on that date.

On its face then, the action would only be improper if it was established that the action was based on animus toward Bobiak and Luder due to their having engaged in protected, concerted activity or could reasonably be perceived in that light. There has been no such showing in this case. While Luder testified that he felt he was subsequently being harassed by management at CCI because of his affiliation with WAPCO, there was little or no evidence offered to support his allegations in that regard. Further, it is undisputed in this case that Bobiak had no affiliation with WAPCO. There simply is no evidence in the record upon which to base a finding that DOC's actions in this regard were anything more than an attempt to comply with the requirements of the contractual grievance procedure. In other words, regardless of how Bobiak and Luder viewed the action, there has been no showing of animus on the part of DOC, only that DOC had a valid business reason for its actions. Therefore, there is insufficient basis in the record for finding a violation of either Sec. 111.84(1)(a) or (c), Stats., based on those actions.

Knapton Grievance

Complainants assert that Schneider's not taking any action on Knapton's grievance at Berglund's behest because Luder had signed it, violated their rights under Sec. 111.83(1) and constitutes both interference and discrimination under SELRA. It is initially noted in that regard that Complainants allege in their amended complaint that Knapton's grievance was filed as both a contractual grievance and as a statutory grievance, but in its post-hearing reply brief asserts that DOC inappropriately "converted" Knapton's grievance, (as well as Luder's November 22 grievance), to a contractual grievance.

With regard to the merits of the allegations, it has already been decided that having been removed as a steward for the Local, Luder did not have the authority under the collective bargaining agreement to file a grievance. Schneider had been made aware of this. Further, there was no indication on the face of the grievance that the Unions had been made aware the grievance was filed. Sec. 4/1/3 of the collective bargaining agreement requires in that case that the employer representative who received the grievance immediately notify the Union and

that no further discussion will be had on the grievance until the Union has been notified and has the opportunity to be present. There also had been no pre-filing step completed as required by Sec. 4/2/1 of the Agreement. As noted previously, Schneider testified that it was his practice when receiving a grievance with deficiencies to notify the Local and have it take care of the matter, i.e., correct the deficiencies. There is no evidence that Schneider handled Knapton's grievance any differently than he had handled other grievances with procedural deficiencies in the past. As noted previously, Complainants have not been able to establish that individual employees have been able to file contractual grievances without the signature of a designated steward since the wording of Sec. 4/1/3 was revised.

While Complainants assert that Knapton's grievance was also filed as a statutory grievance, as has already been discussed, the evidence is to the contrary. The grievance was filed on form DER-25 and alleged violations of the collective bargaining agreement. On its face, there is nothing to indicate it was other than a contractual grievance. The testimony of Bobiak and Luder, as well as Bobiak's letter of October 2, 2000, on which Schneider was copied, indicate that they believed at the time that the rights under Sec. 111.83(1) applied to the contractual grievance procedure. Complainants' argument that the grievance was also a statutory grievance appears to be a belated attempt to alter the nature of the grievance so as to have it fall within Sec. 111.83(1), Stats.

Luder's November 22 Grievance

Similar problems arise as to Luder's November 22 grievance alleging discrimination against him by both management at CCI and by Local 3394 based on his union affiliation. Complainants assert it was filed as a statutory grievance pursuant to Sec. 111.83(1), and not under the contractual grievance procedure. While it is a much closer question, the same reasons Knapton's November 6 grievance has been deemed to be a contractual grievance apply to Luder's November 22 grievance. The thing that sets it apart from Knapton's grievance is Luder's allegations of discrimination against him by Local 3394 and management in violation of his rights under Sec. 111.83(1) by not permitting him to file grievances under the contract. While this admittedly caused some confusion, 20/ the facts remain that the grievance was filed by Luder as a contractual grievance, that Schneider was aware Luder was no longer authorized to file such a grievance, and the grievance was procedurally deficient.

20/ The Employer could reasonably conclude it would not be appropriate to get involved in disputes between the Union and one of its members.

Complainants assert that where there is possible confusion as to whether a grievance is being filed as a contractual grievance or a statutory grievance, it is the employer's obligation, rather than the employee's, to clarify the matter. Complainants also assert that whether a

grievance is a statutory grievance cannot be based on the employee's knowledge of the legal difference between a statutory grievance and a contractual grievance. Depending on the situation, those assertions could be correct. 21/ There might well be situations where an employee's lack of knowledge as to filing a statutory grievance is no defense to a refusal to meet and confer. In this case, however, the confusion was created by the employee who

---

21/ The Examiner declines to speculate and make pronouncements on the obligations of employers and employees under Sec. 111.83(1) based on situations beyond the facts in front of him in this case.

---

had misinterpreted his rights under Sec. 111.83(1), and as he had previously with Knapton's grievance, attempted to exercise those rights in an erroneous manner, i.e., through the contractual grievance procedure. If Luder had wanted or expected DOC to treat the grievance as something other than a contractual grievance, it was up to him to so advise Schneider. 22/ According to the evidence, Luder made no further attempt whatsoever to contact his employer regarding his grievance, even when no one at CCI responded to it. While Schneider's ignorance of Sec. 111.83(1) is no defense in itself, under the circumstances, DOC was not obligated to take further action on the grievance.

22/ While one can only speculate since Schneider did not ask Luder, based on Luder's testimony, it appears likely that if he had, Luder would have confirmed he expected DOC to treat the grievance the same as any other grievance under the labor agreement.

Based upon the foregoing, the allegations of unfair labor practices against the Respondent Unions and the Respondent State have been dismissed in their entirety.

Dated at Madison, Wisconsin, this 8th day of April, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

David E. Shaw /s/

David E. Shaw, Examiner

DES/gjc
30167-B.doc