STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

COUNCIL 24, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO; WISCONSIN STATE EMPLOYEES UNION, and TOM CORCORAN, Complainants,

vs.

STATE OF WISCONSIN, DEPARTMENT OF CORRECTIONS, and WILLIAM GROSSHANS, Respondents.

Case 525
No. 61126
PP(S)–326

Decision No. 30340-A

Appearances:

Lawton & Cates, S.C., by **Attorney P. Scott Hassett**, Ten East Doty Street, Suite 400, P.O. Box 2965, Madison, WI 53701-2965, appearing on behalf of the Complainant WSEU.

Mr. David Vergeront, Legal Counsel, Department of Employment Relations, P.O. Box 7855, Madison, WI 53707-7855, appearing on behalf of the Respondent, Department of Corrections.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Daniel Nielsen, Examiner: The above-named Complainants having filed with the Commission a complaint, alleging that the above-named Respondents have violated the provisions of Ch. 111, Wis. Stats., by interfering with the right of the Union to investigate grievances and represent members; and the Commission having appointed Daniel Nielsen, an Examiner on its staff to conduct a hearing and to make Findings of Fact and Conclusions of Law, and to issue appropriate Orders; and hearings having been on held on the complaint on August 14 and 15, 2002, in Madison, at which time all parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant to the dispute; and the parties having submitted post-hearing briefs and responsive briefs, the last of which was received by the Examiner on January 2, 2003; and the Examiner being fully advised in the premises, 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 Complainant American Federation of State, County and Municipal Employees, Council 24, Wisconsin State Employees Union ("WSEU") is the exclusive bargaining representative for, among others, employees with the Department of Corrections Division of Community Corrections in the classifications of Probation and Parole Agents. Martin Beil is the Executive Director, and Karl Hacker is the Assistant Director of WSEU, and Scott Hassett was, at all relevant times, WSEU's attorney. WSEU's business address is 8033 Excelsior Drive, Suite C, Madison, Wisconsin.

2. The Complainant Tom Corcoran is a Probation and Parole Agent for the Department in Beaver Dam, and since 1996 has been the President of WSEU Local 2748, which represents professional social service employees of the State, including Probation and Parole Agents. Jeff Johnson, an Agent in the Wausau office, is Vice President and Chief Steward of the Local.

3. The Respondent Department of Corrections oversees the incarceration, rehabilitation and supervision of persons convicted of serious crimes. The Division of Community Corrections is principally concerned with supervising persons on probation or parole from the Department's custody. At all times relevant to this complaint, Jon Litscher was the Secretary of the Department of Corrections, William Grosshans was the Administrator of the Division of Community Corrections, and James Miller was the Regional Chief responsible for, among others, the Division's Oshkosh Office.

4. In February of 2002, the Oshkosh office of the Division of Community Corrections was overseen by Supervisors Todd Tim and Susan Ross. Among the staff assigned to the office were Agents Jennifer Coats, Terry Slife, Joan Keltish, Laura Welle and Bruce King.

5. The State of Wisconsin and WSEU are parties to a collective bargaining agreement covering State employees in six bargaining units, including the "Professional Social Services" unit which covers Probation and Parole Agents. The collective bargaining agreement includes provisions governing discipline, and procedures for reporting and pursuing sexual harassment claims:

ARTICLE IV

GRIEVANCE PROCEDURE

. . .

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.

4/9/2 An employe shall be entitled to the presence of a designated grievance representative at an investigatory interview (including informal counseling) if he/she requests one and if the employe has reasonable grounds to believe or has been informed that the interview may be used to support disciplinary action against him/her.

4/9/3 Unless Union representation is present during informal counseling or performance evaluation, disciplinary action cannot be taken at such counseling or performance evaluation meetings. The occurrence of an informal counseling or performance evaluation meeting shall not be used as the basis for or as evidence in any subsequent disciplinary action. Such a meeting can be used to establish that an employe had been made aware of the circumstances which resulted in performance evaluation or informal counseling.

4/9/4 If any discipline is taken against an employe, both the employe and local Union president, or his/her designee, will receive copies of this disciplinary action. If the supervisor and the employe meet to explain or discuss the discipline, a Union representative shall be present, if requested. When an employe has been formally notified of an investigation, and the Employer concludes no discipline will be taken at the present time, the employe shall be so advised.

4/9/5 No suspensions without pay shall be effective for more than thirty (30) days.

4/9/6 Where the Employer provides written notice to an employe of a pre-disciplinary meeting, and the employe is represented by a WSEU statewide local union, the Employer will provide a copy of such notice to the local union. Current practices between other WSEU local unions and the Employer will continue.

. . .

ARTICLE XI

MISCELLANEOUS

SECTION 1. Discrimination

. . .

11/1/8 An employe presenting a sexual harassment complaint to the Affirmative Action Officer of the Employer shall be entitled, at the employe's option, to the presence of his/her designated union representative or any other member of the employe's employing unit selected by the employe. Any advocate so selected by the employe shall respect the confidentiality of the affirmative action process. The time spent by the employe and his/her advocate in presenting said complaint shall be without loss of pay. An advocate, who is also a WSEU designated union representative, must make a disclosure of any potential conflict of interest to the claimant, if he/she may also represent the accused prior to any such presentation meeting.

. . .

6. On Friday, January 25, 2002, Agent Jennifer Coats confided in Agent Joan Keltish that Terry Slife had been making unwelcome comments to her over the prior year, and had several times engaged in uninvited touching of her shoulder, all of which made Coats feel sexually harassed. Accompanied by Keltish, Coats went to Supervisors Susan Ross and Todd Timm, and reported Slife's conduct. Ross and Timm told Coats that the Department would respond. After Coats and Keltish left, Ross and Timm contacted their immediate supervisor, Rose Snyder Sparr, and Regional Chief James Miller and advised them of the allegations.

7. After the meeting with Ross and Timm, Keltish spoke with Laura Welle, who along with Bruce King, was an on-site steward in Oshkosh for Local 2748. She told Welle of the meeting and its content, and also told her she had advised Coats not to give the supervisors any written statement. Keltish said that Coats was concerned that Slife would be disciplined, when what she wanted was to have someone talk to him and have him stop his behavior. Welle had the impression that Keltish had encouraged Coats to go to management, and she told Keltish that it had been a mistake to do so, since a supervisor in Appleton had recently been fired for sexual harassment, and management would go after Slife as a form of payback.

8. On Monday, January 28, Terry Slife approached Bruce King and informed him that he was being investigated for sexual harassment of Coats. Slife asked King to act as his steward. King told him that it would not be appropriate for him to act as the steward, since the case involved two co-workers in his office. King consulted with Laura Welle, who told him she

was aware of the matter and that Keltish had told her Coats was unhappy with how formally the Department was responding to her complaint. King and Welle discussed how best to proceed and they agreed to have Amy Huss, a steward in the Green Bay office, represent Slife.

9. Also on January 28, Sparr and Miller contacted Ross and told her that they were assigning Donald Vogt to investigate the sexual harassment allegation, and that he would begin that day. Ross told Coats this, and though she was visibly upset and crying, she said she would meet with Vogt that afternoon at the Training Center. However, Coats came to Ross's office later and told her she could not meet with Vogt that afternoon. Ross told Vogt not to come to Oshkosh, and also informed Sparr and Miller. They told her that Coats must meet with Vogt, and another session was set up for Tuesday, the 29th.

10. Sometime early in the week of the 28th, Jeff Johnson, an agent in Wausau who is the Vice President and Chief Steward of Local 2748, received a heads-up call from Assistant Division Administrator Sandy Powers, who served as a liaison with the Union. Powers told him Slife was the subject of an investigation for sexual harassment, and that the Department was considering suspending Slife pending an investigation. Johnson subsequently told Corcoran of the call.

11. On Tuesday, the 29th, Coats met with Vogt, the Department's investigator and told him of her concerns about Slife's conduct.

12. On Friday, February 1, King spoke with Coats. He told her he was aware of the complaint involving Slife, and asked her whether it was true that she was unhappy with the way the Department was responding. She said she was concerned that it was becoming so formal. A short time later, Corcoran called King and King discussed the matter with him. King walked across the hall to Coats' office, told her that Corcoran was on the phone, and asked if she wanted to speak with him. She said she would speak with him, and King transferred the call to her office. Coats and Corcoran spoke and agreed to meet that day. Corcoran said he would come to the office but Coats told him she would prefer to meet off-site and they agreed to meet for lunch at a local Perkins restaurant.

13. After speaking with Corcoran on the phone, Coats told Keltish that they were going to meet. Keltish took the information to Susan Ross, and reported that the Union was bothering Coats.

14. Later that day, Coats and Corcoran met at the restaurant. After introducing themselves and exchanging pleasantries, Coats described the situation with Slife. She told Corcoran that she wanted Slife talked to, and wanted his harassment stopped, but that she felt he was basically a good person and that she did not want him suspended or fired. She also told Corcoran she would like to speak on Slife's behalf if discipline was to be imposed. Corcoran told her that would probably not be possible, but that she would be able to testify if the matter went to arbitration. At some point in their conversation, Corcoran told her that he could represent her if she wished, but she did not make an express request for representation.

15. Corcoran took notes as Coats spoke. When she finished, Corcoran gave her a write-up of his notes of what she had said, and he told her that if she signed it, he would see to it that it was provided to management so that they would know how she felt before action was taken against Slife. Coats rejected Corcoran's write-up, because it described Slife's touching of her back as not being in a sexual manner. Corcoran told her that she should prepare the statement herself, in whatever words she felt were accurate. She wrote a memo, portions of which reflected Corcoran's wording and portions of which were her own wording **[Examiner's note: The portions of Coats' memo taken from Corcoran's version are shown in standard type face below, while Coats' wording is shown in italics, per Respondent's Exhibit #4]**:

> Feb. 1, 2002
> To: DOC Administration
> From: Jennifer Coats
> Re: Investigation
>
> I wish to clearly state my views concerning my co-worker, Terry Slife. As you know, I complained to Supervisor Susan Ross & Todd Timm, on 1-25-02 about matters that were bothering me.
> Terry Slife has been making personal remarks to me over the past year or so. While I did not encourage this, neither did I ask him to stop. The situation bothered me since approx. Sept 2001. This is approx when Mr. Slife rubbed me on my back for the first time. *Again, I did not encourage this, but I did not tell him to stop*.
> These verbal remarks & touching bothered me. I did not feel that I could deal with this situation by myself. I finally reported these things to management.
> I never requested or wanted a formal investigation. *(This current situation is stressing me out beyond belief.)*
>
> *In terms of disposition, I would like Terry to stop making these comments & touching my back. I feel he needs to be reprimanded but, I do not feel or want Terry to be fired or suspended. I believe Terry is a very nice individual & is very good @ his job as a prob/parole agent. All I wanted was for Terry to be warned and for everything to stop, not for Terry's job to be in jeopardy*.
>
> Thank you,
> /s/ Jennifer Coats
> Statement witnessed by Tom Corcoran

Corcoran took her signed statement and asked for her address and contact numbers, so that he could mail her a copy of the statement and keep her informed. She provided him with the information.

16. Coats returned to the office after meeting with Corcoran and told Keltish she had met with Corcoran. Keltish told her she did not have to give Corcoran any written statement. She told Keltish that Corcoran had initially prepared a statement that she felt was inaccurate and had refused to sign, but that she had then provided him with a statement saying she did not want Slife disciplined. Keltish then went to Susan Ross and told her that Corcoran had tried to have Coats sign a statement recanting her allegations.

17. After the meeting with Coats, Corcoran called Sandy Powers. Corcoran told Powers that he had met with Coats, and that she was concerned that the Department was carrying the problem with Slife further than she wished. He advised Powers that she had provided a statement, and that management should review the statement before they proceeded with discipline against Slife. Corcoran then faxed Coats' signed statement to Powers.

18. On February 4th, Slife and Steward Amy Huss met with Vogt for an investigatory interview. Huss had a copy of Coats' written statement with her. Corcoran had provided it to her, asking that it not be shared with Slife. She provided the letter to Vogt, who said it was consistent with what Coats had told him in their interview.

19. On Monday, February 4th, Coats sent an e-mail to Ross asking if she could be allowed to work at home for awhile. They met and Coats expressed distress at the atmosphere in the office, and said she had heard comments suggesting she should not have reported Slife to management. Ross agreed to let her take work home.

20. On Tuesday, February 5th, Division Administrator William Grosshans sent Corcoran a memo, ordering him to have no further contact with Coats, or with any other witness, about the case:

February 5, 2002

. . .

Dear Mr. Corcoran:

> As you know management is conducting an official personnel investigation into a complaint of sexual harassment by an agent at our office located at 300 South Koeller Street in Oshkosh. I know you have had discussions with the complainant since the commencement of this investigation.
>
> By this letter I am directing you not to discuss the subject of this investigation with the complainant or other witnesses including any employees of this unit, with the exception of Agent Slife in the course of representing him

in this process. I recognize that you are president of Local 2748, nonetheless, we will not tolerate any interference with this official Department of Corrections process.

Sincerely,
/s/ William Grosshans
Administrator

. . .

The letter was delivered to Corcoran on the 6th. That same day, Welle and King were advised by Regional Chief James Miller that Slife was being temporarily reassigned to another office. At the same time, Miller verbally instructed the two stewards that they were to refrain from speaking with other employees about Coats' charges against Slife.

21. Late on the evening of the 6th, Corcoran responded to Grosshans' letter with an e-mail, asserting there was no interference with the Department investigation, criticizing the Department's conduct in the case, and stating that the Union was within its rights in meeting with its members:

. . .

Dear Mr. Grosshans,

Your letter to me dated Feb. 5th [delivered Feb. 6th] represents a classic example of someone not wanting the facts to get in the way of where they are headed. DCC Administration has apparently prejudged Mr. Slife and totally disregarded the wishes and well-being of Ms. Coats.

For the record, Ms. Coats freely met with me on Feb. 1st and willingly provided a written statement to me. In fact, she insisted on meeting with me away from the Oshkosh P&P office, due to her feeling pressured by management there. My understanding is that Ms. Coats' lack of confidence in management caused her to decline providing your investigator with a statement.

To suggest that the union pursuing its' own investigation constitutes "interference" with your "official process" is both false and offensive!

DCC's decision-making relative to this entire matter has been extremely suspect, with the forced relocation of Mr. Slife today, almost two weeks after allegations surfaced, designed only to pressure and humiliate him. It does nothing to help Ms. Coats, in fact it exacerbates the situation. I have to wonder if you are now trying to get them both to resign.

At this juncture, I request that you rescind, in writing, the illegal gag order that you issued to me today. Further, I request that you return Mr. Slife to the Oshkosh office where he belongs, immediately.

> Mr. Grosshans, in order to be respected, one must show respect. Food for thought.
>
> Yours very truly, Tom Corcoran AFSCME Local 2748 President

In addition to the e-mails, Corcoran spoke with WSEU Assistant Executive Director Karl Hacker. Hacker's reaction was that the Division could not dictate to the Union which of its members it could speak with, and he told Corcoran he would have the Union's legal counsel send Grosshans a letter to that effect.

22. On February 8th, Scott Hassett, the legal counsel for Council 24, wrote to Grosshans, protesting his memo to Corcoran as inappropriate. He stated that Ms. Coats had expressed a desire to meet with Corcoran, and he pointed out that Section 11/1/8 of the collective bargaining agreement allowed employees bringing sexual harassment charges to be assisted by a Union or employee representative:

> 11/1/8 An employe presenting a sexual harassment complaint to the Affirmative Action Officer of the Employer shall be entitled, at the employe's option, to the presence of his/her designated union representative or any other member of the employe's employing unit selected by the employe. Any advocate so selected by the employe shall respect the confidentiality of the affirmative action process. The time spent by the employe and his/her advocate in presenting said complaint shall be without loss of pay. An advocate, who is also a WSEU designated union representative, must make a disclosure of any potential conflict of interest to the claimant, if he/she may also represent the accused prior to any such presentation meeting.

Hassett advised Grosshans that Corcoran "was acting within that context in his contact with complainant, and I believe the union has a right and responsibility to do so when requested." He also enclosed a copy of an opinion letter he had prepared four years earlier for Council 24, outlining the Union's responsibilities in sexual harassment cases. That letter stated, in part:

> . . .
>
> That does not mean the Union can ignore allegations of this nature, and the Union is inviting liability if it attempts to coerce members into not reporting such activity to management, or if it threatens retaliation for reporting discrimination.
>
> I suggest the following steps in cases where a member brings allegations of sexual harassment to the attention of a steward or other union officer:
>
> 1. Advise the employee that management has a duty to respond to such allegations, but not until its advised of the situation. That is a decision the individual employee has to make.

2. Offer our own assistance in handling the matter. We might be able to speak to the offending person and resolve the situation to everyone's satisfaction without involving management.

3. If it cannot be handled successfully by the union, on an informal basis, advise the member again of management's responsibility to act and offer assistance to the member in reporting the allegations, if requested. Obviously, if another one of our members was implicated, we would then assign a different steward to represent him or her.

The point I want to make is that, while the union does not have a duty to pass on allegations of this nature to management, it does have a duty to advise and assist its members in these situations.

. . .

23. On February 12th, after speaking again with Hacker, Corcoran called Coats and told her that management had issued a gag order against him and the Union, but that he was still entitled to represent her. He read her excerpts of Hassett's opinion letter, and told her that this was an argument between the Union and the State. In the course of the conversation, he expressed the opinion that the State was overreacting to the incidents with Slife. The conversation lasted about a half an hour. Afterwards, Corcoran mailed Coats a copy of Grosshans' memo and Hassett's letter.

24. After the conversation with Corcoran, Coats told Keltish that he had telephoned her. Keltish went to Susan Ross and told her that Coats was a wreck, and that people should leave her alone. She told Ross that Coats had said Corcoran had just called her again. Two days later, Ross mentioned this to Ron Kallmuss, one of her Department level supervisors, who said she should report it to Grosshans. James Miller was asked to follow up on this and speak with Coats about Corcoran's contacts with Coats. He talked to her on February 15th. She said Corcoran had called her on the 12th, and spoke with her for about 30 minutes. Coats told Miller that Corcoran did most of the talking, and told her that a gag order had been issued against him, but that he could still talk to her as a member of his Union. He read some legal papers to her and talked with her about the Union's rights. He also told her that if Slife's case went to arbitration, she would have a chance to testify.

25. On February 18th, Department of Corrections Legal Counsel Kevin Potter replied to Hassett's letter. He characterized Grosshans' memo as a necessary step to preserve the integrity of the Department's investigation, and asserted that Corcoran was not in any way representing Coats in the meeting, since Coats was not in need of representation. Potter

concluded that Coats would be entitled to ask Corcoran to accompany her to meetings regarding her complaint, but that failing a request by her, Corcoran was obligated to refrain from having contact with her or face discipline for insubordination:

. . .

Dear Mr. Hassett:

I am writing in response to your February 8, 2002 correspondence to William J. Grosshans Administrator, Division of Community Corrections in which you outlined Council 24's position regarding a contact made between Tom Corcoran and a complainant in a sexual harassment investigation at the Oshkosh Probation and Parole Office. In your letter you indicated that the union has taken exception to Mr. Grosshans' February 5, 2002, letter to Mr. Corcoran directing him to have no further contact with the complainant. You also pointed out that under section 11/1/8 of the union's contract with the state, an employee presenting a sexual harassment complaint to his/her employer is entitled, upon request, to the presence of a union representative for the purpose of presenting the complaint to management. The union contends that Mr. Corcoran was merely acting within that context when he had contact with the complainant.

At the outset I would like to make it clear that the Department does not contest an employee's right to have a union representative present when presenting a sexual harassment complaint to the employer. In this case the complainant chose to voice her initial complaint without the assistance of a union representative. As you yourself acknowledged in your March 12, 1998 letter to Karl Hacker, once the Department received these allegations it had a duty to respond. The Department did so by immediately undertaking an investigation of the complainant's allegations. In order to insure the integrity of the investigation and to protect the complainant from retaliation or pressure from other parties, Mr. Grosshans temporarily reassigned the subject of the investigation to another office and ordered other employees not to discuss the investigation with the complainant or other witnesses. These are steps which the Department is well within its rights to take as an employer.

You indicated to me in our telephone conversation of February 14, 2001 that Mr. Corcoran felt it was necessary to meet with the complainant in order to prepare for future meetings with management regarding this matter. Since the complainant is not the subject of the investigation for purposes of potential disciplinary action, and the meetings would be of a fact finding nature, we do not believe that a preparatory meeting was necessary. On the contrary, such a meeting has the potential of having a chilling effect on the complainant's willingness to cooperate and provide complete and accurate information,

especially when the subject of the investigation is another union member. It is essential to a fair and impartial investigation that the Department's ability to investigate these types of allegations be in no way impeded. Union activity in the midst of this investigation risks such impediment.

If the complainant wishes to have Mr. Corcoran accompany her during any future investigatory interviews by management regarding this matter, he is certainly entitled to be present. In the meantime however, it is expected that he will continue to comply with Mr. Grosshans' prior directive not to discuss this investigation with the complainant or other employees of her unit. Should he fail to do so he could be subject to disciplinary action for insubordination.

Thank you for your consideration with regard to this matter. In the event you should have any questions or concerns please feel free to contact me.

Sincerely,

/s/ Kevin Potter
WI Department of Corrections
Chief Legal Counsel

26. On March 5th, Hassett replied, advising Potter of the Union's view that Corcoran's rights and protections extended well beyond any role under Section 11/1/8 of the contract and that, absent any effort at coercion, the Union had the right and duty to be involved in matters such as these:

. . .

Mr. Grosshans is free to order co-employees of the complainant not to discuss issues or facts raised by the investigation, but he has no basis to order Union officials to refrain from speaking to their own members on this subject. As a Union official, Mr. Corcoran is engaged in mutual aid and protection under § 111.82, and interference with that activity constitutes an unfair labor practice under § 111.84(1), stats.

You state that "(u)nion activity in the midst of this investigation risks such an impediment." The DOC cannot inhibit Union activity of this nature and, in fact, it falls within the responsibilities of the Union. I recognize that coercion is a different issue, but that is not evident in this case and our leadership has been advised that coercion is not protected activity and that the Union is potentially liable for such activity.

> We are advising Mr. Corcoran and other Union leadership in the Department of Corrections that this is protected activity and if anyone is disciplined for speaking to our membership about this matter, we will respond in an unfair labor practice proceeding.
>
> . . .

27. Also on March 5th, Corcoran was in Madison for a negotiating session with Grosshans and other Division officials. At the end of the meeting, Grosshans asked to meet with him privately. He told Corcoran that he had been advised he had spoken with Coats after the memo ordering him not to, and he handed Corcoran a notice of an investigatory interview. The notice stated the purpose the interview as being an effort to determine whether he had failed to comply with Grosshans' directive, and cautioned him that failure to answer all questions truthfully would constitute insubordination and subject him to discipline.

28. On March 11th, Corcoran met for three hours with two Department investigators. In the course of the interview, he conceded that he had initiated a telephone call to Coats on February 12th and had told her that he'd received a letter from Grosshans seeking to limit his Union activities as her representative. He said the content of the call was an expression of continuing support from the Union, and an explanation that there was legal wrangling going on between the Union and the State about the Union's right to represent her.

He was asked if she had ever asked him to act as her representative, and he said she had, in the course of their February 1st meeting, when he witnessed her written statement and agreed to represent her if their were further interviews or any other matters she wished to discuss. The investigators asked if he had arrived at the February 1st meeting with a prepared statement for her to sign, and he said he had not. He also said he had not arrived at the meeting with anything for her to sign. He was asked when the written statement came up during their conversation, and he replied that she wrote up a statement after lunch and he witnessed it for her. He told the investigators that he had not discussed the substance of the investigation with anyone, other than the February 1st meeting with Coats.

At the end of the interview, Corcoran made a statement. One of the points he made was that Grosshans' memo was not a bar on all contact with Coats, but merely a bar on discussions about the subject of the investigation.

29. After the interview with Corcoran, Jim Miller and DACC Superintendent Sherri Graeber interviewed Coats. They asked if she had ever approached Corcoran and asked him to officially represent her. She said she had not, though Corcoran offered to provide her with representation. However, she felt she was not in need of representation. They asked if he had presented her with a "pre-worded statement" or write out a statement for her signature. She said that after they talked on February 1st, he wrote a statement, but that she did not like some of what he had written, and wrote out her own version.

Coats was asked whether she contacted Corcoran on February 12th or asked him to call her. She said he initiated the call, and asked how she was doing. He read some union material to her, and also mailed it to her. Coats said she had the impression that Corcoran was sympathetic to Slife's situation, and this bothered her and made her wonder at his motives for calling her. At the end of the interview, they asked her to write a statement:

3/25/02

> I never called Tom Cochoran [sic] nor did I ask him for union representation based on the fact I did not feel I needed such.
>
> I had contact with Tom Cochoran [sic] on Feb 1st & Feb 12, 2002. I did not ask him to represent me on these dates based on the same – I did not feel I needed representation.

30. On March 17th, the instant complaint was filed, alleging that the February 5th memo from Grosshans and the subsequent investigation of Corcoran constituted interference with the Union's protected rights.

31. A second investigatory interview with Corcoran was conducted on April 9th. Following that interview, a pre-disciplinary meeting was conducted for the purpose letting Corcoran present any information that had not been presented during the interviews. Corcoran prepared a written statement:

. . .

> In reference to the 03-11-02 and 04-09-02 Investigatory Interviews, I have answered all questions asked to the best of my ability, with my memory of the facts, and with my notes.
>
> My involvement with Jennifer Coats was acting in my capacity as elected president of Local 2748, which requires me by the constitution and by-laws of our union, to assist and represent 3,000+ Professional Social Services employees.

. . .

32. On May 15th, Corcoran was directed to report to Department Secretary Jon Litscher's office. Litscher told him he was going to receive a letter of reprimand, principally because the Department had determined that Coats had never requested that Corcoran act as her Union representative:

. . .

Dear Mr. Corcoran:

This letter shall serve as a formal reprimand for your violations of the following Wisconsin Department of Corrections Work Rules:

> **Work Rule # 1**: *"Insubordination, disobedience, or failure to carry out assignments or instructions."*
>
> **Work Rule #6**: "*Falsifying records, knowingly giving false information, or knowingly permitting, encouraging or directing others to do so. Failing to provide truthful, accurate, and complete information when required."*

You have acknowledged receipt and understanding of the Wisconsin Department of Corrections Work Rules.

By letter dated February 5, 2001 I directed you "…not to discuss the subject of the [Coats/Slife] investigation with the complainant or other witnesses including any employees of this unit with the exception of Agent Terry Slife in the course of representing him in this process." Despite this clear directive, you telephoned Agent Coats on or about February 12, 2002 to discuss her complaint against Agent Slife. You were in pay status when you made this call.

During the course of the disciplinary investigation of your violating the February 5, 2002 directive, you provided inaccurate information. Specifically, on March 11, 2002, you stated that on or about February 1, 2002, Agent Coats requested that you act as her union representative in this investigation. Your statement was determined to be false.

Also, during the March 11, 2002 investigatory interview, you denied having presented a statement to Agent Coats for her signature on or about February 1, 2002. The statement concerned her complaint against Agent Slife. It has been determined through this investigation that in fact you did provide Agent Coats with a statement which she refused to sign.

On March 11, 2002, an investigatory interview was conducted with Denis Sutton, DACC Superintendent Patrick Melman, DACC Captain, Daph Knutson, your union representative, and you present. During the course of this interview you admitted violating the February 5, 2002 directive by calling Agent Coats to discuss the investigation with her.

On April 9, 2002 a predisciplinary hearing was conducted with Sheryl Graeber, DACC Superintendent, Steve Sutton, WCC Assistant Superintendent, Harvey Hoeft, your union representative, and you present. During this hearing you

were given an opportunity to respond to the allegations of misconduct. You again admitted that you had a conversation with Agent Coats after receiving the February 5, 2002 directive. You also submitted a written statement, admitting the conduct.

Based on the results of the investigation, including your admissions, I have concluded that you violated DOC Work Rule #1 when you did not comply with my February 5, 2002 directive by discussing the subject of the investigation with the complainant and other witnesses. In addition, I have concluded that you violated DOC Work Rule #6 when you failed to provide truthful, accurate and complete information as required during the investigation. This conclusion is based on your statements during the investigatory interview which are not consistent with information received during the investigation.

* A review of your personnel file indicates you have had no other formal discipline within the last twelve-month period.

* Your credibility as an agent has been negatively affected by your misconduct.

If you believe this action is being taken for reasons other than just cause, you may file a grievance in accordance with Article IV of the WSEU Collective Bargaining Agreement.

Sincerely,
/s/ William Grosshans

. . .

33. On May 29th, the Union amended the instant complaint to add an allegation that the discipline imposed on Corcoran constituted interference with the Union's protected rights.

34. During the meeting between Corcoran and Coates on February 1, as described in Finding Nos. 14 and 15, Corcoran did not attempt to coerce Coates into recanting or materially changing her allegations against Terry Slife.

35. The conduct of Thomas Corcoran in meeting with Jennifer Coats, agreeing to convey her concerns about the Department's handling of the Slife investigation, and in conveying those concerns, was lawful, concerted activity for the purpose of mutual aid or protection. Coats' request that he convey her sentiments constituted a request for representation.

36. The memorandum from William Grosshans directing Corcoran to refrain from contacting Coats and other employees about the Slife investigation had a reasonable tendency to interfere with the exercise of rights guaranteed by Sec. 111.82, SELRA, and did interfere with those rights.

37. In the telephone conversation between Corcoran and Coats on February 12th, as described in Finding of Fact No. 23, Corcoran did not discuss the substance of the Slife investigation, and did not violate the directive issued by Grosshans.

38. Corcoran's statement to investigators on March 11th that he was acting as a representative for Coats on February 1st, and that she had asked for representation, was a substantively accurate statement.

39. Corcoran's statements to investigators on March 11th that he had not arrived at the February 1st meeting with a written statement or any other written document for Coats to sign, and that she had hand written the statement at the end of lunch were accurate.

40. Corcoran's statements to investigators on April 9th that he had not written out statement for Coats to sign was technically inaccurate, in that he had written his notes out in a memo format and provided them to Coats. To the extent that Corcoran's statement on April 9th was intended to deny that he provided Coats with a false statement seeking to exonerate Slife, his statement was accurate.

41. The imposition of discipline on a Union President for insubordination, based upon an inaccurate allegation of having had contact with a member of the bargaining unit in violation of an order which reasonably tends to interfere with the exercise of protected rights, itself reasonably tends to interfere with the exercise of rights guaranteed by Sec. 111.82, SELRA.

42. The imposition of discipline on a Union President for insubordination, based upon an inaccurate allegation of making false statements to investigators regarding representational activities reasonably tends to interfere with the exercise of rights guaranteed by Sec. 111.82, SELRA.

43. The imposition of discipline on a Union President for insubordination, based upon an allegation of making false statements to investigators regarding representational activities, where the answer is false only in a technical sense, and where the false statement was not made on the date alleged in the discipline, but rather in a follow-up interview at a time when the discipline had already been decided on, reasonably tends to interfere with the exercise of rights guaranteed by Sec. 111.82, SELRA.

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

CONCLUSIONS OF LAW

1. The Complainant, Thomas Corcoran, is an agent of the Complainant Wisconsin State Employees Union, Council 24, AFSCME, AFL-CIO, which is a "labor organization" within the meaning of Sec. 111.81(12), SELRA.

2. The Respondent William Grosshans is an agent of the State of Wisconsin, the "employer" within the meaning of Sec. 111.81(8), SELRA.

3. By the acts described in the above and foregoing Findings of Fact, specifically by issuing an order directing Thomas Corcoran not to have any contact with Jennifer Coats and other bargaining unit employees, the Respondent Employer interfered with the Complainants' protected rights guaranteed by Sec. 111.82, and thereby committed an unfair practice within the meaning of Sec. 111.84(1), SELRA.

4. By the acts described in the above and foregoing Findings of Fact, specifically by imposing discipline on Thomas Corcoran for contacting Jennifer Coats on February 12, 2002, and for allegedly making inaccurate statements in the course of the investigation, the Respondent Employer interfered with the Complainants' rights guaranteed by Sec. 111.82, and thereby committed an unfair practice within the meaning of Sec. 111.84(1), SELRA.

On the basis of the above and foregoing Conclusions of Law, the Examiner makes and issues the following

ORDER

1. IT IS ORDERED that the Respondent, State of Wisconsin Department of Corrections, will immediately:

Cease and desist from ordering the President of the Local Union to refrain from having contact with members of the bargaining unit about matters related to mutual aid and protection, except to the extent that such an order may be allowed under existing, agreed protocols for the conduct and protection of internal investigations;

2. Take the following affirmative actions which will effectuate the purposes of the Act:

a. Rescind the letter of reprimand issued to Thomas Corcoran, and remove all references to the letter of reprimand from the personnel file of Thomas Corcoran and from all other files related to Thomas Corcoran's employment with the State of Wisconsin.

b. Notify all employees, by posting in conspicuous places in the Oshkosh, Beaver Dam and Madison offices where employees are employed, copies of the Notice attached hereto and marked "Appendix A." This notice shall be signed by the Director of the Division of Community Corrections, and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for a period of thirty (30) days thereafter. Reasonable steps shall be taken by the Respondent to insure that this Notice is not altered, defaced or covered by other material.

c. Notify the Wisconsin Employment Relations Commission within twenty (20) days following the date of this Order of the steps taken to comply herewith.

Dated at Racine, Wisconsin, this 15th day of August, 2003.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel J. Nielsen /s/

Daniel J. Nielsen, Examiner

APPENDIX "A"

NOTICE TO ALL DIVISION OF COMMUNITY CORRECTIONS EMPLOYEES

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

1. WE WILL NOT INTERFERE with the right of employees and their chosen representatives to engage in lawful concerted activity for the purpose of mutual aid and protection;

2. WE WILL IMMEDIATELY RESCIND the written reprimand issued to WSEU Local 2748 President Thomas Corcoran on April 9, 2002, and remove all reference to that reprimand from the personnel files maintained by the Department.

STATE OF WISCONSIN
DEPARTMENT OF CORRECTIONS
DIVISION OF COMMUNITY CORRECTIONS:

_____

By Director of Division of Community Corrections Date

THIS NOTICE WILL BE POSTED IN THE LOCATIONS CUSTOMARILY USED FOR POSTING NOTICES TO EMPLOYEES FOR A PERIOD OF THIRTY (30) DAYS FROM THE DATE HEREOF. THIS NOTICE IS NOT TO BE ALTERED, DEFACED, COVERED OR OBSCURED IN ANY WAY.

DEPARTMENT OF EMPLOYMENT RELATIONS (DEPARTMENT OF CORRECTIONS)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

The factual background of the complaint is set forth in the Findings of Fact, but is briefly restated here. At the end of January, 2002, Jennifer Coats, a probation and parole agent with the Department of Corrections in Oshkosh, made a sexual harassment complaint against Terry Slife, another agent in the Oshkosh office. Shortly after making the complaint, she met with Tom Corcoran, the President of the WSEU Local representing agents. In the course of their conversation, she expressed concern that management was going to discipline the other agent, when what she wanted was simply for someone to speak with him and get him to stop. Corcoran wrote a statement based on their conversation and said he would see to it that it was brought to management's attention. Coats did not agree with the statement he wrote, principally because he characterized the other agent's touching of her shoulder and back as not being sexual contact. He told her to write the statement as she wished, and she did so, copying large portions of his write-up. She signed the statement, which disclaimed any interest in having Slife suspended or fired, and gave it to Corcoran. Later that day, Corcoran spoke with the Department's liaison and provided him with a copy of the statement.

Several days after the meeting with Coats, Corcoran received a memo from William Grosshans, the Administrator of the Division of Community Corrections. The memo informed him that Grosshans was aware of his conversation with Coats, and directed him to refrain from having any further contact with anyone about the investigation:

. . .

> By this letter I am directing you not to discuss the subject of this investigation with the complainant or other witnesses including any employees of this unit, with the exception of Agent Slife in the course of representing him in this process. I recognize that you are president of Local 2748, nonetheless, we will not tolerate any interference with this official Department of Corrections process.

. . .

Corcoran took issue with Grosshans' directive, as did the WSEU. On February 12th, he called Coats and told her he had been gagged, but that the Union had to right to communicate with its members. Coats mentioned the phone call to a co-worker, Joan Keltish, who reported it to management. An investigation was conducted, and Corcoran was given a written reprimand for

insubordination. The insubordination consisted of contacting Coats after Grosshans issued him memo, and in telling investigators that Coats had asked him to represent her and denying that he had given Coats any statement to sign, claims that the Department judged to be untrue.

ARGUMENTS OF THE PARTIES

Complainant's Initial Brief

The Complainant takes the position that the attempt to gag the President of Local 2748 and its other representatives, and prevent them from speaking with employees about matters related to employment, and the Department's subsequent enforcement of the gag order against the Union President, are acts of flagrant coercion, restraint and interference. The various explanations offered by the Department are generally irrelevant or untrue.

The Department contends that Tom Corcoran was not representing Jenny Coats when he spoke with her at the Perkins restaurant on February 1, 2002. They base this, in part, on Coats' belief that she did not need representation, because representation is only for people who have done something wrong. That may be her belief, but the Department is well aware that the role of the Union in representing employees goes well beyond counseling those who are to be disciplined. Moreover, her understanding of that one word cannot obscure the facts that she felt Tom Corcoran was there acting on her behalf, and that he did act on her behalf. Coats was interested in making sure the Department did not go too far in responding to her complaints about Slife – that he not be fired. Tom Corcoran obtained a truthful statement from her to that effect. The statement she provided to him on February 1st resulted in a penalty of 15 days of suspension, a penalty that even the State admits was reduced because of Coats' input. Tom Corcoran was the one who made sure her input was heard. Plainly, that was an act of representation.

The Department was clearly angered by Corcoran's meeting with Coats, as well as by other points of contention with the Union, and it responded with a gag order prohibiting contact with her. However, that gag order was limited to prohibiting Corcoran and the two on-site stewards from having contact with her and other employees – it did not extend to others in the office such as Keltish, the self-appointed intervenor whose apparent purpose was to stir things up. A gag order against the Union alone is an obvious violation of 111.80, Stats. It interferes only with the Union's activities, and does not protect the integrity of the Department's investigation nor any other legitimate Departmental interest. While the verbal gag order to the on-site stewards has not been pled as an unfair labor practice, it sheds light on the very narrow scope of the Department's concern with limiting discussion about this investigation.

The record evidence establishes that Tom Corcoran became involved in this matter because he was approached and was asked to become involved. His actions were completely

above board and completely consistent with his obligations as a Union official. The Department's retaliation against him was clearly an act of interference, and the Examiner should so find.

The Respondent's Reply Brief

The Respondent takes the position that it has the right and the responsibility to protect employees who report sexual harassment and that this extends to protecting them against coercion by the Union. The evidence is overwhelming that, at the February 1st meeting at Perkins, Corcoran attempted to coerce Ms. Coats and interfere with the Department's on-going investigation. Coats' testimony was that Bruce King suggested to her that management was going to do a poor investigation and would punish Slife more seriously than he deserved, and it was he who set up a meeting with her and Corcoran. Throughout, King was solely motivated by a desire to help Slife, the harasser, escape the discipline he deserved. To this end, he involved Union President Corcoran, a powerful figure who could manipulate Coats. Corcoran purported to be Coats' friend, then took over the effort to undermine her report of sexual harassment by preparing and urging her to sign a statement that would have effectively recanted her charges against Slife.

The Department notes that Coats, who was under tremendous pressure throughout from the time she first reported the harassment to the day of the unfair labor practice hearing, nonetheless remained absolutely consistent in her testimony. She had no motive to get involved in a dispute with a powerful figure such as Corcoran, yet she truthfully reported his attempts at coercion. She truthfully reported that she never felt the need for representation, never asked for representation, and was not offered representation. While the Union claims that Mr. Corcoran was acting as her representative, the facts of his meeting with her tell a completely different story. Again, he sought to have her sign an untrue statement, one that would have gutted the case against her harasser. Her overall impression was that he was on Slife's side. That impression was correct. Even the Union admits that acts of coercion against the complaining party to a sexual harassment case are not protected activity. Given Corcoran's conduct, he had no statutory protection and richly deserved to be disciplined.

Even if the Examiner somehow concluded that Corcoran did not actually coerce Coats during the February 1st meeting, the Department was justified in taking the cautionary step of telling him not to have further contact with anyone but his accused member until the investigation concluded. Coats spoke to Keltish, who then told Ross that the Union was leaning on Coats. This constitutes credible information that a witness was being coerced. That is the information provided to Grosshans, and that is the information to which he responded. Thus, there was no unfair labor practice committed by Grosshans' February 5th memo. It was narrowly tailored to prevent unlawful interference with the investigation. It did not prohibit all contact between Corcoran and Coats – only contact about the investigation and any efforts to interfere with the investigation. Nor did it prevent Coats from being represented if she wished

to be represented. Corcoran could surely have found someone other than the statewide President to represent her if she asked for help. The same is true of the memo's effect on contacts with other employees – Corcoran was free to discuss anything with them, but the investigation. Given the great danger of tampering with the investigation, the minor restrictions in Grosshans' memo cannot be viewed as interference.

The Department notes that Corcoran is an employee of the Department, not an independent Union employee. As such, his actions can bring liability on the Department. The Department had reasonable grounds to believe that he was interfering with an investigation and coercing a complainant in a sexual harassment case. If the Department did nothing in response to this information, it would be guilty of condoning both harassment and retaliation against those who report harassment, and it would incur substantial liability. The Department has the right to avoid that liability, as well as the chilling effect such condonation would have on employees who seek wish to report harassment. It is well settled that actions taken on the basis of a legitimate business justification do not constitute interference. Viewing the evidence in the light that the State views it, Corcoran was engaged in illegal coercion of a complaining witness. Viewing it in the light most favorable to Corcoran, the Department acted on a reasonable belief that he was engaged in such conduct. Either way, the Department is legally obligated to protect the complaining witness and the integrity of its investigation. Compliance with the law regarding sexual harassment is obviously a legitimate business interest of the State.

Even assuming for the sake of argument that the Department did not have the right to impose an order regulating Mr. Corcoran's interactions as a Union official, it remains the fact that he is also an employee. As such, he is not free to disregard Grosshans' memo just because he disagrees with it. He is instead obligated to obey now and grieve later. Yet, he felt the need to call Coats on February 12th, a call that Coats said left her feeling Corcoran was on Slife's side in the harassment case. The evident main purpose of this call was to give him an opportunity to recast the February 1st meeting as an effort at representation. However, whatever its purpose, he must have in some fashion discussed the merits of the case to leave Coats with that impression. In so doing, he violated the directive.

In response to the Union's brief, the Department urges the Examiner to ignore the rhetoric about Corcoran's discipline violating the statutory ban on coercing, intimidating or interfering with protected activity. The truth is that he was disciplined for insubordination and making false statements. Only if his version of the February 1st meeting is accepted can the Examiner conclude otherwise, and the evidence simply does not allow that conclusion. Likewise, the Union's claim that Grosshans acted against Corcoran because of other labor-management disagreements must be disregarded as simply unproved. Certainly, there were areas of discord in the relations between the Local and the Department, but that is not uncommon in labor relations and it is not proof of animus. The February 5th memo was issued because management believed Corcoran had stepped over the line into unprotected, illegal activity and it had a duty to stop his activity. Ultimately, the Examiner must conclude that the

Department had a legitimate business reason for directing Corcoran to refrain from contacting Coats. That conclusion must, in and of itself, yield the conclusion that there was no unfair labor practice.

The Complainant's Reply Brief

The Complainant argues that the Department's theory largely depends upon the Examiner's acceptance of a wild conspiracy theory, in which Tom Corcoran for some reason decided to personally intervene to protect a sexual harasser of one of his members, a man whom he had met perhaps once in his life. By the State's reckoning, Corcoran pursued this by working against the interests of Coats, another member he hardly knew. The proof of this conspiratorial action is that he prepared notes of their meeting and let her review them in writing up her statement. She disagreed with one of his notes, to the effect that Slife's touching her shoulder was "non-sexual." He responded by having her write her own version of events, leaving out anything she disagreed with.

The Union observes that touching the shoulder is not "sexual touching" as that term would be understood in criminal law and would be used by probation and parole agents. Thus, it is unsurprising that Corcoran would characterize it that way in his notes. However, no one, including Corcoran, ever suggested that Slife's touching of Coats' shoulder was not part of a series of actions constituting sexual harassment. Whether or not her statement characterized the touching of her shoulder as harassment or sexual touching would not have changed the substance of her charge against Slife, nor his exposure to discipline. Thus, the State's evidence of attempted coercion amounts to a reasonable difference of opinion about how something should be characterized, a difference of opinion in which Corcoran was plainly correct, but did not push his views. This is an absurd basis on which to pursue discipline against the President of the Local Union.

The Department further strains credulity when it tries to turn Corcoran's February 12th call into an effort to establish an alibi of sorts for the February 1st meeting. Coats' own testimony was that Corcoran spoke mostly about the gag order and read to her from documents concerning the gag order. He was clearly upset by the gag order, and had obtained advice from AFSCME Council 24 and legal counsel that the order was illegal. His only purpose in calling her was to discuss the illegality of the gag order and to reassure her that she could still get assistance through him if she wished. That was consistent with his duties as Union President and with the terms of Grosshans' order.

DISCUSSION

SELRA protects the rights of workers to engage in concerted activity:

> **111.82 Rights of employees.** Employees shall have the right of self–organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing under this subchapter, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection. Employees shall also have the right to refrain from any or all of such activities.

Employer conduct which has a reasonable tendency to interfere with the free exercise of the rights guaranteed employees under Sec. 111.82, violates Sec. 111.84(1), even if the employer did not subjectively intend to interfere with or coerce employees in the exercise of those rights, and even if no coercion actually resulted.

The Nature of the Activity and the Findings of Fact

The activity which the State sought to regulate in this case, both through the Grosshans memo and through the subsequent investigation and use of discipline, was Corcoran's communication with Coats about her harassment complaint against Slife. Corcoran is the President of the Local Union to which Coats and Slife belong and, on its face, communicating with the members of the union is core protected concerted activity. Basic to the State's argument is that Corcoran's activity did not merit the protections of SELRA, because he went past any legitimate communication and was, in fact, engaged in an effort to manipulate and coerce Coats into dropping or substantially weakening her complaint against Slife. Not all communications are protected simply because one party is a Union official, and soliciting an employee to lie to management investigators is not a protected activity. Thus, if Corcoran was actually engaged in an effort to coerce Coats into providing false information to management, his conduct loses the protections of the Act. That said, there is simply no evidence to support that claim.

The February 1st Meeting

The State asserts that Corcoran was part of a complex conspiracy to pressure Coats, that his whole purpose in meeting with her was to undermine her claim against Slife and that he attempted to do so by presenting her with a false statement to sign. The only evidence of what transpired at his meeting with Coats consists of her testimony and his. There is not much difference between their versions. She was not happy that the complaint against Slife was resulting in a formal investigation. She wanted it handled informally, and did not want to see him suspended or discharged, merely reprimanded and stopped. 1/ Corcoran told her he could convey that information to management. He wrote up what his notes reflected and showed it to her. She disagreed with the portion that characterized Slife's touching of her shoulder/back as not being of a sexual nature, and he told her she should write her own statement. She did so and signed it. He took her statement, and provided it to management.

1/ The State argues that these notions were planted with her by Bruce King on February 1st, but she expressed the same concerns to Keltish a week earlier, before any Union official was aware of the investigation.

Given the testimony at the hearing, I am at a loss to understand what coercion the State relies upon for its conclusion that Corcoran was engaged in unprotected activity when he met with Coats. From the record, the material difference between her statement and the one written by Corcoran is the characterization of Slife's rubbing her back. Her statement does not expressly characterize it as sexual contact or as non-sexual, although she did add a caveat that she did not object to the rubbing of her back at the time Slife did it. The Union correctly notes that both versions of the statement make it clear that Slife was engaged in conduct that Coats considered sexual harassment and that most readers would consider harassment. The thrust of the statement is that Slife was guilty of harassment, but that Coats did not want him to receive serious discipline. That is precisely the sentiment Coats expressed to others before and after meeting with Corcoran. It is precisely what she testified had been the concern that led her to meet with Corcoran.

The State makes much of Coats' written statement and subsequent testimony that she never asked for representation from Corcoran, and it argues that since he was not representing her, he should be presumed to have been acting for some other purpose. Coats may not have used the word "representation" and she may not have understood what Corcoran was doing to have been representation, but whether his conduct is protected does not depend on a layperson's understanding of a word. She wanted her point of view expressed to management, and she wanted to influence management's decision-making on an employment matter. She felt the need for assistance in accomplishing that. She secured that assistance through the exclusive bargaining representative. The fact that she believes representation is needed only by those who have done something wrong does not change the nature of the service provided by Corcoran. He was plainly representing her by effectively communicating her concerns to management.

I conclude from the record evidence that Corcoran was engaged in representational activity in his dealing with Coats on February 1st, and that he did not engage in any act of coercion or other misconduct that would remove his activities from the protections of SELRA. Thus, his meeting was protected activity.

The February 5th Memo

When Grosshans became aware of Corcoran's meeting with Coats, he responded with a memo ordering Corcoran not have any further discussions with her regarding the subject of the investigation:

. . .

> As you know management is conducting an official personnel investigation into a complaint of sexual harassment by an agent at our office located at 300 South Koeller Street in Oshkosh. I know you have had discussions with the complainant since the commencement of this investigation.
>
> By this letter I am directing you not to discuss the subject of this investigation with the complainant or other witnesses including any employees of this unit, with the exception of Agent Slife in the course of representing him in this process. I recognize that you are president of Local 2748, nonetheless, we will not tolerate any interference with this official Department of Corrections process.

. . .

Putting to one side the editorial comment regarding interference with DOC process, this memo clearly restricts the ability of the Union to communicate with its members and to represent the interests of both Slife and Coats. It prevents Corcoran from speaking with any witness about the allegations against Slife, and prevents him from following up on Coats' concerns about the Department's response to her complaint. It necessarily would interfere with the Union's performance of its representational role. To the extent that it seeks to regulate the activities of the top official of the Local Union in representing and communicating with members, with the clear prospect of discipline for non-compliance, it has great potential to chill protected activity by other Union officials and by employees themselves. Thus, I conclude that it has a reasonable tendency to interfere with the exercise of protected rights.

The Discipline of Corcoran

Corcoran was disciplined for three counts of insubordination – first, for contacting Coats after he was ordered not to discuss the investigation with her, second, for telling investigators that Coats had requested representation during their February 1st meeting and third, for telling investigators that he had not provided Coats with a written statement to sign.

The Examiner's role is to determine whether the actions of the State constitute a violation of the statute, not whether they violate the just cause standard of the contract. However, whether the imposition of discipline on a Union President has a reasonable tendency to interfere with the exercise of protected rights depends upon the facts. On the one hand, the Union President remains an employee, and holding office in a union does not render an employee immune from discipline. Disciplining a Union President for poor attendance, for example, where the same rules and standards apply to him or her as apply to other employees, would not have a reasonable tendency to interfere with anyone's enjoyment of Sec. 111.82

rights, even if the discipline was later overturned in the grievance or arbitration procedure. On the contrary, discipline under those circumstances demonstrates a neutrality in the application of the work rules.

On the other hand, where the imposition of discipline is intimately tied to a visible leader's activities on behalf of the Union, the prospects for interference with employee rights are obviously greater than where a run-of-the-mill work rule violation is at issue. In general, some latitude is permitted to union officials in the conduct of their duties, and discipline for actions taken in an official capacity is subject to a high degree of scrutiny. 2/ Thus, while the Examiner does not sit as a grievance arbitrator, he is obliged to closely examine the reasons for discipline and the evidence supporting it, in order to determine whether reasonable persons under all of the circumstances would tend to be chilled in the exercise of their rights by the discipline.

2/ See SOUTHERN INDIANA GAS & ELECTRIC, 85 LA 716 (NATHAN, 1985); MAXWELL AIR FORCE BASE, 97 LA 1129 (HOWELL, 1991); BORNSTEIN, ET AL., LABOR AND EMPLOYMENT ARBITRATION, 2ND ED. (Matthew Bender, 1997), AT §12.03(3) and cases cited therein; TRANS-CITY TERMINAL WAREHOUSE, 94 LA 1075 (VOLZ, 1990) holding that obscenity and personal insults directed towards a supervisor while protesting managerial decisions may remove a Union president from the protection of the NLRA; See also HAMBURG INDUSTRIES, 271 NLRB NO. 108 (1984); CATERPILLAR TRACTOR CO., 242 NLRB 523 (1979); TRAVERSE CITY OSTEOPATHIC HOSPITAL, 260 NLRB 1061 (1982); UNION CARBIDE CORP., 171 NLRB 1651 (1968).

The Valid Business Reasons Defense

The State argues that even acts tending to interfere with protected activity do not violate SELRA if the acts are prompted by a legitimate business reason. This is a correct statement of the law, as acknowledged by the Commission in DEPARTMENT OF CORRECTIONS (WAPCO), DEC. NO. 29448-C, ET. SEQ. (WERC, 8/00), at page 19 (hereinafter "WAPCO"):

> . . . [T]he State correctly notes that under existing Commission precedent, conduct that tends to interfere with employe rights may not be found to violate the statute if the employer has valid business reasons for its actions.

The State asserts that it has a fundamental interest in protecting the integrity of its investigations, protecting employees complaining of sexual harassment from coercion by other employees, and insuring that its employees obey work orders, including orders to refrain from contacting other employees and to honestly answer questions. In connection with the work order aspect, the State asserts that the employee's obligation is to obey now, and grieve later.

There is no question but that the State has a compelling interest in protecting its investigations of sexual harassment charges and protecting complaining employees from coercion. The State has a duty under the contract and the statutes to pursue sexual harassment claims, and it has every right to protect itself from the liability attendant to the claims themselves and from any possibility of subsequent claims of retaliation. The State also has a valid concern with insuring that employees comply with legitimate work orders, and that they provide truthful answers when questioned by the Department's investigators. All of these are valid business interests of the State, and all of them are at least superficially served by the various actions of the State in this case.

The valid business reason defense is not a complete shield to liability, and the mere ability to articulate a legitimate business reason for an action does not defeat a claim under SELRA. In the WAPCO case cited above, the Commission went on to note ". . . [W]e think it clear that the identification of the legitimate business interest in conflict reduction needs to be balanced against the intrusion into statutory rights when we determine whether a statutory violation has occurred." ID at 21. Such a balancing of interests has long been recognized as appropriate in the area of interference law where, on the one hand, the breadth of the protections against conduct that "tends" to interfere can sweep up legitimate employer activity and, on the other hand, the valid business reason defense could excuse virtually any conduct where Union animus is not proved. As observed in the context of the parallel provision in MERA:

> "In addition, and of particular significance to this case, it is also well established that employer conduct which may well have a reasonable tendency to interfere with employe exercise of Sec. 111.70(2) rights will generally not be found violative of Sec. 111.70(3)(a)l, Stats., if the employer had a valid business reason for its actions." [citations omitted] "WAUKESHA COUNTY, DEC. NO. 14662-A (GRATZ, 1/78) AT 22-23, AFF'D 14662-B (WERC, 3/78) ("some municipal employer actions that, in the broadest and most literal senses of the terms, "interfere with" or "restrain" municipal employes' exercise of Sec. 111.70(2) rights have been held not to violate Sec. 111.70(3)(a)1. [citations omitted] Rather, the traditional mode of analyzing whether a violation of those quoted terms as used in the applicable statute has occurred has involved a balancing of the interests at stake of the affected municipal employes and of the municipal employer to determine whether, under the circumstances, application of the protections of the interference and restraint prohibitions would serve the underlying purposes of the act. [citations omitted] ID. AT 22-23."); and KENOSHA BOARD OF EDUCATION, DEC. NO. 6986-C (WERC, 2/66)"
>
> RACINE UNIFIED SCHOOLS, DEC. NO. 29074-B (GRATZ, 4/98), AFF'D DEC. NO. 29074–C (WERC, 7/98) AT PPS. 14-15.

Thus, the question is whether, under all of the facts of the case, the reasonable tendency of the State's actions to interfere with protected rights is outweighed by the State's valid business reasons for taking the actions.

The Balancing of Interests

The Grosshans Memo

The Grosshans memo directed Corcoran to refrain from any further contact with Coats or any other bargaining unit member, other than Slife, about the investigation. This memo was not an application of some standing procedure for safeguarding investigations. It was sent to Corcoran because Grosshans believed Corcoran was coercing Coats and that the Union was seeking to undermine the case against Slife. According to Grosshans' testimony at the hearing, he acted solely on basis of the information passed up to him by Ross that Corcoran had attempted to have Coats sign a statement recanting the allegations. Ross's source for that information was Joan Keltish.

Each party has a compelling interest at stake here. The ability to communicate with members and to represent their interests is absolutely fundamental to the Union's role in helping employees exercise their Sec. 111.82, rights. The directive cut off the Union President from further communication with unit members regarding the Slife investigation. For its part, the State has a compelling interest in prosecuting cases of sexual harassment, safeguarding complaining employees from retaliation or further harassment, and safeguarding its investigative procedures. If, as presumed by Grosshans, Corcoran was engaged in coercion of a witness, the directive to cut off further contact with the witnesses would have been an appropriate striking of the balance between these interests – the legitimate interests of the Union and the employees do not extend to coercion. However, the information provided to Ross by Keltish was not correct. There was no effort at coercion by Corcoran. No one tried to have Coats recant her allegations. Instead, Corcoran was engaged in legitimate representational activities on behalf of Coats.

The State argues that whether there actually was coercion or not, it had the right to limit Corcoran's contact with employees because Grosshans had a good faith belief in the accuracy of the information he was provided. It may be that Grosshans believed the information provided to him, but the information was wrong and there appears to have been no attempt to confirm it before the memo was issued. No one asked Coats or Corcoran what occurred at the meeting. It bears remembering that evil intent is not an issue in deciding whether interference took place. The issues are whether the act had a reasonable tendency to interfere, whether there was a valid business reason, and on balance which interest predominates. As discussed above, the memo had an obvious tendency to interfere with basic protected rights – it was intended to cut off communications between the Union President and bargaining unit members. There was also a valid business reason for the memo. In striking

the balance between these interests, the truth of the State's premise for its actions, and the steps taken to confirm the truth of the premise, must be treated as legitimate factors. What makes the State's interest so compelling is that it was seeking to stop the on-going coercion of a complaining witness. The fact that it was wrong about that obviously makes its interest in issuing the memo much less compelling. 3/

3/ Again the memo was not issued pursuant to some generally known standard procedure for these cases, nor was there any effort to narrowly tailor it to protect both the interests of the State and the Sec. 111.82, rights of employees. It was a specific, blunt response to a specific situation, and its legitimacy rises and falls on the facts of the situation.

The balancing of interests is not an abstract exercise. It must take account of what actually happened. The State ordered Corcoran to refrain from having contact with certain of his members. The fact that the order was directed to a top Union official acting in his official capacity magnifies the already inherent tendency of such a memo to chill the employees' exercise of protected rights. In taking this drastic step, the State relied on its conclusion that his activities were actually a form of coercion, and thus not protected activity. They bear the burden of having been wrong about the facts underpinning their defense, and I, therefore, conclude that the purposes of SELRA require a finding of a violation to offset the chilling effect of the Grosshans memo.

The Discipline of Corcoran

The State disciplined Corcoran for three alleged acts of insubordination – contacting Coats on February 12th, telling investigators that Coats had requested representation, and denying that he had prepared a statement for Coats to sign. The State asserts an interest in having employees "obey now and grieve later" if they object to orders received from management.

Certainly the State has a valid interest in having employees obey orders, but the principle of obey now and grieve later has never been absolute. There have always been certain exceptions, the most widely known being that employees are not required to follow orders which pose an unreasonable risk to life or limb. The scope of the principle was discussed early on by Arbitrator Whitley P. McCoy:

> When an employee is told by a supervisor to do something, his duty, perhaps after preserving his rights by a protest, is to do it. He then has the right to file a grievance and have the propriety of the order tested. No plant could operate if the employees were free to obey or disobey orders according to their own notions of their contract rights.

. . .

> Certain exceptions to this principle are equally well recognized. No employee is bound to obey an order which would involve an unreasonable hazard to life or limb; no employee is bound to obey an order which would humiliate him or which has no reasonable relation to his job duties — such as to shine a foreman's shoes or to withdraw a grievance. Arbitration decisions have established these and other exceptions.
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> This case presents the question whether the facts here involved bring it within the scope of the general principle or the scope of the exceptions. In considering this question, it is important to bear in mind the reasons for the general principle; the necessity for the efficient, orderly, uninterrupted operation of production; elimination of unseemly argument on the plant floor; and the practical necessity, for reasons of efficient operations, of maintaining the proper authority and dignity of those entrusted with supervisory duties. Since these are the reasons for the general principle, absence of such reason in a particular case (such as in the shoeshine case), or the existence of an overriding right or interest in the employee (such as to life or health), may form the basis for a legitimate exception. A weighing of the conflicting interests may be necessary on a given state of facts. . ." Sheller Mfg. Corp., 34 LA 689 (McCoy, 1960) at 689.

This balancing of interests was also acknowledged in an earlier case by Arbitrator Harry Shulman, then the umpire for Ford Motor Company:

> "Nothing in Opinion A-116 [3 LA 779] justifies the disciplinary action in this case. That opinion dealt primarily with production employees. It may be applied to the skilled classifications in situations where there is reasonable dispute as to whether the work assignment does or does not fall within the employee's classification. The duty of obedience to orders may well be extended to such instances of reasonable dispute. But it cannot be extended to assignments of work in admittedly different trade groups constituting different seniority groups. The company does not have the same right of transferring or loaning skilled tradesmen from one classification to another that it has with respect to employees in production classifications. . . ." (Ford Motor Co., 3 LA 782 (Shulman, 1946) at page 783).

In the case of the Grosshans memo, the State's general interest in using discipline to have its order obeyed is seriously undercut by the fact that the order itself was an illegal act of interference. The use of discipline is further undercut by the fact that, on this record, there is scant evidence that Corcoran disobeyed the order.

The directive from Grosshans was that Corcoran should not discuss the investigations with Coats, not that he should have no contact with Coats at all. Coats' testimony about the February 12th telephone conversation was that Corcoran devoted most of it to telling her that a gag order had been put in place, that he believed it was illegal, and that they still had the right to communicate with one another. This was essentially Corcoran's testimony as well. Coats also testified that her impression afterwards was that Corcoran thought Slife was a victim of sorts, but she did not explain the basis of that belief. While the State infers from this that they must have discussed the substance of the investigation, no one testified that Corcoran discussed the substance of the investigation with her.

As noted above, discipline of Union leaders for participating in protected activities is subject to heightened scrutiny, because it inherently chills the exercise of Sec. 111.84, rights. Discipline against a Union President for insubordination, based on violating an illegal order, where the evidence does not establish that he actually did violate the order, cannot possibly fail to interfere with the exercise of protected rights. The State's nominal interest in having Corcoran "obey now and grieve later" is vastly outweighed by the destructive effect of the discipline on the rights of the employees, and I conclude that it constitutes interference within the meaning of Sec. 111.84(a)1.

With respect to the allegations of lying during the investigation, the State's interests are more clear-cut, and there was nothing illegal about the order. Here too, though, the evidence of actual insubordination is scant. The allegation that Corcoran lied to investigators about Coats asking him for representation seems to be tied up with Coats' very limited definition of what constitutes representation. Corcoran said she did ask him to serve as her representative, when she expressed her concerns about management's approach to the situation, asked for his help and gave him a statement that he said he would present to management. He is correct in claiming that this is an act of representation, and she is incorrect in thinking that it is not. Her statement denying that she asked him to be her representative is true from her perspective, just as his claim that she wanted representation is true from his. Asserting that Corcoran is a conscious liar based on this argument over semantics, particularly when he is on the right side of the argument, is a glorification of form over substance.

As to the third basis for the discipline, the State asserts that Corcoran lied to investigators on March 11th when he denied providing Coats with a written statement. The investigators' notes of the March 11th interview are instructive as to this allegation:

E.) When you arrived did you have a prepared statement for her to sign?

Absolutely not.

F.) Did you have anything written for her to sign at all?

Absolutely not.

. . .

H.) At what point did the statement come up? During the course of your lunch did you ask her to make a written statement?

Following lunch Jennifer Coats provided a 2 page written statement to DOC Administration dated February 01, 2002. I read it and signed it as a witness, after she wrote it.

Each of these answers is literally true. The suggestion that he arrived at the meeting with something prepared for Coats to sign is not something that anyone now contends happened. His response to the third question is also literally true, in that the question of a written statement came up after lunch and she did hand write a statement. It is incomplete, in that it omits mention of first giving her his own notes of what she had said and letting her refer to them. This was covered in the April 9th follow-up interview:

. . .

Question: Jennifer states on February 1, you (Tom Corcoran) and she (Jennifer Coats) talked for awhile and then you wrote out a statement about the sexual harassment situation involving her. Jennifer states she did not like some of what you (Tom Corcoran) wrote and she (Jennifer Coats) proceeded to write out her own statement, copying some of what you (Tom Corcoran) had written. Is this an accurate statement of what happening on February 1, 2002?

Mr. Corcoran responded no. I never wrote a statement for Jennifer Coats to sign. My notes were all based on information given to me. I told her she could use what she wanted from my notes. Mr. Corcoran stated he advised Jennifer Coats she did not have to write any statement if she didn't want to do so. Mr. Corcoran stated no, this is not what happened on February 1, 2002.

From Corcoran's response on April 9th, it is clear that he was continuing to deny that he wrote out an exculpatory version of Slife's behavior in hopes of having Coats sign off on it – in other words, he denied putting his words in her mouth, which had been the thrust of the Department's previous questioning on this point. It is also clear, though, that he did write his notes up in a memo format for Coats' use. Whether he intended to have her sign his draft, or copy it, the State could have concluded that his April 9th statement to investigators that he did not prepare a statement for her to sign was technically untrue, although there is no untruth in his March 11th statements, which is what was alleged as the basis for discipline. In connection with this, it bears noting that the State was prepared to go forward with discipline on April 9th, since this interview was immediately followed by a pre-disciplinary hearing on the charges. It is a fair inference that the statements on the 9th had nothing to do with the actual decision to imposed discipline, and in that case the third charge is not even technically correct.

Of the three bases for discipline, two are not true, and the third is only technically true, and technically true as of a different date than is alleged. All three flow from the issuance of an illegal order and the Department's efforts to enforce that illegal order. The discipline was imposed on a Union President engaged in official duties, a man with an otherwise clean record. Balancing the interests of the parties, I conclude that the chilling effect of such discipline on the exercise of protected statutory rights far outweighs the generalized interest the State has in maintaining order in the workplace and insuring compliance with supervisory directives. It follows that the discipline against Tom Corcoran constitutes interference in violation of Sec. 111.84(a)1.

Dated at Racine, Wisconsin, this 15th day of August, 2003.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel Nielsen /s/
Daniel Nielsen, Examiner

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