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-B

Appearances:

Bruce M. Davey, Lawton & Cates, S.C., Attorneys at Law, Ten East Doty Street, Suite 400, P.O. Box 2965, Madison, WI 53701-2965, appearing on behalf of the Complainants WSEU and Tom Corcoran.

David Vergeront, Chief Legal Counsel, Office of State Employment Relations, P.O. Box 7855, Madison, WI 53707-7855, appearing on behalf of the Respondents State of Wisconsin, Department of Corrections and William Grosshans.

ORDER ON REVIEW OF EXAMINER'S DECISION

On August 15, 2003, Examiner Daniel Nielsen issued Findings of Fact, Conclusions of Law and Order in this matter, concluding that the Respondent State of Wisconsin (State) violated Sec. 111.84 (1) (a) of the State Employment Labor Relations Act (SELRA), when it issued an order directing the Complainant Tom Corcoran (Corcoran), President of Complainant WSEU, not to have any contact with certain bargaining unit members on certain issues, and when it disciplined Corcoran for allegedly violating that order and making inaccurate statements in the course of the State investigation of his conduct. As a remedy for that violation, the Examiner ordered the State to cease and desist such unlawful conduct, to rescind the discipline imposed upon Mr. Corcoran, and to post a notice in the Department of Corrections (DOC) offices in Oshkosh, Beaver Dam, and Madison.

On September 3, 2003, the State filed a timely petition for review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.84 (4), Stats. and on September 26, 2003 filed a brief in support of the petition. On February 18, 2004, the WSEU and Corcoran filed a brief in opposition to the petition. By letter received April 5, 2004, the State informed the Commission that it would not be filing a reply brief, at which time the record was closed.

For the reasons set forth in our Memorandum, below, we issue this Order wherein we modify and affirm the Examiner's Findings of Fact, Conclusions of Law, and Order.

ORDER

A. The Examiner's Findings of Fact 1 through 34 and 37 through 39 are affirmed.

B. The Examiner's Finding of Fact 35 is modified as follows and as modified is affirmed:

> 35. The conduct of Thomas Corcoran in meeting with Jennifer Coats, agreeing to convey her concerns to the State about the State's handling of the Slife investigation, and in conveying those concerns to the State, was lawful, concerted activity for the purpose of mutual aid or protection, whether or not Coats had asked him to represent her. However, Coats' agreement to meet with Corcoran and her request that he convey her sentiments did in fact constitute a request for representation.

C. The Examiner's Findings of Fact 40 through 43 are modified as follows to Findings of Fact 40 through 42 and as modified are affirmed:

> 40. Corcoran's statements to investigators on both March 11 and April 9, 2002 that he had not written out a statement for Coats to sign was accurate, because he thereby intended to deny that he had provided Coats with a false statement seeking to exonerate Slife or otherwise coerce her into submitting a statement that was not truthful and in her own words.
>
> 41. Where the State issues a directive to a union president that prohibits him from engaging in lawful concerted activity and thereby reasonably interferes with the exercise of protected rights guaranteed by Sec. 111.82, SELRA, enforcing that directive, including interrogation and/or discipline for the alleged violation thereof, reasonably tends to interfere with the exercise of protected rights guaranteed by Sec. 111.82,

SELRA.

42. The imposition of discipline on a union president for an inaccurate allegation of making false statements to investigators about representational activities reasonably tends to interfere with the exercise of rights guaranteed by Sec. 111.82, SELRA, whether or not the State believed in good faith that the statements were false.

D. The following Finding of Fact is made:

43. To the extent the State interrogated Corcoran on March 11 and April 9, 2002, in order to seek information about whether Corcoran had attempted to coerce Coats into recanting her allegations, the interrogation did not reasonably tend to interfere with the exercise of rights guaranteed by Sec. 111.82, SELRA, because Coats' statements on February 15, 2002 to State investigators had given the State a substantial and reliable basis for believing that such coercion may have occurred.

E. The Examiner's Conclusions of Law 1 through 3 are affirmed.

F. The Examiner's Conclusion of Law 4 is modified as follows, and as modified is affirmed:

4. By the acts described in the above and foregoing Findings of Fact, specifically by attempting to enforce a directive that interfered with Complainant Thomas Corcoran's rights guaranteed by Sec. 111.82, SELRA, through interrogations and the imposition of discipline, the Respondent State interfered with the Complainant's rights guaranteed by Sec. 111.82,SELRA, and thereby committed an unfair labor practice within the meaning of Sec. 111.84(1)(a), SELRA.

G. The following Conclusions of Law 5 and 6 are made:

5. By the acts described in the above and foregoing Findings of Fact, specifically by imposing discipline on Complainant Thomas Corcoran for insubordination, based upon an inaccurate allegation of making false statements to investigators about representational activities, the Respondent State interfered with the Complainant's rights guaranteed by Sec. 111.82, SELRA, and thereby committed an unfair practice within the meaning of Sec. 111.84(1)(a), SELRA, whether or not the

Respondent State believed in good faith that the allegation was accurate.

6. By the acts described in the above and foregoing Findings of Fact, specifically by interrogating Complainant Thomas Corcoran about whether he had attempted to coerce Coats into recanting her allegations after receiving substantial and reliable information to believe that may have occurred, the Respondent State did not interfere with the Complainant's rights guaranteed by Sec. 111.82 SELRA, and did not commit an unfair labor practice within the meaning of Sec. 111.84(1)(a), SELRA.

H. Paragraph 1 of the Examiner's Order is modified and affirmed as follows:

1. IT IS ORDERED that the Respondent State of Wisconsin shall immediately cease and desist from directing a union representative to refrain from engaging in lawful concerted activity and from interrogating and disciplining said representative for violating any such directive.

I. Paragraph 2 of the Examiner's Order is affirmed.

Given under our hands and seal at the City of Madison, Wisconsin, this 20th day of July, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

Department of Corrections

MEMORANDUM ACCOMPANYING DECISION

Summary of the Facts

As noted above, we have modified and affirmed the Examiner's Findings of Fact and we summarize those facts as follows. 1/

1/ The State has challenged certain Findings of Fact which we address in the next section of this Memorandum.

At the end of January, 2002, Jennifer Coats, a probation and parole agent with the State Department of Corrections in Oshkosh, mentioned to a fellow agent (Joan Keltish) that another agent in the Oshkosh office, Terry Slife, had been sexually harassing her. On Keltish's advice, Coats submitted a sexual harassment complaint against Slife. The State initiated an investigation and the WSEU appointed a steward from a different office to represent Slife. Shortly after Coats made her complaint, an official of the WSEU who worked in the Oshkosh office received information suggesting that Coats was concerned that the State was overreacting to her complaint and might discipline Slife rather than just get him to stop the behavior. The WSEU official mentioned this information to WSEU President Corcoran, who spoke on the telephone with Coats on Friday, February 1. During this conversation Coats confirmed that she was distressed about the impending investigation and she voluntarily arranged to meet with Corcoran later that day to discuss her concerns. Because Coats preferred to meet outside the Oshkosh office, the meeting took place at a Perkins restaurant. Prior to the incidents giving rise to this case, Corcoran had never met Coats and was barely acquainted with Slife.

In the course of their conversation, Coats voiced concern that management was going to discipline Slife, when what she wanted was simply for someone to speak with him and get him to stop. Corcoran offered to formally represent Coats for purposes of the investigation, but Coats declined. Corcoran then suggested that Coats could make her views known to management through a written statement and that he could see to it that the statement was brought to management's attention. Corcoran had taken notes during the meeting reflecting what Coats had told him and provided these notes to Coats as a draft statement. Coats disagreed with portions of Corcoran's draft, principally where he had characterized Slife's touching of Coats' shoulder and

back as not being sexual contact. Corcoran encouraged Coats to draft a statement as she wished, and she did so, copying large portions of his write-up. Coats' statement is set forth below in full as follows, with the portion she drafted in italics and the remainder being the portion that she adopted from Corcoran's draft:

> 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

Coats signed the statement and gave it to Corcoran, who indicated he would provide it to management but not to Slife. Later that day, Corcoran told a State liaison that he had met with Coats and then provided the liaison a copy of Coats' statement.

After Coats returned to the office, she told Keltish about the meeting and Keltish got the impression that Corcoran had tried to persuade Coats to submit a statement that was inaccurate. Keltish then reported to management that Corcoran had tried to have Coats sign a statement recanting her allegations against Slife. Several days later, Corcoran received a memo from William Grosshans, the Administrator of the Division of Community Corrections, informing Corcoran 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.

. . .

On February 6, 2002, Corcoran responded to Grosshans' letter by e-mail, asking him, inter alia, to "rescind, in writing, the illegal gag order that you issued to me today." On February 8th, WSEU's attorney also wrote to Grosshans, stating the Union's position that the directive was an unlawful interference with the Union's right to communicate with its members.

On February 12, 2002, Corcoran telephoned Coats and during the course of a conversation lasting about 30 minutes told her about the directive from Grosshans and the Union's position that the directive was unlawful. During this conversation, Corcoran expressed an opinion that the State was overreacting to Coats' complaint about Slife and also offered to represent Coats at any future investigatory meetings. Coats mentioned the phone call to Keltish, who reported it to management along with her (Keltish's) view that Coats was becoming a "wreck" because of her treatment by co-workers in the office.

The State interviewed Coats on February 15, 2002. In that interview, Coats stated that Corcoran had done most of the talking during the February 12 telephone conversation, which had largely concerned the "gag order" and the Union's right to represent her. She also stated that Corcoran had written out a statement for her to sign at the February 1 meeting, that she disagreed with portions of the statement, and that she wrote out her own statement.

On March 5, 2002, at the conclusion of a contract negotiations session at which both had been present, Grosshans handed Corcoran a notice of an investigatory interview to determine whether he "had failed to comply with Grosshans' directive." The notice stated that failure to answer all questions truthfully would subject Corcoran to discipline. On March 11, 2002, Corcoran was interviewed for about three hours regarding his contacts with Coats. During this interview he acknowledged initiating the February 12 telephone call and discussing Grosshans' directive with Coats at that time. He asserted that he was acting as Coats' union representative in both conversations and that Coats understood that. He categorically denied arriving at the Perkins meeting with a prepared statement or other writing for her to sign. He also asserted that, in his view, Grosshans had not forbidden Corcoran to contact Coats, but only to avoid discussing the substance of the Slife investigation with her.

On March 25, 2002, the State again interviewed Coats. Her account of the February 1 meeting at Perkins was substantially the same as Corcoran's, except that: (1) Coats stated that, while Corcoran had offered to represent her on both February 1 and February 12, she had not asked him to represent her and had declined his offer because she felt she did not need representation; and (2) Coats characterized Corcoran as having written out a "statement" after their discussion on February 1, whereas Corcoran referred to having presented Coats with "notes" of the conversation from which she drafted her statement. At that March 25 interview, Coats also wrote out the following statement: "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 and 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."

On April 9, the State conducted a second investigatory interview as well as a pre-disciplinary meeting with Corcoran, relating in substance to two charges: first, that Corcoran had violated Grosshans' February 5 directive by contacting Coats on February 12 to discuss her complaint against Slife; and second, that Corcoran was untruthful when he denied presenting Coats with a prepared statement at the Perkins meeting and when he asserted that Coats had asked him to represent her. On or about May 15, 2002, the State reprimanded Corcoran in writing for those two alleged actions..

DISCUSSION

The central issue in this case is whether Corcoran's communications with Coats, a bargaining unit member who had complained about another bargaining unit member's sexual harassment, were protected activity such that the State could not lawfully proscribe the activity or discipline Corcoran for violating such proscription. A secondary issue is whether the State could lawfully discipline Corcoran for what the State perceived as Corcoran's untruthfulness in responding to interrogations regarding his communications with Coats. Related to the second issue is whether the State could lawfully interrogate Corcoran regarding his communications with Coats.

The Examiner concluded that Corcoran's conduct was protected and that the State acted unlawfully in proscribing the conduct. He further concluded that the State acted unlawfully in disciplining Corcoran for responses during the State's investigation process, because the Examiner concluded that those responses in fact were accurate.

In its petition for review, the State advances a two-pronged challenge to the Examiner's decision in this case. On the one hand, the State disputes the accuracy of the Examiner's factual findings regarding Corcoran's conduct and urges the Commission to conclude that Corcoran did engage in misconduct that rendered his activity unprotected. On the other hand, the State contends that, even if the Commission disagrees with the State's factual determinations regarding Corcoran's conduct, the State's determinations were reasonable and in good faith and therefore should not be held to violate the law. For its part, WSEU urges the Commission explicitly to address an issue sidestepped by the Examiner, i.e., whether an employer may lawfully discipline a union president for violating an unlawful directive.

We will address the State's factual challenges first.

I. Factual Challenges.

The State challenges four of the Examiner's findings: (1) that Corcoran did not try to coerce Coats during the February 1 meeting at Perkins into signing a prepared statement that significantly recanted her sexual harassment complaint against Slife; (2) that, during his investigatory interviews with State officials, Corcoran was truthful when he denied that he had presented a written statement to Coats on February 1; (3) that, during those interviews, Corcoran was truthful when he asserted that he was representing Coats during his February 1 and February 12 conversations with her; and (4) that, during those interviews, Corcoran was truthful in denying that he had discussed the substance of the Slife allegations with Coats during their February 12 telephone conversation.

In contending that Corcoran's purpose in meeting with Coats on February 1 was to coerce her into recanting her allegations of sexual harassment, the State recites the tense atmosphere in the Oshkosh office after Coats' allegations, Coats' sense of isolation, the fact that union officials approached Coats rather than the other way around, the fact that Corcoran wrote up a statement for Coats based upon what she had told him, and that, in doing so, Corcoran wrote something (that Slife's touching was not sexual in nature) that Coats rejected when she re-wrote the statement at Corcoran's invitation. Nothing in these facts suggests that Corcoran was doing anything other than what he said he was doing, i.e., trying to help Coats get her point of view across to management and thus ease her tension. Coats did not dispute Corcoran's testimony that he reassured her during this conversation that her complaint was

legitimate. While Coats testified that she did not think Corcoran was acting in her best interests in the specific act of characterizing Slife's touching as non-sexual, Coats also testified repeatedly that she generally felt Corcoran was trying to help her during the February 1 meeting. As WSEU points out, it is not inherently indicative of coercive intent – or an effort to produce a recanting of an allegation – that Corcoran, a law enforcement agent, would impute a more narrow and specific meaning to the term "sexual touching" than Coats intended. Using an ambiguous term narrowly is not ipso facto a "falsehood" as the State labels it. (State Br. at 10). There is no dispute that when Coats objected to the phrase Corcoran encouraged her to draft the statement in her own language and did not insist in any way upon including language that would implicitly "recant" her sexual harassment complaint. The manipulation, intimidation, guile, and coercion that the State sees in Corcoran's behavior are not reasonable inferences from the facts, but rather seem to flow from a presupposition that the union would side with the accused rather than the victim when both are bargaining unit members. 2/ In short, the Examiner's finding that Corcoran was not trying to disrupt the investigation or coerce Coats into recanting her allegations is correct. 3/

2/ As an example, the State asks rhetorically why, in preparation for Corcoran's investigatory interview on March 11, Corcoran's representative would have questioned Coats about whether she had felt pressured by Corcoran, "unless he [Corcoran] knew in his heart and mind that his conduct was coercive." (State Br. at 8). To the contrary, we think Corcoran could reasonably interpret the State's directive that he avoid "interference with an investigation," coupled with the State's subsequent disciplinary notice alleging that he had violated that directive, as indications that he was under suspicion of having done something to interfere with the sexual harassment investigation, such as pressure or coerce the complainant. Hence it would be quite reasonable for Corcoran's representative to prepare for the investigatory interview by asking Coats whether she had felt pressured or coerced – and thus it is not a tacit admission of guilt as the State sees it.

3/ The State argues that the Examiner himself found that Corcoran had engaged in an effort to persuade Coats to recant her sexual harassment allegations. (State Br. at 9). This argument appears to be premised upon the State's belief that the Examiner found that Corcoran had drafted "an exculpatory statement" for Coats to sign. However, when the Examiner used the phrase "exculpatory statement" (at page 35 of his decision), he was not articulating his own finding that Corcoran's draft was exculpatory, but rather describing the State's characterization of Corcoran's draft and noting that Corcoran had consistently denied that accusation.

The State's second factual dispute centers upon its belief that Corcoran deliberately misled State investigators when he denied presenting Coats with a written statement to sign on February 1. The Examiner found Corcoran's answers "incomplete" and perhaps "technically untrue," but he interpreted them as denying the thrust of the State's accusation, which the

Examiner characterized as Corcoran "putting his words in her [Coats'] mouth." Examiner's Dec. at 35. We think the Examiner accurately captured the nature of Corcoran's answers to the State's questions. Corcoran apparently construed the State's use of the term "statement" or something "written for her to sign" to mean a statement drafted in Corcoran's words with the purpose of molding, shaping, or twisting Coats into saying something less incriminating than Coats would have articulated on her own. As the State notes in its petition for review, even at the hearing in the instant case Corcoran continued to deny having presented Coats with a "statement" during their February 1 meeting, while at the same time acknowledging that he presented Coats with a set of "notes" based on what Coats had told him. The central point Corcoran wanted to make, as the Examiner found, was that Coats' written statement was voluntary and expressed in her own words. He saw the State's use of the term "statement" as connoting manipulation or coercion and consistently rejected that he engaged in conduct carrying that connotation. While Corcoran's responses could be characterized as reticent and defensive, we conclude that he was not deliberately deceitful given his consistent and reasonable interpretation of what the State would impute to him if he agreed that he had prepared a "statement" for Coats. 4/

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4 The Examiner stated that Corcoran's denial at the April 9 interview may have been "technically false," but suggested that any such falsehood on April 9 was unlikely to have actuated the reprimand, which was based upon Corcoran's answers at the March 11 interview. We see this issue differently. We think the State viewed Corcoran's answers on April 9 to be just as culpable as his answers on March 11, in that the State believed that Corcoran had prepared a statement for Coats and Corcoran was continuing on April 9 to deny that conduct. Since the State believed that Corcoran was continuing to be untruthful in this regard on April 9, the State could and likely did base its reprimand on Corcoran's April 9 responses as well as his March 11 responses. However, as discussed in the text, above, we do not view Corcoran's denial as untrue, technically or otherwise.

Third, the State contends that Corcoran was untruthful in his interviews when he claimed that he was representing Coats during the February 1 and February 12 conversations. On this point, the Examiner wrote:

> 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 of side of the argument, is a glorification of form over substance.

Examiner's Decision at 34. We agree with the Examiner's reasoning as well as his conclusion.

Fourth, the State disputes the Examiner's conclusion that "on this record, there is scant evidence that Corcoran disobeyed the [February 5] order" by discussing the Slife investigation with Coats. (Examiner's Dec. at 33). As discussed later in this Memorandum, we hold that the February 5 directive was unlawful, that Corcoran could not lawfully be disciplined for violating that directive, that the State could not lawfully interrogate Corcoran about his compliance with that directive, and that the State could not lawfully discipline Corcoran for his responses to the unlawful interrogation. That aside, we agree with the Examiner that the directive, narrowly construed, prohibited Corcoran only from communicating about the Slife investigation, not from contacting Coats, and that the record does not indicate that Corcoran in fact violated that prohibition. The State relies entirely upon Coats' testimony about her "feelings" after the February 12 conversation, i.e., she felt that Corcoran was minimizing Slife's conduct, that Corcoran saw Slife as the victim, that Corcoran was "up to something," and that Corcoran did not think what Slife did was wrong. State Br. at 5, 18. However, as the Examiner stated at page 34 of his decision, Coats' and Corcoran's testimony about the actual contents of the February 12 conversation was substantially the same, i.e., "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." As the Examiner also noted, Coats did not explain what transpired during the conversation that might have contributed to her negative impression about Corcoran's mindset. While the State challenges the Examiner for placing "credibility on this point with Mr. Corcoran," (State Br. at 19), in fact there is no clash in testimony regarding the actual substance of the conversation such as would call either Coats' or Corcoran's credibility into question. We agree with the Examiner's ultimate assessment that, "While the State infers from [Coats' feelings] that they must have discussed the substance of the investigation, no one testified that Corcoran discussed the substance of the investigation with her." Accordingly, we affirm the Examiner's finding that Corcoran did not violate the February 5 directive.

II. Violation of Sec. 111.84 (1) (a), SELRA.

As the Examiner properly noted, determining whether an employer has interfered with, restrained or coerced employees in the exercise of the rights to engage in lawful concerted activity in violation of Sec. 111.84 (1) (a), SELRA, and its statutory analogs, traditionally has

involved balancing the intrusion on employee rights against the employer's legitimate business needs. RACINE EDUCATION ASSOCIATION, DEC. NO. 29074-B (GRATZ, 4/98), AFF'D, DEC. NO. 29074-C (WERC, 7/98). We have recently re-articulated that test as permitting an employer to "interfere with its employees' lawful concerted activity to the extent justified by the [employer's] operational needs." UNIVERSITY OF WISCONSIN HOSPITALS AND CLINICS AUTHORITY, DEC. NO. 30202-C (WERC, 4/04). It is inherent in this balancing test that the employer's legitimate intrusion may not exceed the bounds of its legitimate interests. ID. In this case, the employer's alleged interference took the form of issuing a directive prohibiting Corcoran from contacting unit members about Coats' allegations against Slife, interrogating Corcoran about compliance with that directive, and reprimanding him for violating that directive and for being untruthful during the employer's investigation into whether the directive was violated.

The first step in the Sec. 111.84 (1) (a) SELRA analysis is to determine whether the employee activity is protected under 111.82, SELRA. As the Examiner held, a union president's right to communicate with bargaining unit members about work-related incidents is quintessential concerted activity within the ambit of Sec. 111.82, SELRA. This right is not abridged simply because the incident in question involves the competing interests of bargaining unit members or a charge of unlawful conduct by one member against another. Indeed, such situations implicate special union responsibilities to both unit members. SEE O'MELVENY, "NEGOTIATING THE MINEFIELDS: SELECTED ISSUES FOR LABOR UNIONS ADDRESSING SEXUAL HARASSMENT COMPLAINTS BY REPRESENTED EMPLOYEES," 15 THE LABOR LAWYER 321 (2000). The author points out that, "In many situations, the union can help ensure that both the victim and the accused are satisfied with the outcome of the complaint process ... ." ID. at 355. In short, Corcoran had both a legitimate role in the Coats/Slife matter and a duty to consider the interests of both unit members.

On the other hand, the employer's duty to maintain a work place free of sexual harassment requires vigilant oversight of procedures to investigate such claims, including protecting complainants from retaliation and pressure. We have noted that concerted activity can lose its protection if it is marked by "flagrant misconduct." VILLAGE OF STURTEVANT, DEC. NO. 30378-B (WERC, 11/03) at 25, and cases cited therein. Thus, in the instant case, as the Examiner succinctly stated, "[I]f Corcoran was actually engaged in an effort to coerce Coats into providing false information to management, his conduct loses the protections of the Act." Examiner's Dec. at 26. However, we, like the Examiner, have concluded that Corcoran was engaged in legitimate representational activity and not in fact guilty of coercion. Hence, his conduct remained protected.

Regarding the February 5 directive, the State's legitimate interest in the integrity of its sexual harassment investigation procedures would permit it to issue a rule or directive regulating Corcoran's communication with Coats – but only to the extent necessary to address

that legitimate interest. Even if Corcoran had never contacted Coats, the State legitimately could have directed union officials not to pressure or coerce Coats into recanting her allegations. Indeed, the State lawfully could have disciplined Corcoran for pressuring or coercing Coats even without a prior directive. However, we agree with the Examiner that, under the circumstances present here, where Corcoran's communications were not in fact coercive, the State's directive – forbidding all communication regarding the Coats/Slife harassment issue – considerably exceeded its legitimate interest in limiting coercion and would tend to chill WSEU's ability to monitor and represent the interests of both unit members. Thus the February 5 directive was unlawful.

The State forcefully argues, however, that its directive and its enforcement of that directive were implemented in the good faith belief that Corcoran had engaged in misconduct and that this tribunal's post hoc determinations to the contrary should not render unlawful the State's good faith actions. This point, while understandable, is at odds with the requirements of the law. In CLARK COUNTY, DEC. NO. 30361-B (WERC, 11/03) at 16 n. 7, we referred with approval to the long-standing doctrine applied by the National Labor Relations Board (NLRB) in cases "where the employer mistakenly but in good faith believed the employee had engaged in misconduct in the course of concerted activity...," citing NLRB v. BURNUP AND SIMS, INC., 379 U. S. 21, 57 LRRM 2385 (1964). In that case, the U. S. Supreme Court held that an employer had committed an unfair labor practice in discharging two employees for allegedly threatening violence in order to persuade other employees to join a union, despite the company's honest belief that the threats had occurred, since the NLRB had found that the threats had not in fact occurred. The Court explained:

> Otherwise the protected activity would lose some of its immunity, since the example of employees who are discharged on false charges would or might have a deterrent effect on other employees. Union activity often engenders strong emotions and gives rise to active rumors. A protected activity acquires a precarious status if innocent employees can be discharged while engaging in it, even though the employer acts in good faith.

ID. at 23. While BURNUP AND SIMS itself involved a discharge, we see no reason to differentiate other forms of adverse action, such as the directive and reprimand in the instant case. This doctrine continues to prevail in cases arising under the National Labor Relations Act, where it has been applied to a variety of alleged misconduct, including picket line violence, 5/ threats during organizing campaigns, 6/ threats to coerce other employees into walking out, 7/ and inducing an unlawful strike. 8/ We think similar principles are appropriate under SELRA, and accordingly we reject the State's defense based upon its good faith belief about Corcoran's misconduct. 9/ We hold that an employer violates Sec 111.84(1)(a), SELRA

if it disciplines an employee for alleged misconduct during the course of protected activity, if the evidence demonstrates that the misconduct did not occur, regardless of the employer's good faith belief to the contrary. This principle also invalidates an employer directive, specifically the February 5 directive at issue here, that proscribes protected activity on the mistaken belief that misconduct had occurred in the course of such activity.

5/ See, e.g., TELEDYNE INDUSTRIES V. NLRB, 911 F.2D 1214, 135 LRRM 2274 (6TH CIR. 1990) (holding the employer to have violated the law even though its good faith belief about the picket line misconduct was premised upon the NLRB's own pursuit of an injunction against the picket line violence); E. W. GROBBEL SONS, INC., 322 NLRB 304, 153 LRRM 1184 (1996).

6/ See, e.g., SHAMROCK FOODS CO. V. NLRB, 346 F.3D 1130, 173 LRRM 2454 (D.C. CIR. 2003).

7/ See, e.g., ACCURATE TOOL & MFG. INC., 335 NLRB NO. 91 (2001).

8/ See, e.g., PEPSI-COLA CO., 330 NLRB NO. 69, 164 LRRM 1013 (2000).

9/ Over the years, the NLRB has developed a burden-shifting paradigm in BURNUP AND SIMS cases that has led to some confusing and unnecessary litigation. In the instant case, we have concluded that the record does not evidence misconduct on Corcoran's part, regardless of which party carried the burden of production. Hence we decline to consider whether importing the NLRB's burden shifting paradigm in this type of case is appropriate under SELRA.

WSEU urges us to rule explicitly on a subsidiary issue that the Examiner somewhat sidestepped, i.e., whether the State lawfully could discipline Corcoran for insubordination regarding the unlawful February 5 directive. This issue in turn embraces whether the State lawfully could interrogate Corcoran about his alleged insubordination and, if such interrogation is not permitted, whether the State nonetheless may lawfully discipline Corcoran for untruthfulness during the unlawful interrogation. We believe that, after weighing the State's interest in having its orders obeyed against the "destructive effect of the discipline on the rights of the employees," the Examiner ultimately did conclude that the State could not discipline Corcoran for disobeying its unlawful directive. We believe this is inherent in the Examiner's conclusion that the reprimand itself unlawfully interfered with protected activity. Examiner's Dec. at 34. However, we agree with WSEU that this issue warrants more explicit treatment.

The principle of "obey now, grieve later," which is often applied to employer directives that might violate a collective bargaining agreement, simply does not apply to directives that unlawfully interfere with lawful concerted activity. For reasons much like those

articulated by the U. S. Supreme Court in BURNUP AND SIMS and discussed above, Corcoran's statutory right to communicate non-coercively with Coats regarding her sexual harassment claim would have little meaning if the State could compel him to obey an order prohibiting such communication. Just as the BURNUP AND SIMS doctrine in effect "places an onus upon employers to be correct before they punish employees for misconduct in the course of protected activity," CLARK COUNTY, DEC. NO. 30361-B (WERC, 11/03) at 16 n.7, SELRA also contemplates that an order be lawful before it can be enforced. Hence, the State could not lawfully enforce its unlawful February 5 directive. 10/

10/ The Examiner came to the same conclusion by relying upon arbitration and NLRB decisions suggesting that "discipline for actions taken in an official capacity is subject to a high degree of scrutiny." Examiner's Dec. at 29. The NLRB decisions cited by the Examiner did not involve good faith disputes about whether or not a union official engaged in certain misconduct, as does the instant case, but related to the different (though related) question of whether the undisputed conduct (such as profanity) was outside the bounds of the law's protection. If the conduct was within the law's protection, the employer's disciplinary action was held unlawful. In the cases cited by the Examiner, the employers' good faith was not a relevant consideration because their error was a legal one (not recognizing or not caring whether the conduct was protected) rather than a factual one (concluding wrongly that the employee had engaged in certain conduct). Except for the possible availability of a good faith defense, the outcomes and analysis would be much the same in both types of cases. Nonetheless, the analytical distinction (also noted in CLARK COUNTY, DEC. NO. 30361-B at 16 n.7) could be important in developing a record in cases like the present one, that turn on factual disputes.

Since the State could not lawfully enforce its unlawful directive, it follows that the interrogations that were part and parcel of the State's attempt to enforce an unlawful directive were in themselves an unlawful interference with Corcoran's protected activity. While we have concluded that Corcoran in fact responded truthfully during the State's interrogations, it would follow from our analysis that the State could not lawfully discipline Corcoran for being untruthful, as all of these subsidiary adverse actions are "fruit of the poisonous tree" that also would tend to interfere with the right to engage in protected activity.

Another important aspect of the interrogation issue also bears discussion, though it was broached only generally in the pleadings and given little attention during prior proceedings in this case. To the extent the State's interrogation may have had a broader focus than simply enforcing the February 5 directive, and may have been aimed at determining whether Corcoran's communications with Coats were coercive, a more complex issue is raised. Does the State's substantial legitimate interest in the integrity of its sexual harassment procedures outweigh Corcoran's also weighty statutory right to communicate non-coercively with bargaining unit members about a work-related incident involving the competing interests of

two bargaining unit members, such that the State may question Corcoran about those communications and discipline him if he is not forthcoming? In such a direct clash between statutory rights and an employer's bona fide interests, the Commission's traditional balancing test comes into play. That is, what are the nature and weight of Corcoran's statutory interests, does the State have genuine countervailing operational needs, and are those needs being met in a manner that interferes as little as practical with Corcoran's protected activity? UNIVERSITY OF WISCONSIN HOSPITALS AND CLINICS, DEC. NO. 30202-C (WERC, 4/04) at 14-16.

When balancing the circumstances present in this case, we begin by recognizing the gravity of the State's interest in protecting Coats from coercion or retaliation. Both the Union and the State have potential liability if they mishandle sexual harassment complaints. However, if the mere existence of this employer interest were sufficient to outweigh Corcoran's statutory rights, the State could legitimately monitor every conversation union officials have with sexual harassment complainants to ensure that nothing coercive occurs, a degree of intrusion that the State does not seek and could not justify. Clearly something more than the need to avoid coercion is required before an employer may interrogate union officials about their conversations with unit members. In this case, had the State's interrogation proceeded solely upon third-hand reports that something potentially suspect may have occurred on February 1, we would have trouble finding a sufficient concrete and reliable basis for interrogating Corcoran about his representational activities on February 1. However, in this case, while a very close question, we conclude that Coats provided sufficient information during her February 15 interview to evoke a reasonable suspicion that Corcoran may have been trying to deflect or undermine her charges, such that the State had a basis to question Corcoran regarding that narrow issue. Thus, under these circumstances, to the extent the interrogations were directed at determining whether Corcoran had a coercive purpose in meeting with Coats on February 1, the State's interrogations were lawful. 11/

11/ Our application of the balancing test on the narrow issue of the State's interrogation largely parallels the Examiner's at pages 32-34 of his decision. However, the Examiner did not differentiate in his analysis between the interrogation and the February 5 directive. In our view as expressed above, the directive was unlawful because it far exceeded the boundaries of the State's legitimate interest in avoiding coercive contact – but a narrowly drawn directive would have been lawful even without evidence of Corcoran's potential misconduct. The interrogation was also unlawful to the extent it focused upon enforcing the unlawful February 5 directive. However, the interrogation was lawful to the extent it concerned potentially coercive conduct during the February 1 conversation between Coats and Corcoran, but only because the State had gained from Coats' February 15 interview a concrete basis for believing that Corcoran had engaged in such misconduct. In the present case, these analytical differences between the Examiner's opinion and our opinion do not produce a difference in outcome, because Corcoran participated truthfully in the interrogation. However, had he been untruthful regarding the February 5 directive, our analysis would have prohibited the State from imposing discipline because that portion of the interrogation was itself unlawful.

In sum, the State may lawfully expect union officials to refrain from coercing or intimidating complainants and witnesses in sexual harassment cases and may lawfully enforce directives narrowly addressed to that expectation. The State may also lawfully interrogate union officials about their conversations with bargaining unit members, provided the State has a substantial and reliable basis for believing that coercion or other misconduct had occurred during such communications or that a lawful directive had been violated. The State may also punish union officials for misconduct during the course of protected activity, such as intimidating or coercing complainants or witnesses in a sexual harassment investigation, provided such misconduct actually occurred. However, in this case, the State interfered with Corcoran's rights under 111.82, SELRA by issuing a directive on February 5 that prohibited Corcoran from engaging in protected activity when Corcoran had not in fact committed any misconduct during the course of that protected activity, and by attempting to enforce that unlawful directive by means of interrogation and discipline. To remedy these violations, we have issued the Order set forth above.

As to Respondent's contention that the Notice should only be posted in Madison, we acknowledge the potential for posting in Oshkosh and Beaver Dam to reopen old wounds and be falsely understood as undermining the important State interest in meaningfully addressing allegations of sexual harassment. Nonetheless, the overriding purpose of the Notice is to publicly advise and affirm for affected employees the importance of the statutory rights we enforce and the action the State must take to honor those rights and remedy wrongdoing. Employees affected by this litigation work in Oshkosh and Beaver Dam. Thus, we affirm the three location posting requirement of the Examiner's Order.

Dated at Madison, Wisconsin, this 20th day of July, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

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