STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES - LOCAL 18, AFL-CIO, Complainant,

vs.

WISN DIVISION OF HEARST-ARGYLE TELEVISION STATIONS, INC., Respondent.

Case 18
No. 63891
Ce-2237

Decision No. 31183-A

Appearances:

Mark A. Sweet, Attorney, Law Offices of Mark A. Sweet LLC, 705 East Silver Spring Drive, Milwaukee, WI 53217-5231, appearing on behalf of the Complainant.

Robert H. Duffy and **Steven A. Burk**, Attorneys at Law, Quarles & Brady, LLP, 411 East Wisconsin Avenue, Milwaukee, WI 53202-4426, appearing on behalf of the Respondent.

EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On August 6, 2004, the Complainant named above filed a complaint with the Wisconsin Employment Relations Commission (WERC) alleging that the Respondent named above had committed and was committing unfair labor practices within the meaning of Secs. 111.06(1)(a), (d) and (f) of the Wisconsin Employment Peace Act (WEPA). On December 15, 2004, the Commission designated the undersigned Marshall L. Gratz as hearing examiner in the matter. Pursuant to notice, the Examiner conducted hearing in the matter on January 20, 2005, at the "old" Federal Building in Milwaukee, Wisconsin. As directed at the hearing, certain documentary exhibits were submitted to the Examiner by mail and received after the hearing. A transcript of the hearing was produced and distributed to the parties, and the parties submitted post-hearing briefs, the last of which was received by the Examiner on March 3, 2005, marking the close of the hearing.

On the basis of the record, the Examiner issues the following Finding of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The Complainant, International Alliance of Theatrical Stage Employees – Local 18, AFL-CIO (Complainant or Union), is a labor organization with offices at and a mailing address of 230 West Wells Street, Suite 405, Milwaukee, Wisconsin. At all material times, Paul Friday has been the Union's Business Manager, and Mark A. Sweet has been the Union's attorney.

2. The Respondent, WISN Division of Hearst-Argyle Television Stations, Inc. (Respondent or Company), is an employer, with offices in Milwaukee, and with a mailing address of P.O. Box 402, Milwaukee, WI 53201. Among the Company's operations is WISN-TV, a commercial television station serving southeastern Wisconsin. At all material times, Dean Maytag (Maytag) has been the Company's Director of Broadcast Operations for WISN-TV.

3. W__ H__ (Grievant) is an employee employed by the Company at WISN-TV at all times since September, 1989.

4. The Union and the Company are parties to a series of collective bargaining agreements since at least 1986, including one with a nominal term of December 15, 2001, through December 14, 2004 (Agreement). The Agreement provides, in part, as follows:

> Section 2. RECOGNITION
>
> The Employer recognizes the Union as the collective bargaining agent for Production Specialists.
>
> Section 4. DUTIES
>
> Production Specialists shall perform, as assigned, and/or determined by the Company, the following duties: Preparation, painting, handling, placement, operation, rebuilding, maintenance and repair of backgrounds, scenic sections and devices, platforms, and other structures forming part of the scenery or setting and certain construction work, in connection with television performances (live or videotape), and the maintenance of property storerooms, prop rooms, and workshops, and the restoration of the studio following a performance (this shall include the sweeping of a setting or area used in a performance but will not include general janitorial duties, i.e. sweeping, scrubbing, mopping, etc.); the placement and operation of lighting and dimmer

switchboards, lighting and minor repairs to the lighting devices, and non-exclusive operation of the titling and cueing devices used during performances; relaying information and directions; and such other duties not materially inconsistent herewith as the Employer may from time to time additionally assign.

It is understood that the Employer may have any of the foregoing duties performed by others if, in the judgment of Management, it would be more convenient to do, but the Company agrees that the duties herein described will not be assigned to any others in their employment for the express purpose of avoiding payment of overtime to the Production Specialists where needed on a full-time or regular part-time basis or for the purpose of acting in bad faith to avoid the Company's obligations under this Agreement.

The use of minicameras or standard TV camera equipment, either on the Employer's premises or at remote locations to which an IBEW cameraperson is assigned, will be staffed with production Specialist(s) to accomplish the job in accordance with the duties outlined herein. However, when a TV camera is used outside the station premises, a Production Specialist need not be assigned if unnecessary for the completion of the job in accordance with the duties outlined herein. At least one Production Specialist will be assigned to any use of the station premises for television production.

Section 9. GRIEVANCES

Initially, an attempt shall be made to settle grievances between the employee (and/or the Union Steward) and the employee's supervisor. Grievances must be presented initially within seven (7) working days from the time the grievance arose. At the employee's request, a Union Steward may be present at this stage.

Any grievance not settled in the initial stage shall be reduced to writing by the aggrieved party, and presented to the other party within fifteen (15) days from the time the grievance arose and it shall then be considered by the Employer and an authorized representative or representatives of the Union.

If not settled at this level within thirty (30) days, then if the grievance involves a claimed breach of this Agreement, the aggrieved party's sole remedy shall be to file unfair labor practice charges with the Wisconsin Employment Relations Commission in accordance with the Wisconsin statutes.

An arbitrator shall have the power and jurisdiction to determine whether a particular grievance, dispute, or complaint is arbitrable under the terms of this Agreement. The Arbitrator shall have no authority, however, to add to,

modify, or alter any of the terms and conditions of this Agreement, the authority of the Arbitrator being to render a decision as to the meaning and interpretation of this Agreement and the application of the Agreement to the person(s) involved in the dispute.

If an arbitrable dispute involves, as a part thereof, loss of pay to a Production Specialist, the Arbitrator may determine the amount of pay to which the employee is entitled, pursuant to the provisions of this Agreement, giving proper consideration to mitigation of damages. The decision of the Arbitrator, if made within the scope of their authority, shall be final and binding upon the parties hereto, and shall be put into effect within forty-eight (48) hours from the time the award is made and the parties notified thereof.

. . .

Section 12. PART-TIME EMPLOYEES

The Employer reserves the right to engage the services of employees to work part time. Part-time employees will not be used as a means of replacing regular full-time employees, and no regular full-time employees will be laid off for lack of work unless he or she has been given the opportunity to accept any hours (up to forty [40]) which are currently made available to part-time employees.

A former regular full-time or part-time Production Specialist who is rehired within three (3) months of his/her termination shall be paid at an hourly rate commensurate with his/her length of service credit as it applies to the current pay scale.

Part-time Production Specialists are eligible for a paid vacation after each ten hundred forty (1040) hours of work. The hours of vacation time shall be based on the average number of hours worked each week during the previous three (3) months. Regular part-time Production Specialists are eligible for one-half (1/2) day of paid medical disability leave for each month worked in a year. However, this time cannot be claimed until completion of the Initial Employment Period. A maximum of ten (1) sick days may be carried over from year to year.

Applications of the provision with respect to seniority, severance pay, and discharges for part-time employees shall be in the sole discretion of the Company. All other terms and conditions of this Agreement shall apply to any such part-time employee.

If a part-time employee becomes a full-time employee, he or she shall be credited with seniority on the basis of one (1) week credit for each forty (40) hours worked from the date of the initial employment. The Employer will endeavor to assign all part-time employees to work hours on an equitable basis. However, it is understood that Management retains the right to assign all hours to part-time employees on the basis of the employee's experience, expertise, and the needs of the specific assignment and department. Part-time Production Specialists will not be called in for less than four (4) hours of work.

. . .

Section 15. ASSIGNMENTS

The employer will be the sole judge of the number of employees assigned to any work.

No Production Specialist will be assigned more work than he or she can reasonably be expected to handle.

Every effort shall be made to post weekly work schedules no later than 4:00 p.m. on Wednesday for the following week. A two- (2) week notice shall be given to a Production Specialist if a change is to be made in that employee's primary schedule unless there are extenuating circumstances.

When two (2) or more Production Specialists are on duty, the Employer shall designate one (1) of them to be in charge.

Any Production specialist who, in the judgment of Management, has the necessary qualifications, may be trained, where possible, in direction and production and may be assigned to such work in his or her appropriate pay scale when need for such direction and production arises, as determined by Management.

. . .

Section 18. RATES OF PAY

Regular full-time Production specialists shall receive at least the following minimum weekly rates of pay, based on length of service with the Company: . . . .

. . .

Section 24. LAYOFFS

The Employer shall be the sole judge of the number of Production Specialists to be employed. In case of decrease of staff where several employees are equally capable of doing the job properly, and each is performing in full accordance with Sections 7 [COOPERATION] and 8 [DECORUM] [o]f this Agreement, seniority shall prevail. Should it become necessary at any time for the Employer to lay off a regular full-time Production Specialist, the Employer shall give that person at least two weeks written notice of such layoff.

If a vacancy occurs in the Production Specialist's staff, those persons laid off in the previous six (6) months shall be given preference in filling the vacancy in order of their seniority, providing they are still capable of performing their prescribed duties. The offer for employment must be accepted within seventy-two (72) hours and he or she must report for duty within two (2) weeks thereafter. Any employee called back from layoff [shall be credited for employment prior to the layoff[1]] and seniority shall resume accrual from the time of re-employment in addition to seniority accrued prior to layoff.

. . .

Section 25. DISCIPLINARY ACTION

The following offenses will be grounds for discharge of an employee without warning or notice . . . . For the offense of deliberate insubordination, the employee will be given either a disciplinary layoff or will be discharged as the Company determines. For all other offenses, the company will give the employee a written warning stating the nature of the offense. In the event of further misconduct, the employee will be given a second written notice stating the nature of the misconduct and warning the employee that in event of further misconduct, the employee will be given either a disciplinary layoff or will be discharged as the Company determines. Any dispute as to whether the employee committed the particular offense or participate[d] therein and all discharges and disciplinary actions will be subject to review under the grievance procedure provided it is presented within seven (7) working days from the date of the warning, or the date of the disciplinary action whichever last occurs.

. . .

[1] This bracketed language appears in the otherwise identical concluding sentence of Art. 24 of the parties' 1986-89 agreement, but it appears to have been omitted by typographical mistake from the Agreement.

Section 28. LEAVE OF ABSENCE

Any regular full-time employee may be granted a leave of absence for good cause, provided such leave is approved in writing by both the Employer and the Union. Leaves of absence for emergency reasons may be granted by the Employer with or without pay and without loss of seniority. Any Production Specialist who takes an extended leave for Union business will be re-employed from layoff status, as though he or she had not taken the leave. His or her seniority for all other purposes under the Agreement, including wages, will be computed as to the actual work for the Employer completed at the start of the leave. All other Employer benefits to be at the sole discretion of the Employer.

. . .

Section 30. MILITARY SERVICE

In the event any Production Specialist enters the Armed Services of the United States or the United States Maritime Service, under circumstances which are recognized as justifiable by both the Employer and the Union, upon his or her honorable discharge from such service, he or she shall be re-employed by the Employer provided he/she makes application within ninety (90) days of such honorable discharge and provided he/she shall not have been so disabled or injured as to be incapable of performing Production Specialist work. . . . The Employer shall be entitled for the purposes of making a place for any such [employee] to be so re-employed, to lay off the Production specialist with the least seniority.

. . .

Section 33. MANAGEMENT

Except as expressly limited by this Agreement, the management of the affairs of the Employer is vested exclusively in the Employer, and except as expressly limited by this Agreement, the management of the affairs of the Union is vested exclusively in the Union.

Nothing in this Agreement shall be construed to obligate the Employer to employ Production specialists when there is no work to be performed and the Employer at all times shall be the sole judge of the work to be done and the number of individuals to be employed or retained in employment.

Section 34. ENTIRE CONTRACT

This Agreement constitutes the entire Agreement between the Union and the Employer on all bargainable issues, and both parties do hereby waive bargaining on all bargainable issues for the duration of this Agreement.

5. The Agreement contains no provisions concerning employee health insurance benefits and no specification of the number of hours constituting full-time or part-time employment. At all material times, the standards for eligibility for Company-subsidized and for fully-employee-paid group health insurance benefits and the numbers of hours constituting full-time and part-time employment of Company personnel have been as specified in the Company's Employee Handbook (Handbook). In November of 2003, and at all times since at least January of 1988, the Handbook read, in pertinent part, as follows:

HEALTH INSURANCE

The Company offers medical and dental benefits for all full-time employees and their dependents and domestic partners. The cost of insurance is shared by the employer and the employee. The employee's share is paid via payroll deductions. Health insurance benefits and the related shared costs are subject to change.

. . .

Information on this coverage is available from the Controller or the Human Resources Representative.

. . .

HEALTH BENEFITS CONTINUATION

Full-time employees and their qualified beneficiaries may be eligible to continue health insurance coverage under the Company's health plans when a "qualifying event" would normally result in the loss of eligibility. These qualifying events include death, divorce, retirement, termination, reduction in hours and when a dependent child ceases to be a dependent.

Employees can contact the Controller or the Human Resources Representative for further information.

. . .

CLASSIFICATION OF EMPLOYMENT

Employees at Hearst-Argyle are classified in one of the following ways:

Full-time: Scheduled to work 30 hours or more per week on a regular basis.
Part-time: Scheduled to work fewer than 30 hours on a regular basis.
Temporary: Hired for a specific purpose and for a specified period of time.

6. The Grievant began his Company employment in September, 1989. He began as a part-time bargaining unit employee in the Junior Production Specialist classification, thereafter became a full-time Production Specialist, in 1991 was changed by the Company from full-time to part-time status for a period greater than one year, was returned by the Company to full-time status in or about September of 1992, and remained on full-time status thereafter until November 3, 2003. The Company provided the Grievant with Company-subsidized health insurance benefits during his initial employment as a part-time employee, during the period in 1991-92 when Grievant's status was changed to part-time after he had attained full-time status, and at all times when the Grievant's status was full-time.

7. Since at least 1997, none of the Production Specialists whose employment with the Company has been exclusively part-time has ever been provided with Company-subsidized health insurance benefits.

8. The Company has, at various times material to this dispute, simultaneously employed both full-time and part-time Production Specialists. In or about 1991-92, the Union did not grieve when the Company reduced a full-time Production Specialist (the Grievant) to part-time status, but the record does not establish whether the Company employed any other part-time employees besides the Grievant during the time the Grievant's status was reduced to part-time. In 1996, the Union did not grieve when the Company chose not to fill a full-time position vacated by Dwight Moss, while the Company continued to employ part-time Production Specialists well in excess of an aggregate of 40 hours. As a result of that ungrieved action in 1996, the Company reduced the number of full-time Production Specialists from three to two, while continuing to employ four part-time Production Specialists. The Examiner infers that the parties' agreement in effect in 1996 contained language closely paralleling that which appears in the first paragraph of Agreement Sec. 12 from the fact that the parties' agreement in effect from December 15, 1986, through December 14, 1989, contained such language.

9. Grievant has been the Union steward at the Company at all times since sometime in 1997. Grievant has participated as a member of the Union bargaining team in the three rounds of contract bargaining that have occurred since he became steward. Grievant has also submitted two grievances in written form, one on August 25, 2003, challenging the Company's reduction of the number of bargaining unit employees on duty in connection with broadcasts of State Lottery drawings, and the other on October 31, 2003, challenging the Company's having

allowed non-bargaining unit personnel to perform Production Specialist duties. The Grievant orally informed Maytag that the latter grievance would be submitted in writing during a discussion Grievant had with Maytag on October 15, 2003.

10. Neither Maytag nor any other agent of the Company has been shown to have been hostile either toward Grievant's initiation of the grievances noted in Find of Fact 9, above, or toward any other protected concerted activity engaged in by the Grievant or the Union at any time.

11. The August 25, 2003, grievance initiated by the Grievant read, in pertinent part, as follows:

> We consider the non-staffing of lottery drawings to be a breach of the agreement between Local 18 of the agreement between [the Union] and [the Company]. Specifically Section 4 on page 4 reads, "At least one Production Specialist will be assigned to any use of the station premises for television production.". . .

12. On September 10, 2003, Maytag denied the August 25 grievance as follows:

> This is in response to your August 25, 2003 grievance regarding the Station's staffing for lottery drawings. The Union asserts that the parties' collective bargaining agreement requires that a union stagehand be present for all lottery drawings. For the reasons summarized below, WISN-TV denies the grievance in its entirety.
>
> The Grievance lacks merit. Specifically, numerous provisions with the contract reserve to WISN-TV's sole discretion decisions concerning both the number of stagehands that it will employ and the type of work that those individuals will perform. Such discretion is reserved to WISN-TV in numerous places throughout the contract, including the following:
>
> [quotations from Agreement Secs. 33, 24, 15 and 4 omitted]
>
> The collective bargaining agreement therefore repeatedly makes clear that WISN-TV has the sole discretion to determine how many union stagehands it wishes to employ and what type of work they will perform. Consistent with that right, and with the existing agreement between the Station and the Wisconsin Lottery, effective August 10, 2003, the Station is no longer required to have a stagehand present during any lottery drawing. As the actual work that the union stagehands previously performed during the lottery drawings was minimal, if any, depending upon the day involved, the Station chose to no longer have stagehands present during these drawings. The Station's decision

> to no longer assign stagehands to the lottery drawing is also consistent with its past practice for television production. Specifically, the Station often has multiple productions, which often operate simultaneously. It has in the past and will continue to have occasions when a stagehand is not present in at least one of the areas where production is taking place. Obvious past examples include the numerous live shots of reporters from the newsroom. Certainly you are aware of many other examples as well.
>
> Finally, the Station's decision to perform lottery drawings without a stagehand present is also consistent with Section 4 of the contract, including the provision that: "At least one Production Specialist will be assigned to any use of the station premises for television production." In fact, at least one stagehand is always present during any live newscasts, and therefore on the Station's premises at any time a lottery drawing occurs.
>
> For the reasons above noted, WISN-TV denies the Union's August 25, 2003 grievance in its entirety.

13. On October 20, 2003, Maytag notified the Grievant that the Company was changing Grievant's status from full-time to part-time effective on November 3, 2003. In or immediately after November of 2003, the Company reduced the Grievant's vacation and sick leave benefits, terminated Grievant's Company-subsidized health insurance, and offered him employee-paid COBRA benefits required by law for the period prescribed by law, which ends on or about March 31, 2005. Since the termination of his Company-subsidized health insurance benefits, the Grievant has been paying in full for COBRA-based health insurance benefits under the Company plan. The Company chose to continue to pay Grievant for his work as a part-time employee on and after November 3, 2003, at the $12.99 hourly rate of pay he had been receiving as a full-time employee prior to that date.

14. After changing Grievant's status from full-time to part-time effective on November 3, 2003, the Company employed three part-time bargaining unit employees in addition to the Grievant without offering Grievant the opportunity to accept any of the hours that were being made available to those other part-time employees.

15. In response to changes in the Company's business needs and objectives, the Company has reduced the aggregate hours offered on a regular basis to Union bargaining unit personnel by approximately 50 hours by the end of 2003 from levels at which it had typically been prior to November of 2003. The Company kept its most senior full-time Production Specialist at full-time status. Grievant was changed to part time, reducing his regular weekly hours by about 12 from about 40 to 28 or 29. The number of full-time employees was thereby reduced from two to one, with the aggregate number of hours regularly worked by full-time employees reduced by 40 from about 80 to about 40. The number of part-time employees was

kept at four by the addition of the Grievant and the discontinuation of the part-time employment of an individual named Selner, and the aggregate number of hours regularly offered to part-time employees was reduced by 9 from about 111 to about 102.

16. The record does not establish that 40 of the hours of work made available weekly to part-time employees on and after November 3, 2003, could not have been offered to the Grievant without employing the Grievant at times when there was no work to be performed.

17. In December, 2003, a month after he was changed to part-time status, the Grievant began experiencing health problems. Following a brief absence in May of 2004, during which Grievant was treated for a heart condition, he returned to work and resumed his duties as a part-time Production Specialist. Grievant has been cleared by his doctors to perform full-time work.

18. The written grievance dated October 31, 2003, that Grievant transmitted to Maytag, read as follows:

> On Tuesday, October 14, 2003, I, [Grievant], observed F__ P__ and K__ F__ setting up and then using lights in the channel 12 news room. This is a breach of the agreement between [the Union] and [the Company]. Specifically, Section 4 on page 4 that reads, "At least one Production Specialist will be assigned to any use of the station premises for television production." Also Section 15 ASSIGNMENTS on page 9 that reads "No Production Specialist will be assigned more work that [sic] he or she can reasonably be expected to handle. Only one Production Specialist was on duty at the time, and working on another remote production, so I was unable to set up the light at the time.

19. On November 7, 2003, Union Business Manager Paul Friday transmitted a written grievance to Maytag asserting, "WISN violated the collective bargaining agreement on November 3, 2003 when it unilaterally changed Union Steward [Grievant] from a full time employee to a part time employee." By way of remedy, the grievance requested that the Company "Restore [Grievant] to full time status and restore all lost wages and benefits in a traditional make whole remedy.

20. On December 12, 2003, Maytag denied the November 7 grievance as follows:

> This letter is in response to the Union's November 7, 2003 grievance concerning WISN-TV's decision to reduce [Grievant's] hours and thereby change his status from a full-time to a part-time employee. For the reasons summarized below, WISN-TV respectfully denies the grievance.

> Although the Union is correct in stating that WISN-TV unilaterally made the decision to reduce [Grievant's] status from full to part-time, the Station did so as a result of its sole authority to make such management decisions in the operation of its business. Further, this exclusive management right is delineated in numerous provisions with the parties' Collective Bargaining Agreement. Specifically, Section 33, concerning management rights, provides that the Station "shall be the sole judge of the work to be done and the number of individuals to be employed or retained in employment." Similarly, Section 15, concerning assignments, provides that the Station "will be the sole judge of the number of employees assigned to any work."
>
> Further, the Station had numerous and legitimate reasons for making this decision. Specifically, there has been a significant loss of production hours due to changes in the Lottery and local programming. The Station therefore made the decision to reduce hours in a way that both preserved the flexibility that it needs to complete the work that remains, as well as respects the seniority rights of the members with the Union's bargaining unit.
>
> Finally, the Station's decision to reduce [Grievant's] hours not only complied with the contract, but with its past practice in handling hours reductions within the bargaining unit.

21. On February 13, 2004, the Union filed a charge with the National Labor Relations Board (NLRB) in Milwaukee. After investigating the charge, the NLRB Region 30 Acting Regional Director (ARD) declined to file a complaint and dismissed the charge. Following a Union appeal, the NLRB General Counsel's Office of Appeals affirmed the ARD's decision not to file a complaint in the matter. The ARD's letter to Union Attorney Mark Sweet describing and dismissing the charge read, in pertinent part, as follows:

> The Region has carefully investigated and considered the charge against [the Company] alleging violations under Section 8 of the National Labor Relations Act.
>
> The charge alleges that the Employer unilaterally reduced the assignment of production staff; that the employer unilaterally assigned non-bargaining unit employees to perform bargaining unit work; that the Employer unilaterally reduced the hours of employees, and reassigned employees to part time status and refused to pay benefits. The charge also alleges that the Employer discriminatorily reduced the hours of [Grievant] and reassigned him to part-time and that the Employer discriminatorily refused to pay him benefits.

Decision to Dismiss: Based on that investigation, I have concluded that further proceedings are not warranted, and I am dismissing your charge for the following reasons:

The evidence established that the Employer reduced the number of unit employees assigned to the Wisconsin Lottery drawings. The contract provides that production specialists shall perform duties as assigned and/or determined by the Company. (Section 4). The contract also states that the Employer will be the sole judge of the number of employees assigned to any work. (Section 15). The evidence established that the contract with the Wisconsin Lottery required two stagehands. That contract expired on August 31, 2003, but was temporarily extended to December 31, 2003. The contract for the extended period did not require any stagehands, therefore the Employer, under its interpretation of the contract, reassigned one of the stagehands. The reassigning of employees was grieved by its steward, [the Grievant], under the Union's interpretation of Section 4.

The Employer also assigned unit work to non-bargaining unit employees. The Union claimed that the assignment violated Section 4 of the contract and that portion of Section 15 which states no production specialist will be assigned more work [than] he or she can reasonably be expected to handle. Since [Grievant], the only stagehand on duty at the time, was working in another location, the Employer assigned non-unit employees to light the newsroom. [Grievant] discussed the situation with Dean Maytag, Director of Broadcast Operations, and told Maytag he was going to file a grievance. The Employer contended that it could assign the non-unit employees by contract, under its interpretation of the management rights clause, Section 33. A few days later, [Grievant] was informed by Maytag that he was going to be reduced to part time, and his benefits would also be reduced.

Although [Grievant's] reduction in hours and attendant loss in benefits was close in time to his stating he would file a grievance, which would have been the second one in eight years, as well as in the preceding two months, there was no evidence to establish that the Employer harbored any animosity against [Grievant] for his protected concerted activities. Accordingly the evidence is insufficient to establish his reduction in status was in retaliation for his grievance filing or any other Union and/or protected concerted activities in which he may have engaged.

Regarding the alleged unilateral changes, the evidence shows that the contract contained strong language regarding the Employer's actions, and that both the Employer and the Union had reasonable, competing interpretation[s] of the contract. NCR Corporation, 271 NLRB 1212 (1984). There was no evidence that the Employer had any animosity against the Union as a motive for its actions. Instead, it was relying on its interpretation of the contract.

The Office of Appeals letter to Sweet dated June 21, 2004, read, in pertinent part, as follows:

> Your appeal from the Regional Director's refusal to issue complaint has been carefully considered.
>
> The appeal is denied substantially for the reasons set forth in the Regional Director's letter of March 31, 2004. Notwithstanding the timing of Mr. [H--'s] reduction to part time status in relation to his grievance filing activity, there was insufficient basis to establish that the Employer's actions were based on unlawful considerations. There was insufficient evidence to show that the Employer harbored animus against Mr. [H__] because of his protected activity or that it acted in a retaliatory manner. A review of the Regional Office's file also disclosed that various sections of the collective bargaining agreement were subject to competing and reasonable interpretations by the Employer and Union. Accordingly, further proceedings are unwarranted.

22. On August 6, 2004, the Union filed the instant complaint alleging that the Company had violated WEPA by committing unilateral change refusals to bargain, anti-union discrimination and violations of the terms of a collective bargaining agreement by:

> a. reducing staff from two to one Floor Directors at night on or about August 8, 2003;
>
> b. assigning the setting up of lights to non-bargaining unit employees on or about October 14, 2003; and
>
> c. on or about October 14, 2003, reclassifying the Grievant from full-time to part-time and eliminating his health insurance benefits.

23. With regard to the August 25, 2003 grievance set forth in Finding of Fact 11, above, the Company reduced from two to one the number of bargaining unit employees assigned to work on the station premises during broadcasts of State Lottery drawings from August 10 through December 31, 2003. The Company did so after its contract with the State Lottery was modified at the Company's request to reduce the staffing requirements formerly contained in the Company's contract with the State Lottery. The Company did not offer to bargain with the Union as regards any aspect of the Company's reduction in the number of bargaining unit employees assigned to work during State Lottery broadcasts. In the circumstances extant from August 10 through December 31, 2003, the Company's reduction from two to one in the number of bargaining unit employees assigned to work during State Lottery drawings was an exercise of rights reserved to the Company in Agreement Sec. 15 ("[t]he Employer will be the sole judge of the number of Employees assigned to any work")

and Sec. 33 ("the Employer at all times shall be the sole judge of the work to be done . . .") that did not violate the terms of a collective bargaining agreement. By always having assigned at least one bargaining unit employee to work somewhere on the station premises during broadcasts of the State Lottery drawings at issue, the Company met its Agreement Sec. 4 obligation that "at least one Production Specialist will be assigned to any use of the station premises for television production."

24. With regard to the October 31, 2003, grievance set forth in Finding of Fact 18, above, two individuals, who were not members of the Union bargaining unit, set up and used the lights in the WISN-TV news room. By allowing those individuals to perform that work, the Company effectively assigned that work to those individuals. In the circumstances extant on October 14, 2003, the Company's assignment of that work to those individuals was an exercise of rights reserved to the Company in the second paragraph of Agreement Sec. 4., that did not violate the terms of a collective bargaining agreement.

25. With regard to the November 7, 2003, grievance, set forth in Finding of Fact 19, by changing Grievant's status from full-time to part-time effective on November 3, 2003, the Company "laid off" the Grievant "for lack of work" within the meaning of the first paragraph of Agreement Sec. 12. By doing so without offering him the opportunity to accept hours (up to forty [40]) which were then being made available to part-time employees, in circumstances which would not have required the Company to employ Grievant when there was no work to perform, the Company violated the terms of a collective bargaining agreement, namely, Agreement Sec. 12.

CONCLUSIONS OF LAW

1. The complaint allegations of unfair labor practices other than violation of the terms of a collective bargaining agreement are matters within the exclusive jurisdiction of the NLRB, and hence they are matters as to which the WERC's jurisdiction under WEPA is pre-empted by federal law. The language of Agreement Sec. 9 only makes grievances involving a claimed breach of the Agreement subject to the WERC's jurisdiction under WEPA; that language does not make allegations of unfair labor practices other than violations of the terms of a collective bargaining agreement subject to WERC jurisdiction under WEPA.

2. The Company did not violate the terms of a collective bargaining agreement and therefore did not commit unfair labor practices within the meaning of Sec. 111.06(1)(f), Stats., by the conduct referenced in paragraphs a. and b. of Finding of Fact 22, above.

3. The Company has violated the terms of a collective bargaining agreement, namely Agreement Sec. 12, and therefore has committed and is committing an unfair labor practice within the meaning of Sec. 111.06(1)(f), Stats., by its conduct referenced in Finding of Fact 25, above.

ORDER

1. The following allegations in the instant complaint are dismissed:

a. the allegations that the Company violated the terms of a collective bargaining agreement by the conduct referenced in paragraphs a. and b. of Finding of Fact 22; and

b. the allegations that the Company committed unfair labor practices other than violations of the terms of a collective bargaining agreement.

2. By way of remedy for the violation noted in Conclusion of Law 3, above, the Company, its officers and agents, shall immediately:

a. reinstate Grievant to full-time employment as a Production Specialist, without loss of seniority or other rights and privileges; and offer the Grievant the opportunity to accept any hours (up to forty [40]) which are currently made available to part-time employees, before laying him off from full-time employment as a Production Specialist. Nothing in this paragraph 2.a. shall be construed to obligate the Company to employ the Grievant when there is no work to be performed.

b. make Grievant whole, with interest at 12 percent per year[2], for any loss of pay and benefits he experienced as a result of the Company's changing him from full-time to part-time status on and after November 3, 2003, in violation of Agreement Sec. 12. Among the lost benefits for which Grievant is to be made whole are Company-subsidized health insurance benefits. In that regard, the Company is to immediately restore Grievant's Company-subsidized health insurance benefits to those in effect for full-time bargaining unit employees and to make the Grievant whole for health insurance premium costs and other out-of-pocket health care costs he has incurred as a consequence of the Company's termination of his Company-subsidized health insurance benefits in connection with its change of Grievant's status from full-time to part-time.

c. Notify all Company employees represented by the Union by posting in conspicuous places where the employees are employed, copies of the Notice attached hereto and marked "Appendix A," but with Grievant's name substituted for his initials. That Notice shall be signed by Respondent's Director of Broadcast Operations and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken to ensure that said notices are not altered, defaced or covered with other material.

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[2] The interest rate noted is that set forth in Sec. 814.04(4), in effect at the time the complaint was initially filed with the agency on August 6, 2004. SEE, WILMOT UNION HIGH SCHOOL, DEC. NO. 18820-B (WERC, 12/83), citing, ANDERSON V. LIRC , 111 WIS.2D 245 (1983), and MADISON TEACHERS, INC., V. WERC , 115 WIS.2D 623 (CT. APP. IV, 1983)

d. Cease and desist from violating the terms of its collective bargaining agreement with the Union.

e. Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days following the date of this Order, as to what steps have been taken to comply herewith.

3. The Union's request for an order that the Company pay the Union's costs and attorneys fees incurred in this matter is denied.

4. The Company's request for an order that the Union pay the Company's costs and attorneys fees incurred in this matter is denied.

Dated at Shorewood, Wisconsin, this 22nd day of March, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Marshall L. Gratz /s/

Marshall L. Gratz, Examiner

APPENDIX A

NOTICE TO ALL EMPLOYEES OF WISN DIVISION OF HEARST-ARGYLE TELEVISION STATIONS, INC., REPRESENTED BY INTERNATIONAL ALLIANCE OF THEATRICAL STATE EMPLOYEES, LOCAL 18, AFL-CIO,

Pursuant to an order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Wisconsin Employment Peace Act, we hereby notify the above employees that:

WE WILL immediately:

a. reinstate W__ H__ to full-time employment as a Production Specialist, without loss of seniority or other rights and privileges;

b. offer W__ H__ the opportunity to accept any hours (up to forty [40]) which are currently made available to part-time employees, before laying him off from full-time employment as a Production Specialist, but we will not employ W__ H__ when there is no work to be performed.

c. make W__ H__ whole, with interest, for any loss of pay and benefits he experienced as a result of the Company's changing him from full-time to part-time status on and after November 3, 2003 in violation of Agreement Sec. 12. Among the lost benefits for which Grievant will be made whole is the loss of Company-subsidized health insurance benefits. In that regard, we will immediately restore Grievant's Company-subsidized health insurance benefits to those in effect for full-time bargaining unit employees and make him whole any for health insurance premium costs and other out-of-pocket health care costs he has incurred as a consequence of the Company's termination of his Company-subsidized health insurance benefits in connection with its change of Grievant's status from full-time to part-time.

d. comply with the terms of our collective bargaining agreement with International Alliance of Theatrical State Employees, Local 18, AFL-CIO.

WISN-TV

By _____
Director of Broadcast Operations

THIS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL.

WISN DIVISION OF HEARST-ARGYLE TELEVISION STATIONS, INC.

MEMORANDUM ACCOMPANYING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The complaint in this case alleges that the Company committed unfair labor practices within the meaning of Secs. 111.06(1)(a), (1)(d) and (1)(f), Stats.,[3] by engaging in the conduct specified in paragraphs a-c of Finding of Fact 22. In its answer, the Company denies committing any unfair labor practice.

In its post-hearing arguments, the Union asserts that the Company violated WEPA by committing unilateral change refusals to bargain, anti-union discrimination and violations of the terms of a collective bargaining agreement by the conduct specified in paragraphs a-c of Finding of Fact 22, by its termination of Grievant's Company-subsidized health insurance benefits generally, and by its refusal to extend employee-paid health insurance coverage to Grievant beyond the time period guaranteed by law under COBRA. The Union requests declarative, cease-and-desist, notice posting and make whole relief. The Union also requests that the Company be ordered to pay the Union's costs and attorneys fees in the matter.

In its post hearing-arguments, the Company asserts that all of the Company's actions at issue in this case were exercises of rights expressly reserved to the Company in the Agreement and that none of them violated WEPA in any respect. The Company further asserts that each of the actions at issue was taken for legitimate business reasons and that none of those actions was taken because of Grievant's or the Union's protected activities. The Company requests that the complaint be dismissed in its entirety and that the Union be ordered to pay the Company's costs and attorneys fees in the matter.

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[3] Section. 111.06, Stats., reads in pertinent part, as follows:

(1) It shall be an unfair labor practice for an employer individually or in concert with others:

(a) To interfere with, restrain or coerce the employer's employees in the exercise of the rights guaranteed in s. 111.04.

. . .

(d) To refuse to bargain collectively with the representative of a majority of the employer's employees in any collective bargaining unit with respect to . . . terms and conditions of employment. . . .

. . .

(f) To violate the terms of a collective bargaining agreement. . . .

Federal Preemption as to Claims Other than Violation of Agreement

The language of the third paragraph of Agreement Sec. 9 makes grievances involving a claimed breach of the Agreement subject to the WERC's jurisdiction under WEPA. However, that language does not make allegations that the Company committed unfair labor practices other than violations of the terms of a collective bargaining agreement subject to the WERC's jurisdiction under WEPA.

Because the NLRB's Acting Regional Director asserted that agency's jurisdiction to determine whether there was probable cause to issue a complaint, it follows that the relationship between the Company and Union is subject to the jurisdiction of the NLRB as regards the complaint allegations other than those alleging violations of the terms of the Agreement. The Examiner has therefore concluded that those other allegations (i.e., unilateral change refusals to bargain and anti-union discrimination) are outside the jurisdiction of the WERC to address, except as the substance of the allegations may bear on the remaining allegations that the Company violated the terms of a collective bargaining agreement. SEE, STRAUSS PRINTING COMPANY, INC., DEC. NO. 20115-A (SCHOENFELD, 12/82), AFF'D BY OPERATION OF LAW, -B (WERC, 1/83), CITING, SAN DIEGO BUILDING TRADES COUNCIL V. GARMON, 359 U.S. 236 (1959)(WERC pre-empted by NLRB jurisdiction); PAUL'S IGA FOODLINER, DEC. NO. 10762-A (FLEISCHLI, 9/72), AFF'D BY OPERATION OF LAW, -B (WERC, 2/73)(same); and TECUMSEH PRODUCTS CO. V. WERB, 23 WIS.2D 118 (1963)(WERC jurisdiction concurrent with state and federal courts regarding alleged violations of collective bargaining agreements in relationships affecting interstate commerce).

Accordingly, the Examiner has dismissed the complaint allegations of conduct other than violation of the terms of a collective bargaining agreement.

Nature of Examiner's and Commission's Authority to Adjudicate Alleged Agreement Violations

Although the last two paragraphs of Agreement Sec. 9 refer to the powers and jurisdiction of "[a]n arbitrator," those paragraphs must be read together with the third paragraph of that section which unequivocally provides that "the aggrieved party's sole remedy shall be to file unfair labor practice charges with the Wisconsin Employment Relations Commission in accordance with the Wisconsin statutes."

Reading those provisions together, the Examiner concludes that, in general, the decision-making authority referenced in the last two paragraphs of Sec. 9 are to apply to the WERC (and its appointed examiner) in their exercise of unfair labor practice jurisdiction in accordance with applicable provisions of WEPA.

The parties have not, to this point in the proceedings, addressed the meaning and application of the portion of the last paragraph of Sec. 9 stating, "[t]he decision of the Arbitrator, if made within the scope of their authority, shall be final and binding upon the

parties hereto, and shall be put into effect within forty-eight (48) hours from the time the award is made and the parties notified thereof." Hence, any dispute about the meaning and application of that provision is not ripe for determination by the Examiner. Such a dispute would arise in this proceeding, if at all, only after the issuance of an examiner decision, at the Commission review level.

Issues for Determination

From the foregoing, it follows that the issues for determination by the Examiner in this case are:

1. Did the Company violate the Agreement by any of the following conduct:

   a. reducing staff from two to one Floor Directors at night on or about August 8, 2003;

   b. assigning the setting up of lights to non-bargaining unit employees on or about October 14, 2003; or

   c. on or about October 14, 2003, reclassifying the Grievant from full-time to part-time and eliminating his health insurance benefits.

2. If so, what shall the remedy be?

For reasons outlined below, The Examiner has concluded that the answers to 1.a. and 1.b., above are "no", but that the answer to 1.c. above is "yes." By way of remedy, the Examiner has fashioned a conventional cease and desist, make whole and notice posting order.

Reducing Staff from Two to One Floor Directors at Night as Alleged Violation of Agreement

With regard to the August 25, 2003 grievance set forth in Finding of Fact 11, above, the Company reduced from two to one the number of bargaining unit employees assigned to work on the station premises during broadcasts of State Lottery drawings from August 10 through December 31, 2003. The Company did so after its contract with the State Lottery was modified at the Company's request to reduce the staffing requirements theretofore contained in the Company's contract with the State Lottery. The Company did not offer to bargain with the Union as regards any aspect of the Company's reduction in the number of bargaining unit employees assigned to work during State Lottery broadcasts.

In the circumstances extant from August 10 through December 31, 2003, the Company's reduction from two to one in the number of bargaining unit employees assigned to work during State Lottery drawings was an exercise of rights reserved to the Company in Agreement Sec. 15 ("[t]he Employer will be the sole judge of the number of Employees assigned to any work") and Sec. 33 ("the Employer at all times shall be the sole judge of the work to be done . . .").

By always having assigned at least one bargaining unit employee to work somewhere on the station premises during broadcasts of the State Lottery drawings at issue, the Company met its Agreement Sec. 4 obligation that "at least one Production Specialist will be assigned to any use of the station premises for television production."

The past practice evidence establishes that the parties have not interpreted that quoted language of Sec. 4 to require one Production Specialist for each of multiple simultaneous uses of the station premises for television production. Rather, the Company has often operated multiple productions on its station premises when a Production Specialist is not present in at least one of those areas when production is taking place. Examples include numerous live shots of reporters from the newsroom while a Production Specialist is present in the studio but not in the newsroom. While it is true that the Company had routinely assigned an additional Production Specialist to State Lottery drawing broadcasts for many years, the Company was within its rights under the Agreement language noted above to choose to operate with one instead of two employees as it did in this case. There is no showing that the Company was requiring any of its Production Specialists to perform more work than could reasonably be expected to be performed in the circumstances, so no violation of the workload language in the second paragraph of Agreement Sec. 15 has been proven, either.

Assigning the Setting Up of Lights to Non-bargaining Unit Employees as Alleged Violation of Agreement

With regard to the October 31, 2003, grievance set forth in Finding of Fact 18, above, two individuals, who were not members of the Union bargaining unit, set up and used the lights in the WISN-TV news room. By allowing those individuals to perform that work, the Company effectively assigned that work to those individuals.

In the circumstances extant on October 14, 2003, the Company's assignment of that work to those individuals was an exercise of rights reserved to the Company in the second paragraph of Agreement Sec. 4., that did not violate the terms of a collective bargaining agreement.

Change of Grievant's Status from Full-time to Part-time as Alleged Violation of Agreement

With regard to the November 7, 2003, grievance set forth in Finding of Fact 19, the Union, contrary to the Company, has argued that the Company's change in Grievant's status from full-time to part-time violated the Agreement in several respects, including violations of Secs. 12 and 18.

The Examiner has found merit only in the Union's contention that the Company violated Agreement Sec. 12 by changing Grievant's status from full-time to part-time and thereby causing him to be "laid off due to lack of work" without offering him "the opportunity to accept any hours (up to forty [40]) which are currently made available to part-time employees."

On that point, the Union argued in its brief that, apart from the Company's absolute Sec. 33 right not to employ any bargaining unit personnel when no work is available, the second sentence of Sec. 12 clearly and unambiguously prohibits the Company from reducing an existing full-time employee's regular weekly hours below 40 while continuing to make hours of work available to part-time employees.

On that point, the Company argued in its brief that its change of Grievant's status from full-time to part-time status was an exercise of rights reserved to it in Secs. 4, 15 and 33 both on their face and as applied in past practice; that the Grievant was not "laid off" because he continued to work on a part-time basis; and that common sense, conventional labor relations parlance, Agreement Secs. 24 and 28 and past practice establish that under the Agreement an employee is not "laid off" unless the employee's active employment entirely ceases, CITING, J. R. SIMPLOT CO., 68 LA 1167, 1169 (FLAGLER, 1977), MID-STATE TECHNICAL COLLEGE, WERC MA-10383 (JONES, 1999) and ATHENS SCHOOL DISTRICT ,WERC MA-12056 (EMERY, 10/9/03).

Because Sec. 4 addresses the Company's rights to use other than bargaining unit personnel to perform Production Specialist work, it has no direct bearing on the instant dispute about whether the Company violated the Agreement by failing to offer the Grievant at least 40 hours of work that the Company currently made available to part-time employees in the bargaining unit.

When Secs. 15, 33 and 12 are read together, and in a manner that gives effect, if possible, to all parts of those provisions, they reserve to the Company the absolute right not to employ bargaining unit personnel when there is no work to be performed. They also reserve to the Company the right to be the sole judge of the work to be done, the number of individuals to be employed or retained in employment, and the number of employees assigned to any work. However, the first paragraph of Sec. 12 places limits on the Company's right to engage the services of employees to work part-time. Those limits are specified in the second

sentence of the first paragraph of Sec. 12. While the rights reserved in Secs. 15 and 33 are absolute as to the right not to employ bargaining unit personnel when there is no work to be performed, and quite broad in most other respects, they do not on their face relieve the Company of the limitations provided in the second sentence of the first paragraph of Sec. 12. That sentence reads, "[p]art-time employees will not be used as a means of replacing regular full-time employees, and no regular full-time employees will be laid off for lack of work unless he or she has been given the opportunity to accept any hours (up to forty [40]) which are currently made available to part-time employees."

The past practice evidence does not relieve the Company of the limitations provided in the second sentence of the first paragraph of Sec. 12, either. The Company's ungrieved reduction of Grievant from full-time to part-time in the 1991-92 time frame is not a reliable guide regarding the nature of the Company's rights to engage the services of employees to work part-time because the record does not establish whether the Company employed part-time bargaining unit personnel in addition to the Grievant during the time when Grievant's status was reduced to part-time. The Company's 1996 ungrieved continued employment of part-time bargaining unit personnel well in excess of an aggregate of 40 hours when it left Dwight Moss' full-time position unfilled following his promotion out of the bargaining unit suggests that the parties did not consider the Company's 1996 action to have been an instance of using part-time employees "as a means of replacing full-time employees" within the meaning of Sec. 12. However, the 1996 developments did not involve any existing full-time employee being deprived of full-time status, so they do not provide reliable guidance as to the meaning and application of the "no regular full-time employees will be laid off for lack of work . . ." clause in Sec. 12.

It is therefore necessary to determine whether the Grievant was "laid off for lack of work" within the meaning of Sec. 12 when the Company reduced status from full-time to part-time effective on November 3, 2003.

In conventional labor relations parlance, "[a] 'layoff' is usually defined as the placing of an employee 'on leave' together with the employee's severance from the payroll," Hill and Sinicropi, Management Rights, 370-71 (BNA, 1986).

In Sec. 24, the parties provided that employees called back from layoff will be "re-employed" and that recalled employees "must report for duty." And in Sec. 28, the parties provided that employees on "extended leave . . . will be re-employed from layoff status." Those usages are both consistent with the notion that to be "laid off" means to cease active employment altogether. However, it would not defeat the purposes of either of those provisions if "laid off" were interpreted to include both laid off from full-time employment as well as laid off from all employment by the Company.

The Examiner concludes that interpreting "laid off" in Sec. 12 consistent with conventional labor relations parlance would be contrary to common sense, inconsistent with the evident purpose of the Sec. 12 limit on lack of work layoffs of full-time employees, and, on balance, inconsistent with the Agreement read as a whole.

Under the Company's interpretation, the Company is relieved of what would otherwise be its Sec. 12 obligation to offer Grievant any hours up to 40 which are currently available to part-time employees because it offered him 29 hours of part-time work. Far from being supported by common sense, that result seems contrary to it.

The Company's interpretation is also inconsistent with the purpose of the recall language in Sec. 24 which reads, "[i]f a vacancy occurs in the Production Specialist's staff, those persons laid off in the previous six (6) months shall be given preference in filling the vacancy in order of their seniority, providing they are still capable of performing their prescribed duties." If, as the Company argues, Grievant was not laid off for any purpose under the Agreement, then he would not be entitled to a Sec. 24 seniority-based preference if a full-time vacancy were to occur during the six months following his loss of full-time status, and the Company could fill such a vacancy with anyone. That outcome is inconsistent with the purpose of the Sec. 24 recall language to provide qualified Production Specialists who have been displaced from their former employment status with the Company an opportunity to regain that status if a vacancy occurs within six months of the employee's loss of status.

Furthermore, as a result of being reduced to part-time status, Grievant became subject to the language in the fourth paragraph of Sec. 12 providing that "[a]pplications of the provision with respect to seniority, severance pay, and discharges for part-time employees shall be in the sole discretion of the Company." For that reason, the change in Grievant's status from full-time to part-time involved much more than a reduction of hours and a consequent reduction of fringe benefits. In none of the cases cited by the Company regarding the meaning of the term "layoff" did the agreement involved make application of basic job security protections such as seniority, severance pay or discharge subject to sole employer discretion as a result of the reduction of employee hours or other employer action involved.

Notably, at p.12 of the above-noted ATHENS SCHOOL DISTRICT award cited by the Company, Arbitrator John Emery expressly distinguished another award, SUPERIOR MEMORIAL HOSPITAL, WERC A-5165 (SHAW, 9/6/94), as follows:

> In that case, the arbitrator did interpret layoff to include reduction in hours, even though the contract did not so specifically provide. His determination was based on the fact that other contract language required the layoff of part-time employees before full-time employees. Thus, theoretically, if layoff did not include reductions in hours, a full-time employee could be reduced to part-time and then be completely laid off before less senior employees without reference to the seniority protections in the layoff clause. Here there is no such provision requiring part-time employees to be laid off first.
>
> Therefore I agree with Arbitrator Shaw that whether the concept of layoff includes a reduction in hours requires reading it in the context of the contract as a whole, but reach a different conclusion based on the language in place here.

By similar reasoning, if, as the Company argues, the Grievant was not "laid off" within the meaning of Sec. 12, then he could theoretically be changed from full-time to part-time as he was in this case, and then laid off from part-time employment or discharged at the sole discretion of the Company. To avoid an interpretation that would so seriously undercut full-time employees' rights under the Agreement's discharge, seniority and severance pay provisions, the Examiner concludes that the first paragraph of Sec. 12 must mean that full-time employees are protected from being "laid off" from full-time employment "until he or she has been given the opportunity to accept any hours (up to forty [40] which are currently made available to part-time employees." In other words, the portions of the first and fourth paragraphs of Sec. 12 noted above persuasively distinguish the meaning of "laid off" in Sec. 12 from the conventional meaning of that term applied in ATHENS SCHOOL DISTRICT and in the other cases cited by the Company.

For those reasons, on balance, the Examiner is persuaded that notwithstanding Grievant's continued employment on a part-time basis, he was "laid off for lack of work" within the meaning of Sec. 12 on November 3, 2003.

It is undisputed that after it reduced Grievant's status from full-time to part-time effective on November 3, 2003, the Company made hours available to four part-time employees (including Grievant) aggregating in excess of 40 hours per week, while limiting the Grievant's hours to approximately 29 per week. Because the Company offered the Grievant only 29 of those hours rather than 40 of them, it denied him "the opportunity to accept any hours (up to forty [40]) which are currently made available to part-time employees," within the meaning of the first paragraph of Sec. 12, before it laid him off from full-time employment. The Company thereby violated Agreement Sec. 12 and Sec. 111.06(1)(f), Stats.

Those conclusions are not undercut by the Examiner's findings that the Company changed Grievant's status in pursuit of legitimate business objectives or by the Examiner's and NLRB's conclusions that the Company's action was not motivated by hostility toward protected activity by Grievant or the Union.

Furthermore, the record does not establish that the Company would have been employing Grievant at times when there was no work to be performed had it chosen to reduce the aggregate hours allocated to part-time employees on and after November 3, 2003, to the extent necessary to offer Grievant at least 40 of those hours. In that regard, Maytag testified that the Company chose to reduce Grievant from full-time to part-time, in part, to assure that it would be able to flexibly meet its changing production needs, and, in part, because "it's difficult to retain part-timers if they fall below a certain level." [Tr. 102-103, 125-126] However, neither that testimony nor any of the other evidence presented at the hearing establishes that the Company could not have offered the Grievant 40 hours of the work it made available to part-time employees before it laid him off from full-time employment in November of 2003. The time sheets for bargaining unit employees covering 1996, 2003 and 2004 were not submitted as a part of the Company's case. They were, however, provided to the Examiner and the Union by the Company after the hearing at the request of the Union and they

were received as Union exhibits. [Exhs. 16 and 25]. Neither party's brief included an analysis of the 2003 and 2004 time sheet documents beyond those offered at the hearing, let alone an analysis showing that the work performed by Grievant and the other part-time employees after November 3, 2003, was such that 40 hours of it could not have been regularly offered to the Grievant before he was laid off from full-time employment. On that basis, the Examiner concludes that it would not have contravened the Company's absolute Sec. 33 right not "to employ Production Specialists when there is no work to be performed" if the Company had offered 40 of the hours it made available to part-time employees after November 3, 2003, to the Grievant before it laid him off from full-time employment.

By way of remedy for the violation noted above, the Examiner has ordered the Employer to reinstate the Grievant to full-time status, without loss of seniority or other rights and privileges, and to offer the Grievant the opportunity to accept any hours (up to forty [40]) which are currently made available to part-time employees, before reducing his hours below full-time status. However, in recognition of the Company's Agreement Sec. 33 right not "to employ Production Specialists when there is no work to be performed," the Examiner has expressly provided that "[n]othing in [Order paragraph 2.a.] shall be construed to obligate the Company to employ the Grievant when there is no work to be performed." The Examiner has also ordered the Employer to make Grievant whole, with interest at the statutory rate, for any loss of pay and benefits caused by the Company's violation of Agreement Sec. 12. Among the lost benefits for which Grievant is to be made whole is the loss of Company-subsidized health insurance benefits. The Company is to immediately restore Grievant's Company-subsidized health insurance benefits and make the Grievant whole for insurance premium costs and other out-of-pocket health care costs he has incurred as a consequence of the Company's discontinuation of his Company-subsidized health insurance benefits in connection with its change in Grievant's status from full-time to part-time.

The Examiner has also ordered the conventional cease and desist and notice posting remedies associated with a violation of Sec. 111.06(1)(f), Stats.

The Examiner has not ordered the additional relief requested by Union in the form of reimbursement of the Union's litigation costs and attorneys fees. This case does not fall within the narrow scope of those in which the Commission has found such extraordinary remedies appropriate. SEE, CLARK COUNTY, DEC. NO. 30361-B (WERC, 11/03).

Termination of Company-Paid Health Benefits
Independent of Change from Full-Time to Part-Time Status

The Examiner has concluded above that the Company violated the Agreement by changing Grievant's status from full-time to part-time, and the Examiner has ordered the Company, among other things, to reinstate Grievant to full-time status and to restore to him the Company-subsidized health insurance benefits associated with full-time status.

In light of those conclusions and ordered remedies, the Examiner has not made any hypothetical Findings, Conclusions or Order regarding the Union's further contention that the Company's actions regarding Grievant's health insurance benefits would have constituted a violation of the Agreement even if the Company's change in Grievant's status from full-time to part-time were determined not to have violated the Agreement.

The Examiner is satisfied, however, that neither the Company's termination of the Grievant's Company-subsidized health insurance benefits nor its refusal to allow Grievant to remain in its health plans at his own expense beyond the COBRA-protected time period, would constitute an Agreement violation had the Grievant not been entitled under the Agreement to continued full-time employment as discussed above.

Health insurance benefits, whether Company-subsidized or fully-employee paid, are not expressly provided for in the Agreement nor in the parties 1986-89 agreement, nor presumably in any of the parties' agreements in the interim. Rather, health insurance benefits have been governed by the Company's Handbook polices, i.e., polices that are outside of the Agreement and nowhere expressly referenced in the Agreement. The Handbook's full-time/part-time definitions make it clear that part-time employees (i.e., those "scheduled to work fewer than 30 hours on a regular basis) are not eligible for Company-subsidized health insurance benefits. To the same effect, the parties longstanding, uniform and mutually understood practice since at least 1997 has been that part-time employees are not eligible for Company health insurance benefits.

It is true that Grievant's uncontroverted testimony establishes that he received Company-subsidized health insurance during the time he was reduced to part-time status in 1991-92. However, the significance of that testimony is blunted by his further uncontroverted testimony that he also received Company-subsidized health insurance at the beginning of his employment with the Company when he started as a part-time employee. [Tr. 51] Grievant's testimony in those respects suggests that the parties' general practice regarding the eligibility of part-time employees for Company-subsidized health insurance may have been different in those earlier years than it uniformly came to be since at least 1997, even though the Handbook provisions regarding health insurance and full-time and part-time definitions were the same as those in effect in 2003. [Tr. 137].

The Union also argues that the Handbook section on Health Benefits Continuation shows that the Company allows non-represented employees to remain in the Company's group health plan at the employee's own expense, whereas it has offered the Grievant that opportunity only to the extent required by law (COBRA). Union brief at 20. However, that Union contention is unpersuasive both because the language of that Handbook section states only that full-time employees and their qualified beneficiaries "<u>may</u> be eligible to continue health insurance coverage under the Company's health plans" (emphasis added), and because there is no record evidence establishing that the Company has granted health benefit continuation beyond that required by COBRA to non-represented personnel.

Company Requests for Reimbursement of Attorney's Fees and Costs

The Examiner has denied the Company's request that the Union be ordered to pay the Company's litigation costs and attorneys fees both because a WEPA violation by the Company has been found in this case, but also because the Commission has held repeatedly in recent years that it is without statutory authority to grant the relief the Respondents are requesting in this case. E.G., MILWAUKEE AREA TECHNICAL COLLEGE, DEC NO. 30254 (WERC, 1/4/02) at 4 ("We deny the Respondents' request for costs and attorneys' fees because we do not have the statutory authority to grant same in complaint proceedings to responding parties. STATE OF WISCONSIN, DEC. NO. 29177-C (WERC 5/99).")

Dated at Shorewood, Wisconsin, this 22nd day of March, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Marshall L. Gratz /s/
Marshall L. Gratz, Examiner

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