STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

THE WISCONSIN STATE EMPLOYEES UNION, (WSEU), AFSCME, COUNCIL 24, AFL-CIO, LOCAL 509, Complainants,

vs.

STATE OF WISCONSIN, DEPARTMENT OF CORRECTIONS, Respondents.

Case 657
No. 64117
PP(S)-348

Decision No. 31193-A

Appearances:

Lawton & Cates, S.C., Attorneys at Law, by **Kurt C. Kobelt** and **Richard Thal**, Ten East Doty Street, Suite 400, Madison, Wisconsin 53703-2694, on behalf of the Complainant.

David J. Vergeront, Chief Legal Counsel, and **Lynn Weiser**, Chief Labor Relations Specialist, Office of State Employment Relations, 101 East Wilson Street, Fourth Floor, Madison, Wisconsin 53707-7855, on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On October 27, 2004, the Wisconsin State Employees Union, AFSCME, Council 24, AFL-CIO, Local 509, hereinafter the Complainants, filed a complaint with the Wisconsin Employment Relations Commission wherein they alleged that the Respondent State of Wisconsin, through the actions of the Wisconsin Department of Corrections, had committed unfair labor practices within the meaning of Secs. 111.84(1)(a), (b), (d) and (e), Stats., by refusing to bargain regarding the Food Service work schedule at the Wisconsin Secure Program Facility – Boscobel, by directly negotiating with employees represented by Complainant, and by the unilateral implementation of changes to the parties' collective bargaining agreement regarding scheduling of paid leave. On February 1, 2005, the Respondents filed an answer wherein they denied they had committed unfair labor practices by their actions and raised certain affirmative defenses, including that Complainants had failed to exhaust their contractual remedies.

The Commission appointed a member of its staff, David E. Shaw, to make and issue Findings of Fact, Conclusions of Law and Order in the matter. Hearing was held before the Examiner on March 3, 2005 at the Wisconsin Secure Program Facility in Boscobel, Wisconsin. A stenographic transcript was made of the hearing. At hearing, Respondents moved for deferral of the complaint to arbitration, but did not pursue their motion after the Examiner deferred ruling on it. The parties completed submission of post-hearing briefs by June 27, 2005.

Based upon consideration of the evidence and the arguments of the parties, the Examiner makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The Complainant, Wisconsin State Employees Union, AFSCME, Council 24, AFL-CIO, hereinafter WSEU, is a "(l)abor organization" as that phrase is defined by §111.81(2), Wis. Stats., and as that phrase is used throughout the State Employment Labor Relations Act (SELRA), with its primary office located at 8033 Excelsior Drive, Suite "C", Madison, Wisconsin 53717-1903. At all times material hereto, WSEU has been the exclusive bargaining agent for a number of state employees whose positions were previously allocated by action of the Commission to certain statutorily-created bargaining units. The Executive Director of the WSEU is Martin Beil.

Local 509, hereinafter the Local, is affiliated with the WSEU and is primarily made up of Correctional Officers at the Wisconsin Secure Program Facility, hereinafter WSPF, Correctional Institution in Boscobel, Wisconsin, but also includes members who are the Food Service staff at that facility and are in the Blue Collar unit.

At all times material herein, Sergeant Gerard O'Rourke has been the President of Local 509. Sergeant Craig Tom has been the Vice-President of Local 509, and Roger Lindh, a Cook II in the facility's kitchen, has been a Steward for the Blue Collar unit represented by the Local.

2. The Respondent State of Wisconsin, Department of Corrections (DOC), maintains and operates the WSPF Correctional Institution at Boscobel, Wisconsin. WSPF houses inmates who have been sent there from other State correctional institutions where they have gotten into trouble at those institutions. There are no inmate workers at WSPF and all of the work in the kitchen at this facility is performed by employees. At all times material herein, Mary Wayne has been the Correctional Management Services Director and since February of 2001, Anthony Broadbent has been the Food Service Administrator at WSPF. From October of 1999 until February of 2001, Broadbent was the Food Service Supervisor at WSPF.

3. The Respondent State and WSEU, and its affiliated locals, were parties to a collective bargaining agreement, hereinafter Master Agreement, covering the wages, hours and conditions of employment of employees in the bargaining units represented by WSEU for the period May 17, 2003 to June 30, 2003, which agreement the parties agreed to continue in effect during the period in question. Said Master Agreement contained the following provisions, in relevant part:

ARTICLE III

MANAGEMENT RIGHTS

3/1/1 It is understood and agreed by the parties that management possesses the sole right to operate its agencies so as to carry out the statutory mandate and goals assigned to the agencies and that all management rights repose in management, however, such rights must be exercised consistently with the other provisions of this Agreement. Management rights include:

A. To utilize personnel, methods, and means in the most appropriate and efficient manner possible as determined by management.

. . .

ARTICLE VI

HOURS OF WORK

. . .

SECTION 2: Scheduling

6/2/1 Work Schedules

Work schedules are defined as an employee's assigned hours, days of the week, days off, and shift rotations.

6/2/2 In those departments where work schedules are fixed or posted, fixed work schedules shall be defined as set and recurring without the need to be posted, and posted work schedules shall be defined as set for a specific period of time, established by the department, and communicated to employees. Changes in such work schedules shall be made only to meet the operational needs of the service, which, if requested, shall be explained and shall not be made arbitrarily. Insofar as possible, a minimum of five (5) calendar days notice will be provided to the local Union and to employees affected by a change in such work schedule. Work schedules will not be changed to avoid the payment of

overtime. However, with management approval, employees may voluntarily agree to changes in work schedules. When the duration of such schedule change exceeds two (2) weeks, the Union will be notified. The Union shall have the right to file a grievance in accordance with Article IV commencing at Step One if it feels a work schedule change has been made arbitrarily.

. . .

6/2/3 (BC, AS, SPS, T, LE) This section shall be amended in accordance with agreements reached pursuant to the provisions of Article XI, Section 2.

. . .

ARTICLE XI

. . .

11/2/8

. . .

I. **(BC, AS, T)** Negotiate hours of work, work schedules and overtime assignments. In the event no agreement is reached, either party may appeal to arbitration pursuant to the procedures of Article IV, Section 2, Step Three except that the decision of the arbitrator shall be advisory. If the advisory award is not implemented by local management, a representative of the department, a representative of the Department of Employment Relations, and a representative of the Wisconsin State Employees Union, District Council 24, will meet to discuss the implementation of the award.

. . .

SECTION 28: Operational Need

11/28/1 Definition of Operational Need

Operational need means the needs of the agency that are reasonable (sic) perceived by management as necessary for the effective, efficient and safe performance of the agency's mission at any point in time or at any location.

11/28/2 If deviation from the normal shift is made due to operational needs, the Employer will provide an explanation to the employee or Union representative upon request.

. . .

4. The Respondent DOC, Division of Adult Institutions, WSPF and WSEU Local 509 are parties to a Local Agreement entered into pursuant to Article XI of the Master Agreement between the Respondent State and WSEU. Said Local Agreement was effective September 21, 2003 and continued in effect for the time in question by the agreement of the parties. Said Local Agreement contained the following provisions, in relevant part:

WISCONSIN STATE EMPLOYEES UNION/COUNCIL 24
AND THE STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS
DIVISION OF ADULT INSTITUTIONS,
WISCONSIN SECURE PROGRAM FACILITY

This Local Agreement is made and made effective September 21, 2003, pursuant to the provisions of Article XI of the agreement between the State of Wisconsin and the AFSCME Council 24, Wisconsin State Employees Union, and between the Division of Adult Institutions, Wisconsin Secure Program Facility (hereinafter referred to as the Employer) and WSEU Local 509 (hereafter referred to as the Local) which includes administrative support unit (ASU), blue collar and non-building trades (BC) security and public safety (SPS) and technical (T). This Local Agreement shall stay in effect for 90 days after the signing of a new Master Agreement for the purposes of negotiating a new Local Agreement. The parties may extend beyond that date by mutual agreement.

. . .

Purpose of Agreement

It is the intent and purpose of the parties hereto that this Local Agreement constitutes and implements the provisions of the master agreement, between the State of Wisconsin and AFSCME, Council 24, Wisconsin State Employees Union, AFL-CIO Local #509, covering the period of the Master Agreement ending June 30, 2003.

The parties acknowledge this local agreement represents an amicable understanding reached by the parties as a result of the unlimited right and opportunity of the parties to make any and all demands with respect to the employer/employee relationship which exists between them relative to the subjects identified in the master agreement for local negotiations.

Authority of Master Agreement

Nothing in this local agreement shall be construed to override any contractual provision in the master agreement unless specifically allowed by the terms of the master agreement.

. . .

FOOD SERVICE (BC)

Note: Language in this Food Service Section reflects a 10 hour Workday.

PROVISION FOR OVERTIME

. . .

PROVISION FOR VACATION SCHEDULING – To commence by November 1

Vacations will be available to be scheduled in accordance with the approved numbers off per shift. Because the current schedule allows for people to have every other weekend off, it is understood by the Union and Management that weekends cannot be used to schedule vacation time.

Round #1

The selection in the first round shall be in at least **three (3)** day blocks of scheduled days worked. Employees may select all or part of any available vacation time they have accrued, subject to the maximum number of staff allowed off per day per shift.

. . .

5. Since 2002 the Food Service staff at WSPF had been working 10 hour days, four days per week, with every other weekend off and they were not permitted to use vacation for the weekends they were scheduled to work. In January of 2002, Broadbent had issued a memorandum to the Food Service staff noticing a meeting regarding changing their work schedule. Wayne and Broadbent approached O'Rourke with a 10-hour day schedule and about the need to go to a 10 hour day in order to get meals prepared on time. The facility had gone from contracting out meal preparation to preparing meals in-house. Subsequent to the meeting with O'Rourke, Food Service staff were called into Broadbent's old office with Wayne and Broadbent present. A voice vote was taken among the staff regarding the 10 hour day schedule, resulting in approval of the change to the 10-hour day schedule. There were no exchanges of proposals or counterproposals in the process.

6. Sometime in June of 2004, Broadbent approached O'Rourke and said he needed to meet to discuss schedules and they agreed to meet the following week. Subsequently, Broadbent met with O'Rourke and Lindh and presented a schedule he had prepared with 8 hour shifts. Broadbent was asked what the concern was and he responded that they needed to spread out the coverage and that with staff nearing their fifth year anniversary – giving them additional vacation, with the 10 hour day schedule there was not enough staff to cover the vacations. O'Rourke objected that the proposed schedule was a "flex schedule" (employees could be scheduled for an 8 hour shift anytime between the hours of 5:00 and 7:30 p.m. as management determined) and would be in violation of the contract. Broadbent indicated it needed to be done. O'Rourke responded that they could not agree to it and Broadbent stated then they would go to the "officers schedule" and gave them the proposed schedule. O'Rourke indicated the Union would be willing to negotiate the hours. The meeting then ended.

On July 1, 2004, O'Rourke sent Broadbent an e-mail, which stated, in relevant part:

> Tony
>
> Since hours of work are a mandatory subject of bargaining, WSEU Local 509 is ready to begin negotiations at your earliest convenience. The bargaining team for Local 509 will consist of Roger Lindh, Laurie Neuroth, and Myself.
>
> Thank you.
>
> Gerry

By e-mail of July 2, 2004, Shirley Gates, Human Resources Director at WSPF, responded to O'Rourke's e-mail:

> Gerry,
>
> In the master contract, section 6/2/2 it talks about work schedules and scheduling. In that section, it states "Changes in such work schedules shall be made only to meet the operational needs of the service, which, if requested, shall be explained and shall not be made arbitrarily."
>
> This change in schedule is not being made arbitrarily. This is being done to meet the needs of the institution, which was explained to you. If the union has other alternatives, we can discuss them but there is nothing that says we have to keep the current schedule in the kitchen.
>
> Gerry, if you'd like to discuss this further you're welcome to contact me. However, I do not see in the Master where this has to be negotiated. If I'm wrong, please point out that section so I may review it.

Thanks.

- Shirley

Lindh subsequently gave Broadbent a proposed schedule he had prepared. Broadbent indicated he would review it with Wayne and get back to him with a response. Broadbent subsequently informed Lindh he had run it by Wayne and it was a "no go".

On July 29, 2004, Broadbent sent O'Rourke an e-mail which stated, in relevant part:

> Sgt. O'Rourke, I would like to schedule a meeting for Thursday, August 5, 2004 at 0930 to sit down and discuss the proposed schedule we received. Roger is scheduled to work that day. Please let me know if this is possible.

O'Rourke did not respond to Broadbent's e-mail.

On August 3, 2004, Broadbent issued the following memorandum to the Food Service Staff, which stated in relevant part:

> **SUBJECT:** Meeting
>
> There will be a meeting on Thursday, August 12, 2004 at 0900 in the Wardens Conference room to talk about a schedule proposed by the Union. Staff that are scheduled off will be paid for 1 hour of overtime and have the option of working two hours. If you have any questions please see Tony.

Also on August 3, 2004, Broadbent sent O'Rourke an e-mail which stated, in relevant part:

> **Subject:** Meeting
>
> **Importance:** High
>
> Sgt. O'Rourke, I have scheduled a meeting with my staff on Thursday, August 12, 2004 AT 0900 in the Wardens Conference room to go over the proposed schedule we received from the Union. I would like to invite you to attend the meeting or you may send another representative of the Union. We had planned to put the new postings up on August 4th but postponed it so we could review the proposed schedule and meet with my staff and the Union. We now have scheduled to post the new keys on August 16th so we can get them assigned and give my staff ample opportunity to review their new key before vacation picks.

O'Rourke went to Wayne and asked if they were still going to negotiate the schedule. Wayne responded in the negative and that management had a schedule and was going to talk to the Food Service staff about it.

7. On August 12, 2004, Wayne and Broadbent held a meeting of the Food Service staff at WSPF. Present were Wayne, Broadbent, Food Service Assistant, Laurie Iverson, Local Vice-President Craig Tom and the Food Service staff, including Lindh. O'Rourke did not attend the meeting. The Union did not object to the meeting being held.

Wayne opened the meeting by explaining the reasons for the need to change the schedule from 10 hour days to the officer schedule, stating that the 10 hour schedule was too hard on the kitchen staff, that it generated too much overtime, resulted in too many call-ins, and that they needed to change the coverage in the kitchen. The staff responded that they did not want the officer schedule, as they would end up working too many days straight and too many weekends. Wayne responded that they had to make changes and asked Tom if he had any suggestions. Tom responded that he was there as an observer, but that the Union felt they had to sit down and negotiate schedules and hours of work and asked if management was ready to do that. Wayne responded that management did not have to negotiate hours of work. There was then an exchange between them, with both claiming there were provisions in the contract to support their positions. Wayne then asked Broadbent what he thought. Broadbent responded that he was expecting to hear suggestions from the Union and asked Tom if the Union had any to propose. Tom responded that the Union did have suggestions and schedules and would produce them, if and when they sat down for negotiations with the Union's team, but that this was not the time or place. Wayne responded that they needed to get things straightened out quick because staff needed to make their vacations picks November 1st. Wayne then asked Broadbent if he would be willing to take suggestions from the kitchen staff and he responded in the affirmative. Broadbent then handed out blank schedule sheets to the kitchen staff who were present and put them in the mailboxes of those who were not. The kitchen staff were told that they had two weeks to submit suggested schedules.

Following the August 12, 2004 meeting with the Food Service staff, O'Rourke and Tom went to Wayne and asked if management was going to negotiate with the Union. Wayne responded in the negative and indicated they were waiting to get proposals back from the staff. O'Rourke objected that the Union represented the employees and management could not negotiate with the employees directly. Wayne responded that once they got a schedule that would work, they would implement it.

Three of the kitchen staff submitted proposed schedules: Lindh and his wife and Sharon Terrel. Broadbent reviewed these proposed schedules and concluded that the schedule submitted by Terrel was the closest to what he felt would be workable. He made a few modifications in that schedule and on August 26, 2004 issued the following memorandum to the Food Service staff with the modified Terrel schedule attached as the proposed new schedule:

Memorandum

DATE: August 26, 2004

TO: Food Service Staff

FROM: Anthony L. Broadbent, Food Service Administrator

SUBJECT: Proposed Schedule

Attached is the proposed schedule for Food Service. After our meeting that was held on August 12th, there were concerns about the length of time off between weekends and working six days straight. I feel this schedule will eliminate those concerns. Below I have listed how this schedule will work. If you have any questions please see me.

1. It will be on a three week rotation, I have provided you with six weeks to review
2. The Food Production Assistants (Laurie & Kristen) will have every other weekend off.
3. The Cook 2 will have every third weekend off.
4. The Storekeeper will work Monday thru Friday.
5. The Food Production Assistants will not be allowed to pick vacations on the weekends worked.
6. The Cook 2's will be allowed to pick vacations on weekends scheduled
7. Only one staff member will be allowed off for vacations per day.
8. The 0700-1700 and 0700-1930 positions will need to work 0830-1700 on the weekends to allow coverage for the dinner meal.

8. On September 8, 2004, a Union/Management meeting was held at WSPF. Among those present were O'Rourke, Tom and Lindh as part of the Union's representatives, and Wayne, Broadbent and Warden Berge as part of management's representatives. One of the items on the agenda for the meeting was the "kitchen schedules". Minutes are kept of these meetings and are reviewed and signed by representatives of management and the Local. The minutes for the September 8, 2004 meeting state, in relevant part:

Kitchen Schedules

Mr. Wayne stated that the new kitchen schedules will be posted on Monday, September 13. Currently the kitchen has been generating over 100 hours of overtime per period. She added that all Food Service employees have seen the new schedule and were able to give their input. G. O'Rourke stated that there should have been a meeting with the Union and that the Union should have shown the proposed schedule to Food Service staff. Some of the details of the

> new schedule shared by T. Broadbent included the following – allows for nine of the kitchen staff to choose vacation for weekends, Storekeeper is Monday-Friday, and the Food Production Assistants have every other weekend off. The kitchen currently has one Cook 1 LTE and possibly will get one more. R. Lindh, who works in the kitchen, added that the kitchen staff like the new schedule as a whole. He added that the ten-hour days were too long especially in the heat and with the eight-hour days the longest run will be four days in a row.

In addition to the comments reflected in the minutes, there was a query from Warden Berge to Lindh as to what he thought of the new schedule and Lindh responded as indicated in the minutes. Warden Berge also responded to O'Rourke's objection regarding the lack of negotiations to the effect that it was an issue that was higher than the institution and he was going by what he was told from "higher-ups"; that they would have to agree to disagree.

There were no further discussions between the parties regarding the Food Service staff schedule.

9. On October 27, 2004, Complainants filed a complaint of unfair labor practices with the Wisconsin Employment Relations Commission alleging that by its actions through August 26, 2004, Respondents had violated Secs. 111.84(a), (b), (d) and (e) of the State Employment Labor Relations Act (SELRA).

10. Vacation picks by Food Service staff were made November 1, 2004 for 2005 in accord with the new schedule. Employees were allowed to pick in 4-day blocks, whereas they had to pick in 3-day blocks under the 10-hour schedule. The new schedule (the modified Terrel schedule) was implemented December 27 or 28, 2004.

11. On November 23, 2004, O'Rourke filed a union grievance at Step 2, of Article IV, of the parties' Master Agreement, alleging that:

> "The current work schedules for food service staff is the result of negotiations between the local union and local management. Management has unilaterally changed the agreed work schedule of food service staff."

The grievance alleged that management's actions violated the parties' Local Agreement.

On January 18, 2005, management responded to the grievance with the decision:

> "Grievance denied. Mgmt. has met the intent of the contract by trying to include the union in discussions about schedule changes needed to meet the needs of the Inst."

On January 26, 2005, the Union filed an appeal of the grievance to arbitration. The Respondent State has not indicated it would waive any technical objections it might have to arbitrating the grievance.

12. In 2001 Custodians at WSPF all worked on one shift and management approached the Local Union with a proposal to create two shifts, and have half of the Custodians work one shift and half work the second shift. The Local did not see a problem with the proposal and held a meeting of those Custodians, who are also in the Blue Collar unit, for a vote on the proposal, resulting in their approval of the change.

Due to turnover in the custodial staff, in late 2003 management advised the Local Union that it could not staff two shifts and was going to have all of the Custodians work on the one shift again. The change was made and there was no vote taken among the Custodians. The single shift schedule has remained in effect for Custodians since then.

13. The subject of the parties' respective rights and obligations with regard to changing the work schedules of the Food Service staff at WSPF is covered by Article VI, Section 2, subsection 6/2/2 and Article XI, Section 2, subsection 11/2/8, I, and Article XI, Section 28, of the parties' Master Agreement.

14. On numerous occasions in the past, the parties proceeded to final and binding arbitration of grievances involving management's changing work schedules. These included Arbitrator Robert Mueller's July 8, 1981 award, Arbitrator Jay Grenig's August 6, 1984 and August 14, 1984 awards, Arbitrator John Flagler's November 8, 1994 award, and Arbitrator Christine Ver Ploeg's October 12, 1996 award, all incorporated by reference herein. In each of those awards management was found to have acted within its rights under Article VI of the Master Agreement. Arbitrator Mueller's 1981 award and Arbitrator Grenig's August, 1984 awards involved Article VI, Section 1, paragraph 84, the predecessor to the current Article VI, Section 2, Subsection 6/2/2, in the parties' Master Agreement. Article VI, Section 1, paragraph 84 stated:

> 84 In those departments where work schedules are posted, changes in such posted work schedules shall be made only to meet the operational needs of the service and shall not be made arbitrarily. Insofar as possible, a minimum of five (5) calendar days notice will be provided to the local Union and to employees affected by a change in the posted work schedule. Work schedules will not be changed to avoid the payment of overtime. However, with management approval, employees may voluntarily agree to changes in posted work schedules. The Union shall have a right to file a grievance in accordance with Article IV commencing at Step Two if it feels a posted work schedule change has been made arbitrarily.

Arbitrator Flagler's 1994 award and Arbitrator Ver Ploeg's 1996 award involved the present Subsection 6/2/2. Arbitrator Flagler's award upheld a change to the work schedule that was not intended to be temporary.

15. The change in the work schedule of the Food Service staff at WSPF from the 10 hour days schedule to the present schedule was made for the purposes of reducing the amount of overtime hours being worked by Food Service staff, reducing safety risks to Food Service staff by not having to work 10 hours or more a day in the kitchen and not having to utilize non-Food Service staff in the kitchen to fill in for absent staff, reducing the use of Styrofoam containers, being able to accommodate employee vacation schedules, and avoiding the problems of getting staff to fill in on weekends due to the cliques that had developed and reluctance to work with employees in the other cliques. These reasons constitute "operational needs" and the change was not made arbitrarily or to avoid payment of overtime within the meaning of Sec. 6/2/2 of the parties' Master Agreement. Therefore, the Respondent did not violate the parties' collective bargaining agreements when it unilaterally changed the work schedule of the Food Service staff at WSPF for those reasons.

16. The actions of Wayne and Broadbent at the meeting with WSPF Food Service staff on August 12, 2004 in soliciting proposed schedules from the staff constituted individual bargaining.

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

CONCLUSIONS OF LAW

1. Complainants Wisconsin State Employees Union, AFSCME Council 24, AFL-CIO, and its affiliated Local 509 are labor organizations within the meaning of Sec. 111.81(12), Stats.

2. Respondent Department of Corrections is a subdivision of the Respondent State of Wisconsin, and is the employer of the Food Service employees at the Wisconsin Secure Program Facility at Boscobel, Wisconsin, within the meaning of Sec. 111.81(8), Stats.

3. Hours of work of employees are a mandatory subject of bargaining over which Respondent are required to bargain within the meaning of Sec. 111.91(1)(a), Stats.

4. By refusing to bargain with Complainants regarding changing the work schedule of Food Service staff at the Wisconsin Secure Program Facility, Boscobel, represented by Complainants, and by unilaterally implementing such a change, Respondent State, its officers and agents, did not refuse to bargain collectively with Complainant within the meaning of Sec. 111.84(1)(d), Stats.

5. By refusing to bargain with Complainants regarding the change in the work schedule of Food Service staff at Wisconsin Secure Program Facility, Boscobel, and by unilaterally implementing the change in the work schedule of those employees effective with the beginning of 2005, Respondents did not violate the terms of the parties' collective bargaining agreements within the meaning of Sec. 111.84(1)(e), Stats.

6. By holding a meeting on August 12, 2004, of the available Food Service staff at Wisconsin Secure Program Facility, Boscobel, represented by Complainants at which Respondents' officers and agents solicited employees to submit proposals of work schedules, Respondents engaged in individual bargaining with those employees and thereby refused to bargain with Complainants within the meaning of Sec. 111.84(1)(d), Stats., and derivatively, violated Sec. 111.84(1)(a), Stats.

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

ORDER

1. The alleged violation of Sec. 111.84(1)(d), Stats., is dismissed as to Respondents' refusal to bargain with Complainants regarding change of the work schedule of the Food Service staff at Wisconsin Secure Program Facility, Boscobel.

2. The alleged violation of Sec. 111.84(1)(e), Stats., is dismissed in its entirety.

3. The Respondent, its officers and agents, shall immediately:

(a) Cease and desist from conducting meetings of its management personnel and Food Service staff for the purpose of bargaining with those individual employees represented by Complainants,

(b) Take the following affirmative action which the Examiner finds will effectuate the purposes and policies of the State Employment Labor Relations Act:

1. Notify employees at Wisconsin Secure Program Facility at Boscobel, Wisconsin represented by Complainants Wisconsin State Employees Union, AFSCME, Council 24, AFL-CIO, and its affiliate Local 509, by posting the Notice attached hereto as "Appendix A" in the areas where notices for those employees are posted. Respondents shall take reasonable steps to assure that said Notice is not altered, defaced, or covered by other material.

2. Notify the Wisconsin Employment Relations Commission within twenty days of the date of this Order as to what steps the City has taken to comply with this Order.

Dated at Madison, Wisconsin this 23rd day of February, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

David E. Shaw /s/

David E. Shaw, Examiner

APPENDIX "A"

**NOTICE TO ALL EMPLOYEES OF
THE STATE OF WISCONSIN DEPARTMENT
OF CORRECTIONS, WISCONSIN SECURE PROGRAM
FACILITY CORRECTIONAL INSTITUTION
AT BOSCOBEL, WISCONSIN, REPRESENTED
BY WISCONSIN STATE EMPLOYEES UNION AND LOCAL 509**

As ordered by the Wisconsin Employment Relations Commission, and in order to remedy a violation of the State Employment Relations Act, the State of Wisconsin and its Department of Corrections notify you of the following:

> WE WILL CEASE AND DESIST from conducting meetings of employees for the purposes of collectively bargaining directly with individual employees represented by the Wisconsin State Employees Union, and its affiliated Local 509, except for those employees who have been designated by those Unions as their representatives.

By_____
Warden, WSPF Correctional Institution,
Boscobel, Wisconsin

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.

STATE OF WISCONSIN (DEPARTMENT OF CORRECTIONS)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

POSITIONS OF THE PARTIES

Complainants allege the following in their complaint:

> 10. Management's refusal to bargain on a mandatory subject of bargaining – the WSPF food service work schedule – is a prohibited practice and is a violation of §§111.84(1)(a), (b), (d) and (e), Stats., and §111.91, Stats.
>
> 11. Management's direct negotiations with employees while bypassing the union is a prohibited practice and is a violation of §§111.84(1)(a) and (b), Stats.
>
> 12. The unilateral implementation of changes to a bargained agreement between the parties regarding scheduled paid leave is a prohibited practice and is a violation of §§111.84(1)(a), (b), (d) and (e), Stats.

However, Complainants have not further addressed the allegations of violations of Sec. 111.84(1)(b), Stats., and the allegations are deemed to have been dropped.

Respondents filed an answer denying they had committed the alleged violations of SELRA, and asserted: (1) That allegations taken by Respondents to change the work schedule "were in compliance with the contract and the law"; (2) "that Complainants have failed to exhaust their contractual administrative remedy – the grievance procedure leading to arbitration – and therefore this action must be held in abeyance until such time as Complainants have done so." Respondents then requested that the complaint be dismissed in its entirety.

At hearing, in response to Complainants' submission as evidence a grievance and a request for arbitration the Complainants had filed (Complainants' Exhibit No. 1), Respondents moved to defer the matter to arbitration. However, after the Examiner indicated he would defer ruling on Respondents' motion until following the parties' post-hearing briefs, Respondents objected to deferring ruling on their motion and did not pursue or address the matter further. As is discussed below, the Examiner has concluded that, as both parties have addressed the merits of the alleged violations, both at hearing and in their briefs, and Respondents have not further pursued their motion to defer, nor objected further to the Commission's asserting its jurisdiction to decide the violation of contract allegation, it is appropriate for the Examiner to address the merits of the alleged violations.

Complainants

Complainants note that Section 111.91(1), Stats., provides that hours "are a subject of bargaining under SELRA" and asserts that the State unlawfully refused to bargain over the WSPF Food Service schedule. Local 509 President, O'Rourke, notified the Food Service Administrator at WSPF, Broadbent, that the Union was prepared to negotiate the work schedule of the food service staff. The following day, Human Resources Director at WSPF, Shirley Gates, informed O'Rourke that the State could unilaterally change the schedule of the kitchen staff as long as the change was done to meet the "operational needs" of the employer. Despite the Union's attempts to bargain, the State unilaterally changed the WSPF Food Service schedule.

Respondents mistakenly assert that Section 6/2/2 of the Master Agreement constitutes a waiver by the Unions of their statutory right to bargain over schedule changes. The evidence shows otherwise. Section 6/2/2 entitles the State to make reasonable short-term, temporary changes to the schedule of bargaining unit members, if it can show that the change is necessary. However, it does not constitute a waiver of the Unions' statutory right to bargain fixed work schedules. To find such a waiver, the evidence must show in a clear and unmistakable manner that the party intended to weigh its statutory right. To find a contractual waiver, there must be specific contractual language clearly establishing such a waiver. Although a union may elect to waive the statutory right, the contractual language must evince a clear and unmistakable waiver by the union; a waiver does not exist when there is ambiguity regarding the parties' intent. HONEYWELL INTERNATIONAL, INC. V. NLRB, 253 F.3D 125, 133-134 (D.C. Circuit, 2001). Whether a party waived the statutory right when it agreed to a contractual term is a question of intent. Thus, evidence may be considered indicating intent in order to determine whether a contractual term constitutes a waiver. Consideration of bargaining history and the parties' prior interpretations of a contractual provision may be used to determine that intent. O.C.A.W. LOCAL 1-547 V. NLRB, 842 F.2D 1141, 1144 (9th Cir., 1988).

The evidence shows that the Unions did not waive their statutory right to bargain over work schedules. While Section 6/2/2 provides several restrictions on management's right to change fixed work schedules, it is not a waiver of the right to bargain over schedule changes. In a 1996 grievance arbitration, the State emphasized that under Section 6/2/2 it has the right to temporarily change fixed work schedules. STATE OF WISCONSIN (Arbitrator Ver Ploeg, 1996). The State argued in that case that on countless past occasions it had used Section 6/2/2 to make changes to fixed schedules "based upon operational needs which are identical" to the short-term, temporary operational needs it claimed in that case. Section 6/2/2 restricts the State's ability to make short-term, temporary work schedule changes, and it may only make such changes when they are necessary to meet the "operational needs of the service" and when they are not made arbitrarily and not for the purpose of avoiding the payment of overtime and with the proper notice. However, Section 6/2/2 must be interpreted in conjunction with Section 11/2/8 (I), which explicitly recognizes a duty to bargain over work schedule changes. It is axiomatic that the meaning of the contractual provision is dependent upon its context. Moreover, where the whole can be read to give significance to each part, that interpretation is

preferred. Citing Elkouri and Elkouri, *How Arbitration Works*, p. 462 (6th Edition). Even if the Examiner accepts the State's reading of Section 6/2/2, Section 11/2/8 (I), expressly recognizing the duty to bargain over work schedules, at the very least creates an ambiguity, precluding any finding of a clear and unmistakable waiver of the right to bargain over schedules.

Further, bargaining resulted in the 10-hour work day for the WSPF Food Service employees, and this agreement is explicitly referenced in the parties' Local Agreement. The WSPF Local Agreement covering the period ending June 30, 2001, contained no reference to the Food Service employees' work schedule, however, the successor Local Agreement explicitly notes, "Language in this Food Service Section reflects a ten-hour workday." This language was added to the parties' Local Agreement after they collectively bargained the 10-hour workday for the food service staff. This bargaining history shows that the Unions have not waived their statutory right to negotiate work schedules. To hold otherwise would result in the effective deletion of this contract term from the Local Agreement and would also require the parties to re-negotiate the vacation schedule which is based upon a 10-hour shift. The State cannot be permitted to unilaterally eliminate a written contract provision.

Complainants also assert that the State unlawfully bypassed the Union when it solicited input regarding work schedules directly from bargaining unit members. Bargaining directly with individual employees constitutes an unlawful refusal to bargain collectively with the majority representative of employees. CITY OF MILWAUKEE, DEC. NO. 26354-A (McLaughlin, 4/92). Individual bargaining is prohibited by Section 111.84(1)(d), Stats., which makes it a prohibited practice for the State to refuse to bargain collectively on matters set forth in Section 111.91(1), Stats., the latter providing that "hours and conditions of employment" are matters subject to bargaining. Regardless of whether or not a subject covered in the Agreement is a mandatory subject of bargaining, an employer may not circumvent the majority representative of bargaining unit members, and even when a union waives its statutory right to bargain, the employer nevertheless does not acquire the right to bargain with individual employees instead of their majority representative. CITY OF MILWAUKEE, *supra*. In CITY OF MILWAUKEE, the city sent a notice to employees requesting their attendance at a meeting at which the city intended to solicit input from all interested persons concerning expansion of the substance abuse testing program, and the examiner found that the notice "goes as far as to solicit presentation of 'recommendations as a program to be developed and implemented.'" Similarly, in this case, the State circumvented the Union by turning down the latter's request to bargain and then soliciting schedule recommendations from individual employees.

Complainants conclude that the State violated Section 111.84(1)(a), (d) and (e) of SELRA by unilaterally changing the work schedule of the WSPF Food Service employees. Complainants request as a remedy that the Commission find that the State committed the prohibited practices alleged; that it rescind the schedule changes and make employees whole for all lost wages and benefits; that it prohibit similar types of unlawful conduct in the future; that it require the posting of appropriate notices; and that it require such further and other relief as may be deemed appropriate.

Respondents

The Respondents assert that the burden is on the Complainants to prove by the clear and satisfactory preponderance of the evidence that they have violated SELRA based on the totality of the conduct. When dealing with an alleged violation of Section 111.84(1)(a), Stats., Complainants must "demonstrate that the complained-of conduct was 'likely to interfere with, restrain or coerce' Union-represented employees in the exercise of rights protected by Section 111.82, Wis. Stats." STATE OF WISCONSIN, DEC. NO. 27708-B (WERC, 1996). Even if the conduct has a tendency to interfere with protected activity, there is no violation of SELRA if the acts are prompted by a legitimate business reason. STATE OF WISCONSIN, *supra*. For a derivative violation there must be proof by the requisite standard that a violation of other provisions of Section 111.84(1) occurred. For an alleged violation of Section 111.84(1)(d) and (e), Stats., there must be proof that bargaining was required and there was a refusal to do same and a breach of a contractual provision, respectively.

Respondents assert that under the circumstances, they could change the work schedule without negotiations. Changes in work schedules normally are mandatory subjects of bargaining that can be waived by contract. A union can waive bargaining over a matter if the waiver is "clear and unmistakable". RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 18848-A (WERC, 6/82).

The Master Agreement, not the Local Agreement, controls the obligations as to the changing of the work schedules. The Local Agreement provides, at page 2, that the terms of the Master Agreement govern unless the Master Agreement specifically states to the contrary. Thus, to determine what is required under the contract when changing a work schedule, it is the Master Agreement, not the Local Agreement, that must be considered. There is no language in the Local Agreement that addresses schedule changes or that specifically provides that the Local Agreement controls in determining obligations when a work schedule needs to be changed. Thus, the Master Agreement is the source of any obligations. There are four provisions of the Master Agreement that are relevant in this case. First, is Article 3/1/1, Management Rights, which provides that management rights must be exercised consistent with other provisions of the Agreement. Subsection A of that provision provides management with the right "to utilize personnel, methods, and means in the most appropriate and efficient manner possible as determined by management." Arbitrators have found that the State's ability to unilaterally change work schedules based on "operational needs" is an exercise of its management rights. The second provision is Article 11/2/8(J), which requires negotiations for hours of work and work schedules and sets forth the process to obtain an advisory opinion from an arbitrator. However, the critical provisions are Articles 6/2/1 and 6/2/2, the former defining work schedules to clearly include the schedule which is the subject of this action, and the latter, which defines fixed or posted work schedules. The Article makes no distinction between the two when it comes to making changes. Article 6/2/2 also sets forth the language that is critical in this case:

> "Changes in ***such*** work schedules shall be made only to meet the operational needs of the service, which, if requested, shall be explained and shall not be made arbitrarily." (Emphasis added).

The phrase "such work schedules" can only refer to "work schedules" defined in Article 6/2/1, which includes fixed and posted. There is no language that limits schedule changes to being short-term and/or temporary. Had that been the parties' intent, they most assuredly would have used language to that effect. The language of 6/2/2 affirmatively makes clear that permanent schedule changes are included. The provision has a different notice requirement for a change that is less than two weeks, and those that are more than two weeks. Changes lasting more than two weeks can hardly be labeled as short-term or temporary. To the contrary, the language speaks to long-term, permanent schedule changes. Additionally, the schedule changes can be made for "operational needs", which could be short-term or could be long-term/permanent. Management is entitled to keep the schedule in place for as long as the "operational needs" exist. Thus, any change, permanent or temporary, can be made based on the "operational needs" exception of Article 6/2/2. The final provision is the definition of "operational needs" in Article 11/28/1: "The needs of the agency that are reasonable perceived by management as necessary for the effective, efficient and safe performance of the agency's mission at any point in time or at any location."

Thus, based on the clear and unmistakable language of the Master Agreement, the parties have agreed to an exception to the duty to bargain a change to the work schedule. Changes to work schedules that involve the "operational needs" of the service do not have to be negotiated and can be unilaterally implemented upon notice and explanation. Thus, if the facts establish that "operational needs" existed, Respondents were under no duty to bargain and there can be no refusal to bargain and there can be no unlawful, unilateral implementation.

The "operational needs" exception has been in the parties' Agreement since at least 1980, and the language in Article 6/2/2 has been arbitrated many times with the same result as to the meaning of the "operational needs" language. In STATE OF WISCONSIN V. WSEU, Arbitrator Mueller (1981), Arbitrator Mueller went through an exhaustive analysis of bargaining history in fashioning his decision. The case involved the unilateral change in work schedules under the "operational needs" exception that is identical to that currently contained in Article 6/2/2 of the Master Agreement. There was no bargaining whatsoever over the change and in finding that the State did not violate the contract, Arbitrator Mueller concluded that the "operational needs" exception governed. He concluded that a change in a work schedule to minimize overtime was an "operational need", notwithstanding the language in Article 6/2/2 that states that "work schedules will not be changed to avoid payment of overtime." Arbitrator Mueller concluded that public sector employers are obligated to operate as efficiently as possible in the interest of the public taxpayer and that operational needs are therefore interpreted to include the consideration of minimizing overtime. Arbitrator Mueller's decision has been followed in numerous subsequent arbitrations where the State made a unilateral change in work schedules without negotiations, based on the "operational needs" exception of the Agreement. Citing, WSEU V. STATE (Grenig, 8/6/84); WSEU V. STATE

(Grenig, 8/14/84); WSEU v. STATE (Flagler, 11/8/94); and WSEU v. STATE (Ver Ploeg, 10/12/96). In none of those cases was it found that the State was required to bargain, and in all of the cases the arbitrator upheld the State's right to unilaterally change work schedules without bargaining based on the application of the "operational needs" exception. In Grenig's 8/14/84 Award, he analyzed all of the arbitrations to date that involved the "operational needs" exception, including the Mueller decision. He concluded that as the agreement in question was entered into by the parties following the Mueller Award, and contained language identical to that construed by Arbitrator Mueller, this would indicate there is no basis for disturbing Arbitrator Mueller's interpretation of the language. That case involved language identical to that found in the Master Agreement, page 109, paragraph I – "Negotiate Hours of Work, Work Schedules. . ." Arbitrator Flagler also found it appropriate to follow the well-established doctrine of deferring to prior arbitrators who have ruled on essentially a similar issue between the parties under a common agreement. That case involved a contract that had language identical to the Master Agreement, page 109, paragraph J.

These arbitrations are applicable and relevant to this proceeding for several reasons. First, these arbitrations involved the same contract language agreed to by the parties that is found in the present Agreement and are unanimous in their conclusions. The instant action alleges a breach of contract, which is precisely what arbitrators would address and have addressed. Thus, those decisions must be considered binding in this action. Second, the relevant arbitral law confirms the clear language of the contract that "operational needs" is an exception that allows the State to unilaterally change work schedules without negotiations. Third, those decisions leave no doubt that changes in schedules to minimize overtime are *per se*, "operational needs" that permit a unilateral change in a work schedule without negotiations.

Submission of a matter to arbitration has the dual purpose of resolving the case at hand and providing guidance for the future in similar cases. This is especially the case when the arbitrations and the unfair labor practice involve the same Union, the same language of the Agreement and the same issue. Accordingly, the preceding arbitrations govern the outcome of this case.

Respondents assert that the evidence establishes that "operational needs" were present for the schedule change. Based on the previously-discussed arbitrations, the minimizing of overtime is a *per se*, "operational need", constituting an exercise of the State's management rights under Article 3/1/1, (A). Thus, if minimizing overtime was the only reason for the schedule change, it would itself warrant a unilateral change in the schedule. However, there were more reasons. The evidence establishes that Broadbent informed the Local in June of some of the reasons a schedule change was needed, and that Wayne set forth the reasons for the needed change in the schedule at the August 12, 2004 meeting with the Food Service staff.

The facts demonstrate that management reasonably perceived "operational needs" that were neither pretextual nor arbitrary. First was the overtime. Both Broadbent and Wayne testified that excessive overtime prompted the decision to change the work schedule. There

can be no dispute that there was in fact excessive overtime for the Food Service workers. Food Service staff accounted for 88% of non-security overtime and averaged over 60 hours of overtime per pay period. The second reason was the safety factor. The kitchen was hot and there was no air conditioning and Food Service staff were working 10 hours a day or more in the kitchen. Lindh conceded that 10 hour days were too long, especially in the heat. Also, because of the staff shortage and Food Service employees calling in sick or being on vacation, it was necessary to use non-Food Service employees to assist in the kitchen. Lindh again conceded that this could cause a safety concern. There were also concerns over scheduling vacations under the 10-hour schedule. Many of the employees had been at the institution since its opening and were about to reach the five-year level, which would entitle them to an extra week of vacation. Under the old schedule, this was a problem because employees worked every other weekend and could not utilize vacation when they were scheduled to work, which would leave them with more vacation time, but little opportunity to use it. Another concern was the "weekend versus weekend" problem. Employees worked specific weekends like a team, and if someone could not work that weekend, management had problems getting another employee who did not work on that team to come in, as they were reluctant to work with the other clique and were "unavailable" when it came time for overtime on a shift other than their clique. Last, Broadbent testified that the use of Styrofoam products was expensive, and by changing the schedule, the institution could save money because there would be enough staff to do the dishwashing so that Styrofoam products would not be necessary.

The new schedule was necessary and it was uncontradicted that the new schedule reduced overtime substantially, the overall safety and welfare of the WSPF staff was enhanced, and a safer work environment was accomplished. Further, the schedule change allowed the employees a better opportunity to take the extra vacation time they would be earning. The environment for the weekend clique problem was eliminated and the reduction in the use of Styrofoam was accomplished via the new schedule, as there was a full staff which permitted that dishwashing could be done.

Respondents assert that they did not engage in any clandestine effort with respect for the need to change the schedule. The Complainants were given many opportunities to provide input, but chose not to do so. Broadbent notified the Local of the need for the change and when the Local wanted to meet to discuss these, Broadbent did so. Management gave the Local two suggested changes to consider, neither of which the Union found desirable. Lindh provided a suggested schedule to Broadbent. When Complainants demanded negotiations, management responded that under the "operational needs" language in the contract, there was no obligation to bargain. However, Broadbent wanted to discuss Lindh's proposal with O'Rourke, but the latter would not accept the invitation and went over Broadbent's head to Wayne. Complainants were invited to the August 12th meeting and Sergeant Tom attended as an observer. With the two Union representatives, Lindh and Tom in the audience, management explained the reasons for a need in the schedule change, and indicated that it was open to ideas from the staff. The Local's input was invited, and the Local admitted it had proposals to submit to management, but would only do so if management would negotiate. The Local had its chance, but gambled that its position was right, and lost out on any

opportunity for input short of negotiations. WSPF went above and beyond what was required by the Agreement. Over three months notice of the change was given; more than was required in Article 6/2/2. An explanation as to the need and reasons for the change in the schedule was offered to the Union and to the employees, even though they did not request it.

Respondents assert that as there was no requirement to bargain, they did not refuse to bargain or improperly unilaterally implement the schedule change. The record leaves no doubt that the exception of Article 6/2/2 is available to Respondents and that "operational needs" were in fact present. The needs were reasonably perceived by management and the implementation of the new schedule eliminated and eased the perceived problems. Thus, the decision to go to the new schedule was not arbitrary. The language of Article 6/2/2 is absolutely clear, and the arbitral decisions leave no doubt, that the "operational needs" exception applies in this case and allows changes without negotiations. Thus, there can be no violation of SELRA for changing the work schedule without bargaining, and Complainants have failed to meet their burden by the requisite standard and prove a violation of Sections 111.84(1), (a), (b), (d) or (e), Stats.

Next, Respondents assert that they did not violate SELRA when management met with the employees on August 12th. WSPF has a history of working with the Food Service staff with regard to changes in the work schedule. In January of 2002, WSPF found it necessary to change the schedule as it was going from contract meals to in-house preparation. According to Complainants' witness Lindh, management gathered the employees together in Broadbent's office and advised them there had to be a change and that the schedule had to include a 10-hour day. The Union had no problem with this and a verbal vote was taken while Broadbent and Wayne were present. Thus, the meeting on August 12 represented a practice that was employed on one other occasion when the schedule needed to be changed. There is nothing in the record indicating that the Local objected to management's actions in January of 2002. Thus, there can be no valid objection to similar conduct in 2004.

Respondents assert that everything management did was out in the open, and the Local was not bypassed, nor were there negotiations with employees. Nothing was hid from the employees or the Local. They were told that a change had to be made, and given the reasons. Management invited the Local to discuss proposals submitted by Lindh and always indicated that it was willing to discuss, but not negotiate. Union representatives were invited to the August 12th meeting and one representative and steward were present. At that meeting, management again explained the reasons for the needed change, and why Lindh's proposal would not meet the "operational needs". It listened as to why employees did not like the "officer's" schedule, and advised them that it was willing to take the Food Service employees' suggestions and schedules under consideration. Management gave full disclosure for everything at the meeting, and all matters were discussed in full view and presence of the Union. At no time did the Local object to the holding of the meeting, and at no time during the meeting did it object to management's statement that it would consider any schedule suggestions employees had. The meeting was merely informational.

There is nothing to support the allegation that WSPF bypassed the Local and bargained directly with the employees. First, the Local was advised at every step of the way, and invited to, and present at the August 12th meeting. Second, there was no obligation to bargain with the Union. In merely explaining and listening to the employee's concerns at a mass meeting, noticed and attended by the Local, there were not any negotiations. Third, all WSPF did was listen, and management did not indicate it would use any suggestions from employees, but stated only that it would consider them. No promises were made, and the Local had the opportunity to tell employees not to provide any suggestions. It also could have objected on the spot, but did not do so. There was no coercion, threats or interference with the employees by WSPF. There were no offers made by management, nor were there any promises made to employees. WSPF merely advised employees that changes had to be made, that there were valid reasons to do so, and that WSPF was considering all ideas. That is not negotiations. There was never anything that would indicate a give-and-take. Further, since there was no obligation to bargain under the "operational needs" provision of the Agreement, and therefore no obligation to negotiate with the Local, there can be no bypass, since management could unilaterally implement a new schedule based on the operational needs. It would not make sense for management to negotiate with the employees, as it obviously would not do something it did not have to do.

There can be no violation of Section 111.84(1)(b), Stats., since there is absolutely no proof that there was "interference of a magnitude which threatens the independence of a labor organization as a representative of employee interests." The evidence is to the contrary. Similarly, there is no proof of a violation of Section 111.84(1)(a), whether as a derivative or as an independent violation. There is no showing that any rights in Section 111.82, Stats., had been interfered with, restrained or coerced. There were no threats and no coercion, nor were any promises made. There was no evidence of any conduct that had a reasonable tendency to interfere with, restrain or coerce employees in their rights.

Respondents also respond to arguments raised in Complainants' brief. First, Respondents disagree that Article 6/2/2 of the Master Agreement is restricted to short-term, temporary schedule changes. There is no language in the Agreement that restricts the length of any schedule changes. Any changes are permitted, including those for more than two weeks or for as long as the "operational needs" exist. Second, the arbitral history is contrary to Complainants' position. In the Flagler arbitration, the schedule change was permanent, and the arbitrator concluded that the State could make the change based on "operational needs" without bargaining. Of particular note in that arbitration is the arbitrator's observation that WSEU took the position that the State might contend that the parties must bargain, but that bargaining was not required. He further noted that WSEU also took the position that paragraph J on page 109 of the Master Agreement does not pertain, as Article VI controls. The arbitrator concluded that "These changes are governed by management's rights, Article III and by Article VI, Section 1."

Further, the language of the Master Agreement must be read in harmony. To hold as Complainants argue would lead to an absurd result. To say that the language of paragraph J

always requires negotiations when it comes to changes in schedules would render absolutely meaningless the clear and unambiguous language of the "operational needs" exception in Section 6/2/2. Sections 6/2/2 and 11/2/8 (J) have been in the Agreement for many years and have been litigated many times. A review of the decisions shows that when the arbitrators discussed the Union's position, there was never any mention that the Union contended that negotiations were required even though the "operational needs" exception was present in the Agreement. In two of those arbitrations, there is specific mention that language identical to paragraph J was in the Agreement, yet there was no contention by the Union in those cases that it "trumps" the "operational needs" exception. As noted previously, in the Flagler arbitration the Union argued that Article 11/2/8 (J) did not require negotiations because Article VI controls. In the August 14, 1984 Grenig arbitration, the Union claimed that the employer unilaterally changed the work schedule while the parties were in the process of negotiating a different schedule, however, the arbitrator held that the "operational needs" exception allowed for a unilateral change without negotiations.

Thus, the arbitral history regarding the "operational needs" exception demonstrates three points fatal to the Complainant's position. One, it has never argued that the negotiation language of Section 11/2/8, paragraph I, trumps the operational needs language. Two, WSEU has previously contended that the language of Article VI modifies the negotiation language of paragraph J, the same position Respondents take in this case. Three, WSEU has argued, without success, that the "operational needs" exception does not apply even when the parties are in the process of negotiating a schedule change, thereby demonstrating paragraph J does not trump Article 6/2/2, if "operational needs" exist.

Last, Complainants' contention that local negotiations show that they did not waive their right to bargain schedule changes, overlooks several points. One, language in the Local Agreement specifies that unless there is specific language in the Master Agreement to the contrary, the Master Agreement controls. This means Article 6/2/2 controls and that schedule changes can be made under the Local Agreement without negotiations if "operational needs" are present. The argument also ignores the arbitral history discussed above.

Regarding remedy, Respondents assert that if there is a finding of a violation for bypassing the Local and negotiating directly with employees, only a cease and desist order would be appropriate. Respondents cannot take back the meeting or what was said. Further, because the "operational needs" provision permits WSPF to unilaterally implement the new schedule, any remedy cannot require or have the effect of discontinuing use of the current schedule and reverting back to the old. This means that WSPF can unilaterally adopt the current schedule after the decision without bargaining with the Local. Thus, it makes no sense to have an Order containing anything other than a prospective cease and desist from bypassing the Local and directly negotiating with employees. If there is a finding that the "operational needs" provision does not apply or that there was a bypassing of Complainants, Respondents submit that the only appropriate remedies would be cease and desist, a requirement that the current schedule be retained and the parties be required to bargain for a new schedule. It would be inappropriate, burdensome and chaotic to require WSPF to return to the prior 10-

hour schedule. Food Service employees have picked their vacations for 2005 based on the current schedule. The disruption involved in reverting to the prior schedule would be enormous. Retaining the current schedule far outweighs reverting to the prior schedule, especially since there is testimony that compared to the prior schedule, employees favor the current schedule.

Complainant's Reply

Complainants first dispute the Respondents' contention that the Unions clearly and unmistakably waived their right to bargain over work schedules in agreeing to Section 6/2/2 of the Master Agreement and Respondents' reliance on prior arbitration awards to support its position that it had no duty to bargain, and therefore did not improperly bypass the Union when it solicited input regarding work schedules directly from bargaining unit members. The Mueller Award supports the Union's, rather than the State's, position. Contrary to the Respondents' view of the language contained in Section 6/2/2, Arbitrator Mueller found that because the language is ambiguous, the "setting of specific parameters" of the contractual restrictions on management's right to schedule hours of work "is best left to the parties for free and open mutual negotiations. . ." (At page 30). Arbitrator Mueller did not rule that the State could unilaterally change work schedules, as he did not expressly address that question. The issue before Arbitrator Mueller was whether the employer had violated the agreement when it changed the work schedule of certain custodians, which resulted in a reduction in overtime. Arbitrator Mueller also explained that his lengthy analysis was the result of Section 6/2/2 being "comprised of so many words of indefinable and indefinite meaning" and "of so many conflicting provisions that it literally defies any definitive interpretation by consistent application of non-conflicting contract interpretation principles." Thus, supporting Complainants' position that Section 6/2/2 does not clearly and unmistakably waive their statutory right to bargain over changes in hours of work.

Significantly, the case before Arbitrator Mueller concerned the issue of whether the State changed schedules due to operational needs or to primarily avoid overtime payments. Arbitrator Mueller encouraged the parties to negotiate when they must draw "the precise dividing line" between proper changes due to operational needs and improper changes when the primary motivation is to avoid overtime. Consistent with his advice that the parties engage in "free and open mutual negotiations" when they face conflicting interpretations of the language in Section 6/2/2, Arbitrator Mueller specifically encouraged the parties to bargain over when a schedule change is made primarily to avoid the payment of overtime. Thus, under the Mueller Award the parties should also bargain when confronted by questions related to whether a proposed schedule change is reasonable, or whether it is being arbitrarily made and therefore in violation of Section 6/2/2, under which the Union may grieve arbitrary changes. Arbitrator Grenig's August 14, 1984 decision also indicates that the language of Section 6/2/2 does not release the State from its duty to bargain over schedule changes. Arbitrator Grenig followed the Mueller Award when he ruled that the State did not violate the agreement when it changed the work schedule for Maintenance Mechanics due to operational needs, nothing that the State had asked the Union to bargain, but that the Union failed to

negotiate or provide input when it had the opportunity to do so. Like Arbitrator Mueller, Arbitrator Grenig indicated that the Union and the State should resolve conflicting interpretations of the language in Section 6/2/2 by engaging in timely and good-faith negotiations.

None of the awards cited by the Respondents stand for the principle that the Union waived its right to bargain over schedule changes in agreeing to Section 6/2/2. None of the awards contradict the long-standing Wisconsin public policy that collective bargaining is to be promoted as the preferred method for resolving potential disputes. Section 111.80(3), Stats. Under that provision of SELRA, it is declared that it is public policy in Wisconsin to engage in collective bargaining over terms and conditions "where permitted" by SELRA. The Examiner should reject the State's position that bargaining was not permitted because the Union waived its right to bargain over schedule changes. To the contrary, it negotiated Section 11/2/8 (I), which requests the State to bargain regarding work schedules.

The State's position that it did not improperly bypass the Union because it never actually negotiated directly with employees, but merely listened to their suggestions, should also be rejected. When management representatives met with all of the available food staff to "talk about" schedule change options on August 12th, that conduct constituted unlawful direct negotiations with employees. Under the definition of "collective bargaining" in SELRA, to "meet and confer" with employees constitutes bargaining. Section 111.81(1), Stats.

Last, contrary to the State's position that this is a case regarding whether its operational needs justified a schedule change, the resolution of this case does not require consideration of the State's "operational needs"; rather, it concerns whether the State unlawfully refused to bargain, negotiated directly with bargaining unit members, and then unilaterally changed work schedules.

Complainants conclude that the State violated Sections 111.84(1)(a), (d) and (e) of SELRA. The appropriate remedy for the violations is to find that Respondents committed the prohibited practices alleged and order that they rescind the schedule changes and make employees whole for all lost wages and benefits, and that they be prohibited from engaging in similar types of unlawful conduct in the future and be required to post the appropriate notices, and such other further relief as the Examiner deems appropriate.

DISCUSSION

Complainants have alleged that Respondents' actions regarding unilaterally changing the work schedules of the Food Service employees at WSPF and refusing to negotiate with Complainants in that regard, violated Secs. 111.84(1)(a), (d) and (e), of SELRA. In making determinations regarding such allegations, it is appropriate to consider the Commission's

decisions under the Municipal Employment Relations Act (MERA), as well as those under SELRA, as the relevant provisions of those laws are substantively identical. [1]

As the complaining parties, Complainants have the burden of proving that Respondents have committed the alleged violations by a clear and satisfactory preponderance of the evidence [2].

With regard to Sec. 111.84(1)(a), Stats., the Examiner does not read the complaint to allege an independent violation of that provision. Thus, any finding in that regard is as to a derivative violation based on findings as to the alleged violations of Secs. 111.84(1)(d) and (e), Stats.

111.84(1)(d)

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

> (d) To refuse to bargain collectively on matters set forth in s. 111.91(1) with a representative of a majority of its employees in an appropriate collective bargaining unit. . .

An employer who violates its duty to bargain under this provision derivatively interferes with employees' rights under Sec. 111.84(1)(a), Stats. (See GREEN COUNTY, DEC. NO. 20308-B (WERC, 11/84)).

Complainants allege Respondents violated Sec. 111.84(1)(d), Stats. both by (1) refusing to bargain with Complainants and unilaterally implementing the changed work schedule for the Food Service staff at WSPF, and (2) individually bargaining with those employees at the August 12, 2004 meeting by soliciting and accepting proposals from individual employees.

As to the first allegation, regarding the unilateral change in the work schedule, the parties stipulated at hearing that both the Master Agreement and Local Agreement were extended and continued in effect during the time in question. The Commission previously set out the law regarding an employer's duty to bargain in-term:

We have consistently held that:

> (An) employer's duty to bargain during the term of a contract extends to all mandatory subjects of bargaining except those which are covered by the

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[1] STATE V. WISCONSIN EMPLOYMENT RELATIONS COMMISSION, 172 Wis. 2D 132, 143; STATE OF WISCONSIN, DEC. NO. 29448-C (WERC, 8/00).

[2] Sec. 111.07(3), Stats., made applicable by Sec. 111.84(4), Stats.

> contract or as to which the union has waived its right to bargain through bargaining history or specific contract language. Where the contract addresses the subject of bargaining, the contract determines the parties' respective rights and the parties are entitled to rely on whatever bargain they have struck. (Footnote omitted). CITY OF BELOIT, DEC. NO. 27990-C (WERC, 7/96).

Here, Respondents concede that employees' work schedules constitute "hours" and are a mandatory subject of bargaining, but assert that they acted consistent with their rights under the parties' Master Agreement.

For purposes of deciding if the Respondents have a statutory duty to bargain a change in a work schedule, it is necessary to determine whether the parties' Master Agreement addresses the subject. Article VI, subsection 6/2/2, of the Master Agreement specifically addresses the subject of changes to work schedules, and the subject of negotiating work schedules in the Blue Collar bargaining unit, of which the WSPF Food Service employees are members, is generally addressed in Article XI, Subsection 11/2/8, I. It is therefore not a question of whether Complainants' waived their statutory right to bargain, having bargained those provisions addressing work schedules, the Respondents were under no statutory obligation to bargain further regarding that subject. The parties' rights and obligations regarding changing of work schedules are determined by what they have negotiated into their agreement, and they are not required to bargain further in that regard. CITY OF BELOIT, supra; SCHOOL DISTRICT OF CADOTT, DEC. NO. 27775-C (WERC, 6/94); aff'd 197 Wis. 2D 46 (Ct. App., 1995). Hence, Respondents did not violate Sec. 111.84(1)(d), Stats., by refusing to negotiate with Complainants as to changing the Food Service employees' work schedule. Thus, any further duty to negotiate must therefore stem from the parties' Agreement. [3]

Complainants also assert that Respondents engaged in individual bargaining with the Food Service employees in violation of Sec. 111.84(1)(d), Stats. [4] The allegation centers around the August 12, 2004 meeting WSPF management held with the Food Service employees. Respondents assert in their defense that the August 12th meeting was consistent with the practice that had been followed on the previous occasion when the schedule of those employees needed to be changed. In that instance, the Food Service employees had been called into Broadbent's office after management had explained to the Union that the schedule

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[3] In this regard, the Commission has held that where the contract addresses the subject and contains a grievance procedure with final and binding arbitration, and the alleged refusal to bargain is based upon a unilateral change, the alleged violation is appropriately deferred to the parties' arbitration procedure for resolution of the parties' rights where the respondent has objected to the Commission's exercising its jurisdiction. As noted at the outset, while Respondents made such an objection, they subsequently dropped the objection after the Examiner deferred ruling on their motion. Therefore, the parties rights and obligations under the Agreement are addressed subsequently in this decision.

[4] As the allegation of individual bargaining would not likely be resolved by determination of the parties' contractual rights in arbitration, deferral of this alleged violation of Sec. 111.84(1)(d), Stats., would not be appropriate.

be changed and had to include a 10-hour day. The Union had no problem with this and the employees took a voice vote with Wayne and Broadbent present, approving the change. In contrast, here the Local Union objected to the change and demanded to bargain numerous times. Broadbent first went to O'Rourke and Lindh with the proposed change and they indicated there was a problem and that the Union could not agree to the proposed schedule, but O'Rourke indicated the Union would be willing to negotiate. O'Rourke followed this up with his July 1, 2004 e-mail to Broadbent, which noted hours are a mandatory subject of bargaining and indicated the Union had created a bargaining team and was ready to negotiate. Moreover, after Broadbent sent out the notice of the August 12th meeting to employees and notified O'Rourke of the meeting, the latter went to Wayne and asked if they were going to negotiate the schedule. Wayne responded in the negative. Local 509 Vice-President, Sergeant Tom, and Lindh were present at the August 12th meeting and were given the opportunity to provide input regarding the new schedule, but not to bargain. In response to questions from Wayne and Broadbent as to whether the Union had any suggestions or proposals to make, Tom indicated that the Union did, but that the parties had to negotiate, and the Union would produce its proposals when the management sat down to negotiate with the Union's team. Wayne responded that management did not have to negotiate.

After stating management would not negotiate with the Union regarding their schedule, management subsequently informed the Food Service employees they would have the opportunity themselves to submit suggestions and propose schedules, which management would consider in arriving at a new schedule. It is at this point that Respondents ran afoul of the law. Even assuming *arguendo* that management was correct that it had the right to change the employees' work schedule under the parties' Agreement, and therefore had no duty to bargain in that regard, if, and to the extent, it chose to bargain, it had to do so with the Union and could not lawfully deal directly with the employees. CITY OF MILWAUKEE, DEC. NO. 26354-A (McLaughlin, 4/92), *aff'd by operation of law*, DEC. NO. 26354-B (WERC, 5/92). To do so denigrates the exclusive collective bargaining representative status of the Union.

It must also be kept in mind that the Union was attempting to enforce what it believed were its rights under the parties' Agreement. There is no evidence in the record that the Unions have waived their right to represent these employees and to administer the contract where the parties have a dispute about what their rights are under the agreement. [5] Absent such a waiver, management must deal with the employees' exclusive bargaining representative in resolving the dispute, and not directly with the employees. See AMERY SCHOOL DISTRICT, DEC. NO. 26138-A (McLaughlin, 2/90), *aff'd by operation of law*, DEC. NO. 26138-B (WERC, 3/90).

For these reasons, the Examiner has found that Respondents' actions in soliciting

[5] While Section 6/2/2 of the Master Agreement provides that employees may voluntarily agree to a change with management's approval, Respondents have not asserted that language is implicated here.

proposed schedules directly from the employees in the face of the Unions' objections and demand to bargain violated Sec. 111.84(1)(d), Stats.

111.84(1)(e)

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

> (e) To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting employees, including an agreement to arbitrate or to accept the terms of an arbitration award, where previously the parties have agreed to accept such award as final and binding upon them.

The Commission will not normally exert its jurisdiction over a violation of contract allegation where the parties' agreement contains a provision for final and binding arbitration of such disputes; however, the Commission has recognized that the parties may waive application of this doctrine. CITY OF MILWAUKEE, DEC. NO. 31221-B (WERC, 10/05); ROCK COUNTY, DEC. NO. 29219-B (WERC, 10/98); PET MILK CO., DEC. NO. 6209 (WERC, 1/63); ALLIS-CHALMERS MFG. CO., DEC. NO. 8227 (WERB, 10/67). As noted previously, while Respondents raised the affirmative defense in the answer that Complainants had not exhausted their contractual remedies, and moved for deferral at the hearing, once the Examiner deferred ruling on the motion, the parties fully litigated their dispute and Respondents did not address their objection further at hearing or in their post-hearing brief. The Examiner has presumed from this that the parties have anticipated that the Examiner would address the merits of all the alleged violations, including the allegation of a violation of Sec. 111.84(1)(e), Stats.

It must be reiterated that having concluded that the parties' Master Agreement addresses the subject of work schedules, and specifically changes to work schedules, any requirement that the parties negotiate further regarding that subject must be contractual, rather than statutory. [6]

Respondents have asserted that the parties' Master Agreement contains language in subsection 6/2/2 specifically permitting management to change a work schedule under certain circumstances without negotiating the change. They rely primarily upon that provision and Article III, Management Rights. Conversely, Complainants point to Article XI, Subsection 11/2/8, I, of the Master Agreement and assert that they have not waived their right to bargain over changes to the work schedule of Food Service employees in the Blue Collar unit at WSPF, asserting that such a waiver would have to be "clear and unmistakable". Complainants further assert that given the conflicting and/or inconsistent language in the Agreement, such a clear waiver cannot be found. These arguments, however, slur Complainants' statutory rights with their rights under the parties' Agreement. As noted, it is

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[6] If the Respondents' actions are consistent with their rights under the Agreement, it is, of course, not a unilateral change, and Sec. 111.84(1)(d), Stats., would not be implicated.

only the latter that is in issue at this point. Generally speaking, if the agreement reserves to management the right to take a particular action, absent language to the contrary, management is free to take the action without first negotiating and obtaining the union's agreement.

Article VI, Section 2, 6/2/2, of the Master Agreement, specifically addresses management's right to change work schedules. As Respondents assert, Subsection 6/2/2 does not expressly, nor implicitly, limit management's authority to only making short-term or temporary changes in a work schedule. The only restrictions on management's authority referenced in this provision are that the change be made to "meet operational needs of the service", that the change not be made "arbitrarily", that the change not be made "to avoid the payment of overtime", and that "insofar as possible" the minimum prior notice of the change be given to the local Union and the affected employees. The Union is also expressly given the right to grieve "if it feels a work schedule change has been made arbitrarily." There is no reference in Subsection 6/2/2, whatsoever, regarding negotiations. The only reference at all to bargaining in Article VI, Section 2, is in Subsection 6/2/3, which provides:

> **6/2/3 (BC, AS, SPS, T, LE)** This section shall be amended in accordance with agreements reached pursuant to the provisions of Article XI, Section 2.

There is no evidence in the record as to that provision's application to Subsection 6/2/2, if any. As noted, it is Article XI, Section 2, upon which Complainants rely, specifically Subsection 11/2/8, I, which provides, in relevant part, that, as to certain units, including the Blue Collar unit, "Negotiate hours of work, work schedules and overtime assignments. . ." It also provides that either party may appeal to advisory arbitration "in the event no agreement is reached." From what the Examiner is able to glean from the prior awards cited by the parties, Article XI, Section 2 of the Master Agreement authorizes "Labor-Management meetings" and the subsections of that provision list what the parties agree are appropriate purposes of such meetings. [7]

However, while Subsection 11/2/8, I, generally addresses these subjects, Subsection 6/2/2, of the Master Agreement specifically addresses the authority of management to change work schedules under specified circumstances. It is a generally accepted principle that in interpreting a contract, "Where two contract clauses bear on the same subject, the more specific shall be given precedence." Further, "when an exception is stated to a general principle, the exception shall prevail where it is applicable." Elkouri and Elkouri, *How Arbitration Works* (Fifth Ed.) pp. 498-499.

Complainants also rely upon the references in the section of the Local Agreement covering these employees:

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[7] The parties only submitted excerpts of the Master Agreement, consisting of Article III, Article VI, Section 1, and Section 2, Subsections 6/2/1 through 6/2/3, Article XI, Subsections 11/2/8, I, J, K and L and Subsections 11/27/2, 11/27/3, 11/27/4, 11/28/1 and 11/28/2. The Examiner was not provided with Article XI, Section 2.

FOOD SERVICE (BC)

Note: Language in this Food Service Section reflects a 10 hour Workday.

The Vacations provision also references the "current schedule", recognizes that the 10 hour days schedule allowed employees to have every other weekend off, and requires the first round of vacation picks be taken in three day blocks. Complainants assert these references establish that the 10 hour days schedule was negotiated by the parties and included in their Local Agreement, and therefore, may only be changed by negotiating such a change. Indeed, it appears those provisions were included to recognize the work schedule that was in effect at the time this Local Agreement was negotiated; i.e., the 10 hour days schedule. However, as Respondents point out, the Local Agreement also provides:

> Authority of Master Agreement
>
> Nothing in this local agreement shall be construed to override any contractual provision in the master agreement unless specifically allowed by the terms of the master agreement.

There is no provision in the Master Agreement authorizing local agreements to override Subsection 6/2/2.

Both parties also rely on prior arbitration awards that involved WSEU and the Respondent State and the interpretation and application of the provisions or predecessors of the provisions upon which the parties rely in this case. Of the five prior awards cited by the parties, all involved an interpretation of management's right to change work schedules under Article VI, Subsection 6/2/2,or that provision's predecessor, Article VI, Section 1, and the requirements that the change be made to meet "operational needs" and not be made to avoid the payment of overtime. Arbitrator Mueller, in his 1981 award, reviewed the bargaining history of Article VI, Section 1, and concluded that changing the work schedule to minimize overtime was a permissible purpose within the meaning of meeting "operational needs", and that it was the last-minute change in the middle of the work week to avoid paying employees overtime in that week that the parties intended to prohibit. Subsequent arbitrators accepted and agreed with his reasoning.

Three of the awards – Arbitrator Mueller's 1981 award, Arbitrator Grenig's August 6, 1984 award, and Arbitrator Ver Ploeg's 1996 award, dealt with temporary changes, while Arbitrator Grenig's August 14, 1984 award dealt with a change that was to be in force until more Maintenance Mechanics were hired, and Arbitrator Flagler's 1994 award involved a change that was to remain in effect and not intended to be temporary.

In only the August 14, 1984 Grenig award did the WSEU and the Local Union raise an issue regarding Article XI, Section 2, and the need for negotiations – asserting the parties were in the midst of negotiating a work schedule when management made the change. Arbitrator

Grenig applied the requirements of then-Article VI, Section 1, and as to Article XI, Section 2, concluded there was no violation. Arbitrator Grenig reasoned as follows:

> Article XI provides that the work schedule provisions of Article VI may be amended through the procedure specified in Article XI. There is no evidence that a work schedule agreement has been negotiated between the parties at the time the change was made in the schedule in 1982. While the Employer had asked for the Union's input in 1982, the testimony at the hearing indicates that the Union did not give its "input" until the spring of 1983.
>
> The advisory arbitration referred to in Article XI, is "interest" arbitration. The advisory arbitration proceeding may be used when the parties are unable to reach agreement and request an arbitrator to recommend the terms of an agreement. The negotiations never reached an impasse and, thus, the advisory arbitration provision never came into play.
>
> The evidence indicates that the Employer invited participation and recommendations from the Union but that none was tendered prior to October 1982. The evidence further shows that the changes in the work schedule involved changes required because of operational necessity. (pages 13-14).

While Arbitrator Grenig notes the State invited the Unions' input and participation, as Respondents did here, there is no evidence of negotiations in that case to the degree the Complainants are insisting is necessary in this case.

In Arbitrator Flagler's 1994 award, the employer unilaterally changed the work schedule of transport officers at the Taycheedah Correctional Institution from 7:00 a.m. – 3:00 p.m. to 6:00 a.m. – 2:00 p.m., and subsequently, to "an eight-hour block of time between the hours of 6:00 a.m. and 6:00 p.m. . . .", with a start time no later than 10:00 a.m., with five days prior notice of what their schedule would be. The changes were not intended to be short-term (although the first change only lasted two months) and only the last change was challenged. The WSEU and the local Union did not argue the need for negotiations pursuant to Article XI, Section 2, Subsection J (virtually identical to Subsection I); rather, the Unions asserted another provision of Article VI pertaining to "alternative work patterns" applied, the Unions arguing that such alternative work patterns could only be implemented by mutual agreement of the parties. Arbitrator Flagler reviewed Arbitrator Mueller's award in depth as to Article VI, Section 1, and concluding that the schedule was not an "alternative work pattern", held that the changes "are governed by Management Rights Article III and by Article VI, Section 1." [8]

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[8] It is clear Arbitrator Flagler was referring to Article VI, Subsection 6/2/2, cited as the relevant contract

As the parties recognize, as this is a breach of contract allegation, how arbitrators have previously interpreted the same language in the parties' Agreement is relevant in determining the parties' respective rights and obligations under substantially the same language in this instance. This is especially so where they have had the opportunity to alter that language in agreements arrived at subsequent to those awards.

A number of things are apparent from those prior awards. First, the subsequent arbitrators agreed with Arbitrator Mueller's reasoning and his conclusions that changing work schedules to minimize the need for overtime was permissible as meeting "operational needs", and consistent with the Article III management right "To utilize personnel, methods, and means in the most appropriate and efficient manner possible. . .", and that to do so did not fall within the prohibition regarding avoiding the payment of overtime in Article VI, Section 1, and its successor, Subsection 6/2/2. Second, application of Article VI, Section 1, or its successor, Subsection 6/2/2, was not restricted to only temporary, short-term changes. Third, in only one of the cases did the Unions assert management was obligated to negotiate changes in the work schedule, and Arbitrator Grenig found no violation of Article XI, Section 2, even though the change was made without negotiations and without the Unions' agreement.

As Arbitrator Grenig noted in his August 14, 1984 award, the parties' having entered into a collective bargaining agreement containing language identical to that which was construed by an arbitrator, following the issuance of his arbitration award, indicates that there is no basis for disturbing that prior interpretation of the language. While, as Complainants assert, both Arbitrator Mueller and Arbitrator Grenig encouraged the parties to bargain over inconsistencies in the language of Subsection 6/2/2's predecessor by engaging in good faith negotiations, the Examiner understands those arbitrators to be urging the parties to negotiate contract language that more clearly spells out what is or is not permitted by Subsection 6/2/2. The Examiner heartily concurs.

Both parties also cite past instances of changes to work schedules to employees in the Blue Collar unit at WSPF to support their positions. It is apparent from Arbitrator Grenig's August 14,1984 award, and from what has occurred in the past, that the parties have differing views as to whether they were "negotiating" or "discussing" such changes. The record indicates that in 2001, WSPF management came to the Local Union and said they needed to create a second shift for the Custodial staff, with half working one shift and half working the other. According to O'Rourke, the Local looked at the proposed schedule and agreed and submitted the proposal to the Custodians to look at, and they then took a vote and approved the change. Similarly, in 2002 management approached the Local with a need to change the work schedule from 8 hour to 10 hour days for the Food Service staff. The Local did not see a problem with it, and the Food Service staff were called into Broadbent's old office and they then took a voice vote, approving the change. From Broadbent's perspective, however,

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language in his award, instead of its predecessor, Article VI, Section 1, which Arbitrator Mueller had applied.

management decided the change to 10 hour days was needed due to a change in operations and he and Wayne met with the Local Union to make them aware of it. In late 2003, management approached a steward in the Local Union and advised him that due to turnover in the Custodial staff, there was not enough staff to cover two shifts, so they were going to go back to a single

8 hour shift for all Custodians. O'Rourke conceded there were no negotiations and no vote among staff was taken, but testified that the understanding was that it was only a "temporary" change until more Custodians could be hired. However, he also conceded that as of the time of hearing in this case (March, 2005), the single shift schedule remained in effect.

It appears from the foregoing that in those past instances management informed the Local Union of the need to change the employees' work schedule, and the Union, not having a problem with the change, submitted it to the employees to approve, which they did. There was no give and take or counterproposals from the Union in either instance. In the third and most recent prior instance, management advised the Local Union that the change was being made and why, and implemented the change without further action or input from the Union. Absent that give and take that is the normal component of negotiations, it is difficult to conclude that the parties mutually understood they were engaging in negotiations. From management's perspective, they were informing the Union of the need for the change, and the Union was not challenging it. It is not clear that what happened in the instant case is any different from the prior instances, except that, in this case, the Union was not willing to accept the change in the schedule management initially proposed to make. Given the ambiguity of the "practice", the Examiner is not willing to conclude that the parties have historically negotiated such changes in the work schedules.

The Examiner concludes that Article VI, Subsection 6/2/2 of the Master Agreement specifically authorizes management to unilaterally change the Food Service employees' work schedule, provided the change is to meet the operational needs of WSPF, is not made arbitrarily, and is not made to avoid the payment of overtime, as the latter has been previously construed by the parties' prior arbitration awards. Absent language in the provision indicating otherwise, it is presumed management's authority to change the schedule is not dependent upon obtaining the Unions' prior agreement before it can implement the change, when those conditions are met.

In this case, Wayne's and Broadbent's testimony establishes that the change was made to reduce the amount of overtime hours worked by Food Service staff, to reduce safety risks by not having Food Service staff working 10 or more hours per day in the kitchen and not having to utilize non-Food Service employees to fill in in the absence of Food Service staff, to avoid the problems of employees not wanting to fill in on weekends due to cliques that had formed under the old schedule, to decrease the use of Styrofoam containers and to accommodate employee vacations, which were about to increase for many of the staff. Lindh, a Food Service employee and a steward in the Blue Collar unit, agreed for the most part that these were problems. The evidence indicates that overtime among the Food Service staff decreased substantially after the new schedule was implemented. Wayne also testified that there is more coverage on the weekends under the new schedule and that staff do not have to

work as many hours in a row, so that the safety risk has been reduced. Thus, it is concluded that the schedule was changed to meet the operational needs of the institution. As Arbitrator Grenig recognized in his August 14, 1984 Award, "Since the change was made to meet the operational needs of the service. . .there was a reason for the change and it was not arbitrary. . ."

As the Union and the affected employees were notified by Wayne's August 26, 2004 memorandum as to the change in the work schedule, and the change was not implemented until late December of 2004, or at the earliest, when the Food Service employees made their 2005 vacation picks in November of 2004, the five calendar day prior notice requirement of Subsection 6/2/2 was met.

Based on the foregoing, it is concluded that Respondents did not violate the parties' collective bargaining agreement, and therefore, did not violate Sec. 111.84(1)(e), Stats., when WSPF management unilaterally changed the work schedule of the Food Service employees at WSPF to meet the operational needs of the Institution, as discussed above, and upon prior notice of the change to the employees and the Unions. [9]

Remedy

While the Examiner has found Respondents violated Sec. 111.84(1)(d), and derivatively, (1)(a), Stats., by individually bargaining with the Food Service staff at WSPF, having also concluded that Respondents were not obligated to bargain with Complainants regarding changing the work schedule of those employees in the instant situation, it is concluded that a cease and desist order and the posting of the notice indicating Respondents will not bargain individually with its employees who are represented by Complainants appropriately and adequately addresses the violation.

Dated at Madison, Wisconsin this 23rd day of February, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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[9] It is expressly noted that this decision only addresses the Respondents' obligations and rights in changing an existing fixed or posted work schedule without bargaining with the Complainants as to that change. The Examiner does not read the instant complaint, filed on October 27, 2004, to address Complainants' right to bargain as to work schedules outside those circumstances, and there is no evidence in the record of a demand to bargain in that regard following implementation of the change.

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David E. Shaw /s/

David E. Shaw, Examiner