STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

THE WISCONSIN STATE EMPLOYEES UNION (WSEU), AFSCME, COUNCIL 24, AFL-CIO, and LOCAL 175, Complainants,

vs.

STATE OF WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES, Respondents.

Case 631
No. 63251
PP(S)-338

Decision No. 31207-B

Appearances:

Kurt C. Kobelt, Lawton & Cates, S.C., Attorneys at Law, Ten East Doty Street, Suite 400, P.O. Box 2965, Madison, Wisconsin 53701-2965, appearing on behalf of the Complainants.

David J. Vergeront, Chief Legal Counsel, Office of State Employment Relations, P.O. Box 7855, Madison, Wisconsin 53707-7855, appearing on behalf of the Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On January 21, 2004, Complainants filed a complaint of unfair labor practice with the Wisconsin Employment Relations Commission alleging that Respondents had violated SELRA by changing the work hours and discontinuing the unpaid meal break of certain food service staff at the Sand Ridge Secure Treatment Center. On January 11, 2005, the Commission appointed Coleen A. Burns, a member of its staff, to act as Examiner in this matter. The Examiner conducted a hearing on the complaint in Mauston, Wisconsin on March 29, 2005. On April 5, 2005, Respondents filed a Notice of Motion and Motion requesting the Examiner to reopen the hearing. On April 11, 2005, Respondents filed an Affidavit in support of its motion. On April 12, 2005, Complainants' filed a response to the Motion, objecting to the reopening of the hearing. On April 14, 2005, Respondents filed a response and on April 19, 2005, the Examiner granted Respondents' Motion and, thereafter, the parties stipulated to the submission of one Respondents' exhibit. The record was closed on July 21, 2005, following receipt of the parties' post-hearing written argument.

Having considered 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 Wisconsin State Employees Union, AFSCME Council 24, AFL-CIO (WSEU) and its affiliated Local 175, hereafter Complainants or Union, are labor organizations maintaining a principle office at 8033 Excelsior Drive, Suite "C", Madison, Wisconsin 53717-1903. Complainant WSEU is the exclusive collective bargaining representative of certain employees of the State of Wisconsin, including food service staff employed at the Sand Ridge Secure Treatment Center, hereafter SRSTC, located at 1111 North Road, Mauston, Wisconsin 53948.

2. The Department of Health and Family Services (DHFS) is an agency of the State of Wisconsin with a principle office at 1 W. Wilson Street, Madison, Wisconsin 53702 and has oversight responsibility for SRSTC. The State of Wisconsin and DHFS are hereafter referred to as Respondents.

3. SRSTC, which houses sexually violent patients, including sexual predators, received its first patients in June of 2001. At that time and at all times material hereto, Steve Watters has been employed by DHFS as the Director of SRSTC. As Director, Watters has authority to administer SRSTC on behalf of DHFS. Watters is the appointing authority at SRSTC and represents the State in the negotiation of the Union's local agreement. Tammy Rief was employed by DHFS as Food Service Administrator at SRSTC from the time it opened in 2001 until she left this employment in the fall of 2003. Sandra Duran has been employed by DHFS as Management Services Director at SRSTC since August of 2000. As Director, Watters has supervisory authority over individuals employed at SRSTC, including Duran, Rief and employees represented by the Union. As Management Services Director, Duran has supervisory authority over individuals employed at SRSTC, including Rief and food service staff represented by the Union. As Food Service Administrator, Rief had supervisory authority over food service staff employed at SRSTC, including those represented by the Union. For the protection of staff and patients, SRSTC has detailed rules limiting contact between patients and staff. SRSTC strictly enforces its anti-fraternization rules, the purpose of which are the avoidance of preferential treatment of patients by staff and the manipulation of staff by patients.

4. When Christine Treisch was hired as food service staff at SRSTC, she was told that she would have every other weekend off. When she started work, she, like the other food service staff represented by the Union, received one weekend off a month. In early 2003, Rief changed the schedules of some food service staff, with the effect that their one weekend off was split such that they would have off on either a Saturday or a Sunday. Treisch complained of the split weekends to Steve Smith, a Psychiatric Care Technician and the President of Local 175. Smith has been employed at SRSTC since it opened in April of 2001. In late April or May of 2003, Smith asked Rief to meet with him to discuss issues that had been brought to

Smith's attention by food service staff. Among the issues that had been brought to Smith's attention were that weekends off were being split, employees were not receiving breaks, employees were being pulled to different shifts, and employees were not receiving overtime. When Rief indicated that she did not want to meet with Smith, Smith responded that, if she did not meet with him, then he had the potential to file twenty-seven grievances. Thereafter, Rief agreed to meet with Smith. At the subsequent meeting, which lasted three to four hours, Smith read portions of the contract to Rief in an effort to educate her as to what needed to take place. Although Rief, at times appeared to be ready to cry, Smith considered the meeting to have a good ending. Smith left the meeting with the opinion that changes would take place; that Rief wanted to work with the Union; and that Rief wanted to bring closure to the items that he had discussed. During the meeting with Rief, Smith directed Rief's attention to Sections 6/10/1, 6/2/6 and 11/28/2 of the Union's labor contract and raised the issue that SRSTC food service staff were not receiving the two fifteen minute breaks required by contract because she was combining them for their lunch period; advocated that the food service staff receive additional breaks and questioned Rief about her reasons for changing the work schedules of food service staff from am to pm and vice versa. Smith did not request that food service staff receive a thirty-minute unpaid lunch period, nor did he request that Rief not provide a free lunch to food service staff. Understanding that Rief was changing schedules to avoid overtime, Smith told Rief that she could not do that. Treisch, who had been told that Smith had met with Rief, concluded that this meeting had upset Rief because Rief would not speak to anybody for days unless a person got in Rief's face and asked a question.

5. In late April or early May, 2003, Smith contacted Watters, in his capacity as Local 175 President, to question why food service staff represented by Local 175 were being required to cover their lunch with their two fifteen minute breaks. This question did not make sense to Watters and he decided to check into the matter. Following this contact, Watters contacted Duran, relayed that Smith had questioned why food service staff was being required to combine their two fifteen minute breaks to make up their lunch period and requested that she look into the matter. Duran responded to this request by calling Rief into her office and questioning her about food service breaks. From this conversation, Duran concluded that food service staff was working a straight eight hour shift, receiving a paid lunch period by combining their two fifteen minute breaks, receiving a free meal and eating their meal in the "Staff break/Training Room." Duran, who previously had not been aware that food service staff were working a straight eight hour shift, receiving a paid lunch period by combining their two fifteen minute breaks, receiving a free meal or eating their meal in the "Staff break/Training Room", reported these facts to Watters a week or two before May 13, 2005. Watters concluded that the current method of handling the two fifteen minute breaks was a violation of the contract. Following this discussion with Duran, Watters had a discussion with Rief for the purpose of learning her rationale for the straight eights. Duran attended this discussion. At the time of this discussion, Watters did not know about the discussion that Smith had had with Rief regarding the food staff issues that had been brought to Smith's attention. From his discussion with Rief, Watters concluded that Rief considered the straight eights to be a "perk" for staff that did not receive much pay. Watters did not consider this to be an operational justification for straight eights. Following this discussion with Rief, Watters

contacted other DHFS institutions to determine if food service staff received straight eights and concluded that these institutions did not have food service staff on straight eights. Watters then decided to make the changes contained in his memo of May 13, 2003; consulted with central employment relations; concluded from this consultation that he should provide a thirty day notification of the change in straight eights; and issued his memo of May 13, 2003. Prior to issuing this memo, Watters met with Smith and notified Smith of the changes contained in this memo. Smith did not tell Watters that the Union agreed that these changes were appropriate.

6. On May 12, 2003, Rief met with food service staff from both shifts and stated that things were going to change and that the staff should expect major changes in the future. Food Service Manager Tom Nesseth was the only other management representative that attended this meeting. During this meeting, Rief also stated that, if the staff had not gone to the union, then the changes would not be happening; that the staff should not have gone to Steve Smith; that, if the staff has questions or concerns, then they should come to Rief or Steve Shaw; that there is no reason to go to the union, because the union never wins; and that, when you go to the union, things get worse. Shaw is a Union representative, who for a short period of time, had responsibility for food service staff.

7. On or about May 13, 2003, Smith and the food service staff represented by the Union received a copy of the following:

> DATE: 05/13/2003
>
> TO: SRSTC Food Service
>
> FROM: Steve Watters, Director
>
> RE: Change in SRSTC Practice
>
> This memo provides SRSTC Food Service staff notice of a change in SRSTC practice concerning meal breaks in the work unit. This change in practice will take effect on June 15, 2003.
>
> At present, SRSTC Food Service staff work a "straight eight" work shift and are provided a meal to be consumed on one of your authorized breaks. Effective June 15, 2003, this practice will be changed as follows:
>
> - Food Service staff will no longer work a "straight eight". Instead, Food Service staff will have a scheduled 30-minute, unpaid meal break during your workday.
>
> - SRSTC will no longer provide a meal to SRSTC Food Service staff.

- Consistent with contractual provisions, SRSTC Food Service staff will be afforded two 15-minute breaks during the workday.

During the interim 30-day period, staff will continue to work a "straight eight" and be provided with a meal, which you may consume during one of your authorized breaks.

SRSTC Administration was not aware of this practice of Food Service in scheduling staff for "straight eights" and providing a meal for the staff until this matter was recently brought to our attention. Given that the schedule for Food Service staff can be adjusted to accommodate a 30-minute, unpaid meal break, there is no need for the facility to maintain the current practice. Accordingly, we will move to the standard practice outlined in this memo. This will move SRSTC's practice concerning Food Service staff hours and meal breaks into conformity with the practices that exist at the other DHFS-operated institutions.

Thank you for your understanding.

. . .

SRSTC food service staff does not have to stay on the premises during their unpaid lunch break. Prior to Smith's conversation with Watters in late April or early May, 2003, neither Watters nor Duran knew that food service staff was working straight eights, with a paid lunch period consisting of combining two fifteen minute breaks; that food service staff were receiving a free meal; or that food service staff were permitted to eat this meal and take breaks in the "Staff break/Training Room."

8. The Complainants and Respondents were parties to a master collective bargaining agreement that by its terms was in effect from May 17, 2003 through June 30, 2003. This labor contract includes the following:

ARTICLE VI
HOURS OF WORK

SECTION 1: <u>Standard</u>

6/1/1 (PSS) The standard basis of employment is forty (40) hours in a regularly reoccurring period of 168 hours in the form of seven (7) consecutive 24 hour periods.

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 worked schedules shall be defined as set and recurring without the need to be posted, and posted work schedules shall be defined s 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 change to avoid 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 a 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.

. . .

SECTION 10: Rest Periods

6/10/1 (BC, AS, SPS, T, LE) All employees shall receive one (1) fifteen (15) minute rest period during each one-half shift. The Employer retains the right to schedule employees' rest periods to fulfill the operational needs of the various work units. Rest periods may not be postponed or accumulated. If an employee does not receive a rest period because of operational requirements, such rest period may not be taken during a subsequent work period.

6/10/2 (PSS) Recognizing the fact that employees covered by this contract are professional, reasonable rest periods will be taken at the employee's discretion that will not conflict with the fulfilling of the operational needs of the work unit.

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SECTION 28: Operational Need

11/28/1 Definition of Operational Need

Operational need means 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 pointing 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.

. .

SECTION 15: Meals While on Duty

13/15/1 Where facilities are available and in operation, the Employer will provide meals without charge to employees who are required, as a condition of employment, to take meals in the performance of assigned duties or responsibilities.

13/15/2 All of the following conditions must be met to be eligible for meals:

A. The employee works a straight eight (8) hour or longer without an unpaid lunch break
B. Meals eaten while on duty must be taken at the employee's assigned work post.
C. Meals are delivered to the employee's assigned work post or would have been if so requested and food service facilities are in operation at the location and at the time the meal is consumed.

13/15/3 Where full or part maintenance such as laundry, meals, lodging or quarters is furnished for the employee or his/her family, the employee shall be charged for the value of the allowance as established by the Secretary of the Department of Employment Relations based upon recommendations made by the employing agencies prior to the implementation of such charges. Implementation of such increased charges shall take effect thirty (30) calendar days after the Secretary's approval.

13/15/4 At institutions where facilities are available and in operation at the time of the meal break, the Employer will provide meals without charge to employees held over to work four (4) or more hours overtime.

. . .

ARTICLE XV
GENERAL

SECTION 1: Obligation to Bargain

15/1/1 This Agreement represents the entire Agreement of the parties and shall supersede all previous agreements, written or verbal. The parties agree that the provisions of this Agreement shall supersede any provisions of the rules of the Administrator and the Personnel Board relating to any subjects of collective bargaining contained herein when the provisions of such rules differ with this Agreement. The parties acknowledge that, during negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining and that all of the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. Therefore, the Employer and the Union, for the life of this Agreement and any extension, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter referred to or covered in this Agreement, or with respect to any subject or matter not specifically referred to or covered in this Agreement, even though such subject or matter may not have been within the knowledge or contemplation of either or both parties at the time that they negotiated or signed this Agreement.

SECTION 2: Partial Invalidity

15/2/1 Should any part of this Agreement or any provision contained herein be declared invalid by operation of law or by any tribunal of competent jurisdiction, such invalidation of such part or provision shall not invalidate the remaining portions hereof and they shall remain in full force and effect.

This master contract also contains a grievance procedure that culminates in final and binding arbitration. Complainants were parties to a local collective bargaining agreement, which by its terms was in effect from April 3, 2003 through June 30, 2003. This local agreement addressed vacation scheduling, overtime scheduling, shift trades, job posting, job sharing, telephones and bulletin boards. This local agreement contained a provision specific to food service, which addressed circumstances in which employees could make trades.

9. The food service area at SRSTC is within the secure perimeter and includes a room, labeled on the blue prints as "Staff break/Training Room," which the food service staff commonly refers to as the break room. Prior to the issuance of the May 13th memo, the food service staff represented by the Union worked a straight eight, which included a ½ hour paid lunch break; received a 10 minute break in the morning; received one free meal; and were

permitted to eat this meal, as well as take their break, in the "Staff break/Training Room." The changes set forth in the May 13th memo were implemented on June 15, 2003, as set forth in the memo. On or about May 22, 2003, Smith filed a grievance alleging that Watters' May 13, 2003 notification that the hours of food service staff would be changed from a straight eight shift to an eight and one-half hour shift violated the contract and requesting that the memo not be implemented. This grievance was denied at the first step and the Union did not process this grievance to the second step.

10. A week or two after Watters issued his May 13th memo, Smith advised Watters that Rief had made statements about Smith and about the staff going to the Union. Watters advised Smith that he would look into the matter and, thereafter, requested Duran to investigate. Duran met with Rief and told Rief that there had been an allegation that she had made inappropriate comments. The ensuing discussion lead Duran to conclude that Rief considered Smith to have been stirring up trouble in food service; that Rief had told Smith to "stay the hell out of food service;" and that Rief had indicated to her staff that she would prefer that they come to her first, versus the Union, because if they did not come to her and make her aware of issues, then she would not be able to deal with them. Duran reported back to Watters and they both concluded that Rief had made inappropriate comments and that Rief needed to issue a statement to employees and the Union that her comments were not appropriate and did not represent the views of SRSTC management. Duran reviewed a written statement prepared by Rief; made some changes to this statement; directed Rief to hold a meeting with food service staff to verbalize the written statement; and to issue the statement to all of Rief's staff, as well as to the Union and Smith. Although Rief told Duran that she had followed this directive, Rief did not issue the statement. During the meeting of May 12, 2003, Rief made statements to food service staff represented by Complainants that had a reasonable tendency to discourage food service staff from consulting with Union President Smith and otherwise assisting the Union and to discourage food service staff from engaging in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Based upon the above and 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 (WSEU) and its affiliated Local 175 are labor organizations within the meaning of Sec. 111.81(12), Stats.

2. Respondent Department of Health and Family Services is a subdivision of Respondent State of Wisconsin, which is an employer within the meaning of Sec. 111.81(8), Stats.

3. During her tenure as Food Service Administrator at SRSTC, Tammy Rief was a supervisor within the meaning of Sec. 111.81(19), Stats., and, as such, acted on behalf of Respondents.

4. As SRSTC Director and Management Services Director, respectively, Steve Watters and Sandra Duran are management within the meaning of Sec. 111.81(13), Stats., and/or supervisors within the meaning of Sec. 111.81(19), Stats., and have acted on behalf of Respondents.

5. Steve Smith, Christine Treisch and the other SRSTC food service staff represented by Complainants are employees within the meaning of Sec. 111.81(7), Stats. When Treisch complained to Smith about split weekends and other food service staff represented by Complainants consulted with Smith regarding wages, hours and other conditions of employment, they were exercising rights guaranteed in Sec. 111.82, Stats.

6. During his tenure as President of Local 175, Steve Smith acted on behalf of Complainants and, when Smith, in late April or early May of 2003, met with Watters to discuss his concerns regarding the scheduling of SRSTC food service staff and met with Rief to discuss numerous issues regarding the hours and working conditions of SRSTC food service staff, Smith was exercising rights guaranteed in Sec. 111.82, Stats.

7. At the May 12, 2003 meeting attended by Treisch and other SRSTC food service staff represented by Complainants, Rief engaged in conduct that had a reasonable tendency to interfere with, restrain or coerce employees in the exercise of their rights guaranteed by Sec. 111.82, Stats., when she stated that if the staff had not gone to the union, then the changes would not be happening; that the staff should not have gone to Steve Smith; that, if the staff has questions or concerns, then they should come to Rief or Steve Shaw; that there is no reason to go to the union, because the union never wins; and that, when you go to the union, things get worse and, by this conduct of its supervisor, Respondents have violated Sec. 111.84(1)(a), Stats.

8. Complainants have not established by a clear and satisfactory preponderance of the evidence that Respondents engaged in conduct that had a reasonable tendency to interfere with, restrain or coerce employees in the exercise of their rights guaranteed by Sec. 111.82, Stats., in violation of Sec. 111.84(1)(a), Stats., when its Director of Sand Ridge Secure Treatment Center, Steve Watters, implemented the changes contained in his memo of May 13, 2003 by eliminating the straight eight-hour day(with paid lunch period); replacing it with an 8½ hour day (with unpaid lunch period); and discontinuing the provision of free meals.

9. Respondents did not refuse to bargain collectively in violation of Sec. 111.84(1)(d), Stats., when its Director of Sand Ridge Secure Treatment Center, Steve Watters, eliminated the food service staff's straight eight-hour shift and free meal.

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

ORDER

1. Respondents, its officers and agents, shall immediately:

Cease and desist from interfering with, restraining or coercing employees in the exercise of their rights guaranteed in Sec. 111.82, Stats., by stating that if the staff had not gone to the Union, then changes would not be happening; that, if the staff has questions or concerns, then they should come to a supervisor and/or Union representatives other than Steve Smith; that there is no reason to go to the Union, because the Union never wins; and that, when you go to the Union, things get worse.

2. Respondents shall take the following affirmative action, which the Examiner finds will effectuate the purposes of the State Employment Labor Relations Act:

(a) Notify all employees of the Sand Ridge Secure Treatment Center (SRSTC) represented by Complainants, by posting in conspicuous places at SRSTC, where such employees are employed, copies of the Notice attached hereto and marked "Appendix 'A.'" That Notice shall be signed by SRSTC Director Steve Watters and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by the Respondents to ensure that said Notice is not altered, defaced or covered by other material.

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

3. Complainants' allegation that Respondents violated Sec. 111.84(1)(a), Stats., by eliminating the straight eight-hour day(with paid lunch period); replacing it with an 8 ½ hour day(with unpaid lunch period); and eliminating the provision of free meals of food service workers represented by Complainants is hereby dismissed in its entirety.

4. Complainants' allegation that Respondents violated Sec. 111.84(1)(d), Stats., by eliminating the food service staff's straight eight-hour shift and free meal is hereby dismissed in its entirety.

Dated at Madison, Wisconsin, this 23rd day of November, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/
Coleen A. Burns, Examiner

APPENDIX "A"

NOTICE TO EMPLOYES OF
SAND RIDGE SECURE TREATMENT CENTER

As ordered by the Wisconsin Employment Relations Commission, and in order to remedy a violation of the State Employment Labor Relations Act, the State of Wisconsin and the Department of Health and Family Services, notifies you of the following:

> WE WILL NOT interfere with, restrain, or coerce employees in the exercise of their Sec. 111.82, Stats., rights by stating that that if the staff had not gone to the Union, then changes would not be happening; that, if the staff has questions or concerns, then they should come to a supervisor and/or Union representatives other than Steve Smith; that there is no reason to go to the Union, because the Union never wins; and that, when you go to the Union, things get worse.

By _____
Steve Watters, Director of SRSTC

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 HEALTH AND FAMILY SERVICES)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On January 21, 2004, Complainants filed a complaint of unfair labor practice with the Wisconsin Employment Relations Commission alleging that Respondents had violated Secs. 111.84(1)(a)(c) and (d) of SELRA by making certain statements; by changing the work hours of food service staff; and by discontinuing the provision of free meals to food service staff. Respondents deny that they have violated SELRA, as alleged by Complainants.

POSITIONS OF THE PARTIES

Complainants

The right to communicate with a union representative and to process grievances without interference from employer representatives is a "fundamental right included within the employees' right to representation." VILLAGE OF WEST MILWAUKEE, DEC. NO. 9845-B (WERC, 10/71). On May 12, 2005, Respondents' supervisor Tammy Rief told members of the Complainants' bargaining unit that they should not have talked to their Union about matters relating to their working conditions; that the Union never wins; and that when they go to the Union "things get worse." These disparaging statements violate Sec. 111.84(1) (a), Stats.

Rief also told members of Complainants' bargaining unit that their efforts in contacting their Union representatives would result in "major changes" and would make things worse for the employees. These statements are a naked threat of retaliation for the exercise of protected rights.

The State seeks to evade responsibility for Rief's unlawful conduct by characterizing Rief as a "renegade food service manager. " As a mid-level supervisor, Rief is an agent of the State and prohibited practices committed by such a supervisor are attributed to the employer. MUSKEGO-NORWAY CONSD. SCHOOLS V. WISCONSIN EMPLOYMENT RELATIONS BOARD, 35 WIS.2D 540, 565-566 (1967). Unlawful conduct may not be excused by an apology. CORTI V. COONEY, 191 WIS. 464,471 (1926).

The State eliminated the employees' straight eight-hour day (with a paid lunch period) and replaced it with an 8½ hour day (with an unpaid lunch period). The State also eliminated a no-cost lunch. The timing of these actions compel the conclusion that the intent of making these changes was to interfere with the employees' rights to improve their working conditions through exercising their statutory rights and, thus, has violated Sec. 111.84(1)(a), Stats.

The State unilaterally eliminated the employees' straight eight-hour day and their no cost lunch. Under Sec. 111.84(1) (d), Stats., a unilateral change in existing wages, hours or conditions of employment is a *per se* refusal to bargain. CITY OF MADISON, (WERC) DEC.

NO. 15079-D, 15171-C (1978). Notwithstanding any State assertion to the contrary, the terms of the parties' collective bargaining agreement does not relieve the State of its duty to bargain over the schedule changes or the elimination of the no-cost lunch.

The State is not excused because the longstanding practice of providing straight eight-hour days and a no cost lunch was established by Rief. Director Watters may not have been aware of this practice, but SELRA does not require the highest-ranking official at an institution to be aware of every term and condition of employment in order for that practice to qualify for legal protection as a mandatory subject of bargaining.

Nothing in the parties' agreement prohibits SRSTC from permitting food service employees to work straight eights or to furnish employees with meals. At the Jackson Correctional Institution, which is not far from SRSTC, food service employees work straight eights and receive meals at no cost.

The decision in JAMES SANDERSON, ET AL, V. STATE OF WISCONSIN, CASE NO. 4452 (Flaten, 8/18/88) does not support the State's position. In this case, the issue is not whether employees were entitled to free meals, but rather, whether the State may unilaterally take away free meals that had long been provided by the State. Union Representative Smith misspoke when he stated that SRSTC's provision of meals to third shift correctional officers was a violation of a contract and recognized his mistake when he testified that it is not the Union's position that free meals should be taken away from third shift correctional officers. The States' reliance on CITY OF STEVENS POINT, DEC. NO. 21646-B (WERC, 8/85) is also misplaced.

Rather than proceeding on its interpretation that the contract mandated the changes, the State should have presented its position to the Union so the parties could discuss the issues and resolve any differences through negotiations. When it failed to engage in such collective bargaining, the State violated Sec. 111.84(1)(d), Stats.

The appropriate remedy for the State's violation of Sec. 111.84(1)(a) and (d) of SELRA is to rescind the schedule changes; require the State to reinstate the practice of permitting food service employees to work a straight eight-hour shift; require the State to reinstate the practice of providing food service employees with meals; prohibit similar types of unlawful conduct in the future; post the appropriate notices; and require such further and other relief as may be deemed appropriate.

Respondents

Complainants have the burden to prove, by the clear and satisfactory preponderance of the evidence, that Respondents have violated SELRA. With respect to the alleged violation of Sec. 111.84(1)(a), Stats., Complainants must demonstrate that, based upon the totality of the conduct, that the complained of conduct was "likely to interfere with, restrain or coerce" union represented employees in the exercise of rights protected by Sec. 111.82, Stats. The employer

need not intend to interfere or coerce. Nor is it necessary that interference or coercion actually result. There is no violation if conduct that has a tendency to interfere with protected activity is outweighed by the employer's valid business reasons for taking that action. With respect to the alleged violation of Sec. 111.84(1)(d), Stats., there must be proof that bargaining was required, there was a request to bargain and a refusal to do the same by the employer and an unlawful unilateral implementation.

Inappropriate comments were apparently made by one renegade supervisor, Tammy Rief. When these comments were brought to the attention of Steve Watters and Sandra Duran, they directed Rief to notify Union Representative Smith and employees that her comments were not appropriate; were not authorized by management; and did not represent management's views. The record fails to establish that Watters or Duran engaged in any conduct that interfered with employee rights.

Under the totality of the circumstances, no finding of a violation of SELRA is warranted. Nor is there any nexus between Rief's conduct and the changes implemented in the memo of May 13, 2003.

The purpose of the May 13, 2003 memo was to eliminate two practices that violated the contract. The JAMES SANDERSON arbitration award shows that just because other institutions, with a virtually identical set-up, have a straight 8 shift does not mean that another institution must have a straight 8 shift. It also shows that an employee is not entitled to a free meal unless the employee meets all of the requirements of the contract.

The scheduling and meal practices were unilaterally implemented by Rief, without the knowledge or consent of Watters, the only individual with authority to allow either straight 8's or free meals. Prior to Watters' implementing the changes, Union Representative Smith had raised the issue of a contract violation with respect to breaks. Watters' concluded that there was a contract violation. Management has valid business reasons for taking its action, which valid business reasons outweigh any employee rights. Changing a practice to conform to the requirements of the contract does not violated either Sec. 111.84(1)(a) or (d), Stats. CITY OF STEVENS POINT, DEC. NO. 21646-B (WERC, 8/85)

Management did not violate the contract when it directed employees to not use the training room for breaks. Neither Watters, nor Duran, had previous knowledge of this practice until late April or early May of 2003. Given the potential for inappropriate patient/staff interactions, there are sound policy reasons, involving the safety and welfare of employees, for not using the training room as an employee break room and directing employees to use the break room in the non-secured area of SRSTC.

Under the facts of this case, no violation of SELRA had been established. Accordingly, the complaint should be dismissed.

If Rief's comments rise to the level of a violation of Sec. 111.84(1)(a), Stats., then the appropriate remedy would be a cease and desist order. Inasmuch as Rief has been gone from the workplace for more than one and one-half years, nothing would be achieved by posting. A return to the status quo would be inappropriate because it would require the employer to breach the contract. To require the employer to provide employees with two 15 minute breaks and a paid lunch period would impose upon the employer a term that was not negotiated by the parties. Under the contract, employees can have a paid one-half hour lunch period using the two 15 minute breaks or the two 15 minute breaks with no paid lunch period.

DISCUSSION

General Legal Standards

The complaint, as filed, alleges that Respondents have violated Secs. 111.84(1) (a), (c) and (d), Stats. In post-hearing written argument, Complainants reasserted that Respondents had violated Secs. 111.84(1)(a) and (d), but did not reassert that Respondents had violated Secs. 111.84(1)(c), Stats. Section 111.07(3), Stats., made applicable to SELRA by Sec. 111.84(4), Stats., states that ". . . the party on whom the burden of proof rests shall be required to sustain such burden by a clear and satisfactory preponderance of the evidence."

Sec. 111.84(1)(a), Stats., makes it an unfair labor practice for the State to "interfere with, restrain or coerce employees in the exercise of their rights guaranteed in s. 111.82." Sec. 111.82 states:

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

As Examiner Richard B. McLaughlin stated in STATE OF WISCONSIN, DEC. NO. 27708-A (1/95):

The Wisconsin Supreme Court has observed that:

> It is helpful to compare the wording of MERA and SELRA, whereupon we find that the rights guaranteed to employees under these acts are identical . . . It would be illogical to apply a different test to MERA than SELRA merely because a different group of protected persons are involved (municipal employees versus state employees). STATE OF WISCONSIN, DEPARTMENT OF EMPLOYMENT RELATIONS V. WISCONSIN EMPLOYMENT RELATIONS COMMISSION, 122 Wis.2D 132, 143 (1985).

As Examiner McLaughlin further stated, this observation has been reflected in the test applied by Commission examiners to determine an independent violation of Sec. 111.84(1)(a), Stats., for the test parallels that used to determine an independent violation of Sec. 111.70(3)(a)1, Stats.

As set forth in STATE OF WISCONSIN, DEC. NO. 28104-A (Shaw, 1/97), the Commission has consistently held that:

> Violations of Sec. 111.70(3)(a)1, Stats., occur when employer conduct has a reasonable tendency to interfere with, restrain or coerce employees in the exercise of their Sec. 111.70(2) rights. If, after evaluating the conduct in question under all the circumstances, it is concluded that the conduct had a reasonable tendency to interfere with the exercise of Sec. 111.70(2) rights, a violation will be found even if the employer did not intend to interfere and even if the employee(s) did not feel coerced or was not in fact deterred from exercising Sec. 111.70(2) rights.

If, however, the employer had valid business reasons for its actions, employer conduct which might tend to interfere with employee rights under Sec. 111.70(2), will generally not constitute a violation of Sec. 111.70(3)(a)1. RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 29074-C (WERC, 7/98).

Section 111.84(1)(d), Stats., makes it an unfair labor practice for Respondents "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 bargaining unit. . . ." This duty to bargain is broad and the standards which define it are fact-driven. This makes it impossible to state a standard before examining a specific allegation. STATE OF WISCONSIN, DEC. NO. 28104-A (Shaw, 1/97); STATE OF WISCONSIN, DEC. NO. 27708-A (McLaughlin,1/95).

Merits

Sec. 111.84 (1)(a) Claim

During her tenure as Food Service Administrator at SRSTC, Sandy Rief was an employee of Respondents, with authority to supervise food service staff represented by Complainants. On May 12, 2003, Rief met with a number of SRSTC food service staff represented by Complainants and stated that things were going to change; that the staff should expect major changes in the future; that, if the staff had not gone to the union, then the changes would not be happening; that the staff should not have gone to Union Representative Steve Smith; that, if the staff has questions or concerns, then they should come to Rief or Steve Shaw (another Union representative); that there is no reason to go to the union, because the union never wins; and that, when you go to the union, things get worse.

Rief's comments of May 12, 2003 indicate that food service staff represented by the Union should not raise questions or concerns with Union Representative Smith, in particular, and Union representatives, in general, because such consultation would be fruitless and/or

result in adverse consequences to these employees. In MONONA GROVE SCHOOL DISTRICT, DEC. NO. 20700-G (10/86), the Commission states:

> . . . While the specific facts of each case must always be considered, in our view the filing and processing of a grievance advancing colorable claims according to a contractual grievance procedure can and should be presumed to be protected activity absent a strong showing to the effect that the grievance is wholly unlawful in manner of presentation or purpose.

Rief's May 12, 2003 comments have a reasonable tendency to discourage food service staff from assisting their labor organization and to discourage food service staff from engaging in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection. The Union's bargaining unit employees' right to assist their labor organization and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection is guaranteed in Sec. 111.82, Stats. Within the totality of the circumstances, Rief's statements on May 12, 2003 had a reasonable tendency to interfere with, restrain or coerce employees in the exercise of their rights guaranteed in Sec. 111.82, Stats.

According to SRSTC Director Steve Watters and SRSTC Management Services Director Sandra Duran, they did not authorize, nor agree with, Rief's statements and, after the fact, directed Rief to repudiate her statements. Rief did not do so.

Respondent's employment of Rief as a supervisory employee "is sufficient to constitute an agency relationship." MUSKEGO-NORWAY C.S.J.S.D. NO. 9 V. W.E.R.B., 35 WIS.2D 540, 565-566 (1967) By the May 12, 2003 statements of its supervisor, Tammy Rief, Respondents have violated Sec. 111.84(1)(a), Stats.

On May 13, 2003, Watters issued a memo to the Union and food service staff represented by the Union. In this memo, Watters provided notice that, effective June 15, 2003, he was eliminating the straight eight-hour shift(with paid lunch period); replacing it with an 8 ½ hour shift(with unpaid lunch period); and eliminating the free meal. These changes were implemented on June 15, 2003.

Complainants argue that Watters made these changes in retaliation for learning that Union members sought to alter their work conditions through Smith. Complainants assert, therefore, that Respondents have interfered with employee rights in violation of Sec. 111.84(1)(a), Stats.

Watters' memo of May 13th immediately followed Rief's comments that changes were coming because employees had gone to the Union. The changes set forth in this memo include actions that a reasonable employee could conclude were adverse to their interest.

It is understandable that Complainants are concerned that the implementation of the adverse action set forth in the memo of May 13, 2003 would have a chilling effect upon its bargaining unit members' willingness to engage in union activity. The Commission's analysis in STATE OF WISCONSIN (UW), DEC. NO. 30534-B (2/05) is instructive:

. . . On review, the Commission concluded that in cases "where the essence of the violation lies in the employer's motive for taking adverse action against one or more employees," the appropriate prohibited practice analysis would lie in the four-element paradigm the Commission applies in (3)(a)3 discrimination cases. "If the circumstances demonstrate that the adverse action (e.g., termination, discipline, layoff) was lawfully motivated, we will not find it unlawful [as an independent (3)(a)1] simply because it could be perceived as retaliatory." ID. at 15. We noted that to do otherwise would go beyond preventing discrimination and ensuring a level playing field, and would effectively create a higher standard for union activists than the employer would have to meet in other circumstances. ID. In CLARK COUNTY, for example, under the Examiner's analysis, an employer who had complied with all contractual obligations and had fully legitimate reasons for terminating an employee, nonetheless would have violated the law simply because other employees misperceived the situation. 3/ Similarly, in the instant case, if the SSEC's decision to withdraw the job offer was not a response to the union activity, but instead a legitimate managerial decision to use less expensive and less complicated outside labor sources, then the understandable but mistaken impressions of the TAA and Somalinga should not in and of themselves render the action unlawful.

2/ Since the relevant provisions of SELRA are substantively identical to Secs. 111.70(3)(a)1 and 3, respectively, of the Municipal Employment Relations Act (MERA), both the Commission and the Wisconsin Supreme Court have concluded that it is appropriate to apply precedent arising under provisions of MERA to cases arising under similar provisions of SELRA. DER (DOC), DEC. NO. 30167-B (SHAW, 4/02); AFF'D BY OPERATION OF LAW, DEC. NO. 30167-C (WERC, 5/02), CITING STATE V. WERC, 122 WIS. 2D 132, 143 (1985); AFSCME COUNCIL 24 AND STATE OF WISCONSIN, DEC. NO. 29448-C (WERC, 8/00).

3/ In CLARK COUNTY, the Commission ultimately disagreed with the Examiner and concluded that the employee had been terminated out of animus toward her protected activity and hence held that the County had violated the law, applying the traditional four-element discrimination analysis of (3)(a)3.

The TAA argues that CLARK COUNTY is limited to situations involving disciplinary action, which would not encompass the job withdrawal at issue here. However, by its specific language, CLARK COUNTY applies to "adverse action," because those are the situations in which the essence of the problem would lie in perceived retaliation. Withdrawing a job offer allegedly in response to union activity is "adverse action," and hence its lawfulness is properly determined under the four-element "motive" analysis traditionally utilized in discrimination cases. Accordingly, we will not undertake the

> balancing test traditionally employed in allegations under Sec. 111.84(1)a, Stats. (or Sec. 111.70(3)(a)1, Stats.) (weighing the employer interference with protected activity against the employer's legitimate business needs) in this case, and we have set aside the Examiner's Conclusion of Law and modified Finding of Fact pertinent to that analysis.

The essence of the violation asserted by Complainants lies in the employer's motive for taking adverse action against one or more employees, *i.e.*, unlawful retaliation. Applying the Commission's analysis in STATE OF WISCONSIN, SUPRA, it must be concluded that Complainants' asserted "interference" violation may only be resolved by application of the four-element paradigm that the Commission applies to allegations in Sec. 111.84(1)(c), Stats., discrimination cases.

In summary, Complainants' claim that Respondents violated Sec. 111.84(1)(a), Stats., when it eliminated the straight eight-hour day(with paid lunch period); replaced it with an 8 ½ hour day(with unpaid lunch period); and eliminated the provision of a free meal is a claim that is derivative to a Sec. 111.84(1)(c) discrimination claim. Inasmuch as Complainants have not reasserted their Sec. 111.84(1)(c) claim, the derivative Sec. 111.84(1)(a) claim cannot be resolved in this proceeding and, therefore, must be rejected.

Sec. 111.84(1)(d) claim

Complainants allege that Respondents violated Sec. 111.84(1)(d), Stats., when they unilaterally eliminated the food service staff's straight eight-hour shift and free meal. At the time of the alleged unilateral implementation, *i.e.*, June 15, 2003, the parties were subject to a collective bargaining agreement. In CITY OF MILWAUKEE, DEC. NO. 31221-B (WERC, 10/05), the Commission, relying upon CADOTT SCHOOL DISTRICT, DEC. NO. 27775-C (WERC, 6/94), AFF'D CADOTT EDUCATION ASS'N V. WERC, 197 WIS.2D 46 (1995), stated that, where the parties' labor contract addresses a mandatory subject of bargaining, the parties are entitled to rely upon the contractual provisions for the duration of that contract and have no obligation to bargain over that subject during the contract's term.

Article VI, Section 2, of the parties' collective bargaining agreement addresses hours of work. This section includes language addressing changes to work schedules and the scheduling of rest periods, *i.e.*, breaks. The language of Section 11/28/2 of the parties' collective bargaining agreement addresses deviations from the normal work shift. The language of Section 15 of the parties' collective bargaining agreement addresses the provision of meals.

Assuming *arguendo*, that the elimination of the straight eight-hour shift and free meal are matters on which the parties are required to bargain under Section 111.91(1), Stats., the collective bargaining provisions discussed *supra* persuades the Examiner that the parties have already bargained on the subject of shift hours, including changes thereto, and free meals. Applying the principles enunciated in CITY OF MILWAUKEE, SUPRA, the Respondents are not

obligated to bargain further thereon during the term of their collective bargaining agreement. Having bargained on the subject of shift hours and free meals, the appropriate forum for the resolution of Complainants' claim that Respondents do not have the right to eliminate the straight eight-hour shift and free meal is the parties' contractual grievance arbitration procedure.

Conclusion

For the reasons discussed *supra*, the Examiner has rejected Complainants' claim that Respondents violated Sec. 111.84(1)(a), Stats., when it eliminated the straight eight-hour day(with paid lunch period); replaced it with an 8 ½ hour day(with unpaid lunch period); and eliminated the provision of paid meals for SRSTC food service employees represented by Complainants. For the reasons discussed *supra*, the Examiner has also rejected Complainants' claim that Respondents violated Sec. 111.84(1)(d), Stats., when it eliminated the straight eight-hour shift and free meals of SRSTC food service staff represented by the Union.

As discussed *supra*, the May 12, 2003 statements of Respondents' supervisor Tammy Rief have a reasonable tendency to interfere with, restrain or coerce employees in the exercise of their rights guaranteed in Sec. 111.82, Stats. Complainants have established, by a clear and satisfactory preponderance of the evidence, that Respondents have violated Sec. 111.84(1)(a), Stats.

Notwithstanding Complainants' argument to the contrary, the appropriate remedy for Respondents' statutory violation is not to rescind the schedule changes; require Respondents to return to the straight eight-hour shift; or require Respondents to reinstate the provision of a free meal. Rather, the appropriate remedy for Respondents' violation of Sec. 111.84(1)(a), Stats., is a cease and desist order, as well as an order requiring Respondents to post an appropriate notice.

Dated at Madison, Wisconsin, this 23rd day of November, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/
Coleen A. Burns, Examiner

CAB/gjc
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