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, Respondent.

Case 631
No. 63251
PP(S)-338

Decision No. 31207-C

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 Wisconsin State Employees Union (WSEU), AFSCME, Council 24, AFL-CIO, and Local 175.

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

ORDER ON REVIEW OF EXAMINER'S DECISION

On November 23, 2005, Examiner Coleen A. Burns issued Findings of Fact, Conclusions of Law and Order in the above-captioned matter, holding that the Respondent State of Wisconsin, Department of Health and Family Services (State) had violated Sec. 111.84(1)(a), Stats., when, on May 12, 2003, a supervisor of food service employees at the State's Department of Health and Family Services Sand Ridge Secure Treatment Center, held a meeting with those employees, who were represented for the purposes of collective bargaining by Complainant Wisconsin State Employees Union Local 175 (Union) and made statements to the effect that resorting to the Union only makes things worse. However, the Examiner also held that the State had not engaged in unlawful conduct within the meaning of Secs. 111.84(1)(a), (c), or (d), Stats., when, on or about May 13, 2003, the State implemented certain changes in those employees' daily schedule, access to free lunch, and access to a particular room for breaks. To remedy the violation of Sec. 111.84(1)(a), Stats., the Examiner ordered the State to cease and desist the unlawful activity and post a notice. She dismissed the remaining allegations in the complaint.

On December 12, 2005, the Union filed a timely petition seeking review of the Examiner's decision. Both parties filed written argument in support of their respective positions, the last of which was received on February 8, 2006. As explained in the Memorandum that accompanies this Order, the Commission has affirmed the Examiner's decision and her remedy, although on somewhat different grounds.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

ORDER

A. The Examiner's Findings of Fact 1 through 10 are affirmed.

B. The following Finding of Fact 11 is made:

> 11. Steve Watters, Director of the Sand Ridge Secure Treatment Center, made and implemented the decision to eliminate the food service employees' straight eight hour day (with paid lunch period), replace it with an 8-1/2 hour day (with unpaid lunch period), discontinue the provision of free meals, and remove the use of the training room for breaks/lunch. When Watters made that decision, he was aware that some bargaining unit members had approached the Union regarding scheduling issues, including their not having received the two contractual 15-minute breaks, and that Union representative Smith had advocated on behalf of the employees regarding those issues. However, Watters did not harbor hostility toward those lawful concerted activities and his decision was not influenced in any part by any such hostility.

C. The Examiner's Conclusions of Law 1 and 2 are affirmed.

D. The Examiner's Conclusion of Law 3 is modified as follows and as modified is affirmed:

> 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. However, her position did not include authority to negotiate on behalf of the State or to implement binding practices regarding mandatory subjects of bargaining without the actual or imputed knowledge and acquiescence of appropriate State managers, nor could the Union reasonably have believed that her position had such authority.

E. The Examiner's Conclusions of Law 4 through 7 are affirmed.

F. The Examiner's Conclusion of Law 8 is modified by adding the phrase, "or use of the training room for breaks/lunch" after "free meal," and, as modified, is affirmed.

G. The following Conclusion of Law 9 is made:

> 9. The Union has not abandoned its allegation that, by eliminating the food service employees' straight eight hour day (with paid lunch period), replacing it with an 8-1/2 hour day (with unpaid lunch period), discontinuing the provision of free meals, and removing the use of the training room for breaks/lunch, the State has retaliated against the food service employees for their lawful concerted activity, in violation of Sec. 111.84(1)(c) and/or (a), Stats. However, the Union has failed to establish that the State's actions in this regard were unlawfully motivated and hence, has failed to substantiate this allegation.

H. The Examiner's Conclusion of Law 9 is renumbered Conclusion of Law 10; is modified by adding the phrase "or use of the training room for breaks/lunch" after "free meal;" and, as modified, is affirmed.

I. Paragraphs 1 and 2 of the Examiner's Order are affirmed.

J. Paragraph 3 of the Examiner's Order is modified by adding the phrase "and use of the training room for breaks/lunch" after the term "free meals" and, as modified, is affirmed.

K. The following new Paragraph 4 is added to the Examiner's Order:

> 4. The Union's allegation that the State has violated Sec. 111.84(1)(a) or (c), Stats., by retaliating against the food service workers for their lawful concerted activity by eliminating their straight eight hour day (with paid lunch period), replacing it with an 8-1/2 hour day (with unpaid lunch period), discontinuing the provision of free meals, and removing the use of the training room for breaks/lunch, is hereby dismissed in its entirety.

L. Paragraph 4 of the Examiner's Order is renumbered Paragraph 5; is modified by adding the phrase "and use of the training room for breaks/lunch" after the term "free meal;" and, as modified, is affirmed.

Given under our hands and seal at the City of Madison, Wisconsin, this 23rd day of March, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

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

State of Wisconsin, Department of Health and Family Services

MEMORANDUM ACCOMPANYING ORDER

Summary of the Facts

As indicated in our Order, above, the Commission has affirmed the Examiner's Findings of Fact, which have not been challenged on review. The most pertinent of those facts are summarized as follows.

The Union represents a bargaining unit comprising State employees in several departments and at many locations around the state. Local 175 of the Union is responsible for local representation of employees at the Sand Ridge Secure Treatment Center in Mauston, Wisconsin, a residential facility operated by the State's Department of Health and Family Services (DHFS) for sexually violent patients. The facility was opened in June 2001. At all relevant times, Steve Watters has been the Director of the facility and, as such, has appointing authority for the facility and authority to represent the State in the negotiation of the Union's "local" agreement covering facility employees.

At all relevant times, Tammy Rief was the individual responsible for supervising the bargaining unit food service employees at the facility. Rief was supervised by Sandra Duran, who in turn reported to Watters. At all relevant times, Steve Smith, an employee in a different department of the facility, was the President of the Union's Local 175.

In DHFS-operated facilities, the standard schedule for food service employees is 8-1/2 hours, with a half hour unpaid lunch break. The collective bargaining agreement provides employees with two 15-minute rest breaks, one during each half shift. The agreement also allows free meals "to employees who are required, as a condition of employment, to take meals in the performance of assigned duties or responsibilities." (Article VI, Section 15). That same Section sets certain conditions for free meal eligibility, including that the employee "works a straight eight (8) hour or longer without an unpaid lunch break." The food service employees at the facility were not required to eat their meals while on duty and were not required to remain on the premises during their lunch breaks. Article 11/2/8 of the contract contains language indicating that one purpose of the regularly-scheduled Union/Management meetings would be to:

> Negotiate hours of work, work schedules and overtime assignments. In the event no agreement is reached, either party may appeal to arbitration pursuant to Article IV, Section 2, Step Three except that the decision of the arbitrator shall be advisory.

In some correctional facilities operated by the State's Department of Corrections (DOC), food service employees are scheduled to work a straight eight hour shift, during which they are given a free lunch. There are also some blue collar employees at the instant DHFS facility, outside the food service department, who work a straight eight hour schedule and

receive a free meal. There is no evidence that any such employees are provided a half hour paid break in which to eat the lunch or that their 15-minute breaks are combined to provide a paid half hour lunch.

Apparently from the time the facility opened in June 2001, Rief, without the knowledge of Watters, Duran, or any other State manager, took it upon herself to offer what she viewed as a "perk" to the food service employees, such that she scheduled them to work a straight eight hour shift, combined their two 15-minute breaks into a 30-minute paid lunch break, and provided them an additional 10-minute break during the first portion of their shifts. Employees were permitted to take these paid lunch breaks in the so-called "training room," adjacent to the kitchen.

During the spring of 2003, some food service employees complained to Union representative Smith about certain scheduling issues, including alleged intentional limiting of overtime opportunities and the fact that they were not receiving their two contractual 15-minute breaks. Smith and Rief engaged in a lengthy meeting of several hours regarding these issues. During the meeting, Smith contended that the contract required the employees to receive two breaks, but he did not ask Rief to discontinue the straight eight hour scheduling. Afterwards, Rief seemed visibly upset about the meeting.

Shortly thereafter, Smith contacted facility director Watters and questioned why the food service employees were being required to use their two 15-minute breaks to cover their lunch period. The question confused Watters, and he asked Duran to investigate. Duran met with Rief and learned for the first time that Rief had been arranging the schedules in this manner. Rief strongly favored continuing the practice, but Watters concluded that the contract did not permit this arrangement and that he should conform the schedules of the food service employees to the standard prevailing in other DHFS facilities for food service employees. He then met with Smith and informed him of the intended changes.

On May 12, 2003, shortly after meeting with Watters about this issue, Rief held a meeting with all food service staff, in which she stated words to the effect that the staff should expect some major changes, that those changes would not be occurring if employees had not gone to the Union, that employees should have taken their concerns to supervisors rather than the Union, and that when employees go to the Union things get worse. The next day, May 13, 2003, Union representative Smith and the food service employees received a memorandum from Watters, notifying them that in 30 days their schedules would change to an 8-1/2 hour schedule with two 15-minute breaks, a half hour unpaid lunch period, and no free meal. Watters also decided that the practice of allowing kitchen staff to eat lunch in the training room adjacent to the kitchen was inappropriate, because in his view this location allowed residents of the facility occasionally to interact informally with those kitchen staff, which could lead to inappropriate fraternization, and because he believed that eating in that location, adjacent to the kitchen, was inconsistent with State health regulations.

Within a week or two, Watters learned from the Union about Rief's comments on May 12 and directed Duran to investigate. Duran's investigation essentially confirmed what the Union had reported, causing Watters to direct Duran to direct Rief to issue a written apology. Although Rief thereafter assured Duran that the apology had been issued, in fact it had not.

The Examiner's Decision and the Petition for Review

The Examiner concluded that Rief's statements to the assembled food service staff at the May 12, 2003 meeting would tend to chill employees in the exercise of their rights to approach the Union regarding working conditions and hence those statements violated Sec. 111.84(1)(a), Stats. While the State does not agree with the Examiner's conclusion, the State has not sought review and we conclude that the Examiner was correct. For a remedy, the Examiner ordered the State to cease and desist engaging in the unlawful conduct and to post a notice to employees. On review, the Union challenges the Examiner's failure to remedy this violation by ordering a return to the *status quo ante*.

The Examiner dismissed the Union's claim that Watters' decision to implement the schedule, free lunch, and break room changes was in retaliation for the employees' having sought assistance from the Union and for Union representative Smith's advocacy on their behalf. Citing earlier Commission cases, the Examiner noted that such a claim would require the Union to establish the traditional four elements of a Sec. 111.84(1)(c) discrimination case. which she believed the Union had failed to argue. Since she concluded that the Union had not pursued the discrimination claim and had only pursued an interference claim, the Examiner dismissed the retaliation claim without discussing its merits. On review, the Union argues that the Examiner misconstrued the Commission's precedent by requiring that the Union specifically plead and argue a Section (1)(c) claim. The Union contends that a retaliation claim can be considered under either Section (1)(a) or Section (1)(c), as long as the four elements are satisfied, and that the record satisfies all four elements for a retaliation claim. In response the State argues that the Examiner correctly held that the Union had abandoned the retaliation claim, given that the Union had not addressed the four elements in its post-hearing briefs before the Examiner even after the State had articulated a substantial defense in its post-hearing briefs. As to the merits of the retaliation claim, the State argues that the record lacks support for at least two of the necessary elements, i.e., knowledge of and hostility toward the protected activity on the part of Watters, who made the decision.

The Examiner last considered whether the State had violated its duty to bargain in good faith with the Union by implementing the changes regarding scheduling and free lunches without first negotiating over the issues with the Union. The Examiner assumed, *arguendo*, that the issues in question were mandatory subjects of bargaining, but she concluded that the State had already exhausted its duty to bargain on these matters inasmuch as the collective bargaining agreement "covered" them. The Union challenges the Examiner's conclusion on

the ground that, while the contract required two 15-minute breaks and a free lunch under specified circumstances, the contract neither required nor precluded a paid lunch period and/or a free lunch. Hence, the Union contends that the contract did not "cover" these issues. Moreover, according to the Union, Article 11/2/8 expressly preserves the Union's right to negotiate over work hours and schedules. Hence, the Union has not waived its right to bargain on these topics. The State counters that Commission case law permits an employer to renounce practices that are in conflict with the contract and that, since the facility could not comply with the contractual requirements regarding breaks without violating the contract's requirement of an eight hour work day, the State was entitled to renounce the conflicting practice.

In its Petition for Review, the Union also challenged the Examiner's failure to discuss and specifically rule upon the employer's decision to deny employees the use of the training room for lunch breaks as both retaliation for protected activity and a unilateral change in violation of the duty to bargain in good faith. The Union did not elaborate on this argument in either its initial brief or its reply brief. We address it briefly in footnote 1, below.

The Retaliation Claim

As indicated above, the Examiner dismissed the Union's retaliation claim because she concluded that it had not been properly pursued. While she recognized that the Union had alleged a violation of Sec. 111.84(1)(c) (discrimination) in its Complaint, she held that the Union had not "reasserted" that claim in its post-hearing arguments and therefore she dismissed it without considering the merits.

The Union correctly points out that a retaliation claim can be advanced under either Section (1)(a) or (1)(c), as long as the evidence satisfies the traditional four elements. STATE OF WISCONSIN (UW), DEC. NO. 30534-B (WERC 2/05); CLARK COUNTY, DEC. NO. 30361-B (WERC, 11/03). Hence, the Union asserts that the Examiner rested her decision upon a pleading technicality, i.e., failing to cite Section (1)(c) rather than (1)(a) in connection with the retaliation claim, that is inconsistent with Commission case law. While the Union's interpretation of the Examiner's decision is plausible, her opinion could also be read to say that the Union had abandoned the retaliation claim by not presenting post-hearing arguments directed specifically at the four-element discrimination paradigm, rather than by failing to cite the discrimination section of the statute.

In response to the Union, the State argues that the Examiner correctly concluded that the retaliation claim had been abandoned. However, the State acknowledges that it had devoted considerable energy in its post-hearing brief to defending against that claim, apparently believing that it had been the subject of the litigation. It is also undisputed that the Union's Complaint and its opening statement at the hearing both referred to the retaliation claim. Both parties have referred extensively to evidence in the record to support their respective views of the merits of this claim. Accordingly, we conclude that the claim has not been abandoned and we will address it on the merits.

As all parties note, a successful claim of discrimination in violation of Sec. 111.84(1)(c), Stats., requires adequate evidence of the following four elements: (1) that the employees were engaged in lawful concerted activities; (2) that the employer was aware of those activities; (3) that the employer bore animus towards those activities; and (4) that the employer took adverse action against the employees at least in part out of animus towards those activities. EMPLOYMENT RELATIONS DEPARTMENT V. WERC, 122 WIS.2D 132 (1985); CF. VILLAGE OF STURTEVANT, DEC. NO. 30378-B (WERC, 11/03) at 18, citing MUSKEGO-NORWAY CSJSD NO. 9 V. WERB, 35 WIS.2D 540 (1967).

Here the State does not dispute the first element, i.e., that the food service employees and the Union were engaging in lawful concerted activity when they complained to facility managers about the scheduling issues. As to the second element, the State argues that Watters, who made and implemented the "adverse actions," was not aware that Union representative Smith had engaged in a lengthy meeting with Rief regarding these issues or that she had been upset by that meeting. That may indeed be correct. However, Watters clearly was aware that employees had complained to the Union about scheduling issues, because Smith had contacted Watters about the same issues, precipitating Watters' investigation and discovery of the straight eight hour schedule, lack of contractual breaks, and free lunch. Hence, Watters certainly had knowledge of at least some of the protected activity prior to implementing the changes that gave rise to this case.

The difficult question, as usual, centers on the third and fourth elements: has the Union demonstrated that Watters' decision to implement the changes was prompted in part by animus towards the protected activity? As we discussed in STATE OF WISCONSIN (UW), SUPRA, cases like this, where an adverse action is in a real sense precipitated by protected activity, create special difficulties, not only for the Commission but for the Union and its members, who understandably are concerned about the chilling effect such an experience may have upon employee willingness to engage in union activity. Here, it was protected activity that led to Watters discovering what in his view was an anomalous scheduling situation in food service. In turn, that discovery led to his implementing the changes. Employees easily could infer that engaging in future protected activity will also result in adverse action, especially since Rief expressly alerted them to her view of that nexus. However, as discussed at length in STATE OF WISCONSIN and CLARK COUNTY, SUPRA, this unfortunate possibility, without more, cannot render an employer's action unlawful, where it is actually motivated by lawful managerial purposes. Instead, the Union must establish that the employer's decision was motivated at least in part by hostility toward the protected activity.

In this case we have little difficulty concluding that the necessary nexus with unlawful animus is missing. As to Watters himself, the record is entirely devoid of animus, as even the Union seems to concede. Watters testified and the record amply reflects that he made his

decision because he believed (whether correctly or not) that the contract and the prevailing practices in similar facilities required him to do so. The Union suggests, however, that Rief's palpable animus inevitably must have affected Watters' decision, since Watters made his decision after consulting with Rief. "While the Commission may infer motive from a logical and experienced assessment of the circumstances even in the absence of direct evidence, VILLAGE OF STURTEVANT, DEC. NO. 30378-B (WERC, 11/03) at 19, such an inference must rest upon more than suspicion or speculation." COUNTY OF WAUKESHA, DEC. NO. 30799-B (WERC, 2/05) at 7. Here we might reasonably infer that Rief expressed some negative views about the Union to Watters during their discussion of the scheduling issues. It is not reasonable, however, to reach the inference that Watters was somehow infected by Rief's animus or that Rief's animus led to Watters' decision. There is no circumstantial basis even for suspicion or speculation in this regard. Rief, whatever her animus, was *opposed* to the decision that Watters was implementing and expressed that opposition to Watters. It is simply illogical to posit that Rief's animus influenced Watters to take an action that Rief was urging him not to take.

Accordingly, the Union's claim of retaliation is not supported by the record and is dismissed.

Unilateral Change Allegation

The Union contends that Rief had established a practice with the food service employees at the facility such that, for the entire two years that the facility had been in operation, food service employees worked a straight eight hour schedule, had one ten-minute break, had a paid half hour for lunch, received a free meal, and were allowed to eat that meal in the training room adjacent to the kitchen where they worked. According to the Union, this practice affected employee hours and conditions of employment, which are mandatory subjects of bargaining. Hence, the State was required to provide the Union with notice and an opportunity to bargain about the proposed changes before implementing them.

The State, for its part, contends that the parties had already negotiated about employee schedules, including breaks, lunch breaks, and free meals, that the results of those negotiations are contained in the collective bargaining agreement, and that the parties have no further obligation to bargain on such matters during the course of the contract. Further, according to the State, in the event a practice has developed that is contrary to the contractual language, the State is entitled to renounce that practice and revert to the contractual language.

The Union responds that the practice regarding the straight eight hour shift, the paid lunch, and the use of the training room for meals was neither covered by nor in conflict with the contract. According to the Union, the contract does not specify the schedule for food service employees. Moreover, asserts the Union, while the contract requires a paid lunch under certain circumstances, it does not *forbid* a paid lunch under other circumstances.

Finally, the Union points to the language in Article 11/2/8, permitting negotiations over "work schedules" during the regular Labor/Management meetings, as dispositive evidence that, far from waiving the Union's right to bargain over schedules, the contract itself expressly preserves that right.

We begin by setting forth the Commission's longstanding principles regarding an employer's duty to bargain while a contract is in effect:

> [The] 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 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. . . ."

CITY OF BELOIT, DEC. NO. 27990-C (WERC, 7/96) (footnote omitted). To the extent the contract does not "address" a mandatory subject of bargaining, the employer's duty to bargain would require the employer to provide the Union with notice and an opportunity to bargain before changing any existing practice ("status quo") regarding that subject. SCHOOL DISTRICT OF WISCONSIN RAPIDS, DEC. NO. 19084-C (WERC, 3/85), citing NLRB V. KATZ, 396 U.S. 736 (1962). Where a practice has developed that is in conflict with contract language, the employer may still have an obligation to bargain before renouncing the practice and reverting to the contract language, if the practice is sufficiently clear, mutual, and longstanding. CITY OF STEVENS POINT, DEC. NO. 21646-B (WERC, 8/85).

In accordance with the foregoing principles, a successful unilateral change claim, such as the Union's in the instant case, would require all of the following elements: (1) a unilateral change (2) in an existing practice (3) regarding a mandatory subject of bargaining (4) that is not addressed in the contract or, if in conflict with the contract, is longstanding, clear, and mutual.

The Examiner in this case concluded that the fourth requisite element was not satisfied here, in that the parties' contact already addressed the subjects in question:

> 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. . . . [Hence] the parties have already bargained on the subject of shift hours, including changes thereto, and free meals.

Examiner's Decision at 21, citing CITY OF MILWAUKEE, DEC. NO. 31221-B (WERC, 10/05), and CADOTT SCHOOL DISTRICT, DEC. NO. 27775-C (WERC,6/94), AFF'D SUB NOM. CADOTT EDUCATION ASS'N V. WERC, 197 WIS.2D 46 (1995).

The Examiner's conclusion is a reasonable application of Commission case law in the often blurry area of determining whether a contract "addresses" an issue. That determination can be difficult because it may depend on how narrowly or broadly the topic is defined or the contract language is construed. See, e.g., MAYVILLE SCHOOL DISTRICT, DEC. NO. 25144-D (WERC, 5/92), AFF'D SUB NOM. MAYVILLE SCHOOL DIST. V. WERC, 192 WIS.2D 379 (1995) (although the contract contained comprehensive language regarding health insurance, the Commission held that the employer changed the *status quo* regarding health insurance when it changed the carrier, because this change reduced the amount of damages available to employees in the event they successfully sued the carrier). Similarly, in the instant case, the Union has advanced a reasonable argument that the contract does not "cover" all significant aspects of employee work schedules, since it does not specify a schedule for food service employees, nor does it *preclude* providing them a free lunch.[1] Moreover, as the Union suggests, Article 11/28/2 could be interpreted to indicate that the parties have agreed to negotiate over issues affecting schedules and work hours even while the contract is in effect.

We find it unnecessary to decide either of those issues, however, since we cannot conclude on this record that Rief's apparently unauthorized conduct established a practice or *status quo* to which the State would be bound until it negotiated a change with the Union. The record establishes that the practices Watters implemented in May 2003 were consistent with the prevailing practices for bargaining unit food service employees in DHFS facilities and that Rief had departed from those prevailing practices in providing the free lunch and the straight eight hour schedule. On this record, neither the Union nor the State – the parties to the collective bargaining relationship – could be said to have acquiesced in Rief's departure from the otherwise prevailing practices. Indeed, the Union's dissatisfaction with Rief's eliminating the two 15-minute breaks (by combining them into a 30-minute paid lunch) is what led to both parties (Union and State) discovering the practice. While the State properly will be held responsible for the actions its supervisors take within the sphere of their apparent authority (e.g., disciplinary actions or, as here, threatening statements regarding union activity), the State has not conferred collective bargaining authority upon its first or second tier supervisors, nor could the Union reasonably have believed that to be the case. It is manifest throughout the State Employment Labor Relations Act (SELRA) that the Legislature invested bargaining authority in the Office of State Employment Relations (OSER) and that supervisors are not

[1] Combining the two 15-minute contractually required breaks into one 30-minute paid lunch break presents a fairly clear "conflict with" the contract. The record suggests that this manner of scheduling was unique to the food service employees at this one facility. Moreover, it was the Union's concern that these employees were being denied their breaks that precipitated the instant controversy in the first place, a fair indication that the Union believed the practice violated the contractual break requirements.

agents of OSER for bargaining purposes. See, Sec. 111.815(1), Stats.: "The office [elsewhere defined as OSER] shall negotiate and administer collective bargaining agreements." That provision is particularly germane to the instant dispute, since the language sets forth the legislative intent that "employment relations policies and practices throughout the state service shall be as consistent as practicable." On this record, Rief lacked real or apparent authority to "negotiate" on behalf of the State whether in an affirmative sense, such as signing off on a side-bar agreement, or in a passive sense, by implementing binding practices on mandatory subjects of bargaining without authorization by the State's bargaining agents. Although it is understandable that the individual food service employees may have thought Rief's actions were authorized, it was not reasonable for the Union to reach that conclusion. In this regard, it is important to note that the record does not establish that either Watters or any other management official had actual knowledge of Rief's unique scheduling arrangement, nor, despite the lapse of two years, is there any reason on this record to conclude that Watters should have known of the practices and thus putatively acquiesced in them.

In short, even if the contract did not wholly "cover" all aspects of scheduling issues presented here, Rief was not in a position to fill in the blanks on behalf of the State. Since Rief's alternative practices were unauthorized by the Union or the State, Watters did not change the bona fide *status quo* when he rescinded Rief's unauthorized deviations and reverted to the authorized practices that prevailed elsewhere in DHFS institutions.[2]

As to any duty the State may have to negotiate with the Union about the food service employees' work hours and schedules pursuant to Article 11/28/2 of the collective bargaining agreement, such a claim would be contractual in nature and therefore implicate a contractual remedy.

For the foregoing reasons, the alleged unilateral change violations are dismissed.

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[2] In its Petition, although not in its written arguments submitted in support of the Petition, the Union has requested a specific holding on the alleged unilateral removal of the training room as a place where the facility's food service employees could eat lunch and/or take breaks. Assuming *arguendo* that Watters knew or should have known that employees were using the training room for lunch breaks, because for nearly two years such use of the room was readily observable, this record does not support a conclusion that use of that particular room, as opposed to the break room employees were permitted to use after May 2003, affected employee working conditions so significantly as to be a mandatory subject of bargaining. The record reflects legitimate managerial concerns that (1) the training room permitted casual staff-to-resident contact that could lead to potentially dangerous fraternizing; and (2) could reasonably be viewed as an inappropriate place to eat in light of its proximity to the kitchen, under State safety and health regulations. Against these legitimate managerial prerogatives involving the control of its facilities, the Union has suggested little if any significant negative effect on the food service employees from having to eat their lunches in a different room. We emphasize that this is not a situation where the employer has entirely eliminated the availability of space for breaks and lunches. Accordingly, we do not find support in this record for a conclusion that use of one specific room rather than another is a mandatory subject of bargaining. SEE FRANKLIN SCHOOL DISRICT, DEC. NO. 21846 (WERC, 7/84) at 27-28.

Remedy

As noted earlier, the Commission has affirmed the Examiner's conclusion that Rief's statements to the assembled food service employees on May 12, 2003 would tend to interfere with employees in the exercise of their rights to engage in union activity, in violation of Sec. 111.84(1)(a), Stats. The Union argues that, in addition to a cease and desist order and the posting of a notice, the Commission should order the State to restore the straight eight hour schedule, the paid lunch period and free lunch, and the use of the training room for breaks and lunch as a remedy for this violation.

In this case, as discussed earlier, we have found no nexus between Rief's unlawful statements or her hostility toward the Union and Watters' decision to change the employees' schedules, eliminate the free lunch, and direct that a different room be used for breaks and lunch. Since the losses the Union members experienced did not result from Rief's unlawful words, and since we have concluded that the losses are not otherwise actionable, there is no basis for providing the requested make-whole relief. The remedy ordered by the Examiner is therefore affirmed and Respondent shall advise the Commission and Complainants in writing within 20 days of the date of this Order regarding the action it has taken to comply.

Dated at Madison, Wisconsin this 23rd day of March, 2006

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

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

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