STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

THE WISCONSIN STATE EMPLOYEES UNION (WSEU) COUNCIL 24, AFSCME, AFL-CIO and LOCAL 3394, Complainants,

vs.

STATE OF WISCONSIN (DEPARTMENT OF CORRECTIONS), Respondent.

Case 630
No. 63129
PP(S)-337

Decision No. 31240-A

Appearances:

Bruce Davey, Lawton & Cates, S.C., Attorneys at Law, 10 East Doty Street, Suite 400, P.O. Box 2965, Madison, Wisconsin 53701-2965, for the Union.

David J. Vergeront, Attorney at Law, State of Wisconsin, Department of Employment Relations, 345 West Washington Avenue, Madison, Wisconsin 53701, appearing for the State.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DISMISSING COMPLAINT

On December 22, 2003, the Wisconsin State Employees Union (WSEU), AFSCME, AFL-CIO and Local 3394 filed a complaint with the Wisconsin Employment Relations Commission alleging that the State of Wisconsin Department of Corrections (DOC) had committed unfair labor practices within the meaning of Section 111.84(1)(a), (d) and (e), Wis. Stats. On February 16, 2005, the Commission issued an order appointing the undersigned Stuart D. Levitan, a member of its staff, as Examiner in the matter, with authority to make and issue Findings of Fact, Conclusions of Law and an Order. Pursuant to notice, the undersigned Examiner conducted a hearing concerning the complaint on May 17, 2005, in Madison, Wisconsin. A stenographic transcript was prepared and made available to the parties by June 30, 2005. The complainants submitted written arguments on July 11 and August 26, 2005; respondents submitted a brief on August 2, 2005. Having considered the record evidence and arguments of the parties, the undersigned Examiner hereby makes and issues the following Findings of Fact, Conclusions of Law and Order Dismissing Complaint.

FINDINGS OF FACT

1. The Wisconsin State Employees Union (WSEU), AFSCME, Council 24, AFL-CIO is a labor organization within the meaning of Sec. 111.81(12), Wis. Stats., with offices at 8033 D'Onofrio Drive, Madison, Wisconsin. At all times material, it has been the exclusive bargaining agent for the employees in a number of statutorily created bargaining units, including those represented by Local 3394, affiliated with WSEU in the Security and Public Safety bargaining unit.

2. Respondents State of Wisconsin and the Department of Corrections are employers within the meaning of sections 111.81(8) and 111.84 (1), Wis. Stats.

3. Roger Luder was hired as a state correctional officer in July 1986 and assigned in September 1986 to the Columbia Correctional Institute in Portage where at all times material hereto he has been a Correctional Office 3 (Sergeant), assigned to Housing Unit 6, a 500-bed unit for inmates requiring special management. At all times material, Luder has been employed in the Security and Public Safety unit and represented by the complainants.

4. In 1988 and 1994, the parties negotiated a rest break agreement which provided as follows:

. . .

> 2. Staff may drink coffee or similar beverages on their posts. Staff may smoke on their post, assuming it is not a "no smoking" area. Supervisors do have the discretion to dictate, in writing, when and where this behavior is appropriate.
>
> . . .
>
> 4. This agreement covers any and all AFSMCE Local 3394 employees at Columbia Correctional Institute now and in the future. Changes to this agreement can be made by mutual consent of the parties.

5. Luder openly smoked (at various times cigarettes, a pipe or cigars) at his post while on break from 1987 on, about twelve times or so per shift. On or about November 30, 1999, the facility warden announced a change in policy, effective January 2000, allowing smoking "only in designated areas." The officer's desk in the dayroom of Unit 6 was not a designated smoking area under the new policy. Neither housing unit security staff such as Luder, nor Tower staff, are allowed to leave their post even during their break time. As part of his post orders, Luder's eight-hour shift includes a free meal, as opposed to other employees whose shift is for eight hours and an unpaid half-hour meal break.

6. Following the implementation of the new smoking policy in January 2000, Luder continued to smoke six-to-ten times per shift in the dayroom of Housing Unit 6, which was now a no-smoking area. On August 30, 2000, Luder received notification he was being suspended for one day (September 14) for smoking a cigarette during his rest break at the officer's desk in the dayroom of housing unit 6 on July 21. Luder grieved the matter, and continued to smoke at his post pending consideration of the grievance. On October 5, 2000, Luder received notification of a three-day suspension, October 17-19, for smoking (either a hand-rolled cigarette or a cigar) at his post in the dayroom during a break on September 22. A second grievance was filed over this discipline. Luder's grievances contended that the January 2000 policy allowing smoking only in designated areas violated the rest break agreement which the parties had negotiated, and discriminated against personnel who were not allowed to leave their posts for break.

7. Luder's two suspensions were heard by Arbitrator Christine Ver Ploeg on September 25, 2001, pursuant to Section 4/12/1, Special Arbitration Procedures, the provisions of the parties' collective bargaining agreement which provides as follows:

> **SECTION 12: Special Arbitration Procedures**
>
> **4/12/1** In the interest of achieving more efficient handling of routine grievances, including grievances concerning minor discipline, the parties agree to the following special arbitration procedures. These procedures are intended to replace the procedure in Subsection 4/3/1-7 for the resolution of non-precedential grievances as set forth below. If either of the parties believes that a particular case is precedential in nature and therefore not properly handled through these special procedures, that case will be processed through the full arbitration procedure in subsection 4/3/1-7. Cases decided by these methods of dispute resolution shall not be used as precedent in any other proceeding.
>
> Arbitrators will be mutually agreed to by District Council 24, WSEU, and the State Bureau of Collective Bargaining for both of these procedures during the term of the contract.
>
> **A. Expedited Arbitration Procedure**
>
> 1. The cases presented to the arbitrator will consist of campus, local institution or work site issues, short-term disciplinary actions [five (5) day or less suspensions without pay], denials of benefits under s. 230.36, Wis. Stats., and other individual situations mutually agreed to.
>
> 2. The arbitrator will normally hear at least four (4) cases at each session unless mutually agreed otherwise. The cases will be grouped by institution and/or geographic area and heard in that area.

3. Case presentation will be limited to a preliminary introduction, a short reiteration of facts, and a brief oral argument. No briefs or transcripts shall be made. If witnesses are used to present facts, there will be no more than two (2) per side. If called to testify, the grievant is considered as one of the two witnesses.

4. The arbitrator will give a bench or other decision within five (5) calendar days. The arbitrator may deny, uphold, or modify the action of the Employer. All decisions will be final and binding.

5. Where written decisions are issued, such decisions shall identify the process as non-precedential in the heading or title of the decision(s) for identification purposes.

6. The cost of the arbitrator and the expenses of the hearing will be shared equally by the parties.

7. Representatives of DER and AFSCME Council 24 shall meet and mutually agree on an arbitrator.

B. Umpire Arbitration Procedure

1. Whenever possible, each arbitrator will conduct hearings a minimum of two (2) days per month. District Council 24, Wisconsin State Employees Union and the State Bureau of Collective Bargaining will meet with the arbitrator at least once every six months and select dates for hearings during the next six (6) month period.

2. The cases presented to the arbitrator will consist of campus, local institution, or work site issues; short-term disciplinary actions [three (3) day or less suspensions without pay]; overtime distribution; and other individual situations mutually agreed to.

3. Cases will be given an initial joint screening by representatives of the State Bureau of Collective Bargaining and the WSEU, Council 24. Each party will provide the other with an initial list of the cases which it wishes to be heard on a scheduled hearing date at least forty-five (45) calendar days prior to a hearing date. This list may be revised upon mutual agreement of the parties at any time up to fifteen (15) calendar days prior to the hearing date.

4. Statements of facts and the issue will be presented by the parties, in writing, to the arbitrator at least seven (7) calendar days prior to the hearing date unless the arbitrator agrees to fewer days for that particular hearing date. If contract language is to be interpreted, the appropriate language provisions of the contract will also be provided to the arbitrator prior to the hearing.

5. The arbitrator will normally hear at least eight (8) cases at each session unless mutually agreed otherwise. Whenever possible, the cases will be grouped by campus, institution and/or geographic area and heard in that area. The hearing site may be moved to facilitate the expeditious handling of the day's cases.

6. The case in chief will be limited to five (5) minutes by each side with an opportunity for a one minute rebuttal and/or closing. No witnesses will be called. No objections will be allowed. No briefs or transcripts shall be made. The Grievant and his/her steward, plus a department representative and the supervisor, will be present at the hearing and available to answer questions from the arbitrator.

7. The arbitrator will render a final and binding decision on each case at the end of the day on the form provided. The arbitrator may deny, uphold or modify the action of the Employer.

8. The cost of the arbitrator and the expenses of the hearing will be shared equally the parties.

8. On September 25, 2001, Arbitrator Ver Ploeg upheld both grievances, and ordered Luder made whole. The employer fully compensated Luder for lost wages. After the award was issued, Luder continued to smoke at his post in the dayroom of unit 6.

9. On or about May 28, 2002, CCI management established a Smoking Policy Review Committee, of which Luder was made a member. The panel met three or four times over the next eighteen to twenty-four months, but failed to agree on any changes to the smoking policy.

10. On January 14, 2003, CCI Warden Phillip A. Klingston issued Luder the following official written reprimand for smoking a cigar on the prior December third:

> I have reviewed the written report charging you with violation of Department of Corrections Work Rule #10, which states: "Failure to comply with regulations such as no smoking, no eating or drinking, or building evacuation." This charge is a result of you being observed by Unit Manager David Ditter smoking a cigar at the Housing Unit 6 officer's desk on December 3, 2002. This is in violation of the Institution Smoking Policy, which restricts smoking to provide a more smoke-free environment for staff and inmates.
>
> On December 13, 2002, Captain Higbee held an investigatory hearing with you. Union representative Tonja Hesselberg was present. On January 4, 2003, a pre-disciplinary hearing was held with Union representative Stan Maday present. At the hearing, you admitted that you were smoking, however, you stated it was during a time of minimal movement of inmates.

> This is your first Category B violation during the past twelve months. You are hereby notified that this is your **official written reprimand**. It is important that you recognize and adhere to the Smoking Policy and the Rest Break Agreement. Both only allow smoking to occur where it is allowed. Smoking is restricted for the purpose of health concerns for all staff, visitors and inmates.
>
> Future violation of DOC Work Rules will result inn progressively more severe discipline, and could result in termination of your State employment.
>
> If you feel that this action was not taken for just cause, you may appeal the decision through the Grievance Procedure as provided by Article 4 of the Contract Agreement between WSEU and the State of Wisconsin. An appeal must be made within thirty (30) days of receipt of this letter.
>
> Attachment: (Employee Assistance Program Letter)

11. Also on January 14, 2003, Klingston issued Luder the following one-day suspension for smoking a cigar on the prior December 13:

> I have reviewed the written report charging you with violation of Department of Corrections Work Rule #10, which states: "Failure to comply with regulations such as no smoking, no eating or drinking, or building evacuation." This charge is a result of you being observed by Brett Sutton, Food Service Administrator, smoking a cigar in the Housing Unit 6 dayroom on December 13, 2002. You were seated behind the officer's desk, conversing with two inmates, puffing a cigar, while Mr. Sutton was speaking with the other Correctional Officers that were present. You continued to smoke the cigar the entire time Mr. Sutton was present.
>
> On December 19, 2002, Captain Higbee held an investigatory/predisicplinary hearing with you. Union representative Stan Maday was present. At the hearing, you stated that the arbitrator in your case regarding smoking ruled that CCI's Smoking Policy was discriminatory, and made you whole in all the imposed discipline in the past regarding smoking. You also felt that these charges should be dismissed regarding that decision.
>
> Previous violations occurred on December 3, 2002, making this your second Category B violation during the past twelve months. According to the Department of Corrections Uniform Disciplinary Guidelines, you will receive a **one-day suspension from work** on January 24, 2003. You will report to work on January 28, 2003, at your normally scheduled time.
>
> Future violation of DOC Work Rules will result inn progressively more severe discipline, and could result in termination of your State employment.

> If you feel that this action was not taken for just cause, you may appeal the decision through the Grievance Procedure as provided by Article 4 of the Contract Agreement between WSEU and the State of Wisconsin. An appeal must be made within thirty (30) days of receipt of this letter.
>
> Attachment: (Employee Assistance Program Letter)

12. Luder filed grievances over the written reprimand and one-day suspension, both of which were appealed to arbitration.

13. There are material discrepancies of fact between the discipline which Ver Ploeg addressed in her 2001 award and the discipline which the employer imposed on January 14, 2003.

14. At no time material hereto has the Union made a request of the employer that it bargain collectively about a mandatory subject of bargaining relating to smoking policy.

15. By its discipline of Luder in 2003, the Respondent State did not interfere with, restrain or coerce employees in the exercise of their rights protected by Sec. 111.82, Wis. Stats.

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

CONCLUSIONS OF LAW

1. Due to material discrepancies of fact between the discipline the employer imposed on Luder in 2001 and that imposed in 2003, the Ver Ploeg Award of September 25, 2001 is not conclusive as to the grievance Luder filed following his discipline on January 14, 2003.

2. By issuing Luder an official written reprimand and a one-day suspension on January 14, 2003 for smoking a cigar in the dayroom of Housing Unit 6 on December 3 and December 13, 2002, respectively, the Respondent State, and its agents and officers have not violated Sec. 111.84(1) (e), Wis. Stats., by refusing to accept the terms of an arbitration award the parties had previously agreed would be final and binding upon them.

3. By imposing the discipline noted in Conclusion of Law 2, the Respondent State did not violate Sec. 111.84(1)(d), Wis. Stats., by refusing a union request to bargain collectively on a mandatory subject of bargaining.

4. By imposing the discipline noted in Conclusion of Law 2, the Respondent State did not violate Sec. 111.84(1)(a), Wis. Stats., by interfering with, restraining or coercing employees in the exercise of their rights guaranteed under Sec. 111.82, Wis. Stats.

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

ORDER

That the complaint be, and hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin this 8th day of December, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stuart D. Levitan /s/

Stuart D. Levitan, Examiner

STATE OF WISCONSIN (DEPARTMENT OF CORRECTIONS)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DISMISSING COMPLAINT

POSITIONS OF THE PARTIES

Complainant

In support of its position that the complaint should be sustained, the Complainant asserts and avers as follows:

> The discipline imposed on Luder in January 20032 was for the conduct involved in the grievances decided by Arbitrator Ver Ploeg. The only difference was that he was smoking a cigar rather than a cigarette, and none of the employer's witnesses suggested this was a material or significant difference justifying the discipline. It is further undisputed that there had been no change in the rest break or smoking policy since the decision that would justify the discipline.
>
> It is the Commission's policy to apply *res judicata* to a prior arbitration award in complaint cases where there are no significant discrepancies of fact between the prior award and the subsequent complaint.
>
> By erroneously equating the concepts of precedent with *res judicata*, the state wrongly asserts that the contractual provisions making umpire awards non-precendential trumps its contractual commitment that the awards be final and binding. Precedent would address what value this decision would have in disputes with other facts and circumstances; *res judicata* settles that Luder cannot be disciplined for smoking at the officer's desk in the dayroom because that issue had been decided in the Ver Ploeg award. A Commission examiner has dealt with this precise contract language and this exact legal question, and held that "until there is a material change in the factual situation, the award continues to bind" the respondent as to the grievant. WSEU, DEC. NO. 27510-A (Schiavoni, 11/93).
>
> It is further an unfair labor practice to violate an agreement to accept the terms of an arbitration award which the parties had previously agreed would be final and binding. The State essentially asserts the complainant has waived this statutory right by the provisions as to the non-precedential nature of certain awards. But this language is not the clear waiver that would be required to waive a statutory right.
>
> The State's interpretation would produce an absurd result of permitting it to discipline Luder the day after making him whole as required by the Ver Ploeg

award, depriving the arbitration process of its finality and subjecting Luder to continuing discipline until the state found an arbitrator to deny the grievance.

The parties agreed to accept the arbitration award as final and binding. By again disciplining Luder when there had been no material changes in fact, the state violated the Ver Ploeg award and thus violated Sec. 111.84(1)(e), Wis. Stats.

Further, the State's claim that the complaint is barred by the statute of limitations is without merit, in that the cause of action arose not with the issuance of the Ver Ploeg award, but with the state's discipline in January, 2003.

The State's claim the complainants have failed to exhaust their administrative remedies is also without merit, in that the grievances have been appealed to arbitration.

For its violations of Sec. 111.84(1)(e), Wis. Stats., the State should be ordered to vacate the discipline and make Luder whole. It should also be ordered to cease and desist from failing to abide by expedited arbitration awards and to post appropriate notices.

Respondent

In support of its position that the complaint should be dismissed, the Respondents assert and aver as follows:

Because the prior arbitral decision was the product of an umpire arbitration, it has no precedential value in the instant case. The collective bargaining agreement very specifically bars the use of an umpire decision as precedent. In unambiguous language the agreement declares that such decisions have "no" precedential value, and "no" means "no." If a party wants a decision it can rely on in the future, one that will be incorporated into the agreement, it should not proceed with a Special Arbitration award because it has no precedential value. The clear language leaves no doubt on this point. Without doubt the parties have agreed that an Umpire decision cannot be used as a precedent "in any other proceeding."

The non-precedential value of a special arbitration was a trade off for a reduced level of due process. The fact that an umpire decision would not have precedential value is precisely why the parties felt they could compromise their due process rights for arbitrations that were quick, simple and efficient.

An arbitral precedent involving the contract language at issue confirms that an umpire decision cannot be used as a precedent in a different proceeding. That award, coming in a full arbitration, itself does have precedential value and has become binding on the parties. Under this precedent, Umpire decisions do not have a life beyond the Umpire case itself, and cannot be used as precedent or authority in "any other proceeding." The lack of precedential value for an umpire decision is also supported by legal scholars.

The complainants cannot use the special arbitration decision in any other grievance or arbitration. There is no doubt the complainants are foreclosed by the contract from presenting a prior decision from a special arbitration in a subsequent arbitration and then arguing there is a breach of the contract.

While the respondents do not challenge the complainants' ability to commence an action under section (1)(e) of SELRA to seek redress from the discipline of January 2003, nor challenge the understanding that a failure by the State to honor or abide by a full arbitration award violates SELRA, complainants cannot use the prior Umpire decision in this proceeding. By clear language and the Grenig award cited earlier, the complainants cannot use a prior Umpire award in a breach of contract case. Complainants cannot avoid the restrictive language of the collective bargaining agreement by being permitted to proceed before Wisconsin Employment Relations Commission using evidence that the collective bargaining agreement precludes. If complainants are barred from using the prior Umpire award in a contractual arbitration proceeding based on a breach of contract claim, they surely must also be barred under SELRA since the basis of any SELRA action is a breach of contract founded on the same facts.

Respondents do not argue that complainants have waived their right to litigate. The only waiver is to the right to use a specific type of evidence when litigating; by the collective bargaining agreement language, the complainants have waived their right to use a prior Umpire award as part of their proof that the state breached the collective bargaining agreement.

Even if the Umpire decision could be used as precedent, it has very little, if any, application herein. The best evidence of the Umpire proceeding indicates that a material document was not before the arbitrator, making the impact of her decision zero. One cannot rely on a decision in the absence of any credible, reliable evidence that a key document was in the record. There were many items of relevant evidence not before the Umpire, including Luder's disciplinary record, his admissions about how often he smoked other than at breaks, his admission of smoking cigars, and so on. Because so many important items of evidence were absent from the record, and the decision has nothing to indicate the rationale for the Umpire's decision, there is absolutely no probative value in this case. The Umpire decision means absolutely nothing and has no impact in this case.

Under the facts of this case, there was no violation of SELRA.

Complainants' Reply

In their reply, complainants further assert as follows:

> Respondent's argument, which attempts to differentiate between the Ver Ploeg decision and the remedy it contained, is inane, and not supported by the terms of the collective bargaining agreement, which clearly states that the arbitrator's decision is final and binding; the remedy is but a part of the decision. Words have meaning, and the parties intended the entire decision, not just the remedy, to be final and binding.
>
> Respondent also distorts the meaning of precedent, which is not at issue in this case; the *res judicata* nature of the decision is. The decision would obviously not be final and binding if the state were permitted to discipline Luder for the very same conduct the day after making him whole; complainants would have the Sisyphean task of being condemned to unendingly arbitrate discipline. Such a process would not represent a final and binding award.
>
> Respondent's argument that the Ver Ploeg award has no precedent because of what evidence was or was not presented to the umpire is a straw man; complainants are enforcing a final and binding award, making the issue *res judicata*, not precedent. Ver Ploeg decided the dispute, and until there is a material change in circumstances, respondent must abide by that decision.
>
> Finally, since Respondent's brief fails to discuss its claims regarding statute of limitations or exhaustion of contractual remedies, those defenses are deemed waived.
>
> Because Respondent disciplined Luder for the same conduct that was the basis for the dispute before Arbitrator Ver Ploeg when there was no material change in the circumstances giving rise to the discipline, they violated Sec. 111.84(1)(e), Wis. Stats., and should be ordered to make him whole and cease and desist from failing to abide by expedited arbitration awards.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DISMISSING COMPLAINT

This prohibited practice complaint alleges that the employer's discipline of Roger Luder in 2003 constituted a refusal by the employer to accept the terms of a 2001 arbitration award sustaining Luder's grievance over being disciplined for essentially identical conduct.

For reasons explained below, I have determined that because of the material changes in fact between the 2001 grievance and the 2003 discipline, the 2003 discipline did not amount to a refusal to accept the 2001 award. Accordingly, I have dismissed the complaint.

Section 111.84(1)(e), Wis. Stats., makes it an unfair labor practice for an employer to violate a collective bargaining agreement, including an agreement to arbitrate "or to accept the terms of an arbitration award, where previously the parties have agreed to accept such an award as final and binding upon them." As with all complaints of prohibited or unfair labor practices, to prevail the complainants must establish by the clear and satisfactory preponderance of the evidence that respondents violated the law. [1]

The collective bargaining agreement between the parties contains provisions for two levels of arbitration, a traditional full arbitration procedure (Subsection 4/3/1-7) and special arbitrations (Subsection 4/12/1). Although the collective bargaining agreement explicitly mandates that awards under the special arbitration methods "shall not be used as precedent in any other proceeding," they, like the awards issued under Subsection 4/3/1-7, are "final and binding." The failure by a party to accept the terms of an arbitration award issued under either the full or the special arbitration procedure is a violation of Section 111.84(1)(e), Wis. Stats. To the extent that the respondent assert that a party cannot bring a (1)(e) claim before the Commission alleging non-compliance with the terms of a Special Arbitration award, they are in error.

It is evident why the parties agreed that awards under Section 12 "shall not be used as precedent in any other proceeding." Whether an expedited arbitration under paragraph A or an umpire arbitration under paragraph B, special arbitrations impose extreme limitations on the introduction of evidence and the presentation of argument. Neither proceeding allows for transcripts or written arguments; case presentation is extremely truncated, limited to an introduction, short statement of facts, a limit of two witnesses per side, and brief oral argument (expedited) or a five minute narrative without witnesses plus a one minute rebuttal and/or closing (umpire). The arbitrator's work is as rushed as the parties, with a decision due at the end of the day (umpire) or within five days (expedited). Given these limitations, it is easy to understand why the parties provided the protection of making these awards non-precedential.

The employer correctly notes that the concept of "precedent" is a term of art in the legal community. But as the Union rightly responds, the complaint does not rely on the Ver Ploeg award as *precedent*, but rather as *res judiata (*or as the Supreme Court has renamed the concept, "claims preclusion.") The Commission's longstanding standards for applying *res judicata* to grievance awards have been aptly stated as follows:

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[1] Section 11.07(3), Wis. Stats., made applicable to this proceeding by Sec. 111.84(4),. Wis. Stats., provides 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."

> An arbitration award will be found to govern a subsequent dispute in those instances where the dispute which was the subject of the award and the dispute for which the application of the res judicata principle is sought share an identity of parties, issue and remedy. STATE OF WISCONSIN (DER) DEC. NO. 20145-A (Burns, 5/83), *aff'd by operation of law*, DEC. NO. 20145-B (WERC, 6/83). In addition, there cannot be any material discrepancies of fact existing between the prior dispute governed by the award and the subsequent dispute. Id.

STATE OF WISCONSIN, DEC. NO. 23885-B (Burns, 9/87) at 13, *aff'd in relevant part*, DEC. NO. 23885-D (WERC, 2/88). See also, STATE OF WISCONSIN, WERC DEC. NO. 13539-C, and cases cited and analyzed therein dating back to WISCONSIN TELEPHONE CO., DEC. NO. 4471 (WERB, 1957), *aff'd* (Cir. Ct. Milwaukee, 4/58), *rev'd on other grounds*, 6 Wis.2D 243 (1959). For claim preclusion to apply there must be identity of parties, issues and remedy and there can be "no material discrepancy of fact" between the prior and subsequent disputes. WEAC, ET AL, DEC. NO. 28543-B (WERC, 12/97).

The complainants cite STATE OF WISCONSIN, DEC. NO. 27510-A (Schiavoni, 11/93) as establishing that the Ver Ploeg decision continues to control any attempts by the employer to discipline Luder for smoking in the day room.

In that case, George Rawson, a correctional officer assigned to the Gatehouse at Taycheedah Correctional Institution grieved after the employer unilaterally changed his work schedule in order to reduce overtime. The parties processed the grievance under the Expedited Arbitration Procedure, Section 4/12/1A of their collective bargaining agreement. In July, 1991, Arbitrator Joseph Kerkman issued an award which ordered Rawson restored to his previous schedule, which he was. In February 1992, the employer returned Rawson to the schedule which he had previously grieved under the proceeding before Kerkman. The Union thereupon filed a prohibited practice complaint, alleging a violation of Sec. 111.84(1)(e), Wis. Stats.

Finding that the factual situation at that time was "materially the same as that presented" in the original grievance, that the state acted for "essentially the same reason it did so" in the earlier instance, and that the "parties, the grievant, the issue and the remedy in both cases are identical," Examiner Schiavoni found that the Kerkman award was "conclusive" to the later situation, and that by returning Rawson to the schedule which Kerkman has already barred, the State "refused to accept the terms of an arbitration award" the parties had previously agreed would be final and binding, and thus violated Sec. 111.84(1)(e), Stats.

Schiavoni's decision is well-written and persuasive in holding that "(u)ntil there is a material change in the factual situation," a Special Arbitration Procedures Award "continues to bind the (employer) as to the grievant."

The question in the instant proceeding thus becomes whether there were any material changes in the factual situation between Ver Ploeg's Award in September 2001 and Luder's second round of discipline in 2003.

Here, the abbreviated procedures of the underlying award make it difficult to measure material changes, inasmuch as we have no way of knowing what was important to the arbitrator to begin with. The award which Arbitrator Kerkman issued, under Section 4/12/1-A, gave a more thorough presentation of facts and argument than the the Ver Ploeg award, issued under Section 4/12/1-B. Consistent with the difference in proceedings, Kerkman issued an award which included three full paragraphs of the factual background, three full paragraphs of discussion, and an explicit award, while Ver Ploeg's award consisted entirely of an abbreviated statement of the issue ("1 day sus," "3 day sus"), a single check-mark in the box "grievance upheld" and the words "make whole." That is, when considering whether or not the state had failed to implement the Kerkman award, Schiavoni knew not only *how* Kerkman had ruled, but why, and what facts he found relevant. In contrast, all I know is that Ver Ploeg upheld the grievances – but I don't know her reasoning, or even the facts that she relied upon (which itself has become a matter of contention.).

I can, however, surmise, based on the well-established matrix for considering discipline grievances. That matrix considers several questions, the most important of which are broadly stated as: Was the employee aware that certain behavior was prohibited? Did the employee engage in the forbidden conduct? Was the punishment commensurate with the offense?

Here, there is no dispute that Luder was smoking in an area he knew to be a no-smoking area. Thus, there can be only two explanations as to why Ver Ploeg sustained the grievances – that the employer did not have authority to declare the day room in Housing Unit 6 as a No Smoking area, or that the four days of unpaid suspension was excessive discipline.

I disagree with the Union's statement (page 8 of its brief) that "(t)he dispute that was presented to Arbitrator Ver Ploeg was whether the respondent could discipline Luder for smoking" at the officer's desk in the dayroom during his rest break. The issue was not the generalized notion of discipline; rather, as the meager documentation from the arbitration establishes, the two issues were specifically a one-day suspension and a three-day suspension. Ver Ploeg's award cannot be read to bar all discipline for this conduct; it can only be understood as overturning *that* discipline.

In labor arbitrations to determine whether just cause existed to impose discipline, the precise level of discipline is a crucial element. There is a significant difference between discipline which consists of a written reprimand and a one-day suspension and discipline which consists of a one-day and a three-day suspension.

For this reason I also disagree with the Union's assertion that the "only difference" between the initial discipline and grievance and the subsequent situation "was the Luder was

smoking a cigar rather than a cigarette." To the contrary, there is a significant difference in the level of discipline imposed.

Ver Ploeg may have also felt that the warden exceeded his authority by amending the no-smoking rules in the manner that he did. If that were the case, it is possible that the Respondent's creation of a Smoking Policy Review Committee, may have addressed her concerns.

Due to the procedure followed, we simply have no way of knowing why Ver Ploeg upheld Luder's grievances in 2001. That is the source of the Union's difficulty in basing a (1)(e) complaint on a Special Arbitration Award; it's not that such awards are without precedent, but that they are without explanation. This represents a serious challenge to the complainants, who must prove by the preponderance of the evidence that the material facts between the initial and the subsequent event are materially the same.

Ver Ploeg may have found the discipline excessive. She might have thought the matter needed to be bargained. We just don't know. We do know, however, that the level of discipline in 2003 was materially different than that of 2001, and that the employer had in the interval established a Smoking Policy Review Committee, of which Luder was made a member.

Those differences may or may not have led Ver Ploeg to rule differently, and they may or may not lead another arbitrator to a different conclusion as well. [2] But they are discrepancies of material facts between the Ver Ploeg award of 2001 and the discipline of 2003 sufficient to prevent the complainants from establishing by a preponderance of the evidence that the later incident is materially identical to the earlier one. As such, the 2003 discipline did not constitute a refusal by the employer to accept as final and binding the terms of an arbitration award.

The Union argues that validating the employer's conduct herein is tantamount to enabling it to impose new discipline the very next day after losing a special arbitration award, a result it castigates. But that is not the factual record of *this* case, which instead has a fifteen-month interval between the Ver Ploeg award of September 2001 and the new discipline of January, 2003.

The Union also alleged in its complaint that the respondent employer had violated Sections 111.84(1)(a) and (d), Wis. Stats., as well as (1)(e). Although the Union did not address either of these allegations in its two written submissions, they are deserving of at least some comment.

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[2] The decision in this complaint case does not, of course, address the question of whether Luder's 2003 discipline was with or without just cause, which is being considered in an entirely distinct proceeding. The only question this decision addresses is whether the employer committed a prohibited practice by issuing the 2003 discipline.

Section 111.84(1)(a), Wis. Stats., provides that it is a prohibited practice for the state employer individually or in concert with others "to interfere with, restrain or coerce employees in the exercise of their rights guaranteed in s. 111.82." That sections states:

> 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.

In order to establish a violation of Secs. 111.84(1)(a), a complainant must establish by a clear and satisfactory preponderance of the evidence that the respondent's conduct contained either some threat of reprisal or promise of benefit which would tend to interfere with, restrain or coerce employees in the exercise of their Section (2) rights. STATE OF WISCONSIN, DEPARTMENT OF ADMINISTRATION, DEC. NO. 15945-A (Michelstetter, 7/79), *aff'd by operation of law*, DEC. NO. 15945-B (WERC, 8/79); STATE OF WISCONSIN, DEPARTMENT OF HEALTH AND SOCIAL SERVICES, DEC. NO. 17218-A (Pieroni, 3/81), *aff'd by operation of law*, DEC. NO. 17218-B (WERC, 4/81); STATE OF WISCONSIN, DEC. NO. 19630-A (McLaughlin, 1/84), *aff'd by operation of law*, DEC. NO. 19630-B (WERC, 2/84); STATE OF WISCONSIN, DEPARTMENT OF HEALTH AND SOCIAL SERVICES (DHSS), DIVISION OF CORRECTIONS (DOC), DODGE CORRECTIONAL INSTITUTION (DCI), DEC. NO. 25605-A (Engmann, 5/89), *aff'd by operation of law*, DEC. NO. 25605-B (WERC, 6/89). BEAVER DAM UNIFIED SCHOOL DISTRICT, DEC. NO. 20283-B (WERC, 5/84). It is not necessary to demonstrate that the employer intended its conduct to have such effect, or even that there was actual interference; instead, interference may be proven by showing that the conduct has a reasonable tendency to interfere with the exercise of protected rights. THE STATE OF WISCONSIN, DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS, DEC. NO. 11979-B (WERC, 11/75); STATE OF WISCONSIN, DEC. NO. 25987-A (McLaughlin, 10/89), *aff'd by operation of law*, Dec. No. 25987-B (WERC, 12/89). WERC V. EVANSVILLE, 69 Wis. 2D 140 (1975); CITY OF BROOKFIELD, DEC. NO. 20691-A (WERC, 2/84). However, employer conduct which may well have a reasonable tendency to interfere with an employee's exercise of Sec. 111.70(2) rights will generally not be found to violate Sec. 111.70(3)(a)1, Stats., if the employer had valid business reasons for its actions. CEDAR GROVE-BELGIUM AREA SCHOOL DISTRICT, DEC. NO. 25849-B (WERC, 5/91); OSHKOSH PROFESSIONAL POLICE OFFICERS' ASSOCIATION, No. 57964, DEC. NO. 29791-A (Shaw, 11/00).

There is no evidence in the record, nor argument in the union briefs, that the discipline of Luder contained either some threat of reprisal or promise of benefit which would tend to interfere with, restrain or coerce employees in the exercise of their statutorily protected rights. Accordingly, I have dismissed this part of the complaint.

The Union in its complaint also alleged a violation of Sec. 111.84(1) (d), Wis. Stats., which states, in relevant part, that it is a prohibited practice for the state employer:

> 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.

Section 111.91(1), Stats., provides that, with certain exceptions not herein applicable, "matters subject to collective bargaining to the point of impasse are wage rates … fringe benefits … hours and conditions of employment."

Mandatory subjects of bargaining are those which "primarily relate" to wages, hours and conditions of employment, as opposed to those subjects of bargaining which "primarily relate" to the formulation and choice of public policy. CITY OF BROOKFIELD V. WERC, 87 WIS.2D 819 (1979); UNIFIED SCHOOL DISTRICT NO. 1 OF RACINE COUNTY V. WERC, 81 WIS. 2D 89 (1977); and BELOIT EDUCATION ASSOCIATION V. WERC, 73 WIS.2D 43 (1976). A municipal employer's statutory duty to bargain with a union during the term of a collective bargaining agreement extends to all mandatory subjects of bargaining except those which are covered by the agreement, or to those which the union has clearly and unmistakably waived its right to bargain. SCHOOL DISTRICT OF CADOTT, DEC. NO. 27775-C (WERC, 6/94); CITY OF RICHLAND CENTER, DEC. NO. 22912-B (WERC, 8/86); BROWN COUNTY, DEC. NO. 20623 (WERC, 5/83); and RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 18848-A (WERC, 6/82).

An employer may not normally make a unilateral change during the term of a contract to a mandatory subject of bargaining without first bargaining on the proposed change with the collective bargaining representative. CITY OF MADISON, DEC. NO. 15095 (WERC, 12/76) at 18 citing MADISON JT. SCHOOL DIST. NO. 8, DEC. NO. 12610 (WERC, 4/74); CITY OF OAK CREEK, DEC. NO. 12105-A, B (WERC, 7/74); and CITY OF MENOMONIE, DEC. NO. 12564-A, B (WERC, 10/74). Unilateral changes are tantamount to an outright refusal to bargain about a mandatory subject of bargaining because each of those actions undercuts the integrity of the collective bargaining process in a manner inherently inconsistent with the statutory mandate to bargain in good faith. CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84) at 12 and GREEN COUNTY, DEC. NO. 20308-B (WERC, 11/94) at 18-19. Absent a valid defense, a unilateral change to a mandatory subject of bargaining is a *perse* violation of the MERA duty to bargain. SCHOOL DISTRICT OF WISCONSIN RAPIDS, DEC. NO. 19084-C (WERC, 3/85).

However, the duty to bargain is not self-actuating, but rather rises upon a demand for such. CITY OF GREEN BAY, DEC. NO. 29469-A (Nielsen, 7/99). Accordingly, waiver by inaction has been recognized as a valid defense to alleged refusals to bargain, including alleged unilateral changes in mandatory subjects of bargaining, except where the unilateral change amounts to a *fait accompli* or the circumstances otherwise indicate that the request to bargain would have been a futile gesture. CITY OF GREEN BAY, *supra*.; ST. CROIX FALLS SCHOOL DISTRICT, DEC. NO. 27215-B (Burns, 1/93); WALWORTH COUNTY, DEC. NOS. 15429-A, 15430-A (Gratz, 12/78). RANDOM LAKE SCHOOL DISTRICT, Case 30, No. 58011, DEC. NO. 29998-B (Burns, 9/01).

Here, whether or not the underlying issue constitutes a mandatory subject of bargaining is an issue I need not address because there is no evidence in the record that the Union ever requested of the employer that it bargain the matter. Nor is there any argument in either of the Union's two written submission supporting the claim in its complaint that the respondent engaged in behavior violative of Sec. 111.84(1)(d), Wis. Stats. Accordingly, I have dismissed this element of the complaint as well.

Dated at Madison, Wisconsin this 8th day of December, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stuart D. Levitan /s/

Stuart D. Levitan, Examiner

SDL/gjc
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