STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

THE WISCONSIN STATE EMPLOYEES UNION (WSEU), AFSCME, AFL-CIO, and LOCAL 2748, Complainants,

vs.

STATE OF WISCONSIN, DEPARTMENT OF CORRECTIONS, Respondents.

Case 664
No. 64426
PP(S)-349

Decision No. 31272-A

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, State of Wisconsin, 101 East Wilson Street, 4th Floor, P.O. Box 7855, Madison, Wisconsin 53707-7855, appearing on behalf of Respondents.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

On January 27, 2005, Complainants filed a complaint with the Wisconsin Employment Relations Commission, alleging that Respondent committed unfair labor practices in violation of Sec. 111.84(1)(a), (c), (d) and (e), Stats., by terminating an understanding permitting Thomas Corcoran to perform certain WSEU-related duties during work hours and by taking retaliatory action against him for the exercise of lawful, concerted activity. On March 11, the Commission appointed Richard B. McLaughlin, a member of its staff, to serve as Examiner. Respondent filed an answer to the complaint on April 1. Hearing on the complaint was conducted in Madison, Wisconsin on April 18, June 1, June 2, June 3, August 25 and August 26. Mary L. Mixon and Sarah R. Finley filed a copy of the transcript of each day of hearing by September 12, 2005. The parties filed briefs by November 30, 2005.

FINDINGS OF FACT

1. Wisconsin State Employees Union (WSEU), AFSCME, Council 24, AFL-CIO, is a labor organization which maintains its principal offices at 8033 Excelsior Drive, Suite C, Madison, Wisconsin 53717-1903. Martin Beil is the Executive Director of WSEU.

2. Among its functions, the State of Wisconsin (State) oversees the incarceration, rehabilitation and supervision of persons convicted of crimes. The State performs this function principally through the Department of Corrections (DOC). The current DOC Secretary is Matthew Frank and the current DOC Deputy Secretary is Rick Raemisch. In June of 1999, Jon Litscher was DOC Secretary and Cindy O'Donnell was DOC Deputy Secretary. Within the DOC, the Division of Community Corrections (DCC) is principally concerned with supervising persons on probation or parole from DOC custody. The DCC is administratively structured by region, and maintains an office in Beaver Dam, which is within DCC Region 7. Elmer Karl has been the Beaver Dam Field Supervisor since March of 1998. The immediate supervisory position to Karl is that of Regional Chief of DCC Region 7. From June of 1999 through January of 2003, Allan Kasprzak was Regional Chief of DCC Region 7. The Regional Chief position reports to the positions of Assistant Administrator and Administrator of DCC. At all times relevant to this complaint, William Grosshans was DCC Administrator. Grosshans' immediate supervisor is the DOC Deputy Secretary. DOC and DCC perform employer functions for the State for DOC/DCC employees, but the State's designated agency for collective bargaining representation is the Office of State Employment Relations (OSER), which maintains its principal offices at 101 East Wilson Street, 4th Floor, P.O. Box 7855, Madison, Wisconsin 53707-7855.

3. WSEU Local 2748 represents a bargaining unit of certain professional social service workers employed by the State. The unit consists of roughly three thousand employees who work out of facilities located throughout the State. Thomas Corcoran, a Probation and Parole Agent in the Beaver Dam office, was elected President of Local 2748 in August of 1996. Karl was the incumbent defeated by Corcoran to become President. Local 2748 uses roughly one-hundred thirty stewards.

4. The State and WSEU are parties to a collective bargaining agreement covering employees in six bargaining units, including that represented by Local 2748, which was in effect by its terms between May 17 and June 30, 2003. The parties extended it after its nominal expiration, and ultimately agreed, no later than mid-2004, to a successor with a term through at least June 30, 2005. This Agreement is referred to below as the Master Agreement and contains the following provisions:

AGREEMENT

> The Agreement, made and entered into . . . by and between the State of Wisconsin and its Agencies (hereinafter referred to as the Employer) represented by the Department of Employment Relations; and AFSCME, Council 24, Wisconsin

State Employees Union, AFL-CIO, and its appropriately affiliated locals (hereinafter referred to as the Union), as representative of employees employed by the State of Wisconsin . . .

ARTICLE II
RECOGNITION AND UNION SECURITY

. . .

Section 5: Union Activity

2/5/1 Bargaining unit employees, including Union officers and representatives shall not conduct any Union activity or Union business on State time except as specifically authorized by the provisions of this Agreement. . . .

Section 6: Union Conventions, Educational Classes and Bargaining Unit Conferences

. . .

2/6/9A (PSS) The number of workdays off for such purposes shall not exceed ten (10) for any one employee in any one calendar year. This time off may be charged to vacation credits, holiday credits, compensatory time or to leave without pay as the employee may designated. Where the nature of the educational class is for professional development, such time may be charged to time off without loss of pay under Article 11/13/2, as the employee may designate. The employee shall give his/her immediate supervisor at least ten (10) calendar days advance notice of the employee's intention to attend such functions. . . .

Section 8: Attendance at Local Union Meetings, Monthly Steward Meetings, or Monthly Local Union Executive Board Meetings

. . .

2/8/1 Local Union officers and stewards shall be granted time off without pay to attend local Union meetings, monthly steward meetings, and monthly local union executive board meetings, upon ten (10) calendar days advance notice to his/her immediate supervisor. . .

Section 9: Telephone, Email And Fax Use

2/9/1 Existing telephone facilities may be used by local Union officers and stewards for Union business. The location, number and procedure for using telephones shall be mutually agreed to at the first local labor- management

meeting. Such use shall not obligate the Employer for the payment of long distance or toll charges. Management will endeavor to respect the confidentiality of phone conversations concerning Union business conducted in accordance with the provisions of this Agreement or a local agreement.

2/9/2 Where currently no existing practices or local agreements are in place, union use of Employer facsimile machines shall be limited to communication between union and management.

2/9/3 (BC, T, PSS, SPS, LE) Local Union officers and stewards may use their existing state assigned Email for conducting Union business only as authorized under the Agreement. Such use shall be in compliance with 2/5/1. No political campaign literature or material detrimental to the Employer or the Union shall be distributed . . . This provision shall expire with the expiration of the 2001-2003 Agreement. . . .

ARTICLE IV
GRIEVANCE PROCEDURE

. . .

SECTION 3: Arbitration Panel Procedures

. . .

4/3/10 The decision of the arbitrator will be final and binding . . .

SECTION 6: Number of Representatives and Jurisdictions

. . .

4/6/3 The Union shall designate the jurisdictional area for each grievance representative and his/her alternate. Each jurisdictional area shall have a similar number of employees and shall be limited to a reasonable area to minimize the loss of work time and travel giving consideration for the geographic area, employing unit, work unit, shift schedule and the right and responsibility of the WSEU to represent the employee of the bargaining unit. . . .

SECTION 8: Processing Grievances

. . .

4/8/1 The grievant, including a Union official in a Union grievance, will be permitted a reasonable amount of time without loss of pay to process a grievance

> from pre-filing through Step Three (including consultation with designated representatives prior to filing a grievance) during his/her regularly scheduled hours of employment. . . .
>
> **4/8/2** Designated grievance representatives will also be permitted a reasonable amount of time without loss of pay to investigate and process grievances from pre-filing through Step Three (including consultations) in their jurisdictional areas during their regularly scheduled hours of employment. . . .
>
> **4/8/4** The designated grievance representative shall be in pay status for said hearing and for reasonable travel time to and from said hearing . . .

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 Master Agreement provides for certain LMC meetings and states conditions where employees may attend in pay status. The State and WSEU have negotiated a number of understandings which are attached to the Master Agreement as Memoranda of Understanding (MOU) or as Negotiating Notes. Such agreements may be agency-specific and may not have been directly negotiated by OSER representatives. MOU No. 33 deals with Labor Management Cooperation (LMC) activities, and seeks to encourage "collaborative work improvement projects at all levels of state government." Collaborative work efforts are also addressed at MOU No. 9. Negotiating Note No. 70, from the 2003-2005 Master Agreement states:

> Recognizing the caseload nature of Professional Social Services duties, the Employer will take into account allowable steward activities. The Union will make a good faith effort to evenly distribute steward work. This provision does not obligate the Employer to reduce caseload.

A Master Agreement, including MOUs and Negotiating Notes, is the codification of agreements reached in collective bargaining between the State, through OSER, and the WSEU, through its various locals. Once the parties have reached a tentative agreement (TA) on a Master Agreement, the WSEU submits the TA for a ratification vote among its members throughout the State. The ratified TA is then submitted to a legislative committee, the Joint Committee on Employment Relations (JOCER), which votes on approving the TA. When approved, the TA is submitted as a bill to the Legislature, which, if approved, is submitted to the Governor for signature into law. The State and WSEU may also negotiate Local Agreements, which are designed to specify the

application of the Master Agreement to local employing entities. Local Agreements are not subject to the ratification process governing a Master Agreement, and are not always negotiated through OSER.

5. Prior to becoming President of Local 2748, Corcoran was an elected member of its bargaining team, serving in that capacity on negotiations in 1995 and in 1997. Those negotiations caused WSEU bargaining team members to miss work. Duties a bargaining team member could not attend to during bargaining were either postponed until the team member returned to work or were covered by other employees, including, when available, those in Limited Term Employment (LTE) positions. For bargaining in 1997 and 1999, the WSEU and the State agreed to use LTEs to cover the work of absent bargaining unit employees, and such coverage was available in the Beaver Dam office. In the negotiations of 1997, the Beaver Dam office had two employees who served on the Local 2748 bargaining team. When those negotiations concluded, DCC ceased certain LTE coverage in the Beaver Dam office.

6. From his assumption of the role of Local 2748 President, Corcoran found it difficult to reconcile the time demands of his WSEU position with and those of his caseload in the Beaver Dam office. This prompted Corcoran to raise concerns to Rick Schwalbach, who was then his immediate supervisor. By January of 1999, those concerns had reached Kasprzak, who attempted to convince his supervisors of the need to cover the absences of WSEU bargaining team members from Beaver Dam and to provide ongoing caseload relief for Corcoran. These concerns were addressed at LMC meetings involving WSEU representatives and DOC administrators. Early in 1999, Corcoran raised these concerns to Beil. During this period of time, Grosshans voiced to O'Donnell a concern that bargaining unit personnel were providing Agent Basic Training (ABT) for new Probation and Parole Agents. O'Donnell understood his position to be that unit members were not appropriately policing the classroom, that they lacked necessary teaching skills, and that such training should be provided by non-unit employees. She and ultimately Beil understood his position to be that he lacked sufficient Field Supervisor staff to cover such training. O'Donnell communicated these concerns to Litscher.

7. Beil and Litscher discussed labor relations matters on an ongoing basis in 1999. In June of 1999, they drove together to attend the graduation ceremony for certain employees who had completed training at a correctional training center in Oshkosh. Litscher informed Beil of the problems regarding ABT and indicated his willingness to move positions to make it possible for non-unit personnel to provide ABT. Beil responded that the WSEU could be flexible regarding the conversion of agent positions to training positions, and that the WSEU was concerned with caseload relief for Corcoran, as Local 2748 President. The conversation ended with Beil and Litscher agreeing that some type of arrangement should be possible to address their concerns. Within a week of this conversation, Beil and DOC personnel had implemented an understanding that the WSEU would agree that three vacant agent positions would be made into non-unit training positions in return for DCC providing some flexibility to Corcoran in reconciling his WSEU and DCC duties. Beil understood that the flexibility could consist of LTE coverage for Corcoran's caseload while Corcoran was out of the Beaver Dam office and/or case assignment considerations. Beil and Litscher did not specify these points; did not discuss the duration of the

arrangement; did not discuss whether the arrangement covered Corcoran or any Local 2748 President; and did not commit the arrangement to writing. This rough understanding is referred to below as the Arrangement, and reflects the parties' presumption that the details necessary to make it work would be handled locally, by Corcoran and his supervisors.

8. Litscher reported the Arrangement to O'Donnell, who understood that the Arrangement required that DOC open the application process to fill the ABT positions to afford unit members a promotional opportunity and that DOC hire an LTE to provide caseload relief for Corcoran to permit him to attend to Local 2748 issues without case duties piling up in his absence. O'Donnell spoke with various DCC administrators, including Grosshans, to implement the Arrangement. Her understanding of the LTE coverage was that the LTE would be expected to cover no more than half of Corcoran's time. The percentage of time Corcoran could not attend to DCC duties would, in her view, vary over time but would balance out to no more than half of his available work time. Her understanding on this point reflected her understanding that an LTE could fill one position for no more than 1043 hours per year, which roughly equates to one-half of a full-time position. Litscher did not communicate this limitation to her. O'Donnell believed the coverage reflected that DCC case duties should not accumulate in Corcoran's absence and that Corcoran played a significant role in LMC type of efforts designed to minimize workplace conflict. Kasprzak shared O'Donnell's understanding of the LTE coverage. Kasprzak informed Karl that Karl should assign Corcoran duties that did not involve ongoing caseload responsibilities. Rather, the duties should reflect non-recurring duties that would not be disrupted by Corcoran's unpredictable absences. In Kasprzak's and O'Donnell's view, the Arrangement promoted ongoing LMC type efforts that reduced time lost to workplace conflicts.

9. While President of Local 2748, Karl did not serve on the negotiating team or as a steward and did not receive any caseload relief by LTE coverage or duty assignment. His duties as Field Supervisor in the Beaver Dam office required him to cover the duties Corcoran could not attend to due to his absences from the office on labor relations matters. He did not view LTE usage in the Beaver Dam office to be an accommodation for Corcoran, but the means to get office work done, which had the collateral benefit of providing Corcoran relief regarding his DCC duties. As initially implemented, the Arrangement did not relieve Corcoran of all caseload or office based duties and Corcoran advised Karl of the times and reasons for his absences from the Beaver Dam office. As time passed, Karl became convinced that Corcoran was spending increasingly less time at DCC duties. Corcoran's evaluation form for the report period "06/98 Thru 06/99" includes the repeated notation "Completes as time constraints allow. Efforts subsidized by an LTE position due to Bargaining and other Union duties." The evaluation forms for the report period "06/99 Thru 06/00" and for "06/01 Thru 05/02" changed the notation to "Efforts subsidized by an LTE position due to Bargaining and other union activities." Karl signed each evaluation form, and Grosshans signed the one covering June, 1999 through June, 2000. Corcoran's performance of DCC duties became a topic of increasing friction between Karl and Kasprzak and between Karl and Corcoran. By September of 2001, Corcoran had no ongoing caseload duties, and his office-based duties were declining. His absence from the Beaver Dam office spiked when collective bargaining was taking place, but Karl perceived Corcoran to be performing progressively less DCC duties from September of 2001 through September of 2004.

Corcoran's relief from caseload responsibilities became an irritant within the Beaver Dam office, prompting the filing of a grievance by unit employees in the Beaver Dam office in September of 2001 concerning Corcoran's release from caseload and other office responsibilities. Karl continued to voice his concerns to his supervisors. On certain caseload reports, Karl would note a "0" next to Corcoran's employee number, but ceased this practice when Kasprzak informed Karl that it was an embarrassment. On a relatively frequent basis, Karl attempted to assign Corcoran regular caseload duties, and Kasprzak would inform Karl to cease the attempt. Karl resumed the attempt to assign caseload duties to Corcoran following Kasprzak's retirement in January of 2003. From June of 1999 through his retirement in 2003, Kasprzak viewed the Arrangement as an effective way to address labor issues in a cooperative manner, as he noted in an e-mail to Beil dated January 29, 2003, which states:

> I understand there will be some effort to retain the LTE coverage for Tom Corcoran's position and I wanted to give you my sense for why this is needed. I have no confidence that current division administration would advocate for this and I'm not sure that my successor in Region 7 will have enough of a grasp on the issue to effectively articulate the need. Although I am retiring, I hope the new administration sees the merit of continuing a successful solution. So, let me give you my views:
>
> * When I arrived in Region 7 six years ago we were faced with no coverage for Tom when he was gone on legitimate union business. We ended up with unsupervised offenders and potential liability issues for the department.
> * I immediately advocated for coverage and you may recall a brief conversation about the matter that you and I had several years ago. You were helpful then in getting the matter resolved on temporary basis.
> * Subsequently, a former DOC Secretary agreed to coverage of Tom's caseload via an LTE in return for union cooperation in allowing the conversion of several agent positions to become non-represented trainers at our DCC training academy. This was agreed to be the "permanent" solution to coverage as long as the union president remained in DCC.
> * The present, "permanent" use of LTE coverage is fortunate for all concerned. Other represented employees are not disadvantaged by having to cover extra workload, the local manager is happy and regional management can sleep better knowing the caseload is covered.
> * I believe you are in the best position to resolve this with the new administration and please feel free to share my support as you see fit.

10. Karl's concerns with Corcoran's work assignments continued to grow after Kasprzak's retirement. By August of 2003, Karl had thoroughly aired his concerns to Grosshans, Raemisch and other DCC administrators. In an e-mail to these administrators dated August 4, 2003, Karl advocated that Corcoran be assigned ongoing caseload responsibilities in addition to non-recurring office duties. In DEC. NO. 30340-A, dated August 15, 2003, Examiner Daniel Nielsen stated the following Conclusions of Law:

3. By the acts described in the above and foregoing Findings of Fact, specifically by issuing an order directing Thomas Corcoran not to have any contact with Jennifer Coats and other bargaining unit employees, the Respondent Employer interfered with the Complainants' protected rights guaranteed by Sec. 111.82, and thereby committed an unfair practice within the meaning of Sec. 111.84(1), SELRA.

4. By the acts described in the above and foregoing Findings of Fact, specifically by imposing discipline on Thomas Corcoran for contacting Jennifer Coats on February 12, 2002, and for allegedly making inaccurate statements in the course of the investigation, the Respondent Employer interfered with the Complainants' rights guaranteed by Sec. 111.82, and thereby committed an unfair practice within the meaning of Sec. 111.84(1), SELRA.

In a memo to Corcoran dated August 28, 2003, Karl advised him that:

> The issue of your caseload responsibilities was discussed with Eurial Jordan, Region 7 Chief, William Grosshans, DCC Assistant Administrator and Rick Raemisch, DCC Administrator on August 4, 2003. The decision made during the meeting was to assign the following caseload responsibilities to you during contract bargaining. The caseload responsibilities listed below are assigned to you effective today.
>
> 1. You are to complete initial Interviews of new intake from Courts. Intake appointments will be scheduled by PA staff for days that you are scheduled to be in the office. You are to complete the initial intake interview, complete the DOC 179 with the offender and follow on areas of need per the DCC Operations manual until the casework is completed and transfer may be made to a different agent.
>
> 2. You are to secure statements from offenders and/or victims as needed for Unit 705 agents as directed by your immediate Supervisor.
>
> 3. Beginning Tuesday, September 2, 2003, Unit 705 institution cases will be transferred to your caseload with the expectation that you complete Pre-Parole Investigations and all other case related activities per DCC Operations manual.
>
> 4. You will be accessible to Unit 705 staff to function as Agent-of-the-Day when you are scheduled to be in the office.
>
> 5. You will assist with custody transports as time allows and as directed by your immediate Supervisor.

Sometime after this, Beil learned that DCC was considering the removal of LTE coverage for Corcoran. He reported this and his concern regarding the August 28, 2003 memo to O'Donnell. Karl did not implement the assignments noted in that memo and Beaver Dam continued to have an LTE position.

11. On September 15, 2004, Larry Reed defeated Corcoran in an election for the Presidency of Local 2748. Corcoran and other unit members filed an internal appeal regarding the conduct of this election, alleging among other points that Reed and his slate of candidates, unlike Corcoran and his slate of candidates, had violated an agreement regarding campaign use of computer technology. After a hearing, the international union with which WSEU is affiliated directed that the election be rerun. Votes from that election were tabulated on December 16, 2004, and Corcoran outpolled Reed. Corcoran again assumed the position of Local 2748 President on December 17, 2004.

12. Karl and other DCC supervisors took the position that the September 15, 2004 election terminated the Arrangement, and acted to return Corcoran to a full-time caseload. In late September of 2004, a Probation and Parole Agent in the Beaver Dam office retired. Between September and December of 2004, Karl sought to move the caseload once handled by that agent to Corcoran. Because Corcoran had not been a full-time agent for so long, Karl and Corcoran agreed that a refresher ABT course in Madison would be useful. The ABT spanned a number of work days form October of 2004 through January of 2005. Between ABT, related training and vacation, Corcoran was scheduled to work in the Beaver Dam office for sixteen of the fifty-five work days between October 4 and December 17. Corcoran added to his previously scheduled vacation requests during this period. On September 28, 2004 Corcoran reported to Karl that he was leaving the Beaver Dam office to attend to a pre-filing meeting regarding a grievance in Sheboygan, and was appearing as a steward for an investigatory meeting to be held later that afternoon in Sheboygan. After Karl asked if Corcoran was still a steward, Corcoran stated he would not continue the discussion without a WSEU steward. The discussion continued with the involvement of another employee but became confrontational. Karl asserted his desire to return Corcoran to the duties of an agent and Karl understood Corcoran's position to be that Karl sought to drive him from State employment. Corcoran ultimately left the meeting and the office to attend to the Sheboygan matters. Karl was the hearing officer at the afternoon meeting at which Corcoran appeared as steward. That meeting became confrontational. Karl did not approve Corcoran's absence from the Beaver Dam office on September 28, and Karl documented his concerns regarding the events of that day in an e-mail to Grosshans dated September 28. In a letter to Corcoran dated September 29, 2004, Grosshans stated:

> We have received a copy of a September 25, 2004 letter sent from newly elected 2748 president, Larry Reed, to OSER Director Karen Timberlake. In the letter Mr. Reed has appointed Lynn Hightire, as Chief Steward. In addition, Mr. Reed provided a list of the 2748 appointed stewards. Since your name is not on the list of appointed stewards, we expect that you will not be performing any more steward activities unless or until we receive official notification from the 2748 leadership.

> You are directed to meet with your supervisor, Elmer Karl, to discuss your agent assignments and any training/mentoring you may need to assist in that process.

The relationship between Karl and Corcoran continued to deteriorate along the lines highlighted by their September 28 meetings. Karl became convinced that Corcoran was not taking ABT seriously; was not returning from Madison to the Beaver Dam office in a timely fashion; and was avoiding or neglecting his caseload responsibilities. He documented his concerns in a memo to Corcoran dated December 15, 2004. The memo notes concerns that Corcoran did not timely return to the Beaver Dam office on November 9, December 8 and December 9, and sought an explanation. Corcoran responded to the memo in an e-mail dated December 17, which noted:

> If you believe that any of my activities have risen to the level of potential work-rule violations, please conduct a proper investigation, including formal notice to me and to the union. That would provide me the opportunity to secure steward representation, serving the interests of due process.
>
> I have conferred with Council 24 Asst. Director Karl Hacker about your memo and he advises me that I have no obligation to respond in writing to the scenario that you have characterized, or to the implicit allegations.

On December 20, Corcoran called into the Beaver Dam office to advise that he would be taking leave without pay for at least the morning because he was having a WSEU phone line installed in his home. He did not report to the office until late afternoon. Karl referred the propriety of the request for unpaid leave to Karl's supervisors. When Karl discussed the matter with Corcoran on December 23, Corcoran responded that he had attended to a number of WSEU-related matters that day. When Karl asked about his caseload responsibilities, Corcoran responded that the Arrangement remained in place and should be honored by the State, noting that he had so many demands on his time that he could not reasonably be expected to keep up with his caseload. On December 30, Corcoran left a voice-mail message for Karl, who was home sick, stating that he would be in Madison January 3 and 5, 2005 "on union business". Karl found the notice inadequate and reported the matter to his supervisors by e-mail dated January 3. In another e-mail dated January 3, Karl advised his supervisors that he found Corcoran's December 17, 2004 e-mail insubordinate and requested that "this be pursued as a disciplinary matter".

13. In a letter to Corcoran dated January 5, 2005, Karl stated:

> This letter is a follow-up to our conversation last week regarding the procedures you need to follow when attending to union activities. Except as allowed by the collective bargaining agreement, union officers are not allowed to conduct union business or union activities on state time. Therefore, this letter is to notify you that for all requests for time (with or without pay) to attend union related activities provided for in the WSEU contract (union conventions, educational classes, bargaining unit conferences, local union meetings, monthly steward meetings, bargaining days, monthly local executive board meetings or any other union

> activity), you are required to provide your immediate supervisor at least ten (10) calendar days advance notice (written notice when required by the contract) of your intention to attend such activities, including identifying the applicable contract provision. In addition, when you are requested to act as a local representative at investigatory meetings or in processing grievances, you must secure written approval from me before attending any of these union activities. Before any request is approved, I will need to have the specifics (i.e. reason for meeting, who is involved, expected duration, why you are needed to attend, where is the meeting being held, is another union rep attending, etc.) I will promptly evaluate and respond to your requests for union activity.
>
> When you are not attending approved union activities, you are expected to perform your duties as a full-time Probation and Parole Agent. I have scheduled a meeting with you to discuss the contents of this letter and the expectations regarding you agent duties for Monday, January 10 2005 . . .

This letter is referred to below as the January 5 Memorandum. Prior to its issuance, Karl had not required Corcoran to obtain written approval to attend to WSEU related activities and had not required the specificity for the basis of the absence the Memorandum sought. After receiving this letter on January 6, Corcoran phoned Harris, questioned why he was subject to these restrictions, and questioned why he should be subject to restrictions not imposed on other Local 2748 officials. Harris, who was unaware of the January 5 Memorandum, responded that the January 5 Memorandum was not as draconian as Corcoran asserted, and that it might clarify supervisor/steward relationships. She asked Corcoran to provide her an updated list of Local 2748 stewards. After the conversation, she decided that Corcoran's questions afforded the opportunity to set forth a uniform standard of addressing his concerns as well as those of supervisors who had earlier questioned her on the appropriate handling of steward requests. In a Memorandum addressed to "PSS Union Stewards", "cc'd" to a variety of DOC supervisory personnel, and dated January 7, Harris stated:

> Recently I received an updated PSS Steward list from Local 2748 President Tom Corcoran. In order to ensure operational needs are being met, when requested to act as a local representative at investigatory meetings or in processing grievances, you must secure approval from your immediate supervisor prior to attending the meeting. The request to your supervisor should include specific information as to the reason for the meeting, the expected duration, location of the meeting, etc.
>
> In addition, when requesting to attend other union activities provided for in the WSEU contract, (union conventions, educational classes, bargaining unit conferences, local union meetings, monthly steward meetings, bargaining days or any other union activity) you are required to provide your immediate supervisor at least ten (10) calendar days advance notice (written notice when required by the contract) of your intention to attend such functions, including identifying the applicable contract provision.

This memorandum is referred to below as the January 7 Memorandum. Following the issuance of these memoranda, certain DCC administrators sought to impose restrictions on the amount of travel by Local 2748 stewards, including Corcoran, to represent unit members in contract administration matters.

14. On January 10, 2005, the Commission issued an Order, DEC. NO. 30340-C, which is based on the litigation noted in Finding of Fact 10, and which required the State to post a notice in all eight DOC offices in Madison rather than the one DOC Madison office in which the State had posted the notice required by the Commission in DEC. NO. 30240-B (WERC, 7/04). Corcoran and Karl met on January 10, 2005 to discuss the January 5 Memorandum. The meeting included a WSEU representative for Corcoran and a DOC administrator to take notes for Karl. The meeting was acrimonious. Among other points, Karl and Corcoran discussed whether the Master Agreement required steward notice to a supervisor for WSEU related work or supervisory approval; whether Corcoran was under investigation; whether or not Karl's request for written approval tracked State practice; whether or not the January 5 Memorandum violated State law; and whether or not Karl was aware of or had violated the Arrangement. Karl denied knowledge of the Arrangement and denied that LTE coverage in the Beaver Dam office was to assist Corcoran in his DCC workload. Corcoran accused Karl of deliberately assigning Corcoran a caseload when Karl knew Corcoran would not be available to handle it. Karl accused Corcoran of deliberately avoiding caseload responsibilities. Corcoran identified the non-DCC caseload duties, including WSEU work, which would keep him from the Beaver Dam office over the next few weeks, including a meeting in Madison that afternoon. Karl approved Corcoran's absence for the afternoon meeting and stated he would reply to Corcoran in writing regarding the other identified activities by the close of the work day on January 10. Among the activities identified by Corcoran for Karl was an LMC meeting set for January 11 and two meetings outside of Beaver Dam on January 12.

15. In a memo to Corcoran dated January 13, 2005, and headed "RE: 1-12-2005", Karl stated:

> On Monday, January 10, 2005 I directed you to submit all requests for time to participate in union activities directly to me in advance of the proposed union activity. I advised you that I would promptly review such requests and respond to you in writing. Further, I informed you that you would not be permitted to attend the activity until you received my authorization to do so.
>
> On Wednesday, January 12, 2005 you were absent from the Beaver Dam DCC offices engaging in union activities without my prior authorization. This job notification is to advise you future incidents of that type will be considered insubordination.

The memo refers to the activities noted by Corcoran during the January 10 meeting. Corcoran attended each meeting set for January 12. Karl did not formally approve or deny the absences, but viewed one meeting which took place prior to work hours as appropriate, while viewing later

meetings in Sheboygan as inappropriate due to the presence of other WSEU representatives in the Sheboygan area. In a memo to Corcoran dated January 13, 2005 and headed "RE: 1-10-2005 Meeting", Karl set out his response to the activities from January 14 through January 27, which had been noted by Corcoran during the January 10 meeting. Karl approved certain activities and did not approve others, including an all day meeting of SEPAC, a political action committee for State employees, set for January 14. Corcoran had attended such meetings in the past, using unpaid leave, with Karl's approval. Corcoran responded to the denial of approval for the SEPAC meeting by phoning Harris, and obtaining her approval to attend the meeting, using unpaid leave.

16. Karl continued to perceive Corcoran to be neglecting his DCC caseload, and continued to document his concerns to supervisors throughout January, 2005. For example, Karl documented, via e-mail dated January 18, his opinion that Corcoran had, on January 13, reported to work late, and then kept three offenders waiting for an inordinate amount of time in the Beaver Dam office while Corcoran conducted extended phone conversations. Karl continued to use other employees to cover for Corcoran's absence, but could not use LTE Frank Mesa, whose appointment Grosshans terminated effective January 21. In a memo to Regional Chief Sally Tess dated January 25, Karl documented his concern that Corcoran had been guilty of insubordination on January 20, for failing to provide Karl "the specific meeting time" for a Local 2748 meeting in Waupaca on January 19.

17. Karl's relationship with Corcoran continued to deteriorate. Throughout January of 2005, Corcoran had a voice-mail greeting and an e-mail auto reply message that specifically noted how to contact him on a union-related matter, but did not refer to his Probation and Parole Agent position or offer specific means to contact him regarding DCC business. Karl became aware of this, and acted to change the message to delete the WSEU contact information and replace it with DCC contact information. Regarding the voice-mail, Karl directed Virginia Allen, the Office Manager of the Beaver Dam Office, to reset Corcoran's voice mail message sometime on or about January 10. When confronted by Corcoran on the point, Karl informed Corcoran that the message improperly ignored DCC business and improperly solicited WSEU business. Karl added that the e-mail auto reply was similarly improper and needed to be corrected. In a grievance submitted on Corcoran's behalf dated January 31, Local 2748 alleged, "On or about January 6, 2005, DCC management in the Beaver Dam office tampered with Local 2748 President's telephone service, including voice mail." The State and WSEU ultimately settled the grievance, noting on the grievance form

> Supervisor will not tamper with phone or voicemail of grievant. Per the contract telephone can be used for union business.

State representatives who settled the grievance agreed with Karl's view that the voicemail and e-mail auto reply messages improperly neglected DCC-related business contact information, but would not support Karl's decision to act without first contacting Corcoran. Karl and Allen understood Corcoran's message to have made it impossible for certain DCC supervised offenders to contact Corcoran.

18. The Arrangement was the subject of sporadic discussion between Beil and Wild and other State administrators from early 2004 through the September and December elections. The ongoing tension between Karl and Corcoran, coupled with Grosshans' dismissal of Mesa as an LTE, brought the dispute regarding the Arrangement to a head. After a series of WSEU/State contacts, Raemisch set out the State's position in a letter dated February 1, 2005, which states:

> . . . We are unaware of any written agreement which provides that Mr. Corcoran would be allowed to act as a full-time steward at state expense. In addition, there is no authority, either by law or by contract that would permit a Department Secretary to negotiate with the union to allow a full-time state employee who receives 100% of his pay from the state to perform union activities on a full-time basis. In the absence of any such authority, the current DOC administration does not believe an agreement of this nature would be legal. Moreover, OSER has advised DOC that while the collective bargaining agreement between WSEU, AFSCME Council 24 and the State of Wisconsin sets forth in detail allowable union activities on state time, neither OSER nor DOC has the authority to negotiate to abolish a state authorized position which is what would occur if OSER negotiated for a 100% state paid employee to function as a full-time union steward.
>
> . . .
>
> While we acknowledge that Mr. Corcoran has apparently been acting as a full-time union steward for some time, it has not been with the approval of this administration. After learning of this situation we consulted with OSER legal counsel about Mr. Corcoran resuming his duties as a full-time Probation and Parole Agent. At that time Mr. Corcoran had an unfair labor practice case pending against the State of Wisconsin. To avoid the perception that the Department was retaliating against him for filing the ULP complaint, we followed the advice of legal counsel and did not immediately require Mr. Corcoran to assume a full-time Probation and Parole Agent caseload. Mr. Corcoran continued to act as a full-time union steward at state expense until OSER received notice from Council 24 leadership that Larry Reed had been elected as President of Local 2748 . . . . (I)f any agreement had existed regarding Mr. Corcoran's workload and duties, it terminated as a result of the change in leadership. . . .
>
> While Mr. Reed was Local 2748 President, neither he, nor the union, requested that he be allowed to have zero caseload to perform union activities on a full-time basis. Rather, Mr. Reed maintained a full caseload during his tenure as President. Even if Council 24 had made such a request the DOC would not have entered into a similar agreement regarding Mr. Reed as this administration believes such an agreement would be illegal.
>
> . . . Mark Wild . . . notified you that . . . the state would not agree to any arrangement whereby Mr. Corcoran would be allowed to continue to act as a full-

> time union steward at state expense if he was re-elected . . . (Y)ou replied that if Mr. Corcoran was re-elected, the former agreement would still be in effect and that . . . if DOC did not honor it, then DOC would need to return the non-represented positions that were part of the agreement to the represented ranks.
>
> . . . (W)hile we feel DOC is under no obligation to take such action, to put this issue behind us, the DOC is converting three currently non-represented positions to represented . . . positions. . . . We have already notified Mr. Corcoran of the process necessary for receiving approval for those union activities. This will effectively place the union and the DOC in the same position they were in prior to any agreement with the previous administration.
>
> As you are also aware, at one point . . . (DCC) had hired a Limited Term Employee to cover some of Mr. Corcoran's workload during bargaining. DCC continued to employ the Limited Term Employee to cover some of Mr. Corcoran's workload during bargaining. Since the Professional Social Services Unit has a settled contract, Mr. Corcoran is no longer in ABT and we are converting three non-represented positions to represented Probation and Parole Agent positions, we have terminated the LTE and Mr. Corcoran will be responsible for his own caseload . . .

Beil responded to the Raemisch letter in a February 7 letter to Frank, which states:

> On February 3, 2005 I received a letter . . . which basically set a new direction in Corrections regarding staff in Community Corrections and the union that is legally certified and duty bound to represent them. I might add that this "new direction" is not positive, is confrontational and violates 12 years of good faith. It is obvious that your administration forgot that for a two-year period you continued the agreement regarding Mr. Corcoran, and in essence approved it. It is also clear to us that your actions cited in the letter and supported by the daily harassment of Mr. Corcoran and other leaders of Local 2748 show a clear anti-union animus and lack of respect for labor-management relations. That's unfortunate and will only exacerbate the current tenuous relationship. I thought a Democratic administration worked with and for labor, and did not find cheap, inane self-serving excuses and reasons to undo years of labor-management relations. . . .

In a memo to Corcoran dated February 10. 2005, Ron Kalmus, the Assistant Region 7 Chief, notified Corcoran to appear at an "Investigatory Interview" on February 15 to discuss "potential work rule violations" concerning Corcoran's travel from the Beaver Dam office on WSEU related business on a number of occasions between January 12 and February 9. The purpose of the interview was "to ask questions about" Corcoran's travel to a number of WSEU-related matters, including the January 12 travel to Sheboygan, which is noted in Findings of Fact 14 and 15, and the January 19 travel to Waupaca, which is noted in Finding of Fact 16. Frank responded to Beil's February 7 letter in a letter dated February 14, which states:

> I have received your letter . . . regarding our decision to discontinue the practice of paying Mr. Corcoran a full salary . . . plus fringe benefits, for doing no work as a probation and parole agent. This figure does not include the money the Department has been spending to hire a limited term employee to cover Mr. Corcoran's caseload because he does no work.
>
> . . . Contrary to the suggestion of your letter, out of respect for the labor-management relationship, we have looked at this issue from every conceivable direction before taking action . . .
>
> In the final analysis, the arrangement is simply indefensible. We have decided the practice is wrong and it must be ended. . . .
>
> There is not another union President in AFSCME employed by the Department of Corrections who is allowed to collect full time pay from the state for doing no state work. The practice we are ending was not bargained and recorded publicly as part of a collective bargaining agreement. The fact that something has been going on for a long time based upon some verbal agreement with a previous administration does not make it right. . . .

Beil responded in a letter dated February 23, which states:

> I often advise our leaders not to get into a 'pissing match with a skunk,' but in this instance I cannot resist. I found it absolutely incredulous that you and your Administration are so bold as to make this issue a taxpayer vs. rank and file worker issue. . . .
>
> Unfortunately your legal tunnel vision about what constitutes "good labor management relations" drives the relationship in the opposite direction. . . .
>
> We feel strongly that the arrangement established in your agency with Local 2748 provided "common ground and served the people of Wisconsin". The value of the arrangement lies in the problems avoided, grievances settled, and enhanced communications. . . .

DCC did not conduct an investigatory interview with Corcoran on February 15. On February 14, Corcoran went on an unpaid leave of absence to perform organizing services for WSEU. While President of Local 2748 and an active DCC employee, Corcoran received a WSEU stipend. At all times relevant to this matter, Corcoran's duties as Local 2748 President extended beyond his scheduled hours of work for DCC.

19. The last LTE utilized by DCC to provide caseload relief for Corcoran was Frank Mesa. DCC terminated Mesa's appointment as noted in Finding of Fact 16. Mesa was a bi-lingual, retired DOC employee recruited originally by Corcoran. DCC extended Mesa another

appointment to an LTE position within roughly one month of the termination noted in Finding of Fact 16. Mesa performed duties to relieve ongoing workload demands of the Beaver Dam office exacerbated by Corcoran's absence from the office. Mesa also performed duties independent of Corcoran's availability.

20. The State and the WSEU were parties to a Master Agreement covering the years 1975-77 which provided for up to five full-time grievance representatives at State expense. The provision has not been included in any Master Agreement from 1977 to the present. At no point relevant to this matter, has any other WSEU Local President other than that of Local 2748 been covered by an understanding like the Arrangement. The Master Agreement provides for certain WSEU-related activities, such as the processing of a grievance, which can occur during work hours and which will be compensated by State payment of a regular wage rate. Under the State's time accounting system, such activities are covered by Code 19. The Master Agreement provides for certain WSEU-related activities, such as SEPAC meetings, which can occur during working hours, but which will not be compensated by State payment of a regular wage rate. Under the State's time accounting system, such activities are covered by Code 21. No WSEU or State representative responsible for the implementation of the Arrangement contemplated it to supersede the Master Agreement, a Local Agreement, or to impact the accounting of Corcoran's time including the use of Code 19 or Code 21.

21. The Arrangement reflected a mutually understood practice serving the twofold purpose of permitting Corcoran to attend to certain Local 2748 related responsibilities, particularly those involving collective bargaining and LMC activities, with a minimum of disruption to the workload of the DCC Beaver Dam office due to Corcoran's absences. At no point during the creation or implementation of the Arrangement did the WSEU and State representatives agree that the Arrangement permitted Corcoran to pursue WSEU-related activities on a full-time basis or to pursue activities without regard to the mutual benefit inherent in LMC or other collective-bargaining related duties. LTE usage in the Beaver Dam office reflected these dual purposes by providing DCC duty coverage, which could approach full coverage of Corcoran's caseload at time-intensive periods such as the negotiation of a Master Agreement, but need not involve any coverage of Corcoran's DCC duties at other times. The State did not use LTEs solely to cover Corcoran's caseload, but did use LTEs to address caseload matters created by Corcoran's absence from the Beaver Dam office. State representatives who implemented the Arrangement did so consistent with their understanding of Chapter 230, Stats., and relevant provisions of the Wisconsin Administrative Code. At no point during the implementation of the Arrangement did the State contemplate using an LTE position in excess of 1043 hours during a period of time running 26 pay periods starting with the date of appointment; or using consecutive appointments of an LTE position to exceed those limitations. At no point during the implementation of the Arrangement did the parties mutually understand that Corcoran could leave the Beaver Dam office without notice; without noting a generic statement of the business taking him from the Beaver Dam office; without noting where he could be contacted during work hours; or without properly coding his leave under the State TAC system, including notation of Code 19 and Code 21.

22. Corcoran's performance of WSEU-related activities focusing on LMC efforts and collective bargaining related duties, including contract administration, is lawful, concerted activity. DCC administrators throughout the DOC chain of command were aware of such activities. DOC/DCC administrative effort to assign Corcoran caseload duties, prior to the September 2004 election, does not reflect hostility toward the exercise of lawful, concerted activity. DOC/DCC administrative effort to assign and to enforce a full-time DCC caseload for Corcoran after the September 2004 election was motivated, at least in part, by hostility toward Corcoran's exercise of lawful, concerted activity. OSER/DCC/DOC efforts to restrict the Arrangement to its consensual core purposes noted in Finding of Fact 21 and to enforce Corcoran's performance of the duties of his Probation and Parole Agent position do not reflect hostility to Corcoran's exercise of lawful, concerted activity. OSER/DCC/DOC efforts to unilaterally repudiate the Arrangement during the term of a Master Agreement do reflect hostility to Corcoran's exercise of lawful, concerted activity.

CONCLUSIONS OF LAW

1. Complainants constitute a "Labor organization" within the meaning of Sec. 111.81(12), Stats.

2. Respondents constitute an "Employer" within the meaning of Sec. 111.81(8), Stats.

3. The Master Agreement contains a provision for grievance arbitration, which Respondents have not renounced, and those aspects of the complaint which implicate the binding interpretation of the Master Agreement do not pose any issue for Commission determination under Sec. 111.84(1)(e), Stats.

4. Respondents' failure to repudiate the Arrangement during collective bargaining and its unilateral action to repudiate the Arrangement during the term of the Master Agreement constitute a violation of Sec. 111.84(1)(d) and derivatively, Sec. 111.84(1)(a), Stats.

5. Respondents' unilateral action to terminate the Arrangement was motivated, at least in part, by hostility to the exercise of lawful, concerted activities granted by Sec. 111.82, thus violating Sec. 111.84(1)(c), Stats., and derivatively, Sec. 111.84(1)(a), Stats.

ORDER

1. Those portions of the complaint alleging an independent violation of Sec. 111.84(1)(a), Stats., and alleging violation of Sec. 111.84(1)(e), Stats., are dismissed.

2. To remedy its violation of Secs. 111.84(1)(a), (c) and (d), Stats., the State shall immediately:

a. Cease and Desist from any unilateral action to repudiate the Arrangement during the term of the Master Agreement and to enforce the January 5 and 7 Memoranda, including any related discipline.

3. Take the following affirmative action which will effect the policies and purposes of SELRA:

a. Rescind the January 5 and January 7 Memoranda;

b. Rescind any action based on the January 5 and January 7 Memoranda, including any action to discipline Corcoran for conduct covered by the Memoranda;

c. Expunge any reference in Corcoran's personnel file(s) to any action based on the January 5 and 7 Memoranda;

d. Restore the Arrangement as it existed prior to September of 2004, consistent with the rough understanding noted in Finding of Fact 21 and collectively bargain with WSEU Local 2748 regarding its appropriate scope and duration;

e. Notify all employees, by posting in conspicuous places in the Oshkosh, Beaver Dam and Madison offices where employees are employed, copies of the Notice attached hereto and marked "Appendix A." This notice shall be signed by the Director of the Division of Community Corrections, and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for a period of thirty (30) days thereafter. Reasonable steps shall be taken by the Respondent to insure that this Notice is not altered, defaced or covered by other material.

f. Notify the Wisconsin Employment Relations Commission within twenty (20) days following the date of this Order of the steps taken to comply herewith.

Dated at Madison, Wisconsin, this 28th day of March, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Richard B. McLaughlin /s/

Richard B. McLaughlin, Examiner

APPENDIX "A"

NOTICE TO ALL DIVISION OF COMMUNITY CORRECTIONS EMPLOYEES:

Pursuant to an order of the Wisconsin Employment Relations Commission, and in order to effectuate the purposes of the State Employment Labor Relations Act, we hereby notify our employees that:

1. WE WILL NOT INTERFERE with the right of employees and their chosen representatives to engage in lawful, concerted activity for the purpose of mutual aid and protection;

2. WE WILL NOT REPUDIATE, during the term of the Master Agreement between the State of Wisconsin and Wisconsin State Employees Union (WSEU), AFSCME, Council 24, AFL-CIO, Local 2748 past practices bearing on employee exercise of lawful, concerted activity which are not covered by Master Agreement provisions.

3. WE WILL BARGAIN with the Wisconsin State Employees Union (WSEU), AFSCME, Council 24, AFL-CIO, Local 2748 concerning the appropriate scope and the duration of past practices bearing on employee exercise of lawful, concerted activity which are not covered by Master Agreement provisions.

4. WE WILL RESCIND a Memorandum dated January 5, 2005, issued to the President of the Wisconsin State Employees Union (WSEU), AFSCME, Council 24, AFL-CIO, Local 2748 as well as a Memorandum dated January 7, 2005, issued to PSS Union Stewards and WE WILL NOT ENFORCE those Memoranda.

STATE OF WISCONSIN
DEPARTMENT OF CORRECTIONS
DIVISION OF COMMUNITY CORRECTIONS:

_____

By Director of Division of Community Corrections Date

THIS NOTICE WILL BE POSTED IN THE LOCATIONS CUSTOMARILY USED FOR POSTING NOTICES TO EMPLOYEES FOR A PERIOD OF THIRTY (30) DAYS FROM THE DATE HEREOF. THIS NOTICE IS NOT TO BE ALTERED, DEFACED, COVERED OR OBSCURED IN ANY WAY.

STATE OF WISCONSIN, DEPARTMENT OF CORRECTIONS

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The Parties' Positions

Complainants' Brief

After an extensive review of the evidence, Complainants contend the complaint "raises two basic issues". The first is whether Respondents' termination of the Agreement is unlawful and the second is whether Respondents' conduct surrounding the January 5 and 7 memoranda "unlawfully interferes with Local 2748's ability to represent its members."

The evidence establishes that DOC administrators unilaterally terminated the Arrangement. The rationale for terminating it set forth in Raemisch's letter is spurious. The letter misstates the Arrangement by alleging it made Corcoran a full-time WSEU representative at State expense. Rather, it required LTE coverage for Corcoran's performance of WSEU duties on an as-needed basis. Respondents' assertion that the annual limits on LTE hours limited Corcoran's performance of WSEU duties has no basis in the evidence or in the State's common usage of LTE positions. That the Arrangement was not reduced to writing does not make it unenforceable. Commission and judicial precedent confirm this, as do common-law precepts of contract formation. Nor is it unlawful or improper for a union representative to be paid full-time by an employer for the performance of union business. The Master Agreement itself recognizes the propriety of such compensation agreements. Nor is the absence of OSER ratification an impediment to the Arrangement's enforcement. Section 11/2/A of the Master Agreement recognizes this by authorizing the negotiation of Local Agreements, which are not subject to OSER ratification. State assertions that the Doyle administration cannot be bound by "collective bargaining agreements entered into by prior administrations" are "preposterous." No more credible is the assertion that Respondents waited until December of 2004 to challenge the Arrangement due a pending retaliation charge involving Corcoran.

The evidence will not support any of Respondents' rationale for terminating the Arrangement, other than its hostility toward Corcoran. That Corcoran lost the September election has no bearing on the Arrangement, since he promptly challenged the results. When his challenge was affirmed, he prevailed in a rerun, thus establishing he never left office. That Reed did not seek the benefit of the Arrangement is irrelevant to its enforcement, particularly since Reed enjoyed improper support from Respondents. Nor will the evidence support the assertion Beil ever accepted an offer from Wild to terminate the Arrangement. Rather, Beil asserted if Respondents' removed their consideration for the Arrangement then Complainants would respond in kind. The Arrangement is, then, "a collective bargaining agreement within the meaning of Sec. 111.84(a)(1)(d) and (e) and Respondents unilaterally terminated (it) in violation of these provisions."

Respondents' conduct surrounding the January 5 and 7 Memoranda establishes an independent violation of Sec. 111.84(1)(a), Stats., since, without regard to Respondents' intent, it had a reasonable tendency to interfere in the assertion of protected employee rights. Beyond this, the conduct violates Sec. 111.84(1)(c), Stats. Respondents were hostile to Corcoran's advocacy, and terminated the Arrangement based, in part, on that hostility. Beyond this, an examination of the evidence establishes that Karl acted specifically to curtail Corcoran's advocacy efforts. The requirements announced in the Memoranda gave Karl "veto power over any union activity in which Corcoran was engaged." The requirements unduly restrict contractual rights and impose procedural and substantive notice requirements beyond anything contemplated in the Master Agreement. The limits set on Corcoran were unprecedented and discriminatory because they focus on him alone. Harris' attempt to extend the requirements to other WSEU representatives does no more than confirm their invalidity.

Respondents' unlawful hostility is manifested by its improper support for Reed. When Corcoran defeated Reed, Respondents embarked on a campaign to contain him. That campaign manifests improper hostility evidenced by the assignment of a full caseload to Corcoran as well as the refusal to provide LTE backup for him. Karl's unilateral tampering with Corcoran's voice mail as well as his threats to discipline Corcoran similarly manifest improper hostility. Examination of the circumstances surrounding the January 5 and 7 Memoranda establish the reasons to restrict Corcoran were pretextual. Respondents' attempt to designate union stewards is egregious.

Complainants conclude that the Commission should direct Respondents to "(1) restore the Agreement; (2) rescind the January 5 and 7 memoranda; (3) rescind the February 10 disciplinary letter; (4) permit Local 2748 to designate stewards without interference; and, (5) otherwise restore the procedures for allowing Corcoran and other Local 2784 officials to engage in union activities that were in effect prior to September 2004; and, such other relief as deemed just and appropriate."

Respondents' Reply

After an extensive review of the evidence and governing case law, Respondents contend that credibility issues "should be resolved against Mr. Corcoran." More specifically, Respondents assert that his testimony regarding the January 3, 2005 meeting; the January 24 e-mail; the Hanfler matter; the issue of lobbying on State time; the August 28, 2003 memo; the attribution of retaliatory statements to Karl which Corcoran actually made; and his unfounded assertion that he was willing to work lack credibility.

Acknowledging that "there is no doubt some type of 'arrangement' was made", Respondents argue there is consensus on only three aspects of what it entailed: (1) that some LTE coverage would be provided to the Beaver Dam office; (2) that Corcoran would assume a caseload; and (3) that the LTE coverage would permit him to attend to certain unspecified and unidentified union activities. The record is so unclear on what union activities the "arrangement" was to cover, that it is easier to identify what it did not cover. Those activities

include: (1) bargaining time; (2) grievance representation; (3) grievance pre-filing; (4) Code 21 activities; (5) witness testimony at grievance hearings while under subpoena; (6) LMC and similar departmental meetings; and (7) activities as Local 2748 President. The evidence shows any activities covered by the arrangement would have to arise as Code 19. There is no evidence that clarifies how much coverage would be provided for Corcoran, what limits were placed on him, and how the Arrangement could be terminated.

As a statutory matter, OSER is the State's bargaining representative, and Commission case law establishes that it is a violation of the duty to bargain to bypass a bargaining representative. Against this background, the Arrangement is unenforceable. Complainants insist that the Arrangement is a collective bargaining agreement and no such agreement is possible unless a duly authorized bargaining representative agrees. There is no legal basis to support the assertion a state agency can bind the State on a subject of bargaining, unless OSER is involved. The Master Agreement authorizes Local Agreements as well as Memoranda of Understanding on agency-specific issues. There is no such authority for the Arrangement. In fact, Complainants once negotiated for payment by the State to employees who worked full-time on WSEU matters. That arrangement was negotiated out of the Master Agreement roughly twenty-five years ago. OSER and the WSEU have also negotiated for a leave of absence for an employee to attend to WSEU matters. The Arrangement flies in the face of these practices, since Complainants bypassed OSER. Complainants' were aware of OSER's position, and acted to make the Arrangement knowing of that opposition. The Arrangement has no statutory basis and no basis in equity since Complainants have "unclean hands". It must be considered unenforceable.

Since the Arrangement cannot be considered a collective bargaining agreement, it cannot be protected under Secs. 111.84(1)(d) or (e), Stats. That it was not submitted for ratification under governing statutes underscores this. Even if this was not the case, Section 15/1/1 of the Master Agreement establishes that it was superseded by subsequent bargaining. As argued by Complainants, the Arrangement survived three Master Agreements. As established by Section 15/1/1, no verbal agreement can rise to such a level.

The Arrangement lacks the minimal specificity which putting it into writing would provide. Beyond that, the evidence of the verbal understanding is so vague it cannot be considered enforceable. The understandings are so uncertain that it would be impossible to reinstate it, even if a basis for doing so existed. Case law governing contract formation affirms this. In fact, the Arrangement is so vague that there is a significant possibility that Corcoran acted to make his personal decisions the measure of what the Arrangement permitted. No testimony can clarify how Corcoran was to account for his time, whether through Code 19 or Code 21. The testimony of Complainants' own witnesses is inconsistent on these points.

The terms of the Arrangement, as argued by Complainants, interfere with the lawful authority of OSER the Legislature and DOA regarding positions. Since wages, hours and conditions of employment must be negotiated through OSER, the collective bargaining aspects

of the Arrangement conflict with OSER's authority. Beyond this, the creation or abolition of a position, as well as its duties, must be passed on by the Legislature and by OSER as well as the appointing authority, which includes DOA. In this case, Corcoran's duties as a state employee had been through the statutory scheme prior to the Arrangement. It cannot be contended that these duties could be completely altered through an understanding which has no basis in Chapter 230, Stats. Corcoran's position as a Probation and Parole Agent is eligible for protective status, if certified by OSER. It is established law that protective status cannot be given a position which performs less than 51% protective duties. In spite of this, Complainants contend that the Arrangement could cover a position eligible for protective status, yet result in that position performing few, if any, protective duties.

Nor is the Arrangement supported by public policy. Corcoran did not fully disclose to supervision what he was doing, and such secrecy is incompatible with sound civil service employment policy. The negotiation of the Arrangement was done in secrecy, an indefensible process if public government is to be open. Nor can State subsidy of an employee performing WSEU business while he receives a WSEU stipend as President be justified.

If there was an enforceable Arrangement, Corcoran's defeat as President ended it. His successor carried a full caseload while he was President, pending the rerun election. He also had no difficulty communicating his duties to management. Even if there was an enforceable agreement, Corcoran's conduct so abused it that it should not be enforced.

Respondents' assignment of a caseload to Corcoran in the Fall of 2004 was, in any event, consistent with the Arrangement. Corcoran never received a full caseload. While he performed his duties, his absence was covered in the Beaver Dam office, sometimes by Karl, sometimes by an LTE and sometimes by his fellow employees. In fact, there is no credible evidence that Respondents kept Corcoran from performing any duty he requested.

The evidence establishes Respondents acted reasonably in issuing the January 5 Memorandum. Corcoran continued to abuse the Arrangement after his defeat. He left work in late September to attend to a grievance without securing authorization. He failed to attend a number of ABT training sessions, and improperly avoided some he should have attended. He used Code 21 to attend to the installation of a WSEU phone line at his home. The evidence is rife with similar examples of abuse. Beyond this, Corcoran knew of the need to keep supervision informed of his location during work hours. He informed other WSEU officials of this need. The January 5 Memorandum did no more than restate known, contractually based duties on Corcoran. That Respondents issued Corcoran notice of an investigatory meeting has no greater significance under SELRA than the January 5 Memorandum. Karl never threatened Corcoran with discipline for attending a WSEU function. Rather, he reinforced the need for Corcoran to obtain approval before leaving the worksite.

The January 7 Memorandum does not violate SELRA. Rather the memo addresses the line between Code 19 and Code 21 activities. This line is significant under the Master Agreement, and there is no evidence to support the assertion Respondents acted to curtail

legitimate WSEU activities during work hours. Extending the restrictions placed on Corcoran to other WSEU representatives represents no more than an attempt for consistency.

None of the misconduct alleged against Respondents can be considered retaliatory. The August 28, 2003 memo was prepared prior to the issuance of DEC. NO. 30340-A. Respondents' failure to post the compliance memo in all Madison offices was a good faith dispute over an ambiguous portion of the governing Order. Examination of the credible retaliation allegations against Respondents for events following it establishes that Respondents were doing no more than enforcing legitimate directives. The record contains no credible proof of unlawful animus and no viable precedent to enforce the Arrangement.

Complainant's Reply

Respondents' brief largely ignores the facts and authority advanced by Complainant, thus acknowledging their force. Respondents seek to "divert the Examiner's attention from the relatively straightforward issues" of the complaint. More specifically, Respondents ignore that "Corcoran's combined Code 19 and Code 21 time for the years 2000-04 approximated 1000 hours per year, less than **50%** of his time." Nor do Respondents advance other credible proof that Corcoran's "full-time" WSEU activity somehow implicates the abolition of a Chapter 230, Stats., position.

The authority for contract formation ignored by Respondents establishes that the Arrangement is sufficiently definite to be enforced. In consideration for WSEU concession that three training positions could be removed from the unit, Litscher agreed to "permanently assign an LTE to cover for Corcoran while he was absent on union business". The attempt to specify the business under Code 19 or Code 21 has no bearing on the Arrangement, whatever bearing it has to Respondents' case. Rather, the Arrangement sought to cover Corcoran's work duties while he was unable to perform them due to his WSEU position. In fact, Corcoran's relief from a full-time caseload "was a managerial decision made by Karl and Kasprzak". That "Karl and Kasprzak successfully implemented this Agreement for over four years without any disputes regarding the purported vagueness of its terms" belies Respondents' contentions regarding its vagueness.

Respondents' contention that the Arrangement conflicts with other statutes has no persuasive force. Litscher presented himself to Beil as having the authority to enter into it and was then DOC's highest-ranking officer. OSER's authority over the bargaining process is that of a coordinator rather than that of an exclusive decision-maker. The existence of Local Agreements establishes that OSER is not the sole source of agreements governing wages, hours and conditions of employment. Section 15/1/1 of the Master Agreement has no bearing on this dispute since the Arrangement does not conflict with the Master Agreement. Even if Respondent's public policy arguments were relevant, no concerns regarding Corcoran's conduct were raised "at the time the Agreement was terminated". Even if it could be proven that Corcoran was guilty of misconduct, the recourse is discipline, not repudiation of the Arrangement. In any event, there are valid public policy reasons to honor the Arrangement.

Relevant circumstances establish the invalidity, under SELRA, of the January Memoranda. Corcoran's credibility as a witness has no bearing on this point, since the allegations of a violation of Sec. 111.84(1)(a), Stats., are governed by an objective standard. Beyond this, when Corcoran learned of the January 3 meeting has no bearing on Karl's state of mind when he issued the January 5 Memorandum. In point of fact, Respondents' concern with Corcoran's credibility is less an argument on the merits than "a cheap shot".

A more balanced view of the evidence demonstrates that the "reasons for issuing the January 5 Memorandum were pretextual." That Corcoran was able to keep Karl adequately informed of his duties for eight years undercuts the persuasive force of the contention that events in the Fall of 2004 warranted the January 5 Memorandum. That Memorandum seeks "supervisory **approval** of all union activities" rather than "the contractually required **notice** for certain union activities". No other agency mandates such requirements. The January 7 Memorandum did nothing more than attempt to conceal Respondents' hostility toward Corcoran. The evidence establishes that "the memoranda were issued and the Agreement terminated based upon union animus and deep-seated antipathy at the prospect of dealing with the ever vigilant Corcoran as the Local 2748 President for three more long years."

Karl's January 13 memo was not a work directive but was, in fact, a threat to discipline Corcoran. The allegations of the complaint have been proven and it "should be sustained and appropriate relief ordered."

DISCUSSION

The scope of the parties' dispute demands focus. Legally, the pleadings question the application of Secs. 111.84(1)(a)(c)(d) and (e), Stats., and are broad enough that the parties stipulated that the Commission should interpret the labor agreement to the extent necessary to address the dispute, in spite of the presence of grievance arbitration in the Master Agreement, see STATE OF WISCONSIN, DEC. NO. 20830-B (WERC, 8/85). Factually, the evidence stretches over seven years, including periods when a Master Agreement was in effect and periods in which it was not. The WSEU persuasively argues that the allegations can be focused by addressing two basic issues. The first concerns the termination of the Arrangement and the second concerns the impact of a series of events, including the January 5 and 7 Memoranda, on WSEU's ability to represent its members.

What Was The Arrangement?

The answer to this question is threshold to determining whether the Arrangement was properly terminated. Answering the question is made more manageable by establishing what it was not. Subsection (e) makes "any collective bargaining agreement" enforceable, and the Commission has determined that a grievance settlement can be a "collective bargaining agreement", see STATE OF WISCONSIN, DEC. NO. 25281-C (WERC, 8/91), as can a Local Agreement, see STATE OF WISCONSIN, DEC. NO. 25978-B (WERC, 7/90). The Arrangement was neither. Neither party asserts that it constitutes a Local Agreement, and it is evident that it

was neither negotiated by local representatives nor addressed to local conditions. It was neither created nor maintained to resolve specific litigation.

The WSEU characterizes the Arrangement as a "gentlemen's agreement", urging that it reflects an exchange of offers in return for valuable consideration. As the State points out, this characterization raises more problems than it solves. From a more factual perspective, it was not written; was given no duration; and was given no clear terms. From a more legal perspective, it was not negotiated through the State's bargaining representative under Sec. 111.815(1), and Sec. 111.81(14), Stats. Even noting that Local Agreements, MOUs or Negotiating Notes can be initiated outside of OSER cannot fill this gap. Each of those agreements is set to writing, placed in the Master Agreement and submitted to a statutory ratification procedure under Sec. 111.92(1)(a), Stats. Beyond this, the lack of clarity undercuts the WSEU's assertion of a gentlemen's agreement, since the use of LTE coverage for Corcoran's position poses significant statutory issues regarding the authority of DOC, DCC and OSER to create or to eliminate positions. Other issues loom. For example, if the gentlemen's agreement is a binding contract to cover Corcoran's caseload with an LTE position or positions, can DOC, DCC, OSER and WSEU representatives reach a gentlemen's agreement to layoff a unit position in favor of LTE coverage? How is the creation of a DCC position without DCC duties reconciled to statutes governing the creation and classification of positions? Beyond this, the absence of any understanding on duration poses difficulties with Sec. 111.92(3), Stats.

The State's arguments, however persuasive on the unenforceability of the Arrangement as a gentlemen's agreement, fail to explain the Arrangement. The State urges on the one hand that the Arrangement cannot be considered a contract, but urges that it was terminated by State return of certain positions to the bargaining unit. This presumes that the Arrangement was a contract which could be terminated by the return of the underlying consideration. The State's answer to the complaint challenges the existence of any Arrangement, yet its brief notes, "there is no doubt that some type of 'arrangement' was made." This prefaces the fundamental issue posed by the Arrangement. Both parties acknowledge, and the evidence establishes, a common understanding that spanned a series of Master Agreements.

A review of the evidence establishes that the Arrangement was neither created nor implemented as a free-standing collective bargaining agreement. Rather, it reflected a common understanding on a mutually beneficial business arrangement meant to evolve over time. The Arrangement, in short, was a practice, part of the fabric of accepted custom that makes a collective bargaining agreement a living document, cf. STEELWORKERS V. WARRIOR & GULF NAVIGATION CO., 363 U.S. 574; 46 LRRM 2416 (1960), and "Reflections Upon Labor Arbitration", 72 *Harvard Law Review* 1482 (Archibald Cox, 1959).

Finding of Fact 21 covers the elements of the practice, and reflects that the Arrangement was a rough understanding that in return for WSEU assistance in the creation of three non-unit ABT positions, DOC would provide some assistance to Corcoran, as Local 2748 President, in reconciling his WSEU and DCC duties. The flexibility consisted of caseload

coverage and work duty assignments. The caseload coverage included regular employees and LTEs. The duty assignment assistance was to route duties to him that avoided ongoing caseload responsibility. The Arrangement reflected the understanding of WSEU and DOC personnel that Corcoran's performance of certain labor relations duties was of mutual benefit to the parties and should be encouraged to the extent possible. The Arrangement was less to subsidize his WSEU activities than to avoid having work pile up during his absences. This provided the mutual benefit of permitting labor relations duties to be performed without undercutting the performance of DCC caseload at the Beaver Dam office. The scope of the Arrangement was easiest to define during collective bargaining, and hardest to define in non-bargaining periods. There is no evidence to support the assertion that whatever coverage was provided for his caseload would, over time, demand more coverage than a single LTE position could cover. Kasprzak and O'Donnell shared this understanding, and what evidence there is regarding Litscher's view indicates he did not understand the Arrangement to relieve Corcoran of a DCC caseload. Beil testified that he and Litscher discussed caseload relief, rather than a specific minimum or maximum of coverage. The parties' elimination of fully State subsidized WSEU advocacy positions from earlier Master Agreements makes it unpersuasive to assume that the parties intended to provide such coverage via practice. Nor is there reliable evidence to show that any one LTE position, with the exception of certain periods of collective bargaining for a Master Agreement, "covered" Corcoran. Rather, DCC provided LTE positions over time to cover workload in the Beaver Dam office. Such LTEs would cover the workload of the office, which at times, might focus solely on Corcoran's caseload.

Beil and Litscher reached this rough understanding sometime around June of 1999. It embodied the elements noted in the preceding paragraph in varying form through Kasprzak's retirement. The rough understanding which created the Arrangement is contract-like, in the sense that there was an exchange of sorts. However, the understanding was not a contract. At its inception, Beil and Litscher noted the general interests each sought to advance. There was no writing made or extensive discussion of details because neither intended the matter to become a contract. Rather, each addressed the other's major concerns and trusted the specifics of the Arrangement to evolve over time through the interaction of Corcoran and his supervisors. The rough understanding reached reflects the problem solving, LMC type of effort noted in and fostered by MOU 9 and 33 rather than an attempt to create a collective bargaining agreement.

Treating the Arrangement as a practice flows from and accounts for the parties' conduct. Application of contract creation doctrine cannot. Section 15/1/1 establishes the impossibility of treating the Arrangement as a free-standing agreement. That section does not, however, address the viability of past practice in the bargaining relationship. Section 2/9/2 confirms that the Master Agreement, as other collective bargaining agreements, subsumes and embodies past practices that establish conditions of work. The "consideration" cited by the WSEU to support its assertion that the Arrangement was a contract underscores that the rough understanding was practice, rather than contract. The unit placement of the ABT positions is at most a contractually enforceable agreement to the degree it is incorporated into the Master Agreement's recognition clause. If viewed as a statutory issue, it has no meaning outside of a

formal application of SELRA through the Commission or the Courts. This was not "consideration" for the creation of a contract, but a commonly understood way to address workplace concerns. This makes the implementation of the Arrangement a matter of practice in the first instance and a matter of contract to the degree the practice is incorporated into the Master Agreement. Kasprzak's January 2003 e-mail reflects this. If the Arrangement was a contract, it did not need his support. If a practice, it needed continued advocacy to avert repudiation. Frank's February 14, 2005 letter underscores this, expressly referring to the Arrangement as a practice.

Against this background, the determinative issue is whether the State properly repudiated the Arrangement as a practice.

Was The Arrangement Properly Terminated?

Legally, this determination calls into focus the alleged violations of Secs. 111.84(1)(d) and (e), Stats., and, derivatively, Sec. 111.84(1)(a), Stats. Subsection (d) makes it an unfair labor practice for the State, "To refuse to bargain collectively . . . with a representative of a majority of its employees in an appropriate collective bargaining unit." Subsection (e) makes it an unfair labor practice for the State, "To violate any collective bargaining agreement previously agreed upon by the parties with respect to . . . conditions of employment".

Factually, this determination highlights that the Arrangement developed and changed over time. State efforts to repudiate the Arrangement essentially follow Kasprzak's retirement. As practice under the Arrangement evolved, it became a continuing irritant between Corcoran, Karl, Kasprzak and other DCC supervisors as well as unit employees in the Beaver Dam office. Kasprzak periodically interceded between Karl and Corcoran, urging Karl to continue the Arrangement while trying to balance it with Beaver Dam caseload duties. After Kasprzak's retirement, Karl's efforts to assign a full caseload to Corcoran intensified. By August of 2003, those efforts proved successful enough to produce the August 28, 2003 memo, which sought to undo certain of the duty assignment aspects of the Arrangement. Beil's and O'Donnell's intercession put that memo on hold through September of 2004. Karl's attempts to assign a caseload to Corcoran culminated in the effort to undo the Arrangement prompted by Corcoran's defeat in the September 2004 election. From then until Corcoran's leave of absence, the State actively sought to assign a full caseload to Corcoran and to reign in any non-DCC duties that interfered with his attention to that caseload. The January Memoranda are inextricably linked with this course of behavior.

This sets the factual backdrop against which Subsections (d) and (e) of Sec. 111.84(1), Stats., must be applied. Wild's testimony establishes that the State did not consider terminating the Arrangement until after it had reached agreement on a successor to the 2003 Master Agreement. Beyond this, what evidence there is indicates that the parties extended the terms of the 2003 Master Agreement. Thus, the termination must be treated as occurring during the term of a collective bargaining agreement.

The State's "duty to bargain during the term of an agreement does not extend to matters already covered by the agreement." STATE OF WISCONSIN, DEC. NO. 27365-C (WERC, 8/94) at 14; see also STATE OF WISCONSIN, DEPARTMENT OF HEALTH AND FAMILY SERVICES, DEC. NO. 31207-C (WERC, 3/06). The elements of the Arrangement noted above are not contained in the Master Agreement. There is no assertion that the State and WSEU bargained the termination of the Arrangement. Rather, they occasionally communicated irreconcilable positions. The issue thus posed is whether the State could repudiate the practice the Arrangement reflects without bargaining.

The repudiation of past practice has been discussed in some detail in Commission case law, see CITY OF STEVENS POINT, DEC. NO. 21646-A (Rubin, 1/85), AFF'D DEC. NO. 21646-B (WERC, 8/85); CITY OF MADISON, DEC. NO. 23967-A (Crowley, 12/87) AFF'D BY OPERATION OF LAW, DEC. NO. 23967-B (WERC, 1/88); including cases involving the Commission's "status quo" analysis, see ST. CROIX FALLS SCHOOL DISTRICT, DEC. NO. 27215-D (WERC, 7/93); OUTAGAMIE COUNTY, DEC. NO. 27861-B (WERC, 8/94); and cf. DEC. NO. 31207-C at 10. The cases draw from common sources cogently articulated by a paper, entitled "Past Practice and the Administration of Collective Bargaining Agreements", authored by Richard Mittenthal, published as Chapter 2 of Arbitration and Public Policy, Proceedings of the 14th Annual Meeting of the National Academy of Arbitrators (BNA, 1961). The paper states:

> Once the parties become bound by a practice they may wonder how long it will be binding and how it can be terminated. Consider first a practice which is, apart from any basis in the agreement, an enforceable condition of employment on the theory that the agreement subsumes the continuance of existing conditions. Such a practice cannot be unilaterally changed during the life of the agreement. . . . If either side should, during the negotiation of a later agreement, object to the continuance of this practice, it could not be inferred from the signing of a new agreement that the parties intended the practice to remain in force. Without their acquiescence, the practice would no longer be a binding condition of employment. In face of a timely repudiation of a practice by one party, the other must have the practice written into the agreement if it is to continue to be binding (Ibid., at 56).

As noted above, this articulation of the standard has become well-rooted in Commission case law, as well as arbitral precedent, whether that of Commission arbitrators, see VILAS COUNTY, MA-12477 (Gordon, 9/04) and cases cited at 10; PINELAWN MEMORIAL PARK, A-5966 (Gallagher, 1/02); PORTAGE COUNTY, MA-11259 (Gratz, 12/01); MELLEN SCHOOL DISTRICT, MA-10273 (Mawhinney, 1/99); CITY OF LACROSSE, MA-8278 (Burns, 10/94); and PORTAGE COUNTY, MA-6134 (Jones, 10/90); or that of arbitrators nationally, see, for example Chapter 10, *Labor and Employment Arbitration*, Bernstein, Gosline & Greenbaum (Matthew Bender, 2005).

The persuasive force of past practice is rooted in the agreement manifested by the parties' conduct, see Mittenthal at 54. However, State attempts to terminate the Arrangement

rest on unilateral action. Because the Arrangement rests on mutual agreement, it requires appropriate repudiation which cannot come during the term of an agreement without bargaining. Thus, the State's protracted attempt to terminate the Arrangement violated Subsection (d).

There is no reason to address the contractual ramifications of State conduct under Sec. 111.84(1)(e), Stats. The State has consistently agreed to submit disputes concerning contractual based aspects of the Arrangement to the grievance procedure, which includes arbitration. This includes Karl's alteration of Corcoran's voice mail and e-mail. Because the Commission declines to assert its jurisdiction under Sec. 111.84(1)(e), Stats "over any breach of contract claims covered by the contractual grievance procedure because of the presumed exclusivity of the contractual procedure and a desire to honor the parties' agreement", DEC. NO. 27365-C at 14, there is no reason to further review the contractual ramifications of the Arrangement. The State's unilateral repudiation of the Arrangement during the term of a Master Agreement constitutes a violation of Sec. 111.84(1)(d), Stats., and a derivative violation of Sec. 111.84(1)(a), Stats.

Did State Repudiation Of The Arrangement Unlawfully Interfere With WSEU's Ability To Represent Unit Employees?

Legally, this calls into focus the alleged violations of Secs. 111.84(1)(a) and (c), Stats. Subsection (c) makes it a prohibited practice for the State to "encourage or discourage membership in any labor organization by discrimination in regard to . . . tenure or other terms or conditions of employment." To prove a violation of this section Complainant must, by "a clear and satisfactory preponderance of the evidence" [see Sec. 111.07(3), Stats., made applicable by Sec. 111.84(4), Stats.], establish that: (1) Corcoran was engaged in activity protected by Sec. 111.82, Stats.; (2) the State was aware of this activity; (3) the State was hostile to the activity; and (4) the State issued the January Memoranda and/or terminated the Arrangement based at least in part upon that hostility. EMPLOYMENT RELATIONS DEPT. V. WERC, 122 Wis.2D 132 (1985).

In CLARK COUNTY, DEC. NO. 30361-B (WERC, 11/03) at 15, the Commission stated:

> In our view, a Section (3)(a)3 type analysis is sufficient and appropriate to apply to alleged violations of Sec. 111.70(3)(a)1, Stats., in cases like the present one, where the essence of the violation lies in the employer's motive for taking adverse action against one or more employees.

The Commission applied this to SELRA in STATE OF WISCONSIN (UW), DEC. NO. 30534-B (WERC, 2/05). Thus, the alleged violation of Sec. 111.84(1)(a), Stats., will be treated as derivative of the alleged Sec. 111.84(1)(c), Stats., violation.

As noted above, the January Memoranda are part of a course of behavior by which the State sought to terminate the Arrangement. The elements noted above will thus be applied to that course of conduct, which runs from Corcoran's losing the September, 2004 election through his taking a leave of absence.

Application of the first two elements prefaces the difficulty regarding the application of the third and fourth elements, which are the most closely disputed by the parties. It is obvious that Corcoran's activities while the Arrangement was in effect involve lawful, concerted activity. He was part of Local 2748's bargaining team, represented employees during grievance processing and engaged in LMC efforts fostered by the Master Agreement. The State does not challenge that Corcoran engaged in lawful, concerted activity. Rather, the State's view is that the complaint mischaracterizes the underlying conduct. From its perspective, the termination of the Arrangement implicates not lawful, concerted activity, but its attempt to assign and oversee the performance of Probation and Parole Agent work. This tension underlies the parties' fundamental conflict regarding the final two elements to the application of Subsection (c).

Central to the resolution of that conflict is the definition of the underlying conduct. As initially implemented, the Arrangement was an accommodation of Corcoran's duties as Local 2748 President with his DCC responsibilities. There is no dispute that the original accommodation covered the exercise of lawful, concerted activity. More specifically, the State defends its actions on the premise that Corcoran and the WSEU pushed the Arrangement beyond characterization as lawful activity. Under this view, the termination of the Arrangement does not involve lawful activity if the WSEU did not negotiate it with the State's lawful representative; if the WSEU created an Agreement of indefinite duration; if the WSEU created an Agreement never lawfully ratified; if the WSEU created an Agreement which demands State violation of statutes governing the creation, termination or classification of positions; or if Corcoran's neglect of his caseload voided it.

The analysis thus must focus on the Arrangement as described in Finding of Fact 21. As originally conceived and as implemented the Arrangement does not pose the asserted illegalities noted in the preceding paragraph. The tension between the parties' positions regarding the asserted illegalities must be separately addressed. Against this background, there is no dispute that Corcoran was engaged in lawful, concerted activity or that State administrators up to the Secretary of DOC were aware of it.

Thus focused, the evidence supports the WSEU's assertion of anti-union hostility. This conclusion must, however, be detailed to establish its appropriate scope. State action to terminate the Arrangement reflected a two-fold belief. The first is that the Arrangement could not survive Reed's election as President. The second is that Corcoran exceeded the Agreement's enforceable parameters by refusing to perform legitimate DCC caseload requirements and by improperly performing Local 2748 duties on State-paid time. Either aspect of the State's position could have been, but was not, placed into the bargaining process. Rather, State repudiation of the Arrangement rests on unilateral action.

Among the alleged retaliatory acts are Karl's assignment of a caseload to Corcoran that Karl knew Corcoran could not perform without ceasing work on WSEU-related matters; threats of discipline for continuing to work on WSEU-related matters after Corcoran's December, 2004 re-election; Karl's active tampering with Corcoran's voice and e-mail; and the State's active interference with Corcoran's (and other employee's) performance of steward duties through the January Memoranda.

The evidence establishes that the State was actively hostile to the Arrangement from September of 2004, acting to undo it by increasing oversight of Corcoran's WSEU-related activity and by assigning him a full caseload. The record will support State assertion that Corcoran expanded the scope of the Arrangement. While the record will not support a conclusion that Corcoran acted as a full-time WSEU representative on State pay, it does confirm State concern that Corcoran and the WSEU treated LTE positions as personal coverage for Corcoran. It is not evident that Corcoran took a significant interest in the ABT training, or in his DCC duties between September and December.

However, each facet of State efforts to undo the Arrangement rests on unilateral action. It did not repudiate the practice or bargain concerning its scope. State failure to properly repudiate the Arrangement as a practice inevitably tainted its conduct toward Corcoran. Karl's growing irritation with Corcoran's neglect of DCC duties following the September election is evident, and prompted the January 5 Memorandum.

The January 5 Memorandum highlights the impossibility of separating the State's legitimate interest in job performance from its hostility to the Arrangement. Karl's Memorandum confirmed his belief that the Arrangement was no longer viable. However, as noted above, that belief is unfounded. More significantly regarding the issue of hostility, Karl acted to restrict Corcoran's performance of duties under the Arrangement by demanding an unprecedented approval procedure and by demanding notice beyond anything provided in the Master Agreement regarding steward activities. The Memorandum consists of two paragraphs. The first is lengthy, detailed and directed solely to Corcoran's duties as a Local 2748 representative. The second consists of two sentences. The first is the only sentence noting Karl's job performance concerns. The second sentence notes a January 10 meeting to address Karl's "expectations", but Karl had already alerted his supervisors that he viewed Corcoran's conduct as insubordinate. The focus on concerted activity and the threat of discipline reflects avowed hostility toward the Arrangement and thus hostility proscribed by Sec. 111.84(1)(c), Stats. Whatever caseload concerns Karl legitimately had are obscured by the direct action on lawful, concerted activity.

In the January 7 Memorandum, Harris toned down the excesses of the January 5 Memorandum. The extension of the substance of the January 5 Memorandum to all stewards did not, however, cure the problems underlying its predecessor. There is no reliable evidence to undercut Harris' testimony that she issued her Memorandum to address the lack of uniformity in state-wide practices. This cannot obscure that the January 5 Memorandum sparked the dispute, and that it rests on evident hostility to the Arrangement generally and to

Corcoran's conduct under it specifically. The extension of that Memorandum exacerbates rather than cures the difficulties underlying the January 5 Memorandum.

The conclusion of the existence of proscribed hostility is all that is necessary to the analysis of Subsection (c), but it is necessary to touch on the scope of this conclusion prior to addressing the final element of the analysis. Conduct following the issuance of the Memoranda is in issue, and it is necessary to highlight the difficulty of assessing that evidence. Karl's actions toward Corcoran's voice-mail and e-mail auto reply messages are noted in Finding of Fact 17. Corcoran successfully grieved the matter. This highlights that the hostility noted above was not pervasive. More to the point, it highlights the tension between the State's and WSEU's perception of the underlying conduct. Wild oversaw the settlement of the grievance, and felt Karl overreacted, in violation of contract. This should not obscure that Wild supported Karl's view that the two types of messages manifest disregard of DCC caseload functions. That interest is demonstrated and valid. As with the grievance, however, legitimate State concerns with Corcoran's conduct under the Arrangement are obscured by the hostility of Karl's response. This prefaces that the issues regarding the final element and regarding remedy must account for the scope of the proven hostility.

The final element concerns whether the State acted, at least in part, based on this hostility. As noted above, the January Memoranda reflect hostility toward the Arrangement, and are part of a course of conduct intended to undo it. As noted above, the Arrangement was never properly repudiated as a practice and the attempt to return Corcoran to full-time DCC duties through curbing lawful, concerted activity under the Arrangement was misguided. That Corcoran may have expanded the scope of the Arrangement might have warranted intervention, potentially disciplinary, but the State's attempt to unilaterally undo the Arrangement was inevitably tainted by proscribed hostility. The dialogue between State and WSEU representatives noted in Finding of Fact 18 cannot be characterized as constructive. However, State responses presume that Corcoran was functioning as a full-time State paid WSEU representative. The evidence will not support the assertion, and there is little evidence the State seriously scrutinized the factual basis of its assertion. The stretching of fact reflects hostility to the Arrangement and to the lawful, concerted activity underlying it. Karl testified credibly regarding the complications the Arrangement posed for DCC caseload, and specifically regarding the growing complications as Corcoran's WSEU related activities expanded. His testimony that he did not employ discipline to undo the Arrangement, however, obscures the hostility he felt toward Corcoran's conduct.

As noted in Findings of Fact 14 and 15, State efforts to undo the Arrangement extend beyond the issuance of the Memoranda to an investigatory interview set for February 15, 2005. That interview concerns travel by Corcoran regarding matters discussed between Karl and Corcoran at the January 10 meeting. Whatever job performance concerns Karl had, it is evident that he articulated concerns regarding matters once covered by the Arrangement. That he acted in hostility to those matters is manifested by the fact that he characterized Corcoran's absence from work as insubordinate even when he failed to formally act on Corcoran's request for approval. It is, in any event, evident that Karl did not feel compelled to distinguish

between conduct once condoned by the Arrangement and conduct beyond its scope. Ignoring that the State failed to properly repudiate the Arrangement, Karl's willingness to act was directed less toward Corcoran's DCC duties than to Corcoran's assertion of lawful, concerted activity. This manifests Karl's hostility toward the Arrangement, and highlights the impossibility of sorting this from his legitimate concerns with Corcoran's caseload. As with the January 5 Memorandum, later State efforts, such as the February 15 investigatory interview reflect that hostility. That Karl actively communicated his concerns to supervisors coupled with the correspondence noted in Finding of Fact 18, underscores that the hostility toward the Arrangement was widespread.

As with the January 5 Memorandum, the scope of the hostility is less than pervasive. Corcoran responded to Karl's failure to approve a January 14 absence by successfully appealing to Harris, who evaluated the request without hostility. Such anomalies are evident throughout the record. This cannot, however, obscure that WSEU has demonstrated that the Memoranda and the disciplinary process dating back to the January 10 meeting reflect, at least in part, hostility toward Corcoran's exercise of lawful, concerted activity.

WSEU urges that a similar conclusion should be drawn regarding State interference in the activity and designation of stewards. The evidence will not support this assertion. The record is less than clear regarding State attempts to restrict Local 2748 stewards to a geographic region. It is evident Karl believed Corcoran traveled unnecessarily and paid no attention to whether alternative steward service was available at sites he chose to travel to. The Master Agreement contains provisions such as Section 4/6/3, which address this dispute. Those provisions are comprehensive. There is no reliable evidence that the State has adopted a position regarding geographic jurisdiction of stewards in anything other than a good-faith view of the Master Agreement. Significantly, the State has not renounced the grievance process under the Master Agreement. It is evident that the State and WSEU differ regarding the application of the Arrangement to Corcoran and to Reed. This dispute calls the Arrangement into question, not state-wide issues on steward jurisdiction. Such issues can and should be resolved under the Master Agreement, and there is no persuasive reason to address such concerns under Subsection (c).

The remaining issue is remedy. The complaint seeks a cease and desist Order coupled with posting "of conspicuous compliance notices". The Order grants each, drawing from the posting developed through DECS. NO. 30340-A, B and C. Some discussion of this point is necessary. The pleadings allege that the State acted in retribution for Corcoran's role in that litigation. There is little evidence or argument to support this allegation. Evidence that the State did not assign a full caseload to Corcoran until he lost the September, 2004 election due to the potential perception that it was acting in retribution for Corcoran's role in that litigation stands largely uncontradicted. Karl's August 23, 2003 memo could be perceived as retaliatory, but as Finding of Fact 10 demonstrates, the memo was discussed and effectively prepared prior to the issuance of DEC. NO. 30340-A. In any event, the memo was never implemented and there is no persuasive evidence to connect the hostility found in this case to the issuance of DEC. NO. 30340-A, B or C. The evidence in this case, however, contains no specific evidence

to guide the notice posting process. Tracking the posting developed through DECS. NO. 30340-A, B and C avoids the problems regarding notice addressed in that litigation, which was directed to "all employees".

The Order refers to Corcoran's position rather than his name. This reflects a potentially fundamental problem with the Arrangement. Testimony was uniform that the Arrangement was aimed at Corcoran's position, as affirmed by Kasprzak's January, 2003 e-mail, but differed on its duration and more specifically whether it applied beyond Reed's election. Reed neither sought nor received caseload relief under the Arrangement, and the parties have disputed whether this means the Arrangement was essentially personal to Corcoran. As noted above, the Arrangement was a practice that spanned a number of Master Agreements, and reflected a common understanding on how to reconcile Corcoran's performance of lawful, concerted activities as President and as steward with Probation and Parole Agent duties. The rights underlying the Arrangement flow from Sec. 111.82, Stats., and extend to all State employees falling within Sec. 111.81(7), Stats. The Arrangement cannot be made a personal benefit to Corcoran or to Reed without raising potentially significant issues regarding various subsections of Sec. 111.84(1) and Sec. 111.84(2), Stats. There is some argument on both sides regarding this point generally, but the record affords no persuasive basis to conclude that either the State or WSEU acted improperly to favor Reed or Corcoran. As noted above, the Arrangement reflects an accommodation of lawful, concerted activity as a WSEU official with the performance of the duties of a State employee. The Order thus refers only to the position, highlighting that the practice developed to balance statutory rights and responsibilities, not to test them.

This prefaces the more substantive aspect of the Order. It couples a requirement to bargain with the rescission of the January Memoranda and any action to enforce them. The rescission of these documents addresses each violation found above, but most closely focuses on the need for bargaining. The actions are essentially to restore the "status quo ante."

The bargaining Order serves a twofold purpose. One is to affirm that the Arrangement cannot be repudiated prior to the Master Agreement's expiration without bargaining. At most, the State can give notice of its intent to repudiate the Arrangement with the expiration of the Master Agreement. The other is to address the fundamental tension underlying the Arrangement, which can best, if not only, be accomplished through bargaining. The Arrangement is well known, but ill-defined. The elements noted in Finding of Fact 21 reconciled Corcoran's performance of DCC and labor relations responsibilities, without posing the legal complications that inevitably would follow an expansion of the Arrangement from its core elements to full-time coverage for Corcoran. As noted above, Corcoran expanded his non-DCC duties over time, prompting legitimate State concerns with his conduct. That the State's attempted termination of the Arrangement acted against lawful, concerted activity precludes recognition, on this record, of its legitimate interest in policing the Arrangement. However, it cannot obscure the fundamental difficulty posed in restoring the Arrangement to its original basis as a practice.

The Order addresses this through bargaining. The Arrangement's core elements are covered in Finding of Fact 21, and set the basis for bargaining. LTE coverage was never specifically restricted to Corcoran, even though it could have that effect during bargaining for a Master Agreement. The Order does not specify how caseload assignment or coverage for Corcoran's absences can be handled. The Arrangement was never precise on that point and the Order can be no more precise. Rather, the Order restores the rough understanding that preceded State attempts to terminate the Arrangement. Rescission of the January Memoranda places the notice requirements incumbent on Corcoran back to those in effect at the Arrangement's inception, until or unless the parties develop alternatives through bargaining. The amount of time Corcoran can legitimately claim to attend to labor relations duties was fluid under the Arrangement, and is fluid under the Order. As noted in Findings of Fact 7 and 21, there is no evidence that the parties ever understood the Arrangement to permit Corcoran to rid himself of DCC duties or to be absent from DCC duties for more time than could be covered on average by a single LTE position which was itself not exclusively focused on Corcoran. Attempts to discipline Corcoran traceable to the January Memoranda are rescinded as is any mention of the Memoranda or disciplinary consequences in his personnel file(s).

Much of the friction traceable to the termination of the Arrangement flows from the State's perception that Corcoran expanded it beyond appropriate bounds. This perception has a solid basis in fact. What originally made the Arrangement work was the flexibility of the two parties in addressing issues of mutual concern. The Order cannot dictate flexibility other than directing the bargaining process in which flexibility can occur. If the Arrangement cannot be restored to mutually acceptable limits through bargaining, its limits will have to be set through expensive and time consuming case-by-case litigation of disputes regarding its excesses.

A number of fundamental issues underlie the record and the parties' dispute is so broad that it is impossible to address them all. Before closing, it is appropriate to touch on certain concerns raised in the parties' arguments. The discussion above does not focus on credibility determinations to the degree asserted by the parties, particularly the State. This reflects a difference in focus. Concluding the Arrangement is a practice rather than a free standing collective bargaining agreement mutes the credibility determination sought by the State. As noted above, the Arrangement is a practice not terminable by unilateral action during the term of a Master Agreement.

Against this background, the case cannot be made a fundamental credibility call regarding Karl's credibility versus Corcoran's. It is evident Karl was hostile to the Arrangement. Kasprzak saw and appreciated the benefit of the Arrangement as a policy matter, but Karl was stuck with the details of getting DCC work done. That he became hostile to the Arrangement is not surprising. The fundamental difficulty is that this hostility is the backdrop to events which reflect self-help on Karl's and Corcoran's part. Corcoran successfully acted over time to expand the Arrangement's scope while Karl struggled unsuccessfully until Kasprzak's retirement to restrict it. After that point, Karl acquired supervisory support formerly lacking. The problem, however, is that the support turned into unilateral action to undo a practice. Karl's actions following the September election grew in

force because they reflected a consensus among supervisors that the Arrangement was void or voided. The actions that followed, however, directly targeted the exercise of lawful, concerted activity. The underlying hostility to the Arrangement, as noted above, tainted what would otherwise be legitimate efforts of the State enforce the performance of work consistent with the Master Agreement (see, for example, Section 2/5/1). Karl's characterization of efforts to enforce the January 5 Memorandum as non-disciplinary is particularly unpersuasive. It does not, however, pose a stark credibility issue. The larger issue is hostility to the Arrangement, and Karl's testimony is only part of the evidence of hostility to the Arrangement.

The parties' public policy arguments are unhelpful to resolve the complaint. Sec. 111.80, Stats., sets the governing policy considerations. The conclusions stated above are to enforce the bargaining process that effects that policy. The Order sets the parties to the collective bargaining process that is the centerpiece of Sec. 111.80, Stats. Presumably, some of the rhetoric surrounding public policy can be muted. The assertion that one administration can sweep away practices of a predecessor unilaterally does not merit extensive discussion under the statutes specifically applied above or generally under Sec. 111.80, Stats. Nor can this case be made a fundamental assault on protected activity. The dispute is in many respects less about hostility to protected activity than the degree to which the State can be persuaded or compelled to subsidize it.

Dated at Madison, Wisconsin, this 28th day of March, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Richard B. McLaughlin /s/
Richard B. McLaughlin, Examiner

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