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, Respondent.

Case 664
No. 64426
PP(S)-349

Decision No. 31272-B

Appearances:

Kurt C. Kobelt, Lawton & Cates, S.C., Attorneys at Law, Ten East Doty Street, Suite 400, P.O. Box 2965, Madison, Wisconsin 53701-2965, appearing on behalf of the Wisconsin State Employees Union (WSEU), AFSCME, AFL-CIO, and Local 2748.

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 State of Wisconsin, Department of Corrections.

ORDER ON REVIEW OF EXAMINER'S DECISION

On March 28, 2006, Examiner Richard B. McLaughlin issued Findings of Fact, Conclusions of Law and Order in the above-captioned matter, holding that the State of Wisconsin, Department of Corrections (State or DOC) refused to bargain in good faith with Wisconsin State Employees Union (WSEU), Local 2742, in violation of Sec. 111.84(1)(d) and (a), Stats., by unilaterally repudiating a practice ("the Arrangement") pursuant to which Thomas Corcoran, President of Local 2748, was given certain case load relief in order to accommodate the union duties he performed during his normal work day. The Examiner also concluded that the State's action in terminating this practice was motivated at least in part by hostility to Corcoran's lawful concerted activities, which violated Sec. 111.84(1)(c) and (a), Stats. The Examiner dismissed the alleged independent violation of Sec. 111.84(1)(a), Stats., and the alleged violation of Sec. 111.84(1)(e), Stats. He ordered the State (in principal part) to restore the practice and to negotiate with WSEU about its appropriate scope and duration, as well as to post a notice regarding the violations.

On March 17, 2006, WSEU filed a timely petition seeking review of the Examiner's decision, pursuant to Secs. 111.07(5) and 111.84(4), Stats. On April 12, 2006, the State filed a timely petition seeking such review. Both parties thereafter filed briefs and reply briefs in support of and in opposition to the respective petitions, the last of which was received by the Commission on June 26, 2006. The decision was held in abeyance for several months during the fall of 2006, while the parties, with the assistance of the Commission's General Counsel, attempted to conciliate the matter.

For the reasons set forth in the Memorandum that accompanies this Order, the Commission largely affirms the Examiner's Findings of Fact and reaches a similar ultimate result, though on different grounds. The Commission concludes that the "Arrangement" at issue was an enforceable agreement between DOC and WSEU as to case load relief that would accommodate Corcoran's use of contractual union leave. The Commission also holds that the State did not violate Secs. 111.84(1)(a) or (1)(c), Stats., by ending the Arrangement and by issuing certain directives circumscribing Corcoran's and other stewards' union leave. The Examiner's Conclusions of Law and Order are modified to reflect the Commission's conclusions in these respects.

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

ORDER

A. The Examiner's Findings of Fact 1 through 20 are affirmed.

B. The Examiner's Findings of Fact 21 and 22 are partially affirmed and partially set aside, as reflected in the following Findings of Fact 21 through 25:

> 21. The Arrangement was an agreement between DOC and WSEU, within DOC's lawful sphere of authority, addressing the work place problems associated with Corcoran's use of contractually-permitted union leave. As such, the Arrangement was analogous to a grievance settlement and was implicitly incorporated into the collective bargaining agreement's union leave provisions as they pertained to Corcoran. The Arrangement served the mutually beneficial purposes of facilitating Corcoran's effectiveness as a union official, on the one hand, and facilitating DOC's practical ability to assign its cases effectively, on the other hand. The Arrangement required DOC to provide Corcoran meaningful case load relief that would permit him to undertake legitimate/approved union activities during work time, and included a commitment on the part of DOC to deploy LTEs to decrease the degree to which Corcoran's case load relief burdened other staff. The Arrangement did

not include any minimum or maximum amount of union leave or case load relief available to Corcoran.[1]

22. The Arrangement was not intended to expand or alter the type, amount, purposes, or conditions pertaining to Corcoran's use of union leave beyond the parameters of the contractual provisions pertaining to union leave (as interpreted and applied in practice). The meaning of those provisions, the specific extent and conditions under which the State must provide Corcoran with union leave, the concomitant case load relief and/or LTE coverage that the State must provide Corcoran pursuant to the Arrangement, and whether the State has just cause for disciplining Corcoran for the type, amount, or manner of his using union leave, are all matters appropriately left to the parties' negotiations, grievance, and discipline procedures.

23. Corcoran's performance of WSEU-related activities during work time focusing on LMC efforts and collective bargaining related duties, including contract administration, is lawful, concerted activity, provided it remains within contractual/mutually-agreed parameters.

24. DOC's and the State's administrative efforts to assign Corcoran case load duties were aimed at enforcing Corcoran's performance of the duties of his State position, and/or at effectuating the State's and DOC's good faith (though mistaken) belief that the Arrangement was not an enforceable agreement. These efforts were not undertaken in retaliation for Corcoran's lawful, concerted activity in pursuing a previous prohibited practice complaint before the Commission or otherwise engaging in lawful, concerted activity.

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[1] Both the Union and the State have challenged certain aspects of the Examiner's Finding of Fact 21. The Union contends that the Examiner improperly found that the Arrangement contemplated Corcoran spending no more than 50% of his time on union duties. We do not see that the Examiner made a finding of fact to that effect. The Examiner found in Finding of Fact 21 that the Arrangement did not contemplate the State *using an LTE in excess of 1043 hours in any 26-week pay period*. (emphasis supplied). This finding is accurate. However, neither we nor the Examiner have found that the Arrangement required any necessary relationship between the amount of LTE coverage *per se* and the amount of approved union leave/case load relief for Corcoran. To the contrary, the Examiner found, and we agree, that the Arrangement did not establish minimum or maximum limits for either union leave or the concomitant case load relief. Those amounts would be a function of how the parties interpreted and applied the collective bargaining agreement's leave provisions and are beyond the province of the Commission in the instant case. See Examiner's Conclusion of Law 4 and our Finding of Fact 22. The State, for its part, has challenged the Examiner's characterization in Finding of Fact 21 that the Arrangement was "mutually-understood," since, in the State's view, only OSER had authority to reach "mutual" understandings of this nature, and here the Arrangement was made with DOC, not OSER. This is primarily a legal argument and is addressed as such in the Memorandum that accompanies this Order.

25. The State and the WSEU have negotiated contractual language governing the purposes for and conditions pertaining to union leave. The parties' collective bargaining agreement includes a grievance procedure that applies to the contractual language governing union leave, that culminates in final and binding arbitration, and that was intended to be the exclusive means of enforcing the agreement.

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

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

3. The Respondent's memoranda of January 5, 2005, and January 7, 2005, and their attempts to restrict PSS stewards to activities are matters that are properly addressed under the grievance procedure in the collective bargaining agreement and did not interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Sec. 111.82, Stats., in violation of Sec. 11.84(1)(a), Stats.

E. The Examiner's Conclusion of Law 4 is set aside and the following Conclusion of Law 4 is made:

4. Respondent's renunciation of the Arrangement effective September 2004 violated the Respondent's duty to bargain in good faith and renounced a collective bargaining agreement, thereby violating Secs. 111.84(1)(d) and (e), Stats.. and, derivatively, Sec. 111.84(1)(a), Stats.

F. The Examiner's Conclusion of Law 5 is reversed and the following Conclusion of Law 5 is made:

5. The Respondent's efforts to end the Arrangement, impose a case load upon Corcoran inconsistent with the Arrangement, and cease deploying an LTE consistent with the Arrangement were not motivated by hostility toward his lawful, concerted activity and did not violate Sec. 111.84(1)(c), Stats.

G. Paragraph 1 of the Examiner's Order is set aside and the following Order is made:

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

H. Paragraphs 2 and 3 of the Examiner's Order are modified and consolidated as set forth below, and, as modified, are affirmed:

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

a. Cease and desist from refusing to comply with the Arrangement until such time as it is eliminated or modified by mutual agreement.

b. Take the following affirmative action which will effectuate the policies and purposes of SELRA:

1. Restore the Arrangement consistent with the parameters set forth in Findings of Fact 21 and 22, above;

2. Notify all employees in the Department of Corrections who are members of the bargaining unit represented by Local 2748, by posting in conspicuous places in offices where such employees are employed, copies of the Notice attached hereto and marked "Appendix A." This notice shall be signed by the Secretary of the Department of 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.

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

Given under our hands and seal at the City of Madison, Wisconsin, this 12th day of September, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

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

I concur.

Paul Gordon /s/
Paul Gordon, Commissioner

APPENDIX "A"

NOTICE TO ALL EMPLOYEES OF THE WISCONSIN DEPARTMENT OF CORRECTIONS WHO ARE REPRESENTED BY LOCAL 2748, WSEU, AFSCME, COUNCIL 24

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:

> WE WILL NOT RENOUNCE agreements between the State of Wisconsin and Wisconsin State Employees Union (WSEU), AFSCME Council 24, Local 2748, including the arrangement whereby Local 2748 President Thomas Corcoran was provided a reduced case load and the deployment of LTEs to cover portions of said case load, to accommodate his use of legitimate contractual union leave, or otherwise interfere with our employees' rights to engage in lawful, concerted activity, in violation of Secs. 111.84(1)(d), (e), and, derivatively, (a), Stats.

STATE OF WISCONSIN
DEPARTMENT OF CORRECTIONS

_____ _____

By: Secretary, Department of 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.

Department of Corrections

MEMORANDUM ACCOMPANYING ORDER

Summary of the Facts

The Examiner's Findings of Fact have been largely affirmed; they are summarized here to provide context for the discussion that follows.

Local 2748 represents the Professional Social Services (PSS) bargaining unit of State employees, comprising approximately 3,000 employees working in several State departments and in locations geographically spread throughout the State. The bargaining unit includes the probation and parole officers who work for the Division of Community Corrections (DCC) within the Department of Corrections (DOC), including Thomas Corcoran, who works in the DCC's Beaver Dam office. Corcoran has held the position of state-wide president of Local 2748 since 1996 (except for brief period in late 2004 while the election results were in dispute). The Local is divided into 15 geographical chapters, each of which has four elected officers, and also appoints some 130 stewards state-wide to assist bargaining unit members in grievances and contract administration.

Probation and parole officers are generally assigned a case load of individual offenders who are have been released from incarceration by means of parole or probation. Handling such a case load requires regular availability for scheduled supervisory appointments both within and outside the office as well as availability for unanticipated incidents or needs involving the assigned offenders. Given the size and geographical dispersion of Local 2748's bargaining unit and the substantial union leave during the work day associated with Corcoran's legitimate/approved duties as Local 2748 President, Corcoran, who had a very good employment record, had difficulty handling a normal case load almost from the outset of his tenure as president. These difficulties increased considerably in the late 1990's and early 2000's, when Corcoran's DCC managers found it appropriate and beneficial to the conduct of State business to provide him increasingly expansive leave because they found him to be skillful in facilitating resolution of work place disputes especially in connection with the State's labor-management cooperation (LMC) program. As a result, however, Corcoran's immediate supervisor in the Beaver Dam office and his co-workers there bore the brunt of his unavailability. During the late 1990's, Corcoran's managers continually agitated to higher officials within DOC for the ability to provide Corcoran substantial and acknowledged case load relief which would be accommodated by an additional LTE employee assigned to the Beaver Dam office.[2] Corcoran also continually urged Martin Beil, Executive Director of the parent union, WSEU, to pursue such official accommodation of his (Corcoran's) union leave.

[2] LTE's have customarily been used to cover the prolonged absences of key union officials, including Corcoran, during successor contract negotiations.

In June 1999, while Beil and DOC Secretary Jon Litscher were driving together to a State function, Litscher mentioned that DCC managers had expressed a desire to have additional supervisory positions to provide training for DCC agents. Beil mentioned the ongoing problems with Corcoran's case load. The two officials reached an agreement such that three vacant bargaining unit positions would be removed from the unit and made into supervisory positions to provide agent training, in exchange for which DOC would provide an additional LTE to the Beaver Dam office to facilitate giving Corcoran case load relief. While some DOC managers had the impression that Corcoran's union leave would average out to approximately half time, since that is the amount of time one LTE position could provide substitute coverage, the record does not reflect an agreement regarding minimum or maximum amounts of case load relief or union leave Corcoran would be permitted nor any limit on the duration of the arrangement. The arrangement was not designed to give Corcoran more leave, whether paid or unpaid, than the contract provided, nor to modify contractual conditions (such as notice) applicable to union leave. As the Examiner stated, "This rough understanding [referred to as the Arrangement] reflects the parties' presumption that the details necessary to make it work would be handled locally, by Corcoran and his supervisors." The agreement was not reduced to writing. Officials of the Office of State Employment Relations (OSER) were not aware of the Arrangement until some time in late 2003 or early 2004. After learning of the Arrangement, OSER did not act to terminate it until February 2005.

By at least mid-2001, if not earlier, the Arrangement, as implemented by Corcoran's DCC managers, operated to relieve him of any case load duties – in terms of offenders assigned to him – because such duties could not be carried out properly given Corcoran's extensive approved absences from the office for union duties. Corcoran was assigned various non-recurring duties that he could perform on an ad hoc basis while in the office, such as in-take and unscheduled visits from offenders or individuals associated with their parole/probation needs. While his leave records indicate that his union leave averaged about 50% over the course of several years, there were periods of time when it approached or reached 100%. In addition, when Corcoran was in the Beaver Dam office, he frequently was on the telephone regarding union business.

Since the additional LTE could not absorb all of what would have been Corcoran's case load, the Arrangement caused coverage difficulties for the manager of the Beaver Dam office, Elmer Karl, and was a continual source of friction within that office. Karl was also Corcoran's immediate supervisor. The record reflects frequent communication over the years between Karl and his superiors about the amount of Corcoran's leave and what effect it was having on the kinds of work load Karl could appropriately assign to Corcoran. Karl's immediate superior until January 2003 was Allan Kasprzak, who directed Karl to implement the Arrangement in a way that maximized Corcoran's availability for various union-related duties, especially LMC, during the work day. After Kasprzak retired, and in response to state-wide pressure to cut LTE utilization, Karl increased his efforts to assign Corcoran some level of case load and/or to eliminate the LTE position associated with the Arrangement. Owing to Beil's intervention with DOC managers, Karl's efforts were not successful.

While Karl was plainly irritated by the Arrangement over the years, and while he attempted from time to time to increase Corcoran's work load, Karl's day to day interactions with Corcoran apparently were friendly until the events giving rise to this case, i.e., approximately September 2004. Until then, the record reflects no efforts on the part of State officials, including Karl, to limit or condition Corcoran's use of union leave.

During 2002 and 2003, WSEU prosecuted an unfair labor practice case before the Commission challenging certain actions DOC managers had taken against Corcoran for the manner in which he had handled a situation involving a sexual harassment claim brought by one bargaining unit member against another unit member. In August 2003, the Commission Examiner issued a decision holding in favor of WSEU and Corcoran (Dec. No. 30340-A). A couple of weeks later, in early September 2003, Karl attempted to impose certain work load responsibilities on Corcoran. Beil learned of this attempt at about the same time that he learned that DCC managers were considering removing LTE coverage for Corcoran's case load. Beil intervened with DOC management, and the Arrangement remained intact. Karl was not involved in the litigation culminating in Dec. No. 30340-A, and only vaguely aware of its issuance or import at the time he attempted to impose the additional work load in September 2003.

OSER sought review of the Examiner's decision in the above-described unfair labor practice case. While OSER officials had become aware of the Arrangement at some point during the above-mentioned litigation and had formed a belief that the Arrangement was inappropriate, OSER intentionally refrained from taking action pending the final outcome of the litigation in order to avoid an appearance of retaliation. In July 2004 the Commission issued a decision largely affirming the Examiner (Dec. No. 30340-B), after which the parties engaged in some further skirmishing over the scope of the Commission's remedy. The litigation ended with the Commission's supplemental decision issued on January 10, 2005 (Dec. No. 30340-C).

In the meantime, Corcoran ran for reelection as President of Local 2748 and appeared to have been defeated when the votes were counted on September 15, 2004. Karl and other State officials took this circumstance as a green light to restore Corcoran to a regular case load. Because Corcoran had not handled that work for several years, Karl and Corcoran arranged for Corcoran to take a multi-day refresher course in agent training. Karl also assigned Corcoran a relatively limited work load during this period of time. In addition to the scheduled training days, Corcoran had also scheduled considerable vacation time during the fall of 2004 and, after his election defeat, added more vacation time, all of which was approved by Karl. During this period of time, Corcoran and members of Local 2748 successfully challenged the fairness of the union election results. In the re-run election, tallied on December 17, 2004, Corcoran emerged as the victor and reassumed his duties as union president. For all these reasons, Corcoran was not available for much work in the Beaver Dam office through the remainder of 2004.

The confluence of events during the fall of 2004, set forth in the preceding paragraph, brought to a boil the long-simmering friction between Karl's work-related interests and Corcoran's union-related interests and ultimately led to the instant case. On September 28, 2004, Corcoran left the Beaver Dam office to handle two Union representational matters in Sheboygan, one of which was also attended by Karl on behalf of management. Karl questioned whether Corcoran was entitled to handle these duties, since he was no longer President, and Corcoran refused to answer without having a representative present. Karl refused to approve a portion of Corcoran's leave for September 28 and instigated a follow-up letter from DCC management stating, inter alia, "Since your name is not on a list of appointed stewards, we expect you will not be performing any more steward activities unless or until we receive official notification from the 2748 leadership." Karl continued to chafe at what he viewed as Corcoran's continued indifference to his work-related duties; Corcoran continued to chafe at what he viewed as Karl's improper attempts to limit his lawful union activity.

On December 15, 2004, Karl sent Corcoran a memorandum seeking an explanation from Corcoran about why he did not return to work in what Karl viewed as a timely fashion from certain union activity on November 9, December 8, and December 9. In an e-mail that Karl viewed as insubordinate, Corcoran stated (in part), "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. ... I have no obligation to respond in writing to the scenario that you have characterized …." On December 20, Corcoran notified the office that he would be taking unpaid union leave to have a union telephone line installed in his home and did not report to the office that day. On December 23 Karl demanded an explanation of the December 20 absence and also questioned Corcoran about his case load duties. By then Corcoran had been re-elected President and stated that he viewed the Arrangement as still being in effect, including the case load relief. Karl responded, "What Arrangement?" On December 30, Corcoran left Karl a voice message stating that he (Corcoran) would be out of the office "on union business" on January 3 and 5, 2005. Karl viewed this notice as inadequate.

On January 5, Karl sent a directive to Corcoran that is set forth in full in paragraph 13 of the Examiner's findings. In sum and substance it directed Corcoran to provide Karl with at least 10 calendar days' advance notice ("written when required by the contract") of any "union related activities" and to obtain written prior approval from Karl before representing other unit members in grievances or investigatory meetings. The memo also directed Corcoran to provide various details about such representational activities, such as location, duration, and specific purpose, so that Karl could "evaluate and respond" to the requests. The memo also stated that, "When you are not attending approved union activities, you are expected to perform your full-time duties as a Probation and Parole Agent." These requirements had not been applied to Corcoran previously or to other Local 2748 stewards or officials.

After Corcoran complained to Sherri Harris, DOC's Employment Relations Section Chief, about being subjected to greater restrictions than other stewards, she decided it was an opportunity to establish some guidance and uniformity in handling requests for union leave.

On January 7, Harris conveyed a memorandum to PSS union stewards within DOC and to a variety of DOC supervisors, which is set forth in full in the Examiner's Finding of Fact 13. It essentially required all Local 2748 stewards within DOC to follow the directives that Karl had given to Corcoran in the January 5 memorandum.

In early January 2005, Karl discovered that Corcoran's e-mail and voice-mail out-of-office responses specifically detailed how to reach Corcoran for union-related inquiries but did not provide similar guidance for reaching Corcoran for work-related issues. On January 6, in Corcoran's absence and without his knowledge, Karl altered Corcoran's e-mail and voice-mail messages to eliminate the references to the union.[3] On January 10, 2005, Karl, accompanied by another administrator, and Corcoran, accompanied by another union representative, met to discuss the January 5 memorandum. The meeting was acrimonious and included mutual accusations about the existence and significance of the Arrangement, the extent to which Corcoran could or should be handling a case load, what kinds of union duties Corcoran legitimately could perform during the work day, and what kinds of prior notice and/or approval Karl legitimately could require.

Karl continued to insist upon advance notice and prior written supervisory approval. On January 12, Karl notified Corcoran that his union activity on January 12, about which Corcoran had informed Karl on January 10, had been without prior authorization and that such future conduct would be treated as insubordination. Corcoran provided Karl with a set of union activities scheduled between January 14 and January 27, and, by memo dated January 13, Karl approved some and disapproved others. Karl documented other incidents in January 2005 that he considered inappropriate union activity by Corcoran. In response to Karl's documentation, DCC management issued a memo to Corcoran on February 10, 2005, summoning him to an "investigatory interview" regarding certain "work rule violations" related to his use of union leave in January. The interview did not take place, as, on February 14, 2005, Corcoran embarked upon an approved extended unpaid leave of absence to perform organizing services for WSEU.

The friction between Karl and Corcoran in late 2004 and early 2005 led to several discussions among top DOC managers, OSER officials, and WSEU Executive Director Beil about the Arrangement. In a memorandum to Beil dated February 1, 2005, set forth in full in the Examiner's Finding of Fact 18, DOC stated its view that there was no written agreement and no legal authority which would allow the State to allow Corcoran "to act as a full-time steward at state expense." Without conceding any legal obligation, DOC also informed Beil that it was returning the three positions to the bargaining unit that had been converted into supervisors in 1999 as part of the Arrangement, and that DOC was terminating the employment of the LTE who had been assigned to the Beaver Dam office as part of the

[3] Corcoran grieved the "tampering" with his voicemail and e-mail, and the grievance ultimately was resolved as follows: "Supervisor will not tamper with phone or voicemail of grievant. Per the contract telephone can be used for union business."

arrangement.[4] Finally, the February 1 memo informed Beil that DOC would hold Corcoran "responsible for his own caseload. . . ." Beil, in turn, articulated WSEU's position that the Arrangement was an "agreement" and that OSER had effectively approved the agreement by allowing it to continue for "two years" after learning of its existence.

The applicable Master Contract between WSEU and the State contains a number of provisions pertaining to both paid (so-called Code 19) and unpaid (so-called Code 21) union leave, which are set forth in full in the Examiner's Finding of Fact 4. None of them expressly addresses the issue of work load relief to accommodate approved union leave.[5] The Master Contract also provides, in Section 15/1/1, "This Agreement represents the entire Agreement of the parties and shall supersede all previous agreements, written or verbal. . . ."

The Master Contract, including various appended Memoranda of Understanding and Negotiating Notes, is negotiated between OSER and WSEU and is not effective until approved by the Legislature's Joint Committee on Employment Relations (JOCER). OSER has delegated authority to various departments and other subdivisions to negotiate "Local Agreements" that supplement the Master Agreement and do not require the full state-wide WSEU ratification process or JOCER approval.

As the State acknowledged at hearing, OSER permits local department managers to settle contractual grievances and otherwise reach agreements resolving local work place issues within their "spheres of authority," and does not require that all such settlements or agreements be reduced to writing or subjected to OSER sign-off. For example, DCC and Local 2748 have a longstanding agreement about how overtime among probation and parole agents will be compensated, i.e., cash payouts vs. compensatory time off, that has never been reduced to writing but has been acknowledged as valid by OSER.

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[4] The LTE was re-employed about a month later. In conversations predating DOC's February 1 memorandum, Beil had mentioned the three supervisory positions as a "quid pro quo" for Corcoran's case load relief, but, contrary to one of the State's arguments, there is no evidence that Beil's comments were intended as a proposed condition for terminating the Arrangement nor did Beil at any time agree to such termination, whether or not the State returned the positions to the bargaining unit.

[5] The 2003-05 Master Agreement contains "Negotiating Note 70," which states as follows: "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." The record indicates that this was the result of discussions about the general effect steward duties in the PSS unit has upon work load, but that Corcoran's situation was not brought up during these discussions and was not the focus of the agreed-upon Note. Accordingly, we conclude that this Note had no effect upon Corcoran's Arrangement.

Discussion

1. The Content and Scope of the Arrangement

The Examiner concluded that the Arrangement was an understanding between WSEU and DOC to provide Corcoran with case load coverage, on the one hand, and work assignments that avoided ongoing case load responsibilities, on the other. The Examiner found that the Arrangement did not provide any particular percentage or amount of union leave or work load relief and was not intended to alter contractual requirements regarding notice, types of permissible activities, and so forth. The Examiner also found that the Arrangement did not designate one LTE position for coverage for Corcoran.

In challenging the Examiner's decision, the State continually refers to the Arrangement as having, in practice, provided full time union release time for Corcoran, which the State contends is unlawful. To the extent the Arrangement may have been lawful, the State argues that the parties' understood it to give Corcoran no more than 50% release time and case load relief. WSEU, for its part, has objected to any implication in the Examiner's decision that the Arrangement was limited to 50% time.

As discussed in footnote 1, above, we agree with the Examiner that the Arrangement did not encompass any set minimum or maximum amount of leave or release time, but rather provided case load relief and coverage for approved/legitimate release time. This conclusion is based upon Beil's credible and uncontradicted testimony. The State's view (and that of some managers who testified at hearing, but were not present when the deal was struck) about the 50% limit is based upon the second prong of the Arrangement, the deployment of an LTE (a 50% position) to provide coverage. While 50% release time sounds ample and in fact Corcoran averaged about 50% release time over several years of the Arrangement, the amount could fluctuate above – or far below – that level. As the Examiner indicated, whether and under what conditions various activities are approved or legitimate remains a function of the collective bargaining agreement as it has been interpreted and applied in practice.

Given the importance both parties place upon the amount of release time and/or case load relief available to Corcoran, both are likely to be dissatisfied with our resolution of this issue, which essentially defers it to the grievance and/or discipline procedure (or to the negotiations process). However, the Commission has long refused to assert its statutory complaint jurisdiction over breach of contract claims covered by the contractual grievance procedure, in order to effectuate the parties' agreement that such grievance procedure would be the exclusive means of enforcing the contract. STATE OF WISCONSIN, DEC. NO. 31384-B (11/05); STATE OF WISCONSIN, DEC. NO. 20830-B (WERC, 8/85). Even if we were to disregard this settled principle, the instant record is far from adequate to reach a disposition on these issues, which would likely require extensive evidence of bargaining history and actual practices across at least the PSS bargaining unit, if not beyond. The record reflects some sparring between the parties about their respective views of the contractual union leave provisions, but little factual exploration of these issues.

Thus, while, as discussed below, we conclude that the Arrangement is an enforceable part of the collective bargaining agreement, its full effect is inherently dependent upon how the parties interpret and apply the contractual leave and/or discipline provisions.[6]

2. Was the Arrangement an Enforceable Agreement?

The Examiner held that the Arrangement was not a "free-standing collective bargaining agreement," but rather was a practice, "part of the fabric of accepted custom that makes a collective bargaining agreement a living document." (Examiner's Decision at 28, citations omitted). He held that the State had violated its duty to bargain in good faith by failing to repudiate this practice during collective bargaining and instead unilaterally changing it during the term of an agreement, in violation of Sec. 111.84(1)(d), Stats.

In concluding that the Arrangement was a practice but not an agreement, the Examiner questioned the authority of DOC management to enter into a collective bargaining agreement with WSEU, as well as the lack of a written instrument with clear terms and a definite duration, the legal implications of agreeing to LTE coverage, and the adequacy of the three-position tradeoff as "consideration" for forming a contract. He viewed the Arrangement as the result of a cooperative, problem-solving effort by Beil and Litscher that was not intended to have contractual effect.

Both parties have challenged the Examiner's decision on this issue. WSEU cites precedent showing that the Commission does not require agreements to be in writing before they are enforceable. WSEU further argues that, although the Arrangement by its nature was flexible and fluid, its basic elements (i.e., coverage and case load relief) were sufficiently clear for the parties to carry them out, as demonstrated by the nearly nine-year duration of the Arrangement. WSEU also points out that SELRA does not specifically require OSER's direct involvement in and approval of all agreements, even those at a local level. Finally, WSEU contends that the Examiner's concerns about the legality of using LTE's to provide coverage lack any support in the law and seem to reflect an erroneous belief that release time for union duties is illegal.

For its part, the State agrees with the Examiner's conclusion that the Arrangement was not an enforceable agreement, but vigorously contends that the same legal flaws that make such an agreement unenforceable also preclude giving the Arrangement effect as a practice.

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[6] The State has cited RHODE ISLAND BHD. V. STATE, 707 A.2D 1229 (R I. 1998) to support its claim that, after a change in gubernatorial administrations, OSER could repudiate an arrangement between an agency and a union that provided one or more employees with full time union release time. We agree with WSEU that this case does not provide persuasive authority in the present situation, at least in part because, unlike SELRA, the Rhode Island collective bargaining law gave the state's governor the ultimate authority to enter into collective bargaining agreements. Other principal distinctions are that, contrary to the situation in the Rhode Island case, the Arrangement, as we have found it to be, neither provided Corcoran with 100% release time nor did so without any support in the contract. Thus we need not, and do not, decide the issue presented in the Rhode Island case, viz., whether such an agreement would be lawful under SELRA.

This is the central issue in the case, and, as reflected in the Examiner's complex analysis, is fraught with some difficulty. Upon careful consideration, we conclude that the Arrangement has the same legal character and effect as would the settlement of a grievance about how to accommodate Corcoran's contractual union leave.[7]

In this case, the issue did not arise under the grievance procedure as such, but rather informally in a conversation between DOC and WSEU. Nonetheless, the issue at root was *contractual,* i.e., how to make the contractual union leave workable for Corcoran. It seems obvious that the issue could have arisen as a formal grievance – that without a work load adjustment Corcoran was effectively being denied union leave. It generally is easier to ascertain the terms of a settlement or other agreement if it is in writing. However, the Commission's case law, in accord with traditional arbitration precedent and common law contract principles, establishes that agreements, particularly those resolving grievances, can be enforceable even if unwritten. SEE, E.G., CITY OF MADISON, DEC. NO. 20656-C (WERC, 9/84). To do otherwise would discourage parties from reaching exactly the kind of informal but mutual resolution of problems that occurred in the instant case. Thus, if the Arrangement had been the authorized result of a grievance about Corcoran's need for case load relief, it would be enforceable even if unwritten. We see no reason in policy or law that the parties may not accomplish the same result without the formalities of the grievance procedure, so long as the mechanism is mutually agreeable. Oral understandings about how a contract should be applied in particular situations should be enforceable whether the understanding is reached in the grievance procedure, in an LMC-type forum, or, as here, in an informal discussion – provided, of course, that the parties making the deal have authority to do so.

Here the State strongly argues that DOC (in the person of then-DOC Secretary Litscher) did not have authority to reach such a deal and that WSEU (in the person of Executive Director Beil) was well aware of that.[8] The State first argues that only OSER has the statutory authority under SELRA to enter into collective bargaining agreements, or even to effectively condone the development of practices that affect wages, hours, and working

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[7] Our concurring colleague believes that the Arrangement is better conceived as a binding practice than as an agreement. However, while both he and the Examiner view the Arrangement as a practice, it is important to note that they differ dramatically as to the legal effect of the practice in question. The concurrence agrees with the majority that the Arrangement had become a contractually binding commitment that could not simply be renounced. In contrast, the Examiner viewed the Arrangement as a freestanding practice without a contractual basis, and, as such, subject to renunciation at the conclusion of any existing collective bargaining agreement. See DODGELAND SCHOOL DISTRICT, DEC. NO. 31098-C (WERC, 2/07) at 19-20.

[8] Much of the State's vehemence on this point stems from its insistence that the Arrangement allowed Corcoran to be paid his full state salary for doing full-time union work. We see no need to address the legality of such a deal, had it been made. As discussed above, WSEU does not claim, nor did the Examiner or we find, that the Arrangement requires any particular amount of union leave, whether paid or unpaid. It appears that prior DOC/DCC managers found it appropriate to approve liberal use of contractual leave by Corcoran, and provided him a correspondingly high level of case load relief pursuant to the Arrangement. Whether such liberal allowance is required/precluded by the contract is something the parties are free to explore, preferably through negotiations, but if necessary through lawful application of the contractual discipline and/or grievance procedures.

conditions, citing Sec. 111.815, Stats. An examination of that statute, however, reflects a legislative understanding that OSER, as a practical matter cannot involve itself in the myriad day to day labor relations problems that arise within the State's many, far-flung, and large collective bargaining units. Thus, Sec. 111.815, Stats., provides in relevant part:

> (1) In furtherance of this subchapter, the state shall be considered as a single employer and employment relations policies and practices throughout the state service shall be as consistent as practicable. The office shall negotiate and administer collective bargaining agreements. . . . the office is responsible for the employer functions of the executive branch under this subchapter, *and shall coordinate its collective bargaining activities with operating state agencies on matters of agency concern.…*
>
> (2) In the furtherance of the policy under s. 111.80(4) [i.e., collective bargaining], the director of the office shall, *together with the appointing authorities or their representatives, represent the state in its responsibility as an employer* under this subchapter . . . The director of the office shall establish and maintain, wherever practicable, consistent employment relations policies and practices throughout the state service.

(Emphasis added).

Clearly the Legislature has invested OSER with ultimate authority and responsibility for making and administering collective bargaining agreements. At the same time, at least absent any overriding labor relations directive from OSER, departments and agencies remain in charge of many practical implications of those agreements, such as hiring, firing, and deployment of staff. See Sec. 230.06(1)(b), Stats. OSER, as the ultimate guardian of the contract, certainly may provide guidance and specific directives as it deems appropriate to ensure as much consistency "as practicable" in how agencies carry out the contract. In this case, however, the record does not reflect that OSER (by contract or directive) has expressly prescribed how local supervisors should handle workload problems created by contractual provisions regarding union release time. Nothing indicates that OSER has restricted appointing authorities from providing work load relief as necessary to accommodate the contractual leave commitment. Absent such an OSER restriction, appointing authorities and their subordinate section and division heads are responsible for deploying available staff in a manner that gets the work done. In our view, the Legislature has expressly recognized this intersecting employer authority – and the practical reality of conducting labor relations in complex state-wide units across inter-departmental lines – by the italicized language in subsection (2) of Sec. 111.815, Stats., above. Indeed, this record itself reflects that all parties, including OSER, understand that agreements resolving local or individual labor relations issues are sometimes made at the departmental or agency level, "within their spheres of authority." The contract itself permits appointing authorities to resolve contractual grievances at Step II of the grievance procedure, without obtaining OSER approval.

Accordingly, as we see it, it was logical and proper for Beil to address his concerns to DOC Secretary Litscher about the localized problem in the DCC's Beaver Dam office stemming from Corcoran's union duties. Nothing in this record indicates that Litscher would lack authority to agree, with or without Beil's relinquishing three bargaining unit positions, that an additional LTE would be deployed in the Beaver Dam DCC office and that Corcoran would receive case load relief commensurate with his approved union duties.[9]

Because Litscher had authority to agree to and implement the Arrangement, OSER's reliance upon STATE OF WISCONSIN, DEC. NO. 31207-C (WERC, 3/06) is misplaced. In that case a low-level supervisor implemented a practice regarding her kitchen workers that was inconsistent with the practices that prevailed throughout the institution and was renounced by the institution's manager as soon as he discovered it. In that situation, we concluded that the supervisor "lacked real or apparent authority to 'negotiate' on behalf of the State. . . . " ID. at 12.[10]

The State also argues that the Arrangement is not an agreement because its duration is uncertain and its contours are too vague to enforce. As to the duration of the Arrangement, the analogy to a grievance settlement provides guidance. Since the Arrangement is, in effect, a particularized gloss upon the contractual union leave provisions, the duration of the Arrangement is the same as the duration of the contractual provisions upon which it is premised. Thus, it remains in effect for the remainder of the existing agreement, during any hiatus between agreements, and in any future agreement that contains those provisions – unless and until the parties agree to change it. As to the vagueness of its terms, we agree with WSEU that the Arrangement is inherently fluid since it is contingent upon Corcoran's approved union leave, but such flexibility is not the same thing as vagueness. We, like the Examiner, have found it relatively straightforward to describe the Arrangement, despite its inherent contingency.

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[9] The State's concern that, if the Arrangement is an agreement, "any union will be free to strike deals with agencies without going through OSER...and there will be no consistency of employment relation matters as mandated by [law]," (Resp. Br. in Opp. at 8) is unfounded. Nothing in this decision undermines OSER's overarching authority to guide state-wide labor relations. OSER is free to direct agencies how to handle contractual and labor relations matters, such as restrictions on release time, assuming, of course, its directions are consistent with the collective bargaining agreement and the statutory duty to bargain. Obviously, given the discussion in the text, above, that authority does not permit OSER to retrospectively terminate an existing agreement such as the Arrangement. OSER could, however, withdraw authority from agencies to enter into other such arrangements or agreements in the future without specific OSER approval.

[10] The Examiner's concerns about the limits of Litscher's commitment to deploy an LTE are reasonable, especially when extrapolated, as the Examiner did, to a situation where the LTE might remain employed while bargaining unit members were laid off. We agree with the Examiner that situations could arise that might undermine the enforceability of the Arrangement, such as the Legislature's failure to make an LTE available for deployment in the DCC and/or a clash between the commitment to an LTE and the layoff rights of other bargaining unit members. However, we agree with WSEU that these problems are not inherent in the Arrangement and are not at issue on this record.

Finally, the State points to the "zipper clause" contained in Section 15/1/1 of the Master Contract, which states in pertinent part: "This Agreement represents the entire Agreement of the parties and shall supersede all previous agreements, written or verbal. . . ." The State argues that this clause, re-executed every two years with the rest of the Master Contract, automatically wipes the slate clean of any practices/agreements that may be floating around outside the perimeter, citing SUN PRAIRIE AREA SCHOOL DISTRICT, DEC. NO. 31190-B (WERC, 3/06). In response, WSEU notes that, even as to extraneous or "free-standing" agreements, the term "supersede" means that 15/1/1 is implicated only where provisions in the Master Contract *conflict with* such outside agreements. SUN PRAIRIE itself involved a situation where a longstanding practice conflicted in several ways with specific contract language. WSEU's primary argument, however, is that the State (and the Examiner) err in viewing the Arrangement as a "free-standing" agreement wholly outside the context of the Master Contract. Instead, according to WSEU, the Arrangement "is one of many unwritten agreements incorporated into the Master Agreement, which as the Examiner properly noted must be treated as a 'living document.'" Compl. Br. in Supp. of Exceptions at 24. WSEU also points out that OSER, having learned of the Arrangement sometime in 2003-04, permitted it to continue throughout the 2003-05 contract period, thus "ratifying" this oral agreement after the most recent execution of the zipper clause in 15/1/1.

WSEU has the better of these arguments. Like a grievance settlement, the Arrangement was in essence an agreement about how the contractual union-leave provisions would be interpreted and applied in Corcoran's particular situation. As such it is most accurately viewed as one of the many glosses and grafts that give "life", meaning, and structure to the collective bargaining agreement. Unlike the situations in SUN PRAIRIE, SUPRA, and CITY OF STEVENS POINT, DEC. NO. 21646-B (WERC, 8/85), the Arrangement (whether viewed as a practice or an agreement) did not conflict with contract language, but rather fleshed out that language in a manner that addressed a particular situation. Accordingly, we do not see that Section 15/1/1 is an impediment to enforcing the Arrangement.

We hold, therefore, that the Arrangement was an enforceable agreement and that the State's wholesale renunciation of the Arrangement violated Secs. 111.84(1)(d) and (e), Stats. Having held that the State must comply with the Arrangement until it is eliminated by mutual agreement, and that the Arrangement (as part of the existing collective bargaining agreement) is enforceable during the term of that contract, WSEU is entitled to rely on the Arrangement during the term of a contract and need not bargain with the State over its alteration or elimination except in the context of successor contract negotiations. Thus, no bargaining order is needed or appropriate to remedy the (1)(d) violation in this case.

3. The Interference and Retaliation Allegations

The Examiner held that Karl's efforts to impose a case load upon Corcoran and the State's January 5 and January 7, 2005, memoranda, as well as Karl's pursuit of the disciplinary process regarding Corcoran's union leave, were motivated, at least in part by hostility toward Corcoran's exercise of lawful, concerted activity and therefore violated Sec. 111.84(1)(c), Stats. He dismissed the allegation that the State's memoranda and conduct

had independently violated Sec. 111.84(1)(a), Stats., by interfering with Corcoran's and other stewards' rights to engage in lawful concerted activity. The State has challenged the Examiner's (1)(c) holding, arguing that the State had legitimate reasons for trying to rein in Corcoran's conduct that outweigh the interference with his rights: "… [A]n employer should not be held to an 'angel' standard when dealing with one who has engaged in excesses and abuses and created havoc." Resp. Br. in Supp. of their Pet. for Review, at 28.

The complaint in this case contained both retaliation claims under the rubric of Sec. 111.84(1)(c), Stats., and interference claims under the rubric of Sec 111.84(1)(a), Stats. Interference claims are subjected to a balancing test, weighing the degree of intrusion on the employees' protected activity against the employer's legitimate business reasons for engaging in the activity. STATE OF WISCONSIN, DEC. NO. 30340-B (WERC, 7/04), at 17, and cases cited therein. That interference analysis is objective, examining the likely effects of employer conduct on the "reasonable employee," and does not require evidence of unlawful motivation. In retaliation cases, however, which generally are brought under the discrimination provisions contained in Sec. 111.84(1)(c), Stats., improper motive is a pivotal element in establishing the claim.[11] See generally, CLARK COUNTY, 30361-B (WERC, 11/03), and cases cited therein. Thus, the Commission has held that, whether the claim is brought under (1)(a) or (1)(c), if the essence of the claim lies in retaliation, the Commission will apply the four-part discrimination paradigm. STATE OF WISCONSIN, DEC. NO. 31207-C (WERC, 3/06); STATE OF WISCONSIN (UW), DEC. NO. 30534-B (WERC, 2/05).

The Examiner applied the retaliation/discrimination analysis and agreed with the Complainants that Karl was hostile toward the Arrangement, that the Arrangement was lawful concerted activity, and hence that Karl's actions to curb the Arrangement were unlawful, despite whatever legitimate case load concerns Karl may have had. However, it is apparent from the Examiner's discussion that he did not find the (1)(c) retaliation/motive analysis to be a comfortable fit with situation at hand. Nor do we. The difficulty stems from the fact that the State's "adverse action" in this case was to prohibit (terminate) the activity itself, i.e., the Arrangement. In contrast, the typical retaliation case does not involve an employer's prohibition of the protected activity and consequent efforts to enforce such a prohibition. Rather, in a typical case, the employer is alleged to have taken some extrinsic form of adverse action, ostensibly for a legitimate reason but actually (or at least partly) to punish the employee for the protected activity.

Here, while Karl certainly disliked the Arrangement and leaped at the opportunity to end it, the record does not suggest that Karl's efforts to give Corcoran a case load subsequent to September 2005 were done to punish him for previously having had the Arrangement, but rather to implement what Karl viewed as his right to end the Arrangement. Similarly, Karl's January 5 memorandum was not designed to retaliate against Corcoran for the Arrangement, but rather to monitor Corcoran's schedule so he could be available for his case load now that,

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[11] The four elements necessary to establish retaliation for lawful concerted activity are: (1) that the complainant engaged in lawful concerted activity; (2) that the employer was aware of this activity; (3) that the employer was hostile to the activity; and (4) that the employer's adverse action against the complainant was motivated at least in part by that hostility. CLARK COUNTY, SUPRA.

in Karl's mind, the Arrangement had ended. Thus we conclude that the essence of this case is not retaliation, the (1)(c) motive analysis is not appropriately applied here, and, in any event, the hostility element in the (1)(c) paradigm is not present. Accordingly we have dismissed the alleged violation of Sec. 111.84(1)(c), Stats.

This situation is also not properly cognizable under a subsection (1)(a) interference analysis. It is well-established under the Municipal Employment Relations Act (MERA), the municipal counterpart to SELRA, that the collective bargaining law itself does not give employees a per se statutorily-protected right to union release time. ROCK COUNTY, DEC. NO. 30787-A (WERC, 9/04) at 4, and cases cited therein. Instead, the right to be paid for time spent in such activities, and the conditions under which such paid leave will be provided, are mandatory subjects of bargaining. ID. Here, the parties have negotiated a number of provisions pertaining to this subject. The Arrangement, in effect, was part and parcel of those provisions. The parties have differing views about how those provisions apply; the State acted in accordance with its views and the Complainants have persuaded us that the State breached the agreement. This was an unfair labor practice under subsections (1)(d) and (e). As is generally true of unfair labor practices (at least those under subsection (1)(d)), the State also derivatively interfered with Corcoran's and other employees' lawful concerted activity. However, for the reasons that follow, we are persuaded that the State's action did not constitute an independent violation of subsection (1)(a).

Here, the right to engage in union activity on work time is dependent on what the parties have bargained, because, as noted above, there is no statutory right to do so. Thus, while WSEU has a statutory right to bargain over the ability of employees to perform union activities during work time and a statutory right to enforce any resulting agreement, the State did not independently interfere with employees' Section 2 rights since the State acted in a way that it believed in good faith was consistent with the bargain the parties have struck. Accordingly, we see no basis for finding an independent violation of Sec. 111.84(1)(a) in the State's efforts to terminate the Arrangement, give Corcoran a case load without regard to the Arrangement, or cease deploying an LTE to provide coverage for Corcoran without regard to the Arrangement.

The Complaint also alleged that the January 5 and January 7 memoranda, imposing notice and approval requirements upon PSS bargaining unit stewards, including Corcoran, as well as the State's subsequent attempts to impose geographic restrictions upon PSS stewards, constituted unlawful interference or coercion under subsection (1)(a) of the law. The Examiner dismissed this allegation, concluding that these restrictions were a good faith attempt to enforce the contractual provisions governing union leave and, as such, should be addressed through the contractual grievance procedure. The Complainants have challenged the Examiner's conclusion in this regard, arguing that it constituted an improper deferral to the grievance procedure.

It is apparent from our conclusion regarding the Arrangement, discussed above, that we agree with the Examiner on this issue. It may be that the January 5 and January 7 memoranda, and the directives limiting stewards to specific geographical areas, violated those contractual provisions. It is also possible that, if the contract does not address these issues, the State may have a duty to bargain before unilaterally imposing directives on these topics. However, short of such possible bargaining-related violations, the State has not interfered with, restrained, or coerced its employees in the exercise of their rights under SELRA, as an independent violation of Sec. 111.84(1)(a), Stats., simply by issuing these directives. We therefore affirm the Examiner's decision to dismiss this allegation.

As to the Complainants insistence that the Commission determine whether the State's actions in these respects violated the contract and therefore violated subsection (1)(e) of SELRA, the Examiner properly deferred these allegations to the parties' grievance procedure, for the reasons set forth in Section 1 of this Discussion.

Dated at Madison, Wisconsin, this 12th day of September, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

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

Department of Corrections

Concurring Opinion of Commissioner Paul Gordon

I concur with the result reached by the Majority which is based on its decision that the Arrangement was an enforceable agreement the wholesale renunciation of which violated Sec. 111.84(1)(e), Stats. However, I also see the Arrangement as having become a binding past practice that became part of the parties' labor agreement and, consistent with the conclusions of the Examiner, was breached by the State in violation of the State Employment Labor Relations Act (SELRA).

The Arrangement was a contract based past practice, one that clarified or filled the gaps in terms that were otherwise contained in the written labor agreement – as opposed to a practice which exists totally outside of a written labor agreement and which may even be at odds with the terms of a written labor agreement. The State argues that OSER cannot be bound by such a practice because only OSER, under Sec. 111.815, Stats., has the authority to enter into labor agreements or condone practices. The Majority's analysis of Sec. 111.815, Stats., demonstrates how the statute allows for agreements resolving local or individual labor relations issues are sometimes made at the departmental or agency level within their spheres of authority. But, besides allowing for the Arrangement to be recognized as a labor agreement, the statute also allows for it to be viewed as a practice. There is nothing in the statute which prevents the resolution of a local labor issue, such as Corcoran's, from being accomplished by a binding past practice. SELRA actually refers to employment relations policies and practices, and directs that they be as consistent as practicable. See Sec. 111.815(2), Stats.

Indeed, the Commission has recognized the existence of binding past practices between the State and a labor organization representing teachers employed in state penal institutions, reformatories and colonies. In STATE OF WISCONSIN, DEC. NO. 13017-D, (WERC, 5/77), an unfair labor practice complaint case brought under Sec. 111.84(1)(d), Stats, the Commission stated:

> An employer must bargain before it changes a past practice affecting wages, hours and conditions of employment, such as the rotational plan here, absent waiver. (citations omitted).

The Commission also noted the rights in past practices and customs in the public sector enjoy constitutional protection, citing, e.g., PERRY V. SINDERMANN, 408 U.S. 593 (1972). Placing practices within the framework of the common law of the shop, the Commission stated:

> In STEELWORKERS V. WARRIOR NAVIGATION CO., 363 U.S. 574, 46 LLRM 2416, 2418 (1960), the court quoted favorably from a learned commentator as follows: ". . . [I]t is not unqualifiedly true that a collective bargaining agreement is simply a document by which the union and employees have imposed upon management limited, express restrictions of its otherwise absolute right to manage the enterprise, so that an employee's claim must fail unless he

> can point to a specific contract provision upon which the claim is founded. There are too many unforeseeable contingencies to make the words of the contract the exclusive source of rights and duties. One cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages. Within the sphere of collective bargaining, the institutional characteristics and the governmental nature of the collective bargaining process demand a common law of the shop which implements and furnishes the context of the agreement."

Consistent with the Court's above-quoted observations in STEELWORKERS, I note that the practicalities of reducing all the rules governing a statewide agency such as the Department of Corrections into a single written labor agreement are even less plausible than doing so in the context of a single industrial plant. Thus, I am satisfied that as a general matter past practices can and must exist in the context of SELRA and that both the language of SELRA and Commission precedent recognize that the State and the Department of Corrections can be bound by such past practices.[12]

The State argues in this case that the DOC Secretary had no authority to create a binding practice, citing our decision in WSEU V. STATE OF WISCONSIN, DEC. NO. 31207-C, wherein we rejected the argument that a supervisor had the authority to create a practice that had developed in one of the State's correctional facilities. However, a close reading of that case shows that the Commission merely said that a kitchen supervisor at one facility did not have the level of authority to bind DOC and OSER to a practice. Having found that a position at a certain level did not have such authority, we did not find that such authority could not or did not exist at the highest level position of the DOC. If an Agency Head can bind DOC and OSER by an express agreement like the Arrangement recognized by the Majority, there would be no impediment to the same Agency Head allowing or approving of a practice that becomes binding on the parties. In this regard, it is important to note the fact that OSER actually knew of the Arrangement for several years and over the course of subsequent contract negotiations, yet did nothing to end it. While it is recognized that OSER chose not to address the matter earlier out of concern for appearing to act retaliatory towards Corcoran's other Union activities, that does not eliminate OSER's knowledge of the Arrangement and the fact that OSER chose not to address it earlier in negotiations while the State continued to honor the provisions of the Arrangement. This evidence also provides a factual record showing the practice had existed for a sufficient length of time within the knowledge of the highest levels of authority so as to become binding.

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[12] Binding past practices involving the State and the Department of Corrections have been the subject of grievance arbitrations. See, e.g., STATE OF WISCONSIN, DEC. NO. 28378-A (GRATZ, 10/95), Aff'd by operation of law. DEC. NO. 28378-B (WERC, 11/95) (no unfair labor practices were committed by the State in refusing to apply, as a matter of *res judicata*, prior arbitration awards based on past practice).

The State also argues that the Arrangement was not sufficiently clear to be a binding practice. However, the practice is what the historical and factual record has revealed it to be. As the Majority notes, the Arrangement may have been inherently fluid since it is contingent upon approved union leave, but flexibility is not the same thing as vagueness. Whatever appropriate leave is provided for negotiating contracts and attending to other legitimate union business, the Arrangement required LTE coverage and case load relief for that time. Thus, I conclude the scope of the practice is ascertainable. However, as noted below, the practice cannot conflict with the written terms of the labor agreement.

The State further contends that if there was a practice, it was repudiated. However, this practice was not at odds with or in conflict with any provision of the written labor agreement. Such a practice becomes part of the labor agreement and cannot be simply repudiated. It must be affirmatively negotiated out of the agreement. STATE OF WISCONIN, DEC. NO. 13017-D, (WERC, 5/77), *Supra,* p. 7. Here, the Arrangement and the practice that evolved from it fill gaps in the labor agreement as to how Corcoran's case load is to be addressed while he is on legitimate union business. There is a written provision in the labor agreement which allows him to pursue that union business. The practice that evolved from the Arrangement clarifies how this is to be done and is not inconsistent with the terms of the labor agreement. Thus, the Arrangement and the practice that evolved from it cannot simply be repudiated.

Given all of the foregoing, I find as an alternative to the Majority's analysis that there was a binding past practice here which became part of the labor agreement and that the State committed an unfair labor practice when it repudiated the practice. The scope of the practice is the same as the Arrangement identified by the Majority. Thus, I agree with the Majority as to the scope of the SELRA violation and the remedy ordered.

Dated at Madison, Wisconsin this 12th day of September, 2007.

Paul Gordon /s/

Paul Gordon, Commissioner

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31272-B