STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN LAW ENFORCEMENT ASSOCIATION on behalf of itself, its members including STEVEN J. MAEDER, and other similarly situated employees, Complainants.

vs.

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, WISCONSIN STATE EMPLOYEES UNION COUNCIL 24; and STATE OF WISCONSIN, Respondents.

Case 668
No. 64618
PP(S)-352

Decision No. 31397-B

Appearances:

Sally A. Stix, Attorney, Law Offices of Sally A. Stix, 700 Rayovac Drive, Suite 117, Madison, Wisconsin 53711, appearing on behalf of the Complainants.

Kurt C. Kobelt, Attorney, Lawton & Cates, S.C., Ten East Doty Street, Suite 400, P.O. Box 2965, Madison, Wisconsin 53701-2965, appearing on behalf of AFSCME Council 24, Wisconsin State Employees Union, AFL-CIO.

David J. Vergeront, Chief Legal Counsel, Office of State Employment Relations, State of Wisconsin, 101 East Wilson Street, Fourth Floor, P.O. Box 7855, Madison, Wisconsin 53707-7855, on behalf of the State of Wisconsin.

EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On March 17, 2005, Complainant WLEA filed a complaint alleging that Respondent WSEU had committed unfair labor practices within the meaning of Secs. 111.84(2)(a), (b), (d) and 111.84 (3) of the State Employment Labor Relations Act (SELRA) and that Respondent State had committed unfair labor practices within the meaning of Secs. 111.84(1)(a), (b), (c), (d) and (e) of SELRA. The Commission subsequently appointed the undersigned as hearing examiner in the matter.

On May 25, 2005, WLEA filed a motion to amend the complaint to include an Exhibit 2 consisting of a list of grievances allegedly dropped by WSEU. On June 7, 2005, Respondent WSEU filed a motion to dismiss the complaint on the grounds that it fails to allege facts which, if proven, would constitute violations of Secs. 111.84(2)(a), (b), (d) and 111.84(3), Stats. Briefing concerning WSEU's motion to dismiss was completed June 30, 2005, and the Examiner issued an order on July 14, 2005, granting WLEA's motion to amend and denying WSEU's motion to dismiss. DEC. NO. 31397-A.

The Respondents each filed an answer to the complaint. In lieu of a hearing, the parties entered into a Stipulation of Facts which was received by the Examiner on October 20, 2005, and which consisted of the information contained in Findings of Fact 4-10, *infra*. WLEA's brief, Respondents' responses, and WLEA's reply were then submitted, with briefing concerning the merits of the complaint completed on December 30, 2005, marking the close of the record.

On June 2, 2006, WLEA e-mailed to the Examiner a request which the Examiner has deemed to be a motion to reopen the record so that official notice can be taken of Examiner Coleen Burns' decision in STATE OF WISCONSIN, DEC. NO. 31271-A (Burns, 3/06). Briefing concerning WLEA's motion to reopen was completed on June 19, 2006.

On the basis of the record, the Examiner makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The Complainant, Wisconsin Law Enforcement Association, Inc. (WLEA), is a labor organization with a mailing address of c/o Attorney Sally A. Stix, 700 Rayovac Drive, Suite 117, Madison, Wisconsin 53711-2468. WLEA alleged in the instant complaint that it was filing same "on behalf of itself, its members including Steven J. Maeder, and other similarly situated employees."

2. Respondent Wisconsin State Employees Union Council 24, affiliated with the American Federation of State, County and Municipal Employees, AFL-CIO, (WSEU), is a labor organization with a mailing address of 8033 Excelsior Drive, Suite "C", Madison, Wisconsin 53717.

3. Respondent State of Wisconsin (State), is the state employer. The State's labor relations are conducted by its Office of State Employment Relations (OSER), with a mailing address of 101 East Wilson Street, PO Box 7855, Madison, Wisconsin 53707-7855.

4. WSEU and the State were parties to a collective bargaining agreement effective from May 17, 2003-June 30, 2003. On June 30, 2003, WSEU and the State extended the collective bargaining agreement indefinitely. The Law Enforcement (LE) bargaining unit was covered by this contract. The extension agreement between WSEU and the State read, in pertinent part, as follows:

EXTENSION OF EXISTING
COLLECTIVE BARGAINING AGREEMENT
BETWEEN THE
STATE OF WISCONSIN
AND THE
WISCONSIN STATE EMPLOYEES UNION

The above named parties to the Collective Bargaining Agreement covering the Wisconsin State Employees Union, Law Enforcement (LE) bargaining unit effective May 17, 2003, through June 30. 2003, hereby agree to extend said Agreement effective July 1, 2003, subject to the following terms and conditions:

(1) Except as provided below, there will be no bargaining unit-wide increases in pay granted to employees until a new collective bargaining agreement is ratified by the Union and approved by the Wisconsin Joint Committee on Employment Relations, and other such procedures as outlined by statute are completed.

Personnel transactions adjustments (e.g., promotion, transfer, reclass, etc.) will continue to be processed under this extension agreement pursuant to applicable contract language.

(2) Local agreements negotiated pursuant to the master contract are extended, effective July 1, 2003, on the same terms and conditions as the extension of the master contract.

(3) This extension in no way may be interpreted as a waiver by the Union of its right to bargain on wages and benefits.

(4) This extension in no way may be interpreted as an agreement by the State to grant any form of retroactivity nor as a waiver by the Union of its right to bargain on the subject of retroactivity.

(5) This extension may be terminated by either party upon thirty (30) days written notice.

5. On February 25, 2005, the WLEA won an election conducted by the Wisconsin Employment Relations Commission (WERC) to determine whether WLEA, WSEU or no union, would represent the LE bargaining unit.

6. On February 28,2005, WSEU Executive Director Marty Beil wrote the following letter to Office of State Employment Relations (OSER) Director Karen Timberlake, stating in pertinent part:

> As you are aware, on February 25, the members of the Law Enforcement Unit represented by WSEU Council 24 voted for representation by a different labor organization. WSEU Council 24 does not intend to file any protests to this election.
>
> Accordingly, WSEU Council 24 hereby disclaims interest in the Law Enforcement Unit. The collective bargaining agreement between WSEU Council 24 and the State, which has been extended, should be considered null and void. All pending grievances should be considered withdrawn, including those set for arbitration. We will also withdraw all pending unfair labor practices involving this Unit.
>
> We request that all dues for the month of February deducted from the paychecks of members of the Law Enforcement Unit pursuant to the contract be forwarded directly to WSEU Council 24, not to the affected Local Unions, which are being dissolved in accordance with the AFSCME International Union Constitution. In addition, from this point forward, no further deductions should be made from the employees paychecks for dues in this unit.
>
> Finally, regarding deductions for union dental insurance, the deductions for dental insurance premiums should also cease immediately for this unit since these employees are no longer covered under the union contract with the dental provider(s).

7. On March 7, 2005, Jill Thomas, Labor Relations Specialist-Chief for OSER, sent WLEA interim president, Glen Jones, an email, in response to his request that the WLEA take over the LE Unit's pending grievances and arbitrations, that stated, in pertinent part: "Mark Wild and I discussed the disciplinary and other grievances that have been filed and/or appealed to arbitration by WSEU. Because those grievances and appeals were filed under the WSEU contract, the grievances and appeals are dropped. OSER will not be taking the appeals to hearing." Prior to his discussion with Jill Thomas, Mr. Wild reviewed [(1)] University of Wisconsin Hospital and Clinics Board, Case 7, No. 57941, DR(S)-5, DECISION NO. 29784; and (2) Mr. Beil's February 28 letter that included the statement that "All pending grievances should be considered withdrawn, including those set for arbitration." Based on Mr. Wild's review of that case and that document and his discussion with Ms. Thomas, OSER decided that it would not process the grievances, including not proceeding to hearing.

8. The WERC certified the WLEA as representative for the LE Unit on March 10, 2005. DEC. NO. 31195-A.

9. On or about March 16, 2005, the WLEA filed an appeal pursuant to Section 230.44, Stats., on behalf of Steve Maeder and other LE Unit members who had grievances pending protesting discipline under the WSEU contract.

10. OSER stands ready to process the grievances at issue once the WERC determines which union, WLEA or WSEU, owns the grievances and should the WERC ultimately determine that OSER has a legal obligation to process the grievances.

11. On February 1, 2005, WSEU filed with the WERC a complaint against the State in Case 665, No. 64450, PP(S)-350 (Case 665 complaint) alleging that the State had violated its SELRA duty to bargain collectively with WSEU by refusing to comply with WSEU's January 21, 2005, request that the State provide WSEU with a list of the names and addresses of the members of the LE bargaining unit, in addition to any such lists that the State was required by contract to provide to WSEU. WSEU did not withdraw the Case 665 complaint, despite: the State's having, on January 27, 2005, provided WSEU with a list of the names and addresses of the members of the LE bargaining unit, pursuant to requirements of the State-WSEU extension agreement; WSEU's February 28, 2005, letter to the State noted in Finding of Fact 6; and the WERC's March 10, 2005, certification of WLEA as the representative of the LE bargaining. An examiner decision dismissing the Case 665 complaint on its merits was issued on March 31, 2006. STATE OF WISCONSIN, DEC. NO. 31217-A (Burns, 3/06). The State's bases for requesting dismissal of that complaint, as recited in that decision, did not include any reference to the WSEU's February 28, 2005, letter or to the WERC's certification of WLEA as the exclusive representative of the LE unit.

12. The examiner decision referenced in Finding of Fact 11 was newly discovered by WLEA after the close of the hearing in the instant matter. There was no negligence on WSEU's part in seeking to discover such evidence. The contents of that decision are material to matters at issue in this case. It is reasonably possible that the taking of official notice of the contents of that decision will affect the disposition of this case. WLEA is not requesting that official notice be taken of the contents of that decision solely for the purpose of impeaching a witness.

13. The Examiner infers -- from the State's March 7, 2005, response to WLEA (noted in Finding of Fact 7) coupled with the State's stated willingness to honor WLEA's request upon issuance of a WERC determination that the State has a legal obligation to do so (noted in Finding of Fact 10) -- that at all times after WLEA's certification as exclusive representative on March 10, 2005, the State has refused to allow WLEA to take over processing of any of the LE bargaining unit grievances (including arbitrations) pending as of WSEU's issuance of the February 28, 2005, letter.

14. WSEU, by its February 28, 2005, letter informing the State that the pending LE unit grievances "should be considered withdrawn," caused the State to refuse, at various times including all times after WLEA's certification as exclusive representative on March 10, 2005, to allow WLEA to take over processing of any of the LE bargaining unit grievances (including arbitrations) pending as of WSEU's issuance of the February 28, 2005, letter. WSEU did so in connection with controversies as to employment relations consisting of the substantive claims set forth in the grievances involved.

15. The record does not establish whether the State has treated the extension agreement as terminated or as null and void following the State's receipt of WSEU's February 28, 2005, letter, or at any other time. Accordingly, the record also does not establish whether WSEU has caused the State to treat the extension agreement as terminated or as null and void following the State's receipt of WSEU's February 28, 2005, letter, or at any other time.

CONCLUSIONS OF LAW

1. WLEA has shown "good cause," within the meaning of s. ERC 20.19, Wis. Adm. Code, to reopen the record in this case for the sole purposes of taking official notice of the contents of STATE OF WISCONSIN, DEC. NO. 31217-A (Burns, 3/06) and for receiving the arguments submitted by the parties to date regarding the implications, if any, of the contents of that decision for matters at issue in this case.

2. It is appropriate under Sec. 227.45(3), Stats., for the Examiner to take official notice the contents of STATE OF WISCONSIN, DEC. NO. 31217-A (Burns, 3/06).

3. Section 111.83(6), Stats., of SELRA, did not require WSEU to continue to serve as exclusive representative of the LE unit until the fiscal year and biennium ended on June 30, 2005, and did not prevent WLEA from taking over representation of the LE unit prior to that date.

4. Under SELRA, and in the circumstances of this case, WSEU's February 28, 2005, disclaimer of interest in further representation of the LE unit, in and of itself:

a. was valid and did not violate SELRA;

b. had the automatic legal effect of immediately terminating WSEU's exclusive representative status and SELRA duty of fair representation with respect to the members of the LE bargaining unit, and did not violate SELRA by doing so.

c. had the automatic legal effect of terminating WSEU's authority to withdraw pending LE bargaining unit grievances;

d. had the automatic legal effect of terminating WSEU's authority to terminate the extension agreement;

e. did not have the automatic legal effect of terminating the extension agreement or of otherwise rendering the extension agreement null and void; and

f. did not have the automatic legal effect of extinguishing or withdrawing the grievances then pending with regard to the LE bargaining unit.

6. Under SELRA, the provisions of the extension agreement, other than those inuring to the benefit of the exclusive representative, were not rendered null and void: by the February 25, 2005, results of the election; by WSEU's February 28, 2005, disclaimer of interest; by WSEU's post-disclaimer statement in the same letter that the extension agreement should be considered null and void; or by WERC's March 10, 2005, certification of WLEA as the exclusive representative of the LE unit.

7. Because the record does not establish whether the State has treated the provisions of the extension agreement not inuring to the benefit of the exclusive representative as terminated or as null and void following the State's receipt of WSEU's February 28, 2005, letter, or at any other time:

a. the legal status of those provisions of the extension agreement is not a matter on which a conclusion of law can be appropriately issued in this case;

b. the State has not been shown to have violated SELRA by its treatment of the provisions of the extension agreement after receiving WSEU's February 28, 2005, letter; and

c. WSEU has not been shown to have violated SELRA by causing the State to treat those provisions of the extension agreement as the State treated them.

8. Under SELRA, the WERC's March 10, 2005, certification of WLEA as exclusive representative of the LE bargaining unit had the effect of making WLEA, for grievance processing purposes, a party to the agreements under which the pending grievances arose and the owner of the pending LE bargaining unit grievances other than those inuring to the benefit of the exclusive representative. From that time on, WLEA became entitled to process those grievances in accordance with the grievance procedures, including arbitration, contained in the agreements under which the respective grievances arose, and responsible for the costs of doing so. WLEA also became entitled and responsible to make its own judgments regarding whether and how best to proceed with each of the pending grievances upon consideration of the various relevant factors which may include but not be limited to WLEA's available financial and other resources, in a manner consistent with the duty of fair representation that became applicable to it upon being certified as exclusive representative.

9. Under SELRA, neither the termination, if any, of the June 30, 2003, extension agreement, nor the expiration of any prior State-WSEU agreement, nor WSEU's February 28, 2005, disclaimer of interest, nor WSEU's February 28, 2005, post-disclaimer statement that the grievances should be considered withdrawn, nor WERC's certification of WLEA as LE

unit exclusive representative on March 10, 2005, resulted in the withdrawal or extinguishment of those of the then-pending LE unit grievances (including those appealed to arbitration) that do not inure to the benefit of the exclusive representative. None of those developments relieved the State of any obligation it may have had under those agreements to process (including to arbitrate) those grievances. As of March 10, 2005, it became WLEA's responsibility, rather than WSEU's, to enforce and administer those provisions of those agreements that did not inure to the benefit of the exclusive representative. The agreements to process and arbitrate grievances contained in those agreements are provisions inuring to the benefit of the employees covered by the agreement, as regards grievances relating to substantive agreement provisions inuring to the benefit of the covered employees. The only provisions of the WSEU-State agreements that were extinguished by operation of law and rendered unenforceable by WLEA's certification as exclusive representative were those which inure to the benefit of the exclusive representative such as union security provisions.

10. Except to the extent that the grievances inured to the benefit of the exclusive representative, the State's refusal, at all times after WLEA's certification on March 10, 2005, to allow WLEA to take over processing of the LE bargaining unit grievances (including arbitrations) pending as of WSEU's issuance of the February 28, 2005, letter, constituted a violation of the State's SELRA duty to bargain collectively, and unfair labor practices within the meaning of Sec. 111.84(1)(d), Stats., and derivatively, Sec. 111.84(1)(a), Stats.

11. WSEU committed an unfair labor practice within the meaning of Sec. 111.84(2)(b) and derivatively Sec. 111.84(2)(a), Stats., by inducing an officer or agent of the employer (Mark Wild and Jill Thomas) to engage in any practice with regard to its employees which would constitute an unfair labor practice if undertaken by the officer or agent on the officer's or agent's own initiative (refusing to allow WLEA to take over processing of those of the pending grievances that did not inure to the benefit of the exclusive representative, once WLEA was certified as the LE unit exclusive representative).

12. WSEU is a "person" within the meaning of Sec. 111.84(3), Stats.

13. WSEU committed an unfair labor practice within the meaning of Sec. 111.84(3), Stats., by causing the State, in connection with controversies as to employment relations (the various substantive claims set forth in the pending LE grievances not inuring to the benefit of the exclusive representative), to do an act prohibited by subs. (1) or (2) (the State's violation of the Sec. 111.84(1)(d), Stats., consisting of refusing to allow WLEA to take over processing of the pending LE grievances not inuring to the benefit of the exclusive representative after WLEA was certified as exclusive representative).

14. Except as noted in Conclusions of Law 10, 11 and 13, neither WSEU nor the State has been shown to have violated SELRA in any other respect by their conduct noted in the Findings of Fact.

ORDER

1. The instant record is hereby reopened for the sole purposes of taking official notice of the contents of STATE OF WISCONSIN, DEC. NO. 31217-A (Burns, 3/06) and for receiving the arguments submitted by the parties to date regarding the implications, if any, of the contents of that decision for the matters at issue in this case. Official notice is hereby taken of the contents of that decision, and those arguments have been considered by the Examiner in rendering this decision.

2. By way of remedy for the violation noted in Conclusion of Law 10, Respondent State, its officers and agents, shall immediately:

a. Cease and desist from refusing to allow WLEA to take over processing of the LE bargaining unit grievances (except those inuring to the benefit of the exclusive representative) pending prior to WSEU's issuance of its February 28, 2005, letter disclaiming interest in representing the LE unit, including such grievances that were appealed to arbitration.

b. Cease and desist from treating "as dropped" the LE bargaining unit grievances described in 2.a., above, unless and until they are withdrawn by WLEA.

c. Cease and desist from, in any other way, refusing to bargain collectively with WLEA as the exclusive representative of the LE unit, in the manner and to the extent required by law.

d. Take the following affirmative action which the Examiner finds will effectuate the purposes of SELRA:

(1) Upon request by WLEA, allow WLEA to take over processing of the grievances described in 2.a., above, in accordance with the grievance and arbitration procedures set forth in the WSEU-State agreements under which the grievances arose, without raising timeliness objections for any time which passed since February 28, 2005.

(2) Notify all of its employees in the LE bargaining unit, by posting in conspicuous places where those employees are employed, copies of the notice attached hereto and marked “Appendix A.” That notice shall be signed by the Director of the State's Office of Employment Relations and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by the State of Wisconsin to assure that those notices are not altered, defaced, or covered by other material.

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

3. By way of remedy for the violation noted in Conclusions of Law 11 and 13, Respondent WSEU, its officers and agents, shall immediately:

a. Cease and desist from causing the State of Wisconsin to refuse to allow WLEA to take over processing of the LE bargaining unit grievances (except those inuring to the benefit of the exclusive representative) pending prior to WSEU's issuance of its February 28, 2005, letter disclaiming interest in representing the LE unit, including such grievances that were appealed to arbitration.

b. Cease and desist from, in any other way, causing the State of Wisconsin to commit unfair labor practices in connection with any controversy as to employment relations.

c. Cease and desist from inducing an officer or agent of the State of Wisconsin to refuse to allow WLEA to take over processing of the grievances described in 3.a., above.

d. Cease and desist from, in any other way, inducing an officer or agent of the State of Wisconsin to engage in any practice with regard to its employees which would constitute an unfair labor practice if undertaken by the officer or agent on the officers' or agent's own initiative.

e. Take the following affirmative action which the Examiner finds will effectuate the purposes of SELRA:

(1) Notify all employees in the LE bargaining unit, by posting in conspicuous places where those employees are employed, copies of the notice attached hereto and marked "Appendix B." That notice shall be signed by the WSEU Executive Director and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by WSEU to assure that those notices are not altered, defaced, or covered by other material.

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

4. The request by WLEA for an order requiring the State and WSEU to pay WLEA's attorneys fees and costs is denied.

5. The requests by WSEU and the State for orders requiring WLEA to pay their attorneys fees and costs are denied.

6. Except as otherwise noted in 2. and 3., above, the instant complaint is dismissed.

Dated at Shorewood, Wisconsin, this 1st day of August, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Marshall L. Gratz /s/
Marshall L. Gratz, Examiner

APPENDIX "A"

NOTICE TO ALL EMPLOYEES OF THE STATE OF WISCONSIN IN THE LAW ENFORCEMENT BARGAINING UNIT

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the State Employment Labor Relations Act, we hereby notify our employees in the Law Enforcement bargaining unit represented by Wisconsin Law Enforcement Association (WLEA) that:

1. WE WILL cease and desist from refusing to allow WLEA to take over processing of the LE bargaining unit grievances (except those inuring to the benefit of the exclusive representative) pending prior to WSEU's issuance of its February 28, 2005, letter disclaiming interest in representing the LE unit, including such grievances that were appealed to arbitration.

2. WE WILL NOT treat "as dropped" the LE bargaining unit grievances described in 1., above, unless and until they are withdrawn by WLEA.

3. WE WILL, upon request by WLEA, allow WLEA to take over processing of the grievances described in 1., above, in accordance with the grievance and arbitration procedures set forth in the WSEU-State agreements under which the grievances arose, and WE WILL do so without raising timeliness objections for any time which passed since February 28, 2005.

4. WE WILL NOT, in any other way, refuse to bargain collectively with WLEA as regards the LE bargaining unit in the manner and to the extent required by law.

Dated this _____ day of _____, 2006.

STATE OF WISCONSIN
OFFICE OF STATE EMPLOYMENT RELATIONS

_____
Director

THIS IS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED OR COVERED BY ANY OTHER MATERIAL.

APPENDIX "B"

NOTICE TO ALL EMPLOYEES OF THE STATE OF WISCONSIN IN THE LAW ENFORCEMENT BARGAINING UNIT

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the State Employment Labor Relations Act, we hereby notify all employees in the Law Enforcement bargaining unit represented by Wisconsin Law Enforcement Association (WLEA) that:

1. WE WILL cease and desist from causing the State of Wisconsin to refuse to allow WLEA to take over processing of the LE bargaining unit grievances (except those inuring to the benefit of the exclusive representative) pending prior to WSEU's issuance of its February 28, 2005, letter disclaiming interest in representing the LE unit, including such grievances that were appealed to arbitration.

2. WE WILL NOT, in any other way, cause the State of Wisconsin to commit unfair labor practices in connection with any controversy as to employment relations.

3. WE WILL cease and desist from inducing an officer or agent of the State of Wisconsin to refuse to allow WLEA to take over processing of the grievances described in 1., above.

4. WE WILL NOT, in any other way, induce an officer or agent of the State of Wisconsin to engage in any practice with regard to its employees which would constitute an unfair labor practice if undertaken by the officer or agent on the officers' or agent's own initiative.

Dated this _____ day of _____, 2006.

WISCONSIN STATE EMPLOYEES UNION (WSEU)
AFSCME, AFL-CIO

_____
Executive Director

THIS IS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED OR COVERED BY ANY OTHER MATERIAL.

STATE OF WISCONSIN

MEMORANDUM ACCOMPANYING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

PLEADINGS, MOTIONS AND PARTIES' POSITIONS

Complaint

In the complaint, WLEA alleges, in pertinent part, as follows:

. . .

C. [facts giving rise to complaint:]

[1] On or about March 2, 2005, AFSCME, WSEU notified the State of its withdrawal of any and all grievances for the law enforcement ("LE") unit.

[2] WLEA was not certified as representative for the LE bargaining unit at the time of Council 24's withdrawal.

[3] Complainant Maeder and others had grievance proceedings terminated regarding discipline, termination and other matters.

[4] On March 7, 2005, the State notified WLEA, because the "grievances and appeals were filed under the WSEU contract, the grievances and appeals are dropped."

[5] Further, in AFSCME, WSEU's notice to the State, it unilaterally canceled without 30-days notice the extended contract with the State of Wisconsin which pertained to the LE bargaining unit, refusing representation to LE employees despite the lack of a new certified representative and the new representation assumption date which was to begin at the expiration of AFSCME, WSEU and the State's contract. (See, Ex. 1, attached). [attachment omitted].

D. [statutory sections alleged violated:]

Secs. 111.84(2)(a), (b), (d) and 111.84(3) by AFSCME, WSEU; and

Secs. 111.84(l)(a), (b), (c), (d), (e) by the State of Wisconsin.

E. [relief requested:]

(1) All relief sought by AFSCME, WSEU as articulated in the original grievances and a finding that AFSCME, WSEU and the State committed unfair labor practices.

(2) In the alternative, a requirement that AFSCME, WSEU act as LE employees' representative for all unlawfully withdrawn grievances and AFSCME, WSEU and the State be ordered to continue the grievance/arbitration process or an order requiring AFSCME, WSEU to transfer all pending grievances to WLEA for processing and an order that the State accept the grievances for processing.

(3) Further, AFSCME, WSEU be ordered to immediately reinstate the discontinued dental insurance coverage to LE unit members and pay all out-of-pocket expenses any LE bargaining unit member incurred due to the unlawful cancellation.

(4) Attorneys' fees and costs for bringing action.

Exhibit 1 attached to the complaint is a WSEU-State extension agreement signed on June 30, 2003, to the effect that the WSEU-State collective bargaining agreement effective May 17, 2003, through June 30, 2003, was extended effective July 1, 2003, subject to termination by either party upon thirty days written notice. The text of that extension agreement is set forth in Finding of Fact 4.

On May 25, 2005, WLEA filed a motion to amend the complaint to include Exhibit 2 consisting of what WLEA asserts is a list of the grievances allegedly dropped by WSEU. Neither Respondent responded in any way to that routine motion, and the Examiner granted it as a part of his Order dated July 14, 2005.

Examiner's July 14, 2005, Order Denying WSEU Motion to Dismiss

In its June 7, 2005, motion to dismiss, WSEU requested that the complaint be dismissed because "Complainants have failed to allege or establish violations of Secs. 111.84(2)(a), (b), (d) and 111.84(3), Stats."

By an order dated July 14, 2005, the Examiner denied that motion on the following bases.

WSEU sought dismissal of the portions of the complaint alleging WSEU unfair labor practices, on the grounds that the facts alleged in the complaint, if proven, could not constitute a basis for concluding that WSEU committed any of the unfair labor practices alleged. WLEA asserted that the complaint sets forth facts constituting viable claims that WSEU violated its SELRA duty of fair representation by various acts and omissions alleged in the complaint, and it requested that the motion be denied with an order that WSEU pay WLEA's attorneys fees and costs relating to the motion. The State submitted no arguments regarding the motion.

WSEU cited federal private sector case law[1] on what it asserted are first impression issues for the WERC, for the propositions that when an exclusive representative disclaims further interest in representing a bargaining unit, all pending grievances are extinguished; that, absent collusion between unions not present here, an exclusive representative is entitled to disclaim interest at any time; that WSEU was therefore entitled to do so without providing any notice when it lost the decertification election and decided not to challenge that result; that the existence of the June 30, 2003, contract extension agreement did not preclude WSEU from disclaiming interest; that once WSEU disclaimed interest, the contract extension agreement was null and void, all grievances relating to WSEU-State agreements were extinguished by operation of law, and the employees' decision to certify WLEA as their representative took effect by operation of law with the later WERC certification of WLEA merely serving as an after-the-fact confirmation; and that, in any event, after a labor organization is decertified, the employer is not obligated to arbitrate grievances filed prior to the decertification. WSEU further suggests WSEU's withdrawal of the grievances has not left WLEA and the affected employees without recourse because WLEA can, if it chooses, both bargain with the State for reconsideration of the grievances, pursue a violation of contract unfair labor practice complaint against the State under Sec. 111.84(1)(e), Stats., or pursue Sec. 230.44, Stats., appeals regarding those of the grievances subject to that process.

WLEA, primarily citing federal and other non-Wisconsin case law[2], asserted that in some circumstances a decertified union that is signatory to a collective bargaining agreement may retain the right to enforce claims that arose under the contract before it expired and before the union was decertified; that the grievances at issue would not have been extinguished by the outcome of the election, by WSEU's disclaimer of interest, by the termination or expiration of the extension agreement, or by the WERC's later certification of WLEA; and that, in any event, a union is entitled to disclaim interest only if the disclaimer is made in good faith, unlike WSEU's disclaimer taken as a retaliatory action prior to the WERC's certification of the election results. WLEA further asserted that Sec. 111.83(6), Stats., when read together with Sec. 111.92(3), Stats., conferred on WSEU the responsibility to represent the LE unit through the end of the biennium ending on June 30, 2005, and specifically provides that a newly elected representative takes over only upon expiration of the prior agreement, thereby preventing a new representative from taking over immediately after a disclaimer of interest by the prior representative. WLEA further argued that WSEU's claimed right to abrogate its

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[1] WSEU cited, among others, JOINT COUNCIL OF TEAMSTERS, NO. 42 (GRINNELL FIRE PROTECTION SYSTEMS COMPANY, INC.), 235 NLRB 1168, 1169 (1978) (AFF'D SUB NOM. DYCUS V. NLRB, 615 F.2D 820, 826 n.2 (CA 9, 1980); ARIZONA PORTLAND CEMENT CO., 302 NLRB 36, 37 (1991); PRODUCTION AND MAINTENANCE LOCAL UNION 101, 329 NLRB 247, 249 (1999); AMERICAN SUNROOF, 243 NLRB 1128, 1129-30 (1979); DYCUS, *supra*, at 826 n.2; and TEAMSTERS V. FLIGHT ATTENDANTS, 864 F.2D 173 (CA DC, 1988).

[2] WLEA cited, among others, AUTOMOBILE WORKERS V. TELEX COMPUTER PRODUCTS, 816 F.2D 519, 522-23 (CA 10, 1987); QUINN V. POLICE OFFICERS LABOR COUNCIL, 456 Mich. 478, 572 N.W.2D 641 (1998); UNITED STATES GYPSUM CO. V. STEELWORKERS, 384 F.2D 38 (CA 5, 1967); and CHICAGO TRUCK DRIVERS LOCAL 101 (BAKE-LINE PRODUCTS), 329 NLRB 247, 248 (1999); ARIZONA PORTLAND CEMENT CO., 302 NLRB 36, 37 (1991).

duties within the statutorily defined period of representation must be rejected as inconsistent with the expressed statutory policy favoring stability and continuity in the State's relations with its employees and their unions. Further, WLEA suggested that if WSEU did not want to fulfill its responsibilities to the LE unit after losing the election, it could have delegated them to WLEA. WLEA concluded that by failing to follow one or the other of those courses, WSEU violated its duty of fair representation under SELRA.

In denying the motion, the Examiner agreed with WLEA that it is well-settled Commission case law that the expiration or termination of the agreement under which a grievance arises does not extinguish the grievance or relieve the employer of any obligation it may have had under the agreement to process or arbitrate the grievance involved. SEE, E.G., RACINE UNIFIED SCHOOL DISTRICT, DEC NO. 24272-B (WERC, 3/1/88). In that case, the Commission stated,

> While we have affirmed the Examiner's Conclusion of Law that the District acted lawfully in refusing to arbitrate the nine grievances deemed to have arisen after expiration, we are not holding herein that the expiration of the agreement relieved the District of the obligation to arbitrate grievances filed after expiration but concerning events arising during the term of the agreement. On the contrary, the Sec. 111.70(3)(a)5, Stats., duty not to violate an agreement to arbitrate is not extinguished--as regards a grievance concerning pre-expiration events--by the fact that the agreement expired before the grievance was initiated and/or fully processed through the grievance and arbitration procedures. In other words, the fact that a grievance arising prior to expiration has not been initiated or fully processed through contractual grievance and arbitration procedures by the time of expiration does not, alone, extinguish the contractual duty to complete those processes as to such grievance. SEE, E.G., ALMA CENTER SCHOOLS, DEC. NO. 11628 (WERC, 7/73) ("The fact that the 1971-72 agreement has expired does not excuse Respondents from arbitrating a dispute which arose during the term of said agreement." ID. at 8); and ABBOTSFORD SCHOOLS, DEC. NO. 11202-A (3/73) (The fact that the agreement has now expired does not excuse the Respondents from their duty to remedy any breaches of the agreement arising during the term of the agreement. ID. at 8.), AFF'D BY OPERATION OF LAW, DEC. NO. 11202-B (WERC, 5/73). Each of those cases cited with approval this agency's private sector decisions in SAFEWAY STORES, DEC. NO. 6883 (WERB, 9/64) (employer ordered to arbitrate grievance filed after expiration because "the alleged contractual violation occurred during the term of the agreement." ID. at 6.) and KROGER COMPANY, DEC. NO. 7563-A (WERB, 9/66)(to the same effect.)

RACINE, *supra*, DEC. NO. 24272-B at 7-8. Section 111.84(1)(e), of SELRA parallels the above-referenced Sec. 111.70(3)(a)5 of the Municipal Employment Relations Act (MERA).

Whereas the parties' arguments otherwise rely primarily on private sector decisional principles developed under other than Wisconsin statutes, the Examiner found it preferable to apply public sector decisional principles developed by the Commission under MERA.

Specifically, the Examiner found it appropriate to draw guidance from the Commission's long held view in public sector cases under MERA that,

> Where the Commission conducts an election during the term of a collective bargaining agreement and the employees select a bargaining representative other than the one previously recognized in the agreement, the Commission's policy is that the new representative "will be obligated to enforce and administer the substantive provisions therein inuring to the benefit of the employes covered by the . . . agreement. Any provision which runs to the benefit of the former bargaining agent will be considered extinguished and unenforceable.

GATEWAY DISTRICT BOARD OF VTAE, DEC. NO. 20209-B, (CROWLEY, 7/83) at 7, AFF'D -B (WERC, 8/84), AFF'D (CIRCT KENOSHA, 11/14/85), CITING CITY OF GREEN BAY, DEC. NO. 6558 (WERB, 11/83) and MERTON SCHOOLS, DEC. NO. 12828 (WERC, 6/74). In GATEWAY, the Commission affirmed the Examiner's conclusions that the new representative's responsibility to enforce and administer the non-extinguished agreement provisions began as of the date of the WERC's certification of the new representative as exclusive representative. SEE, GATEWAY, *supra*, DEC. NO. 20209-A at 4, AND DEC. NO. 20209-B at 6.

The Examiner further noted that the GATEWAY decision provides persuasive guidance in several respects where, as here, the Commission conducts an election under SELRA during the term of an extension agreement[3] and the employees select a bargaining representative other than the one previously recognized in the agreement.[4] First, the Commission considered it to be the new representative's responsibility, rather than the old representative's, to enforce and administer the non-extinguished portions of the existing agreement. Second, it was the date of the WERC's certification of the new representative that marked the point after which contract enforcement and administration became the new representative's responsibility. Third, neither the election result nor the certification of the new representative had the effect of extinguishing or rendering unenforceable provisions of the unexpired agreement inuring to the benefit of the employees covered by the agreement. And fourth, the only provisions of the existing agreement that were extinguished by operation of law and unenforceable were those which run to the benefit of the former bargaining agent such as union security provisions.

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[3] In contrast, where the Commission conducts an election under SELRA during the term of other than an extension agreement, specific language in Sec. 111.83(6), Stats., would become applicable, see, STATE OF WISCONSIN, DEC. NO. 31195 (WERC, 12/04).

[4] The Examiner noted that he did not have occasion on the facts of this case to offer an opinion on the decisional principles applicable where an exclusive representative is decertified and no new representative is selected.

Applying the above principles from the RACINE and GATEWAY cases, together, to the facts alleged in the instant complaint, the Examiner concluded as follows: Neither the expiration nor termination of the June 30, 2003, extension agreement nor the expiration of any prior State-WSEU agreement would have extinguished grievances arising under those agreements or relieved the State of any obligation it may have had under those agreements to process or arbitrate the grievances involved. It became WLEA's responsibility, rather than WSEU's, to enforce and administer the non-extinguished portions of those agreements, as of the date of the WERC's certification of WLEA as the new representative. Neither the election result nor the certification of the new representative had the effect of extinguishing or rendering unenforceable provisions of those agreements inuring to the benefit of the employees covered by the agreements. (In the Examiner's opinion, agreements to process and arbitrate grievances are clearly provisions inuring to the benefit of the employees covered by the agreement, as regards grievances relating to substantive agreement provisions inuring to the benefit of the covered employees.)[5] And finally, the only provisions of the WSEU-State agreements that were extinguished by operation of law and unenforceable were those which run to the benefit of the former bargaining agent such as union security provisions.

On the following bases, the Examiner rejected WLEA's contention that Sec. 111.83(6), Stats., of SELRA, would require WSEU to continue to serve as exclusive representative of the LE unit until the fiscal year and biennium ended on June 30, 2005, and/or that that Section prevented WLEA from taking over representation of the LE unit prior to that date. To the contrary in STATE OF WISCONSIN, DEC. NO. 31195 (WERC, 12/04), *supra*, the Commission held that Sec. 111.83(6), Stats., only establishes procedures applicable where an "actual agreement" is in effect, and that an extension agreement does not constitute such an "actual agreement." ID. at 4-6. Accordingly, the portion of Sec. 111.83(6), Stats., stating, "[i]f a majority of the employees in the collective bargaining unit vote for a change or discontinuance of representation by any named representative, the decision takes effect upon expiration of any existing collective bargaining agreement between the employer and the existing representative," is not applicable where, as here, there is only an extension agreement but no "actual agreement" in force.

The Examiner also rejected WSEU's contention that WSEU's disclaimer of interest prior to the WERC's certification of WLEA as the newly-elected representative extinguished pending grievances by operation of law. The Examiner found it contrary to the purposes served by the RACINE and GATEWAY principles noted above and contrary to the underlying

[5] The Examiner noted that the grievance list added to the complaint by amendment did not permit the Examiner to determine which, if any, of the grievances listed relate to substantive agreement provisions inuring to the benefit of the former bargaining agent. For that reason, and because the complaint alleges that the grievances involved relate to "discipline, termination and other matters," the Examiner stated that he could not conclude at that stage of the proceedings that none of the grievances referred to in the complaint relate to substantive agreement provisions inuring to the benefit of the covered employees.

purposes of SELRA[6] for the defeated and outgoing representative's decision not to further represent the employees for the period of time after the election and before the WERC certification of a newly elected representative to have the effect of extinguishing by operation of law what would otherwise remain viable contractually-enforceable substantive claims affecting the employees involved.

Furthermore, assuming, without deciding, both that WSEU was acting within its rights to disclaim interest in further representing the LE unit during the period of time prior to the WERC's certification of WLEA as the new representative, and that WSEU's disclaimer of interest relieved it thereafter of its duty of fair representation of the LE unit, the Examiner nonetheless concluded that the complaint states a viable SELRA claim against WSEU, on the following bases. The complaint alleges that WSEU disclaimed interest by the same letter in which it withdrew all grievances. If the disclaimer is deemed to take effect the instant after the grievances were withdrawn, then WSEU would have remained subject to the duty to fairly represent the LE unit when it withdrew the grievances and the complaint would constitute a viable Sec. 111.84(2)(a), Stats., claim that WSEU's withdrawal of the grievances violated that duty. If the disclaimer is deemed to take effect at the same time or before the grievances were withdrawn, then WSEU would have been purporting to withdraw grievances it lacked the representational authority to withdraw, and the complaint would constitute a viable Sec. 111.84(3), Stats., claim that WSEU improperly caused the State to commit alleged unfair labor practices consisting of improperly refusing to further process the grievances.

On the following bases, the Examiner also rejected any WSEU contention that the complaint against WSEU is somehow rendered non-viable because WLEA may have non-contractual alternative means of pursuing the grievances at the bargaining table or through statutory proceedings. The complaint could result in a determination that WSEU has unlawfully deprived WLEA of the right to pursue some or all of those grievances through the contractual grievance procedure. The availability of bargaining table or statutory enforcement alternatives does not persuasively undercut the viability of such a claim against WSEU, generally. Especially so when the limitations of and possible State defenses to those alternative enforcement means are considered.

In sum, the Examiner concluded that, under SELRA and in the circumstances alleged in the instant complaint, grievances concerning events or occurrences during the term of the June 30, 2003, extension agreement or during the term of earlier agreements between the State and WSEU would not have been extinguished by the expiration or termination of the agreement(s) under which those grievances arose, or by the outcome of the election, or by WSEU's disclaimer of interest in further representation of the LE unit, or by the WERC's later certification of WLEA as representative of the LE unit. Thus, but for WSEU's withdrawal of

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[6] The Examiner noted that the SELRA "Declaration of Policy" emphasizes the values of "[o]rderly and constructive employment relations for employees and the efficient administration of state government", and the importance of "providing a convenient, expeditious and impartial tribunal in which [the interests of the public, the employee and the employer] may have their respective rights determined." Secs. 111.80(2) and (4), Stats.

the grievances, some or all of those grievances would have had continued viability as contract grievances the processing of which became WLEA's responsibility when WERC certified WLEA as representative. The complaint asserts that by its wholesale withdrawal of the grievances in the extant circumstances, WSEU either violated its SELRA duty of fair representation with respect to those grievances or improperly purported to withdraw those grievances when WSEU was without the authority to do so, causing the State to allegedly commit unfair labor practices by refusing to continue to process those grievances. While under the foregoing analysis WLEA may not be entitled to an order requiring WSEU to provide or pay for the continued processing of the grievances in question, WSEU has not persuasively shown that no relief of any kind against WSEU (e.g., declarative relief, notice posting, etc.) could be granted under any interpretation of the facts alleged in the complaint.

For all of those reasons, the Examiner stated that he was not persuaded that the complaint fails to allege or establish any violations of Sec. 111.84(a), (b), (d) and 111.84(3), Stats.

Respondents' Answers to the Complaint

After denying WSEU's motion to dismiss, the Examiner issued a notice of hearing and called upon the Respondents to file answers to the complaint.

In its answer, WSEU admitted the first third and fourth sentences of complaint paragraph C, and denied the second and fifth sentences of complaint paragraph C and all of paragraphs D and E. WSEU requested that the complaint be dismissed either for failure to state a claim or on its merits, and it requested that WLEA be ordered to pay its attorneys fees and costs.

In its answer, the State admitted the first three sentences of complaint paragraph C. It denied the fourth sentence "because Complainants take the language out of context" and affirmatively alleged "that any decision and any statements [the State] made not to proceed with the grievances already filed was based on Respondent [WSEU]'s notice that it owned the grievances and that '[a]ll pending grievances should be considered withdrawn, including those set for arbitration.'" With respect to the fifth sentence, the State "admit[ted] only that the document speaks for itself." The State denied complaint paragraphs D and E, denied that the State has violated any law and denied that any remedy is appropriate. The State requested that the complaint be dismissed on its merits and requested that the Commission order "other and further relief as may be deemed just and equitable, including fees and costs as appropriate."

The Stipulation of Facts and WLEA's Motion to Reopen the Record

Following the Examiner's issuance of a notice of hearing, the parties agreed to waive a hearing, and they executed and submitted a Stipulation of Facts which has been restated by the Examiner, without material modification, in Findings of Fact 4-10.

The parties then submitted written post-hearing arguments, the last of which was received on December 30, 2005. Prior to any further developments in the matter, WLEA sent the Examiner an e-mail on June 2, 2006, requesting that the Examiner take official notice of WERC Examiner Coleen Burns' decision in STATE OF WISCONSIN, DEC. NO. 31271-A (Burns, 3/31/06). The Examiner advised the parties that he would treat WLEA's e-mail request as a motion to reopen the record for the purpose of taking official notice of that decision, and the Examiner established a briefing schedule regarding that motion. By June 19, 2006, each of the parties had submitted to the Examiner in writing its position regarding the motion to reopen and regarding what implications, if any, the contents of Examiner Burns' decision have for the instant case. The State opposed the motion to reopen, whereas WLEA stated that it had no objection to the motion. Contrary to WLEA, both WSEU and the State assert that the contents of the decision have no material implications for the instant case.

The Examiner finds the instant request for reopening to be consistent with the applicable Commission case law standards of: material evidence, newly discovered after close of evidentiary hearing, absence of negligence in seeking to discover such evidence, reasonable possibility that the newly discovered evidence will affect the disposition of the proceeding, and introduction of evidence not solely for the purpose of impeaching a witness. E.G., KENOSHA COUNTY (SHERIFF'S DEPARTMENT), DEC. NO. 21909 (WERC, 8/84) (standards for applying MERA rule ERC 10.19, which provides in pertinent part, "The hearing may be reopened for good cause shown" and which is identical to the language of SELRA rule ERC 20.19, Wis. Adm. Code.)

Accordingly, the record has been reopened for the sole purpose of taking official notice of the contents of Examiner Burns' decision, official notice has been taken of the contents of that decision, and the parties' arguments about the implications, if any, of those contents have been considered by the Examiner in rendering this decision.

SELRA Provisions Involved

> 111.80 Declaration of policy. The public policy of the state as to labor relations and collective bargaining in state employment, in the furtherance of which this subchapter is enacted, is as follows:
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> . . .
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> (2) Orderly and constructive employment relations for employees and the efficient administration of state government are promotive of all these interests [of the public, the employee and the employer]. . . .
>
> . . .
>
> (4) It is the policy of this state, in order to preserve and promote the interests of the public, the employee and the employer alike, to encourage the

practices and procedures of collective bargaining in state employment subject to the requirements of the public service and related laws, rules and policies governing state employment, by establishing standards of fair conduct in state employment relations and by providing a convenient, expeditious and impartial tribunal in which these interests may have their respective rights determined.

. . .

111.83(6) While a collective bargaining agreement between a labor organization and an employer is in force under this subchapter, a petition for an election in the collective bargaining unit to which the agreement applies may only be filed during October in the calendar year prior to the expiration of that agreement. An election under that petition may be hold only if the petition is supported by proof that at least 30% of the employees in the collective bargaining unit desire a change or discontinuance of existing representation. Within 60 days of the time that an original petition is filed, another petition may be filed supported by proof that at least 10% of the employees in the same collective bargaining unit desire a different representative. If a majority of the employees in the collective bargaining unit vote for a change or discontinuance of representation by any named representative, the decision takes effect upon expiration of any existing collective bargaining agreement between the employer and the existing representative.

. . .

111.84(1) It is an unfair labor practice for an employer individually or in concert with others:

(a) To interfere with, restrain or coerce employees in the exercise of their rights guaranteed in s. 111.82.

(b) Except as otherwise provided. in this paragraph, to initiate, create, dominate or interfere with the formation or administration of any labor or employee organization or contribute financial support to it.

(c) To encourage or discourage membership in any labor organization by discrimination in regard to hiring, tenure or other terms or conditions of employment. This paragraph does not apply to fair-share or maintenance of membership agreements.

(d) To refuse to bargain collectively on matters set forth in s. 111.91(1) with a representative of a majority of its employees in an appropriate collective: bargaining unit.

(e) To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting employees, including an agreement to arbitrate or to accept the terms of an arbitration award, where previously the parties have agreed to accept such award as final and binding upon them.

111.84(2) It is unfair practice for an employee individually or in concert with others:

(a) To coerce or intimidate an employee in the enjoyment of the employee's legal rights, including those guaranteed under s. 111.82.

(b) To coerce, intimidate or induce any officer or agent of the employer to interfere with any of the employer's employees in the enjoyment of their legal rights including those guaranteed under s. 111.82 or to engage in any practice with regard to its employees which would constitute an unfair labor practice if undertaken by the officer or agent on the officer's or agent's own initiative.

. . .

(d) To violate the provisions of any written agreement with respect to terms and conditions of employment affecting employees, including an agreement to arbitrate or to accept the terms of an arbitration award, where previously the parties have agreed to accept such awards as final and binding upon them.

. . .

111.84(3) It is an unfair labor practice for any person to do or cause to be done on behalf of or in the interest of employers or employees, or in connection with or to influence the outcome of any controversy as to employment relations, any act prohibited by subs. (1) and (2).

. . .

POSITIONS OF THE PARTIES

Position of WLEA

In general, WLEA asserts that WSEU committed unfair labor practices when, in order to penalize LE unit employees for selecting WLEA as their representative, it prematurely and unnecessarily disclaimed interest in the LE unit and terminated the collective bargaining agreement for the LE bargaining unit and withdrew all LE grievances and unfair labor

practices (but not the Case 665 complaint where WSEU's own organizational interests were at stake); and that the State committed unfair labor practices when it terminated the collective bargaining unit for the LE bargaining unit, refused to permit WLEA to take over processing of the pending grievances filed on behalf of the members of that unit, but nonetheless allowed the Case 665 complaint to proceed to decision without pointing out that WSEU was no longer the exclusive representative of the LE unit to which that complaint related.

WLEA asserts that the timing and wording of WSEU's February 28, 2005, letter, WSEU's continued pursuit its own interests in the Case 665 Complaint, and the absence of any reasonable justification for WSEU's agreement termination, grievance withdrawal and withdrawal of all other unfair labor practice complaints, combine to persuasively establish that those WSEU actions were motivated by animus against the LE bargaining unit members protected activity of selecting WLEA to replace WSEU as their representative.

WSEU's disclaimer of interest was: arbitrary and bad faith conduct violative of WSEU's SELRA duty of fair representation; contrary to the federal private sector case law cited by WSEU because it was done for a retaliatory purpose rather than in good faith;[7] and inconsistent with policies favoring orderly transition between representatives implicit in SELRA's Sec. 111.83(6), Stats., in the WERC's GATEWAY decision and in the Michigan Supreme Court's decision requiring an ousted representative to bear the costs of arbitrating a grievance initiated prior to the ouster.[8] Since the disclaimer and grievance withdrawals were in the same letter, the logical conclusion is that WSEU was purporting to withdraw grievances it lacked the representational authority to withdraw due to its disclaimer, thereby violating Sec. 111.84(3), Stats., by improperly causing the State to commit an unfair labor practice of improperly refusing to further process the grievances. If the wholesale grievance withdrawal without consideration of the individual disputes involved were deemed to precede the disclaimer, then it would have violated WSEU's SELRA duty of fair representation.

The State, faced with the facts of the WLEA's election and the WSEU's February 28, 2005, letter, could have chosen to continue its contractual relationship with the LE unit and to process the outstanding LE unit grievances once WLEA was certified as the new representative on March 10, 2005. Under the Commission's GATEWAY and RACINE cases, neither the election result nor the certification of the new representative had the effect of: extinguishing provisions of the WSEU-State agreement and extension inuring to the benefit of the employees covered by the agreements, or of extinguishing grievances arising under those agreements. Thus, but for the State's joining in WSEU's unlawful retaliation by concurring in WSEU's purported immediate cancellation of the agreement without the requisite 30 days written notice, and in WSEU's purported withdrawal of the grievances, the extension agreement would have remained in effect when WLEA was certified as the LE unit representative, allowing WLEA to continue with and process grievances under the extension agreement. Alternatively, if the

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[7] Citing, UNITED STEEL WORKERS OF AMERICA LOCAL 14693 (SKIBECK, PLC), 345 NLRB No. 46, at 10, citing BAKE-LINE, *supra*, 329 NLRB 247, 248.

[8] Citing, QUINN, *supra*, 456 Mich. 478, 572 N.W.2D 641.

State is deemed not to have concurred in the immediate cancellation of the extension agreement, then the State committed an unfair labor practice by refusing to comply with the extension agreement and by refusing to allow WLEA to continue with and process grievances under the extension agreement. In any event, the Commission's RACINE decision makes it clear that the expiration of the agreement alone would have been insufficient for the State to legally deny the processing of pending grievances through and including final and binding arbitration.

In its initial brief, WLEA broadened and clarified the relief sought in the complaint to request:

1. All relief originally sought by WSEU in each withdrawn grievance;

2. As an alternative to #1 above, an order requiring the State to process the withdrawn grievances without the ability to raise timeliness objections for any time which has passed since February 28,2005;

3. Requiring WSEU to pay the reasonable costs of arbitrating those grievances scheduled for arbitration as of February 28, 2005;

4. An order that the collective bargaining agreement extension was and is valid and in force for the LE bargaining unit;

5. An order requiring WSEU and/or the State to reinstate discontinued dental insurance coverage to LE unit members and pay all out-of-pocket expenses incurred by LE members as a result of the cancellation;

6. An order requiring unfair labor practice postings in all locations where LE unit members work as well as in all locations where WSEU represents State employees;

7. An order prohibiting AFSCME or WSEU from dedicating any resources to any effort seeking to remove or replace WLEA as representative of the LE unit until, at least, October 2008;

8. Attorney’s fees and costs for bringing this action;

9. All other relief the WERC deems reasonable to effectuate the purposes of the Act.

Among its various reply brief arguments, WLEA asserts that WSEU's contention that it WSEU not "a person" within the meaning of Sec. 111.84(3), Stats., is undercut by the express inclusion of "labor organizations" in the Sec. 111.70(1)(k) definition of that term as used in Sec. 111.70(3)(c), Stats. which parallels Sec. 111.84(3), Stats.; that WSEU's reliance on

BAKE-LINE, *supra*, is misplaced because that case involved union security deauthorization rather than decertification; that the remaining private sector cases cited by WSEU are all contrary to the policy favoring survival of the collective bargaining agreement in the event of a change in representative reflected in Wisconsin public sector case law (GATEWAY and RACINE) and in 111.83(6), Stats. of SELRA; that WSEU's claimed purpose of avoiding financial liabilities could have been achieved had WSEU "sought agreement with WLEA and the State to ensure an orderly transition . . .", or "simply handing [the contract and grievances] off [to WLEA] and walking away," rather than terminating the extension agreement and withdrawing the grievances wholesale; that the UNIVERSITY OF WISCONSIN HOSPITAL AND CLINICS BOARD case, *infra*, cited by the State addressed only the respective rights of the exclusive representative and aggrieved employees to control grievances, but it provided no guidance as to what becomes of outstanding grievances or the agreement when a change in representatives occurs; WSEU violated Sec. 111.84(3) by terminating the agreement and withdrawing the grievances because by doing so it sought to influence the employment relations between the State and LE unit by leaving no agreement or grievances for WLEA to inherit and because it did so upon disclaiming interest in the LE unit, after which WSEU "had no business advising the State how to conduct employment relations with the LE unit. And, the State erred when it complied with WSEU's actions."

WLEA asserts that the remedies it has requested are appropriate because: "[a]n ousted union should not be entitled to hamstring a new representative by punishing the employees voting for change or by interfering with the new representative's relationship with the employer. Such sabotage of the collective bargaining relationship justifies a prohibition on campaigning by the saboteur to replace its victim"; WSEU was prepared to spend dues money it had already collected on arbitrations scheduled as of February 28, 2005; WSEU treats the multiple units of State employees it represents as an integrated pool, rather than as entirely separate and autonomous entities; and both WSEU's "scorched earth" policy and the State's "wait and see" approach to its relations with WLEA have resulted in irreparable harm to WLEA and the LE unit, requiring expenditure of resources to get back to the point it should have been at the time it was certified, and substantial delays in the resolution of issues raised in the disputed grievances.

Position of WSEU

WSEU contends that no violations of SELRA by WSEU are established on the instant record, such that the complaint against WSEU should be dismissed in all respects. WSEU contends that, in the absence of any directly applicable case law under either MERA or SELRA, federal private sector principles show that WSEU lawfully and properly disclaimed interest in a good faith effort to avoid future liabilities for pending grievances, automatically resulting in the extension agreement and the pending grievances all becoming null and void.

There can be no merit to a claim that WSEU violated its Sec. 111.84(2)(a), Stats., duty of fair representation by making a blanket withdrawal of grievances without regard to any assessment of their merits, because WSEU's February 28, 2005, letter disclaimed interest in

representing the LE unit -- and thereby ended WSEU's duty of fair representation of that unit -- before any references were made in that letter to the status of the grievances. There can be no merit to a claim that WSEU violated Sec. 111.84(3) by causing the State to refuse to process the grievances because Sec. 111.84(2), Stats., is the only part of SELRA imposing specific liability on unions for unfair labor practices. The reference to "any person" in sub (3) "is not intended to apply to unions who are also named as respondents in the same proceeding under Sec. 111.84(2)." WSEU brief at 5.

In any event, there is no basis for finding that WSEU violated its duty of fair representation in any respect. Neither the RACINE and GATEWAY cases cited by the Examiner nor any other WERC precedent directly addresses the questions of: whether the disclaimer itself violates the WSEU duty of fair representation; whether WSEU's position that the disclaimer necessarily entails a withdrawal of pending grievances is correct; and, even if it is not, whether WSEU intentionally induced the State not to process the grievances. The February 28 letter shows WSEU's plain intent was to cleanly sever its relationship with the LE unit in light of its defeat. WSEU thereby also protected its assets from exposure to claims by WLEA that WSEU was required to arbitrate all pending claims.[9] The record does not establish that WSEU's actions were animus-motivated retaliation against the WLEA or the members of the LE unit on account of WSEU's defeat. Although the Case 665 complaint arose in the context of the LE unit, its continued pendency following the February 28, 2005, letter related only to WSEU's status as representative of other bargaining units of State employees, and not to its status as the former representative of the LE unit. The continued pendency of that case does not evidence a lack of good faith on WSEU's part or collusion between WSEU and the State to discriminate against the members of the LE bargaining unit. Even if animus were deemed proven, there is no reason why WERC ought not adopt the federal private sector principles under which: absent a showing of bad faith collusion between two unions, a "union may disclaim its role as a collective bargaining representative and may do so even in apparent response to the employees' filing of a deauthorization petition or the loss of a deauthorization election";[10] once a union "relinquishes its statutory authority to act as the exclusive representative of a bargaining unit, the corresponding duty of fair representation terminates";[11] a necessary effect of disclaiming interest is that the contract is automatically terminated;[12] and

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[9] WSEU points to the QUINN case, *supra*, cited by WLEA as an example of how a defeated representative's failure to make a timely disclaimer of interest can expose itself to such liability, arguing that if WSEU had waited until after the WLEA was certified before disclaiming, it may have been too late to avoid assuming such unwanted responsibilities.

[10] Citing, BAKE-LINE, *supra*, 329 NLRB 246, 249.

[11] Citing, DYCUS, *supra*, 615 F.2D 820, 826, n.2.

[12] Citing, AMERICAN SUNROOF, *supra*, 243 NLRB 1128, 1130 and NLRB V. CIRCLE A&W PRODUCTS CO., 647 F.2D 924 (CA9 1981).

the employer is relieved of any obligation to arbitrate grievances arising out of a terminated agreement.[13]

In any event, WSEU is not responsible for any unfair labor practices committed by the State. There is no evidence that the State and WSEU conspired to undermine the WLEA by refusing to process the disputed grievances. Rather, the record establishes that the State declined to further process those grievances following its receipt of the February 28 letter and its review of the Commission's holding in UNIVERSITY OF WISCONSIN HOSPITAL AND CLINICS BOARD, *infra*, that the union and not the grievant essentially owns the grievance. Thus, either the State accepted at face value WSEU's representation that it was authorized to disclaim and that one implication of disclaiming was that pending grievances were mooted, or the State came to those conclusions based on its own independent determination of the law. Either way, if the State's determination turns out to be legally erroneous, WSEU cannot be held derivatively liable under Sec. 111.84(3) or any other provision of SELRA for what was an independent determination and action by the State.

Similarly, the record does not support WLEA's claim in its brief that WSEU conspired with or caused the State to prevent the WLEA from assuming the WSEU-State contract. The Extension Agreement provided that it "may be terminated by either party upon thirty days notice." After receiving WSEU's February 28 letter, it was up to the State to determine when the termination was to become effective, immediately or in 30 days. "[I]t does not appear the State violated this Agreement, since the WLEA has not introduced any evidence indicating it was treated any differently by the State during this 30-day period as opposed to after it and that such treatment caused any damages. Regardless of the existence of the contract extension, the State was required to maintain all mandatory terms and conditions of employment, except those inuring to the benefit of the exclusive representative. There is no evidence it failed to do so." WSEU brief at 12.

If a violation of SELRA by WSEU is found, the only appropriate remedy would be an order requiring the State to process the pending grievances and that the WSEU post a notice at WLEA-represented locations that it improperly purported to withdraw the grievances. No monetary sanctions against the WSEU are appropriate, given: WSEU's good faith conduct in light of unsettled law; the Examiner's rejection of WLEA's reading of Sec. 111.83(6) on which its theory of liability against WSEU is predicated; and the absence of any record evidence regarding the terms or duration of the dental plan that was not included in the State-WSEU contract. The WLEA cites no authority whatsoever in support of the unprecedented additional remedies it is requesting, and WSEU submits there is none.

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[13] Citing, ARIZONA PORTLAND CEMENT, *supra*, (rejecting newly certified union's claim that employer is required to arbitrate grievances filed by defeated union and pursued by newly certified union) and LITTON FINANCIAL PRINTING V. NLRB, 501 U.S. 190 (1991) (under federal private sector law, arbitration provisions do not survive contract expiration).

Position of the State

The State contends that it is caught in the middle of a "tug of war" between two unions, without the benefit of established precedents under SELRA to guide the parties in what is an unprecedented fact situation.

The State asserts that it should not be a violation of SELRA for the employer not to process grievances that were properly dropped or dismissed by the owner of, and necessary "party" to, those grievances. On its face, the Commission's decision in UNIVERSITY OF WISCONSIN HOSPITAL AND CLINICS BOARD, DEC. NO. 29784-D (WERC, 11/00) supports the legal doctrine that a union owns the grievances and describes the extent to which an employee can proceed with a grievance without the presence of a "party." However, there is no definitive word from the WERC or the courts as to who is the "party" in the unprecedented circumstances of this case, WSEU or WLEA, and "what is the legal consequence of the owner of the grievances (WSEU) and a likely "party" (WSEU) dropping/dismissing the grievances under the circumstances of this case. These questions will presumably be clarified for all parties through this litigation." State brief at 1.

In any event, "no matter the outcome on the various questions presented in this case, the State will follow the law once it is established with certainty and clarity." *Id*.

Although the Case 665 complaint initially arose in the context of the LE unit, its potential significance and continued pendency following the February 28, 2005, letter related only to WSEU's status as representative of other bargaining units of State employees, and not at all to WSEU's status as the former representative of the LE unit. The continued pendency of that case does not establish that the State understood or treated the February 28, 2005, letter as revocable or modifiable. Nor does it evidence collusion between WSEU and the State to discriminate against the members of the LE bargaining unit. On the contrary, the State vigorously litigated that case and was successful at the examiner level in obtaining a dismissal of WSEU's complaint on its merits.

DISCUSSION

This case presents issues of first impression under SELRA regarding the respective rights and obligations of bargaining unit employees, their former and new representatives and the State where the employees choose a new representative in a representation election conducted at a time when an extension agreement but no "actual agreement" is in effect.

Claims Regarding Cancellation of the Extension Agreement

In its brief and reply brief, WLEA variously asserts, that WSEU and the State violated SELRA by cancellation of the extension immediately upon the State's receipt of WSEU's February 28 letter, and that the WERC's remedies in this case should include an order declaring that the extension agreement "was and is valid and in force for the LE bargaining

unit." For the following reasons, Finding of Fact 15 has been entered to make it clear that the Examiner finds those contentions to be without a clear and satisfactory factual basis in the record.

WLEA cites Stipulation 4 (i.e., Finding of Fact 7) as its basis for asserting that "WSEU requested and the State granted an immediate expiration of the agreement as it pertained to the LE bargaining unit, contrary to the agreement's terms." WLEA brief at 10. In pertinent part, that portion of the Stipulation of Fact provides that the State responded to WLEA's request to take over the LE Unit's pending grievances and arbitrations as follows:

> Mark Wild and I discussed the disciplinary and other grievances that have been filed and/or appealed to arbitration by WSEU. Because those grievances and appeals were filed under the WSEU contract, the grievances and appeals are dropped. OSER will not be taking the appeals to hearing.

The context of that State response was the pending grievances (including arbitrations) filed when WSEU was the exclusive LE unit representative, not grievances that had been or were to be filed by WLEA after the State received WSEU's February 28, 2005, letter. The substance of the State response was that the State was treating those grievances (including arbitrations) as dropped, such that the State was refusing WLEA's request that the State process those matters further with WLEA serving as representative. Neither the WLEA's request nor the State's response focused on or directly addressed the question of whether the State was treating the extension agreement as terminated or otherwise null and void. The State's reference to the fact that the grievances and arbitrations "were filed under the WSEU contract" could simply have meant that the grievances and arbitrations to which WLEA's request related had all been filed by WSEU prior to its February 28, 2005, letter and that they were therefore the grievances and arbitrations that WSEU's February 28, 2005, letter had stated should be considered withdrawn. For those reasons, the State's reference to the fact that the grievances and arbitrations "were filed under the WSEU contract" does not constitute a clear and satisfactory evidentiary basis on which to determine whether or as of when the State treated the extension agreement as terminated or otherwise null and void.

WLEA's complaint, does not make any specific allegation regarding the State's treatment of the extension agreement. In sentence 3 of paragraph C, WLEA alleges that ". . . the State notified WLEA, because the "grievances and appeals were filed under the WSEU contract, the grievances and appeals are dropped." WSEU's answer admitted that allegation, and the State's denied it on the ground that it took the State's statement out of context. In any event, as noted above, that the facts alleged in that sentence do not constitute a clear and satisfactory evidentiary basis on which to determine how the State has treated the extension agreement. In sentence 5 of paragraph C, WLEA alleges, in pertinent part, that "WSEU's notice to the State . . . unilaterally canceled without 30-days notice the extended contract with the State . . . which pertained to the LE bargaining unit . . ." In their respective answers to the allegations contained in that sentence, WSEU denied them, and the State admitted "only that the [February 28, 2005] document speaks for itself." For those reasons, the complaint and

answers also do not constitute a clear and satisfactory evidentiary basis on which to determine how the State has treated the extension agreement.

The Examiner has therefore found that the record does not establish by the requisite clear and satisfactory preponderance of the evidence whether or as of when the State has treated the extension agreement as terminated or otherwise null and void. For that reason, the Examiner has concluded that the State has not been shown to have committed a prohibited practice by its treatment of the extension agreement, and WSEU has not been shown to have caused the State to commit a prohibited practice in that regard.

Claims Regarding WSEU Disclaimer of Interest

As to the lawfulness of WSEU's disclaimer itself -- apart from its effect on pending grievances -- the parties have not cited, and the Examiner has not found any Commission cases concerning the relationship of an exclusive representative's disclaimer of interest to its duty of fair representation. Both WLEA and WSEU have, instead, relied on general principles recognized by the NLRB and reviewing courts in the federal private sector case law.

Those principles can be summarized as follows:

> . . . [A]n exclusive bargaining agent may avoid its statutory duty to bargain on behalf of the unit it represents by unequivocally and in good faith disclaiming further interest in representing the unit [however] . . . a disclaimer will not be given effect if it is inconsistent with the union's conduct, or if it is made for an improper purpose, such as the evasion of the terms and obligations of a collective-bargaining agreement. . . . [A valid] withdrawal as bargaining agent [does] not breach the duty of fair representation . . . [because] this duty is the corollary to a union's power and authority to act as the exclusive representative of a bargaining unit. When a union relinquishes its authority to do so, the corresponding duty of fair representation terminates.

BAKE-LINE, *supra* 329 NLRB 247 at 249, CITING DYCUS, *supra*, 615 F.2d at 826.

Applying those principles, the NLRB in BAKE-LINE, *supra*, stated "that a union may disclaim its role as a collective bargaining representative, and may do so even in apparent response to the employees' filing of a union security deauthorization petition or the loss of a deauthorization election." *Id*. at 249. The same principle would also logically seem applicable if the disclaimer were, as here, in apparent response to the loss of a representation election.

WLEA, contrary to WSEU, asserts that WSEU's disclaimer of interest in this case was neither unequivocal nor made in good faith, such that it was invalid, leaving WSEU's duty of fair representation of the LE unit unaffected by the WSEU's February 28, 2005, letter. The Examiner concludes that WLEA has not proven its assertions in those regards by the requisite clear and satisfactory preponderance of the evidence.

WSEU's February 28, 2005, letter appears intended in various respects to end WSEU's representation of the LE bargaining unit. While WSEU's letter purports to address the status of the pending LE unit grievances and of the extension agreement, it did so in a manner that is at least consistent with its claimed belief (incorrect in the Examiner's opinion) that the disclaimer had the automatic legal effects of extinguishing both the grievances and the extension agreement. The references to the status of the grievances and the extension agreement in the WSEU letter were therefore not necessarily inconsistent with WSEU's stated disclaimer of interest in further representation of the LE unit.

It is true that WSEU continued to prosecute the Case 665 complaint that the State had violated its SELRA duty to bargain by refusing to provide a list of the LE bargaining unit members names and addresses to WSEU at a time when WSEU had been the exclusive representative of that unit. However, once WLEA was certified as the exclusive representative of the LE unit, the questions presented by Case 665 complaint remained significant only as general principles of law applicable in WSEU's continuing relationships with the State regarding other bargaining units, and in the State's other collective bargaining relationships with the exclusive representatives of its represented bargaining units. For those reasons, the Examiner is not persuaded that WSEU's continued pursuit of the Case 665 complaint constituted equivocation on WSEU's part as to its February 28, 2005, disclaimer of interest in further representation of the LE bargaining unit.[14]

With regard to the disputed good faith nature of WSEU's disclaimer, it is quite clear that all parties were acting without the benefit of established SELRA case law precedents to guide them. It is also reasonably arguable that if federal private sector principles were applied, a valid disclaimer would have had the automatic legal effects of extinguishing the extension agreement,[15] and of relieving the employer of any obligation to arbitrate pending grievances.[16] In those contexts, WSEU's February 28, 2005, letter statements to the State that the pending grievances "should be considered withdrawn" and that the extension agreement "should be considered null and void" appear at least as consistent with being statements of WSEU's good faith (albeit mistaken in the Examiner's opinion) understanding of the automatic legal consequences of its disclaimer of interest, as they are with a purpose of negatively impacting the LE employees for having selected WLEA as their new representative. Finally, the Michigan Supreme Court's decision in QUINN, *supra*, in which the ousted representative –

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[14] CF. FRANZ FOOD PRODUCTS, 137 NLRB 340 (1962)(Union's pursuit of appeal from dismissal of a charge alleging violation of employer duty to bargain held not inconsistent with union's disclaimer of a present status as majority representative of the employees, because refusal to bargain allegation is based on contention that union represented a majority in the past, i.e., at the time it requested recognition and the employer unlawfully refused to bargain with it, rather than in the present.)

[15] See, e.g., NLRB V. CIRCLE A&W PRODUCTS CO., *supra*, (where a union disclaimed during the term of an agreement, and the employees elected a new union, the employer was not bound by the terms of the prior agreement.)

[16] See, ARIZONA PORTLAND CEMENT CO., *supra*.

which had not disclaimed interest before the new representative was certified -- was held responsible for the costs of pursuing arbitration of a grievance that was pending at the time a new representative was elected, lends credibility to WSEU's contention that its disclaimer was a good faith effort to cleanly end its responsibilities, financial and otherwise, for further representation of the LE unit.

For those reasons, the Examiner has concluded that WSEU's disclaimer of interest was valid, and that it had the effect of immediately relieving WSEU of the rights and obligations of the exclusive representative including the SELRA duty of fair representation of the LE bargaining unit. Accordingly, the Examiner has concluded that the disclaimer itself did not violate SELRA as regards the duty of fair representation or in any other respect.

Claims Regarding Grievances Pending Before the February 28, 2005, Letter

Upon consideration the full evidentiary record and the parties' closing arguments, the Examiner remains persuaded, for the reasons set forth in the Memorandum accompanying his July 5, 2005, Order, DEC. NO. 31397-A, *supra*, at 4-9 (and as described earlier in this Memorandum), that the change of representative transition provisions of SELRA's Sec. 111.84(6), Stats., do not apply where, as here, there was only an extension agreement rather than an "actual" agreement in effect when the new representative was elected, and that guidance is, instead, appropriately drawn in this case from the Commission's municipal sector decisions in the GATEWAY and RACINE cases.

On those bases, the Examiner has concluded that, under SELRA and in the circumstances reflected in the Findings of Fact, except to the extent that they inure to the benefit of the exclusive representative rather than the employees, the grievances pending on February 28, 2005, concerning events or occurrences during the term of the June 30, 2003, extension agreement or during the term of earlier agreements between the State and WSEU were not extinguished or otherwise rendered withdrawn by operation of law by any of the following: the expiration or termination, if any, of the agreement(s) under which those grievances arose; WSEU's disclaimer of interest in further representation of the LE unit; or the WERC's later certification of WLEA as representative of the LE unit.

The UNIVERSITY OF WISCONSIN HOSPITAL AND CLINICS BOARD case, *supra*, which the State identifies as one of the bases on which it predicated its responses to the WSEU's February 28, 2005, is not a persuasive basis for concluding otherwise. That case involved the employer Board's petition for a declaratory ruling concerning SELRA and the Board-WSEU agreement regarding the respective rights and obligations of employees, the exclusive representative (which was WSEU and its Local 1942) and the Board, as regards the processing of contractual and other grievances. The WERC held, among other things, "that an employee has the contractual right to process a grievance through a representative of his/her own choosing but does not have an independent contractual right to arbitrate the grievance." *Id*. at 18. With regard to the right to arbitrate a grievance, the Commission stated, ". . . the right to arbitrate is limited to a "party." . . . [W]e conclude an individual employee is not a "party" but

rather that "party" status is limited to the parties who entered into the Agreement (i.e. the Union (Council 24 and Local 1942) and the Board). . . . " *Id*. at 19 (emphasis added). That underlined portion could superficially be viewed as meaning that WSEU continued to control the grievances at issue in this case at all material times, notwithstanding an election defeat, a WSEU letter purporting to disclaim interest in representing the LE unit, and a WERC certification of a new exclusive representative for the LE unit. However, as WLEA persuasively points out, that case was not focused at all on the materially different circumstances involving a change of representative that are involved here. Accordingly, the Examiner concludes that the holding establishes only that WSEU was the owner of the grievances and a party to the extension agreement and prior WSEU-State agreements when it was the exclusive bargaining representative of the LE unit. That case does not establish whether -- for purposes of grievance processing -- WSEU continued to be the owner of the grievances or a party to the extension agreement or other prior agreements after the results of the election were known, after WSEU disclaimed interest in representing the LE unit, or after WLEA was certified as the exclusive representative of the LE unit.

Based on GATEWAY and RACINE, the Examiner concludes, instead, that the WERC's March 10, 2005, certification of WLEA as exclusive representative of the LE bargaining unit had the effects, of entitling WLEA to be treated -- for grievance processing purposes -- as a party to the extension agreement and other WSEU-State agreements under which the pending LE bargaining unit grievances arose and as the owner of those grievances. From that time on, WLEA became entitled to process those grievances in accordance with the grievance procedures, including arbitration, contained in the agreements under which the respective grievances arose, and responsible for the costs of doing so. WLEA also became entitled and responsible to make its own judgments regarding whether and how best to proceed with each of the pending grievances upon consideration of the various relevant factors which may include but not be limited to WLEA's available financial and other resources, in a manner consistent with the duty of fair representation that became applicable to it upon being certified as exclusive representative.[17]

As WSEU and WLEA both now assert, WSEU's February 28, 2005, letter references to the status of the pending grievances cannot logically be read to have preceded WSEU's disclaimer of interest in the LE bargaining unit. Viewed in that context, those references were made at or after the time when WSEU disclaimed interest in the LE bargaining unit, and hence, at a time when WSEU was no longer the exclusive representative and hence no longer had representational authority to affect the status of the pending grievances.

As noted in Finding of Fact 13, the Examiner has inferred from the State's March 7, 2005, response to WLEA -- coupled with the State's stated willingness to honor WLEA's request upon issuance of a WERC determination -- that the State has a legal obligation to do

[17] See generally, MAHNKE V. WERC, 66 Wis.2D 524, 534 (1975) (discussing factors that the duty of fair representation requires the exclusive representative to consider in addition to the cost of arbitration, in deciding whether to proceed to arbitration).

so, that at all times after WLEA's certification as exclusive representative on March 10, 2005, the State has refused to allow WLEA to take over processing of any of the LE bargaining unit grievances (including arbitrations) pending as of WSEU's issuance of the February 28, 2005, letter. Those State refusals to process those grievances after March 10, 2005, in the manner prescribed in the WSEU-State agreement, including final and binding grievance arbitration, violated the State's SELRA duty to bargain and specifically Secs. 111.84(1)(d), and derivatively (1)(a), Stats.

The Examiner has also found that WSEU's statement in its February 28, 2005, letter that the grievances "should be considered withdrawn" caused the State to treat those grievances "as dropped" and thereby caused the State to commit the unfair labor practice noted above. As discussed above, in the Examiner's opinion, WSEU's statement that the grievances "should be considered withdrawn" was not a correct statement of the legal effect of WSEU's disclaimer set forth earlier in the letter. Nor was the status of pending LE grievances a matter as to which WSEU had representational authority or responsibility to act in light of its disclaimer of interest set forth earlier in the letter. While it is true that the State could have disagreed with or otherwise disregarded WSEU's statement that the grievances "should be considered withdrawn," the Examiner is nonetheless persuaded that WSEU's letter statement concerning the status of the grievances caused the State to treat the grievances "as dropped" and to refuse on that basis to deal with WLEA regarding any of them unless and until the WERC ordered it to do so.

The Examiner has also concluded that WSEU thereby violated both Secs. 111.84(2)(b) (and derivatively (2)(a)), Stats., and Sec. 111.84(3), Stats. It violated (2)(b) by inducing any officer or agent of the employer (Mark Wild and Jill Thomas) to engage in any practice with regard to its employees which would constitute an unfair labor practice if undertaken by the officer or agent on the officer's or agent's own initiative (refusing to allow WLEA to take over processing of those of the pending grievances that did not inure to the benefit of the exclusive representative, once WLEA was certified as the LE unit exclusive representative). WSEU violated (3) because WSEU is a person (as that term is defined in the employment relations context in MERA Sec. 111.70(1), Stats.,[18] and used in the MERA counterpart to 111.84(3), Stats.[19]) which caused to be done in connection with any controversy as to employment relations (the various substantive claims set forth in the pending LE grievances not inuring to the benefit of the exclusive representative), an act prohibited by subs. (1) or (2) (the State's above noted violation of the Sec. 111.84(1)(d), Stats., by refusing to allow WLEA to take over

[18] Section 111.70(1)(k), Stats., reads as follows: "(1) Definitions. As used in this subchapter: . . . (k) 'Person' means one or more individuals, labor organizations, associations, corporations or legal representatives."

[19] Section 111.70(3)(c), Stats., reads as follows: "It is a prohibited practice for any person to do or cause to be done on behalf of or in the interest of municipal employers or municipal employees, or in connection with or to influence the outcome of any controversy as to employment relations, any act prohibited by par. (a) or (b)."

processing of the pending LE grievances not inuring to the benefit of the exclusive representative after WLEA after it was certified as exclusive representative).[20]

Claims Regarding Termination of WSEU Dental Insurance Benefits

In complaint paragraph E.2., WLEA requested that WSEU "be ordered to immediately reinstate the discontinued dental insurance coverage to LE unit members and pay all out-of-pocket expenses any LE bargaining unit member incurred due to the unlawful cancellation." That request relates to the concluding paragraph of WSEU's February 28, 2005, letter which stated, "Finally, regarding deductions for union dental insurance, the deductions for dental insurance premiums should also cease immediately for this unit since these employees are no longer covered under the union contract with the dental provider(s)."

The Examiner has found no WSEU SELRA violation arising out of those aspects of the complaint and record. The record, at most, would seem to indicate that dental insurance benefits -- made available by WSEU to employees represented by WSEU, paid for by paycheck deductions from participating employees, and not provided for in the State-WSEU agreements -- were unilaterally terminated by WSEU on a date not clearly established in the record but presumably on or shortly after WSEU's February 28, 2005, disclaimer of interest in further representation of the LE unit. To the extent that WLEA's request for relief from WSEU's discontinuation of those benefits is predicated on WLEA's contention that WSEU's disclaimer of interest was invalid, that contention is rejected because the Examiner has determined that the disclaimer was valid and not unlawful. To the extent that WLEA's request for such relief is predicated on some other theory, the Examiner has been provided with no authorities to support it. Given the very limited factual basis available to the Examiner regarding this issue, the Examiner has concluded that WSEU was within its rights in unilaterally terminating non-contractual benefits offered by WSEU to State employees

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[20] The cases cited by WSEU do not persuasively support its contention that Sec. 111.84(3), Stats., is inapplicable to WSEU in the instant circumstances. STATE OF WISCONSIN, DEC. NO. 28379-B (Gratz, 3/00) held only that the respondent individual in that case was not liable for a Sec. 111.84(3), Stats., violation because the conduct he caused his union to commit would not constitute a union unfair labor practice under SELRA. That case did not involve a claim that a labor organization respondent had violated Sec. 111.84(3), Stats. STATE OF WISCONSIN, DEC. NO. 29143-A (McLaughlin, 4/98), held only that the union respondent did not violate Sec. 111.84(3), Stats., where the employer conduct caused by the union respondent would not constitute an employer unfair labor practice under SELRA. And in OCONTO COUNTY, DEC. NO. 27706-A (Jones, 4/94) the complainant union alleged that a private corporation violated Sec. 111.70(3)(c) of MERA by acting on behalf of or in concert with a municipal employer when the municipal employer discharged an employee. The examiner introduced his discussion of that issue by stating, "This section [(3)(c)] recognizes that prohibited practices can be committed by parties other than the municipal employer of employes. Thus persons other than a municipal employer are proscribed from committing acts, in concert with or on behalf of a municipal employer, that the municipal employer itself may not commit." *Id.* at 3-4. It does not appear that the examiner in that case intended the quoted language to exhaustively describe the full range of applicability of (3)(c). In any event, for purposes of analyzing the applicability of the SELRA language paralleling (3)(c) to a labor organization respondent, the quoted language would only be dicta because that case did not involve a claim that a municipal employer or a labor organization had committed a violation of (3)(c).

represented by WSEU at or shortly after the time when WSEU effectively terminated its representation of the LE bargaining unit by its February 28, 2005, disclaimer of interest.

Remedy for SELRA Violations Found

By way of remedy for the State's improper refusal to allow WLEA to take over those of the pending LE unit grievances that do not inure to the benefit of the exclusive representative, the Examiner has ordered the State to allow WLEA to do so free from State timeliness objections for any time which has passed since February 28, 2005. The Examiner has also ordered the State to cease and desist from such unfair labor practices in the future and to post notices in all locations where LE unit members work.

By way of remedy for WSEU's causing the State to commit the above-noted unfair labor practice, the Examiner has ordered that WSEU cease and desist from causing such unfair labor practices in the future and to post notices in all locations where LE unit members work.

WLEA has cited no authority for the various other remedies it requested in its brief, and the Examiner has not found that any of those additional remedies are necessary or appropriate to effectuate the purposes of SELRA in the circumstances of this case. Especially so where, as here, all of the parties were dealing with an apparently unprecedented fact situation without benefit of settled SELRA case law.

Ordering that the affected grievants be awarded the relief originally sought by WSEU in each pending grievance regardless of the merits of the claim or the appropriateness of relief requested runs the obvious and unwarranted risk that some non-meritorious claims will be granted and some inappropriate remedies will be imposed.

Requiring WSEU to pay the costs of arbitrating grievances that were scheduled for arbitration as of February 28, 2005, would be inconsistent with the balance struck in the GATEWAY case, as a part of which the new representative takes over full responsibilities for representation upon certification.

As noted earlier in this **DISCUSSION**, the record does not clearly and satisfactorily establish whether and as of when the State has treated the extension agreement as terminated or as null and void. For that reason, the Examiner has found no unfair labor practice related to such conduct on the State's part. Accordingly, no declaration or other related remedial order regarding whether that the extension agreement was or is valid and in force would be appropriate in the circumstances.

The Examiner has also concluded that no SELRA violation has been proven as regards discontinuation of the WSEU's dental insurance for LE bargaining unit employees after WSEU's disclaimer terminated its representation of those employees. Therefore, no restoration or make whole relief related to that discontinuation is warranted in the circumstances.

Extending the notice posting orders to all work areas where WSEU-represented employees in other State bargaining units work, appears to be excessive in the circumstances. It was the LE bargaining unit members who were directly and adversely affected by the unfair labor practices that the State and WSEU have been found to have committed, and it is therefore appropriate that the scope of the notice posting order be limited to the LE bargaining unit members' work areas.

If a remedy such WLEA's request for an order prohibiting WSEU from dedicating any resources to any effort seeking to remove or replace WLEA as representative of the LE unit for a specified period of time could ever be appropriate, it is not appropriate where, as here, the parties were without guidance from SELRA case law, and the record is at least consistent with WSEU's claim that it acted in reliance on what it believed would be the law if federal private sector case law were applied.

In the context of those two factors and the balance of the record, the Examiner has also concluded that the order requested by each of the parties for payment of its fees and costs by the opposing party or parties, is unwarranted and inappropriate, as well.

Dated at Shorewood, Wisconsin, this 1st day of August, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Marshall L. Gratz /s/
Marshall L. Gratz, Examiner

MLG/gjc
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