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-C

Appearances:

Sally A. Stix, Law Offices of Sally A. Stix, 700 Rayovac Drive, Suite 117, Madison, Wisconsin 53711, appearing on behalf of the Wisconsin Law Enforcement Association and Steven J. Maeder and other similarly-situated employees.

Kurt C. Kobelt, Lawton & Cates, S.C., Ten East Doty Street, Suite 400, P.O. Box 2965, Madison, Wisconsin 53701-2965, appearing on behalf of American Federation of State, County and Municipal Employees, Wisconsin State Employees Union, Council 24.

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, appearing on behalf of the State of Wisconsin.

ORDER ON REVIEW OF EXAMINER'S DECISION

On August 1, 2006, Examiner Marshall L. Gratz issued Findings of Fact, Conclusions of Law, and Order in the above-captioned matter, including the following principal holdings:

> (1) the Respondent Wisconsin State Employees Union (WSEU) had validly disclaimed interest in continuing to represent the Law Enforcement (LE) bargaining unit after WSEU had lost a representation election in favor of the Complainant Wisconsin Law Enforcement Association (WLEA), but before the Wisconsin Employment Relations Commission (Commission) had certified the results of that election;
>
> (2) WSEU's disclaimer automatically and immediately terminated WSEU's right and duty to represent the members of the LE bargaining unit;

(3) WSEU's disclaimer did not automatically terminate the extension agreement between WSEU and the Respondent State of Wisconsin (State);

(4) WSEU's disclaimer did not automatically extinguish or withdraw any grievances in the LE bargaining unit that were pending at the time of the disclaimer;

(5) On March 10, 2005, pursuant to the Commission's certification, WLEA became the exclusive bargaining representative of the LE unit and, as such, a party to the agreements between WSEU and the State regarding the LE unit and, consistent with the duty of fair representation, responsible for processing grievances then pending pursuant to those agreements, up to and including arbitration;

(6) Provisions of those agreements inuring to the benefit of WSEU were extinguished as of the date WLEA was certified as the bargaining representative;

(7) The State violated Secs. 111.84 (1)(d) and (1)(a), Stats., to the extent the State refused to process said grievances after receiving WSEU's disclaimer;

(8) WSEU violated Secs. 111.84(2)(b), (2)(a), and (3), Stats., through its notice of disclaimer, which induced the State to refuse to process the pending grievances;

(9) Since the Examiner viewed the disclaimer as valid, it was lawful for WSEU to terminate immediately any dental insurance coverage for members of the LE bargaining unit, since such coverage was not contractually provided, but rather available through payroll deduction to employees represented by WSEU; and

(10) The record was not sufficient for the Examiner to rule on the status of the extension agreement after WSEU's disclaimer, except those portions inuring to the benefit of WSEU, or as to whether the State had violated the law with respect to said extension agreement.

On August 9, 2006, the Respondent WSEU filed a timely petition seeking review of the Examiner's decision, pursuant to Secs. 111.07(5) and 111.84(4), Stats. The Respondent State did not seek review. WSEU and WLEA filed briefs respectively in support of and in opposition to WSEU's petition for review, the last of which was received on October 19, 2006.

As explained in the accompanying Memorandum, the Commission agrees with the Examiner that the Respondent State violated the State Employment Labor Relations Act (SELRA) by treating all pending grievances as withdrawn as of the date of WSEU's disclaimer and thereafter refusing to process those grievances. The Commission also agrees with the Examiner that the record is not sufficient to determine how the State treated the extension agreement after February 28, 2005 and hence insufficient to conclude that the State violated SELRA in that regard.

As to the allegations against the Respondent WSEU, the Commission agrees that WSEU violated SELRA, but reaches that conclusion through a significantly different analysis. Contrary to the Examiner, the Commission concludes that, despite the February 28, 2005 disclaimer, WSEU continued to have the right and duty to fairly represent the bargaining unit, including the processing of grievances, until June 30, 2005, at which point such right and duty devolved upon the WLEA as a matter of law; that WSEU violated its duty of fair representation by attempting to abandon its representational status before such status lawfully terminated, and by thereafter refusing to continue processing grievances and representing the unit before June 30, 2005; and that WSEU violated Sec. 111.84(2)(b), Stats., by inducing the State to treat the pending grievances/arbitrations as withdrawn. The Commission concomitantly concludes that WSEU unlawfully withdrew the eligibility of bargaining unit members for WSEU-provided dental insurance, paid for through the State's payroll deduction system.[1]

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

ORDER

A. The Examiner's Findings of Fact 1 through 12 are affirmed.

B. The Examiner's Findings of Fact 13 and 14 are set aside and the following Findings of Fact 13 and 14 are made:

> 13. At all times after February 28, 2005, the Respondent State has refused to participate in processing any LE bargaining unit grievances/arbitrations that were pending as of WSEU's February 28, 2005 letter.
>
> 14. The Respondent WSEU, by its February 28, 2005 letter, caused the Respondent State to refuse to continue processing grievance/arbitrations that were pending as of WSEU's February 28, 2005 letter.

C. The Examiner's Finding of Fact 15 is affirmed.

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

[1] The Examiner had dismissed this allegation and WLEA did not appeal this aspect of the Examiner's decision. However, it is well settled that "a petition for review opens the entire Examiner decision for affirmation, modification or reversal. See Secs. 111.07(5) and 111.70(4)(a), Stats.; TRANS AMERICA INSURANCE CO. V. DILHR DEPARTMENT, 54 WIS.2D 252 (1971) . . ." EDGERTON FIRE PROTECTION DISTRICT, DEC. NO. 30686-B (WERC, 2/05) at 22 n. 7 (additional citations omitted).

E. The Examiner's Conclusions of Law 3 through 15 are set aside and the following Conclusions of Law are made:

3. The policies and purposes of SELRA, taken as a whole, required Respondent WSEU, under the circumstances present here, to maintain its duties and rights as exclusive representative of the LE bargaining unit until the fiscal year/biennium ended on June 30, 2005, at which point WLEA assumed those duties and responsibilities.

4. Respondent WSEU breached its duty of fair representation, in violation of Sec. 111.84(2)(a), Stats., by issuing a letter dated February 28, 2005 purporting to disclaim interest in continuing to represent the LE bargaining unit, where such disclaimer was intended to have the effect, prior to June 30, 2005, of terminating WSEU's representation of the bargaining unit, terminating the existing collective bargaining agreement, and arbitrarily withdrawing all pending grievances/arbitrations.

5. Respondent State violated the provisions of a written agreement with respect to terms and conditions of employment affecting employees, including an agreement to arbitrate, in violation of Secs. 111.84(1)(e) and (1)(a), Stats., by refusing to process grievances/arbitrations in the LE unit that were pending as of February 28, 2005.

6. Respondent WSEU violated Secs. 111.84(2)(b), Stats., by inducing an officer or agent of the Respondent State to engage in a 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 (i.e., refusing to process grievances/arbitrations in the LE unit that were pending as of February 28, 2005).

7. Respondent WSEU breached its duty of fair representation, in violation of Secs. 111.84(2)(a), Stats., by terminating the eligibility of members of the LE bargaining unit for participation in WSEU's dental insurance plan, paid for through the State's payroll deduction system, prior to the lawful termination of WSEU's status as exclusive bargaining representative.

8. The record is not sufficient to determine whether the Respondent State has violated SELRA by the manner in which the extension agreement has been treated following the State's receipt of WSEU's February 28, 2005 letter or at any other time, other than its refusal to process grievances that were pending as of that date.

F. Paragraph 1 of the Examiner's Order is affirmed.

G. Paragraphs 2 and 3 of the Examiner's Order are set aside and the following Orders are made:

2. Respondent State shall cease and desist from refusing to process LE bargaining unit grievances/arbitrations that were pending as of February 28, 2005, in violation of Secs. 111.84 (1)(e) and (1)(a), Stats.

3. Respondent State shall take the following affirmative action which the Commission finds will effectuate the purposes of SELRA:

a. Upon request of WLEA, provided such request is made within thirty (30) days following the date of this Order, permit WSEU or WLEA, at WLEA's option, to process grievances/arbitrations in the LE bargaining unit that were pending as of February 28, 2005, including those that reasonably would have reached arbitration before June 30, 2005 had such grievances been processed lawfully by the State and WSEU, without raising timeliness objections for any time that has passed since February 28, 2005.

b. 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 to assure that those notices are not altered, defaced, or covered by other material.

c. 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 Respondent WSEU shall cease and desist from:

a. Breaching its duty of fair representation, in violation of Sec. 111.84(2)(a), Stats., by disclaiming interest in continuing to represent the LE bargaining unit, where such disclaimer was intended to have the effect, prior to June 30, 2005, of terminating WSEU's representation of the bargaining unit, terminating the existing collective bargaining agreement, and arbitrarily withdrawing all pending grievances/arbitrations.

b. Breaching its duty of fair representation, in violation of Secs. 111.84(2)(a), Stats., by terminating the eligibility of members of the LE bargaining unit for participation in WSEU's dental insurance plan, paid for by payroll deduction, prior to June 30, 2005.

c. Violating Sec. 111.84 (2)(b), Stats, by inducing an officer or agent of the Respondent State to engage in practices with regard to its employees which would constitute unfair labor practices if undertaken by the officer or agent on the officer's or agent's own initiative (i.e., refusing to process grievances/arbitrations in the LE unit that were pending on February 28, 2005).

5. The Respondent WSEU shall take the following affirmative action which the Commission finds will effectuate the purposes of SELRA:

a. Immediately upon request of WLEA, provided such request is made within thirty (30) days following the date of this Order, process in conformance with the standards governing an exclusive bargaining representative's duty of fair representation, any or all grievances/arbitrations that were pending as of February 28, 2005, including those that reasonably would have reached arbitration before June 30, 2005 had such grievances been processed lawfully by the State and the WSEU.

b. Pay all out-of-pocket expenses that any LE bargaining unit member incurred between February 28, 2005 and June 30, 2005, due to the unlawful cancellation of said member's dental insurance coverage, with interest at 12 percent per year.[2]

c. 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] As reflected in WILMOT ASSOCIATION HIGH SCHOOL, DEC. NO. 18820-B (WERC, 12/83) and BROWN COUNTY, DEC. NO. 20857-D (WERC, 5/93), the Commission has long held that simple interest on back pay at the statutorily established rate of 12% is a standard part of a make-whole remedy. BROWN COUNTY provides guidance as the applicable calculation methodology.

d. 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.

H. Paragraphs 4 and 5 of the Examiner's Order are renumbered Paragraphs 6 and 7 and affirmed.
I. Except as noted above, the complaint is dismissed.

Dated at Madison, Wisconsin, this 8th day of June, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

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

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 all employees in the Law Enforcement (LE) bargaining unit represented by Wisconsin Law Enforcement Association (WLEA) that:

1. WE WILL NOT refuse to process LE bargaining unit grievances/arbitrations that were pending as of February 28, 2005.

2. WE WILL, upon request of WLEA, permit the processing of grievances/arbitrations in the LE bargaining unit that were pending as of February 28, 2005, without raising timeliness objections for any time that has passed since February 28, 2005.

Dated this _____ day of _____, 2007.

STATE OF WISCONSIN
OFFICE OF STATE EMPLOYMENT RELATIONS

_____
Director

THIS 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 (LE) bargaining unit that:

1. WE WILL NOT breach our duty of fair representation, in violation of Sec. 111.84(2)(a), Stats., by disclaiming interest in continuing to represent the LE bargaining unit, where such disclaimer was intended to have the effect, prior to June 30, 2005, of terminating WSEU's representation of the bargaining unit, terminating the existing collective bargaining agreement, and arbitrarily withdrawing all pending grievances/arbitrations.

2. WE WILL NOT breach our duty of fair representation, in violation of Secs. 111.84(2)(a), Stats., by terminating, prior to June 30, 2005, the eligibility of members of the LE bargaining unit for participation in WSEU's dental insurance plan, through payroll deduction.

3. WE WILL NOT induce an officer or agent of the Respondent State to engage in practices with regard to State employees which would constitute an unfair labor practice if undertaken by the officer or agent on the officer's or agent's own initiative (i.e., refusing to process grievances/arbitrations in the LE unit that were pending as of February 28, 2005).

4. WE WILL immediately, upon request of WLEA and in conformance with the standards governing an exclusive bargaining representative's duty of fair representation, process any or all of the grievances/arbitrations that were pending as of February 28, 2005, including those that reasonably would have reached arbitration before June 30, 2005 had such grievances been processed lawfully.

5. WE WILL pay all out-of-pocket expenses that any LE bargaining unit member incurred between February 28, 2005 and June 30, 2005, due to the unlawful cancellation of said member's dental insurance coverage, with interest at 12 percent per year.

Dated this _____ day of _____, 2007.

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

_____
Executive Director

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

Office of State Employment Relations

MEMORANDUM ACCOMPANYING ORDER

Summary of the Facts

The mostly stipulated facts can be summarized in pertinent part as follows.[3]

WSEU has represented the instant Law Enforcement (LE) bargaining unit for many years. WSEU and the Respondent State were parties to a collective bargaining agreement that expired on June 30, 2003, at which time they entered into a written extension agreement with no defined termination date except that it could be "terminated by either party upon thirty (30) days written notice." Negotiations continued for a successor agreement whose term, by operation of Sec. 111.92(3), Stats., would end June 30, 2005.

On October 28, 2004, while the extension agreement was in effect, WLEA filed a petition with the Commission seeking an election in the LE bargaining unit to determine whether WLEA or WSEU would be the exclusive bargaining representative. The Commission conducted a mail-ballot election, and, when the votes were tallied on February 25, 2005, WLEA emerged the winner. On February 28, 2005, WSEU conveyed a letter to the State, which included the following paragraphs:

> . . . WSEU Council 24 hereby disclaims interest in the LE 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. . . .
>
> . . . [R]egarding 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).

In approximately the same time frame as the foregoing letter from WSEU, WLEA requested by e-mail that the State permit WLEA to take over processing the LE unit's pending grievances and arbitrations. However, based in part upon the statements in WSEU's letter, the State took the view that the pending grievances had been "dropped," and, on March 7, 2005, conveyed to WLEA the State's decision not to process further any such grievances or arbitrations. On March 10, 2005, the Commission certified the results of the February 25 tally and established WLEA as the collective bargaining representative for the LE bargaining unit.

---

[3] Where pertinent, the Commission takes administrative notice of factual information contained in its prior decision related to the instant situation, viz., Dec. No. 31195 (WERC, 12/04).

After February 28, 2005, the State ceased processing any grievances or arbitrations that were pending prior thereto, but asserts its willingness to permit those grievances to be reactivated if and under the conditions the Commission deems required. It is not clear from the record if or when the State treated the extension agreement as having been terminated.

Issues on Review

The Examiner concluded that WSEU was within its rights in disclaiming interest in continuing to represent the LE bargaining unit after the bargaining unit had voted to be represented by WLEA but before WLEA had been certified as the new exclusive bargaining representative. The Examiner accepted WSEU's desire to avoid incurring further legal obligations to bargaining unit members as a legitimate basis for a disclaimer. However, the Examiner also concluded that WSEU's disclaimer had no effect upon the contractual rights or existing grievances of bargaining unit members. By analogy to the Commission's longstanding rules established pursuant to SELRA's companion statute, the Municipal Employment Relations Act (MERA), the Examiner held that, upon certification, WLEA assumed the rights and responsibilities for administering and enforcing the collective bargaining agreement, including all pending grievances, except those that inured primarily to the benefit of WSEU as an entity (such as dues checkoff). By advising the State, in its February 28, 2005 letter, that, as a result of the disclaimer, the contract was terminated and the grievances withdrawn, WSEU induced the State to violate SELRA, and the State did violate SELRA, by refusing to permit WLEA to assume the contract and the grievances.

WSEU challenges the Examiner's decision principally upon the ground that a lawful disclaimer inherently must be viewed as abrogating all contractual rights as well as duties. According to WSEU:

> The logical import of a disclaimer is to automatically nullify the collective bargaining agreement and moot all grievances pending at the time of the disclaimer. If the union formally terminates its representational status, the contract becomes void. ... Once a union disclaims, the employer becomes non-union. ... Likewise, any grievances pending at the time of the disclaimer are moot. ... Only a union can process grievances to arbitration; an individual employee lacks standing to enforce grievances.

WSEU Br. at 6.

WSEU contends that basic contract principles require the extinction of all contractual rights once one party walks away, since the other party never agreed to a contract with a completely new and different party (in this case, WLEA). WSEU claims support from private sector decisions under the National Labor Relations Act which indicate that, after a valid disclaimer, the contract will no longer bar an election petition and neither the new union nor

the employer is bound by that contract even if its term has not expired. AMERICAN SUNROOF, 243 NLRB 1128, 1130 (1979); NLRB v. CIRCLE A & W PRODUCTS CO., 674 F.2D 924 (9TH CIR. 1981). WSEU also points out that the MERA cases on which the Examiner relied did not involve disclaimers at all, but merely elections in which one union replaced another. Hence, according to WSEU, they carry no guidance for the instant situation. Moreover, WSEU contends that the MERA model, in which the newly certified union immediately assumes the former union's contractual rights and responsibilities, is directly at odds with the system specifically established for the state sector pursuant to Sec. 111.83(6), Stats. Under the state sector statutory scheme, notes WSEU, an ousted incumbent continues to administer the contract until its expiration. According to WSEU, the Examiner effectively rendered the WSEU's disclaimer a dead letter.

Before the Examiner, WLEA argued, at least in the alternative, that Sec. 111.83(6), Stats., suggested that WSEU should have been required to continue representing the LE unit until June 30, 2005. WLEA also argued to the Examiner that the State and WSEU had violated SELRA by withdrawing bargaining unit members' eligibility for dental insurance after the WSEU's disclaimer. On review, WLEA no longer advances those contentions, but urges that the Examiner's decision be affirmed. WLEA argues that specific SELRA language as well as public sector policies of stability and continuity support the Examiner's application of the "contract inheritance" rule, even after a valid disclaimer:

> Given the circumstances present here, which are not specifically addressed by 111.83(6), and rather than opt for an orderly transition, WSEU chose to create chaos by abdicating its responsibilities as soon as a new representative was elected. It is doubtful the Legislature amended SELRA with the intention of creating more chaos by opening a window where employees would have no representation. Thus, the most reasonable interpretation of Wis. Stat. 111.83(6) in light of these unique circumstances is one that maximizes stability and that promotes continuity and the *status quo*.

Discussion

1. The Disclaimer

Two essential issues regarding WSEU's disclaimer emerge from the foregoing summary. First, was WSEU's disclaimer valid under the present circumstances? Second, if the disclaimer was valid, what effect should it have had on the contract between WSEU and the State and/or any grievances that were pending at the time of the disclaimer?

As to the first issue, the Examiner held that the disclaimer was valid, because WSEU, after receiving the election results, had a good faith interest in limiting its continuing liability for pursuing grievances. As to the second issue, the Examiner held that the disclaimer had no effect on the existing contract or the pending grievances, except as to provisions or grievances inuring to the benefit of WSEU itself.

As all parties recognize, the Legislature has specifically addressed how a change of representatives should be handled under SELRA when a rival union challenges an incumbent union during the term of an "actual" or normal collective bargaining agreement.[4] Section 111.83(6), Stats., provides:

> 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. . . . 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.

The full meaning of the phrase "the decision takes effect" in the last clause in the above-quoted statutory language may be somewhat ambiguous. However, there is no ambiguity about the Legislature's intention that the election of a new union should not interrupt or terminate the collective bargaining agreement, on the one hand, and that the newly elected union should not assume the rights and duties of exclusive bargaining representative until the end of the fiscal biennium covered by that contract, on the other. The language does not specify that the incumbent must maintain its representational duties until the end of the contract. However, as we see it, an agreement would have little meaning if one of the contracting parties (the incumbent union) could simply abandon its rights and duties to enforce the agreement. Hence, the most logical inference is that the Legislature intended the incumbent union to continue to maintain its status as exclusive bargaining representative until the end of the collective bargaining agreement, which is also the end of the State's fiscal biennium.

This conclusion, which maximizes stability and continuity during a transition from one representative to another, is reinforced by specific policy statements contained in SELRA. In Sec. 111.80(2), Stats., the Legislature declared that, "whatever may be the rights of disputants with respect to each other in any controversy regarding state employment relations, neither party has any right to engage in acts or practices which jeopardize the public safety and interest and interfere with the effective conduct of public business." In Sec. 111.92(4), Stats., the Legislature stated, "It is the declared intention under this subchapter that the negotiation of collective bargaining agreements and their approval by the parties should coincide with the overall fiscal planning and processes of the state."

---

[4] We, like the parties, use the terms "actual," "normal," or "regular" to mean an agreement that comports with the Legislature's directive in Sec. 111.92(3), Stats., that agreements in the state sector must coincide with the state fiscal year or biennium. Since the State operates on a biennial fiscal year, the normal contract period is two years coinciding with the State's fiscal biennium. Here, the challenge to WSEU arose after June 30, 2003, the nominal expiration date of the most recent "actual" or normal agreement, during a period of time in which the parties operated under an extension agreement that could be terminated unilaterally by either the State or WSEU with 30 days' notice.

Accordingly, had WLEA's challenge to WSEU arisen during the term of a normal contract, WSEU could not lawfully have abandoned its role as exclusive bargaining representative – for negotiations or grievance processing – by disclaimer or any other means, prior to June 30, 2005.

We, like the Examiner and the parties, acknowledge that Sec. 111.83(6), Stats., directly addresses only a situation where a normal contract is in existence. It does not directly prescribe how to handle election petitions and/or the outcome of elections in state bargaining units in situations like the present one, where the parties are operating under an extension agreement while they continue to negotiate the terms of a successor regular agreement. In the absence of explicit direction, we must determine what the Legislature intended in this situation. Essentially three options present themselves: (1) to extrapolate from the system the Legislature has expressly ordained where a regular contract is in effect; (2) to apply analogous principles developed under SELRA's companion statute, the Municipal Employment Relations Act (MERA); or (3) to seek guidance from private sector principles developed under the National Labor Relations Act.

WSEU urges the third option, that the Commission adopt disclaimer principles from the private sector. According to WSEU, those principles allow a union to disclaim its representational status at any time and thereby extinguish any existing collective bargaining agreement covering the unit as to any pending grievances. We are not persuaded that disclaimer principles in the private sector are as clear, as coherent, or as supportive of its positions as WSEU has characterized them. WSEU seems to have conflated a group of disparate holdings issued in diverse circumstances in an effort to portray its actions as lawful under private sector case law.[5] Regardless, we agree with the Examiner that private sector

---

[5] Many of the private sector cases discussing the effect of a union's disclaimer have arisen in the context of an election petition filed by a new union during the term of a collective bargaining agreement. Normally the existence of a contract would preclude processing an election petition, the so-called "contract bar rule." However, the National Labor Relations Board (NLRB) normally will process a petition if it is filed during the "window period" between the 60th and 90th days preceding the expiration date of the agreement. One exception to the contract bar rule, one that would permit a new union to file an election petition outside of the window period, might be a situation where the incumbent union has made a valid disclaimer of interest in continuing to represent the unit. However, even for purposes of a contract bar, a "valid disclaimer" does not include one that is made for "an improper purpose." DYCUS V.NLRB, 615 F.2D 820, 826 (9TH CIR. 1980), CITING EAST MFG. CORP., 242 NLRB NO. 5 (1979). SEE ALSO BENSEL V. ALLIED PILOTS ASSOCIATION, 387 F.3D 298 (3RD CIR. 2004) AT 311. The precedent on this issue is quite muddled. "The Board's treatment of a union's ability to disclaim its representational status during the term of a collective bargaining agreement has not been a model of clarity or consistency." HIGGINS, JR., ED., THE DEVELOPING LABOR LAW (BNA 5TH ED. 2006) AT 1082 N. 7, and citations therein. Moreover, the NLRB has suggested that a disclaiming union, even after a new union has been elected, may have a duty to continue processing grievances that arose prior to the change in representatives. AFGE (BAYLEY-SETON HOSPITAL), 323 NLRB NO. 123 (1997). At least one public sector case is in accord with that view. QUINN V. POLICE OFFICERS LABOR COUNCIL, 456 MICH. 478 (SUP. CT. 1998). Case law also suggests that a decertified union still has standing to compel an employer to arbitrate grievances that arose prior to decertification, at least if there is no replacement union on the scene. IUUAAAIW V. TELEX COMPUTER PRODUCTS, 816 F.2D 519 (10TH CIR. 1987). These precedents do not provide persuasive support for WSEU's assertion that "[t]he logical import of a disclaimer is to automatically nullify the collective bargaining agreement and moot all grievances pending at the time of the disclaimer," (WSEU Br. at 6), or even for the proposition that the disclaimer itself was valid under these circumstances.

case law, which may provide useful guidance in some situations, is particularly inapposite in representation cases in the state sector. Under SELRA, representation matters are considerably more regulated in terms of size and composition of bargaining units, timing of negotiations, duration of contracts and so forth, than is true in the private sector or even under MERA. The purpose of the statute's highly regulated system is to infuse as much stability and continuity as possible in state labor relations, while still effectuating employees' free choice of representatives.

Thus the Examiner properly opted for a public sector model, choosing the second of the options set forth above. He looked to MERA, where the Commission has long, consistently, and with no apparent negative consequences, employed the rule that the new union, upon certification, inherits the existing contract and grievances, if any, except for those provisions or grievances that inure to the benefit of the previous union as an entity. CITY OF GREEN BAY, DEC. NO. 6558(WERB, 11/63); GATEWAY DISTRICT BOARD OF VTAE, DEC. NO. 20209-B (WERC, 8/84), AFF'D CIR. CT. KENOSHA, 11/85). However, as WSEU points out, the Commission's MERA cases have not addressed a situation in which an incumbent union has disclaimed interest prior to certification of the new union and then argued that its disclaimer has the automatic effect of extinguishing the contract and the existing grievances. WSEU is correct, therefore, that the MERA cases on which the Examiner relied do not constitute precedent regarding the validity or effect of such a disclaimer.

Moreover, even if the Examiner correctly held that the disclaimer was valid as such, but did not terminate either the contract or the pending grievances, the Examiner's decision still leaves unanswered the important question of what effect the still extant contract should have during the "interregnum" between the predecessor's disclaimer and the certification of the successor union. If an employee is disciplined during that period or experiences other grievable events, no union would have authority or responsibility to file grievances. If the employee were savvy enough to attempt a grievance on his or her own, a number of questions arise. Would such a grievance be valid? How would any defects be viewed by the employer or a potential arbitrator? How far could the employee pursue the grievance without a union, given that the union is the party to the contract? Would such grievances be timely if not filed until after the new union is certified? Would arbitration be available to the employee? In addition to the contract administration problems, it is obvious that the ongoing negotiations for the successor agreement would be interrupted during this period.

These problems may not seem significant where, as here, the period was only a matter of ten days. However, the principles we adopt in this case would apply in other situations that could be more problematic, for example, where an incumbent union, rather than face an impending loss in an election, decides to disclaim well beforehand, or where certification of the new representative is delayed because of legal challenges or other circumstances. The potential for any period of confusion or chaos is inconsistent with the Legislature's clearly stated policies favoring stability, continuity, harmony with the budget process, and minimal interruption of public services. We also note that, in a unit the size of the LE unit and many other SELRA bargaining units, numerous grievable events could occur even in a matter of days, thus increasing the potential for disruption or confusion in the state's labor relations and/or conduct of its business.

Accordingly, we find ourselves at odds with the Examiner's decision to follow the MERA model for transitioning to a successor union. Instead, we adopt the first option set forth above. We conclude that it would best effectuate the Legislative intent regarding transitions in representation to apply in this context the basic model set forth in Sec. 111.83(6), Stats., even though that section specifically addresses only those situations where a regular contract is in place.

This decision is consistent with how the Commission has previously handled questions about representation procedures that arise after the nominal expiration date of a predecessor regular contract and hence are not directly addressed in Sec. 111.83(6), Stats., but that implicate virtually identical policies. Thus, Sec. 111.83(6), Stats., requires that election petitions must be filed in the October preceding the termination date of an existing contract. In STATE OF WISCONSIN, DEC. NO. 23648 (WERC, 5/86), and more recently in STATE OF WISCONSIN, DEC. NO. 31195 (WERC, 12/04), involving these parties, a challenging union had filed an election petition after the nominal expiration date of the most recent regular contract. Noting that Subsection (6) did not apply and that SELRA was "silent" about when petitions could be filed in that situation, the Commission had to decide what, if any, timeliness rule ought to be followed. The Commission considered and rejected the option of following the MERA rule in similar situations, i.e., where no "actual" contract is in effect, because that:

> would pose a threat to the orderly agreement negotiation and approval process that Sec. 111.92(5) [which is now (6)] seeks to protect because it would impose undue pressures on the incumbent organization during critical times in the negotiation and agreement approval processes and because it would potentially inject a new representative with different bargaining priorities into the negotiations process at a point well into that process. Those and other potential consequences of deeming timely a petition for election filed after the nominal expiration date in a SELRA agreement appear likely to interfere with or interrupt the processes that the Legislature has taken pains to insulate.

STATE OF WISCONSIN, DEC. NO. 23648, at 12. The Commission also recognized, however, that "an existing representative cannot be permitted to remain free indefinitely from the possibility of a timely filing of a petition challenging its representative status." ID. Accordingly, the Commission fashioned a timeliness rule specific to SELRA, modeled on what the Legislature had ordained where a regular contract been in effect, i.e., the petition would be timely if filed during the second October of the fiscal biennium. The Commission reaffirmed that rule in STATE OF WISCONSIN, DEC. NO. 31195.

Hence the simplest and most consistent answer to the issues presented in the instant case is one that would follow the path carved out in the Commission's earlier election cases in state units where no regular contract is in effect. Extrapolating from the model set forth in subsection (6), which is designed to coordinate transitions in representation with the orderly

course of state unit bargaining, the Commission requires election petitions to be filed in the October of the second year of the State's fiscal biennium, just as would be true if a regular contract were in place. By the same token, just as subsection (6) does not countenance a hiatus in union representation as a result of an election petition, neither should the rules be different simply because no actual contract is in place. It follows that, just as WSEU could not lawfully abandon its representational rights and duties prior to the termination of a regular agreement (the end of the fiscal biennium), if one were in effect, neither may it do so in the present situation, until the end of the fiscal biennium in which the election petition has been filed. In attempting to do so, including a wholesale abandonment of all pending grievances, by means of the disclaimer letter of February 28, 2005, WSEU committed a per se violation of its duty of fair representation, in violation of Sec. 111.84(2)(a), Stats.

2. WSEU's Inducing the State to Commit Unfair Labor Practices

Having held that WSEU could not lawfully abandon its representational status, it necessarily follows that WSEU's February 28, 2005 letter was also unlawful in that it induced the State to treat the then-pending grievances as "dropped."

In its February 28 letter, WSEU had written, in pertinent part, "All pending grievances should be considered withdrawn, including those set for arbitration." WSEU argues that this statement was merely intended to describe the inherent legal consequences of WSEU's disclaimer. According to WSEU, the State was under no compulsion to accept WSEU's views in that regard or to act accordingly, but instead had its own independent obligation to ascertain and follow its legal duties. WSEU also points out that the State has stipulated that its decision to stop processing grievances was based upon its review of certain case law.

The Examiner rejected these arguments, correctly reasoning in pertinent part that, "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'...." Examiner's Decision at 36. Indeed, the State stipulated that its decision to treat the grievances as "dropped" was a result not only of examining certain legal precedents, but also of WSEU's February 28 letter. (Stip. ¶ 4). Thus WSEU's letter was clearly a factor in the State's action, if not the precipitating factor. Thus we have little trouble affirming the Examiner's conclusion that the WSEU induced the State to act unlawfully (treating the pending grievances as "dropped"), in violation of Sec. 111.84(2)(b), Stats. [6]

[6] As we have interpreted SELRA, the State's duty to bargain remained with WSEU until June 30, 2005, as a matter of law, despite WSEU's February 28 letter. Therefore, the State's action in treating all grievances as "dropped" after February 28, violated Sec. 111.84(1)(e) of SELRA, as it amounted to a wholesale repudiation of the contractual grievance procedure. As the State had no duty to bargain with WLEA until June 30, 2005, we have modified the Examiner's conclusion that the State refused to bargain within the meaning of Sec. 111.84(1)(d) of SELRA.

The Examiner also held that WSEU's letter of February 28, 2005 violated Sec. 111.84(3) of SELRA, by causing the State to commit an unfair labor practice. WSEU challenges this conclusion, as well, contending that subsection (3) is intended to reach individuals or entities who cause unfair labor practices but who are not within the reach of either subsection (1) as an employer or subsection (2) as an employee or a union. We agree. The Examiner correctly noted that it may be possible for a union to violate subsection (3), and, since the Examiner held that WSEU may have taken the wrongful actions in this case after it had lawfully surrendered its authority to represent the unit, it appears that the Examiner may have viewed subsection (3) as an alternative basis for holding WSEU culpable for unfair labor practices. In our view, subsection (3) may provide a basis for holding a union responsible for unfair labor practices committed by entities who are subject to subsection (1) or (2), but only if the union is an outside party in a particular situation. In this case, we, contrary to the Examiner, have concluded that WSEU had not properly relinquished its duties and responsibilities for the LE unit at the time WSEU induced the State to drop the pending grievances. Accordingly, WSEU was not an outside entity but rather answerable under subsection (2), and we have held WSEU to have violated subsection (2)(b) by inducing the State to violate SELRA. Moreover, finding a violation of subsection (3) would also be largely redundant, as it would not affect the remedy available to WLEA. For these reasons we have set aside the Examiner's conclusion that WSEU violated Sec. 111.84(3), Stats.

3. The Dental Insurance Issue

Before the Examiner, WLEA argued that the State and WSEU had violated SELRA by terminating LE bargaining unit members' eligibility for WSEU-provided dental insurance, paid for by means of payroll deduction by the State. The Examiner dismissed this alleged violation, on the ground that he had found WSEU's disclaimer to be valid and that WSEU therefore "was within its rights in unilaterally terminating non-contractual benefits offered by WSEU to State employees represented by WSEU…." Examiner's Decision at 37-38.

We agree with the Examiner that a non-contractual benefit provided under the auspices of union, such as the WSEU's dental insurance plan, generally may be terminated once the eligibility criteria (usually union or bargaining unit membership) are no longer viable. Cf. WPPA/LEER DIVISION, DEC. NO. 26950-B (MAWHINNEY, 1/92), AFF'D BY OPERATION OF LAW, DEC. NO. 26950-C (WERC, 2/92) (a union ousted as a result of an election under MERA was not required to continue to offer coverage through its union-administered health and welfare fund, where the fund's trustees had promulgated a policy of providing benefits only to members of the union and where the union's status as exclusive bargaining representative had ended).

However, unlike the Examiner, we have concluded that WSEU's disclaimer did not lawfully terminate WSEU's status as collective bargaining representative of the LE unit prior to June 30, 2005. It follows that, as a matter of law, LE unit members remained "State employees represented by WSEU" for purposes of eligibility for dental insurance through the State's payroll deduction system until June 30, 2005. Nothing in the record suggests WSEU

was otherwise "within its rights" in terminating these individuals' dental insurance eligibility, and we conclude that by doing so WSEU violated its duty of fair representation – whether as a form of retaliation against the LE unit for having elected a different representative or simply as an arbitrary action in derogation of the unit members' contractual rights.

Remedy

The Commission's general remedial goals are to restore the parties to the positions they would have been in had the law not been violated and to make the complainants whole to the extent practicable for their out-of-pocket losses attributable to the violations that have been found. As to make-whole relief, the Commission has explained:

> In our view the purposes of make whole relief include preventing the party that committed the unlawful change from benefiting from that wrongful conduct, compensating those affected adversely by the change, and preventing or discouraging such violations.

GREEN COUNTY, DEC. NO. 20308-B (WERC, 11/84). While GREEN COUNTY concerned a "unilateral change" violation, rather than the duty of fair representation and breach of agreement violations at issue here, the general articulation of the purposes of make-whole relief is equally applicable. At the same time, the Commission "has a great deal of latitude in devising its remedies and may tailor them to the facts of a specific case." OZAUKEE COUNTY, DEC. NO. 30551-B (WERC, 2/04), CITING EMPLOYMENT RELATIONS DEPT. V. WERC, 122 WIS.2D 132 (1985). Thus, the Commission has occasionally refrained from fully restoring the status quo and/or deviated from the strict calculation of make-whole relief, where doing so was necessary to achieve the result most consistent with the purposes of the law. SEE RACINE COUNTY, DEC. NO. 31377-C, 31378-C (WERC, 6/06), and cases cited therein.

In the instant situation, restoring the parties to the situation they would have been in had WSEU not attempted to extinguish prematurely its representational status would mean requiring WSEU to handle the grievances that were pending as of February 28, 2005, up to and including arbitration if such reasonably could have occurred by June 30, 2005. However, the practical reality is that for almost two years the WLEA has been representing the LE bargaining unit. Under these circumstances, it could disrupt WLEA's relationship with its bargaining unit members and/or the State to compel WSEU, rather than WLEA and regardless of WLEA's wishes, to handle grievances of LE unit members, including those that may have been initiated by WSEU prior to February 28, 2005. On the other hand, WLEA is entitled, if it wishes, to have WSEU assume the costs of handling those grievances that lawfully should have been within WSEU's purview. Given these considerations, the most equitable remedy is to allow WLEA to decide whether it wishes to undertake all, any, or a portion of the grievances that WSEU unlawfully abandoned, or whether instead WLEA wishes to let WSEU assume such representation and cost. Our Order so provides.

In all other respects, the Order in this case is conventional, including the requirement that WSEU compensate LE unit members for any out-of-pocket costs attributable to those employees' loss of dental insurance eligibility, through June 30, 2005.

Dated at Madison, Wisconsin, this 8th day of June, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

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

rb