STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ROBIN WEST, Complainant,
vs.

WSEU COUNCIL 24, AFSCME, AFL-CIO LOCAL 579 and PAULETTE FELD, et al., Respondents.

Case 8
No. 64966
PP(s) - 356

Decision No. 31437-A

Appearances:

Ms. Robin West, Complainant.

Lawton & Cates, S.C., by **Mr. Kurt C. Kobelt, Esq.,** 10 E. Doty Street, Suite 400, Madison, Wisconsin 53703, on behalf of Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DISMISSING COMPLAINT

On July 5, 2005, Complainant Robin West filed a complaint with the Wisconsin Employment Relations Commission alleging that WSEU Council 24, its Local 579 and Local President Paulette Feld "and anyone else in C-24 who may have directly or indirectly had a part in this decision," had committed prohibited practices in violation of SELRA by allowing a shift rebid which resulted in West being displaced from her dayshift to a nighshift position.

On September 1, 2005 the Commission appointed Sharon A. Gallagher, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in 111.84, Stats. Hearing on the complaint was scheduled with mutual agreement of the parties for October 4, 2005, at Oshkosh, Wisconsin. Complainant did not appear on October 4, 2005. Respondents WSEU and Feld appeared by their attorney Kurt Kobelt on October 4, 2005.

Further hearing was held on March 7, 2006 at Oshkosh, Wisconsin. The hearing was transcribed and the parties' briefs were received by July 12, 2006, whereupon the record was closed. The Examiner having considered the evidence and argument as well as the parties' briefs herein issues the following

FINDINGS OF FACT

1) Robin West (Complainant) is an individual who resides in the State of Wisconsin. West has been employed as a law enforcement officer at University of Wisconsin Oshkosh, University Police (UWO/UP) for the past 20 years.

2) AFSCME Council 24, Wisconsin State Employees Union, AFL-CIO is a labor organization and has its principal offices at 8033 Excelsior Drive, Suite C, Madison, Wisconsin 57717-1903.

3) At all times relevant hereto, Evelyn Meuret has been Chief Steward and Paulette Feld has been President of Local 579 WSEU and agents thereof. Until February 25, 2005, WSEU represented law enforcement employees of UWO/UP whereupon another union, Wisconsin Law Enforcement Association, (WLEA) became certified as the UWO/UP law enforcement officers' bargaining representative.

4) The Master labor agreement between the State of Wisconsin and WSEU for the relevant period contained the following provisions:

ARTICLE IV

GRIEVANCE PROCEDURE

SECTION 1: Definition

4/1/1 A grievance is defined as, and limited to, a written complaint involving an alleged violation of a specific provision of this Agreement.

4/1/2 Only one (1) subject matter shall be covered in any one (1) grievance. A grievance shall contain a clear and concise statement of the grievance by indicating the issue involved, the relief sought, the date of the incident or violation took place, and the specific section or sections of the Agreement involved. The grievance shall be presented to the designated supervisor involved in quadruplicate (on mutually agreed upon forms furnished by the Employer to the Union and any prospective grievant) and signed and dated by the employee(s) and the Local Union representative. A grievant shall not represent him or herself. Only a designated grievance representative pursuant to Article IV, Section 6 of this agreement may represent a grievant.

4/1/3 If an employee brings any grievance to the Employer's attention without first having notified the union, the Employer representative to whom such grievance is brought shall immediately notify the designated Local Union representative and no further discussion shall be had on the matter until the appropriate Local Union representative has been given notice and an opportunity to be present.

4/1/4 All grievances must be presented promptly and no later than thirty (30) calendar days from the date the grievant first became aware of, or should have become aware of with the exercise of reasonable diligence, the cause of such grievance.

4/1/5 The parties will make a good faith effort to handle filed grievances, discipline and investigations in a confidential matter. The Employer and the Union agree to not release any open or closed grievance or arbitration file(s) to another organization or person not representing the Union or the Employer unless both parties mutually consent or the release is required by the WERC or a court of law. A breach of confidentiality will not affect the merits of the grievance, discipline or investigation.

4/1/6 (AS) Representatives of the Union and Management shall be treated as equals and in a courteous and professional manner.

SECTION 2: Grievance Steps

4/2/1 Pre-Filing: When an employee(s) and his/her Local Union representative become aware of circumstances, other than disciplinary actions, that may result in the filing of a Step One grievance, it is the intent of the parties that, prior to filing a grievance, the Local Union representative will contact the immediate supervisor of the employee to identify and discuss the matter in a mutual attempt to resolve it. The parties are encouraged to make this contact by telephone. The State's DAIN line facilities will be used whenever possible. Both parties will provide any and all documents available, if requested, at the pre-filing step.

4/2/2 If the designated agency representative determines that a contact with the immediate supervisor has not been made, the agency representative will notify the Local Union and may hold the grievance in abeyance until such contact is made.

4/2/3 The Employer representative at any step of the grievance procedure is the person responsible for that step of the procedure. However, the Employer may find it necessary to have an additional Employer representative present. The Union shall also be allowed to have one additional Local Union representative present in non-pay status. Only one (1) person from each side shall be designated as the spokesperson. By mutual agreement, additional Employer and/or Union observers may be present.

4/2/4 All original grievances must be filed in writing at Step One or Two, as appropriate, promptly and not later than thirty (30) calendar days from the date the grievant first became aware of, or should have become aware of, with the exercise of reasonable diligence, the cause of such grievance.

4/2/5 Step One: Within twenty-one (21) calendar days of receipt of the written grievance or within twenty-one (21) calendar days of the date of the supervisor contact provided for in 4/2/1, whichever is later, the designated agency representative will schedule a hearing with the employee and Local Union representative and respond to the Step One grievance. By mutual agreement of the parties, the parties are encouraged to hold grievance hearings by telephone or video conferencing. The State's DAIN line facilities will be used whenever possible.

4/2/6 Step Two: If dissatisfied with the Employer's answer in Step One, to be considered further, the grievance must be appealed to the appointing authority or the designee (i.e., Division Administrator, Bureau Director, or personnel office) within fourteen (14) calendar days from receipt of the answer in Step One. Upon receipt of the grievance in Step Two, the department will provide copies of Step One and Step Two to the Bureau of Collective Bargaining of the Department of Employment Relations as soon as possible. Within twenty-one (21) calendar days of receipt of the written grievance, the designated agency representative(s) will schedule a hearing with the employee(s) and his/her designated Local Union representative(s) and a representative of Council 24 (as Council 24 may elect) and respond to the Step Two grievances, unless the time limits are mutually waived. The Employer and the Union agree to hear Step Two grievances on a regular schedule, where possible, at the work site or mutually agreed upon locations. By mutual agreement of the parties, the parties are encouraged to hold grievance hearings by telephone or video conferencing. The State's DAIN line facilities will be used whenever possible.

4/2/7 Step Three: Grievances which have not been settled under the foregoing procedure may be appealed to arbitration by either party within thirty (30) calendar days from the date of the agency's answer in Step Two, or from the date on which the agency's answer was due, whichever is earlier, except grievances involving discharge, which must be appealed within fifteen (15) calendar days from the agency's answer in Step Two, or from the date on which the agency's answer was due, whichever is earlier, or the grievance will be considered ineligible for appeal to arbitration. If an unresolved grievance is not appealed to arbitration, it shall be considered terminated on the basis of the Second Step answers without prejudice or precedent in the resolution of future grievances. The issue as stated in the Second Step shall continue the sole and entire subject matter to be heard by the arbitrator, unless the parties agree to modify the scope of the hearing.

Time Limits

4/2/8 Grievances not appealed within the designated time limits in any step of the grievance procedure will be considered as having been adjudicated on the

basis of the last preceding Employer answer. Grievances not answered by the Employer within the designated time limits in any step of the grievance procedure may be appealed to the next step within the designated time limits of the appropriate step of the procedure. The parties may however, mutually agree in writing to extend the time limits in any step of the grievance procedure.

4/2/9 If the Employer representative with whom a grievance appeal must be filed is located in a city other than that in which the grievance was processed in the preceding step, the mailing of the grievance appeal form shall constitute a timely appeal if it is postmarked within the appeal period. Likewise, when an Employer answer must be forward to a city other than that in which the Employer representative works, the mailing of the answer shall constitute a timely response if it is postmarked within the answer period. The Employer will make a good faith effort to insure confidentiality.

4/2/10 Arbitrations for discharge cases will be heard within one (1) year from the date of appeal to arbitration.

SECTION 3: Arbitration Panel Procedures

4/3/1 Within seven (7) calendar days from the date of appeal to arbitration, the parties shall meet to select an arbitrator from the panel of arbitrators according to the selection procedures agreed upon.

4/3/2 Where two or more grievances are appealed to arbitration, an effort will be made by the parties to agree upon the grievances to be heard by any one (1) arbitrator. On the grievances where agreement is not reached, a separate arbitrator from the panel shall be appointed for each grievance. Where the grievance is denied by the arbitrator, the fees and expenses of the arbitrator and the costs of a court reporter, if one was requested by either party for the hearing will be borne by the Union. Where the grievance is upheld by the arbitrator, the fees and expenses of the arbitrator and the costs of the court reporter, if one was requested by either party for the hearing, will be shared equally by the parties. Except as provided in Section 11 of this Article, each of the parties shall bear the cost of their own witnesses, including any lost wages that may be incurred. On grievances where the arbitrability of the subject matter is an issue, a separate arbitrator shall be appointed to determine the question of arbitrability unless the parties agree otherwise. Where the question of arbitrability is not an issue, the arbitrator shall only have authority to determine compliance with the provisions of this Agreement. The arbitrator shall not have jurisdiction or authority to add to, amend, modify, nullify, or ignore in any way the provisions of this Agreement and shall not make any award which in effect would grant the Union or the Employer any matters which were not obtained in the negotiation process.

4/3/3 Both parties agree that there will be a panel of twelve (12) arbitrators selected to hear arbitration cases that are covered under the Agreement between the parties.

The procedure for selecting this panel of twelve (12) arbitrators as follows:

A. Both parties will make an attempt to mutually agree on a panel of twelve (12) arbitrators.

B. If mutual agreement cannot be reached on the total twelve (12) arbitrators then the remaining number of arbitrators needed to complete the panel will be selected equally between the two parties.

C. After one (1) year from the date the panel was selected, either party shall have the right to eliminate up to two (2) arbitrators from the panel.

D. In replacing the arbitrators that were eliminated from the panel the procedure in B above shall be used, but, it is noted that any arbitrator eliminated in C above may not be placed back on the panel.

4/3/4 The procedure for selecting an arbitrator from the panel to hear a particular case is as follows:

A. Each arbitrator shall be assigned a number one (1) through twelve (12).

B. In selecting an arbitrator for a case the parties shall draw five (5) arbitrator numbers at random from the total twelve (12). Then the elimination process will be used to select one (1) arbitrator from the group of five (5).

C. If both parties mutually disagree with the arbitrator number that has been selected in B above, then the original process of selecting an arbitrator shown in B above will again be used.

D. If, after two attempts, the parties mutually disagree with the arbitrator number that has been selected, then both parties shall jointly request a panel of arbitrators from the Federal mediation and Conciliation Service.

E. Both parties shall jointly send letters to the twelve (12) arbitrators selected and request these arbitrators to agree to participate on the panel and comply with specific requirements.

F. Both parties agree to some type of retainer fee for each of the selected arbitrators in addition to a set daily fee allowed each arbitrator for his/her services.

4/3/5 Both parties shall jointly contact court reporters from around the state and develop a listing of these reporters who will agree to return the transcript of a hearing within ten (10) days from the date of the hearing.

4/3/6 Both parties agree to submit exhibits to each other that will be entered into evidence at the arbitration at least three (3) work days prior to the date of arbitration. Exhibits postmarked at least three (3) work days prior to the arbitration will satisfy the requirement.

4/3/7 The names of the witnesses that will be called to testify shall be shared with the other party three (3) work days prior to the hearing.

4/3/8 Disputes which arise under 4/3/6 or 4/3/7 will be resolved by DER and Council 24.

4/3/9 If briefs are to be filed, both parties shall file their briefs within fourteen (14) days from the date of their receipt of the transcript. This time limit may be extended if mutually agreed by the two parties.

4/3/10 The decision of the arbitrator will be final and binding on both parties of this Agreement. When the arbitrator declares a bench decision, this decision shall be rendered within fifteen (15) calendar days from the date of the arbitration hearing. On discharge and 230.36 hazardous duty cases, the decision of the arbitrator shall be rendered within fifteen (15) calendar days from receipt of the briefs of the parties or the transcript in the event briefs are not filed. On all other cases, the decision of the arbitrator shall be rendered within thirty (30) calendar days from receipt of the briefs of the parties or the transcript in the event briefs are not filed.

SECTION 4: Retroactivity

4/4/1 Settlement of grievances may or may not be retroactive as the equities of particular cases may demand. In any case, where it is determined that the award should be applied retroactively, except for administrative errors relating to the payment of wages, the maximum period of retroactivity allowed shall be a date not earlier than thirty (30) calendar days prior to the initiation of the written grievance in Step One. Employees who voluntarily terminate their employment (not including those who retire) will have their grievances immediately withdrawn and will not benefit by any later settlement of a group grievance. When a discharged employee resigns for the purpose of withdrawing funds from the State's retirement system, his/her grievance of the discharge will not be considered as withdrawn.

SECTION 5: Exclusive Procedure

4/5/1 The grievance procedure set out above shall be exclusive and shall replace any other grievance procedure for adjustment of any disputes arising from the application and interpretation of this Agreement.

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ARTICLE VII

TRANSFERS

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SECTION 1: Transfer Within Employing Units

7/1/1 When a permanent vacancy occurs in a permanent (part-time, full-time or seasonal) position in an employing unit or when the Employer becomes aware of an impending permanent position in an employing unit, unless mutually agreed to otherwise, the Employer shall notify the local Union indicating the classification, any special requirements (including training and experience), the shift, shift rotation (if any), work schedule and the work location, and the local Union shall notify the employees of the bargaining unit in the employing unit. Interested permanent employees assigned to the same or other shifts in the employing unit who are in the same classification and who have completed their probationary period in the classification of the vacancy shall indicate their desire for a transfer by notifying the Employer within five (5) calendar days of notice to the employee or within seven (7) calendar days notice to the Union, whichever is greater. During the period while the selection process is being administered or for a maximum of six (6) months, whichever is less, the Employer may temporarily fill the vacancy to fulfill operational requirements. The employee selected to fill the permanent vacancy shall be the employee with the most seniority, unless he/she is not physically or emotionally fit for the job or cannot perform the work in a satisfactory manner.

ARTICLE VIII

LAYOFF PROCEDURE

Section 5: Employee Options Upon Notification of Layoff

8/5/1 Following notification of layoff the employee shall decide on which of the following options he/she shall exercise:

8/5/2 Transfer in Lieu of Layoff:

Prior to the layoff effective date the affected employee may transfer as follows:

A. Within the Department –
   1. The employee shall be afforded the opportunity to transfer laterally to permanent vacant positions in the same class in any employing unit within the department in accordance with the provisions of Article VII, Section 3.

2. The employee may file a request for transfer with any employing unit in the department, and with approval of the appointing authority, may be appointed to any permanent vacancy in any other class for which he/she meets the necessary qualifications in the same or counterpart pay range as the position occupied at the time of notification of layoff.

B. Between Departments - The employee may file a request for transfer to any department in state service. Upon approval of that department, such employee may be appointed to any permanent vacancy in a class for which he/she meets the necessary qualifications in the same or counterpart pay range as the position occupied at the time of notification of layoff.

ARTICLE XI

MISCELLANEOUS

Section 2 – Union – Management Meetings

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11/2/8 Agenda

Items to be included on the agenda for the aforementioned Union-Management meetings are to be submitted at least five (5) days in advance of the scheduled dates of the meeting if at all possible. The purpose of each meeting shall be to:

A. Discuss the administration of the Agreement.
B. Disseminate general information of interest to the parties.
C. **(BC, SPS, T, PSS)** Give representatives an opportunity to express their views, or to make suggestions on subjects of interest to employees of the bargaining units.
D. **(AS)** Give representatives an opportunity to express their views, or to make suggestions on subjects of interest to employees of the bargaining unit, including day care and dependent care. To discuss and attempt to resolve issues including those referred to local labor/management meetings from the Master Bargaining Agreement.

E. Consider recommendations of the Health and Safety Committee on matters relating to the bargaining unit employees in the departments.

F. Notify the Union of changes in non-bargainable conditions of employment contemplated by management which may affect employees in the bargaining unit. Failure of the Employer to provide such information shall not prevent the Employer from making any such changes.

G. Discuss policies and programs affecting employees and clients. However, failure of the Employer to discuss changes in policies or programs prior to implementation or to adopt Union suggestions shall not prevent the Employer from making any changes.

H. Whenever the Employer decides to reorganize any state agency or subdivision thereof which affects fifty (50) or more employees in a bureau or employing unit, the Union shall be given thirty (30) days advance notice whenever practicable and an opportunity to discuss and confer with the Employer regarding that reorganization and its impact and effect on employees in the bargaining units.

I. **(BC, AS, T)** Negotiate hours of work, work schedules and overtime assignments. In the event no agreement is reached, either party may appeal to arbitration pursuant to the procedures of Article IV, Section 2, Step Three except that the decision of the arbitrator shall be advisory. If the advisory award is not implemented by local management, a representative of the department, a representative of the Department of Employment Relations, and a representative of the Wisconsin State Employees Union, District Council 24, will meet to discuss the implementation of the award.

J. (**SPS, LE)** Negotiate hours of work, work schedules, overtime assignments and the procedures for the administrative investigation of citizen complaints. In the event no agreement is reached, either party may appeal to arbitration pursuant to the procedures of Article IV, Section 2, Step Three except that the decision of the arbitrator shall be advisory. If the advisory award is not implemented by local management, a representative of the department, a representative of the Department of Employment Relations, and a representative of the Wisconsin State Employees Union, District Council 24, will meet to discuss the implementation of the award.

K. In the event VDT – CRT equipment is to be installed, the Employer shall notify the appropriate local Unions of the intent to

install such equipment. Whenever possible, such notice will be given to the local union at least thirty (30) days prior to the lease, purchase or acquisition of such equipment.

L. **(AS)** VDT-CRT concerns may be discussed, as either party desires, at local Union-Management meetings. When the agenda for local Union-Management meetings includes such concerns adequate time shall be allotted for such discussion. The following subjects may be discussed:

1. lighting,
2. vision care and examinations,
3. noise,
4. chairs,
5. desks,
6. footrests,
7. adjustable terminals and keyboards,
8. work environment design (wall cover, carpet, windows),
9. room temperature,
10. training.

M. Decision to institute major technological changes or significantly downsize an employing unit may be discussed at local Union-Management meetings.

When the Employer decides to make major technological changes directly affecting ten (10) or more employees in the bargaining units, the Employer will provide advance notice, ninety (90) days in advance if possible, to the Union. The following subjects may be discussed:

1. implementation plans,
2. new equipment installation,
3. transition plans
4. training or retraining, and
5. placement of any displaced employees.

As mutually agreed, attendance at the Union-Management meetings discussing these subjects may be expanded to include a reasonable number of employees from affected organizational subunits not recognized as employing units for the purpose of Union-Management meetings. Such employees shall attend without loss of pay.

N. Discuss child/elder/dependent care issues including establishment of on-site centers.

O. Where meals are not currently being provided, meals (without charge) for employees held over to work four (4) or more additional hours will be discussed locally.

P. Discuss the administration of the Worker's Compensation law, specifically denials of benefits at the agency or lower level.

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5) Prior to the Fall 2004, the eight law enforcement officers employed by UWO/UP worked on four shifts, as follows:

"A" shift employees worked from 12:00 a.m. to 8:00 a.m.;
"B" shift employees worked from 8:00 a.m. to 4:00 p.m.;
"C" shift employees worked from 4:00 p.m. to 12:00 a.m.; and
"D" shift employees worked from 8:00 p.m. to 4:00 a.m.

6) The local agreement covering police at UWO/UP for the relevant period contained the following provision:

WORK SCHEDULES
Permanent shifts will be maintained as much as possible. The master contract language will be used when posting, offering and when making assignments to fill permanent shift vacancies.

7) Sometime during the Fall of 2004, UWO Police management and local union members began discussing the possibility of the UWO/UP changing from four shifts of eight hours each to three shifts of ten hours each. This action would require the elimination of "D" shift and would mean that Officer Joe Schoeder, the second most senior UP officer and the only "D" shift employee, would be displaced and have to select another position on another shift.

8) In early October, 2004, Local WSEU President Feld was advised for the first time by HR Manager Willihnganz of the possible change to 10 hour shifts in the UWO/UP which employees and management had been discussing and wanted to implement by January 1, 2005 on a trial basis. The new (proposed) shift schedule meant that "A" shift would work from 11:00 p.m. to 9:00 a.m., "B" shift would work from 8:00 a.m. to 6:00 p.m., and "C" shift would work from 5:00 p.m. to 3:00 a.m.

9) On October 7, 2004, Union Steward Meuret e-mailed unit officers asking them for their preferences for changing to 10 hour shifts and whether they wanted all shifts rebid upon the elimination of "D" shift with seniority being the deciding factor and whether they wanted a meeting regarding these issues. Meuret received responses from all eight officers as follows:

- 6 voted for no meeting; 1 voted for a meeting;
- 6 voted for the change to 10 hour shifts
- 5 voted for a shift rebid; 1 no opinion on the question

10) On October 26, 2004, unit officers conducted an internal vote without the sanction or participation of Local 579 which resulted in a 7 to 1 vote in favor of the change to 10 hour shifts at UWO/UP and 5 votes in favor of a shift rebid. As Local 579 had to approve any action taken, the employees and management sought the further involvement of Local 579 officials.

11) By e-mails sent between October 20 and November 29, 2004, Local 579 President Feld expressed her opinion that there was no contractual basis for a shfit rebid and that a rebid would be an extreme action, although Feld also took the position that the contract gives the Local Union the responsibility and right to negotiate shift changes. By e-mail dated November 29, 2004, Feld wrote that a Special Committee would be set up to draft a proposal for consideration by Local 579, the employees and UWO/UP management regarding how best to implement the 10 hour shifts desired by a majority of officers. Feld appointed Complainant, Schroeder and Officer Stan Zitek to the Committee and the Local 579 Executive Board approved their appointment. This Committee was never denominated as a Labor-Management Committee by Feld or any other agent of WSEU.

12) The proposal (drafted by Feld) of this Special Committee regarding implementing the 10 hour shifts was as follows:

> The proposed rotation and shifts maintain the A, B, and C shifts, but eliminates the D shift, which currently is 8pm-4am. In order to implement the 10 hour shifts, it will be necessary to place the D shift officer in one of the 10 hour slots. The proposed A shift includes 5 hours that were part of the D shift. The officer currently working the D shift has the second highest seniority in the department and should be given the opportunity to select either of the two shifts that include the hours of his current shift. If the A shift is chosen, there are no other movements necessary. If the C shift is chosen, the least senior officer on that shift will be moved to the A shift where there is a vacancy.

At this time, no officer had quit or retired and no new position had been created.

13) On December 2, 2004, the Special Committee met for approximately 55 minutes. Feld, Meuret and the three officers on the Special Committee met with three other officers present. All officers expressed their opinions at the meeting as Feld allowed non-Committee members to speak as well as officers on the Committee. During the meeting, Officer Kathy Kemp mentioned the up-coming election in which officers would consider whether they wished to be represented by WLEA. At the end of the meeting, Feld decided to support negotiating with UWO/UP a shift rebid by seniority as all present wanted the change to 10 hour shifts and only Complainant (of those present) was against the shift rebid. Feld also told Complainant that she could do what she had to do, referring to filing a grievance regarding the matter.

14) Immediately following her meeting with the Special Committee and officers, Feld and the Special Committee met with UWO/UP officials and the parties mutually agreed to implement the 10 hour shifts to eliminate "D" shift and to have the remaining shifts (A-C) rebid, as follows:

> Work Schedule Change
>
> After consultation with representatives from the Wisconsin State Employees Union (WSEU), Police Officers from the UW Oshkosh Police Department, Police Department management and the Human Resources Office, effective January 2, 2005, the UW Oshkosh Police Department will replace the current Police Officer rotating eight-hour shift with a new ten-hour rotating shift schedule.
>
> (A copy of the new ten-hour rotating shift schedule is attached.)
>
> Key components of the new ten-hour rotating shift schedule are:
>
> - Police Officers will bid on assignments by state seniority.
> - Shift assignments will be final.
> - There will not be a trial period.
>
> Once approved by WSEU and University Police Officers, the Lieutenant in consultation with individual Police Officers will coordinate the transition from the current 8-hour rotating shift schedule to the new 10-hour rotating shift schedule.
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> Bidding of shifts and shift reassignments will begin after WSEU representatives and Police Officers meet and accept the change in shift schedule.
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> The 10-hour shift change was reached through an exchange of information form both Labor and Management representatives.

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15) On December 18, 2004 Complainant sent the following e-mail to Union Steward Meuret:

> Ok Evelyn, I guess I have to TRY to file a grievance. I believe my contractual rights have been violated with this shift rebid. I have been bumped off my shift by Joe as I predicted from the start. The sections I want to cite include: The local agreement which has a provision that states: Permanent shifts will be maintained as much as possible AND the master contract language will be used when posting, offering and when making assignments to fill permanent shift vacancies. I also want to cite: Transfer within units 7/1/1. and section 11/2/8 which covers the

> agenda for labor management meetings. A Shift rebid was discussed, and in fact, dominated the ½ meeting, even though Field rep Gary Lonzo told me in an e-mail that if a topic is not listed, in the contract, generally it cannot be discussed.
> And we may as well add the language in 8/5/2 that you mentioned in an e-mail and any other language that pertains. For a remedy I want to be assigned back to dayshift. I want the time limits upheld as far as the filing of all the steps. I want this to move as quickly as possible to resolution. I realize that means arbitration. I see no reason for this grievance to be hung up at any of the steps before arbitration. I have been thrown to the wolves and if it were you you would not want to be in my position any longer than you have to be.
> If you are told that a grievance cannot be filed, or won't be supported by council 24, please me know ASAP. I am off on Monday.(sic) but will be available on tuesday (sic) to sign it or discuss it. Melland will be here Monday and tuesday (sic), then will be gone for awhile as will Dennis. So, if you can get step one to Melland via e-mail on Monday and ask him to respond and not wait for Nasci to get back in a couple of weeks, we can move on to step two..he should be able to respond himself, he was there after all. You should know that he told brewer (sic) about this, oh yeah, they are enjoying the hell out of this one.

16) On December 20th Meuret sent the following e-mail to UWO/UP Chief Melland as a pre-file document on Complainant's grievance:

> Please consider this a pre-file to a possible grievance relating to Robin West who lost her current B shift position as a result of a voluntary shift change within the department.
>
> On December 2, 2004, the Local Union president and the University Police management reached an agreement to voluntarily implement a shift change from 8 hours to 10 hours for the University Police Department. The 8 hour shifts consisted of 4 shifts—A shift: 12 midnight to 8 a.m.; B shift: 8 a.m. to 4 p.m.; C shift: 4 p.m. to 12 a.m. and D shift: 8 p.m. to 4 a.m. As a result of this agreement, the D shift would no longer exist, resulting in an office (sic) no longer having a shift to work. The shifts for the 10 hour shifts would be A shift: 11 p.m. to 9:00 a.m.; B shift: 8 a.m. to 6 p.m.; and C shift: 5 p.m. to 3 a.m. Because of the level of seniority of this officer, the Local Union president and management agreed to hold a shift rebid of all the positions in the department. We feel, however, that 8/5/2 could have been more appropriately implemented. 8/5/2 A. 1. states that the employee shall be afforded the opportunity to transfer laterally to permanent vacant positions in the same class in any employing unit with

the department in accordance with the provisions of Article VII, Section 3. With the implementation of the shift change, the D shift would be eliminated, ultimately, putting the officer into a layoff situation. If all other officers maintained the shifts they were currently assigned to, there would be a vacancy in Shift C, which the officer who lost his shift could work. This shift would also be the closest shift to what the D shift had been.

If management does not feel that a lay off was occurring, then the language in 7/1/1 would apply wherein a permanent vacancy would occur within the C shift as a result of going from the 8 hour shifts to the 10 hour shifts. The department could open up the C shift as a result of going from the 8 hour shifts to the 10 hour shifts. The department could open up the C shift vacancy as a transfer and the employee from the D shift could then transfer into the permanent vacancy.

The Local agreement, which is in effect within the Department, indicates that Permanent shifts will be maintained as much as possible. The master contract language will be used when posting, offering and when making assignments to fill permanent shift vacancies. The implementation of the 10 hour shift schedule totally deviates from this agreement and resulted in one of the regular shifts being eliminated, essentially, putting an officer in a lay off position. The University Police management had been in discussion with many of the officers relating to implementing a 10 hour shift for quite some time. The discussion with the Local Union started only after the officer losing his shift made the local aware it was affecting one or more of the officers adversely.

11/2/8 Union management agenda items – shift rebids are not listed as a topic of discussion for Union management meetings. Other contract language should have been used to implement this shift change rather than using a shift rebid. Management could have placed the officer from the "lost" D shift into the C shift where there was a vacancy or management could have created another D shift for this officer as they did when the D shift was first created.

We are asking that Robin West be assigned to the B shift and that management assign the other officers in the Department following the contract and local agreement language.

On December 21, the Chief responded by e-mail as follows:

Labor and management already met, reopened local negotiations and came to an agreement on this issue. I do not see any violation of the agreement pertaining to the new schedule or the master contract.

17) On December 21st Complainant, with Meuret's assistance, filed the following formal grievance regarding the shift rebid

> On December 2, 2004, the Local Union president and the University Police management reached an agreement to voluntarily implement a shift change from 8 hours to 10 hours for the University Police Department. The 8 hour shifts consisted of 4 shifts – A shift: 12 midnight to 8 a.m.; B shift: 8 a.m. to 4 p.m.; C shift: 4 p.m. to 12 a.m. and D shift: 8 p.m. to 4 a.m. As a result of this agreement, the D shift would no longer exist, resulting in an office (sic) no longer having a shift to work. The shifts for the 10 hours shifts would be A shift: 11 p.m. to 9 a.m.; B shift: 8 a.m. to 6 p.m.; and C shift: 5 p.m. to 3 a.m. Because of the level of seniority of the officer losing his shift, the Local Union president and management agreed to hold a shift rebid of all the positions in the department in order to implement the shift.
>
> The membership voted 7-1 to implement the shift change and hold a shift rebid. The rebid was done by seniority. The grievant was 3rd in seniority and the grievant lost her position on the B shift. We do not feel the rebid was contractually the way the change in shifts should have been implemented. The grievants (sic) contractual rights were violated with regards to the entire shift change and shift rebid.
>
> We feel that 8/5/2 could have been used to implement the shift change. With the implementation of the shift change, the D shift would be eliminated, ultimately, putting the officer into a layoff situation. If all other officers maintained the shifts they were currently assigned to, there would be a vacancy in Shift C, which the officer who lost his shift could work. This shift would also be the closest shift to what the D shift had been. 8/5/2 A. 1. states that the employee shall be afforded the opportunity to transfer laterally to permanent vacant positions in the same class in any employing unit with the department in accordance with the provisions of Article VII, Section 3.
>
> If management does not feel that a lay off was occurring by eliminating a shift with an employee on that shift, then the language in 7/1/1 would apply wherein a permanent vacancy would occur within the C shift as a result of going from the 8 hour shifts to the 10 hour shifts. The department could open up the C shift vacancy as a transfer and the employee from the D shift could then transfer into the permanent vacancy.

> The Local agreement, which is in effect within the Department, indicates that Permanent shifts will be maintained as much as possible. The master contract language will be used when posting, offering and when making assignments to fill permanent shift vacancies. The implementatuion of the 10 hour shift schedule totally deviates from this agreement and resulted in one of the regular shifts being eliminated, essentially, putting an officer in a lay off position. The University Police management had been in discussion with many of the officers relating to implementing a 10 hour shift for quite some time. The discussion with the Local Union started only after the officer losing his shift made the local aware it was affecting one or more of the officers adversely.
>
> 11/2/8 Union management agenda items – shift rebids are not listed as a topic of discussion for Union management meetings. Other contract language should have been used to implement this shift change rather than using a shift rebid. As stated before, the employee shall be afforded the opportunity to transfer laterally to permanent vacant positions in the same class in any employing unit with the department in accordance with the provisions of Article VII, Section 3 or management could have created another D shift for this officer as they did when the D shift was first created.

18) In her grievance, Complainant sought the following relief:

> The grievant be assigned to the B shift and that management assign the other officers in the Department following the contract language and local agreement language, to make employee whole.

19) UWO and UP denied the grievance at Step 1 as follows:

> Grievance Denied / No Contract Violation.
> Refer to the Work Schedule Change local agreement.

20) On January 7, 2005 Meuret e-mailed Complainant regarding the grievance as follows:

> FYI: I have granted an extension on the answer for your grievance to January 20, 2005 at the latest. Tom and John were to meet today, but Tom had to cancel. John anticipates they will meet next week so we should see an answer prior to the 20th. Does this mean they are leaning toward granting the grievance, I have no idea. Will keep you posted.

21) On January 16th Complainant responded to Meuret's January 7th e-mail on Step 2, as follows:

> Evelyn, please begin preparing the next step grievance. Word I got is that they have no intention of granting the grievance, au contrare, they wish they could find a way to make it go away..and I suspect this will be the case all the way through with this one so please don't grant any more extentions. If we were late filing, they would not excuse it. For the next step, make the transfer language under 7/1/1 and past practice and the local agreement language be the basis of the grievance. The language under layoffs can be there too as can the agenda for labor management meetings language..You should also add ". And any other pertinent language"...I was once a steward and chief steward and I feel these are the main sections of the contract that have been violated. I want a copy of their grievance denied answer and then get the next one off in the mail please.no more unnecessary delays.

22) Meuret timely filed an amended Step 2 which incorporated paras. 1 through 3 and 6 of the Step 1 allegations but added the following new verbiage and deleted paras. 4 and 5 of Step 1. The new allegations in Step 2 read, as follows:

> This grievance alleges management violated the contract language specifically listed in the grievance and any other pertinent language.
>
> . . .
>
> The Local agreement, which is in effect wtihin the Department, indicates that Permanent shifts will be maintained as much as possible. The master contract language will be used when posting, offering and when making assignmnts to fill permanent shift vacancies. The implemention of the 10 hour shift schedule totally deviates from this agreement and resulted in one of the regular shifts being eliminated. Past practice has also been that any shift vacancies are posted according to 7/1/1 in the contract and filled accordingly by seniority.
>
> . . .
>
> 11/2/8 Union management agenda items—shift rebids are not listed as a topic of discussion for Union management meetings. Other contract language should have been used to implement this shift change rather than using a shift rebid. As stated before, the employee shall be afforded the opportunity to transfer laterally to permanent vacant positions in the same class in any employing unit with the department in accordance with the provisions of Article VII, Section 3 or management could have created another D shift within the 10 hour shift schedule.

23) By letter dated February 25, 2005, (from Field Rep. Gary Lonzo) WSEU informed Complainant that it had appealed her case to arbitration, as follows:

> This is to inform you that your grievance(s) heard at SECOND step of the grievance procedure has been denied. Many grievances are lost because they do not comply with the time limits and steps contained in the labor agreement. All requests for arbitration must be initiated by filing the attached form with the Department of Employment Relations in a timely manner, which I have done (sic)
>
> This is not to say that the grievance(s) will be arbitrated. The purpose of this form is to appeal the case to arbitration in accordance with the requirement of the labor agreement. All grievances belong to the Union and only the Union shall determine whether or not unresolved grievances will be arbitrated. You will receive confirmation of the Union's decision on your case from the Madison office of the Wisconsin State Employees Union, Council 24.
>
> The undersigned and/or your local leadership will keep you informed of the progress concerning your case(s).
> Should you have any questions or concerns, please feel free to contact us.

24) By close of business February 25, 2005, WSEU no longer represented the law enforcement officers at UWO/UP as on that day, WLEA won the WERC election to represent that group. Thereafter, it was WLEA's responsibility to process Complainant's grievance.

25) Complainant was a WSEU Steward during the 1990's. Complainant filed seven or eight grievances in the past when WSEU represented her. WSEU took most of Complainant's prior grievances to arbitration and Complainant won some of them and lost some of them. Complainant never requested that WLEA process her WSEU grievance regarding the rebid. Complainant has not asked WLEA to seek to abolish the shift rebid at UWO/UP. Complainant did not allege or prove that she was harassed by agents of WSEU. No evidence was submitted to show that Complainant, prior to the decertification election, was active in WLEA or that WSEU or Feld knew that Complaintant was active in WLEA, if she was. Complainant was satisfied with the representation Meuret gave her on her shift rebid grievance.

Upon the basis of the above and foregoing Finding of Fact, the Examiner makes and issues the following

CONCLUSION OF LAW

Respondents have not been shown to have committed prohibited practices within the meaning of Sec 111.84, Stats., by any of the conduct alleged in the Complaint.

ORDER

It is ORDERED that the complaint be dismissed in its entirety.

Dated at Oshkosh, Wisconsin, this 24th day of August, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Sharon A. Gallagher /s/
Sharon A. Gallagher, Examiner

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Dec. No. 31437-A

MEMORANDUM ACCOMPANYING FINDINGS OF FACTS, CONCLUSIONS OF LAW AND ORDER

In her complaint, filed only against WSEU and Local 579 President Feld, Complainant alleged that Respondents had violated the WSEU Master Labor Agreement with the State of Wisconsin at Sections 7/1/1, 8/5/2 and 2a, 11/2/8, 11/1/89, 11/1/10 and the Local Agreement on maintaining shifts, "per 111.84(1)(e)" by Feld's agreement on December 2, 2004 to a shift rebid. Complainant also asserted that in any event the meeting on December 2nd was a labor-management meeting pursuant to Section 11/2/8 and that shift rebidding was not a topic which could be discussed at such a meeting. Complainant sought to be reinstated to her dayshift position (a position she had before the shift rebid occurred).

On October 4, 2005, Mr. Kobelt presented oral argument and moved to dismiss the matter on the grounds that the complaint failed to state a claim upon which relief could be granted and for failure to prosecute. Mr. Kobelt also placed Union Exhibits 1-11 into the record in support of his Motion to Dismiss. The Examiner denied Respondents' Motion to Dismiss on the record on October 4th. The transcript of the proceedings thereon was received on October 6, 2005.

On October 18, 2005 the Examiner sent complainant a letter and enclosures including Union Exhibits 1-11 and a copy of the transcript of proceedings and asked her to withdraw her complaint with prejudice. Complainant thereafter sought 2 weeks in which to have Attorney Nola Hitchcock-Cross assess her complaint/position which the Examiner granted. By letter dated November 28, 2005 the Examiner requested that Attorney Cross contact her regarding the case, it being more than one month since the Examiner granted Complainant's request for Attorney Cross to assess her claim. On December 2, 2005 Attorney Cross responded that she had never represented Complainant. Thereafter, further hearing was held and completed on March 7, 2006.

Complainant's Arguments

Complainant argued that Local 579 President Feld acted arbitrarily and capriciously when she suddenly decided to allow the shift rebid at UWO/UP, on December 2, 2004, after she had expressed many good reasons for refusing to allow the rebid in her prior e-mails. Complainant urged that past practice, several sections of the Master Agreement were violated by the rebid: 7/1/1, 8/5/2, 8/5/2A, 11/2/8 and 8; 11/1/3, 11/1/9 and 11/1/10, that the Local Agreement was also violated. Complainant argued regarding the proper interpretation of these contract sections and that they would have supported the underlying grievance at arbitration. Complainant urged that Feld was arbitrary when she set up the Special Committee, allowed it to meet only once on December 2nd for a short period of time regarding a plan to implement the 10 hour shifts (distributed just prior to the meeting), when she allowed officers who were

not on the Committee to speak at the December 2nd meeting and because Feld scheduled a meeting with UWO/UP immediately after the December 2nd Committee meeting. Complainant alleged that Lonzo told her that Council 24 did not intend to arbitrate her grievance; she asserted that WSEU refused to turn her grievance over to WLEA for arbitration. Complainant put no supporting evidence in the record on these two points.

Complainant then quoted dictionary definitions of "arbitrary" and "capricious." As shift rebids are not listed among the contract subjects to be discussed/negotiated by the Local, Complainant asserted that Feld's actions were arbitrary in allowing a rebid to be discussed and negotiated here. Feld's action in so quickly changing her mind and allowing the rebid on December 2nd showed she was capricious in Complainant's view.

Therefore, Complainant sought an order finding Feld's agreement to the rebid was illegal, that it be rescinded so that Complainant "can begin the steps necessary to restore (her) contractual rights with the employer" (U. Br., p. 10).

Respondent's Arguments

Respondents argued that they did not breach their duty of fair representation by supporting the shift rebid. In this regard, Respondents urged that Feld's December 2nd change in position regarding a rebid was not arbitrary or in bad faith as it was supported by the majority vote of the unit employees and it was to be done by seniority, a fair and objective standard. Although Feld had been strongly against a rebid until December 2nd it was not irrational for her to change her mind. To find her decision arbitrary, Respondents argued that the Examiner must find that no reasonable person could reach the same decision as Feld.

Respondents urged that the case law provides that the Union has wide discretion in evaluating the merits of grievances and in representing unit employees. However, the WSEU agents fully represented Complainant on her grievance and timely appealed it to arbitration although WSEU had no time to arbitrate the case because the decertification election terminated its representational duties to Complainant before that could be accomplished. Respondents noted that Feld denied considering the impending WERC election in making her decision to support the rebid.

Furthermore, Respondents argued in depth that Complainant failed to prove any contract violation occurred in the negotiation of the shift rebid. Specifically, or in the calling/holding of the December 2nd meeting and that no violation of the Local Agreement occurred.

Regarding the other sections of the agreement cited by Complainant (11/1/3, 11/1/9, 11/1/10) Respondents noted that as Complainant put no evidence into the record to support her claims and she never argued these matters in her brief, they must be dismissed.

Finally, Respondents urged the Examiner to dismiss the Complaint because WSEU is now unable to grant Complainant meaningful relief having been decertified and as Complainant failed to join UWO/UP herein she cannot get the relief she has requested (to declare the rebid illegal and rescind it). Therefore, Respondents sought an order dismissing the Complaint in its entirety.

Complainant's Reply

Either Feld arbitrarily changed her mind in deciding to allow a shift rebid or she intentionally mislead Complainant (is bad faith). In addition, Complainant urged that she reasonably believed based upon Feld's conduct for months prior to December 2, 2004 that Feld would not support a shift rebid. Complainant argued that WSEU did not give sufficient attention to her grievance; that neither Meuret nor Feld indicated to Complainant that they thought no contract violation had occurred and that WSEU refused to act upon or turn over her grievance to WLEA for months. Complainant reiterated her prior arguments that violations of the Master Agreement, Sections 11/2/8 and 7/1/1 as well as a violation of the Local Agreement occurred.

Complainant urged that WERC should find that Feld had committed an unfair labor practice whether or not a remedy can be ordered because failure to do so would allow Union officials to mislead members. If Feld believed no contract violation had occurred she should have told Complainant so and refused to file a grievance. Feld allowed the shift rebid because "WSEU was desperate to retain the law enforcement members and they would do whatever it took to please them two months from a vote to decertify" (Compl. Reply p. 3).

Finally, Complainant noted that the e-mail evidence between Feld and WSEU confirmed that Feld changed her mind about the rebid after an observer at the December 2nd meeting referred to the upcoming decertification election and she urged that Feld must have simply decided "to give the majority what they wanted . . .to increase the chances of the group voting to keep WSEU as their union" (Compl. Reply, p. 3). Complainant urged the Examiner to find that Feld committed an unfair labor practice by allowing the rebid and she noted that UWO would not have agreed to a rebid otherwise.

DISCUSSION

The statutory scheme applicable to this case requires that Complainant to prove, by a clear and satisfactory preponderance of the evidence that the Union breached its duty to fairly represent Complainant when its agent, Feld (allegedly), arbitrarily and capriciously decided to allow a shift rebid at the December 2, 2004 meeting where all officers in attendance were allowed to voice their opinion; and where Feld changed her opinion of the situation and thereafter negotiated the change to a 10 hour day with a shift rebid although shift rebids are not listed as allowable topics for Section 11/2/8 Labor-Management meetings.

In Veasley v. Milwaukee County et al., Dec. Nos. 29467-B and 29467-A (Crowley, 6/99), Examiner Crowley masterfully stated the parameters of a union's duty of fair representation (DFR) as follows:

> In VACA V. SIPES, 386 U.S. 171, 177, 64 LRRM 2369 (1967) and MAHNKE V. WERC, 66 WIS.2D 524 (1974), the courts set forth the requirements of the duty of fair representation a union owes its members. A union must represent the interests of all its members without hostility or discrimination, to exercise its discretion with good faith and honesty, and to eschew arbitrary conduct. The union breaches its duty of fair representation only when its actions are arbitrary, discriminatory or in bad faith. VACA V. SIPES, 386 U.S. 171, 64 LRRM 2369 (1967); COLEMAN V. OUTBOARD MARINE CORP., 92 WIS.2D 565 (1979). The Union is allowed a wide range in the exercise of its discretion. FORD MOTOR CO. V. HOFFMAN, 345 U.S. 330, 31 LRRM 2548 (1953). As long as the Union exercises its discretion in good faith, it is granted broad discretion in the performance of its representative duties. WEST ALLIS – WEST MILWAUKEE SCHOOL DISTRICT, DEC. NO. 20922-D (SCHIAVONI, 10/84) AFF'D BY OPERATION OF LAW, DEC. NO. 20922-E (WERC, 10/84); BLOOMER JT. SCHOOL DISTRICT, DEC. NO. 16228-A (ROTHSTEIN, 8/80); AFF'D BY OPERATION OF LAW, DEC. NO. 16228-B (WERC, 8/80). A complainant has the burden to demonstrate, by a clear and satisfactory preponderance of the evidence, each element of its contention. WEST ALLIS – WEST MILWAUKEE SCHOOL DISTRICT, DEC. NO. 20922-D (SCHIAVONI, 10/84). Mere negligence on the part of the Union does not rise to the level of a breach of the duty of fair representation. PETERS V. BURLINGTON N.R.R., 931 F.2D 534 (9TH CIR. 1991) AT 538. An error of judgment or mismanagement does not equate with arbitrary, discriminatory and bad faith conduct on the part of the Union. DIVERSIFIED CONTRACT SVCS, 292 NLRB 603 (1989). A mere misunderstanding on the part of the Union representative does not breach the duty of fair representation. TEAMSTERS LOCAL 407 (WENHAN TRANSPORTATION, INC., 249 NLRB 59 (1980)).

In making DFR decisions under SELRA, the Commission has considered relevant MERA case law as well as SELRA cases, as the applicable provisions of the two statutes have been found to be substantially identical. State v. WERC, 172 Wis. 2d 132, 143; State of Wisconsin, Dec. No. 29448-C (WERC, 8/00). Thus, Complainant has the burden in this case of proving that Respondents have committed the alleged violations of SELRA by a clear and satisfactory preponderance of the evidence. Here, Complainant alleged only that Section 111.84(1)(e) was violated by Feld and WSEU.[1]

[1] Complainant's Motion to Conform the Complaint to the evidence at the end of the instant hearing was granted.

Sec. 111.84(1)(e), Stats., provides that it is an unfair labor practice for an employer individually and in concert with others:

> (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.

This Section of SELRA is not applicable to Complainant's case as the Employer was never joined as a Respondent herein. However, Section 111.84(2), Stats is applicable to labor organizations and their agents. Specifically, Sec. 111.84(2)(a) reads as follows:

> (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 Section 111.82.

It has been held that a DFR violation under SELRA should be determined under the above section. Peshut v. State of Wisconsin (UWM) Dec. No. 29775-F (McLaughlin, 2/15/02), slip op. at p. 58-59. The other allegations made by Complainant against Feld essentially assert that Feld as President of Local 579 and its agent was arbitrary and capricious in her decision to allow the shift rebid which in turn caused Complainant to file a grievance regarding which Complainant asserted she was unfairly represented by WSEU. Thus, the record facts show if anything and at most, a Section 111.84(2)(a) DFR case has been alleged and tried against Respondents.

Relevant Recent Case

A recent case involved WLEA and WSEA concerning the proper processing of WSEU grievances by WLEA after the latter won the decertification election in the instant bargaining unit, WLEA and Steven Maeder v. AFSCME, WSEU Council 24 and State of Wisconsin, Dec. No. 31397-A (Gratz, 7/14/05). There, on a Motion to Dismiss filed by WSEU, WERC Examiner Gratz described the Complaint before him as follows:

> 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. WLEA was not certified as representative for the LE bargaining unit at the time of Council 24's withdrawal. Complainant Maeder and others had grievance proceedings terminated regarding discipline, termination and

> other matters. 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." 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.
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> . . .

Examiner Gratz then described the Commission's approach in similar cases arising under MERA and he noted that the MERA caselaw was applicable to cases arising under SELRA, as follows:

> . . .
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> As WLEA argues, 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,
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> > 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.)
>
> . . .

Examiner Gratz then applied MERA caselaw and analysis to the case before him and denied WSEU's Motion to Dismiss as follows:

> . . .
>
> Specifically, the Examiner finds 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 employees 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 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 and the employees select a bargaining representative other than the one previously recognized in the agreement. 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. (footnotes omitted)

Applying the above principles from the RACINE and GATEWAY cases, together, to the facts alleged in the instant complaint, 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.) 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.

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

concludes that the complaint states a viable SELRA claim against WSEU. 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.

The Examiner also rejects 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 concludes 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 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.

Gratz' Decision of the Merits

On August 1, 2006, Examiner Gratz found (Finding No. 14) that

> 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.

Gratz then concluded WSEU violated Sec. 111.84, 1(a) and (d) and 2(a) and (b), Stats., as follows (Conclusions of Law 4, 6 and 8-9):

> 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:
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> 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.
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> 6. (sic) 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.
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> . . .

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 t 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 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.

Analysis of the Instant Complaint

The excerpts from the Gratz decisions show that West's concerns about her rebid grievance will be handled pursuant to those decisions and need not be addressed/remedied herein. Regarding West's specific allegations herein which would not be addressed pursuant to the Gratz decision, the Examiner finds no basis upon which to rule that Feld's pre-grievance actions, even assuming they were as Complainant asserted herein, violated SELRA. Rather, it is clear that Feld made every effort to represent all UWO/UP officers; that although she initially agreed with Complainant that a shift rebid was a drastic measure not normally taken,

she became convinced based upon substantial unrefutable evidence that the majority of officers desired a shift rebid and that nothing in the Master or Local Agreement forbade a rebid. Had Feld done as Complainant wished, she would have had to overlook the majority vote of the officers taken in October, 2004 and either refused to allow attending officers to speak at the December 2, 2004 meeting or disregarded verbal arguments at the December 2, 2004 meeting in order to do what one officer – Complainant – wished. This would have left WSEU and Local 579 wide open to DFR claims made by the other seven UWO/UP officers. The fact that an informed vote and open argument swayed Feld shows that she was acting in a rational and reasonable manner in all of the circumstances. Therefore, based upon the record herein the Examiner concludes Respondent's, actions did not rise to the level of unfair representation and they did not violate 111.84(2) by their actions prior to Complainant's filing her grievance, See Veasley, supra, and cases cited therein.

The question arises whether Feld violated Section 11/2/8 of the labor agreement and thereby independently violated Sec 111.84(2)(a) Stats., by negotiating the change to 10 hour shifts including a rebid of shifts with UWO/UP. On its face, a change to 10 hour shifts from 8 hour shifts would fall under the Section of the Master Agreement which allows the Local Union to negotiate with UWO/UP regarding "hours of work, work schedules and overtime assignments." In addition, the evidence further showed that Feld was representing UWO/UP officers when she negotiated the shift change (which included a rebid) based upon the sentiment of the majority of UP officers. In these circumstances, and in light of the fact that Complainant submitted no evidence to show she had been active on behalf of WLEA before the decertification vote or that WSEU or Feld knew that Complainant was active in WLEA, if indeed she was, the Examiner finds Complainant failed to submit sufficient evidence to prove that Feld acted arbitrarily, capriciously or in bad faith by entering into such a mutual agreement with UWO/UP.

Regarding Respondent's actions in filing and then representing Complainant concerning her grievance, the Examiner notes that Union Steward Meuret helped Complainant with every aspect of her grievance, even amending the allegations therein at Complainant's request; and that Complainant admitted herein that she was satisfied with Meuret's assistance. Union Representative Lonzo then timely appealed Complainant's case to arbitration on February 25, 2004. However, WSEU was decertified as of February 25, 2004 and no longer represented the unit of UWO/UP officers and, according to Examiner Gratz' decision (quoted at length above), WSEU no longer had the responsibility to represent Complainant on her grievance pursuant to the WSEU and Local 579 agreements, See, WLEA, supra. Rather, WLEA had the right and responsibility to do so as the new representative of the UWO/UP officers. Therefore, this Section 111.84(2)(a), Stats., allegation must be dismissed against Respondents herein as it is moot.

Complainant alleged various Sections of the Master and the Local Agreements which she felt supported her arguments herein. Such arguments may not be ruled upon herein as they are for an arbitrator to consider.

Sharon A. Gallagher /s/

Sharon A. Gallagher
/dag
Dec. No. 31437-A