STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

THE WISCONSIN STATE EMPLOYEES UNION (WSEU), AFSCME, COUNCIL 24, AFL-CIO and its LOCAL 634, Complainants,

vs.

STATE OF WISCONSIN, DEPARTMENT OF HEALTH AND FAMILY SERVICES, (DHFS), DIVISION OF DISABILITY AND ELDER SERVICES, and CENTRAL WISCONSIN CENTER FOR THE DEVELOPMENTALLY DISABLED, Respondents.

Case 677
No. 65035
PP(S)-359

Decision No. 31467-A

Appearances:

Kurt C. Kobelt, Lawton & Cates, S.C., Attorneys at Law, Ten East Doty Street, Suite 400, P.O. Box 2965, Madison, Wisconsin 53701-2965, appearing on behalf of the Complainants.

David J. Vergeront, Chief Legal Counsel, Office of State Employment Relations, 101 East Main Street, 4th Floor, Madison, Wisconsin 53703, appearing on behalf of the Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On August 11, 2005, Complainants filed a complaint of unfair labor practices with the Wisconsin Employment Relations Commission alleging that Respondents had violated SELRA when it established guidelines for the Safe Days Program on February 10, 2005. On September 22, 2005, the Commission appointed Coleen A. Burns, a member of its staff, to act as Examiner and issue Findings of Fact, Conclusions of Law and Order in the matter as provided for in Sec. 111.84(4) and 111.07, Stats. Hearing was held in Madison, Wisconsin on January 18 and March 9, 2006. The hearing was transcribed and the record was closed on May 26, 2006, upon receipt of post-hearing written argument.

Having considered the evidence and the arguments of the parties, the Examiner makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The Wisconsin State Employees Union, AFSCME Council 24, AFL-CIO (WSEU) and its affiliated Local 634, hereafter Complainants or union, are labor organizations maintaining a principal office at 8033 Excelsior Drive, Suite "C", Madison, Wisconsin 53717-1903 and are the exclusive collective bargaining representative of certain employees of the State of Wisconsin that are employed at the Central Wisconsin Center for the Developmentally Disabled.

2. The Department of Administration - Office of State Employment Relations (OSER) is an agency of the State of Wisconsin with responsibility for bargaining a Master Agreement with the Complainants and has a principle office at 101 E. Main Street, Madison, Wisconsin 53703. Department of Health and Family Services (DHFS) is an agency of the State of Wisconsin with principal offices located 1 W. Wilson Street, Madison, Wisconsin 53702. DHFS and its subdivisions, Division of Disability and Elder Services and Central Wisconsin Center for the Developmentally Disabled (CWC), hereafter Respondents or employer, have certain supervisory and managerial authority over employees represented by Complainants. Respondents also have certain authority to negotiate Local Agreements with Local 634.

3. Effective September 1, 1995, the Policy on Attendance, developed by the Department of Health and Social Services, Division of Care and Treatment Facilities (DCTF), included the following:

> C. Unanticipated/Anticipated Absence
>
> > 1. Unanticipated Absence includes illness, family emergency, death in family, requests to leave work early for any reason (excluding vacation, personal/Saturday legal holiday or comp time), or other occurrences outside of the control of the employe which result in the employe being unable to report for scheduled duty (this does not include inclement weather) and notice is less than 72 hours. Anticipated absence is when an employee provides notice 72 hours or more to the employer.
> >
> > (Occurrence-Defined as "each day or less of unanticipated absence will be considered one (1) occurrence for the time missed.")

On July 17, 2000, the Acting DCTF Administrator issued a Policy on Attendance that included the following:

C. Unanticipated/Anticipated Absence

1. Unanticipated absence include illness, family emergency, death in family, requests to leave work early for any reason (excluding vacation, personal/Saturday legal holiday or comp time), or other occurrences outside of the control of the employe which results in the employe being unable to report for scheduled duty (this does not include inclement weather) and notice is less than 72 hours except where emergency conditions prevail or urgent appointments are cancelled and rescheduled. Anticipated absence is when an employe provides notice 72 hours or more to the employer.

(Occurrence-Defined as "each day or less of unanticipated absence or a medical related continuous absence longer than one day.")

For approximately eight years, Robin Gruchow has been employed as a Unit Director at CWC. Gruchow, who has supervisory subordinates, has supervisory authority over Resident Care Technician (RCT) and Licensed Practical Nurse (LPN) employees represented by Local 634. In 1999, Gruchow was a Personnel Assistant, subordinate to Barb Bronte, and was present at an overtime reduction meeting that included management and union representatives. In addition to Gruchow, management was represented by Bonnie Maier. Local 634 was represented by its then President William Hayes; its then Secretary Catherine Horenberger; Lori Vissers and Judy Hoene. Hayes continued in the position of Local 634 President until June of 2005. At this meeting, Gruchow suggested the concept of a Safe Days program as one method of reducing employee absences and overtime costs associated with replacing absent employees. Thereafter, in 1999, representatives of Local 634 and CWC negotiated an addendum to the existing 1998-99 Local Agreement that states as follows:

ADDENDUM to AGREEMENT
CENTRAL WISCONSIN CENTER
AFSCME LOCAL 634
1998-1999

The 1998-1999 Local 634 Agreement for is hereby amended for the period of beginning March 1, 1999 and ending on December 31, 1999. The purpose of this amendment is to allow for the implementation of "Safe Days" on a trial basis per established guidelines. This amendment is specific to Article IIIA, D2a, b and covers ONLY the Resident Care Technician (RCT) classification.

III. OVERTIME – RCTs and LPNs

A. Exemption

A fourteen (14) day exemption from required overtime will, when possible, apply upon any accumulation of 3-1/2 hours or more overtime within any fourteen immediately preceding calendar days. Once an accumulation of 3-1/2 hours has been established, the 14-day exemption shall begin on that date. To establish a new exemption date, an additional 3-1/2 or more hours of overtime must be accumulated. Part time employees receive the 14 days exemption upon accumulation of at least 3-1/2 forced hours or posted voluntary overtime hours or unscheduled overtime in seniority, rotation order in excess of their normally scheduled hours in a pay period; other extra hours worked on a voluntary basis do not count toward the exemption.

RCTs ONLY – A RCT who has scheduled a Safe Day according to the established guidelines will be totally exempt from the required overtime on that designated Safe Day.

D. Unscheduled

2. Required

a. In the absence of volunteers, the least senior non exempt on-unit in-class employee will be held over whenever practicable and when not in conflict with other provision of the contract. RCT's who have earned and scheduled a Safe Day on the required overtime day, will be exempt and will not be required to work overtime until the employee reports back to work for their regularly scheduled shift.

b. In the event all employees subject to be held over are under the exemption described in IIIA, and management is aware of the required overtime prior to the start of their shift, the required overtime will be assigned to the least senior in-class non-exempt employee at work who is also scheduled to work the shift immediately following the required overtime. In the event the unit is not aware of the required overtime prior to the start of the shift in which all employees are under the exemption described in IIIA in-class non-exempt employees scheduled for the next shift may be called in reverse seniority order. Should these efforts fail to provide necessary coverage, the 14 day exemption no longer applies, in that case, the employee whose exemption is closest to expiring will be forced. If two or more employees' exemption date is the

same, the least senior shall be forced. RCTs who have scheduled a designated Safe Day(s) will not be forced.

This amended language to the Local 634 Agreement is agreed to for the trial period of March 1, 1999 through December 31, 1999.

Theodore Bunck /s/	William F. Hayes /s/
Theodore Bunck, Ph.D.	William Hayes, President
CWC Director	Local 634
5/7/99	5-1-99
Date	Date

The parties also negotiated the following

Guidelines for RCT Safe Days for the period of March 1, 1999 – December 31, 1999

Definition of Safe Day: A designated day free from required overtime that is earned by a Resident Care Technician who has 60 consecutive calendar days with zero unanticipated absences.

1. The "Safe Day" calculation of RCT unanticipated absences will begin on January 1, 1999.

2. RCT's will earn one Safe Day for each sixty (60) calendar day period with zero (0) unanticipated absences.

3. RCT Safe Days must be scheduled 48 hours prior to the day to be designated as a Safe day through their supervisor. Safe Days will be granted on a first come, first serve basis, with a quota of one (1) per day per unit. All Safe Days must be used within (1) one year of when they are earned. A unit is defined as Building 1, 2, 3, 4, 5, 6, 7, SCU, Murphy Hall 1 N/S, 2 N/S, 3 N/S, 4 N/S each standing alone.

4. RCT will notify the RCS when they have earned a Safe Day as defined.

5. RCS will verify the zero (0) unanticipated absences in a sixty (60) calendar day period.

6. RCS will fill out a leave request/cancellation form (#DCTF-160-A) stating the date that the Safe Day was earned and will return a copy to the RCT for their record. The RCS will keep a copy.

7. When the RCT submits their request to designate the Safe Day to the RCS, the RCS will enter the Safe Day designation information on the calendar posted in each unit/building.

We, the undersigned agree to the stated guidelines establishing "Safe Days" for Resident Care Technicians at Central Wisconsin Center for a trial period of March 1, 1999 through December 31, 1999.

Theodore Bunck /s/
Theodore Bunck, Ph.D.
CWC Director

5/7/99
Date

William F. Hayes /s/
William Hayes, President
Local 634

5-1-99
Date

Hayes, but not Gruchow, participated in the negotiation of the above Addendum and guidelines. Two RCT Supervisors, Bonnie Maier and Loni Karcz, who had responsibility to provide training regarding the pilot program, prepared a packet of materials that included a document that states as follows:

RCT SAFE DAYS

As an incentive for employees who have 0 unanticipated absences in a 60-day period of time, employees may schedule a day in which they cannot be forced for an extra shift. *Example:* An employee receives a wedding invitation for one month from today. They plan on going to the reception after they work their AM shift. They schedule to use this "SAFE DAY" the day of the wedding. No matter what occurs on the unit that day (call ins, holes in the schedule, no-come no-show) this employee can leave the unit for their after-work engagement.

When an employee has met the above requirement, it is their responsibility to notify their RCS that they have earned a "SAFE DAY." The RCS will verify that the 60-day requirement has been met.

"SAFE DAYS" need to be scheduled at least 48-hours prior to the day to be designated as "SAFE," through their supervisor, on a first come first serve basis, with the quota of 1 per day/per unit. All "SAFE DAYS" must be used within 1 year of when they are earned.

RCSs will maintain a record of staff who have earned a "SAFE DAY" and when they are scheduled to be used.

This incentive will be a pilot program, which will be evaluated after 1 year for possible inclusion into the WSEU Local Agreement.

The 2000-2001 Local Agreement between Local 634 and CWC, which by its terms is effective April 18, 2001 through June 30, 2001, but continued in effect until the parties negotiated their 2003-2005 Local Agreement, includes the following:

. . .

E. Exemption from Required Overtime

. . .

2/E/4 (RCTs, LPNs, Therapy Assistants and Blue Collar Related) – <u>who have scheduled a Safe Day according to the established guidelines will be totally exempt from the required overtime on that designated Safe Day. Definition: A Safe Day is earned upon 60 days without an unscheduled absence. Upon earning two (2) consecutive safe days, an additional consecutive safe day will be earned after 45 days.</u>

<u>**2/E/4a** RCT Mutually agreed guidelines will be posted on each unit</u>.

<u>**2/E/4b** All other guidelines will be completed within 30 days upon effective of this contract, and will be posted in work areas.</u>

Hayes and Bronte, who has been the CWC Human Resources Director since 1997, were the chief spokesperson of their respective bargaining teams. Horenberger and Gruchow were also present at the negotiation of the 2000-2001 Local Agreement. In May of 2001, Bronte issued the following mutually agreed upon guidelines:

Guidelines for Safe Days
RESIDENT CARE TECHNICIANS

Definition of <u>**Safe Day**</u>: A designated day free from required overtime that is earned by a Resident Care Technician who has a designated number consecutive calendar days with zero unanticipated absences.

1. The "Safe Day" calculation of RCT unanticipated absences began on January 1, 1999.

2. RCT's will earn one Safe Day for each sixty (60) calendar day period with zero (0) unanticipated absences.

   2a) Upon earning two (2) consecutive safe days, an additional consecutive safe day will be earned after 45 days with zero unanticipated absences.

3. RCT Safe Days must be scheduled 48 hours prior to the day designated as a Safe day through their supervisor. Safe Days will be granted on a first come, first serve basis, with a quota of one (1) per day per unit. All Safe Days must be used within one (1) year of when they are earned. A unit is defined as Building 1, 2, 3, 4, 5, 6, 7, SCU, Murphy Hall East, Murphy Hall West.

4. RCT will notify the RCS when they have earned a Safe Day as defined.

5. RCS will verify the zero (0) unanticipated absences in a sixty (60) or 45 (forty-five) calendar day period.

6. RCS will fill out a leave request/cancellation form (#DCTF-160-A) stating the date the Safe Day was earned and will return a copy to the RCT for their record. The RCS will keep a copy.

7. When the RCT submits their request to designate the Safe Day to the RCS, the RCS will enter the safe Day designation information on the calendar posted in each unit/building.

8. Safe Days shall not be cancelled and re-scheduled.

(Implemented for RCTs on January 1, 1999 w/adjustments effective 4/18/01)

The State of Wisconsin and WSEU negotiated a Master Agreement, which by its terms was effective May 17, 2003 – June 30, 2003. Hayes was the Chief Spokesperson on the Local 634 team that negotiated the 2003-2005 Local Agreement. Bronte was the chief spokesperson for the CWC team that negotiated the 2003-2005 Local Agreement. Gruchow and Horenberger were also present during these negotiations. During the negotiation of the 2003-2005 Local Agreement, Local 634 made a written proposal that includes the following:

. . .

Section 2 Overtime

2/A/6 Hospitalization of an individual or a death in a persons immediate family, as outlined in the master agreement, will allow for the cancellation of overtime with less than 24 hours notice.

2/E/4 A death in the immediate family of a person, as outlined in the Master agreement, will not break the safe day chain.

2/E/4 Safe Day guidelines be changed to reflect 1 per shift per building.

2/E/4 Safe Day guidelines be changed for LPN,s working P.M. shifts in areas when Noc coverage is RN to read, such LPN's in these areas shall be safe from being forced in on a safe day.

. . .

Following discussion by the parties, CWC's bargaining representatives rejected the above proposals. During the parties' bargaining discussions, management proposed extending the Safe Days program to include a Safe Year for RCTs; which proposal was accepted by the union. The Local Agreement, which by its terms is in effect from October 20, 2003 through June 30, 2005, includes the following:

. . .

E. Exemption from Required Overtime

. . .

2/E/6 (RCTs, LPNs, Therapy Assistants and Blue Collar Related) – who have scheduled a Safe Day according to the established guidelines will be totally exempt from the required overtime on that designated Safe Day. Definition: A Safe Day is earned upon 60 days without an unscheduled absence. Upon earning two (2) consecutive days, an additional consecutive safe day will be earned after 45 days.

> **2/E/6a (RCT)** Employees will be exempt from required overtime for one calendar year upon having completed the previous calendar year without any unscheduled absences.
>
> **2/E/6b** Guidelines will be posted on each unit.
>
> **2/E/6c** All other guidelines will be completed within 30 days upon effective of this contract, and will be posted in work areas.

2/E/7 Exemptions earned per this section are non-cumulative and limited to one per day. This does not pertain to the Safe Day.

On October 20, 2003, Bronte issued the following:

Guidelines for SAFE Days
RESIDENT CARE TECHNICIANS

Definition of **Safe Day**: A designated day free from required overtime that is earned by a Resident Care Technician who has a designated number consecutive

calendar days with zero unanticipated absences. Designated Safe Day ensures that employee is exempt from required overtime for the shift prior to and after the scheduled work hours that day.

1. The "Safe Day" calculation of RCT unanticipated absences began on January 1, 1999.

2. RCT's will earn one Safe Day for each sixty (60) calendar day period with zero (0) unanticipated absences.

   2a) Upon earning two (2) consecutive safe days, an additional consecutive safe day will be earned after 45 days with zero unanticipated absences.

3. RCT Safe Days must be scheduled 48 hours prior to the day designated as a Safe day through their supervisor. Safe Days will be granted on a first come, first serve basis, with a quota of one (1) per day per unit. All Safe Days must be used within one (1) year of when they are earned. A unit is defined as Building 1, 2, 3, 4, 5, 6, 7, STCU, or Murphy Hall.

4. RCT will notify the RCS when they have earned a Safe Day as defined.

5. RCS/timekeeper will verify the zero (0) unanticipated absences in the sixty (60) or 45 (forty-five) calendar day period.

6. RCS will fill out a leave request/cancellation form (#DCTF-160-A) stating the date that the Safe Day was earned and will return a copy to the RCT for their record. The RCS will keep a copy.

7. When the RCT submits their request to designate the Safe Day to the RCS, the RCS will enter the safe Day designation information on the calendar posted in each unit/building.

   7a. A NOC Shift RCT will enter their Safe Day exemption designating the day at the beginning of their shift. (e.g. exempt prior to start of shift and after shift next morning.)

8. Safe Days shall not be cancelled and re-scheduled.

9. A **Calendar Year** of Safe Day exemptions are earned upon having one calendar year of zero (0) unanticipated absences for the full previous calendar year (January 1-December 31). Note: Calculations to begin January 1, 2004.

9a. RCT's earning a Calendar Year of Safe Days will be recognized within the first week of January for the following calendar year and receive written confirmation of the Safe Year exemption.

Implemented for RCT's on January 1, 1999.
Last update 4/18/01
Revisions effective 10/20/03

4. In December of 2004, Hayes telephoned Bronte to advise her that he needed to schedule a medical procedure and to confirm how he could schedule this procedure in a manner that would not jeopardize his eligibility for a Safe Year. During this telephone conversation, Bronte told Hayes that he needed to provide 72 hours notice. Hayes had received this same information from his Unit Director. In mid-December of 2004, CWC timekeepers provided Bronte with the names of those employees who had earned a Safe Year for 2005 based upon their 2004 attendance. Bronte questioned a timekeeper regarding one named individual, *i.e.*, Neil Kiley. As a result of this questioning, Bronte concluded that the timekeeper had considered Kiley to have met the requirements of the Safe Year program because the guidelines referenced "unanticipated absences" and Kiley had provided 72-hour notice of his absences. At or about this same time, Gruchow approached Bronte and stated that there was a problem with the Safe Year program because there was a perception among employees that the 72-hour notice rule was being used. At that time, Gruchow pointed out that there was a clerical error in the existing guidelines in that it used the term "unanticipated absences," rather than "unscheduled absences." Bronte did not consider Kiley to have met the requirements of the Safe Year program because not all of his absences met her definition of the phrase "unscheduled absences." Bronte included Kiley in the list of twenty-seven (27) employees whom she approved for a Safe Year in 2005 because he had received notification that he had been granted a Safe Year for 2005. Bronte was on vacation during the month of January, 2005 vacation. In January of 2005, Local 634 filed a grievance on behalf of Kiley that disputed CWC's determination that Kiley had lost his eligibility for a Safe Year in 2006 due to an absence in 2005 for which Kiley had provided his supervisor with a 72-hour or greater notice. On February 10, 2005 Bronte issued the following

Guidelines for SAFE Days
RESIDENT CARE TECHNICIANS

Purpose of Safe Day Program: To acknowledge employees who have obtained the goal of uninterrupted attendance for an extended period of time.

Definition of **Safe Day**: A designated day free from required overtime that is earned by a Resident Care Technician who has a designated number consecutive calendar days with zero unscheduled absences. Designated Safe Day ensures that employee is exempt from required overtime for the shift prior to and after the scheduled work hours that day.

1. RCT's will earn one Safe Day for each sixty (60) calendar day period with zero (0) unscheduled absences.

   2a) Upon earning two (2) consecutive safe days, an additional consecutive safe day will be earned after 45 days with zero unscheduled absences.

2. RCT Safe Days must be scheduled 48 hours prior to the day designated as a Safe day through their supervisor. Safe Days will be granted on a first come, first serve basis, with a quota of one (1) per day per unit. All Safe Days must be used within one (1) year of when they are earned. Each "Safe Day" unit is defined as Building 1, 2, 3, 4, 5, 6, 7, STCU, or Murphy Hall.

3. RCT will complete a leave request/cancellation form (#DCTF-160-A) stating the date that the Safe Day was earned and submit to the timekeeper.

4. RCS and timekeeper will verify the zero (0) unscheduled absences in the sixty (60) or 45 (forty-five) calendar day period.

5. RCS will return a copy to the RCT for their record. The RCS will retain a copy.

6. When the RCT submits their request to designate the Safe Day to the RCS, the RCS will enter the safe Day designation information on the calendar posted in each unit/building.

   6a. A NOC Shift RCT will enter their Safe Day exemption designating the day at the beginning of their shift. (e.g. exempt prior to start of shift and after shift next morning.)

7. Safe Days shall not be cancelled and re-scheduled.

8. Safe Days are calculated based on the employee reporting to work as scheduled. The accumulation of days used to calculate a Safe Day must consist of **no** interruption of their work schedule unless it has been approved as part of the "paid leave time" process based on the staffing and quota.

   Meaning, if the quota is full or the staffing needs do not allow the RCT to be off, it is considered an unscheduled absence and the accumulation/count stops.

9. A **Calendar Year** of Safe Day exemptions are earned upon having one calendar year of zero (0) unscheduled absences for the full previous calendar year (January 1-December 31). Note: Calculations to begin January 1 for each year.

    9a. RCT's earning a Calendar Year of Safe Days will be recognized within the first week of January for the following calendar year and receive written confirmation of the Safe Year exemption.

Implemented for RCT's on January 1, 1999.
Last update 4/18/01
Revisions effective 10/20/03

The Safe Days program with respect to LPNs was implemented on April 18, 2001. Guidelines for Safe Days for LPNs, which are identical in material respects to the RCT guidelines, were issued by Bronte in May 2001; as well as on October 20, 2003 and February 10, 2005. The RCT and LPN Safe Day guidelines always have been posted throughout the CWC facility.

5. Under Bronte's definition of "unscheduled absences," it is immaterial whether or not an employee has provided at least a 72-hour notice of an absence; rather the determining factor is whether or not the employee absence creates a hole in the schedule that would necessitate the payment of overtime. Prior to issuing the February 10, 2005 guidelines, Bronte had a conversation with Local representatives Hayes and Horenberger in which they discussed the Safe Days guidelines. During this discussion, Bronte gave her definition of "unscheduled" and Hayes told Bronte that "unscheduled" meant "unanticipated." Hayes also told Bronte that he had taken time off under the Safe Days program with a 72-hour notice and that a 72-hour notice was the way it was supposed to be. On February 23, 2005, Bronte and Local 634 representative Howard Schuck had an informal discussion regarding a grievance filed on behalf of Lori Vissers. Bronte prepared a written memorandum of this discussion that was not provided to Local 634 and which states as follows:

> Grievance #216-007-05 LORI VISSERS held 2/23/05
> WSEU – Howard Schuck; HR – Barb Bronte
>
> Issue: Lori was not included in the Safe Year recognition and feels that she should be granted a Safe Year from required overtime.
>
> There was discussion regarding the timeliness of the grievance because it was not submitted until February 1, 2005. Howard stated they purposely waited to file the grievance until the recognition meetings were held – on January 5 and another one on January 13 to see if Lori was going to be included.
>
> Lori stated that since she is a RCT that she is covered by the Safe Day/Safe

Year program and that the absence on November 1, 2004 should not be counted as an unscheduled absence. Explained that she was injured on the job about

8:30am and had to go off the clock to see a Dr. She said it was under 230.36 and used 4 hours of time. She left at 11 am and returned to work at 3 pm. Scheduled day was from 7 am until 3:30 pm.

Feels that even though she is not on the unit as a RCT (Lori is one of four RCTs who accompany residents to medical appointments), she would appreciate the recognition for being at work throughout the year. Lori stated that if she would have known that taking time off would impact her attendance that she would not have left to see the physician at that time.

There was discussion regarding no exceptions for Safe Day/Safe Year and that it was an absolute. BB reminded Howard and Lori of a previous meeting between these three (Lori, Howard and Barb) where Howard acknowledged that the agreement at the Local bargaining was that there would be no exceptions for absences. Howard now responded that Lori is a good RCT and works hard (BB agreed) but that a work injury is different.

Howard restated that management violated the Local agreement 2/E/6a and should grant Lori the Safe Year recognition.

GRIEVANCE DENIED: no contract violation. The absence was clearly not scheduled and is documented as an unscheduled and unanticipated absence. The Local agreement refers to "unscheduled" absence for the earning of a Safe Day (& ultimately a Safe Year). The consensus at the Local bargaining was that there would be no exceptions because it may result in the perception of being unfair. The question that was discussed at Local bargaining was what warrants an exception – i.e. death or murder of a family member? National crisis such as the Sept 11th resulting in their inability to fly back home for work? Employee heart attack? -- and who would make that kind of decision. Understanding that this was a work injury, it is critical for CWC to stay with the intent of the Safe Day program and that is NO EXCEPTIONS.

At the end of December 2005, Bronte prepared a 2006 RCT Safe Year List based upon the February 10, 2005 guidelines. The 2006 RCT Safe Year List prepared by Bronte contains the names of thirty-one (31) RCT employees.

6. At the time that the parties entered into their 2003-2005 Local Agreement, the term "unscheduled absence" found in Article 2/E/6 of this Local Agreement was interchangeable with the term "unanticipated absence" as defined in Section C of the then existing attendance policy and an "anticipated absence," as that term is used in Section C of the attendance policy, was not an "unscheduled absence" as that term is used in Article 2/E/6. From the time that the parties negotiated their 2003-2005 Local Agreement, until Bronte,

acting on behalf of Respondents, implemented the February 10, 2005 guidelines for the RCT and LPN Safe Days program, the parties had not mutually agreed otherwise. The

February 10, 2005 Safe Days program guidelines implemented by Bronte violate the parties' 2003-2005 Local Agreement because they define the contractual term "unscheduled absence" in a manner that is inconsistent with the rights granted to employees by Article 2/E/6 of the parties' 2003-2005 Local Agreement and deny employees their contractual right to have an "anticipated absence," as that term is used in Section C of the attendance policy, not be counted as an "unscheduled absence" as that term is used in Article 2/E/6. Bronte implemented the February 10, 2005 Safe Days program guidelines for the purpose of correcting what she perceived to be an error in the existing guidelines that she perceived was resulting in employees earning a Safe Year to which they were not contractually entitled and to clarify the contractual requirements for earning a Safe Year.

Based upon the above and foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSIONS OF LAW

1. Complainants Wisconsin State Employees Union, AFSCME Council 24, AFL-CIO (WSEU) and its affiliated Local 634 are labor organizations within the meaning of Sec. 111.81(12), Stats.

2. Respondents Department of Health and Family Services, Division of Disability and Elder Services, Central Wisconsin Center for the Developmentally Disabled, are subdivisions of Respondent State of Wisconsin, which is an employer within the meaning of Sec. 111.81(8), Stats.

3. Complainants have established, by a clear and satisfactory preponderance of the evidence, that Respondents, by implementing the February 10, 2005 Safe Days program guidelines, have violated a collective bargaining agreement in violation of Sec. 111.84(1)(e), Stats., and, derivatively, in violation of Sec. 111.84(1)(a), Stats.

4. Complainants have not established, by a clear and satisfactory preponderance of the evidence, that Respondents' decision to implement the February 10, 2005 Safe Days program guidelines was motivated, in any part, by animus toward the lawful concerted activities of any employee and, therefore, Respondents have not committed a violation of Sec. 111.84(1)(a), Stats., based upon retaliation as alleged by Complainants.

5. Complainants have waived the right to raise any claim of an independent violation of Sec. 111.84(1)(a), Stats., that is not based upon retaliation.

6. Complainants have not established, by a clear and satisfactory preponderance of the evidence, that Respondents have violated Sec. 111.84(1)(d), Stats.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER

1. The portion of the complaint alleging that Respondents have violated Sec. 111.84(1)(d), Stats., and have committed an independent violation of Sec. 111.84(1)(a), Stats., is hereby dismissed.

2. To remedy Respondents' violation of Sec. 111.84(1)(e), Stats., and the violation of Sec. 111.84(1)(a), Stats., that is derivative thereto, the State of Wisconsin, its officers and agents, shall:

a) immediately cease and desist from implementing the February 10, 2005 Safe Days program guidelines that have been found to violate the 2003-2005 collective bargaining agreement between CWC and Local 634.

b) take the following affirmative action which the Examiner finds will effectuate the purposes of the State Employment Labor Relations Act:

1) immediately make whole all employees who have lost a Safe Day or a Safe Year due to Respondents' conduct in implementing the February 10, 2005 Safe Days program guidelines in violation of the 2003-2005 Local Agreement between CWC and Local 634.

2) immediately notify the employees represented by Complainants for the purpose of collective bargaining who are employed at CWC by posting, in conspicuous places on its premises where these employees work, copies of the Notice attached hereto and marked "Appendix A." This Notice shall be signed by a management employee of CWC and shall remain posted for a period of thirty (30) days. Reasonable steps shall be taken to ensure that said Notices are not altered, defaced or covered by other material.

3) notify the Wisconsin Employment Relations Commission, in writing and within twenty (20) days of the date of this Order, of the action taken to comply with this Order.

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

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/
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Coleen A. Burns, Examiner

<u>"APPENDIX A"</u>

<u>NOTICE TO CWC EMPLOYES REPRESENTED BY AFSCME LOCAL 634</u>

As ordered by the Wisconsin Employment Relations Commission and in order to remedy violations of the State Employment Labor Relations Act, the State of Wisconsin, Department of Health and Family Services, Division of Disability and Elder Services, and the Central Wisconsin Center notify you of the following:

1. We will not enforce the February 10, 2005 Safe Days program guidelines in violation of the 2003-2005 Local collective bargaining agreement between AFSCME Local 634 and CWC.

2. We will make whole all employees represented by AFSCME Local 634 for all Safe Days and/or Safe Years that these employees have lost due to our enforcement of the February 10, 2005 Safe Days program guidelines in violation of the 2003-2005 Local collective bargaining agreement between AFSCME Local 634 and CWC.

CENTRAL WISCONSIN CENTER

By____________________________________
Name

____
Title

____
Date

THIS NOTICE IS TO REMAIN POSTED FOR 30 DAYS AND IS NOT TO BE COVERED OR OTHERWISE OBSTRUCTED OR DEFACED.

STATE OF WISCONSIN (DEPARTMENT OF HEALTH AND FAMILY SERVICES)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On August 11, 2005, Complainants filed a complaint of prohibited practices alleging that Respondents have violated Secs.111.84(1)(a), (d) and (e), Stats., by changing the qualifying criteria for employee safe time without bargaining the change or impact of the change; by repudiating Article 2/E/6 of the Local Agreement; and by engaging in such conduct in retaliation for employees exercise of their legal and contractual rights to earn Safe Days. Respondents deny that they have committed the prohibited practices alleged by Complainants and raise, as an affirmative defense, that Complainants have failed to exhaust their administrative remedies, *i.e.*, the grievance procedure ending in arbitration.

POSITIONS OF THE PARTIES

Complainants

Respondents did not file any pre-hearing motion seeking deferral of this matter to arbitration, or raise deferral in its opening statement. Only after the Examiner noted an affirmative defense of deferral and Respondents' failure to raise this defense in its opening statement did Respondents indicate that they had not abandoned this defense; with the vague assertion that a grievance had been filed in this matter.

The Commission has established three criteria for deferral:

1) the parties must be willing to arbitrate and renounce technical objections which would prevent a decision on the merits by an arbitrator;

2) the collective bargaining agreement must clearly address itself to the dispute; and

3) the dispute must not involve important issues of law or policy

The record fails to establish that there is any pending grievance that duplicates the subject matter of the complaint. The only grievance referenced in the record was filed prior to the February, 2005 changes at issue. The contract language does not clearly address the dispute since an arbitrator is not empowered to address the retaliation charge by issuing a cease and desist order. The brazen and retaliatory nature of this change presents important issues of policy rendering deferral inappropriate.

Additionally, the complaint alleges that Respondents have engaged in conduct undermining the bargaining process; an allegation found to be inappropriate for deferral. Complainants' unilateral change claim is rooted in the statute and not in the contract, thereby raising an important issue of law.

The three elements of deferral are not established herein. Respondents have not met their burden of showing grounds for deferral.

Paragraph 8 of the February 10, 2005 Guidelines for SAFE DAYS RESIDENT CARE TECHNICIANS for the first time has the requirement if "staffing needs do not allow the RCT to be off, it is considered an unscheduled absence and the [Safe Day] accumulation/count stops." The evidence of bargaining history and past practice establishes that this change amounts to a material modification of the Safe Days program in which the parties consistently had applied the definition of "unanticipated absences" based upon its Attendance Policy to make employees eligible for Safe Days provided they gave at least 72 hours notice of an absence. The imposition of the new eligibility requirements in Paragraph 8 violates the mutually agreed, uniform and consistent five-year practice of applying the 72-hour notice rule and, thereby, violates Sec. 111.84(1)(e), Stats. The unilateral repudiation of past practice constitutes an unfair labor practice.

By unilaterally changing the guidelines, Respondents have violated their statutory duty to bargain over mandatory terms and conditions of employment established by Sec. 111.84(1)(d), Stats. As the Commission has previously concluded, in order to establish an unlawful unilateral change, the union must show:

(1) a unilateral change

(2) in an existing practice

(3) regarding a mandatory subject of bargaining

(4) that is not addressed in the contract or, if in conflict with the contract, is longstanding, clear, and mutual.

All of these elements are satisfied here. Where, as here, the unilateral change amounts to *a fait accompli*, Complainants do not have to make a demand to bargain for its unilateral change claim to be viable.

No bargaining occurred prior to implementation and the contract language does not expressly refer to any eligibility requirement. There is no evidence that the union clearly and unmistakably waived its right to bargain over the issue. A violation of Sec. 111.84(1)(d), Stats., has been established.

As the Commission has previously concluded, retaliation under Sec. 111.84(1)(a), Stats., is shown by establishing the following four elements

(1) the employees were engaged in lawful concerted activities;

(2) the employer was aware of those activities;

(3) the employer bore animus towards those activities; and

(4) the employer took adverse action against the employees at least in part out of animus towards those activities.

These criteria are satisfied here.

Under NLRB law, an employee's exercise of a contractual right is a form of concerted activity protected by the NLRA. The Commission should import this principle into Sec. 111.84(1)(a). In this case, the 27 employees who exercised their contractual right to qualify for the Safe Year program were engaged in protected, concerted activities. Respondents were aware of these activities when they learned how many had qualified for the Safe Year. The record provides a reasonable basis to infer that Respondents bore animus toward these activities.

In mid-December 2004, Bronte learned that 27 RCT's had qualified for the newly negotiated safe year, under which employees could not be forced to work overtime for an entire year and then "discovered" her "clerical error" regarding the use of the term "unanticipated absences" in the guidelines. This timing, together with the absence of any other plausible explanation for this change being made, compels the drawing of the inferences that this so-called "clerical error" is a mere pretext and that the decision to change the eligibility requirements of the guidelines was motivated, at least in part, by animus.

Complainants' claim of retaliation has been established. If retaliation is not found, alternatively the conduct here reasonably interferes with employees' Sec. 111.84(1)(a) rights to exercise their contractual rights to qualify for Safe Days.

The complaint should be sustained. Appropriate relief should be imposed, including directing Respondents to restore the *status quo ante*; make whole all employees who would have qualified for the Safe Year in 2005 under the 72-hour notice rule granting them a Safe Year; as well as posting appropriate cease and desist notices.

Respondents

Complainants' burden of proof is a clear and satisfactory preponderance of the credible evidence. Complainants' interpretation of the relevant contract language is not supported by the evidence of bargaining history. The weight of the credible evidence establishes that Respondents have always used "unscheduled" as the standard for determining Safe Days' eligibility

In bargaining, the parties eliminated the requirement that guidelines be mutually agreed upon. Under WERC decisions, the removal of the mutuality language constitutes a recognizable defense to situations that require bargaining. Assuming *arguendo* that there was a bargaining obligation, there is no credible evidence that Complainants made a demand to bargain.

Any change in the guidelines has been consistent with the contract language. The Respondents are entitled to rely upon the bargain that they have struck with Complainants and, therefore, Respondents do not have a duty to bargain further.

The parties have an established grievance procedure leading to arbitration. Under WERC law, Complainants' alleged violation of the collective bargaining agreement must be deferred to the contractual grievance arbitration procedure for resolution. If the breach of contract claim is not deferred, then this claim is without merit because there has been no contract violation.

Complainants' allegation that Respondents have violated Sec. 111.84(1)(a), Stats., by retaliating against employees is derivative to a Sec. 111.84(1)(c) claim. Complainants have not alleged a Sec. 111.84(1)(c) claim. Complainants' Sec. 111.84(1)(a) claim is deficient in that it does not afford Respondents with proper due process notice and, thus, must be dismissed in the first instance. Assuming *arguendo*, that Complainants' Sec. 111.84(1)(a) claim may be litigated herein, it fails for lack of proof.

Complainants' allegations that Respondents have violated SELRA are without merit. Accordingly, the complaint must be dismissed with prejudice.

DISCUSSION

Complainants allege that, in issuing the February 10, 2005 guidelines for Safe Days, Respondents have violated Secs. 111.84(1)(a), (d) and (e), Stats. Section 111.07(3), Stats., made applicable to SELRA by Sec. 111.84(4), Stats., states that ". . . the party on whom the burden of proof rests shall be required to sustain such burden by a clear and satisfactory preponderance of the evidence."

Sec. 111.84(1)(a), Stats., makes it an unfair labor practice for the State individually or in concert with others to "interfere with, restrain or coerce employees in the exercise of their rights guaranteed in s. 111.82." Sec. 111.82 states:

> **111.82 Rights of employees.** Employees shall have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing under this subchapter, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection. Employees shall also have the right to refrain from any or all of such activities.

As Examiner McLaughlin has stated in UW MILWAUKEE, DEC. NO. 29775-F, 29776-F (2/02); *aff'd in relevant part*, DEC. NO. 29775-G, 29776-G (WERC, 1/03):

The Wisconsin Supreme Court has observed that:

> It is helpful to compare the wording of MERA and SELRA, whereupon we find that the rights guaranteed to employees under these acts are identical . . . It would be illogical to apply a different test to MERA than SELRA merely because a different group of protected persons are involved (municipal employees versus state employees). STATE OF WISCONSIN, DEPARTMENT OF EMPLOYMENT RELATIONS V. WISCONSIN EMPLOYMENT RELATIONS COMMISSION, 122 WIS.2D 132, 143 (1985).

This observation has been reflected in the test applied by Commission examiners to determine an independent violation of Sec. 111.84(1)(a), Stats., for the test parallels that used to determine an independent violation of Sec. 111.70(3)(a)1, Stats. The test requires that Complainant demonstrate that UWM Respondents' conduct was "likely to interfere with, restrain or coerce" Complainant or other employees in the exercise of rights protected by Sec. 111.84(2), Stats. See STATE OF WISCONSIN, DEPARTMENT OF ADMINISTRATION, DEC. NO. 15945-A (Michelstetter, 7/79), AFF'D BY OPERATION OF LAW, DEC. NO. 15945-B (WERC, 8/79); STATE OF WISCONSIN, DEPARTMENT OF HEALTH AND SOCIAL SERVICES, DEC. NO. 17218-A (Pieroni, 3/81), AFF'D BY OPERATION OF LAW, DEC. NO. 17218-B (WERC, 4/81); STATE OF WISCONSIN, DEC. NO. 19630-A (McLaughlin, 1/84), *aff'd by operation of law*, DEC. NO. 19630-B (WERC, 2/84); STATE OF WISCONSIN, DEPARTMENT OF HEALTH AND SOCIAL SERVICES (DHSS), DIVISION OF CORRECTIONS (DOC), DODGE CORRECTIONAL INSTITUTION (DCI), DEC. NO. 25605-A (Engmann, 5/89), *aff'd by operation of law*, DEC. NO. 25605-B (WERC, 6/89). This is an objective test that does not require proof that UWM Respondents intended to interfere with the exercise of protected rights. See THE STATE OF WISCONSIN, DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS, DEC. NO. 11979-B (WERC, 11/75).

Section 111.84(1)(d), Stats., states, in relevant part, that it is an unfair labor practice for the State individually or in concert with others:

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

At Section 111.81(1), Stats., "collective bargaining" is defined to mean

> . . . the performance of the mutual obligation of the state as an employer, by its officers and agents, and the representatives of its employees, to meet and confer at reasonable times, in good faith, with respect to the subjects of bargaining provided in s. 111.91(1) with the intention of reaching an agreement, or to resolve questions arising under such an agreement. . . .

Section 111.91(1), Stats., provides in pertinent part:

> **111.91 Subjects of bargaining. (1)** (a) Except as provided in pars. (b) to (e), matters subject to collective bargaining to the point of impasse are wage rates, consistent with sub. (2), the assignment and reassignment of classifications to pay ranges, determination of an incumbent's pay status resulting from position reallocation or reclassification, and pay adjustments upon temporary assignment of classified employees to duties of a higher classification or downward reallocations of a classified employee's position; fringe benefits consistent with sub. (2); hours and conditions of employment.

This duty to bargain is broad and the standards which define it are fact-driven. This makes it impossible to state a standard before examining a specific allegation. STATE OF WISCONSIN, DEC. NO. 28104-A (Shaw, 1/97); *aff'd by operation of law*, DEC. NO. 28104-B (WERC, 3/97); STATE OF WISCONSIN, DEC. NO. 27708-A (McLaughlin,1/95), *aff'd in relevant part*, DEC. NO. 27708-B (WERC, 11/96).

Sec. 111.84(1)(e), Stats., provides that it is an unfair labor practice for an employer individually or 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.

Due Process

In its complaint and initial brief, Complainants assert that Respondents' implementation of the February 10, 2005 Safe Day guidelines was in retaliation for employees exercising their contractual rights, as guaranteed in s. 111.82, Stats., and, therefore, Respondents have violated Sec. 111.84(1)(a), Stats. Respondents argue that, to assert jurisdiction over such a Sec. 111.84(1)(a) retaliation claim, would deprive Respondents of due process notice because such a Sec. 111.84(1)(a) claim is derivative of a Sec. 111.84(1)(c) claim and Complainants have not plead a Sec. 111.84(1)(c) claim. In STATE OF WISCONSIN, DEC. NO. 31207-C (3/06), the Commission stated as follows:

> The Union correctly points out that a retaliation claim can be advanced under either Section (1)(a) or (1)(c), as long as the evidence satisfies the traditional four elements. STATE OF WISCONSIN (UW), DEC. NO. 30534-B (WERC 2/05); CLARK COUNTY, DEC. NO. 30361-B (WERC, 11/03). Hence, the Union asserts that the Examiner rested her decision upon a pleading technicality, i.e., failing to cite Section (1)(c) rather than (1)(a) in connection with the retaliation claim, that is inconsistent with Commission case law. While the Union's

> interpretation of the Examiner's decision is plausible, her opinion could also be read to say that the Union had abandoned the retaliation claim by not presenting post-hearing arguments directed specifically at the four-element discrimination paradigm, rather than by failing to cite the discrimination section of the statute.
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> . . .
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> As all parties note, a successful claim of discrimination in violation of Sec. 111.84(1)(c), Stats., requires adequate evidence of the following four elements: (1) that the employees were engaged in lawful concerted activities; (2) that the employer was aware of those activities; (3) that the employer bore animus towards those activities; and (4) that the employer took adverse action against the employees at least in part out of animus towards those activities. EMPLOYMENT RELATIONS DEPARTMENT V. WERC, 122 WIS.2D 132 (1985); CF. VILLAGE OF STURTEVANT, DEC. NO. 30378-B (WERC, 11/03) at 18, citing MUSKEGO-NORWAY C.S.J.S.D. NO. 9 V. WERB, 35 WIS.2D 540 (1967).

Each of the above four elements must be established by a clear and satisfactory preponderance of the evidence. CITY OF MADISON, DEC. NO. 30028-A (Burns, 3/02); *aff'd by operation of law*, DEC. NO. 30028-B (WERC, 4/02).

For the first time in its reply brief, Complainants claim that Respondents have committed an independent violation of Sec. 111.84(1)(a), Stats., that is not based upon retaliation. By failing to raise this claim in a manner that provides Respondents with the notice of claims that is fundamental to due process, the Examiner considers Complainants to have waived any right to argue that Respondents have committed any independent violation of Sec. 111.84(1)(a), Stats., that is not based upon retaliation.

Deferral/Failure to Exhaust Contractual Grievance Procedure

In its Answer to the complaint, Respondents argue, as an affirmative defense, that Complainants have failed to exhaust the contractual grievance procedure ending in arbitration. When Respondents did not address this defense in its opening statement, the Examiner pointed this fact out to Respondents and Respondents stated that it had not abandoned this defense.

In post-hearing argument, Respondents asserted that the parties have a contractual procedure for resolving contract violation claims and Complainants have filed a grievance on the February 2005 guidelines. Respondents maintain, therefore, that the Commission must defer to the contractual grievance procedure.

Where, as here, the complaint alleges statutory violations other than breach of contract, the Commission may defer asserting jurisdiction over these other statutory claims if it appears that a grievance arbitrator will be issuing an award that may resolve the dispute in a manner that is consistent with the statutes administered by the Commission. Upon issuance of such an

arbitration award, either party may request that the Commission proceed based upon allegations that these statutory claims have not been resolved by the award or the statutory claims have been resolved in a manner that is contrary to SELRA. STATE OF WISCONSIN (DOC), DEC. NO. 31384-B (WERC, 11/05).

In STATE OF WISCONSIN, DEC. NO. 15261 (1/78), the Commission commented as follows:

> Deferral of alleged statutory violations to arbitration is a discretionary act in which the commission abstains from adjudicating the statutory question. The United States Supreme Court has approved deferral on the ground that it harmonizes the objectives of administrative determinations of unfair labor practices with the equally important legislative objective to encourage parties to utilize their mutually agreed upon forum for the resolution of contractual questions. 7/ The decision to abstain from discharging the commission's statutory responsibility to adjudicate complaints in favor of the arbitral process will not be made lightly. The commission will abstain and defer only after it is satisfied that the legislature's goal to encourage the resolution of disputes through the method agreed to by the parties will be realized and that there are no superseding considerations in a particular case. Among the guiding criteria for deferral are these: First, the parties must be willing to arbitrate and renounce technical objections, such as timeliness under the contract and arbitrability, which would prevent a decision on the merits by the arbitrator. Otherwise, the commission would defer only to have the dispute go unresolved. Second, the collective bargaining agreement must clearly address itself to the dispute. 8/ The legislative objective to encourage the resolution of disputes through arbitration would not be realized when the parties have not bargained over the matter in dispute. Third, the dispute must not involve important issues of law. 9/ An arbitrator's award is final and ordinarily not subject to judicial review on questions of law. Further, questions of legislative policy and law are neither within the province nor the expertise of arbitrators. 10/ On the other hand, the legislature has entrusted to the commission in the first instance the responsibility to resolve questions of law and legislative policy and has made commission decisions subject to further review. (cites omitted)

This complaint presents a Sec. 111.84(1)(d) unilateral change claim as well as a Sec. 111.84(1)(a) retaliation claim based upon Respondents' conduct in implementing the February 10, 2005 Safe Days program guidelines. Respondents argue that the Kiley grievance addresses Respondents right to issue the February 10, 2005 Safe Days guidelines. Complainants correctly respond that this grievance was filed prior to the issuance of the February 10, 2005 guidelines and, based upon the record evidence, does not challenge Respondents issuance of the February 10, 2005 Safe Day guidelines.

It is not evident that the parties are willing to arbitrate and renounce technical objections, such as timeliness, with respect to any grievance that would result in an arbitration decision on the merits that is likely to resolve Complainants' unilateral change claim or its retaliation claim. Accordingly, it would not be appropriate to defer Complainants' Sec. 111.84(1)(a) or (d) claims to arbitration.

When determining whether or not to assert jurisdiction over a Sec. 111.84(1)(e) breach of contract claim, the Commission considers whether or not the record establishes that the parties have agreed upon a contractual procedure for the resolution of alleged violations of the contract. Where there is a contractual grievance procedure that does not culminate in final and binding arbitration, the Commission generally will require that this contractual grievance procedure be exhausted prior to asserting jurisdiction to decide the breach of contract claim. NORTHLAND PINES SCHOOL DISTRICT, DEC. NO. 29978-A (Jones, 5/01); *aff'd by operation of law*, DEC. NO. 29978-B (WERC, 5/01); WINTER SCHOOL DISTRICT, DEC. NO. 17867-C (WERC, 5/81). If there is a contractual grievance procedure that culminates in final and binding arbitration, then the Commission generally will not assert its Sec. 111.84(1)(e) jurisdiction and will dismiss the alleged violation of Sec. 111.84(1)(e). STATE OF WISCONSIN, DEC. NO. 31384-B (WERC, 11/05).

The Commission's general policy of not asserting its jurisdiction to hear and decide Sec. 111.84(1)(e) breach of contract claims where the parties have bargained an agreement that contains a procedure for resolving alleged violations of that contract rests upon the Commission's presumption that the parties intend their contractual procedure to be the exclusive procedure for resolving alleged violations of the contract and a Commission desire to honor the parties' agreement. STATE OF WISCONSIN, DEC. NO. 20830-B (WERC, 8/85). The Commission's refusal to assert jurisdiction over statutory breach of contract claims is based upon the potential availability of the agreed-upon dispute resolution procedure, rather than actual resort to the agreed-upon dispute resolution procedure. Accordingly, the fact that the parties' agreed-upon dispute resolution procedure did not, in fact, address the alleged violation of the contract or an arbitrator did not, in fact, rule on the merits of the alleged violation of the contract does not provide a basis for asserting jurisdiction over the alleged violation of the contract. To conclude to the contrary would nullify the procedural requirements, such as timeliness, which are part and parcel of the contractual procedure to which the Commission is giving deference. STATE OF WISCONSIN, *supra*.

There are exceptions to this general policy of not asserting jurisdiction over statutory breach of contract claims where the parties have agreed upon a contractual procedure for resolving alleged violations of the contract. For example, the Commission will assert its jurisdiction to hear breach of contract claims where the parties waive reliance on the contractual grievance procedure, or where there is clear and satisfactory evidence that the grievance and arbitration machinery cannot be relied upon to dispose of employee grievances. Consistent with the latter exception, the Commission will assert its jurisdiction to determine breach of contract claims where it has been established that the contractual grievance and arbitration procedures may not be relied upon to dispose of employee grievances because the union has violated its

duty of fair representation. MUSKEGO-NORWAY SCHOOL DISTRICT, DEC. NO. 30871-D (Nielsen, 5/05); *aff'd by operation of law* DEC. NO. 30871-E (WERC, 7/05).

Witness testimony establishes that Complainants have filed grievances. The record does not contain contract language that identifies a contractual grievance procedure, or any contractual procedure for resolving alleged violations of their contract. Nor is there other evidence that is sufficient to establish that the parties have agreed upon a contractual procedure for resolving alleged violations of their contract.

On the basis of this record, it would not be reasonable to conclude that there is a contractual grievance procedure that has not been exhausted by Complainants. Nor would it be reasonable to presume that the parties intend a contractual procedure to be the exclusive procedure for resolving alleged violations of the contract. On the basis of this record, it is appropriate for the Commission to assert its jurisdiction to determine the merits of Complainants' statutory breach of contract claim.

Sec. 111.84(1)(d) Claim

Complainants allege that Respondents have violated their Sec. 111.84(1)(d), Stats., duty to bargain by implementing the February 10, 2005 Safe Days guidelines. Specifically, Complainants allege that these Safe Days guidelines unilaterally change the eligibility for Safe Days, a mandatory subject of bargaining.

Eligibility for Safe Days is primarily related to hours and conditions of employment. Thus, eligibility for Safe Days is a mandatory subject of bargaining as defined in Sec. 111.91(1), Stats.

On February 10, 2005, the parties' 2003-2005 Master Agreement and Local Agreement were in effect. In STATE OF WISCONSIN, DEC. NO. 31207-C, *supra*, the Commission stated:

> We begin by setting forth the Commission's longstanding principles regarding an employer's duty to bargain while a contract is in effect:
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> > [The] employer's duty to bargain during the term of a contract extends to all mandatory subjects of bargaining except those which are covered by the contract or as to which the union has waived its right to bargain through bargaining history or specific contract language. Where the contract addresses the subject of bargaining, the contract determines the parties' respective rights and the parties are entitled to rely on whatever bargain they have struck. . . ."
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> CITY OF BELOIT, DEC. NO. 27990-C (WERC, 7/96) (footnote omitted). To the extent the contract does not "address" a mandatory subject of bargaining, the

employer's duty to bargain would require the employer to provide the Union with notice and an opportunity to bargain before changing any existing practice ("status quo") regarding that subject. SCHOOL DISTRICT OF WISCONSIN RAPIDS, DEC. NO. 19084-C (WERC, 3/85), citing NLRB V. KATZ, 396 U.S. 736 (1962). Where a practice has developed that is in conflict with contract language, the employer may still have an obligation to bargain before renouncing the practice and reverting to the contract language, if the practice is sufficiently clear, mutual, and longstanding. CITY OF STEVENS POINT, DEC. NO. 21646-B (WERC, 8/85).

In accordance with the foregoing principles, a successful unilateral change claim, such as the Union's in the instant case, would require all of the following elements: (1) a unilateral change (2) in an existing practice (3) regarding a mandatory subject of bargaining (4) that is not addressed in the contract or, if in conflict with the contract, is longstanding, clear, and mutual.

The Examiner in this case concluded that the fourth requisite element was not satisfied here, in that the parties' contact already addressed the subjects in question:

> Article VI, Section 2, of the parties' collective bargaining agreement addresses hours of work. This section includes language addressing changes to work schedules and the scheduling of rest periods, i.e., breaks. The language of Section 11/28/2 of the parties' collective bargaining agreement addresses deviations from the normal work shift. The language of Section 15 of the parties' collective bargaining agreement addresses the provision of meals. . . . [Hence] the parties have already bargained on the subject of shift hours, including changes thereto, and free meals.

Examiner's Decision at 21, citing CITY OF MILWAUKEE, DEC. NO. 31221-B (WERC, 10/05), and CADOTT SCHOOL DISTRICT, DEC. NO. 27775-C (WERC,6/94), *aff'd sub nom*. CADOTT EDUCATION ASS'N V. WERC, 197 WIS.2D 46 (1995).

The Examiner's conclusion is a reasonable application of Commission case law in the often blurry area of determining whether a contract "addresses" an issue. That determination can be difficult because it may depend on how narrowly or broadly the topic is defined or the contract language is construed. See, e.g., MAYVILLE SCHOOL DISTRICT, DEC. NO. 25144-D (WERC, 5/92), *aff'd sub nom*. MAYVILLE SCHOOL DIST. V. WERC, 192 WIS.2D 379 (1995) (although the contract contained comprehensive language regarding health insurance, the Commission held that the employer changed the *status quo* regarding health insurance when it changed the carrier, because this change

> reduced the amount of damages available to employees in the event they successfully sued the carrier). Similarly, in the instant case, the Union has advanced a reasonable argument that the contract does not "cover" all significant aspects of employee work schedules, since it does not specify a schedule for food service employees, nor does it *preclude* providing them a free lunch. 1/ Moreover, as the Union suggests, Article 11/28/2 could be interpreted to indicate that the parties have agreed to negotiate over issues affecting schedules and work hours even while the contract is in effect. (footnote omitted)

The Local Agreement in effect on February 10, 2005 contains Article 2/E, entitled Exemption from Required Overtime. The language of Article 2/E/6 addresses eligibility for the Safe Days with sufficient specificity to warrant the conclusion that the Respondents have no further duty to bargain with Complainants over this mandatory subject of bargaining during the term of this agreement. As Respondents argue, the parties' contract determines the parties' rights with respect to eligibility for Safe Days and the parties are entitled to rely on whatever contractual bargain they have struck.

Sec. 111.84(1)(e) Claim

The concept of the Safe Days program was first raised by management employee Robin Gruchow in a 1999 overtime reduction committee comprised of management and union representatives. Following committee discussions, the Safe Days program concept was referred out of this committee.

The parties subsequently negotiated an Addendum to their 1998-99 Local Agreement. This Addendum allowed "for the implementation of 'Safe Days' on a trial basis per established guidelines." The "established guidelines," which were also negotiated by the parties, expressly state that a Safe Day "is earned by a Resident Care Technician who has 60 consecutive calendar days with zero unanticipated absences." (Emphasis supplied)

Under the guidelines negotiated by the parties, the RCT Supervisors verify eligibility for Safe Days. No employee occupying the position of RCT Supervisor testified at hearing. Materials prepared by RCT Supervisors responsible for providing training regarding the pilot program included a document that states "As an incentive for employees who have 0 unanticipated absences in a 60-day period of time, employees may schedule a day in which they cannot be forced for an extra shift."

Gruchow was not a party to the negotiation of the Addendum or the referenced "established guidelines." With respect to bargaining history, the relevant discussions are not those that occurred in the overtime reduction committee, but rather, are those that occurred between the parties at the time that they negotiated the Addendum and referenced guidelines.

In 1999, William Hayes was Local 634 President. Hayes remained President through June of 2005. Hayes, who participated in the negotiations that lead to the 1999 Addendum and

guidelines, recalls that Human Resources Director Barb Bronte prepared the final copy of the Addendum and the referenced guidelines. Bronte, who assumes that she participated in these negotiations, does not recall having any discussions with the Local 634 regarding what was meant by the term "unanticipated absences."

Bronte and Hayes confirm that, in 1999, the term "unanticipated absence" was used in the attendance policy that was applicable to CWC employees. This attendance policy includes the following:

> C. Unanticipated/Anticipated Absence
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> 1. Unanticipated Absence includes illness, family emergency, death in family, requests to leave work early for any reason (excluding vacation, personal/Saturday legal holiday or comp time), or other occurrences outside of the control of the employe which result in the employe being unable to report for scheduled duty (this does not include inclement weather) and notice is less than 72 hours. Anticipated absence is when an employee provides notice 72 hours or more to the employer.

Hayes did not relate any specific discussions that occurred between the union and management when the parties negotiated the 1999 Addendum and guidelines, but states that he understood the term "unanticipated absences" to have the same meaning as in the attendance policy that was in effect at that time. Bronte states that attendance policy could not have been used as the definition for "unanticipated absences" during the trial period because it would have generated a much larger eligibility list. When asked if she had any direct knowledge of how the trial period was administered by the timekeepers, Bronte responded that "they were supposed to be using unscheduled, where somebody does not have a negative impact that's not going to be causing overtime."

In 1999, LPN Catherine Horenberger was Local 634 Secretary. Horenberger did not relate any specific discussions that occurred between the union and management when the parties negotiated the 1999 Addendum and guidelines, but states that she understood the term "unanticipated absences" to have the same meaning as in the attendance policy that was in effect at that time. According to Horenberger, during the trial period that was implemented by the Addendum, the terms "anticipated absences" and "unanticipated absences" had the same definition as in the attendance policy.

In 1999, Hayes was an RCT and, as such, entitled to earn Safe Days under the newly negotiated Addendum and guidelines. Hayes recalls that, if he wished to avoid breaking the Safe Days chain, he had to schedule his use of sick leave 72 hours in advance.

In summary, at the time that the parties negotiated the Addendum and guidelines, the term "unanticipated absences" had a specific and well understood meaning and that meaning

was defined in the existing Policy on Attendance. The absence of clear bargaining history evidence that the parties intended this term to have another meaning and the evidence that the only witness to have direct experience with the administration of the trial period, *i.e.*, Hayes, recalls that Safe Days eligibility was preserved by providing 72 hours notice, the term "unanticipated absences," as used in the Addendum and guidelines, is reasonably construed to have the same definition as in the existing attendance policy.

Subsequently, the parties negotiated a Local Agreement that, by its terms, was effective April 18, 2001 through June 30, 2001. This Local Agreement included the following language

> **2/E/4 (RCTs, LPNs, Therapy Assistants and Blue Collar Related)** – who have scheduled a Safe Day according to the established guidelines will be totally exempt from the required overtime on that designated Safe Day. Definition: A Safe Day is earned upon 60 days without an unscheduled absence. Upon earning two (2) consecutive safe days, an additional consecutive safe day will be earned after 45 days.
>
> > **2/E/4a** RCT Mutually agreed guidelines will be posted on each unit.
> >
> > **2/E/4b** All other guidelines will be completed within 30 days upon effective of this contract, and will be posted in work areas.

Gruchow, who was a member of the management team that negotiated the 2000-2001 Local Agreement, recalls that management wanted to use the term "unscheduled absence" to "put distance" between the policy definition of "unanticipated absence" and the Safe Days program because management wanted a mutual scheduling component; to eliminate the right of employees to demand time off and then have management be responsible for scheduling coverage for an absence. Gruchow's testimony does not establish whether or not union representatives were a party to these discussions.

Gruchow also recalled that there was discussion that there would be no exceptions to the requirement that there be no "unscheduled absences." It appears that Gruchow was recalling discussions that occurred between the parties.

Bronte was management's Chief Spokesperson at the negotiation of the 2000-2001 Local Agreement. Bronte recalls that management purposely used the term "unscheduled absences" in order to distinguish such absences from "unanticipated absences" within the meaning of the attendance policy and that an "unscheduled absence" was one which did not cause overtime.

During cross examination, Bronte confirmed that the employee who requested the absence was expected to meet with his/her supervisor and that, unless the two were able to come up with alternative scheduling, the employee absence would make the employee ineligible for a Safe Day. Bronte stated that she believed that this definition of "unscheduled

absence" was communicated to the union during the 2000-2001 contract negotiations. Bronte, however, could not recall specific discussions with respect to the term "unscheduled absences," except that management was very specific in using the term "unscheduled absences;" that there was discussion of exemptions or exceptions to unscheduled absences; and that there was discussion of trades and schedule manipulations.

Evidence that there were discussions that there would be no "exceptions" to "unscheduled absences" does not, in and of itself, support either party's interpretation of "unscheduled absences." However, Bronte's testimony that there were discussions of trades and schedule manipulations does reasonably suggest that the term "unscheduled absence" meant something other than an absence for which a 72-hour notice had not been provided.

Hayes, who was involved in the negotiation of the 2000-2001 Local Agreement, states that he does not recall any discussions of a definition of "unscheduled absence" that required an employee to sit down with a supervisor. According to Hayes, he did not ask management what "unscheduled absence" meant and that, when he saw the term, it meant the same to him as "unanticipated absence."

Horenberger, who was also involved in the negotiation of the 2000-2001 Local Agreement, states that, when "unscheduled absences" was negotiated into the 2000-2001 Local Agreement, she did not consider it to have a meaning that differed from "unanticipated absence," as that term had been defined in the attendance policy and previously applied to the Safe Days program. Horenberger states that she does not recall raising a question about unscheduled absence versus unanticipated absence.

As discussed above, the record indicates that Safe Days previously had been earned on the basis of zero "unanticipated absences," with "unanticipated absences" being defined by the attendance policy. It is likely, therefore, that, if the parties had intended to continue that method of earning Safe Days, then they would have continued to use the term "unanticipated absences." The parties conduct in substituting "unscheduled absences" for "unanticipated absences" and the evidence of their bargaining discussions reasonably gives rise to an inference that, when the parties bargained their 2000-2001 Local Agreement, "unscheduled absences" meant something other than "unanticipated absences" as that term is used in the attendance policy.

In May 2001, after the effective date of the 2000-2001 Local Agreement, the RCT and LPN Safe Days program guidelines were posted on every unit. These guidelines expressly defined a Safe Day as being earned by "a designated number consecutive calendar days with zero unanticipated absences."

Bronte states that the use of the term "unanticipated absences" in the guidelines was an error and that the correct term should have been "unscheduled absences." Horenberger states that, from March 1, 1999 through December of 2004, no management representative ever told her that the use of the term "unanticipated absences" in the guidelines was a clerical error.

Under the contract language, these RCT guidelines were to be mutually agreed upon by the parties. According to Hayes, these RCT guidelines had been the subject of mutual agreement. Hayes does not agree that there was an error in the guidelines that were posted in May of 2001. Rather, Hayes states that the use of the term “unanticipated absences” is consistent with his understanding of the Safe Days program.

Horenberger’s testimony establishes that the 2000-2001 agreement continued through calendar year 2002 and into calendar year 2003 because the parties had not negotiated a successor agreement. According to Horenberger, in her capacity as a union representative, she monitored the administration of the Safe Days program; that the May 2001 guidelines were used by management to administer the Safe Days program throughout the time that the 2000-2001 agreement remained in effect; and that the term “unanticipated absences” was given the same definition as in the attendance policy.

Hayes recalls that he tried to qualify for Safe Days in 2001, 2002 and 2003. According to Hayes, he had occasions in which he provided more than 72 hours notice of an absence and these absences never disqualified Hayes from the Safe Days program. Gruchow, who had supervisory responsibility for RCT and LPN employees during this time period, confirms that, under the May 2001 guidelines, the term “unanticipated absences” was defined by the attendance policy. Although Respondents argue that it is not reasonable to construe Gruchow’s testimony as containing such a confirmation, the undersigned disagrees.

In summary, the evidence of the 2000-2001 Local Agreement bargaining history provides a reasonable basis to infer that the parties intended the term “unscheduled absences” to have a different meaning than “unanticipated absences.” This inference, however, is rebutted by the evidence of the parties’ subsequent administration of the 2000-2001 Local Agreement, which agreement remained in effect until October 20, 2003. As Complainants argue, based upon the record presented at hearing, Respondents contention that it is possible that all of the employees who had provided 72-hour notice would also have qualified under the definition of “unscheduled absences” advocated by Respondents is speculation.

Notwithstanding Bronte’s belief to the contrary, the record does not warrant the conclusion that the use of the term “unanticipated absences” in the May 2001 guidelines was an error. The reasonable conclusion to be drawn from the evidence of the subsequent administration of the Safe Days program is that the term “unscheduled absences” in Article 2/E/4 of the 2000-2001 Local Agreement is interchangeable with the term “unanticipated absences” as used in the guidelines and defined by the attendance policy.

The State of Wisconsin and WSEU negotiated a Master Agreement, which by its terms is effective May 17, 2003 through June 30, 2003. It is not evident that, during these negotiations, either party addressed the Safe Days program, or that the parties agreed to any contract language that addressed the Safe Days program.

During the negotiation of the parties' 2003-2005 Local Agreement, the union made the following proposal

> 2/A/6 Hospitalization of an individual or a death in a persons immediate family, as outlined in the master agreement, will allow for the cancellation of overtime with less than 24 hours notice.
>
> 2/E/4 A death in the immediate family of a person, as outlined in the Master agreement, will not break the safe day chain.
>
> 2/E/4 Safe Day guidelines be changed to reflect 1 per shift per building.
>
> 2/E/4 Safe Day guidelines be changed for LPN,s working P.M. shifts in areas when Noc coverage is RN to read, such LPN's in these areas shall be safe from being forced in on a safe day.

Management rejected all of the proposed modifications.

As Gruchow recalls the discussion, management told the union that management did not want to make exceptions to "unscheduled absences." Bronte confirms that management was adamant that there be no exceptions and also recalls discussion that perfect attendance was necessary. Neither the testimony of Gruchow and Bronte, nor any other witness, reasonably indicates that, when the parties were discussing "exceptions" to "unscheduled absences," or "perfect attendance," that either party offered a definition of "unscheduled absences."

Gruchow does not have any specific recollection of the discussion regarding the hospitalization proposal. Consistent with the plain language of the proposal, Hayes recalls that this discussion related to the cancellation of overtime with less than 24 hours notice in 2/A/6.

Bronte's bargaining notes indicate a management response to a proposal of Death/Hospitalization related to Safe Days. As does Bronte's testimony.

Hayes recalls that the union proposed that a death in the immediate family not break the Safe Days chain because the employee had no control over this and then they were being punished by losing their Safe Day, but that the hospitalization discussion related to the cancellation of overtime with less than 24 hours notice under 2/A/6. Given Hayes testimony, which is supported by the plain language of the union's proposal, it is not implausible that management misconstrued the union's hospitalization proposal. The evidence regarding the bargaining history discussions of "hospitalization" are inconclusive with respect to whether or not the union was seeking to "except" hospitalization from "unscheduled absences", as used in 2/E/4.

On its face, the union's proposal regarding a death in the immediate family raises an exception to the contractual definition of "unscheduled absences." Such deaths often require

an immediate absence and, therefore, are as likely to break the Safe Day chain under the union's position that absences with at least a 72-hour notice do not break the Safe Day chain, as under the employer's position that absences that cannot be covered without overtime break the Safe Day chain. Neither the union's written proposal, nor the evidence of the bargaining discussions regarding this proposal, provides a reasonable basis to infer any mutual intent with respect to the contractual definition of "unscheduled days."

Horenberger recalls that, during the negotiation of the 2003-2005 agreement, management proposed a Safe Year for RCTs; which would be based upon one year without any unanticipated absences. The 2003-2005 Local Agreement, which by its terms is effective October 20, 2003 through June 30, 2005, includes the following language:

> **2/E/6 (RCTs, LPNs, Therapy Assistants and Blue Collar Related)** – who have scheduled a Safe Day according to the established guidelines will be totally exempt from the required overtime on that designated Safe Day. Definition: A Safe Day is earned upon 60 days without an unscheduled absence. Upon earning two (2) consecutive days, an additional consecutive safe day will be earned after 45 days.
>
> > **2/E/6a (RCT)** Employees will be exempt from required overtime for one calendar year upon having completed the previous calendar year without any unscheduled absences.
> >
> > **2/E/6b** Guidelines will be posted on each unit.
> >
> > **2/E/6c** All other guidelines will be completed within 30 days upon effective of this contract, and will be posted in work areas.

The previous provision that corresponded to 2/E/6b states "RCT Mutually agreed guidelines will be posted on each unit."

Hayes, who was the union's Chief Spokesperson during the negotiation of the 2003-2005 Local Agreement, agrees that the term "mutual" was removed from the language concerning the guidelines. Hayes states that there was no discussion across the bargaining table about why management wished to remove the term "mutual" and that no one from management indicated that, if the mutual language were removed, then management would have the power to unilaterally change the guidelines.

By removing the phrase "RCT Mutually agreed," the parties have demonstrated a mutual intent to provide Respondents with the right to unilaterally establish guidelines. The removal of this phrase, however, provides no reasonable basis to conclude that the parties have agreed to a change in the definition of the contractual term "unscheduled absences." Neither the removal of this phrase, nor any other record evidence, provides a reasonable basis to conclude that Respondents have the right to establish guidelines that are inconsistent with any contractual right.

On October 20, 2003, Bronte issued Safe Days guidelines for RCT and LPN employees that, according to Hayes, were agreed upon by the parties. These guidelines did not differ in relevant respect from the prior guidelines, except that for the following:

> 9. A **Calendar Year** of Safe Day exemptions are earned upon having one calendar year of zero (0) unanticipated absences for the full previous calendar year (January 1-December 31). Note: Calculations to begin January 1, 2004.
>
> > 9a. RCT's earning a Calendar Year of Safe Days will be recognized within the first week of January for the following calendar year and receive written confirmation of the Safe Year exemption.

These guidelines, which were posted throughout the institution, continued to refer to "unanticipated absences." Gruchow confirms that the term "unanticipated absences" under the October 2003 guidelines had the same meaning as under the May 2001 guidelines.

The Safe Year became effective in 2005; with eligibility based upon attendance in 2004. At the end of 2004, Bronte approved a list of employees who had earned a 2005 Safe Year. Gruchow states that employees on this list qualified under the definition of "unanticipated absences" in which employees were considered eligible if they had provided 72-hours notice of their absence.

Bronte acknowledges that, at the time that Bronte approved this list, she knew that not all of the employees had earned a Safe Year based upon her definition of no "unscheduled absences." According to Bronte, the employees on the list had been granted a Safe Year and management did not want to revoke this decision.

Bronte testified that, in December 2004, when she was reviewing eligibility for a 2005 Safe Year, one employee caught her attention and, when she followed up by questioning one of the timekeepers, the timekeeper indicated that this employee had given 72-hours notice and, when questioned by Bronte where she had received that information, the timekeeper referred to the fact that the guidelines used the term "unanticipated absences."

According to Bronte, she discovered that timekeepers had an inconsistent practice regarding the application of the 72-hour notice. No timekeeper responsible for verifying eligibility for the Safe Year program testified at hearing.

Notwithstanding Respondents argument to the contrary, Hayes' testimony reasonably indicates that he discussed eligibility for the Safe Days program with Bronte in December of 2004 and that she, as well as his Unit Director, verified that he would remain eligible for the 2005 Safe Year if he provided 72 hours notice of his absence. In view of Bronte's testimony that she understood that there had been an inconsistent practice with respect to the application of a 72-hour notice rule and her decision to approve a 2005 Safe Year for employees who had

not, in her opinion, met the contractual requirement of no "unscheduled absences," it is not incredible that Bronte would have made such verification.

Hayes' credibly testified that he contacted his Unit Director and Bronte to make sure that he had his Safe Year. Hayes' conduct in contacting his Unit Director and Bronte to confirm the 72-hour notice rule does not cast any reasonable doubt on his testimony regarding the prior application of the 72-hour notice rule. Nor, contrary to the argument of Respondents, does the record otherwise provide a reasonable basis to conclude that Hayes lacks credibility.

Gruchow recalls that, at the end of calendar year 2004 or early in the calendar year 2005, he pointed out to Bronte that there was a clerical error in the posted guidelines because it used the term "unanticipated absences" and the contract used the term "unscheduled absences." Bronte, who was on vacation during the month of January 2005, recalls that, when she returned from vacation, she had a conversation with Horenberger, Hayes, Gruchow and others related to the Safe Days program guidelines. Hayes and Bronte each recall that there were discussions of the meaning of the words "scheduled" and "unscheduled." Hayes states that Bronte gave her opinion regarding the definition of "unscheduled" and Hayes told Bronte that "unscheduled" still means "unanticipated." According to Bronte, Hayes stated that he had taken time off under the Safe Days program and a 72-hour notice was the way it was supposed to be.

According to Bronte, on February 1, 2005, Local 634 representative Howard Schuck filed a grievance alleging that Lori Vissers' absence on November 1, 2004 should not have been counted as an "unscheduled absence" because she had left work early due to a workers comp injury. Respondents argue that the filing of this grievance provides a reasonable basis to doubt the testimony of Local 634 witnesses regarding the application of the 72-hour notice rule. Since it would not be reasonable to conclude that unions only file grievances that the union representatives conclude are meritorious, the Examiner does not find Respondents argument to be persuasive.

On February 10, 2005, Bronte issued new guidelines for the Safe Days program. These guidelines differed in material respects from the prior guidelines. Bronte did not meet with Complainants to negotiate the changes in the guidelines prior to issuing these guidelines.

The February 10, 2005 guidelines give rise to Complainants' Sec. 111.84(1)(e) claim. Specifically, Complainants contest the right of Respondents to implement the following guidelines:

> 8. Safe Days are calculated based on the employee reporting to work as scheduled. The accumulation of days used to calculate a Safe Day must consist of **no** interruption of their work schedules unless it has been approved as part of the "paid leave time" process based on the staffing and quota.

> Meaning, if the quota is full or the staffing needs do not allow the RCT to be off, it is considered an unscheduled absence and the accumulation/count stops.

Bronte acknowledges that, under the February 10, 2005 guidelines, it is irrelevant whether or not an employee provides at least 72-hours notice of an absence and an absence is "unscheduled" if it cannot be staffed without incurring overtime. While Bronte's testimony on this point is not entirely consistent, it appears that, under the February 10, 20005 guidelines, Bronte is requiring the employee to meet with the employee's supervisor to discuss how the absence can be covered without incurring overtime; with the employee sharing responsibility to provide such coverage. Horenberger states that, under these guidelines, employees who provided at least 72-hours notice of a doctor's appointment were being told by their supervisors that this absence would no longer qualify for a Safe Day or Safe Year; whereas as previously they would be granted the absence with 72-hours notice and the absence would not affect their Safe Day or Safe Year.

Bronte's notes of a February 23, 2005 meeting with Schuck regarding the Vissers' grievance indicate that, in a prior conversation, Schuck acknowledged that, at the Local negotiations, there was an agreement that there would be no exceptions to "unscheduled absences." By confirming that there would be "no exceptions," Schuck has not reasonably indicated any understanding with respect to the definition of "unscheduled absences."

While not without ambiguity, the most reasonable conclusion to be drawn from Bronte's testimony is that her "review" of individual cases consisted of determining whether or not staffing allowed the absence to be covered without overtime. Bronte does not claim, and the record does not establish, that, with the exception of Kiley, her December, 2004 review involved any determination as to whether or not the RCS/timekeeper had applied a 72-hour notice rule. The fact that an absence did not incur overtime does not mean that the 72-hour notice rule was not applied. Bronte's testimony regarding individual situations, such as Wendy King, that met her definition of "unscheduled absences" does not reasonably indicate that, prior to the issuance of the February 10, 2005 guidelines, the Safe Days program had been administered by applying Bronte's definition of "unscheduled absences."

At the end of 2005, Bronte approved a list of RCT employees who were eligible for a 2006 Safe Year; with eligibility determined on the basis of the February 10, 2005 guidelines. As Respondents argue, more employees qualified for the Safe Year program under the February 10, 2005 guidelines then under the old guidelines. Contrary to the argument of Respondents, the number of employees who qualified for a 2006 Safe Year is irrelevant to the determination of the contractual meaning of "unscheduled absence" at the time that Bronte established the February 10, 2005 guidelines.

Summary

The clear and satisfactory preponderance of the evidence establishes that, at the time that the parties negotiated their 2003-2005 Local Agreement, the term "unscheduled absence" found in Article 2/E/6 of this Local Agreement was interchangeable with the term "unanticipated absence" as defined in Section C of the then existing attendance policy and an "anticipated absence," as that term is used in Section C of the attendance policy, was not an "unscheduled absence" as that term is used in Article 2/E/6. The record does not establish that, prior to the implementation of the February 10, 2005 guidelines, the parties mutually agreed to another construction of Article 2/E/6.

Although Respondents argue that such a contract construction leads to absurd results, the undersigned disagrees. One may reasonably conclude that having at least a 72-hour notice of an absence provides a supervisor with more staffing alternatives than having no notice of an absence.

When Bronte implemented the February 10, 2005 guidelines, she defined "unscheduled absences" in a manner that is inconsistent with the contractual definition of "unscheduled absences." As a result of this redefinition, Complainants' bargaining unit employees have been denied their contractual right to have "anticipated absences," as defined by Section C of the attendance policy, not be counted as an "unscheduled absence" for the purpose of earning a Safe Day/Safe Year.

Sec. 111.84(1)(a)

In their complaint and initial brief, Complainants raised a Sec. 111.84(1)(a) claim based upon retaliation for the exercise of lawful, concerted activity, *i.e.*, the employees' exercise of their contractual right to earn a Safe Year. Complainants argue that it is unquestioned that Respondents were aware of this activity and that the retaliatory action was altering the guidelines on February 10, 2005 to make it more difficult for employees to qualify for a Safe Year in the future. Complainants further argue that animus toward this lawful, concerted activity may be inferred by the timing of the alteration in the guidelines; the unexpectedly large number of employees who qualified; and the retaliatory action of altering the guidelines. According to Complainants, Respondents have proffered only one justification for altering the guidelines, *i.e.*, a clerical error; which justification has been shown to be pretextual.

An employee's exercise of a contractual right is lawful, concerted activity. CITY OF MILWAUKEE, DEC. NO. 29270-B (WERC, 12/98) As Complainants argue, it is evident that, in December of 2004, Respondents had knowledge that employees were exercising their contractual right to earn a Safe Year.

In arguing that Respondents have proffered only one justification for changing the guideline, *i.e.*, clerical error, Complainants have misapprehended Bronte's testimony. Upon consideration of Bronte's testimony as a whole, the Examiner concludes that Bronte's

proffered rationale for changing the guidelines is that she wanted to correct a perceived error that, in her view, had caused employees to earn a 2005 Safe Year to which the employees were not contractually entitled and to "get everyone back on the same page" with respect to the contractual requirements for earning a Safe Year in 2006 and, to achieve that end, Bronte issued the February 10, 2005 guidelines that substituted the term "unscheduled absence" for the term "unanticipated absence" and inserted Paragraph 8, described supra.

To be sure, in December of 2004, Bronte had confirmed to Hayes that a 72-hour notice of absence would preserve his eligibility for a Safe Year. In light of Bronte's testimony that she had decided to approve a Safe Year for all employees whom the timekeepers had determined eligible for a 2005 Safe Year, regardless of whether or not Bronte considered these employees to have qualified for a Safe Year, Bronte's December 2004 confirmation to Hayes is not sufficient to conclude that Bronte's avowed interpretation of the contractual term "unscheduled absence" is not *bona fide*. Nor does the record otherwise warrant the conclusion that Bronte's avowed interpretation of the contractual term "unscheduled absence" is not *bona fide*.

According to Bronte, her decision to change the guidelines was prompted by her December review of the list of employees whom the timekeepers had determined to be eligible for the 2005 Safe Year. Complainants argue that Bronte's testimony that she reviewed the eligibility of the employees on the Safe Year list is implausible given the amount of time needed to verify attendance under Bronte's interpretation of the contractual requirements for earning a Safe Year. As discussed above, it appears that Bronte's review consisted of verifying whether or not the employees were absent at a time in which the schedule reflected adequate coverage. The record provides no reasonable basis to conclude that Bronte could not have reviewed the 2005 Safe List in December 2004, as claimed by Bronte.

Bronte's testimony indicates that her decision to change the guidelines was prompted by December 2004 discussions with the timekeepers and Gruchow. According to Bronte, these discussions revealed that a timekeeper had been applying the 72-hour notice rule based upon the use of the guidelines term "unanticipated absence" and that Gruchow thought there was a problem with the guidelines using the term "unanticipated absence," rather than "unscheduled absence," because "people" were under the impression that "anticipated" means with 72-hour notice. Gruchow confirms that, in late December of 2004 or early January 2005, he pointed out to Bronte that there was a clerical error in the guidelines in that "unanticipated absences" was used incorrectly and that "unscheduled absences" was in the contract language and should be in the guidelines.

It is not evident that Bronte had day to day responsibility for determining eligibility for the Safe Days program. Calendar year 2004 was the first year in which employees could qualify for a Safe Year program. Thus, one may reasonably conclude that Bronte had not previously reviewed a Safe Year list for the purpose of determining eligibility for a Safe Year.

Gruchow's testimony establishes that, when the concept of Safe Year was first proposed, "people" were throwing around numbers regarding how many employees might qualify, but that this was just conversation and there was no formal projection. Neither Gruchow's testimony, nor any other record evidence, reasonably indicates that, prior to establishing the February 10, 2005 guidelines, Bronte, or any other Respondent representative, had concluded that the number of employees qualifying for the 2005 Safe Year program were more than expected. Given the absence of proof, Complainants claim that animus may be inferred from the unexpectedly large number of employees who qualified for the Safe Year program is not persuasive.

Bronte has provided a plausible, non-retaliatory explanation for her decision to change the guidelines. Bronte has also provided a plausible non-retaliatory explanation for the timing of her decision to change the guidelines. Notwithstanding Complainants' argument to the contrary, the record does not warrant the conclusion that Bronte's proffered rationale for changing the guidelines is pretextual.

The clear and satisfactory preponderance of the evidence does not establish that Bronte's decision to establish the February 10, 2005 guidelines was motivated, in any part, by animus toward the lawful concerted activities of any employee. Complainants' claim that Respondents have violated Sec. 111.84(1)(a), Stats., by retaliating against employees for exercising their contractual right to earn a Safe Year is without merit.

Conclusion

For the reasons discussed above, Complainants' allegation that Respondents have violated Sec. 111.84(1)(d), Stats., or committed an independent violation of Sec. 111.84(1)(a), Stats., have been dismissed. Complainants have established, by a clear and satisfactory preponderance of the evidence, that Respondents have violated a collective bargaining agreement in violation of Sec. 111.84(1)(e), Stats., and, derivatively, in violation of Sec. 111.84(1)(a), Stats.

In remedy of Respondents' statutory violations and in order to effectuate the purposes of SELRA, Respondents have been ordered to cease and desist from enforcing the February 10, 2005 Safe Days program guidelines in violation of the 2003-2005 Local Agreement between CWC and Local 634 and to make the employees represented by Local 634 whole for all Safe Days/Safe Years lost as a result of Respondents' enforcement of the

February 10, 2005 Safe Days program guidelines in violation of the 2003-2005 Local Agreement between CWC and Local 634. Additionally, Respondents have been ordered to post an appropriate notice.

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

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/
Coleen A. Burns, Examiner

CAB/gjc
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