

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

**WISCONSIN LAW ENFORCEMENT ASSOCIATION, BRIAN SWITALA and
EDWARD GOTO, Complainants,**

vs.

STATE OF WISCONSIN (UNIVERSITY OF WISCONSIN-MILWAUKEE), Respondent.

Case #5
No. 65004
PP(S)-357

Decision No. 31527-A

Appearances:

David Vergeront, Chief Legal Counsel, Department of Administration, Office of State Employment Relations, P.O. Box 7855, Madison, Wisconsin 53707-7855, appearing on behalf of the State of Wisconsin.

Law Offices of Sally A. Stix, by **Sally A. Stix**, 700 Rayovac Drive, Suite 117, Madison, WI 53711, appearing on behalf of the Wisconsin Law Enforcement Association and Brian Switala.

**FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER DISMISSING COMPLAINT**

Daniel Nielsen, Examiner: On July 28, 2005, the Wisconsin Law Enforcement Association and Brian Switala filed a complaint of unfair labor practices against the University of Wisconsin-Milwaukee, asserting that the University had interfered with the Association's right to provide representation to the law enforcement personnel of the University, and had coerced employees to forgo representation in investigatory interviews where discipline might reasonably be expected to result from the interview, and thereby violated the provisions of the State Employment Labor Relations Act, Section 111.80, Stats. ("SELRA"). The Commission appointed Daniel Nielsen, an Examiner on its staff, to conduct a hearing and make and issue appropriate Findings of Fact, Conclusions of Law and Orders.

Dec. No. 31527-A

Hearings were held on the complaint on February 21 and May 3, at the University campus in Milwaukee, and on June 19, 2006 at the Commission's offices in Madison, Wisconsin. The hearings were transcribed and the last of the transcripts was received on June 30. The parties thereafter filed written arguments.

On June 8, 2007, while this matter was still pending, the Commission issued its Order on Review in Case 668, No. 64618, PP(S)-352, WLEA and Stephen Maeder v. WSEU and the State of Wisconsin, Dec. No. 31397-C (WERC, 6/8/07), wherein it concluded, inter alia, that as a matter of law the WSEU continued as the exclusive bargaining representative for the employees at issue in this case during the times of the alleged unfair labor practices brought by WLEA. The Examiner thereafter contacted the parties and invited comment on the implications of that case for the proper disposition of this matter. The parties submitted written arguments, the last of which was received on July 21, whereupon the record was closed.

Now, having reviewed the testimony, the exhibits, the arguments of the parties, and the record as a whole, and being fully advised in the premises, the Examiner makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The Complainants, Brian Switala and Edward Goto, (hereinafter referred to as Switala and Goto) are employed as police officers by the University of Wisconsin-Milwaukee.
2. The Complainant Wisconsin Law Enforcement Association (hereinafter referred to as either the WLEA or the Association) is a labor organization, maintaining its offices in care of Attorney Sally Stix, 700 Rayovac Drive, Suite 117, Madison, Wisconsin, 53711.
3. The Respondent, University of Wisconsin-Milwaukee (hereinafter referred to variously as the University, UWM or the Respondent) is an institution of higher education operated by the State of Wisconsin, under the direction and control of the Board of Regents. Shannon Bradbury is UWM's Labor Relations Coordinator.
4. Labor relations at UWM are relatively autonomous as to disciplinary matters and grievance processing. Collective bargaining and matters of concern beyond the campus level are coordinated through the labor relations office of the University System, and the Office of State Employment Relations (OSER). Jason Beier is the UW System's labor relations specialist.
5. As part of its operations, the University maintains a police department. At the times relevant to this complaint, Pamela Hodermann was the Chief of the UWM Police, Linda Swenson was a Lieutenant, and Brenda Brister-Cooper, James Learman, Craig Martinez and Arthur Koch were Sergeants.

6. Police officers in the University of Wisconsin system were, prior to March 1, 2005, members of a collective bargaining unit represented by the Wisconsin State Employees Union, Council 24, AFSCME, AFL-CIO (hereinafter referred to as WSEU).

7. In October of 2004, the WLEA petitioned for an election in the Law Enforcement Unit (LE Unit) then-represented by WSEU, including police officers at the various UW campuses.

8. The election campaign was discussed among officers at the campus level during open discussions following roll calls. Although Brian Switala favored the WLEA, he did not assume a role of open advocacy, instead limiting himself to answering questions posed by other officers. At times as he answered questions, Sergeant Brenda Brister-Cooper was also present in the room.

9. A mail ballot was conducted by the Wisconsin Employment Relations Commission. Ballots were sent to eligible voters on February 4, 2005, and were counted by WERC personnel on February 25. WLEA received 499 votes to 303 votes for the WSEU. Three days later, WSEU Executive Director Marty Biel sent a letter to Karen Timberlake, Director of the Office of State Employee Relations, advising her that WSEU did not intend to challenge the election results. He went on to say:

Accordingly, AFSCME Council 24 hereby disclaims interest in the Law Enforcement Unit. The collective bargaining agreement between AFSCME Council 24 and the State which has been extended, should be considered null and void. All pending grievances should be considered withdrawn, including those set for arbitration. We will also withdraw all pending unfair labor practices involving this Unit.

. . .

10. On March 1, the day after Biel's letter to Timberlake, the news of WSEU's disclaimer of interest, voiding of the contract, and withdrawal of all grievances and unfair labor practices was passed on to all state agencies employing members of the LE Unit, including UWM.

11. The WERC did not certify the results of the election, nor certify WLEA as the exclusive bargaining representative for the LE Unit, until March 10, 2005.

12. On March 3, prior to the certification of the election results by the WERC, an investigatory interview was held at the University of Wisconsin-Milwaukee Police Department involving Officer Switala. The schedule for the interview had been set the week before. Switala notified Stan Yasaitis, the long time WSEU Steward, of the interview, and asked that he be present to provide representation. Officer Switala also arranged for WLEA President Glen Jones, a State Trooper, to come to the Department for the interview.

13. The interview was scheduled to begin at 3:15 p.m. When Yasaitis arrived, Sergeant James Learman advised him that Chief Hodermann had said no Union representatives could participate in the interview. Yasaitis spoke directly to Hodermann, who said that Shannon Bradbury had issued the directive. The two of them called Bradbury. Bradbury explained that she had received an e-mail from WSEU disclaiming all representational interest in the LE Unit, and withdrawing all pending matters. Yasaitis pointed out that all employees were entitled to representation, and Bradbury agreed that he could participate as an individual representative, in his capacity as a licensed attorney.

14. Yasaitis spoke with Switala, and told him that the University would not allow him to be present as a Union representative, but would allow him to provide representation as an individual representative. Switala insisted that he wanted someone present as a Union representative, and declined to have Yasaitis represent him individually, whereupon Yasaitis left. Switala called Glen Jones, who said he was running about ten minutes late, so Switala requested a delay in the investigatory interview to allow for Jones' arrival. Hodermann had no idea who Jones was, and contacted Bradbury, who said she had never heard of him, had not received notice from WLEA or the State that Jones was a Union representative, and had not received notice that WLEA had any official standing. Bradbury advised Hodermann to proceed with the interview, without waiting for Jones. The interview proceeded without Switala having representation. As a result of the underlying incident, Switala was assessed a letter of reprimand for going directly through the prosecutor to reschedule a court appearance in order to accommodate a vacation, rather than going through the Department. Switala did not contest the reprimand.

15. At the end of the day on March 3, OSER notified affected agencies that Glen Jones had been designated as the interim President of the WLEA, and that the labor organization would hold its organizational meeting on March 26th. OSER named Jill Thomas as the State's Chief Spokesperson for negotiations with WLEA.

16. In early March, Jones met with Jill Thomas and discussed the transition to WLEA. Among other things, they discussed the fact that State Patrol stewards should be used until stewards were named for the University campuses, Capitol Police and DOT.

17. WLEA held its initial organizing meeting on March 26. It structured itself as three locals – Local 1, representing State Patrol Officers; Local 2, representing University and State Capitol Police; and Local 3, representing DOT Customer Service Representatives. Glen Jones was elected President of WLEA, and President of Local 1. Mike Sacco, a police officer at UW-Whitewater, was elected President of Local 2.

18. Following the WLEA's organizational meeting, the parties scheduled initial bargaining sessions to discuss a new collective bargaining agreement. The first of these sessions took place in May.

19. From March through the end of July, the University campuses had difficulty in obtaining Union representatives to be present at investigatory interviews for officers. While Local 1 was relatively highly organized among the troopers from the point at which WLEA assumed representational duties, Local 2 took longer to organize its operations among the university police.

20. On June 21, Glen Jones sent an e-mail to State agencies, forwarding a list of Officers and Stewards for WLEA Local 1. The cover message said:

Here is the Local 1 Officer and Steward listings. We are in the process of developing stewards for the other two Locals now, but we have no objections to the State Patrol stewards being used to assist the other agencies. We also anticipate developing more Local 1 stewards once the training is held.

I believe UW stewards requests are already going through Local 2 President Mike Sacco.

OSER forwarded the list to the campuses, with instructions that they go through Jones and the State Patrol to secure stewards. Bradbury was not advised of Jones' comment that he believed UW steward requests were going through Mike Sacco.

21. In early July, Local 2 President Mike Sacco contacted Shannon Bradbury. He introduced himself and told Bradbury that Brian Switala had been selected as a member of the WLEA bargaining team for the new collective bargaining agreement. He asked Bradbury to contact Chief Hodermann and help smooth the process of releasing Switala from duty so that he could participate in bargaining. Bradbury did so.

22. On July 7, Brian Switala was notified of an investigatory interview concerning his work on July 4th. He asked that Glen Jones be assigned as his Union representative. Jones did represent Switala. In the interview, Switala defended himself on the grounds that he had followed the orders of Sergeant Brenda Brister-Cooper in working a parade on that day. The Department investigated further and concluded that Brister-Cooper, and not Switala, was guilty of misconduct. Charges against Switala were withdrawn, and Brister-Cooper was terminated.

23. On July 16, Sergeant Craig Martinez sent an e-mail to Officer Edward Goto, advising him that a pre-disciplinary meeting needed to be scheduled regarding a vehicle issue. He asked Goto to let him know if he wanted a Union Representative present. Goto responded that he wanted either Mike Sacco or Jim Heller. Martinez replied: "Sorry, Ed you are not entitled to choose a representative. I need to contact State Patrol District #2. They will assign representation for you." Lt. Swenson followed up with Varla Bishop of the State Patrol, requesting a steward from the Local 1 list of stewards. Inspector Anne Maxson of the State Patrol was assigned as Goto's steward, and represented him at the investigatory interview on July 28.

24. At the end of July, Mike Sacco and Shannon Bradbury exchanged e-mails regarding Sacco's belief that the University was evading him in scheduling disciplinary meetings:

Shannon,

Can you please explain why the administration at the UW-Milwaukee Police Department refuses to contact me reference any discipline or union concerns involving union members. You and I had a conversation not to [sic] long ago, reference Brian Switala, where I informed you that, being the President of Local 2, I expected to be contacted regarding ALL union matters. I also informed you that Glen Jones was not to be contacted. For all union matters you MUST contact me. There are no exceptions. I have been informed by police personnel that the police administration has stated that they will not contact or work with me on any union matters, and that they will only work with Glen Jones. Unfortunately, the State, UW-Milwaukee or Police Administration, does not dictate how this union will be run. That is our job. If this continues, a grievance may be filed or possibly an unfair labor practice will be pursued.

Why is it so hard to work together? This lack of respect for WLEA is unacceptable. As we all now know, we DO have a contract that is in effect and it is time that the State and your University live up to it.

Please respond to this email by July 29th or I will bring this matter to a higher level.

Sincerely, Mike Sacco
WLEA, Local 2 President

Bradbury's response denied that Sacco or any WLEA representative had told her to go only through him and to avoid working through Glen Jones:

Mike:

This is the first that I have heard that the administration of the UWM University Police has "refused" to contact you. It is also the first that I have heard about being "informed" that you expected to be called on every matter or that Glen Jones was *not* to be contacted. As a matter of fact, UWM *was instructed* to call Glen Jones when your union was formed a few months ago and we were given his Email address so as to do so. We haven't received any clear guidance from the WLEA to the contrary since.

The employer may not "dictate" how your union will be run, but neither do you dictate how UWM administration will manage the Department. When the UWM University Police requires the presence of a WLEA grievance representative, they will make a concerted effort to find one, as I am sure that you want them to do. I might point out that your name and contact information is *not listed anywhere* on the stewards and officers list we received, but Mr. Jones is listed as an appropriate steward available in this area.

I have no sense that it will be particularly hard to work together, but I do expect reasonable, civil and clear communications to ensure that this will continue to be possible.

Shannon B. Bradbury
Labor Relations Coordinator
Department of Human Resources, UWM

Sacco replied, reiterating his claim that he had told her to go through him for all union business, and expressing the opinion that the University was ignoring its contractual and legal obligations:

Shannon,

I have been informed by officers at UW-Milwaukee that the administration there is fully aware that I am to be contacted. Officers have been told that the administration refuses to work with me, thus will not be contacting me. Also, I informed you when we talked reference Brian Switala being on the Bargaining Team, that I was to be contacted reference ALL union matters. I guess you are right, I was not clear and did not define ALL to mean all disciplines and grievances or potential grievances. I thought that was implied, and for that I am sorry. If you remember, when we talked, you stated you had only been given Glen's info. At that time, I explained when I wanted to be contacted and that my info was located at our web page.

Shannon, I too expect reasonable and civil communications no matter if it is me being dealt with or officers at your police department I do not take kindly to the possible 4 Weingarten violations that your police department may have committed in the last several months Not to mention the 2 that have occurred over the last several days. How many times do Glen and I have to be civil until this administration stops these violations?

You are very correct that WLEA can not dictate how to run the department. We are not trying to run this department or any university department. We are only trying to guarantee our rights that are afforded us under law and the contract, which you choose to ignore, is in effect.

I truly want to work with you and every other HR and police department in the system. That is what Glen and I have been trying to do. If you want to continue these conflicts, we have no problem fighting them in court, in the respective Chancellors office or the Governors office.

I am sorry that you have misconstrued my honesty and straightforwardness as being unreasonable and uncivilized, but unfortunately, I don't see how we are going to be able to accomplish anything if you and systems ignore the commissioners ruling. The whole crutch [sic] of our debate hinges around the contract. Once we can stop arguing about that, maybe we can accomplish something.

With all this said, I assure you that I will do my part to be civil, and hold my people accountable, will you?

Sincerely,
Mike Sacco
WLEA, Local 2 President

25. On July 28, the instant complaint was filed, alleging that the University had committed unfair labor practices by refusing to allow Yasaitis or Jones to be present as a Union Representative at Switala's March 3rd investigatory interview, retaliating against him by giving him a negative performance evaluation, and by bringing charges against him in July for his work at the parade on July 4th. The complaint was subsequently amended to add allegations concerning the University's failure to schedule the investigatory interview with Officer Goto through Mike Sacco, as well as an allegation that Officer Craig Rafferty was coerced into proceeding with an investigatory interview without representation.

26. On August 1st, Jill Thomas, Jason Beier, Glen Jones and Jim Heller met to discuss, among other things, the difficulties in obtaining stewards for Local 2 employees. They agreed that the e-mail advising the affected officer of the investigatory interview should be copied to Mike Sacco and Brian Switala on behalf of the Union, and to Varla Bishop at the State Patrol, and the Police Chiefs at UW-Whitewater and Oshkosh, whose officers were the most likely to be assigned as stewards. After this agreement was publicized to the campuses, the agreed upon procedure was followed in all cases.

27. In February, 2006, Mike Sacco distributed a list of available Local 2 stewards for University and Capitol Police investigations and grievances.

28. Hearings on the instant complaint were conducted on February 21, May 3 and June 19, 2006. Through a combination of withdrawals, settlement and dismissals, the allegations of the complaint were narrowed to the March 3rd investigatory interview, the allegation of retaliation against Switala in the form of the reprimand following the March interview, and the allegation that the State interfered with the rights of Goto and WLEA in failing to schedule the July 28 investigatory interview through Sacco.

29. In a separate proceeding, a complaint of unfair labor practices was brought against the State and the WSEU over the disavowal of the contract, and withdrawal of pending grievances and complaint cases. The Commission's Decision in WLEA and Stephen Maeder v. WSEU and the State of Wisconsin, Dec. No. 31397-C (WERC, 6/8/07) [hereinafter cited as Maeder] concluded as a matter of law that the WSEU's disavowal of representation on March 10, 2005 was legally ineffective, and that the WLEA did not assume the rights and responsibilities of exclusive bargaining representative for the LE unit until July 1, 2005:

3. The policies and purposes of SELRA, taken as a whole, required Respondent WSEU, under the circumstances present here, to maintain its duties and rights as exclusive representative of the LE bargaining unit until the fiscal year/biennium ended on June 30, 2005, at which point WLEA assumed those duties and responsibilities. [Dec. No. 31397-C, at page 4].

30. The collective bargaining agreement between the State and the WSEU contained, inter alia, provisions for the Union to name grievance representatives for the various bargaining units, including the LE unit, and to provide those names to the Employer. The agreement also contained a provision that entitled employees to the presence of one of these designated grievance representatives at any investigatory interview. Stan Yasaitis was one of the WSEU's named grievance representatives for the LE unit at the UWM campus.

31. By offering to have Stan Yasaitis represent Brian Switala in the investigatory interview on March 3, 2005, UWM acted in a manner consistent with the status quo established by the expired collective bargaining agreement between the State and the WSEU.

32. In the period between the certification of WLEA as the exclusive bargaining representative for University police officers, and the August 1, 2005 agreement between Jones, Heller, Beier and Thomas, there was no clear request from Local 2 of the WLEA that all requests for Union representation involving campus police be directed to Mike Sacco in the first instance.

33. UWM did not circumvent Sacco or the WLEA's internal structure of operations in scheduling Inspector Ann Maxson as the steward for the investigatory interview with Ed Goto on July 28.

34. By answering fellow officers' questions concerning the representation election, Brian Switala was engaged in the protected concerted activity of supporting the efforts of WLEA to supplant the WSEU as the bargaining representative for the Law Enforcement Unit.

35. Officers and agents of UWM were aware of Brian Switala's protected concerted activity in supporting the efforts of WLEA to supplant the WSEU as the bargaining representative for the Law Enforcement Unit.

36. The management of UWM and its campus Police Department were not hostile to Brian Switala's activities on behalf of WLEA.

37. The investigatory interview scheduled for Switala in March of 2005 was unrelated to his activities on behalf of WLEA.

On the basis of the above and foregoing Finding of Fact, the Examiner makes the following Conclusions of Law.

CONCLUSIONS OF LAW

1. Brian Switala and Edward Goto are "employees" within the meaning of Section 111.81(7), Stats.

2. The University of Wisconsin-Milwaukee is a subdivision of the State of Wisconsin, and is an "employer" within the meaning of Section 111.81(8), Stats.

3. The Wisconsin Law Enforcement Association is a "labor organization" within the meaning of Section 111.81(12), Stats.

4. By the acts described in Findings of Fact 6 through 38, the State of Wisconsin, its officers and agents, did not commit unfair labor practices within the meaning of Section 111.84(1), Stats.

5. By the acts described in Findings of Fact 6 through 38, the University of Wisconsin-Milwaukee, its officers and agents, did not commit unfair labor practices within the meaning of Section 111.84(1), Stats.

On the basis of the above and foregoing Finding of Fact and Conclusions of Law, the Examiner makes and issues the following Order.

ORDER

That the instant complaint of unfair labor practices be, and the same hereby is, dismissed in its entirety.

Dated at Racine, Wisconsin, this 18th day of October, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel J. Nielsen /s/

Daniel J. Nielsen, Examiner

STATE OF WISCONSIN (UW-MILWAUKEE)

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER DISMISSING COMPLAINT

This case centers on the University's alleged denial of Weingarten rights to the members of the LE bargaining unit in the wake of the switchover in bargaining representatives from WSEU to WLEA. There are two instances cited. The first is the investigatory interview with Brian Switala on March 3, 2005, the day after the WSEU purported to disclaim its representational interest in the bargaining unit. The Commission had not yet certified WLEA as the exclusive bargaining representative. Switala asked for representation, and arranged for the WSEU Steward, Stan Yasaitis, and the WLEA President, Glen Jones, to be present. The employer refused to treat either entity – WSEU or WLEA – as an exclusive representative, and instead offered to let Switala be represented in the interview by Yasaitis, who was also a licensed attorney. Yasaitis was willing to proceed on that basis, but Switala declined, again requesting union representation. The employer refused to treat either organization as the union for the LE Unit at that point, and Switala proceeded with the interview without representation. He subsequently received a letter of reprimand for the issue that led to the interview.

The second instance involves an investigatory interview with Officer Edward Goto. On July 16, 2005, Goto was notified of an interview by Sergeant Craig Martinez. He advised Martinez that he wanted Union representation, “preferably either Mike Sacco or Jim Heller.” Martinez told him he wasn’t entitled to pick a specific representative, and that one would have to be arranged through State Patrol District #2. A steward from WLEA Local 1 was assigned and represented him in the interview. Goto subsequently received a reprimand for the issues that triggered the interview.

A. Parties’ Arguments on the Switala Investigatory Interview

The Complainant asserts that the University violated Switala’s right to Union representation. Shannon Bradbury stated that she would not allow any Union Representative to be present for his investigatory interview. Perhaps the University was confused by WSEU’s claim to have withdrawn from representation, but that did not render Switala unrepresented. The University knew the LE Unit had been represented by WSEU and had voted for representation by WLEA. While they may have been unsure which one should be in the interview, they had absolutely no basis to conclude that the LE Unit was ever *unrepresented*. In light of the Commission’s decision that WSEU remained the bargaining representative until June 30, 2005, it is clear that their refusal to let Yasaitis attend the meeting as a WSEU Union Steward violated both the collective bargaining agreement then in place and Switala’s Weingarten rights. Their offer to have Yasaitis present in a different role – that of attorney – does not cure the violation. It was not the University’s place to determine Yasaitis’s role, and Officer Switala reasonably rejected their effort to do so.

The Complainant further notes that Officer Switala had no history of discipline prior to his activities as a highly visible advocate for WLEA, but was almost immediately scheduled for a disciplinary investigation when WLEA won the contested election for the LE Unit. A number of investigatory interviews followed in the months after the election. As there is no evidence of employees who are not Union activists being similarly harassed, the Complainant argues that the Examiner should find that the application of disciplinary procedures to Officer Switala was in retaliation for his Union activities.

The Respondent argues that it cannot be held liable for its inability to predict the future. The mid-contract replacement of one bargaining representative with another, and the disavowal of representation status and responsibilities by the incumbent, were both completely unprecedented. Yasaitis was present as a steward for a union that expressly disclaimed any representational status. Jones was coming in as a representative of a union that had not been certified and had no apparent legal standing. The State's duty is to deal only with the exclusive bargaining representative. Two years later, in the wake of the Commission's decision overruling its own Examiner, it is apparent that WSEU continued as exclusive bargaining representative, but on March 3, 2005 it was not possible to say with any certainty who held that status. The University tried to act fairly, giving Mr. Switala the substantive right to representation while not conferring exclusive status on either organization, by offering to have Yasaitis present as Switala's attorney rather than his Union steward. The University's actions have to be judged based on the totality of the circumstances, and that includes what was known or could have been known at the time. Given the impossibility of knowing which organization, if any, had the right to represent employees in the unprecedented interregnum between WSEU's disavowal and the certification of WLEA, the University should be found to have struck an appropriate balance between the various courses of action open to it, all of which had the potential to interfere with Switala's protected rights.

The University points out that, under the Commission's decision in Maeder, the WSEU continued as the exclusive bargaining representative. On March 3, 2005, the University proposed to proceed with Stan Yasaitis present to represent Officer Switala. Yasaitis was the WSEU steward and the designated grievance representative under the labor agreement. How is it possible, the University asks, that this was an unfair labor practice? Yasaitis, whether he was labeled Union representative or attorney, was the same person, serving the same function, ready, willing and able to represent Switala. It was Switala who invited Yasaitis to the meeting to represent him, and then refused to have Yasaitis present unless he was labeled a Union steward. The officer's Weingarten rights are satisfied by the opportunity to be represented by an experienced and trained union representative. That is what he was given.

As for the claim that the University somehow retaliated against Switala for his involvement with WLEA, the Respondent argues that it had no knowledge of his involvement and no hostility to his involvement, and that there is no evidence of any adverse action against him based on his Union activities. His "activism" was apparently limited to neutrally answering some other officers' questions when a sergeant may or may not have been in the

room. There is no proof that any member of management had any idea that he was involved with WLEA. Neither is there evidence that management had hostility to the efforts of WLEA to replace WSEU, or had any opinion one way or the other. Nor is there evidence to suggest a causal link between Switala's claimed union activity and the scheduling of the investigatory interview. On the contrary, Officer Switala's investigatory interview was motivated by evidence that he had violated procedures for rescheduling court appearances. The lack of prior investigatory interviews was due to the lack of evidence of any prior violations. There is simply no evidence whatsoever of illegal retaliation, and that allegation must be dismissed.

B. Parties' Arguments on the Goto Investigatory Interview

The Complainant asserts that the University interfered with its right to designate grievance representatives and provide representation to its members when it denied Edward Goto's request to have either Sacco or Heller represent him, and instead arranged for a State Patrol officer to be present. The State and Bradbury had been informed by Sacco that all Local 2 issues should be directed to him. This reinforced an earlier e-mail from Jones noting that campuses were referring disciplinary matters to Sacco. There was simply no basis on which the Department could have concluded that it could unilaterally bypass Local 2 in the designation of grievance representatives and instead follow a procedure of its own creation. This was a blatant violation both of Goto's right to be represented, and of the Union's right to determine its own structure and affairs.

The Respondent argues that any confusion or difficulty in the identification of grievance representatives in the summer of 2005 was due to the WLEA's difficulties in organizing itself as a functioning labor organization. The union's organizational meeting wasn't held until nearly a month after the election. Agencies were clearly instructed to go through Glen Jones to secure grievance representatives. Through late June, Jones continued to tell agencies to go through him and to use State Troopers as grievance representatives: "We are in the process of developing stewards for the other two Locals now, but we have no objections to the State Patrol stewards being used to assist the other agencies..." In that same June 21st e-mail, which provided a list of stewards drawn exclusively from the State Patrol, Jones said "I believe UW steward requests are already going through Local 2 President Mike Sacco." That statement says nothing about going through Sacco exclusively. It states Jones' opinion about how things were proceeding generally, but no reasonable person could read this as some sort of mandate not to use the stewards listed in the message as available grievance representatives.

Nor, contrary to Sacco's claims, was any management representative ever informed that they should exclusively go through Sacco, until an e-mail to that effect was sent on July 29th. Glen Jones testified that he was upset about the Goto interview only because he was not contacted. If, as the Union now claims, Sacco was the sole contact, why would Jones be upset at not being contacted? Why would Jones have sent his June 21st e-mail, indicating that agencies could continue to use State Patrol stewards? Why would Jones have agreed to serve

as a grievance representative for Brian Switala in July? Most importantly, why would the University care if it went through the State Patrol or through Sacco to get a grievance representative? Given the tremendous difficulty in obtaining grievance representatives from WLEA in the spring and summer of 2005, a new system dedicated solely to UW system grievances should have been a welcome development for management. They had no reason to resist a change to going through Sacco exclusively. The great weight of the evidence is that once the University was advised that they should do so, they immediately started referring all Local 2 matters to Mike Sacco. It follows that they are not guilty of any unfair labor practices for referrals to other representatives before the Union designated Sacco.

C. Discussion

1. The March 3rd Investigatory Interview with Switala

As part of their right to engage in concerted activities for mutual aid and protection, employees have a right to the assistance of a union representative in investigatory interviews, when they have a reasonable belief that the interview may lead to discipline. The right is not self-triggering – it arises upon request. Further, the right may be shaped and qualified by the terms of a collective bargaining agreement.¹ The contract between the State of Wisconsin and the Wisconsin State Employees Union contains just such qualifications, at Article IV, wherein it provides a contractual right to such representation, and specifies that the choice of union representative shall be made from a list of grievance representatives who are members of the bargaining unit.

As of February 28, 2005, in reaction to its election loss, the WSEU purported to have disclaimed its representational interest in the Law Enforcement Unit and voided its collective bargaining agreement. In Maeder, the principle case flowing from that action, the Commission determined that the WSEU could not, as a matter of law, disclaim its representational status until the end of the budget biennium. Thus, although it was not known to the State and the WLEA at that time, the WSEU continued to represent the bargaining unit when the Switala investigatory interview was conducted on March 3rd. The University, believing that WSEU had disclaimed and knowing that WLEA had not yet been certified, refused to allow a representative of either union qua union to represent Switala, but offered to proceed with Stan Yasaitis, the WSEU Steward that Switala had asked to represent him, so long as Yasaitis was characterized as an attorney, rather than as a union representative.

This case was heard prior to the Commission's decision in Maeder. Originally the WLEA complained that Switala should have been allowed representation by Glen Jones, the WLEA representative. In response to the Examiner's invitation for arguments in light of Maeder, the WLEA now focuses on the University's refusal to allow a WSEU representative to Switala. Given the odd facts giving rise to this case, I conclude that the University abided by the status quo under the collective bargaining agreement, albeit inadvertently, by offering to have Stan Yasaitis participate as Switala's representative, and thus did not violate SELRA.

¹ See WSEU v. WERC, DEC. NO. 26739-C (DANE CO. CIR. CT., 4/22/93) and cases cited therein.

The contract provided for a union representative, and it also specified that the union representative would be drawn from a list of bargaining unit names provided by the Union. Yasaitis was on that list, and Switala was offered the opportunity to have Yasaitis represent him. This was not a grievance filing or a step in the grievance procedure, where the characterization of Yasaitis as attorney rather than union representative might carry with it some substantive limitation on his ability to assist Switala, or some actual effect on Switala's rights. However he was characterized by the employer, Yasaitis was a trained and experienced union representative who could have provided guidance and counsel to Switala in the interview. Switala knew of Yasaitis's background, had called on him for grievance representation in the past, and had specifically requested his presence for the purpose of providing representation during this interview.²

2. The July 28th Investigatory Interview with Goto

The second Weingarten issue concerns the Edward Goto interview in July, and is far more straightforward. Goto asked to be represented by Mike Sacco or Jim Heller, but the University instead arranged to have a State Patrol steward represent him. The Union claims that the State knew or should have known that Mike Sacco was the only authorized WLEA representative for scheduling investigative interviews. The State asserts that it was never told this, and on the contrary had been told to go through State Patrol stewards to secure union representatives for disciplinary interviews. This is purely a question of fact. If the State was ignoring and evading the Union's internal structure, it was interfering with the Union and with individual employee rights to representation. If, on the other hand, the State was merely doing what the Union had asked, it cannot be liable under SELRA for the labor organization's own internal confusion.

I find that the record does not show that the WLEA had provided clear notice to the University that it should go through Sacco. The evidence that it had such notice consists of Sacco's recollection that he told Beier and Bradbury this, and the June e-mail sent by Jones, which notes his belief that UW campuses were already using Sacco to arrange representatives for disciplinary interviews. However, the e-mail does not state that Sacco is the exclusive venue for representation at campuses, and if that was the position of the WLEA, it made little sense to send a list of State Patrol stewards to the University System's labor relations contact, Jason Beier, who is the first addressee on Jones' e-mail. A reasonable person receiving Jones' e-mail could have read it as permission, and indeed encouragement, to use State Patrol stewards until the WLEA completed its "process of developing stewards for the other two Locals."

² I do not suggest that an employer could, in denigration of the Union's role as exclusive bargaining representative, refuse to recognize the status of union stewards as union stewards but seek to evade liability under Chapter 111 by allowing the same individuals to function under some different label. WLEA has no standing to raise that issue, and the WSEU is not a party to this case. Thus I need not reach that question.

While Jones' e-mail could be read as meaning that campuses should go through State Patrol stewards, that is a general conclusion. If Sacco directly informed Jason Beier and Shannon Bradbury that steward requests should go through him as President of Local 2, that would effectively negate any inference they might have drawn from the e-mail, and obligated them instead to respect the internal structure of the Union. On review of the record as a whole, however, I conclude that Sacco's recollection that he had such direct discussions is faulty. Both Bradbury and Beier denied that Sacco ever told them to go through him, and it makes very little sense that they would have ignored such a request. Campus police departments were having great difficulty in scheduling investigatory interviews, and if Sacco had offered to be the clearinghouse for such scheduling, it would have been an advantage for the labor relations officers at the campus level. Moreover, by Sacco's own account, his contact with Bradbury, prior to their snippy exchange of e-mails in late July, was limited to an apparently cordial telephone conversation about getting Switala released for bargaining. After the e-mail exchange she may have had some motive to avoid Sacco, but before the exchange there was little reason to think that she would seek to circumvent him.

Beyond Bradbury's lack of apparent motive to avoid Sacco, I am persuaded that there was not a general understanding that Sacco was the exclusive grievance representative, even within WLEA. Glen Jones was the President of WLEA, and Brian Switala was the Vice President of Local 2. Yet when a pre-disciplinary meeting was scheduled with Switala in July, he requested Jones as his representative, and Jones acted in that capacity at the interview. This was within a few weeks of Sacco's claimed directive that all representation matters should go only through him. If that was, in fact, Local 2's policy, it seems likely that the WLEA President and the Local 2 Vice President would have known of it.

It may well have been the case that Sacco intended that all Local 2 matters go only through him beginning in the summer of 2005, but I find that he did not succeed in clearly communicating that to others, including the University's labor relations personnel. Given that, and in light of Glen Jones's June 21st e-mail apparently giving permission to agencies, including the University, to use State Patrol stewards for pre-disciplinary meetings and interviews, I find that UWM did not commit an unfair labor practice by using Inspector Ann Maxson as the steward for Edward Goto's interview on July 28th.

3. The Alleged Retaliation Against Switala

Finally, the WLEA asserts that the University retaliated against Switala for his activism on behalf of the Union. It concludes that this is the case because he had no history of discipline before the contested representation election, but had several investigatory interviews and a reprimand in the months immediately after WLEA's victory. In order to establish illegal retaliation under Sec. 111.80, the complainant must prove the following four elements by a clear and convincing preponderance of the evidence: (1) that a state employee engaged in lawful concerted activity; (2) that the employer, by its officers or agents, was aware of said activity; (3) that the employer was hostile to the lawful concerted activity; and (4) that the employer took action against the state employee based at least in part upon such hostility.³

³ EMPLOYMENT RELATIONS DEPT. V. WERC, 122 Wis.2d 132 (1985).

In this case, the evidence of both significant concerted activity and employer knowledge of the activity are scant. By Switala's own account, he did not adopt an advocacy role on behalf of WLEA during the campaign. He restricted himself to answering questions posed by other officers during open discussion sessions. The only management observer of this very limited activity was Sergeant Brister-Cooper, whom Switala recalled may have been present in the squad room during some of these sessions. For purposes of analysis, however, I conclude that given the relatively small size of the University police force, and the duration of the campaign, it is more likely than not that the management of the Department became aware that Switala was in favor of the WLEA in the contest with WSEU. However, I find no evidence to support the allegations that UWM was hostile to Switala as a result of this activity, or that the scheduling of pre-disciplinary hearings was an act of retaliation against him. There is no evidence that the University had a particular stake in the outcome of the representation contest between WLEA and WSEU, or favored one organization over the other. Nor does it appear that the charges that underlay the pre-disciplinary interviews were pretexts for retaliation. Officer Switala did not contest the reprimand for rescheduling his court appearance. That charge was based on what appeared to be a violation of an established rule. The July pre-disciplinary hearing was apparently based on false charges, but when that became clear to the University, the charges were dismissed, along with the sergeant who brought the charges. That is actively inconsistent with a management plan to harass or punish Officer Switala. Nor is it the case, contrary to the Union's argument, that Switala was singled out and other employees were not scheduled for investigatory interviews. At a minimum, Officers Goto and Rafferty were also subject to investigatory interviews in the months following the WLEA victory, and there is no allegation that they were visible WLEA partisans.

There is a weak preponderance of evidence establishing the first two factors for finding retaliation – protected activity and employer knowledge – but essentially no evidence of the other two factors establishing illegal animus. Accordingly I conclude that the record does not support the claim of retaliation against Switala. In light of the similar conclusions regarding the Weingarten claims, I have dismissed the complaint in its entirety.

Dated at Racine, Wisconsin, this 18th day of October, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel J. Nielsen /s/

Daniel J. Nielsen, Examiner

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