STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**THOMAS CORCORAN,** Complainant,

vs.

**STATE OF WISCONSIN,**
**DEPARTMENT OF CORRECTIONS,** Respondents.

Case 680
No. 65137
PP(S)-362

# Decision No. 31570-B

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**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 Complainant.

**David J. Vergeront,** Chief Legal Counsel, Office of State Employment Relations, State of Wisconsin, 101 East Wilson Street, 4th Floor, P.O. Box 7855, Madison, Wisconsin 53707-7855, appearing on behalf of Respondents.

## FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The procedural background of the above captioned complaint, from its filing on September 13, 2005, through February 15, 2006, is set forth in State of Wisconsin, Dec. No. 31570-A (McLaughlin, 2/06). That decision granted Complainant's motion to amend the complaint captioned above, and postponed a hearing previously set for February 27. Between the issuance of that decision and mid-April, 2006, the parties and I addressed a series of issues concerning rescheduling hearing on PP(S)-362. On March 28, 2006, I issued a decision in Case 664, No. 64426, PP(S)-349, captioned by the Commission as Dec. No. 31272-A. The procedural history of that decision is set forth by State of Wisconsin, Dec. No. 31272-B (WERC, 9/07), in which the Commission addressed each party's appeal of Dec. No. 31272-A.

Hearing on PP(S)-362 was held in Madison, Wisconsin on May 9, May 10 and July 19, 2006. Linda Kuhlman and Heidi Davis filed a transcript of each day of hearing with the Commission by September 12, 2006. In an e-mail dated September 18, 2006, I confirmed the parties' agreement to suspend the briefing schedule pending a mediation effort. The mediation

effort proved unsuccessful and the parties completed a briefing schedule by January 25, 2007. With e-mails dated February 5 and February 7, 2007, I posed a series of questions to the Commission and to the parties regarding the efficiency of having me issue an Examiner decision regarding PP(S)-362 prior to any action on the Commission's part regarding the then-pending appeal of PP(S)-349. After comment from the parties, the Commission noted in an e-mail to the parties dated February 12, 2007 that I should "wait for the WERC's decision in Case 664 before issuing his decision." The Commission issued its decision on September 12, 2007. After e-mail correspondence, I confirmed in an e-mail to the parties dated October 23, 2007, that PP(S)-362 would not be further processed pending negotiations to resolve the matter informally. The status of those negotiations was addressed in various e-mail exchanges in December of 2007 and February of 2008. In an e-mail dated March 24, 2008, Respondent asserted that the negotiations had concluded without success and that PP(S)-362 should be briefed regarding the impact of DEC. NO. 31272-B. This prompted an e-mail exchange culminating in an e-mail from me to the parties dated April 1, 2008, which set a briefing schedule that permitted sufficient time for negotiations to take place. The negotiations proved unsuccessful and the parties filed briefs and a waiver of reply briefs by May 8, 2008.

## FINDINGS OF FACT

1. Wisconsin State Employees Union (WSEU), AFSCME, Council 24, AFL-CIO, is a labor organization which maintains its principal offices at 8033 Excelsior Drive, Suite C, Madison, Wisconsin 53717-1903. Martin Beil is the Executive Director of WSEU.

2. Among its functions, the State of Wisconsin (State) oversees the incarceration, rehabilitation and supervision of persons convicted of crimes. The State performs this function principally through the Department of Corrections (DOC). The current DOC Secretary is Matthew Frank and the current DOC Deputy Secretary is Rick Raemisch. In June of 1999, Jon Litscher was DOC Secretary and Cindy O'Donnell was DOC Deputy Secretary. Within the DOC, the Division of Community Corrections (DCC) is principally concerned with supervising persons on probation or parole from DOC custody. The DCC is administratively structured by region, and maintains an office in Beaver Dam, which is within DCC Region 7. Elmer Karl has been the Beaver Dam Field Supervisor since March of 1998. The immediate supervisory position to Karl is that of Regional Chief of DCC Region 7. From June of 1999 through January of 2003, Allan Kasprzak was Regional Chief of DCC Region 7. The Regional Chief position reports to the positions of Assistant Administrator and Administrator of DCC. At all times relevant to this complaint, William Grosshans was DCC Administrator. Grosshans' immediate supervisor is the DOC Deputy Secretary. DOC and DCC perform employer functions for the State for DOC/DCC employees, but the State's designated agency for collective bargaining representation is the Office of State Employment Relations (OSER), which maintains its principal offices at 101 East Wilson Street, 4th Floor, P.O. Box 7855, Madison, Wisconsin 53707-7855.

3. WSEU Local 2748 represents a bargaining unit of certain professional social service workers employed by the State. The unit consists of roughly three thousand employees

who work out of facilities located throughout the State. Thomas Corcoran, a Probation and Parole Agent in the Beaver Dam office, was elected President of Local 2748 in August of 1996. Karl was the incumbent defeated by Corcoran to become President. Local 2748 uses roughly one-hundred thirty stewards. Corcoran, named Complainant above, resides at 915 Newton Avenue, Waupun, Wisconsin 53963.

4. The State and WSEU are parties to a collective bargaining agreement covering employees in six bargaining units, including that represented by Local 2748, which was in effect by its terms between May 17 and June 30, 2003. The parties extended it after its nominal expiration, and ultimately agreed, no later than mid-2004, to a successor with a term through at least June 30, 2005. This Agreement is referred to below as the Master Agreement and contains the following provisions:

**AGREEMENT**

> The Agreement, made and entered into . . . by and between the State of Wisconsin and its Agencies (hereinafter referred to as the Employer) represented by the Department of Employment Relations; and AFSCME, Council 24, Wisconsin State Employees Union, AFL-CIO, and its appropriately affiliated locals (hereinafter referred to as the Union), as representative of employees employed by the State of Wisconsin . . .

**ARTICLE II**
**RECOGNITION AND UNION SECURITY**

. . .

**Section 5: Union Activity**

**2/5/1** Bargaining unit employees, including Union officers and representatives shall not conduct any Union activity or Union business on State time except as specifically authorized by the provisions of this Agreement. . . .

**Section 6: Union Conventions, Educational Classes and Bargaining Unit Conferences**

. . .

**2/6/9A (PSS)** The number of workdays off for such purposes shall not exceed ten (10) for any one employee in any one calendar year. This time off may be charged to vacation credits, holiday credits, compensatory time or to leave without pay as the employee may designated. Where the nature of the educational class is for professional development, such time may be charged to time off without loss of pay under Article 11/13/2, as the employee may designate. The employee shall

give his/her immediate supervisor at least ten (10) calendar days advance notice of the employee's intention to attend such functions. . . .

**Section 8: Attendance at Local Union Meetings, Monthly Steward Meetings, or Monthly Local Union Executive Board Meetings**

. . .

**2/8/1** Local Union officers and stewards shall be granted time off without pay to attend local Union meetings, monthly steward meetings, and monthly local union executive board meetings, upon ten (10) calendar days advance notice to his/her immediate supervisor. . .

**Section 9: Telephone, Email And Fax Use**

**2/9/1** Existing telephone facilities may be used by local Union officers and stewards for Union business. The location, number and procedure for using telephones shall be mutually agreed to at the first local labor- management meeting. Such use shall not obligate the Employer for the payment of long distance or toll charges. Management will endeavor to respect the confidentiality of phone conversations concerning Union business conducted in accordance with the provisions of this Agreement or a local agreement.

**2/9/2** Where currently no existing practices or local agreements are in place, union use of Employer facsimile machines shall be limited to communication between union and management.

**2/9/3 (BC, T, PSS, SPS, LE)** Local Union officers and stewards may use their existing state assigned Email for conducting Union business only as authorized under the Agreement. Such use shall be in compliance with 2/5/1. No political campaign literature or material detrimental to the Employer or the Union shall be distributed . . . This provision shall expire with the expiration of the 2001-2003 Agreement. . . .

. . .

**ARTICLE IV**
**GRIEVANCE PROCEDURE**

. . .

**SECTION 3: Arbitration Panel Procedures**

. . .

**4/3/10** The decision of the arbitrator will be final and binding . . .

**SECTION 6: Number of Representatives and Jurisdictions**

. . .

**4/6/3** The Union shall designate the jurisdictional area for each grievance representative and his/her alternate. Each jurisdictional area shall have a similar number of employees and shall be limited to a reasonable area to minimize the loss of work time and travel giving consideration for the geographic area, employing unit, work unit, shift schedule and the right and responsibility of the WSEU to represent the employee of the bargaining unit. . . .

**SECTION 8: Processing Grievances**

. . .

**4/8/1** The grievant, including a Union official in a Union grievance, will be permitted a reasonable amount of time without loss of pay to process a grievance from pre-filing through Step Three (including consultation with designated representatives prior to filing a grievance) during his/her regularly scheduled hours of employment. . . .

**4/8/2** Designated grievance representatives will also be permitted a reasonable amount of time without loss of pay to investigate and process grievances from pre-filing through Step Three (including consultations) in their jurisdictional areas during their regularly scheduled hours of employment. . . .

**4/8/4** The designated grievance representative shall be in pay status for said hearing and for reasonable travel time to and from said hearing . . .

. . .

**ARTICLE XV**
**GENERAL**

**SECTION 1: Obligation to Bargain**

**15/1/1** This Agreement represents the entire Agreement of the parties and shall supersede all previous agreements, written or verbal . . .

The Master Agreement provides for certain LMC meetings and states conditions where employees may attend in pay status. The State and WSEU have negotiated a number of understandings which are attached to the Master Agreement as Memoranda of Understanding (MOU) or as Negotiating Notes. Such agreements may be agency-specific and may not have been directly negotiated by OSER representatives. MOU No. 33 deals with Labor Management Cooperation (LMC) activities, and seeks to encourage "collaborative work improvement projects at all levels of state government." Collaborative work efforts are also addressed at MOU No. 9. Negotiating Note No. 70, from the 2003-2005 Master Agreement states:

> Recognizing the caseload nature of Professional Social Services duties, the Employer will take into account allowable steward activities. The Union will make a good faith effort to evenly distribute steward work. This provision does not obligate the Employer to reduce caseload.

A Master Agreement, including MOUs and Negotiating Notes, is the codification of agreements reached in collective bargaining between the State, through OSER, and the WSEU, through its various locals. Once the parties have reached a tentative agreement (TA) on a Master Agreement, the WSEU submits the TA for a ratification vote among its members throughout the State. The ratified TA is then submitted to a legislative committee, the Joint Committee on Employment Relations (JOCER), which votes on approving the TA. When approved, the TA is submitted as a bill to the Legislature, which, if approved, is submitted to the Governor for signature into law. The State and WSEU may also negotiate Local Agreements, which are designed to specify the application of the Master Agreement to local employing entities. Local Agreements are not subject to the ratification process governing a Master Agreement, and are not always negotiated through OSER.

5. Prior to becoming President of Local 2748, Corcoran was an elected member of its bargaining team, serving in that capacity on negotiations in 1995 and in 1997. Those negotiations caused WSEU bargaining team members to miss work. Duties a bargaining team member could not attend to during bargaining were either postponed until the team member returned to work or were covered by other employees, including, when available, those in Limited Term Employment (LTE) positions. For bargaining in 1997 and 1999, the WSEU and the State agreed to use LTEs to cover the work of absent bargaining unit employees, and such coverage was available in the Beaver Dam office. In the negotiations of 1997, the Beaver Dam office had two employees who served on the Local 2748 bargaining team. When those negotiations concluded, DCC ceased certain LTE coverage in the Beaver Dam office.

6. From his assumption of the role of Local 2748 President, Corcoran found it difficult to reconcile the time demands of his WSEU position with and those of his caseload in the Beaver Dam office. This prompted Corcoran to raise concerns to Rick Schwalbach, who was then his immediate supervisor. By January of 1999, those concerns had reached Kasprzak, who attempted to convince his supervisors of the need to cover the absences of WSEU bargaining team members from Beaver Dam and to provide ongoing caseload relief for Corcoran. These concerns were addressed at LMC meetings involving WSEU representatives and DOC administrators.

Early in 1999, Corcoran raised these concerns to Beil. During this period of time, Grosshans voiced to O'Donnell a concern that bargaining unit personnel were providing Agent Basic Training (ABT) for new Probation and Parole Agents. O'Donnell understood his position to be that unit members were not appropriately policing the classroom, that they lacked necessary teaching skills, and that such training should be provided by non-unit employees. She and ultimately Beil understood his position to be that he lacked sufficient Field Supervisor staff to cover such training. O'Donnell communicated these concerns to Litscher.

7. Beil and Litscher discussed labor relations matters on an ongoing basis in 1999. In June of 1999, they drove together to attend the graduation ceremony for certain employees who had completed training at a correctional training center in Oshkosh. Litscher informed Beil of the problems regarding ABT and indicated his willingness to move positions to make it possible for non-unit personnel to provide ABT. Beil responded that the WSEU could be flexible regarding the conversion of agent positions to training positions, and that the WSEU was concerned with caseload relief for Corcoran, as Local 2748 President. The conversation ended with Beil and Litscher agreeing that some type of arrangement should be possible to address their concerns. Within a week of this conversation, Beil and DOC personnel had implemented an understanding that the WSEU would agree that three vacant agent positions would be made into non-unit training positions in return for DCC providing some flexibility to Corcoran in reconciling his WSEU and DCC duties. Beil understood that the flexibility could consist of LTE coverage for Corcoran's caseload while Corcoran was out of the Beaver Dam office and/or case assignment considerations. Beil and Litscher did not specify these points; did not discuss the duration of the arrangement; did not discuss whether the arrangement covered Corcoran or any Local 2748 President; and did not commit the arrangement to writing. This rough understanding is referred to below as the Arrangement, and reflects the parties' presumption that the details necessary to make it work would be handled locally, by Corcoran and his supervisors.

8. Litscher reported the Arrangement to O'Donnell, who understood that the Arrangement required that DOC open the application process to fill the ABT positions to afford unit members a promotional opportunity and that DOC hire an LTE to provide caseload relief for Corcoran to permit him to attend to Local 2748 issues without case duties piling up in his absence. O'Donnell spoke with various DCC administrators, including Grosshans, to implement the Arrangement. Her understanding of the LTE coverage was that the LTE would be expected to cover no more than half of Corcoran's time. The percentage of time Corcoran could not attend to DCC duties would, in her view, vary over time but would balance out to no more than half of his available work time. Her understanding on this point reflected her understanding that an LTE could fill one position for no more than 1043 hours per year, which roughly equates to one-half of a full-time position. Litscher did not communicate this limitation to her. O'Donnell believed the coverage reflected that DCC case duties should not accumulate in Corcoran's absence and that Corcoran played a significant role in LMC type of efforts designed to minimize workplace conflict. Kasprzak shared O'Donnell's understanding of the LTE coverage. Kasprzak informed Karl that Karl should assign Corcoran duties that did not involve ongoing caseload responsibilities. Rather, the duties should reflect non-recurring duties that would not be disrupted

by Corcoran's unpredictable absences. In Kasprzak's and O'Donnell's view, the Arrangement promoted ongoing LMC type efforts that reduced time lost to workplace conflicts.

9. While President of Local 2748, Karl did not serve on the negotiating team or as a steward and did not receive any caseload relief by LTE coverage or duty assignment. His duties as Field Supervisor in the Beaver Dam office required him to cover the duties Corcoran could not attend to due to his absences from the office on labor relations matters. He did not view LTE usage in the Beaver Dam office to be an accommodation for Corcoran, but the means to get office work done, which had the collateral benefit of providing Corcoran relief regarding his DCC duties. As initially implemented, the Arrangement did not relieve Corcoran of all caseload or office based duties and Corcoran advised Karl of the times and reasons for his absences from the Beaver Dam office. As time passed, Karl became convinced that Corcoran was spending increasingly less time at DCC duties. Corcoran's evaluation form for the report period "06/98 Thru 06/99" includes the repeated notation "Completes as time constraints allow. Efforts subsidized by an LTE position due to Bargaining and other Union duties." The evaluation forms for the report period "06/99 Thru 06/00" and for "06/01 Thru 05/02" changed the notation to "Efforts subsidized by an LTE position due to Bargaining and other union activities." Karl signed each evaluation form, and Grosshans signed the one covering June, 1999 through June, 2000. Corcoran's performance of DCC duties became a topic of increasing friction between Karl and Kasprzak and between Karl and Corcoran. By September of 2001, Corcoran had no ongoing caseload duties, and his office-based duties were declining. His absence from the Beaver Dam office spiked when collective bargaining was taking place, but Karl perceived Corcoran to be performing progressively less DCC duties from September of 2001 through September of 2004. Corcoran's relief from caseload responsibilities became an irritant within the Beaver Dam office, prompting the filing of a grievance by unit employees in the Beaver Dam office in September of 2001 concerning Corcoran's release from caseload and other office responsibilities. Karl continued to voice his concerns to his supervisors. On certain caseload reports, Karl would note a "0" next to Corcoran's employee number, but ceased this practice when Kasprzak informed Karl that it was an embarrassment. On a relatively frequent basis, Karl attempted to assign Corcoran regular caseload duties, and Kasprzak would inform Karl to cease the attempt. Karl resumed the attempt to assign caseload duties to Corcoran following Kasprzak's retirement in January of 2003. From June of 1999 through his retirement in 2003, Kasprzak viewed the Arrangement as an effective way to address labor issues in a cooperative manner, as he noted in an e-mail to Beil dated January 29, 2003, which states:

> I understand there will be some effort to retain the LTE coverage for Tom Corcoran's position and I wanted to give you my sense for why this is needed. I have no confidence that current division administration would advocate for this and I'm not sure that my successor in Region 7 will have enough of a grasp on the issue to effectively articulate the need. Although I am retiring, I hope the new administration sees the merit of continuing a successful solution. So, let me give you my views:

* When I arrived in Region 7 six years ago we were faced with no coverage for Tom when he was gone on legitimate union business. We ended up with unsupervised offenders and potential liability issues for the department.
* I immediately advocated for coverage and you may recall a brief conversation about the matter that you and I had several years ago. You were helpful then in getting the matter resolved on temporary basis.
* Subsequently, a former DOC Secretary agreed to coverage of Tom's caseload via an LTE in return for union cooperation in allowing the conversion of several agent positions to become non-represented trainers at our DCC training academy. This was agreed to be the "permanent" solution to coverage as long as the union president remained in DCC.
* The present, "permanent" use of LTE coverage is fortunate for all concerned. Other represented employees are not disadvantaged by having to cover extra workload, the local manager is happy and regional management can sleep better knowing the caseload is covered.
* I believe you are in the best position to resolve this with the new administration and please feel free to share my support as you see fit.

10. Karl's concerns with Corcoran's work assignments continued to grow after Kasprzak's retirement. By August of 2003, Karl had thoroughly aired his concerns to Grosshans, Raemisch and other DCC administrators. In an e-mail to these administrators dated August 4, 2003, Karl advocated that Corcoran be assigned ongoing caseload responsibilities in addition to non-recurring office duties. In DEC. NO. 30340-A, dated August 15, 2003, Examiner Daniel Nielsen stated the following Conclusions of Law:

> 3. By the acts described in the above and foregoing Findings of Fact, specifically by issuing an order directing Thomas Corcoran not to have any contact with Jennifer Coats and other bargaining unit employees, the Respondent Employer interfered with the Complainants' protected rights guaranteed by Sec. 111.82, and thereby committed an unfair practice within the meaning of Sec. 111.84(1), SELRA.
>
> 4. By the acts described in the above and foregoing Findings of Fact, specifically by imposing discipline on Thomas Corcoran for contacting Jennifer Coats on February 12, 2002, and for allegedly making inaccurate statements in the course of the investigation, the Respondent Employer interfered with the Complainants' rights guaranteed by Sec. 111.82, and thereby committed an unfair practice within the meaning of Sec. 111.84(1), SELRA.

In a memo to Corcoran dated August 28, 2003, Karl advised him that:

> The issue of your caseload responsibilities was discussed with Eurial Jordan, Region 7 Chief, William Grosshans, DCC Assistant Administrator and Rick Raemisch, DCC Administrator on August 4, 2003. The decision made during the meeting was to assign the following caseload responsibilities to you during contract bargaining. The caseload responsibilities listed below are assigned to you effective today.
>
> 1. You are to complete initial Interviews of new intake from Courts. Intake appointments will be scheduled by PA staff for days that you are scheduled to be in the office. You are to complete the initial intake interview, complete the DOC 179 with the offender and follow on areas of need per the DCC Operations manual until the casework is completed and transfer may be made to a different agent.
>
> 2. You are to secure statements from offenders and/or victims as needed for Unit 705 agents as directed by your immediate Supervisor.
>
> 3. Beginning Tuesday, September 2, 2003, Unit 705 institution cases will be transferred to your caseload with the expectation that you complete Pre-Parole Investigations and all other case related activities per DCC Operations manual.
>
> 4. You will be accessible to Unit 705 staff to function as Agent-of-the-Day when you are scheduled to be in the office.
>
> 5. You will assist with custody transports as time allows and as directed by your immediate Supervisor.

Sometime after this, Beil learned that DCC was considering the removal of LTE coverage for Corcoran. He reported this and his concern regarding the August 28, 2003 memo to O'Donnell. Karl did not implement the assignments noted in that memo and Beaver Dam continued to have an LTE position.

11. On September 15, 2004, Larry Reed defeated Corcoran in an election for the Presidency of Local 2748. Corcoran and other unit members filed an internal appeal regarding the conduct of this election, alleging among other points that Reed and his slate of candidates, unlike Corcoran and his slate of candidates, had violated an agreement regarding campaign use of computer technology. After a hearing, the international union with which WSEU is affiliated directed that the election be rerun. Votes from that election were tabulated on December 16, 2004, and Corcoran outpolled Reed. Corcoran again assumed the position of Local 2748 President on December 17, 2004.

12. Karl and other DCC supervisors took the position that the September 15, 2004 election terminated the Arrangement, and acted to return Corcoran to a full-time caseload. In late September of 2004, a Probation and Parole Agent in the Beaver Dam office retired. Between September and December of 2004, Karl sought to move the caseload once handled by that agent to Corcoran. Because Corcoran had not been a full-time agent for so long, Karl and Corcoran agreed that a refresher ABT course in Madison would be useful. The ABT spanned a number of work days form October of 2004 through January of 2005. Between ABT, related training and vacation, Corcoran was scheduled to work in the Beaver Dam office for sixteen of the fifty-five work days between October 4 and December 17. Corcoran added to his previously scheduled vacation requests during this period. On September 28, 2004 Corcoran reported to Karl that he was leaving the Beaver Dam office to attend to a pre-filing meeting regarding a grievance in Sheboygan, and was appearing as a steward for an investigatory meeting to be held later that afternoon in Sheboygan. After Karl asked if Corcoran was still a steward, Corcoran stated he would not continue the discussion without a WSEU steward. The discussion continued with the involvement of another employee but became confrontational. Karl asserted his desire to return Corcoran to the duties of an agent and Karl understood Corcoran's position to be that Karl sought to drive him from State employment. Corcoran ultimately left the meeting and the office to attend to the Sheboygan matters. Karl was the hearing officer at the afternoon meeting at which Corcoran appeared as steward. That meeting became confrontational. Karl did not approve Corcoran's absence from the Beaver Dam office on September 28, and Karl documented his concerns regarding the events of that day in an e-mail to Grosshans dated September 28. In a letter to Corcoran dated September 29, 2004, Grosshans stated:

> We have received a copy of a September 25, 2004 letter sent from newly elected 2748 president, Larry Reed, to OSER Director Karen Timberlake. In the letter Mr. Reed has appointed Lynn Hightire, as Chief Steward. In addition, Mr. Reed provided a list of the 2748 appointed stewards. Since your name is not on the list of appointed stewards, we expect that you will not be performing any more steward activities unless or until we receive official notification from the 2748 leadership.
>
> You are directed to meet with your supervisor, Elmer Karl, to discuss your agent assignments and any training/mentoring you may need to assist in that process.

The relationship between Karl and Corcoran continued to deteriorate along the lines highlighted by their September 28 meetings. Karl became convinced that Corcoran was not taking ABT seriously; was not returning from Madison to the Beaver Dam office in a timely fashion; and was avoiding or neglecting his caseload responsibilities. He documented his concerns in a memo to Corcoran dated December 15, 2004. The memo notes concerns that Corcoran did not timely return to the Beaver Dam office on November 9, December 8 and December 9, and sought an explanation. Corcoran responded to the memo in an e-mail dated December 17, which noted:

> If you believe that any of my activities have risen to the level of potential work-rule violations, please conduct a proper investigation, including formal notice to

> me and to the union. That would provide me the opportunity to secure steward representation, serving the interests of due process.
>
> I have conferred with Council 24 Asst. Director Karl Hacker about your memo and he advises me that I have no obligation to respond in writing to the scenario that you have characterized, or to the implicit allegations.

On December 20, Corcoran called into the Beaver Dam office to advise that he would be taking leave without pay for at least the morning because he was having a WSEU phone line installed in his home. He did not report to the office until late afternoon. Karl referred the propriety of the request for unpaid leave to Karl's supervisors. When Karl discussed the matter with Corcoran on December 23, Corcoran responded that he had attended to a number of WSEU-related matters that day. When Karl asked about his caseload responsibilities, Corcoran responded that the Arrangement remained in place and should be honored by the State, noting that he had so many demands on his time that he could not reasonably be expected to keep up with his caseload. On December 30, Corcoran left a voice-mail message for Karl, who was home sick, stating that he would be in Madison January 3 and 5, 2005 "on union business". Karl found the notice inadequate and reported the matter to his supervisors by e-mail dated January 3. In another e-mail dated January 3, Karl advised his supervisors that he found Corcoran's December 17, 2004 e-mail insubordinate and requested that "this be pursued as a disciplinary matter".

13. In a letter to Corcoran dated January 5, 2005, Karl stated:

> This letter is a follow-up to our conversation last week regarding the procedures you need to follow when attending to union activities. Except as allowed by the collective bargaining agreement, union officers are not allowed to conduct union business or union activities on state time. Therefore, this letter is to notify you that for all requests for time (with or without pay) to attend union related activities provided for in the WSEU contract (union conventions, educational classes, bargaining unit conferences, local union meetings, monthly steward meetings, bargaining days, monthly local executive board meetings or any other union activity), you are required to provide your immediate supervisor at least ten (10) calendar days advance notice (written notice when required by the contract) of your intention to attend such activities, including identifying the applicable contract provision. In addition, when you are requested to act as a local representative at investigatory meetings or in processing grievances, you must secure written approval from me before attending any of these union activities. Before any request is approved, I will need to have the specifics (i.e. reason for meeting, who is involved, expected duration, why you are needed to attend, where is the meeting being held, is another union rep attending, etc.) I will promptly evaluate and respond to your requests for union activity.
>
> When you are not attending approved union activities, you are expected to perform your duties as a full-time Probation and Parole Agent. I have scheduled a meeting

> with you to discuss the contents of this letter and the expectations regarding you agent duties for Monday, January 10 2005 . . .

This letter is referred to below as the January 5 Memorandum. Prior to its issuance, Karl had not required Corcoran to obtain written approval to attend to WSEU related activities and had not required the specificity for the basis of the absence the Memorandum sought. After receiving this letter on January 6, Corcoran phoned Harris, questioned why he was subject to these restrictions, and questioned why he should be subject to restrictions not imposed on other Local 2748 officials. Harris, who was unaware of the January 5 Memorandum, responded that the January 5 Memorandum was not as draconian as Corcoran asserted, and that it might clarify supervisor/steward relationships. She asked Corcoran to provide her an updated list of Local 2748 stewards. After the conversation, she decided that Corcoran's questions afforded the opportunity to set forth a uniform standard of addressing his concerns as well as those of supervisors who had earlier questioned her on the appropriate handling of steward requests. In a Memorandum addressed to "PSS Union Stewards", "cc'd" to a variety of DOC supervisory personnel, and dated January 7, Harris stated:

> Recently I received an updated PSS Steward list from Local 2748 President Tom Corcoran. In order to ensure operational needs are being met, when requested to act as a local representative at investigatory meetings or in processing grievances, you must secure approval from your immediate supervisor prior to attending the meeting. The request to your supervisor should include specific information as to the reason for the meeting, the expected duration, location of the meeting, etc.
>
> In addition, when requesting to attend other union activities provided for in the WSEU contract, (union conventions, educational classes, bargaining unit conferences, local union meetings, monthly steward meetings, bargaining days or any other union activity) you are required to provide your immediate supervisor at least ten (10) calendar days advance notice (written notice when required by the contract) of your intention to attend such functions, including identifying the applicable contract provision.

This memorandum is referred to below as the January 7 Memorandum. Following the issuance of these memoranda, certain DCC administrators sought to impose restrictions on the amount of travel by Local 2748 stewards, including Corcoran, to represent unit members in contract administration matters.

14. On January 10, 2005, the Commission issued an Order, DEC. NO. 30340-C, which is based on the litigation noted in Finding of Fact 10, and which required the State to post a notice in all eight DOC offices in Madison rather than the one DOC Madison office in which the State had posted the notice required by the Commission in DEC. NO. 30240-B (WERC, 7/04). Corcoran and Karl met on January 10, 2005 to discuss the January 5 Memorandum. The meeting included a WSEU representative for Corcoran and a DOC administrator to take notes for Karl. The meeting was acrimonious. Among other points, Karl and Corcoran discussed whether the

Master Agreement required steward notice to a supervisor for WSEU related work or supervisory approval; whether Corcoran was under investigation; whether or not Karl's request for written approval tracked State practice; whether or not the January 5 Memorandum violated State law; and whether or not Karl was aware of or had violated the Arrangement. Karl denied knowledge of the Arrangement and denied that LTE coverage in the Beaver Dam office was to assist Corcoran in his DCC workload. Corcoran accused Karl of deliberately assigning Corcoran a caseload when Karl knew Corcoran would not be available to handle it. Karl accused Corcoran of deliberately avoiding caseload responsibilities. Corcoran identified the non-DCC caseload duties, including WSEU work, which would keep him from the Beaver Dam office over the next few weeks, including a meeting in Madison that afternoon. Karl approved Corcoran's absence for the afternoon meeting and stated he would reply to Corcoran in writing regarding the other identified activities by the close of the work day on January 10. Among the activities identified by Corcoran for Karl was an LMC meeting set for January 11 and two meetings outside of Beaver Dam on January 12.

15. In a memo to Corcoran dated January 13, 2005, and headed "RE: 1-12-2005", Karl stated:

> On Monday, January 10, 2005 I directed you to submit all requests for time to participate in union activities directly to me in advance of the proposed union activity. I advised you that I would promptly review such requests and respond to you in writing. Further, I informed you that you would not be permitted to attend the activity until you received my authorization to do so.
>
> On Wednesday, January 12, 2005 you were absent from the Beaver Dam DCC offices engaging in union activities without my prior authorization. This job notification is to advise you future incidents of that type will be considered insubordination.

The memo refers to the activities noted by Corcoran during the January 10 meeting. Corcoran attended each meeting set for January 12. Karl did not formally approve or deny the absences, but viewed one meeting which took place prior to work hours as appropriate, while viewing later meetings in Sheboygan as inappropriate due to the presence of other WSEU representatives in the Sheboygan area. In a memo to Corcoran dated January 13, 2005 and headed "RE: 1-10-2005 Meeting", Karl set out his response to the activities from January 14 through January 27, which had been noted by Corcoran during the January 10 meeting. Karl approved certain activities and did not approve others, including an all day meeting of SEPAC, a political action committee for State employees, set for January 14. Corcoran had attended such meetings in the past, using unpaid leave, with Karl's approval. Corcoran responded to the denial of approval for the SEPAC meeting by phoning Harris, and obtaining her approval to attend the meeting, using unpaid leave.

16. Karl continued to perceive Corcoran to be neglecting his DCC caseload, and continued to document his concerns to supervisors throughout January, 2005. For example, Karl

documented, via e-mail dated January 18, his opinion that Corcoran had, on January 13, reported to work late, and then kept three offenders waiting for an inordinate amount of time in the Beaver Dam office while Corcoran conducted extended phone conversations. Karl continued to use other employees to cover for Corcoran's absence, but could not use LTE Frank Mesa, whose appointment Grosshans terminated effective January 21. In a memo to Regional Chief Sally Tess dated January 25, Karl documented his concern that Corcoran had been guilty of insubordination on January 20, for failing to provide Karl "the specific meeting time" for a Local 2748 meeting in Waupaca on January 19.

17. Karl's relationship with Corcoran continued to deteriorate. Throughout January of 2005, Corcoran had a voice-mail greeting and an e-mail auto reply message that specifically noted how to contact him on a union-related matter, but did not refer to his Probation and Parole Agent position or offer specific means to contact him regarding DCC business. Karl became aware of this, and acted to change the message to delete the WSEU contact information and replace it with DCC contact information. Regarding the voice-mail, Karl directed Virginia Allen, the Office Manager of the Beaver Dam Office, to reset Corcoran's voice mail message sometime on or about January 10. When confronted by Corcoran on the point, Karl informed Corcoran that the message improperly ignored DCC business and improperly solicited WSEU business. Karl added that the e-mail auto reply was similarly improper and needed to be corrected. In a grievance submitted on Corcoran's behalf dated January 31, Local 2748 alleged, "On or about January 6, 2005, DCC management in the Beaver Dam office tampered with Local 2748 President's telephone service, including voice mail." The State and WSEU ultimately settled the grievance, noting on the grievance form

> Supervisor will not tamper with phone or voicemail of grievant. Per the contract telephone can be used for union business.

State representatives who settled the grievance agreed with Karl's view that the voicemail and e-mail auto reply messages improperly neglected DCC-related business contact information, but would not support Karl's decision to act without first contacting Corcoran. Karl and Allen understood Corcoran's message to have made it impossible for certain DCC supervised offenders to contact Corcoran.

18. The Arrangement was the subject of sporadic discussion between Beil and Wild and other State administrators from early 2004 through the September and December elections. The ongoing tension between Karl and Corcoran, coupled with Grosshans' dismissal of Mesa as an LTE, brought the dispute regarding the Arrangement to a head. After a series of WSEU/State contacts, Raemisch set out the State's position in a letter dated February 1, 2005, which states:

> . . . We are unaware of any written agreement which provides that Mr. Corcoran would be allowed to act as a full-time steward at state expense. In addition, there is no authority, either by law or by contract that would permit a Department Secretary to negotiate with the union to allow a full-time state employee who receives 100% of his pay from the state to perform union activities on a full-time

basis. In the absence of any such authority, the current DOC administration does not believe an agreement of this nature would be legal. Moreover, OSER has advised DOC that while the collective bargaining agreement between WSEU, AFSCME Council 24 and the State of Wisconsin sets forth in detail allowable union activities on state time, neither OSER nor DOC has the authority to negotiate to abolish a state authorized position which is what would occur if OSER negotiated for a 100% state paid employee to function as a full-time union steward.

. . .

While we acknowledge that Mr. Corcoran has apparently been acting as a full-time union steward for some time, it has not been with the approval of this administration. After learning of this situation we consulted with OSER legal counsel about Mr. Corcoran resuming his duties as a full-time Probation and Parole Agent. At that time Mr. Corcoran had an unfair labor practice case pending against the State of Wisconsin. To avoid the perception that the Department was retaliating against him for filing the ULP complaint, we followed the advice of legal counsel and did not immediately require Mr. Corcoran to assume a full-time Probation and Parole Agent caseload. Mr. Corcoran continued to act as a full-time union steward at state expense until OSER received notice from Council 24 leadership that Larry Reed had been elected as President of Local 2748 . . . . (I)f any agreement had existed regarding Mr. Corcoran's workload and duties, it terminated as a result of the change in leadership. . . .

While Mr. Reed was Local 2748 President, neither he, nor the union, requested that he be allowed to have zero caseload to perform union activities on a full-time basis. Rather, Mr. Reed maintained a full caseload during his tenure as President. Even if Council 24 had made such a request the DOC would not have entered into a similar agreement regarding Mr. Reed as this administration believes such an agreement would be illegal.

. . . Mark Wild . . . notified you that . . . the state would not agree to any arrangement whereby Mr. Corcoran would be allowed to continue to act as a full-time union steward at state expense if he was re-elected . . . (Y)ou replied that if Mr. Corcoran was re-elected, the former agreement would still be in effect and that . . . if DOC did not honor it, then DOC would need to return the non-represented positions that were part of the agreement to the represented ranks.

. . . (W)hile we feel DOC is under no obligation to take such action, to put this issue behind us, the DOC is converting three currently non-represented positions to represented . . . positions. . . . We have already notified Mr. Corcoran of the process necessary for receiving approval for those union activities. This will effectively place the union and the DOC in the same position they were in prior to any agreement with the previous administration.

> As you are also aware, at one point . . . (DCC) had hired a Limited Term Employee to cover some of Mr. Corcoran's workload during bargaining. DCC continued to employ the Limited Term Employee to cover some of Mr. Corcoran's workload during bargaining. Since the Professional Social Services Unit has a settled contract, Mr. Corcoran is no longer in ABT and we are converting three non-represented positions to represented Probation and Parole Agent positions, we have terminated the LTE and Mr. Corcoran will be responsible for his own caseload . . .

Beil responded to the Raemisch letter in a February 7 letter to Frank, which states:

> On February 3, 2005 I received a letter . . . which basically set a new direction in Corrections regarding staff in Community Corrections and the union that is legally certified and duty bound to represent them. I might add that this "new direction" is not positive, is confrontational and violates 12 years of good faith. It is obvious that your administration forgot that for a two-year period you continued the agreement regarding Mr. Corcoran, and in essence approved it. It is also clear to us that your actions cited in the letter and supported by the daily harassment of Mr. Corcoran and other leaders of Local 2748 show a clear anti-union animus and lack of respect for labor-management relations. That's unfortunate and will only exacerbate the current tenuous relationship. I thought a Democratic administration worked with and for labor, and did not find cheap, inane self-serving excuses and reasons to undo years of labor-management relations. . . .

In a memo to Corcoran dated February 10. 2005, Ron Kalmus, the Assistant Region 7 Chief, notified Corcoran to appear at an "Investigatory Interview" on February 15 to discuss "potential work rule violations" concerning Corcoran's travel from the Beaver Dam office on WSEU related business on a number of occasions between January 12 and February 9. The purpose of the interview was "to ask questions about" Corcoran's travel to a number of WSEU-related matters, including the January 12 travel to Sheboygan, which is noted in Findings of Fact 14 and 15, and the January 19 travel to Waupaca, which is noted in Finding of Fact 16. Frank responded to Beil's February 7 letter in a letter dated February 14, which states:

> I have received your letter . . . regarding our decision to discontinue the practice of paying Mr. Corcoran a full salary . . . plus fringe benefits, for doing no work as a probation and parole agent. This figure does not include the money the Department has been spending to hire a limited term employee to cover Mr. Corcoran's caseload because he does no work.
>
> . . . Contrary to the suggestion of your letter, out of respect for the labor-management relationship, we have looked at this issue from every conceivable direction before taking action . . .

> In the final analysis, the arrangement is simply indefensible. We have decided the practice is wrong and it must be ended. . . .
>
> There is not another union President in AFSCME employed by the Department of Corrections who is allowed to collect full time pay from the state for doing no state work. The practice we are ending was not bargained and recorded publicly as part of a collective bargaining agreement. The fact that something has been going on for a long time based upon some verbal agreement with a previous administration does not make it right. . . .

Beil responded in a letter dated February 23, which states:

> I often advise our leaders not to get into a 'pissing match with a skunk,' but in this instance I cannot resist. I found it absolutely incredulous that you and your Administration are so bold as to make this issue a taxpayer vs. rank and file worker issue. . . .
>
> Unfortunately your legal tunnel vision about what constitutes "good labor management relations" drives the relationship in the opposite direction. . . .
>
> We feel strongly that the arrangement established in your agency with Local 2748 provided "common ground and served the people of Wisconsin". The value of the arrangement lies in the problems avoided, grievances settled, and enhanced communications. . . .

DCC did not conduct an investigatory interview with Corcoran on February 15. On February 14, Corcoran went on an unpaid leave of absence to perform organizing services for WSEU. While President of Local 2748 and an active DCC employee, Corcoran received a WSEU stipend. At all times relevant to this matter, Corcoran's duties as Local 2748 President extended beyond his scheduled hours of work for DCC.

19. The last LTE utilized by DCC to provide caseload relief for Corcoran, prior to the leave of absence noted in Finding of Fact 18, was Frank Mesa. DCC terminated Mesa's appointment as noted in Finding of Fact 16. Mesa was a bi-lingual, retired DOC employee recruited originally by Corcoran. DCC extended Mesa another appointment to an LTE position within roughly one month of the termination noted in Finding of Fact 16. Mesa performed duties to relieve ongoing workload demands of the Beaver Dam office exacerbated by Corcoran's absence from the office. Mesa also performed duties independent of Corcoran's availability.

20. The State and the WSEU were parties to a Master Agreement covering the years 1975-77 which provided for up to five full-time grievance representatives at State expense. The provision has not been included in any Master Agreement from 1977 to the present. At no point relevant to this matter, has any other WSEU Local President other than that of Local 2748 been covered by an understanding like the Arrangement. The Master Agreement provides for certain

WSEU-related activities, such as the processing of a grievance, which can occur during work hours and which will be compensated by State payment of a regular wage rate. Under the State's time accounting system, such activities are covered by Code 19. The Master Agreement provides for certain WSEU-related activities, such as SEPAC meetings, which can occur during working hours, but which will not be compensated by State payment of a regular wage rate. Under the State's time accounting system, such activities are covered by Code 21. No WSEU or State representative responsible for the implementation of the Arrangement contemplated it to supersede the Master Agreement, a Local Agreement, or to impact the accounting of Corcoran's time including the use of Code 19 or Code 21.

21. The leave of absence referred to in Finding of Fact 18 was originally scheduled to end in April of 2005, but through a series of agreements between State and WSEU representatives, was extended until Friday, July 15. The leave of absence allowed Corcoran to assist in a WSEU campaign to win a fair share referendum covering the bargaining unit noted in Finding of Fact 3. At the start of the leave of absence, the State accounted for the leave under Code 14, which is an accounting entry for "without pay". Karl received an e-mail dated February 23, which confirmed that the leave should be accounted for under Code 14. Use of Code 14 adversely impacted Corcoran regarding the accrual of benefits, including, among others, vacation and sick leave. It could have impacted his coverage under the group health insurance plan, but WSEU funded that coverage for the part of his leave not already paid by payroll deduction prior to the leave. Hacker became aware of this during Corcoran's leave, and asked Wild to look into covering the leave under the labor agreement at Article 2, Section 13. Wild considered the point with DOC officials, and ultimately agreed to act as Hacker had requested. This agreement changed the accounting for the leave from Code 14 to Code 21. Karl was not informed of the change and was not involved in the discussions leading to the change.

22. In an e-mail to Karl dated July 15, 2005, Corcoran stated:

> I will be returning to work at the Beaver Dam office on Monday morning, July 18, 2005. Please be advised that I will be attending the DWD Local President's meeting with Secretary Gassman in Madison on Monday afternoon, July 18th. On Tuesday, July 19th, I will be at an arbitration hearing in Racine. On Wednesday, July 20th, I will be at the DOC Labor/Management meeting in Madison, followed by the MOU#14 meeting with DCC Administrator Maples. On Thursday, July 21st, I have dental and medical appointments. On Friday, July 22nd, I will be at the Council 24 Convention. On Tuesday, July 26th, I will be participating in the BMCW Labor/Management meeting in Milwaukee. Thank you for your attention.

Karl forwarded the e-mail to his supervisors and to DOC legal counsel, seeking advice. Karl issued a "Work Directive" to Corcoran via e-mail dated July 15. This e-mail, referred to below as the July 15 Memorandum, reads thus:

> This memo is to notify you that for all requests for time (with or without pay) to attend union related activities provided for in the WSEU contract you are required

to provide your immediate supervisor notice of your intention to attend such activities, including identifying the applicable contract provision. In addition, all staff must utilize appropriate Leave Codes when completing their time sheets, this includes the use of Code 19 and Code 21 leave time. The contract allows union officials to engage in specific union activities. The contract further provides that no employee, including union officials, can perform any union business or union activity on state time "unless specifically authorized by the provisions of the Agreement." The contract specifically identifies certain union activity/business that is on state time. It also permits leave from work without pay for specifically designated union activity/business. There appear to have been instances in the past where Code 19 and Code 21 leave were used in an inappropriate manner. Your are reminded that Code 19 and Code 21 leave time will not be approved for activities not covered in the contract or agreed to in advance by the Department of Corrections (DOC).

Union activities that are on state time require a Code 19 on your timesheets, Those activities requiring a Code 19 are specifically set forth in the contract. I will not approve a Code 19 entry on your timesheet unless the activity is specifically identified in the contract or approved by DOC as a union activity that can be conducted on state time.

Union activities that are not on state time require a Code 21 on your time sheets. Those activities requiring a Code 21 are also specifically set forth in the contract. I will not approve a Code 21 entry on your timesheet unless the activity is specifically identified in the contract or approved by DOC as a union activity that excuses an employee from performing his/her assigned duties at times they are scheduled to work.

If you use Code 19 or Code 21 for an activity that is not identified in the contract or approved by DOC you will be required to use an appropriate code like vacation, personal day, sabbatical, etc.

In order for me to be able to determine whether the union activity that requires you to be away from your assigned duties is a union activity covered by the contract or has been so approved by DOC and what is the appropriate code for your absence, I must know specific information regarding the union activity, including: when the union activity is scheduled to occur; the date(s) you will be away from your assigned duties; the amount of time you will be away from those duties; and the reason(s) (contractual provision for your absence from work) why you will be away from your assigned duties. As you know, you are already required to provide me with that information so I can approve your absence from work before your scheduled union activity. That information also will permit me to carry out my supervisory duties relating to your timesheets and proper time recording.

> When you are not attending approved union activities, you are expected to perform your duties as a full-time Probation and Parole Agent. I have scheduled a meeting with you to discuss the contents of this letter and the expectations regarding your agent duties for Monday, July 18, 2005 at 9:30 am in my office.

Karl and Corcoran met in the morning of Monday, July 18. Karl read the July 15 Memorandum to Corcoran. Karl attempted to explain his desire to have Corcoran return to duty as a Probation and Parole agent and his desire that Corcoran detail and properly account for his WSEU work during normal work hours so that his WSEU and DOC work would not interfere with each other. He specifically noted that he needed more information regarding the WSEU activities noted in Corcoran's July 15 e-mail before he could approve them. Corcoran perceived Karl as extremely angry and understood Karl to have denied approval for any of the requested time off except for the medical and dental appointments. Karl believed he had withheld approval rather denying approval for the activities. Following the meeting, Corcoran contacted Hacker, stating that Karl was interfering with his leave requests and was trying to prevent him from attending the Presidents' meeting set for 2:00 p.m. on July 18. Corcoran also gave Karl a series of documents regarding his July 15 request for time off work. One of the documents was a July 5 e-mail from the Deputy Secretary of the Department of Workforce Development (DWD) to Corcoran regarding the meeting. At the bottom of that e-mail, Corcoran wrote,

> Following my lunch period, I will travel to the meeting with Secretary Gassman. Per established practice, I plan to use Code 19 for travel and the meeting.

Corcoran also included an e-mail dated July 12, stating the location of the arbitration hearing set for Racine on July 19, together with a copy of a subpoena for his attendance. The subpoena is dated June 27. The remaining documents are handwritten notes stating a contractual reference justifying leave for July 20 and 22, coupled with a request to use "1/2 hour vacation, this afternoon following my meeting the DWD Secretary." Sometime after this, Hacker told Corcoran to come to the Presidents' meeting because he had secured OSER approval for it. In an e-mail to Karl dated July 18 at 12:55 p.m., Corcoran stated,

> I have been advised that my participation to attend this afternoon's meeting with DWD Secretary Gassman has been approved by DOC and OSER. Thank you for your attention.

Karl responded to this information by contacting DOC personnel to verify the remaining meetings covered by Corcoran's documentation. He approved them via e-mail dated 12:56 p.m. on July 18.

23. In a Memorandum dated July 22, 2005 Karl stated:

> I expected you to return to the Beaver Dam DCC office on Wednesday, July 20 2005 following your meeting with DCC Administrator Maples. However, you did not return to your worksite following your meeting with DCC Administrator

Maples on Wednesday, July 20, 2005. I will now take this opportunity to again provide direction to you regarding the information you must provide when requesting time off for union activities and examples of the information that you are required to submit when requesting union leave. In the future, I will not approve any requests for time off for union activities unless you have submitted the information as you have been directed in my January 5, 2005 and July 15, 2005 memos. When you are not attending approved union activities, you are expected to perform your duties as a full-time Probation and Parole Agent in the Beaver Dam DCC offices.

Union activities that are on state time require a Code 19 on your timesheets. Those activities requiring a Code 19 are specifically set forth in the contract. I will not approve a Code 19 entry on your timesheet unless the activity is specifically identified in the contract or approved by DOC as a union activity that can be conducted on state time.

Union activities that are not on state time but take place during your scheduled working hours require a Code 21 on your time sheets. Those activities requiring a Code 21 are also specifically set forth in the contract. I will not approve a Code 21 entry on your timesheet unless the activity is specifically identified in the contract or approved by DOC as a union activity that excuses an employee from performing his/her assigned duties at times they are scheduled to work.

If you use Code 19 or Code 21 for an activity that is not identified in the contract or approved by DOC you will be required to use an appropriate leave code such as Code 06 - vacation. Code 07 - personal day, Code 14 - Leave without Pay, etc.

In order for me to be able to determine whether a proposed union activity requires you to be away from your assigned work duties the proposed union activity must be covered by the contract or have been approved by DOC. In addition, you must utilize the appropriate leave code for any absence from work and I will need specific information regarding the union activity, including: when the union activity is scheduled to occur; the date(s) you will be away from your assigned duties; the amount of time you will be away from those duties; and the reason(s) (contractual provision for your absence from work) why you will be away from your assigned duties. As you know, you are already required to provide me with that information so I can consider your request to be absent from work before the scheduled union activity takes place. This information will also permit me to carry out my supervisory duties relating to your time sheets and proper time recording.

**The essential information I need prior to considering any leave requests for union activities include:**

1. **Why you will be away from your assigned duties (contractual provision for your absence from work) including the specific contractual article and section.**
2. **Where the proposed union activity is to take place (address and contact information).**
3. **When the union activity is scheduled to take place (date, start and end times).**

4. **Who will be attending the activity on behalf of the union (per the relevant contract provision) due to limitations indicated in the contract.**
5. **Time out - The time you are asking to be allowed to leave your worksite.**

6. **Time back - The time you anticipate returning to your worksite following the union activity.**
7. **The number of hours of leave time you will be using.**

8. **Leave Code: The leave code you anticipate using on your time sheet for time spent in union activities (Vacation - 06; Personal Holiday - 07; Comp Time - 18; 19, 21, etc.) pursuant to the current contract provisions.**

9. **A copy of notices (such as those you submitted on July 22, 2005 regarding the bargaining unit conference on 8-4-05 and education conference on 8-3-05).**

. . .

**In addition,** On Friday, July 22, 2005 I received the following documents from you in the US Mail:

1. Pay period 16 time sheet for 7-10-05 through 7-23-05

. . .

4. Hand-written message from you regarding BMCW and an investigatory interview on 7-26-05. . . .

Item #1:
Your time sheet for pay period 16 claims that you were on Code 21 union leave for 40 hours from Monday, July 11, 2005 through Friday, July 15, 2005.
- On Friday, July 8, 2005 you left a voicemail message on my office telephone indicating that your union leave was extended by one week. That

> extended period of leave (beginning in February 2005) at the union's request was for organizing purposes and appropriately recorded as Code 14 – Leave Without Pay, not Code 21. I will change your time sheet to reflect that week 1 of pay period 16, Monday July 11, 2205 through Friday, July 15, 2005, is Code 14 – Leave Without Pay. . . .
>
> Item #4
>
> You have not provided the necessary information regarding the BMCW L-M meeting as directed in my January 5, 2005 or July 15, 2005 memos to you regarding leave requests to attend union activities, therefore, I will not approve your request. You are directed to report to your work site as scheduled on July 26, 2005 to attend to your caseload responsibilities.
>
> Your hand-written message goes on to state: "Also, I will be the steward at an Investigatory Interview in Sheboygan on Tuesday afternoon, July 26th." As I indicated in my January 5, 2005 letter, pursuant to the contract, you must secure approval from me before attending a union activity such as this. Before any request is approved, I need to have the specifics (i.e., reason for meeting, who is involved, expected duration, why you are needed to attend, where is the meeting being held, is another union rep attending, etc.), however, you have not provided the information needed to make an informed decision. In addition, other union stewards are available in the Sheboygan area or in neighboring areas located much closer to Sheboygan. I will not approve your request at this time. You are directed to report to your work site as scheduled on July 26, 2005 to attend to your caseload responsibilities. (*Bold from original*)

The time sheet in question in Item #1 was noted by a DOC payroll employee who, in a July 25 e-mail to Karl and to Corcoran, stated that a time sheet faxed to her by Corcoran did not include a supervisor's signature. Karl responded in a July 25 e-mail that he was going to make changes in the time sheet. Karl changed Corcoran's time sheet as noted in Item #1 of the July 22 Memorandum. Corcoran responded by filing a grievance, seeking that the time sheet be restored to Code 21 and that he be made whole for Karl's action. Kalmus granted the grievance in his answer dated August 16. Kalmus' answer notes that the "unit supervisor was not aware of the change so sent in timesheets with Code 14." Corcoran arranged for another WSEU steward to cover the July 26 meeting in Sheboygan. That steward drove to Sheboygan from Green Bay. A number of disputes between Karl and Corcoran arose during late July concerning the amount of time Corcoran devoted to other than caseload work. For example, Corcoran requested to attend a DOC provided, two-day educational conference in early August and a three-day educational conference in mid-August sponsored by AFSCME. Karl approved each request, but conferred extensively with his supervisors regarding each. Corcoran also spoke with DOC administrators and WSEU officials regarding each. During this period of time, Karl also spoke with DOC administrators regarding a complaint that Corcoran's "out-of-office" auto reply for e-mail included a WSEU forwarding address, but not one for DOC related inquiries. This discussion

branched into whether or not his voice mail and e-mail replies should be restricted to State and not to WSEU contacts. These discussions, between Karl and Corcoran and between them and WSEU or State administrators, concerned how to reconcile Corcoran's case load responsibilities with his WSEU activities.

24. The friction between Karl and Corcoran prompted Corcoran to sign, on July 19, 2005, a posting for a position in a DCC office in Fond du Lac. The posting closed on July 26, with Corcoran, as the senior employee who signed for the position, able to claim the position if he indicated a desire to do so not later than August 2. Eric Gross is a Corrections Field Supervisor for DCC, and supervised its Fond du Lac office at all times relevant here. He phoned Corcoran on July 28 to discuss the opening Corcoran had successfully bid for. Corcoran and Gross spoke twice on July 28 and discussed the job duties and other matters, including Corcoran's WSEU duties. During that conversation, Gross indicated he wished to speak with Corcoran "man to man", and emphasized that the opening involved the supervision of sex offenders, which had significant public safety implications. Corcoran asked when the job would start, and Gross indicated he would have to check with DOC administrators. After Gross had done so, he again phoned Corcoran. They discussed the anticipated start date of August 8, as well as the community safety implications of the supervision of sex offenders. Corcoran perceived Gross' discussion of the safety implications of the position combined with the discussion of his WSEU duties as an overt attempt to dissuade him from accepting the position. Gross did not share this perception. They agreed that Corcoran would either accept or decline the opening by August 2. Corcoran phoned Gross and accepted the position on August 2.

25. At the time Corcoran posted into the Fond du Lac office, the office had three full time equivalent (FTE) positions devoted to the supervision of sex offenders. Kevin Shulteis filled one, a second was vacant and Corcoran filled the third. Cases in the Fond du Lac office are assigned point values corresponding to the degree of direct supervision activity a caseload requires. Case files characterized as intensive sex offender receive a higher point value because they demand more face-to-face office contacts in the supervision process. Sex offender cases typically carry higher point values than non-sex offender cases, thus requiring fewer case files to fill a full-time caseload. Point values increase with new case assignments and with any event that requires more direct supervision, such as a revocation proceeding requiring a hearing or a presentence investigation. The point system operates as the authorization of one hour of overtime for every 5.5 points over 215. Gross assigns sex offender cases, and attempts to balance caseloads, as measured by point values, within the office. Point values for the three sex offender positions from the week of August 7 through the week of October 16 can be summarized thus, with the "Kristie" numbers reflecting the vacant position noted above:

| ***WEEK OF:*** | ***TOTAL POINTS KRISTIE*** | ***TOTAL POINTS SCHUTEIS*** | ***TOTAL POINTS CORCORAN*** |
|---|---|---|---|
| ***8/7/2005*** | 11 | 252 | 211.5 |
| ***8/14/2005*** | 11 | 254.5 | 220 |
| ***8/21/2005*** | 11 | 254.5 | 213 |

| | | | |
|---|---|---|---|
| ***8/28/2005*** | 11.5 | 261.5 | 228.5 |
| ***9/4/2005*** | 11 | 251.5 | 281 |
| ***9/11/2005*** | 11 | 231.5 | 281 |
| ***9/18/2005*** | 11 | 216 | 281.5 |
| ***9/25/2005*** | 11.5 | 251.5 | 289.5 |
| ***10/2/1005*** | 11.5 | 260.5 | 281 |
| ***10/9/2005*** | 11.5 | 252.5 | 261 |
| ***10/16/2005*** | 11.5 | 263 | 255.5 |

Corcoran's caseload assignment was discussed by DOC administrators early in August of 2005 before Corcoran's transfer from Beaver Dam was implemented. Maples, Grosshans, Raemisch, Tess, Gross and Jay Taylor, a DOC employee who serves in the DOC central office to assist regional offices regarding human resource issues, participated in the meeting. The participants addressed, among other points, the status of PP(S)-349 and the percentage of a full 215 point caseload Corcoran should be assigned. A consensus was reached that Corcoran should be assigned a full caseload. These meetings continued through August and September and the consensus regarding Corcoran's caseload held, although Maples did voice objection to the assignment decision on at least one occasion.

26. In an e-mail to Corcoran dated August 2, 2005, Karl advised Corcoran that, regarding his scheduled absence on August 3 and 4, "It is incumbent upon you to make arrangements with other agent staff in the office to cover in your absence, including seeing offenders that report to see you." Karl's e-mail cc'd a number of DOC administrators and supervisors, not including Gross. Corcoran responded by e-mail the same day, stating, "Your statement is not consistent with past practice." Corcoran's response cc'd a DOC administrator, two WSEU officials and WSEU's legal counsel. Corcoran's first work day in the Fond du Lac office was August 8. Gross was on vacation that day. They first met face-to-face at a meeting on August 9, during which Gross gave Corcoran an orientation to his new worksite and voiced concerns about Corcoran's ability to handle a full-time sex offender caseload. In an e-mail to Gross dated August 11, Corcoran informed Gross that he would be out of the office on September 14, either to attend a ULP hearing or to participate in a collective bargaining session, noting "Either way, I will be in Madison on September 14th, away from the Fond du Lac office." In a memo to Corcoran entitled "Work Directive", dated August 9, Gross stated:

> This memo is to notify you that for all requests for time away from your assigned duties (with or without pay) to attend union related activities provided for in the WSEU contract or approved by DOC, you are required to: (1) provide your immediate supervisor written notice of your intention to attend any such activities, as well as certain information listed below in explanation of your absence; and (2) obtain prior written approval to attend any such activities. To ensure you receive timely written responses to your request to attend such activities, your requests should be submitted as soon as you become aware to attend the event. The following information must be provided to your supervisor before he/she will consider your request: (a) the reason why you will be away

from your assigned duties, identifying the specific contractual article and section; (b) where the union activity will take place (specific location and contact data); (c) the date, start and end times of the union activity; (d) who will be attending the union activity for the union when there is a limitation of attendees per the contract; (e) the time you anticipate you will need lo leave your worksite and the time you anticipate returning to the worksite after the union activity; (f) the numbers of hours of leave time you intend to use; and (g) the leave code you will be using for your time away from your worksite. Additionally, when the contract requires that you provide advance notice to your supervisor for your attendance at union activities, you are required to provide the amount of notice specified in the contract. If no specific amount of notice is required, then you must provide your supervisor with reasonable notice which means notice as of when you first learn of the union activity and the need for your absence from the worksite.

As you know, all staff must use appropriate leave codes when completing their time sheets and this includes the use Code 19 and Code 21. The contract specifically identifies certain union activities/business that are on state time. It also permits leave from work without pay for specifically designated union activities/business. Union activities that are on state time require a Code 19 on your timesheets. Those activities requiring a Code 19 are specifically set forth in the contract. I will not approve a Code 19 entry on your timesheet unless the activity is specifically identified in the contract or approved by DOC as a union activity that can be conducted on state time and I have given you written approval for your absence from your worksite. Union activities that are not on state time require a Code 21 on your time sheets. Those activities requiring a Code 21 are specifically set forth in the contract. I will not approve a Code 21 entry on your timesheet unless the activity is specifically identified in the contract or approved by DOC as a union activity that excuses an employee from performing his/her assigned duties at times they are scheduled to work and I have given you written approval for your absence from your worksite. If you use Code 19 or Code 21 for an activity that is not identified in the contract or approved by DOC you will be required to use an appropriate code like vacation, personal day, sabbatical, etc.

In order for me to be able to determine whether the union activity that requires you to be away from your assigned duties is a union activity covered by the contract and what is the appropriate code for your absence, I must be provided with the specific information regarding the union activity identified above. You must also receive my approval to be away from your worksite. That information and my approval will permit me to carry out my supervisory duties relating to your timesheets and proper time recording.

> You are employed by the State as a 100% FTE Probation and Parole Agent. You are assigned a caseload and are expected to carry out your duties as a Probation and Parole Agent in the Fond du Lac office in a manner that will keep you current with your caseload and is consistent with the professional expectations and standards of the job.

Gross gave this Memorandum to Corcoran during a meeting between them on August 12. The Memorandum had been reviewed by a number of DOC administrators and by OSER's legal counsel prior to being given to Gross to be given to Corcoran. During the meeting, Gross informed Corcoran that he had discussed the work directive with Karl and wanted Corcoran to be aware that the work directive in place in Beaver Dam would continue in Fond du Lac.

27. Corcoran attended hearing on PP(S)-349 on August 25 and 26, 2005. Corcoran informed Gross of the hearing and questioned Gross on whether to account for the absence with Code 19 or Code 21. Gross had no prior experience with such a request, and consulted Harris, via e-mails dated August 9 and August 16. Harris responded to the first e-mail by starting an inquiry with OSER. She did so because she did not believe the labor agreement addressed Gross' inquiry and she wanted to check with OSER to determine if OSER had an understanding with WSEU regarding Corcoran's attendance at the hearing. She attempted, without success, to consult Wild. The resulting delay prompted Gross' e-mail of August 16. Harris did meet Wild at a meeting unrelated to her inquiry, and took the opportunity to ask Wild about such an arrangement. They spoke in passing and Harris understood Wild's response to be that he thought that there might be such an understanding. This prompted Harris to respond to Gross' August 16 e-mail with an August 17 e-mail which states:

> He should go without loss of pay on the 25th and 26th . . . Let me know if he trys to claim travel. I think the union is paying for that . . .
>
> Has his investigatory meeting been scheduled yet? Can't let grass grow . . . . It already needs to be mowed.

Gross informed Corcoran in an e-mail dated August 17 that he would "attend the hearings on Aug. 25 and 26 in pay status." Harris was not, however, satisfied with the use of Code 19 because she believed the normal practice was to direct an employee attending a ULP hearing in which the employee was not a named party to use personal leave. Harris relayed her concerns regarding the code for Corcoran's appearance at the August 25 and 26 hearing together with Gross' earlier question regarding Corcoran's attendance at the September 14 ULP hearing, to OSER's legal counsel, David Vergeront. Vergeront responded in an e-mail dated August 22, which states:

> There is a ULP on that date involving Stephanie Henning who is employed by DOC. TC was really involved in that one. She really trashes him so I am looking forward to sitting back and havinf her testify. . . .

> However, subpoena or no subpoena TC does *not* get time off with pay. The contract only allows that for arbitrations. He has to take personal time and WSEU or the Loacal can reimburse him.. That is the rule that we have held fast to throughout the years. [In fact you should make sure that he is not in pay status for 8/25 and 26 or for the other days of hearing.] . . .
>
> So, the subpoena gets him off work but he has to take personal time. . . .

Gross confirmed DOC's change of position regarding the use of Code 19 and Code 21 to cover Corcoran's attendance at the August 25 and 26 hearings on PP(S)-349 in an e-mail to Harris dated August 23. Gross informed Corcoran of the change of position verbally and through an e-mail dated August 23, which states

> I was mistaken, you will need to use leave time for Aug. 25th and 26th attendance at the ULP hearing. This applies to your attendance at the ULP on 9/14/05 ULP also.

The labor agreement noted in Finding of Fact 4 does not specifically address what pay code should be used by unit members who attend ULP hearings. DOC has permitted some WSEU members to use Code 19 or Code 21 to attend ULP hearings, but has required other WSEU members to use personal paid time off. OSER has no formal policy on the point and State agencies can account for such time with or without OSER's input. Corcoran has attended ULP hearings and had Code 19 and Code 21 approved for the absence.

28. Conflict between Corcoran and DOC regarding the reconciliation of his caseload and WSEU duties grew throughout August, 2005 and intersected with then-pending collective bargaining. Harris and Gross consulted regarding whether or not Corcoran was managing his case load and discussed whether or not his WSEU duties overwhelmed it. Case management issues come to a head regarding one of the files assigned to Corcoran. The offender in that case was placed in jail on August 12. Under DOC Policy No. 10.01.01-.03, an individual placed in custody as that offender had been "should be interviewed within 3 working days." Gross or other DOC administrators sent Corcoran an e-mail inquiry regarding this offender's file on August 23, 26 and 29. In an e-mail to Gross dated August 29, Corcoran responded to Gross' August 23 e-mail concerning the appropriate pay code for the August 25 and 26 ULP hearings, thus:

> Eric, September 14th is a bargaining day. I will use Leave Code 19 that day. I will use Leave Code 21 for Aug. 25th and 26th.

In an e-mail memorandum to the membership of WSEU Local 2748 dated August 29, Corcoran stated:

> Many of you have expressed ongoing support and interest with the union's ULP action, filed earlier this year in labor court at the . . . (WERC).

> Testimony concluded this past Friday, August 26th, freeing those of us who were sequestered to now speak out.
>
> This trial is entirely about DOC's attempt to control or bust our union. They are trying to accomplish this by restricting our members' steward access, interfering with other internal union decisions, and by reneging on our long-standing agreement concerning the 2748 president. That deal involves the ongoing use of an LTE to free me up for performance of union duties. . . .
>
> From a layman's perspective I cannot imagine how this trial, start to finish, could have gone much better for us. . . .
>
> It is a sad fact that DOC administration is so intent on shutting us down that as they proceed with this business, they are willing to risk something terrible happening in the community. At the very least, their course of action seems incredibly irresponsible. . . .
>
> Those of us who have the privilege of serving as your officers know that the union has your unwavering support. We are engaged in one helluva struggle right now, but when all is said and done, we shall prevail. . . .

Gross stated in an e-mail to Corcoran dated August 31 that he would not approve the use of Code 21 for the August 25 and 26 absences from the office to appear at the hearing on PP(S)-349, and that Corcoran needed to amend his time sheet accordingly or risk a delay in being paid for that time period. Corcoran responded in an e-mail dated September 1, questioning whether DOC was "attempting to deny me access to the WERC" and noting, "I am aware that you did not come up with this by yourself." Harris and Gross discussed his response via e-mail, with Harris noting in a September 1 e-mail to Gross that "Tom does make a good point, it certainly does look like we don't know what we're doing." On September 2, Corcoran attended a grievance pre-filing meeting. A prefiling meeting is designed to create informal discussions that address non-disciplinary issues short of the filing of a formal grievance. The September 2 prefiling meeting concerned DOC compliance with Negotiating Note 70 regarding Corcoran's caseload duties. WSEU Steward Laura Welle represented Corcoran. Welle noted WSEU concerns that DOC was interfering with Corcoran's ability to attend to WSEU duties and Gross noted DOC concerns that Corcoran was refusing to manage his caseload, including using authorized overtime to assure he completed his duties. At the close of the September 2 meeting, Gross handed Corcoran the following letter, dated August 29, from Regional Chief Art Thurmer to Corcoran:

> You are hereby directed to appeal at an investigatory interview to be held at the DCC Fond du Lac office on Sept. 19, 2005 . . . Except for the latest allegation listed below the other alleged work rule violations would have been investigated in February 2005, however, you were on approved union leave from February 14, 2005 to July 15, 2005 and unavailable for an interview.

> The purpose of this investigatory interview is to ask questions about the following:
>
> - January 12, 2005 your travel to Sheboygan
> - January 19, 2005 your travel to Waupaca
> - January 21, 2005 your driving a state vehicle without signing the vehicle use agreement form
> - January 26, 2005 your travel to Sheboygan
> - February 3, 2005 your travel to a DWD meeting
> - February 8, 2005 your travel to Madison
> - February 9, 2005 your travel to Milwaukee
> - August 12, 2005 Offender . . . custody
>
> This is not a pre-disciplinary notice.
>
> To the best of your ability, you are required to answer fully and completely the questions asked of you. If you refuse to answer, you may be disciplined for that refusal in addition to any other discipline, which may be imposed for other conduct. Management may also rely on other sources of information for the conclusions of fact. Also, if you choose not to answer questions, management will make a decision based upon those facts and sources of information which, are available.
>
> You have a right to representation. If you decide to have a representative present during this interview please contact your supervisor before the meeting. It is your responsibility to schedule this representative.
>
> This investigation is considered a confidential matter and I am ordering you not to discuss this information with anyone other than your union representative.

In an e-mail to Corcoran dated September 6, Gross confirmed his denial of Corcoran's use of Codes 19 or 21 to account for the August 25 and 26 absences, and responded to Corcoran's September 1 e-mail. Between September 2 and September 6, various DOC and OSER managers discussed Corcoran's caseload, including the use of overtime as well as the use of an LTE who had been hired to cover for Corcoran's anticipated absences to participate in collective bargaining for a labor agreement to succeed that noted in Finding of Fact 4. DOC hired an LTE, Dan Dornbrook, to cover for Corcoran's anticipated absence during collective bargaining. By September 6, the WSEU had advised OSER that the issuance of the pre-disciplinary letter to Corcoran precluded collective bargaining. In a document headed "Bargaining Report 9/7/05", and mailed to members of Local 2748, Beil stated:

> We felt it was important to report to you the current status of bargaining. Our team was scheduled to meet with the employer to receive its economic offer on this date. Last week we had met with the employer to generally frame out our non-economic issues. This team has been ready for months to get to the table, bargain a good

> economic package and bring resolve to language issues mainly union security. The Department of Corrections has gone out of its way to challenge and obstruct representation . . . and create hostile work environments for Local union officers.
>
> . . .
>
> On Friday 9/2/05, President Corcoran was "served" with a notice of investigation for allegations going back to January and February. Not only did we view these as retaliatory but also as a lack of good faith on the part of the largest employer in this unit, Department of Corrections. We found it impossible to seriously problem solve and bargain in good faith given this environment. We asked the employer to resolve these issues and bargaining could go on, they wouldn't. That left us with no choice but to return home and to our worksites. . . .

Corcoran continued to process a number of grievances, including one challenging Karl's refusal to permit him to attend the July 26 BMCW meeting noted in Finding of Fact 22. Kalmus asked Harris to clarify the basis for the denial in an e-mail dated September 6. Harris responded by e-mail dated September 9, which states:

> We based that denial on two things. First of all as part of the ULP it was determined that Tom was not a regular attendee at that meeting, other representatives attended. So as a normal monthly meeting that may be so but is attendance at those meetings was less than 50%. Second, it is a code 21 activity and attendance is optional. It was determined that we could not give him caseload relief under NN70 because of a vacancy and workload in the BD office and so he needed to stay and get his work done. Third, I contacted . . . DHFS to see if there was a particular need for Tom to attend that meeting and he said there wasn't anything on the agenda that required the Pres. To be there and in the past if there had been then Tom got a special invite. So based on those factors he was denied to go.

On September 14, Corcoran filed a formal grievance regarding the caseload controversy discussed at the September 2 prefiling meeting. The grievance detailed concerns with the point value of Corcoran's caseload as well as with the propriety of DOC assigning bargaining team members overtime when collective bargaining was looming. DOC administrators continued to address caseload issues, with Maples stating in an e-mail to Harris dated September 15,

> My preference would be not to give Tom and bargaining team members overtime. I think this makes our motives look suspect.

Welle sent an e-mail to members of Local 2748 dated September 15, which followed up on Beil's memo of September 7. The memo noted, "the union filed additional Unfair Labor Practice . . . charges against the Department of Corrections, based on their ongoing union busting efforts and retaliation" and described Corcoran as "presently under 'investigation' and 'gagged' by the

employer." The "gagged" reference was to the final sentence of the August 29 notice of the September 19 investigatory interview. That sentence is a standard reference included in such notices. Corcoran took sick leave on September 19, 2005 and the investigatory interview set for that date did not take place. Thurmer rescheduled the interview to September 26 with a notice dated September 19, which was identical to that of August 29, with the exception of references to the rescheduled dates and the reason for not proceeding on September 19. Harris confirmed Maples' September 15 e-mail in a response dated September 21, which added, "No one else has any knowledge of past practice." Thurmer conducted Corcoran's investigatory interview on September 26. Welle represented Corcoran. In a memorandum dated September 26 and made available via e-mail on that date to PSS bargaining unit members, Maples responded to Beil's September 7 Bargaining Report thus:

> The DOC disagrees with the assertions in the email and wants to set the record straight. . . . DOC has no interest in challenging or fighting with the union, obstructing representation, intimidating stewards, or creating a hostile work environment for union officers.
>
> The State, through . . . OSER . . . was ready to present an economic package to PSS, but PSS walked away from the bargaining table with OSER because DOC had scheduled an investigatory meeting with the Local 2748 President for possible work rule violations.
>
> There is no connection between the investigation of the Local 2748 Union President for possible work rule violations and collective bargaining. The investigation concerns events that began in January and February 2005. DOC notified the Local 2748 President in a letter dated February 10, 2005, that an investigatory meeting was scheduled for February 15, 2005. The day before the meeting, AFSCME Council 24 notified OSER that the Local 2748 President was going on a union leave under section 13/8/3 of the Agreement. He then remained out on union leave for approximately five months. The DOC has a responsibility to its employees and the public to investigate possible work rule violations. Likewise, the DOC cannot allow an employee to steer clear of an investigation of possible discipline by merely taking leave or asserting status as a union officer. All employees, including the Local 2748 President, are responsible for their actions in the workplace.
>
> DOC has been informed by OSER that the State continues to be ready to bargain in good faith with PSS.

WSEU Local 2748 issued a response to this e-mail, challenging whether Maples had authored it; asserting Raemisch had in fact authored it; asserting that Raemisch was motivated by an intense dislike for Council 24 and the union as a whole; and challenging its factual assertions.

29. On October 7, 2005, Harris advised Corcoran that DOC was dropping all of the allegations subject to the September 26 investigatory interview, with the exception of the allegation that Corcoran had not interviewed an offender jailed on August 12 in a timely fashion. She informed him that he would receive a counsel regarding that allegation. A counsel is not a formal part of the progressive disciplinary steps under the labor agreement. At a meeting conducted on October 12, WSEU determined to resume collective bargaining with OSER as soon as practicable. DOC re-hired Dornbrook as an LTE, to cover for Corcoran's role in collective bargaining, assigning cases to Dornbrook on or about October 17. Dornbrook's initial hire as an LTE had been rescinded when WSEU withdrew from bargaining as noted in Finding of Fact 24. From October 20, 2005 through May 2, 2006, Corcoran's time was devoted to collective bargaining and contract administration duties and his caseload at the Fond du Lac office was assumed by Dornbrook. Corcoran's caseload was not reduced during the period Dornbrook covered it.

30. The Arrangement was an agreement between DOC and WSEU, within DOC's lawful sphere of authority, addressing the work place problems associated with Corcoran's use of contractually-permitted union leave. As such, the Arrangement was analogous to a grievance settlement and was implicitly incorporated into the collective bargaining agreement's union leave provisions as they pertained to Corcoran. The Arrangement served the mutually beneficial purposes of facilitating Corcoran's effectiveness as a union official, on the one hand, and facilitating DOC's practical ability to assign its cases effectively, on the other hand. The Arrangement required DOC to provide Corcoran meaningful case load relief that would permit him to undertake legitimate/approved union activities during work time, and included a commitment on the part of DOC to deploy LTEs to decrease the degree to which Corcoran's case load relief burdened other staff. The Arrangement did not include any minimum or maximum amount of union leave or case load relief available to Corcoran.

31. The Arrangement was not intended to expand or alter the type, amount, purposes, or conditions pertaining to Corcoran's use of union leave beyond the parameters of the contractual provisions pertaining to union leave (as interpreted and applied in practice). The meaning of those provisions, the specific extent and conditions under which the State must provide Corcoran with union leave, the concomitant case load relief and/or LTE coverage that the State must provide Corcoran pursuant to the Arrangement, and whether the State has just cause for disciplining Corcoran for the type, amount, or manner of his using union leave, are all matters appropriately left to the parties' negotiations, grievance, and discipline procedures.

32. Corcoran's performance of WSEU-related activities during work time focusing on LMC efforts and collective bargaining related duties, including contract administration, is lawful, concerted activity, provided it remains within contractual/mutually-agreed parameters.

33. DOC's and the State's administrative efforts to assign Corcoran case load duties were aimed at enforcing Corcoran's performance of the duties of his State position, and/or at effectuating the State's and DOC's good faith (though mistaken) belief that the Arrangement was not an enforceable agreement. These efforts were not undertaken in retaliation for

Corcoran's lawful, concerted activity in pursuing a previous prohibited practice complaint before the Commission or otherwise engaging in lawful, concerted activity.

34. The State and the WSEU have negotiated contractual language governing the purposes for and conditions pertaining to union leave. The parties' collective bargaining agreement includes a grievance procedure that applies to the contractual language governing union leave, that culminates in final and binding arbitration, and that was intended to be the exclusive means of enforcing the agreement.

## CONCLUSIONS OF LAW

1. Complainant is an "Employee" within the meaning of Sec. 111.81(7), Stats.

2. Respondents constitute an "Employer" within the meaning of Sec. 111.81(8), Stats.

3. Wisconsin State Employees Union (WSEU), AFSCME, Council 24, AFL-CIO, and WSEU Local 2748, constitute a "Labor organization" within the meaning of Sec. 111.81(12), Stats.

4. Respondents' efforts to impose a case load upon Complainant, including the Memoranda of July 15, July 22 and August 9, and including its implementation of the investigatory interview/counsel process, are matters that are properly addressed under the grievance procedure in the collective bargaining agreement and did not interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Sec. 111.82, Stats., in violation of Sec. 111.84(1)(a), Stats.

5. Respondents' renunciation of the Arrangement effective September 2004 violated the Respondent's duty to bargain in good faith and renounced a collective bargaining agreement, thereby violating Secs. 111.84(1)(d) and (e), Stats.. and, derivatively, Sec. 111.84(1)(a), Stats.

6. Respondents' efforts to end the Arrangement and impose a case load upon Complainant inconsistent with the Arrangement were not motivated by hostility toward his lawful, concerted activity and did not violate Sec. 111.84(1)(c), Stats.

## ORDER

1. Those portions of the complaint alleging an independent violation of Sec. 111.84(1)(a), Stats., and/or a violation of Sec. 111.84(1)(c), Stats., are dismissed.

2. To remedy its violations of Secs. 111.84(1)(d) and (e), and, derivatively, (a), Stats., the State shall immediately:

a. Cease and desist from refusing to comply with the Arrangement until such time as it is eliminated or modified by mutual agreement.

b. Take the following affirmative action which will effectuate the policies and purposes of SELRA:

1. Restore the Arrangement consistent with the parameters set forth in Findings of Fact 30 and 31, above;
2. Notify all employees in the Department of Corrections who are members of the bargaining unit represented by Local 2748, by posting in conspicuous places in offices where such employees are employed, copies of the Notice attached hereto and marked "Appendix A." This notice shall be signed by the Secretary of the Department of Corrections, and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for a period of thirty (30) days thereafter. Reasonable steps shall be taken by the Respondent to insure that this Notice is not altered, defaced or covered by other material.

3. Notify the Wisconsin Employment Relations Commission within twenty (20) days following the date of this Order of the steps taken to comply herewith.

Dated at Madison, Wisconsin, this 24th day of June, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Richard B. McLaughlin /s/
Richard B. McLaughlin, Examiner

**APPENDIX "A"**

**NOTICE TO ALL EMPLOYEES OF THE WISCONSIN DEPARTMENT OF CORRECTIONS WHO ARE REPRESENTED BY LOCAL 2748, WSEU, AFSCME, COUNCIL 24**

Pursuant to an order of the Wisconsin Employment Relations Commission, and in order to effectuate the purposes of the State Employment Labor Relations Act, we hereby notify our employees that:

> WE WILL NOT RENOUNCE agreements between the State of Wisconsin and Wisconsin State Employees Union (WSEU), AFSCME Council 24, Local 2748, including the arrangement whereby Local 2748 President Thomas Corcoran was provided a reduced case load and the deployment of LTEs to cover portions of said case load, to accommodate his use of legitimate contractual union leave, or otherwise interfere with our employees' rights to engage in lawful, concerted activity, in violation of Secs. 111.84(1)(d), (e), and, derivatively, (a), Stats.

STATE OF WISCONSIN
DEPARTMENT OF CORRECTIONS

_____ _____

By: Secretary, Department of Corrections Date

**THIS NOTICE WILL BE POSTED IN THE LOCATIONS CUSTOMARILY USED FOR POSTING NOTICES TO EMPLOYEES FOR A PERIOD OF THIRTY (30) DAYS FROM THE DATE HEREOF. THIS NOTICE IS NOT TO BE ALTERED, DEFACED, COVERED OR OBSCURED IN ANY WAY.**

**STATE OF WISCONSIN, DEPARTMENT OF CORRECTIONS**

**MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER**

## The Parties' Positions

The parties completed a briefing schedule after my issuance of DEC. NO. 31272-A, but prior to Commission issuance of DEC. NO. 31272-B. The following three subsections reflect that responsive schedule and include arguments which the issuance of the Commission's decision make inapplicable, but which highlight arguments that extend beyond the events addressed in DEC. NO. 31272-B. The final two subsections reflect the parties' submissions regarding the impact of DEC. NO. 31272-B, which they submitted well after its issuance.

### Complainants' Brief

After a review of the evidence, Complainant notes that, "This case quite literally picks up where the prior case left off." More specifically, Complainant argues that even before Corcoran ended his leave of absence, Respondents continued an ongoing course of hostility toward him, which consists of a "two-pronged scheme of imposing onerous technical impediments on the approval of . . . union activities, coupled with setting him up for discipline by assigning him an excessive caseload".

Karl's July 15 and July 22 memoranda highlight his ongoing discrimination against Corcoran. The addition of innumerable technical requirements was unprecedented and "were intended to further impede Corcoran's ability to engage in protected activities." Beyond this, Karl improperly required Corcoran to use personal leave for his final week on leave of absence. This, coupled with Karl's routine disapproval of Corcoran's reasonable requests to be off the work site for lawful, concerted activities led Corcoran to reasonably conclude that "Karl's harassment was unrelenting and was only becoming more pronounced." This coerced Corcoran to transfer from Beaver Dam to Fond du Lac.

The "involuntary transfer . . . did not abate Respondent's campaign against him." Gross' issuance of the August 9 Memorandum incorporated the onerous requirements of the January 5, July 15 and July 22 memos. Beyond this, it is evident that Gross assigned Corcoran a fulltime caseload in the hope he would make an error for which he could be disciplined. Harris' "grass mowing" e-mails confirm this. Her e-mail of August 23 further underscores this course of conduct, which culminated in the investigatory process that led to the issuance of a counsel. That Gross dramatically increased Corcoran's caseload in September underscores the depth of the Respondents' vendetta.

WSEU "threw a monkey wrench into this scheme to discipline Corcoran by its swift and militant response to the issuance of the disciplinary notice on September 2. The

cancellation of bargaining coupled with the filing of the complaint slowed down, but did not stop Respondents. This is exemplified by the contorted effort to force Corcoran to use personal leave for appearing at hearings in the prior complaint.

The remedy appropriate to Respondents' legal violations is to,

> (1) allow Corcoran the opportunity to transfer back to Beaver Dam, if he desires; (2) rescinding the July 15, 22 and August 9 memoranda restricting his union activities; (3) reinstating the Arrangement providing for LTE coverage, or other mutually agreed method of permitting Corcoran to engage in union activities permitted by the contract, consistent with his responsibilities as an employee; (4) directing Respondents to cease and desist from engaging in these and any violations of the Act; and (5) such other relief the Examiner deems just and proper.

**Respondents' Reply**

PP(S)-362 picks up where PP(S)-349 left off because Corcoran "continues on and on with his gamesmanship and his attempts to misuse and abuse the rules, policies and contractual provisions." The July 15 Memorandum did not violate SELRA. Karl issued it as a reasonable response to Corcoran's extended leave of absence. Beyond this, Corcoran's abuse of Codes 19 and 21 is evident. Notice of his union duties is appropriate given his past failure to provide adequate or timely notice of events pulling him from his work. Beyond this, the July 15 Memorandum was not simply a reissuance of the January 5 Memorandum. It deleted the portions of the predecessor found objectionable by the Examiner in PP(S)-349. Nor did Karl's actions of July 18 violate SELRA. He did not deny all of Corcoran's requests for leave and was not overruled by any of his supervisors. Corcoran's failure to adequately document his requests cannot be held against Karl, who sought no more than to assure absence from work was based on contract. Similarly, the July 22 Memorandum did nothing beyond reasonably attempting to supervise the workplace. From his return from leave, Corcoran made it clear that he "simply did not get it and was hell bent on doing things his way, as he had done in the past, not the proper way." His absence from the worksite on July 20 confirms this. Examination of Corcoran's other absences confirm the reasonableness of the July 22 Memorandum.

The evidence amply demonstrates that Karl's change of Corcoran's final week of leave from Code 21 to Code 14 was done in good faith. Karl was not notified that Wild and Hacker had agreed to account for the leave with Code 21. He did no more than alter Corcoran's time sheet to make it consistent with the way the leave had previously been accounted for. Corcoran compounded the problem by trying to end run Karl "by faxing his time sheet directly to payroll without Mr. Karl's signature." Rather than inform Karl of the agreement, Corcoran filed a grievance to set the matter right. This manifests that Corcoran "was more interested in setting up Mr. Karl than doing the right thing."

Examination of the evidence establishes that any denial by Karl of time off of work for Corcoran reflects a good faith attempt to supervise him. There is no credible evidence that Karl harassed Corcoran into making the transfer request. Rather, the transfer "placed him closer to venues he has sought to attend for grievance meetings and investigatories." Gross' August 9 Memorandum did no more than continue Karl's good faith efforts to supervise Corcoran. Gross had no experience dealing with a WSEU official and his attempt to keep continuity in Corcoran's work expectations is understandable.

Nor will the record support finding a violation of law or contract with regard to Corcoran's caseload in the Fond du Lac office. Gross confirmed in his July 28 conversations with Corcoran that he was expected to service a full-time caseload of sex offenders. Sex offender caseloads generate higher point totals from fewer cases due to the contact demands of those cases. Gross tried to balance the caseload between the two positions available to him. That an LTE serviced Corcoran's caseload while bargaining was ongoing highlights that Respondents did not demand anything out of the ordinary of Corcoran. Beyond this, an examination of Negotiating Note 70 establishes that Respondents had no duty to reduce Corcoran's caseload. The point system assured that Corcoran was not compelled to work overtime and assured that he was treated as any other full-time employee. Gross did not intentionally load Corcoran's caseload. His grieving of the investigatory played no role in his caseload. The LTE was hired well before that and the WSEU rather than Respondents called a temporary halt to the bargaining process. But for that halt, the LTE rather than Corcoran would have borne the brunt of the increased point totals for his caseload.

That Corcoran was subject to an investigatory cannot be used to find a violation of law since the WSEU rather than Respondents notified unit members of the investigatory process. That the investigatory did not take place earlier reflects only that Corcoran was unavailable due to his leave and that the offender issue arose in late August. Corcoran's constant absence from the workplace following his return to work in July compounded the problem.

The offender issue reflects bona fide supervisory issues rather than animus or interference with lawful, concerted activity. The evidence establishes that Corcoran's neglect of the case was egregious and handled with restraint by Respondents. Corcoran's inability to recognize any personal accountability for the case highlights a pattern of conduct that Respondents had a reasonable need to subject to the disciplinary process. There was no animus, "just an investigation prompted by possible wrongdoing." Examination of Respondents' conduct regarding the investigatory process and regarding the ULP process affords no persuasive basis upon which to infer unlawful hostility.

Complainant's brief regarding the use of Code 19 or Code 21 for Corcoran's attendance at the hearings in PP(S)-349 ignores that the evidence shows no consistent practice of permitting use of those codes for that purpose. In fact, the contract is silent on the point and OSER typically demands use of personal paid time off for such purposes. Gross' initial approval of the use of Code 19 reflects his inexperience with such matters and a problem of communication within Respondents' management oversight. Wild's initial response to Harris

was casual and based on limited information. Her subsequent actions highlighted that such payment is not authorized by contract, practice or policy.

Complainant's isolation of certain references within management e-mail discussions of Corcoran fails to support a finding of proscribed hostility. Harris' "grass mowing" comments reflect her concern with delays in the investigatory process, not a desire to "get" Corcoran. Comments by Respondents' counsel that he looked forward to testimony trashing Corcoran shows no more than the adversarial process. Commission case law confirms that labor relations conversations can reasonably be expected to be wide open. Animus must rest on something greater than "shop talk."

The record demands that "the Complaint must be dismissed in its entirety on the merits."

**Complainant's Reply**

Respondents' brief "never seriously disputes record evidence adduced regarding the basic allegations that" Karl reiterated improper restrictions from the January 5 Memorandum and improperly expanded them. His improper restriction of Corcoran's "legitimate union activities" in July and August stands unrebutted. Gross' improper continuance of this course of conduct is no less unchallenged by Respondent despite the length of its brief. Assertions that Corcoran abused Codes 19 and 21 lack any support in the evidence, and even if such support existed, no other union official was disciplined for the asserted abuse. That Karl wanted greater detail on Corcoran's reasons for attending WSEU activities ignores the prior seven years of largely unregulated approval of these activities. Karl's desire to assure Corcoran returned to Beaver Dam after attending approved meetings in Madison shows less a desire to supervise than a desire to harass. Respondents' characterization of Karl's alteration of Corcoran's time records and of Karl's reasons for issuing the July 22 Memorandum are unpersuasive. Assertions that Corcoran transferred to Fond du Lac for any reason other than Karl's harassment "are absurd."

The evidence establishes that Gross did no more than continue Karl's harassment of Corcoran for his lawful, concerted activity. Corcoran's carrying the heaviest caseload in the Fond du Lac office in mid-September establishes this. Gross assigns cases on a weekly basis and thus Respondents' assertion that Gross expected the LTE to carry these cases is unpersuasive. The assertion that the LTE carried Corcoran's caseload on a less than full-time basis has no evidentiary support and ignores that the use of an LTE does not preclude assigning the LTE a forty-hour work week. Even if Negotiation Note 70 does not compel a caseload reduction for Corcoran, it demands some consideration of his union duties. Respondents afforded Corcoran none. Even a casual review of management e-mail discussions demonstrates a callous attitude toward Corcoran, which cannot be excused under a reasonable review of Commission case law. The investigatory process was not-even handed, but reflects in its timing and in its substance retaliation against the filing of a grievance. Detailed review of the facts establishes unlawful discrimination and interference with Corcoran's lawful, concerted activity.

**Complainant's Brief On The Impact Of DEC. NO. 31272-B**

After a review of DEC. NO. 31272-B, Complainant contends that the "only allegation relating to the January 5 Memorandum in this action appears in paragraph 15 of the amended complaint." That allegation "assumes the legitimacy of the January 5 Memorandum as incorporated into the July 15 directive." Since Corcoran complied with the July 15 Memorandum, the Commission's upholding the validity of the January 5 Memorandum has no bearing on the allegation that "Karl interfered with Corcoran's rights by denying him permission to attend the functions". Thus, "the allegations made in paragraph 15 should be sustained, notwithstanding the Commission's upholding of the validity of the January 5 memorandum."

**Respondent's Brief On The Impact Of DEC. NO. 31272-B**

The Commission's treatment of DEC. NO. 31272-A leaves, "except for the validity of the Arrangement," the "slate clean for Corcoran II when it came to alleged violations of the Act." This means that "any claims of animus/hostility/retaliation that Complainant contends was present (in) Corcoran II must be proven solely in the record of Corcoran II."

The "nebulous parameters the WERC attempted to fashion" regarding the Arrangement leave "only a very limited number of alleged clams that could **possibly** fall under the shadow of the Arrangement." The July 15, July 22 and August 9 Memoranda thus are no more a violation of SELRA than the January 5 Memorandum. It follows that any questions regarding them "are properly addressed under the grievance procedure" rather than in an unfair labor practice proceeding. The good faith of Respondents found in DEC. NO. 31272-B makes the same conclusion relevant to the alleged acts of interference by Karl, Gross and others.

Commission affirmance of the good faith underlying the January 5 Memorandum means that Corcoran was bound to give his supervisors the notice regarding WSEU activities that Complainants urge constitutes an act of interference. The same analysis governs the alleged acts of interference committed by Gross. Thus, absent proof of bad faith in the evidence of PP(S)-362, there can be no statutory basis for the complaint, which at most poses issues appropriate to grievance arbitration. Since the record shows no proof of bad faith, it follows that "the allegations of the Complaint are without merit and the Complaint must be dismissed."

## DISCUSSION

The amended complaint, like the complaint in PP(S)-349, alleges Respondent violations of Sec. 111.84(1) (a), (c), (d) and (e), Stats. The parties agree that the conduct underlying PP(S)-362 takes up where the conduct underlying PP(S)-349 leaves off. Thus, DEC. NO. 31272-B necessarily affects the analysis of PP(S)-362, and analysis of the allegations of PP(S)-362 must start with the impact of that decision.

The impact of that decision starts with the Commission's conclusion regarding the Arrangement. The Commission addressed the point thus (AT 18 OF DEC. NO. 31272-B):

> We hold, therefore, that the Arrangement was an enforceable agreement and that the State's wholesale renunciation of the Arrangement violated Secs. 111.84(1)(d) and (e), Stats.

The specific statement of the illegality of the State's conduct appears at Conclusion of Law 4 (DEC. NO. 31272-B AT 4). The Arrangement was only part of the conduct disputed by the parties in PP(S)-349 and PP(S)-362. Rather, it was an integral part of a disputed course of conduct by Respondents to reconcile Complainant's caseload duties with his duties as a WSEU official. In PP(S)-349 as well as PP(S)-362, this involved the issuance of memoranda to regulate the approval of Complainant's absence from the worksite as well as the initiation of the investigatory interview process to enforce those memoranda. The Commission's Conclusion of Law 3 addressed the implications of the broader course of conduct thus:

> Respondent's memoranda . . . and their attempts to restrict PSS stewards . . . are matters that are properly addressed under the grievance procedure in the collective bargaining agreement . . . DEC. NO. 31272-B AT 4.

Conclusions of Law 3 and 5 of DEC. NO. 31272-B establish that the broader course of conduct underlying PP(S)-349 did not violate Secs. 111.84(1)(a) or (c), Stats. The issue posed regarding PP(S)-362 is thus whether it poses conduct qualitatively distinguishable from that addressed by the Commission in DEC. NO. 31272-B.

The conduct underlying both complaints preceded the issuance of DEC. NO. 31272-B. There is no evidence regarding what, if any, action the parties have taken in collective bargaining or under the grievance procedure to address Complainant's conduct under the Arrangement. The submission of post DEC. NO. 31272-B argument questioned no aspect of duty to bargain issues. Thus, PP(S)-362 poses no duty to bargain or contract interpretation issue independent of DEC. NO. 31272-B. Accordingly, the Conclusions of Law and Order mirror the Commission's in DEC. NO. 31272-B regarding the application of Secs. 111.84(1) (d) and (e), Stats., and their corollary derivative violation of Sec. 111.84(1)(a), Stats.

Here, as in PP(S)-349, the parties' arguments focus on the interference and discrimination components of an independent violation of Sec. 111.84(1)(a), Stats., or a violation of Sec. 111.84(1)(c), Stats. The issue posed is whether the record underlying PP(S)-362 poses evidence of interference or hostility qualitatively different from that addressed by the Commission in PP(S)-349. In my opinion, it does not.

Examination of this conclusion requires some background. DEC. NO. 31272-B overturned the Sec. 111.84(1)(c), Stats., analysis of DEC. 31272-A. Whether or not I agree with the Commission's analysis is irrelevant to this record. I am bound by it. I do not believe the Commission's application of standards articulated in CLARK COUNTY, DEC. NO. 30361-B (WERC, 11/03), cited at DEC. NO. 31272-B AT 19), can be reconciled to their application in DEC. NO. 31272-B. This point has no direct bearing on PP(S)-362, which must focus solely on the Commission's application of them in DEC. 31272-B for the law to have consistency. It

is, however, the necessary preface to the analysis of the existence of proscribed hostility under the "the four-part discrimination paradigm":

> The four elements necessary to establish retaliation for lawful concerted activity are: (1) that the complainant engaged in lawful concerted activity; (2) that the employer was aware of this activity; (3) that the employer was hostile to the activity; and (4) that the employer's adverse action against the complainant was motivated at least in part by that hostility. Dec. 31272-B at 19.

More to the point, the evidence of hostility in CLARK COUNTY is weaker than in PP(S)-349, and more significantly, the evidence of hostility is weaker in PP(S)-362 than in PP(S)-349. The significance of this point is established by Conclusion of Law 5 in DEC. NO. 31272-B. That the Commission found no hostility on the record of PP(S)-349 affords no reason to believe it would find hostility on the record in PP(S)-362.

Because this record involves conduct beyond that of PP(S)-349, it is necessary to address this conclusion in some detail. Karl's and Gross' Memoranda of July 15, July 22 and August 9 draw directly from the January Memoranda the Commission found not to evidence hostility in PP(S)-349. The existence of hostile conduct, if any, that is qualitatively different from that in PP(S)-349 must, then, be found elsewhere.

Complainant points to a number of e-mails which, coupled with what Complainant views as acts of interference, indicate hostility. The evidence will not, however, support this assertion. The Harris "grass growing/mowing" e-mail of August 17, standing alone, can be read to indicate hostility. Her testimony that she referred only to the delay in the investigatory process is, with the balance of her testimony, credible. Even if this was not the case, the coercive overtones must be tempered by what the e-mail referred to, which is a non-disciplinary investigative interview. Nor is there reliable evidence that the investigatory process started in February was tainted prior to Harris' e-mail. DOC and OSER agreed with Hacker's suggestion that the coding for Corcoran's leave should be changed to protect his accrual of benefits. This cannot be reconciled to an ongoing effort to harass him.

Beyond this, the asserted effort to "get" Corcoran affords little insight into Respondents' behavior. The e-mail trail manifests less the visible tip of an aggressive plan than tumult in reaction to Corcoran's ongoing unwillingness to assume a caseload. The allegedly coercive tone of the August 17 e-mail must be contrasted to the August and September e-mails among a number of DOC and OSER employees concerning how to code the August 25 and 26 absences. Harris' candid assessment of September 1 that, "it certainly does look like we don't know what we're doing" underscores this. Respondents did not, in the statutory sense, know what they were doing. Rather, they were figuring it out. This does not reflect hostile design, but good faith confusion over a point not specifically governed by contract or policy. The number of e-mails addressing Corcoran in August and September is notable. However, their number standing alone affords little support for Complainant. The number of meetings on whether to assign him a full caseload is easier to reconcile to the inference that

administrators were trying to figure out how to keep Complainant's caseload functioning within the limits of appropriate WSEU duties than with the inference that he was being set up to fail. Maples' dissension on the assignment to Complainant of a full-time caseload underscores this. Significantly, examination of those e-mails affords little evidence of the unfolding of a hostile plan. Administrators reacted to ongoing events rather than dictating them. In any event, Corcoran's ongoing attempts to end-run his immediate supervisors is difficult to reconcile to an organized management effort to engineer his failure.

Significantly, Respondents' behavior consistently revolved around concerns over Corcoran's handling of his caseload. Complainant persuasively notes that Gross' assignment of cases can be viewed as a means to engineer failure. That Corcoran's case point values rose as bargaining approached lends force to the assertion. However, it is not evident what the alternative was. Total case point values rose over this period and it is not evident where else they could go. Beyond this, it is undisputed that Dornbrook assumed the caseload without alteration while Corcoran served on the bargaining team.

Ultimately, the evidence of hostility breaks down because the dominating consistency throughout this period was Complainant's intransigence regarding caseload issues. This consistency dates back to PP(S)-349. At 34 of of DEC. NO. 31272-A, I noted:

> The record will support State assertion that Corcoran expanded the scope of the Arrangement. While the record will not support a conclusion that Corcoran acted as a full-time WSEU representative on State pay, it does confirm State concern that Corcoran and the WSEU treated LTE positions as personal coverage for Corcoran. It is not evident that Corcoran took a significant interest in the ABT training, or in his DCC duties between September and December.

This pattern was one of many currents underlying PP(S)-349, but it dominates the record of PP(S)-362. Corcoran's July 15 Memorandum to Karl on returning from leave underscores this. He did not seek approval, but informed Karl what he "will" do. Karl responded by seeking advice from his managers. This pattern dominates the record, with DOC administrators reacting to Corcoran's pushing of the Arrangement toward WSEU activities and away from DCC case duties. The asserted harassment from Karl is undercut by this pattern. Karl's changing the pay code for Corcoran's final week of leave reflects a good faith error on Karl's part. Corcoran submitted one time sheet without Karl's signature and responded to Karl's good faith action to correct the coding by a series of actions end-running Karl. None of those actions is statutorily improper, but manifest that conflict between Karl and Corcoran over this period of time reflected not supervisory harassment but the attempt to supervise.

The pattern continued in Fond du Lac. Corcoran's August 11 e-mail provoked Gross' version of Karl's work directives. Consistently, Corcoran communicated what he "will" do and consistently DOC administrators responded by attempting to supervise Corcoran to the point he would handle a DOC caseload. Throughout the ongoing dialogue between Corcoran and his managers there is little, if any, indication from Complainant that his managers could apply caseload concerns to any request he made of them. As noted above, the reactions to his

requests do not afford persuasive evidence of a hostile plan. Rather, they manifest ongoing conflict on how to reconcile Corcoran's DOC and WSEU duties.

As noted in the various bargaining memoranda, that conflict rose in pitch, including allegations of "union busting." The evidence, however, does not establish hostility within the meaning of Sec. 111.84(1)(c), Stats. The inference cannot reliably account for any aspect of Respondents' behavior over the period of time covered in PP(S)-362. That Corcoran received a counsel for asserted neglect in handling his caseload poses no statutory issue. His testimony on the matter is instructive in this proceeding, because it manifests the pattern noted above. The detail and command of events he testified to regarding WSEU duties is matched by a remarkable lack of detail or any recall of events surrounding his DCC caseload. His testimony tracks the tone of his August 29 e-mail to members concerning the events surrounding the litigation of PP(S)-349. Neither betrays any indication that there may be more than one view of events surrounding his conduct.

In sum, the record of PP(S)-362 does not manifest conduct qualitatively different from that addressed by the Commission in DEC. NO. 31272-B. Even from the point of view in Dec. No. 31272-A, in which I concluded the record did manifest statutory hostility, I do not believe the evidence in PP(S)-362 manifests hostility within the meaning of Sec. 111.84(1)(c), Stats.

Similar considerations apply to the allegation of an independent violation of Sec. 111.84(1)(a), Stats. As noted above, the various memoranda issued after the close of the record in PP(S)-349 flow directly from memoranda found by the Commission in Dec. No. 31272-B not to violate Sec. 111.84(1)(a), Stats. As noted above, the asserted harassment by Karl or other administrators manifests the attempt to supervise Corcoran, not supervisory harassment. Because the underlying conduct is not qualitatively different from that addressed by the Commission in PP(S)-349, there is no need for any discussion beyond that offered by the Commission in DEC. NO. 31272-B.

Before closing, some notes on the structure of this decision are in order. The parties incorporated the evidentiary record underlying PP(S)-349 into this litigation, and I have incorporated as much of DEC. NO. 31272-B into this decision as possible. The inconvenience of added bulk should be offset by the convenience of not having to flip through three decisions to read one. Findings of Fact 1 through 20 are taken directly from DEC. NO. 31272-A, with the exception of Findings of Fact 3 and 19. The final sentence of Finding of Fact 3 appears above because in PP(S)-362, unlike in PP(S)-349, Corcoran is named as an individual complainant. The final sentence notes his party status and includes his address, as required by Sec. 227.47(1), Stats. Finding of fact 19 above, unlike PP(S)-349, includes a reference to Corcoran's leave to make it consistent with Finding of Fact 29 of PP(S)-362. The Commission affirmed Findings of Fact 1 through 20, other than the exceptions noted above, in DEC. NO. 31272-B AT 2. Findings of Fact 21 through 29 reflect my view of the facts underlying PP(S)-362. Findings of Fact 30 through 34 are drawn directly from DEC. NO. 31272-B AT 2-4, where they were numbered 21 through 25. The Conclusions of Law have been kept as close as possible to those stated by the Commission in DEC. NO. 31272-B AT 4 to highlight that PP(S)-

362 does not pose conduct qualitatively different from that addressed by the Commission in PP(S)-349.

The Order, with Appendix "A", is taken verbatim from DEC. NO. 31272-B AT 4-6, with the exception of the renumbering of Findings of Fact noted above. While this has the effect of finding a violation on a record that supports no violation beyond that found in PP(S)-349, PP(S)-362 must be consistent with PP(S)-349. Since there is neither evidence nor argument on the impact of DEC. NO. 31272-B on the Arrangement, the Commission's findings on the point carry into this decision to avoid any arguable conflict between them. Unlike PP(S)-349, Corcoran is named as an individual Complainant in PP(S)-362. This has no bearing on the substantive, statutory issues posed by PP(S)-362.

Dated at Madison, Wisconsin, this 24th day of June, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Richard B. McLaughlin /s/
Richard B. McLaughlin, Examiner

RBM/gjc
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