STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN LAW ENFORCEMENT ASSOCIATION, Complainant,

vs.

STATE OF WISCONSIN (UNIVERSITY OF WISCONSIN-LA CROSSE), Respondent.

Case 29
No. 66882
PP(S)-379

Decision No. 32236-A

Appearances:

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

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

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Daniel Nielsen, Examiner: On April 5, 2007, the Wisconsin Law Enforcement Association filed a complaint of unfair labor practices against the University of Wisconsin-LaCrosse, asserting that the University had interfered with the Association's right to provide representatives of it choosing to the law enforcement personnel of the University in the grievance procedure, and had coerced employees to refuse to cooperate with the union and other employees in investigating a possible grievance, and thereby violated the provisions of the State Employment Labor Relations Act, Section 111.80, Stats. ("SELRA"). The Commission appointed Daniel Nielsen, an Examiner on its staff, to conduct a hearing and make and issue appropriate Findings of Fact, Conclusions of Law and Orders.

A hearing was held on the complaint on November 20, 2007 at the Commission's offices in Madison, Wisconsin. The hearing was transcribed and the transcript was received

on December 17. The parties thereafter filed written arguments, the last of which was received on February 18, 2008 whereupon the record was closed.

Now, having reviewed the testimony, the exhibits, the arguments of the parties, and the record as a whole, and being fully advised in the premises, the Examiner makes and issues the following Findings of Fact [1], Conclusions of Law and Order.

FINDINGS OF FACT

1. The Complainant Wisconsin Law Enforcement Association (hereinafter referred to as either the WLEA or the Association) is a labor organization, maintaining it offices in care of Attorney Sally Stix, 700 Rayovac Drive, Suite 117, Madison, Wisconsin, 53711. Attorney Stix serves as the Association's legal counsel.

2. WLEA is the exclusive bargaining representative for, among others, law enforcement officers employed by the State Patrol, the University system, and the State Capitol Police. Officer Glen Jones is the President of the WLEA, and Officer Robin West is the Chief Steward of WLEA Local 2, which represents University Police Officers.

3. The Respondent, University of Wisconsin-LaCrosse (hereinafter referred to as either the University or the Respondent) is an institution of higher education operated by the State of Wisconsin, under the direction and control of the Board of Regents.

4. Labor relations at the University of Wisconsin-LaCrosse are relatively autonomous as to disciplinary matters and grievance processing. Kari Heilman was, at the time of the events giving rise to this case, the Human Resources Manager for UW La Crosse, and Jennifer Wilson was the Executive Director for Human Resources. Collective bargaining and matters of concern beyond the campus level are coordinated through the labor relations office of the University System, and the Office of State Employment Relations (OSER). Jill Thomas is the Labor Relations Specialist for OSER who is principally responsible for negotiations with the WLEA, among other labor organizations. Jason Beier is an attorney, who serves as the University Employee Relations Manager, and is responsible for Step Two hearings on grievances.

4. As part of its operations, the University maintains a police department. At the times relevant to this complaint, Scott Rhode was the Chief of the Campus Police at UW La Crosse, and Scott McCullough was the Sergeant.

5. Prior to March 1, 2005, police officers in the University of Wisconsin system were members of a collective bargaining unit represented by the Wisconsin State Employees

[1] Portions of Findings No. 5, 6 and 7 concerning the organizational history of the WLEA are drawn from uncontested findings in a prior decision involving these parties, WLEA v. UWM, DEC. NO. 31385 (Nielsen, 10/18/07).

Union, Council 24, AFSCME, AFL-CIO (hereinafter referred to as WSEU). In October of 2004, the WLEA petitioned for an election in the Law Enforcement Unit then-represented by WSEU, including police officers at the various UW campuses. A mail ballot was conducted by the Wisconsin Employment Relations Commission, and the WLEA prevailed. The WERC certified the WLEA as the exclusive bargaining representative for the LE Unit on March 10, 2005.

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

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

8. Following the WLEA's organizational meeting, the parties scheduled initial bargaining sessions to discuss a new collective bargaining agreement. The first of these sessions took place in May. The parties agreed early on to continue the basis structure of the grievance procedure used between the State and the WSEU under the prior agreement. Step Two under that agreement provided for representation of a grievant by "his/her designated Local Union representative(s) and a representative of Council 24 (as Council 24 may elect)..." Under the WSEU, the representative of Council 24 was generally a Field Representative, who was a full-time employee of the Union. This section was discussed at bargaining on July 18, 2005, with Jill Thomas asking Glen Jones how the language would apply to WLEA, which had decided as of that point not to hire any full-time staff. Jones told her that the Chief Stewards would handle the Step Two hearings until such time as the Association decided to hire staff. Neither party discussed the possibility of having an attorney attend the Step Two hearings on behalf of the Association. The parties reached agreement to continue the language as before, substituting "WLEA" for "Council 24", and this became §4/2/6 of the collective bargaining agreement between the State and WLEA:

> **4/2/6 Step Two**: If dissatisfied with the Employer's answer in Step One, to be considered further, the grievance must be appealed to the appointing authority or designee [...] within fourteen (14) calendar days from receipt of the answer in Step One. Upon receipt of the grievance in Step Two, the department will provide copies of Step One and Step Two to the Bureau of Labor Relations of the Office of State Employment Relations as soon as possible. Within twenty-one (21) calendar days of receipt of the written grievance, the designated agency representative(s) will schedule a hearing with the employee(s) and his/her designated Local Union representative(s) and a representative of WLEA (as WLEA may elect) and respond to the Step Two grievance, unless the time limits are mutually waived. ...

9. On August 17, 2005 Glen Jones sent an e-mail to Jill Thomas, forwarding a list of Officers and Stewards for WLEA Local 2. Robin West was identified as the Chief Steward for Local 2, and Ronald Parker and Brian Oyen were identified as Stewards for UW La Crosse. West had previously served as a Steward for WSEU for approximately ten years, from 1990 through 2000.

10. Gregory Wurz was employed by the Wisconsin Department of Corrections as a Correctional Officer and Correctional Sergeant from January 2004 through July 2005, when he transferred to a Police Officer opening at UW La Crosse. He was terminated by UW La Crosse effective October 11, 2006. The basis of the discipline was a September 20th incident involving a car chase which began on campus, but continued off campus. In the course of the chase damage was done to his squad car and a retaining wall. Wurz was alleged to have failed to report the damage, and to have violated policy by pursuing a vehicle outside of the campus police department's jurisdiction. The City of La Crosse Police Department commenced an independent investigation of the damage to the retaining wall.

11. During the course of the police chase, Officer Wurz was in contact via radio with Jeri Helgerson, a probationary dispatcher. She was subsequently interviewed about the events in separate conversations with Chief Rhode and Sergeant McCullough, who was her direct supervisor. Rhode told her that other employees would start hearing rumors and might have questions, and that members of the press and public might also have questions, but that all inquiries should be directed to him or to Sergeant McCullough. McCullough told her that what happened with Officer Wurz was a personnel matter that was still under investigation and that she should not discuss it.

12. At some point after the interviews with Rhode and McCullough, Helgerson received a phone call from Officer Wurz. He wanted to know what she had told the two supervisors. She did not want to argue with him, and told him that she had been advised not to discuss the matter.

13. On October 11, the Department terminated Wurz. That same day, a memo was posted on the Department bulletin board to all employees:

> As of today's date Greg Wurz is no longer an employee of the UW-La Crosse Protective Services Department. His employment was terminated effective 10-11-2006. We will be having a staff meeting in the very near future to answer general questions and voice concerns.

No staff meeting was actually held until December, at which time no questions were asked concerning Wurz's situation.

14. A grievance was filed on October 16, protesting Officer Wurz's termination. It was denied the following day, and was scheduled for a second step hearing on December 14.

15. On October 13, Chief Steward Robin West submitted an information request on behalf of Wurz, seeking records related to the investigation of the incident, any prior discipline for violations of the rules under which Wurz was disciplined, the officer's personnel file, and all documents on which the employer intended to rely in proceeding with the discipline.

16. During her investigation of the grievance, West sought to interview two witnesses, Helgerson and Officer Ronald Parker. Officer Parker was the initial contact for the La Crosse Police Department when they commenced their investigation of the property damage. West tried to reach Helgerson by calling a number that Wurz had told her was Helgerson's home number, but there was no answer. She was able to speak to Parker shortly after the Department started investigating Wurz, but her later attempts to reach him by leaving messages with his wife were unsuccessful.

17. On November 14, Attorney Sally Stix sent an e-mail to Jason Beier, advising him that the WLEA had asked her to represent Officer Wurz at his second step grievance hearing, accompanied by Chief Steward Robin West. Beier conferred with Jill Thomas, and responded with an e-mail stating the University's position that the contract language allowing participation by "a representative of WLEA (as WLEA may elect)" referred only to "current State employees and bargaining unit members." Beier advised her that only West would be allowed to accompany Wurz at his hearing. He attached a Dane County circuit court decision involving an unsuccessful argument by the prior bargaining representative, WSEU, that its attorney should be allowed to represent employees in investigatory interviews. (WSEU v. WERC, 92-CV-1444 (DEC. NO. 26739-C, (Hon. P. Charles Jones, 4/22/93)).

18. The State's refusal to allow Stix to participate prompted an exchange of e-mails between Glen Jones and Beier. On November 28, Jones wrote to Beier stating that the circuit court decision had nothing to do with Step 2 grievance hearings, and that contract clearly allowed the WLEA to designate whomever it wished to represent it members at such hearings:

> Jason,
>
> We have received your response regarding your position on Attorney Sally Stix's presence at the December 14 Step Two hearing. We disagree with your interpretation of the decision you forwarded to us, because the decision is not relevant to the facts and situation pending here.
>
> The decision, 92-CV-1444 (Dane County), is in regards to having an attorney present during an Investigatory Interview. Both sides recognize that an Investigatory Interview should be occurring early in the process, prior to the issuance of any discipline, and the employer has a business need to obtain information in order to come to an appropriate conclusion based on information and evidence available to the employer. The presence of an attorney in that situation could add a layer of difficulty in a time when expeditious fact collection is fair and proper for all involved parties.

A Step Two grievance hearing is post termination, after the decision to discipline has been rendered by management. The testimony and evidence have already been collected. Now we are simply trying to ascertain if the personnel action taken by management was appropriate, and if all required steps of Due Process were followed as required by the constitution, case law and the CBA.

Our former union, AFSCME Council 24, employs field representatives who process Step Two grievances. Those field reps are not employees of the state or members of the bargaining unit. Still, they are allowed to participate in the process with the steward of record and the grievant. That participation is allowed under 4/2/6 of the master agreement. I have participated in numerous Step Two hearings with a field representative, and never did I see a field rep's presence objected to by the employer.

4/2/6 Step Two

"…the designated agency representative(s) will schedule a hearing with the employee(s) and his/her designated Local Union representative(s) and a representative of WLEA (as WLEA may elect) and respond to the Step Two grievance."

There is nothing in this section to suggest that the WLEA representative is limited to an employee of the state and a member of the bargaining unit. This language is identical to the language from the former WSEU contract, other than the changing to the new bargaining unit representative's name.

To further counter your position, Section 2/11/1 of the contract states:

Section 11 Visitations

2/11/1 *The Employer agrees that non-employee officers and representatives of the WLEA or of the International Union shall be admitted to the premises of the Employer during working hours upon advance notice, twenty four (24) hours if possible, to the appropriate Employer representative. Such visitations shall be for the purpose of ascertaining whether or not this Agreement is being observed by the parties and for the adjustment of grievances. The Union agrees that such activities shall not interfere with the normal work duties of employees. The Employer reserves the right to designate a private meeting place whenever possible or to provide a representative to accompany the Union officer where operational requirements do not permit unlimited access.*

On Page 6 of the decision, Judge P. Charles Jones noted that this section does not apply to an investigatory interview. He wrote, "This provision has nothing to do with investigatory interviews which is the subject of the specific CBA

provision." I would further note that the contract specifically addresses the question of investigatory interviews and grievance. representatives. It states:

4/9/2 *An employee shall be entitled to the presence of a designated grievance representative at an investigatory interview if he/she requests one and if the employee has reasonable grounds to believe or has been informed that the interview may be used to support disciplinary action against him/her.*

This section has been in existence prior to the decision in 92-C V-1444. It was 4/9/3 in the 1987-89 contract, and renumbered to 4/9/2 in the 1991-93 contract.

As noted previously, the December 14th hearing is not an investigatory interview. An investigatory interview occurs before discipline occurs, and therefore a grievance should not be. pending at the time of the investigatory interview. Section 2/11/1 does allow for non-employee officers and representatives of the WLEA to appear for the "Adjustment of grievances." Clearly this meeting falls under that definition.

WLEA has appointed Attorney Sally Stix as WLEA's representative for Greg Wurz[t] second step grievance. Our position remains that she is allowed to attend this proceeding as a representative of WLEA. The attendees from the WLEA would consist of Greg Wurz, grievant; Robin West, steward of record; and Sally Stix, WLEA Representative.

If you have anything else in writing to demonstrate why you allow employees of other unions to use this process, just like our unit did under our former representative, but feel compelled to deny this union the same treatment, my attorney and I would be willing to review them prior to December 14th so we can eliminate any misunderstanding and get on with the business at hand, specifically a final determination on Greg Wurz's employment status. It is time we get on with the business of actually administrating the CBA rather than continuing to spend time at the WERC determining if unfair labor practices have been committed.

. . .

19. On December 5, Beier responded to Jones, asserting that Jones had said in negotiations that Step Two hearings would be conducted by the Chief Steward, and that this was consistent with the State's position and inconsistent with the Union's position:

Glen,

I agree entirely that we should get on with administering the collective bargaining agreement. Our notes from a bargaining session with you on July 25,

> 2005 reflect that this very issue was discussed. Those notes indicate that Jill asked you about how WLEA intended to handle Step Two grievances, specifically the language regarding 'assigned union rep & rep of council 24.' Your response was that 'each local has a chief steward ; intent is that the chief steward will handle Step Two grievances.' This comports with management's understanding that only 'designated grievance representatives,' as defined by Article IV, Section 6 will represent employees in the grievance process. (See Article 4/1/2) Article 4/6/1 states that grievance representatives shall be 'members of the bargaining unit.' Ms. Stix is not a member of the bargaining unit, and would not be an appropriate
> grievance representative.
>
> Further, in a decision that would at first blush appear to support your point of view, the WERC allowed a 'representative of the employee's choosing' to represent employees in a grievance procedure up until an arbitration is scheduled. (http://werc.wi.gov/decisions/29784-D.pdf) However, the contract at issue in that decision had language that your collective bargaining agreement does not, namely that '. . . employees shall have the right to present grievances.. .through other representatives of their choosing.' As mentioned above, the WLEA collective bargaining agreement does not have that language, and in fact has language that restricts appropriate grievance representatives to members of the bargaining unit, only.
>
> For these reasons and those stated previously, we believe it is inappropriate for Ms. Stix to be in attendance at the Step Two hearing on December 14th in LaCrosse. We expect that Robin West from UW-Oshkosh and the local steward from UW-LaCrosse will be the only grievance representatives in attendance. If, however, instead of the local steward some other representative who is a member of WLEA were to attend, for instance you or Mike Sacco, that would be appropriate.

. . .

20. Chief Steward Robin West represented Officer Wurz at his Step Two hearing. She contended that the officer was unaware of any damage to his vehicle, since it was confined to the undercarriage, and did not realize at time that any damage had been done to the retaining wall. As to the chase itself, she contended that it was conducted within the speed limit, and that it was well within the bounds of policy to continue with a pursuit that began on campus once the vehicle being pursued left the University's premises. West noted the officer's relatively good work record, and further contended that the discipline imposed on Officer Wurz was inconsistent with the seven tests of just cause used by many employers and unions. She reviewed each of the seven tests and raised questions as to whether they were met. At the close of the hearing, West requested additional information from the University, including copies of the relevant policies, the maintenance and repair records for the squad, and a copy of

any notice posted on the department's bulletin board, advising employees not to discuss this case.

21. On December 29, the University denied Officer Wurz's Step Two grievance.

22. There is no record of the Step Two denial having been appealed to arbitration.

23. The instant complaint of prohibited practices was filed on April 5, 2007, contending that the State's refusal to allow Stix to participate in the Step Two hearing and the Department's directive to Helgerson not to discuss the case with anyone constituted unfair labor practices under Sec. 111.84, SELRA.

24. Shortly before the WERC hearing on this complaint, Attorney Jonathon Rosenblum of Attorney Stix's office sought to interview Helgerson. He phoned her and she declined to speak with him, because she was at work. She got a telephone number for him, but did not call him back. Greg Wurz also attempted to call her a few weeks before the unfair labor practice hearing, and she refused to speak with him.

25. At the hearing on this complaint, the State offered exhibits regarding Wurz's appeal of the denial of his application for unemployment compensation. The purpose of the exhibits was represented to be to show that another government agency had found Wurz's testimony incredible on certain points. A question of relevance was raised, and the Examiner initially ruled the exhibits irrelevant. On further consideration during the course of the hearing, the Examiner concluded that credibility is always relevant, reversed his ruling and admitted the documents as Respondent's Exhibits 9A and 9B.

26. Section 108.101(1), Stats. provides that: "No finding of fact or law, determination, decision or judgment made with respect to rights or liabilities under this chapter is admissible or binding in any action or administrative or judicial proceeding in law or in equity not arising under this chapter, unless the department is a party or has an interest in the action or proceeding because of the discharge of its duties under this chapter."

27. Respondent's Exhibits 9A and 9B were not legally admissible.

28. Helgerson's refusals to speak to Officer Wurz, and her failure to call Attorney Rosenblum, were primarily the result of her own desire not to speak with them, and were not the result of any Departmental gag order.

29. The State had a compelling interest in preventing Helgerson from discussing her recollections of the September 20th incident with other employees during the pendency of the investigations by the University and the La Crosse Police Department.

30. By advising Helgerson that the investigation into Officer Wurz was a personnel matter, and that she should refrain from discussing it with others while there was an on-going

investigation, the State did not interfere with the ability of the Association to investigate the officer's grievance.

31. The language of Section 4/2/6 of the collective bargaining agreement between the State of Wisconsin and the Wisconsin Law Enforcement Association does not limit the Association's choice of representatives at Step Two hearings to bargaining unit members, employees of the Association or non-attorneys.

32. The prior practice of the WSEU in using non-employee Field Representatives as Step Two hearing representatives does not bind the Wisconsin Law Enforcement Association to a practice of not using outside counsel for that purpose.

33. The refusal to allow Attorney Sally Stix to represent Officer Wurz at the Step Two grievance hearing did not actively involve the State in the WLEA's administration of the labor organization so as to threaten its independence.

34. The refusal to allow Attorney Sally Stix to represent Officer Wurz at the Step Two grievance hearing did not affect the WLEA's ability to appeal the Wurz grievance to arbitration.

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

CONCLUSIONS OF LAW

1. Gregory Wurz, Jeri Helgerson, Ronald Parker and Robin West are "employees" within the meaning of Section 111.81(7), Stats.

2. The University of Wisconsin-La Crosse, the University System, and the Office of State Employment Relations are subdivisions of the State of Wisconsin, and are "employers" within the meaning of Section 111.81(8), Stats.

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

4. Attorney Sally Stix is an agent of the Wisconsin Law Enforcement Association.

5. By the acts described in Findings of Fact 11, 12, 13, 16 and 24, the State of Wisconsin, its officers and agents, did not interfere with employees in the exercise of protected rights and therefore did not commit unfair labor practices within the meaning of Section 111.84(1), Stats.

6. By the acts described in Findings of Fact 17, 18, 19 and 20, the State of Wisconsin, its officers and agents, did not interfere with the administration of the WLEA and

therefore did not commit unfair labor practices within the meaning of Section 111.84(1)(b), SELRA.

7. By the acts described in Findings of Fact 17, 18, 19 and 20, the State of Wisconsin, its officers and agents, did not refuse to bargain with the WLEA and therefore did not commit unfair labor practices within the meaning of Section 111.84(1)(d), SELRA.

8. By the acts described in Findings of Fact 17, 18, 19 and 20, the State of Wisconsin, its officers and agents, violated Section 4/2/6 of the collective bargaining agreement between the State and WLEA, and thereby committed unfair labor practices within the meaning Secs. 111.84(1)(a) and (e), SELRA.

9. Section 108.101(1), Stats., prohibits the use of LIRC unemployment compensation determinations for any purpose in the instant proceeding.

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

ORDER

1. That Respondent's Exhibits 9A and 9B are stricken from the record;

2. That the portions of the instant complaint alleging that the State committed unfair labor practices arising from the alleged order to Helgerson not to speak with anyone concerning the September 20th incident be, and the same hereby are, dismissed.

3. That the portions of the instant complaint alleging that the State committed unfair labor practices by refusing to bargain with Sally Stix by refusing to allow her to participate in the Step Two grievance hearing be, and the same hereby are, dismissed;

4. That the portions of the instant complaint alleging that the State committed unfair labor practices by interfering with the administration of a labor organization by refusing to allow Stix to participate in the Step Two grievance hearing be, and the same hereby are, dismissed;

5. That the State of Wisconsin shall immediately cease and desist its practice of refusing to allow the WLEA to designate non-employee representatives, including attorneys, to represent employees at Step Two grievance hearings;

6. That the State of Wisconsin shall immediately take the following affirmative actions which will effectuate the purposes of the Act:

a. Notify all employees represented by Complainant, by posting in conspicuous places in its offices and buildings where such employees are

employed, copies of the Notice attached hereto and marked Appendix "A". This Notice shall be signed by the University of Wisconsin System's Employee Relations Manager, and shall be posted for a period of thirty (30) days thereafter. Reasonable steps shall be taken by the Respondent to ensure that this Notice is not altered, defaced, or covered by other material.

b. Offer the Wisconsin Law Enforcement Association the option of reconvening the Step Two hearing on Officer Gregory Wurz's termination with a representative of the WLEA's choice, or standing on the Step Two hearing as originally conducted. The reconvening of the Step Two hearing shall not affect the Association's decision not to seek arbitration of this grievance.

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

Dated Racine, Wisconsin, this 14th day of November, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel J. Nielsen /s/

Daniel J. Nielsen, Examiner

APPENDIX "A"

**NOTICE TO EMPLOYEES OF
THE UNIVERSITY OF WISCONSIN SYSTEM REPRESENTED BY THE WISCONSIN LAW ENFORCEMENT EMPLOYEES ASSOCIATION**

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

> WE WILL NOT refuse to permit the Wisconsin Law Enforcement Association to designate non-employee representatives, including attorneys, to represent employees at Step Two grievance hearings.

UNIVERSITY OF WISCONSIN

By _____
Employee Relations Manager

STATE OF WISCONSIN (UW-LA CROSSE)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This case centers on the University's alleged gag order interfering with the rights of employees and the WLEA to investigate the grievance of Officer Gregory Wurz, and the University's refusal to allow the WLEA's outside counsel to represent Officer Wurz at his Step Two grievance hearing.

A. Complainant's Brief

At the outset, the Complainant urges the Examiner to strike the Respondent's exhibits setting forth the decisions on Officer Wurz's unemployment compensation claim. While the officer's testimony in those matters may be cited for impeachment purposes, the decisions in those cases may not legally be used for the purpose of persuading the WERC that Wurz is not credible.

Turning to the merits. the Complainant asserts that the University violated Section 111.84(1)(a) by taking actions that reasonably tended to interfere with, restrain and coerce employees. It did so by issuing a blanket order to its employees not to discuss Wurz's case with him or anyone else. Thus Wurz's efforts, and the Association's effort, to investigate his termination were frustrated. Investigating grievances is fundamental to protected concerted activity. Employees, and the labor organizations through which they exercise their rights, cannot engage in mutual aid and protection where an employer uses the threat of discipline to prevent them from communicating with one another.

The State further compounded its SELRA violations by refusing to allow the WLEA to designate its attorney, Sally Stix, as a grievance representative. There is no limitation on the WLEA's right to designate its representatives within the grievance procedure. While the State points to a circuit court decision restricting non-employees from functioning as stewards in a Weingarten setting, the balancing of employee rights to representatives of their own choosing and the employer's need for expeditious investigation of possible misconduct which is required for a Weingarten interview has no application to a grievance hearing, where discipline has already been imposed and there are no particular time pressures. Instead, the applicable standard is that in the collective bargaining agreement, which is that the Association may designate its own representative. By refusing to allow Stix to participate in the Step Two grievance hearing, the State violated the collective bargaining agreement, and thereby committed an unfair labor practice under Section 111.84(e). It further interfered with the self-administration of the union in violation of Section 111.84(b), and with the union's right to bargain through representatives of its own choosing, in violation of Section 111.84(d).

The State has committed clear and serious violations of Section 111.84. In order to remedy these violations, the Examiner must issue a cease and desist order as to both the

blanket gag order and the interference with the selection of grievance representatives, and direct the employer to post notices. Further, as a remedy for the interference with the Step Two grievance meeting, the Examiner should order the grievance remanded to the grievance procedure, so that Officer Wurz may have the benefit of proper representation on his case.

B. Respondent's Responsive Brief

The Respondent denies any violations of Section 111.84, and asks that the complaint be dismissed. The allegation that management issued a gag order to employees, directing them not to discuss the Wurz matter is simply not true. Ms. Helgerson stated that she was told it was a personnel matter, that the Chief and Sergeant McCullough were investigating it, and that she should not be discussing it with her co-workers. She also testified that she already knew this, just as a matter of common sense. She specifically denied being told she could not talk to anyone, and that she would have been willing to talk to a union representative or an attorney for the union if she had been asked. There is no evidence that she was contacted by any such representative while this matter was under investigation, or that the union made any but the most minimal efforts to ever make contact with her. While Helgerson did tell Wurz she would not speak with him, and claimed that her superiors had told her not to discuss the case, it is clear that this was her own embellishment, intended to avoid an argument with him about the statements she had made to management. She used it as an excuse, but that was not because she ever received such blanket directions from management – it was because she chose to exercise her own right not to speak with Wurz. Just as she has the right to provide information and assistance to him in presenting his grievance, so she has the right to refrain from doing so. Section 111.80 protects her as much as it protects him, so long as her actions are not prompted by management interference.

To the extent that Helgerson's reticence to speak with Wurz may be attributed to management's caution against discussing personnel matters, the Respondent observes that there were two on-going investigations – one by the LaCrosse Police and one by the UW La Crosse Police Department. These agencies have the right and the responsibility to safeguard their investigations, and part of that effort would be to prevent any interference with their witnesses. This is not the same circumstance as the CORCORAN case [2], in which the Commission found illegal a global directive to a union president not to have any contact with a union member who had reported sexual harassment. There, the directive was found to exceed what was necessary to protect the investigation. Here, the directive to Helgerson was limited to avoiding discussion with police officer co-workers, and to instead direct inquiries to the supervisors. She was a witness, and not a Union official. The interference with her right to assist Wurz was very narrow, and tailored specifically to what was needed to protect the investigation. Helgerson was free to discuss the matter with any non-employee, including union officials and union attorneys, had they made more than a token effort to contact and question her. Thus, since management did not issue any broad gag order to Helgerson, and since the union had

[2] WSEU V. STATE OF WISCONSIN, DEC. NO. 30340-B (WERC, 7/20/04).

ample opportunities to speak with Helgerson so long as it did so through someone other than one of her department colleagues, the Examiner should conclude that there is no violation of SELRA.

Turning to the Union's claim that Stix should have been allowed to serve as the second step representative, the Respondent argues that the contract language supposedly giving rise to the right is lifted directly from the predecessor contract with the WSEU. Under the WSEU agreement, the term "representative" was never understood to mean an attorney. It was always a Field Representative. Indeed, there is no evidence of any labor organization, other than the attorneys' unions, having an attorney present at any Step Two proceeding under a State contract. Those unions which want outside attorneys present in the grievance procedure have negotiated specific language to that effect. The contract between the State and the Complainant specifies that "Only a designated grievance representative pursuant to Article IV, Section 6 of this agreement may represent a grievant." Article IV, Section 6 speaks of Chief Stewards and Local Stewards. It does not mention outside attorneys, and the reasonable implication is that they are excluded. Thus the contract language is susceptible to an interpretation allowing three possible representatives – a Field Representative should WLEA ever decide to hire full-time staff, a Chief Steward, or a Local Steward. The use of a private attorney was never discussed in bargaining, is not suggested in the contract language, and was never in the contemplation of the parties. The State cannot be held to have agreed to some secret, unstated intention of the Union to introduce attorneys to the grievance process, and the Examiner should therefore conclude that there is no violation associated with the refusal to permit Stix to sit in on the Step Two hearing in this case.

Even if the Examiner somehow concluded that the State erred in excluding Stix from the Step Two meeting, the Union's suggestion that this error be cured by reinstating the grievance at that level is utterly inappropriate. A Step Two hearing was held with a Union representative present, and the Union thereafter failed to pursue the case to arbitration. Whether the lack of an appeal was deliberate or inadvertent, it was a choice within the control of the Union, and had nothing to do with Stix's lack of participation at Step Two. Had the Union wished to preserve its rights, it could have appealed to arbitration while separately pursuing this complaint. As noted, there has never been an outside attorney at the pre-arbitration step of the grievance procedure in this bargaining unit, and that has not prevented any prior case from being appealed to arbitration. The notes of the Step Two meeting in this case show vigorous representation of the employee. There is nothing that even approaches a causal connection between the alleged violation and the Union's request that the right to appeal to arbitration be resurrected. The purpose of a remedy is to restore the parties to the position they would have occupied but for the violation, and to prevent future violations. A cease and desist order would be appropriate, as might be a repetition of the Step 2 hearing with Stix participating. However, if Stix's efforts at Step Two were unavailing, the Union should be compelled to live with its mistake in not seeking arbitration.

C. Complainant's Reply

The Complainant notes that the Respondent's argument concerning Step Two representatives folds in on itself and collapses of its own weight. The Respondent argues that the contract language mentions only Chief Stewards and Local Stewards, and that those must be the only ones who can be present at Step Two. This ignores, of course, the fact that Step Two proceedings were generally conducted by a Field Representative employed by the WSEU, a personage not mentioned at all in the contract provision. Clearly the language was not intended to limit the union to the specific officers mentioned in Article IV, Section 6, and the Respondent fails to explain why the WLEA's attorney is not the equivalent of the WSEU's Field Representative. The contract language provides for participation by a "representative of the WLEA (which the WLEA may elect)". The WLEA elects to use a private attorney.

Turning to the gag order on Helgerson, the Complainant points out that there was a general order to this employee not to discuss personnel matters with anyone. She cited this directive as her reason for not speaking to Wurz, and avoiding discussions with the Union's Steward and attorney. This had a reasonable tendency to interfere with the Union's ability to investigate the grievance, a right protected by SELRA.

Finally, the Complainant dismissed the State's claim that restoring this case to Step Two is an inappropriate remedy. Steward West was not trained to represent employees at Step Two, including the procedures for appealing to arbitration. Had Stix been allowed to participate, the representation would probably have been more competently done, and in any event, the appeal to arbitration would have been handled properly. Even if there would have been no qualitative difference, the fact remains that the Union had the right to proceed to Step Two with a representative of its own choosing and the restoration of that right requires a return of this case to that step.

DISCUSSION

A. Admissibility of LIRC Decisions

In the course of the hearing, the State proffered as exhibits two decisions rejecting Officer Wurz's appeal to the Labor and Industry Review Commission for unemployment insurance benefits. The decisions, inter alia, found certain of the officer's claims incredible. The State offered the exhibits as evidence relevant to the officer's credibility as a witness in this proceeding. I initially ruled the exhibits irrelevant as they did not address any specific factual controversy in this case, but subsequently concluded that a witness's credibility is always relevant, and reversed the ruling, admitting the exhibits into evidence.

In its brief to the Examiner, the Complainant pointed out Sec. 108.101(1), Stats. which clearly prohibits the admission of LIRC unemployment decisions for any purpose in other proceedings. The State responded that the exclusion in that provision applies only to "rights

and liabilities under this Chapter" – e.g. unemployment compensation issues. With all respect to the State, this misreads the statute:

> *"No finding of fact or law, determination, decision or judgment made with respect to rights or liabilities under this chapter is admissible or binding in any action or administrative or judicial proceeding in law or in equity not arising under this chapter*, unless the department is a party or has an interest in the action or proceeding because of the discharge of its duties under this chapter."

On the face of the statute, the decisions of the LIRC cannot be admitted to evidence in this proceeding for any purpose. It was error to admit them as proof of the officer's credibility and accordingly they are stricken from the record.

B. The Directive Not to Discuss the Case

Jeri Helgerson, the dispatcher with whom Officer Wurz was in contact during his police chase, was interviewed by the Chief and the Sergeant. According to Helgerson, both men told her, in so many words, that it was a personnel matter and she should not be discussing it. Chief Rhode testified that he never told Helgerson not to discuss the matter, but agreed that he had told her to refer questions to him or to the sergeant. I conclude that the Chief did not give her a direct order not to discuss the matter, but that she reasonably understood him to mean that she should not be the one to respond to any questions about it. Her supervisor Sergeant McCullough expressly told her that this was a matter that was still under investigation and that she should not discuss it. She cited this to Officer Wurz when he attempted to find out what she had told management. The Complainant alleges that this interfered with the protected right of Helgerson to provide mutual aid and protection to her co-worker, and the right of Wurz and the Association to investigate the grievance.

The question of whether an employer has interfered with, restrained or coerced employees in the exercise of the rights to engage in lawful concerted activity in violation of Sec. 111.84 (1) (a), SELRA, and its statutory analogs, traditionally has involved balancing the intrusion on employee rights against the employer's legitimate business needs. RACINE EDUCATION ASSOCIATION, DEC. NO. 29074-B (Gratz, 4/98), AFF'D, DEC. NO. 29074-C (WERC, 7/98). Employer actions and directives which have a reasonable tendency to interfere with lawful concerted activity may nonetheless be legitimate, to the extent that they are justified by the employer's operational needs. UNIVERSITY OF WISCONSIN HOSPITALS AND CLINICS AUTHORITY, DEC. NO. 30202-C (WERC, 4/04). It is inherent in this balancing test that the employer's legitimate intrusion may not exceed the bounds of its legitimate interests. WSEU V. STATE OF WISCONSIN, DEC. NO. 30340-B (WERC, 7/20/04), hereinafter referred to as "Corcoran".

The threshold question is whether the conduct which is constrained is protected, concerted activity. "It is impossible to define 'concerted' acts in the abstract. Analysis of what a concerted act is demands an examination of the facts of each case to determine whether

employee behavior involved should be afforded the protection of [the Act]. At root, this determination demands an evaluation of whether the behavior involved manifests and furthers purely individual or collective concerns."[3] In this case, there is little question but that Helgerson had a right to provide Wurz with mutual aid and protection, in the form of cooperating with his efforts to investigate the facts surrounding his grievance. She also had a right to refrain from that activity, so long as her decision to do so was her own, and not the result of management coercion.[4]

By way of factual background, I find that Helgerson's refusal to speak with Wurz was occasioned more by her personal reluctance to get caught up in any sort of argument with him than by any management directive. Wurz called to find out what she had said about him. She testified that told Wurz she could not discuss the matter with him because it dealt with personnel issues and that "I did not care to get into an argument with Greg on the phone. I was at work and I did not feel that that was the proper time and place to have that kind of a conversation, so my easiest way of trying to change the subject and stop the phone call was to say I was not to discuss this."[5] She also explained that her prior experience as a Human Resources Manager for a small private company and as a member of the Police and Fire Commission in Hillsboro led her to believe that it would not be proper to speak with Officer Wurz, since the two of them were the only direct witnesses to the events, or to discuss a personnel matter with other employees generally. In short, even though she hid behind the Sergeant's caution not to discuss the matter, the refusal to speak with Wurz was actually the result of her personal desire to avoid the conversation.[6] I find, as a matter of fact, that the directives from the Chief and the Sergeant did not actually interfere with Helgerson's right to speak with Wurz, or with the right of Wurz and the Union to seek to speak with Helgerson. Her refusal to speak with him was, instead, an exercise of her right to refrain from concerted activity.

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[3] CITY OF LA CROSSE, DEC. NO. 17084-D (WERC, 10/83), AFF'D., CIR. CT. CASE NO.-83-CV 821 (1985), a case arising under MERA, the statute providing identical rights to municipal employees.

[4] Sec. 111.82 **Rights of employees**: "Employees shall have the right of self–organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing under this subchapter, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection. Employees shall also have the right to refrain from any or all of such activities." (emphasis added)

[5] Transcript, pages 49-50.

[6] Her failure to return a call to Attorney Rosenblum or speak with Wurz immediately prior to the unfair labor practice hearing also appear to have been ad hoc judgments based on her own views of what she did or did not deem proper rather than the result of any interference by management. Transcript, pages 55-57. In any event, the contacts at that point were about the management directive, not about the underlying incident, and there is no evidence of any subsequent order from Chief Rhode or Sergeant McCullough to avoid discussion of matters outside of the events of September 20th.

Neither do the facts of this case allow a finding that the cautions from the Chief and the Sergeant were made with any thought to preventing the investigation of a grievance or otherwise interfering with protected activity. This was not a gag order, along the lines of the directive at issue in the CORCORAN case. There the State issued a very clear written order to a Union President not to have any case-related discussions with a specific bargaining unit employee who had made a complaint of sexual harassment against a co-worker. The order was intended to avoid coercion of the complaining employee, but it was broadly worded and broadly interpreted by the State, so as to prohibit even legitimate contacts in furtherance of the Union President's representational duties to that employee. In this case, the supervisors' comments to Helgerson were more on the order of the routine type of cautions that any manager might make to any employee where a workplace controversy might provoke questions and gossip about a personnel matter that was still under investigation. There were no written directives, and no specific individuals named who were not to be communicated with. There was no follow-up with management by the employee or the union, to determine the scope of the directive, or to determine whether management had intended to cutoff the legitimate questioning of witnesses in preparation for the grievance procedure. The order was given immediately after the incident in late September, when there were still investigations on-going. and there was no effort to find out how long it was supposed to remain in effect. The whole of the interactions regarding this order was a single contact by Wurz, asking her what she had said about him to management, which Helgerson rebuffed.[7]

The order to Helgerson in this case did not cause actual interference, in that the order itself was not the cause of her refusal to speak with Wurz. Moreover, I find no evidence that is was intended to interfere with the exercise of protected rights. It was intended to prevent dissemination of confidential information, tamp down gossip among co-workers, and preserve the integrity of pending investigations. However, whether an order has a reasonable tendency to interfere with the exercise of protected rights does not turn on subjective intent or actual effect. It turns on whether a reasonable person, under all of the circumstances, would have felt constrained in the exercise of their Section 111.82 rights. The effect of an order on a reasonable person is, among other things, a matter of wording, overall context and manner of delivery. An order given in writing, or in a public meeting to all employees, might have a substantial chilling effect on employee rights, while the same order if given verbally in private it might cause little or no interference with a reasonable employee's willingness or ability to exercise those rights. Where a particular order or action falls on this continuum is a case by case determination.

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[7] The Association presented evidence that West tried to contact Helgerson without success, but that was because there was no answer at the number she called, and there is no evidence of any other efforts by West to reach Helgerson. This is not evidence that management somehow interfered with the Association's investigation. In this same vein, the fact that Officer Parker, a Union steward who was the person initially contacted by the La Crosse Police Department in its investigation, did not respond to messages left with his wife seeking a second interview with West, offers no support for the notion that the employees were under any type of general gag order or otherwise subject to management coercion.

This order was delivered verbally, almost casually, to a single employee outside the presence of other employees, during the pendency of two investigations into Wurz's conduct. That employee took it to mean that she should not discuss the matter with other employees, which she understood to be her obligation in any event, based upon her prior experience as a Human Resources Manager and a member of a Police and Fire Commission in another jurisdiction. She did not take it as blanket order to refrain from all discussion of the incident under all circumstances. According to her testimony, during the investigation of the grievance, she would have been willing to speak with Officer Wurz's Union representative or his attorney if she had been asked.[8] On the other hand, the fact that Helgerson herself understood the order to be limited in scope does not prove that all reasonable persons would so understand it. Helgerson's understanding was informed by her own, unique life experience. Another listener, equally reasonable but with a different personal history, could as easily have concluded that the order was a blanket prohibition on discussing what she knew of the events surrounding Officer Wurz's termination, at least during the pendency of the investigations.

While it is a fairly close call on the facts of this case, I conclude that a reasonable person in Helgerson's position would not have been chilled in the exercise of her Section 111.82 rights to cooperate with the union by Sergeant McCullough's caution not to discuss pending personnel matters. My conclusion is influenced by the fact that Helgerson's background, while unusual, would have been known to the management of the Department. Again, the probable effect of a given statement depends upon context, and where the statement is made privately to a single employee, the known background and characteristics of the employee would be a legitimate factor in assessing the probable chilling effect. An employer would rely on that type of judgment at its own risk, but where the employer and the employee essentially agree on the scope of a statement, and that statement could reasonably be interpreted as they claim, it is fair to conclude that the statement did not have a reasonable tendency to chill protected rights.

While I conclude that this statement, made to this employee, did not have a reasonable tendency to chill her willingness to cooperate with the union, it clearly would have chilled her freedom to communicate directly with Wurz. The fact that she had no desire to do so does not change the analysis. Sergeant McCullough made no effort to determine that at the time and, in any event, intent and actual effect are not controlling. The fact that a statement may interfere with the freedom to exercise one's rights, however, does not end the Sec. 111.84(1)(a) analysis. An order tending to interfere with protected rights may nonetheless be legitimate, if it is tailored to meet a supervening, legitimate operational interest of the employer. At the time the order was given the Department had a compelling interest in protecting Helgerson, as the only witness to an incident which was being investigated by the City Police and the University, from the conscious or unconscious interference with her recollection that might result from discussions with the person who was the only other witness, and the object of the

[8] Transcript at pages 51-52.

investigation. The Department also had a compelling interest in safeguarding the recollections of Wurz from contamination that might occur from comparing notes with Helgerson.

The balancing of interests in this case between Helgerson's right to speak with Wurz and the Department's interest in preserving the investigations would tilt strongly to the Department, but only so long as the investigations were on-going. Once they were concluded and a course of action decided upon, management's interest would dissipate. The remaining issue on the question of interference, then, is what a reasonable person would have understood the durability of the order to have been. This is difficult to judge, since the order was given only once, verbally, while the investigations were in full swing, and the subject was never revisited by anyone. However, Helgerson's recollection of McCullough's caution included an express linkage with the on-going investigations – he cited that as a reason for not discussing the matter. From this, I conclude that a reasonable person would have understood that the prohibition on speaking with other employees about the incident was limited to the period during which the investigation was still pending. So limited, the order does not constitute interference.

C. The Refusal to Allow Stix to Appear at the Step Two Hearing

The Association sought to have its attorney, Sally Stix, appear as its representative at the Step Two grievance hearing, citing Section 4/2/6 of the collective bargaining agreement. The State refused, contending that the contract did not allow private attorneys to participate in Step Two hearings. I conclude that the State's reading of the provision is erroneous, and that it thereby violated the collective bargaining agreement in violation of Section 111.84(1)(e).

Section 42/2/6 of the contract addresses the procedure for Step Two hearings, and provides in relevant part:

> **4/2/6 Step Two**: … Within twenty-one (21) calendar days of receipt of the written grievance, the designated agency representative(s) will schedule a hearing with the employee(s) and his/her designated Local Union representative(s) *and a representative of WLEA (as WLEA may elect)*. … [emphasis added]

The language of Section 4/2/6 does not, on its face, in any way limit the WLEA's choice of a representative. The language is carried over from the WSEU agreement, save for the designation of WLEA rather than Council 24. During the WSEU's representation of the bargaining unit, non-employee Field Representatives from the union's staff were usually the Step Two representatives. Because WLEA does not have paid staff, the State inquired during bargaining about their intentions regarding Step Two representation, and WLEA President Glen Jones advised them that the Chief Stewards would be the representatives, but that as the union evolved it might add paid staff in the future. The parties accordingly left the language unchanged. Neither party discussed the possibility of using attorneys rather than stewards or paid union staff as Step Two representatives.

The State contends that private attorneys are forbidden on three bases. First, the bargaining history of the WLEA-State labor contract; second, the prior practice under the WSEU and with other unions; and third, the decision of the Circuit Court in WSEU v. WERC, 92-CV-1444 (DEC. NO. 26739-C, (Hon. P. Charles Jones, 4/22/93).

The citation to bargaining history is inapt. There are two reasons for this. First, bargaining history is an interpretive aid in determining the meaning of ambiguous language. The language of Section 4/2/6 cannot be said to be ambiguous. It clearly reserves to the union the right to "elect" who will be its Step Two hearing representative. The familiar rule is that clear language is to be applied as written, and cannot be modified by resort to parol evidence. Second, even if the language could be said to contain latent ambiguity, I do not find the bargaining history inconsistent with the union's choice of Stix as a Step Two representative. There was no discussion of using attorneys at Step Two. However, the issue of using non-State employee representatives was plainly discussed and was within the contemplation of the parties. The union represented to the State that it might add paid staff in the future and wish to use them in a representative role, and the parties agreed to leave in place the language allowing for that eventuality. The State has not explained why an attorney under retainer to the union is materially different than an attorney the union employs as a member of its paid staff, yet under the State's interpretation of the language, the former would be barred while the latter would be allowed. The mode of compensation for services to the union's chosen representative cannot logically be the distinguishing characteristic in this dispute. Nor can it be the case that employing attorneys at Step Two is somehow inconsistent with the purposes of the contract provision or the grievance procedure generally. Jason Beier, the State's representative in Step Two hearings, is himself an attorney.

Neither is the State's appeal to past practice in this and other bargaining units a persuasive basis on which to bar Stix from Step Two representation. Again, past practice is an aid to interpreting unclear language, and this language is not unclear. Moreover, the past practice in this unit is the absence of a practice – the issue never came up, because WSEU did not seek to use attorneys in Step Two hearings, and the absence of a practice concerning an issue which never came up cannot shed light on the intent of bargainers for a successor contract involving a different labor organization. The State does point to two bargaining units, represented by the Association of State Prosecutors and the State Attorneys Association, which function without paid staff and are represented by law firms on retainer, in whose collective bargaining agreements specific provision is made for the aggrieved employee to have a non-employee representative present in the grievance procedure. Since the parties agree that this contract already contemplates the use of non-employee representatives, these provisions offer little guidance as to the meaning of the WLEA agreement.[9]

[9] Part of the State's argument hinges on Section 4/6 of the contract, which provides that "Only a designated grievance representative pursuant to Article IV, Section 6 of this agreement may represent a grievant." The section mentions only local stewards and chief steward, and thus the State argues that no one but a steward should be deemed a grievance representative. However, this argument does not hold together, given the State's admission that under this contract, and its predecessor contract with the WSEU, non-employee representatives of the union may appear at Step Two.

Finally, the State points to the Circuit Court's decision in WSEU v. WERC. In that case, the WSEU sought to have its attorney represent employees in investigatory interviews. The State denied the request, and the WERC found that it had not thereby committed any unfair labor practice. On review, the Circuit Court concluded that the right to representation in an investigatory interview was properly a subject for collective bargaining, and that the State and the WSEU had in fact negotiated over it, and reached agreement. The Court found that the labor agreement between the parties provided for a "designated grievance representative" in investigative interviews, and defined that term as meaning a member of the bargaining unit. Since the attorney was not a member of the bargaining unit, he was not a "designated grievance representative" and was not entitled to be present. This analysis has absolutely no application to the instant case, which arises under a different contract provision, using starkly different language. As already discussed, the specification of "a representative of WLEA (as WLEA may elect)" is understood by both parties to encompass non-bargaining unit members. The linchpin of Judge Jones' analysis in WSEU v. WERC is that the contract language must control, and I have already determined that the contract language here allows the Association to "elect" to use outside counsel as its representative.

The State violated the collective bargaining agreement by refusing to allow Stix to participate as the WLEA's representative at the Step Two hearing. It thereby violated Sec. 111.84(1)(e). The Association argues that it also violated the duty to bargain (Sec. 111.84(1)(d)), and the prohibition on interference with the administration of a labor organization (Sec. 111.84(1)(b)). I conclude that it did not. The State was not engaged in bargaining over who might be present at Step Two. The parties had already bargained to agreement on that subject, and the State was applying the agreed upon language of the contract, albeit incorrectly. Thus there was no duty to bargain – there was a duty to comply with the existing agreement. As for the interference allegation, an employer interferes with the administration of a labor organization "where it is actively involved in its affairs to the extent that the organization's independence is threatened."[10] While it might conceptually be possible to run afoul of this prohibition by systematically misapplying contract language concerning access and participation by union representatives, that simply is not what happened here. This is a single incident of a good faith dispute between the parties over the meaning of contract language in a context that has not previously arisen.

D. The Appropriate Remedy

The Association asserts that, in addition to a cease and desist order and the posting of a notice, the remedy for refusing to allow Stix to participate in the Second Step should be to remand the grievance to that step. The State objects to this proposed remedy as having far broader impacts than would be necessary to effectuate the purposes of the Act. Specifically, the State notes that the Association failed to appeal the grievance to arbitration after Step Two,

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[10] COLUMBIA COUNTY, DEC. NO. 22683-B (WERC, 1/87); ROCK COUNTY, DEC. NO. 28494-A (Jones, 1/96), applying the analogous provisions of Sec, 111.70, MERA.

and that a remand to that step would presumably resurrect that option. The State argues that nothing the State did could reasonably be said to have forced that decision on the Association.

The Association has the right to be represented at Step Two by whomever it chooses, and an appropriate part of the remedy here would be to reconvene the Step Two hearing with Stix in attendance, if the Association so chooses. However, that does not logically demand the reinstitution of the arbitration option following that hearing. The connection between the identity of the Step Two representative and the decision to arbitrate is not at all apparent. This is the first case in which the Association has felt the need of an attorney at Step Two, yet it has been able to decide on its arbitration options in other cases handled, as this hearing was, by stewards. Given that the controversy about Stix's participation arose three weeks before the hearing, the Association knew, at every level of its leadership, that this hearing was going forward on December 14 with West as the representative. Whether Robin West, Mike Sacco, Sally Stix or Glen Jones appeared for the WLEA on December 14, the Association knew that if the case was not resolved in that hearing, a decision would have to be made about arbitration. The Association's decision not to seek arbitration does not bear a rational relationship to the State's refusal to have Stix appear at Step Two. I conclude that effectuating the purposes of the Act requires a cease and desist order directing the State to refrain from interfering with the Association's choice of Step Two representatives, the posting of a notice to employees to that effect, and the option to reconvene a Step Two hearing should the Association so choose. I further conclude, however, that the actions of the State had no effect on the Association's ability to decide whether to seek arbitration of this matter. That option was not exercised within the time specified under the contract, and the remedy is limited accordingly.

Dated at Racine, Wisconsin, this 14th day of November, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel J. Nielsen /s/
Daniel J. Nielsen, Examiner

DJN/gjc
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