STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN LAW ENFORCEMENT ASSOCIATION, LOCAL 2, Complainant,

vs.

UNIVERSITY OF WISCONSIN SYSTEM, Respondent.

Case 32
No. 67203
PP(S)-384

Decision No. 32239-A

Appearances:

Ms. Sally A. Stix, Attorney at Law, Law Offices of Sally A. Stix, 700 Rayovac Drive, Suite 117, Madison, Wisconsin 53711, appearing on behalf of the Complainant.

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

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

On August 13, 2007, Wisconsin Law Enforcement Association, Local 2, filed a complaint with the Wisconsin Employment Relations Commission alleging that the University of Wisconsin System had committed unfair labor practices under Secs. 111.84(1)(a), (d) and (e), Stats., by refusing to provide to its stewards information and reports in its possession concerning potential employee discipline; by ordering a steward to delay his investigation into possible employee misconduct; by ordering a member of the bargaining unit not to discuss her possible misconduct with fellow employees other than her Association and legal representatives, by subjecting that employee to an off-duty search for alcohol consumption, and by restricting her consumption of alcohol while off-duty. On October 10, 2007, the Commission appointed as Hearing Examiner a member of its staff, Stuart D. Levitan, to make and issue Findings of Fact, Conclusions of Law and Order in the matter. On January 14, 2008, respondent filed its answer, denying it had committed unfair labor practices and raising

certain affirmative defenses. After a series of preliminary matters, hearing in the matter was held in Madison, Wisconsin, on February 7, with a transcript being available by February 20. The parties filled written arguments and replies, the last of which was received on April 22, 2008. The Examiner hereby issues the following

FINDINGS OF FACT

1. Wisconsin Law Enforcement Association, Local 2, is a "labor organization" as that phrase is defined in Sec. 111.81(12), Stats., and as that phrase is used throughout the State Employment Labor Relations Act (SELRA). At all times material hereto, it was and continues to be the exclusive bargaining agent for various positions within the classified service of the State of Wisconsin, including Police Detectives and Police Officers employed by the University of Wisconsin System at its UW – Madison and UW – Milwaukee Police Departments. At all times material hereto, Officer Erik Pearce has been an employee of the UW-Madison Police Department and a steward for WLEA bargaining unit employees employed there.

2. The University of Wisconsin System is the "employer" as that phrase is defined in Sec. 111.815, Stats., and as that phrase is used throughout the State Employment Labor Relations Act (SELRA). At all times material hereto, it was and continues to be the employer of certain law enforcement personnel represented by WLEA Local 2. At all times material, the parties had a collective bargaining agreement which provided for final and binding arbitration of disputes arising there under.

3. In the spring and summer of 2007, the UW-Madison and UW-Milwaukee Police Departments conducted four separate investigations into alleged misconduct by employees represented by WLEA Local 2. An investigative interview was conducted for each incident, with the employee represented by a WLEA steward. In each instance, the WLEA steward made a request for information gathered during the investigation once notice was given that a pre-disciplinary hearing was scheduled or during the pre-disciplinary hearing. A pre-disciplinary hearing occurred prior to the imposition of discipline. Prior to the disciplinary hearing, the employer did not produce all of the information pursuant to the requests.[1]

4. The State of Wisconsin Department of Employment Relations on June 4, 1997, published Collective Bargaining Bulletin 41, entitled "Guidelines for Providing Association Representatives with Relevant Information Necessary to Administer Collective Bargaining Agreements," providing as follows:

. . .

> DER and another agency have developed the following language to deal with grievances involving discipline which now appears in that agency's Supervisory

[1] These facts were stipulated to by the parties.

> Manual. This language provides an orderly way to address a Association's request for documentary information. To ensure uniformity, DER is requiring that all agencies adopt the following language and procedures adapted to their own agencies. (emphasis in original)[2]
>
> > Upon completion of the pre-disciplinary hearing and after disciplinary action has been imposed, investigatory documents which management used in determining the disciplinary action must be provided to the employee and his/her representative within 20 work days of receipt of a written request, unless an extension is obtained through mutual agreement. CBB-41, at 2-3. (6/4/97)

. . .

Respondent relied in part on this policy in its consideration of the Association's request for investigative files at the pre-disciplinary hearing.

5. C.A.G., a UW-Madison Police Detective, is a member of the collective bargaining unit represented by WLEA Local 2. In June, 2007, the UW-Madison Police Department hosted a week-long conference for gang investigators from around the country at Grainger Hall on the UW-Madison campus. G. had been one of the main organizers of the conference, whose attendees stayed at the off-campus InnTowner hotel about 1.5 miles away. At about 11:00 p.m.on June 11, while off-duty, G. was walking down a hallway in the hotel with an employee of the U.S. Department of Homeland Security when she smelled burning marijuana emanating from a hotel room. G. had been drinking alcohol, and at that time had a blood alcohol content more than double the legal limit for operating a motor vehicle. Despite her drunkenness, G. contacted the occupants of the room, identifying herself as a UW-Madison Police Department detective. After a brief investigation, she used the room telephone to call her dispatcher and request two additional UW- Madison officers to assist in the arrest, informing the dispatcher the matter was not routine. This caused the officers to respond with their emergency lights and sirens activated, which caused a UW - Madison Police Department sergeant to also respond. The responding officers quickly determined that G. had been drinking and was impaired. G. was directed to contact the City of Madison Police Department, which had primary jurisdiction. Further aspects of the incident are related below, in Finding of Fact 9.

6. In June, 2007, Lt. Karen Soley was G.'s direct supervisor. [3] On the morning of June 12, Sgt. Jerome Van Natta, who was among those called to the scene at the InnTowner, informed her of the incident of the night before. Soley conducted a preliminary investigation, and that afternoon wrote G. as follows:

[2] DER is now the Office of State Employment Relations (OSER).

[3] Soley was subsequently promoted to Captain.

> This letter is to put into writing the directives I gave you this morning and reiterated this afternoon at the investigatory meeting Your Union Steward, Officer Pearce, also requested these be put into writing
>
> I am directing you:
>
> - to appear at 2:30 PM on June 12, 2007 at the Police Department for an investigatory meeting. You have complied with this directive.
> - that you have no law enforcement authority until 8:30 AM on June 13, 2007.
> - that you are not to engage in law enforcement actions while off duty and off campus for the duration of this investigation.
> - that you are to not consumer any alcohol during the duration of the conference and for the duration of the investigation.
>
> I am further directing you to not speak about the incident with anyone except UW Police managers, your union representative or other legal representative during the duration of the investigation.
>
> You are being permitted to continue to attend the conference and see to your duties as a conference organizer; however, if you violate these directives you may be placed on administrative leave and face potential discipline.

Soley had already verbalized the bulleted items in the above-quoted letter items to G. in their first meeting, at about 8:30 on the morning of June 12. Following her meeting with G., Soley met with Association steward Erik Pearce, who asked for the relevant police reports. Soley demurred, informing Pearce she would have to check and see if he could have those. Pearce subsequently told Soley he intended to conduct his own investigation into the matter; Soley told him she preferred that he not speak to the two officers on the scene during the incident, Silvernagl and Evans, until she had a chance to get their statements.[4] Soley told Pearce she would try and get the interviews done as quickly as she could. Soley interviewed Evans and Silvernagl on June 12, and received written statements from them on June 13 and 15, respectively. Soley never informed Pearce that she had completed her interviews and received the written statements, and Pearce did not follow-up to find out if she had.

At the time she drafted this memo, Soley had completed a preliminary investigation, including interviewing G., who told her there were aspects of the incident she could not recall. Soley also had heard that G. was discussing the incident with other officers, which concerned Soley because it posed the threat that G. would fill in her incomplete memory with inaccurate impressions that would create inconsistencies in her account, and it would also require Soley to

[4] Soley testified this conversation took place at the morning meeting; Pearce testified it took place during a separate conversation that afternoon. It is not necessary for me to resolve this discrepancy in testimony.

interview all those with whom G. spoke, to track G.'s account of the incident. Soley learned that, prior to the directive, G. had in fact talked about the incident with Officer Jeff Ellis, requiring Soley to interview him.

Soley had the authority to place G. on paid administrative leave pending the completion of her investigation. Had she done so, G. would not have been able to attend the remaining four days of the conference, for which she was one of the department's key organizers. In order to guard against the adverse impact of G. discussing the incident, but still allow her to participate in the conference, Soley added the directive that G. not discuss the matter with anyone other than her Association or legal representative.

7. The UW Police Department maintains a computerized record management system, called CRIMES, where all the official police reports are stored. All department employees have access to this data base. Silvernagl and Evans filed incident reports detailing the events of June 11 on June 12. UW - Madison Police Department Officer Aaron Chapin, another steward for WLEA Local 2, accessed the case file concerning the incident on June 24. Pearce, who testified he was unaware he had access to the CRIMES data, never accessed the file.

8. On June 13, Pearce sent an e-mail to Soley, as follows:

> It has come to WLEA's attention that one of the directives you provided to Det. [G.] in a letter dated June 6, 2007 (sic) may be in violation of WI State Stats. 111.321 and the WI Fair Employment Act.
>
> The specific directive we're referring to is the following:
>
> "- that you are not to consumer any alcohol during the duration of the conference and for the duration of the investigation."
>
> WLEA's attorney, Sally Stix was consulted and responded with the following:
>
> "It is a violation of Wisconsin's Fair Employment Act for an employer to attempt to stop someone from using lawful substances/products when not at work."
>
> The WLEA appreciates management's intention with respect to preventing possible further incidents. However, it is our recommendation these directives be amended to remove this specific provision.
>
> Thank you for your cooperation in this matter.
>
> Ps. I attached some of the referenced stats and information directly from the DWD website, as relates to the WI Fair Employment Act:

> **111.321 Prohibited bases of discrimination**. Subject to ss. 111.33 to 111.36, no employer, labor organization, employment agency, licensing agency or other person may engage in any acts of employment discrimination as specified in s. 111.322 against any individual on the basis of age, race, creed, color, disability, marital status, sex, national origin, ancestry, arrest record, conviction record, membership in the national guard, state defense force or any reserve component of the military forces of the United States or this state or use or nonuse of lawful products off the employer's premises during nonworking hours.

At 4:52 pm that afternoon, Soley replied by email, "I appreciate your position. For tonight my order stands and you may take the issue up with Chief Burke tomorrow."

9. Soley, Pearce, G. and Capt. Brian Bridges met on June 14, 2007, to discuss the concerns Pearce expressed in his e-mail. On that date, Bridges memorialized the meeting in the following letter to G., with a copy to Pearce:

> On 6/11/07 while off-duty at the Inntowner Hotel you chose to take law enforcement action after you had been consuming alcohol. The Department is now investigating this matter as a potential work rule violation. During the course of the investigation and as an alternative to placing you on Administrative Leave, Lt. Soley provided you with a directive instructing you to not consume alcohol during the duration of the conference and the conclusion of the investigation.
>
> Union Steward Pearce raised the issue as to if Department could in fact regulate your off-duty conduct regarding the use of alcohol and we met to discuss it on 6/14/07. Present at this meeting were you, Ofc. Erik Pearce (in his Union Steward capacity), Lt. Soley and me. We discussed specifically the directive instructing you to not consume alcohol until the conference and investigation have concluded and you agreed to voluntarily abide by it. We also discussed that you are on full duty status at the conclusion of the conference.
>
> Should you decide that you no longer want to abide by the directive to not consume alcohol when you are off-duty, please turn in your badge and police identification in to Lt. Soley for the length of time you are not on duty. Should Lt. Soley not be available pleas contact AC Burke or me.

Surrendering her badge and identification while off-duty would not affect G.'s wages or benefits. Although Pearce testified he did not recall any discussion of the aspect related in the third paragraph, neither he nor G. objected to any of the terms reflected in Bridge's letter, including the directives concerning G.'s consuming alcohol while off-duty, and neither G. nor

the Association filed a grievance over any aspect of the June 14 meeting or directive. Neither Bridges nor Soley ever informed G. that the directive concerning her off-duty consumption of alcohol was rescinded.

10. On June 20, Bridges wrote to inform G. that she had been scheduled for an alcohol assessment on June 29. The assessment was conducted as scheduled, and did not indicate a pattern of alcohol abuse by G. On July 5, Bridges wrote to inform G. she had been scheduled for a pre-disciplinary meeting with Chief Burke and himself on July 19 (later rescheduled to July 23), with Officer Pearce as her representative.

11. On Friday, June 29, 2007, Ofc. William Larson wrote Soley, Bridges and Burke as follows:

> Karen,
>
> On Friday, June 29, 2007, at approximately 9:00 am, [G.] contacted me and advised that she is going on vacation and will return to work on July 9th. She said that in her letter from the Department concerning conduct, she is to turn her Department ID over to you if there is the possibility that she may consume alcohol. I have not seen the letter, but is apparently says the id needs to be turned over to you if she consumes alcohol. If you are not available, then Capt. Bridges. If not him, Chief Burke. Everyone was gone, therefore I took the id. [G.] will be camping at Mirror Lake State Park with her family and she anticipates she may have a beer around the camp fire.
>
> I placed it in an envelope and put it in your desk. [G.] said the letter did not say anything about her badges. [G.]. voluntarily placed all of her badges in her top left drawer of her desk. ([G.'s] idea). Thanks, Bill.

Larson did not copy Pearce on this correspondence, and Pearce was not aware of the facts related therein until this exhibit was offered by the respondent at hearing.

12. On August 3, 2007, Assistant Chief Dale Burke wrote G. as follows:

> Dear C.A.,
>
> On 6/11/07 at approximately 11:00 p.m. you were off duty and accompanied by an off-duty Department of Homeland Security officer at the Inn Towner Hotel in connection with a law enforcement conference, when you detected the odor of burning marijuana in a hotel hallway. You decided to contact the residents of Room 334 to further investigate the burning marijuana. Neither you nor the other officer had badges/identification, radios, weapons, handcuffs or a cell phone. You had both been drinking alcoholic beverages.

You contacted the occupants of the room and identified yourself as a detective with the University Police Department. After a brief investigation you used their room telephone to ask our dispatch center to send two UW officers to assist you with a drug arrest. The dispatcher asked if the response was routine, you responded "no." The two officers then responded with emergency lights and sirens activated. Hearing the emergency dispatch, a UWPD sergeant also responded. The responding officers, once on-scene, quickly determined that you had been drinking alcohol, were under the influence and physically impaired as you conducted an investigation into the suspected drug use. When UWPD Sergeant Kari Sasso met with you, you said that you had three beers. Sergeant Sasso then instructed you to contact the Madison Police Department (MPD) and leave the rest of the investigation to them. You acknowledged her instructions.

Two MPD officers arrived on scene and once briefed, asked for an MPD supervisor to respond. UWPD personnel, concerned that you were continuing to investigate, called for a UWPD supervisor to return to their location. This time Sergeant Jerome Van Natta responded. You were still attempting to interview the occupants of the room when Sergeant Van Natta told you to go to your room. He then required you to take a PBT with the results being .199. Three sergeants and two police thought you were intoxicated and your condition was documented in official police reports from both MPD and this agency.

When meeting with Capt. Bridges, Lt. Soley and Association Steward Erik Pearce on June 14th to clarify a question related to the investigation, you said, "I was just doing my job."

This information caused us grave concern and, combined with the information from the investigation that you had not followed the directions of the two UWPD sergeants to stop investigating the case and turn it over to MPD, began to make us think that your actions may actually have been intentional acts of wrongdoing as opposed to mistakes or poor judgment.

On 7/23/07 we met in a Pre-disciplinary meeting. Present were you, Union Steward Erik Pearce, Captain Brian Bridges and me. During the meeting I explained to you that when this incident was first brought to our attention given your exemplary work record, our assumption was that you had made an error in judgment due to your level of intoxication. This behavior was so out of character that you would immediately acknowledge an recognize this as an aberration that you would not repeat. As our investigation progressed, however, you were reported to have made statements to others that you would do the same thing again, that this was not a big deal, and that you felt the department was blowing the whole thing out of proportion. Your actions moved this down the continuum form a mistake to an intentional act.

I asked you what your view of the incident was and you responded that you "wished it had never happened" and that you try to do a good job, but you learned that you are not a good drinker and getting involved in this incident was a mistake. You explained that you did not start out the evening to become intoxicated and that alcohol is not a big part of your life. You said that you were at the hotel in the hallway with the DHS officer when the odor of marijuana was noticed. You said it was "a stupid decision" to knock on the door instead of just calling to report the incident. You further said, "I should not have done it." You said you knew that after drinking you should have just been a good witness, but that due to your drinking you may not have been a good witness. I asked what you learned as a result of this incident. You replied to "not get involved if you have been drinking["] and that you "can't get on the stand after drinking."

You also said you learned that one mistake can change the way that people think about you and how you do your job and that you hope you can regain the trust of the other officers. You said your actions were a mistake and you were sorry that you put the responding officers, supervisors and agency in a bad position. You also said you apologized to your supervisor, Lt. Soley. I also told you that there is not now nor has there ever been an expectation that you or anybody else in this department be a police officer twenty four hours a day, 7 days a week.

As part of the investigation, you completed an alcohol assessment which did not indicate a pattern of abuse.

After reviewing the investigation and your explanation for your involvement, I find that you are in violation of UW System Work Rule:

IV. PERSONAL ACTIONS AND APPEARANCE

J. Failure to exercise good judgment, …

When you chose to place yourself in on-duty status by exercising your law enforcement authority while clearly under the influence of alcohol, you exercised very poor judgment. When you more than once failed to follow the instructions of two different UW police supervisors, you placed your job in jeopardy.

You are a trusted and valued member of this organization with a long and credible career but your actions in this case were unprofessional and potentially hazardous to yourself and others. You placed your co-workers in a difficult situation and your behavior has reflected poorly on this agency.

Had you not recognized and taken responsibility for this series of serious mistakes, promising that this type of behavior will never be repeated, you would

> be facing a major suspension or potential termination. A repeat of this behavior will not be viewed as a mistake again. It will be viewed as an intentional act that will result in further discipline.
>
> As a result of your actions I am ordering that you be suspended without pay for one day. Your suspension will be served on Thursday, August 9th 2007. Your Police identification, badges and access card should be surrendered to Lt. Holen at 4:00 p.m. on Wednesday, August 8. You are not to act as police officer in any capacity on August 9th, 2007.
>
> You may appeal this suspension within the current contractual guidelines.

13. G. did not grieve, appeal or otherwise challenge the one-day suspension. Neither party called G. as a witness at the hearing in the instant complaint.

On the basis of the above and foregoing Findings of Fact, the Examiner issues the following

CONCLUSIONS OF LAW

1. Because the Respondent's legitimate need for confidentiality outweighed the Complainant's need for investigative files at pre-disciplinary hearings, Respondent did not violate Sec. 111.84(1)(d), Stats., or, derivatively, Sec. 111.84(1)(a), Stats., by refusing Association requests for investigative files prior to the pre-disciplinary hearing.

2. Because Lt. Soley's request to Pearce that he not talk to unit members who witnessed the June 11 incident involving G. had the effect of interfering with, restraining and/or coercing Pearce in the exercise of his protected rights guaranteed by Sec. 111.82, Stats., Respondent thereby violated Sec. 111.84(1)(a), Stats.

3. Because the directives to G. that she not talk to anyone other than her Association or legal representatives during the investigation into the events of June 11, 2007 did not interfere with, restrain or coerce her in the exercise of her protected rights guaranteed by Sec. 111.82, Stats., Respondent did not thereby violate Sec. 111.84(1)(a), Stats.

4. Because the parties' collective bargaining agreement provides for final and binding arbitration of disputes arising thereunder, and there is no claim the Association breached its duty of fair representation, the commission will not exercise its jurisdiction to determine if the directive to G. that she surrender her badge and identification before drinking while off-duty violated the parties' collective bargaining agreement and thus violated Sec. 111.84(1)(e), Stats.

5. Because the directive to G. that she surrender her badge and identification before drinking while off-duty did not interfere with, restrain or coerce G in the exercise of her

rights protected under Sec. 111.82, Stats., Respondent did not thereby violate Sec. 111.84(1)(a), Stats.

On the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner issues the following

ORDER

1. To effectuate the purposes of the State Employment Labor Relations Act, IT IS ORDERED that the Respondent, University of Wisconsin System, immediately take the following affirmative actions:

A. Cease and desist from requesting or directing that Wisconsin Law Enforcement Association stewards refrain from interviewing potential witnesses to possible misconduct by WLEA members until authorized to do so, except to the extent that such a request or directive may be allowed under protocols for the conduct of union business which the parties mutually agree to;

B. Post, in conspicuous places in the offices where employees represented by WLEA Local 2 are employed, copies of the Notice attached hereto and marked "Appendix A." This notice shall be posted immediately upon receipt of a copy of this Order and shall remain posted for a period of thirty (30) days thereafter. Respondent shall take reasonable steps to insure that this Notice is not altered, defaced or covered by other material;

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

2. To further effectuate the purposes of the Act, IT IS ORDERED that the elements of the complaint referenced in Conclusions of Law 1, 3, 4 and 5 shall be, and hereby are, DISMISSED.

Dated at Madison, Wisconsin, this 31st day of October, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stuart D. Levitan /s/

Stuart D. Levitan, Examiner

APPENDIX "A"

NOTICE TO ALL EMPLOYEES IN BARGAINING UNITS REPRESENTED BY THE WISCONSIN LAW ENFORCEMENT ASSOCIATION (WLEA) LOCAL 2.

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 INTERFERE with the right of WLEA members and their representatives to engage in lawful concerted activity for the purpose of mutual aid and protection by requesting or directing that WLEA stewards refrain from interviewing potential witnesses to possible misconduct by WLEA members until authorized to do so, except to the extent that such a request or directive may be allowed under protocols for the conduct of union business which the WLEA and the State of Wisconsin have mutually agreed to.

Dated this ________ day of ____________, 2008

By ________________________________
Susan Riseling
Chief of Police and Associate Vice Chancellor
University of Wisconsin - Madison

THIS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS AND MUST NOT BE DEFACED, ALTERED OR COVERED BY ANY OTHER MATERIAL

UNIVERSITY OF WISCONSIN SYSTEM

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

POSITIONS OF THE PARTIES

Complainant

In support of its position that the complaint should be sustained and relief ordered, the Complainant asserts and avers as follows:

> The state violated Secs. 111.84(1)(a) and (d), Stats., by failing to produce information before pre-disciplinary hearings pursuant to the request of WLEA stewards, information which was relevant to the Association's administration of the collective bargaining agreement. The WLEA's requests demonstrate the requisite relevancy and necessity to trigger the State's duty to produce the departmental investigative reports prior to the pre-disciplinary meetings. Management denied all requests, citing a uniform directive from the state Department of Employment Relations that investigatory documents used to support discipline be released upon completion of the pre-disciplinary hearing or after discipline has been imposed. Such a blanket policy should be rejected as contrary to the commissions' case-by-case analysis.
>
> The Association's need for information ripens at the pre-disciplinary hearing, when such requests are relevant and necessary. The right to Union representation at pre-disciplinary meetings is well-established, and expeditious release of information should be a close corollary. Given that similar interests are implicated. Releasing the investigative files "within 20 days of receipt of a written request," as provided for under the current blanket policy, allows for just a ten-day window before a grievance must be filed. Providing the information prior to the hearing would enable stewards to effectively make decisions without these extreme time pressures.
>
> The state also violated Sec. 111.84(1)(a), Stats., by imposing limitations on G.'s and the Association steward's communications with department employees involved in the G. incident. The right to communicate with bargaining unit members regarding a member's discipline is quintessential concerted activity. Management overstepped its authority in ordering steward Pearce not to take witness statements, including from bargaining unit members. The state's interest in ensuring that communications do not undermine the investigation can be protected by establishing boundaries against undue pressure on the interviewee rather than forbidding such interviews. G. herself should also have the right, subject to limits on coercive communications, to discuss the incident with other

> members of the department. The only interest the state has articulated is that it had to expand its investigation with each person G. contacted. But to cut off an employee's right to speak to others on such procedural grounds, rather than substantive concerns, improperly tilts the balance too far in favor of management's claimed operational needs.
>
> The state further violated Secs. 111.84(1)(a) and (e), Stats., by requiring that G. not consumer any alcohol, even while off duty, for the duration of the investigation. This was an unlawful, extreme and invasive discipline, presenting G. with the coercive choice between compliance and administrative suspension. The state's conduct contained a threat of reprisal which interfered with, restrained or coerced G.'s exercise of her rights, and constituted a gross violation of the collective bargaining agreement. The state could have subjected G to the negotiated concentrated performance evaluation program, or imposed discipline through its detailed procedure, but did neither. A summary order to turn in her badge and identification to participate in off-duty conduct constitutes a gross violation of the collective bargaining agreement, and thus violated Sec. 111.84(1)(e).
>
> As relief, all UW System police departments should be ordered to provide all information, including documents, which management has gathered during its investigation at least 24 hours prior to a pre-disciplinary hearing. All UW System police departments should also be ordered to cease and desist from prohibiting LE unit employees from discussing, inquiring or investigating incidents, complaints or other issues related to the collective bargaining agreement and/or engaging in protected, concerted activity. An order should also be entered finding that the UW-Madison Police Department violated the collective bargaining agreement when it imposed a non-negotiated and unlawful working condition (the off-duty alcohol ban) on G. Further, all discipline arising out of the investigations cited in Finding of Fact 3 should be removed, and appropriate violation notices be posted. Finally, the state should pay the complainant's attorney fees and costs.

<u>Respondent</u>

In support of its position that the complaint should be dismissed, the Respondent asserts and avers as follows:

> The state lawfully refused to turn over information gathered during its investigation pursuant to the statutory prohibition of disclosure of such information prior to the disposition of the investigation, namely the imposition of discipline. Sec. 19.36(10), Stats., provides for only four circumstances in which an employer may release information relating to the investigation of possible employee misconduct prior to disposition of the investigation, none of

which apply to this situation. The Association does not contend that any of the exceptions apply, and none do. The release is not "specifically authorized or required by statute," the information was not requested by an employee involved in a current grievance, the information was not needed to fulfill a duty to bargain, and access was not provided for under a collective bargaining agreement.

Without any support in statute or case law, the Association is also refuted by the two leading cases relevant to the pre-disciplinary stage. WEINGARTEN establishes that the Association representative may be present at the pre-disciplinary hearing only as a witness and to ask for clarification, as the employer conducts its investigation without interference. There is no expression anywhere in WEINGARTEN that the employee or Association representative has a right at this time for access to the information or documents which the employer has already accumulated. Nor does LOUDERMILL provide for what the Association seeks; instead, it only requires that the employee and/or Association be given a "notice of the charges," and "explanation of the employer's evidence," and an opportunity to present the employee's side of the story. All that LOUDERMILL requires is a verbal recitation of the employer's relevant evidence, with no requirement for disclosure of the underlying information/documents that support the employer's explanation/summary of that evidence.

Nor does SELRA require the state to turn over the information prior to the imposition of discipline. Production of the information/documents is not required under the "collective bargaining and contract administration" doctrine of SELRA.

Soley's request to Pearce that he wait on interviewing officers Evans and Silvernagl until she had interviewed them first was not an unfair labor practice for several reasons. The employer had the right to conduct the initial investigation because the employer had the initial interest in the investigation; there was nothing for the Association to investigate until after the employer had made a determination as to possible discipline. Also, having the employer conduct the first interviews was necessary to ensure an untainted investigation, which is its duty. And Soley did not unduly delay matters, interviewing the two witnesses within a day of the event. Soley never told Pearce she would let him know when she had finished her interviews, and she was not required to so inform him. Also, the reports were on-line and available to Pearce within three days of the incident, and over a week before the investigatory interview.

Nor was it unlawful for the employer to direct G. to not discuss the incident with anyone other than a Association or legal representative during the investigation. Again, this is to preserve the integrity of the investigation. It is

especially important, given the gaps in G.'s memory of the incident, which Soley reasonably believed she would fill in – not necessarily with accurate information -- if she talked to other officers about it. The commission has sanctioned limits on employee communications during an investigation into misconduct.

Nor has complainant proved that it was unlawful for the employer to prohibit G. from consuming alcohol off duty, despite rulings and comments by the examiner that adversely compromised respondent's ability to develop a policy defense for the restriction.

G. voluntarily agreed to the restriction of surrendering her identification if she wanted to drink alcohol while off-duty, and never grieved the matter. That mutual settlement bars any complaint under SELRA. Complainant's case also fails because restrictions on off-duty activity are not conditions of employment that need to be negotiated, but can be agreed to by an employee, as G. did. Also, statutes allow such restrictions when alcohol impairs an employee's ability to perform job-related duties. The restriction only lasted seven weeks, until the disciplinary decision was announced, not an unreasonable period of time for such an investigation. And there was clearly a burden on the employer to ensure that such conduct did not occur again, and to address G.'s off-duty consumption of alcohol.

It is ridiculous for complainant to contend that the Bridges letter would result in a suspension if G. decided to drink alcohol off-duty. No reasonable person could conclude that. The "opt out" option for G. to drink off-duty after surrendering her badge in no way impacted her doing her duties during her regularly scheduled shift. Also, surrendering identification does not prohibit off-duty personnel form engaging in law enforcement duties; an officer's authority flows from their department, and the absence of identification is more symbolic and psychological than jurisdictional.

As to Issue 1, the removal of any discipline for the four employees is not only unwarranted by the record, but inconsistent with SELRA. There is nothing in the record as to whether the employees did or didn't engage in certain conduct, whether discipline was imposed, or whether the employees grieved. There is no evidence that the state's refusal to produce the information affected the discipline, if any.

Also as to Issue 1, complainant misses the point and fails to acknowledge intervening legislation because said statute destroys its case. The legislature was well aware of SELRA when it created the two exceptions to the Open Records Law, and specifically referred to collective bargaining and not contract administration. Complainant can cite no case that even remotely holds that it is

entitled to documents prior to the imposition of discipline. The documents only become relevant, and subject to disclosure, upon the disposition of the investigation and the imposition of discipline. Without discipline, the documents cannot possibly be relevant and necessary. The cases complainant cites are either not on point, or actually contrary to its claims; its attempt to cut and paste legal authority is totally off base. The respondent's Bulletin -- which its attorney drafted in consultation with the Association's former lawyer, and which has gone unchallenged in the 11 years since -- correctly advises that investigatory documents are to be given to the Association upon completion of the pre-disciplinary hearing and imposition of discipline.

Complainant's Response

In its reply, the Association posits further as follows:

Contrary to the employer, the WLEA stewards did have a right to the employer's information gathered during investigations prior to the pre-disciplinary hearings. The employer errs in its statutory analysis of Sec. 19.36(10), Stats., which, as applied by the commission requires the employer to furnish information which is relevant and reasonably necessary for the administration of the collective bargaining agreement. A steward's representation of a unit member at a pre-disciplinary hearing is part of the Association's administration of the contract, and the WLEA has a right to the investigatory information the employer has gathered as a prelude to possible discipline which is available at the time and relevant to the issues of the pre-disciplinary hearing. The employer's duty to bargain obliges it to provide the information.

The employer also errs in not understanding how Soley's request that Pearce not interview witnesses until she had done so had a reasonable tendency to interfere with his right to engage in the protected activity of investigating an incident where a unit member was facing discipline.

The employer's "me first" investigation argument also lacks merit, in that it, too, had a tendency to interfere with Pearce's protected concerted activity. While management is entitled to conduct its own investigation, it must not interfere with the Association member's right to engage in protected activity. The employer's gag order on G. was also improper, in that it, too – as admitted by Soley – was for the specific purpose of restraining G. from engaging in concerted activity, stopping her from speaking with others who might have information concerning the incident.

Management's order that G. not drink alcohol off duty without surrendering her identification and badge violated the parties' collective bargaining agreement, in

that it invaded her privacy. Management had options under the collective bargaining agreement, and a directive controlling off-duty conduct or a requirement that allowed management to know what G. was doing while off-duty was not one of them.

DISCUSSION

The Association asserts that the UW System violated Secs. 111.84(1)(a) and (d), Stats., by refusing to provide documents and other investigative information to WLEA stewards prior to pre-disciplinary hearings involving UW – Madison and UW – Milwaukee police department employees represented by WLEA Local 2. The Association also asserts the supervisors in the UW-Madison police department committed acts which constituted violations of Secs. 111.84(1)(a) and (e), Stats., by restricting the ability of Association steward Pearce and unit member C.A.G. to investigate and/or discuss the June 11 incident, and by imposing on G. a non-negotiated and unlawful working condition, namely requiring her to surrender her badge and identification prior to consuming alcohol while off duty. The Association did not pursue its claim, contained in its complaint, that the respondent also violated secs. 111.84(1)(a) and (e), Stats., by ordering G. to allow them to conduct a search of her, namely a Preliminary Breath Test, while she was off duty, and that complaint has thus been dismissed. [5]

[5] The statutes at issue provide:

> **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. Such employees shall also have the right to refrain from any or all of such activities.
>
> 111.84 **Unfair labor practices.** (1) It is an unfair labor practice for an employer individually or in concert with others:
>
> (a) To interfere with, restrain or coerce employees in the exercise of their rights guaranteed in s. 111.82
>
> . . .
>
> (d) To refuse to bargain collectively on matters set forth in s. 111.91 (1) with a representative of a majority of its employees in an appropriate collective bargaining unit ....
>
> (e) To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting employees, including an agreement to arbitrate or to accept the terms of an arbitration award, where previously the parties have agreed to accept such award as final and binding upon them.

Issue 1

The parties stipulated that between May and July, 2007, the UW Madison and UW Milwaukee police departments conducted four separate disciplinary investigations of members of WLEA Local 2 (one of them for the June 11 incident involving G.); that each investigation included an investigatory interview at which the employee was represented by a WLEA steward; that in each instance, once notice was given that a pre-disciplinary hearing was scheduled, the steward asked for the investigative files; that a pre-disciplinary hearing was held before the imposition of discipline, and that the employer did not provide the requested files prior to the pre-disciplinary hearing.

The Association claims that by refusing to provide the requested information, the UW System denied it information relevant to its administration of the contract, thereby violating Sec. 111.84(1)(d), and, derivatively, Sec.111.84(1)(a), Stats.

Sec. 111.84(1)(d) makes it an unfair labor practice for the State to refuse to bargain collectively with the appropriate Association on mandatory subjects of bargaining, or to provide it with relevant and necessary information. As Commissioner Torosian summarized in his concurrence and dissent in MORAINE PARK VTAE, DEC. NO. 26859-B (WERC, 8/93):

> It has long been held that a municipal employer's duty to bargain in good faith .... includes the obligation to furnish, once a good faith demand has been made, information which is relevant and reasonably necessary to the exclusive bargaining representative's negotiations with the employer or the administration of an existing agreement. [6] Whether information is relevant is determined under a "discovery type" standard and not a "trial type standard." [7] The exclusive representative's right to such information is not absolute and must be determined on a case-by-case basis, as is the type of disclosure that will satisfy that right. [8] Where information relates to wages and fringe benefits, it is presumptively relevant and necessary to carrying out the bargaining agent's duties such that no proofs of relevancy or necessity are needed and the burden is on the employer to justify its non-disclosure. [9] In cases involving other types of information, the burden is on the exclusive representative in the first instance, to demonstrate the relevance and

[6] MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 24729-A (Gratz, 5/88), affirmed DEC. NO. 24729-B (WERC, 9/88); RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 23094-A (Crowley), 6/86), *aff'd by operation of law*, DEC. NO. 23094-B (WERC, 7/86); OUTAGAMIE COUNTY (SHERIFF'S DEPARTMENT), DEC. NO. 17393-B (Yaeger, 4/80), *aff'd by operation of law*, DEC. NO. 17394-C (WERC, 4/80).

[7] PROCTOR AND GAMBLE MANUFACTURING CO. V. N.L.R.B., 102 LRRM 2128 (8th Cir., 1979).

[8] MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 24729-A (Gratz, 5/88) affirmed DEC. NO. 24729-B (WERC, 9/88) citing DETROIT EDISON, supra, and OUTAGAMIE COUNTY, supra at n. 2.

[9] MILWAUKEE BOARD OF SCHOOL DIRECTORS, supra n. 2 and 4.

> necessity of said information to its duty to represent unit employes.[10] The exclusive representative is not entitled to relevant information where the employer can demonstrate reasonable good faith confidentiality concerns and/or privacy interests of employes.[11] The employer is not required to furnish information in the exact form requested by the exclusive representative and it is sufficient if the information is made available in a manner not so burdensome or time consuming as to impede the process of bargaining[12]

In MADISON METROPOLITAN SCHOOL DISTRICT, DEC. NO. 28832-A (SHAW, 6/97) and DEC. 28832-B, (WERC, 9/98) the commission considered the Association's access to forms entitled, "Probationary and Experienced Employees Who Need to Improve Performance," which the district used to evaluate the supervisory skills of principals and other administrators. The district provided a copy of the blank form, but not any completed ones. The examiner found that completed forms were not relevant and reasonably necessary for the Association to police the administration of the collective bargaining agreement, because the form was not utilized to evaluate the employees identified thereon, and because the blank form was sufficient to enable the Association to determine whether its use would constitute a violation of the contractual provisions for evaluation and personnel files. DEC. NO. 28832-A.

Upon review, the commission modified the examiner's decision because it found that the completed forms *were* "relevant and reasonably necessary to the Complainant's ability to fulfill its role as the collective bargaining representative." As the commission explained:

> As to the relevance and reasonable necessity of access to the forms themselves, Complainant correctly notes that the applicable standard for relevancy is a very liberal one. Applying this "discovery" standard to the facts of the case, we find the completed forms are relevant. The forms do contain information regarding deficiencies in teacher performance and it is apparent that deficiencies, if not remedied, can ultimately lead to discipline. In its role as the collective bargaining representative, Complainant obviously has a very real interest in the obligation to protect employees against discipline through enforcement of the various contractual protections it has bargained relating to evaluations and discipline. We further conclude that the information on the forms is reasonably necessary to Complainant's ability to enforce these contractual protections. DEC. 28832-B, at 8.

The commission did not order the release of the completed forms to the Association, however, because it found that the material was properly considered confidential:

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[10] Id.

[11] DETROIT EDISON, supra; SAFEWAY STORES V. N.L.R.B., 111 LRRM 2745 (10th Cir., 1982); SOULE GLASS AND GLAZING COMPANY V. N.L.R.B., 107 LRRM 2781 (1st Cir., 1981).

[12] CINCINNATI STEEL CASTING CO., 24 LRRM 1657 (1949).

> Contrary to Complainant, we find those confidentiality interests to be substantial. The record definitively demonstrates that the forms were created as part of the Respondent's effort to monitor the performance of its supervisory employes and are retained and used by management solely for that purpose. Through the testimony of Baum and Greenwald, the record persuades us that unless the confidentiality of the information on the forms is maintained (including the names of the employes), Respondent's ability to effectively monitor the performance of its supervisors will be significantly compromised. Secondarily, that same testimony persuades us that if the confidentiality of the forms (including the names of the employes) is not maintained, the supervisors' ability to utilize various informal supervisory techniques to improve employe performance will also be negatively affected.
>
> When we balance these confidentiality interests against the relevance and need for the information (particularly in light of: (1) the ultimate availability to Complainant of information about deficiencies through existing contractual provisions; and (2) the absence of any evidence that the completed forms have been or will be used to discipline/nonrenew employes), we conclude that the confidentiality interests predominate and thus that Respondent was not and is not obligated to provide the completed forms or the names of involved employes to Complainant.
>
> Our balancing of competing interests is limited to the facts and issues before us in this case. Thus, for instance, we need not, and do not resolve the issue of whether Complainant would be entitled to receive a completed form for an employee in the context of a disciplinary or non-renewal proceeding involving that same employee. DEC. 28832-B, at 8-9.

MORAINE PARK VOCATIONAL, TECHNICAL AND ADULT EDUCATION DISTRICT, DEC. NO. 26859-B (WERC, 8/93), arose during bargaining. The union asked for a specific description of the way management determined the classification and salary range for bargaining unit positions, including a verbal briefing of the procedure "along with supportive forms, documents, instructions, etc., used by management for such determinations." The District gave what it considered to be "a thorough verbal briefing of the procedure," but denied the union's request for the supporting documents because there was neither language in the collective bargaining agreement nor in statutes regarding the release of such documents. The examiner found the material sought to be relevant and reasonably necessary for the association to perform its responsibilities as the bargaining representative, and rejected the District's statutory and contractual arguments. However, the examiner found no violation because he believed the verbal briefing was sufficient to satisfy the association's request for information. DEC. NO. 26859-A (NIELSEN, 10/92).

A split commission affirmed. All commissioners agreed that the "forms, documents, instructions" were "relevant and reasonably necessary" to the union's ability to administer the contract, and two agreed with the examiner that detailed verbal briefings were sufficient.

Noting that district officials engaged association officials in two lengthy meetings to discuss in great detail the classification process as it applied to a single newly created position – including a 90-minute briefing with a step-by-step explanation –Chair Meier and Member Hahn agreed with the examiner that what the association had a right to obtain was "relevant information rather than relevant pieces of paper." The majority concluded:

> In summary, the two conferences were substantial both in time and detail. All questions asked by the Association were answered. The process and results were explained thoroughly. The Association does not contend that it does not understand the process. The Association merely disagrees with the outcome. There were no issues of credibility or integrity raised which may need corroboration. The Association has not been able to identify a need to receive the information in a different form. Following the Association's line of argument, all information would need to be provided in the exact form requested or the employer would be subject to an automatic corroboration argument. DEC. NO. 26859-B, at 9.

Concurring and dissenting, Commissioner Torosian wrote :

> We all agree the information requested was relevant and thus, in my opinion, the Association was entitled to the information unless the employer could "demonstrate reasonable good faith confidentiality concerns and/or privacy interests of employes." Such a demonstration is lacking in this case. Nor has the Employer justified its refusal to provide the relevant information in the form requested. Case law allows an employer to provide requested information in another form ". . . if the information is made available in a manner not so burdensome or time consuming as to impede the process of bargaining." There is no evidence in this case that the information sought in the form requested was unduly burdensome to the Employer.
>
> The majority, in support of its position, cites the Milwaukee Board of School Directors and LaCrosse cases. But in the Milwaukee case the information sought was found to be relevant and that the production of the information in the form requested was not unduly burdensome to the employer. In the LaCrosse case the information sought was found to be relevant but the employer's refusal to provide it in the form requested was justified for confidentiality reasons.[13]
>
> It appears, the majority's view of the law with respect to providing relevant information is that an employer can provide such information in the form it chooses, even if providing said information is not burdensome to the employer and if no issue of confidentiality exists. My view is that relevant information must be provided in the form requested unless a legitimate and substantial reason for its

[13] MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 24729-A (Gratz, 5/88); LACROSSE SCHOOL DISTRICT, DEC. NO. 26541-A (Crowley, 3/91)

> non-disclosure is shown. Here there was no such reason for not providing "supportive forms, documents, instructions, etc." used by the Employer in making its reclassification/salary range determination. DEC. NO. 26859-B, at 13.

Here, the Association has requested the employer's investigative files prior to the pre-disciplinary hearing. There is no question the desired information was relevant to the Association's administration of the agreement, which contains a "just cause" standard for discipline. Knowing how a disciplinary investigation was set in motion, knowing what the witness statements were and how they were interpreted by the employer, knowing the employer's investigative strategy are all things that would be useful to the Association in ensuring that the employer conducted its disciplinary investigations appropriately, and in determining whether the discipline was for just cause. Knowing the details of how the employer imposed discipline could also help the Association formulate proposals for the next round of bargaining. This is all information to which the Association is entitled.

The question before me, though, is whether that entitlement exists at the time of the pre-disciplinary hearing.

The Association has stated and re-stated that its need for this investigative information matures at the pre-disciplinary hearing, but it never fully explains why that is. Repetition is not an explanation. I also believe the association confuses the record by stating the four cases "involve requests for information directly related to discipline," inasmuch as the requests were made before discipline was imposed. As I discuss below, the fact that the state imposed discipline *after* the request does not establish that discipline results in *all* such instances. The Association has not made a compelling case that it is entitled to such knowledge before discipline is imposed.

The Association's difficulty in making its case is evident from the number of times it cites cases in which no violations were found, including MADISON METROPOLITAN SCHOOL DISTRICT, DEC. NO. 28832-B, and BOARD OF SCHOOL DIRECTORS OF MILWAUKEE, DEC. 15825-B (Yaeger, 6/79), in which the Association asked for details about possible changes in curriculum because that could lead to involuntary transfers or other actions governed by specific contract provisions. But the examiner found that the association "did not meet its burden of proof respecting the relevancy of information to its policing administration of the contract." ID., at 20.

Essentially, the Association here has equated what it wants with what it needs. [14] Contrary to its assertion, while it *wants* the investigative files before the pre-disciplinary hearing, its *need* for these documents simply does not ripen at this time. What the Association and its members need at this stage – and what the law, under LOUDERMILL and its progeny,

[14] As it has been said, "Your debutante knows what you need, but I know what you want." (Dylan, Bob; *Stuck Inside of Mobile with the Memphis Blues Again.)*

provides – is notice of the charges, an explanation of the employer's evidence, and an opportunity to present their side of the story. [15]

The Association suggests that disciplinary matters could be handled more fairly and expeditiously, and some grievances avoided, if the parties undertook a full exchange of information, including the employer's investigative files, at the pre-disciplinary hearing. That is probably true, and could reflect a positive development in a particular employment setting. Any employer is free at any time to agree to such an exchange.

But the Association errs when it declares that there is "no discernible interest" to maintaining the confidentiality of investigative reports at the pre-disciplinary hearing. Such reports may very well contain uncorroborated information from the employee's co-workers which the employer has not had the opportunity to verify; the dissemination of such information can only have a deleterious effect within the workplace. There may also be commentary of a highly personal nature, which could do serious damage to individual reputations. Although there is certainly the presumption that a pre-disciplinary hearing will lead to discipline, such an outcome cannot be absolutely assured – after all, if discipline is absolutely inevitable, the pre-disciplinary hearing has no due process function. That is, it must be assumed that certain pre-disciplinary hearings will *not* result in discipline, and that the files for such hearings will not be released to the Association. The knowledge that investigative files will become available to the Association upon imposition of discipline can be a significant factor in the employer's decision whether or not to impose discipline. As the moving party in discipline, the employer is entitled to consider this aspect, among others, in determining whether or not to impose discipline. The employer's legitimate interest in the confidentiality of the investigation prior to the imposition of discipline outweighs the Association's desire for access to investigative files at the pre-disciplinary hearing.

The statutory right to mutual aid and protection is a keystone in our labor law. But it does not extend to requiring the employer to provide witness statements to an officer under investigation prior to the officer's own pre-disciplinary hearing.

In finding that the Association has no right to investigative files prior to the imposition of discipline, I rely exclusively on commission precedent, and explicitly do not adopt the state's analysis of the Public Records Law, Sec. 19.36(10), Stats., or even acknowledge any relevance of that statute or its case law in this proceeding. [16]

Determining that the Association did not have a right to investigative files prior to discipline does not, however, end the issue one analysis, because the Association has also

[15] CLEVELAND BOARD OF EDUCATION V.LOUDERMILL, 470 U.S. 532, 546 (1985).

[16] The Association did not request the documents pursuant to the public records law; rather, it sought the material under its statutory right to engage in informed collective bargaining and police the administration of the collective bargaining agreement. Accordingly, I do not believe the state's analysis of what can and cannot be released pursuant to a request under the public records law is relevant to this controversy.

challenged the state's reliance on a provision in its *Collective Bargaining Bulletin* requiring the state to provide such files to the Association within twenty days of a request, following the imposition of discipline. Relying on a uniform policy, the Association argues, violates the requirement that the state engage in a case-by-case analysis. The state does not deny the bulletin provision, which it notes was arrived at in consultation with the then-Association counsel, and which has gone unchallenged for over a decade. The state also contends that the bulletin is consistent with current law, and in fact anticipated relevant statutes.

I believe the bulletin provision properly reflects the policy and the spirit of the law that a labor organization is entitled to investigative files, but only upon the imposition of discipline. I further understand the law to require that the employer must provide the Association with such access within a reasonable period of time.

The collective bargaining agreement requires that grievances be filed within thirty days of when the grievant knew, or with reasonable diligence should have known, of the cause of the grievance. The Collective Bargaining Bulletin require the employer to provide documentary files within twenty days of a written request. During the time in which it is waiting for the employer to provide the files, the Association is not prevented from undertaking other investigations and analyses to evaluate whether the employer had just cause to impose discipline. The provisions of the bulletin do not prevent the timely submission of a grievance challenging discipline.

Accordingly, I have dismissed the Association's complaint as to Issue 1.

Issue 2 – A

The Association further alleges that Soley ordered Pearce to wait until she had taken statements from officer witnesses Evans and Silvernagl before interviewing them, thereby interfering with Sec. 111.82 rights and thus violating Sec. 111.84(1)(a). The state responds that Solely merely made a request, and did not issue an order, and there was no interference.

It is not necessary to demonstrate that an employer *intended* to interfere with Sec. 111.82 rights, or even that there *was* actual interference; instead, the Commission has consistently held that it will find interference "when employer conduct has a reasonable tendency to interfere with, restrain or coerce employees in the exercise" of their rights under 111.82, "even if the employer did not intend to interfere and even if the employee(s) did not feel coerced or was not in fact deterred from exercising" their statutory rights. [17]

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[17] JEFFERSON COUNTY, DEC. NO. 26845-B (WERC, 7/92), _aff'd_, 187 Wis. 2D 647 (Ct.App. 1994), citing WERC v. EVANSVILLE, 69 Wis. 2D 140 (1975) and BEAVER DAM UNIFIED SCHOOL DISTRICT, DEC. NO. 20283-B, (WERC, 5/84); CITY OF BROOKFIELD, DEC. NO. 20691-A (WERC, 2/84); JUNEAU COUNTY, DEC. NO. 12593-B, (WERC, 1/77). While these holdings reference the provisions of the MERA, the applicable provisions are substantially identical to those of SELRA, and the same test for whether interference occurred applies under both statutes. THE STATE OF WISCONSIN, DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS, DEC. NO. 11979-B (WERC, 11/75); STATE OF WISCONSIN, DEC. NO. 25987-A (McLaughlin, 10/89), _aff'd by operation of law_, DEC. NO. 25987-B (WERC, 12/89). WERC v. EVANSVILLE, 69 Wis. 2D 140, as cited in STATE OF

As intent is not an element to the offense, good faith is not a defense. The commission recently referred with approval to the well-established holding of the National Labor Relations Board to find a violation "where the employer mistakenly but in good faith believed the employee had engaged in misconduct in the course of concerted activity ...," and therefore issued discipline. CLARK COUNTY, DEC. NO. 30361-B (WERC, 11/03), citing NLRB V. BURNUP AND SIMS, INC., 379 U.S. 21, 57 LRRM 2385 (1964). It is a violation of Sec. 111.84(1)(a) for an employer to discipline an employee for alleged misconduct during the course of protected activity, if the evidence indicates the misconduct did not occur, regardless of the employer's good faith belief that it had. The law also prohibits an employer directive "that proscribes protected activity on the mistaken belief that misconduct had occurred in the course of such activity." STATE OF WISCONSIN (DOC) [CORCORAN], DEC. No. 30340-B (WERC, 7/04).

Determining 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) traditionally has involved balancing the intrusion on employee rights against the employer's legitimate business needs. "[I]t is also well-established that employer conduct which may well have a reasonable tendancy to interfere with employee ... rights will generally not be found violative ... if the employer had a valid business reason for its actions." RACINE EDUCATION ASSOCIATION, DEC. NO. 29074-B (Gratz, 4/98), aff'd DEC. NO. 29074-C (WERC, 7/98). [18] The Commission recently re-articulated that test as permitting an employer to "interfere with its employees' lawful concerted activity to the extent 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. ID.

For there to be a violation of Sec. 111.84(1)(a), respondent's conduct must contain either some threat of reprisal or promise of benefit which would tend to interfere with, restrain or coerce employees in the exercise of their section (2) rights. [19] The threat or promise can be

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WISCONSIN (DEPT. OF CORRECTIONS), DEC. NO. 30166-A (Levitan, 3/2002).

[18] See also, e.g., BROWN COUNTY, DEC. NO. 28158-F (WERC, 12/96); CITY OF OCONTO, DEC. NO. 28650-A (Crowley, 10/96), aff'd by operation of law, -B (11/96); MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 27867-B (WERC, 5/95); MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 27484-A (Burns, 7/93), aff'd by operation of law, -B (WERC, 7/93); CITY OF MILWAUKEE, DEC. NO. 26728-A (Levitan, 11/91), aff'd on rehearing, -D (WERC, 9/92); CEDAR GROVE-BELGIUM SCHOOL DISTRICT, DEC. NO. 25849-B (WERC, 5/91); CITY OF BROOKFIELD, DEC. NO. 20691-A (WERC 2/84); see generally, WAUKESHA COUNTY, DEC. NO. 14662-A (Gratz, 1/78) at 22-23, aff'd -B (WERC, 3/78)

[19] STATE OF WISCONSIN, DEPARTMENT OF ADMINISTRATION, DEC. NO. 15945-A (Michelstetter, 7/79), aff'd by operation of law, DEC. NO. 15945-B (WERC, 8/79); STATE OF WISCONSIN, DEPARTMENT OF HEALTH AND SOCIAL SERVICES, DEC. NO. 17218-A (Pieroni, 3/81), aff'd by operation of law, DEC. NO. 17218-B (WERC, 4/81); STATE OF WISCONSIN, DEC. NO. 19630-A (McLaughlin, 1/84), aff'd by operation of law, DEC. NO. 19630-B (WERC, 2/84); STATE OF WISCONSIN, DEPARTMENT OF HEALTH AND SOCIAL SERVICES (DHSS), DIVISION OF CORRECTIONS (DOC), DODGE CORRECTIONAL INSTITUTION (DCI), DEC. NO. 25605-A (Engmann, 5/89), aff'd by operation of law, DEC. NO. 25605-B (WERC, 6/89). BEAVER DAM UNIFIED SCHOOL DISTRICT, DEC. NO. 20283-B (WERC, 5/84).

implicit, as an employer can engage in prohibited conduct merely by "indirectly" threatening reprisal or promising benefit. BEAVER DAM, 20283 at 7.

In STATE OF WISCONSIN (DOC) [CORCORAN], DEC. NO. 30340-B, the commission found the state violated Sec. 111.84(1)(a) by issuing a directive prohibiting the union president, Corcoran, from contacting a female unit member, Coats, who had alleged another member had sexually harassed her; by interrogating Corcoran about compliance, and by reprimanding him for violating that directive and for being untruthful during the employer's investigation. The Commission said:

> The first step in the Sec. 111.84 (1) (a) SELRA analysis is to determine whether the employee activity is protected under 111.82, SELRA. As the Examiner held, a union president's right to communicate with bargaining unit members about work-related incidents is quintessential concerted activity within the ambit of Sec. 111.82, SELRA. This right is not abridged simply because the incident in question involves the competing interests of bargaining unit members or a charge of unlawful conduct by one member against another. Indeed, such situations implicate special union responsibilities to both unit members.
>
> ....
>
> … the State's legitimate interest in the integrity of its sexual harassment investigation procedures would permit it to issue a rule or directive regulating Corcoran's communication with Coats – but only to the extent necessary to address that legitimate interest. Even if Corcoran had never contacted Coats, the State legitimately could have directed union officials not to pressure or coerce Coats into recanting her allegations. Indeed, the State lawfully could have disciplined Corcoran for pressuring or coercing Coats even without a prior directive. However, we agree with the Examiner that, under the circumstances present here, where Corcoran's communications were not in fact coercive, the State's directive – forbidding all communication regarding the Coats/Slife harassment issue – considerably exceeded its legitimate interest in limiting coercion and would tend to chill WSEU's ability to monitor and represent the interests of both unit members. Thus the … directive was unlawful.
>
> In sum, the State may lawfully expect union officials to refrain from coercing or intimidating complainants and witnesses in sexual harassment cases and may lawfully enforce directives narrowly addressed to that expectation. The State may also lawfully interrogate union officials about their conversations with bargaining unit members, provided the State has a substantial and reliable basis for believing that coercion or other misconduct had occurred during such communications or that a lawful directive had been violated. The State may also punish Union officials for misconduct during the course of protected activity, such as intimidating or coercing complainants or witnesses in a sexual harassment investigation, provided such misconduct actually occurred. However, in this case, the State interfered with Corcoran's rights under 111.82,

> SELRA by issuing a directive ... that prohibited Corcoran from engaging in protected activity when Corcoran had not in fact committed any misconduct during the course of that protected activity, and by attempting to enforce that unlawful directive by means of interrogation and discipline.

As CORCORAN instructs, I start by considering whether Pearce's proposed conduct constituted "lawful, concerted" activity under 111.82, Stats.

A determination as to whether or not particular activity is concerted activity requires a case-by-case analysis. In CITY OF LA CROSSE, DEC. NO. 17084-D (WERC, 10/83), aff'd., Cir. Ct. Case No.-83-CV 821 (1985), the Commission elaborated on concerted and protected activity as follows:

> 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 Sec. 111.70(2) of MERA. At root, this determination demands an evaluation of whether the behavior involved manifests and furthers purely individual or collective concerns.

There is no question about Pearce's communication with Silvernagl and Evans being lawful, concerted activity. A union steward's right to investigate allegations of misconduct by a union member by interviewing witnesses "manifests and furthers ... collective concerns," and is concerted activity under SELRA just as quintessential as the right at issue in CORCORAN.

The next issue is whether there was a threat of reprisal, a necessary component for the Association's complaint to proceed.

The state presents many good arguments that there was not, starting with the fact that there is no evidence Soley ordered or formally directed Pearce to not interview the witnesses until she had, nor any evidence Pearce would have been disciplined if he had done so. And there is no evidence to challenge Soley's testimony that she believed that she was merely "requesting" Pearce hold off on the interviews, and not directing him to do so. And I believe Soley that she would not have disciplined Pearce for talking to the other officers. But I also believe Pearce -- that he feared she could have, or would have, if he had contravened her stated desire. There is nothing to either support or challenge the testimony about how Soley and Pearce understood their exchange. Soley testified she believed she was making a request; Pearce testified he believed she was giving him an order.

Pearce testified he was "directed not to speak to any of the witnesses." Soley testified, "I did not say, 'I order,' or, 'I direct you not to talk to them.'" Acknowledging that she, like Pearce, couldn't remember her exact words, Soley testified "it was, 'I ask,' 'I request,' 'I would rather you not talk to them.'

But taking just those points where Soley corroborates Pearce's testimony produces three critical points of agreement: that he told her he planned on interviewing the witnesses, she told him she wanted him to wait until she had done so first, and she never notified him once she had done so.

The state devotes many paragraphs, even pages, to challenging Pearce's testimony about his conversation with Soley, especially the details of his request to interview Silvernagl and Evans. But even accepting the state's analysis still leaves as the underlying unrebutted reality that Pearce told Soley he wanted to interview the two officers, and Soley said she would prefer that he didn't until she had done so.

As the state correctly notes, Pearce had no role in the criminal or internal investigation of the G. incident, and thus any action he took was only in the union context. As the matter could only concern union business, it thus could not logically (and perhaps even lawfully) be the subject of a direct command. If Soley couldn't issue a command, the state continues, she couldn't impose discipline for non-compliance – therefore, there was no threat of reprisal, and the complaint must be dismissed.

The state's logic seems good, but it ignores the reality of the workplace, especially a paramilitary workplace like law enforcement. In such a setting, when a superior officer requests that a subordinate officer not do something the officer said s/he was about to do, it is in the officer's professional interest to not do it. When a superior officer expresses to a subordinate a desire that s/he not do something that has a clear and direct connection to the workplace, the subordinate disregards the expression at his or her peril.

Contrary to the examples the employer offers, Soley's request wasn't about some purely personal or inconsequential matter, but was indeed a matter directly related to the workplace. It was a request that an Association steward not interview witnesses whose testimony could potentially affect the employment future of a Association member.

Pearce could reasonably interpret what Soley said as a command, with an implicit threat of reprisal for his non-compliance. The Association satisfies this criterion for its complaint.

By giving Pearce pause to proceed, Soley's conduct had the reasonable tendency to restrain him in the exercise of his statutory rights. The question thus becomes whether the employer had a legitimate operational need that justified interfering with this right.

I do not believe that it did. Rather, I believe Pearce had a Sec. 111.82 right to contact the witnesses without waiting for the employer to finish its interviews and authorize the contact. That right benefited several parties, including G. (to aid in her defense), and the Association itself (so that its members would see it actively representing their interests).

I believe the WEINGARTEN right to Association representation means informed representation. I have already found that the state does not have to provide investigatory files

at the pre-disciplinary stage. But that very right of the employer to conduct its own confidential investigation produces a corresponding right for the Association to do the same. The right to representation includes the right for representative and member to have a reasonable opportunity for private preparation about known charges prior to the investigatory interview. The state is correct, of course, that at the interview, Pearce's only role would be to observe and clarify. But that very limitation on the Association's role *at* the interview produces a corresponding right for the Association *prior* thereto, namely to provide confidential, informed counsel.

As the state has noted, G. could not fully assist in Pearce's preparation, because there were things she didn't remember. In order to fully represent G. throughout the investigatory process, Pearce had a reasonable need to talk to witnesses.

As the state notes, the court of appeals has determined that it is the imposition of discipline that defines the end of the investigation for public records purposes. But that does not mean it takes discipline to create a 111.82 right. Section 111.82 rights exist throughout the disciplinary process, even when discipline is not ultimately imposed. Collective action responding to a disciplinary investigation is presumptively protected.

Silvernagl and Evans were unit members who witnessed another member's misconduct, and who could be witnesses at future disciplinary hearings. To fully discharge his duty to both G. and the witnesses to her misconduct, Pearce had an absolutely protected right to interview them at their earliest mutual convenience.

The employer makes a convincing case that, given the contractual ban on conducting Association business while on duty, and the schedules of the three officers involved, it would be very difficult, if not impossible, for Pearce to schedule a time to actually talk to Evans or Silvernagl. The employer had a legitimate right to enforce the contractual and work rule provisions which would have prevented Pearce from interview Silvernagl and Evans while he, or they, were on duty. But that does not exhaust Pearce's statutory rights.

The schedule seems to indicate that the only time Pearce and the other officers are all off-duty together is between 2:00 a.m. and 6:00 a.m. Indeed it may be the case that Pearce could not talk to the other officers at length. But he still had the statutory right to contact them, to leave them a message, either voice or email, for them to return at a proper time. The employer did not have an operational need to justify preventing Pearce from contacting Silvernagl and Evans to notify them of the Association's interests in the case, and request they contact him at their earliest convenience.

At the very least, Pearce had a right to inform Silvernagl and Evans that he was representing G., and to request they contact him as soon as the contract and properly promulgated work rules would allow. Soley's comment to Pearce added a new restriction on Association activity beyond that authorized by the collective bargaining agreement

As the state in DEC. NO. 30340-B could lawfully have directed Corcoran not to pressure or coerce Coats into recanting her allegations, Soley could have lawfully directed Pearce not to coerce or induce Silvernagl and Evans to give less than full and truthful testimony, and could have disciplined him if he had, even without such a prior directive.

As the state's directive in DEC. No. 30340-B forbidding Corcoran from any communication regarding the Coats/Slife harassment issue "considerably exceeded its legitimate interest in limiting coercion and would tend to chill WSEU's ability to monitor and represent the interests" of its members," so too did Soley's "request" to Pearce that he delay his interview of Silvernagl and Evans exceed the state's legitimate interest and tend to chill the Association's ability to monitor and represent the interest of its members.

I do not believe Soley intended to interfere with Pearce's s. 111.82 rights. But as intent is not an element in the offense, good faith is not a defense. The employer's good faith belief that its action was necessary and thus lawful "while understandable, is at odds with the requirement of the law." DEC. NO. 30340-B, at. 14. An employer's good faith – but erroneous – belief that something bad *had* happened does not authorize interference with protected activity, and its good faith belief that something bad *will* happen not justify illegal interference.

As Corcoran had a statutory right to communicate non-coercively with Coats, so too did Pearce have a statutory right to communicate non-coercively with Silvernagl and Evans. By expressing her preference that Pearce not talk to unit members who witnessed the events for which another unit member was facing discipline for an unspecified period of time, Soley impeded Pearce's ability to interview potential witnesses expeditiously, and thus interfered with and restrained the Association.

Accordingly, I have found the employer violated Sec. 111.84(1)(a), Stats., and entered the appropriate remedial order.

Issue 2 – c -1

The Association also alleges that Respondent's directive to G. that she "not speak about the incident with anyone except UW Police managers, your union representative or other legal representative during the duration of the investigation" improperly interfered with her Sec. 111.82 rights in violation of Sec. 111.84(1)(a), Stats. It didn't.

By definition, communication with coworkers is a critical component to mutual aid or protection. The Association thus satisfies the first step in the statutory analysis.

But the state's legitimate interest in an honest and comprehensive investigation presented a valid business reason for the temporary and limited curtailment of G.'s communications with persons other than her union and legal representatives.

There were two justifications for this directive. First, the paramount need for a valid investigation, which included G. providing honest and accurate information. But G. had told Solely there were some things about the incident she couldn't remember. Based on her professional knowledge of interrogations, Soley knew that allowing G. to talk freely with other officers during the investigation would thus create the risk that G. would, consciously or not, absorb their memories and impressions to fill the gaps in her own true memory. This could severely taint the investigation. Given the critical need that G. provide only truthful and accurate information, respondent was entitled to take reasonable steps to protect the integrity of her testimony.

Also, in order to track if and how G's statements about the situation changed during subsequent conversations, Soley would have had to speak with every officer G. talked to about the incident. Indeed, before G. got the directive, G. had spoken with Officer Ellis, requiring Soley to interview Ellis about the statements G. had made to him. The interests of all parties – G., the state and the Association – in a timely and complete investigation would be stymied by such an open-ended aspect.

The Association may attempt to minimize the significance of these burdens on both the quality and extent of the investigation, but they are real, and it is unnecessary for the state to suffer given the timely availability to G. of Association and/or legal representation.

The directive was well-tailored to meet respondent's legitimate interest. The state satisfied G.'s statutory rights by preserving her ability to communicate fully with her union and legal representatives. Allowing G. to talk to all the other rank and file employees prior to the conclusion of the investigation would be reasonably likely to unduly complicate the investigation, and jeopardize a timely and appropriate result. Accordingly, I have dismissed the charge that the state violated Sec. 111.84(1)(a), Stats. by its restrictions on G.'s communications.

Issue 2 – c - 2

The Association also asserts that the restrictions on G. drinking alcohol while off-duty, which it calls "an unlawful, extreme and invasive form of discipline," violated Secs. 111.84(1)(a) and (e), Stats. I do not find that description to be correct, or that legal analysis to be persuasive.

G.'s choice was not, as the Association asserts, between compliance and administrative suspension (although non-compliance with the overall terms of the letter certainly would have led to discipline). G.'s choice was compliance with the directive to not drink off duty, or exercising her option to drink off duty after surrendering her ID.

Yet, claiming that the directive *was* disciplinary, the Association then decries that the state did not follow the contractual provisions for discipline. There are two problems – one factual, one legal -- with this argument. The factual flaw is that, as noted above, this restriction

simply was not disciplinary. The legal flaw is that, as the parties have a collective bargaining agreement which provides for final and binding grievance arbitration and there is no claim that the Association failed in its duty of fair representation, there can be no statutory violation.

The provisions of Sec. (1)(a) have been noted earlier. Section 111.84(1)(e) makes it an unfair labor practice to violate a collective bargaining agreement. However, where there is no alleged breach of the duty of fair representation, and where the parties to the collective bargaining agreement have agreed upon a contractual mechanism for resolution of alleged violations, that contractual mechanism is presumed to be exclusive and the Commission will not assert its jurisdiction over the alleged violations of Sec. 111.84(1)(e), Stats. STATE OF WISCONSIN [CORRECTIONS], DEC. NO. 31384 (WERC, 11/05), citing STATE OF WISCONSIN, DEC. No. 20830-B (WERC, 8/85). As noted above, the parties' collective bargaining agreement provides for final and binding arbitration of disputes arising thereunder. Further, there is no claim that the Association in any way breached its duty of fair representation. Accordingly, I decline to assert Commission jurisdiction on this element of the complaint.

Clearly, there are real and meaningful limitations on the extent to which the state can restrict or regulate an employee's lawful off-duty behavior. However, Complainant has not fully explained how drinking alcohol off-duty is related to the rights to form, join or assist labor organizations, to bargain collectively, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection. Respondent's well-tailored restriction did not interfere with any right guaranteed under Sec. 111.82, and thus did not violate Sec. 111.84(1)(a).

First, I believe Pearce fundamentally misunderstood Bridge's letter of June 14. That letter clearly directs G not to drink off duty until the conclusion of the investigation, *except that she could drink off duty if she first surrendered her badge and department identification*. I do not understand how Pearce could testify that this was tantamount to an administrative suspension. Based on Pearce's confused testimony, the Association brief then states as *a fact* that the requirement that G. "turn in her badge and her ID if she drank off duty constituted an administrative suspension." It most assuredly did not, and for Pearce to so testify, and the Association to so recite as a fact, reflects a fundamental misunderstanding of some very basic terms and concepts.

An administrative suspension is a disciplinary act, involving a loss of pay and other adverse impacts. The directive that G. surrender her badge and ID before drinking off-duty involved neither, and thus was simply not an administrative suspension. Nor was it any form of discipline at all, as it had no adverse consequences regarding G.'s wages, hours or conditions of employment. Having to surrender the symbols of her professional identity in such a manner probably was embarrassing for G., maybe even humiliating, but it was in no way a suspension or any other discipline. Therefore, notwithstanding that Sec. 111.84(1)(e) is, as noted, not applicable here, the state did not have to follow the contractual provisions regarding discipline.

Nor is the Association correct in describing the directive as "controlling off-duty conduct" or allowing management "to know what an employee was doing in her off-duty time." The directive did not prevent G. from consuming alcohol while off duty, or require her to give any details whatsoever as to the details of such conduct. Indeed, G. was not required to provide any information at all – all she was required to do was surrender her badge and identification if she wanted to drink, and only do so during the duration of the investigation. Given the enormity of her misconduct, G. can hardly say she is fully entitled to the department's confidence when it comes to drinking off duty.

Indeed, by not grieving any aspect of the directives or discipline, and not appearing at the hearing, G. implicitly acknowledges that she understands and accepts the department's actions. [20]

Finally, the directive is not legally objectionable because it was operationally necessary.

G. had just abused her law enforcement authority by getting extremely drunk while off duty and using her badge and identification to act as a law enforcement officer in a reckless, wasteful and potentially dangerous manner. I believe Soley testified accurately that the events of June 11 showed that alcohol impaired G.'s performance of her job-related responsibilities including her judgment, her investigative skills and her officer safety skills. The severe level of her intoxication also adversely impacted the Madison Police Department in its investigation and could have complicated the prosecution of the drug offenses.

Until the alcohol assessment was done, the investigation completed and a determination made that such an untoward event would not recur, G.'s supervisors were entitled – even required – to take all reasonable steps to ensure that it didn't.

The easiest way to do that, of course, would be to threaten G. with discipline if she drank off-duty again. But that *would* entail an excessive imposition of employer power into an employee's personal life, not supported by the facts known to the department on June 12.

A more limited restriction would be to allow G. to drink off-duty during the investigation, but prevent her from exercising law enforcement authority if she did so. The easiest way to do that was to ensure that if she drank off-duty during the investigation, she didn't have the symbols of law enforcement authority at hand. The obvious way to do that, of course, would be to require her to surrender her badge and ID for that period when she was off-duty and wanted to drink. That is exactly what respondent did.

[20] That G. did not challenge any aspect of the directive or discipline is why I have used her initials herein.

The state's directive that G. surrender her badge and ID before drinking alcohol off-duty during the investigation was directly tailored to fit a well-defined operational necessity. It prevented a repeat of bad conduct by an officer without unduly interfering with the officer's lawful off-duty activities. The directive did not interfere with any of G.'s statutory rights.

Dated at Madison, Wisconsin, this 31st day of October, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stuart D. Levitan /s/

Stuart D. Levitan, Examiner

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