STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN STATE EMPLOYEES UNION, AFSCME, COUNCIL 24, AFL-CIO, and SHANNON PATROUILLE, Complainants,

vs.

STATE OF WISCONSIN, Respondent.

Case 793
No. 67726
PP(S)-387

Decision No. 32392-A

Appearances:

Kurt C. Kobelt, Lawton & Cates, S.C., Attorneys at Law, Ten East Doty Street, Suite 400, P.O. Box 2965, Madison, Wisconsin 53701-2965, appearing on behalf of the Complainants Wisconsin State Employees Union, AFSCME, Council 24, AFL-CIO and Shannon Patrouille.

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

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On January 29, 2008, the Wisconsin State Employees Union, AFSCME, Council 24, AFL-CIO, and Shannon Patrouille filed a complaint with the Wisconsin Employment Relations Commission, asserting that the State of Wisconsin had committed certain unfair labor practices in violation of Section 111.84(1)(a), Wis. Stats. The Commission appointed Danielle L. Carne to act as Examiner, to make and issue Findings of Fact and Conclusions of Law and to issue appropriate Orders. On April 15, 2008, the State of Wisconsin filed an amended answer to the complaint, denying any alleged violation and making certain affirmative defenses. A hearing on the matters at issue was held in Madison, Wisconsin, on May 13, 2008. Post-hearing arguments were submitted, the last of which was received by the Examiner on November 6, 2008, whereupon the record was closed. The Examiner, being fully advised in the premises, now makes and issues the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. The Complainant Wisconsin State Employees Union, AFSCME, Council 24, AFL-CIO (hereafter "WSEU"), is the exclusive bargaining representative for a number of state employees whose positions were previously allocated, by action of the Wisconsin Employment Relations Commission, to statutorily created bargaining units, pursuant to Sec. 111.825, Wis. Stats. The Executive Director of WSEU is Martin Beil, whose place of business is 8033 Excelsior Drive, Suite C, Madison, Wisconsin, 53717-1903.

2. The Complainant Shannon Patrouille is employed as a Correctional Officer with the Department of Corrections (hereafter "DOC") at the Waupun Correctional Institution in Waupun, Wisconsin. At all relevant times, Ms. Patrouille was in the bargaining unit of employees represented by WSEU.

3. The DOC is a subdivision of the Respondent State of Wisconsin.

4. WSEU and the State of Wisconsin are parties to a collective bargaining agreement (hereafter "Agreement"), which was effective from May 13, 2006, through June 30, 2007.

5. While on duty on an unspecified day in March of 2007, Ms. Patrouille was asked by her immediate supervisor, Sergeant Voss, to relieve him from duty in a secured area at the Waupun Correctional Institution known as the "sergeant's cage". Ms. Patrouille had just entered the sergeant's cage for the purpose of heating up her lunch. In response to Sergeant Voss' request, Ms. Patrouille indicated that she would first like to take five minutes to eat. Sergeant Voss indicated that she could relieve him of duty immediately by eating her lunch in the sergeant's cage. Ms. Patrouille responded that she would prefer to eat at her desk. At that point, the conversation between Ms. Patrouille and Sergeant Voss ended. Ms. Patrouille took three or four minutes to eat lunch at her desk, and she then relieved Sergeant Voss from duty in the sergeant's cage.

6. Following the exchange recounted in Finding of Fact number five, Sergeant Voss completed an incident report, in which he indicated that Ms. Patrouille had been insubordinate by failing to relieve him from duty in a prompt manner. On March 21, 2007, Ms. Patrouille was asked to attend an investigatory meeting regarding the incident. The meeting also was attended by DOC supervisor Captain Meli, as well as Ms. Patrouille's union representative, Sergeant Gerritson. During the meeting, Ms. Patrouille asserted, among other things, that she believed Sergeant Voss had pursued discipline against her for the sergeant's cage incident because Ms. Patrouille recently had made an allegation of harassment against Sergeant Voss. In support of that assertion, Ms. Patrouille pointed out that one of her coworkers, Officer Kroll, who also was supervised by Sergeant Voss, had been reading newspapers while on duty and Sergeant Voss had overlooked that behavior rather than taking the appropriate action of submitting an incident report regarding Officer Kroll.

7. At the conclusion of the meeting, Ms. Patrouille was told that matters discussed in conjunction with the ongoing investigation should not be discussed with anyone other than a supervisor or union representative. In response, Ms. Patrouille indicated that she understood the confidentiality directive.

8. At some point after the meeting, Ms. Patrouille had a conversation with Officer Kroll, in which she indicated to Officer Kroll that he should tell the truth if anyone asked him about reading newspapers.

9. On March 29, Ms. Patrouille was directed to attend another disciplinary meeting. Again, present at the meeting were DOC supervisor Captain Meli, as well as Sergeant Gerritson as Ms. Patrouille's union representative. Captain Meli questioned Ms. Patrouille about whether she had told Officer Kroll to tell the truth about reading newspapers, in violation of the confidentiality directive that had been issued at the conclusion of their previous meeting. Ms. Patrouille acknowledged having made the newspaper comment to Officer Kroll. She indicated, however, that she did not believe she had jeopardized the investigation, because she simply had solicited the truth from Officer Kroll and, further, because the focus of the investigation was her own wrongdoing, not any wrongdoing on Officer Kroll's part.

10. For having violated the directive not to discuss the investigation with anyone other than a supervisor or union representative, Ms. Patrouille received a one-day suspension.

11. The directive prohibiting discussion of an ongoing investigation with anyone other than a supervisor or union representative is one the State of Wisconsin has authorized its supervisors, in the DOC and Department of Health and Family Services (hereafter "DHFS"), to issue to represented and non-represented employees who are interviewed in the course of investigations into employee misconduct. The directive can be given to the subject of a disciplinary investigation, as well as any other employees who are interviewed in the course of the investigation. The directive is not issued in the course of every investigation, and there are no criteria provided by the State regarding when the directive should be issued. A supervisor has the discretion to determine whether the circumstances of a particular investigation warrant issuing the directive. DOC supervisor Clyde Maxwell, who performs investigations into employee misconduct at the Fox Lake Correctional Institution, generally does not issue the directive in situations involving minor rule infractions.

12. When the directive is issued, it does not preclude a union representative from carrying out independent investigations into allegations of employee misconduct, on behalf of the employees to whom the directive is given.

13. The conduct of Ms. Patrouille in telling Officer Kroll to tell the truth about having read newspapers constituted a violation of the confidentiality directive that had been issued to her by Captain Meli.

14. The conduct of Ms. Patrouille in telling Officer Kroll to tell the truth about having read newspapers was lawful, concerted activity for the purpose of mutual aid or protection.

15. The confidentiality directive issued to Ms. Patrouille by Captain Meli had a reasonable tendency to interfere with the exercise of rights guaranteed by Sec. 111.82, Wis. Stats., and did interfere with those rights.

16. The imposition of discipline on Ms. Patrouille, for having violated the directive issued by Captain Meli, had a reasonable tendency to interfere with the exercise of rights guaranteed by Sec. 111.82, Wis. Stats., and did interfere with those rights.

17. The State's interest in safeguarding disciplinary investigations represents a legitimate business reason for having interfered with the exercise of rights guaranteed by Sec. 111.82, Wis. Stats., by having issued a confidentiality directive prohibiting the discussion of ongoing investigations with anyone other than a supervisor or union representative.

18. The State's interest in safeguarding disciplinary investigations represents a legitimate business reason for having interfered with the exercise of rights guaranteed by Sec. 111.82, Wis. Stats., by having disciplined Ms. Patrouille for violating the confidentiality directive.

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

CONCLUSIONS OF LAW

1. The Complainant, Wisconsin State Employees Union, AFSCME, Council 24, AFL-CIO, is a labor organization within the meaning of Sec. 111.81(12), Wis. Stats.

2. The Complainant Shannon Patrouille is an employee within the meaning of Sec. 111.81(7)(a), Wis. Stats.

3. The Respondent State of Wisconsin is an employer within the meaning of Sec. 111.81(8), Wis. Stats.

4. Because the Respondent had a legitimate business reason for issuing a directive prohibiting Shannon Patrouille from discussing an ongoing disciplinary investigation with anyone other than a supervisor or union representative, which reason outweighed Shannon Patrouille's interest in the exercise of protected rights guaranteed under Sec. 111.82, Wis. Stats., the interference with said rights through issuance of the confidentiality directive did not constitute an unfair labor practice within the meaning of Sec. 111.84(1), Wis. Stats.

5. Because the Respondent had a legitimate business reason for issuing a directive prohibiting Shannon Patrouille from discussing an ongoing disciplinary investigation with anyone other than a supervisor or union representative, which reason outweighed Shannon

Patrouille's interest in the exercise of protected rights guaranteed under Sec. 111.82, Wis. Stats., the interference with said rights through issuance of disciplinary action for Ms. Patrouille's violation of the confidentiality directive did not constitute an unfair labor practice within the meaning of Sec. 111.84(1), Wis. Stats.

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

ORDER

It is hereby ORDERED that

The Complaint of unfair labor practices is dismissed in its entirety.

Dated at Madison, Wisconsin, this 30th day of December, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Danielle L. Carne /s/
Danielle L. Carne, Examiner

DOA-Office of State Employment Relations (Corrections)

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

The facts relevant here are largely undisputed. Ms. Patrouille became the subject of a disciplinary investigation for an incident wherein she failed to promptly relieve her supervisor, Sergeant Voss, from duty as requested. During an investigatory meeting into the incident, Ms. Patrouille asserted that she believed Sergeant Voss was seeking to have her disciplined because she recently had made a harassment complaint against him. As evidence that Sergeant Voss was retaliating against her, Ms. Patrouille asserted that one of her coworkers, Officer Kroll, had read newspapers while on duty, but Sergeant Voss never had sought to have Officer Kroll disciplined for that work rule violation. At the conclusion of the investigatory meeting, Ms. Patrouille was informed that she was not to speak with anyone, except a supervisor or union representative, regarding matters discussed in conjunction with the ongoing investigation. Sometime after the conclusion of the meeting, however, Ms. Patrouille approached Officer Kroll and stated to him that he should tell the truth if asked about reading newspapers. Subsequently, Ms. Patrouille was disciplined, with a one-day suspension, for having violated the confidentiality directive by discussing the investigation with Officer Kroll.

The legal issue presented by this case is whether the State's issuance of a confidentiality directive, as well as its discipline of employees who fail to comply with the directive, unlawfully interfere with the exercise of protected activity, in violation of the State Employment Labor Relations Act. SELRA protects the right of employees to engage in lawful, concerted activity, as follows:

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

The question as to whether an employer has unlawfully interfered with the exercise of the right to engage in lawful, concerted activity, in violation of Section 111.84(1)(a), Wis. Stats., is properly answered through a balancing of the intrusion on employee rights against the employer's legitimate business needs. STATE OF WISCONSIN, DEPARTMENT OF CORRECTIONS, DEC. NO. 30340-B (WERC, 7/04).[1] This balancing test permits an employer to interfere with its employees' lawful, concerted activity to the extent justified by the employer's operational needs. ID., *citing* UNIVERSITY OF WISCONSIN HOSPITALS AND CLINICS AUTHORITY, DEC. NO. 30202-C (WERC, 4/04). However, inherent in the balancing test is the qualification that the employer's intrusion may not exceed the bounds of its legitimate interests. ID.

Here, it is clear that Ms. Patrouille was engaged in lawful, concerted activity when she raised the subject of newspaper reading with Officer Kroll. The Commission has recognized the general importance of communication in the work place, UNIVERSITY OF WISCONSIN

[1] Hereafter referred to as "CORCORAN".

HOSPITALS AND CLINICS AUTHORITY, DEC. NO. 30202-C (WERC, 4/04), and, as WSEU persuasively argues, the particular ability to communicate with coworkers regarding issues of discipline is central to the exercise of organizational rights. In this case, Ms. Patrouille believed that Sergeant Voss was seeking to have her disciplined to retaliate against her for having made a harassment complaint against him, and she intended to prove disparate treatment by shining a spotlight on Officer Kroll's overlooked work-rule violations. Her effort to avoid discipline by discussing this issue with Officer Kroll falls squarely within the realm of lawful, concerted activity, and the State does not assert otherwise.

It is equally clear, on the other hand, that the State has articulated a legitimate business reason for issuing the confidentiality directive at issue in this case. I am persuaded that the directive safeguards the integrity of investigations by minimizing the likelihood that employees will, intentionally or otherwise, taint one another's perceptions and recollections by discussing matters relevant to investigations. The directive also safeguards the efficiency of investigations by limiting the number of individuals with knowledge relevant thereto.

In an effort to undermine the legitimacy of the State's purported interest, WSEU points to the State's failure, in this case, to prove that it authorizes supervisors in State agencies other than DOC and DHFS to issue the confidentiality directive. According to WSEU, if the directive was really necessary to protect the investigatory process, the State would authorize its use in all of its agencies. My conclusion that the State has a legitimate, basic interest in protecting its investigatory process and that the interest is served by the directive, however, simply is not impacted by the State's evident decision, for any number of unknown reasons, to limit its use of the directive to investigations involving DOC and DHFS employees.

The mere ability to articulate a legitimate business reason for an action, however, does not defeat a claim under SELRA. As explained above, the State's interest must be weighed against the intrusion onto employee statutory rights, with an eye toward the question of which interest predominates, given the facts and circumstances of the case.

WSEU contends that CORCORAN establishes that a confidentiality directive can only be issued lawfully – that is, that the State can only show that its interest predominates – in instances where there is actual evidence that an employee has committed some wrongdoing in an effort to tamper with an investigatory process. This contention rests, however, on an over-broad application of the CORCORAN decision. It is true that the Commission stated in CORCORAN that it only would have been appropriate for the State to have limited Corcoran's ability to discuss an ongoing investigation if there had been some actual evidence of wrongdoing on his part. That pronouncement, however, was premised on the Commission's conclusion that the employer had not presented a legitimate business interest that outweighed Corcoran's right to discuss ongoing investigations with employees, *in his representative role as president of the bargaining unit*, CORCORAN AT 13. Patrouille has no representative responsibilities in her bargaining unit, and the absence of that factor realigns the balance in the present case.

Here, the State's basic, legitimate interest in protecting its disciplinary investigations outweighs what I find to be a limited degree of interference with employee communication. Contrary to WSEU's contention, employees are not "muzzled" by the directive. The directive does not – and, indeed, according to CORCORAN, cannot lawfully – prohibit an employee from

speaking about an ongoing investigation with a union representative. The union representative can undertake an independent investigation on an employee's behalf, appropriately ensuring that an employee has the opportunity to address allegations of misconduct while the related investigation is ongoing.

While WSEU attempts to cast doubt on the feasibility of allowing a union representative to conduct an investigation on an employee's behalf, the disadvantages highlighted by WSEU simply are not sufficient to outweigh the State's interests. WSEU asserts, for example, that a union representative will not have a vested interest in the outcome of an investigation and, therefore, will not pursue the matter as vigorously as would the employee facing discipline. The concept of the union representation, however, is built on the assumption that the individual holding that position will represent the interests of the employees in the bargaining unit, and the fact that a union representative is not personally facing discipline does not render this role presumptively ineffectual. Alternatively, WSEU asserts that it does not make sense to only allow union representatives to discuss ongoing investigations, because a union representative is just as likely as an employee to engage in coercive behavior. Such likelihood simply has no bearing, however, on whether the State can utilize the directive at issue here. As CORCORAN provides, the State is lawfully required to allow a union representative to communicate with employees regarding ongoing investigations, and the fact that this requirement leaves the State exposed to the possibility that a union representative will engage in misconduct relative to the investigation does nothing to persuade me that this right should be extended to rank and file employees. Finally, WSEU asserts that, in cases where a union representative is not familiar with a worksite and its employees, the employee is in a better position than a union representative to gather exculpatory evidence. The fact that such situations would require some additional effort, on the part of an employee and union representative, to communicate about the nuances of a particular worksite is not sufficiently burdensome to outweigh the State's interest in issuing the directive.

Further, it is undisputed that the directive only limits those to whom it is issued from discussing investigations that are ongoing. There is no contention that, once a disciplinary investigation is concluded, employees are prohibited from communicating freely with one another regarding investigations or other matters related to employee discipline. The outcome of this case would likely be different if the State set out to prevent employees from discussing disciplinary investigations even after their conclusion.[2]

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[2] Indeed, in several of the NLRB cases cited by the Appellant, the confidentiality directives that did not pass muster extended beyond the confines of a discreet investigation. *See, e.g.,* SNE ENTERPRISES, INC., 347 NLRB NO. 43 AT 34 (*finding a confidentiality directive overbroad that was used as justification for the employee's discharge over a month after the investigation was completed and the rule, therefore, "was not enforced in order to protect the sanctity of an ongoing investigation"*), WESTSIDE COMMUNITY MENTAL HEALTH CENTER, INC., 327 NLRB NO. 125 AT 666 (*finding a confidentiality directive overbroad that prohibited communication between employees even after the investigation had been concluded and discipline had been imposed*), PHOENIX TRANSIT SYSTEM, 337 NLRB No. 78 at 513 (*finding a confidentiality directive overbroad that was open-ended when issued and never lifted after the investigation had been concluded*), THE ALL AMERICAN GOURMET, 292 NLRB NO. 128 AT 1130, (*finding a confidentiality directive overbroad that was not limited to a discreet investigation, but prohibited employees from discussing any future sexual harassment issues with one another*), CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS, 349 NLRB NO. 62 AT 31-33 (*finding a confidentiality directive overbroad that prohibited employees from discussing discipline already imposed*). To the extent that the Appellant may be able to locate an NLRB decision more on point with the facts present here, it would nevertheless not dictate the outcome of this SELRA case.

WSEU argues that the routine use of the directive is over-broad, because it falsely assumes that all employees will interfere with investigations in all cases. The record indicates, however, that the directive is not issued in every situation involving employee misconduct. Supervisors are permitted to issue the directive, but they are by no means compelled to do so – they use discretion to determine whether the circumstances of a particular investigation warrant the issuance of the directive. Even acknowledging that the directive is, nevertheless, bound to be issued in instances where employees would not have tampered with an investigation, WSEU has not persuasively shown that such overreaching is avoidable, from a practical standpoint. The proposed alternative of disciplining those employees who tamper with an investigation represents a classic case of too little, too late. After-the-fact discipline does little, if anything, to restore an already tainted investigation. Nor does it seem possible to limit the issuance of the directive, as suggested by WSEU, in those "unique cases where there is a demonstrated potential for violence or clear cut credibility issues". This undeniably subjective standard would, it seems, become fertile ground for disputes between the parties.

Finally, WSEU argues that Ms. Patrouille should not have been disciplined in this case, because she simply told Officer Kroll to tell the truth. I disagree with the assertion that such statements have a neutral impact on an investigation. Ms. Patrouille did not ask Officer Kroll to lie, but her statement ensured that Officer Kroll's thinking was oriented in a way that supported Ms. Patrouille's version of events. Had the statement not had the potential to influence Officer Kroll, it is hard to imagine that Ms. Patrouille would have seen a reason to make it, particularly when doing so exposed her to potential discipline.

CONCLUSION

Based on the foregoing, WSEU's complaint alleging unfair labor practices in violation of Section 111.84(1)(a), Wis. Stats., is dismissed.[3]

Dated at Madison, Wisconsin, this 30th day of December, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Danielle L. Carne /s/
Danielle L. Carne, Examiner

[3] Implicit in this result is a decision that I do not have to address the State's waiver argument.

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