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-B

Appearances:

Richard Thal, 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 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 the State of Wisconsin.

ORDER ON REVIEW OF EXAMINER'S DECISION

On December 30, 2008, Examiner Danielle L. Carne issued Findings of Fact, Conclusions of Law, and Order in the captioned matter, holding that the Respondent State of Wisconsin (State) did not violate Sec. 111.84(1)(a), Stats., by prohibiting the Complainant Shannon Patrouille from discussing an ongoing disciplinary investigation with other employees except for a supervisor or union representative.

On January 16, 2009, Ms. Patrouille and the Complainant Wisconsin State Employees Union (Union) filed a timely petition seeking review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.84(4), Stats. Thereafter both parties filed briefs in support of their respective positions, the last of which was received on March 9, 2009.

For the reasons set forth in the Memorandum that follows, the Commission has reversed the Examiner's decision and holds that, in the circumstances of this case, the State's directive unlawfully interfered with Patrouille's rights to communicate about conditions of employment, which is lawful, concerted activity within the protection of Sec. 111.82, Stats.

Having considered the matter and being fully advised in the premises, the Commission makes and issues the following:

ORDER

A. The Examiner's Findings of Fact 1 through 16 are affirmed.

B. The Examiner's Findings of Fact 17 and 18 are set aside and the following Finding of Fact 17 is made:

> 17. In the instant circumstances, the State's legitimate interest in safeguarding disciplinary investigations did not warrant a blanket prohibition against Ms. Patrouille discussing with fellow employees the content of her investigatory interview.

C. The Examiner's Conclusions of Law 1 through 3 are affirmed.

D. The Examiner's Conclusions of Law 4 and 5 are reversed and the following Conclusions of Law 4 through 6 are made:

> 4. The Union has not waived by contract or by acquiescence Ms. Patrouille's or other employees' statutory right to communicate with each other about conditions of employment.
>
> 5. In the instant circumstances, the Respondent interfered with, restrained, and coerced Ms. Patrouille and other employees in the exercise of their rights under Sec. 111.82, Stats. by directing them not to discuss an ongoing disciplinary investigation with anyone other than a supervisor or union representative.
>
> 6. In the instant circumstances, the Respondent interfered with, restrained, and coerced Ms. Patrouille in the exercise of her rights under Sec. 111.82, Stats., by suspending Ms. Patrouille for one day for violating the directive referred to in Conclusion of Law 5, above.

E. The Examiner's Order is reversed and the following Order is made:

> The Respondent State of Wisconsin, its officers and agents, shall immediately:
>
> a. Cease and desist from directing employees, including Ms. Patrouille, not to communicate with each other regarding ongoing disciplinary investigations where such a directive is not warranted by and limited to actual and specific

concerns about the effect such communication may have upon the integrity of the fact-finding process, or in any other way interfering with, restraining, or coercing employees in the exercise of the rights they are guaranteed under Sec. 111.82, Stats.

b. Take the following affirmative action which will effectuate the purposes of the State Employment Labor Relations Act:

(1) Immediately rescind the one-day suspension imposed upon Shannon Patrouille for violating the confidentiality directive referred to in paragraph "a", above, make her whole for all lost wages and benefits attributable to that suspension, and remove all references to said discipline from her personnel file.

(2) Notify all employees of the State of Wisconsin Department of Corrections who are in the bargaining unit represented by the Wisconsin State Employees Union by posting copies of the Notice attached hereto as Appendix "A" in conspicuous places where said employees are employed. The Notice shall be signed and posted immediately upon receipt of this Order and shall remain posted for thirty (30) days. Reasonable steps shall be taken to insure that said Notices are not altered, defaced, or covered by other material.

(3) Notify the Wisconsin Employment Relations Commission and the Wisconsin State Employees Union in writing within twenty (20) days from the date of this Order as to what steps have been taken to comply herewith.

Given under our hands and seal at the City of Madison, Wisconsin, this 27th day of May, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

APPENDIX "A"

NOTICE TO ALL EMPLOYEES OF THE STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS REPRESENTED BY WISCONSIN STATE EMPLOYEES UNION

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 direct employees not to communicate with each other regarding ongoing disciplinary investigations where such a directive is not warranted by and limited to actual and specific concerns about the effect such communication may have upon the integrity of the fact-finding process, or in any other way interfere with, restrain, or coerce employees in the exercise of the rights they are guaranteed under Sec. 111.82, Stats.

WE WILL immediately rescind the one-day suspension imposed upon Shannon Patrouille for violating the directive not to communicate with fellow employees about an ongoing disciplinary investigation, make her whole for all lost wages and benefits attributable to that suspension, and remove all references to said discipline from her personnel file.

Dated this ____ day of _____, 2009

STATE OF WISCONSIN
DEPARTMENT OF CORRECTIONS

_____
Rick Raemisch, Secretary

THIS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED OR COVERED BY ANY OTHER MATERIAL.

STATE OF WISCONSIN (Patrouille)

MEMORANDUM ACCOMPANYING ORDER ON REVIEW OF EXAMINER'S DECISION

Summary of the Facts

Shannon Patrouille works as a Correctional Officer at the Waupun Correctional Institution and as such is a member of a bargaining unit represented by the Union. At some point prior to the events giving rise to this case, Ms. Patrouille had made an allegation of harassment against her supervisor, Sergeant Voss. At an unspecified date in March, 2007, subsequent to the harassment allegation, Sergeant Voss was on duty in a secured area at the institution known as the "sergeant's cage." Ms. Patrouille entered the cage for the purpose of heating up her lunch. Voss thereupon asked Patrouille to relieve him from duty, Patrouille responded that she would like to take five minutes first to eat her lunch, Voss indicated she could eat her lunch at the desk in the Cage, and Patrouille responded that she would prefer to eat elsewhere. The conversation ended and Patrouille left for a few minutes to eat her lunch before returning to the Cage to relieve Voss.

Voss filed an incident report concerning the foregoing event charging Patrouille with insubordination. On March 21, 2007, Patrouille, accompanied by her Union representative, attended an investigatory meeting regarding the incident. During the meeting, Patrouille asserted her belief that Voss had filed the incident report in retaliation for Patrouille having filed the harassment allegation, pointing out that a co-worker, Officer Kroll, who was also supervised by Voss, sometimes violated protocol by reading newspapers on duty but had never been written up for that by Voss.

At the conclusion of the meeting, State officials told Patrouille not to discuss the ongoing investigation with anyone other than a supervisor or union representative. For many years, the State has authorized its supervisors in some departments, including the Department of Corrections (DOC), at their discretion, to issue such a general prohibition on communications regarding ongoing disciplinary investigations in situations where they believe it is warranted. In Patrouille's situation, as is generally the case, the prohibition did not apply to communications with union officials, who are permitted to conduct their own investigations. There are some State departments that do not issue such directives regarding disciplinary investigations. Until the instant case, neither the Union nor any individual employee has filed a complaint alleging that such a "confidentiality" directive violates the State Employment Labor Relations Act.

Despite the directive, at some point after her investigatory interview on March 21, Patrouille told her co-worker, Kroll, that he (Kroll) should tell the truth if anyone asks him about reading the newspaper on duty. DOC officials learned of this communication and, on March 29, 2007, suspended Patrouille for one day for violating the confidentiality directive.

At relevant times, the collective bargaining agreement has contained the following provision:

> **4/1/5** The parties will make a good faith effort to handle filed grievances, discipline and investigations in a confidential manner. The Employer and the Union agree to not release any open or closed grievance or arbitration file(s) to another organization or person not representing the Union or the Employer unless both parties mutually consent or the release is required by the WERC or a court of law. A breach of confidentiality will not affect the merits of the grievance, discipline or investigation.

The Examiner's Decision and the Issues on Review

The Examiner held that Ms. Patrouille was engaging in lawful, concerted activity within the protection of Sec. 111.82, Stats., when she communicated with Officer Kroll about a subject that has arisen during an investigatory interview with Patrouille that could have resulted in her being disciplined for insubordination. The Examiner further held that the State interfered with Patrouille's exercise of that right by prohibiting her from engaging in that communication while the investigation was pending and then disciplining her for violating that prohibition. However, the Examiner ultimately concluded that, on balance, the State's legitimate interest in maintaining the integrity of its disciplinary investigations, coupled with the short duration of the prohibition (which ends once the investigation is complete) and the fact that the communication with and from the Union remained available, outweighed the limited incursion into Patrouille's rights. Accordingly, the Examiner dismissed the complaint.

In its petition for review, the Union argues that the Examiner "failed to properly balance Patrouille's rights with DOC's business needs." The Union emphasizes the strong and fundamental statutory interest at stake for Patrouille and other employees in communicating with each other about working conditions. In contrast, according to the Union, the State's interests in this situation were wholly speculative, since there were no facts in dispute regarding Patrouille's situation nor any reason to believe she would attempt to intimidate witnesses or tamper with evidence. The Union contends that both the State and the Examiner have overstated the State's need for broad confidentiality directives, pointing out that many State agencies never give the directive and it is discretionary even within DOC. Accordingly, while the Union acknowledges that a confidentiality directive might be appropriate in some circumstances, here it was unnecessary, overbroad, and unlawful.

In response to the Union's petition, the State vigorously contends that the directive served crucial managerial interests in ensuring that its investigation would produce "truthful facts," rather tainted information. Calling the issue "not even close," the State argues, "When employees are allowed to communicate about a case, the likelihood of adverse consequences occurring is increased; only bad consequences can occur. Fear, coercion, harassment, intimidation and interference can run rampant [in such] an investigation...." According to the State, the broad prohibition is essential in order to prevent misconduct from occurring in the

first place, since, once, once tainted, the damage cannot be undone. The State also points out that, given the Union's ability to freely communicate and investigate, any bona fide interests of employees can be advanced through the Union. Finally, the State renews its argument, made to the Examiner but unnecessary for her to decide, that the Union has waived on its own behalf and on behalf of bargaining unit employees any contention that such a directive violates the law. As to waiver, the State points out that these directives have been given routinely for many years without previous protest from the Union, thus showing that the Union has condoned and acquiesced in the practice. The State further points out that section 4/1/5 of the collective bargaining agreement contains a confidentiality clause that was broadened a few years ago to include "discipline and investigations." Therefore, the State contends that the Union has also waived by contract the rights of bargaining unit members to communicate with each other regarding ongoing disciplinary investigations.

DISCUSSION

1. Lawfulness of the General Prohibition on Communications

The complaint contends that the State's directive prohibiting Patrouille from communicating with other employees about an investigation into her alleged misconduct has violated Sec. 111.82, Stats. That section provides 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 rights thus set forth, for employees to engage other employees in addressing work place concerns, are the firmament on which the entire collective bargaining law depends. Within that firmament, as we have previously emphasized, the right of employees to communicate with each other is the ultimate bedrock:

> As in any participatory enterprise, communication and information are elemental in the exercise of this right, both among employees and between employees and labor organizations. This right includes communication within the work place itself where, after all, employees most commonly encounter each other. Cf. BETH ISRAEL HOSPITAL v. NLRB, 437 U.S. 483, 491 (1978) (applying this principle under the National Labor Relations Act (NLRA).

UNIVERSITY OF WISCONSIN HOSPITALS AND CLINICS, DEC. NO. 30202-C (WERC, 4/04), at 12-13 (holding that the employer unlawfully banned the union from using the employer's e-mail system to communicate with employees). See also, MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 31732 (WERC, 8/06), at 8 (holding that the employer could not lawfully prohibit union-related buttons or posters in classrooms, where the employer permitted the display of other personal and non-instructional materials in the classroom).

As both parties recognize, the right to exercise such collective and communicational rights is not absolute. When the employer contends that a rule or directive limiting these rights is justified by legitimate managerial needs, the Commission must balance the nature and weight of the employees' statutory interests against the interests of the employer in order to determine whether the rule is lawful or has been lawfully applied. KENOSHA BOARD OF EDUCATION, DEC. NO. 6986-C (WERC, 2/66). An employer may interfere with its employees' lawful concerted activity in the work place only to the extent justified by operational needs. UW HOSPITAL AND CLINICS AUTHORITY, *supra,* at 13. "It is inherent in this balancing test that the employer's legitimate intrusion may not exceed the bounds of its legitimate interests." STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, DEC. NO. 30340-B (WERC, 7/04) at 13. Moreover, as the Union points out, the employer's proffered justification must be more than speculative or theoretical; it must be genuine and substantial. UW HOSPITAL AND CLINICS AUTHORITY, *supra*, at 19. Thus, even if the State has a legitimate business need for limiting employees' rights, the work rule must be narrowly tailored to serve that interest. ID. See also, GUARDSMARK, LLC V. NLRB, 475 F.3D 369 (D.C. CIR. 2007) at 380.

The Examiner properly set forth the foregoing balancing test and then concluded that the State's legitimate need to safeguard the integrity of its disciplinary investigations outweighed what the Examiner viewed as a very limited intrusion into Patrouille's rights to communicate with coworkers about the incident and the investigation. However, we weigh the interests on each side of the scale differently than did the Examiner. We find Patrouille's and her coworkers' statutory interests more compelling than did the Examiner, and we also find the State's interest, although legitimate, too narrow in the instant circumstances to justify the broad prohibition employed.

We begin by emphasizing the fundamental nature of an employee's right under SELRA to discuss his or her working conditions, including potential disciplinary incidents, with other employees. Patrouille had a statutory right to seek support among other employees, to pursue information that might shed a positive light on her situation, and to urge witnesses with helpful information to come forward on her behalf. Even if she only wanted to "vent" or complain, she had a statutory right to communicate with other employees about her plight, and, indeed, as noted above, communication of this kind forms the basic fabric of concerted activity and ultimately of collective bargaining.

The Examiner and the State appear to acknowledge Patrouille's statutory interests in this regard, but they think it sufficient that Patrouille could exercise these rights through the offices of the Union steward, who was exempted from the confidentiality directive. The Union steward no doubt can serve an important function, particularly in skillfully investigating other facts or circumstances that could help an employee present an effective response to the disciplinary charges. However, as a practical matter, given the speed with which the initial stages of a disciplinary inquiry may be conducted, the Union steward may not have the opportunity to provide this kind of skilled assistance until after discipline has already been imposed. More importantly, developing a sophisticated defense is not the only interest at stake in Patrouille's statutory right to communicate with fellow employees about her situation. She has a fundamental interest in seeking support from fellow employees and in disseminating

information about the issues in her case. These statutory interests work both ways: the other employees also have a right to communicate with Patrouille and offer their support. While direct communication between employees and their employers on wages, hours, and working conditions is restricted once a union has been selected as the exclusive bargaining representative, see generally MILWAUKEE BOARD OF SCHOOL DIRECTORS (MURILLO), DEC. NO. 30980-B (WERC, 3/09), we see nothing in the statute that similarly restricts employee communications with each other once a union is in place. Indeed, the most elemental and effective concerted activity may occur directly between or among employees. See, e.g., CLARK COUNTY, DEC. NO. 30361-B (WERC, 11/03, at 12, and cases cited therein. Thus, we believe Section 111.82 confers upon Patrouille and her co-workers a vital and generally compelling right to communicate with each about pending disciplinary situations, separate and apart from whatever communication occurs between employees and the Union.

To weigh against this fundamental statutory right, the State offers its own general interest in maintaining the integrity of the investigatory process. We agree with the State that this is a legitimate and important interest. However, unlike the State, we are unwilling to assume that this general interest is implicated in each and every disciplinary situation so as to warrant a total abrogation of employees' statutory right to communicate during the period of the investigation. The State argues with passionate conviction that "only bad consequences can occur" from permitting such communication, including "[f]ear, coercion, harassment, intimidation and interference." This argument is at odds with the basic premise of Section 111.82, i.e., that it is legitimate and indeed desirable that employees are free to discuss working conditions with each other, including accusations of misconduct and potential discipline. We have articulated in the preceding paragraph the various ways in which such communication can serve bona fide employee interests. We are unwilling to accept the State's assumption that the truth-seeking process is always impaired when employees discuss facts and events; we think it just as likely that the process can be advanced if employees remind each other of events that may have receded from memory or may not have appeared less significant at the time. Here, for example, Sergeant Kroll may have had no reason to remember or acknowledge reading the newspaper at his desk, and/or no reason to believe it had any significance to Ms. Patrouille's situation, had Patrouille not mentioned the matter to him with the request that he "tell the truth." We therefore do not accept the State's overarching premise that employee communication during the pendency of a disciplinary investigation will inevitably corrupt and hinder the integrity of the process. Indeed, the availability of the Union as a conduit for communication, which the State acknowledges to be required by law, somewhat undermines the weight of the State's asserted interests here, since the Union communications could accomplish indirectly the same effect that the State is attempting to prevent with its ban on communications by employees. [1]

[1] The State may lawfully punish either individual employees or union representatives who engage in misconduct during the course of a disciplinary investigation, including attempts to coerce or intimidate witnesses. To that end, it may be possible for the State to craft a lawful, narrowly-constructed, and non-coercive general directive to employees that, while they may discuss an ongoing investigation with other employees and the Union, attempts to intimidate or coerce other witnesses will be grounds for further discipline. See STATE AND GROSSHANS, DEC. NO. 30340-B (WERC, 7/04) at 18 ("…the State may lawfully expect union officials to refrain from coercing or intimidating complainants and witnesses … and may lawfully enforce directives narrowly addressed to that expectation.")

Having said that, we are mindful of the possibility that the State may have an actual basis for concern in specific scenarios that a witness may, in the State's words, "coerce, harass, intimidate, and interfere" with an ongoing investigation. If so, the State may certainly issue an appropriate directive to such witnesses. Even beyond such nefarious possibilities, there may be investigations that are so sensitive, complex, or dependent upon maintaining the clean slate of witness memories that some kind of a limit on communication may be warranted. Nothing in the record or the State's argument suggests that this was the case here. The State had no specific reason to believe that Patrouille would intimidate Kroll or any other employee into distorting the facts. Indeed, as the Union points out, the facts were not really in dispute, as Patrouille acknowledged having delayed responding to Voss' directive to relieve him in the "cage." There was nothing inherently improper or likely to derail the search for truth in Patrouille reminding Kroll of his newspaper reading and asking him to "tell the truth." As noted above, in those cases where the State does have a specific concern, the State can and lawfully must tailor its directives to whatever genuine concerns are realistically implicated.

The State and the Examiner believe there is "no practical alternative" to the broad prohibition, on the ground that post-hoc penalties for employee intimidation or harassment of other witnesses would not cure the marred investigation that resulted. We can well understand that it is more convenient for the State to simply broadly prohibit employee discussions during all investigations rather than engage in a case by case determination, but convenience is not sufficient to counterbalance the exercise of statutory rights, nor is inconvenience equivalent to total impracticality. [2] We also note from the examples the State has provided that even a broad prohibition does not deter those employees who may be bent on skewing the results of an investigation from ignoring the directive and engaging in misconduct. Drawing on the familiar First Amendment analogy, broad and general prohibitions on inter-employee communications tend to have a "chilling effect" on the exercise of statutorily protected concerted activity and therefore seldom withstand scrutiny.

For the foregoing reasons, therefore, we conclude that the State did not have a sufficient legitimate business reason to broadly prohibit Patrouille and her co-workers from exercising their statutory right to communicate with each other during the pendency of the State's investigation of the Voss incident.

2. Waiver or Acquiescence

The State argues in the alternative that, even if the prohibition would otherwise be unlawful, in this case the Union had acquiesced in the State's issuance of such confidentiality directives, both by inaction over several years and by means of language contained in the collective bargaining agreement. Therefore, according to the State, the Union has waived its bargaining unit members' statutory rights in this regard.

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[2] The Union correctly points out that DOC has already given its supervisors discretion to determine that a particular misconduct investigation does not warrant the communication prohibition, usually on the basis of how "minor" the supervisor considers the charges.

As to the contract waiver argument, the law is largely undeveloped about the extent to which a union may limit by contract individual statutory rights set forth in Section 111.82, Stats. Assuming, *arguendo*, that that the contract could set enforceable protocols or parameters governing employee rights to communicate during ongoing investigations, any such waiver or limitation would have to clear and unequivocal in the contract language. This is not the case here. The provision on which the State relies, Section 4/1/5, is set forth in full in the Summary of the Facts, above. The most pertinent sentence reads, "The parties will make a good faith effort to handle filed grievances, discipline and investigations in a confidential manner." Contrary to the State's argument it is not clear on the face of that sentence, or from any bargaining history, that the Union and the State were concerned, in negotiating this provision, about confidentiality between employees, rather than, for example, between either the State or the Union and outside entities, such as the press. The remainder of Section 4/1/5 suggests the concern was confidentiality vis-à-vis such outside parties.. Far more direct and specific language would be necessary to meet a "clear and unequivocal" standard. [3]

As to the argument that the Union acquiesced in a longstanding practice, the record indicates that DOC supervisors have commonly issued this directive for some period of time and that Union stewards were present on many of those occasions. However, even if the Union has been complacent in the past about the issue, the right in question is not one that belongs to the Union (such as a right to bargain over any particular issue). Section 111.82 establishes individual employee rights to communicate with each other about working conditions, separate and apart from whatever rights the Union may have to bargain and/or whatever contractual rights the Union has negotiated for employees. In this case, there is no evidence that Patrouille acquiesced in the overly broad confidentiality directive that gave rise to this case, notwithstanding whatever acquiescence other employees may have given in other situations.

For the foregoing reasons, we have concluded that the State's broad prohibition against Patrouille and other employees communicating with each other during an ongoing disciplinary

[3] We emphasize that this case does not require a decision – and we are not deciding – that any such contractual waiver or limitation, even if clear and unequivocal, would be lawful.

investigation violated Sec. 111.82, Stats. It follows that the State could not lawfully discipline Patrouille for violating that unlawful directive. We have remedied these violations as set forth in our Order, above.[4]

Dated at Madison, Wisconsin, this 27th day of May, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

[4] The Union seeks a remedy that would "require the State to rescind all discipline imposed on WSEU-represented employees who were disciplined for violating confidentiality orders similar to the one imposed on Officer Patrouille." (Union Brief at 13). While we have determined that the general prohibition applied to Patrouille is unlawful, we have also indicated that circumstances may exist in particular cases that warrant limitations on employee Section 111.82 communications. The only situation that has been litigated in the instant case is that pertaining to Patrouille. The record is therefore insufficient to conclude that the State has committed any other prohibited practices and we have no basis for affording the broader remedy that the Union seeks.