STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CHARLES T. WAGNER, Complainant,

vs.

AFSCME, STATE OF WISCONSIN
DEPARTMENT OF MILITARY AFFAIRS, Respondents.

Case 794
No. 67803
PP(S)-388

Decision No. 32418-A

Appearances:

Mr. Charles T. Wagner, appearing *pro se*.

Mr. David Vergeront, Chief Legal Counsel, Office of State Employment Relations, 101 E. Wilson St, 4th Floor, Madison, Wisconsin 53702, appearing on behalf of Respondent State.

Ms. Peggy A. Lautenschlager, Attorney at Law, Bauer & Bach LLC, 123 East Main Street, Suite 300, Madison, Wisconsin 53703, appearing on behalf of Respondent Union.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On February 22, 2008, Charles T. Wagner, hereinafter Complainant, filed a complaint with the Wisconsin Employment Relations Commission alleging that WSEU, AFSCME Council 24, Local 1, and the State of Wisconsin (Department of Military Affairs) had committed unfair labor practices by not representing Complainant in the grievance process and violating a collective bargaining agreement, respectively. On May 7, 2008, the Wisconsin Employment Relations Commission (Commission) appointed Coleen A. Burns, a member of its staff, to act as Examiner to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.84(4) and Sec. 111.07(5), Stats. By July 21, 2008, Respondents had filed Answers and Affirmative Defenses. Hearing was held in Madison, Wisconsin on June 11 and August 12, 2009. The record was closed on August 31, 2009. Having considered the evidence and arguments of the parties, the Examiner hereby makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The State of Wisconsin, hereafter referred to as State or Employer, is an employer and has delegated responsibility for collective bargaining to the State Office of Employment Relations, hereinafter OSER, which maintains its offices at 101 East Wilson Street, Madison, Wisconsin 53702.

2. The Wisconsin State Employees Union, AFSCME, Council 24, AFL-CIO, (WSEU) and its affiliated Local 1 are labor organizations and maintain offices at 8033 Excelsior Drive, Suite C, Madison, Wisconsin 53717-1903. WSEU is the exclusive collective bargaining representative for certain statutorily-created bargaining units of State employees.

3. The State operates an agency known as the Department of Military Affairs (DMA). DMA has the responsibility to provide firefighting crash/rescue services at Truax Field in Madison, Wisconsin. Master Sergeant Gary Peck has been the Fire Chief of the Truax Field Fire Department since December of 2005. The Truax Field Fire Department operates 24 hours per day/7 days per week. Fire fighters at the Truax Field Fire Department are assigned to one of three crews (referred to as A Shift, B Shift and C shift) and each crew works a regularly assigned 24-hour shift. In December of 2007, the Truax Field Fire Department had three supervisory employees in addition to the Fire Chief, *i.e.*, Deputy Chief Al Frietag, assigned to A Shift; Deputy Chief Lou Sedlmeyer, assigned to B Shift; and Deputy Chief David McCutchin, assigned to C Shift.

4. The WSEU and the State are parties to a master collective bargaining agreement that covers fire fighters represented by WSEU Local 1 at Truax Field and which expired at the end of December 2007. This master agreement, which covers employees represented by Local 1, contains a contractual grievance procedure culminating in arbitration, as well as the following language:

. . .

6/2/5 (**BC, AS, SPS, T**) Scheduling of Overtime

> Whenever scheduled overtime work is required, the Employer will whenever practicable, assign such scheduled overtime work by seniority on a rotating basis unless mutually agreed otherwise among those included employees in that classification assigned to the work unit who normally perform the work involved,
>
> **6/2/5A** Scheduling of extra hours, whenever scheduled extra hours are required, the Employer will, whenever practicable, assign such scheduled extra hours, non-premium rate time work among those included employees in that classification assigned to the work unit, who are less than full time, who

normally perform the work involved, by seniority on a rotating basis, unless mutually agreed otherwise.

6/2/6 ***(BC,*** **AS,** ***SPS,*** **T)** In the overtime assignment process, employees shall be permitted to decline scheduled overtime work, however, the Employer shall have the right to require the performance of overtime work. When all employees in the work unit who normally perform the work involved decline an opportunity for scheduled overtime, the Employer shall require the performance of scheduled overtime work on each occasion in reverse seniority order, beginning with the employee with the least seniority.

6/2/7 (BC, AS, SPS, T) Employees who do not want to accept scheduled overtime work on an ongoing basis may file a written waiver on a quarterly basis. Such waiver shall indicate that the Employer is relieved from the requirement to offer scheduled overtime work to the employee for the period covered in the waiver. The waiver in no way affects the ability of the Employer to require the employee signing the waiver to perform scheduled overtime work as provided in this section.

6/2/8 (BC, AS, SPS, T) Scheduled overtime work is defined as any overtime work which the Employer knew would be necessary twenty four (24) hours or more in advance of the overtime work.

6/2/8A (BC, AS, SPS, T) Unscheduled overtime work is defined as any overtime work for which the need is known less than twenty four (24) hours in advance of the work.

6/2/8B (SPS, T) Institution/hospital based patient/resident/inmate direct care employees notified while on duty that they are being required to work an additional consecutive shift, will be guaranteed a minimum of two (2) additional hours of work with pay. With the agreement of the employee and the Employer, such employees may be released from duty in less than two (2) hours, but, in such instances, be paid only for the actual time worked.

. . .

In December 2007, Local 1 and the State did not have a local agreement in effect that addressed overtime of fire fighters at Truax Field. In December of 2007, and at all times material hereto, a document entitled "Seniority-Based Extra/Time/Overtime" has been posted at the Truax Field Fire Department. This document is used by management employees, as well as members of the Local 1 bargaining unit, in determining overtime procedures. This document recognizes a seniority right to work scheduled overtime, as well as unscheduled overtime, but is silent on the issue of splitting overtime hours among bargaining unit employees. Prior to December 20, 2007, a junior employee who was forced in to work an

overtime shift had the right to make other arrangements to cover the forced overtime shift, including splitting the overtime hours among employees. Prior to December 20, 2007, it was not common for two employees to post for a scheduled overtime shift by splitting the hours of the overtime shift between the two employees. In December 2007, Assistant Chief Eugene Friede, a non-supervisory employee and member of the fire fighter bargaining unit represented by WSEU Local 1, functioned as a lead worker.

5. At all times material hereto, Complainant has been employed by the State (DMA) as a fire fighter at Truax Field and has been a member of the collective bargaining unit represented by WSEU, Local 1. On March 2, 2005, the Commission received a "Petition for Election;" the purpose of which was to decertify WSEU as the exclusive bargaining representative of "Full-time paid Employees" of the Truax Field Fire Department. This petition was filed by Complainant and Friede acting on behalf of Fire Fighters Local 311, IAFF. On November 30, 2006, the Commission received a letter addressed to WSEU representative Kurt Kobelt and State representative David Vergeront. This letter included the following:

. . .

> Case 774 Petition for Election
>
> To Whom It May Concern:
>
> We the majority of FCR 1-2-3's statewide that are currently represented by WSEU Counsel 24, Local 1 for the last 16 years, We have unresolved labor issues in relation to work schedule and benefits for hours worked. We work 24-hour shifts, 56 hours a week, 365 days a year. We are still referred to in many areas of the contact as 40 hour a week employee's i.e.; worker compensation, Sabbatical hours, sick leave.
>
> Our work environment requires us to have specialized training and job skills to perform our duties safely in hazardous environments. Our occupation has an average of 105 job related deaths per year. It's rated as one of the most dangerous professional occupations. Firefighters need a voice and labor representation familiar with our occupational needs, to address: hazardous duty, safety & health, training, work environment, scheduling and benefits for 56 hr. a week employee's.
>
> Wisconsin state employee union has had over 16 years to address these issues such as: scheduling, sick leave, sabbatical, and benefits for our hours worked. WSEU is not familiar with our occupation and is delayed in addressed these issues because of it.

On behalf of the majority of FCR's 1-2-3 statewide, we call for an election with in our bargain unit to decertify. We have provided you a list of all FCR 1-2-3's with case 667 No. 64600 that support this election. It identify an over whelming majority.

In reference to an election with in the bargain unit, we request that you send us a copy of the names, telephone numbers and e-mail addresses of all SPS members with in our bargain unit that will be voting on our decertification so we can contact them and discuss our concerns prior to the election.

We have been in contact with a firefighters professional organization that can provide the representation we need.

Would you please identify the individuals or parties this letter is (c.c.) to. We had a WSEU repersentive discussing our last letter before we received your reply.

Yours truly:

Eugene K. Friede FCR-3
Charles Wagner FCR-2

Complainant has been a Steward with WSEU, Local 1, and, as such, has processed grievances on behalf of WSEU. WSEU Local 1 President Vern Seay sent Complainant an email dated December 8, 2006 that includes the following:

Subject: Local #1 Appointments

Chuck, I regret that you will no longer act as Steward of our Local, or hold any other position with us.

This decision is based on your involvement in an attempt to decertify from our Union.

If you persist in that activity, or you suppose to represent this Union in any way, formal charges before a trial body may be brought.

In December 2007, Fire Fighter Eric Moe was the Local 1 Steward who represented fire fighters at Truax Field and Seay was the Local 1 President.

6. On December 17, 2007, B shift posted an "Extra Time/Over Time Roster/Caller Check List" for 24 hours of overtime on December 20, 2007 in the classification of "FF II." On December 18, 2007, several fire fighters signed this list by indicating that they did not

accept this overtime and two fire fighters, *i.e.*, Scott Mcilquham and Moe, signed this "list" by indicating that they accepted the overtime and were splitting the 24 hours of overtime between them. Moe and Mcilquham, who are on A Shift, signed this posting in order to ensure that the least senior employees, who were also on A Shift, would not be forced in to work this overtime. On December 19, 2007, the Complainant, who is on C Shift and has less seniority than Mcilquham and Moe, signed this "list;" indicating that he accepted the full 24 hours of overtime. When Friede observed the posted "list" on December 19, he concluded that Mcilquham and Moe did not have the right to accept scheduled overtime by splitting the overtime hours between them and contacted the A Shift supervisor, Frietag, to clarify the overtime situation. Frietag agreed that Complainant should work the overtime on December 20. Thereafter, Friede contacted Sedlmeyer, the B Shift supervisor, to inform Sedlmeyer of his conversation with Frietag. Sedlmeyer disagreed with Frietag and directed Friede to ensure that Complainant knew that he would not work the overtime hours on December 20 and that Moe and Mcilquham knew that they would work the overtime hours on December 20. Moe and Mcilquham, rather than Complainant, worked the 24 hours of overtime on December 20. When Complainant discussed this overtime situation with Chief Peck, he agreed that Complainant, rather than Moe and Mcilquham, should have worked the 24 hours of overtime on December 20. Peck also stated that there was nothing that Peck could do about the situation and that Complainant should file a grievance.

7. Given the fact that Moe was the Local 1 Steward at Truax Field and a recipient of the disputed overtime, Complainant contacted Seay and asked that someone other than Moe represent the Grievant on his overtime claim. In response to this contact, Seay told Complainant that he would send someone out. Seay then asked Randy Kundert, a WSEU Steward at Large, to conduct an investigation on Complainant's overtime claim to determine if a grievance should be filed. Kundert, who is employed by DOA at DSF Capital 8 Power, agreed to this request. At the time of this request, Seay did not tell Kundert what Seay thought should be the results of the investigation and Kundert did not know anyone at Truax Field other than Moe. Kundert had met Moe at WSEU meetings, but had not socialized with Moe, except as a fellow Steward at WSEU meetings. Kundert's investigation included a meeting with Friede and Complainant; a discussion with Moe; a discussion with Sedlmeyer and a review of the relevant contract language. In the meeting with Kundert, which lasted nearly two hours, Friede and Complainant presented their view of the merits of the dispute and provided Kundert with the overtime roster and overtime procedures. In the discussion with Kundert, Moe read to Kundert the "Seniority-Based Extra/Time/Overtime" document that had been posted at Truax Field; responded to Kundert's request to clarify scheduled and unscheduled overtime; and discussed the contract language and policy. Kundert did not ask Moe what Moe wanted to do about the disputed overtime. Based upon his discussion with Sedlmeyer, Kundert concluded that Sedlmeyer had the opinion that there was nothing "black and white" with respect to the splitting of overtime and that management's only concern was that the overtime shift be covered. Kundert concluded that the language of the master contract was silent on the issue of splitting overtime and that there was not enough evidence to support a grievance. Kundert notified Complainant that Kundert would not file a grievance because there was insufficient evidence to support a grievance and Complainant responded in a manner

that Kundert considered to be hostile. Kundert advised Complainant that, if Complainant wished to pursue a grievance, then Complainant should contact Council 24 Representative Diana Miller. Complainant's conduct toward Kundert caused Kundert to resign as Complainant's Steward. Kundert notified Seay and Miller of this resignation. Kundert also notified Seay that Kundert had conducted an investigation and concluded that the master contract did not appear to support a grievance. Kundert was so upset at Complainant's hostile response that he searched for a reason for this response. During this search, Kundert learned that Complainant had been involved in an attempt to decertify WSEU. Prior to this search, Kundert had known that there had been a decertification attempt at Truax Field, but had not known that Complainant was involved in this attempt.

8. On January 10, 2008, after Kundert told Complainant that Kundert would not file a grievance on Complainant's overtime claim, Complainant met with Miller. Miller sent Kundert and Seay an email dated January 10, 2008 that states:

> I just met with Chuck Wagner and he explained the situation. I agree with Chuck that we need to pursue a grievance on overtime. Please file on under Art. 6 and their local agreement. Thank you.

In response to this email, Kundert reminded Miller that he had resigned as Complainant's Steward. Seay sent an email to Lieutenant Colonel Kevin Philpot, dated January 14, 2008, which states as follows:

> Local 1 has received a complaint from a member of the Fire Crash Rescue Worker at the Truax work unit that he believes there has been a deviation of past practice regarding overtime offering procedure. Based on the information we received from our Steward Randy Kundert, it is unclear what our policy has been in the past. It appears that the overtime offer in question did go to the most senior employee available which is in compliance with the master agreement.
>
> It is our Locals obligation to ensure that all employees rights under the agreement are being observed.
>
> Because there is no local agreement in place on a overtime offering procedure, and what the past practice has been, the union is proposing that one be agreed to in the form of a written agreement. The union is proposing this be our first agenda item for a Labor-Management meeting which we are requesting be convened soon.
>
> To avoid confusion and possible future grievances on this matter we are asking management to agree to this agenda item now.

Philpot responded with an email dated January 14, 2008 and copied to Peck that states:

> Mr. Seay, I agree to inclusion of this subject in the next Labor Management meeting.

Philpot, who is the Truax Field Base Engineer, has supervisory responsibility over Truax Field Fire Department operations and attends the labor/management meetings involving the Truax Field Fire Department for the purpose of gaining an understanding of issues and to offer support and advice to the Chief. In the summer of 2006, the Fire Chief and Philpot agreed that the Fire Chief would handle pre-files on grievances and Philpot would handle Step 1 grievances. At the time of the January 2008 emails, Philpot had handled few, if any, Step 1 grievances.

9. Concerned that a grievance on his overtime claim would not be filed within the contractual time limits, Complainant sent Miller two emails on January 15, 2008. The first email states:

> Diana as of today 1/15/08, Randy Kundert has not done a pre-file on my overtime grievance. My 30 day window for filing ends Jan. 19, 2008. could please look in to this for me. thank you Chuck Wagner.

On January 16, 2008, Miller responded to this email as follows:

> Vern did a pre-file with the Col.

Complainant's second email of January 15, 2008 states:

> Diana, this is a follow up to my phone message from this morning. Vern's e-mail to you said he would put overtime as the first on the agenda for a labor management meeting. But Diana as you know it has been almost a year sense the last labor management meeting, and no meetings are scheduled at this time. I spoke with Col. Philpot this morning and he leaves on monday Jan. 21, 2008 to go overseas until the end of May 2008. It looks to me like Vern Seay's way of side stepping my grievance. Please look in to this for me. The most senior employee was not the problem, the problem was, the overtime was a posted 24-hours, and management let two (2) employees split the 24-hours befor going through the hole overtime list. THANK YOU CHUCK WAGNER

In an email dated January 16, 2008, addressed to Seay and copied to Complainant, Miller attaches the above email and states: "Vern I received this from Chuck can you follow up." In an email to Miller dated January 22, 2008, Complainant states:

> Diana today is Jan 22, 2008. and my 30 day window for filing ended Jan 19 2008. No one from local #1 has done a pre-file or step #1 filing on my overtime grievance. I can only assume that local #1 will not represent me in grievance procedures. Diana i need your help, what can i do with my grievance now: As

> a dues paying member of A.F.S.C.M.E. How do i get representation from local #1 ? I hope you can help me, chuck wagner.

Miller responded with an email dated January 22, 2008 that states:

> Chuck, I will follow up with Vern. Thanks for bringing this to my attention.

On January 22, 2008, Miller emailed Seay a copy of Complainant's email of January 22, 2008 with the following statement:

> Vern, I thought you did a pre-file on his issue?

Seay responded to Miller with the following email dated January 23, 2008:

> I did a pre-file with Col. Philpot and he agreed that management is willing to try to comply with the labor agreement. As relief we will meet and discuss and agree at Labor/Management as to how we will handle overtime offerings in the future.
>
> According to Steward Kundert the interpitation of the overtime article is unclear as it applies here and there does not seem to be a clear past practice one way or another. In addition the 2 more senior employees were awarded the overtime. Chuck Wagners' concern is being appropriately expedited.
>
> Thanks

Complainant sent Miller an email dated January 25, 2008 that states:

> Diana, in my last e-mail of Jan 22, 2008. I asked for your help. You e-mailed me back that you would make contact with Vern from local #1. I'm checking to see if any thing come out of your follow up with Vern. thanks chuck Wagner.

Miller responded in an email dated January 25, 2008 and copied to Seay which states:

> Vern conducted a prefile and I sent you the result of his prefile or at least I thought I did, if you did not receive it please advise and I will forward the message again.

Shortly after sending the above email, Miller sent Complainant the following email:

> Chuck here is the response I received on the issue you raised.

The attached response is Seay's email of January 23, 2008, *supra*. Complainant responded with an email dated January 25, 2008 that states:

> Diana, Vern Seay did not do a pre-file with Col. Philpot, and Maj. Dave Mac has a e-mail from Col. Philpot stating that fact. Vern seay is not being totally truthful in an effort to cover up for a steward from Local #1, that split the overtime with an other employee before it was offered to all employees as a 24 hour overtime. Diana the contract is clear on overtime and our local agreement and past practice only reinforces it. this grievance is not about who took the overtime, it's about management not following contract procedures. can no one help with this contract violation.

Complainant received the following email from Major David R Maj, dated February 7, 2008:

> Chuck,
>
> Lt Col Philpot emailed me back on 5 Feb 08 and wrote that Vern called' him about this issue but Lt Col Philpot never thought of the conversation as a pre-file as such. They agreed that talking about splitting overtime postings between employees would he a good topic of discussion at a labor management meeting.
>
> I hope this helps and let me know if there's anything else I can do for you.
> —Dave

10. For the purpose of responding to Complainant's request that WSEU pursue a grievance on his overtime claim of December 20, 2007, WSEU was represented by Kundert, Seay and Miller. WSEU did not pursue a grievance on Complainant's overtime claim because Seay decided to settle Complainant's overtime claim. Kundert, Seay and Miller's conduct in responding to Complainant's request to pursue a grievance, including Seay's decision to settle Complainant's overtime claim, was not hostile, discriminatory, arbitrary or in bad faith, but rather, involved the exercise of reasonable discretion in the performance of WSEU's duties as bargaining representative.

Based on the foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSIONS OF LAW

1. Complainant, Charles T. Wagner, is an "employee" within the meaning of Sec. 111.81(7), Stats.

2. Respondent Wisconsin State Employees Union, Council 24, AFSCME, AFL-CIO, and its affiliated Local 1, are "labor organizations" within the meaning of Sec. 111.81(12), Stats., and, at all times material hereto, have been represented by Vern Seay, Randy Kundert, and Diana Miller.

3. Respondent State of Wisconsin (DMA) is an "employer" within the meaning of Sec. 111.81(8), Stats., and, at all times material hereto, has been represented by Lieutenant Colonel Kevin Philpot.

4. Complainant has not established, by a clear and satisfactory preponderance of the evidence, that Respondent Wisconsin State Employees Union, Council 24, AFSCME, AFL-CIO, and its affiliated Local 1, have violated their statutory duty of fair representation toward Complainant in the manner in which they responded to Complainant's request to pursue a grievance on his overtime claim of December 20, 2007 and, therefore, Respondent Wisconsin State Employees Union, Council 24, AFSCME, AFL-CIO, and its affiliated Local 1, have not violated Sec. 111.84(2)(a), Stats.

5. Given Complainant's failure to establish that Respondent Wisconsin State Employees Union, Council 24, AFSCME, AFL-CIO, and its affiliated Local 1, have violated their statutory duty of fair representation toward Complainant, the Examiner will not assert the Commission's jurisdiction to decide Complainant's claim that Respondent State of Wisconsin (DMA) has violated a collective bargaining agreement in violation of Sec. 111.84(1)(e), SELRA.

Based on the foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER

Complainant's complaint is dismissed in its entirety.

Dated at Madison, Wisconsin, this 29th day of October, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/

Coleen A. Burns, Examiner

STATE OF WISCONSIN (DEPARTMENT OF MILITARY AFFAIRS)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

POSITIONS OF THE PARTIES

Complainant

A 24-hour overtime opportunity for a Fire Fighter 2 on B Shift for December 20, 2007 was posted. State management did not follow the contract procedures when it allowed two employees to split the 24-hour overtime before it had gone through the full overtime seniority list.

Union representative Diana Miller agreed with Complainant that a grievance should be filed. Vern Seay of Local 1 refused to represent Complainant and process Complainant's grievance through the grievance procedure. This refusal was unlawful discrimination motivated by the fact that Complainant had previously engaged in efforts to decertify AFSCME and was an attempt to cover-up the fact that a Union Steward had taken the posted overtime.

WSEU

There was not a violation of the contract, a local agreement, a past practice or any kind of policy. The Union has not acted in an arbitrary, discriminatory or bad faith manner. Rather, the Union conducted a good faith investigation of Complainant's claim and exercised its discretion in a reasonable manner.

STATE

The contract, local or master, does not prevent the splitting of overtime shifts as was done here and there was no practice under WERC case law that existed with respect to this issue. The intent of seniority prevailing in overtime was honored because each of the two employees that split the overtime had more seniority than Complainant.

DISCUSSION

Complainant argues that the State violated a collective bargaining agreement in violation of Sec. 111.84(1)(e), Stats., by failing to follow contractual procedures in filling an overtime shift. Complainant further argues that WSEU has violated Sec. 111.84(2)(a), Stats., by refusing to represent Complainant and process Complainant's overtime grievance through the grievance procedure. The State and WSEU deny that they have committed unfair labor practices as alleged by Complainant.

Legal Standards

Section 111.84(1)(e), Stats., makes it an unfair labor practice for an employer individually or in concert with others "to violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting employees . . ." Where the parties to the collective bargaining agreement have agreed upon a contractual mechanism for the resolution of alleged violations of the collective bargaining agreement, the Commission has a general policy of not asserting its jurisdiction over a Sec. 111.84(1)(e) breach of contract allegation because of the presumed exclusivity of the parties' agreed upon contractual mechanism and the Commission's desire to honor the parties' agreements. An exception to this general policy is where there is an allegation that the union has violated its statutory duty of fair representation. STATE OF WISCONSIN (DOC), DEC. NO. 31384-B (WERC, 11/05); STATE OF WISCONSIN (DHSS), DEC. NO. 20830-B (8/85)

Section 111.84(2)(a), Stats., makes it an unfair practice for an employee individually or in concert with others to "coerce or intimidate an employee in the enjoyment of the employee's legal rights, including those guaranteed under Sec. 111.82." Under SELRA, a breach of the union's duty of fair representation is a violation of Sec. 111.84(2)(a), Stats.

As Examiner Gallagher has stated in STATE OF WISCONSIN, DEC. NO. 28735-A (10/96); AFF'D BY OPERATION OF LAW, DEC. NO. 28735-B (WERC, 11/96):

. . .

> The United States Supreme Court has set forth the requirements the duty of fair representation a union owes to members of bargaining units it represents. VACA V. SIPES, 386 U.S. 171, 177, 64 LRRM 2369, 2371 (1967). The Wisconsin Supreme Court has followed the requirements laid out by our country's highest court in its own decisions. MAHNKE V. WERC, 66 WIS.2D 524 (1974) Therefore, it is clear that under SELRA, unions must represent the interests of all their members without hostility or discrimination; they must exercise their discretion with good faith and honesty; and they must avoid arbitrary conduct. A union breaches its duty of fair representation when its actions are arbitrary, discriminatory or in bad faith. VACA V. SIPES, SUPRA; COLEMAN V. OUTBOARD MARINE CORP., 92 WIS.2D 565 (1979) In conducting its business, a union is granted a wide range of reasonableness, subject always to complete good faith and honesty of purpose in the exercise of its discretion. FORD MOTOR CO. V. HOFFMAN, 345 U.S. 330, 31 LRRM 2548 (1953) As long as a union exercises its discretion in good faith, it is allowed broad discretion in the performance of its representative duties. WEST ALLIS-WEST MILWAUKEE SCHOOL DISTRICT, DEC. NO. 20922-D (SCHIAVONI, 10/84); AFF'D BY OPERATION OF LAW, DEC. NO. 20922-E (WERC, 10/84); BLOOMER JT. SCHOOL DISTRICT, DEC. NO. 16228-A (Rothstein, 8/80); AFF'D BY OPERATION OF LAW, DEC. NO. 16228-B (WERC, 8/80)

> A union is not under any absolute duty to pursue even a meritorious grievance and proof that an underlying grievance was meritorious is insufficient, in itself, to establish a violation of the duty of fair representation. WEST ALLIS-WEST MILWAUKEE SCHOOL DISTRICT, *supra*. . . .

The Commission has found it appropriate to apply precedent arising under provisions of MERA to cases arising under similar provisions of SELRA. STATE OF WISCONSIN (UW), DEC. NO. 30534-B (WERC, 2/05). In MILWAUKEE PUBLIC SCHOOLS, DEC. NO. 31602-C (WERC 1/07), the Commission has stated:

> . . .
>
> It is exceedingly difficult for an individual bargaining unit member to establish a breach of the duty of fair representation, and properly so. Decades of experience under federal and state labor relations laws have demonstrated the wisdom and necessity of maintaining this exceptionally high bar. It acknowledges that unions have limited resources, that grievances may be handled by relatively unsophisticated fellow employees or union staff, who as human beings sometimes make mistakes of judgment or are negligent, that a union's resources come from dues and fees paid by employees, that the union is a collective enterprise that must serve the interests of the overall group, that serving those collective interests frequently comes at the cost of a particular individual's real or perceived interests, and that a union must have discretion to make these decisions without being subjected to expensive second-guessing by agencies or courts.
>
> Thus, as the Examiner and the Union have pointed out, it is well-established that a union does not breach its duty of fair representation simply by negligently processing a grievance, simply by failing to communicate with a grievant, simply by making unwise or improvident decisions about the merits of a grievance, or simply by settling a grievance against the wishes of the grievant. Imperfections in representation are permitted the union, with one important caveat: " … subject always to complete good faith and honesty of purpose in the exercise of its discretion." HUMPHREY V. MOORE, 375 U. S. 335, 349 (1964) (emphasis added).
>
> The seminal articulation of the Union's duty of fair representation remains that set forth in VACA V. SIPES, 386 U. S. 171, 190 (1967), i.e., avoiding conduct toward a member of the bargaining unit that is "arbitrary, discriminatory, or in bad faith." In the context of an employee grievance, the essence of the analysis of the union's conduct under each of these three prongs is whether the union has abused its considerable discretion in handling the grievance. The inquiry is not a piecemeal analysis of how a grievance was handled at any particular stage, but rather a judgment based on the total picture.

As Judge (now Justice) Kennedy described the duty in his concurring opinion in Robesky v. Qantas Empire Airways, 593 F. 2d 1082 (9th Cir. 1978):

> [W]e should inquire whether the union decisions lacked a rational basis, or whether by perfunctorily processing a grievance so that a reasoned decision was not made, the union foredoomed the grievance. In determining whether a union's handling of a grievance is arbitrary or perfunctory, the trial court should consider whether the grievance lacked merit, …, as well as the importance of the grievance to the employee. These factors may bear upon whether or not there was a rational basis for the failure to advise the employee of the status of the claim, and whether or not the procedures followed in the particular case were adequate and fair to protect the interests at stake.

573 F.2d at 1092 (citations omitted).

. . .

Sec. 111.07(3), Stats., made applicable to SELRA by Sec. 111.84(4), Stats., provides that "the party upon whom the burden of proof rests shall be required to sustain such burden by a clear and satisfactory preponderance of the evidence."

Application Of The Legal Standards To The Facts

In December 2007, the time of the alleged contract violation, the State and WSEU were parties to a collective bargaining agreement which contained an agreed upon mechanism for resolving contractual disputes, *i.e.*, the contractual grievance and arbitration procedure. Applying the legal principles set forth above, the Examiner will not assert the Commission's jurisdiction to determine Complainant's claim that the State has violated a collective bargaining agreement in violation of Sec. 111.84(1)(e), Stats., unless Complainant first establishes, by a clear and satisfactory preponderance of the evidence, his allegation that WSEU has violated its statutory duty of fair representation.

Allegation that WSEU was Dilatory in Grievance Processing

Complainant became aware of his overtime claim on or about December 19, 2007. Thereafter, Complainant contacted Local 1 and requested that someone other than Steward Eric Moe represent Complainant on this claim. In response to Complainant's request, Local 1 President Vern Seay contacted Steward Randy Kundert to ask if Kundert would investigate Complainant's overtime claim.

By January 10, 2008, Kundert had investigated Complainant's claim; notified Complainant that Kundert would not be filing a grievance because there was insufficient

evidence to support a grievance; and advised Complainant that Complainant could contact Council 24 Representative Miller if Complainant wished to pursue a grievance. On that date and following a meeting with Complainant, Miller sent an email to Seay and Kundert stating, *inter alia*, that "we need to pursue a grievance on overtime."

According to Kundert, he responded to Miller's email by reminding Miller that he had resigned from the case. It is not evident that Kundert had any further involvement in WSEU's representation of Complainant's overtime claim.

Complainant claims that, in order to be timely, his grievance had to be filed by January 19, 2008. As confirmed in the January 14, 2008 emails, by that date, Seay had contacted Lieutenant Colonel Philpot, an employer representative with overall supervisory authority of the Truax Field Fire Department, and secured Philpot's agreement to place overtime offering procedures upon the agenda of the next labor/management meeting. According to Seay, his contact with Philpot was a pre-file on Complainant's grievance and Seay settled Complainant's grievance in the pre-file by securing this agreement.

Philpot's testimony that he did not understand Seay's contact to be a pre-file on Complainant's grievance indicates that Philpot and Seay disagree on the nature of Seay's contact with Philpot. Contrary to the argument of Complainant, Philpot's testimony is insufficient to establish that Seay is untruthful when he claims that his contact with Philpot was a pre-file.

For the purposes of determining the merits of Complainant's claim that WSEU was dilatory in processing his grievance, it does not matter if Seay's conversation with Philpot was, or was not, a pre-file. Of significance is that Seay, as President of Local 1 and one of the individuals to whom Complainant's grievance was referred to by Miller, had authority to act on behalf of WSEU to settle Complainant's grievance.

Seay states that he is not sure that he notified Complainant of his decision to settle Complainant's grievance. Seay recalls that he contacted Miller; explained why he had chosen to settle the pre-file grievance in that way; and that Miller agreed.

On January 15, 2008, Complainant sent two emails to Miller requesting assistance on his overtime claim. By emails dated January 16, 2008, Miller responded to each of Complainant's emails and requested Seay to follow-up on Complainant's stated concerns.

Seay's follow-up was provided to Miller by email dated January 23, 2008. Miller forwarded this email to Complainant on January 25, 2008. Seay's January 23, 2008 email includes the following:

> I did a pre-file with Col. Philpot and he agreed that management is willing to try to comply with the labor agreement. As relief we will meet and discuss and agree at Labor/Management as to how we will handle overtime offerings in the future.

> According to Steward Kundert the interpitation of the overtime article is unclear as it applies here and there does not seem to be a clear past practice one way or another. In addition the 2 more senior employees were awarded the overtime. Chuck Wagners' concern is being appropriately expedited.
>
> Thanks

Summary

When contacted by Complainant regarding his overtime claim, representatives of WSEU and its affiliated Local 1 responded to these contacts without undue delay. These responses included acquiescence to Complainant's request to be represented by a Steward other than Moe; an investigation of Complainant's overtime claim; and a decision to settle Complainant's overtime claim. All of these responses, including the decision to settle Complainant's overtime claim, occurred within a month of the incident that gave rise to Complainant's overtime claim and prior to the deadline for filing a grievance on this overtime claim.

Statements contained in Seay's January 23, 2008 email, including the statement "As relief we will meet and discuss and agree at Labor/Management as to how we will handle overtime offerings in the future." provided Complainant with reasonable notice that Local 1 had settled his overtime grievance. Complainant's claim that representatives of WSEU and its affiliated Local 1 were dilatory in processing Complainant's grievance is contrary to the record evidence.

Allegation That WSEU's Representation of Complainant Was Discriminatory

As Complainant argues, prior to December 2007, he was involved in efforts to decertify WSEU as the bargaining representative of Truax Field fire fighters and WSEU was aware of such efforts. As Complainant further argues, in December of 2006, WSEU responded to these efforts by removing Complainant as a Steward for Local 1.

Seay, in his capacity as President of Local 1, sent the December 8, 2006 email advising Complainant that, due to Complainant's involvement in an attempt to decertify the Union, Complainant was removed as a Steward of the Local and would not be allowed to hold any other position with Local 1. Seay also threatened formal charges before a trial body if Complainant persisted in his attempts to decertify the Union or represent the Union.

The December 8, 2006 email does not state, or imply, that Seay, or WSEU, will not represent Complainant as a member of WSEU's bargaining unit. Nor does the record establish that Seay, or any other WSEU representative, has made a statement that expresses or implies that Complainant's attempts to decertify WSEU would have an adverse impact upon WSEU's representation of Complainant as a member of WSEU's bargaining unit.

Complainant's overtime claim arose in December of 2007. In response to a request from Complainant, Seay arranged to have a WSEU Steward other than Moe investigate Complainant's overtime claim. Steward Kundert, who was not employed at Truax Field, investigated Complainant's claim by interviewing management and union employees who were likely to have relevant knowledge of the disputed overtime assignment and by reviewing relevant contract language and written procedures.

Kundert concluded his investigation by deciding to not file a grievance. According to Kundert, his decision to not file a grievance was based upon his conclusion that there was insufficient evidence to support a grievance because the master contract was silent on the issue of splitting overtime shifts. Kundert's articulated rationale for deciding to not file a grievance is not arbitrary or discriminatory.

Kundert states that he was not aware of any of Complainant's decertification activities until after he had completed his investigation and advised Complainant that he had decided to not file a grievance and the record does not establish otherwise. The record provides no reasonable basis to conclude that Kundert's decision to not file a grievance was influenced, in any part, by bias against Complainant, because of Complainant's attempts to decertify WSEU or for any other reason.

At the time of his investigation, Kundert knew that Moe was a WSEU Steward; Kundert had socialized with Moe at union meetings; and Kundert knew that Moe had been a recipient of the disputed overtime. The record, however, provides no reasonable basis to conclude that Kundert's decision to not file a grievance was influenced, in any part, by partiality toward Moe's union activity, including his position as Steward, or Moe's social interactions with Kundert.

After Complainant was informed of Kundert's decision to not file a grievance, Complainant had a discussion with Council 24 Representative Miller. As a result of this discussion, Miller sent Seay and Kundert the email stating that a grievance should be pursued. At that point in time, Complainant had a reasonable basis to conclude that Kundert's decision that Local 1 would not file a grievance had been overturned.

After Miller sent the email stating a grievance should be pursued, Seay contacted the overall supervisor of the Fire Department, Lieutenant Colonel Philpot. According to Seay, he settled Complainant's overtime claim by securing Philpot's agreement to place the overtime issue on the agenda of the next labor/management meeting. Seay states that he had an obligation to ensure that a grievance was not possible and that he contacted Philpot in the context of a prefile so that he could gather additional information.

Seay recalls that Philpot agreed that there had been no contract violation; and that Philpot, like Kundert, was unsure of what a consistent past practice was. Philpot, who states that he did not understand Seay's contact to be a pre-file, recalls that Seay proposed that "we" solve the misunderstandings of the extra time/overtime at a labor/management meeting and that Philpot agreed that would be a good idea.

Seay notified Miller of his disposition of Complainant's overtime claim. According to Seay, his contacts were with Miller, rather than Complainant, because Complainant's contacts had been with Miller.

Miller did not testify at hearing. Seay claims that Miller agreed with his disposition of Complainant's overtime claim. This claim is consistent with the evidence that, when notifying Complainant of Seay's disposition of his overtime claim, Miller did not renew her request that Local 1 pursue a grievance or express any dissatisfaction with this disposition.

As articulated in his emails and testimony at hearing, Seay's decision to settle Complainant's overtime claim was based upon Seay's conclusion that there was no contract violation and that this conclusion was based upon his understanding that there was no support for a grievance in the contract language; that there was no clear past practice and that having the disputed overtime worked by more senior employees was in compliance with the master contract. Seay's articulated rationale for his decision to settle, rather than to pursue a grievance on Complainant's overtime claim, is not arbitrary or discriminatory.

Complainant maintains that the parties had a clear practice of not permitting employees to post for a scheduled 24 hour overtime shift by splitting the hours between employees. If the record established that there were such a clear practice, then one might have a sound basis to question the reasonableness of Seay's understanding that there was no clear past practice. This record, however, fails to establish the existence of such a clear past practice. Rather, the evidence indicates that this is the first instance in which two employees posted for a scheduled 24 hour overtime shift by splitting the hours. Generally speaking, a clear practice of not permitting employees to engage in certain conduct requires evidence that employees attempted to engaged in certain conduct; that the employer had knowledge of these attempts; and that the employer responded by placing the employees on notice that the employees could not engage in such conduct.

Contrary to the argument of Complainant, at the time of the overtime dispute, the State and WSEU did not have a local agreement in effect that addressed overtime issues. In his emails, Seay articulates his rationale for disposing of Complainant's claim by placing overtime issues on the agenda of a future labor/management meeting, *i.e.*, to provide a vehicle for negotiating a written local agreement on overtime procedure. Seay's articulated rationale is not arbitrary or discriminatory.

As Complainant argues, at the time that Seay and Philpot agreed to place the overtime issue on the agenda of the next labor/management meeting, such a meeting had not been held for several years; no such meeting was scheduled; and, since that discussion, no such meeting has been held. It is not evident, however, that at that time, Seay, who had requested that the labor/management meeting be convened "soon," knew, or anticipated, that a labor/management meeting would not be convened. Seay's conduct in disposing of Complainant's claim by securing Philpot's agreement to place overtime issues on the agenda of a future labor/management meeting does not provide a reasonable basis to infer that Seay's articulated reasons for settling Complainant's overtime claim are pretextual.

Summary

Seay, in his role as President of Local 1, was the WSEU representative who made the decision to settle Complainant's overtime claim. Contrary to the argument of Complainant, the record provides no reasonable basis to conclude that Seay's decision to settle Complainant's overtime claim was influenced, in any part, by bias in favor of Moe because of Moe's WSEU activity or by bias against Complainant because of Complainant's attempts to decertify WSEU.

Seay, Kundert, and Miller were the WSEU Representatives who represented Complainant on his overtime claim. The record provides no reasonable basis to conclude that, in representing Complainant on his overtime claim, Kundert, Miller or Seay engaged in any hostile or discriminatory conduct. The record provides a reasonable basis to conclude that, in representing Complainant on his overtime claim, Kundert, Miller and Seay avoided arbitrary conduct and exercised their discretion as representatives of WSEU in good faith and with honesty of purpose.

Conclusion

Complainant has the burden to establish, by a clear and satisfactory preponderance of the evidence, that WSEU has violated its statutory duty of fair representation as alleged by Complainant. Complainant has not sustained this burden. Accordingly, Complainant's claim that WSEU has violated Sec. 111.84(2)(a), Stats., has been dismissed.

Given the dismissal of Complainant's claim that WSEU has violated its statutory duty of fair representation, the Commission will not assert its jurisdiction over Complainant's claim that the State has violated a collective bargaining agreement in violation of Sec. 111.84(1)(e), Stats. Accordingly, Complainant's claim that the State has violated Sec. 111.84(1)(e), Stats., has been dismissed.

Dated at Madison, Wisconsin, this 29th day of October, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/
Coleen A. Burns, Examiner

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