STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CARL PONTILLO, Complainant,

vs.

STATE OF WISCONSIN (DEPARTMENT OF CORRECTIONS) and WISCONSIN STATE EMPLOYEES UNION, AFSCME, COUNCIL 24, AFL-CIO, Respondents.

Case 809
No. 68587
PP(S)-395

Decision No. 32798-A

Appearances:

Carl Pontillo, appeared on behalf of himself.

David J. Vergeront, Chief Legal Counsel, Office of State Employment Relations, P.O. Box 7855, Madison, Wisconsin 53707-7855, appeared on behalf of Respondent-State. [1]

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

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DISMISSING COMPLAINT

On January 22, 2009, Carl Pontillo, hereafter "Complainant," filed a complaint with the Wisconsin Employment Relations Commission (herein "WERC") in which he alleged that State of Wisconsin (Department of Corrections), hereafter referred to as "Respondent-Employer," violated Section 111.84(a), Stats, when it assigned a position for which he signed a posting to another employee and Wisconsin State Employees Union, AFSCME, Council 24, AFL-CIO, herein referred to as "Respondent-Union," violated Section 111.84(b) by violating its duty to fairly represent him by failing to pursuing his grievance concerning that issue to arbitration. The Commission appointed Mr. Stanley H. Michelstetter II, a member of its staff,

[1] David Vergeront retired after the completion of hearing and William H. Ramsey has substituted as Chief Legal Counsel.

to act as Examiner in this matter and to make and issue Findings of Fact, Conclusions of Law and Orders, as provided in Sec's. 111.07(5) and 111.84(4)(a), Stats. The parties agreed to bifurcate the proceedings to have the fair representation issue heard first. The Examiner held the first phase of the hearing in the matter on December 14 and 15, 2009, in Waukesha, Wisconsin. Each party made oral argument. Complainant and Respondent-Union each filed a post-hearing brief the last of which was received April 20, 2010.

Having considered the evidence and the arguments of the parties, the Examiner makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Complainant Carl Pontillo is an adult individual who resides in Wisconsin.

2. Respondent-Employer State of Wisconsin (Department of Corrections) is an agency of the State of Wisconsin which operates the State of Wisconsin correctional facilities, which include but are not limited to, the Ethan Allen School (herein "Ethan Allen") in Village of Wales, Waukesha County, Wisconsin. Ethan Allen is a residential facility for the treatment of juvenile males who have been found by a court to be delinquent and sentenced to be confined thereto. The residential portion of the facility is sub-divided into group living units known as "cottages."

3. Respondent-Union, State Employees Union, AFSCME, Council 24, AFL-CIO, is a labor organization with main offices at 8033 Excelsior Drive, Suite C, Madison, Wisconsin.

4. Respondent-Union is the certified collective bargaining representative of various state employees including, but not limited to, non-managerial and non-supervisory personnel employed by the Respondent State at Ethan Allen.

5. Complainant has been continuously employed by Respondent-Employer since June 1, 1992 and, at all relevant times, was assigned as a Youth Counselor at Ethan Allen.

6. Respondent-Employer and Respondent-Union were party to a comprehensive collective bargaining agreement at all material times with respect to the bargaining unit in which Complainant was employed. The July 22, 3006 to June 30, 2007, collective bargaining agreement which was then continuing in effect at the relevant times provides as follows:

. . .

ARTICLE IV
GRIEVANCE PROCEDURE

SECTION 1: Definition

4/1/1 A grievance is defined as, and limited to, a written complaint involving an alleged violation of a specific provision of this Agreement.

4/1/2 Only one (1) subject matter shall be covered in any one (1) grievance. A grievance shall contain a clear and concise statement of the grievance by indicating the issue involved, the relief sought, the date the incident or violation took place, and the specific section or sections of the Agreement involved. The grievance shall be presented to the designated supervisor involved in quadruplicate (on mutually agreed upon forms furnished by the Employer to the Union and any prospective grievant) and signed and dated by the employee(s) and the Local Union representative. A grievant shall not represent him or herself. Only a designated grievance representative pursuant to Article IV, Section 6 of this agreement may represent a grievant.

4/1/3 If an employee brings any grievance to the Employer's attention without first having notified the Union, the Employer representative to whom such grievance is brought shall immediately notify the designated Local Union representative and no further discussion shall be had on the matter until the appropriate Local Union representative has been given notice and an opportunity to be present.

4/1/4 All grievances must be presented promptly and no later than thirty (30) calendar days from the date the grievant first became aware of, or should have become aware of with the exercise of reasonable diligence, the cause of such grievance.

4/1/5 The parties will make a good faith effort to handle filed grievances, discipline and investigations in a confidential mariner. 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.

4/1/6 (AS) Representatives of the Union and Management shall be treated as equals and in a courteous and professional mariner.

SECTION 2: Grievance Steps

4/2/1 (AS, BC, SPS, T) Pre-Filing: When an employee(s) and his/her Local Union representative become aware of circumstances, other than disciplinary actions, <u>including written reprimands</u>, that may result in the filing of a Step One grievance it is the intent of the parties that, prior to filing a grievance, the Local

Union representative will contact the immediate supervisor of the employee to identify and discuss the matter in a mutual attempt to resolve it. The parties are encouraged to make this contact by telephone. The State's DAIN line facilities will be used whenever possible. Both parties will provide any and all documents available, if requested, at the pre-filing step. **(PSS)** If the grievance is denied, the grievance response will include an explanation of the reason for denial.

4/2/2 If the designated agency representative determines that a contact with the immediate supervisor has not been made, the agency representative will notify the Local Union and may hold the grievance in abeyance for not more than fourteen (14) days, for an attempt at such contact to be made.

4/2/3 The Employer representative at any step of the grievance procedure is the person responsible for that step of the procedure. However, the Employer may find it necessary to have an additional Employer representative present. The Union shall also be allowed to have one additional Local Union representative present in non- pay status. Only one (1) person from each side shall be designated as the spokesperson. By mutual agreement, additional Employer and/or Union observers may be present.

4/2/4 All original grievances must be filed in writing at Step One or Two, as appropriate, promptly and not later than thirty (30) calendar days from the date the grievant first became aware of, or should have become aware of, with the exercise of reasonable diligence, the cause of such grievance.

4/2/5 Step One: Within twenty-one (21) calendar days of receipt of the written grievance or within twenty-one (21) calendar days of the date of the supervisor contact provided for in 4/2/1, whichever is later, the designated agency representative will schedule a hearing with the employee and Local Union representative and respond to the Step One grievance. By mutual agreement of the parties, the parties are encouraged to hold grievance hearings by telephone or video conferencing. The State's DAIN line facilities will be used whenever possible. If the grievance is denied, the grievance response will include an explanation of the reason for denial.

4/2/6 Step Two: If dissatisfied with the Employer's answer in Step One, to be considered further, the grievance must be appealed to the appointing authority or the designee (i.e., Division Administrator, Bureau Director, or personnel office) within fourteen (14) calendar days from receipt of the answer in Step One. Upon receipt of the grievance in Step Two, the department will provide copies of Step One and Step Two to the Bureau of Labor Relations of the Office of State Employment Relations as soon as possible. Within twenty-one (21) calendar days of receipt of the written grievance, the designated agency

representative(s) will schedule a hearing with the employee(s) and his/her designated Local Union representative(s) and a representative of Council 24 (as Council 24 may elect) and respond to the Step Two grievance, unless the time limits are mutually waived. The Employer and the Union agree to hear Step Two grievances on a regular schedule, where possible, at the work site or mutually agreed upon locations. By mutual agreement of the parties, the parties are encouraged to. hold grievance hearings by telephone or video conferencing. The State's DAIN line facilities will be used whenever possible. If the grievance is denied, the grievance response will include an explanation of the reason for denial. If the Employer has not responded to the grievance within sixty (60) days of the filing at Step Two, the Union may, prior to Step Three, refer the grievance to Council 24 and the Office of State Employment Relations to expedite an answer to the grievance.

4/2/7 Step Three: Grievances which have not been settled under the foregoing procedure may be appealed to arbitration by either party within thirty (30) calendar days from the date of the agency's answer in Step Two, or from the date on which the agency's answer was due, whichever is earlier, except grievances involving discharge, which must be appealed within fifteen (15) calendar days from the agency's answer in Step Two, or from the date on which the agency's answer was due, whichever is earlier, or the grievance will be considered ineligible for appeal to arbitration. If an unresolved grievance is not appealed to arbitration, it shall be considered terminated on the basis of the Second Step answers without prejudice or precedent in the resolution of future grievances. The issue as stated in the Second Step shall constitute the sole and entire subject matter to be heard by the arbitrator, unless the parties agree to modify the scope of the hearing.

Time Limits

4/2/8 Grievances not appealed within the designated time limits in any step of the grievance procedure will be considered as having been adjudicated on the basis of the last preceding Employer answer. Grievances not answered by the Employer within the designated time limits in any step of the grievance procedure may be appealed to the next step within the designated time limits of the appropriate step of the procedure. The parties may, however, mutually agree in writing to extend the time limits in any step of the grievance procedure.

4/2/9 If the Employer representative with whom a grievance appeal must be filed is located in a city other than that in which the grievance was processed in the preceding step, the mailing of the grievance appeal form shall constitute a timely appeal if it is postmarked within the appeal period. Likewise, when an

Employer answer must be forwarded to a city other than that in which the Employer representative works, the mailing of the answer shall constitute a timely response if it is postmarked within the answer period. The Employer will make a good faith effort to insure confidentiality.

4/2/10 Arbitrations for discharge cases will be heard within one (1) year from the date of appeal to arbitration.

SECTION 3: Arbitration Panel Procedures

4/3/1 Within seven (7) calendar days from the date of appeal to arbitration, the parties shall meet to select an arbitrator from the panel of arbitrators according to the selection procedures agreed upon.

4/3/2 When two or more grievances are appealed to arbitration, an effort will be made by the parties to agree upon the grievances to be heard by any one (1) arbitrator. On the grievances when agreement is not reached, a separate arbitrator from the panel shall be appointed for each grievance. When the grievance is denied by the arbitrator, the fees and expenses of the arbitrator and the costs of a court reporter, if one was requested by either party for the bearing, will be borne by the Union. When the grievance is upheld by the arbitrator, the fees and expenses of the arbitrator and the costs of a court reporter, if one was requested by either party for the hearing, will be borne by the Employer. When the grievance is upheld in part and denied in part by the arbitrator, the fees and expenses of the arbitrator and the costs of the court reporter, if one was requested by either party for the hearing, will be shared equally by the parties. Except as provided in Section 11 of this Article, each of the parties shall bear the cost of their own witnesses, including any lost wages that may be incurred. In grievances when the arbitrability of the subject matter is an issue, a separate arbitrator shall be appointed to determine the question of arbitrability unless the parties agree otherwise. When the question of arbitrability is not an issue, the arbitrator shall only have authority to determine compliance with the provisions of this Agreement. The arbitrator shall not have jurisdiction or authority to add to, amend, modify, nullify, or ignore in any way the provisions of this Agreement and shall not make any award which in effect would grant the Union or the Employer any matters which were not obtained in the negotiation process.

4/3/3 Both parties agree that there will be a panel of twelve (12) arbitrators selected to hear arbitration eases that are covered under the Agreement between the parties.

The procedure for selecting this panel of twelve (12) arbitrators is as follows:

A. Both parties will make an attempt to mutually agree on a panel of twelve (12) arbitrators.

B. If mutual agreement cannot be reached on the total twelve (12) arbitrators then the remaining number of arbitrators needed to complete the panel will be selected equally between the two parties.

C. After one (1) year from the date the panel was selected, either party shall have the right to eliminate up to two (2) arbitrators from the panel.

D. In replacing the arbitrators that were eliminated from the panel the procedure in B above shall again be used, but, it is noted that any arbitrator eliminated in C above may not be placed back on the panel.

4/3/4 The procedure for selecting an arbitrator from the panel to hear a particular case is as follows:

A. Each arbitrator shall be assigned a number one (1) through twelve (12).

B. In selecting an arbitrator for a case the parties shall draw five (5) arbitrator numbers at random from the total twelve (12). Then the elimination process will be used to select one (1) arbitrator from the group of five (5).

C. If both parties mutually disagree with the arbitrator number that has been selected in B above, then the original process of selecting an arbitrator shown in B above will again be used.

D. If, after two attempts, the parties mutually disagree with the arbitrator number that has been selected, then both parties shall jointly request a panel of arbitrators from the Federal Mediation and Conciliation Service.

E. Both parties shall jointly send letters to the twelve (12) arbitrators selected and request these arbitrators to agree to participate on the panel and comply with specific requirements.

F. Both parties agree to some type of retainer fee for each of the selected arbitrators in addition to a set daily fee allowed each arbitrator for his/her services.

4/3/5 Both parties shall jointly contact court reporters from around the state and develop a listing of these reporters who will agree to return the transcript of a hearing within ten (10) days from the date of the hearing.

4/3/6 Both parties agree to submit exhibits to each other that will be entered into evidence at the arbitration at least three (3) work days prior to the date of arbitration. Exhibits postmarked at least three (3) work days prior to the arbitration will satisfy the requirement.

4/3/7 The names of the witnesses that will be called to testify shall be shared with the other party three (3) work days prior to the hearing.

4/3/8 Disputes which arise under 4/3/6 or 4/3/7 will be resolved by OSER and Council 24.

4/3/9 If briefs are to be filed, both parties shall file their briefs within fourteen (14) days from the date of their receipt of the transcript. This time limit may be extended if mutually agreed by the two parties.

4/3/10 The decision of the arbitrator will be final and binding on both parties of is Agreement. When the arbitrator declares a bench decision, this decision shall be rendered within fifteen (15) calendar days from the date of the arbitration hearing. On discharge and 230.36 hazardous duty cases, the decision of the arbitrator shall be rendered within fifteen (15) calendar days from receipt of the briefs of the parties or the transcript in the event briefs are not filed. On all other cases, the decision of the arbitrator shall be rendered within thirty (30) calendar days from receipt of the briefs of the parties or the transcript in the event briefs are not filed.

SECTION 4: Retroactivity

4/4/1 Settlement of grievances may or may not be retroactive as the equities of particular cases may demand. In any case, where it is determined that the award should be applied retroactively, except for administrative errors relating to the payment of wages, the maximum period of retroactivity allowed shall be a date not earlier than thirty (30) calendar days prior to the initiation of the written grievance Step One. Employees who voluntarily terminate their employment (not including those who retire) will have their grievances immediately withdrawn and will not benefit by any later settlement of a group grievance. When a discharged employee signs for the purpose of withdrawing funds from the State's retirement system, his/her grievance of the discharge will not be considered as withdrawn.

SECTION 5: Exclusive Procedure

5/5/1 The grievance procedure set out above shall be exclusive and shall replace any other grievance procedure for adjustment of any disputes arising from the application and interpretation of this Agreement.

SECTION 6: Number of Representatives and Jurisdictions

6/6/1 (BC, SPS, T) Council 24 shall designate a total of up to 750 grievance representatives who are members of the bargaining units for the bargaining units.

6/6/2 (AS) Council 24 shall designate a total of up to 500 grievance representatives who are members of the bargaining unit for the bargaining unit.

6/6/2A (PSS) Council 24 shall designate a total of up to 115 grievance representatives who are members of the bargaining unit for the bargaining unit.

6/6/3 The Union shall designate the jurisdictional area for each grievance representative and his/her alternate. Each jurisdictional area shall have a similar number of employees and shall be limited to a reasonable area to minimize the loss of work time and travel giving consideration for the geographic area, employing unit, work unit, shift schedule and the right and responsibility of the WSEU a represent the employee of the bargaining unit. Jurisdictional areas shall including other employing units and/or departments where the number of employees in such units or departments are too minimal to warrant designation of a grievance representative.

4/6/4 (BC, T, PSS) Each local Union or each chapter of a statewide local Union (for PSS and Department of Transportation SPS only) may appoint one chief steward whom the designated grievance representative of the local or chapter may consult with by telephone pursuant to the provisions of Article II, Section 9 (Telephone Use) in the event the grievance representative needs advice in interpreting the Agreement or in handling a grievance

4/6/4A (AS) Each local Union may appoint chief stewards, and shall furnish to the Employer, in writing, the name of the Chief Steward for each respective jurisdictional area. The grievance representative of the local may consult with his/her appropriate jurisdictional area Chief Steward by telephone pursuant to the provisions of Article II, Section 9 (Telephone Use) in the event the grievance representative needs advice in interpreting the Agreement or in handling a grievance.

4/6/5 In those instances where there is not a designated grievance representative from an employee's bargaining unit available in the same building, a designated grievance representative from another WSEU represented bargaining unit or local Union within the same building shall be allowed, pursuant to Paragraph 4/8/1, to cross bargaining unit or local Union lines so as to provide grievance representation. Such substitute grievance representative shall obtain approval from his/her supervisor prior to providing such substitute representation.

4/6/6 (BC, SPS, T, PSS) The Union shall furnish to the Employer in writing the names of the grievance representatives and their respective jurisdictional areas within thirty (30) calendar days after the effective date of this Agreement. Any changes thereto shall be forwarded to the Employer by the Union as soon as the changes are made.

4/6/7 (AS) The Union shall furnish to the Employer in writing the names of the grievance representatives, and theft respective jurisdictional areas as soon as they are designated and determined but not later than 180 calendar days after the effective date of this Agreement. Any changes thereto shall be forwarded to the Employer by the Union as soon as the changes are made.

4/6/8 The Employer will supply the local Union with a list of supervisors to contact on grievance matters.

SECTION 7: Union Grievances

4/7/1 Union officers and stewards who are members of the bargaining unit shall have the right to file a grievance when any provision of this Agreement has been violated or when the Employer interpretation of the terms and provisions of this Agreement leads to a controversy with the Union over application of the terms or provisions of this Agreement.

SECTION 8: Processing Grievances

4/8/1 A. The grievant, including a Union official in a Union grievance, will be permitted a reasonable amount of time without loss of pay to process a grievance from pre-filing through Step Three (including consultation with designated representatives prior to filing a grievance) during his/her regularly scheduled hours of employment. The employee's supervisor will arrange a meeting to take place as soon as possible for the employee with his/her Union representative through the Union representative's supervisor.

B. For purposes of training, first time new local union stewards will be permitted a reasonable amount of time without loss of pay to accompany a senior steward during the investigation and processing of one grievance (from pre-filing through step 2), one investigatory interview and one pre-disciplinary (Loudermill) meeting. Prior approval from the new steward's supervisor is required to exercise these provisions. Management will base participation decisions on the proximity of the stewards, work schedules, and staffing levels. The Employer may grant additional steward training as identified in this provision. Current practices will continue.

4/8/2 Designated grievance representatives will also be permitted a reasonable amount of time without loss of pay td investigate and process grievances from pre-filing through Step Three (including consultations) in their jurisdictional areas during their regularly scheduled hours of employment. Only one designated grievance representative will be permitted to process any one grievance without loss of pay as above. Further, in a group grievance, only one grievant, appearing without loss of pay, shall be the spokesperson for the group. (Group grievances are defined as, and limited to, those grievances which cover more than one employee, and. which involve like circumstances and facts for the grievants involved.) Group grievances must be so designated at the first step of the grievance procedure and set forth a list of all employees covered by the grievance.

4/8/3 The grievance meeting as provided in the Pre-Filing Step and Steps One and Two above shall be held during the grievant's regularly scheduled hours of employment unless mutually agreed otherwise. The Employer shall designate the time and location for pre-filing, first and second step grievance hearings. The grievant's attendance at said hearings, including reasonable travel time to and from the hearing, shall be in pay status. The parties will provide all documents and information available if requested, at the pre-filing step, step 1, step 2 or when appropriate.

4/8/4 The designated grievance representative shall be in pay status for said hearing and for reasonable travel time to and from said hearing, provided that the hearing occurs during his/her regularly scheduled hours of work. If the grievant and/or the designated representative has a personally assigned vehicle, he/she may use that vehicle, without charge, to attend such grievance meetings. If there is a state fleet vehicle available, at the sole discretion of the Employer, the designated grievance representative may use the vehicle, without charge, to attend such grievance meetings. However, the decision of the Employer is not subject to the grievance procedure.

4/8/4 A. **(BC, AS, SPS, T)** The Pre-Filing Step and Step One of the grievance procedure will be held on the grievant's and the grievant's representative's work time if the work time is on the same or overlapping shift. It is understood that the grievance time limits may have to be extended to accommodate this provision and that work schedules need not be changed.

B. **(BC, PSS, T)** In cases where a steward is not available on an employee's shift to represent an employee in a hearing, the Employer will arrange for a steward from another shift. In scheduling the hearings, the Employer shall give consideration to minimizing the time between the hearing and the steward's shift. By mutual agreement, the steward's schedule may be adjusted to allow the steward to be in pay status during the hearing.

4/8/5 The Employer is not responsible for any compensation of employees for time spent processing grievances outside their regularly scheduled hours of employment. The Employer is not responsible for any travel or subsistence expenses incurred by grievants or Union representatives in the processing of grievances.

4/8/6 (BC, AS) The Employer and the Union may mutually agree to the need for an interpreter in discipline hearings and the Pre-Filing Step and Steps One and Two of the grievance procedure. The interpreter shall be used to assist persons who are hearing impaired or who do not speak English to understand the proceedings. The person selected as the interpreter will be mutually agreed to, and the Union and the Employer shall share the costs equally.

4/8/7 The Employer will send one (1) copy of the answered grievance at Step One to the District Council 24 area representative.

4/8/8 Information Requests

Both parties have the responsibility to share information when available. When requested by Council 24, information, materials, or photo copies pertinent to representation in the grievance procedure will be provided at no cost to the Union, prior to the 2 step of the grievance process.

Any requests where costs exceed $50.00 (fifty dollars), if questioned by the agency, must be approved by the Director of Council 24, and OSER.

SECTION 9: Discipline

4/9/1 The parties recognize the authority of the Employer to suspend, demote, discharge or take other appropriate corrective disciplinary action against employees for just cause. An employee who alleges that such action was not

based on just cause may appeal a demotion, suspension or discharge taken by the Employer beginning with the Second Step of the grievance procedure. A grievance in response to a written reprimand shall begin at the step of the grievance procedure that is appropriate to the level of authority of the person signing the written reprimand, unless the parties mutually agree to waive to the next step. Any letter issued by the department to an employee will not be considered a written reprimand unless a work rule violation is alleged or it is specifically identified as a letter of reprimand.

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

B. When an employee reasonably believes a meeting or informal counseling with his/her supervisor will result in disciplinary action, the employee has the right to consult with a union representative when the employee requests one. If a supervisor tells an employee that the interview or counseling will not result in discipline, there is no reasonable basis to believe the meeting will result in discipline, the employee must answer questions or may be subject to discipline for insubordination. If a supervisor denies an employee union representation and informs the employee that he/she will not be disciplined as a result of the meeting or counseling and then the supervisor does discipline the employee as a result of the meeting or counseling, the Office of State Employment Relations will not support the agency's disciplinary actions.

4/9/3 Unless Union representation is present during informal counseling or performance evaluation, disciplinary action cannot be taken at such counseling or performance evaluation meetings. The occurrence of an informal counseling or performance evaluation meeting shall not be used as the basis for or as evidence in any subsequent disciplinary action. Such a meeting can be used to establish that an employee had been made aware of the circumstances which resulted in performance evaluation or informal counseling.

4/9/4 If any discipline is taken against an employee, both the employee and local Union president, or his/her designee, will receive copies of this disciplinary action. If the supervisor and the employee meet to explain or discuss the discipline, a Union representative shall be present, if requested.

4/9/4/A The Employer agrees that when a written note of suspension with pay, pending an Employer investigation, is sent to an employee, a copy of the notice will also be provided to the Local Union president or his/her designee.

[Historical Note: This language was moved from old Negotiating Note 36, which was deleted.]

4/9/5 When an employee has been formally notified of an investigation, and the Employer concludes no discipline will be taken at the present time, the employee shall be so advised. If a Union representative was present during the investigation, the Union representative shall also be advised. Such notification shall be provided in a timely manner.

4/9/6 No suspensions without pay shall be effective for more than thirty (30) days.

4/9/7 Where the Employer provides written notice to an employee of a pre-disciplinary meeting, and the employee is represented by a WSEU statewide local union, the Employer will provide a copy of such notice to the local Union. Current practices between other WSEU local unions and the Employer will continue.

4/9/8 An employee shall be informed by his/her supervisor that he/she is being verbally reprimanded at the time such reprimand is issued. Verbal reprimands shall not be reduced to writing and placed in the employees personnel file(s), and shall not be used as a step in the progressive discipline process.

SECTION 10: Exclusion of Probationary Employees

4/10/1 Notwithstanding Section 9 above, the retention or release of probationary employees shall not be subject to the grievance procedure except those probationary employees who are released must be advised in writing of the reasons for the release and do, at the discretion of the Equal Rights Division of the Department of Workforce Development, have the right to a hearing before the Equal Rights Division. If a meeting is held to notify an employee of his or her release for failure to pass original probation, union representation may be requested. The purpose of such representation is to observe, ask clarifying questions and advise the employee. Failure of a Union representative to attend shall not delay the release of the probationary employee.

4/10/2 In those situations where an employee is on permissive probation between employing units in the same agency and same class due to a transfer and that probation is terminated, the employee has the right to request a formal meeting and be notified of the reason for termination in writing. Except for terminations far performance reasons, if the employee feels that the termination was for arbitrary and/or capricious reasons and not consistent with how other similarly situated employees are treated, the employee has the right to appeal the

probation termination through the grievance procedure as set out in Article IV, Section 12, of the collective bargaining agreement.

SECTION 11: Pay Status of Arbitration Witnesses

4/11/1 When an employee is subpoenaed by either party in an arbitration case that employee may appear without loss of pay if he/she appears during his/her regularly scheduled hours of work providing the testimony given is related to his/her job function or involves matters he/she has witnessed while performing his/her job and is relevant to the arbitration ease. A subpoenaed employee who appears during his/her non-scheduled hours of work shall be guaranteed an appearance fee equivalent to the hourly rate of the employee for two (2) hours or all hours testifying at the hearing, whichever is greater.

4/11/2 It is the intent of this section that every effort shall be made to avoid the presentation of repetitive witnesses.

4/11/3 A grievant appearing during non-scheduled hours of work at a special arbitration hearing as covered in Section 12 of this Article shall be paid an appearance fee equivalent to the hourly rate of the grievant for one (1) hour when appearing at the hearing. It is expressly understood by the parties that no more than one (1) appearance fee per day may be paid to a grievant appearing at the hearing.

SECTION 12: Special Arbitration Procedures

4/12/1 In the interest of achieving more efficient handling of routine grievances, including grievances concerning minor discipline, the parties agree to the following special arbitration procedures. These procedures are intended to replace the procedure in Subsection 4/3/1-7 for the resolution of non-precedential grievances as set forth below. If either of the parties believes that a particular case is precedential in nature and therefore not properly handled through these special procedures, that case will be processed through the full arbitration procedure in subsection 4/3/1-7. Cases decided by these methods of dispute resolution shall not be used as precedent in any other proceeding.

Arbitrators will be mutually agreed to by District Council 24, WSEU, and the State Bureau of Labor Relations for both of these procedures during the term of the contract.

A. Expedited Arbitration Procedure

1. The cases presented to the arbitrator will consist of campus, local institution or work site issues, short-term disciplinary actions [five (5) day or

less suspensions without pay], denials of benefits under s. 230.36, Wis. Stats., and other individual situations mutually agreed to.

2. The arbitrator will normally hear at least four (4) cases at each session unless mutually agreed otherwise. The cases will be grouped by institution and/or geographic area and heard in that area.

3. Case presentation will be limited to a preliminary introduction, a short reiteration of facts, and a brief oral argument. No briefs or transcripts shall be made. If witnesses are used to present facts, there will be no more than two (2) per side. If called to testify, the grievant is considered as one of the two witnesses

4. The arbitrator will give a bench or other decision within five (5) calendar days. The arbitrator may deny, uphold, or modify the action of the Employer. All decisions will be final and binding.

5. Where written decisions are issued, such decisions shall identify the process as non-precedential in the heading or title of the decision(s) for identification purposes.

6. The cost of the arbitrator and the expenses of the hearing will be shared equally by the parties.

7. Representatives of OSER and AFSCME Council 24 shall meet and mutually agree on an arbitrator.

B. Umpire Arbitration Procedure

1. Whenever possible, each arbitrator will conduct hearings a minimum of two (2) days per month. District Council 24, Wisconsin State Employees Union and the State Bureau of Labor Relations will meet with the arbitrator at least once every six months and select dates for bearings during the next six (6) month period.

2. The cases presented to the arbitrator will consist of campus, local institution, or work site issues; short-term disciplinary actions [three (3) day or less suspensions without pay]; overtime distribution; and other individual situations mutually agreed to.

3. Cases will be given an initial joint screening by representatives of the State Bureau of Labor Relations and the WSEU, Council 24. Either party will provide the other with an initial list of the cases which it wishes to be heard on a scheduled hearing date at least forty-five (45) calendar days prior to a

hearing date. This list may be revised upon mutual agreement of the parties at any time up to fifteen (15) calendar days prior to the hearing date.

4. Statements of facts and the issue will be presented by the parties, in writing, to the arbitrator at least seven (7) calendar days prior to the hearing date unless the arbitrator agrees to fewer days for that particular hearing date. If contract language is to be interpreted, the appropriate language provisions of the contract will also be provided to the arbitrator prior to the hearing.

5. The arbitrator will normally hear at least eight (8) cases at each session unless mutually agreed otherwise. Whenever possible, the cases will be grouped by campus, institution and/or geographic area and heard in that area. The hearing site may be moved to facilitate the expeditious handling of the day's cases.

6. The case in chief will be limited to five (5) minutes by each side with an opportunity for a one minute rebuttal and/or closing. No witnesses will be called. No objections will be allowed. No briefs or transcripts shall be made. The Grievant and his/her steward, plus a department representative and the supervisor, will be present at the hearing and available to answer questions from the arbitrator.

7. The arbitrator will render a final and binding decision on each case at the end of the day on the. form provided. The arbitrator may deny, uphold or modify the action of the Employer.

8. The cost of the arbitrator and the expenses of the hearing will be shared equally by the parties.

SECTION 13: Concentrated Performance Evaluation

4/13/1 (BC, PSS, SPS) Employees will be placed on a concentrated performance evaluation program only after the Employer has documented the reasons for such action and with the prior approval of the department head or his or her designee(s). Placement on the program must not be arbitrary and capricious. At the time an employee is placed on a concentrated performance evaluation program, the Union will receive formal written notice of the action. At the request of the employee (after the employee has been made aware of the possible consequences of being put on the program), a Union representative may attend the meeting in which formal notice of performance problems will be explained to the employee. Selection of a Union representative shall not delay this scheduled meeting. Neither the notice to the employee nor the placement of the employee on such a program is grievable under this Agreement until such time as the employee receives a written notice of a disciplinary action under this

program. At such time as the employee is subjected to disciplinary action, the principle of just cause must be met.

4/13/1A (AS, T) Employees will be placed on a concentrated performance evaluation program (for example, Performance Improvement Plan/PIP, Concentrated Performance Planning and Development/CPPD, Final Performance Improvement Plan/FPIP, Concentrated Performance Evaluation/CPE, etc.) only after the Employer has documented the reasons for such action and with the prior approval of the department head or his or her designee(s). Placement on the program must not be arbitrary and capricious. At the time an employee is placed on a concentrated performance evaluation program, a representative of the local Union will receive formal written notice of the action. At the request of the employee (after the employee has been made aware of the possible consequences of being put on the program), a Union representative may attend the meeting in which formal notice of performance problems will be explained to the employee. Selection of a Union representative shall not delay this scheduled meeting. Neither the notice to the employee nor the placement of the employee on such a program is grievable under this Agreement until such time as the employee receives a written notice of a disciplinary action under this program. At such time as the employee is subjected to disciplinary action, the principle of just cause must be met.

4/13/2 After an employee has been placed on a concentrated performance evaluation program and has received written notice of a possible termination or other disciplinary action, a designated grievance representative, at the request of the employee, may attend all formal concentrated performance review meetings. Participation of the grievance representative at such meetings is limited to observing, asking clarifying questions and advising the employee.

4/13/3 (AS) Evaluations that occur more than once per year may be used as documentation of the reasons for beginning a concentrated performance evaluation program. Such evaluations shall be corrective in nature and shall not result in discipline without just cause. The parties agree that this paragraph does not change the grievability of performance evaluations under this Section.

ARTICLE V

SENIORITY

SECTION 1: General

5/1/1 Seniority for employees hired after the effective date of this Agreement shall be determined by the original date of employment with the State of Wisconsin. Seniority for existing bargaining unit employees shall be their

seniority date as of the effective date of this Agreement. Seniority for employees who become members of the bargaining unit during the term of this Agreement shall be their adjusted continuous service date as of the time they became members of the unit. When the Employer becomes responsible for a function previously administered by another governmental agency, a. quasi-public, or a private enterprise, the seniority of employees who become bargaining unit members as a result of this change of responsibility shall be their date of accretion into state service unless the legislation or the Executive Order causing such accretion specifies differently. Such seniority will be changed only where the employee is separated from state service by discharge, resignation or layoff.

5/1/2 The Employer shall notify the Union as soon as the Employer becomes aware of formal consideration being given to state assumption of functions currently administered by another governmental agency, a quasi-public or private enterprise by Executive Order, or aware of any legislative hearings scheduled to discuss such state assumptions of functions.

5/1/3 Where within five (5) years of resignation or discharge an employee is rehired, his/her new seniority date will be the original date of employment adjusted to a new and later date which gives no credit for the period of separation during which he/she was not an employee of the state, except when an employee is laid off and recalled or reinstated from layoff within five (5) years thereof, he/she shall reclaim his/her original date of employment for the computation of seniority.

5/1/4 In the event two employees have the same seniority date, seniority of the one as against the other shall be determined by age with the older employee considered having the greater seniority.

ARTICLE VII

TRANSFERS

SECTION 0: Waiver

7/0/1 (BC, T, SPS, PSS) On a case-by-case basis, by mutual agreement of the parties, the full transfer provision of this Article may be waived for the purpose of Affirmative Action or to accommodate the return to work of a disabled employee who is medically certified for alternate duty. Absent mutual agreement, the full transfer provision of this Article will apply as hereinafter set forth.

7/0/1A (AS) On a case-by-case basis, by mutual agreement of the parties, the full transfer provision of this Article may be waived for the purpose of:

relieving hardship; Affirmative Action or to accommodate the return to work of a disabled employee who is medically certified for alternate duty. Absent mutual agreement the full transfer provision of this Article will apply as hereinafter set forth.

SECTION 1: Transfer Within Employing Units

7/1/1 When a permanent vacancy occurs in a permanent (part-time, full-time or seasonal) position in an employing unit or when the Employer becomes aware of an impending permanent position in an employing unit, unless mutually agreed to otherwise, the Employer shall notify the local Union indicating the classification, any special requirements (including training and experience), the shift, shift rotation (if any), work schedule and the work location, and the Local Union shall notify the employees of the bargaining unit in the employing unit. Interested permanent employees assigned to the same or other shifts in the employing unit who are in the same classification and who have completed their probationary period in the classification of the vacancy shall indicate their desire for a transfer by notifying the Employer within five (5) calendar days of notice to the employee or within seven (7) calendar days notice to the Union, whichever is greater. During the period while the selection process is being administered or for a maximum of six (6) months, whichever is less, the Employer may temporarily fill the vacancy to fulfill operational requirements. The employee selected to fill the permanent vacancy shall be the employee with the most seniority, unless he/she is not physically or emotionally fit for the job or cannot perform the work in a satisfactory manner. (PSS see Negotiating Note No. 48)

7/1/1A (AS) In addition to employees identified in 7/1/1 above, employees in the employing unit who have been reallocated to a different classification as a result of a classification survey conducted or approved by the Office of State Employment Relations (OSER), will be considered for transfer (or demotion if reallocated to a classification in a higher pay range), utilizing their seniority, to a position in the classification from which reallocated. Employees shall be able to exercise this transfer (or demotion) right once during the twelve (12) month period following the date of reallocation.

SECTION 2: Seniority Information

5/2/1 The Employer agrees to provide all local unions with two seniority lists. One list shall be by local union, employing unit, classification, and employee name by seniority with date of birth and mailing address. The second list shall be by local union, employing unit, classification, and employee name by alphabetical listing with date of birth and mailing address. These lists shall be provided on a semiannual basis. Employees shall have thirty (30) calendar days

from the date the list is provided to the local Union officer to correct errors except that in cases of layoff the time available for correction of errors shall be the life of the list.

. . .

7/1/2 (PSS) In addition to the provisions of 7/1/1, when the Employer determines that a position in this bargaining unit is in an approved progression series and the agency determines the position may be filled at the same or different level in that series, the position may be posted at all appropriate levels within the progression series.

7/1/3 (AS) Prior to posting a permanent vacancy for transfer, the Employer will identify any necessary demonstrable special qualifications and will so note on the posting. In such a situation the employee selected shall be the most senior employee who has indicated interest in the vacancy and meets the necessary demonstrable special qualifications.

7/1/4 (BC) Randomly Ranked Classifications Transfers Within Employing Units. Employees in classes for which random ranking is used for certification purposes may apply for transfers announced under 7/1/1 to classifications in the same pay range. This right is also extended to employees in positions classified as Laundry Worker 3. Consideration for such transfers will be given to persons within the employing unit only after the provisions of 7/1/1 are exhausted and in accordance with the following procedures. The vacancy shall be filled by transfer of an employee in another random ranked classification, or Laundry Worker 3 which is in the same pay range as the vacancy. The employee selected shall be from among the three (3) most senior applicants. The reason for the selection of an applicant other than the most senior shall not be arbitrary or capricious. The posting procedures and eligibility criteria of 7/1/1 shall apply; however, a single posting under both 7/1/1 and 7/1/4 may be conducted by the Employer so as to expedite the selection process. Following appointment, if within the first six (6) months the Employer determines the employee is not performing satisfactorily, the employee will be returned to his/her former position, or one of like nature, within the employing unit for which the employee is qualified. If no vacancy exists, the provisions of Article VIII (Layoff) shall apply.

7/1/5 At the sole discretion of the Employer, an employee who has transferred within the employing unit may be permitted to return to his or her previous position if the employee makes a written request to the Employer before the previous position has been filled. This provision supersedes any other conflicting provision of the contract. The decision of the Employer is not subject to the grievance procedure.

SECTION 2: Additional Procedures

7/2/1 When a permanent vacancy occurs or the Employer becomes aware of an impending permanent vacancy, the Employer will review those requests on file from any employees in the same employing unit who are in the same classification as the vacancy and have indicated an interest in the vacancy.

7/2/1A It is in the best interests of the parties for employees to make informed decisions about their ability to perform or learn the essential functions of a position prior to accepting a contractual transfer. Upon request, a copy of the position description will be made available for the employee's review.

Where no interview is conducted, upon request, the Employer will provide additional information (e.g., vacation schedules, vacation scheduling policies and shift information) about the position, if available.

7/2/2 (PSS) Any employee who is selected for transfer shall have three (3) workdays in which to decline the offer.

7/2/2A The employee will be notified of the effective date of the transfer at the time of acceptance. If the employee wishes written confirmation of the start date of the transfer, he/she will provide written confirmation of the start date to his/her supervisor and the supervisor will sign it. If a delay occurs regarding this date, the employee will be notified in writing as to the reason(s) for the delay.

7/2/2B (AS, BC, SPS, T) Any employee who is selected for transfer shall have three (3) workdays in which to decline the offer. To expedite the hiring process, the employee is encouraged to contact the Employer as soon as a decision is reached to accept or decline the offer. For SPS-DOC only, any employee who is selected for internal transfer within the institution shall have three (3) working days in which to decline the offer.

7/2/3 In the event the most senior employee is not selected to fill the vacancy, the Employer shall notify the affected employee(s) in writing of the reason(s) within thirty (30) days. Failure to provide such notice shall not constitute grounds for reversal of any personnel transactions.

7/2/4 Whenever a vacancy is created involving a new position and the duties are substantially different or involve a different geographic location, the Employer will announce the vacancy in the employing unit in which the vacancy exists. The announcement shall be in the same manner as the announcement for promotional exams as provided in Article XI, Section 4 of this Agreement. A period of five (5) calendar days shall be allowed for interested employees to file

a written request to be included in the group of applicants to be considered for that vacancy.

SECTION 3: Secondary Selection Procedures

A. Transfer Between Employing Units

7/3/1 (BC, SPS, T, PSS) In the event that the vacancy is not filled by transfer of an employee under provisions of Section 1 of this Article, the Employer shall select from interested qualified employees from other employing units of the department following the seniority requirements of Section 1 of this Article. In the event the vacancy is not filled by transfer, the Employer may fill the vacancy in accordance with the Wisconsin Statutes.

7/3/2A At the sole discretion of the Employer, an employee who has transferred between employing units of the same agency, may be permitted to return to his or her previous position if the employee makes a written request to the original Employer before the previous position has been filled. This provision supersedes any other conflicting provision of the contract. The decision of the Employer is not subject to the grievance procedure.

7/3/2 (AS) In the event that the vacancy is not filled by transfer of an employee under provisions of Section 1 of this Article, the Employer must select the most senior employee from other employing units of the department who have registered with the department unless the permanent vacancy requires necessary demonstrable qualifications. In such a situation the employee shall be the most senior employee as provided for in 7/1/3. In the event the vacancy is not filled by transfer, the Employer may fill the vacancy in accordance with the Wisconsin Statutes.

B. Transfer Between Agencies

7/3/3 An employee who transfers between agencies outside the provisions of this labor agreement and is placed on a permissive probationary period will have the right to return to his/her original position if available, or one of like nature for which the employee is qualified, if the employee's permissive probation is terminated by the Employer prior to completion. If no vacancy exists, the provisions of Article VIII (Layoff) will be invoked.

C. Pay on Transfer

7/3/4 An employee whose pay is over the maximum of the pay range to which his/her classification is assigned and has been "red-circled" and who has transferred to a different position in the same classification whether within his/her agency or between agencies shall retain his/her "red-circle" rate, subject to the provisions of Appendix #5 and Article XII, Section 10 of this Agreement, whichever is applicable.

SECTION 4: Definition of Permanent Vacancy

7/4/1 For purposes of this Article, a permanent vacancy is created:

A. When the Employer has approval to increase the work force and decides to fill the new positions;

B. When any of the following personnel transactions take place and the Employer decides to replace the previous incumbent:

1. terminations,
2. transfers out of the bargaining unit,
3. promotion or demotion,
4. resignation, and
5. retirement;

C. If no employee has indicated a desire to transfer to a vacancy and the Employer fills such vacancy by transfer of an employee from another classification in the same salary range and determines that the vacated position is to be filled, such position shall be subject to the provisions of Section 1 of this Article;

D. Transfers within the bargaining unit resulting from either A., B., or C., above.

SECTION 5: Limitations

7/5/1 A. Except as mutually agreed otherwise, the applications of the procedures in this Article shall be limited to a maximum of three (3) transfers resulting from any given original vacancy. For SPS/DOC only, except as mutually agreed otherwise, the applications of the procedures in this Article shall allow an unlimited number of transfers from any given original vacancy.

B. Employees may not transfer under the provisions of this Article more often than once every six months. (ASU, BC, SPS, T) However, an employee who transfers in lieu of layoff shall be eligible for one (1) additional transfer under Article VII provisions within six (6) months, if the employee informs the prospective Employer at the time of application that he/she has transferred within the last six (6) months in lien of layoff and is eligible for one (1) additional contractual transfer.

C. Employees transferring under the provisions of this Article shall not be eligible for payment of moving expenses by the Employer.

D. In eases of involuntary transfers, the Employer will reimburse employees in accordance with s. 20.917, Wis. Stats.

7/5/2 (SPS) In the Department of Corrections, Officers 1, 2, and 3 and Youth Counselors 1, 2, and 3 and in the Department of Health and Family Services, Psychiatric Care Technicians 1 and 2 shall have the right to transfer once within an Employing Unit and once between Employing Units in a six (6) month period. When transferring between Employing Units, the right to transfer within that new Employing Unit cannot be exercised for six (6) months.

7/5/3 In the Department of Health & Family Services, Resident Care Technicians 1 & 2 shall have the right to one additional transfer within the employing unit during the six (6) months following a contractual transfer to accommodate a shift change.

In the Department of Veterans Affairs, Licensed Practical Nurses 1 & 2, nursing Assistants 1, 2 & 3, and Program Assistants (unit clerks) assigned to nursing care work units shall have the right to one additional transfer within the employing unit during the six (6) months following a contractual transfer to accommodate a shift change.

7/5/4 (SPS) In the event that the vacancy is not filled by transfer of an employee under the provisions of 7/1/1 or 7/1/3 of this Article, and the Employer is considering individuals from outside the SPS bargaining unit for voluntary demotion, transfer or reinstatement to the Correctional Sergeant, Correctional Officer, Psychiatric Care Technician, Youth Counselor or Youth Counselor - Advanced classification those individuals selected shall be placed into vacancies which have cleared the transfer provisions of Article 7 and shall not have transfer rights to positions under the provisions of Article 7 for a period of six months from their date of entry/re-entry into the SPS bargaining unit.

SECTION 6: Priority of Transfer Rights

7/6/1 It is expressly understood that transfer rights under 7/1/1 supersede restoration or reinstatement rights under Article VIII.

SECTION 7: Interviews

7/7/1 (BC, AS, SPS, T) If the Employer conducts interviews related to the transfer procedure and the interview is conducted in the employee's assigned headquarters city, necessary and reasonable time for such interview shall be without loss of pay. The employee shall notify the Employer as soon as possible of such interview. If requested by the employee, the Employer shall reschedule the employee to a different shift on the same day to enable the interview to be held without loss of pay.

7/7/2 (PSS) If the Employer conducts interviews related to the transfer procedure and the interview is conducted in the employee's assigned headquarters city, necessary and reasonable time for such interview shall be without loss of pay.

7/7/3 If the Employer conducts an on site interview related to the transfer procedure and the interview is conducted outside the employee's assigned headquarters city, the employee will be granted up to two (2) hours without loss of pay to participate in the interview. The Employer will grant one such payment per calendar year. Employees in positions classified as Correctional Officer or Correctional Sergeant at either the Department of Corrections or the Department of Health and Family Services shall be eligible for transfer between the two agencies consistent with Article VII, Section 3, of the Master Agreement and such transfers are subject to any training requirements imposed by DOC or DHFS. [Historical Note: This language was moved from old Negotiating Note 31, which was deleted].

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ARTICLE XV

GENERAL

. . .

SECTION 3: Definition of Probationary Employee

15/3/1 The term "probationary employee" as used in this Agreement relates to all employees serving on a probationary period as defined below. All original

> and all promotional appointments to permanent, seasonal and seasonal positions in the classified service shall be for a probationary period of six (6) months except as specifically provided in s. 230.28, Wis. Stats., and Wisconsin Administrative Code ER MRS 13, in the cases of trainees, intern classes, reinstatement, transfer, and demotion, or where longer probationary periods are authorized.
>
> The inclusion of this section in the Agreement is for information purposes only and does not constitute bargaining with respect to the subject matter of this section. Further, any amendment to the aforementioned law or rule governing probationary periods will require an immediate amendment to this section.
>
> . . .

Article VII, Subsection 7/5/4 was first adopted by the parties to the agreement in the negotiations leading to the May 13, 2006 – June 30, 2007 collective bargaining agreement. This occurred shortly prior to the facts in this dispute.

7. Complainant was not active in Respondent-Union. A few years prior to 2004, Respondent-Union allegedly asked employees to concertedly call in sick for one specific day (herein "blue flu" or "sick-out"). Complainant participated in that action. In about 2004, Respondent-Union allegedly again asked employees to do the same for another specific day. Respondent-Employer maintained a notebook in each cottage for employees to communicate with each other and management. Complainant wrote a statement in that notebook referring to that potential action and stating his opposition thereto. Complainant did not participate in the 2004 concerted action. No other employees at Ethan Allen did either. Complainant received calls shortly after he made that notation from fellow employees investigating what he had written. He perceived these as threatening. This incident was a topic of discussion for about a month after it occurred among employees of Ethan Allen. However, it was never mentioned again after that time by anyone and was not something any representative of the Union actively recalled at the time of the events disputed herein.

8. Carl LaGalbo was employed by Respondent-Employer on May 18, 1981 and continuously employed by Respondent-Employer until his retirement on July 23, 2006. At the time of his retirement he had been employed as a Youth Counselor at Ethan Allen and had been there many years.

9. LaGalbo was active in the Union and was known by the people acting on behalf of Respondent-Union specified in Findings of Fact 16, 17 and 18, below, as a delegate for Respondent-Union until he retired. At the relevant times, Pam LaGalbo, his wife, held the office of Union Delegate in Respondent-Union and her activity was known at all relevant times to the same people.

10. Respondent-Employer re-hired LaGalbo to a position of Youth Counselor at Ethan Allen on September 17, 2007, after he successfully competed for it in the State civil service competitive process. He was assigned to a vacant position on second shift as a Utility Youth Counselor in which he was not assigned to a specific cottage but filled in for other Youth Counselors who were absent. Respondent-Employer treated him as if he was also reinstated pursuant to law. He remained in this position until the facts leading to this dispute. Respondent-Employer determined that since LaGalbo had retired from a position in the same classification and had returned to a position in the same employing unit within five years of his retirement, he would not be required to serve a probationary period within the meaning of Section 230.28, Stats., or Article XV, Section 3 of the collective bargaining agreement. This decision was made before the facts of this dispute and not based at all on any attempt to provide any preference to LaGalbo. This is the first time known to Respondent-Employer and Respondent-Union that an employee who retired from state service was re-hired into a regular, permanent position. In the past, retired employees had only sought temporary positions.

11. On August 15, 2007, Respondent-Employer posted a vacancy pursuant to the collective bargaining agreement for a Youth Counselor in the Vilas Cottage at Ethan Allen, first shift. Respondent-Employer rescinded the posting on August 15, 2007, solely out of respect for the then terminally ill occupant of the position. Complainant was not eligible to sign that posting and did not do so. He was prohibited from doing so by the collective bargaining agreement because he had transferred to another position less than six months before. Until the position was filled, Complainant was working in the position on a temporary assignment.

12. On October 26, 2007, Respondent-Employer reposted the vacancy referred to in the prior Finding of Fact. The posting required that interested employees make their interest known by November 1, 2007. Complainant duly applied for the position on October 26, 2007 by e-mail to Scheduling Supervisor Robert Gauthier, a non-unit supervisor. LeGalbo also applied for the position on October 27, 2007, by contacting non-unit Supervisor James Hackett or non-unit Supervisor Julie Hanson, and signing a letter requesting appointment to the disputed position on that date and having it counter-signed by that supervisor on that date. The letter was not forwarded to Gauthier until after November 2, 2007. Gauthier made the decision to fill the position. He offered the position to Complainant on November 2, 2007, prior to receiving the letter, based upon his belief that Complainant was the most senior applicant. Shortly thereafter, LeGalbo complained to Superintendent Davidson that he was the most senior employee and had applied for the position. On November 6, 2007, Superintendent Davidson phoned Gauthier and directed that he rescind Complainant's appointment to the disputed position because LeGalbo was more senior and had applied. On November 6, 2007, Gauthier then rescinded the offer of the position to Complainant. Davidson forwarded LeGalbo's letter to Gauthier who determined that LeGalbo had duly applied for the position and was entitled to the position based upon his seniority. LeGalbo was the most senior person who applied based upon his length service from before his retirement plus his service after his re-hire. If his prior service were not considered, he would have been less senior to Complainant. Respondents did not then consider the potential that Section 5, Subsection 7/5/4

might disqualify LeGalbo from applying for this provision. No one on behalf of Respondent-Union ever contacted Gauthier about this appointment before Gauthier made the final decision to select LeGalbo.

13. Don Woodley was a Youth Counselor employed by Respondent at Ethan Allen and a Steward for Respondent-Union, at all relevant times. Woodley had served on Respondent-Union's executive board for twelve years which service had ended a few years before this dispute. Under Respondent-Union's policy an employee may choose the specific Steward he or she wishes to have process his or her grievance. Complainant chose to have Woodley process his grievance. Woodley provided advice to Complainant at all stages of the grievance procedure. He vigorously supported Complainant's interpretation of Article 7, Subsection 7/5/4 both internally within Respondent-Union and to Respondent-Employer at all material times. He pursued the pre-filing grievance procedure in Article IV, Section 2. He then filed the grievance which is the subject of this dispute on November 28, 2007. The grievance provided in relevant part:

> Carl put in for a posting under Article 7 for Vilas cottage, Federal key #5, 1st shift. On Friday, 11-2-07, Mr. Gauthier offered the post to Carl. Carl accepted the post that day. On Tuesday, 11-6-07, Carl called Mr. Gauthier for an unrelated matter and Mr. Gauthier then told Carl that he was rescinding the previous offer that Carl had accepted on 11-2-07. The reason stated was that another employee, who had recently reinstated to the SPS bargaining unit and had been placed into a vacancy on 2nd shift that had cleared all provisions of Article 7, had also posted for the same position that Carl had posted for. Management had misplaced the paper. The reinstated employee was then offered and accepted the position ahead of Carl.
>
> Carl believes that the contract is clear regarding the reinstatement rights of an employee. 7/5/4 clearly states: ***In the event that the vacancy is not filled by transfer of an employee under the provisions of 7/1/1 or 7/1/3 of this Article,*** (This is where Carl as a full time permanent employee of the State of Wisconsin should have been offered) ***and the employer is considering individuals from outside the SPS bargaining unit*** (the eventual reinstated employee that got the post) ***for voluntary demotion, transfer or reinstatement to the Youth Counselor classification*** (again the YC that reinstated) ***those individuals selected shall be placed into vacancies which have cleared the transfer provisions of Article 7*** (The post had NOT cleared the provisions of Article 7) ***and shall not have transfer rights to positions under the provisions of Article 7 for a period of 6 months from their date of entry/re-entry into the SPS bargaining unit.*** (This employee has been back for less than 6 months). Furthermore, 7/6/1 clearly states: ***It is expressly understood that transfer rights under 7/1/1 supersede restoration or reinstatement rights under Article VIII***

How this management can sit on a Pre-file grievance for the entire 21 days and then come up with the same answer they have been saying all along is beyond me. Was it truly investigated or decided after a pow-wow?

We have not heard too many "rumors" about the discussions between Local 15/Council 24 and management about this particular grievance over the past 3 weeks. It now appears that you have all come to a consensus. We will continue to follow the proper channels in an attempt to resolve this issue. Carl is NOT going away.

There is a bigger issue here than just Carl and Paul. With the new language in 7/5/4 and the very real possibility of more demotions, transfers and re-instatements, we must come up with a precedent. We thought the language was clear. It appears that this management would rather fight every grievance in the future related to this issue. I guarantee there will be more if the language is not changed. If there is an intent statement related to the interpretation of this Article somewhere, can we see it? Or is it top secret?

14. In response to the dispute framed by the pre-filing grievance filed herein, Respondent-Employer consulted with Respondent-Union at the District Council 24, AFSCME, level as to the applicability of Article VII, Subsection 7/5/4. Respondent-Union took the position that it did not apply to this dispute. The Employer relied thereon and at all times thereafter maintained the position that Article VII, Subsection 7/5/4 did not prohibit LeGalbo from applying for the disputed position.

15. The grievance referred to in Finding of Fact 13 was processed through all of the steps of the applicable grievance procedure but was not processed to arbitration solely because Respondent-Union declined to do so and Mr. Pontillo lacked the authority to do so.[2]

16. Julie Peters was the President of the Local affiliated with Respondent-Union and a representative of Respondent-Union at all material times. When Respondent-Employer rehired LeGalbo, she contacted Respondent-Employer's Human Resources Department at LeGalbo's request to determine if he would be required to serve a probationary period. She never had a discussion concerning any matter relating to the subjects in dispute with Kyle Davidson the Superintendent of Ethan Allen. After the grievance was filed herein, but before it was processed to the second step, she talked to Jana Weaver (identified in Finding of Fact 17) to inquire as to the correct meaning of the disputed collective bargaining agreement provisions. As a result of those conversations, Peters honestly believed that LeGalbo was the person entitled to the position in dispute. None of her actions were motivated by favoritism for LeGalbo as a result of his activities on behalf of Respondent-Union or hostility to Complainant on any basis.

[2] See the stipulation at Tr. p. 8.

17. Martin Biel is the Executive Director and CEO of Respondent-Union. He actively participated in the negotiation of all relevant collective bargaining agreements. Jana Weaver is the Assistant Director of Respondent-Union. Weaver makes the day-to-day decisions as to whether to arbitrate grievances filed by Respondent-Union. Potential Grievants who are dissatisfied with Weaver's decisions are permitted to formally appeal her determinations to Biel whose determination is final for Respondent-Union. Either shortly before or after the second step meeting concerning the disputed grievance, she had discussions about the grievance with Peters concerning the applicability of the disputed provisions to the specific facts of this situation. She made an inquiry of Biel and others who participated in the negotiation of Section 7/5/4 of the agreement on behalf of Respondent-Union. All of them told her that it was intended to prevent supervisors from being able to return to a bargaining unit to take highly desirable positions and that it was not intended to apply to the situation in dispute herein. Solely acting in that belief as to the meaning of Section 7/5/4 she told Peters that the grievance is without merit and stated that Respondent-Union would not arbitrate the grievance specified in Finding of Fact 13. She first talked to Superintendent Davidson about this grievance in the latter stages of the grievance procedure. She told him that Respondent-Union had made the decision to not actually arbitrate the grievance specified in Finding of Fact 13. She decided that the grievance would not be arbitrated. She had a discussion with Woodley in which she told him that Respondent-Union would not arbitrate the grievance. Her actions were solely based upon her interpretation of the collective bargaining agreement and were not motivated at all by LeGalbo's activities on behalf of Respondent-Union or any hostility to Complainant for any reason.

18. On July 7, 2008, Complainant filed an appeal to Biel of Respondent-Union's decision to not process the grievance specified in Finding of Fact 13. Biel denied that appeal and affirmed Weaver's decision to not arbitrate that grievance. His actions were solely based upon his interpretation of the collective bargaining agreement and were not motivated at all by LeGalbo's activities on behalf of Respondent-Union or any hostility to Complainant for any reason.

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

CONCLUSIONS OF LAW

1. Respondent-Union is a "labor organization" within the meaning of Sec. 111.81(12), Stats.

2. Respondent-Employer is an "employer" within the meaning of Sec. 111.81(8), Stats.

3. Complainant is an employee within the meaning of Sec. 111.81(7), Stats.

4. Respondent-Employer did not discriminate against Complainant on the basis of his activities protected under Sec. 111.82, Stats, by refusing to place him in the disputed

position or approve his grievance specified in Finding of Fact 13 above, in violation of Section 111.84(1)(a), c), Stats.

5. Respondent-Union did not coerce or intimidate either Respondent-Employer or Complainant with respect to the circumstances underlying his grievance specified in Finding of Fact 13 in violation of Sec. 111.84(2)(a), (b), Stats.

6. Respondent-Union did not violate its duty to fairly represent Complainant with respect to the grievance specified in Finding of Fact 13 or in refusing to arbitrate the same.

7. Given the Conclusion of Law 4, above, the Wisconsin Employment Relations Commission will not exercise its jurisdiction pursuant to Sec. 111.84(1)(e), to determine the merits of the grievance specified in Finding of Fact 13.

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

ORDER

The Complaint filed herein is dismissed.

Dated at Madison, Wisconsin, this 12th day of May, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stanley H. Michelstetter II /s/
Stanley H. Michelstetter II, Examiner

PONTILLO V. STATE OF WISCONSIN (DEPARTMENT OF CORRECTIONS), ET AL.

MEMORANDUM ACCOMPANYING ORDER DENYING MOTION TO DISMISS

Complainant filed a bid under the parties' collective bargaining agreements' bidding procedure for assignment to another cottage. His bid was accepted but the offer was rescinded when another employee who had un-retired sought the job using his seniority from before he retired. The Employer selected the other employee. Complainant believed that the other employee was prohibited from bidding by another contract provision and that the other employee's seniority from prior to retiring should not count. He filed a grievance but was prevented from going to arbitration because both Respondents agreed that his grievance was without merit. Complainant filed the complaint herein alleging that Respondent-Union violated its duty of fair representation in refusing to arbitrate and that the Respondent-Employer had violated the collective bargaining agreement. The hearing was divided into two parts. The first part was a hearing to determine if Respondent-Union violated its duty of fair representation. This decision is in response to the record and arguments as to that part of the hearing.

POSITIONS OF THE PARTIES

COMPLAINANT

Argument at Hearing and By Brief

Respondent-Union violated its duty of fair representation when it refused to process the disputed grievance to arbitration. Section 7/5/4 of the agreement is clear and disqualified LaGalbo from applying for the disputed position at the time I applied. The Employer provided a false answer to my grievance. Superintendent Davidson did not base his actions on the agreement, but on the basis of favoring union activist LeGalbo as a way to curry favor with Respondent-Union.

Respondent-Union became an arm of Respondent-Employer when it offered two different reasons for denying my grievance. Respondent-Union has argued that Section 7/5/4 does not apply to this situation, but it has offered no proof that it does not. If this was such a grey area, then the grievance should have been arbitrated anyway. That is what arbitration is for. Respondent-Union intimidated me when they did the following:

1. Told me there was another internal appeal to Martin Biel after they had already agreed with the Employer that Section 7/5/4 did not apply;

2. They left me out in the cold when they did not explain their reasoning to the Union steward who was representing me.

3. They provided a copy of their denial letter to LeGalbo's wife;

Respondent-Union violated its constitution when it did not vigorously represent me. They did not vigorously represent me because I was not active in Respondent-Union and had opposed a "Blue Flu" incident. They favored LeGalbo because LeGalbo and his wife were active in Respondent-Union. Respondent-Union interpreted the agreement in conflicting ways in other situations. Respondent-Union has failed to produce any documentary evidence that the disputed provision was only intended to block supervisors from "cherry-picking" unit positions to bump back into.

Finally, Respondent-Union tried to blame language from legislators for the refusal to arbitrate, knowing that the law allows them to interpret their own version of what the legislators are saying by way of notes, if language isn't clear. But they never did clear up the possibility of as to whether there was another meaning for the disputed language, not even in the new and current contract. I ask the Commission to find that my grievance is valid, award me the position, and order Respondent-Union to pay me back any lawyer fees.

Argument by Brief

RESPONDENT-UNION

Oral Argument and Brief

The evidence demonstrates that the situation involved in this case was highly unusual. It is rare, if ever, that a state retiree has returned to full-time employment in this unit. Article VII, Subsection 7/5/4 was never intended to apply to this situation. The purpose the provision was to prevent non-unit managers and supervisors from "cherry-picking" unit jobs upon voluntary demotion from their positions. While Mr. Pontillo alleges that the language is clear the evidence establishes otherwise. In any event, neither party to the agreement agrees with Mr. Pontillo's interpretation.

When this unusual situation occurred, it was Pontillo's union who represented him. Indeed, he indicated great satisfaction with Parrett's bargaining and with Woodley's representation of him in the grievance procedure. Despite the fact that both people vying for this job were members of Respondent-Union, when it came to Julie Peters she credibly testified that she wanted to do the right thing. Her actions were not related to the level of union activity, but to simply doing the right thing. She called Human Resources to determine if LeGalbo was eligible for the position in dispute.

The decision to assign Mr. LeGalbo to the disputed position was made by the Employer and not by Respondent-Union. Mr. Gauthier is not part of the bargaining unit. He testified that when he received LeGalbo's application late, he concluded that it had been timely submitted but misdirected. He made the decision and not Respondent-Union. He testified that he received no pressure from Respondent-Union concerning that application. Complainant produced no credible evidence of his allegation that the Respondents conspired together.

Local Union President Julie Peters made a good faith effort to determine the meaning of the disputed provisions. When the issue came to Jana Weaver, she did the same thing. She diligently checked with those people who were involved in the bargaining as to the meaning and reason for the disputed contract provision. In making her decision on behalf of Respondent-Union to not pursue Mr. Pontillo's case to arbitration, she spoke with those "who actually bargained" the provisions in dispute. While Mr. Pontillo asserts there should be some other evidence in support of that position such as bargaining notes, etc. there is no such evidence in existence. Contrary to Mr. Pontillo's position, this does not mean that Ms. Weaver's testimony is incredible. Marty Biel also drew the same conclusions when Mr. Pontillo appealed to him to pursue his grievance.

Pontillo has failed to demonstrate that Respondent-Union's actions were anything but an honest difference as to the meaning of the disputed provision. The "blue flu" incident occurred in 2004. Unit employee Mark Biefeld testified that talk of Complainant's having made a notation about it which could be seen by management died out in 2004. Julie Peters and Jana Weaver testified that they do not remember being upset with complainant about that incident at the times relating to this grievance. Respondent-Union asks that the case be dismissed.

RESPONDENT-EMPLOYER

Respondent-Employer agreed with Respondent-Union and offered no additional argument.

DISCUSSION

The Commission's law governing complaints of this nature is of long standing. It applies the doctrine elucidated by the Supreme Court in VACA V. SIPES, 386 U.S 171 (1967) and followed by the Wisconsin courts. See, for example, MAHNKE V. WERC, 66 Wis.2D 524, 529-30 (1975). Under its policy, the Commission declines to assert its jurisdiction over allegations of a violation of collective bargaining agreement pursued by individual employees where the parties to a collective bargaining agreement have provided an exclusive grievance and arbitration procedure for resolving disputes concerning violation of a collective bargaining agreement unless the employee can show by a clear and satisfactory preponderance of the evidence that he or she pursued the grievance as far as he or she could in the grievance procedure, that he or she was prevented from pursuing the grievance at the next step in the procedure or going to arbitration thereunder by virtue of his or her union's exclusive control of access to that step or arbitration, and that the union breached its duty of fair representation by arbitrarily, discriminatorily, or in bad faith refusing to proceed to the next step or arbitration over the grievance. For the most recent decisions, see, for example, MILWAUKEE PUBLIC SCHOOLS, WERC DEC. NO. 13602-C (WERC, 1/07); FLORENCE COUNTY, WERC DEC. NO. 32435-C, note 1, (WERC, 1/10)

LeGalbo returned to full-time state service after having retired only a year and one-half earlier. It is possible, but by no means sure, that LeGalbo returned because he wanted the plum assignment in Vilas Cottage which is in dispute herein. LeGalbo's total service including that before he retired was more than Complainant's and, therefore, under the collective bargaining agreement, absent the provision in dispute, he was entitled to that position. In essence, Complainant understandably views this as unfair.

Complainant's testimony was that he believed that Respondent-Employer and Respondent-Union worked together to deprive him of the coveted disputed position. He testified to the effect as follows. LeGalbo was active in Respondent-Union until he retired. LeGalbo's wife was a Union Delegate at the time of this dispute. Complainant had never been active in Respondent-Union. Complainant had in 2004 written about his opposition to a one-day sick-out job action by Respondent-Union in a place in which management could see the writing. This infuriated active union members for two reasons. First, it alerted management to the concerted activity instead of keeping it confidential. Second, he opposed the job action. In August, 2007, it was well known that the current occupant of this position was terminally ill and would never return from leave to that position. Complainant was temporarily assigned to that position. Every one knew that he wanted this position. It is a position which appears to be one of the more desirable positions. Complainant ran into LeGalbo in August, 2007, and the two talked casually. This was well before the position in dispute was posted the first time and around the time LeGalbo was or had interviewed for a position to return to full-time service. LeGalbo was then retired. LeGalbo told him that he was coming back to work and that Respondent-Union had "really gone to bat for him." He indicated he suspected that LeGalbo was coming back because the disputed, desirable position was going to be available and LeGalbo was going to try to get it. As the facts of this dispute began to occur, Complainant inferred that Superintendent Davidson was trying to establish a better rapport with Respondent-Union and that the actions which occurred concerning not placing LaGalbo on probation when he was initially hired and rescinding the initial posting for this position were really taken for the purpose of insuring that LaGalbo would get this position. When Complainant learned of the existence of Subsection 7/5/4 he felt that it was so clear that it could only be interpreted to preclude LeGalbo's applying for the position and that the only explanation for Respondent-Union's actions was that Respondent-Union arbitrarily ignored it to favor LeGalbo. The reasons that Complainant ascribes to Respondents' conduct are not supported by the facts.

Conclusions

1. Exhaustion of Grievance Procedure

The parties stipulated to the fact that Complainant filed his grievance and that Respondent-Union at least allowed the grievance to go through all of the steps of the grievance procedure to the arbitration stage. It decided, however, that it would not seek arbitration of

Complainant's grievance. Complainant was prevented from seeking arbitration by the actions of Respondent-Union. Complainant has, therefore, met the first and second tests.[3]

2. Arbitrary or Discriminatory Motivation

There is no allegation in this matter that the contractual right to the disputed position is at all, itself, based upon activity on behalf of Respondent-Union, such as super seniority or a position funded for a union's representative.

Complainant's chief allegation is that Respondent-Union's actions were based upon hostility to his refusal to participate in the circumstances referred to in Finding of Fact 7 and/or its favoritism for LeGalbo because he, alone, was active as a Union Delegate in Respondent-Union.

Respondent-Union's decision to not pursue arbitration was made by Weaver and Biel at the inquiry of Peters after the grievance was filed, but before it reached the last step. I address first whether they had hostility to Complainant based upon his refusal to participate in a proposed one day sick-out in 2004 and his having written his opposition to that in the "green book." Fellow employee Mark Biefeld also testified about the 2004 incident. I find both Weaver and Biefeld to have testified in a straight forward manner and I have placed heavy reliance on their testimony as to what occurred in 2004. That testimony is reflected in Finding of Fact 7 above.[4] In that regard, it appears that Complainant's action in 2004 did engender some hostility from union activists when it occurred for two reasons. First, by memorializing the proposed sick-out in the "green book," Complainant unintentionally created a written record of the conspiratorial nature of a proposed sick-out. This record was available to management. Second, he expressed hostility to the proposed sick out. I note he had participated in a prior episode of a sick-out. Both Peters and Weaver forthrightly admitted that they were probably aware of the incident when it occurred. There is no evidence Biel was ever aware of the incident and in the course of the nature of this event, I conclude it is unlikely he ever would have been aware.

Biefeld credibly testified that not only did Complainant not participate in the proposed sick-out, but no one else in the bargaining unit at Ethan Allen did either. He also credibly testified that all mention of it died out about a month after the "green book" incident occurred. Thereafter, no one in Respondent-Union gave any expression of hostility to Complainant for his actions in 2004. This is consistent with Weaver's forthright testimony that she might have been aware of it at the time, but she gave it no thought during this event. I conclude the 2004 incident was not at all a part of Peters' or Weaver's actions.

There was no direct testimony as to how active LeGalbo and his wife had been as

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[3] The Union actually moved the grievance to the arbitration stage, but the parties all agree that the Union prevented it from actually going to arbitration.

[4] See, Tr. pp. 91-117.

office in Respondent-Union or was particularly active. He did participate in the prior sick-out a few years before 2004. LeGalbo's wife was a Union Delegate in Respondent-Union at the time of this incident and LeGalbo appears to have been a long standing Union Delegate prior to his retirement. There is evidence that information about this grievance was sent to LeGalbo's wife in her capacity as a Union Delegate. I conclude that it is very likely that Peters, Weaver and Biel were aware of both LeGalbo and has wife's history of activity on behalf of Respondent-Union.

Complainant's conspiratorial inferences about what may have occurred to facilitate LeGalbo's return are not supported by the record, the agreement, or the conduct of the parties. Complainant cites a number of incidents as evidence of a "conspiracy" between Respondents and to demonstrate that Respondent-Union's decision was based upon LeGalbo's activities on behalf of Respondent-Union and not on the terms of the agreement.

I deal first with the foundational facts which led to this dispute. Respondent-Employer did three things for LeGalbo which created the foundation for this dispute. First, it re-hired him into a vacant position of the same classification he had held. There is no dispute from any party that the re-hiring was properly conducted by competitive examination. There is a question as to whether the hiring was still a "reinstatement" within the meaning of civil service law.[5] Second, it credited LeGalbo with his prior state service. Third, it did not require him to serve a probationary period.

Respondents agree that LeGalbo was entitled to seniority based upon his prior service upon his competitive rehire. Complainant did not think this should be so, but he admitted that he had never studied the applicable law or contract provisions. Article V, Section 5/1/4 provides that when an employee who leaves state service is rehired within 5 years of terminating service, he receives an adjusted seniority date of his prior state service less the period he was off. This is unusual by comparison to industrial seniority provisions which ordinarily use the last date of hire. Section 230.28, Stats, establishes that an employee who leaves state service is ordinarily entitled to "reinstatement." Respondent-Employer treated LeGalbo as reinstated when he successfully competed for his re-hire position. It is not clear however, whether this was a "reinstatement" within the meaning of the statute because LeGalbo was selected as part of a competitive hiring process. It may be both a re-hiring and reinstatement. That is not clear. The concept of "adjusted continuous service date" is not defined. It may reflect the concept commonly used in state service. The only definition of "continuous service" is in Wis. Admin. Rule Sec. ER 18.02 which grants LeGalbo his prior service for vacation purposes. The Examiner concludes that neither Respondent had discretion to deny LeGalbo his prior service credit.

It is undisputed that had LeGalbo been on probation at the time he returned to state service, he would not have been eligible to post for the disputed position. Article XV,

[5] See, Sec. 238.28, Stats. This is discussed below.

Sec. 15/3/1 incorporates civil service rules on the subject. Under civil service rules,

Sec. 230.28, Stats., and Wis. Admin. Code, Sec. ER-MRS 16.04(1)(c), LeGalbo clearly was not required to serve a probationary period in the position by which he returned to state service.

On the basis of those conclusions, I now turn to part of Complainant's "conspiracy" theory. Complainant cites the fact that Respondent-Union made an inquiry of the Employer as to whether LeGalbo would be required to serve a probationary period upon reinstatement as evidence of favoritism for LeGalbo and conspiracy between Respondents. In the light of the foregoing observations, the actions of Respondent-Union in making inquiries of Davidson and/or others appear to be in the form of a service rather than advocacy. I agree with Complainant that this is some evidence that Respondent-Union assisted LeGalbo in returning to work, but it cannot be sufficient to establish Respondent-Union's motivation to favor LeGalbo for several reasons. First, there is no evidence that similar services would not have been provided to Complainant if he were in the same situation. Second, the existence of an employee returning to full-time permanent work after having retired was a new issue for everyone. No one involved was aware of it having ever occurred before. Both Respondents needed to communicate to understand each other in this unique situation. Third, contrary to Complainant, there is no evidence that Respondent-Union's actions for LeGalbo were at all related to the disputed position. There is no evidence that when LeGalbo sought to return to work from retirement he was aware that the position in dispute was going to be vacated. It was first posted in August, 2007. He was hired in September, 2007, but would have had to make an application well before the position was posted.

Robert Gauthier testified in this proceeding. He was a non-unit supervisory employee. He made the decision to post the position in dispute and the selection of the person to fill it. He credibly testified that no one contacted him on Legalbo's behalf from Respondent-Union or upper management prior to the posting in question.[6] The activities of Respondent-Employer were motivated simply by trying to understand what rights LeGalbo had when he returned to work and not to this position at all.

Respondent-Employer decided to rescind the posting of August 15, 2007, solely because it did not want to post the position during the occupant's terminal illness. Respondent-Employer asserts that Complainant would not have been eligible to apply for the position at that time in any event because he had transferred less than six months earlier. See, agreement subsection 7/5/1B.

It is not necessary to address all of Complainant's other factual allegations attempting to establish the alleged conspiracy or favoritism. I address his strongest allegation. Complainant points to circumstances surrounding the posting for this disputed position which he views as so suspicious as to obviously warrant the conclusion of conspiracy. However, close examination of the circumstances demonstrate that his inferences are incorrect. Although, it was never

[6] Tr. p. 84

raised as an issue at the time of the filing of this grievance, Complainant now effectively

alleges that Respondents conspired to rescind the offer of the disputed position to him and to back-date a bid for LeGalbo for the disputed position. Complainant implies that LeGalbo did not sign his bid for this position and that it was back-dated. In this regard, I credit the testimony of Gauthier on this point.[7] He testified that he did not know whether that was LeGalbo's signature on the bid, but he knew that it was witnessed by a non-unit supervisor on October 27, 2007, and, he, therefore, believed it to have been signed by LeGalbo and dated that day. As Gauthier testified, Complainant's theory of management conspiracy would have had to include the witnessing supervisor. Gauthier had no reason to believe that they would do so. In the context of a corrections facility, I would find it extremely unlikely as well. Accordingly, I am satisfied that LeGalbo signed and dated his bid on October 27, 2007, well within the time allotted for making a bid. The conclusion that it was signed and dated on October 27, 2007, supports Gauthier's conclusion that it was misdirected.

It is undisputed that while Gauthier was unaware of LeGgalbo's bid, he offered the position to Complainant. Superintendent Davidson called Gauthier and directed him to rescind the offer. While Complainant understandably views this as a conspiracy against him, the evidence is woefully insufficient to make that inference. Davidson was never called as a witness and we will never know why he made that call. There is no evidence that anyone on behalf of Respondent-Union asked him to do so. Peters testified to the effect that she had dealt with Respondent-Employer's personnel department and contacted Davidson only late in the grievance processing after Respondent-Union had decided to not arbitrate this grievance. However, even if Respondent-Union did contact Davidson earlier to get LeGalbo's bid processed, it is as possible as not that it did so as a service to LeGalbo to be sure that his legitimate bid for the position had been considered and not necessarily that LeGalbo be selected. Complainant has failed to show that this or any other incident was as nefarious as he has inferred.

I turn now to the decision made by Respondent-Union to not pursue this grievance to arbitration. I conclude that the decision was made solely upon the merits of the grievance and not upon the activities of LeGalbo. Respondent-Union President Peters testified in this proceeding and, as noted above, I find her testimony to be forthright and credible. It appears from her testimony and that of Woodley that there was some strain between the two of them over this issue. Thus, it appears that Woodley never got a full explanation of Respondent-Union's thinking. Indeed, as is not unusual in grievance situations, the thinking of both Respondent-Employer and Respondent-Union, each individually evolved as they worked through the grievance process and their own internal processes trying to understand this situation in the light of their agreements and responsibilities. Peters testified as to repeated conversations she had with management personnel representatives to understand the specific facts of LeGalbo's return to service. Both she and Weaver credibly testified that LeGalbo's return to service from retirement was a unique situation. It was a situation which those who negotiated the disputed provision did not contemplate when they negotiated it. Weaver is

[7] Tr. pp. 59, 68, 69-70

entirely credible when she testified as to her efforts to understand the meaning of the disputed

provision. I conclude that the decision of Respondent-Union to not arbitrate this grievance was solely made upon the history and purpose of the dispute provision and the unusual facts of this situation.

Complainant has failed to show by a clear and satisfactory preponderance of the evidence that any part of Respondent-Union's decision to not pursue his grievance to arbitration was based upon LaGalbo's activities on behalf of Respondent-Union and/or Complainant's lack thereof. Accordingly, the complaint has been dismissed without the need for further hearing on the second phase of these proceedings.

Dated at Madison, Wisconsin, this 12th day of May, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stanley H. Michelstetter II /s/
Stanley H. Michelstetter II, Examiner

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