STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN STATE ATTORNEYS ASSOCIATION, Complainant,

vs.

STATE OF WISCONSIN, DEPARTMENT OF WORKFORCE DEVELOPMENT, Respondent.

Case 827
No. 69539
PP(S)-404

Decision No. 32997-A

Appearances:

Steven C. Zach, Boardman, Suhr, Curry & Field, LLP, Attorneys at Law, Fourth Floor, 1 South Pinckney Street, P.O. Box 927, Madison, Wisconsin 53701-9521 for Complainant.

William H. Ramsey, Chief Legal Counsel, Wisconsin Office of State Employment Relations, 101 East Wilson Street, 4th Floor, P.O. Box 7855, Madison, Wisconsin 53707-7855, for Respondent.

ORDER GRANTING MOTION TO DEFER

On February 3, 2010, Complainant filed a complaint of unfair labor practices, alleging Respondent had violated Secs. 111.84(1)(a), (d) and (e), Stats., by implementing "a memo significantly changing hours and working conditions of WSAA bargaining unit employees in the Unemployment Insurance Division". On February 10, 2010, Complainant filed a request for hearing within the forty day period set by Sec. 111.07(2)(a), Stats., made applicable by Sec. 111.84(4), Stats. On February 11, 2010, the Commission informally assigned Richard B. McLaughlin, a member of its staff, to serve as examiner. On February 23, 2010, Respondent filed a motion (the Motion), "to hold the Complaint in abeyance pending resolution of the parties' mutually agreed upon method for resolving disputes over the interpretation of their CBA." On March 4, 2010, I conducted a teleconference with the parties to discuss the processing of the complaint. The parties reached agreement that I should address the Motion prior to hearing and, if I denied the Motion, promptly schedule hearing. The parties agreed to the submission of letter briefs, the last of which was filed on March 8, 2010. On March 12, 2010, the Commission issued an Order formally appointing me Examiner.

ORDER

The processing of the complaint is held in abeyance pending completion of the ongoing grievance arbitration proceeding.

Dated at the City of Madison, Wisconsin, this 18th day of March, 2010

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Richard B. McLaughlin /s/
Richard B. McLaughlin, Examiner

STATE OF WISCONSIN, DEPARTMENT OF WORKFORCE DEVELOPMENT

MEMORANDUM ACCOMPANYING ORDER GRANTING MOTION TO DEFER

BACKGROUND

Daniel LaRocque, the Director of the Bureau of Legal Affairs, issued the memo referred to in the complaint (the Memo) to "UI Administrative Law Judges". The Memo, attached to the complaint as Exhibit A is dated November 23, 2009, states:

> As you know, the number of UI benefit appeals has increased dramatically in recent months. The ongoing volume of regular UI and federal extended benefit claims and adjudications makes it clear that this high level of appeals will be with us for some time to come. The UI Division has recently increased its adjudication staff, which will yield substantial increases in determinations and appeals.
>
> Both in response to the growth of appeals volume over the last six months and in anticipation of further increases in the next year, the department has increased the capacity to hear UI appeals . . . Also, as of Week 44 we increased the weekly assignment of hearing hours to 24 hours. . . .
>
> After consulting with the Senior ALJs and many of you, I have received authorization from the Division Administrator to:
>
> 1. Increase assignments to ALJs working full-time to 26 hours per week. Part-time ALJs (those in 0.5 FTE positions) not currently volunteering to work full-time will be assigned a proportionate increase, to at least 13 hours per week.
>
> 2. Spread hearing schedules more evenly over the work week. In each hearing office, hearings will be scheduled each day of the week, Monday through Friday, both mornings and afternoons, rather than concentrated heavily on Monday and Tuesday. Hearings will be scheduled with buffers in between hearings, which will afford writing time immediately after each hearing (except where cases are concentrated in larger numbers for hearing on a particular day, as typically occurs at outstation hearing locations).
>
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in larger numbers for hearing on a particular day, as typically occurs at outstation hearing locations). . . .

We recognize that most ALJs have not been accustomed to the level of assigned work announced here or the new pattern of scheduling. The response to these new circumstances may vary somewhat from one individual to another. We will seek to accommodate legitimate individual needs in adjusting to the workload assignment and scheduling pattern. Also, where appropriate under department policies and consistent with business operational and customer needs, we will carefully consider requests for alternative work schedules (see discussion of Hours below). Similarly, we will try to accommodate individual preferences regarding Officer of the Day and other assignments where consistent with business needs. . . .

Hours

ALJs will work from 7:45 a.m. to 4:30 p.m. daily unless an alternative work schedule has been approved by the Senior ALJ. In general, it is expected that an ALJ will work a full day when there is work to be done. Exceptions to an approved schedule may be granted by the Senior ALJ on a case-by-case basis.

ALJs will notify the Senior ALJ as much as possible in advance of their leave requests and other absences from the office. In this context, "absence from the office" includes all types of absence during scheduled hours, including Professional Time Used, Professional Development Time Used, Vacation, Personal Holiday, Sick Leave, compensatory time off, etc.

Issuance of decisions

It is expected that ALJs will complete ATDs in benefit appeals as soon as possible but in any event by the second business day following the hearing, unless exceptional circumstances exist and the Senior ALJ is informed of such circumstances as soon as possible and not later than the second business day following the hearing. Where cases are concentrated in larger numbers, exceptions will be provided ad hoc but in any event the decision will be expected to be issued by the end of the week in which the hearing is held.

In general, ATDs in tax appeals are expected to be completed within 45 days of hearing or, where adequate writing time for that decision has been afforded, sooner.

> An ATD is completed when it has been fully typed or dictated and submitted sufficiently in advance of the close of business to allow for staff final typing, handling and mailing. Exceptions (e.g., complex or lengthy hearings or ALJ is informed that parties intend a post-hearing submission) will be granted by the Senior ALJ case-by-case. . . .

Ken Duren, Complainant's President, responded to the Memo in a letter, dated December 16, 2009, to Jennifer Donnelly, the Director of the Office of State Employment Relations. His letter, attached to the complaint as Exhibit B, states:

. . .

> The memo unilaterally promulgates several substantial changes to the hours and working conditions of Unemployment Insurance Administrative Law Judges (UI ALJ's). As such, the proposed changes, which are to be implemented the week of January 4, 2010, are a mandatory subject of bargaining between the State of Wisconsin and the WSAA regarding the decision to implement and/or the effects of such implementation.
>
> As a result, I am requesting that the State of Wisconsin:
>
> 1.) cease implementation of the proposed changes;
> 2.) immediately schedule a bargaining session on the proposed changes at a mutually convenient place and time. . . .

Complainant filed a grievance, dated December 22, 2009, which is attached to the Motion as Exhibit A. The grievance form alleges violations of Article VII, Sections 2 and 4 and describes the grievance thus:

> (The Memo) . . . unilaterally imposed substantial changes to the hours and working conditions of UI ALJs. The memo increases caseload and abbreviates the time for issuing Appeal Tribunal Decisions (ATDs) without additional compensation. The proposed changes are in conflict with caseloads established and agreed to between the UI ALJs and the employer, DWD, over the last two decades. The caseloads established by the memo are arbitrary and capricious. In addition, the memo is being used to void existing alternative work patterns, some of which have been in effect for 30 years. Finally, it is the position of the UI ALJs and the WSAA that this memo dictates issues regarding work patterns that are a mandatory subject of bargaining under the WSAA contract.
>
> The relief sought is to cease the implementation of the November 23, 2009, memo planned for January 4, 2010, immediately. Continue current conditions of employment including the caseload, time for issuing ATDs and alternative

> work patterns/flexible scheduling. In the alternative, we demand a 30% increase in the compensation reflecting the 30% increase in caseload since 2008.

Respondent denied the grievance. There is no dispute that it is currently being processed through the steps of the contractual grievance procedure.

Attached to the Motion as Appendix B are excerpted portions of the parties' labor agreement, including the following provisions of Article VII, which is entitled "Hours of Work":

> **Section 2 Hours of Work**
>
> **7/2/1** Hours of work are defined as those hours of the day, days of the week for which the employees are required to fulfill the responsibilities of their professional positions.
>
> . . .
>
> **Section 4 Alternative Work Patterns**
>
> **7/4/1** The State of Wisconsin as an Employer recognizes the value and benefits of alternative work patterns to the employee as set forth in s. 230.215, Wis. Stats. The Employer agrees to implement the statutes consistent with past practices of the particular employing units.

The excerpts include Article IV, which is entitled "Grievance Procedure" and which provides for final and binding grievance arbitration.

Included in the attachments to the complaint as Exhibit B is a copy of an e-mail from Duren to Donnelly, dated January 11, 2010, which states:

> . . .
>
> The WSAA stands ready to "sit at the table" and discuss the workload and work conditions of our members at DWD-UI - Hearings, in a good-faith effort to achieve a rational solution to the caseload problem at that agency. Such a resolution of a similar problem was achieved in 1993 by an extra-contract agreement. I would be remiss if I did not take this opportunity to remind you of that willingness. While WSAA has filed a grievance on the changes implemented by DWD management, we of course are allowed to do so by statute, and must do so to preserve our rights. The exercise of this right does not, in and of itself, preclude discussion or bargaining of the items described in our letter of December 18, 2009. . . .

Attached to the complaint as Exhibit C is a copy of a letter, dated January 13, 2010, from Roberta Gassman, the Secretary of DWD, to Duren, which states:

. . .

> The Volume of UI benefit appeals' is a matter of serious concern to both the department and the Association. UI Division staff have actively explored opportunities to expand our UI appeals capacity that go beyond those announced in the memo. We are evaluating all of the options. For example, we intend to significantly diminish the time expended on travel to outstations. While the outstations afford a service that is convenient to some of our customers, the travel consumes about 2,000 hours annually that can be utilized to more timely serve all customers. Also, we have begun to advance certain hearings on a faster track, conducting *ad hoc* one-party phone hearings . . .
>
> We are also seeking to implement changes that will soften the impact on ALJs of the increasing workload. Examples which have been discussed with UI ALJs:
>
> - Assign ALJs "specialized" categories of more complex issues.
> - Script the introduction to the hearing process for parties to read immediately before the hearing.
> - Automate out-bound telephone system for recording the hearing and relieve ALJs and support staff of handling recording devices.
>
> Again, we welcome your comments on all ideas for change and your suggested improvements in our appeals processes.
>
> Spreading the hearings across five days per week affords the maximum ability to serve our high volume of customers. A buffer between hearings allows us to fully and efficiency utilize our facilities and staff and better assures that hearings do not conflict with each other. Time between hearings will counter the stress of back-to-back hearings and is available for reflection and decision making. With more time between hearings, decisions need not be concentrated later in the week. The memo allowed for exceptions to the two-day expectation.
>
> The 26 hours of hearings scheduled per week equates to 23.6 scheduled hearings in each full week of work by an ALJ, on average (at 66 scheduled minutes per hearing, on average). That is before accounting for withdrawals and no-shows. Our studies show that less than 60% of the time assigned for a UI benefit hearing is used in hearing the case, when we account for withdrawals, no-shows and abbreviated hearings. While review of a file in advance of a hearing and incidental tasks consume some time, we believe that ample time remains for decision writing. Assigning work over five days in this volume is a reasonable

> expectation for professionals serving the public, especially during this time of extraordinary challenges to the unemployment program.
>
> The 26-hour per week assignments will likely compel ALJs to increase work hours. The high appeals volume in 2009 follows a period of several years during which we did not assign more than 20 hours (about 18.2 hearings) per week and maximized flexibility in the arrangement of hearing schedules to ALJ preferences. That is not a policy we can continue with the current workload. Dealing with that workload will be a continuing focus of this Department and the UI Division. . . .

The Parties' Positions

In its Motion, Respondent asserts that Commission "policy of deferring the litigation of ULP's where a grievance on the same subject matter has been filed 'harmonizes the objectives of administrative determination of unfair labor practices with the equally important legislative objective to encourage parties to utilize their mutually agreed upon forum for the resolution of contractual questions"; citing STATE OF WISCONSIN, DEC. NO. 19057 (WERC, 1/78) and STATE OF WISCONSIN, DEC. NO. 31384-B (WERC, 11/05). More specifically, Respondent argues that established Commission case law calls for deferral where three conditions are met. Noting that the facts are "undisputed" and that "(a)ll three criteria are met in this case," Respondent concludes that the Commission should "grant its motion to hold the Complaint in abeyance pending resolution of the parties' mutually agreed upon method for resolving disputes over the interpretation of their CBA."

In response to the Motion, Complainant acknowledges that the "Commission has set forth (three) criteria in deciding whether it is appropriate to exercise its jurisdiction"; citing BROWN COUNTY, DEC. NO. 30614-A (McGilligan, 12/03). Application of those criteria will not, however, make deferral appropriate. Complainant contends that the "Commission has generally deferred to the arbitration process in unfair practice claims asserting contractual violations (under MERA Sec. 111.70(3)(a)(5) or SELRA Sec. 111.84(1)(e))." Concerning refusal to bargain allegations, however, Complainant contends that Commission case law permits deferral "only where there is a high probability that grievance arbitration would fully resolve" the alleged bargaining violation as well as the alleged violation of contract; citing CADOTT SCHOOL DISTRICT, DEC. NO. 27775-B (Schiavoni, 01/94). Similar cases recognize the need to reserve to the Commission the ultimate determination of alleged violations of law.

The Memo unilaterally changed hours and conditions of employment, including an increase in scheduled hearing hours as well as an increase in the number of days on which hearing is scheduled. The labor agreement addresses each area of change, at Article VII, Sections 2 and 4. The grievance questions Respondent violation of "long-standing practices" and "effectively abrogates past practices in the employing unit with respect to alternative work patterns." Complainant also questions the impact of the unilateral changes on the wage

schedule. Respondent has denied any contract violation, asserting "its actions are within its management rights to invoke."

Along with the grievance, Complainant has unsuccessfully sought to bargain the changes and their impact. Deferral "is not appropriate" because Complainant "seeks enforcement of the State's statutory obligation to bargain with respect to mandatory subjects of bargaining." The grievance "may cure the underlying contract violation" but "that process will not address the fundamental issue of the unfair practice charge; namely, that when the State seeks to impact mandatory subjects of bargaining, it is required to negotiate". Even though the contractual and statutory claims arise from the same set of facts, they seek different results. Complainant concludes "WERC precedent recognizes and permits this concurrent jurisdiction distinguished by contractual versus statutory rights and remedies."

In response, Respondent urges that none of the Complainant's precedent addresses facts applicable here. Beyond this, "Complainant confuses the issue of whether an item is a mandatory subject of bargaining with . . . whether the State has a *duty* to bargain the changes it implemented"; citing STATE OF WISCONSIN, DEC. NO. 23161-C (WERC, 9/87). The labor agreement contains provisions covering "Management Rights" and "Obligation to Bargain" and it follows that the "issue of whether the contract has been violated is squarely and properly before the arbitrator the parties have agreed should resolve contractual disputes." If the unilateral changes violate the labor agreement, the arbitrator will remedy them. If not, Respondent has acted within its rights. The Motion should be granted.

DISCUSSION

The complaint alleges Respondent violations of Secs. 111.84(1)(a)(d) and (e), Stats. The Motion addresses the relationship of Secs. 111.84(1)(d) and (e), Stats. The parties' arguments highlight that Subsection (a) poses no independent issue. Rather, it is a derivative issue from Subsections (d) and (e).

Subsection (e) grants the Commission authority to interpret the labor agreement which is essentially concurrent with the arbitrator's authority under Article IV of the collective bargaining agreement. Complainant does not seek an independent review of the labor agreement under Subsection (e), and thus the Motion poses no issue regarding the interpretation of the labor agreement. This is appropriate under long-established Commission case law, which establishes, "that where the parties have bargained a procedure for final and binding impartial resolution of disputes over contractual compliance, the Commission generally will not assert its statutory jurisdiction under Sec. 111.84(1)(e), Stats., to resolve breach of contract claims because of the presumed exclusivity of the contractual procedure and a desire to honor the parties' agreement." STATE OF WISCONSIN, DEC. NO. 25281-C (WERC, 8/91) AT 12; citing STATE OF WISCONSIN, DEC. NO. 20830-B (WERC, 8/85).

The Motion questions the relationship of Subsections (d) and (e) because the presence of "grievance arbitration is available to resolve issues of contract interpretation which may be

determinative of unfair labor practice allegations other than breach of contract." *Ibid.* As the parties acknowledge, longstanding law governs this determination. The issue posed is not the legal standard, but its application to the facts. The parties cite a series of cases, which trace ultimately to STATE OF WISCONSIN, DEC. NO. 15261 (WERC, 1/78), in which the Commission detailed the three criteria thus:

> First, the parties must be willing to arbitrate and renounce technical objections, such as timeliness under the contract and arbitrability, which would prevent a decision on the merits by the arbitrator. Otherwise, the commission would defer only to have the dispute go unresolved. Second, the collective bargaining agreement must clearly address itself to the dispute. The legislative objective to encourage the resolution of disputes through arbitration would not be realized where the parties have not bargained over the matter in dispute. Third, the dispute must not involve important issues of law. An arbitrator's award is final and ordinarily not subject to judicial review on questions of law. DEC. NO. 15261 AT 8.

Respondent is willing to arbitrate and has posed no technical objection that would prevent a decision on the merits by the arbitrator. Thus, the first criterion is met.

As noted above, the grievance form asserts that two subsections of Article VII establish the impropriety of Respondent's unilateral implementation of the Memo. Subsection 2 generally addresses hours. Subsection 4 addresses the specific issue of alternative work schedules as well as the more general impact of past practices. The subsections address the allegations contained in the grievance documentation. As underscored by Complainant's arguments, the grievance seeks, with one exception, the same result achievable through the complaint. That exception would be an order to bargain the mandatory subjects of bargaining Complainant wishes to address. Respondent notes that the contract itself may contain a provision regarding "Obligation to Bargain" which may meet this concern under the second criterion, but the file does not include the provision. This difficulty is, however, best noted as a preface to the application of the third criterion. Barring that difficulty, the second criterion for deferral is met.

Threshold to application of the third criterion is Complainant's assertion that the duty to bargain mandatory subjects of bargaining under Sec. 111.84(1)(d), Stats., poses a statutory issue distinguishable from a contractual obligation. Under this view, the statutory duty to bargain continues into a contract term without regard to contract coverage of the subject. This is not a viable position under Commission case law. Commission case law has long recognized "the principle that there is no duty to bargain during the term of a collective bargaining agreement as regards subject matters covered by that agreement." STATE OF WISCONSIN, DEC. NO. 23161-C (WERC, 9/87) at 10; see also STATE OF WISCONSIN, DEC. NO. 13017-D (WERC, 5/77) and STATE OF WISCONSIN, DEC. NO. 31264 (WERC, 3/05). There may be uncertainty regarding the Commission's application of the scope of a waiver of bargaining, see STATE OF WISCONSIN, DEC. NO. 31207-C (WERC, 3/06). Whatever uncertainty there may be, however,

does not extend to the waiver of bargaining on matters covered by the agreement. Rather, it extends to whether a given matter is sufficiently covered by the agreement to warrant a finding of waiver.

Against this background, application of the third criterion requires a determination whether deferral would frustrate or delay Commission determination of an important issue of law. The Motion poses no important issue in that sense. There is no dispute that the Memo poses mandatory subjects of bargaining and no dispute that Respondent has refused to collectively bargain the Memo. The attachments to the complaint establish an ongoing dialogue on the dispute, but that dialogue is not bargaining. This cannot, however, obscure that the parties disagree at most on whether the contract fully addresses Respondent's implementation of the Memo. As noted in the application of the first criterion, the contract's coverage of the dispute is arguably complete.

This is not to imply the statutory duty to bargain is insignificant. The statutory issue posed by the Motion focuses on the appropriate forum for determination of the duty. Under Sec. 111.80(3), Stats., the "voluntary agreement" reflected by the collective bargaining agreement embodies public policy. If the parties' collective bargaining agreement covers the parties' dispute regarding the Memo's creation and implementation, then grievance arbitration is the appropriate forum. At most, the bargaining issue left for the Commission is whether or not the labor agreement fully addresses the parties' dispute. At best, that issue will be fully addressed through arbitration and at worst, the completion of that process will clarify what, if any, issues regarding the Memo are not covered by the labor agreement. Against this background, the third criterion for deferral has been met.

Ultimately, the weakness in Complainant's opposition to the Motion is that denial of the Motion would undercut the labor agreement and the collective bargaining that produced it. If the existence of a dispute on a mandatory subject of bargaining during the effective term of a labor agreement warranted collective bargaining even though labor agreement covered the dispute, there would be no end to the bargaining process and neither certainty nor finality to the labor agreement's codification of employment conditions. Grievance arbitration is the appropriate forum for the parties' dispute regarding the Memo.

The Order entered above tracks DEC. NO. 31384-B, supra. There is no dismissal of Complainant's allegation of a violation of Sec. 111.84(1)(e), Stats. This reflects only that the Motion does not seek it. The Motion seeks that the matter be held in abeyance, which is well-founded under DEC. NO. 31384-B, where the Commission stated:

> While dismissal is not appropriate, we do have the discretion to hold litigation of these allegations in abeyance pending the outcome of an ongoing grievance arbitration proceeding, where it appears that the arbitrator's award may resolve the dispute in a manner consistent with the statute the Commission administers. STATE OF WISCONSIN, DEC. NO. 15261 (WERC, 1/78). Here, the record satisfies us that there is sufficient potential for such a resolution that it is

> appropriate to hold this matter in abeyance. Upon issuance of the arbitrator's award, either party may ask us to have the complaint proceed based upon allegations that there are matters not resolved by the award or resolved in a manner that is contrary to the State Employment Labor Relations Act. DEC. NO. 31384-B at 5.

Allegations of violations of Subsections (d) and (e) of Sec. 111.84(1), Stats., may prove mutually exclusive. Granting the Motion rejects Complainant's claim that it can assert its statutory and contractual claims concurrently. This does not mean it loses the statutory forum. Rather, if that forum is to be available, it will focus only on those issues not covered by the parties' labor agreement. That determination awaits the completion of the grievance procedure. The Order preserves Commission jurisdiction over the matter, but defers it to the completion of the grievance procedure.

Dated at Madison, Wisconsin, this 18th day of March, 2010

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Richard B. McLaughlin /s/

Richard B. McLaughlin, Examiner

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