STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN STATE EMPLOYEES UNION, AFSCME, COUNCIL 24, AFL-CIO, Complainant,

vs.

STATE OF WISCONSIN, and its DEPARTMENTS OF CORRECTIONS and HEALTH SERVICES, Respondents.

Case 865
No. 71851
PP(S)-429

Decision No. 34029-B

Appearances:

Peggy A. Lautenschlager, Bauer & Bach, LLC, 123 East Main Street, Suite 300, Madison, Wisconsin 53703, appearing on behalf of the Wisconsin State Employees Union, AFSCME, Council 24, AFL-CIO.

William H. Ramsey, Chief Legal Counsel, Office of State Employment Relations, 101 East Wilson Street, 4th Floor, Madison, Wisconsin 53707, appearing on behalf of the State of Wisconsin, Department of Corrections and Department of Health Services.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On October 31, 2012, the Wisconsin Association for Correctional Law Enforcement (WACLE) filed a petition with the Wisconsin Employment Relations Commission seeking an election to determine whether the State of Wisconsin employees in the "Security and public safety" bargaining unit wish to be represented by WACLE for the purposes of collective bargaining.

On November 19, 2012, the Wisconsin State Employees Union, AFSCME, Council 24, AFL-CIO (WSEU) filed a complaint with the Commission alleging that Respondents State of Wisconsin and Office of State Employment Relations (OSER) had committed unfair labor practices within the meaning of the State Employment Labor Relations Act (SELRA) by depriving WSEU of the opportunity to organize "Security and public safety" employees while allowing WACLE to do so. WSEU further alleged that the unfair labor practices needed to be

remedied before any fair election in the "Security and public safety" employee bargaining unit could be held. On December 10, 2012, the Commission advised the parties that the WSEU complaint allegations, if proven, did have the potential to interfere with a fair election and thus the Commission would hold election proceedings in abeyance pending resolution of said allegations.

The Commission designated Peter G. Davis to conduct hearing on the complaint and to issue a proposed decision pursuant to Sec. 227.46, Stats.

On December 11, 2012, WACLE moved to intervene in the complaint proceedings. On January 4, 2013, Davis issued an Order Denying Motion to Intervene.

Hearing on the complaint was held January 14 and 16, 2013 in Madison, Wisconsin. At the start of the hearing, WSEU moved to amend the complaint to delete the Office of State Employment Relations as a respondent and to add the Wisconsin Department of Corrections and the Wisconsin Department of Health Services as respondents. The State/OSER and said departments agreed to the proposed amendment.

Briefs were filed until February 13, 2013.

On March 29, 2013, Examiner Davis issued Proposed Findings of Fact, Conclusions of Law and Order. On April 10, 2013, WSEU filed objections to the proposed decision. Written argument in support of and in opposition to the objections was filed by May 10, 2013.

Having considered the matter, the Commission makes and issues the following

FINDINGS OF FACT

1. The State of Wisconsin, herein the State, is the employer of State employees. State employees work in various departments including the Department of Corrections (DOC) and Department of Health Services.

2. The Wisconsin State Employees Union, AFSCME, Council 24, AFL-CIO, herein WSEU, is a labor organization.

3. Until 4:31 p.m. on September 22, 2011, WSEU was the collective bargaining representative for approximately 5800 State employees in the "Security and public safety" bargaining unit established by Sec. 111.825(1)(d), Stats. The vast majority of employees in this bargaining unit are employed by the DOC in numerous locations scattered across the State.

After WSEU lost is status as the collective bargaining representative, it continued to provide services to WSEU members in the "Security and public safety" bargaining unit including the representation of members in investigatory/pre-disciplinary meetings and in grievance proceedings. Until January 1, 2012, the State continued to honor many of the

provisions of an expired collective bargaining agreement it had previously reached with the WSEU covering the "Security and public safety" bargaining unit.

4. On January 5 and again on January 6, 2012, DOC managers and supervisors at the Lincoln Hill School ordered a "Security and public safety" DOC employee to take off WSEU-related clothing. Responding to WSEU protests, State-level DOC management investigated the matters and advised Lincoln Hill management that it had acted improperly. On January 6, 2012, Lincoln Hills management advised Lincoln Hill employees by memo that "staff may wear AFSCME or other union clothing." By a January 12, 2012 memo to all DOC employees, DOC confirmed that "union apparel" continues to be generally appropriate in the workplace for all non-uniformed employees.

5. In early 2012, the Wisconsin Association for Correctional Law Enforcement, herein WACLE, began an effort to become the collective bargaining representative of the State employees in the "Security and public safety" bargaining unit. As part of that effort, WACLE encouraged employees to become WACLE members and to sign "showing of interest" cards to be attached to a WACLE election petition. In response to WACLE's organizing activities, WSEU began its own organizing campaign as to the "Security and public safety" bargaining unit and sought to have employees sign "showing of interest" cards for attachment to a potential WSEU election petition.

6. On October 31, 2012, WACLE filed a petition with the Commission seeking an election to determine whether the employees in the "Security and public safety" bargaining unit wish to be represented by WACLE for the purposes of collective bargaining with the State. As required by Sec. 111.825(4), Stats., the petition was accompanied by signed authorization cards from employees in the "Security and public safety" bargaining unit.

Later that day, so that it could determine whether the number of signed WACLE authorization cards met the 30% threshold established by Sec. 111.825(4), Stats., the Commission asked the State to provide it with a list of all employees in the "Security and public safety" bargaining unit as of October 31, 2012. The State provided that list to the Commission on November 19, 2012 and that same day the Commission forwarded the list to WSEU pursuant to a public records request. On December 10, 2012, the Commission advised the State, WACLE and the WSEU that the WACLE petition had been accompanied by signed authorization cards from at least 30% of the "Security and public safety" employees.

7. On January 2, 2013, WSEU filed a petition with the Commission seeking an election to determine whether the employees in the "Security and public safety" bargaining unit wish to be represented by WSEU for the purposes of collective bargaining with the State. As required by Sec. 111.825(4), Stats., the petition was accompanied by signed authorization cards from employees in the "Security and public safety" bargaining unit. On January 7, 2013, the Commission advised the State, WSEU and WACLE that the WSEU petition had been accompanied by signed authorization cards from at least 10% of the "Security and public safety" employees as required by Sec. 111.825(4), Stats.

8. DOC allows "Security and public safety" employees to: (1) discuss WACLE or WSEU organizing activities during work time so long as the employees are not thereby neglecting their duties and during non-work time in DOC facilities and parking lots; (2) place WACLE or WSEU organizing literature on car windshields in DOC parking lots; (3) use work-site bulletin boards to post notices of off-site WACLE or WSEU organizing meetings; and (4) send WACLE or WSEU organizing messages or materials to DOC employees at their DOC email address if the emails are sent from a private email account and do not clog the DOC email system.

9. Pursuant to a *bona fide* security interest, DOC does not allow "Security and public safety" employees, WSEU non-employee organizers and any other individuals to spend extended amounts of time in the parking lots of secure DOC work locations for any purpose.

10. DOC does not allow: (1) use of DOC facilities to conduct organizing activity on behalf of WACLE or WSEU; or (2) WACLE or WSEU organizing messages or materials to be sent to employees from DOC email addresses.

11. DOC has not enforced its policies and procedures in manner that favors either WSEU or WACLE.

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

CONCLUSIONS OF LAW

1. The State and its Department of Corrections and Department of Health Services did not commit unfair labor practices within the meaning of Secs. 111.84(1)(a) or (b), Stats. by the conduct referenced in Findings of Fact 6, 9, 10, and 11.

2. The State and its Department of Corrections committed an unfair labor practice within the meaning of Sec. 111.84(1)(a), Stats, by the conduct referenced in Finding of Fact 4.

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

ORDER

1. The complaint is dismissed in all respect except for the unfair labor practice found in Conclusion of Law 2.

2. As to the unfair labor practice found in Conclusion of Law 2, the State and its officers and agents shall cease and desist from engaging in conduct that interferes with the exercise of employees rights established by Sec. 111.84(1)(a), Stats.

3. Processing of the elections petitions filed by WACLE and WSEU shall proceed without further delay.

Given under our hands and seal at the City of Madison, Wisconsin, this 21st day of May, 2013.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/
James R. Scott, Chairman

Rodney G. Pasch /s/
Rodney G. Pasch, Commissioner

STATE OF WISCONSIN
(DEPARTMENTS OF CORRECTIONS AND HEALTH SERVICES)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

It is important at the outset to note the context in which this case is being decided. Although WSEU was the collective bargaining representative of employees in the "Security and public safety" bargaining unit for many years, WSEU lost that status on September 22, 2011 when it did not file a petition for annual certification election pursuant to Sec. 111.83(3)(b), Stats. and emergency administrative rule ERC 80. The Wisconsin Association for Correctional Law Enforcement (WACLE) wants to become the new collective bargaining representative of employees in this bargaining unit and WSEU wants to regain that status. Thus, the questions to be resolved in this complaint proceeding are: (1) Did the State violate the State Employment Labor Relations Act (SELRA) rights of unrepresented State employees and of a labor organization (WSEU) seeking to become the collective bargaining representative of those employees; and (2) if so, should there be any resultant delay in the "Security and public safety" election sought by WACLE and WSEU?

The Scope of the Complaint

The complaint alleges [1] that the State violated Secs. 111.84(1)(a) and (b), Stats. by: (1) allowing employees supporting WACLE to engage in organizing activity "while on state-owned property, while in state-run institutions, and while at work" but denying WSEU employee members and staff the opportunity to engage in such activity and disciplining WSEU employee members who engage in said activity; [2] and (2) failing to timely provide WSEU with a list of employees in the "Security and public safety" bargaining unit.[3]

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[1] The complaint makes reference to WSEU members having "been discouraged from wearing clothing with AFSCME logos." Evidence was presented as the State's January 2012 conduct in that regard at Lincoln Hills as well the State's corrective response (see Finding of Fact 4). Consistent with the holding in State of Wisconsin, Dec. Nos. 29448-C, 29495-C, 29496-C, and 29497-C (WERC, 8/00), the State's conduct has been found to have violated Sec. 111.84(1)(a), Stats. (see Conclusion of Law 2).

[2] Section 111.84(1)(b), Stats. provides in pertinent part:

> (b) Except as otherwise provided in this paragraph, to initiate, create, dominate or interfere with the formation of any labor organization or contribute financial support to it.

The purpose of this statutory provision is to prevent the State from seeking to create "Company unions" that it controls. Thus, to establish a violation of (1)(b), WSEU must demonstrate that the State's conduct threatened the independence of the Union as an entity devoted to employee interests. State of Wisconsin, Dec. No. 25393 (WERC, 4/88). WSEU has not done so and thus this allegation is dismissed without further discussion.

[3] As reflected in Finding of Fact 6, the State provided the Commission with the requested "Security and public safety" employee list on November 19, 2012. That same day, the Commission forwarded the list to WSEU.

The State filed an answer denying the WSEU allegations.

Although the Department of Health Services became a named respondent at the commencement of the hearing, all evidence presented related to the conduct of DOC. In any event, as Sec.111.81(8), Stats. makes clear, the State of Wisconsin is the "employer" whose conduct is at issue here.

The Legal Framework

Section 111.82, Stats. provides in pertinent part:

> **Rights of employees**. Employees have the right of self-organization and the right to form, join or assist labor organizations, . . . and to engage in lawful, concerted activities for the purposes of . . . mutual aid or protection.

Section 111.84(1)(a), Stats. makes it an unfair labor practice for the State to "interfere with, restrain or coerce employees in the exercise of their rights guaranteed in s. 111.82."

However, as the Commission concluded in State of Wisconsin, Dec. Nos. 29448-C, 29495-C, 29496-C, and 29497-C (WERC, 8/00), the right to exercise Sec. 111.82 rights is not absolute. As noted in State of Wisconsin, the exercise of such rights can be limited for legitimate and non-discriminatory reasons which fall within the scope of the "effectuation" of the employer's "public function" (quoting from City of Kenosha Board of Education, Nos. 6986-C, 6986-D (WERC, 2/66) and the "right of the employer to maintain production and discipline in its establishment" (quoting from Acme Die Casting Corp., Dec. No. 8704-B (WERC, 5/69).

When applying these general principles in State of Wisconsin, the Commission made the following legal conclusions that are particularly relevant to this matter because they were reached in the factual context of two unions competing to represent employees in the "Security and public safety" bargaining unit:

1. The State's general interest in maintaining productivity and discipline in the workplace is sufficient to allow the State to prohibit the workplace exercise of Sec. 111.82 SELRA rights during work time but not during non-work time.

2. In the context of employees working at correctional facilities, the security interests of the State can be sufficient to limit the exercise of Sec. 111.82 SELRA rights during non-work time.

There is no evidence that the State acted with anything other than due diligence when generating the 5800 employee list. Thus, this complaint allegation is dismissed.

3. Once the appropriate balance is struck between the interests of the State and the exercise of Sec. 111.82 SELRA rights by employees, the State cannot treat employees/competing unions differently in terms of their ability to exercise those rights.

These three legal conclusions establish the basic legal framework that will applied to the issues litigated in this matter.

Prohibition Against Employees and Non-Employees "Setting up Shop"

WSEU asserts that the State violated Sec. 111.82(1)(a), Stats. when it prohibited employees and WSEU organizers from "setting up shop" in the parking lots [4] of correctional facilities to distribute literature or seek employee signatures on "showing of interest" cards. The State responds by arguing that the restriction is justified by its security interests-particularly in light of the other options available to employees and WSEU organizers to contact bargaining unit employees. WSEU asserts the State's security interests are pre-textual and contends that very limited opportunities otherwise exist for organizing activity.

WSEU correctly points out that under State of Wisconsin, the employee activity in question clearly falls within scope of Sec. 111.82 SELRA rights and that the prohibition in question is presumptively invalid because it limits the ability of employees to exercise those rights during non-work time. However, under State of Wisconsin, non-work time restrictions on the exercise of Sec. 111.82 SELRA rights can be valid in the context of the State's security interests.

As to the State's security interest, Randall Hepp testified that any sustained presence of any individual or individuals in a correctional facility parking lot attracts the attention of on-duty security personnel and thus dilutes the attention said personnel can focus on other matters. This testimony persuasively establishes a bona fide security interest. The record also establishes that the State allows employees to discuss organizing activities during work time [5] in the facility so long as they are not neglecting their duties, during breaks in the work day and also in the parking lots as they arrive or leave work. The State also tolerates employee distribution of organizing literature through placement of leaflets on employee vehicle windshields in the parking lots. Employees are also allowed to post notices of off-site organizing meetings on a work-site bulletin board and, as will be discussed more fully below, some use of the State's email system for organizing purposes. Particularly in light of these permissible opportunities for the exercise of Sec. 111.82 SELRA rights, the State's security

[4] Because use of the parking lots is limited to those having business at the correctional facility (i.e. employees coming to and leaving work and individuals with corrections-related business in the facility), the lots are effectively part of the employer's premises for the purpose of this analysis.

[5] Many employees in the "Security and public safety" unit work a straight eight hour shift with no official breaks (i.e. their entire shift is "work time").

interests warrant the conclusion that the prohibition against employees "setting up shop" in parking lots during non-work time does not violate Sec. 111.84 (1)(a), Stats.

In reaching this conclusion, consideration has been given to WSEU's contention that there cannot be a valid State security risk because the employees are known to the on-duty security personnel. This argument misses the mark because it is the distraction caused by the need to identify those congregating in the parking lot that poses the security risk-not the actual identity of those congregating. WSEU also points to evidence that some employee WSEU-related activity did occur in the Sand Ridge correctional facility and parking lot in late 2011. However, the State persuasively responds that such activity occurred during a time when WSEU employees were still allowed to exercise rights under an expired collective bargaining agreement. Thus, this evidence does not negate the State's security interest.

Consideration has also been given to WSEU's assertion that sustained access to employees in parking lots is necessary because "Security and public safety" employees do not welcome organizing contacts at their home and because the rural location of some correctional facilities makes off-site organizing contacts difficult. However, in the context of the State's valid security interest and the other above-noted means by which employees can be contacted, these considerations are not sufficient to overturn the prohibition against "setting up shop" in parking lots. It is also noteworthy that utilizing permissible organizing options, WACLE and WSEU were able to acquire signature authorization cards from a combined total of at least 40% of the "Security and public safety" employees.

WSEU also contends that the State's prohibition against non-employee organizing activity in the parking lots of secure facilities violates Sec. 111.84(1)(a), Stats. While it can well be argued that the exercise of any Sec. 111.82 SELRA rights of non-employee organizers can permissibly be limited to a greater degree than the exercise of those rights of employees, that argument need not be resolved here. [6] Clearly the SELRA rights of non-employee organizers cannot not be greater than those of the employees they seek to organize. The restrictions on employee exercise of SELRA rights have been found to be permissible. The "setting up shop" restrictions on non-employees are the same as the restrictions on employees. It follows that the non-employee restrictions also do not violate Sec. 111.84(1)(a), Stats. [7]

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[6] Section 111.82 SELRA rights are limited on their face to "employees". Nonetheless, when interpreting provisions that largely parallel Sec. 111.82, Stats., the United State Supreme Court has held that under the National Labor Relations Act, " the right of self-organization depends in some measure on [their] ability . . . to learn the advantages of self-organization from others." NLRB v. Babcock & Wilcox Co. 351 U.S. 105, at 113 (1956). The Commission concurred with Court's view in UW Hospitals, Dec. No. 30202-C (WERC, 4/04) when interpreting the Wisconsin Employment Peace Act as the issue of email use by a union. However, the Court has also held that it is permissible for the employer to bar non-employee organizers from its property unless there are unique obstacles to accessing employees. Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992). The Commission did not reject this line of reasoning in UW Hospitals.

[7] WSEU minimizes the security risk posed by non-employee organizers to the extent the organizers were known to the State by virtue of their status as long-time WSEU business representatives. This argument again misses the mark because it is the distraction caused by the need to identify those congregating in the parking lot that poses

Alleged Disparate Treatment of WSEU and WACLE

Facility Use

WSEU asserts that the State has allowed WACLE supporters to use State facilities for meetings but has prohibited such activity by WSEU supporters. In support of this assertion, WSEU presented the following testimony from an employee at the New Lisbon correctional facility as to an alleged WACLE meeting in the fall of 2012:

> Q. What about, do you know if there were any activity by the group called WACLE during that period of time?
>
> A. I believe they utilized that room for some type of informational gathering.
>
> Q. And did you see this?
>
> A. Yes, I walked by and noticed, but I don't have any details nor did I attend.
>
> Q. Did you see any posters about that meeting being held or anything like that?
>
> A. I believe they had some type of small sign indicating that they were having a meeting.

The State contends that neither WACLE nor WSEU are allowed to hold meeting in State facilities. The State denies that any such meeting was allowed and presented copies of emails by which WACLE sought but was denied permission to use the room in question. The State also presented evidence that that there was an ongoing disciplinary investigation of a WACLE supporter for distributing WACLE literature inside the Green Bay correctional facility in late November 2012.

The witness' use of the word "believe" can be understood to indicate something other than a firm recollection. The State's general policy on facility use (as expressed in an August 8, 2012 letter from the DOC Human Resources Manager to a WSEU supporter and then widely distributed to DOC managers) prohibits such a meeting. Further, given the State's specific September 10, 2012 denial of the request for facility use in New Lisbon, it seems unlikely that the employees would have risked discipline by holding such a meeting. However, even assuming that such a meeting was held, it is apparent that it was it conducted without the

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the security risk-not the actual identity of those congregating. Further. while WSEU business representatives previously had contractually guaranteed access to the facility to conduct WSEU business, there is no persuasive evidence that such access included the right to "set up shop" in parking lots.

State's authorization and there is no persuasive evidence that the State had knowledge of any such meeting. Thus, the record does not support a conclusion that the State treated WACLE and WSEU supporters differently as to facility use in this instance.

Email Use

The evidence establishes that in September 2012, DOC advised its managers that it was generally permissible for WACLE or WSEU organizing emails to be sent to DOC employee work email addresses as long as the emails originated from a non-DOC email address and did not clog the DOC email system. Prior to September 2012, there was uncertainty as to what was allowable and a December 2011 memo to all DOC employees (pre-organizing campaigns) generally prohibited "use" of DOC email for "any form of union business." WSEU asserts that the State has disciplined WSEU supporters for alleged violations of the DOC email policy but has not disciplined WACLE supporters for similar conduct. The State denies have done so, asserts that it was unaware of any potential WACLE violations of the DOC email policy, and argues in its answer to the complaint that some of the WSEU allegations are untimely as the alleged violation occurred more than a year before the instant complaint was filed.

The State's actions as to DOC employees supporting WSEU can be summarized as follows:

- Schneider Written reprimand issued November 4, 2011 for sending an email from home email to a DOC work email which DOC local management determined created an "intimidating work environment" for the receiving employee. Schneider grieved the discipline and in September 2012 DOC sustained the grievance concluding that the email did not "rise to the level of harassment or intimidation . . . "

- Bloyer After an investigation prompted by a complaint, a one day suspension was issued November 6, 2012 for sending "partisan political messages from your DOC email account. Your lack of good judgment was manifested by your decision to disregard the content of your December 2011 written reprimand for continuing to send out political emails . . . ." and for use of the "State's computer e-mail system and equipment to send, receive, and store large amounts of unauthorized electronic communication."

- Curtis Investigation ongoing based on a November 2, 2012 email sent from his DOC email account to other DOC employees seeking their home email addresses because "I am not supposed to contact you about Union stuff here at work, any info I need to get out will have to be sent to your home e-mail."

- Sutter Written reprimand issued October 31, 2012 for violating "written directives put out to all DOC employees related to political activity in the work place. You sent partisan political messages from your DOC email account."

- Hoyle Testimony from WSEU witness Weaver as to a reprimand received by Hoyle in spring 2012 for sending an email to DOC employees announcing a WSEU meeting.

- Krumm Testimony from WSEU witness Weaver as to Krumm (and other WSEU members) ceasing to send emails from their home email to DOC protesting a policy change after Krumm was "politely" asked to stop by her supervisor. Testimony from State witness Heilman that the supervisor advised Krumm that she could have employees send protest emails to the general DOC Human Resources and need not continue to send them directly to Heilman's email address.

The evidence in the record does not support the WSEU assertion that the State singled out WSEU supporters by reviewing their State email use for potential discipline under either the pre-September 2012 "no union" use or the post-September 2012 allowable use policy. Rejection of this allegation is supported by the facts underlying the discipline or investigation. With the exception of Curtis, "union use" is not the basis for the State's action. Schneider's discipline was due to the allegedly harassing content of his email (and, in any event, is time barred as an independent unfair labor practice by the applicable one year statute of limitations contained in Secs. 111.84(4) and 111.07(14), Stats.) Bloyer was disciplined for the partisan political content of emails and a large volume of personal emails. Sutter was disciplined for the partisan political content of his emails. As to Hoyle, the disciplinary letter is not in the record and the hearsay testimony does not provide a satisfactory basis for determining why any such discipline was issued. Although Curtis is being investigated for an apparent violation of the current "don't send from work" policy, there is no persuasive evidence that he was singled out. Indeed, it appears the investigation was pursued because the content of his email can be read as confirming that he knew he was engaging in prohibited conduct. Only hearsay evidence was presented as to Krumm who apparently was neither disciplined nor investigated but was asked to have employees stop or redirect emails as to the policy change where employee dissatisfaction was already well known by DOC due to previously received emails.

Just as importantly, State witness Heilman credibly testified that: (1) DOC was not aware of the WACLE supporters emails (placed in the record as WSEU exhibits)that WSEU argues violated DOC policy; and (2) DOC would have investigated the emails for policy violations if they had knowledge of same. Without evidence of DOC knowledge of WACLE emails, a disparate treatment argument cannot succeed.

Thus, the record does not support the WSEU allegation of disparate treatment of the WSEU and WACLE as to use of DOC email.

Absence of Laboratory Conditions

Independent of the resolution of the complaint allegations raised in this matter, WSEU contends that the laboratory conditions necessary for a fair election are not currently present due to the conduct of some DOC supervisors. As a consequence, WSEU argues that an election cannot be conducted until the laboratory conditions are restored through an end of the improper conduct and by providing WSEU with an appropriate opportunity to demonstrate its ability to effectively represent employees. [8] The State correctly responds that the scope of the issues in this proceeding is limited to resolution of the complaint allegations that prompted us to delay the election proceedings. [9]

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[8] As a general matter, the "laboratory conditions" issue is litigated if post-election objections are filed by a party. While WSEU is correct that disruption of "laboratory conditions" can occur even if the conduct does not rise to the level of an unfair labor practice, as a general matter only significant or pervasive unfair labor practices warrant delaying an election or overturning an election result. Thus, in State of Wisconsin, Dec. Nos. 29448-C, 29495-C, 29496-C, and 29497-C (WERC, 8/00), despite the presence of both union and employer unfair labor practices during an election campaign, the Commission concluded no delay in the election process was warranted. In Racine Schools, Dec. No. 29450-A (WERC, 4/99) employer communications to employees that were critical of a union and contain name calling and exaggerations did not warrant the conduct of a new election. Further, where the secrecy of the voting process itself is maintained, there is a strong presumption that the ballots actually cast reflect the true wishes of the employees participating. Fox Valley VTAE, Dec. No. 25357-A (WERC, 11/88). Therefore, where objections are filed which allege that conduct or conditions existed which prevented the employees from freely expressing their preference as to union representation and that the election results should be set aside, the question before us is whether the conduct or conditions in question render it improbable that the voters were able to freely cast their ballots. Fond du Lac County, Dec. No. 16096-B (WERC, 9/78); Town of Weston, Dec. No. 16449-B (WERC, 2/79).

[9] However, because the parties spent some effort litigating matters that fell outside the scope of the alleged unfair labor practices and because it may minimize or eliminate the need for post-election litigation, some comment on the WSEU contentions is warranted.

When interpreting the Municipal Employment Relations Act (MERA), the Commission and the Wisconsin Supreme Court have concluded that employees are entitled to an election climate which is free of conduct or conditions which improperly influence them and which is fair to all parties on the ballot/ WERC v Evansville, 69 Wis. 2d 140 (1975); Washington County, Dec. No. 7694-C (WERC, 9/67); St. Croix County, Dec. No. 8932-E (WERC, 9/87). Because the statutory right to choose (or not) a collective bargaining representative (see Sec. 111.70(2), Stats.) upon which this conclusion rests for MERA employees is paralleled by the election rights of State employees (see Sec. 111.82, Stats.), State employees are entitled to the same election climate when they cast their ballots. See generally State of Wisconsin, Dec. Nos. 29448-C, 29495-C, 29496-C, and 29497-C (WERC, 8/00).

WSEU asserts that DOC supervisors have acted improperly by their: (1) "you don't have a union" comments to employees; (2) behavior during investigatory/pre-disciplinary meetings conducted pursuant to DOC policy; (3) their behavior during grievance meetings conducted pursuant to the Wisconsin Human Resources Handbook Chapter 430, Employee Grievance Procedure.

As the State argues, the "you don't have a union" comments by DOC supervisors can be given a benign interpretation along the lines of "WSEU is no longer your collective bargaining representative." However, because employees continue to have a SELRA protected right to belong to WSEU (or any other labor organization) if they wish, such comments can reasonably be viewed otherwise and, if ongoing and pervasive in a sufficient number of the multiple DOC work sites, provide a basis for a post-election litigation. Further, despite

Remedy and Need for Delay in Election Proceedings

As reflected in the foregoing discussion and Conclusion of Law 1, the primary WSEU complaint allegations have been found to lack merit. However, as indicated by Conclusion of Law 2, the State did commit an unfair labor practice at Lincoln Hills in January 2012. Because the State immediately acknowledged and remedied its improper conduct, a cease and desist order is the appropriate remedy for this unfair labor practice. Based on the dismissal of the primary WSEU complaint allegations and on the time that has elapsed since the acknowledged and remedied January 2012 unfair labor practice, there is no basis for any further delay in 2013 election proceedings.

Dated at Madison, Wisconsin this 21st day of May, 2013.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/
James R. Scott, Chairman

Rodney G. Pasch /s/
Rodney G. Pasch, Commissioner

efforts by DOC management, it is also apparent that some DOC supervisors have not allowed WSEU representatives to fulfill the roles allowed by DOC policy during investigatory/pre-disciplinary meetings and by Chapter 430 during steps in the Grievance Procedure. However, as to investigatory/pre-disciplinary and grievance meetings, there is no evidence one way or the other as to whether DOC supervisors have also failed to follow DOC policy and/or Chapter 430 when the employee representative is a WACLE supporter or a friend, relative or fellow employee. Thus, the record does not support a conclusion that DOC supervisors have singled out WSEU employee members/representatives when failing to follow State procedures. Nonetheless, any such future pervasive conduct by DOC supervisors, particularly if it singles out WSEU members, can provide a basis for post-election litigation.

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