

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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WISCONSIN LAW ENFORCEMENT ASSOCIATION, Complainant,

vs.

STATE OF WISCONSIN DEPARTMENT OF TRANSPORTATION,  
DIVISION OF STATE PATROL, Respondent.

Case ID: 55.0010  
Case Type: COMP\_PPS

DECISION NO. 36776-A

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**Appearances:**

Sally A. Stix, Attorney, Stix Law Offices, 700 Rayovac Drive, Suite 117, Madison, Wisconsin, appearing on behalf of Wisconsin Law Enforcement Association

William H. Ramsey, Attorney, Department of Administration, 101 E. Wilson Street, 10th Floor, P.O. Box 7864, Madison, Wisconsin, appearing on behalf of the State of Wisconsin Department of Transportation, Division of State Patrol

**ORDER DISMISSING COMPLAINT IN PART**

On November 21, 2016, the Wisconsin Law Enforcement Association filed a complaint with the Wisconsin Employment Relations Commission alleging that the State of Wisconsin, Department of Transportation, had committed unfair labor practices within the meaning of §§ 111.84(1)(a) and (d), Stats. The State filed a motion to dismiss the complaint, and the Association subsequently amended the factual basis for the complaint. The motion became ripe for action on September 11, 2017.

Having considered the matter, I conclude that, assuming all the facts pled by the Association to be true, no violation of §§ 111.84(1)(a) or (d), Stats., can be found as to some portions of the complaint but violations could be found as to other portions thereof.

NOW, THEREFORE, it is:

**ORDERED**

The complaint is dismissed in part.

Signed at the City of Madison, Wisconsin, this 28th day of September, 2017.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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Peter G. Davis, Examiner

**MEMORANDUM ACCOMPANYING ORDER DISMISSING COMPLAINT IN PART**

The Association represents State public safety employees in the classified service employed in a bargaining unit identified in § 111.825 (1)(g), Stats.

The Association's complaint alleges that the State has: (1) unilaterally modified the status quo as to mandatory subjects of bargaining during a contract hiatus; (2) refused to bargain over mandatory subjects of bargaining during negotiations for a successor agreement; and (3) individually bargained with employees represented by the Association by seeking agreement to change conditions of employment related to discipline.

The State has moved to dismiss the complaint generally contending that: (1) there is no contract hiatus and thus no status quo to maintain; and (2) the disciplinary subjects that are the focus of the Association's complaint are all now prohibited subjects of bargaining by virtue of 2015 Wisconsin Act 150 and thus not subject to the duty to bargain.

Wisconsin Admin. Code § ERC 12.04(2)(f), which is applicable to this complaint proceeding pursuant to Wis. Admin. Code § ERC 22.04, provides:

*To dismiss.* A motion to dismiss shall state the basis for the requested dismissal. A motion to dismiss shall not be granted before an evidentiary hearing has been conducted except where the pleadings, viewed in the light most favorable to the complainant, permit no interpretation of the facts alleged that would make dismissal inappropriate.

**ALLEGATION NO. 1 – VIOLATION OF DUTY TO BARGAIN BY MODIFICATION OF STATUS QUO**

The Association alleges that after the parties' 2015 agreement expired, the State unilaterally modified matters that are mandatory subjects of bargaining and thereby violated its duty to bargain obligation to maintain the status quo until a new successor agreement was reached.

The State asserts this allegation must be dismissed because a collective bargaining agreement has been in effect at all relevant times and thus there was no relevant contract hiatus / status quo the State was obligated to maintain.

The pleadings indicate that between the expiration date of the 2015 contract and May 26, 2016, there was no agreement in place and thus for that period of time there was a contract hiatus and a status quo to maintain. Thus, to the extent this complaint alleges a refusal to bargain violation of the status quo as to mandatory subjects of bargaining for the period between the expiration of the 2015 agreement and May 27, 2016, it cannot be dismissed.

The pleadings also reflect that from May 27, 2016, to the present, an agreement to extend the terms of the 2015 agreement has been in place. The Association acknowledges this agreement but asserts that, because the agreement was an extension of an expired contract (as opposed to a new successor agreement), its allegation of a status quo violation remains viable for the post-May 26, 2016 period, citing *AFSCME Council 24*, Dec. No. 31397-C (WERC, 6/07).

*AFSCME Council 24* examined whether an incumbent union could lawfully end its representational rights and duties prior to the termination of an existing agreement. Therefore, that decision does not support the Association's proposition that a contract hiatus exists where, as here, the parties have contractually agreed to extend the terms of their expired agreement. Thus, once the extension agreement took effect, there was no contract hiatus and no duty to bargain status quo for the State to maintain. To the extent the Association believes State action has violated the terms of the contract extension, the Association can, if timely, use the grievance arbitration provisions of that agreement to resolve such issues.

## **ALLEGATION NO. 2 – REFUSAL TO BARGAIN OVER ISSUES IN A SUCCESSOR AGREEMENT**

The parties' disagreement over the scope of bargaining for a successor agreement focuses on how Act 150 impacts bargaining over discipline. At the outset, it is important to acknowledge that Act 150 applies to discipline for conduct occurring on or after July 1, 2016. Therefore, it is clear that the scope of permissible successor agreement bargaining between the parties as to disciplinary issues remains untouched by Act 150 for conduct occurring between the expiration of the 2015 agreement and June 30, 2016. To the extent that the complaint asserts a refusal to bargain as to disciplinary issues arising out of pre-July 1, 2016 conduct, it cannot be dismissed.

For post-June 30, 2016 conduct, it is clear that Act 150 imposes limitations on bargaining over discipline.

Section 111.91, Stats., provides the following as to the subjects that the Association has a right to bargain with the State (mandatory subjects) as well as those subjects as to which bargaining cannot occur (prohibited subjects). 2015 Wisconsin Act 150 amended § 111.91, Stats., in several significant ways – most particularly by reference to the newly created provisions of §§ 230.34(1)(a), (am), and (ar), Stats. The disciplinary provisions of § 230.34(1)(a), Stats. took effect for conduct that occurs on or after July 1, 2016.

### **111.91 Subjects of bargaining**

#### **(1)**

- (a)** Except as provided in pars. (b) to (d), with regard to a collective bargaining unit under s. 111.825 (1) (g), matters subject to collective bargaining to the point of impasse are wage rates, consistent with sub. (2), the assignment and reassignment of classifications to pay ranges, determination of an incumbent's pay status resulting from position reallocation or reclassification,

and pay adjustments upon temporary assignment of classified public safety employees to duties of a higher classification or downward reallocations of a classified public safety employee's position; fringe benefits consistent with sub. (2); hours and **conditions of employment.**

- (b) The employer is not required to bargain with a collective bargaining unit under s. 111.825 (1) (g) on management rights under s. 111.90, except that procedures for the adjustment or settlement of grievances or disputes arising out of any type of disciplinary action referred to in s. 111.90 (3) shall be a subject of bargaining.
  - (c) **The employer is prohibited from bargaining with a collective bargaining unit under s. 111.825 (1) (g) on matters contained in sub. (2).**
  - (cm) Except as provided in sub. (2) and ss. 40.02 (22) (e) and 40.23 (1) (f) 4., all laws governing the Wisconsin retirement system under ch. 40 and all actions of the employer that are authorized under any such law which apply to nonrepresented individuals employed by the state shall apply to similarly situated public safety employees, unless otherwise specifically provided in a collective bargaining agreement that applies to the public safety employees.
  - (d) In the case of a collective bargaining unit under s. 111.825 (1) (g), demands relating to retirement and group insurance shall be submitted to the employer at least one year prior to commencement of negotiations.
- (2) **The employer is prohibited from bargaining with a collective bargaining unit under s. 111.825 (1) (g) with respect to all of the following:**
- (a) The mission and goals of state agencies as set forth in the statutes.
  - (b) Policies, practices and procedures of the civil service merit system relating to:
    1. Original appointments and promotions specifically including recruitment, examinations, certification, policies with respect to probationary periods and appointments, but not including transfers between positions allocated to classifications that are assigned to the same pay range or an identical pay range in a different pay schedule, within the same collective bargaining unit or another collective bargaining unit represented by the same labor organization.

2. The job evaluation system specifically including position classification and reclassification, position qualification standards, establishment and abolition of classifications, and allocation and reallocation of positions to classifications; and the determination of an incumbent's status, other than pay status, resulting from position reallocations.
- (c) **Disciplinary actions and position abandonments governed by s. 230.34 (1) (a), (am) and (ar), except as provided in those paragraphs.**

(Emphasis added.)

As reflected in the foregoing, while “conditions of employment” (traditionally understood to include matters related to employee discipline) are generally identified in § 111.91(1)(a), Stats., as mandatory subjects of bargaining, there is now a specific prohibition in § 111.91(2)(c), Stats., against bargaining over disciplinary actions that are governed by the following provisions under Chapter 230:

**230.34 Demotion, suspension, discharge and layoff.**

(1)

- (a) An employee with permanent status in class or an employee who has served with the state as an assistant district attorney or an assistant state public defender for a continuous period of 12 months or more may be removed, suspended without pay, discharged, reduced in base pay, or demoted only for just cause. It is just cause to remove, suspend without pay, discharge, reduce the base pay of, or demote an employee for work performance or personal conduct that is inadequate, unsuitable, or inferior, as determined by the appointing authority, **but only after imposing progressive discipline that complies with the administrator's standards under s. 230.04 (13m)**. It is just cause to remove, suspend without pay, discharge, reduce the base pay of, or demote an employee without imposing progressive discipline for any of the following conduct:
1. While on duty, harassing a person.
  2. While on duty, intentionally inflicting physical harm on another person.
  3. While on duty, being intoxicated or under the influence of a controlled substance, as defined in s. 961.01 (4), or a controlled substance analog, as defined in s. 961.01 (4m).

4. While on duty, being in possession of a controlled substance, as defined in s. 961.01 (4), or a controlled substance analog, as defined in s. 961.01 (4m), without a prescription.
  5. Falsifying records of the agency.
  6. Theft of agency property or services with intent to deprive an agency of the property or services permanently, theft of currency of any value, felonious conduct connected with the employee's employment with the agency, or intentional or negligent conduct by an employee that causes substantial damage to agency property.
  7. A conviction of an employee of a crime or other offense subject to civil forfeiture, while on or off duty, if the conviction makes it impossible for the employee to perform the duties that the employee performs for the agency.
  8. Misuse or abuse of agency property, including the intentional use of the agency's equipment to download, view, solicit, seek, display, or distribute pornographic material.
  9. A serious violation of the code of ethics established by the director under s. 19.45 (11) (a), as determined by the director.
- (am)** If an employee fails to report for work as scheduled or to contact his or her supervisor, the appointing authority may discipline the employee. If an employee fails to report for work as scheduled, or to contact his or her supervisor for a minimum of 3 working days during a calendar year, the appointing authority shall consider the employee's position abandoned and may discipline the employee or treat the employee as having resigned his or her position. If the appointing authority decides to treat the position abandonment as a resignation, the appointing authority shall notify the employee in writing that the employee is being treated as having effectively resigned as of the end of the last day worked.
- (ar)** Paragraphs (a) and (am) apply to all employees with permanent status in class in the classified service and all employees who have served with the state as an assistant district attorney or an assistant state public defender for a continuous period of 12 months or more.

Included within the bargaining prohibitions referenced in § 230.34(1)(a), Stats., are progressive disciplinary standards established by the administrator pursuant to § 230.04(13m), Stats.

Section 230.04(13m), Stats., provides:

**(13m)** The administrator shall establish standards for progressive discipline plans to be prepared by all agencies and applied to all employees in the classified service. The standards shall address progressive discipline for personal conduct and work performance that is inadequate, unsuitable, or inferior. The standards established under this subsection shall allow an appointing authority to accelerate progressive discipline if the inadequacy, unsuitability, or inferiority of the personal conduct or work performance for which an employee is being disciplined is severe.

The “administrator” identified in §§ 230.34(1)(a) and 230.04 (13m), Stats., is the administrator of the Division of Personnel Management within the Wisconsin Department of Administration.

To the extent the complaint alleges a refusal to bargain over matters that are now prohibited subjects of bargaining, it is dismissed.

### **ALLEGATION NO. 3 – INDIVIDUAL BARGAINING**

To the extent the complaint alleges interactions between the State and employees seeking employee agreement or acknowledgment as to matters that remain within the scope of collective bargaining, it cannot be dismissed. To the extent the complaint alleges interactions between the State and employees seeking employee agreement or acknowledgment as to matters that are now outside the scope of collective bargaining, the complaint is dismissed.

Signed at the City of Madison, Wisconsin, this 28th day of September, 2017.

### **WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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Peter G. Davis, Examiner