

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

THE WISCONSIN STATE EMPLOYEES UNION  
(WSEU), AFSCME, AFL-CIO, and  
LOCAL 2748, Complainants,

RECEIVED

SEP 13 2007

vs.

LAWTON & CATES

STATE OF WISCONSIN,  
DEPARTMENT OF CORRECTIONS, Respondent.

Case 664  
No. 64426  
PP(S)-349

Decision No. 31272-B

Appearances:

Kurt C. Kobelt, Lawton & Cates, S.C., Attorneys at Law, Ten East Doty Street, Suite 400, P.O. Box 2965, Madison, Wisconsin 53701-2965, appearing on behalf of the Wisconsin State Employees Union (WSEU), AFSCME, AFL-CIO, and Local 2748.

David J. Vergeront, Chief Legal Counsel, Office of State Employment Relations, State of Wisconsin, 101 East Wilson Street, 4<sup>th</sup> Floor, P.O. Box 7855, Madison, Wisconsin 53707-7855, appearing on behalf of State of Wisconsin, Department of Corrections.

ORDER ON REVIEW OF EXAMINER'S DECISION

On March 28, 2006, Examiner Richard B. McLaughlin issued Findings of Fact, Conclusions of Law and Order in the above-captioned matter, holding that the State of Wisconsin, Department of Corrections (State or DOC) refused to bargain in good faith with Wisconsin State Employees Union (WSEU), Local 2742, in violation of Sec. 111.84(1)(d) and (a), Stats., by unilaterally repudiating a practice ("the Arrangement") pursuant to which Thomas Corcoran, President of Local 2748, was given certain case load relief in order to accommodate the union duties he performed during his normal work day. The Examiner also concluded that the State's action in terminating this practice was motivated at least in part by hostility to Corcoran's lawful concerted activities, which violated Sec. 111.84(1)(c) and (a), Stats. The Examiner dismissed the alleged independent violation of Sec. 111.84(1)(a), Stats., and the alleged violation of Sec. 111.84(1)(e), Stats. He ordered the State (in principal part) to restore the practice and to negotiate with WSEU about its appropriate scope and duration, as well as to post a notice regarding the violations.

Dec. No. 31272-B

On March 17, 2006, WSEU filed a timely petition seeking review of the Examiner's decision, pursuant to Secs. 111.07(5) and 111.84(4), Stats. On April 12, 2006, the State filed a timely petition seeking such review. Both parties thereafter filed briefs and reply briefs in support of and in opposition to the respective petitions, the last of which was received by the Commission on June 26, 2006. The decision was held in abeyance for several months during the fall of 2006, while the parties, with the assistance of the Commission's General Counsel, attempted to conciliate the matter.

For the reasons set forth in the Memorandum that accompanies this Order, the Commission largely affirms the Examiner's Findings of Fact and reaches a similar ultimate result, though on different grounds. The Commission concludes that the "Arrangement" at issue was an enforceable agreement between DOC and WSEU as to case load relief that would accommodate Corcoran's use of contractual union leave. The Commission also holds that the State did not violate Secs. 111.84(1)(a) or (1)(c), Stats., by ending the Arrangement and by issuing certain directives circumscribing Corcoran's and other stewards' union leave. The Examiner's Conclusions of Law and Order are modified to reflect the Commission's conclusions in these respects.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

### ORDER

- A. The Examiner's Findings of Fact 1 through 20 are affirmed.
- B. The Examiner's Findings of Fact 21 and 22 are partially affirmed and partially set aside, as reflected in the following Findings of Fact 21 through 25:

21. The Arrangement was an agreement between DOC and WSEU, within DOC's lawful sphere of authority, addressing the work place problems associated with Corcoran's use of contractually-permitted union leave. As such, the Arrangement was analogous to a grievance settlement and was implicitly incorporated into the collective bargaining agreement's union leave provisions as they pertained to Corcoran. The Arrangement served the mutually beneficial purposes of facilitating Corcoran's effectiveness as a union official, on the one hand, and facilitating DOC's practical ability to assign its cases effectively, on the other hand. The Arrangement required DOC to provide Corcoran meaningful case load relief that would permit him to undertake legitimate/approved union activities during work time, and included a commitment on the part of DOC to deploy LTEs to decrease the degree to which Corcoran's case load relief burdened other staff. The Arrangement did

Page 3  
Dec. No. 31272-B

not include any minimum or maximum amount of union leave or case load relief available to Corcoran.<sup>1</sup>

22. The Arrangement was not intended to expand or alter the type, amount, purposes, or conditions pertaining to Corcoran's use of union leave beyond the parameters of the contractual provisions pertaining to union leave (as interpreted and applied in practice). The meaning of those provisions, the specific extent and conditions under which the State must provide Corcoran with union leave, the concomitant case load relief and/or LTE coverage that the State must provide Corcoran pursuant to the Arrangement, and whether the State has just cause for disciplining Corcoran for the type, amount, or manner of his using union leave, are all matters appropriately left to the parties' negotiations, grievance, and discipline procedures.

23. Corcoran's performance of WSEU-related activities during work time focusing on LMC efforts and collective bargaining related duties, including contract administration, is lawful, concerted activity, provided it remains within contractual/mutually-agreed parameters.

24. DOC's and the State's administrative efforts to assign Corcoran case load duties were aimed at enforcing Corcoran's performance of the duties of his State position, and/or at effectuating the State's and DOC's good faith (though mistaken) belief that the Arrangement was not an enforceable agreement. These efforts were not undertaken in retaliation for Corcoran's lawful, concerted activity in pursuing a previous prohibited practice complaint before the Commission or otherwise engaging in lawful, concerted activity.

---

<sup>1</sup> Both the Union and the State have challenged certain aspects of the Examiner's Finding of Fact 21. The Union contends that the Examiner improperly found that the Arrangement contemplated Corcoran spending no more than 50% of his time on union duties. We do not see that the Examiner made a finding of fact to that effect. The Examiner found in Finding of Fact 21 that the Arrangement did not contemplate the State using an LTE in excess of 1043 hours in any 26-week pay period. (emphasis supplied). This finding is accurate. However, neither we nor the Examiner have found that the Arrangement required any necessary relationship between the amount of LTE coverage *per se* and the amount of approved union leave/case load relief for Corcoran. To the contrary, the Examiner found, and we agree, that the Arrangement did not establish minimum or maximum limits for either union leave or the concomitant case load relief. Those amounts would be a function of how the parties interpreted and applied the collective bargaining agreement's leave provisions and are beyond the province of the Commission in the instant case. See Examiner's Conclusion of Law 4 and our Finding of Fact 22. The State, for its part, has challenged the Examiner's characterization in Finding of Fact 21 that the Arrangement was "mutually-understood," since, in the State's view, only OSER had authority to reach "mutual" understandings of this nature, and here the Arrangement was made with DOC, not OSER. This is primarily a legal argument and is addressed as such in the Memorandum that accompanies this Order.

25. The State and the WSEU have negotiated contractual language governing the purposes for and conditions pertaining to union leave. The parties' collective bargaining agreement includes a grievance procedure that applies to the contractual language governing union leave, that culminates in final and binding arbitration, and that was intended to be the exclusive means of enforcing the agreement.

- C. The Examiner's Conclusions of Law 1 and 2 are affirmed.
- D. The Examiner's Conclusion of Law 3 is modified as follows and as modified is affirmed:

3. The Respondent's memoranda of January 5, 2005, and January 7, 2005, and their attempts to restrict PSS stewards to activities are matters that are properly addressed under the grievance procedure in the collective bargaining agreement and did not interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Sec. 111.82, Stats., in violation of Sec. 111.84(1)(a), Stats.

- E. The Examiner's Conclusion of Law 4 is set aside and the following Conclusion of Law 4 is made:

4. Respondent's renunciation of the Arrangement effective September 2004 violated the Respondent's duty to bargain in good faith and renounced a collective bargaining agreement, thereby violating Secs. 111.84(1)(d) and (e), Stats., and, derivatively, Sec. 111.84(1)(a), Stats.

- F. The Examiner's Conclusion of Law 5 is reversed and the following Conclusion of Law 5 is made:

5. The Respondent's efforts to end the Arrangement, impose a case load upon Corcoran inconsistent with the Arrangement, and cease deploying an LTE consistent with the Arrangement were not motivated by hostility toward his lawful, concerted activity and did not violate Sec. 111.84(1)(c), Stats.

- G. Paragraph 1 of the Examiner's Order is set aside and the following Order is made:

1. Those portions of the complaint alleging an independent violation of Sec. 111.84(1)(a), Stats., and/or a violation of Sec. 111.84(1)(c), Stats., are dismissed.

- H. Paragraphs 2 and 3 of the Examiner's Order are modified and consolidated as set forth below, and, as modified, are affirmed:

2. To remedy its violations of Secs. 111.84(1)(d) and (e), and, derivatively, (a), Stats., the State shall immediately:

Page 5  
Dec. No. 31272-B

- a. Cease and desist from refusing to comply with the Arrangement until such time as it is eliminated or modified by mutual agreement.
- b. Take the following affirmative action which will effectuate the policies and purposes of SELRA:
  1. Restore the Arrangement consistent with the parameters set forth in Findings of Fact 21 and 22, above;
  2. Notify all employees in the Department of Corrections who are members of the bargaining unit represented by Local 2748, by posting in conspicuous places in offices where such employees are employed, copies of the Notice attached hereto and marked "Appendix A." This notice shall be signed by the Secretary of the Department of Corrections, and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for a period of thirty (30) days thereafter. Reasonable steps shall be taken by the Respondent to insure that this Notice is not altered, defaced or covered by other material.
  3. Notify the Wisconsin Employment Relations Commission within twenty (20) days following the date of this Order of the steps taken to comply herewith.

Given under our hands and seal at the City of Madison, Wisconsin, this 12<sup>th</sup> day of September, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

\_\_\_\_\_  
Judith Neumann, Chair

Susan J. M. Bauman /s/

\_\_\_\_\_  
Susan J. M. Bauman, Commissioner

I concur.

Paul Gordon /s/

\_\_\_\_\_  
Paul Gordon, Commissioner

**APPENDIX "A"**

**NOTICE TO ALL EMPLOYEES OF THE WISCONSIN  
DEPARTMENT OF CORRECTIONS WHO ARE REPRESENTED  
BY LOCAL 2748, WSEU, AFSCME, COUNCIL 24**

Pursuant to an order of the Wisconsin Employment Relations Commission, and in order to effectuate the purposes of the State Employment Labor Relations Act, we hereby notify our employees that:

WE WILL NOT RENOUNCE agreements between the State of Wisconsin and Wisconsin State Employees Union (WSEU), AFSCME Council 24, Local 2748, including the arrangement whereby Local 2748 President Thomas Corcoran was provided a reduced case load and the deployment of LTEs to cover portions of said case load, to accommodate his use of legitimate contractual union leave, or otherwise interfere with our employees' rights to engage in lawful, concerted activity, in violation of Secs. 111.84(1)(d), (e), and, derivatively, (a), Stats.

STATE OF WISCONSIN  
DEPARTMENT OF CORRECTIONS

By: \_\_\_\_\_  
Secretary, Department of Corrections

\_\_\_\_\_  
Date

**THIS NOTICE WILL BE POSTED IN THE LOCATIONS CUSTOMARILY USED FOR POSTING NOTICES TO EMPLOYEES FOR A PERIOD OF THIRTY (30) DAYS FROM THE DATE HEREOF. THIS NOTICE IS NOT TO BE ALTERED, DEFACED, COVERED OR OBSCURED IN ANY WAY.**

Department of CorrectionsMEMORANDUM ACCOMPANYING ORDERSummary of the Facts

The Examiner's Findings of Fact have been largely affirmed; they are summarized here to provide context for the discussion that follows.

Local 2748 represents the Professional Social Services (PSS) bargaining unit of State employees, comprising approximately 3,000 employees working in several State departments and in locations geographically spread throughout the State. The bargaining unit includes the probation and parole officers who work for the Division of Community Corrections (DCC) within the Department of Corrections (DOC), including Thomas Corcoran, who works in the DCC's Beaver Dam office. Corcoran has held the position of state-wide president of Local 2748 since 1996 (except for brief period in late 2004 while the election results were in dispute). The Local is divided into 15 geographical chapters, each of which has four elected officers, and also appoints some 130 stewards state-wide to assist bargaining unit members in grievances and contract administration.

Probation and parole officers are generally assigned a case load of individual offenders who are have been released from incarceration by means of parole or probation. Handling such a case load requires regular availability for scheduled supervisory appointments both within and outside the office as well as availability for unanticipated incidents or needs involving the assigned offenders. Given the size and geographical dispersion of Local 2748's bargaining unit and the substantial union leave during the work day associated with Corcoran's legitimate/approved duties as Local 2748 President, Corcoran, who had a very good employment record, had difficulty handling a normal case load almost from the outset of his tenure as president. These difficulties increased considerably in the late 1990's and early 2000's, when Corcoran's DCC managers found it appropriate and beneficial to the conduct of State business to provide him increasingly expansive leave because they found him to be skillful in facilitating resolution of work place disputes especially in connection with the State's labor-management cooperation (LMC) program. As a result, however, Corcoran's immediate supervisor in the Beaver Dam office and his co-workers there bore the brunt of his unavailability. During the late 1990's, Corcoran's managers continually agitated to higher officials within DOC for the ability to provide Corcoran substantial and acknowledged case load relief which would be accommodated by an additional LTE employee assigned to the Beaver Dam office.<sup>2</sup> Corcoran also continually urged Martin Beil, Executive Director of the parent union, WSEU, to pursue such official accommodation of his (Corcoran's) union leave.

---

<sup>2</sup> LTE's have customarily been used to cover the prolonged absences of key union officials, including Corcoran, during successor contract negotiations.

Page 8  
Dec. No. 31272-B

In June 1999, while Beil and DOC Secretary Jon Litscher were driving together to a State function, Litscher mentioned that DCC managers had expressed a desire to have additional supervisory positions to provide training for DCC agents. Beil mentioned the ongoing problems with Corcoran's case load. The two officials reached an agreement such that three vacant bargaining unit positions would be removed from the unit and made into supervisory positions to provide agent training, in exchange for which DOC would provide an additional LTE to the Beaver Dam office to facilitate giving Corcoran case load relief. While some DOC managers had the impression that Corcoran's union leave would average out to approximately half time, since that is the amount of time one LTE position could provide substitute coverage, the record does not reflect an agreement regarding minimum or maximum amounts of case load relief or union leave Corcoran would be permitted nor any limit on the duration of the arrangement. The arrangement was not designed to give Corcoran more leave, whether paid or unpaid, than the contract provided, nor to modify contractual conditions (such as notice) applicable to union leave. As the Examiner stated, "This rough understanding [referred to as the Arrangement] reflects the parties' presumption that the details necessary to make it work would be handled locally, by Corcoran and his supervisors." The agreement was not reduced to writing. Officials of the Office of State Employment Relations (OSER) were not aware of the Arrangement until some time in late 2003 or early 2004. After learning of the Arrangement, OSER did not act to terminate it until February 2005.

By at least mid-2001, if not earlier, the Arrangement, as implemented by Corcoran's DCC managers, operated to relieve him of any case load duties - in terms of offenders assigned to him - because such duties could not be carried out properly given Corcoran's extensive approved absences from the office for union duties. Corcoran was assigned various non-recurring duties that he could perform on an ad hoc basis while in the office, such as intake and unscheduled visits from offenders or individuals associated with their parole/probation needs. While his leave records indicate that his union leave averaged about 50% over the course of several years, there were periods of time when it approached or reached 100%. In addition, when Corcoran was in the Beaver Dam office, he frequently was on the telephone regarding union business.

Since the additional LTE could not absorb all of what would have been Corcoran's case load, the Arrangement caused coverage difficulties for the manager of the Beaver Dam office, Elmer Karl, and was a continual source of friction within that office. Karl was also Corcoran's immediate supervisor. The record reflects frequent communication over the years between Karl and his superiors about the amount of Corcoran's leave and what effect it was having on the kinds of work load Karl could appropriately assign to Corcoran. Karl's immediate superior until January 2003 was Allan Kasprzak, who directed Karl to implement the Arrangement in a way that maximized Corcoran's availability for various union-related duties, especially LMC, during the work day. After Kasprzak retired, and in response to state-wide pressure to cut LTE utilization, Karl increased his efforts to assign Corcoran some level of case load and/or to eliminate the LTE position associated with the Arrangement. Owing to Beil's intervention with DOC managers, Karl's efforts were not successful.

Page 9  
Dec. No. 31272-B

While Karl was plainly irritated by the Arrangement over the years, and while he attempted from time to time to increase Corcoran's work load, Karl's day to day interactions with Corcoran apparently were friendly until the events giving rise to this case, i.e., approximately September 2004. Until then, the record reflects no efforts on the part of State officials, including Karl, to limit or condition Corcoran's use of union leave.

During 2002 and 2003, WSEU prosecuted an unfair labor practice case before the Commission challenging certain actions DOC managers had taken against Corcoran for the manner in which he had handled a situation involving a sexual harassment claim brought by one bargaining unit member against another unit member. In August 2003, the Commission Examiner issued a decision holding in favor of WSEU and Corcoran (Dec. No. 30340-A). A couple of weeks later, in early September 2003, Karl attempted to impose certain work load responsibilities on Corcoran. Beil learned of this attempt at about the same time that he learned that DCC managers were considering removing LTE coverage for Corcoran's case load. Beil intervened with DOC management, and the Arrangement remained intact. Karl was not involved in the litigation culminating in Dec. No. 30340-A, and only vaguely aware of its issuance or import at the time he attempted to impose the additional work load in September 2003.

OSER sought review of the Examiner's decision in the above-described unfair labor practice case. While OSER officials had become aware of the Arrangement at some point during the above-mentioned litigation and had formed a belief that the Arrangement was inappropriate, OSER intentionally refrained from taking action pending the final outcome of the litigation in order to avoid an appearance of retaliation. In July 2004 the Commission issued a decision largely affirming the Examiner (Dec. No. 30340-B), after which the parties engaged in some further skirmishing over the scope of the Commission's remedy. The litigation ended with the Commission's supplemental decision issued on January 10, 2005 (Dec. No. 30340-C).

In the meantime, Corcoran ran for reelection as President of Local 2748 and appeared to have been defeated when the votes were counted on September 15, 2004. Karl and other State officials took this circumstance as a green light to restore Corcoran to a regular case load. Because Corcoran had not handled that work for several years, Karl and Corcoran arranged for Corcoran to take a multi-day refresher course in agent training. Karl also assigned Corcoran a relatively limited work load during this period of time. In addition to the scheduled training days, Corcoran had also scheduled considerable vacation time during the fall of 2004 and, after his election defeat, added more vacation time, all of which was approved by Karl. During this period of time, Corcoran and members of Local 2748 successfully challenged the fairness of the union election results. In the re-run election, tallied on December 17, 2004, Corcoran emerged as the victor and reassumed his duties as union president. For all these reasons, Corcoran was not available for much work in the Beaver Dam office through the remainder of 2004.

Page 10  
Dec. No. 31272-B

The confluence of events during the fall of 2004, set forth in the preceding paragraph, brought to a boil the long-simmering friction between Karl's work-related interests and Corcoran's union-related interests and ultimately led to the instant case. On September 28, 2004, Corcoran left the Beaver Dam office to handle two Union representational matters in Sheboygan, one of which was also attended by Karl on behalf of management. Karl questioned whether Corcoran was entitled to handle these duties, since he was no longer President, and Corcoran refused to answer without having a representative present. Karl refused to approve a portion of Corcoran's leave for September 28 and instigated a follow-up letter from DCC management stating, *inter alia*, "Since your name is not on a list of appointed stewards, we expect you will not be performing any more steward activities unless or until we receive official notification from the 2748 leadership." Karl continued to chafe at what he viewed as Corcoran's continued indifference to his work-related duties; Corcoran continued to chafe at what he viewed as Karl's improper attempts to limit his lawful union activity.

On December 15, 2004, Karl sent Corcoran a memorandum seeking an explanation from Corcoran about why he did not return to work in what Karl viewed as a timely fashion from certain union activity on November 9, December 8, and December 9. In an e-mail that Karl viewed as insubordinate, Corcoran stated (in part), "If you believe that any of my activities have risen to the level of potential work-rule violations, please conduct a proper investigation, including formal notice to me and to the union. ... I have no obligation to respond in writing to the scenario that you have characterized ...." On December 20, Corcoran notified the office that he would be taking unpaid union leave to have a union telephone line installed in his home and did not report to the office that day. On December 23 Karl demanded an explanation of the December 20 absence and also questioned Corcoran about his case load duties. By then Corcoran had been re-elected President and stated that he viewed the Arrangement as still being in effect, including the case load relief. Karl responded, "What Arrangement?" On December 30, Corcoran left Karl a voice message stating that he (Corcoran) would be out of the office "on union business" on January 3 and 5, 2005. Karl viewed this notice as inadequate.

On January 5, Karl sent a directive to Corcoran that is set forth in full in paragraph 13 of the Examiner's findings. In sum and substance it directed Corcoran to provide Karl with at least 10 calendar days' advance notice ("written when required by the contract") of any "union related activities" and to obtain written prior approval from Karl before representing other unit members in grievances or investigatory meetings. The memo also directed Corcoran to provide various details about such representational activities, such as location, duration, and specific purpose, so that Karl could "evaluate and respond" to the requests. The memo also stated that, "When you are not attending approved union activities, you are expected to perform your full-time duties as a Probation and Parole Agent." These requirements had not been applied to Corcoran previously or to other Local 2748 stewards or officials.

After Corcoran complained to Sherri Harris, DOC's Employment Relations Section Chief, about being subjected to greater restrictions than other stewards, she decided it was an opportunity to establish some guidance and uniformity in handling requests for union leave.