

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Respondent.

No. 15196-A

June 15, 1978 and Complainant's Counsel submitted a brief on February 14, 1979 on which date the parties briefs were exchanged. Complainant filed a reply brief on February 28, 1979, and the record in the matter was closed on March 6, 1979. The Examiner considered the evidence and arguments of the parties and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Shirley Scheider, Complainant herein, is an individual, and she resides at 1007 North Marshall Street, Milwaukee, Wisconsin 53202.

2. Milwaukee County is a municipal employer, and it operates a general medical facility with other related facilities which all comprise the Milwaukee County Medical Complex, hereinafter the Medical Complex.

3. The Staff Nurses Council of Milwaukee is the certified collective bargaining representative of nurses in the employ of Milwaukee County, and in that regard, the Staff Nurses Council and the Employer were parties to a collective bargaining agreement which was in effect at all times pertinent hereto and which in material part provides as follows:

PART 1

. . .

1.04 MANAGEMENT RIGHTS. The County of Milwaukee retains and reserves the sole right to manage its affairs in accordance with all applicable laws, ordinances, regulations and executive orders. Included in this responsibility, but not limited thereto, is . . . the right to transfer and assign nurses, subject to existing practices and the terms of this Agreement; the right, subject to civil service procedures and the terms of this Agreement related thereto, to suspend, discharge, demote or take other disciplinary action and the right to release nurses from duties because of lack of work or lack of funds; . . .

PART 2

. . .

2.32 SENIORITY DEFINED. For all purposes where it applies, seniority shall be measured by the length of a nurse's continuous service with Milwaukee County based on total straight time hours worked, regardless of whether full or part time or type of appointment. Seniority as defined above shall be recomputed on an annual basis. Existing past practices and contractual provisions related to seniority shall remain in effect until seniority is recomputed in accordance with this section.

. . .

PART 5

5.01 RESOLUTION OF DISPUTES. The disputes between the parties arising out of the interpretation, application or enforcement of this Memorandum of Agreement, including nurse grievances, shall be resolved in the manner set forth in the ensuing sections.

. . .

- (6) FINAL AND BINDING. The decision of the Umpire when filed with the appropriate fifth step agency shall be binding on both parties.

5.02 DISCIPLINARY SUSPENSIONS NOT APPEALABLE UNDER S. 63.10, STATS. In cases where a nurse is suspended for a period of 10 days or less by her department head, pursuant to the provisions of Section 63.10, Wis. Stats., the Council shall have the right to refer such disciplinary suspension to the permanent Umpire who shall proceed in accordance with the provisions of Paragraph (3)(a). Such reference shall in all cases be made within 10 working days from the effective date of such suspension. The decision of the Umpire shall be served upon the Department of Labor Relations and the Council. In such proceedings the provisions of Par. (3)(c) shall apply.

Section 63.10 Wis. Stats. states in material part that:

Whenever a person possessing appointing power in the County, . . . believes that an officer or employe in the classified service in his or its department has acted in such a manner as to show him to be incompetent to perform his duties or to have merited demotion or dismissal, he or it shall report in writing to the civil service commission setting forth specifically his complaint, . . .

Rule IV sec. 4 of the Rules of the Milwaukee County Civil Service Commission states in material part:

Section 4 - Probation. All persons certified from original or promotional eligible lists . . . shall be on probation for a period of six months . . .

If any probationer after fair trial shall be found incompetent or unqualified in the opinion of the appointing authority, to perform the duties of the position to which he has been certified, the appointing authority may separate the probationer prior to the completion of the probationary period. . . .

4. Respondent does not assert Complainant's failure to exhaust the above-stated grievance procedure as a defense to any charge made herein by Complainant.

5. Complainant filed her application for a nursing position at the Milwaukee County Medical Complex on September 9, 1975. Scheider was permitted to commence her employment under an emergency appointment, while the Milwaukee County Civil Service Commission, hereinafter the Civil Service Commission, reviewed her application and credentials. The review of Scheider's application was completed on October 6, 1975; notice of her certification to an eligibility list was mailed on October 21, 1975 even prior to approval of the list by the Civil Service Commission on October 27, 1975. The above actions by the Milwaukee County Civil Service Commission together with Scheider's acceptance of a permanent position after her certification to the Employer were necessary conditions which had to be met to permit the change of Scheider's status from an emergency to a regular appointment. Scheider's probationary period commenced on November 2, 1975 with the change in her employment status from an emergency to a regular appointment. Accordingly, her six month probationary period was to extend to May 2, 1976.

6. Nancy Doleysch, the Nurse Supervisor in the Neurological Unit where Scheider was assigned during her tenure with Respondent, discussed both at the initial interview with Complainant and during her first month of employment Doleysch's hope to upgrade Room 923, the critical care room on the neurological floor, to a certified intensive care unit. Under Doleysch's plan, Scheider would be the head nurse of the Intensive Care Unit and Maureen Furno, who became the head nurse of Scheider's work area within one month of Scheider's employment at the Medical Complex, would remain as head nurse of the remainder of the neurological floor, to the exclusion of Room 923. From September, 1975 through March, 1976 Doleysch encouraged Scheider to train nurses in critical care nursing procedures and in the use of equipment such as respirators and electroencephalograms. Doleysch asked Scheider to criticize the work and performance of fellow nurses who worked with her on the Neurological Unit.

7. Scheider complied with Doleysch's request. Complainant criticized the work of fellow employees to demonstrate her ability to assume the position of head nurse of Room 923. This produced a great deal of resentment among her colleagues, to the point that Doleysch convened a meeting at the end of October to explain to the staff working on the neurological floor the reason for Scheider's critical comments and to encourage staff to use Scheider as a resource person. After the meeting, fewer employees told Scheider to "buzz off". However, several employees still resented receiving critical remarks about their work from a new employee.

8. The first evaluation of Scheider's work recites both the strengths and problems associated with Scheider's employment at the Medical Complex. Barbara Budny, the head nurse of the neurological floor during Scheider's first month of employment, observed:

Shirl (Complainant) is an excellent nurse. She is a valuable addition to our staff. . . I find Shirl a very compassionate nurse. She tries not only to meet the patients' physical needs but also their psychological needs. . . I feel she could really co-ordinate better the care the pts. (patients) are receiving and make our staff nurses more aware and sensitive to the needs of these patients. . . She will be valuable in on (sic) the floor in-

service. I have already spoken to Shirl and she has agreed to give the ward classes on EKG's. Shirl has also been beneficial in helping reorganize our Code 4 (emergency) system and in redesigning our ICU (Intensive Care Unit-Room 923) room.

There have been some problems on the ward between the staff nurses and Shirl. Shirl does come on strong in the beginning but I cannot pinpoint why the staff nurses have become defensive. I have spoken to the staff nurses on 10/8/75 in ward conference about this and we will all try hard to work as a team together.

9. During the first two weeks of November, soon after the commencement of Complainant's probationary period, Scheider submitted several suggestions to Doleysch concerning such matters as the construction and layout of the "crash cart" ^{1/} together with a proposal to establish a Dying Patient Nurse Specialist position. ^{2/} As a result of Complainant's suggestions, the crash cart was altered and Haasch, the Director of Nursing Service and Nursing Education, placed the Dying Patient Nurse Specialist proposal on the agenda of a Nurse Supervisors' meeting in November, 1975. Complainant made her presentation to all the Nurse Supervisors concerning her proposal to establish a Dying Patient Nurse Specialist position at the Medical Complex. The Nurse Supervisors, with Haasch's concurrence, rejected Scheider's proposal in the belief that it would further fragment nursing care.

Furthermore, as a result of Scheider's complaints and the complaints of other nurses concerning Kenny, a staff nurse on the neurological floor on permanent regular status, was switched from night to day shift where his work could be closely supervised and he was directed to additional training to improve his skills. Scheider was critical of the work of Sinclair, a nurse with six years of seniority at the Medical Complex. Scheider's specific criticisms were discussed with Sinclair by Furno, the head nurse of the Neurological Unit. Scheider's critical remarks concerning Sinclair's nursing performance and her regular assignment to Room 923, the Critical Care Room, while all other staff nurses on the neurological floor had to rotate through all the different nursing assignments in the Neurological Unit, created resentment between Sinclair and Complainant.

10. On February 1, 1976, Furno rated Complainant's performance and graded her at 99 out of 125 points, a good evaluation. Furno noted that Complainant had to "improve tact and work on communication with other people."

11. On February 21, 1976, Furno evaluated Scheider and expressed high regard for Scheider's knowledge and expertise in critical care

^{1/} A crash cart is a cart which is used in the critical care room 923 to store supplies used in emergency situations.

^{2/} In her proposal to establish a Dying Patient Nurse Specialist, Scheider suggested that a nurse trained in the growing field concerning death and dying would counsel terminally ill patients and their families and assist them in coping with death.

nursing, her alertness to patient needs and her ability to work well in emergency situations, but Furno noted some concern about Scheider's interaction with other employees.

12. On March 18, 1976 just prior to the commencement of her shift, Scheider received a report from Lemke, the nurse on the prior shift, that Dopamine, a blood pressure elevator which is administered by intravenous drip, was charted as being administered to the patient for the duration of her shift. In fact, it was administered only for a brief moment at the time entries were made on the patient's chart. Then the drip was stopped. While Scheider was receiving Lemke's report, the medical resident arrived who orally countermanded the written orders of a staff physician and who directed Lemke to refrain from administering the Dopamine. He orally directed Scheider to do anything she wanted so long as the Dopamine were not administered. Scheider asked that the resident write the order, since oral orders were not in conformance with hospital policy. He refused. Scheider ran several drops of the medication at the commencement of her shift and charted the patient's blood pressure. For the duration of her shift, she did not administer the Dopamine but charted it as if it were administered. Kenny, the nurse on duty on the shift following Scheider's reported this "Dopamine incident" to Furno. The head nurse told Scheider she had erred. Doleysch, the Nurse Supervisor in the Neurological Unit, expressed disappointment and chided Complainant for permitting a physician to place her nursing license in jeopardy. Despite their personal feelings, neither Furno nor Doleysch nor Haasch took any disciplinary action against Scheider or any other employee involved in this incident. However, after the Dopamine incident, Complainant's interactions with her nursing colleagues were oriented solely to business matters. Scheider believed she no longer had the support of supervision which she enjoyed in the past.

13. On March 26, 1976 while on her own time, Scheider counselled a dying patient at the request of the head nurse on 7 North. Scheider was observed out of her work area by the night supervisor. Furno wrote a memorandum to Scheider directing her to receive permission from her departmental supervisor (Doleysch) before interviewing patients in another department. In addition, at a meeting of nursing supervisors and teachers in April, 1976, Haasch announced that there was no position of Dying Patient Nurse Specialist at the Medical Complex.

14. From April 1 through mid-April Furno, Scheider's immediate supervisor, authored six memoranda critical of Scheider's work. On April 13, Furno recommended to Doleysch that Scheider be terminated.

15. Upon receipt of Furno's recommendation, Doleysch sought a meeting with Haasch which meeting took place on April 16, 1976. Doleysch asked Haasch to extend Scheider's probationary period. Haasch denied Doleysch's request in the belief that the processing of the request to extend Complainant's probationary period could not be completed prior to its scheduled expiration. Doleysch then recommended to Haasch that Scheider be terminated.

16. Upon receiving Doleysch's recommendation to terminate Scheider, Haasch considered Complainant's evaluations and Furno's six memoranda, all written in the first two weeks of April, and on April 20, 1976 she too concluded on the basis of the friction between Scheider and her colleagues that Complainant's employment be terminated during her probationary period. Haasch's decision to terminate Scheider's employment had a rational basis and it was not an arbitrary decision. Both Doleysch and Haasch reached their decisions to terminate Scheider's employment despite Complainant's excellent

nursing skills and despite the fact that their supervisory decisions were responsible in part for the resentment between Scheider and her fellow employees. On April 21, Doleysch advised Scheider that her employment at the Medical Complex would terminate as of April 30, 1976.

17. On April 22, Haasch, Scheider and Doleysch met. During this meeting, Scheider was provided with the choice of resigning her position or having her employment at the Medical Complex terminated. Given that choice, Scheider resigned. In light of her prior decision to terminate Scheider, Haasch constructively discharged Complainant at the April 22, 1976 meeting.

18. In providing Complainant with a 5 1/2 month probationary period, Respondent gave her a fair opportunity to demonstrate her qualifications, skills, strengths, as well as her shortcomings in the position of a Registered Nurse -1 (RN-1).

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

CONCLUSIONS OF LAW

1. Complainant Shirley Scheider is a municipal employee within the meaning of Section 111.70(1)(b) of the Municipal Employment Relations Act (MERA herein).

2. That the Milwaukee County (Medical Complex) is a municipal employer within the meaning of Section 111.70(1)(a) of MERA.

3. Since Respondent does not assert as a defense to any charge made herein that Complainant should have exhausted the contractual grievance procedure, the Examiner shall invoke the jurisdiction of the Wisconsin Employment Relations Commission to determine if, by its acts as related herein, Respondent has violated Section 111.70(3)(a)5 of MERA.

4. Respondent did not violate any Statute governing or Rules promulgated by the Milwaukee County Civil Service Commission which are incorporated by reference in the collective bargaining agreement between the Staff Nurses Council and Respondent by its constructive discharge of Complainant prior to the conclusion of her probationary period without first filing charges with the Milwaukee County Civil Service Commission, and in regard thereto, Respondent did not violate Section 111.70(3)(a)5 of MERA.

5. Respondent provided Complainant with a fair trial, required under Rule IV Section 4 of the rules of the Milwaukee County Civil Service Commission which is incorporated by reference in the collective bargaining agreement between the Staff Nurses Council and Respondent, prior to its constructive discharge of Complainant, and in regard thereto, Respondent did not violate Section 111.70(3)(a)5 of MERA.

6. Respondent's constructive discharge of Complainant did not result from Complainant's exercise of protected rights delineated in Section 111.70(2) of MERA, and thereby, Respondent did not violate Section 111.70(3)(a)1 of MERA.

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

ORDER

The complaint in the above-captioned matter be, and the same hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin, this 26th day of March, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Sherwood Malamud
Sherwood Malamud, Examiner

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Scheider alleges in her complaint that Respondent interfered with her right to engage in protected concerted activity, discriminated against her because of her involvement in protected concerted activity, and violated the collective bargaining agreement between Milwaukee County and the Staff Nurses Council. Complainant charges that Respondent violated Sections 111.70(3)(a)1, 3, and 5 of the Municipal Employment Relations Act when it discharged Scheider from her nursing position at the Milwaukee County Medical Complex. During the course of the hearing Complainant withdrew her charge of discrimination and allegations asserting that Respondent violated Sections 111.70(3)(a)3 of MERA. Accordingly, this charge was dismissed. 3/

Respondent asserts that Complainant resigned from her nursing position at the Milwaukee County Medical Complex. Should the Examiner find that Complainant was constructively discharged, Respondent argues in the alternative that Complainant's probationary period was terminated without regard to any concerted activity allegedly engaged in by Complainant. Respondent requests that the complaint be dismissed in its entirety and that costs be taxed against Complainant.

The Examiner will consider the interference and breach of contract issues seriatim.

Interference

Complainant's charge of interference is premised on the theory that Respondent discharged Scheider in response to her involvement in protected concerted activity. Complainant supports this charge by asserting that all reasons proffered by Respondent for its termination of Scheider are pretextual in nature. In this regard Complainant's counsel cited sixteen events which demonstrate the pretextual nature of the discharge. Complainant's counsel argues at p. 13 of his brief that these events and other conduct of Respondent:

. . . ineluctably draw one to the conclusion that the asserted reason for the termination was pretext. And, in the absence of a convincing explanation, it must be inferred that the purpose was unlawful.

Respondent, on the other hand, argues that Complainant failed to prove that she engaged in any protected activity. Respondent notes that Complainant did not call any co-workers to corroborate her testimony that the complaints she made to supervision at the Medical Complex were made on behalf of or in conjunction with other employees. Respondent asserts that Scheider never availed herself of the grievance process, and she did not work with her collective bargaining representative, the Staff Nurses Council to obtain the desired changes in working conditions. It is Respondent's position that the decision to terminate Complainant was solely the result of her problematic interpersonal relationship with fellow staff at the Medical Complex.

3/ Transcript Volume IX, p. 4.

To prevail in her interference charge, Complainant must demonstrate 4/ that the Employer's conduct has a reasonable tendency to interfere with the exercise of rights protected under Section 111.70(2) of MERA. 5/

Respondent terminated Complainant's employment. Respondent's conduct would certainly interfere with Complainant's right to engage in protected activity provided the employer's conduct is related to or is in response to Complainant's exercise of protected rights.

The record reflects that Complainant was not engaged in protected activity at the time her employment was terminated. The Examiner finds that Complainant was terminated as a result of the friction which developed between Scheider and some of her co-workers, even though the creation of that friction was not all Complainant's doing. The following review of the record evidence substantiates the above conclusions.

Scheider was placed in a difficult situation at the very outset of her tenure at the Medical Complex. As a new employee she was placed in a pseudo-supervisory position. Doleysch, the Nursing Supervisor of the Neurological Department, asked her to criticize the nursing performance of her colleagues. She received special treatment with respect to her nursing assignment. Scheider was permitted to remain in Room 923, the critical care room on the unit, while other nursing personnel on the unit had to rotate through the various nursing assignments. Supervision thereby established the conditions under which resentment between Scheider and other staff would build.

However, Scheider did not shrink from Doleysch's requests or resist special treatment in her work assignments. She liked the challenge inherent in her situation. Scheider testified in response to a question from her attorney, as follows:

Q Did the expectations that Mrs. Doleysch (sic) voiced for you to assume this kind of quasi-supervisory capacity with respect to your peers and co-workers make you uncomfortable?

. . .

A Okay. I felt that because of my critical care position it really wasn't going to

4/ Winnebago County (Department of Social Services) (16930-A, B), 8/79, 9/79.

5/ Section 111.70(2) of MERA provides that:

Municipal employees shall have the right to self-organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, and such employees shall have the right to refrain from any and all such activities . . .

bother me that much, because I obviously had the background. I could look at what was going on and see if this indeed was the type of thing that is expected of critical nurses.

I felt it was an additional challenge, and I really like challenges, and that's basically the way I took it, as a challenge to see what I could do with this position.

Transcript Volume VIII, p. 138.

The challenge of which Scheider speaks concerns Doleysch's plan to upgrade the critical care room to a certified intensive care unit, and promote Scheider to the position of head nurse of that intensive care unit. 6/

On the basis of the above evidence, the Examiner finds that Complainant's actions in pursuit of the head nurse position in Room 923 does not constitute protected concerted activity. This finding differs substantially from the interpretation of the record pressed by Complainant. In the discussion below the Examiner analyzes the major elements of Complainant's argument and provides the basis for his rejection of those arguments.

Complainant views her termination as a product of Respondent's hostile reaction to her complaints about conditions at the Medical Complex which she voiced on behalf of and in concert with her colleagues.

The record does not support this allegation. At Volume IX, p. 59 of the transcript Scheider testified in response to a question from her attorney as follows:

Q Were you ever instructed by any of your superiors to cease making complaints of the sort that you described today and yesterday in your testimony?

A As a matter of fact, I was encouraged to continue the complaints, so to speak, because they pointed out deficient areas, areas we needed to improve on and really get going on so that we could upgrade the quality of care that was being delivered.

Complainant points out that nurse Kenny who, by Scheider's account was incompetent and who by supervision's account, was a marginal employe was not treated as harshly as Scheider. This disparate treatment points up the pretextual nature of Respondent's action, Complainant argues.

Nurse Kenny was placed on the day shift and sent to school for additional training in part as a result of Scheider's complaints.

6/ Transcript Volume VI, p. 93-94, Volume VIII, p. 137.

Nonetheless, if there was disparate treatment here, the record reveals that it is a manifestation of uneven supervision rather than illegal motive on the part of the Respondent. It is this uneven supervision which, in part, created the resentment towards Scheider from her colleagues. It is that resentment which supervision detected and reacted to by terminating Scheider's probation.

Complainant focused a major part of her presentation and much argument on the Dopamine incident. Complainant notes in her argument that Scheider complained many times about oral or unclear medical orders from physician to nurse. She complained about the slow response by medical personnel, or the slow codes as it is described in the record, to emergency situations for patients in crises; Complainant notes that supervision failed to respond to these complaints. She argues it is these working conditions about which Scheider complained which led to and were a direct cause of the Dopamine incident. Complainant argues that in order to cover up supervision's failure to correct these working conditions, Respondent decided to terminate Scheider, the person who kept calling attention to these conditions.

The events comprising the Dopamine incident are described in Finding of Fact No. 12. The record evidence establishes that the Dopamine incident had a great impact on Scheider and her relationship to her work. In this regard, the record demonstrates that on March 18, the date of the Dopamine incident, Scheider acted under a physician's order to refrain from administering Dopamine to a patient but to chart it as if that medication were administered. Scheider testified she believed the resident assumed control of the situation so she followed his orders. There were other staff nurses involved in the incident. None were disciplined. Both Furno and Doleysch told Scheider she had made a serious error. Scheider concluded from their remarks that she no longer enjoyed the support of supervision. She described her attitude towards her work after the Dopamine incident as follows:

A Towards my work there wasn't much of a change, other than the fact that I simply restricted myself to concentrating all my efforts on my patients; to be very narrow as far as confining my comments, my criticisms to my own work; to reporting only the patient's status to the next nurse; that I didn't get into the idle chitchat at report times where it was common to discuss, you know, who is going where tonight and 'do you want to go out for breakfast after work.'

My comments were strictly, 'this is the patient's condition, this is what I have done during the night,' and I would leave.

Transcript Volume IX, p. 126.

The decline in Scheider's attitude towards staff after the Dopamine incident was observed by Head Nurse Furno. Her problematic relationship with her fellow employees was the basis of Respondent's decision to terminate her employment.

A review of the lengthy record in this case reveals that Complainant failed to demonstrate by a clear and satisfactory preponderance of the evidence 7/ that Complainant was engaged in protected concerted activity or that Respondent's termination of her employment during her probationary period is in any way related to Complainant's involvement in protected activity. Consequently, the Examiner dismissed Complainant's interference charge. The Examiner will now turn to consider Complainant's other charge that Respondent violated Section 111.70(3)(a)5 of MERA.

Violation of Contract

Complainant alleges that Respondent violated the agreement between the Staff Nurses Council and Respondent when it terminated her employment. The collective bargaining agreement contains a grievance procedure which culminates in final and binding arbitration of disputes. Respondent did not assert Complainant's failure to exhaust the grievance procedure as a defense to her contractual charge. Consequently, the Examiner asserted the jurisdiction of the Wisconsin Employment Relations Commission to determine the two contractual issues raised by Complainant. 8/

Resignation or Constructive Discharge

Respondent raises a threshold issue with regard to Scheider's termination. Respondent asserts that Complainant resigned from her nursing position on April 22, at a meeting among Scheider, Doleysch and Haasch.

The decision to terminate Complainant was made prior to the April 22 meeting. Furno recommended to Doleysch on April 13 that Scheider be terminated. On April 16, Doleysch recommended to Haasch that Scheider be terminated. Finally, according to her own testimony, Haasch decided to terminate Scheider on April 20, 1976. The decision to resign did not originate with Complainant. Haasch made the suggestion to Scheider at the April 22 meeting. On the basis of the above evidence, the Examiner concludes that Scheider was constructively discharged from her nursing position at the Medical Complex.

Regular vs. Probationary Employee

Now, the Examiner will consider Complainant's contractual arguments. Complainant claims she completed her six-month probationary period prior to Respondent's termination of her employment. Complainant argues that Respondent was required under the agreement between it and the Staff Nurses Council to file charges against her with the Milwaukee County Civil Service Commission to effectuate her termination. Respondent did not file charges with the Civil Service Commission, therefore it violated the agreement.

The Rules of the Milwaukee County Civil Service Commission are incorporated by reference into the collective bargaining agreement between Respondent and the Staff Nurses Council. The language of

the agreement, specifically Section 1.04, makes Respondent's suspension or discharge of an employee subject to the procedures of the Civil Service Commission. 9/ The filing of a complaint and hearing on such complaint before the Milwaukee County Civil Service Commission are safeguards which Sec. 63.10 Wis. Stats. provides for employees who have completed their probationary period.

The length of a probationary period is oft times established by contract. Here, there is no reference to a probationary period in the agreement. The probationary period for Respondent's new hires is established under Section 4 of Rule IV of the rules of the Civil Service Commission, as follows:

All persons certified from original or promotional eligible lists, . . . shall be on probation for period of six months, . . .

Scheider commenced her employment at the Medical Complex on September 15, 1975. She was employed under an emergency appointment, which permitted her to work, while the Civil Service Commission reviewed her application and her credentials. On October 21, Scheider was notified that the Civil Service Commission found her eligible to fill the RN-1 position. On October 27 the Civil Service Commission met and certified a list of eligibles including Scheider to the Medical Complex for the RN-1 position. Soon thereafter, Scheider accepted a permanent position at the Medical Complex. She was placed on regular status on November 2, 1975. She commenced her six-month probationary period on November 2, 1975, which period was scheduled for completion on May 2, 1976.

The various kinds of appointment are established by the employer. Scheider's employment status was changed from an emergency to a permanent appointment when all the prerequisites for that change were met. Those conditions were met on November 2, 1975. Therefore, Scheider was still on probation at the time her employment was terminated.

As a probationary employee, Scheider did not enjoy the protection of Sec. 63.10, Wis. Stats. Respondent was not required to effectuate her termination by filing charges with the Civil Service Commission. In addition, as a probationary employee she was not entitled to a hearing prior to her termination. 10/ In this regard, Respondent did not violate the collective bargaining agreement or any provision of the rules of the Civil Service Commission when Respondent terminated Scheider's employment without filing charges against her with the Civil Service Commission or when it failed to afford her a hearing prior to terminating her employment.

Complainant's Rights as a Probationary Employee

Complainant's contractual charge is two pronged. Her second argument comes into play in the event the Examiner finds that Complainant was a probationary employee at the time her employment was terminated. 11/ Complainant relies on Section 4 of Rule IV which provides:

9/ In its brief, Respondent assumes the applicability of the rules and procedures of the Civil Service Commission.

10/ See State ex rel. Dela Hunt v. Ward, (1965) 26 Wis 2d 345, 133 NW 2d 523.

11/ The Commission has jurisdiction to review Respondent's conduct under the rule as a result of the incorporation of the rule into the agreement between Staff Nurses Council and Respondent.

. . . If any probationer after fair trial shall be found incompetent or unqualified, in the opinion of the appointing authority to perform the duties of the position to which he has been certified, the appointing authority may separate the probationer prior to the completion of the probationary period. . .

Complainant argues that she did not receive a fair trial; her counsel states in his brief:

Not only was there no fair trial; on the contrary, the Complainant was put between the devil and the deep blue sea, being told to supervise co-workers but given no authority to do so; and made the scapegoat for 'no code' and 'slow code' practices which had been routine at the facility: . .

Respondent asserts that Complainant was given every opportunity to qualify for her position.

The Wisconsin Supreme Court in Dela Hunt v. Ward, supra, defined the phrase fair trial found in Section 4 of Rule IV as follows: 12/

. . . If a hiring authority under the commission's rule separates a probationer from a position arbitrarily without affording him a fair trial on the job, the probationer would have recourse to the courts on the issue of arbitrariness. . . (emphasis added)

Under Rule IV, Section 4, Respondent was required to provide Scheider with a fair opportunity to demonstrate her skill and ability on the job. 13/ Scheider worked for 5 1/2 months on probation plus an additional 1 1/2 months under an emergency appointment to demonstrate her skills as a nurse. She was provided with a fair opportunity to demonstrate her skills.

Under Rule IV Section 4 and the Wisconsin Supreme Court's interpretation of that rule in Dela Hunt v. Ward, supra, Respondent's decision to terminate Scheider's employment during her probationary period may not be arbitrarily made. The Wisconsin Supreme Court defined an arbitrary decision as one which:

. . . is either so unreasonable as to be without a rational basis or the result of an unconsidered, wilful and irrational choice of conduct. Town of Pleasant Prairie v. Johnson, (1967) 34 Wis 2d 8, 12; cited in Hamilton School District (16801-A, B), 1/80, 2/80.

Rule IV does not require the Employer to meet the much higher standard of just cause in terminating the employment status of a probationary employe.

12/ State ex rel. Dela Hunt v. Ward, 26 Wis 2d 345, 350.

13/ Neither Complainant nor Respondent presented argument concerning the precise meaning of the phrase fair trial or the phrase fair trial on the job.

The Examiner finds that Respondent had a rational basis for its action. There was friction between Complainant and her co-workers. The Examiner set forth the origins and contributing factors to the friction between Complainant and her co-workers in his discussion of Complainant's interference charge, above. That friction which arose from her criticism of her co-workers in a manner which was resented by her colleagues constitutes a rational basis for Respondent's action. The Examiner concludes, therefore, that Respondent did not arbitrarily decide to terminate Scheider's employment. As a result, the Examiner finds that Respondent did not violate the agreement or Rule IV Section 4 of the Rules of the Civil Service Commission when it terminated Complainant. Therefore, the Examiner concludes that Respondent did not violate the agreement nor did it violate Section 111.70(3)(a)5 of MERA when it constructively discharged Complainant.

Dated at Madison, Wisconsin, this 26th day of March, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

Sherwood Malamud, Examiner