STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 720, WCCME, AFSCME, AFL-CIO, Complainant, vs. DANE COUNTY HOUSING AUTHORITY, Respondent.	Case III No. 31302 MP-1455 Decision No. 20497-A

Appearances:
Mr. Darold O. Lowe, Representative, Wisconsin Council 40, WCCME, AFSCME, AFL-CIO, for Complainant.
DeWitt, Sundby, Huggett and Schumacher, Attorneys at Law, by Mr. Robert M. Hesslink, Jr. for the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Local 720, WCCME, AFSCME, AFL-CIO, on March 16, 1983 filed a complaint with the Wisconsin Employment Relations Commission alleging that the Dane County Housing Authority had committed a prohibited practice in violation of Section 111.70(3)(a)5 of the Municipal Employment Relations Act (MERA); the Commission appointed Jane B. Buffett, a member of its staff, to act as Examiner, to make and issue Findings of Fact, Conclusions of Law and Order pursuant to Section 111.07(5), Wis. Stats; and hearing on said complaint was held at Madison, Wisconsin on May 3, 4, 5 and 10, 1983; and the parties filed briefs by August 22, 1983; and the Examiner, having considered the evidence and arguments of the parties, makes the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Local 720, WCCME, AFSCME, AFL-CIO, herein the Union, is a labor organization and the exclusive collective bargaining representative of all regular full-time and regular part-time employes, excluding all supervisory, confidential and craft employes of the Dane County Housing Authority; and that the Union has its offices at 5 Odana Court, Madison, Wisconsin 53719.

2. That the Dane County Housing Authority, herein Housing Authority, is a municipal employer and has its offices at 120 East Wilson Street, Madison, Wisconsin 53703.

3. That the Union and the Housing Authority are parties to a collective bargaining agreement having an effective date of January 1, 1981 and expiration date of December 31, 1981; and that said agreement contained, inter alia the following provisions:

ARTICLE II.
MANAGEMENT RIGHTS

> The Employer possesses the right to manage and operate its affairs in all respects and retains all such rights it possessed prior to this Agreement which are not expressly modified or superseded by this Agreement. Such rights of the Employer to manage its affairs shall be modified only by the express language of this Agreement. Those management rights, which are subject to law, include, but are not in any way intended to be limited by, the following:
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> . . .

3. To hire, transfer, promote or discipline employees and to demote, suspend or discharge employees for just cause;

4. To make, modify and enforce reasonable rules, regulations and standards of performance applicable to the work force;

. . .

That said collective bargaining agreement has a grievance procedure ending with the following provision:

ARTICLE V.
GRIEVANCE PROCEDURE

. . .

Step 4. If the grievance is still unresolved, the party may file a prohibited practice complaint with the Wisconsin Employment Relations Commission in accordance with Subsection 111.70(3)(a)5, Wis. Stats. The Commission shall process such complaint in accordance with applicable legal standards.

. . .

4. That Grievant, E.W., a municipal employe, was employed as a Housing Specialist by the Housing Authority from March 1978 until November 15, 1982 when he was terminated pursuant to the following letter:

November 15, 1982

Mr. (E.W.)
Dane County Housing Authority
120 E. Wilson Street
Madison, WI 53703

Re: Termination from Employment

Dear Mr. (W.):

This is to notify you that, pursuant to Article II, numbers 3 and 4 of the collective bargaining agreement, you are being discharged from your position with the Housing Authority. This discharge will be effective immediately.

The reason for this discharge is that you violated Housing Authority policies and procedures as well as the policies and procedures established by the federal government for the administration of the Section 8 Existing Program (Rent Assistance Program).

Specifically, you processed at least 10 client's cases in a manner that violated both the Dane County Housing Authority and the federal government's processing guidelines. The effect of your actions was to allow certain individuals, whom you have already admitted to be your close friends, friends or acquaintances, to be advanced ahead of others on the waiting list in order to receive housing benefits or subsidies. You also manipulated certain clients' income data in order to either allow higher than normal allowances for benefits or benefits which would otherwise not be allowable. In each case, the end result of your actions was to provide greater benefits to certain individuals than those persons would have received if the agency policies and procedures had been complied with. Many of these cases were previously discussed at length in our pre-disciplinary hearing on November 3, 1982.

When I met with you on November 3, 1982 to give you an opportunity to respond to the allegations of policy and procedure violations, you failed to provide information that would excuse such misconduct. Your sole allegation was that others have taken similar actions. We have reviewed the cases you have cited, as well as files of others involved in administering the program, and have failed to uncover any evidence that any other Housing Authority employee was engaged in practices similar to yours.

You have the right to grieve this action under Section 5 of the 1981-1982 contract. If you wish to exercise your rights under this section, you must file a grievance within 10 days.

Sincerely,

Linda Marx /s/
Linda Marx
Executive Director

5. That Grievant filed a grievance concerning his discharge November 18, 1982; that, on December 8, 1982, Executive Director Linda Marx heard Grievant's appeal; that, on December 22, 1982, Marx denied the appeal by letter to the Grievant; that, on February 2, 1983, the Housing Authority Commissioners heard the grievance; that on February 4, 1983, the Commissioners denied the grievance; and, that on March 16, 1983 the Union, on behalf of the Grievant, filed a complaint with the Wisconsin Employment Relations Commission.

6. That the Housing Authority provides rental assistance for eligible very low, low, and moderate income persons from funds and under regulations of the United States Department of Housing and Urban Development (HUD); that the Housing Authority receives more applicants than it has funds to serve; that it allocates its limited funds by making applicants wait in turn for an available certificate that entitles them to financial assistance; that the system for implementing the waiting period is a Waiting List; that the Waiting List is categorized by the number of bedrooms in the housing unit; that within each category the applications are placed in order of the application date appearing on the Preliminary Application; that within each category, applicants are given assistance in the aforementioned chronological order with the exception of disabled or very low income applicants; that exceptions to this chronological order could be made if less than 10% of the Housing Authority's allocation were received by disabled clients or if less than 30% of its allocation were received by clients in HUD's Very Low Income category; that at the current time, 70-80% of the Housing Authority's clients are Very Low Income; that in 1982 the Waiting List for City of Madison applicants, which had previously been kept separately from those applicants outside the City, was integrated into the Waiting List of applicants outside the City; and that said integration followed chronological order, using the date of the Preliminary Application so that City of Madison residents were considered for assistance at the same time they would have been if there had been only a single list at the time of their original application; that said integration of lists did not involve the altering or back-dating of documents; that Housing Specialists process Preliminary Applications and place them on the Waiting List; and, that, excepting the earliest years of the program, in 1978 and 1979, applicants have had to wait from one to two-and-a-half years to receive financial assistance.

7. That the Grievant back-dated a Preliminary Application for D.R. so that it appeared to have been filed in March, 1981, although another Preliminary Application, not back-dated, was filed by D.R. in April, 1982; and that Grievant prepared D.R.'s papers to be certificated for financial assistance in October, 1982, after only a six-month waiting period.

8. That Grievant back-dated a Preliminary Application for K.M. so that it appeared to have been filed in May, 1981, when in fact K.M. had not yet applied when a written Waiting List had been developed in February, 1982; and that K.M. in spring 1982 lived at an address different from that of the back-dated Preliminary Application.

9. That Grievant altered the Preliminary Application of T.Y. to change it from July, 1981, to July, 1980; and that T.Y. was certificated for financial assistance in October, 1981 after only a three-month waiting period.

10. That Grievant back-dated a Preliminary Application for C.Y. to make it read December, 1980, whereas C.Y. did not move to Madison until February, 1982; and that C.Y. was certificated for financial assistance in April, 1982, after a two-month waiting period.

11. That Grievant back-dated a Preliminary Application of A.G. to make it read September, 1980; that a comparison of the ages of A.G. and A.G.'s children written on the Preliminary Application and their ages written on the certification for financial assistance shows that the Preliminary Application was back-dated approximately one year; and that A.G. was certificated for financial assistance in March, 1982, after approximately a six-month waiting period.

12. That Grievant back-dated the Preliminary Application for B.M. so that it appeared as if it had been filed in September, 1980; that the birthdate of B.M. and B.M.'s children as recorded at the Dane County Social Services, reveals that they would be one year older than listed on the Preliminary Application; and that the Preliminary Application was back-dated approximately one year.

13. That Grievant altered the date of the Preliminary Application of K.J. to change it from October, 1981, to October, 1980; and that K.J. was certificated for financial assistance in November, 1981, after a one-month waiting period.

14. That Grievant back-dated the Preliminary Application for Y.C.; that the Preliminary Application for Y.C. dated September, 1980, listed a child, P., as zero years old; and that P. was born in December, 1980, so that the Preliminary Application was back-dated a minimum of three months.

15. That Grievant back-dated the Preliminary Application of H.A. to make it appear as if filed in August, 1980; that a comparison of the ages of H.A. and his spouse shown on the Preliminary Application and the ages shown on the certification for financial assistance reveal that the Preliminary Application was back-dated approximately one year; and that H.A. was certified for financial assistance in December, 1981, after a waiting period of approximately four months.

16. That Grievant back-dated the Preliminary Application of S.L. to make it appear as if filed in September, 1980; that S.L. did not live at the address listed on the Preliminary Application until summer, 1981; and that the Preliminary Application was back-dated at least nine months.

17. That none of the above-mentioned applicants was entitled to preference by reason of disability; and that the Housing Authority had already met its percentage of very low income clients, so that none of the above-mentioned applicants was entitled to preference by reason of very low income.

18. That HUD regulations allow for side payments, amounts which are attributable to non-essential amenities, such as a dishwasher or a garage, which would cause the rent to exceed the HUD standards for Fair Market Rent Limitation; that HUD regulations require that such payments be reasonable, but do not specify those amounts; that clients are obligated to pay owners directly for such side payments; that in 1981 the Program Coordinator told the Grievant that a $50 side payment for a garage was excessive; that in August, 1981, the Grievant allowed client R.R. a $204 side payment for a garage; that the effect of such a substantial side payment was to allow R.R. to occupy a unit which would otherwise exceed HUD price limitations; that when asked how R.R. could make such a side payment on her income, Grievant responded that R.R. had anticipated income that Grievant had not included in calculating R.R.'s financial assistance; that HUD regulations require Housing Specialists to include anticipated income in financial assistance calculations; and that the effect of such omissions was to certify R.R. for more financial assistance than she would otherwise have received.

19. That calculations of rental assistance are based on the client's income with adjustments for allowable expenses; that child care expenses are, under certain circumstances, allowable expenses; that the Grievant allowed adjustments for child care expenses represented to be paid to client T.Y.'s mother, C.Y.; and that subsequent application information revealed that C.Y. was living in Milwaukee

at the time she was represented to be providing child care to T.Y.'s children in Dane County.

20. That Grievant, in November, 1981, calculated client R.C.'s financial assistance based on a child care allowance when she was not working; and, that HUD regulations do not allow child care adjustments when the parent is not working.

21. That all of the clients noted in Findings of Fact 7 through 16 and 18 through 20 above were friends or acquaintances of the Grievant; and that two of the above-mentioned clients had been Grievant's "girlfriends."

22. That inasmuch as Grievant altered or back-dated nine Preliminary Applications, allowed impermissible side payments or income deductions, and omitted reportable income, thereby violating written policies of HUD and violating common practices of the Housing Authority, the Housing Authority had just cause to discharge the Grievant.

CONCLUSIONS OF LAW

1. That inasmuch as the parties' collective bargaining agreement does not provide for final and binding arbitration of alleged violations of the agreement, the Examiner exercises the Commission's jurisdiction to decide the instant matter.

2. That the Housing Authority, by discharging the Grievant for just cause, did not violate the collective bargaining agreement and therefore did not commit and is not committing a prohibited practice within the meaning of Sec. 111.70(3)(a)5, Wis. Stats.

On the basis of the above Findings of Fact and Conclusions of Law the Examiner makes and issues the following

ORDER

It is ordered that the complaint be, and the same hereby is, dismissed. 1/

Dated at Madison, Wisconsin this 29th day of December, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Jane B. Buffett
Jane B. Buffett, Examiner

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In its complaint filed on March 16, 1983, the Union alleged the Housing Authority committed a prohibited practice within the meaning of Sec. 111.70 (3)(a)5, MERA, by discharging Grievant E.W. in violation of the collective bargaining agreement's just cause standard. In its answer, the Housing Authority denied violating the collective bargaining agreement, and, consequently MERA.

POSITIONS OF THE PARTIES

The Union acknowledges that the Grievant violated both Housing Authority and HUD regulations, but contends that he does not deserve to be discharged. It argues that the Housing Authority should have followed progressive discipline by suspending, instead of discharging, the Grievant for his infractions. It supports its position by citing arbitral opinions favoring progressive discipline.

The Housing Authority argues that the Grievant's admitted acts violated not only its written procedures, but routine Housing Authority practices. It asserts that under a Commission decision in Wilmot Union High School District 2/ employers can show that they have met the requirements of a just cause provision if: (1) the procedures leading up to the disciplinary decision are fair and objective; (2) the employe was either told not to engage in the conduct or knew that he should not have engaged in it; and (3) the "penalty fit the crime." The Housing Authority additionally cites St. Croix Joint School District No. 1 3/ for the proposition that employers do not have to warn employes that discipline will follow misconduct if that misconduct is basically incompatible with the employe's responsibilities, and if the employe was given specific direction to stop the misconduct. Finally, the Housing Authority contends that the Grievant's offenses were so severe that the warnings were not required, citing St. Croix 4/and other arbitration awards. 5/

DISCUSSION

Since the Grievant does not dispute that he altered or back-dated Preliminary Application dates, made rental assistance calculations based on impermissible deductions, allowed an excessive side payment, and omitted reportable income, the sole question before the Examiner is whether that conduct was just cause for discharge. The Union asserts that the Housing Authority had just cause for only a lesser penalty, specifically, a suspension.

A lesser penalty than discharge is arguably required by a just cause standard for certain employe misconduct, depending upon the nature of the employe's actions. For example, corrective discipline might be appropriate if an employe is unaware that his performance is gradually deteriorating through numerous minor infractions. Such an employe might dramatically improve his work if the rude awakening of discipline is coupled with the second chance of progressive discipline. In the instant case, however, the altering and back-dating of Preliminary Applications were deliberate, conscious acts. The Grievant did not try to defend himself by claiming that he was unaware of the error of his acts,

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2/ (18840-A) 3/82, affirmed (18840-B) 1/83.

3/ (12498-A) 5/75, affirmed (12498-B) 5/75.

4/ Supra.

5/ Chrysler Corporation, 53 LA 1279 (Alexander, 1969); Wheaton Industries and Glass Bottle Blowers, Local 7, 64 LA 826 (Kerrison, 1975); Joy Manufacturing Company and Machinists, Local 1842, District 83, 68 LA 697 (Freeman, 1976); and ITT Continental Baking Co., 80 LA 377 (Kreimer, 1983).

nor did he claim that he merely made a mistake in judgment. Additionally, these alterations and back-datings occurred not once but nine times, and the improper assistance calculations occurred three times.

In light of the Grievant's duties, the seriousness of the misconduct becomes even more clear. As a Housing Specialist, a major part of his assignment was to confer financial benefits upon clients in a fair and regular fashion. The Grievant's actions, by circumventing the Waiting List, destroyed the very same fairness he was responsible for achieving. Since his misconduct concerned the essence of his duty, the Grievant clearly knew that his actions had the effect of giving benefits to some applicants earlier than they were entitled to such benefits, and postponing benefits of other applicants beyond the time when they should have received them. Indeed, at a time when other applicants waited for a period ranging from one to two-and-a-half years, the applicants whose forms the Grievant back-dated waited for periods ranging from only two months to a year. It is unnecessary to underline the abuse of official authority involved in the Grievant's bestowal of favors upon his friends.

In summary, the Grievant committed repeated, deliberate, and serious misconduct 6/ involving the essence of his duties. As a result, the Housing Authority had just cause to dismiss the Grievant, and by so doing did not violate the collective bargaining agreement, and did not violate Sec. 111.70(3)(a)5, Wis. Stats.

Dated at Madison, Wisconsin this 29th day of December, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Jane B. Buffett, Examiner

6/ In its brief, the Housing Authority referred to the Grievant's actions as a violation of criminal statutes. The Commission has no jurisdiction to determine such violations; no such convictions are in evidence; and this decision in no part relies upon such alleged criminal violations. Similarly, the Housing Authority attached to its brief the determination of the Department of Industry, Labor and Human Relations (DILHR) relating to the Grievant's unemployment benefits claim. Although the parties did provide that a transcript of the DILHR hearing be placed in evidence, the DIHLR determination was not in evidence. Furthermore, that determination was based upon the standards of 108.04, Wis. Stats., which differ from the standards of the collective bargaining agreement. Since this Examiner is faced with an alleged violation of the collective bargaining agreement, this decision in no way relies upon the DILHR determination.