STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

GENE A. ELLISON, Complainant, vs. BROOKSIDE CARE CENTER, A KENOSHA COUNTY INSTITUTION, Respondent.	Case LVIII No. 31495 MP-1467 Decision No. 20790-A

Appearances:

Mr. Robert C. Kupfer, Kupfer and Kupfer, Attorneys at Law, 3830 - 63rd Street, Kenosha, Wisconsin 53142, appearing on behalf of Gene A. Ellison.

Mr. William P. Nickolai, First Assistant Corporation Counsel, Kenosha County Courthouse, 912 - 56th Street, Room 307, Kenosha, Wisconsin 53140, appearing on behalf of the Brookside Care Center, a Kenosha County institution.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Gene A. Ellison, having on May 3, 1983, filed a complaint with the Wisconsin Employment Relations Commission, in which he alleged that the Brookside Care Center, a Kenosha County institution, had committed prohibited practices within the meaning of the Municipal Employment Relations Act (MERA); and the Commission, on June 29, 1983, having appointed Richard B. McLaughlin, a member of its staff, to act as an Examiner to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.70(4)(a) and Sec. 111.07 of the Wisconsin Statutes; and a hearing having been conducted on the complaint in Kenosha, Wisconsin, on August 3, 1983; and a transcript of that hearing having been provided to the Examiner on August 26, 1983; and the parties having filed briefs by September 19, 1983; and the Examiner having 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. That Gene A. Ellison, hereinafter referred to as the Complainant, is an individual who lives at 3711 - 75th Street, Kenosha, Wisconsin 53142, and who filed a complaint against the Brookside Care Center, a Kenosha County institution, which was received at the Commission offices on May 3, 1983.

2. That Kenosha County, hereinafter referred to as the County, is a municipal employer which has its offices located in care of the Kenosha County Courthouse, 912 - 56th Street, Room 307, Kenosha, Wisconsin 53140; and that the County, among its various functions, operates the Brookside Care Center as a County institution which employs various employes to attend to the maintenance requirements of the Brookside facility.

3. That the County is a party to a collective bargaining agreement with the Kenosha County Institutions Employees, Local 1392, American Federation of State, County and Municipal Employees, AFL-CIO, hereinafter referred to as the Union; that this agreement was in effect from January 1, 1979 until January 25, 1983; and that this agreement contained the following provisions:

ARTICLE I - RECOGNITION

Section 1.1. The County hereby recognizes the Union as the exclusive bargaining agent for all Brookside and Willowbrook employees except supervisory employees, administrator's stenographer and registered nurses for the

purpose of bargaining of all matters pertaining to wages, hours and all other conditions of employment.

Section 1.2. Management Rights. Except as otherwise provided in this agreement, the County retains all the normal rights and functions of management and those that it has by law. Without limiting the generality of the foregoing, this includes the right to hire, promote, transfer, demote or suspend or otherwise discharge or discipline for proper cause . . .

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ARTICLE III - GRIEVANCE PROCEDURE

Section 3.1. Procedure. Any difference or misunderstanding involving the interpretation or application of this agreement or a work practice which may arise between an employee or the Union covered by this agreement and the County concerning wages, hours, working conditions or other conditions of employment shall be handled and settled in accordance with the following procedure:

Step 1. Any employee who has a grievance shall first discuss it with his immediate supervisor with or without the presence of the steward at his option. If the grievance is not resolved between the employee with or without the steward and the immediate supervisor, the grievance shall be reduced to writing, in triplicate, on a form provided by the Union and the Union shall request a meeting with the department head within ten (10) working days after the supervisor's answer to the employees. If the grievance is resolved between the employee and the supervisor, the Union shall be notified of the settlement.

If the grievance is reduced to writing, a copy shall be furnished to the County's Director of Labor Relations and Personnel and to the Union's Council 40 Representative.

Step 2. The hearing shall consist of a meeting with the administrator, the department head and the steward and aggrieved and/or other representatives of the Local. The department head shall give his answer in writing to the Union Representative who signed such grievance within four (4) working days of this meeting.

Step 3. In the event the grievance is not satisfactorily adjusted in Step 2, the Union may appeal the grievance to Step 3 by notifying within ten (10) working days of the completion of Step 2, the Personnel Committee of the County Board in writing. This appeal shall state the name of the aggrieved, the date of the grievance, the subject and the relief requested. The Personnel Committee shall give its disposition of the grievance to the Union in writing within fourteen (14) calendar days. If the Personnel Committee fails to give its disposition of the grievance in writing to the Union within fourteen (14) calendar days after the date the parties have met to discuss the grievance, it shall be settled in favor of the grievant. The parties may mutually agree to extend the time limit at this step in accordance with Section 3.3.

Step 4. All grievances which cannot be adjusted in accord with the above procedure may be submitted for decision in an impartial arbitration within ten (10) working days following receipt of the County's answer in Step 4 (sic) above. The arbitrator shall be selected by mutual agreement of the parties; or, if no such agreement can be reached within five (5) days after notice of appeal to arbitration, the Union

or the employer may request two (2) panels of seven (7) arbitrators each from the Federal Mediation and Conciliation Service. The arbitrator shall be selected from the panel by each party alternately striking a name from the panel until only one (1) name remains, the party desiring arbitration striking the first name. Expenses of the arbitrator shall be shared equally by the parties.

The authority of the arbitrator shall be limited to the construction and application of the terms of this Agreement and limited to the grievance referred to him for arbitration; he shall have no power or authority to add to, subtract from alter or modify any of the terms of this Agreement. The decision of the arbitrator shall be final and binding upon the Union and the County.

Section 3.2. Time Limits - Appeal and Settlement. The parties agree to follow each of the foregoing steps in processing the grievance and if, in any step except Step 3, the County representative fails to give his answer within the time limit therein set forth, the grievance is automatically appealed to the next step at the expiration of such time limit. Any grievance which is not appealed to the next step within the time limits provided herein, shall be considered settled on the basis of the County's last answer.

Section 3.3 Extension of Time Limits. Additional days to settle or move a grievance may be extended by mutual agreement. No retroactive payments on grievances involving loss of pay shall be required of the County prior to ninety (90) calendar days before the date the grievance was first presented in writing.

Section 3.4. Time Limits for Filing Grievances. Any grievance shall be presented within ten (10) working days after the date of the event or occurrence or said grievance will be barred.

Section 3.5. Work Rules and Discipline. Employees shall comply with all provisions of this Agreement and all reasonable work rules. Employees may be disciplined for violation thereof under the terms of this Agreement, but only for just cause and in a fair and impartial manner. Excluding discipline for patient abuse, any employee who has not been disciplined for any reason for a period of three (3) years shall be considered as having a clean record as of the end of such three (3) year period. When any employee is being disciplined or discharged, there shall be a Union representative present and a copy of the reprimand sent to the Union and the employee.

The foregoing procedure shall govern any claim by an employee that he has been disciplined or discharged without just cause. Should any action on the part of the County become the subject of arbitration such described action may be affirmed, revoked, modified in any manner not inconsistent with the terms of this Agreement.

Section 3.6. Pay for Grievance Handling. Grievance matters shall be handled through Step 4 during the daily schedule of hours with no loss in wages for stewards, officers or employees involved in handling said matter. The Local shall be allowed to have Union representatives deemed necessary at any or all grievance meetings. Employees shall have the right to present their grievances without fear of any penalty.

Section 3.7. Policy Grievances. The Union shall have the right to submit policy grievances regarding provisions of this agreement in matters which do not necessarily apply to any one employee.

Section 3.8. Suspension and Discharge. No employee shall be subject to discharge without first sustaining a suspension from work for a period of at least three (3) days. During the suspension period, the County and Union representatives shall investigate and review the circumstances involved and then meet and attempt to resolve the issue. If not resolved and the employee is discharged, the grievance must be filed within five (5) workdays of the notification of discharge and shall be processed beginning at Step 3 of the grievance procedure.

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ARTICLE VI - SENIORITY

Section 6.1 Probationary Period. New full-time employees shall be on a probationary status for a period of ninety (90) days. New part-time employees shall be on a probationary status for a period of sixty (60) scheduled days worked, or five (5) calendar months, whichever is earlier. During such probationary period, employees shall not be entitled to any fringe benefits under this Agreement except for the appropriate wage rate to be paid for work actually performed. During this probationary period, neither the Union nor the employee shall have recourse to the grievance procedure in case of discharge. If still employed after such date, seniority shall date from first day of hiring. Until a probationary employee has acquired seniority, he shall have no re-employment rights in case of layoff.

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Section 6.5 Notice of Termination. An employee covered by this Agreement whose employment is terminated for any reason other than disciplinary action, shall be entitled to two (2) weeks notice and give (sic) the reason for such termination.

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4. That the Complainant was hired by the County on April 13, 1981 and classified as a temporary part-time employe; that on February 24, 1982 the County posted a job opening for a permanent full-time maintenance employe; that the Complainant signed this posting on February 25, 1982; that the County determined that the Complainant would be offered the opening thus posted and signed; that on March 3, 1982 the Complainant began work classified by the County as a regular full-time maintenance employe on probationary status; that the Complainant performed substantially the same duties while classified as a regular full-time employe as he had performed while classified as a temporary part-time employe; that among those duties the Complainant was expected to monitor and to oversee the operation of the County's boilers, to make rounds of the Brookside facility to determine what, if any, maintenance work was required, and to respond as needed to requests regarding the repair of malfunctioning equipment; that about ten percent of his duties centered on boiler work, with the balance being devoted to various maintenance work involving duties ranging from cleaning to plumbing, electrical and carpentry related duties; that on May 5, 1982 the Complainant was approached by Robert LeBlanc, the County's maintenance supervisor and the Complainant's immediate supervisor, and by Roland Gregory, the Administrator of the Brookside facility; that Mr. LeBlanc and Mr. Gregory informed the Complainant that they did not have confidence in his work, that employes in the nursing department did not have confidence in his work, and that Mr. LeBlanc and Mr. Gregory felt it would be necessary to extend the Complainant's probation period for approximately three months; that Mr. Gregory supplied the Complainant with a memorandum dated May 5, 1982 which the Complainant signed, and which stated: "Your probation is being extended three months to an ending date of August 10, 1982."; that the County sent a copy of this memorandum to the Union which did not file any grievance regarding that memorandum; that the Complainant did not have Union representation at the meeting of May 5, 1982; that although the Complainant did not consider the signing of the May 5, 1982 memorandum to have been voluntary, both the Complainant and

Mr. Gregory understood that the alternative to the extension was immediate termination; that on June 24, 1982 the County terminated the Complainant's employment; and that the Complainant did not have Union representation at the time of his termination on June 24, 1982.

5. That the Union filed a grievance on June 29, 1982 regarding the Complainant's termination; that this grievance stated that the Union did not feel there was just cause for the Complainant's termination, and that the Union demanded that the County reinstate the Complainant with backpay; that on June 30, 1982 Mr. Gregory sent the following letter to Helen Kaquatosh, the Union's president:

> Mr. Ellison was working as a temporary employee until the date of his successful bid for a maintenance position. During both his temporary and probationary periods some problems were cited to Mr. Ellison. Prior to completion of his probation, Mr. LeBlanc and myself had a discussion with Mr. Ellison regarding specific problems we saw in his work performance, specifically regarding building trade skills and also a problem in handling emergency situations.
>
> Mr. Ellison agreed to extend his probation so that he might improve in these areas. The union and Mr. Ellison were given copies of a memo stating this, a copy of which Mr. Ellison signed for his file.
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> As Mr. Ellison was unable to improve his performance, he was terminated on June 24, 1982, while still on extended probation. Termination of probationary employees is a management right. Based on section 6.1 of the contract, this grievance is denied.

that on July 9, 1982 Ms. Kaquatosh sent a letter to Brooke Koons, the County's Personnel Director, in which the Union requested Mr. Koons to schedule a meeting between the Union and the County's Personnel Committee under Step 3 of the grievance procedure set forth in Finding of Fact 3 above; that on August 10, 1982, Mr. Koons sent a memorandum to the Chairman and members of the County's Personnel Committee which stated the following recommendation regarding the grievance:

> Section 6.1 - Probationary Period of the 1392 contract provides for a probationary period of 90 days and there is no special language for an extension of that period and/or a (60) scheduled days worked or (5) months which ever is earlier for part-time employees.
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> However, in a review of the facts i.e. most specifically the signed letter by Mr. Ellison for the extension of his probationary period effective on May 5, 1982 which the Union received a copy of and never grieved, everyone apparently agreed to the extension of the probationary period, thus the termination was correct and should stand and this grievance should be totally disallowed under Section 6.1.

that on August 11, 1982 the Personnel Committee decided to "let the (Complainant's) termination stand"; and that the grievance was not processed beyond the Personnel Committee's actions of August 11, 1982.

6. That Mr. LeBlanc and Mr. Gregory decided to hire the Complainant as a full-time employe placed on probationary status because he had prior experience on the job, was a licensed boiler technician, and, in Mr. Gregory's and Mr. LeBlanc's opinion, deserved the opportunity to work, if possible, through a probation period; that at the time of the extension of the Complainant's probation period, Mr. Gregory and Mr. LeBlanc had concluded that the Complainant's job performance was not satisfactory and had been questioned by various Brookside maintenance and nursing employes; that Mr. LeBlanc and Mr. Gregory concluded, however, that the Complainant should be given a chance to improve on his job performance in the hope that his performance would improve sufficiently to warrant his reclassification as a non-probationary employe; that in their conference with the Complainant on May 5, 1982 Mr. Gregory and Mr. LeBlanc told the Complainant that they did not have confidence in his work ability and that nursing department employes did not have confidence in his work ability; that Mr. Gregory and Mr. LeBlanc concluded

that the Complainant's job performance did not significantly improve during the extension of his probation period; that as of the date of the Complainant's termination, Mr. LeBlanc felt that the Complainant had noticeable difficulties performing plumbing and electrical related work and should not be considered to have successfully completed a probation period; that Mr. LeBlanc based his conclusion on an overall observation of the Complainant's work performance and on a number of specific incidents that Mr. LeBlanc had personally observed; that among these specific incidents, the Complainant, on one occasion, discovered a loose wire mold in a resident's room which required only minor repair, but which the Complainant decided, without seeking any advice, could only be repaired by first removing a wire which the Complainant could not subsequently replace without assistance; that on another occasion, the Complainant left a degreasing compound he had used to clean certain fans "slopped all over the floor" by the boiler room sink which created a safety hazard, and which caused another maintenance employe to slip; that on another occasion Mr. LeBlanc discovered that the Complainant had attempted to repair a leaking faucet in a utility room but had tried to install a new seat with the wrong threads, thus stripping the threads in the faucet body, and thus requiring that the entire faucet be replaced; that on another occasion the Complainant was instructed to adjust a loose belt on a laundry drier and was instructed on how to do so but could not perform the adjustment without direct supervision; that Mr. LeBlanc based his conclusion regarding the Complainant's job performance in part on reports received from other Brookside employes; that a nursing department employe reported that when asked to replace a missing screw on a wheel chair, the Complainant made repeated trips back and forth to the boiler room to locate a replacement rather than taking the chair or the affected part of the chair to the boiler room; that another nursing department employe reported to Mr. LeBlanc that the Complainant panicked when called to repair a time clock which was malfunctioning and smoking; that Mr. LeBlanc was concerned with the Complainant's response to emergency situations in part because of an incident which occurred on or about June 13, 1981 in which the Complainant had been summoned to the nursing department to assist a woman who had gotten her finger caught in an elevator door, and in which the Complainant was unable to offer any assistance to the woman because while he looked for a key to the elevator other employes successfully freed the woman's fingers; that although the Complainant stated he did not know where the key was, Mr. LeBlanc stated without contradiction that the Complainant had been shown the location of the key during his training and was required to use that key as a part of his regular duties to maintain the elevators; that other maintenance employes complained to Mr. LeBlanc that the Complainant could not repair bed lamps even after instruction, had on one occasion let another maintenance employe perform the Complainant's duties to supply an oxygen bottle to a Brookside resident, and had, on one occasion, failed to properly operate a drill press; that the Complainant did not receive any written evaluation regarding his work performance, did not receive any written warnings regarding that performance, and was not suspended from work for performance related reasons at any time during his employment with the County; that Mr. LeBlanc's evaluation of the Complainant's work performance consisted of informal discussions between Mr. LeBlanc and the Complainant which occurred on approximately a monthly basis, with more frequent evaluations occurring only if specific incidents demanded it; that the Complainant maintained a good attendance record throughout his employment with the County; that the Complainant, during his employment with the County, took certain classes to gain a second class license as a boiler technician, and did receive such a license; that Mr. LeBlanc informed the Complainant during his employment with the County that boiler work was only a small part of his duties, and that the Complainant would be well advised to get further training in electrical and plumbing work; that the County has not extended the probation period of any other maintenance employe; and that the County does not generally keep written files on the work performance of probationary employes in the maintenance department.

7. That the extension of the Complainant's probation period was made solely to afford the County further opportunity to observe the Complainant's work performance; that the County did not extend the Complainant's probation period or subsequently terminate him in bad faith or for discriminatory reasons; and that the Complainant's termination cannot be considered arbitrary or capricious.

CONCLUSIONS OF LAW

1. That Gene A. Ellison was a "Municipal employe" within the meaning of Sec. 111.70(1)(b), Wis. Stats., during his employment by Kenosha County at its Brookside Care Center.

2. That Kenosha County, in its operation of the Brookside Care Center, is a "Municipal employer" within the meaning of Sec. 111.70(1)(a), Wis. Stats.

3. That the County's extension of the Complainant's probation period on May 5, 1982 and its subsequent termination of the Complainant on June 24, 1982 both occurred within the one year preceding the filing of his complaint regarding these actions on May 3, 1983; and that his complaint regarding those acts has been timely filed within the meaning of Sec. 111.70(4)a and Sec. 111.07(14), Wis. Stats.

4. That the Complainant, as an individual, is a "party in interest" within the meaning of Sec. 111.70(4)a and Sec. 111.07(2)a, Wis. Stats. and of Sec. ERB 12.02(1) of the Wisconsin Administrative Code, to allege that Kenosha County breached the collective bargaining agreement mentioned in Finding of Fact 3 above in violation of Sec. 111.70(3)(a)5, Wis. Stats.

5. That the Complainant has not established a violation of any provision of the collective bargaining agreement mentioned in Finding of Fact 3 above which would grant the Complainant a right to employment with the County as a non-probationary employe; and that the County's actions in terminating the Complainant's employment on June 24, 1982 do not constitute a violation of Sec. 111.70(3)(a)5, Wis. Stats.

ORDER

That the Complaint be, and hereby is, dismissed. 1/

Dated at Madison, Wisconsin this 9th day of January, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Richard B. McLaughlin, 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

THE PARTIES' POSITIONS

The Complainant has asserted that the County's actions in extending his probation period and in subsequently terminating him constitute violations of the collective bargaining agreement which demand "reinstatement with back pay . . . seniority to the date of hire . . . (and) status as a non-probationary employee." The Complainant urges that the extension of his probation period was improper for a number of reasons. The Complainant argues that the collective bargaining agreement does not grant the County any right to extend a probation period, and that to allow the County to do so in this case would arrogate to the County the authority to indefinitely extend any probation period. In addition, the Complainant asserts that the "circumstances surrounding the extension were coercive in nature," since the Complainant had no alternative to the extension but immediate termination, and was not afforded Union representation. The circumstances surrounding the Complainant's termination were no less coercive in nature, in the Complainant's estimation, and form an additional basis to conclude that his discharge violated the collective bargaining agreement. The Complainant contends that the County's conduct violated Secs. 3.5, 3.8, 6.1 and 6.5 of the collective bargaining agreement. In addition, the Complainant argues that an examination of the evidence reveals that the County's means of evaluating his work performance and the conclusions reached by the County regarding that performance constitute nothing more than "mere pretenses to justify an arbitrary and capricious discharge." The County's purported rationale for the termination establishes, in the Complainant's estimation, reason to believe that the County's discharge of the Complainant "is a mere pretense for some motive, unknown to Complainant, that shocks the public conscience and violates the Agreement between the public and its workers and the laws under which we live." The Complainant concludes that the County's conduct violates Sec. 111.70(3)(a)5, Wis. Stats., and also constitutes a wrongful discharge under relevant Wisconsin law.

The County has asserted two contentions of a jurisdictional nature. Because the Complainant filed his complaint with the Commission on May 3, 1983 and was placed on probationary status on March 3, 1982, the County urges that his complaint is either untimely or timely raises issues only regarding events occurring after his placement on probationary status. In addition, the County urges that the Complainant has no standing to press his complaint because the Union, not the Complainant, is a party to the collective bargaining agreement in issue, and thus only the Union, can assert "an interest . . . recognized by law" 2/ in this case. If the Commission has jurisdiction over this matter, the County urges that it has, under Sec. 1.2 of the labor contract, a retained right to extend a probation period. Any other conclusion, in the County's estimation, would simply encourage the County to terminate employes the County had any doubts regarding and would anomalously grant the Complainant greater rights after the extension of his probation period than he possessed before that extension. The County argues that if it did have the right to extend the Complainant's probation period, then its right to terminate the Complainant cannot be challenged since he was a probationary employe. Even if its rights to terminate the Complainant cannot be considered to be unfettered, the County urges that the record contains ample reason to believe the Complainant was properly terminated.

DISCUSSION

Analysis of whether or not the County violated Sec. 111.70(3)(a)5 demands examination of the County's contentions regarding the Commission's jurisdiction over this matter. An examination of the parties' contentions demonstrates that the Complainant has not challenged the County's contractual right to classify him as a probationary employe on March 3, 1982 but has challenged the County's contractual right to extend his probation on May 5, 1982 and to terminate his

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2/ Citing Wisconsin's Environmental Decade, Inc., v. PSC, 69 Wis 2d 1, 10 (1974).

employment on June 24, 1982. Both of these challenged acts fall within the one year period set forth in Secs. 111.70(4)(a) and 111.07(14), and are therefore properly before the Commission.

The County has also questioned the Complainant's standing to bring a complaint against the County under Sec. 111.70(3)(a)5. It is undisputed that the contractual grievance procedure is not available to the Complainant, and thus the Commission's well established policy of deferring disputes arising under a collective bargaining agreement to the contractual grievance procedure is not relevant to this case. The County argues, however, that the Complainant's lack of standing is traceable to the provisions of Sec. 111.70(3)(a)5 which "by its own language only applies to the parties of a collective agreement." Sec. 111.70(3)(a)5 makes it a "prohibited practice for a municipal employer . . . (t)o violate any collective bargaining agreement previously agreed upon by the parties . . ." The statutes and administrative rules which establish the procedure for the determination of violations of this section set forth that a complaint must be filed by a "party in interest." 3/ In Weyauwega Joint School District No. 2, the Commission indicated that an individual has standing to assert a violation of Sec. 111.70(3)(a)5. 4/ The Weyauwega case indicates that while collective bargaining agreements are made and enforced by majority representatives, many of the rights set forth in such agreements accrue to individuals who thus have a direct interest in the enforcement of those agreements. The Complainant does, then, have standing to allege a violation of Sec. 111.70(3)(a)5.

That the Complainant has standing to allege a violation of Sec. 111.70(3)(a)5 does not mean that the Complainant acquired by that statute any greater rights than those granted him by the collective bargaining agreement. Whatever employment rights the Complainant possessed are traceable to the collective bargaining agreement since Sec. 111.70(3)(a)5 does not grant any employment rights in itself, but rather provides a mechanism for enforcing whatever rights are granted the Complainant under the labor contract. That the parties to the agreement excluded questions of discharge of probationary employes from the grievance procedure is a significant point here, since it is not clear that the labor agreement was drafted to grant probationary employes greater rights before an Examiner than they would possess before an Arbitrator. However, because a waiver of a statutory right must be clear and unambiguous 5/, and because there is no evidence that the parties to the labor agreement intended to waive individual employes' rights under Sec. 111.70(3)(a)5, it is necessary to examine the Complainant's contractual rights regarding the extension of his probation period and his subsequent termination.

Although the extension of the Complainant's probation period raises an issue of contract interpretation since the parties' agreement does not expressly grant or deny the County such a right, it would be inappropriate to resolve this issue in light of the circumstances of this case and of the Complainant's arguments. Several factors present in this case indicate issues of contract interpretation should be addressed only if necessary. First, the Union, though a party to the agreement, is not a party to this action, and any contract interpretation must be made without evidence or arguments submitted on their behalf. Second, neither the Union nor the Complainant ever filed a grievance regarding the extension, and nothing in the record indicates that this issue could not be placed before an arbitrator. In fact, Article III, Sec. 3.7 arguably could cover such a grievance if other agreement provisions did not. An unnecessary Examiner opinion could, then, subvert the contractual grievance procedure. Finally, there is no evidence to indicate that the extension was proposed by the County for any reason other than to allow the Complainant an opportunity to improve his work performance. Each of these factors militates against making an unnecessary interpretation on the contract, and in light of the Complainant's arguments on this point, such an

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3/ Secs. 111.70(4)a and 111.07(2)a, and Wisconsin Administrative Code ERB 12.02(1).

4/ Weyauwega Jt. School District No. 2; Board of Education of Weyauwega Jt. School District No. 2, 14373-B (6/77), 14373-D (7/78).

5/ Faust v. Ladysmith-Hawkins School Systems, 88 Wis. 2d 525, 532 (1979).

interpretation would be unnecessary. The Complainant has argued that the extension of his probation period, if violative of the contract, would grant him a right to reemployment as a non-probationary employe. Because this contention cannot be accepted, it is unnecessary to examine the contractual validity of the extension. The Complainant's contention cannot be accepted because both the Complainant and Mr. Gregory understood that the Complainant's options at the time of the extension were to either accept immediate termination or the extension. In light of this understanding, and of the circumstances noted above, the contention that the Complainant acquired greater employment rights by accepting the extension than he would have had by refusing the extension is unpersuasive. Whether or not such an extension is violative of the collective bargaining agreement is an issue which should be resolved by the County and the Union at the bargaining table or through the contractual grievance procedure. Any other conclusion would only obscure the fundamental issue presented in this case: Has the Complainant established, by a clear and satisfactory preponderance of the evidence 6/ a contractual provision, the violation of which grants the Complainant a substantive right to reemployment as a non-probationary employe?

A resolution of this issue demands an examination of the Complainant's contractual rights as a probationary employe. The Complainant has persuasively asserted that he is an "employe" within the meaning of Sec. 1.1. That section does not, however, set forth any substantive employment rights, but simply establishes that the Complainant is within the bargaining unit represented by the Union. As the Complainant argues, he would appear 7/ to be an "employe" entitled to notice of termination under Sec. 6.5 which requires two weeks' notice of termination "for any reason other than disciplinary action." The Complainant has also argued that he is covered by the provisions of Sec. 3.5 which extends a right to Union representation to employes in cases of discipline or discharge. If Sec. 3.5 applies to the Complainant because the extension of his probation period or his subsequent termination was disciplinary in nature, then no notice would be required under Sec. 6.5 since his termination would be due to "disciplinary action." Even if the Complainant's contention regarding Sec. 3.5 is treated as an alternative argument, and even if his termination is considered a non-disciplinary termination which requires notice, nothing in Sec. 6.5 indicates that the Complainant, as a probationary employe, could acquire a substantive right to reemployment as a non-probationary employe through a violation of the procedural rights set forth in that section. Thus, Sec. 6.5 cannot serve as a contractual provision, the violation of which would grant the Complainant substantive reemployment rights as a non-probationary employe.

The Complainant's assertion that Secs. 3.5 and 3.8 offer a contractual basis for these reemployment rights cannot be accepted. Sec. 3.5 sets forth certain rights to Union representation as well as a just cause standard in cases of discipline and discharge. Sec. 3.8 mandates that a suspension shall precede any discharge. Sec. 6.1 appears to deny the Complainant recourse to the rights he seeks to assert in this case. Sec. 6.1 denies the Complainant and the Union "recourse to the grievance procedure in case of discharge." Article 3 of the collective bargaining is entitled "Grievance Procedure," and Sec. 6.1 thus appears to deny the Complainant recourse to the rights set forth in that Article. Sec. 3.8 appears by its terms to underscore this point. Discharge under this section must be preceded by a suspension, during the course of which certain actions by the Union and by the County are to take place in an attempt to resolve the matter. If these actions do not result in a resolution of the matter, then the matter is to be processed at Step 3 of the grievance procedure. Thus, it would not appear that the restrictions of Sec. 6.1 on the grievance procedure are limited to the processing of a formal grievance as set forth in Secs. 3.1 to 3.4. That Secs. 3.6 and 3.7 deal with the processing of formal grievances also indicates that Secs. 3.5 and 3.8 do not state rights which can be separated from

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6/ Sec. 111.07(3), Wis. Stats.

7/ How definitive an interpretation of a contract provision can be in a proceeding in which one of the parties to the agreement is not a party to the action is a question which cannot be addressed in this proceeding. Certain conclusions on contract interpretation regardless of their precedential value must, however, be made in this case. The use of the word "appear" reflects this dilemma.

the other provisions of Article III, which are denied the Complainant as a probationary employe under Sec. 6.1. Thus, nothing in Secs. 3.5 or 3.8 constitutes a contractual provision granting the Complainant any substantive reemployment rights as a non-probationary employe.

Since the provisions of Sec. 3.5 do not apply to the Complainant as a probationary employe, his discharge is not subject to review by a just cause standard. The Complainant has not asserted any other provision of the collective bargaining agreement which would impose such a standard 8/, and a provision of that significance to the employment security of probationary employes should not be implied. 9/ Even in the absence of a just cause standard, the parties dispute the standard applicable to the review of the Complainant's termination. The County urges it can terminate probationary employes for any reason at all, while the Complainant characterizes his termination as arbitrary and capricious. Even assuming, for the sake of argument in this case, that the collective bargaining agreement imposed an arbitrary and capricious standard on the County regarding the termination of probationary employes, that standard would have been met in this case. The Complainant has raised some considerable points regarding the weight that should be attached to certain incidents attributed by other employes to the Complainant. Though persuasive to a point, the Complainant's arguments are not sufficient to establish that the discharge was arbitrary and capricious. The Complainant, though a credible witness, testified primarily that, in his own opinion, his work was adequate. None of the incidents reported to the grievant's supervisor by employes who did not testify at the hearing were specifically refuted by the Complainant. More significantly, even without these incidents, the County has demonstrated that the Complainant's termination had a basis in proven fact. Mr. LeBlanc's testimony establishes that he concluded that the Complainant was deficient regarding electrical and plumbing skills and this conclusion was supported by specific incidents observed by Mr. LeBlanc in which the Complainant failed to perform certain basic plumbing and electrical duties. While the County did not keep detailed written records regarding the Complainant's work performance, the Complainant has not established any contractual provision which mandates such records. In addition, there is no evidence the County behaved in a bad faith or discriminatory fashion toward the grievant. That the Complainant had a good attendance record and did appear to respond to incidents in which his deficiencies were made known to him does speak well of the Complainant's initiative and willingness to learn. However, the ultimate evaluation of whether or not the Complainant should be considered to have demonstrated the ability necessary to become a non-probationary employe is a decision the parties' collective bargaining agreement reserves to the County. On balance, the County was able to demonstrate a basis in proven fact for its conclusion that the Complainant had not performed adequately to warrant a non-probationary position. It cannot be said that the County's termination of the Complainant was arbitrary or capricious.

None of the Complainant's remaining contentions can establish a contractual provision, the violation of which would grant the Complainant a substantive right to reemployment as a non-probationary employe. That the County paid the Complainant fringe benefits it may not have been required to pay under Sec. 6.1 does not establish, as the Complainant asserts, "a pattern of (the County's) failure to comply with the terms of its agreement." Although the Complainant asserts that he "acquired an expectation of continued employment . . . after being reclassified as permanent," the Complainant has not offered any contractual basis to ground that expectation, and this assertion also must be rejected. Finally, that Wisconsin recognizes a cause of action for wrongful discharge does not grant the Complainant any substantive reemployment rights. Such an action may be relevant to this proceeding since a probationary employe arguably retains whatever rights he may have at common law. In Scarpace v. Sears, Roebuck, and Co., and in Brockmeyer

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8/ Sec. 1.2 of the agreement refers to the County's retained right to discharge for "proper cause." The Complainant has not asserted that this provision states a specific standard for probationary employes, and nothing in the record indicates that this provision states a specific standard of termination relevant to probationary employes.

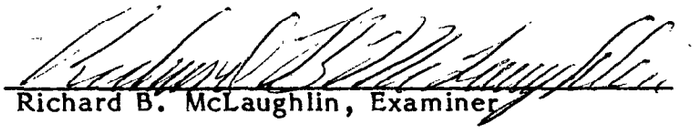
9/ See Union High School District, City of Lake Geneva, et al., 17939-A, B (4/82).

v. Dun and Bradstreet, 10/ the Wisconsin Supreme Court set forth the outlines of the wrongful discharge action recognized in Wisconsin law. Under those cases the relevant inquiry is "whether the defendant-employer's termination of the plaintiff violated a fundamentally-stated public policy." 11/ In this case, the Complainant urges that Sec. 111.01, Wis. Stats., sets forth the "fundamentally-stated public policy," and demands "the maintenance of fair, friendly and mutually satisfactory employment relations." Even assuming the relevance of this statement of public policy to the present case, Sec. 111.01 Wis. Stats., does not create substantive employment rights. 12/ Thus, the presence of the wrongful discharge action, and the declaration of policy contained in Sec. 111.01 at best only restate the issue for decision in this case, which is whether or not the collective bargaining agreement sets forth any substantive rights to reemployment for the Complainant. Nothing in that statute or in the cause of action recognized by the Wisconsin Supreme Court offers any basis to question the conclusions reached above.

In sum, the Complainant has not been able to establish by a clear and satisfactory preponderance of the evidence, a contractual provision, the violation of which would grant the Complainant a substantive right to reemployment by the County as a non-probationary employe. In the absence of such a contractual provision, the present record will not support the conclusion that the County violated Sec. 111.70(3)(a)5 of the Wisconsin Statutes. Accordingly, the complaint has been dismissed.

Dated at Madison, Wisconsin this 9th day of January, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Richard B. McLaughlin, Examiner

10/ Scarpace v. Sears, Roebuck, and Co., 113 Wis. 2d 608 (1983); Brockmeyer v. Dun and Bradstreet, 113 Wis. 2d 561 (1983).

11/ Scarpace, 113 Wis. 2d at 609.

12/ Sec. 111.01, Wis. Stats., sets forth a declaration of policy applicable to Subchapter I of Chapter 111 of the Wisconsin Statutes. That this declaration of policy does not set forth substantive employment rights, see Ward v. Frito-Lay, Inc., 95 Wis. 2d 372, 376 (1979 Court of Appeals).