STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

NORTHWEST UNITED EDUCATORS, Complainant, vs. BARRON COUNTY AND SHIRLEY MCGIFFIN, DIRECTOR, DEPARTMENT OF SOCIAL SERVICES, BARRON COUNTY, Respondent.	Case 64 No. 36559 MP-1817 Decision No. 23391-A

Appearances:

Mr. Alan D. Manson, Executive Director, Northwest United Educators, 16 West John Street, Rice Lake, Wisconsin 54868, appearing on behalf of the Complainant.

Mulcahy & Wherry, S.C., Attorneys at Law, by Mr. Michael J. Burke, 21 South Barstow, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On February 18, 1986, Northwest United Educators filed with the Wisconsin Employment Relations Commission a complaint alleging that Respondent had committed prohibited practices by violating Sec. 111.70(3)(a)1, 2, 3, 4 and 5, Stats. On March 19, 1986, the Wisconsin Employment Relations Commission appointed Coleen A. Burns, a member of the Commission's staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats. Hearing was held on April 9, 1986 in Barron, Wisconsin and the record was closed upon receipt of briefs on July 28, 1986. The Examiner having considered the evidence and arguments and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Northwest United Educators, hereinafter NUE or Complainant, is a labor organization within the meaning of Sec. 111.70(1)(h), Stats., and has its principal place of business at 16 West John Street, Rice Lake, Wisconsin 54858. Complainant is the certified exclusive bargaining representative for all regular full-time and regular part-time social workers and all other regular full-time and regular part-time employes of the Department of Social Services excluding supervisors.

2. Barron County, hereinafter referred to as Respondent or the County, is a municipal employer which maintains and operates a Department of Social Services. Respondent has its principal offices at Barron, Wisconsin 54812 and that at all times material herein, Ms. Shirley McGiffin, Director of the Social Services Department, hereinafter also referred to as Director, was employed by the Respondent and functioned as its agent.

3. On February 18, 1986, Complainant filed the instant petition in which it alleges that the decision to post Social Worker vacancies at the Social Worker-II classification was motivated in part by union animus, and that the County and the Director have refused to bargain the decision to post Social Worker vacancies at the II classification. Complainant alleges that such conduct is a violation of Sec. 111.70(3)(a)1, 2, 3, 4 and 5, Stats.

4. On September 3, 1985, the County posted three Social Worker II vacancies in the Department of Social Services. On September 5, 1985, Judy M. Demers, an Income Maintenance Worker with the County since March 3, 1978, applied for one of the Social Worker II vacancies. At the time of application, Demers possessed a BA

degree, with a French and Education major. On her application, Demers listed Psychology in the column indicating "Major Field." At the time of the application, Demers also possessed thirteen credits towards a MS in Counseling. For six years of her employment with the County, Demers has served as either the President or Vice-President of the Union and has served continuously on the Union's labor contract negotiating team. On January 17, 1980, Demers and another employe filed a grievance alleging that they were unreasonably denied the position of social worker in the Client Services Unit. An arbitration hearing on the grievance was conducted before Arbitrator Sharon K. Imes on June 2, 1980, at which time the County and Local No. 518, Chapter A, AFSCME, AFL-CIO, the bargaining unit representative, stipulated to the following statement of the issue:

> Did the Employer violate the collective bargaining agreement by posting for a Social Worker II vacancy? If so, what is the appropriate remedy?

On July 18, 1980, Arbitrator Imes issued the following Award:

AWARD

> The Employer did not violate the collective bargaining agreement by posting for a Social Worker II vacancy. The grievance is dismissed.

5. The merit system is a set of rules and regulations promulgated by the State of Wisconsin and intended to govern the personnel practices of county social services departments. Although the merit system remains in effect, the State is less involved in the day-to-day administration of personnel policy than in previous years. Provisions of the merit system are contained in a document known as the personnel manual, as well as the parties' 1985-86 collective bargaining agreement. The merit system qualifications for the Social Worker I and Social Worker II classifications are as follows:

> QUALIFICATIONS - Social Worker I - County
>
> Minimum Education and Experience: Graduation from an accredited four-year college or university with a degree in Social Work. Majors in other appropriate fields and professional social work experience may be considered in cases where few social work majors apply.
>
> QUALIFICATIONS - Social Worker II - County
>
> Minimum Education and Experience: Graduation from an accredited four-year college or university with a degree in Social Work. Two years of professional social work experience and fulfillment of requirements for the five Division of Community Services core courses required for reclassification from a Social Worker I to a Social Worker II.

6. McGiffin, who has been Director since at least 1981, assists with collective bargaining and has hiring authority. McGiffin determines the classification of social worker job postings, evaluates applicant qualifications, and selects the applicant to be hired or promoted. McGiffin has never hired at the Social Worker-I level during her tenure as Director. Of those social workers employed at the time of hearing, the last to be hired at the Social Worker-I classification was Rebecca Lindeman, who was hired on October 18, 1971. McGiffin hired into the Social Worker-II position on November 1, 1984, February 25, 1985 and March 1, 1985. When determining the social worker classification to be posted as a vacancy, McGiffin evaluates such factors as the complexity of the work to be performed, the need to use independent judgment, and the availability of supervision. McGiffin determined that the social worker positions posted on September 3, 1985 required the skill and experience of a Social Worker-II. The positions posted on September 3, 1985 were appropriately determined to be Social Worker-II positions. Demers is not qualified for a Social Worker-II position.

7. McGiffin considers Demers to be a very good worker who is dependable, intelligent and has skill in working with people. McGiffin evaluated Demers' qualifications for a Social Worker-II position and determined that Demers was not

qualified for a Social Worker-II position. McGiffin follows the merit system requirements when determining the qualifications of applicants for social worker positions. McGiffin frequently consults Ralph Handtke, a State of Wisconsin Merit System official, to ascertain his opinion as to whether job applicants meet the merit system requirements. McGiffin consulted with Handtke when she evaluated Demers' application for a Social Worker-II position. When McGiffin asked Handtke whether Demers was qualified for a Social Worker-II position, Handtke replied "No, she's not even qualified for a Social Worker-I with a French major." McGiffin did not independently evaluate Demers' application to determine whether Demers was qualified for a Social Worker-I position, the reason being that there were no Social Worker-I vacancies. Following McGiffin's review of Demers' application and the discussion with Handtke, McGiffin informed Demers that she was not qualified for the Social Worker-II position. McGiffin also related Handtke's opinion that Demers was not qualified for a Social Worker-I position. McGiffin suggested that Demers pursue employment with another employer, such as a counseling agency. McGiffin also stated that "employes would perhaps be better off if they didn't have a union," that employes "should perhaps consider self-representation rather than unionization" because "the union stood in the way of the promotional capabilities of employes" and that "many employes shared her same feelings."

8. As McGiffin construes the merit system requirements, Social Worker-I positions are required to be filled by applicants with four-year degrees in social work if such applicants are available. In the absence of such applicants, McGiffin believes that she has the flexibility to hire applicants who have four-year degrees in related fields, but that first consideration must be given to applicants with sociology degrees. At hearing, McGiffin initially expressed the opinion that Demers did not meet the merit system requirements for a Social Worker-I position because Demers lacked an appropriate degree. At the conclusion of her testimony, McGiffin declined to give any further opinion on Demers' qualifications for a Social Worker-I position and indicated that she would need to consult the merit system bureau to determine whether Demers' Bachelors Degree and 13 credits towards a Masters of Science in counseling qualified Demers for a Social Worker-I position.

9. On a date not established herein, McGiffin was approached by a group of social service employes and asked for information about the merit system. After a brief discussion with McGiffin, the employes reached the conclusion that the provisions of the merit system and the collective bargaining agreement were one and the same. From this discussion, McGiffin formed the opinion that a faction of employes did not believe that a union was necessary. In October, 1985, McGiffin had a conversation with Mr. Alan Manson, NUE Executive Director, in which McGiffin told Manson that "workers wouldn't need a union to have all of the protections they have from the union here in this manual" (referring to the personnel manual) and "that the older workers knew that." The impetus for McGiffin's remarks was the conversation that she had had with the employes who had requested information on the merit system. At hearing, McGiffin stated that it was true that workers wouldn't need a union because the merit system provided for most of the things covered by the collective bargaining agreement.

10. Following McGiffin's decision to deny Demers a promotion to a Social Worker-II, Manson telephoned Handtke, Handtke told Manson that he "had concluded that Miss Demers was not qualified under the merit system to be a Social Worker-II but that he had no opinion to advance as to whether or not she was qualified as a Social Worker-I." Handtke further stated that the State was gradually moving away from the detailed imposition of merit system regulations upon counties.

11. In a letter dated November 26, 1985, Complainant requested Respondent to negotiate the impact of Respondent's decision to change hiring policy, i.e., to hire at the Social Worker-II classification rather than at the Social Worker-I classification. At the time of Complainant's request to negotiate the impact of the hiring decision, Respondent and Complainant were subject to a 1985-86 collective bargaining agreement. The collective bargaining agreement sets forth Social Worker-II wage rates. The agreement also contains, inter alia, the following language:

ARTICLE V - PROMOTIONS

> 5.01 When the County chooses to fill a vacancy or create a new job, a notice of the vacancy shall be posted on the employees' bulletin board for at least five (5) days. Said

notice shall contain the prerequisites for the position and said prerequisites shall be consistent with the requirements for the position. Those employees within the service who met the prerequisites may apply. Following the five day notice, applicants will then be tested according to requirements of the Merit System Rule. In the event none of the applicants qualify, the Employer may then advertise publicly for the applicants to fill the position.

. . .

5.03 Social Worker I will be reclassified to a Social Worker-II after two years of experience as a Social Worker-I in the Barron County Department of Social Services, satisfactory performance, and achievement of the Merit System minimum inservice training requirements. Social Workers-II will be eligible for reclassification to a Social III after they have had three years of experience as a Social Worker-II, 12 graduate credits from an accredited school of social work or extension programs, 255 hours of in-service training, and specified staff development activities. Promotion from a Social Worker-II to a Social Worker III will be at the discretion of the Employer.

5.05 An employee, upon being promoted to a higher paying classification, shall serve a trial period of six (6) months in the classification. An employee who does not satisfactorily complete the trial period shall be returned to his former position or equivalent and his former rate of pay. In the event the Employer determines an employee is not qualified to fill the position before the end of six (6) months, the Employer reserves the right to return that employee to his former position or equivalent at his former rate of pay.

5.06 During the six (6) month trial period, the employee's pay shall be computed as follows:

1. If the pay of the new classification is less than $50.00 more than the pay of previous classification, the meployee shall receive the pay of the new classification; or

2. If the pay of the new classification is between $50.00 and $100.00 more than the pay of the previous classification, the employee shall receive his previous pay plus $50.00; or

3. If the pay of the new classification is over $100.00 more than the pay of the previous classification, the employee shall receive 50% of the difference between the pay of the two classifications.

ARTICLE XXII - MANAGEMENT RIGHTS

22.01 The Employer possesses the right to operate the Department and all management rights repose in it, subject only to the provisions of this contract and applicable law. These rights include, but are not limited to, the following:

A. To direct all operations of the department;
B. To establish reasonable work rules;
C. To hire, promote, transfer and assign employees in positions within the department;
D. To relieve employees from their duties subject to other provision in this contract;
E. To maintain efficiency of department operations;
F. To take whatever action is necessary to comply with state or federal law or to respond to emergencies;

G. To introduce new or change existing methods or facilities;
H. To determine the kinds and amounts of services to be performed as pertains to department operations;
I. To contract out for goods or services provided there is no layoff of existing employees;
J. To determine the methods, means and personnel by which department operations are to be conducted.

The provisions of the 1985-86 collective bargaining agreement address the impact of the decision to hire at the Social Worker-II level.

12. On June 9, 1983, Examiner Dennis P. McGilligan, a member of the staff of the Wisconsin Employment Relations Commission, found that Barron County violated Sec. 111.70(3)(a)1 of MERA when it interferred with employes in the exercise of their rights under Sec. 111.70(2). 1/ The interference occurred when the County's agent, McGiffin, sent a memorandum to Barron County Social Services staff, including members of the certified NUE bargaining unit, which memorandum read in relevant part:

> In the not too distant future, perhaps, not until 1983, all social services staff will be on a permanent time study. All of you time will have to be logged and accounted for in relation to your work. This seems to be a requirement in most social work situations except in county departments. We are learning that it is the only tool there is for accurate budgeting and accountability. It is also part of being a real professional social worker. I want to alert you to the fact that this is where many counties and State are moving--in fact, some are already on a continuous time study. If you don't feel that it is a vital and important part of social work and that it shouldn't be done accurately and completely, then you will have a few months time to look around and get into a field which is of more particular interest to you. I just don't want any of you to say, "If I had only known--"!!

13. McGiffin's statement to Demers that employes "should perhaps consider self-representation rather than unionization" because "the union stood in the way of the promotional capabilities of employes" contains a promise of benefits, i.e., that employes, including Demers, would receive promotions, if the employes would refrain from engaging in union activities, which promise of benefit reasonably tends to interfere with the right of Social Services Department employes to engage in those rights guaranteed by Sec. 111.70(2) MERA.

14. The record does not demonstrate that either the decision to post the September 3, 1985 vacancies at the Social Worker-II level, or the decision to deny Demers the Social Worker-II position, was motivated in any part by union animus, or animus toward Demers, or any other employe, for engaging in protected concerted activity.

15. Complainant neither identifies any provisions of the collective bargaining agreement which have been violated, nor identifies an arbitration award which has not been implemented.

Upon the basis of the above and foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. McGiffin's statements to Demers that employes "should perhaps consider self-representation rather than unionization" because "the union stood in the way of promotional capabilities of employes" contain a promise of benefit, i.e., that employes would obtain promotions if employes would refrain from union activity, which promise of benefit would reasonably tend to interfere with, restrain or coerce employes in the exercise of Sec. 111.70(2) rights and, thus, Respondent, by its agent McGiffin, has violated Sec. 111.70(3)(a)1 of MERA.

1/ Barron County, Dec. No. 19883-A (McGilligan, 6/83).

2. Respondent County and its agent McGiffin have not initiated, created, dominated or interfered with the formation or administration of any labor or employe organization, nor contributed financial support to such organizations, and, thus, have not violated Sec. 111.70(3)(a)2 of MERA.

3. Complainant has failed to prove by a clear and satisfactory preponderence of the evidence that either the decision to post the September 3, 1985 vacancies at the Social Worker-II classification or the decision to deny Demers the Social Worker-II promotion was motivated in any part by union animus or animus toward any employe for engaging in protected concerted activity and, thus, the record does not demonstrate that Respondent or its agent McGiffin has violated Sec. 111.70(3)(a)3 of MERA.

4. The decision to hire at the Social Worker-II classification, rather than at the Social Worker-I classification, is a decision which is primarily related to the formulation or management of public policy and, thus, the decision is not a mandatory subject of bargaining. Respondent County and its agent McGiffin did not violate Sec. 111.70(3)(a)4 of MERA when it refused to bargain the decision to post the September 3, 1985 vacancies at the Social Worker-II classification, rather than at the Social Worker-I classification.

5. The impact of the decision to hire at the Social Worker-II classification is addressed in the parties' 1985-86 collective bargaining agreement. Respondent does not have a statutory duty to bargain, during the term of the 1985-86 collective bargaining agreement, those matters which are addressed in the collective bargaining agreement. Respondent County and its agent McGiffin did not violate Sec. 111.70(3)(a)4 of MERA when it refused, during the term of the 1985-86 collective bargaining agreement, to bargain the impact of Respondent's decision to hire at the Social Worker-II classification.

6. The record does not demonstrate that Respondent or its agent McGiffin has violated any collective bargaining agreement or refused to accept the terms of of any arbitration award and, thus, the Examiner does not find Respondent or its agent McGiffin to have violated Sec. 111.70(3)(a)5 of MERA.

ORDER 2/

IT IS ORDERED that, Respondent Barron County, its officers and agents, shall immediately:

1. Cease and desist from violating Sec. 111.70(3)(a)1 of MERA by interfering with, restraining or coercing employes in the

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2/ 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.

exercise of their rights as guaranteed in Section 111.70(2) of the Municipal Employment Relations Act.

2. Take the following affirmative action that the Examiner finds will effectuate the policies of the Municipal Employment Relations Act:

   (a) Notify all employes in the bargaining unit represented by the Complainant by posting in conspicuous places on the Department of Social Services premises where notices to employes are usually posted, copies of the notice attached hereto and marked Appendix "A". (Such copies shall bear the signature of Shirely McGiffin, Director, Department of Social Services, and shall remain posted for sixty (60) days after initial posting.) Reasonable steps shall be taken to insure that said notices are not altered, defaced or covered by other materials.

   (b) Notify the Wisconsin Employment Relations /commission in writing, within twenty (20) days of the date of service of this Order, as to what steps it has taken to comply herewith.

IT IS ALSO ORDERED that all remaining portions of the aforementioned complaint shall be, and hereby are, dismissed.

Dated at Madison, Wisconsin this 8th day of July, 1987.

WISCONSIN EMPLOYMENT RELATIONS CO MMISSION

By 
Coleen A. Burns, Examiner

APPENDIX "A"

NOTICE TO ALL DEPARTMENT OF SOCIAL SERVICES EMPLOYES REPRESENTED BY NORTHWEST UNITED EDUCATORS

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, WE hereby notify the above employes that:

1. WE WILL NOT interfere with the Department of Social Services Employes in the exercise of their rights under Section 111.70(2) of the Municipal Employment Relations Act by making statements which contain a promise of benefit to employes who refrain from engaging in protected concerted activity.

2. WE WILL NOT in any other or related matter violate Sec. 111.70(3)(a)1 of the Municipal Employment Relations Act.

Dated this _____ day of _____ , 1987.

By _____
Shirley McGiffin
Director, Department of Social Services
Barron County

THIS NOTICE MUST BE POSTED FOR SIXTY (60) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY MATERIAL.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

INTRODUCTION

Complainant initiated the instant proceeding when, on February 18, 1985, Complainant filed a complaint with the Wisconsin Employment Relations Commission alleging that Respondent has violated Sec. 111.70(3)(a)1, 2, 3, 4 and 5 of the Municipal Employment Relations Act.

POSITION OF THE PARTIES

Complainant

Complainant maintains that Respondent has violated its statutory duty to bargain by (1) unilaterally changing the practice of hiring at the Social Worker-I classification and (2) refusing Complainant's request to bargain the impact of not hiring at the Social Worker-I classification. Complainant further maintains that Respondent's decision to post at the Social Worker-II classification, rather than at the Social Worker-I classification, was motiviated, in part, by unlawful union animus. Complainant argues that Respondent's conduct is in violation of Sec. 111.70(3)(a)1, 2, 3, 4 and 5 of the Municipal Employment Relations Act.

Respondent

Respondent maintains that it has bargained over the hiring and promotional practices of the Social Services Department when it negotiated the parties' 1985-86 agreement. Respondent argues that Respondent has retained the right to determine the classification needed to fill Department vacancies. Respondent notes that Arbitrator Imes has previously upheld Respondent's right to post vacancies at the Social Worker-II classification.

Respondent further maintains that the decision to post the vacancies at the Social Worker-II level was based solely upon legitimate, non-discriminatory business considerations. Respondent denies that it has violated any provision of the Municipal Employment Relations Act.

DISCUSSION

Section 111.70(3)(a)1 Allegation

It is a prohibited practice for a municipal employer individually or in concert with others to interfere with, restrain or coerce municipal employes in the exercise of their rights guaranteed in Sec. 111.70(2) of the Municipal Employment Relations Act, which rights are as follows:

> (2) RIGHTS OF MUNICIPAL EMPLOYES. Municipal employes shall have the right of 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 employes shall have the right to refrain from any and all such activities except that employes may be required to pay dues in the manner provided in a fair-share agreement. . .

A violation exists where a clear and satisfactory preponderance of the evidence demonstrates that the employer's complained of conduct contained either some threat of reprisal or promise of benefit which would tend to interfere with its employes in the exercise of their rights guaranteed by Sec. 111.70(2) of MERA. 3/ It is not necessary to demonstrate that the employer intended the conduct to have the effect of interfering with those rights. 4/

3/ City of Brookfield, Dec. No. 19367-A (Shaw, 11/82).

4/ Beaver Dam Unified School District, Dec. No. 20283-A (Jones, 10/83)

After evaluating Demers' application for a Social Worker-II position, McGiffin had a conversation with Demers in which McGiffin told Demers that Demers was not qualified for the Social Worker-II position. At hearing, Demers gave the following account of the conversation:

> Mrs. McGiffin indicated to me that, again, I would not be qualified as a Social Worker-II, and she also indicated to me that she had discussed the matter with Mr. Handtke, and even if it were a Social Worker-I position, I would not be qualified, and that I should perhaps pursue employment at a 51 agency rather than pursuing employment at Barron County. 5/

When Complainant's representative asked whether McGiffin had made any comments about NUE or the union involved, Demers responded as follows:

> Mrs. McGiffin's parting comment to me at that time was that the agency -- the employees would perhaps be better off if they didn't have a union, that we should perhaps consider self-representation rather than unionization because she felt that the union stood in the way of the promotional capabilities of employees. And she also felt that many employees shared her same feelings. 6/

McGiffin, who testified at hearing, did not deny making the remarks attributed to her by Demers. Accordingly, Demers account of the conversation will be credited.

McGiffin's comments to Demers were made during a discussion in which McGiffin had notified Demers that she would not be promoted. Given this context and McGiffin's authority to select applicants for positions within the Social Services Department, McGiffin's comments that employes "should perhaps consider self-representation rather than unionization" because "the union stood in the way of the promotional capabilities of employes" may reasonably be interpreted to mean that employes, including Demers, would be treated more favorably, i.e., obtain promotions, if the employes would refrain from union activity. Accordingly, McGiffin's comments contain a promise of benefit which would reasonably tend to interfere with, restrain or coerce employes in the exercise of Sec. 111.70(2) rights and, thus, violates Sec. 111.70(3)(a)1. It is immaterial whether McGiffin intended her remarks to have such an effect.

Section 111.70(3)(a)2

It is a prohibited practice for a municipal employer individually or in concert with others to initiate, create, dominate or interfere with the formation or administration of any labor or employe organization or contribute financial support to it. To violate this provision, there must be active involvement of a magnitude which threatens the independence of the labor organization as the representative of employe interest. 7/ The level of interference occasioned by Respondent McGiffin's remarks to Demers is fully addressed in the Sec. 111.70(3)(a)1 violation found above, and does not rise to the level of interference required to establish a violation of Sec. 111.70(3)(a)2. Nor is it evident that Respondent County or McGiffin engaged in any other conduct violative of Sec. 111.70(3)(a)2.

Section 111.70(3)(a)4

Complainant alleges that Respondent violated its statutory duty to bargain when Respondent refused to negotiate a change in hiring practices. The alleged unilateral change being Respondents' decision to hire at the Social Worker-II classification, rather than at the Social Worker-I classification.

5/ T. p. 14-15. A 51 agency is a counseling agency.

6/ T. p. 15.

7/ Winnebago County (Department of Social Services), Dec. No. 16930-A (Davis, 8/79).

Respondent has a statutory duty to bargain mandatory subjects of bargaining, i.e., matters which are primarily related to wages, hours and working conditions of employes in the bargaining unit. Respondent does not have a statutory duty to bargain over non-mandatory subjects of bargaining, i.e., matters which are primarily related to the formulation or management of public policy.

The decision to post at the Social Worker-II classification resulted from McGiffin's appropriate determination that the work to be performed required the skill and experience of a Social Worker-II. Thus, the decison to post at the Social Worker-II level involved a determination as to the number of Social Worker-II classifications which Respondent needed to carry out its operations. The Commission has held that the decison regarding the number of classifications which will exist within an employer's workforce is primarily related to the formulation or management of public policy and, thus, is not a mandatory subject of bargaining. 8/ Inasmuch as the decision to post the position at the Social Worker-II classification is not a mandatory subject of bargaining, Respondent does not have a statutory duty to bargain the decision. Assuming arguendo, that Complainant is correct when it asserts that Respondent unilaterally changed past hiring practices when Resondent hired at the Social Worker-II level, such a unilateral change is not a violation of Sec. 111.70(3)(a)4.

Complainant further alleges that Respondent violated Sec. 111.70(3)(a)4 when Respondent refused Complainant's request to bargain the "impact" of the decision to hire at the Social Worker-II classification. If the decision to hire at the Social Worker-II classification has an "impact" which primarily relates to wages, hours and working conditions, the "impact" is a mandatory subject of bargaining. However, at the time that Complainant made its request to bargain "impact," the parties were subject to a collective bargaining agreement. The duty to bargain to agreement or impasse during the term of an existing collective bargaining agreement extends to any mandatory subject of bargaining which Complainant has not waived its right to bargain over or which is not addressed in the existing agreement. 9/

According to Complainant, hiring at the Social Worker-II classification deprives bargaining unit employes of the opportunity to be promoted to a Social Worker-I. Thus, the impact which Complainant seeks to bargain is the failure of Respondent to post at the Social Worker-I classification. For the reasons discussed supra, the decision as to whether or not Respondent needs to hire Social Worker-I's is a decision which is primarily related to the formulation or management of public policy and, thus, is not a mandatory subject of bargaining. Consequently, Respondent did not violate Sec. 111.70(3)(a)4 when it refused to bargain over its failure to post at the Social Worker-I classification. Complainant does not identify any other "impact" which it is seeking to bargain. The Examiner notes that the collective bargaining agreement assigns a wage rate to the Social Worker-II classification and sets forth a procedure for progressing to a Social Worker-III position. Additionally, the agreement establishes a posting procedure by which bargaining unit members may apply and be considered for bargaining unit positions. The agreement also contains the following management rights clause:

ARTICLE XXII - MANAGEMENT RIGHTS

> 22.01 The Employer possesses the right to operate the Department and all management rights repose in it, subject only to the provisions of this contract and applicable law. These rights include, but are not limited to, the following:

8/ Brown County (Department of Social Services), Dec. No. 19042 (WERC, 11/81).

9/ Brown County (Department of Social Services), Dec. No. 20623 (WERC, 5/83).

A. To direct all operations of the department;
B. To establish reasonable work rules;
C. To hire, promote, transfer and assign employees in positions within the department;
D. To relieve employees from their duties subject to other provision in this contract;
E. To maintain efficiency of department operations;

F. To take whatever action is necessary to comply with state or federal law or to respond to emergencies;
G. To introduce new or change existing methods or facilities;
H. To determine the kinds and amounts of services to be performed as pertains to department operations;
I. To contract out for goods or services provided there is no layoff of existing employees;
J. To determine the methods, means and personnel by which department operations are to be conducted.

Given the above provisions, as well as the agreement as a whole, the Examiner is satisfied that the collective bargaining agreement in effect at the time Complainant made the demand to bargain "impact" does address the "impact" of the decision to hire at the Social Worker-II classification. Inasmuch as Respondent does not have a duty to bargain on matters already addressed in the agreement, Respondent did not violate Sec. 111.70(3)(a)4 when it refused Complainant's request to bargain the impact of the decison to post at the Social Worker-II classification.

Section 111.70(3)(a)5

Section 111.70(3)(a)5 makes it unlawful for a municipal employer to violate a collective bargaining agreement or to refuse to implement a final and binding arbitration award. Although the Complainant alleges that Respondent has violated Sec. 111.70(3)(a)5, Complainant neither identifies provisions of the collective bargaining agreement which have been violated, nor identifies an award which has not been implemented. Complainant has not commented on the Sec. 111.70(3)(a)5 allegations in either oral or written argument. The Examiner concludes that the Sec. 111.70(3)(a)5 allegation is without substance.

Section 111.70(3)(a)3

Complainant maintains that McGiffin's decision to hire at the Social Worker-II level was motivated, in part, by a desire to deny Demers promotional opportunities because Demers has been active in the union. Complainant maintains, therefore, that McGiffin has discriminated against Demers in violation of Sec. 111.70(3)(a)3.

Section 111.70(3)(a)3 Stats., provides that it is a prohibited practice for a municipal employer individually or in concert with others:

> 3. To encourage or discourage a membership in any labor organization by discrimination in regard to hiring, tenure, or any other terms or conditions of employment . . .

To establish that McGiffin has engaged in discrimination in violation of Sec. 111.70(3)(a)3, Complainant must prove by a clear and satisfactory preponderance of the evidence each of the following factors:

(1) That Demers has engaged in protected, concerted activity.

(2) That the employer was aware of such activity.

(3) That the employer was hostile to such activity.

(4) That the employer's complained of conduct was motivated at least in part upon such hostility. 10/

10/ Town of Mercer, Dec. No. 23136-B (Buffett, 5/86).

At the time of hearing, Demers had been employed with the County for a period of eight years. For six of the eight years, Demers was either the union president or vice president. Further, Demers has continuously represented the union in contract negotiations. In 1980, Demers filed a grievance which resulted in an arbitration hearing. 11/ It is evident, therefore, that Demers has engaged in protected, concerted activity.

McGiffin was not questioned concerning her knowledge of Demers' position in the union. McGiffin, however, assisted the County in contract negotiations. Given Demers' role as union representative in contract negotiations, the Examiner is satisfied that McGiffin has knowledge of the fact that Demers has engaged in protected concerted activity.

According to Complainant, McGiffin's union animus is evidenced by the fact that McGiffin has repeatedly, and recently, stated to Demers, NUE representatives, and Barron County Social Services department employes that Barron County Social Services Department employes do not need a union and, further, that these employes would do just as well without a union. For ease of discussion, statements made to NUE representative Alan Manson, and statements made to employes other than Demers, will be considered first. The content of these conversations is revealed in the following exchange between Manson (Q) and McGiffin (A):

> Q Do you recall telling me on October -- that when we talked about the merit system you said it's interesting because workers wouldn't need a union to have all of the protections they have from the union here in this manual?
>
> A That's correct.
>
> Q And that the older workers knew that?
>
> A Uh-huh
>
> Q You believe that to be true?
>
> A I believe that's true because there's provision in the personnel mannual for promotions, for lateral transfers, for seniority, for most of the things that are covered in the union contract.
>
> Q How about wages?
>
> A You pointed that out to me.
>
> Q I'm asking you, how about wages?
>
> A Well, I think that in the '60's the merit system did have, and if you looked at the copy of the personnel manual, a set wage for evry position, which was pretty much statewide. But with the advent of -- of unions, they have gotten away from that role because they were negotiated by representatives of the employes.
>
> Q How about fringe benefits?
>
> A Well, I hear quite often at negotiations that we have the most liberal fringe benefits of any county around, and most of those fringe benefits were written into the first contract, I think, in about '73, based on the fringes that were -- that we had at that point in time.
>
> Q About -- how about grievances that might arise?

11/ At issue was the right of the Respondent to post at the Social Worker-II level, rather than at the entry level. The arbitrator found that it was not a violation of the agreement to post at the Social Worker-II level.

A There is provisions for that too. I think that our nonunion people in our agency are still under all these things in the merit system. I think they have recourse under the merit bureau for grievance or whatever they might choose to ask for.

Q Have you ever had any grievances under the merit system?

A No. I have that same recouse myself.

Q Have you told that to other -- to any of the employees, that they wouldn't need a union?

A No, I never -- I never said that. But I am aware of the faction that believes that a union isn't needed. I guess that's why I indicated that to you that day.

Q You believe there is a faction of current employees in this unit who do not believe a union is needed?

A Right.

Q How do you arrive at that conclusion?

A Because some of them have talked to me and asked about it.

Q Asked about what?

A About the provisions of the merit system.

Q And what have they said relative to the union that led you --

A That's the same -- one in the same, really.

Q They said it was one in the same?

A Yeah.

Q They reached that conclusion on their own?

A Yes.

Q After doing what? After reading the merit system?

A After just a brief discusison.

Q With you?

A Uh-huh. But there are -- well, forget -- 12/

Given the above, it is apparent that the October conversation with Manson followed McGiffin's discussion with the employes. Accordingly, the conversation with the employes will examined first.

Not one of the employes who participated in the discussion with McGiffin testified at hearing. Thus, the only evidence of the conversation is contained in McGiffin's testimony. A review of this testimony reveals that, upon the request of an undisclosed number of employes, McGiffin discussed the provisions of the merit system. The testimony further reveals that the employes, on their own initiative, expressed the opinion that a union was not necessary because the provisions of the collective bargaining agreement and the merit system were one and the same.

12/ T. at p. 46-49.

It is not evident that McGiffin initiated the conversation, nor is it evident that she made any contribution to the discussion other than to discuss provisions of the merit system. McGiffin's conduct during the discussion does not evidence any union animus, nor is it in violation of any provision of Sec. 111.70(3)(a).

It is not evident that anyone other than Manson and McGiffin was present during the October conversation. McGiffin expressed an opinion that (1) employes do not need a union because the merit system provides the same protections as the labor contract and (2) that "older workers" were in agreement with this opinion. 13/ McGiffin's comments concerning the lack of need for a union demonstrate hostility towards the union. The comments, however, do not demonstrate that McGiffin has any animus toward Demers, or any other individual employe, for engaging in protected concerted activity. Nor do the comments, per se, establish a relationship between McGiffin's union animus and the decision to post at the Social Worker-II classification. Aditionally, the comments do not contain either a threat of reprisal or promise of benefit necessary to establish a violation of Sec. 111.70(3)(a)1, nor do the comments establish a violation of Sec. 111.70(3)(a)2. McGiffin did not violate any provision of Sec. 111.70(3)(a) when she communicated her understanding that "older workers" shared her opinion regarding the need for the union.

The record contains evidence of only one conversation between McGiffin and Demers, which conversation occurred at the time that McGiffin informed Demers that Demers would not receive the Social Worker-II position. The context of the conversation is reflected in the following exchange between Manson (Q) and Demers (A):

> Q And can you describe what happened in terms of your discussions with the employer after you made application?
>
> A Mrs. McGiffen indicated to me that, again, I would not be qualified as a social worker two, and she also idicated to me that she had discussed the matter with Mr. Handtke, and even if it were a social worker one position, I would not be qualified, and that I should perhaps pursue employment at a 51 agency rather than pursuing employment at Barron County.
>
> Q What is a 51 agency?
>
> A It's a -- a counseling agency, such as Northern Pines.
>
> Q Did -- in your discussions with the employer at that time, did the employer make any comment about NUE or the union involved?
>
> A Mrs. McGiffen's parting comment to me at that time was that the agency -- the employees would perhaps be better off if they didn't have a union, that we should perhaps consider self-representation rather than unionization because she felt that the union stood in the way of the promotional capabilities of employees. And she also felt that many employees shared her same feelings.
>
> Q I have no further questions. 14/

McGiffin, who testified at hearing, did not contradict Demers' account of the conversation.

According to Complainant, McGiffin's animus towards Demers is demonstrated by the fact that she falsely told Demers that Demers was not qualified for a Social Worker-I position and, further, suggested that Demers seek employment outside the

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13/ In this discussion, the term "personnel manual" and the term "merit system" are interchangeable.

14/ T. at p. 14-15.

County. Demers states that McGiffin "indicated to me that she had discussed the matter with Mr. Handtke, and even if it were a Social Worker-One position, I would not be qualified." Although Demers' testimony is not free from ambiguity, it is reasonable to construe Demers' testimony to mean that McGiffin was telling Demers that Handtke did not consider Demers to be qualified for a Social Worker-I position. At hearing, McGiffin confirmed that she was relating the opinion of Handtke. Thus, the truth or falsity of McGiffin's statement is not a function of whether or not Demers is qualified for a Social Worker-I position, but rather, it is a function of whether McGiffin had a reasonable basis to believe that Handtke did not consider Demers qualified for a Social Worker-I position.

When reviewing Demers' application for a Social Worker-II position, McGiffin consulted Ralph Handtke, a State of Wisconsin merit system official. McGiffin reviewed Demers' application materials with Handtke and asked for his opinion as to whether Demers was qualified for a Social Worker-II position. 15/ According to McGiffin, Handtke replied "No, she's not even qualified for a Social Worker-I with a French major." 16/ Absent proof that Handtke did not make this comment, one must conclude that McGiffin had a reasonable basis to believe that Handtke did not consider Demers to be qualified for a Social Worker-I position.

Handtke did not testify at hearing. Complainant's representative, Alan Manson, offered the following testimony:

> I did call Mr. Handtke and asked him about the procedures that had been discussed between me and Miss McGiffen, and I also mentioned the specific case of Judy Demers, and Mr. Handtke was familiar with that. And he indicated to me on the telephone that he had concluded that Miss Demers was not qualified under the merit system to be a social worker two but that he had no opinion to advance as to whether or not she was qualified as a social worker one. He indicated at that time that it has been a developing history of the State Department of Health and Social Services to gradually move itself away form the detailed imposition of a -- merit system regulations on the counties. He reflected that politically it was the trend that the State had been following for a number of years and was following under the current administration. 17/

The Examiner notes that Manson does not say that Handtke denied telling McGiffin that Demers was not qualified for a Social Worker-I position. In fact, it is not evident that Handtke is offering any comment on the conversation with McGiffin. Thus, while one may conclude that Handtke declined to offer Manson an opinion as to whether Demers is qualified for a Social Worker-I position, one cannot conclude that Handtke did not offer such an opinion to McGiffin. Accordingly, the undersigned credits McGiffin's testimony that Handtke told McGiffin that Demers was not qualified for a Social Worker-I position.

For reasons discussed below, the Examiner is not persuaded that Handtke's comment is dispositive of the issue of Demers' qualifications for a Social Worker-I. However, given Handtke's position in the state merit system and the fact that McGiffin had not independently evaluated Demers' application to determine eligibility for a Social Worker-I position, it was not unreasonable for McGiffin to accept the comment as an accurate assessment of Demers' qualifications.

Under some circumstances, McGiffin's comments that Demers should consider employment with another employer could be evidence of animus. However, given the fact that Demers is not qualified for a Social Worker-II position and McGiffin had

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15/ McGiffin frequently consults Handtke because the County follows the merit system requirements.

16/ T. at p. 33.

17/ T. at p. 73.

a reasonable basis to believe that Demers was not qualified for a Social Worker-I position, it is reasonable to construe McGiffin's comments to be nothing more than career advice, i.e., a suggestion that other agencies may be able to provide Demers with greater opportunity for career advancement.

According to Complainant, McGiffin's animus is also demonstrated by her "parting comments" to Demers, i.e., that employes would perhaps be better off if they didn't have a union and that employes should perhaps consider self-representation rather than unionization because the union stood in the way of promotional capabilities of employes.

McGiffin's parting comments were made at a meeting in which Demers was being denied a promotion. Given this context, McGiffin's comments give rise to an inference, that Demers' union activity was a consideration in denying Demers a promotional opportunity. Taking the comments at face value, however, McGiffin is not commenting on Demers' union activities, but rather, is expressing dissatisfaction with the union as the bargaining representative of employes. Given the lack of other evidence that McGiffin has demonstrated hostility towards Demers, or any other employe, for engaging in protected, concerted activity and, further, given that McGiffin expressed similar dissatisfaction with the union in her conversation with Manson, as well as in her other testimony at hearing, the Examiner is persuaded that McGiffin's comments express dissatisfaction with the union as the bargaining representative of employes, rather than hostility towards Demers, or any other employe, for engaging in concerted, protected activity. The question then becomes whether this dissatisfaction, which can be characterized as union animus, was a motivating factor in the decision to post the September 3, 1985 vacancies at the Social Worker-II classification.

Complainant does not argue, and the record does not support a finding, that the work to be performed in the disputed Social Worker-II positions is work which may be performed by a Social Worker-I. Rather, the unrebutted testimony of McGiffin establishes that the work requires the skill and experience of a Social Worker-II. Consequently, the record demonstrates that McGiffin had legitimate business reasons for posting at the Social Worker-II classification. Since the record establishes that Demers was not qualified for a Social Worker II, McGiffin also had legitimate business reasons for denying Demers the promotion to Social Worker-II.

Complainant maintains, however, that the legitimate business reasons are suspect because the practice has been to hire at the Social Worker-I classification, rather than the Social Worker-II classification. The record, however, does not establish such a hiring practice. McGiffin, who has been the Director since at least January 1, 1981, has never hired at the Social Worker-I level, but rather, has always hired at the Social Worker-II level. In fact, the last current employe to be hired at the Social Worker-I level was Rebecca Lindeman, who was hired in 1971. 18/ Prior to September 3, 1985, the date of the disputed postings, McGiffin hired three employes at the Social Worker-II classification, on November 1, 1984, February 25, 1985, and March 1, 1985. 19/ Thus, McGiffin's decision to hire at the Social Worker-II level is not a "suspicious" departure from past practice, but rather, a continuation of previous hiring procedures.

Contrary to the assertion of Complainant, the record fails to demonstrate that Demers is a "viable candidate" for a Social Worker-I. The qualifications for a County Social Worker-I position are the merit system qualifications for a Social Worker-I position, which are as follows:

> Minimum Education and Experience: Graduation from an accredited four-year college or university with a degree in Social Work. Majors in other apropriate fields and

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18/ The record is silent with respect to individual's no longer employed by the County.

19/ These three were employed at the time of hearing. There is evidence that one individual who was hired at the Social Worker II level left employment prior to hearing. However, it is not clear that the employment pre-dated 9/3/85.

professional social work experience may be considered in cases where few social work majors apply.

The parties do not contest the fact that Demers does not have a degree in Social Work. Rather, the parties are in agreement that Demers has a BA in French and 13 credits towards a MS in counseling. 20/ If, as Complainant argues, Demers is academically qualified for a Social Worker-I position, the express language requires Demers to have a "major in other appropriate fields." 21/ Moreover, given the express language of the qualifications, Demers cannot be considered for the Social Worker-I position except "in cases where few social work majors apply."

The qualifications language does not define "majors in other appropriate fields." At hearing, McGiffin offered testimony as to how the merit system interprets the qualifications language. According to McGiffin, Demers is not qualified for a Social Worker-I position because Demers does not have an appropriate degree. As McGiffin understands the merit system requirements, she is obligated to hire applicants with four-year degrees in Social Work, if such applicants are available. If such applicants are not available, or refuse the employment offer, McGiffin understands that she may then offer the position to applicants with related degrees, with first consideration given to applicants with sociology degrees. 22/

While the Examiner does not doubt the sincerity of McGiffin's testimony, the testimony is at odds with the express language of the Social Worker-I qualifications. Specifically, the language permits consideration of non-social work majors in cases where "few social work majors apply," rather than, as McGiffin believes, where "no social work majors apply." This apparent contradiction, together with the lack of evidence that McGiffin has had to apply the Social Worker-I qualifications in a hiring situation, raises doubt as to whether McGiffin's interpretation of the merit system requirements is entirely correct. 23/ Moreover, upon conclusion of her testimony, McGiffin acknowledged that she wished to consult with the merit system bureau before offering any further opinion on the matter. While McGiffin did not recant her previous testimony that Demers was not qualified for a Social Worker-I position, it is apparent that she was entertaining some doubt as to whether her opinion was correct. Consequently, McGiffins testimony is not dispositive of the question of whether Demers is academically qualified for the Social Worker-I position.

For the reasons discussed supra, the Examiner credits McGiffin's testimony that Handtke expressed the opinion that Demers was not qualified for a Social Worker-I position. However, when Handtke offered his opinion, McGiffin was requesting an opinion on Demers' qualifications for a Social Worker-II, not a Social Worker-I. Handtke responded "No, she is not even qualified for a Social Worker-I with a French major." 24/ Given the context in which the remark was made, as well as the remark itself, the Examiner considers the remark to be more of an aside, than a considered opinion. Given Handtke's position in the merit system bureau, McGiffin cannot be faulted for accepting Handtke's comment at face value. However, the Examiner does not consider Handtke's comment to be dispositive of the issue of Demers' qualifications for a Social Worker-I position.

20/ According to her application for the Social Worker-II position, Demers also has a Major in Education. It is unclear whether she has a minor or major in Psychology.

21/ Complainant does not argue, nor does the record support a finding, that Demers has professional social work experience.

22/ McGiffin did not offer any testimony as to the procedure in cases where no social work or sociology majors apply. It is evident that McGiffin believes that social work majors are available.

23/ McGiffin has not hired at the Social Worker-I level. Nor did she evaluate Demers' application to determine whether Demers was qualified for a Social Worker-I. The reason being that McGiffin was not hiring into the Social Worker-I classification.

24/ T. at p. 33.

Upon review of the record as a whole, the Examiner is unable to determine whether Demers' academic work constitutes "a major in other appropriate fields" within the meaning of the merit system qualifications.

Assuming arguendo, that Demers' academic work constitutes "a major in other appropriate fields" the express language permits consideration of such "majors" only in instances where "few social work majors may apply." If Demers' academic work did qualify as a "major in other appropriate fields" Demers' eligibility for a Social Worker-I position would be dependent upon the number of other candidates who possess a degree in Social Work. Thus, even if the Examiner were able to conclude that Demers is academically qualified for a Social Worker-I position, Demers' eligibility for a Social Worker-I position could not be determined until such time as the position is posted and the qualifications of all applicants known. Accordingly, it is not evident that Demers is either a viable candidate for a Social Worker-I position or qualified for a Social Worker-I position.

McGiffin does not consider Demers to be qualified for a Social Worker-I position. While such a claim could be pretext, the Examiner is persuaded that McGiffin was being truthful when, at hearing, she expressed her opinion that Demers was not qualified for a Social Worker-I. To be sure, Complainant's representative was ultimately able to shake McGiffin's confidence in this opinion. McGiffin, however, did not recant the opinion. Regardless of whether McGiffin is correct in her opinion that Demers does not meet the qualifications for a Social Worker-I, the fact that she held such an opinion makes it unlikely that she would post at the Social Worker-II level in order to deny Demers a promotion to a Social Worker-I.

Upon consideration of the record as a whole, Complainant has failed to prove by a clear and satisfactory preponderence of the evidence that either the decision to deny Demers a Social Worker-II position, or the decision to post the September 3, 1985 vacancies at the Social Worker-II classification was motiviated in any part by union animus or animus toward any employe for engaging in protected concerted activity. 25/ Accordingly, the Examiner rejects Complainant's assertion that Respondent has violated Sec. 111.70(3)(a)3 of MERA.

Based upon the above and the record as a whole, the Examiner rejects Complainant's assertion that Respondent or its agent McGiffin has violated Sec. 111.70(3)(a)2, 3, 4, or 5, of MERA. Therefore, the Examiner has dismissed that portion of the Complaint which alleges a violation of these statutory provisions. The Examiner, however, has found Respondent, by its agent McGiffin, to have violated Sec. 111.70(3)(a)1 of MERA and has ordered appropriate remedial action.

Dated at Madison, Wisconsin this 8th day of July, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Coleen A. Burns
Coleen A. Burns, Examiner

25/ The fact that McGiffin was found to have violated Sec. 111.70(3)(a)1 in a previous complaint proceeding does not alter the conclusions reached herein. (See Barron County, Dec. No. 19883-A (McGilligan, 6/83).