STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MATHEW J. MUSGRAVE, Complainant, vs. MARATHON COUNTY AND AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 2492-A, Respondents.	Case 138 No. 41118 MP-2140 Decision No. 25757-C
MATHEW J. MUSGRAVE, Complainant, vs. PATRICIA ACHESON, KATHLEEN CONWAY, ROBERT NICHOLSON, DOUG THOMAS, SANDRA WADZINSKI, JAMES DALLAND, BRAD KARGER, JOHN SEFERIAN, CONSTANCE BROWN, TOM HENNESSY, HOWARD N. JORGENSON, JEAN LAMBIE, ARTETHA PAYNE, GARY RODRIGUES, NATE SMITH, PHYLLIS ZAMARRIPA, ROBERT LYONS, SAM GILLISPIE, AND PHIL SALAMONE; MARATHON COUNTY, AFSCME LOCAL 2492-A, AFSCME COUNCIL 40, 8/ Respondents.	Case 142 No. 41463 MP-2171 Decision No. 25908-C

Appearances:
Mr. Mathew J. Musgrave, RR2, Box 118, Oxford, Wisconsin 53952, appearing on his own behalf.
Lawton & Cates, Attorneys at Law, by Mr. Richard V. Graylow, 214 West Mifflin Street, Madison, Wisconsin 53703-2594, appearing on behalf of Respondents AFSCME Local 2492-A, AFSCME Council 40, and individual Respondents Acheson, Conway, Nicholson, Thomas, Wadzinski, Seferian, Brown, Hennessy, Jorgenson, Lambie, Payne, Rodrigues, Smith, Zamarripa, Lyons, Gillispie, and Salamone.
Ruder, Ware & Michler, S.C., Attorneys at Law, by Mr. Dean R. Dietrich, 500 Third Street, P.O. Box 8050, Wausau, Wisconsin 54402-8050, appearing on behalf of Marathon County and individual Respondents Dalland and Karger.

ORDER MODIFYING EXAMINER'S FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER

Examiner Christopher Honeyman having on December 27, 1989 issued Findings of Fact, Conclusions of Law and Order in the above matters wherein he concluded that none of the above-named Respondents had committed any violations of the Municipal Employment Relations Act and therefore dismissed the complaints; and Complainant Musgrave having on January 12, 1990 timely filed a petition with the Commission seeking review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.70(4)(a) Stats.; and Complainant Musgrave having on January 29, 1990 filed a Motion requesting that he be allowed to present additional evidence and to make oral argument before the Commission; and the parties thereafter having filed written argument in support of their respective

1/ While the Examiner's decision also included a generic reference to "AFSCME" as a Respondent, our review of the pleadings satisfies us that the scope of Musgrave's complaint in Case 142 was limited to the Local and the District Council. Thus, we have deleted "AFSCME" as a Respondent.

positions, the last of which was received on February 26, 1990; and the Commission having considered the matter and being fully advised in the premises, makes and issues the following

ORDER 9/

A. Complainant Musgrave's Motion to Reopen the Record is denied.

B. Complainant Musgrave's request for oral argument is denied. 10/

C. Examiner's Findings of Fact 1-5 are affirmed.

D. Examiner's Findings of Fact 6-11 are set aside and the following Findings of Fact are made:

6. At all times material herein, Complainant Musgrave was employed as a Social Worker in the County's Department of Social Services. Between September 1985 and March 1988, Complainant filed at least five contractual grievances with Local 2492-A alleging that various directives, performance evaluations and discipline he had received from the County were improper. One of these grievances was taken to grievance arbitration by Local 2492-A. The manner in which Local 2492-A elected to process these various grievances was generally unsatisfactory to Complainant Musgrave and Musgrave repeatedly advised various officers of Local 2492-A, including those named as individual Respondents herein, of his dissatisfaction. By letter dated March 25, 1988, Musgrave complained to Respondent Robert Lyons, the Executive Director of Respondent AFSCME Council 40, that Local 2492-A had failed to fairly represent Musgrave as to at least two grievances and asked that Respondent Council 40 intervene to provide Musgrave with fair representation. The conflict between Musgrave and Local 2492-A over the Local's response to one of his grievances played a part in the decision of the President and Vice President of Local 2492-A to resign in March and April, 1988, respectively.

7. On April 18, 1988, Complainant Musgrave received a written reprimand from Respondent Dalland, Director of Respondent County's Social Services Department, for allegedly threatening another County employe. That same day, Musgrave grieved the reprimand and said grievance was received by Dalland on April 19, 1988 pursuant to Step 1 of the contractual grievance procedure. On or about April 26, 1988 Dalland forwarded the reprimand grievance to Respondent Karger, Director of Respondent County's Personnel Department, with the following memo:

2/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

Continued

3/ Please find Footnote 3/ on page 3.

2/ Continued

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) 1. Proceedings for review shall be instituted by serving a petition therefore personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held.

2. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency.

3. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified. The petition may be amended, by leave of court, though the time for serving the same has expired. The petition shall be entitled in the name of the person serving it as petitioner and the name of the agency whose decision is sought to be reviewed as respondent.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

3/ Section 227.46(2), Stats., provides that the Commission may direct whether "argument shall be written or oral." Thus, oral argument is not available as a matter of right. However, if we were satisfied that it would materially advance our understanding of the case, we would nonetheless grant Musgrave's request. We decline to do so because the parties have adequately argued the matter in written form and because oral argument would produce additional delay and expense for all parties.

I am forwarding this grievance for consideration by the personnel director due to the fact that the grievance is related to actions by myself.

I had a lengthy meeting with Marilyn Henderson regarding the incident in question and am completely satisfied that the incident occured (sic) and that threats were made. I further understand that the executive board of the local has been investigating this grievance matter and has not yet decided whether or not to support this grievance. Nonetheless because of the time frames I feel I have no choice but to forward it on to the next step.

8. Shortly after the reprimand grievance had been referred to Karger, Respondent Nicholson and Mayer, another member of Local 2492-A, met with Musgrave to discuss the grievance and the facts surrounding the alleged "threat" and to determine whether Musgrave was willing to meet with Respondent Dalland to attempt to settle the dispute. Musgrave advised Nicholson and Mayer that he had not threatened or intended to threaten the employe but indicated a willingness to meet with Respondent Dalland. After this meeting, Musgrave wrote Respondent Wadzinski, Secretary of Respondent Local 2492-A, advising her that Musgrave and Mayer had disagreed during said meeting over Musgrave's potential right to adjustment of his lunch hour to compensate him for a grievance meeting and asking that Mayer not be on the grievance committee if a grievance arose over the adjustment issue. Musgrave also wrote the Executive Board for Respondent Local 2492-A on May 5, 1988, questioning Respondent Dalland's compliance with the grievance procedure and asking whether the meeting with Dalland was a Step 1 meeting. On May 6, 1988, a Local 2492-A grievance committee consisting of Respondent Nicholson, Mayer and Prozinski, another Local 2492-A member, met in Dalland's office with Dalland and Musgrave. During the meeting, Nicholson proposed to Musgrave and Dalland that the grievance be settled by having Musgrave write a letter of explanation as to the alleged "threat" in exchange for withdrawal of the letter of reprimand. Respondent Dalland indicated that it might be possible to settle the matter in such a fashion, depending upon the content of Musgrave's letter of explanation. Musgrave then wrote a brief note of explanation for Dalland's consideration and the meeting ended. Seconds later, Musgrave returned to Dalland's office, retrieved his note of explanation, and told Respondent Dalland that he (Musgrave) could not settle the grievance in the manner proposed by Respondent Nicholson.

9. On May 9, 1988, Respondent Nicholson, Mayer and Prozinski met as the Local 2492-A grievance committee and decided not to process Musgrave's reprimand grievance further. Musgrave was advised on this decision by memo dated May 9, 1988. When making this decision, the committee considered Musgrave's actions during the May 6 meeting with Respondent Dalland, Dalland's formal written response to the grievance, as well as the content of the meeting which the committee had conducted with Musgrave regarding the grievance. On or about June 3, 1988, Respondent Karger received a letter from Respondent Local 2492-A dated May 27, 1988 advising that "Local 2492-A has decided to discontinue the 4/18/88 Musgrave grievance regarding the alleged threat." Respondent Karger relied upon this letter and a similar letter from Respondent Salamone dated July 21, 1988 when subsequently denying a request from Musgrave that the grievance be granted by the County. By letter dated August 7, 1988 to Respondent Salamone, Musgrave asked Respondent Council 40 to intervene to "reintroduce representation of this grievance" and by letter dated August 9, 1988, Salamone advised Musgrave that Local 2492-A controlled decisions regarding whether to process grievances.

10. On or about May 10, 1988, Musgrave advised the Local 2492-A Executive Board by letter as follows:

Executive Board
AFSCME Local 2492-A
Sandra Wadzinski, Secretary

RE: Initiation of Judicial Procedure, Article X, International Constitution; Local 2492-A Grievance Committee

Ladies and Gentlemen:

I am writing you to initate (sic) the Judicial Procedure of Article X; Sections 1, 2, 3, and related Articles and

Sections regarding the members of the Local 2492-A Grievance Committee: Robert Nicholson, George Mayer, and James Prozinski.

I am requesting that these charges be the basis for this action. The noted members of the Grievance Committee of Local 2492-A have violated Article X, Section 2, D, in that the Committee members have acted in collusion with management relative to the Committee's failure to represent me in a current grievance regarding a written reprimand from management received by me on April 18, 1988, and grieved that date and that the Committee members refused to process the grievance beyond Steps 1 or 2 of the labor agreement without providing a factual basis for their refusal on May 9, 1988; furthermore, this refusal of the Committee occurred after this grievant declined to enter a compromise with management proposed by Committee members on May 6, 1988, without any prior discussion with the grievant, or to the knowledge of the grievant, or with the agreement of the grievant.

I am also submitting that additional basis for these charges is Article X, Section 2-F, in that by refusing to represent a member/grievant, the Committee members have violated the legally authorized decision of the International Convention in the form of the International Constitution as endorsed by the International Convention and, specifically, as reflected in the Bill of Rights for Union Members, number 7.

Given the content of Article IX, Section 43, of the International Constitution, I expect the respective grievance at question in this trial to be pursued by Local 2492-A, as the Grievance Committee appears to lack the power to bind the local union to the Committee's decision.

I shall look forward to your response.

Sincerely,

Mathew Musgrave

On or about June 10, 1988, Musgrave advised the Local 2492-A Executive Board by letter as follows:

Executive Board AFSCME Local 2492-A
Ms. Sandra Wadzinski, Secretary

Dear Ms. Wadzinski:

Consistent with Article X, Section 6, I am hereby filing charges against members of AFSCME Local 2492-A, as follows:

GRIEVANCE #7-85

On September 25, 1985, this member filed a grievance in response to an annual performance appraisal which was inaccurate and non-factual in content (Local 2492-A Grievance #7-85).

This grievance was carried through the complete grievance process--steps 1, 2, 3 of the bargaining agreement which was completed, according to my records, sometime in January, 1986. Upon completion of the grievance per Step 3 of the Contract, Marathon County continued to deny the grievance, and Local 2492-A per contract had 20 days from Step 3 denial to pursue or decline arbitration. On the 19th day of this period, I was informed by Local 2492-A's President Robert Nicholson that the local's Grievance Committee, J. George Mayer, Doug Thomas and Robert Nicholson, had determined that grievance would not be pursued to arbitration and that I had no alternative to contest this decision (I had previous to the Committee's decision communicated to Mr. Nicholson questions regarding the authority of the

grievance committee per consult with the staff representative of Council 40 AFSCME. Yet, he responded that he would not be seeking any answers on these questions from AFSCME Council 40 as I had requested).

I never received a written basis for this decision by the 2492-A Grievance Committee or Executive Board; Grievance #7-85 never entered arbitration.

Accordingly, I am charging that Robert Nicholson, Doug Thomas, J. George Mayer, violated Article X, Section 2-F as they failed to represent me fairly, based upon the obvious merit of Grievance #7-85, consistent with their obligation under the International Constitution. (It should be noted that a Local 2492-A membership vote was ultimately carried out re #7-85 but the membership was not given specific instructions from 2492-A Executive Board re summarization of the issue, although I requested such from President Nicholson; the 20 members of 2492-A were asked to circulate a file with approximately 40 documents after I had formally challenged local leadership to accomplish a vote with specific clarifications for the members. I observed members to be confused on the issues involved and uncertainty prevailed--many were wrongly told that a performance appraisal was not a grievable issue for arbitration; the document file was rotated within the membership in less than an eight-hour work day, and many members were not aware of why they were asked to review it--there were no routing/analysis guidelines. Local members voted to decline arbitration.)

NOTE:

Of additional significance is that an immediately prior grievance (#6-85) was filed by a colleague with parallel concerns regarding his performance appraisal by the same supervisor as did my appraisal; this grievance was endorsed for arbitration, by the 2492-A Grievance Committee, and Council 40 representative Daniel Barrington was informed of the similarity to #7-85 by Marathon County Personnel Department in November, 1985.

In June, 1986, I was again issued an inaccurate, grossly misrepresentative (1985-1986) performance evaluation by the same management supervisor. Given the non-support of Local 2492-A re Grievance #7-85, I consulted with Mr. Phil Salamone and, ultimately, Mr. Joseph Kreuser, both of Council 40 AFSCME; these two individuals advised me to defer filing of charges per Local 2492A officers and to attempt to resolve future issues through the Local. A grievance was not filed per this performance evaluation.

GRIEVANCE #3-87

On June 8, 1987, this member advocated for a juvenile client accused of a crime during a conference with the Wausau, Wisconsin, Police Department. On June 18, 1988, management of the police department informally alleged obstruction of justice to management of Marathon County Department of Social Services. Subsequently, on July 8, 1987, management of that agency (my supervisor) met with me and AFSCME Local 2492-A president Timothy Theiler. Management demanded that I attend a meeting with police department management without legal counsel present (I was entitled to legal counsel per my employer per Wisconsin District III Court of Appeals Case No. 86-1158) scheduled for July 9, 1987.

Local 2492-A President Theiler informed management present that neither he nor Local 2492-A would support me if I failed to comply, or if I filed a grievance. Theiler cited my 1986 contact with Council 40 in Madison,

Wisconsin, e.g. Joseph Kreuser to management present per evidence of my union non-compliance as justification for his position, and declination of Local 2492-A representation.

I declined to meet with police given the absence of legal counsel, as well as an obligation to attend a relative's funeral. My supervisor was strongly dissatisfied and mentioned disciplinary action. I requested that Mr. Theiler attend any meeting with police (a meeting was convened on July 9, 1987. Mr. Theiler did not attend).

On July 15, 1987, management of Marathon County Department of Social Services issued disciplinary action to me for alleged professional misconduct for "interrogating a police officer in the presence of a child, "based upon my 6/19/87 memo to management re the police/client conference of 6/18/87, and based upon the meeting with police and management of July 9, 1987, which was not attended by any union representative of Local 2492-A. I requested and received exclusive representation from Mr. Phil Salamone of Council 40, and filed a grievance which was heard by an arbitrator on February 11, 1988, a decision is still pending as of this date.

Accordingly, I am filing charges against Timothy Theiler pursuant to Article X, Section 2F for failure to represent me and deliberate refusal to represent me, per the legally authorized decision of the International Convention e.g. the International Constitution, Preamble (page 8, 1984).

Grievance #4-87

On July 30, 1987, this member filed a grievance regarding gross inaccuracies and distortion relative to my annual performance evaluation for the period July 1, 1986 to July 1, 1987, which was received by me July 23, 1987 (Local 2492-A Grievance #4-87).

On February 11, 1988, I was informed that members of the 2492-A Grievance committee, Robert Nicholson, J. George Mayer, and James Prozinski, were withdrawing representation of Grievance #4-87 based upon a denial of the grievance by Marathon County; members of the Committee had never met with me to discuss the grievance or reviewed factual documentation supporting of the grievance merits.

I requested on February 11, 1988, a meeting with the Local Grievance Committee and 2492-A President, Timothy Theiler, to discuss the Committee's decision and was subsequently informed that the Executive Board of Local 2492-A had just completed a "special meeting" convened by President Theiler without notice to me to likewise deny representation to me re Grievance #4-87, this action being endorsed on February 11, 1988, by Executive Board members Nancy Disbrow, Doug Thomas and Sandra Wadzinski (comprising less than a majority of the seven-member Board), based explicitely (sic) upon the denial of the 2492-A Grievance Committee--Executive Board members never read the documentation of the Grievance.

Ultimately, upon my demand, the pursuit of Grievance #4-87 was voted upon by the membership despite my objection to dissemination by the Executive Board of inaccurate and prejudicial information as well as dissemination of prejudicial information by ex-officio President Timothy Theiler, regarding grievance #4-87 prior to the vote of the membership--the membership denied support for the grievance on April 1, 1988.

Accordingly, I am charging that members of Local 2492-A Grievance Committee, Robert Nicholson, J. George Mayer, and James Prozinski, and Local 2492-A Board members, Timothy Theiler, Robert Nicholson, Sandra Wadzinski, Doug Thomas, Darrel Becker, Kathleen Conway, and Nancy Disbrow violated Article X, Section 2F, in that they

failed to represent my interests fairly and in good faith, as obligated to do so by the International Convention per the International Constitution (Preamble, page 8, 1984), directives from Council 40 AFSCME re representation of members interest, and the Local 2492-A Constitution.

GRIEVANCE #1-88

On March 23, 1988, members of the Executive Board of AFSCME Local 2492-A refused to pursue representation of me regarding local grievance #1-88 and provided me with no basis to support the Board's refusal for representation, although I had requested representation based upon at least eight (8) reasons provided to Executive Board members, in writing, on March 23, 1988, regarding merit of the grievance.

Accordingly, I charge that Executive Board members Darrel Becker, Kathleen Conway, Robert Nicholson, Nancy Disbrow, Doug Thomas, and Sandra Wadzinski, violated Article X, Section 2F, International Constitution, by failing to represent a member "forcefully and effectively" (International Constitution Preamble, page 8, 1984) contrary to the facts and merits of the grievance.

Furthermore, relative to Grievance #1-88, Local 2492-A Grievance Committee members Robert Nicholson, J. George Mayer, and James Prozinski violated Article X, Section 2F, by failing to represent this member by failing to recognize the merit of the facts of said grievance as contained in related documents provided to them on March 14, 1988, as reflected in said committee members' decision to terminate representation of this member without reason with respect to Grievance #1-88, and in said Committee's unwritten recommendation to AFSCME Local 2492-A Executive Board to terminate representation of this member without reason with respect to Grievance #1-88, contrary to factual evidence of merit provided to members of said Grievance Committee of Local 2492-A on March 14, 1988.

GRIEVANCE #3-88

On March 14, 1988, I was disciplined per a reprimand for "poor performance" by my management supervisor. I filed a grievance (AFSCME Local 2492-A #3-88).

Local 2492-A assumed representation of the grievance appointing Board Member Doug Thomas as Local 2492-A representative. I appealed to the Executive Board of 2492-A to assign an alternate rather than Mr. Thomas, citing his lack of objectivity per involvement in previous grievances related to me, and I also questioned Mr. Thomas' training/qualifications to act as a steward--the Board refused to appoint an alternate whom I selected.

Management held a Step 1 hearing on April 25, 1988. Representation from Council 40 was lacking at this hearing, although I had requested such from Council 40. On April 29, 1988, management denied the grievance.

Appeal of the denial was due by May 13, 1988, per the current labor agreement, yet the 2492-A Board indicated to me on April 27, 1988, that it would not pursue the grievance unless I made available to management exhibits in my possession tentatively scheduled for my defense per arbitration. I requested the 2492-A Board to justify why such action would not constitute collusion with management per memo of May 2, 1988. The Board did not reply.

On June 6, 1988, I inquired of the status of the grievance and was informed on June 8, 1988, that the Board had presented to union membership for a vote at a membership meeting of May 23, 1988, that a resolution of the grievance acceptable to me had been achieved at

the Step 1 hearing of April 25, 1988, and accordingly, membership present at the meeting of May 23, 1988, had voted to terminate representation of Grievance #3-88.

Notice of the impending vote was not provided to me or the membership prior to the meeting of May 23, 1988, nor was such contemplated action noted in the agenda for the May 23 meeting. I left this meeting prior to this item being introduced, and no member of the Board stated any vote to be pending. The vote occurred after my departure, and I never knew of its existence until June 8, 1988 (I had requested minutes from the Board of the meeting of May 23 on May 24, 1988, and have yet to receive same).

Additionally, I am also charging per Article X, Section 2-D that Board members Doug Thomas, Robert Nicholson, Sandra Wadzinski, Patricia Acheson, and Kathleen Conway acted in collusion with management by demanding I provide management with exhibits for my defense prior to arbitration as a condition for furtherance of Grievance #3-88 beyond Step 1 of the current labor agreement.

Please establish a time and date for the local trial to be commenced on these charges, as well as those charges filed on May 10, 1988, mutually convenient and acceptable to myself and the charged parties, consistent with Article X, Sections 6, 7, 10, 11, 12, 13, of the International Constitution, AFSCME, AFL-CIO, copyright 1984.

With the highest expectations that the union will stand and deliver, I remain

Sincerely,

Mathew Musgrave /s/

cc: Mr. James Koppelman
Mr. Phil Salamone, AFSCME Council 40 Staff Representative
Mr. Sam Gillispie, Associate Director AFSCME Council 40

By letter dated July 10, 1988, Local 2492-A asked that Respondent AFSCME appoint a judicial panel to take jurisdiction over the June 10, 1988 charges. On August 1, 1988 and August 17, 1988, Respondent John Seferian, Chairperson of Respondent AFSCME's Judicial Panel, dismissed Musgrave's June 10, 1988 charges against Local 2492-A members. Musgrave appealed Seferian's decision to the remaining members of the AFSCME Judicial Panel consisting of Respondents Brown, Hennessy, Jorgenson, Lambie, Payne, Rodrigues, Smith and Zamarripa. On September 28, 1988, ten members of Local 2492-A, including Respondents Acheson, Conway, Nicholson, Thomas and Wadzinski, wrote Seferian the following letter:

Dear Mr. Seferian,

We are members of AFSCME Local 2492-A, and were recently cleared of charges brought by Mathew Musgrave, also a Local 2492-a member, though a dissmal (sic) by your office.

Because we believe these charges were not brought in good faith in fact, only levied to disrupt the Local and punish certain members, we are asking that you invoke Article X, Section 16, Penalties against accuser of charges not sustained, and see fit to expel or suspend Brother Musgrave from membership.

Thank you for your consideration.

Fraternally,

Timothy Theiler /s/
Sandra Wadzinski /s/
Robert Nicholson /s/
Douglas Thomas /s/
J. George Mayer /s/
James Prozinski /s/
Darrel Becker /s/
Kathleen Conway /s/
Nancy Disbrow /s/
Patricia Acheson /s/

CC:
Robert Lyons
Sam Gillispie
Phil Salamone
Sandra Bloomfield

On November 1, 1988, the Judicial Panel sustained Seferian's dismissal of the June 10, 1988 charges. Local 2492-A took no action as to Musgrave's May 10, 1988 charges and in August, 1988, Musgrave asked Respondent Council 40 to take jurisdiction over same. In October 1988, Respondent Lyons wrote Respondent Seferian asking that the Respondent AFSCME Judicial Panel take jurisdiction over the May 10, 1988 charges. The Judicial Panel took no action regarding Lyons' request. Musgrave's May 10, 1988 charges were never ruled upon by the Judicial Panel, Council 40 or Local 2492-A.

11. On or about September 15, 1988, Musgrave received a memo from his supervisor, Linda Duerkop, directing Musgrave to attend a September 26, 1988 meeting "to discuss complaints regarding your job performance." On September 26, 1988, Musgrave, accompanied by Local 2492-A grievance representative Deborah Morris, met with Duerkop and the Deputy Director for the Department of Social Services. Following the September 26 meeting, Musgrave received the following letter from Duerkop:

> Dear Mr. Musgrave:
>
> In the past few weeks I have received several new complaints regarding your work performance particularly as it relates to the need to establish effective working relationships with professionals in the community and the other employees of the Department of Social Services. Specific complaints that I have received and view as representing significant problems are as follows:
>
> A. Bill Cerney - You authored a memorandum to Judge Thums in which you compared the qualifications of Mr. Cerney to your own qualifications. This memorandum served no useful purpose from the department's perspective and made more difficult your ability to develop and maintain an effective work relationship with Mr. Cerney. If you have problems working with Mr. Cerney, you should have discussed this matter with your supervisor rather than initiating this type of contact.
>
> B. Jim Prozinski - Expressed concern regarding your repeated failure to work through him for possible placements at the Reynold's Group Home. Further, Mr. Prozinski characterized his contacts with you as "unprofessional and inconsiderate".
>
> C. Nancy Backes and Kerry Whiteside - These employees have complained that you are wasting their work time by discussing union business and a multitude of other complaints that you have regarding departmental operations.
>
> D. Sandra Hoenisch - You authored a memorandum to Attorney Hoenisch which she interpreted as questioning her professional ethics. Your memorandum should have been reviewed by your supervisor prior to sending this out. We have in the past talked about the need to consult with management on sensitive issues of this type.
>
> You have requested time to respond in writing to a written summary of complaints which I am providing via this letter. We of course discussed these today, 9/26/88, with David Carlson, Deputy Director and Deborah Morris, Union Representative.
>
> You will have until Monday, 10/3/88, to provide me with this written statement which I will carefully review and share with Mr. Carlson.

Sincerely,

Linda Duerkop /s/
Social Work Supervisor

LD/sa

cc: Deborah Morris, Union Representative
David Carlson, Deputy Director

By the following memo, dated October 3, 1988, Musgrave responded to Duerkop's letter of September 26, 1988:

> My response to the issues noted in the above-referenced letter is as follows:
>
> Paragraph A - Regarding the memo of 8/23/88 to Judge Thums and your statement that it served "no useful purpose" was not stated in the meeting of 9/26/88. This contact had no intended reference to previous or current difficulties relevant to working with Mr. Cerny - the purpose was, in serving the client, to delineate differences in the two parties' job responsibilities and direct service obligations to the client. As stated in the close of the letter, "I hope these clarifications regarding my professional involvement with (client) and his family have contributed to your review of his needs...". Regarding my work relationship with Cerny, I would only hope that clarification of the role of Department of Social Services staff would mutually enhance the understanding of all community agency personnel.
>
> Paragraph B - Jim Prozinski - "repeated failure to work through him for possible placements at the Reynolds Group Home." Based upon the meeting, this concern of Mr. Prozinski's was relative to the recent proposed placement of Robert Glenn Stewart; I am not aware of any previous (i.e. "repeated") concerns which were verbalized by Mr. Prozinski. During the meeting of 9/26/88, Mrs. Duerkop, herself, made reference to this last placement routing as being atypical to Mr. Musgrave's previous compliance with "understood" procedures; for further commentary on this issue, it would be useful to review the written placement procedure in practice at the time of referral of R. G. Stewart, and compare that procedure with the available written record of the referral.
>
> I am unclear as to what Mr. Prozinski views as "unprofessional" conduct, based upon our meeting and this letter. The concerns regarding my being "inconsiderate" appeared to be dismissed by Mr. Carlson as irrelevant and insignificant, e.g. not greeting Mr. Prozinski in the hallway, referred to by Mrs. Duerkop on 9/26/88. As stated in the meeting, I continue to believe that I have an adequate professional relationship with Mr. Prozinski; the content of the meeting did not reveal any "unprofessional" concerns of Mr. Prozinski, Mr. Carlson or Ms. Duerkop.
>
> Paragraph C - N. Backes and K. Whiteside - It is my understanding that in an interview with these two staff members and their union representative, that neither of them categorized their actions as "complaints" against me. That rather, Ms. Backes came to Ms. Duerkop on what she refers to as an "informal" basis and that Ms. Whiteside's comments were solicited by Mrs. Duerkop. Both of these staff members have stated that they have no difficulty in working cooperatively with me. Regarding my discussing "union business and a multitude of other complaints regarding departmental operations", as Mrs. Duerkop pointed out during the 9/26/88 meeting, neither Mrs. Backes nor Ms. Whiteside belong to the same union as I do and any concern regarding inappropriate union organizing was irrelevant - as pointed out by Mrs. Duerkop during the meeting. Apparently Mrs. Duerkop, per the summary letter of 9/26/88, has reintroduced this as an issue.

Paragraph D - 8/10/88 Memo to Sandra Hoenisch - The motivation for writing this letter is clearly stated in Paragraph Three, where I noted that resolution of my concerns would assure continuity of my client's legal representation. The content of the memo clearly represents an effort to cooperatively represent the "best interests of our ... mutual client." Furthermore, Ms. Hoenisch was asked to contact me, at her convenience, to clarify and discuss this situation to promote an effective positive working relationship to assure quality service delivery to my client. Ms. Hoenisch's apparent concerns regarding the intent of this letter were never conveyed to me prior to our meeting on 9/26/88, although she was clearly encouraged by me, within the body of the letter to discuss its content.

I feel obligated to comment on the contradictions between what is presented in your written summary of the meeting of 9/26/88 and my and local 2492-A representative, Deborah Morris' impressions of that meeting. When we discussed the complaint of Mr. Prozinski, relative to group home placement, neither of us were under the impression that this was a repetitive occurrence that had previously been addressed by management to me.

In addressing the concerns involving Ms. Whiteside and Mrs. Backes, I am documented by as discussing "union business and a multitude of other complaints regarding departmental operations." Our notes from the 9/26/88 meeting indicate that Mrs. Duerkop dismissed our request for clarification of agency policy regarding discussion of union business during work hours as irrelevant, since these three parties are not all in the same union. Our concern is that Paragraph C of your written summary is not pertinent to the purpose for this meeting, which apparently was to discuss Mat's "effective work relationship"; if it is management's premise that effective working relationships are being compromised by perceived union business, that was not made clear in either the meeting or the letter. In fact, neither Ms. Whiteside or Mrs. Backes mentioned this in our meeting with them. Both Mr. Carlson and Mrs. Duerkop were unable to provide, during the meeting, clarification as to what union business was being discussed. We remain unclear as to what "complaints regarding departmental operations" were discussed with Whiteside and Backes. Again, our interview with those parties did not reflect a concern on their part that their working relationships with me have been inhibited.

In the paragraph regarding Ms. Hoenisch, you refer to this as a "sensitive issue", yet while in the meeting, to the best of our recollection, Mrs. Duerkop suggested that this matter would have been better handled informally through a phone contact. It is our opinion that sensitive or potentially sensitive issues warrant written documentation.

Thank you for the opportunity to make a written response to your summary of our 9/26/88 meeting.

Sincerely,

Mathew Musgrave

MM/ky

cc: Deborah Morris, Local 2492-A

On October 3, 1988, Respondent County, through its County Clerk, received a copy of Musgrave's complaint filed with the Wisconsin Employment Relations Commission on September 26, 1988. On or about October 7, 1988, Musgrave received the following memo from Duerkop suspending him for one day effective October 21, 1988.

Dear Mr. Musgrave:

In the past few weeks I have received several new complaints regarding your work performance particularly as it relates to effective working relationships with professionals in the community and the other employees of the Department of Social Services. Specific complaints that I have received and view as representing significant problems are as follows:

A. Bill Cerney - You authored a memorandum to Judge Thums in which you compared the qualifications of Mr. Cerney to your own qualifications. This memorandum served no useful purpose from the department's perspective and made more difficult your ability to develop and maintain an effective work relationship with Mr. Cerney.

B. Jim Prozinski - Expressed concern regarding your repeated failure to work through him for possible placements at the Reynold's Group Home. Further, Mr. Prozinski characterized his contacts with you as "unprofessional and inconsiderate".

C. Nancy Backes and Kerry Whiteside - These employees have complained that you are wasting their work time by discussing complaints that you have regarding departmental operations during normal working hours.

D. Sandra Hoenisch - You authored a memorandum to Attorney Hoenisch which she interpreted as questioning her professional ethics. Your memorandum should have been reviewed by your supervisor prior to sending this out. We have in the past talked about the need to consult with management on sensitive issues of this type.

These matters were specifically reviewed with you at a meeting on September 26, 1988 and you were given the opportunity to respond to these complaints.

These complaints show a continuing insensitivity to other department employees and a failure to maintain an effective working relationship with other professionals both within and outside the Department. Your criticism of the credentials of Mr. Cerney to Judge Thums in no way assisted in the performance of your responsibilities and severely harmed the Department relationship with that individual. Your failure to follow procedures for group home placement at Reynolds shows an unwillingness to work with other department staff. Your failure to handle the question of professional ethics of Attorney Hoenisch in a careful manner in concert with me, your supervisor, shows your insensitivity to other professionals just as you have imposed your personal complaints about the department on other employees.

These complaints follow a pattern of behavior over the past year which include the development of poor work relationships both inside and outside the department. We have discussed these problems with your work performance on previous occasions and you have previously been subjected to formal disciplinary action for similar performance deficiencies. On July 15, 1987 you were given a counseling memo regarding your job performance in this area relating to your working relationship with the Wausau Police Department; on November 18, 1987 you were given a written reprimand for failing to adhere to the agency hierarchy for processing of legal matters in the department; on March 14, 1988 you were disciplined for your job performance as it relates to your relationship with coworkers in the department and professionals in the community. On April 18, 1988 you were given a written reprimand for

your conduct regarding a perceived threat delivered to a coworker (Marilyn Henderson).

Given that your job performance has not improved after having been formally disciplined and other informal efforts have been undertaken to resolve this problem, I feel it necessary to suspend you without pay for one day. You are not to report for work on Friday, October 21, 1988 and you should begin immediately to reschedule any work commitments or meetings that you have made for that day. This action is being taken to emphasize the seriousness of your performance deficiencies and the need for improvement to occur immediately. The events of the last several weeks show a continued failure to perform up to acceptable standards in this Department.

Without a substantial improvement in your job performance including the development and maintenance of effective work relationships you will be subjected to further disciplinary action which will in all likelihood result in the termination of your employment with Marathon County. In order to help you avoid further discipline, I will be meeting with you on a monthly basis to discuss and review your job performance.

Further, Dave Carlson and I have talked with you about the County's Employee Assistance Program and suggested that you consider seeking assistance under that program. If you have not already availed yourself of that program, I encourage you to do so. It may be that some type of personal problem is leading to the problem in your performance and the EAP may be a constructive method in which both problems can be resolved.

Sincerely,

Linda Duerkop /s/
Social Work Supervisor

LD/sa

cc: Jim Dalland
Dave Carlson
Personnel
Personnel File

12. On October 11, 1988, Musgrave filed a grievance as to the one day suspension and had a Step 1 grievance meeting with Duerkop and Carlson at which he was represented by Local 2492-A member Deborah Morris. On October 13, 1988, Local 2492-A agreed to extend the 10-day period which Step 1 of the grievance procedure establishes as the time frame for a formal written Step 1 management response. On November 1, 1988, another Step 1 meeting was held with Respondent Dalland. Musgrave did not attend said meeting but was represented by Morris and Respondent Thomas. Dalland issued a Step 1 denial of the grievance on November 2, 1988. Sometime between November 2 and November 17, 1988, Respondent Local 2492-A decided not to process Musgrave's suspension grievance to Step 2 of the contractual grievance procedure. On November 17, 1988, Respondent Salamone advised Respondent Karger of the Local's decision. By letter dated November 18, 1988, Karger advised Musgrave of the Local's decision. On or about November 22, 1988, Musgrave sent Respondent Salamone the following letter:

Dear Mr. Salamone:

Enclosed is a copy of a letter I received on November 18, 1988, from Brad Karger regarding withdrawal of AFSCME Local 2492-A support for my recent suspension of one day's pay.

Please provide a written response regarding Council 40's position on this issue--ample evidence exists to support my grievance, and I have yet to be contacted by any member of Local 2492-A regarding withdrawal of support.

Has Local 2492-A contacted you on this issue; if so, was this contact in writing from the Executive Board or a telephone contact? When did this contact take place?

Has Local 2492-A provided you with your copy of my November 14, 1988 Step 2 request to Brad Karger--a copy for you was provided by me to Sandra Wadjinski of Local 2492-A on November 16th.

As you know, a listing of documents was sent to you by me on November 18th; Local 2492-A also has a set of those same documents via the Local's Grievance Committee. Additional documents from agency employees contradicting management's position on this grievance are also forthcoming.

Sincerely,

Mathew J. Musgrave /s/

13. On or about November 22, 1988, Musgrave advised Respondent Dalland of his intent to end his employment with Respondent County. Prior to the end of Musgrave's employment by Respondent County on January 3, 1989, Respondent Salamone and Respondent Karger discussed settlement of Musgrave's suspension grievance. To settle the grievance, Karger offered to withdraw the discipline from Musgrave's file, make Musgrave whole for the suspension and give Musgrave a neutral generic letter of reference. Respondent Salamone telephonically advised Musgrave of the settlement offer. Musgrave asked Respondent Salamone for a written version of the settlement offer and Respondent Salamone responded by indicating that if the offer was acceptable to Musgrave, it would be reduced to writing. Following this telephone conversation, there was no further discussion of settlement of the suspension grievance between Musgrave and Salamone.

14. Marathon County did not suspend Musgrave in whole or in part in retaliation for his having filed a complaint with the Wisconsin Employment Relations Commission.

15. The grievance procedure in the parties' 1987-1988 contract was available to Musgrave for potential resolution of issues regarding compliance by Marathon County, James Dalland and Brad Karger with the 1987-1988 contract when processing Musgrave's reprimand and suspension grievances.

16. Hostility by the AFSCME Local 2492-A Executive Board toward Musgrave played a role in the Board's decision not to further process Musgrave's reprimand and suspension grievances.

E. The Examiner's Conclusions of Law are set aside and the following Conclusions of Law are made:

CONCLUSIONS OF LAW

1. Because Marathon County did not suspend Musgrave in whole or in part in retaliation for his having filed a prohibited practice complaint with the Wisconsin Employment Relations Commission, Marathon County did not thereby commit a prohibited practice within the meaning of Sec. 111.70(3)(a)3, Stats.

2. Marathon County's suspension of Musgrave did not have a reasonable tendency to interfere with the exercise of rights guaranteed by Sec. 111.70(2), Stats., and thus the County did not thereby commit a prohibited practice within the meaning of Sec. 111.70(3)(a)1, Stats.

3. Because Complainant Musgrave did not seek to exhaust an available contractual procedure regarding his allegation that Respondents Marathon County, James Dalland and Brad Karger violated the collective bargaining agreement by the manner in which his reprimand and suspension grievances were processed, the Wisconsin Employment Relations Commission will not assert its jurisdiction under Sec. 111.70(3)(a)5, Stats., to determine the merits of these allegations.

4. Because hostility by the AFSCME Local 2492-A Executive Board toward Musgrave played a role in the Board's decision not to further process Musgrave's reprimand and suspension grievances, AFSCME Local 2492-A and Executive Committee members Acheson, Conway, Nicholson, Thomas and Wadzinski thereby committed prohibited practices within the meaning of Sec. 111.70(3)(b)1, Stats.

5. Aside from the decision of its Executive Board not to further process Musgrave's reprimand and suspension grievances, AFSCME Local 2492-A, its officers and agents, processed Musgrave's reprimand and suspension grievances in a manner consistent with its duty of fair representation and the contractual grievance procedure and thus AFSCME Local 2492-A, its officers and agents, did not thereby commit a prohibited practice within the meaning of Sec. 111.70(3)(b)1 or 4, Stats.

6. AFSCME Local 2492-A, its officers and agents, and AFSCME Council 40, Lyons, Salamone and Gillispie did not coerce, intimidate or induce any officer or agent of Marathon County to interfere with Musgrave's enjoyment of his legal rights and thus did not commit a prohibited practice within the meaning of Sec. 111.70(3)(b)2 or (3)(c), Stats.

7. Because the complaint against the named Respondents who are members of the AFSCME Judicial Panel was not properly served, the Commission cannot exercise whatever jurisdiction it may otherwise have had over Respondents Seferian, Brown, Hennessy, Jorgenson, Lambie, Payne, Rodrigues, Smith, or Zamarripa.

8. AFSCME Council 40, Lyons, Gillispie and Salamone did not commit prohibited practices within the meaning of Secs. 111.70(3)(b)1 or (3)(c), Stats., by the manner in which they responded to and processed Musgrave's May 10 and June 10, 1988 charges.

F. The Examiner's Order is set aside and the following Order is made:

ORDER

1. The complaints are dismissed as to Respondents Marathon County, James Dalland, Brad Karger, AFSCME Council 40, Robert Lyons, John Seferian, Constance Brown, Tom Hennessy, Howard Jorgenson, Jean Lambie, Aretha Payne, Gary Rodrigues, Nate Smith, Phyllis Zamarripa, Sam Gillispie and Phil Salamone.

2. AFSCME Local 2492-A, its officers and agents, shall immediately:

A. Cease and desist from failing to fairly represent employes of Marathon County who said Local represents for the purposes of collective bargaining and contract administration.

B. Take the following affirmative action which the Commission finds will effectuate the purposes and policies of the Municipal Employment Relations Act.

1. Consistent with its obligations under Mahnke v. WERC, determine whether it will further process Musgrave's reprimand and suspension grievances and advise Musgrave and Marathon County of the result of said determination.

2. Post the Notice attached hereto as "Appendix A" in any conspicuous places available in the work place to Local 2492-A. The Notice shall be signed by the President of Local 2492-A and shall be posted immediately upon receipt of a copy of this Order for sixty (60) days. Reasonable steps shall be taken to insure that said Notice is not altered, defaced or covered by other material.

3. Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days of the date of this Order what steps it has taken to comply.

Given under our hands and seal at the City of Madison, Wisconsin this 5th day of March, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
A. Henry Hempe, Chairman

_____
Herman Torosian, Commissioner

_____
William K. Strycker, Commissioner

MEMORANDUM ACCOMPANYING ORDER MODIFYING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Given the nature and number of the issues raised by Musgrave on review, we begin our Memorandum with an extensive Background section. We will then proceed to consider: (1) Musgrave's allegations that the Examiner committed various procedural errors; (2) Musgrave's Motion to Reopen the Record to take additional testimony; (3) Musgrave's assertions that the Examiner's Findings of Fact are erroneous; and finally (4) Musgrave's contentions that the Examiner incorrectly resolved the legal issues before him.

BACKGROUND

On September 26, 1988, Musgrave filed the following complaint with the Wisconsin Employment Relations Commission:

> My name is Mathew J. Musgrave, and I reside at 331 Broadway Avenue, Wausau, Wisconsin 54401. I am employed as a social worker by Marathon County Department of Social Services, 400 E. Thomas Street, Wausau, Wisconsin. My employment is covered under contract with Marathon County and Local 2492-A, American Federation of State, County, and Municipal Employees (AFSCME), AFL-CIO.
>
> I am filing this Complaint with the Commission relative to members of the Executive Board of Local 2492-A AFSCME: Ms. Patricia Acheson, Ms. Kathleen Conway, Mr. Robert Nicholson, Mr. Doug Thomas, Ms. Sandra Wadzinski. These individuals may be contacted at their collective business address, 400 E. Thomas Street, Wausau, Wisconsin 54401. In addition, this Complaint is also relative to Marathon County Department of Social Services, James Dalland, Director, 400 E. Thomas Street, Wausau, Wisconsin, and Marathon County Personnel Department, Brad Karger, Director, 500 Forest Street, Wausau, Wisconsin.
>
> My Complaint is as follows:
>
> These events occurred primarily at 400 E. Thomas Street, Wausau, Wisconsin.
>
> On April 18, 1988, I received a written reprimand from James Dalland, Director, Marathon County Department of Social Services, stating that I had threatened a fellow employee of that agency. Since I had not threatened the employee in question, I filed a grievance with my union, Local 2492-A, AFSCME, on April 18, 1988.
>
> Per contract language (Step 1), the Department head, Mr. James Dalland, was obligated to "discuss the matter with the employee and the Union, if the employee so desires and provide a written answer to the grievance within ten (10) working days." Mr. Dalland did not discuss this matter with me nor with the Union (that I am aware), yet on April 27, 1988, forwarded the grievance to Marathon County Personnel Director Brad Karger, neither denying nor supporting the grievance. The Contract stipulates that forwarding of the grievance to the Personnel Director (Step 2) shall take place by action of the grievant after disposition by the Department Head (Step 1); Mr. Dalland's memo request of April 26, 1988, to Mr. Karger fails to constitute a disposition and requests Mr. Karger to conclude a disposition per Step 2, i.e. "...forward it on to the next step;" Both actions by Mr. Dalland are violations of contract language and written procedure.
>
> On or about May 5, 1988, I received an undated, unreferenced, and unsigned note (apparently in Robert Nicholson's handwriting, of Local 2492-A) regarding a "grievance" meeting with James Dalland was scheduled for May 6, 1988. I sent a memo of inquiry to the 2492-A Executive Board on May 5, 1988, indicating that I believed a deviation of the contract had occurred per Mr. Dalland's action and asking for direction from the Union. I received no reply from Local 2492-A.
>
> I attended the meeting in question on May 6 and inquired initially if the meeting constituted a Step 1 meeting per the Contract, and was informed by Mr. Nicholson that it was not.

Mr. Nicholson then requested, in the presence of Mr. Dalland, that I enter an agreement with management implying admission to the reprimand; some discussion ensued and I ultimately refused, asking for a Step 1 conference and I left the meeting. The proposed agreement per Mr. Nicholson had never been discussed with me in any way by 2492-A Board members prior to the meeting on May 6, 1988.

On May 9, 1988, I was informed by the Grievance Committee of Local 2492-A--Robert Nicholson, George Mayer, James Prozinski--that the Committee would not further pursue my grievance, no reason was given.

On May 10, 1988, I filed collusion charges per the International Constitution, AFSCME, AFL-CIO, regarding Local 2492-A Grievance Committee. To date, Local 2492-A and Council 40, AFSCME, have declined to process these charges as obligated to do so within International Constitution, AFSCME, AFL-CIO.

I received no further correspondence per this grievance from Local 2492-A during the next four weeks, and on June 17, 1988, initiated correspondence to Brad Karger, Director Marathon County Department of Personnel, inquiring as to the status of the grievance relative to Step 2 of the Contract, noting the obligation of Mr. Karger per Step 2 to respond to the grievance. I also requested that given the absence of Mr. Karger's response/disposition within ten days of receipt that the reprimand be withdrawn from my personnel file.

Mr. Karger replied on June 21, 1988, received at my work address on June 22, 1988, denying the grievance and basing his denial upon expiration of time frames applied to myself and the union. I was out of state on vacation from June 18 to July 5, 1988, a fact known to Mr. Karger.

I replied to Mr. Karger on July 13, 1988, indicating disagreement with his interpretation of Contract language per Step 2 in light of Mr. Dalland's failure to discuss, accept, or deny the grievance per Step 1 and clarification from him for a return to Step 1 if a referral to Step 3 was inappropriate.

Mr. Karger responded on July 21, 1988, (received on July 22) that Local 2492-A had withdrawn representation per a memo from Robert Nicholson of 2492-A received at the Personnel Department office on July 21, 1988, yet dated May 27, 1988. Mr. Karger provided a copy of this Local 2492-A correspondence to me with his letter of July 21. I was never informed of withdrawal of representation but (sic) Local 2492-A until being so informed by Mr. Karger on July 21.

Accordingly, I then requested and obtained minutes of the Local 2492-A May, 1988, membership and Executive Board (none) meetings and found no procedural evidence of any union motion to withdraw representation for my grievance or for delegation of Mr. Nicholson to contact Marathon County Personnel Director Brad Karger to that effect. Mr. Nicholson was not an officer of Local 2492-A empowered by privilege of office to take such action. I conveyed my observations of these facts to Mr. Phil Salamone of AFSCME Council 40 in a letter of August 7, 1988, with supportive documents, seeking redress. Mr. Salamone advised he had no such authority relative to Local 2492-A.

Summarily, I am submitting that (1) members of the then Executive Board of Local 2492-A, AFSCME, AFL-CIO, did violate sections 111.06(2)(a) of the Wisconsin Statutes in that said employees acted in concert to coerce and intimidate me in the enjoyment of my legal rights, including those guaranteed per Wisconsin Statute 111.04 by failure to represent me properly, and

(2) that said members of Local 2492-A Executive Board did violate Sections 111.06(2)(b), Wisconsin Statutes, in that failure to properly represent me induced my employer to interfere the enjoyment of my legal rights, including those guaranteed under 111.04 Wisconsin Statues, and

(3) that said members of the Executive Board of Local 2492-A violated the terms of a collective bargaining agreement by failure to represent me consistent with my Employment

Contract accomplishing a Step 1 and Step 2 hearing, violating 111.06(2)(c) Wisconsin Statues.

I am also submitting that (4) Marathon County Department of Social Services violated 111.06(1)(f) as said Department violated terms of a collective bargaining agreement by not providing a Step 1 or Step 2 procedure as outlined in the Contract, and

(5) Marathon County Department of Personnel violated 111.06(1)(f) as said department did not provide for a Step 1, Step 2, and Step 3 procedure as outlined in the Contract.

The relief I am seeking is for the Commission to order the parties, if respective charges are sustained, to cease and desist such unfair labor practices found to be committed, and any other affirmative action--especially representation by said union of the complainant--deemed appropriate by the Commission.

Lack of representation of the complainant by Local 2492-A, AFSCME, AFL-CIO, has been a long-standing documented pattern of said Local as noted in correspondence of June 10, 1988, to AFSCME, and the complainant requests the Commission to take notice of such pattern in its findings and the reluctant response obtained to date from the American Federation of State, County, and Municipal Employees.

The complaint was served on the Marathon County Clerk and the President of AFSCME Local 2492-A with a cover letter from Commission Staff Director Yaeger dated September 29, 1988. The Marathon County Clerk and the President of AFSCME Local 2492-A received the complaint on October 3, 1988.

On October 10, 1988, Yaeger received the following letter and attachment from Musgrave:

October 8, 1988

I am writing you to request that the Commission take notice of an action by AFSCME Local 2492-A, a party in the above complaint, as evidenced in the enclosed correspondence from said Local, dated September 28, 1988, yet received by me on October 4, 1988, one day after serving of notice of my complaint to said Local 2492-A by the Wisconsin Employment Relations Commission.

I would request the Commission make note of this correspondence relative to my complaint for the following reasons:

a)Local 2492-A of the American Federation of State, County, and Municipal Employees has in the past back-dated correspondence to objurgate retributive action toward me for pursuit of rightful union representation, as noted in my complaint of September 22, 1988, to the Commission. It is my belief that the enclosed correspondence may have been similarly purposefully post-dated to disguise retributive action for my filing of the complaint to the Commission;

b)the action contained in the enclosed correspondence of AFSCME Local 2492-A, dated September 28, 1988, was not duly authorized, in my belief, by either the membership or Executive Board of said Local; five of the 10 co-signers of said correspondence are not Executive Board members of said Local. The correspondence is not endorsed by the President or Vice President of said Local (these Local offices are vacant); and

c)the charges noted are still under appeal, and the request of Local 2492-A, AFSCME, are out of order per Article X, Section 16 of the International Constitution, American Federation of State, County and Municipal Employees, AFL-CIO

I would request the Commission consider issuance of a subpoena(s) for records and documents, pertinent to the content validity, mailing date, and procedural basis, for the respective correspondence of September 28, 1988, from AFSCME Local 2942-A to Mr. John Seferian, AFSCME/ AFL-CIO, Washington, D.C.

(ATTACHMENT)

September 28, 1988

Mr. John Seferian
Judicial Panel Chairperson
AFSCME
1625 L Street, N.W.
Washington, D.C. 20036

Dear Mr. Seferian,

We are members of AFSCME Local 2492-A, and were recently cleared of charges brought by Mathew Musgrave, also a Local 2492-a member, though a dissmal (sic) by your office. Because we believe these charges were not brought in good faith in fact, only levied to disrupt the Local and punish certain members, we are asking that you invoke Article X, Section 16, Penalties against accuser of charges not sustained, and see fit to expel or suspend Brother Musgrave from membership.

Thank you for your consideration.

Fraternally,

Timothy Theiler /s/
Sandra Wadzinski /s/
Robert Nicholson /s/
Douglas Thomas /s/
J. George Mayer /s/
James Prozinski /s/
Darrel Becker /s/
Kathleen Conway /s/
Nancy Disbrow /s/
Patricia Acheson /s/

CC:
Robert Lyons
Sam Gillespie (sic)
Phil Salamone
Sandra Bloomfield

On October 13, 1988, Yaeger received the following letter from Musgrave:

I am writing to inform the Commission that my employer, Marathon County Department of Social Services, suspended me from work for one day on September 7, 1988. Marathon County is a respondent in the above complaint, having been served notice of the complaint on September (sic) 3, 1988.

I interpret Marathon County's action as retributive for my filing with the Wisconsin Employment Relations Commission and wish to inform the Commission accordingly, so it may consider this action on the part of the County in any interlocutory finding relative to a hearing on the above-referenced complaint.

Please note I will be out of the state from October 13 to 24, 1988, relative to scheduling of a hearing and preparation of materials.

Commission Examiner Christopher Honeyman was administratively assigned the case and on November 15, 1988 mailed an Order Appointing Examiner and a Notice of Hearing to Musgrave, Counsel for Local 2492-A and Marathon County scheduling hearing for January 5, 1989.

On November 28, 1988, Examiner Honeyman received a letter from Musgrave asking that hearing be postponed because Musgrave would be commencing work for a new employer on January 3, 1989. The Examiner responded to Musgrave's request by indefinitely postponing hearing.

On December 21, 1988, the Commission received the following complaint from Musgrave:

My name is Mathew J. Musgrave, and I reside at 331 Broadway, Wausau, Wisconsin 54401. I am employed as a Social Worker at Marathon County Department of Social Services, 400 E. Thomas Street, Wausau, Wisconsin. My employment is covered under contract with Marathon County and Local 2492-A, American Federation of State, County, Municipal Employees (AFSCME), AFL-CIO.

I am filing this Complaint regarding members of the Executive Board of Local 2492-A, AFSCME: Ms. Patricia Acheson, Ms. Kathleen Conway, Mr. Robert Nicholson, Mr. Doug Thomas and Ms. Sandra Wadzinski. These individuals may be contacted at their collective work address: 400 E. Thomas Street, Wausau, Wisconsin 54401.

This Complaint is also filed relative to Marathon County Department of Social Services, James Dalland, Director 400 E. Thomas Street, Wausau, Wisconsin 54401. The Complaint is also filed relative to Marathon County Personnel Department, Brad Karger, Director, 500 Forest Street, Wausau, Wisconsin.

This Complaint is also filed relative to Members of the Judicial Panel, American Federation of State, County, Municipal Employees, AFL-CIO, are: John Seferian, Constance Brown, Tom Hennessy, Howard N. Jorgenson, Jeane Lambie, Aretha Payne, Gary Rodrigues, Nate Smith, and Phyllis Zamarripa. These persons may be reached at their business address: American Federation of State, County, and Municipal Employees, AFL-CIO, 1625 L. Street, N.W., Washington, D.C. 20036.

Additionally, this Complaint is also filed relative to Representatives of Council 40, American Federation of State, County and Municipal Employees, AFL-CIO, are: Robert Lyons, Executive Director; Sam Gillespie, (sic) Associate Director; Phil Salamone, Staff Representative. These individuals may be reached at their business address: Wisconsin Council 40, AFSCME, AFL-CIO, 5 Odana Court, Madison, Wisconsin 53719.

The Complaint is as follows:

The events occurred primarily at 400 E. Thomas Street, Wausau, Wisconsin 54401.

On October 7, 1988, I was suspended from work for one day, forfeiting pay, and was threatened with termination for "poor job performance in the area of establishing effective work relationships." As the basis for this suspension was spurious and without just cause, I filed a grievance on October 11, 1988.

On November 2, 1988, James Dalland, Director of Marathon County Department of Social Service, denied the grievance--16 working days after filing of the grievance. Terms of the contract stipulate a response per Step 1 in ten (10) working days per the Department Director. As no waiver of time frames was executed in writing by the union and management, a violation of the contract occurred. Local 2492-A was informed of the contract violation prior to November 2.

Per the contract, I appealed the denial of the grievance to Brad Karger, Director, Marathon County Personnel Department, on November 14, 1988, and was informed on November 18 via a letter dated November 18 per Mr. Karger that AFSCME Local 2492-A had withdrawn representation of my grievance. I contacted Mr. Karger on November 18 via telephone and was informed that Mr. Phil Salamone of AFSCME Council 40 had contacted Mr. Karger that AFSCME Local 2492-A was withdrawing representation, however, Mr. Karger noted he had yet to receive written support for the Local's position from Mr. Salamone or the Local, and that Mr. Salamone had not mentioned specifically those Local members endorsing the withdrawal of representation.

Mr. Karger's letter of November 18, 1988, indicated he would be taking no further action on the grievance appeal until he was notified to the contrary (of the Local's non-support)--such a suspended action by Mr. Karger is not supported by the contract.

Mr. Karger's letter dated November 18, 1988, was the first indication provided to me that Local 2492-A was withdrawing representation; no member of the Local's Grievance Committee or Executive Board indicated withdrawal of support, verbally or in writing; as of the date of this filing, I have received no such verbal or written notice from AFSCME Local 2492-A.

On November 22, 1988, I sent a letter to Mr. Salamone of Council 40, AFSCME, requesting a detailed, written explanation of Local 2492-A's apparent withdrawal, and of Mr. Salamone's involvement in same--as of the date of this filing, I have not received a reply from Mr. Salamone.

Summarily, I am submitting that the following violations have occurred:

1. Members of the Executive Board of Local 2492-A, AFSCME, AFL-CIO did violate Section 111.06(2)(a) of the Wisconsin Statutes in that said employees acted in concert to coerce and intimidate me in the enjoyment of my legal rights, including those guaranteed per 111.04 Wisconsin Statutes by failure to represent me fairly and properly, and

2. Said members of Executive Board, Local 2492-A, did violate Sections 111.06(2)(b), Wisconsin Statutes, in that failure to fairly and properly represent me induced my employer to interfere with the enjoyment of my legal rights, including those guaranteed per 111.04 Wisconsin Statutes, and

3. Said members of the Executive Board of Local 2492-A violated the terms of a collective bargaining agreement by failure to represent me consistent with my Employment Contract to accomplish a Step 2 ruling and beyond, to arbitration, if necessary, in spite of merits supporting such furtherance, violating 111.06(2)(c)(f) Wisconsin Statute, and

4. Marathon County Department of Social Services violated 111.06(1)(f) in not providing a timely response to the respective grievance consistent with the contract, and

5. Said County Department also violated 111.06(1)(h) as the Complainant has been discriminated against by said department for previously filing charges under the noted subchapter 111 Wisconsin Statutes ref. WERC case 138 No. 4118 MP-2140, such discrimination being the suspension action which created the grievance of the present Complaint to the Commission, as said department has not issued a suspension to any other employee in over three (3) years, said suspension being issued within a week of Notice to said department by the Commission of the previous Complaint, and that the Complainant has never received a suspension in the six (6) year history of employment with said department, and

6. Marathon County Department of Personnel did violate 111.06(1)(f) Wisconsin Statutes as said department did violate the terms of a collective bargaining agreement by failing to issue a timely response per Step 2 of the contract, consistent with Article 3 and the time limits therein, and failure to issue a response whatsoever denying or accepting the grievance, further violated said contract in failing to adhere to language of Article 3-C of the contract, resulting in further violation of 111.06(1)(f) Wisconsin Statutes.

7. Inasmuch as the Judicial Panel and Council 40, American Federation of State, County, and Municipal Employees, have been made aware of the history of lack of representation of the complainant by Local 2492-A, AFSCME, and have nevertheless disallowed the current complainant to the Commission, to experience the benefit of redress consistent with the Rules of Procedure, Judicial Panel, AFSCME, and the International Constitution, AFSCME/ AFL-CIO and the current Labor Agreement existant (sic) between the Complainant and his employer; the complainant believes a violation of 111.06(3) Wisconsin Statutes has occurred in that said Judicial Panel and Council 40, American Federation of State, County, and Municipal Employees have cause to be done on behalf of the complainant's employer and fellow employees who constitute the Executive Board of AFSCME Local 2492-A, an unfair labor practice under 111.06(2)(b) as the

> failure of said organization to properly and consistently apply the Rules of Procedure of the Judicial Panel and the International Constitution, American Federation of State, County, and Municipal Employees, AFL-CIO, and the current Labor Agreement between complainant's enjoyment of his legal rights, including those per 111.04 of the Wisconsin Statutes.
>
> The relief I am seeking, should charges be sustained, is restoration of the complainant's suspended pay, removal of said suspension from the personnel record of the employer, an Order from the Commission directing Local 2492-A, AFSCME, to fairly represent its membership, and an Order to the employer to cease such unfair labor practice as proven.

The complaint was served on all named Respondents by certified mail. The complaint was not sent by registered mail to out-of-state Respondents. Nor was a copy of the complaint filed with the Secretary of State's office.

Examiner Honeyman was subsequently appointed to hear the December 21, 1988 complaint. On February 14, 1989, Examiner Honeyman received a request from Musgrave to schedule hearing on his September 1988 complaint. By Notice dated February 28, 1989, Honeyman scheduled hearing on both the September 1988 complaint and the December 1988 complaint for April 11, 1989.

On March 9, 1989, Honeyman sent the following letter to Musgrave:

> Please find enclosed the eight subpoenas you requested.
>
> By copy of this letter I am advising Mr. Graylow and Mr. Dietrich that you indicated an intent to subpoena two individuals (not yet named to me) now apparently employed by AFSCME but outside the State of Wisconsin. This will also note that you expressed doubt that the hearing can be completed in one day.

On March 17, 1989, Examiner Honeyman received the following letter from Counsel representing all named Respondents except Marathon County Department of Social Services, Marathon County Personnel Department, Brad Karger and James Dalland (herein Marathon County et.al.).

> March 16, 1989
>
> If any of the Subpoenaes, apparently forwarded by you to Mr. Musgrave by your letter of March 9, 1989, are served upon any of my clients out of the State of Wisconsin, same will be subject to a Motion to Suppress.
>
> It is the position of my clients that Subpoenaes issued in Wisconsin by an Administrative Agency are not subject to extraterritorial effect.

On March 22, 1989, Counsel for Marathon County et.al. filed an Answer to both of Musgrave's complaints which contained certain affirmative defenses and a request for attorneys' fees.

On March 24, 1989, Counsel for Local 2492-A, et.al., filed an Answer Affirmative Defenses and Motion to Dismiss to both of Musgrave's complaints which contained a request for attorneys' fees, costs and disbursements and asserted inter alia that the complaint should be dismissed "for want of personal and subject matter jurisdiction over organizations and individuals foreign to the State of Wisconsin.

On March 31, 1989, Examiner Honeyman sent the following letter to the parties' representatives:

> This is to confirm that I was advised by Mr. Musgrave today by telephone that he has served the subpoenas referred to in my letter of March 9 in this matter. As these include subpoenas served on out-of-state individuals as referred to in Mr. Graylow's March 16 letter, it is appropriate for Mr. Graylow now to file the motion to suppress, with supporting argument, referred to in that letter, but not actually filed. I have advised Mr. Musgrave that in view of this impending issue, the hearing will be postponed pending an opportunity for him to reply to the Union's argument and a ruling on the expected motion.

Counsel for Local 2492-A et.al. filed a Motion to Quash Subpoenas on

April 5, 1989 which Motion also sought dismissal of the complaint as to Respondent Seferian and Payne. Following receipt of argument, Examiner Honeyman issued an Order Granting Motion to Quash Subpoenas and Denying Motion to Dismiss Certain Respondents. Said Order, dated June 2, 1989, held:

> The substance of the complaint against the Union and the 19 named officers thereof is that the Union failed or refused to process Complainant's grievances against the County fairly. As part of the complaint against the Union, Complainant alleges in essence that at least two members of the Union's International Judicial Panel, John Seferian and Artetha (sic) Payne, unfairly handled the Complainant's appeal of the local union's refusal to process his grievance further. Respondents contend that the subpoenas served by Complainant on Seferian and Payne lack legal force because Seferian and Payne are not within the State of Wisconsin's jurisdiction, citing State ex rel. McKee v. Breidenbach. 1/ Respondents further contend that the International Judicial Panel has no role pursuant to contract between the local union and County in the processing of grievances and that its members individually or collectively therefore cannot violate the Union's admitted duty of fair representation in grievance handling.
>
> Complainant contends that the subpoenas also request "various documents from the individual's receiving process - documents pertaining to contractual employment relationship between the Plaintiff...(and the County)." I read Complainant's letter in support of his subpoenas and his reply to Respondents' brief as being to the effect that he alleges that the International Judicial Panel, by virtue of the Union's international constitution, has a role in the processing of individuals' grievances, and that that body purposefully violated the International's constitution to prevent fair representation of Complainant in the grievance process.
>
> I find that the Union's objection to extraterritorial affect of a WERC subpoena is merited, and that because of the location of Seferian and Payne, these subpoenas are without force and should be quashed. This applies also to the aspect of said subpoenas which requests the production of documents allegedly in the possession of Seferian and Payne. I note, however, that Complainant has not identified any such document in particular which would be within the possession of Seferian and Payne and not in the possession of other Respondents in this matter.
>
> I further find that the motion for dismissal of Seferian and Payne as Respondents in this matter raises issues of fact which require that Complainant have the opportunity to establish his contentions at a hearing. Accordingly, the motion to dismiss Respondents is denied. (Footnote omitted.)

On June 14, 1989, Examiner Honeyman issued a Notice which scheduled hearing on the complaints for July 24 and July 25, 1989. On June 28, 1989, Counsel for Local 2492-A et.al. filed a request for postponement of the hearing citing the unavailability of a named Respondent. Examiner Honeyman denied said request by letter dated June 30, 1989 which stated in pertinent part:

> On June 27 I received Mr. Graylow's letter requesting rescheduling of the hearing in the above matters; on June 29 Mr. Musgrave, by telephone message, objected to postponement.
>
> Respondent AFSCME's request is governed by Rules ERB 10.12 and 10.13. In pertinent part these specify:
>
> 10.12 Particular Motions 1. To reschedule hearing. Motion to reschedule hearing shall set forth (a) the grounds for same, (b) alternate dates for rescheduling, (c) the positions of all other parties . . . .
>
> 10.13 Hearing, transcripts 2. Rescheduling of Hearing. Upon its own motion or proper cause shown by any of the parties, the commission may prior to the opening of hearing reschedule the date of such hearing.
>
> In considering this disputed request for postponement, the following facts seem relevant. The complaints in this matter

were originally filed on September 26, 1988 and December 21, respectively, and hearing was subsequently delayed first at Complainant's request (with the consent of the other parties) and then to permit time to rule on Respondent AFSCME's motion to quash certain subpoenas. In the letter accompanying the order ruling on that motion, issued on June 2, 1989, I offered hearing dates of July 10-11 or July 24-25 and requested notification of the parties' availability within one week. Mr. Dietrich replied on June 6 accepting the July 24-25 dates; Mr. Musgrave replied on June 7 accepting the same dates; Mr. Graylow did not reply. On June 12 I left a telephone message for Mr. Graylow that since he had said nothing to the contrary, hearing would be scheduled for July 24-25. The notice doing so was issued on June 14.

In view of these facts, I must find that the present request fails under both of the applicable rules. First, the request cites the unavailability of a witness, but fails to explain the reason for the unavailability and to give any indication that timely action was taken to attempt to assure the availability of that witness. (On June 29, Mr. Philip Salamone, the witness referred to, independently advised me by telephone that he had recently advised the Commission that he would be on vacation during the month of July, and further objected that he has received a subpoena from Complainant in this matter requiring his attendance on "June" 24-25, 1989.) Even if it is assumed that Complainant would not wish to interrupt Mr. Salamone's vacation, the prospective dates of hearing were circulated well in advance and the same party did not object to them. Moreover, the request does not suggest alternate dates for hearing. And in addition, the request does not set forth "the positions of all other parties" but cites the position of Complainant as "unknown", without any indication that effort was expended to obtain it.

The Commission's rules concerning postponement are not onerous, and serve the clear and desirable purpose of requiring the burden of attempting to secure consensus as to alternate arrangements to be borne by the party wanting the benefit. While Respondent AFSCME may yet demonstrate that it can meet the rules' requirements, it has clearly not done so to date. Respondent AFSCME's request for postponement is accordingly denied.

By letter received by Examiner Honeyman on July 6, 1989, Musgrave asked for additional subpoenas noting that he had incorrectly listed the hearing date on those subpoenas already served. On July 7, 1989, Examiner Honeyman complied with Musgrave's request. On July 10, 1989, Examiner Honeyman received the following letter from Counsel for Local 2492-A et.al.:

July 7, 1989

Be advised that Mr. Phil Salamone, Staff Representative, Council 40, AFSCME, AFL-CIO was subpoenaed to appear on June 24 and 25, 1989 in the Marathon County Courthouse in the Large Conference Room. A copy of the Subpoena served by mail upon Mr. Salamone is attached hereto and made a part hereof.

I understand that Mr. Salamone appear. I understand further that no proceedings were conducted on that date at said place. I understand further that Bob Lyons, Sam Gillespie (sic) and Sandra Wadzinski were also subpoenaed.

Mr. Salamone has now left the State and will be vacationing for the month of July, 1989. As such, he will not be appearing for any proceedings set during that particular month. I understand and believe that Mr. Robert Lyons will be out of State vacationing during the month of July.

On July 18, 1989, Counsel for Local 2492-A et.al. filed a Motion to Quash Subpoenas with Examiner Honeyman alleging that Musgrave was serving subpoenas through the U.S. Mail and that the U.S. Mail is not a "proper conduit for service of process in Wisconsin."

On July 28, 1989, Examiner Honeyman issued a Notice which rescheduled hearing for September 19-20, 1989. Late in July, 1989, the parties and the Examiner engaged in discussions regarding a possible factual stipulation. By letter dated July 24, 1989, Musgrave proposed a stipulation which Counsel for

Local 2492-A et.al. rejected by letter dated August 1, 1989. In said letter, Counsel indicated Respondents Lyons and Gillispie "will be available on September 20, 1989."

On August 25, 1989, Examiner Honeyman received a copy of the following letter dated August 25, 1989, from Musgrave to Counsel for Local 2492-A et.al.:

> I have yet to receive a return of the milage and witness fees checks sent to your clients on June 27, 1989.
>
> As you have made a Motion to the Commission on July 13, 1989, to Quash the subpoenas related to these fees, I am requesting the return of the enclosed checks numbered 252 ($70.00); 253 ($18.00); and 255 ($12.00), issued respectively to Robert Lyons/Sam Gillespie; (sic) Phil Salamone; and Sandra Wadzinski. I desire the return of these checks by August 30, 1989.
>
> Should the checks not be returned by August 30th, I am requesting a certified check from you in the amount of $124.00 -- the value of the checks plus $24.00 in bank cancellation fees -- to be received by August 31st.
>
> Should neither the checks nor your certified check reach me by August 31st, I will move the Commission to consider your Motion to Quash said subpoenas as an impedance of the performance of duties of the examiner in this action, pursuant to Section 111.14 Wisconsin Statutes.

On August 31, 1989, Examiner Honeyman received a copy of the following letter from Counsel for Local 2492-A et.al. to Musgrave:

> August 30, 1989
>
> Replying to your letter of August 23, 1989, I indicate to you that if you wish to secure the appearance of Messrs. Lyons, Gillespie (sic) and Ms. Wadzinski on September 19 and 20, 1989, I will hold the checks.
>
> If you want me to return the checks, said individuals will not appear in September. What is your pleasure? Please advise.

On September 5, 1989, Examiner Honeyman received the following Motions from Musgrave:

> Please take notice that at a time, date, and place the Examiner assigned to this case, Mr. Christopher Honeyman will be requested to enter an Order for Issuance of Subpoenas for the following witnesses identified as Robert Lyons, Samuel Gillespie, (sic) Phil Salamone, and Sandra Wadzinski.
>
> The issuance of said subpoenas will be to effect the presence of said witnesses at a hearing relative to the cases noted, and that said subpoenas shall direct said witnesses to appear with such documents as deemed relevant by the Commission, consistent with a hearing date established by the Commission.
>
> Said Order being necessary as the attorney for said parties, Richard Graylow, is unwilling to accomplish the appearance of said parties through voluntary agreement with the Commission, or stipulated agreement with the Commission.
>
> See Section 111.07(2)(b).
>
> . . .
>
> Please take notice that at a date, time, and place the Examiner assigned to this case, Mr. Christopher Honeyman, will be requested to enter an Order Finding Richard Graylow in violation of Section 111.14 Wisconsin Statutes for willfully (sic) impeding and interfering with a member of the Commission in the performance of duties as Mr. Richard Graylow refuses to make available witnesses as agreed by Mr. Graylow on August 1, 1989 without condition to subpoenas or associated witness fees/milage furnished by the Complainant, Mathew J. Musgrave.

As Mr. Graylow now refuses to effect the appearance of said witnesses as stipulated on August 1, 1989, per Mr. Graylow's letter of August 31, 1989, unless witness fees/milage fees are retained, such action constitutes impedance and interference with the Commission.

Additionally, as Mr. Graylow's correspondence of August 31, 1989, does not deny the possession of said fees by the witnesses in question as served by the U.S. Mail, Mr. Graylow's Motion to Quash Subpoenas submitted to the Commission appears out of Order as, in fact, the witnesses so named were successfully served by the U.S. Mail, and said Motion to Quash was made by Mr. Graylow solely for the purpose of impeding and interfering with the efforts of, and duties of, the Examiner of the Commission.

On September 7, 1989, Examiner Honeyman received a copy of the following letter from Counsel for Local 2492-A et.al. to Musgrave:

I wish to reinerate (sic) that I will produce, voluntarily, the witnesses that you identify in your recent pleadings dated September 1, 1989.

More specifically, witnesses and/or parties identified as Lyons, Gillespie, (sic) Salamone and Wadzinski.

On September 11, 1989, Examiner Honeyman received the following letter dated September 8, 1989 from Musgrave:

I am writing you to indicate that I desire the Commission to establish a formula for reimbursement of my costs in the above actions, prior to a hearing on the facts, as I anticipate some disagreement from the other parties should portions of the complaint be upheld and are deserving of reimbursement.

Accordingly, I have committed in excess of 100 hours thus far, and would wish reimbursement at the rate of at least $25.00 per hour for my para-legal efforts. Furthermore, I will be seeking reimbursement for outstanding witness fees which have yet to be returned; filing fees, lost wages of one day suspended pay; milage costs for the hearing and for the taking of a deposition in Wausau, Wisconsin from a witness; copy costs, subpoena mailing costs, and telephone charges and lost wages.

Should you desire this request in the form of a motion, please respond relative to your preferred format; I wish to receive an Order from the Commission re reimbursement before a hearing on the facts.

On September 12, 1989, Honeyman sent the following response to Musgrave:

Your letter of September 8, 1989 was received by me today.

Please be advised, with respect to your request for reimbursement of costs, that while at least some of the kinds of losses you describe can be awarded as part of a remedy in this type of proceeding, the Commission will enter into such calculations only after a finding of prohibited practices. Your request is therefore premature even if it is assumed that a violation of the statutes occurred.

I note also that you describe your request as something other than a motion and offer to file a motion if needed. You may, of course, file such a motion; but the hearing is now imminent, it has been postponed before for a substantial period, and the other parties have a right to reply to any motion filed before I issue a ruling. If you wish to file such a motion, therefore, I will entertain it as well as the other parties' replies at the hearing.

On September 13, 1989, Honeyman received the following letter dated September 11, 1989 from Counsel for Local 2492-A et.al.:

I have received and reviewed Mr. Musgrave's letter to you of September 8, 1989. Mr. Musgrave apparently feels that he is entitled to reimbursement of costs prior to hearing.

I am unaware of any authority supporting such a request and accordingly will resist same. All of the authority, of which I am aware, is contra to the request made.

> Specifically, Threshermen seeks recovery of the attorney fees it expended at the initial trial to prove Robert committed the arson. Traditionally, under the "American rule," the prevailing litigant is not entitled to collect attorney fees unless authorized by statute or contract. Meas v. Young, 142 Wis.2d 95, 101, 417 N.W.2d 55, 57 (Ct.App. 1987). No applicable statute or contract provision governs here. Madsen v. Threshermen's Mut. Ins. Co., 149 Wis.2d 594, 605 (1989).

Cf:

> Pursuant to that policy no attorney's fees nor costs will be granted, unless the parties have agreed otherwise, or unless the Commission is required to do so by specific statutory language. Madison Metropolitan School District, WERC Dec. No. 20845-A, p. 13).

Needless to say, the request should/must be denied forthwith.

On September 18, 1989, Honeyman received the following letter from Musgrave:

> As you know, I tried to reach you by telephone on September 14th and September 15th to discuss the status of subpoenas, if any, issued by the Commission for the witnesses noted in the above cases, per my Motion to the Commission of September 1, 1989.
>
> Mr. Graylow's unreliability to secure the presence of these witnesses has been documented to the Commission, and accordingly, I continue to hold the position that the Commission subpoena these witnesses, the presence and testimony of same being significant for proof of my charges filed with the Commission.
>
> Without the presence of subpoenas for these witnesses, I will be unable to proceed with my case, and accordingly, I will not attend the hearing scheduled for September 19 and 20th as I believe to do so under present circumstances would violate my right to due process.

By the following telegram, Examiner Honeyman responded on September 18, 1989 to Musgrave's request:

> THIS IS A CONFIRMATION COPY OF THE FOLLOWING MESSAGE:
>
> THIS IS A TELEGRAM SENT TO MATTHEW MUSGRAVE PLEASE BE ADVISED YOUR SEPTEMBER 16 LETTER IS NOT A PROPER POSTPONEMENT REQUEST. YOU WERE INFORMED BY WERC RECEPTIONIST AT MY INSTRUCTION THAT RULES REQUIRE YOU OBTAIN OTHER PARTIES POSITIONS CONCERNING POSTPONEMENT AND YOU DID NOT DO SO. ALSO BOTH OTHER PARTIES ADVISED ME THAT THEY WILL PRODUCE WITNESSES KARGER DALLAND LYONS GILLESPIE (sic) SALIMONE (sic) AND WADZINSKI REGARDLESS OF PENDING QUESTION AS TO WHETHER SUBPOENA FEES ARE REFUNDABLE. THERE IS ACCORDINGLY NEITHER SUBSTANTIVE NOR PROCEDURAL BASIS FOR YOUR POSTPONEMENT REQUEST AND IT IS DENIED.

The hearing convened at 11:00 a.m. on September 19, 1989. Pages 14-26 of the stenographic transcript of the proceedings of September 19, 1989 state:

> Mr. Musgrave: Well, I appear in front of the Commission today pursuant to the two complaints which I have filed. They're part of the record. As my complaint indicates, this filing concerns local 2492-A, AFSCME Council 40, International Judicial Panel of AFSCME, Marathon County, its personnel office and Marathon County Department of Social

Services. My, my complaint essentially is about a union local which did not represent me adequately or fairly for a number of years. It is about a Council of AFSCME, Council 40, which failed to recognize that lack of representation by the local after numerous efforts which were made in writing to apprise the Council of that situation. It's about the failure of the entire International Judicial Panel of AFSCME to follow correctly the judicial procedures outlined in its constitution and its publication on Judicial Panel procedures and it's about a management group in Marathon County who took advantage of this disorganized union response to continue to harass and misrepresent the employment performance of the Complainant, myself.

Examiner: Anything further?

Mr. Musgrave: No, further.

Examiner: Mr. Dietrich, do you wish to make an opening statement at this point?

Mr. Dietrich: My opening statement will be limited to the issues that are raised against Marathon County. It is my understanding in case 138 which I think we might at this proceeding be described as the reprimand dispute. The issues relating to Marathon County are number one, a failure by the Social Services director to answer the grievance filed by the Complainant at his step, and number two, the failure of the personnel director to process the grievance either at his step or to a step beyond his stepped (sic) or to refer back to the Social Services director. In the case of the Social Services director, the grievant's addressed an issue as to a reprimand issued by the Social Services director, so it has been and is his practice in instances where a grievance relates to his action that in fact if he referred up to the next step of the procedure because it is in his view unnecessary and illogical for the director to address a grievance concerning his action, that it should be reviewed by the next step up. In the case of the alleged failure of the personnel director to process the grievance the testimony will show that there were three separate pieces of correspondence sent or, or given to the personnel director which indicated that the local union was not processing and was withdrawing its representation and processing of the grievance and on the basis of that, the personnel director acted in good faith to not process the grievance further.

The case 142 which is known as a one day suspension, again addresses similar issues. In other words, the failure of the Social Services director to answer the grievance within the ten day time frame in the contract. Then second, the failure of the personnel director to answer the grievance at step two, at his step. The testimony will show that the social Services director requested an extension of time and received an extension from the local union to put together his answer to the grievance and in fact, to schedule a meeting to address the grievance at his level. Mr. Musgrave, the Complainant, was part of that scheduling process for the meeting on the grievance. When the matter was processed to the second step after that meeting, again the personnel director received correspondence from the local union indicating that they were not proceeding the grievance further, and so a decision was made then not to process the grievance in good faith at his step of this procedure.

I will be making at the conclusion of the testimony as I've indicated in my preliminary documents some sort of motion for dismissal of a portion of the grievance or of the complaint as it relates to the failure of Mr. Dalland to process the grievance at his first step within the ten days, based upon what I think is a clear record that he requested an extension of time and did receive it. That concludes my opening statement. Thank you.

Examiner: Mr. Graylow.

Mr. Graylow: I rely upon the pleadings previously filed, especially the affirmative defenses. However we will be supplementing those by indicating to you at this point, sir, that as Mr. Dietrich correctly points out, two grievances

were filed, and I will refer to them in the same manner that Mr. Dietrich referred to them, i.e. the letter of reprimand followed thereafter by the letter of one day suspension. Both of these grievances were filed under the terms of a particular labor agreement which I assume will be part of the record in these proceedings and basically the grievance procedure not too surprisingly contains a number of intermediate cities (sic) followed by binding arbitration. It also contains a provision requiring just cause for any disciplinary action taken. Grievances were filed in both cases. One contesting the letter of reprimand and the other of course contesting the one day suspension. During of (sic) the course of the processing of each and every one of those grievances, that is to say both of them, settlement proposals were hammered out between the parties. The union on the one hand, the county on the other, and the proof will show that at least with respect to the settlement of the letter of reprimand for a period of time Mr. Musgrave was in agreement with it, apparently subsequently had a change of heart and repudiated it. Nevertheless the union based upon what it felt to be a good faith settlement of agreements decided not to take any further action.

The same can be said with the other grievance, that is to say the grievance contesting the one day suspension. In light of the opening statement plaintiff Musgrave I also must indicate to you sir that I will appear specially in these proceedings as they relate to this jurisdiction, the jurisdiction of this Commission over individuals and entities extraneous to and foreign to the State of Wisconsin, more specifically the International Judicial Panel which as the proof will show is headquartered in Washington, D.C. and is part of the international union and there are a number of named individuals, all of whom are members of the International Judicial Panel, and I'm not too sure if on your earlier ruling on the motion to quash whether or not these parties and entities are or are not before the Commission in a proper fashion but nevertheless, in order to preserve my record, I appear specially for those and for it. Thank you, sir.

Examiner: I follow that. All right. Mr. Musgrave, are you ready to proceed by calling a witness?

Mr. Musgrave: Yes, I am.

Examiner: Who do you call?

Mr. Musgrave: I'd like to call Robert Lyons.

Mr. Graylow: Lyons and Gillespie (sic) will be here tomorrow. They are currently in Manitowoc.

Examiner: Well, that seems to imply that you expect the Complainant to construct hits (sic) case in some other order.

Mr. Graylow: I'm just telling you that they will be here tomorrow.

Examiner: All right. Well, we have scheduled a two day hearing. I imagine that they need not be present the entire time. Who do you intend to call among all of the witnesses that you have subpoenaed? You've subpoenaed six people.

Mr. Musgrave: That's correct. I intend to call them all.

Examiner: All right. It is fairly customary not to tie up the witnesses' time for an entire hearing because people have other things to attend to. So which witnesses among those subpoenaed are here right now?

Mr. Graylow: If you're looking at me, I assume you are, I will respond. Salamone is here and Mr. Nicholson is here, and Wadzinski is on stand by. She is here in the area, Marathon County area somewhere and I will ask that Mr. Dietrich, he can tell us who he has here.

Mr. Dietrich: James Dalland and Brad Karger, named parties in the subpoena.

Examiner: All right. What's your preference, Mr. Musgrave?

Mr. Musgrave: Well, my preference is to make a motion for postponement at this point. I as you know was in touch with the Commission regarding the availability of these witnesses as recently as yesterday. I was concerned that Mr. Graylow's previous position did not reflect a certainty of these witnesses being available. I think the issue of whose witnesses they are remains somewhat in dispute, given the record of correspondence regarding the subpoenaing of these witnesses and records that these witnesses are expected, you know, to posses. And at this pint given my discussion with the Examiner yesterday, it is, you know, my position that a postponement take place so that I can present these witnesses in the fashion that I had anticipated, presuming they were going to be present.

Examiner: Any comments?

Mr. Graylow: I, I don't know if he's asking for an indefinite postponement or a postponement until tomorrow, which would indicate or which would dictate my response, if the, if the request for postponement is till tomorrow, I don't oppose that. But if he's requesting an indefinite postponement I'm certainly going to object to that.

Examiner: What is your request?

Mr. Musgrave: My request is a postponement till tomorrow, but I question now if the Commission can complete its work in one day. I'll certainly make every effort to do that, if we can start in a timely fashion.

Examiner: All right. I'm inclined to grant the postponement till tomorrow. I believe that the Complainant does have the right to expect to present his case in the order he had anticipated and there was an attempt by me to contact all of the parties yesterday with an, in an effort to make sure that in fact what had been an anticipated in the way of witnesses would be what appeared. I was not aware at that time that you didn't intend to have all four of them here day one, although perhaps that's understandable in view of the fact that two days were scheduled. However, that could have the effect of interfering with Complainant's right to present his case in order. Now so as far as that motion is concerned, I'm inclined to grant it until tomorrow. However, let's go off the record for a minute.

(Discussion off the record.)

Examiner: Back on the record. What's your preference as to how to proceed in this case?

Mr. Musgrave: Well, given my position as, as not being an attorney in this action I am going to retain my objection for postponement. I feel that the witness order that I've developed to present evidence is to my advantage, perhaps if I had addition (sic) legal skills that would not be as critical to my presentation as it is. So I would, I would retain the submission of my objection to have a postponement until Mr. Lyons and Mr. Gillespie (sic) are available. If it will help the Commission, I can give you the first four witnesses in the order that I expect to have them appear, and that might.

Examiner: That would be helpful.

Mr. Musgrave: Be profitable. It would be Mr. Lyons first, Sandra Wadzinski for a brief piece of testimony, then Samuel Gillespie, (sic) and then Phil Salamone.

Examiner: What about the two county witnesses?

Mr. Musgrave: I would suspect that I would subpoena them probably fifth and sixth.

Mr. Dietrich: Which is which?

Mr. Musgrave: Well, probably I would think I would subpoena Mr. Dalland five and Mr. Karger six.

Examiner: All right. It isn't my intention to have all the

witnesses sit throughout the proceeding, provided that they can be made available at short notice as their term comes up. You should have established that, all right. All right. I've already indicated that would I (sic) grant that motion till tomorrow, so it is granted. However, that doesn't mean that there is not some purpose to be served by now wasting the time that we have here. Mr. Graylow has indicated that he wants to put on Mr. Nicholson who is not among your witnesses out of order and get him out of the way.

Mr. Graylow: Yes, sir.

Examiner: Yes, sir, you may proceed with that.

Mr. Musgrave: If I could present. I had an additional motion, you know, for the Commission. I would like to restate my concern about the absence of these witnesses and I am going to move that the Commission consider an obstruction motion regarding Mr. Graylow and his inability to produce these witnesses. As I indicated previously to the Commission, I had concerns about the availability of these witnesses. I've made that motion previously to the Commission regarding the issue of these witnesses, regarding each of these witnesses and Mr. Graylow and subpoena costs and subpoenas themselves and I'm now reintroducing that, given the absence of these witnesses at today's hearing.

Examiner: All right. You may make any argument you support, you wish, in support of that motion at the conclusion of the hearing. I'm not going to rule on it at this time. All right. Are you ready to call Mr. Nicholson?

Following the testimony of Nicholson which concluded at 12:45 p.m., the hearing adjourned until the next day, September 20, 1988. At 8:30 a.m. on September 20, hearing reconvened and continued until 6:45 p.m. at which time all parties advised the Examiner that they had nothing more to present. The Examiner then concluded the hearing.

ALLEGED "PREJUDICIAL PROCEDURAL ERRORS" BY EXAMINER

Musgrave asserts the Examiner committed certain "procedural errors" which prejudiced Musgrave.

Musgrave contends the Examiner erroneously quashed subpoenas which action prevented him from reviewing certain documents prior to hearing and thus hindered his presentation of evidence. As recited earlier herein, in June 1989, the Examiner quashed two subpoenas by which Musgrave sought the production of documents from witnesses who lived outside the State of Wisconsin. The Examiner premised his ruling upon what he termed "the Union's objection to extra-territorial affect of a WERC subpoena . . . ."

The subpoena power of the Commission and its examiners in unfair labor practice and prohibited practice proceedings is derived from Secs. 111.07(2)(b), 227.46(1)(b), and 885.01(4), Stats. 11/ As cited to the

---

4/ Section 111.07(2)(b), Stats., provides:

(b) The commission shall have the power to issue subpoenas and administer oaths.

Section 227.46(1)(b), Stats., provides:

. . . Subject to the rules of the agency, examiners presiding at hearings may:

(b) Issue subpoenas authorized by law and enforce subpoenas under S.885.12.

Section 885.01(4), Stats., provides:

The subpoena need not be sealed, and may be signed and issued as follows:

. . .

(4) By any . . . commission, commissioner, examiner, . . .

Examiner, State ex rel. McKee v. Breidenbach, 246 Wis. 513 (1945) holds that the subpoena power of the State of Wisconsin cannot be construed to compel a non-resident to come to Wisconsin to testify. Thus the Examiner properly quashed the subpoenas as to non-residents Seferian and Payne. 12/

Musgrave also contends the Examiner erred by not ruling on his motion that Counsel for Local 2492-A et.al. violated Sec. 111.14, Stats., 13/ by failing to produce witnesses and documents at hearing. Musgrave is correct that the Examiner should have but did not rule upon the above-described Motion. However, as we are satisfied that the Motion lacks merit, and as we are satisfied that the Examiner's failure to rule upon the Motion did not impede Musgrave's ability to present evidence to the Examiner, we do not find the Examiner's failure to rule to have been prejudicial to Musgrave.

Initially, we note that it can well be argued that Sec. 111.14, Stats., is limited in its application to unfair labor practice proceedings under the Wisconsin Employment Peace Act and can only be invoked by the Commission itself. However, even presuming the applicability of this statutory provision to the proceedings at hand and Musgrave's ability to invoke same, it is apparent that Counsel for Local 2492-A et.al. did not impede the Examiner in the performance of his duties.

As the Background portion of our decision reveals, Musgrave and Counsel for Local 2492-A et.al. had an extensive dispute over whether Musgrave had properly served certain subpoenas. Counsel for Local 2492-A et.al. elected not to pursue his Motion to Quash filed July 18, 1989 and instead chose to voluntarily produce the witnesses and documents in question at hearing. When Musgrave asserted at the commencement of hearing on September 19 that the absence of two of the six witnesses Musgrave sought to subpoena interfered with his ability to present his case, the Examiner granted the postponement Musgrave requested. The two witnesses in question were available on September 20, 1989 and were called by Musgrave to testify. Our review of the transcript demonstrates that during September 19 and 20, the Examiner gave Musgrave broad latitude to present his case and that the hearing concluded without Musgrave seeking additional hearing. Given the foregoing, it is apparent to us that the conduct of Counsel for Local 2492-A et.al. in no way impeded the Examiner and that Musgrave received a full and fair hearing despite the absence of a ruling from the Examiner on Musgrave's Motion.

Musgrave further contends that the Examiner erred by failing to grant the Motion for Postponement which the Examiner received one day prior to the scheduled commencement of hearing and by allegedly advising Musgrave that his failure to attend the hearing on September 19 could lead to dismissal of Musgrave's complaints. As recited earlier herein, the Examiner's September 18 telegram reflects that the postponement request was denied because it did not comply with ERB 10.12 and because the other parties had advised the Examiner that they would produce the witnesses Musgrave sought thereby resolving the concern that had prompted Musgrave to seek the postponement. We affirm the propriety of the Examiner's conduct. We also find no fault with an examiner advising a party of the possible consequences of a failure to appear. 14/

Lastly, Musgrave complains that the Examiner committed a "prejudicial procedural error" by "failing to reference in his decision the numerous

---

5/ Section 227.45(7)(a), Stats., and ERB 10.15 would have allowed Musgrave to seek to take the deposition of Seferian and Payne pursuant to the provisions of Ch. 887, Stats.

6/ Section 111.14, Stats., provides:

> Any person who shall willfully assault, resist, prevent, impede or interfere with any member of the commission or any of its agents or agencies in the performance of duties pursuant to this subchapter shall be punished by a fine of not more than $500 or by imprisonment in the county jail for not more than one year or both.

7/ When responding to this contention, we are assuming the truth of Musgrave's assertion that the Examiner told Musgrave that if he failed to appear, his complaints "stood a good chance of being dismissed." ERB 10.13(4) provides:

> (4) EFFECT OF FAILURE TO APPEAR. Any party failing to appear and participate after due notice shall be deemed to have waived the rights set forth in sub. (2) above, to admit the accuracy of the uncontradicted evidence adduced by the parties present, and shall, unless good cause be shown, be precluded thereafter from introducing any evidence controverting any contentions or allegations. The commission or individual determining the matter may rely on the record as made.

exhibits which indicated discrimination toward the Complainant by Marathon County for the Complainant's union activity and union status." We will respond to this contention when we review the merits of the Examiner's decision.

MUSGRAVE'S MOTION TO REOPEN RECORD

On January 29, 1990, Musgrave filed a motion asking that the record be reopened to allow presentation of evidence which "will contradict and refute the credibility of respondent Phil Salamone." Musgrave asserts in his motion that the evidence in question is of sufficient strength to reverse the Examiner's decision and was not presented at hearing "due to procedural prejudice of the hearing Examiner, regarding Complainant, during said hearing." Respondents oppose the motion.

Section 111.07(5), Stats., allows the Commission to "direct the taking of additional testimony." ERB 10.19 establishes that "hearings may be reopened on good cause shown." Here, Musgrave asserts that he has "good cause" because of prejudicial procedural error by the Examiner during the hearing. As we have found no procedural error by the Examiner, we find no "good cause" to reopened the record. Thus, we have denied Musgrave's motion.

ALLEGED ERRORS OF FACT

Musgrave alleges that the Examiner committed numerous material errors of fact in his decision. We proceed to review each such allegation.

Examiner's Finding of Fact 6 states:

> 6. At all times material to these proceedings Complainant was employed as a Social Worker in the County's Department of Social Services. On April 18, 1988 Complainant received a written reprimand signed by Respondent Dalland, for allegedly threatening a fellow employe. Complainant filed a grievance, which was processed by the Grievance Committee of Local 2492-A through the first step of the contractual grievance procedure, but which was thereafter dropped by the Committee. Complainant appealed the grievance committee's dropping his grievance to the Executive Board of Local 2492-A, which refused to reinstate representation of Complainant with respect to said grievance. The record demonstrates that both the Grievance Committee and the Executive Board considered the merits of the grievance in determining not to represent Complainant further with respect to it, and fails to demonstrate by a clear and satisfactory preponderance of the evidence that Respondent Local 2492-A's handling of Complainant's April 18, 1988 grievance was arbitrary, discriminatory or in bad faith.

Musgrave argues in his brief:

> The Examiner states "The record demonstrates that both the Grievance Committee and the Executive Board considered the merits of the Grievance in determining not to represent Complainant further with respect to it, and feels that demonstrate (sic) by a clear and satisfactory preponderance in the evidence that Respondent Local 2492-A's handling of Complainant April 18, 1988 Grievance was arbitrary, discriminatory or in bad faith." In fact, the record failed to demonstrate that the Grievance Community (sic) or the Executive Board considered the merits of the Grievance in question. The union submitted no evidence in written form to indicate that merits of the Grievance had been considered at the time of the Local's withdrawal of representation. Accordingly, lack of reference by the local regarding merits of the Grievance indicates that handling of Complainant's Grievance was arbitrary; the record indicates that at least 3 successive prior grievances of the Complainant were not pursued beyond step 1, by the Local, and no reference was made to respective merits by the Local at the time of withdrawal.

We have modified the Examiner's Findings to more fully and accurately detail the manner in which various Respondents acted vis-a-vis Musgrave's reprimand grievance. The day after the grievance committee advised Musgrave that it was dropping his grievance, Musgrave filed his May 10 charges with the Executive Board alleging collusion between Respondent Nicholson, George Mayer and James Prozinski and Respondent County. The May 10 charges conclude with a request that the Local pursue his grievance, noting Musgrave's opinion that the grievance committee could not bind the Local. The Executive Board took no

action as to the May 10 charges. However, the Executive Board appears to have considered and denied Musgrave's request that the Local pursue his grievance despite the decision of the grievance committee. We reach this conclusion based upon the May 27, 1988 letter from the Board to Karger. However, the record is silent as to what factors the Executive Committee considered when making this decision.

As to Musgrave's contention that even the grievance committee failed to consider the merits of the grievance, the testimony of Respondent Nicholson establishes to our satisfaction that the grievance committee considered both management's and Musgrave's view of the facts underlying the grievance as well as the settlement conference when determining not to proceed. In that sense, we are satisfied that the grievance committee "considered the merits" of the grievance. As indicated earlier, there is no evidence in the record as to what factors the Executive Committee considered when deciding not to overturn the grievance committee decision. We reserve our discussion of whether there was a breach of the duty of fair representation to later in our decision.

Examiner's Finding of Fact 8 states:

> 8. On October 7, 1988 Complainant received a one-day disciplinary layoff for "poor job performance in the area of establishing effective work relationships". Complainant filed a grievance on October 11, 1988 contending that this discipline was without just cause, and the Grievance Committee of Local 2492-A met on October 11, 1988 with Linda Duerkop, Complainant's supervisor and with Complainant; and met again on November 2, 1988 with Respondent Dalland, concerning the October 11 grievance. The record demonstrates that the Grievance Committee member present on October 11 argued with management that just cause did not exist for the discipline, but that management averred to the contrary, and further demonstrates that following the second step meeting the grievance committee dropped the grievance. The record shows that the Grievance Committee did not notify Complainant of this act and that Complainant learned of it indirectly from Respondent Karger. The record also shows, however, that Respondent Salamone on behalf of the Union obtained from the Employer a settlement offer which would have granted the Complainant back pay and removed the discipline from his record, but that Complainant refused either to accept or reject the offer. The record therefore demonstrates that the Union dropped all representation of Complainant as to this grievance only after Complainant failed to respond to the Employer's settlement offer, and fails to demonstrate by a clear and satisfactory preponderance of the evidence that the Grievance Committee or other Union officials acted for reasons which were arbitrary, discriminatory or in bad faith.

Musgrave alleges in his brief:

> The hearing Examiner states "The record demonstrates that the Grievance Community (sic) member present on October 11th argued with management that just cause did not exist for the discipline, but that management averred to the contrary, and further demonstrates that following the second step meeting the Grievance Committee dropped the Grievance." This statement by the examiner is in error, as the Grievance Committee withdrew from representing the Grievance following the first step of the Grievance process. The record also shows that the Grievance Committee never indicated in writing to any party that it had withdrawn representation at the first step, but allegedly withdrew representation through a verbal communication through a council of 40 representatives. The examiner also states "The record also shows, however, that respondent Salamone on behalf of the union obtained from the employer a settlement offer..." In fact, the record shows there is no written record of any such settlement offer obtained by Respondent on behalf of the union. In fact, the record indicates that Respondent "did not recall" how he became aware of the union's decision not to proceed with the Grievance. The examiner also states "The record therefore demonstrates that the Union dropped all representation of Complainant as to the Grievance only after Complainant failed to respond the (sic) Employer's settlement offer." In fact, the record demonstrates that the union did not drop representation of the Complainant regarding this Grievance, and at the time of the Complainant's termination of employment with the employer in January, 1989, the Grievance had yet to be resolved (see testimony of Respondent Brad

> Karger and hearing transcript.) Furthermore, the record fails to demonstrate that an offer from the employer was in fact, ever made, to the Complainant, as no written evidence of any such offer was introduced into the record.

In his petition for review, Musgrave also asserts that Finding 8 and Finding 11 erroneously set forth the role played by Respondent Salamone and that said Findings conflict with facts recited by the Examiner in the Memorandum portion of his decision.

We have modified the Examiner's Findings to more fully and accurately detail the manner in which various Respondents acted vis-a-vis Musgrave's suspension grievance. Musgrave correctly notes that Local 2492-A dropped the suspension after it was denied at the first Step of the grievance procedure, not the second Step as found by the Examiner. Musgrave also correctly points out that the Local did not provide either Musgrave or Respondent County with written notice that the grievance had been dropped and that it was Respondent Salamone who telephonically advised Respondent Karger of the Local's decision. As to the settlement discussions, the testimony of Respondents Salamone and Karger confirms the existence of an offer from Respondents as to which Musgrave would not take a position until he received said offer in writing. We reserve our discussion as to whether the foregoing establishes any breach of the duty of fair representation to later in our decision.

Examiner's Finding of Fact 9 states:

> 9. On December 21, 1988 Complainant filed the complaint in Case 142, contending that the Executive Board of Local 2492-A failed to fairly represent him with respect to the October 11 grievance; that the County issued the discipline involved as retaliation for Complainant's earlier complaint filed against the County; that the County violated the collective bargaining agreement and thereby violated MERA by failing to process the grievance timely or properly in other procedural respects; and that Council 40 and the Judicial Panel of AFSCME violated MERA by failing to cause the Executive Board of Local 2492-A to reverse its decision not to process Complainant's grievances further.

Musgrave argues in his brief:

> The examiner states that "... and that Council 40 and the judicial panel of AFSCME violated MERA by failing to cause the Executive Board of Local 2492-A to reverse its decision not to process Complainant's Grievances further." In fact, the record shows that the Complainant's citation of Council 40 and the Judicial Panel of AFSCME made on December 21, 1988 to the Commission, was not for the failure of those bodies to cause the Executive Board of Local 2492-A to reverse its decision regarding Complainant's Grievances; in fact, Complainant's citation of Council 40 and the Judicial Panel were for failures to exercise due process under the International Constitution of AFSCME, and these failures to exercise due process were relative to a number of issues distinct from the Complainant's Grievances handled by Local 2492-A. Complainant did not allege that Council 40 and the judicial panel of AFSCME violated MERA by failing to cause Local 2491-A (sic) to reverse decisions regarding the Complainant's Grievances. Instead, Commission complaints against Council 40 and the judicial panel were failures of those bodies to take action distinct from reversing decisions of Local 2492-A.

Musgrave correctly asserts that Examiner's Finding of Fact 9 inaccurately characterizes the nature of Musgrave's complaint against Respondent Council 40, and the individual members of the Judicial Panel. We reserve our discussion of the merits of the theory advanced by Musgrave until later in our decision.

Examiner's Finding of Fact 10 states:

> 10. The record demonstrates that the Complainant was first given notice of the possibility of discipline because of failure to maintain adequate working relationships by a letter dated September 26, 1988 and signed by his supervisor Duerkop. The record shows that that letter followed by twelve days a memorandum from Duerkop to Complainant requesting a meeting to discuss complaints concerning his job performance, and that the September 26 letter gave Complainant until October 3, 1988 to answer two pages of specific complaints concerning his performance. The record

> shows that the complaint in Case 138 was first filed with the Commission on September 26, 1988 and that a copy of it was first served on the County Clerk of Marathon County on October 3, 1988. The record fails to demonstrate by a clear and satisfactory preponderance of the evidence that Duerkop was motivated even in part by the existence of the complaint filed by Complainant, or by Complainant's prior grievances, in deciding on October 7 to issue the discipline suggested by her prior letters.

Musgrave argues in his brief:

> The examiner states that "The record fails to demonstrate by a clear and satisfactory preponderance of the evidence that Duerkop was motivated even in part by the existence of the complaint filed by Complainant, or by Complainant's prior Grievance, in deciding on October 7th to issue the discipline suggested by her prior letters." In fact, the record does demonstrate that the supervisor in question, Ms. Duerkop, along with management member David Carlson, Assistant Agency Director, were likely motivated in part by the existence of the complaint filed by the Complainant with the commission, as these two individuals alleged the Complainant to be conducting inappropriate union organizing prior to the discipline issued on October 7th; these two management members had harassed the Complainant previously in February, 1988 for appropriate union activity on the agency premises. The record also reflects that Supervisor Duerkop had attempted to intimidate the Complainant in July, 1987, relative to the Complainant's candidacy for local president in an election of Local 2492-A. (see exhibits contained in record.)

Musgrave's contentions as to this Finding amount to argument that the Examiner erroneously concluded that Respondent County did not suspend Musgrave because of hostility toward his Commission complaint. We reserve our discussion of this issue until later in the decision.

Musgrave also takes issue with certain factual assertions by the Examiner in the Background portion of his decision. In the first paragraph, the Examiner states:

> For some years Complainant was employed as a Social Worker in the County's Department of Social Services. During that time, the record demonstrates, he filed several grievances. Complainant was represented by Local 2492-A in an arbitration proceeding which took place in February, 1988, and the record is replete with references to other disputes; but the particular chain of events which led to these two complaints began when Complainant received a written reprimand from Department Head James Dalland in April, 1988. On April 11 of that year Complainant filed a grievance protesting the written reprimand, which the Grievance Committee of the Union processed to a meeting with Personnel Director Brad Karger. According to various documents introduced into evidence by Complainant, the County bypassed Step 1 of the grievance procedure by omitting any discussion with the Union conducted by Dalland, and proceeding directly to a discussion with Karger. The Union's grievance committee, according to uncontradicted testimony by one of its members, John Nicholson, represented Complainant at the meeting with Karger, which took place on May 6, 1988. Complainant, as well as Karger, Dalland and three grievance committee members, was present. Nicholson gave uncontradicted testimony that the grievance committee, after some discussion, proposed a settlement of the grievance to both Dalland and Musgrave. The proposed settlement was that the letter of reprimand be withdrawn from Musgrave's file, provided that Musgrave file a letter of explanation regarding the incident in question. (The incident in question involved an alleged threat made by Musgrave to another employe.) There is nothing in the record to rebut Nicholson's testimony that Karger agreed to this settlement subject to seeing the content of Musgrave's letter, that Musgrave agreed to file such a letter, and that all parties were satisfied that this would resolve the matter. Subsequently, Nicholson testified without contradiction, Musgrave wrote a brief letter of explanation, but then retracted it. The grievance committee thereafter declined to process the grievance further. Nicholson testified that the Union's reason for so doing was that the grievance committee considered that a fair

settlement had been achieved or could have been achieved, involving the withdrawal of the reprimand from the file, and that it was not obligated to proceed further. Musgrave was advised of the grievance committee's decision by a memorandum.

Musgrave argues in his brief:

> The Examiner states "According to various documents introduced into evidence by the Complainant the County bypassed step one of the Grievance Procedure by omitting any discussion with the union conducted by Dalland, and proceeding directly to a discussion with Karger. The Union's Grievance Committee, according to uncontradicted testimony by one of his members, John Nicholson, represented Complainant at the meeting with Karger, which took place on May 6, 1988. Complainant, as well as Karger, Dalland, and three Grievance Committee members, was present.(") In fact, the documents introduced into evidence by the Complainant do not indicate the County proceeded directly to a discussion with Karger. In fact, there was no discussion with Mr. Karger, the Personnel Director. The Union's Grievance Committee did not meet with Karger on May 6, 1988, and Mr. Jon (Robert Nicholson did not represent the Complainant at the meeting with Dalland on that date. In fact, the documents indicate that Karger was not at the meeting on May 6, 1988, and the testimony of Mr. Nicholson confirms that fact. The Examiner further states, "There is nothing in the record to rebut Nicholson's testimony that Karger agreed to this settlement subject to seeing the content of Musgrave's letter, and that Musgrave agreed to file such a letter, and that all parties were satisfied that this would resolve the matter." In fact, the record of Mr. Nicholson's testimony does not reference Mr. Karger's agreement to any alleged settlement. Furthermore, the record of Mr. Nicholson's testimony indicates that Musgrave ultimately refused to file any such letter, rather than agreeing to it as the Examiner states. The record clearly indicates that Musgrave disagreed with the action of the Grievance Committee, and exhibits presented in the record and the filed complaint attest to this fact. Additional exhibits, as well as the testimony of Brad Karger, clearly demonstrate that the County purposefully bypassed step one of the Grievance Procedure, and that the union failed to presume any discussion what-so-ever with Mr. Karger, the Personnel Director, as required in step two. Furthermore, the record clearly indicates that the Grievance Committee decision at the time of its withdrawal lacked any reference what-so-ever to merit of the Grievance, or that "A fair settlement had been achieved or could have been achieved" as alleged by the Examiner reference to the testimony of Mr. Nicholson.

Musgrave correctly argues that this portion of the Examiner's decision erroneously sets forth the identities and roles of certain individuals involved in the processing and attempted settlement of the reprimand grievance. Our modified Findings correct those errors. Musgrave's contentions as to what the grievance procedure required and whether the grievance committee acted properly will be addressed later herein.

In the second paragraph of the Background portion of his decision, the Examiner stated:

> Complainant was not satisfied with this disposition, and proceeded to appeal within the Union at various stages, the results of which are amply demonstrated in some 400 pages of testimony and some 130 documents which make up the record in this consolidated case. Complainant also attempted to persuade the County to continue to process the grievance despite the fact that the Union had dropped it, and numerous documents in the record attest to these attempts.

Musgrave argues in his brief:

> The Examiner states "Complainant also tempted (sic) to persuade the County to continue to process the Grievance despite the fact that the union had dropped it..." In fact, this statement of the Examiner is inaccurate. It does not represent the facts, as the record indicates that the Union had not dropped the April, 1988 Grievance, during the 2 months while the Complainant continued to pursue resolution of the Grievance of the County Personnel Director, Brad Karger.

We have modified our Findings to reflect that on or about June 3, 1988 and July 21, 1988, the County was advised by Respondent Local 2492-A that it would not be pursuing the grievance.

In the fifth paragraph of the Background portion of his decision, the Examiner stated:

> Subsequently, the record indicates that the grievance committee withdrew representation of Complainant; exhibits in the record prepared at the time by Complainant indicated that the grievance committee had done so without notifying Complainant, and testimony by Deborah Morris, a member of the grievance committee, appears to support this. 2/ AFSCME Council 40 District Representative Salamone, however, testified without contradiction that at approximately this time Complainant resigned his employment with the County voluntarily, and Salamone was notified that the local union was withdrawing representation of Complainant concerning this grievance. Salamone indicated that he could not remember how he had learned of this. But Salamone testified further that upon hearing of this possibility, he called the County's Personnel Director Karger on the telephone and obtained a settlement offer on the grievance. Salamone testified that Karger offered to settle the grievance at that point by withdrawing the discipline from Complainant's personnel file, repaying him for the wages lost as a result of the suspension, and giving him a general reference without negative content. Salamone testified, again without contradiction, that he called Musgrave and relayed this settlement offer to him, and that Musgrave indicated a desire to see it in writing. Salamone told Musgrave that if he was agreeable to the settlement it would be reduced to writing, but testified (without contradiction) that Musgrave never called him back to indicate whether he agreed to the settlement or not. There is no dispute that following this incident the Union declined to process the grievance further.

2/The testimony is in the form of a written transcript of an interview conducted by Complainant with Morris privately, to the accuracy of which Morris testified at the hearing.

Musgrave argues in his brief:

> The Examiner states "AFSCME Council 40 District Representative Salamone, however, testified without contradiction that at approximately this time (November, 1988) Complainant resigned his employment with the County voluntarily, ..." in fact, exhibits in the record contradict Salamone's statement regarding the Complainant's resignation; the Complainant tendered a resignation, however, it was not effective for approximately 6 weeks (January 1, 1989.) The Complainant continued as a County employee until that date. The Examiner further states, "There is no dispute that following this incident (telephone call from Salamone) the Union declined to process the Grievance further." In fact, there is dispute regarding the Union decision regarding further processing the Grievance; the record fails to reflect any written evidence that the Union made any such decision, and Respondent Karger testified at hearing that the grievance had not been relinquished by the union as of January 1, 1989. (see record)

Our modified Findings draw the distinction which Musgrave correctly notes between the date when he gave Respondent County notice of his intent to resign and the actual date of his resignation. As to Musgrave's contention that the grievance "had not been relinquished by the union as of January 1, 1989," the record establishes that on November 17, 1988, Karger was advised by Respondent Salamone that Local 2492-A was dropping the suspension grievance. After Karger advised Musgrave of that fact, Musgrave wrote Salamone on November 22, 1988 asking that Salamone provide information about the Local's decision. The record also establishes that Karger responded to Musgrave's continued efforts to process the grievance by advising Musgrave that he (Karger) would not be taking further action on the grievance unless Local 2492-A were to reverse its decision. As Karger's responses to Musgrave left the door potentially open for

continued processing of the grievance, Musgrave is correct when he argues that the grievance may not have been completely dead as of January 1, 1989.

The remainder of the alleged factual errors cited by Musgrave amount to Musgrave's disagreement with the Examiner's characterization of the grievance "settlements" and use of said settlements in his analysis. Our modified Findings more fully and precisely recite the facts surrounding the grievance "settlements." We reserve our discussion of the impact of these "settlements" until later in our decision.

ALLEGED "ERRORS OF LAW"

Musgrave incorrectly filed his complaints under the Wisconsin Employment Peace Act. The Examiner, through his June 1989 decision denying a Motion to Dismiss and his Notice of Hearing, provided notice to all parties that he was treating the complaints as having been filed under the Municipal Employment Relations Act and as raising issues under the provisions of said Act which are counterparts of those cited by Musgrave in his complaints. It would have been preferable for the Examiner to have required Musgrave to amend his complaint. However, the Examiner's decision to in effect amend the complaint for Musgrave was consistent with the fundamental fairness shown Musgrave by the Examiner. As none of the Respondents took exception to the Examiner's actions in this regard and as we regard the Examiner's action as consistent with the purposes of the Municipal Employment Relations Act, we will also treat Musgrave's complaint as if it had been filed under the Municipal Employment Relations Act.

ALLEGATIONS AGAINST THE COUNTY AND ITS AGENTS

Complainant Musgrave asserts that the County and its agents Dalland and Karger committed prohibited practices by: (1) suspending Musgrave in retaliation for his filing his September 26, 1988 complaint against the County; and (2) by violating the contract provisions regarding the manner in which grievances are to be processed.

As to the allegation of retaliation, Musgrave alleged that his suspension violated Sec. 111.06(1)(h), Stats., of the Wisconsin Employment Peace Act which provides it is an unfair labor practice for a private sector employer:

> (h)To discharge or otherwise discriminate against an employe because he has filed charges or given information or testimony in good faith under the provisions of this subchapter.

The Municipal Employment Relations Act (MERA) does not have a provision directly equivalent to Sec. 111.06(1)(h), Stats. The Examiner's Conclusion of Law 3 reflects his determination that Secs. 111.70(3)(a)3 and 1, Stats., were the appropriate MERA provisions under which to examine Musgrave's allegation of retaliation. We find this determination to be appropriate and will review Musgrave's allegations of Examiner error in the context of these two statutory provisions.

We concur with the Examiner's assessment that Musgrave failed to establish a relationship between the filing of his complaint and his receipt of a one day suspension. To prevail as to this allegation under Sec. 111.70(3)(a)3, Stats., Musgrave must establish by a clear and satisfactory preponderance of the evidence that:

1. He engaged in protected lawful concerted activity;

2. The County was aware of his protected lawful concerted activity;

3. The County was hostile to his protected lawful concerted activity; and

4. The County suspended him, at least in part, because of said hostility. 15/

The filing of Musgrave's prohibited practice complaint is lawful

---

8/ Muskego-Norway C.S.J.S.D. No. 9 v. WERB, 35 Wis.2d 540 (1967); Employment Relations Dept. v. WERC, 122 Wis.2d 132 (1985).

concerted activity protected by Sec. 111.70(3)(a)1, Stats. The County, at least through its Clerk, was aware of the complaint before the suspension was imposed on Musgrave. Thus, Musgrave has established the first two elements of his proof.

Musgrave cites prior grievances and employment disputes with the County as well as the timing of the discipline vis-a-vis his filing of a Commission complaint as sufficient to establish the third and fourth elements of his proof. This evidence creates an inference that hostility toward Musgrave's prior lawful concerted activity played some role in this suspension. However, on balance, we are persuaded that this inference is overcome by the inference to be drawn from evidence that the suspension was merely the culmination of disciplinary process begun by the County prior to filing his complaint. Given the foregoing, we affirm the Examiner's dismissal of this allegation under a Sec. 111.70(3)(a)3, Stats., theory.

To establish a violation of Sec. 111.70(3)(a)1, Stats., Musgrave must prove that the County's suspension had a reasonable tendency to interfere with the exercise of rights guaranteed by Sec. 111.70(2), Stats. 16/ Looking only at the timing of the suspension, it can be argued that the County's action had a reasonable tendency to interfere with the filing of complaints with the Commission, conduct which we find falls within the rights guaranteed by Sec. 111.70(2), Stats. However, when the timing of the suspension is viewed in the context of facts establishing that the suspension was the culmination of a disciplinary process begun before the complaint was filed, we conclude that the County's action did not have a reasonable tendency to interfere with Sec. 111.70(2) rights. Therefore, we also affirm the Examiner's dismissal at this allegation under a Sec. 111.70(3)(a)1 theory.

Turning to Complainant Musgrave's violation of contract allegations, we affirm the Examiner's dismissal of this portion of the complaint but not for the reason relied upon by the Examiner. The violation of contract claims involve alleged non-compliance by County representatives with the contractual grievance procedure when processing Musgrave's reprimand and suspension grievances. The Examiner concluded that because Musgrave did not establish a breach of the duty of fair representation, he could not assert jurisdiction to determine the merits of these contract claims. If Musgrave's claims involved the merits of the disciplinary grievances he filed with the County and which Local 2492-A did not take to arbitration, the ability of the Examiner to reach the merits of those grievances would indeed be dependent upon Musgrave establishing that the Local breached its duty of fair representation. However, as noted above, Musgrave's contractual claims against the County in this proceeding are not related to the merits of the grievances which Local 2492-A did not arbitrate. Thus, the duty of fair representation analysis of the Examiner is inapposite.

However, we have long held that we will not assert jurisdiction over violation of contract allegations unless the complaining party has sought to exhaust any available contractual mechanism for addressing such disputes. 17/ Here, the 1987-1988 contract gave Musgrave the right to use the contractual grievance procedure as a means of attempting to resolve disputes "over the interpretation and application of this collective bargaining agreement." Thus, we are satisfied that Musgrave could have utilized the contractual grievance procedure as to the contractual claims he makes herein. Because he did not seek to exhaust the grievance procedure, we will not assert jurisdiction over his contract claims against the County herein. 18/

ALLEGATIONS AGAINST LOCAL 2492-A REGARDING MUSGRAVE'S REPRIMAND GRIEVANCE

The duty of fair representation imposes upon a union the obligation to

---

9/ Beaver Dam United School District, Dec. No. 20283-B (WERC, 5/84).

10/ See generally Monona Grove Schools, Dec. No. 22414 (WERC, 3/85).

11/ We acknowledge that given our later conclusions that Local 2492-A breached its duty to fairly represent Musgrave as to his reprimand and suspension grievances, an argument can be made that it would have been futile for Musgrave to have filed a grievance as to these alleged contract violations. However, we are satisfied that the relationship between Musgrave and Local 2492-A had not degenerated to the point where a "futility" argument becomes persuasive.

make good faith determinations when determining whether to process employe grievances. 19/ To make a good faith determination, a union must evaluate the merits of the grievance by considering the monetary value of the claim to the grievant, the effect of the alleged contractual breach upon the grievant and the likelihood of success in arbitration. 20/ However, the burden to establish that a union did not honor its obligation rests upon the employe. 21/ Section 111.07(3), Stats., which is made applicable to this proceeding by Sec. 111.70(4)(a), Stats., requires that this burden of proof be met by "a clear and satisfactory preponderance of the evidence."

As to the reprimand grievance, Musgrave seeks to meet his burden of proof by alleging that there was hostility between himself and various members and officers of Local 2492-A and that this hostility is what motivated the Local to drop his reprimand grievance. The record clearly establishes Musgrave's continual dissatisfaction with the representation provided by Local 2492-A. It can reasonably be inferred that because Musgrave chose to pursue his dissatisfaction in an aggressive manner, marred by personal attacks on various Union members, there existed a certain personal distaste for Musgrave at least among those Union members with whom he had clashed. However, while the inference of animosity toward Musgrave provides a reasonable basis for Musgrave to argue that said animosity motivated Local 2492-A to drop the reprimand grievance, the record also contains testimony and objective evidence that Local 2492-A met its duty of fair representation obligation when the grievance committee dropped the reprimand grievance. Respondent Nicholson testified that when deciding whether to process the grievance further, the Local 2492-A grievance committee considered the positions of both Musgrave and Respondent County as to the merits of the grievance. By this testimony, it can be reasonably inferred that, as required by Mahnke, the grievance committee evaluated the chances of ultimately prevailing in arbitration on the merits of the grievance as well as the impact of the discipline upon Musgrave. Evidence of the Local's settlement efforts provides objective evidence of the Local's willingness to represent Musgrave despite any personal animosity that may have existed. Although Musgrave protests herein that the settlement discussions did not take place within the formal confines of the grievance procedure, there was no contractual bar to the informal discussion which the Local sought and in which Musgrave participated. Far from demonstrating a lack of representation, the settlement effort by the Local provides substantial objective evidence of the Local's willingness to provide Musgrave with fair representation. We also conclude that when deciding whether to pursue the grievance further, the Local's grievance committee was entitled to consider the manner in which settlement discussions broke down.

Given the foregoing, Musgrave has not met his burden of proof as to the decision of the grievance committee. The testimony of Nicholson and the objective evidence of the settlement effort outweigh the inference of hostility Musgrave asks us to draw. However, the same cannot be said as to the apparent decision by the Local 2492-A Executive Board to deny Musgrave's May 10 request that it override the decision of the grievance committee. The record is silent as to precisely when this decision was made or whether the Mahnke factors were considered. Under such circumstances, the inference of hostility is not rebutted by any evidence. Indeed, as noted later herein, the filing of Musgrave's May 10 charges would only serve to heighten the inevitable animosity between Musgrave and the Local. Thus, we conclude that Musgrave met his burden of proof as to the refusal of the Local's Executive Board to further process his grievance.

Because we are satisfied that Local 2492-A otherwise acted in a manner consistent with its duty of fair representation and the contractual grievance procedure when processing the reprimand grievance vis-a-vis representatives of Respondent County, we have dismissed the portion of Musgrave's complaint which alleges that the Local's procedural handling of the grievance at Steps 1 and 2 violated Sec. 111.70(3)(b)1 or 4, Stats. We have also dismissed Musgrave's Sec. 111.70(3)(b)2, Stats., allegation as we find no persuasive evidence that the Local coerced, intimidated or induced Respondent County to interfere with Musgrave's rights.

ALLEGATIONS AGAINST LOCAL 2492-A REGARDING MUSGRAVE'S SUSPENSION GRIEVANCE

The same inferences of hostility toward Musgrave by Local 2492-A as were present as to the reprimand grievance are present as to the suspension

---

12/ Mahnke v. WERC, 66 Wis.2d 524 (1974).

13/ Id. at 534.

14/ Id. at 535.

grievance. Indeed, with Musgrave's filing of internal Union charges on May 10 and June 10, 1988, and the Local's September 28, 1988 request that Musgrave be suspended or expelled from the Local, it can well be argued that hostility had peaked when the Local was called upon in October and November 1988 to represent Musgrave as to the suspension grievance. However, unlike the reprimand grievance decision, the record contains no evidence of the factors which either the grievance committee or Executive Board of the Local considered when deciding not to pursue the suspension grievance beyond Step 1 of the grievance procedure. All this record allows us to conclude is that sometime between the Step 1 meeting on November 2 and November 17, when Salamone advised the County that the Local was not going to process the grievance further, the Local decided to drop the grievance for unspecified reasons.

As there is no evidence that Local 2492-A met its Mahnke obligations as to the suspension grievance and as there is evidence in the record from which bad faith can be inferred, we can reasonably conclude that Musgrave has met his burden of proof as to the suspension grievance 22/ unless, as concluded by the Examiner, Respondent Salamone's settlement efforts are found to "nullify" any Local decision based upon hostility toward Musgrave. The Examiner found that:

> "There is nothing in the record to counter Salamone's testimony that Respondent Union, as an institution, refused to represent Complainant further with respect to this grievance only after Complainant had taken this peculiar position." (of asking that the settlement offer be put in writing)

We initially note that we find nothing peculiar in Musgrave's desire to see a settlement offer in written form. More importantly, contrary to the Examiner's statement, the record contains evidence that warrants the conclusion that Local 2492-A had dropped its representation of Musgrave's suspension grievance before Respondent Salamone initiated settlement discussions with Respondent Karger. Karger testified that on November 17, 1989 Salamone called him to indicate that Local 2492-A had "dropped representation on the matter." (Tr. 350, 361) Karger put a note in his file confirming the Salamone conversation (County Ex. 15) and on November 18, 1988 wrote Musgrave stating that:

> I have received your November 14, 1988 letter requesting me to review the disciplinary action taken against you on October 7, 1988.
>
> I have been informed by representatives of Local 2492-A that the bargaining unit is not supporting your request for an appeal of this matter. Therefore, until I am notified to the contrary no further action will be taken in regard to your request.

Salamone's testimony regarding the timing of the settlement discussion is vague but is linked to learning that Musgrave was leaving or had left the County's employ. The record reflects that on November 22, 1988 Musgrave gave the County notice of his intent to resign and did not actually leave until January 3, 1989. Given the foregoing, the record can most reasonably be viewed as establishing that the settlement discussion did not occur until after Local 2492-A had dropped the grievance.

While Respondent Salamone's settlement efforts on Musgrave's behalf demonstrate an ongoing effort by an agent of Local 2492-A to provide Musgrave with fair representation, that effort, even had it proven successful, cannot be a basis for determining that the Local did not earlier violate Sec. 111.70(3)(b)1, Stats., when it decided to drop the grievance. The willingness of a wrongdoer to attempt to remedy its prior wrong may impact upon the relief which is appropriate but does not nullify the illegal status of the original action. Thus, contrary to the Examiner, we conclude not only that Local 2492-A had dropped Musgrave's grievance before Salamone's settlement effort but that Salamone's effort does not "nullify" the Local's decision. Given these conclusions, we find that Local 2492-A's action dropping the grievance breached its duty to fairly represent Musgrave.

ALLEGATIONS AGAINST REPRESENTATIVES OF AFSCME COUNCIL 40 AND MEMBERS OF AFSCME INTERNATIONAL PANEL

Paragraph 7 of Musgrave's December 21, 1988 complaint alleges:

15/ See University of Wisconsin-Milwaukee (Guthrie), Dec. No. 11457-H (WERC, 5/84).

7. Inasmuch as the Judicial Panel and Council 40, American Federation of State, County, and Municipal Employees, have been made aware of the history of lack of representation of the complainant by Local 2492-A, AFSCME, and have nevertheless disallowed the current complainant to the Commission, to experience the benefit of redress consistent with the Rules of Procedure, Judicial Panel, AFSCME, and the International Constitution, AFSCME/AFL-CIO and the current Labor Agreement existant (sic) between the Complainant and his employer; the complainant believes a violation of 111.06(3) Wisconsin Statutes has occurred in that said Judicial Panel and Council 40, American Federation of State, County, and Municipal Employees have cause to be done on behalf of the complainant's employer and fellow employees who constitute the Executive Board of AFSCME Local 2492-A, an unfair labor practice under 111.06(2)(b) as the failure of said organization to properly and consistently apply the Rules of Procedure of the Judicial Panel and the International Constitution, American Federation of State, County, and Municipal Employees, AFL-CIO, and the current Labor Agreement between complainant's enjoyment of his legal rights, including those per 111.04 of the Wisconsin Statutes.

In his brief to the Examiner, Musgrave asserted:

. . .

This filing by the complainant alleges breach of the duty of fair representation by the Union and also alleges violation of the labor agreement by the employer, as well as discriminatory action by the employer for filing of a complaint to the Commission. Additionally, it is alleged that the International Panel and Council 40 of the American Federation of State, County, and Municipal Employees (AFSCME) induced the employer to engage in unfair labor practice as said AFSCME units failed to adhere to, and enforce, the International Constitution, AFSCME, AFL-CIO, as requested to do so by the grievant, so as to effect fair representation from the Union local.

. . .

Exhibits and testimony support complainant's claim that Council 40, AFSCME, failed to duly process complainant's May 10, 1988 charge of collusion under the International Constitution in that no trial was convened regarding the grievant's charges against the Union. Exhibits of Union minutes of June 27, 1988, contradict testimony of respondents Lyons, Gillespie, (sic) and Salamone that Council 40 remained neutral and did not influence the Union to defer complainant's June 10, 1988 charges away from Council 40 and instead to the International Judicial Panel.

Exhibits reveal complainant never received a trial of union members charged on May 10, 1988, although referred to the Judicial Panel for trial. Exhibits reveal dismissal of said charges by Judicial Panel, AFSCME, was perfunctory and arbitrary without a finding of fact or law required by the International Constitution. Dismissal of charges by the Judicial Panel created a breach of the duty of fair representation. See Vaca v. Sipes, Humphrey v. Moore, Ford Motor Co. v. Hoffman.

By failing to preserve the complainants fair representation, both Council 40 and the Judicial Panel induced the employer to continue commission of unfair labor practice as the employer knew the Union would not represent the complainant.

In his decision the Examiner responded to the foregoing by holding:

The remainder of the complaints concern allegations leveled against various individuals and organs of AFSCME not employed by the local union. The record evidence shows that only the local union is signatory to a contract with the Employer and

it is the local union which determines the processing or refusal to process a grievance. The allegations against the remainder of the union's officials are thus a matter of internal union affairs. Moreover' it is axiomatic that even if the appellate organs of AFSCME were found to have effective power to overturn the decisions of the Local with respect to grievance processing, they could not violate the duty of fair representation by refusing to do so where the Local's actions were not improper to begin with.

In his brief filed in support of his petition for review, Musgrave contends:

. . .

The examiner states that "... and that Council 40 and the judicial panel of AFSCME violated MERA by failing to cause the Executive Board of Local 2492-A to reverse its decision not to process Complainant's Grievances further." In fact, the record shows that the Complainant's citation of Council 40 and the Judicial Panel of AFSCME made on December 21, 1988 to the Board of Local 2492-A to reverse its decision regarding Complainant's Grievances; in fact, Complainant's citation of Council 40 and the Judicial Panel were for failures to exercise due process under the International Constitution of AFSCME, and these failures to exercise due process were relative to a number of issues distinct from the Complainant's Grievances handled by Local 2492-A. Complainant did not allege that Council 40 and the judicial panel of AFSCME violated MERA by failing to cause Local 2491-A (sic) to reverse decisions regarding the Complainant's Grievances. Instead, Commission complaints against Council 40 and the judicial panel were failures of those bodies to take action distinct from reversing decisions of Local 2492-A.

. . .

In addition, the conclusions of law presented by the Examiner on page 11, paragraph 4, and page 12, paragraph 1, which are not supported by the Examiner. These conclusions appear to prevent the Commission from exercising jurisdiction over due process provisions of the

International Constitution Of The American Federation of State County Municipal Employees noted in the Labor-Management Reporting And Disclosure Act of 1959, as amended (29 U.S.C. 411) and (29 U.S.C. 164, 29 U.S.C. 153, 29 U.S.C. 159). Such due process provisions, in conjunction with other provisions (Bill of Rights) of the AFSCME International Constitution are central to the Petitioner's Case and violations of said provisions of the AFSCME International Constitution were the subject of the Petitioner's complaint to the Commission. However, the Examiner fails to reference a legal basis for his lack of recognition of the Petitioner's exhibits of record in this regard. While civil enforcement per 29 U.S.C. 412 is available to the Petitioner through filing of a civil action in a district court of the United States, the Examiner draws no reference to this possibility, nor to the alternate possibility of retention of existing rights (29 U.S.C. 413) which appear to also allow the Petitioner to seek remedies before other tribunals, such as the State of Wisconsin Employment Commission. Furthermore, the Petitioner retains existing rights (29 U.S.C. 413) per the International Constitution of AFSCME, for redress of these Constitutional violations; these were pursued by the Complainant with AFSCME Judicial Panel.

It is the Petitioner's submission that the Examiner has failed to recognize within his decision that the Petitioner's rights and remedies were voided by the failure of the International Panel to enforce due process of it's (sic) Constitution, and these failures constituted, in and of themselves, a breech (sic) of Petitioner's rights as a member of a labor organization.

While the Examiner's decision (number 25908-B) postulates that the actions of the International Panel of AFSCME regarding the Complainant are justified by a proven innocence

> of the Local prior to the complaint to the Commission, there exist no basis in fact or law for this contention by the Examiner. As evidenced by the record, the actions of the Judicial Panel were perfunctory dismissals of the Complainant's charges against the Local, and these dismissals by the Judicial Panel made no reference to upholding the action of the Local through a finding of fact or conclusion of law by the Judicial Panel, as was required by the AFSCME Constitution. The charges against the Local have never received a legal analysis by the Judicial Panel nor by the Examiner.
>
> While the Examiner makes the reference that allegations against the Union Officials are a matter of internal union affairs, this assertion by the Examiner appears to void the language of 29 U.S.C. 412 and 29 U.S.C. 413. It is the submission of the Petitioner that enforcement of union constitution and bylaw violations are vested in at least one, if not both, of these sections, rather than being vested absolutely within internal union procedures.

From our review of the record, including the pertinent portions of the complaint and brief to the Examiner quoted above, we conclude that Musgrave is correct when he asserts on review that the Examiner decision did not address at least a portion of Musgrave's case against AFSCME and the members of the Judicial Panel and against Council 40 and its representatives. The Examiner properly concluded in his Conclusion of Law 2 that Musgrave was pursuing the members of the Judicial Panel, and representatives of Council 40 under theories premised on Secs. 111.70(3)(b)1 and 2, Stats. However, as indicated by the quoted portions of Musgrave's complaint against these individuals, Musgrave is pursuing these Respondents not as "municipal employe(s), individually or in concert with others," but as "persons" under 111.70(3)(c), Stats. 23/ Further, contrary to Examiner's Conclusion of Law 2, Musgrave's complaint, opening statement at hearing and brief to the Examiner demonstrate that his cause of action is not primarily based upon whether these Respondents improperly failed to overturn the Local's decision not to process the grievances. In our view, Musgrave's cause of action against these Respondents is premised upon the following theories:

1. The treatment accorded Musgrave's May 10 and June 10, 1988 charges by Council 40 staff and members of the Judicial Panel constituted a breach of the duty of fair representation independent from the fact that none of the named Respondents reversed Local 2492-A's decision not to process the grievance.

2. By the conduct under (1) above, these Respondents induced Respondent County to commit prohibited practices against Musgrave because the County knew that Musgrave would not be represented fairly.

We proceed to consider these contentions.

As a general matter, we initially note that a union's constitution and bylaws are a contract between the union member and the union and, as such, can be enforced by either party in State court. 24/ We further note that if a union is subject to the provisions of the Labor-Management Reporting and Disclosure Act of 1959, employees represented by said union thereby acquire additional rights as to their relationship with their union.

Here, Musgrave seeks to use the duty of fair representation as a means to litigate his belief that the Respondent Council 40 and its named Respondent agents and Respondent Judicial Panel members breached the applicable AFSCME constitution and bylaws. We are persuaded that the duty of fair representation cannot be invoked to resolve disputes between a union member and a union which do not involve the union's representational function vis-a-vis an employment

---

16/ Section 111.70(3)(c), Stats., provides:

> (c)It is a prohibited practice for any person to do or cause to be done on behalf of or in the interest of municipal employers or municipal employes, or in connection with or to influence the outcome of any controversy as to employment relations, any act prohibited by par. (a) or (b).

17/ Attoe v. Madison Professional Policemen's Ass'n; 79 Wis.2d 199 (1977); White v. Ruditys, 117 Wis.2d 130 (CtApp. 1983); Wells v. Waukesha Marine Bank, 135 Wis.2d 519 (CtApp. 1986).

relationship. 25/ Thus, for instance, disputes over membership rights and privileges typically will not be able to be litigated as duty of fair represent-ation claims. However, where a dispute in the relationship between a union member and the union involves matters related to the union's function as the collective bargaining representative in the context of the member's employment, the duty of fair representative can properly be invoked. 26/ However, as with all duty of fair representation disputes, no breach of the duty will be found unless the union's conduct in its internal dispute with the member is arbitrary, capricious or in bad faith. Thus, so long as the union's conduct appears consistent with a plausible interpretation of the constitution and bylaws and is not based upon hostility toward the union member, no violation will be found.

Measured against the foregoing standard, we conclude that because Musgrave's contentions regarding compliance with the constitution and bylaws focus upon the manner in which the named Respondents responded to his charges of union/employer collusion, there is a sufficient nexus between these contentions and Musgrave's employment relationship with Respondent County to raise a duty of fair representation claim. We proceed to assess that claim.

AFSCME Judicial Panel members named herein as individual Respondents have consistently asserted that the Commission has no jurisdiction over them because they reside outside the State of Wisconsin. In a case arising under the Wisconsin Employment Peace Act, the Commission concluded that it lacked jurisdiction over a non-resident individual who had taken no action within the State. 27/ We cannot reach the question of whether we would find this Peace Act precedent persuasive herein because we did not properly serve these parties with the complaint. 28/ Under such circumstances, we dismiss Musgrave's complaint as to these Respondents. Remaining before us are Musgrave's allegations against Council 40 and Respondents Lyons, Salamone and Gillispie as to application of the AFSCME constitution and bylaws to Musgrave's May 10 and June 10, 1980 charges of collusion.

Reviewing the evidence as to Musgrave's June 10, 1988 charges which were ultimately dismissed by the Judicial Panel in November 1988, the record does not establish by a clear and satisfactory preponderance of the evidence that the various remaining Respondents acted in an arbitrary or bad faith manner. The actions of Council 40 and Respondents Lyons, Salamone and Gillispie bear a reasonable relationship to the obligations imposed by the applicable provisions of the constitution and bylaws and there is insufficient evidence in the record from which it could reasonably be inferred that any of these Respondents was acting due to hostility toward Musgrave.

We reach the same conclusion as to the May 10, 1988 charges which were not reviewed by Local 2492-A, Council 40 or the Judicial Panel. Lyons acted reasonably in October, 1988 when he asked that the Judicial Panel take jurisdiction over the May 10 charges and the onus then fell upon the Judicial Panel to take further action.

18/ Bass v. Boilermakers, 630 F.2d 1058 (CA 5, 1980); Hovan v. Carpenters, 704 F.2d 641 (CA 1, 1983).

19/ AFSCME Local 1714, Dec. Nos. 12707-B, 12708-B (WERC, 1/76); AFSCME Local 990, Dec. No. 14608-A (Davis, 11/76) aff'd by operation of law (WERC, 11/76); Retana v. Apartment Workers, 453 F.2d 1018 (CA 9, 1972).

20/ Wisconsin Liquor Company, Dec. No. 685 (WERC, 11/44).

21/ Section 111.07(2)(a), Stats., provides that:

. . .

> In case a party in interest is located without the state and has no known post-office address within this state, a copy of the complaint and copies of all notices shall be filed in the office of the secretary of state and shall also be sent by registered mail to the last-known post-office address of such party. Such filing and mailing shall constitute sufficient service with the same force and effect as if served upon the party located within this state.

. . .

Our review of the file reflects that although copies of the complaint were sent by certified mail to the Judicial Panel members' address in Washington, D.C., a copy of the complaint was not filed in the office of the Secretary of State nor were copies of the complaint sent by registered mail.

We have also dismissed Musgrave's Sec. 111.70(3)(b)2, Stats., allegation against all union Respondents and their agents because there is no persuasive evidence in the record that Respondents' conduct coerced, intimidated or induced Respondent County to take action which interfered with Musgrave's rights.

REMEDY

In his September 1988 complaint, Musgrave asked for cease and desist relief as well as an affirmative order that Local 2492-A provide him with fair representation. In his December 1988 complaint, he asked that he be made whole for the suspension; that the suspension be removed from his record; that Local 2492-A be ordered to fairly represent its membership; and that the County be ordered to cease and desist from committing prohibited practices.

As no violations of MERA were committed by the County, we have not ordered that the County take any action as to Musgrave's suspension or as to the manner in which his grievances were processed.

As to Respondent Local 2492-A, we have ordered cease and desist and notice posting relief and affirmatively required that the Local reconsider the question of whether it will pursue the reprimand and suspension grievances on Musgrave's behalf. We acknowledge the potential that even if the Local decides to pursue said grievance(s) further when it complies with our Order, the Local may not be able to compel the County to arbitrate. However, as Musgrave could have but did not seek to litigate before us the contractual issues of whether the County had cause to reprimand or suspend him, we do not find it appropriate to have those issues litigated before the Commission as part of our remedy in the event arbitration is unavailable.

Before the Examiner, Musgrave filed a motion for the costs of litigating his complaints. Costs are only available to litigants before the Commission in instances where: (1) a party refuses to implement a Sec. 111.70(4)(cm) interest arbitration without good cause 29/; (2) the position of an opposing litigant demonstrates extraordinary bad faith 30/; or (3) a union's breach of the duty of fair representation has caused an employe to incur the expense of litigating an underlying breach of contract claim before the Commission. 31/ None of these circumstances are applicable herein. No interest arbitration award is at issue; the Respondent's position does not demonstrate a level of bad faith which warrants the extraordinary remedy of costs; and as Musgrave elected not to litigate the merits of the underlying reprimand or suspension grievances, costs are not available to him for any portion of the proceedings before the Examiner despite the fact that we have found a breach of the duty of fair representation.

22/ Section 111.70(7m)(e), Stats., provides:

> (e) **Civil liability.** Any party refusing to include an arbitration award or decision under sub. (4) (cm) in a written collective bargaining agreement or failing to implement the award or decision, unless good cause is shown, shall be liable for attorney fees, interest on delayed monetary benefits, and other costs incurred in any action by the nonoffending party to enforce the award or decision.

23/ Wisconsin Dells School District, Dec. No. 25997-C (WERC, 8/90); Hayward Community School District, Dec. No. 24259-B, (WERC, 3/88); Madison Schools, Dec. No. 16471-D (WERC, 5/81), Torosian dissent.

24/ State of Wisconsin, Dec. No. 11457-H (WERC, 5/84).

Both the County and Local 2492-A et.al. asked the Examiner for attorneys' fees and costs because they contended that Musgrave's complaints were "frivolous." The Examiner should have but did not respond to these requests. These requests are evaluated by us under the "bad faith" standard noted above. As is apparent from our conclusions that certain prohibited practices were committed by Local 2492-A et.al., fees or costs cannot be awarded to Local 2492-A. It is also clear to us that Musgrave's litigation against the County does not meet the "bad faith" standard and thus the County's request is also denied.

Dated at Madison, Wisconsin this 5th day of March, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
A. Henry Hempe, Chairman

_____
Herman Torosian, Commissioner

_____
William K. Strycker, Commissioner

APPENDIX "A"

NOTICE TO ALL EMPLOYES REPRESENTED BY LOCAL 2492-A

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 employes that:

1. We will fairly represent all those employes of Marathon County who we represent for the purposes of collective bargaining and contract administration.

2. Consistent with our duty to fairly represent employes, we will determine whether reprimand and suspension grievances filed by Mathew Musgrave should be further processed.

Dated this _____ day of _____, 1991.

By _____
for Local 2492-A

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