STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LABOR ASSOCIATION OF WISCONSIN, INC., for and on behalf of the GREEN COUNTY DEPUTY SHERIFF'S ASSOCIATION and DEPUTY JOAN KAMHOLZ, Jail/Clerical Employee, Complainants, vs. GREEN COUNTY (SHERIFF'S DEPARTMENT), Respondent.	Case 98 No. 42345 MP-2238 Decision No. 26080-B
GREEN COUNTY (SHERIFF'S DEPARTMENT), Complainant, vs. DEPUTY JOAN KAMHOLZ and THOMAS A. BAUER, Labor Consultant for GREEN COUNTY DEPUTY SHERIFF'S ASSOCIATION, Respondents.	Case 99 No. 42416 MP-2243 Decision No. 26081-B

Appearances:

Vanden Heuvel and Dineen Law Firm, by Ms. Linda S. Vanden Heuvel, 3105 West Wisconsin Avenue, Milwaukee, Wisconsin 53208, on behalf of the Labor Association of Wisconsin, Inc., et al.

DeWitt, Porter, Huggett, Schumacher & Morgan, by Mr. Howard Goldberg, Two East Mifflin Street, Suite 600, Madison, Wisconsin 53703, on behalf of Green County.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Labor Association of Wisconsin, Inc., on behalf of the Green County Deputy Sheriff's Association and Deputy Joan Kamholz, having, on June 8, 1989, filed a complaint with the Wisconsin Employment Relations Commission, wherein it was alleged that Green County, by its officers and agents, had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1, 2, 3 and 5 of the Municipal Employment Relations Act (MERA); and Green County having, on June 22, 1989, filed an answer wherein it denied that it had committed any prohibited practices, as well as a cross-complaint wherein it was alleged that the Associations and Deputy Kamholz had committed a prohibited practice within the meaning of Sec. 111.70(3)(a)5, Stats.; 1/ and the Commission having ordered the cases consolidated and appointed a member of its staff, David E. Shaw, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats.; and a hearing on said complaints having been held at Monroe, Wisconsin on March 22, 1990; and the parties having filed post-hearing briefs in these matters by July 23, 1990; and the Examiner having considered the evidence and the arguments of the parties, and being fully advised of the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That the Labor Association of Wisconsin, Inc., (LAW) and the Green County Deputy Sheriff's Association hereinafter referred to as the Association, are labor organizations with the former's principal offices located at 2825 North Mayfair Road, Wauwatosa, Wisconsin 54915; that since 1977 Deputy Joan Kamholz has been employed as a jailer/clerical employe in the Green County Sheriff's Department and as such has been a member of the bargaining unit represented by the Association; that for the last two years Kamholz has served as the Chair of the Association's Negotiation Committee and has been a steward for the Association and was the Association's Vice President in 1985; and that at all times material herein Thomas Bauer has been a labor consultant with LAW and as such has served as a consultant to the Association for the purposes of collective bargaining and contract administration.

2. That Green County is a municipal employer with its offices located at the Green County Courthouse, Monroe, Wisconsin 53566; that since 1985 Steven

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1/ This was subsequently corrected to Sec. 111.70(3)(b)4, Stats.

Elmer has been the Sheriff of Green County; that at all times material herein Gordon Malaise was the County's Corporation Counsel; that at all times material herein Patrick Conlin has been the Chief Deputy in the Green County Sheriff's Department; that at all times material herein Scott Pedley was the Undersheriff in Green County; that at all times material herein LaVerne Wichelt has been a Sergeant in the Green County Sheriff's Department and as such the person to whom Kamholz immediately reported; that Wichelt is in the bargaining unit represented by the Association; and that Conlin is Kamholz's immediate supervisor outside of the bargaining unit.

3. That on January 20, 1989 Sheriff Elmer caused the following notice to be posted in the Green County Sheriff's Department:

> TO: All Department Personnel
>
> FROM: Sheriff Steven R. Elmer
>
> DATE: 20 JAN 89
>
> RE: Department ID's
>
> Please note that Monroe Police Investigator James J. Kosek has contacted me this date reference the completion of our department ID's. Arrangements have been made for ID's to be done on Monday, 30 JAN 89 at 1500 hours. A second time of Wednesday, 01 FEB 89 at 0700 hours will be available as well. Both sessions will be conducted at the Monroe Police Department. Please make yourselves available in uniform at the Monroe Police Department at one of those two scheduled times in order that you may have a department ID completed.
>
> The informational cards which serve as a background for the ID's will be completed ahead of time and supplied to the police department so they should be available when you arrive. Likewise, the police department will keep your pictures and forward them all together to our department for stamping and sealing when they are completed.
>
> Should you have any questions, please feel free to contact Pat, Scott, or myself.

4. That on January 25, 1989 Chief Deputy Conlin sent Sergeant Wichelt the following memorandum:

> TO: Sergeant LaVerne K. Wichelt #40
>
> FROM: PJC
>
> DATE: 25 JAN 89
>
> RE: Identification card Photographs
>
> Would you please instruct your personnel to wear their long sleeve shirts with tie when they get their photograph taken at the Monroe Police Department for their identification cards.
>
> Also, if there are employees that can NOT make the two dates provided for their identification card, please forward their name to me so I can forward a list to the Sheriff. Those persons that can NOT make it to the two available dates will have to wait until some time around March before there will be another date available to them.
>
> If there are any questions, please contact Steve, Scott, or myself. Thanks,
>
> PJC

and that as a result of receiving the aforesaid memorandum Sergeant Wichelt posted the following notice on or about January 27, 1989:

> TO: All Dispatch and Jail Personnel
>
> FROM: Sgt. Wichelt

DATE: 27 January 89

RE: Identification Card Photographs.

Reference Photo ID Card be sure to wear your long sleeve shirts with tie when you get your photograph taken at the Monroe Police Department.

Also if you are unable to attend the two dates provided for the Photo ID please advise me. A list will be forward (sic) to the Sheriff for new dates can be arranged but it most likly (sic) will not be until some time in March that it can be done.

If you have any questions, please contact me.

LaVerne K. Wichelt
Jail Sgt. #40

5. That on January 30, 1989 Kamholz appeared at the Monroe Police Department at 3:00 p.m. to have her ID photo taken since she was taking February 1st off as a vacation day; that the time Kamholz spent at the Monroe Police Department on January 30th was outside of her regular work hours; that on January 31, 1989 Kamholz submitted a "Request For Over-Time Credit" to Sgt. Wichelt for 20 minutes of overtime for the time she had spent at the Monroe Police Department on January 30th to have her ID photo taken; that Sgt. Wichelt did not indicate to Kamholz whether or not he was going to approve her request for overtime credit and did not indicate on the request form whether it was approved or not approved; that Kamholz's request for overtime credit was subsequently not approved by Conlin or Sheriff Elmer and on February 15, 1989 Kamholz filed a grievance over the denial; that the grievance was discussed at Step 2 and Sheriff Elmer stated he did not agree that having the ID photograph taken was mandatory overtime; and that Sheriff Elmer sent Kamholz the following response to her grievance dated march 13, 1989:

TO: Deputy Joan M. Kamholz

FROM: Sheriff Steven R. Elmer

DATE: 13 Mar 89

RE: Grievance / Overtime for Photo ID session

Deputy Kamholz:

Subsequent to our discussion at step two of the grievance which you have labelled as your thirteenth grievance of 1989 we have reached a decision concerning your demand.

You were not required to attend the photo session you chose to attend. One session was made available on your regularly scheduled shift and you have admitted that it was by your choice that you were absent on a vacation date at that scheduled time. You were informed in writing by Sgt. Wichelt that make-up dates would be scheduled later for those unable to attend one of the first two scheduled dates. Not one other employee of the department has indicated that they felt entitled to overtime compensation or that they were **mandated** to attend the January 30th, 1989 session.

Nevertheless, you have still chosen to interpret your attendance as mandatory. This may be a result of your failing to make yourself aware (as you yourself admitted) of the contents of the intradepartmental memo which your sergeant provided you. It may also be a result of the fact that you failed to follow established departmental directives prior to working overtime. We will deal with these issues separately and rather than debate this issue further, we are hereby agreeing to compensate you for the twenty minutes you indicate that you spent at this photo session. By making this settlement, the County is admitting no wrongdoing; on the contrary, the facts as listed above speak for themselves.

Please resubmit your overtime request in the next payperiod if you still feel your actions so

warrant.

/s/ Steven R. Elmer
Sheriff

6. That on March 14, 1989 Sheriff Elmer had the following notice posted in the Sheriff's Department:

TO: All Departmental Personnel

FROM: Sheriff Steven R. Elmer

DATE: 14 Mar 89

RE: Departmental Identification Cards

Please note that we have received a grievance demanding payment of overtime for time spent having a department ID photo taken. Despite the fact that the session attended was not mandatory and despite the fact that make-up dates were available, we are choosing to resolve this grievance rather than debate the issue further. Since we have always treated every member of this department in the same manner, we are hereby authorizing compensation for any member of the department who attended a photo session when off duty.

Unfortunately, this means that we are being faced with a significant increase in the cost of our department ID's (to over $8.00 apiece). This has in turn forced us to reevaluate the financial viability of our department ID program. In other words, we will likely be forced to eliminate ID's altogether or else return to the "cut and paste" cards. Some of you may recall that those cards had no department name or affiliation and had polaroid pictures hand cut and taped to the card itself (similar to our current Special Deputy cards).

We regret that we may be forced to take this action, but we feel that we have been given little alternative. Further information will be made available when a final decision has been made.
/s/ Steven R. Elmer
Sheriff;

and that following the posting of said notice Kamholz, Wichelt and another bargaining unit member, Jeanette Hasse, submitted requests for overtime credit for the time they had spent having their ID photo taken and said requests were approved by the Undersheriff.

7. That Bauer sent Sheriff Elmer a letter dated March 20, 1989 which read, in relevant part, as follows:

Sheriff Steven Elmer
Green County Sheriff's Department
2827 6th Street
P.O. Box 473
Monroe, Wisconsin 53566

RE: Grievance 89-13
Deputy Joan Kamholz - grievant

Dear Sheriff Elmer:

This letter is in response to your letter, dated March 13, 1989, to Deputy Kamholz regarding the County's decision to pay Deputy Kamholz for the twenty (20) minutes of overtime due her as a result of a mandated photo session requiring her attendance.

This letter is to confirm that the County's decision to compensate Deputy kamholz for the time spent at the photo session will satisfy this grievance, and, upon payment of the appropriate compensation, please consider this matter settled.

However, your letter makes numerous allegations which, as a matter of fact, are completely untrue. Please be advised that the grievant's, and the

Association's decision to accept the terms of settlement does not indicate that we agree with your allegations, and in fact, please be advised of the following facts:

The Association's position, as well as the grievant's is as follows

1. The original notice, dated January 20, 1989, specifically indicates that employees were to "make yourselves available in uniform at the Monroe Police Department at one of those two dates", i.e., January 30th or February 1st. Deputy Kamholz made herself available pursuant to your letter because she did not wish to attend on her vacation day which she had applied for well in advance.

2. Sgt. Wichelt's letter, dated January 27, 1989, specifically stated that "if you are unable to attend the two dates provided for the Photo ID please advise me". Please be advised that Deputy Kamholz "was able" to attend one of the dates that your originally set for the photo session, therefore, she did not need to advise Sgt. Wichelt of any problem. Furthermore, no where in this letter does it state that overtime will not be paid because the original dates were not mandatory.

3. Your alleged accusation that Deputy Kamholz "failed to follow established departmental directives prior to working overtime" is in fact a fabrication of what actually occured, (sic) i.e., she did follow your directive that required mandatory attendance at one of two dates set forth in your notice of January 20, 1989.

Additionally, now that the record contains both positions of the parties in this matter, be advised that the Association, nor (sic) the grievant, is admitting any wrongdoing; on the contrary, the facts as listed above speak for themselves.

Thomas A. Bauer
Labor Consultant

8. That on April 3, 1989 at 2:30 p.m., at Sheriff Elmer's direction, Chief Deputy Conlin asked to talk to Kamholz in Wichelt's office; that Conlin described it as a "counseling session" and talked to Kamholz in Wichelt's presence for approximately two minutes during which time he gave Kamholz a copy of a May 10, 1985 memorandum he had issued regarding department procedure for overtime "slips" and "overtime off slips," and a copy of examples of correctly completed forms and asked Kamholz if she was familiar with the procedure; that Kamholz stated she was familiar with the procedure; that Conlin stated that he had to counsel Kamholz regarding her violation of the procedure; that Kamholz asked when she did not follow the procedure; that Conlin responded he did not know the date; that Kamholz then asked if the discussion was in connection with her grievance and Conlin responded that it was not, but involved the ID photo and was in regard to obtaining proper approval for overtime and that if it is stated as mandatory, then it is mandatory, and if it does not state such, Kamholz should ask; that Conlin advised Kamholz that future violations would result in disciplinary action, including the possibility of suspension or dismissal; and that the May 10, 1985 memorandum from Conlin reads as follows:

TO: ALL DEPARTMENTAL PERSONNEL

FROM: PJC

DATE: 10 MAY 85

RE: OVERTIME SLIPS & TIME OFF SLIPS

OVERTIME SLIPS

When filling out an overtime slip, be sure to include the date, actual time spent on case(s), case number(s), what time worked from till time completed, salary or compensatory time noted in hours, your signature, sergeant signature, comments (what happened and who authorized your overtime. Also I will need a copy

attached so I can return one to you so you are aware of any changes if any.

OVERTIME OFF SLIPS

When filling out time off slips, be sure to include the date, time off from vacation/personal/compensatory time, your signature, sergeant signature, and exactly what days and shifts needed off. If there is over two weeks requested off, please try to put the additional time off requests on another slip. Also include a copy so I can return one to you so you are aware of any changes if any.

I have attached sample copies so that you can familiarize yourself with that information I need to expedite your requests. If you have any questions, feel free to contact myself, Undersheriff Pedley or Sheriff Elmer.

Pat

9. That at Sheriff Elmer's direction Conlin authored the following memorandum on April 3, 1989 following his meeting with Kamholz and placed it in Kamholz's personnel file:

TO: File

FROM: Chief Deputy Patrick J. Conlin

DATE: 03 APR 89

RE: Counseling

On 03 APR 89 at 1430 hours, Sergeant LaVerne Wichelt and myself met with Deputy Joan M. Kamholz in Sergeant Wichelt's office. I handed Deputy Kamholz a copy of the department memorandum I issued on 10 MAY 85 in regards to proper procedure for the use of overtime. I had highlighted an area on the memo which referred to obtaining authorization for overtime. I explained the proper procedure for the overtime usage and explained that in most cases it is clearly spelled out that it would be mandatory or non-mandatory and if there was any doubts, that she should have sought an answer if there was any doubt before going ahead with working the overtime.

She asked if this was in regards to the photograph session at Monroe Police Department. I advised her it was.

I explained that in the future she should check before any overtime is worked in accordance with department procedures. I informed her that future violations would result in disciplinary action with the real possibility of suspension or dismissal.

I asked her if she understood what I had said and she said yes and had no questions. She left at 1432 hours. END PJC

Patrick J. Conlin
Chief Deputy

10. That subsequent to her meeting with Conlin, Kamholz filed a grievance regarding the meeting, leaving the grievance with the Sheriff's secretary; that said grievance was not signed; that on or about April 14, 1989, Sheriff Elmer sent Kamholz the following letter:

TO: Deputy Joan M. Kamholz

FROM: Sheriff Steven R. Elmer

DATE: 14 APR 89 21:00

RE: Attached Document

Dear Deputy Kamholz:

I am in receipt of a document (attached) which

purports to be yet another grievance. I am informed that you left the document with Secretary Tschudy without explanation even though Undersheriff Pedley was in his office and would have been available to see you if you had chosen to be communicative. I am at a loss as to understand what the document is; the document is unsigned, is falsely dated, and is outside the scope of the contractually agreed upon grievance procedure currently in effect. This memo is to inform you that I do not recognize this document as a grievance since you have failed to comply with the procedural and substantive requirements of the grievance procedure as outlined in Article XXIII of the contract.

The document which you have presented to Secretary Tschudy purports to be a grievance concerning a memo in your personnel file. You have again attempted to circumvent the requirements of the contract. Step one of the contractually agreed upon grievance procedure, requires an employee who feels aggrieved, to present his/her grievance orally to their immediate supervisor outside the bargaining unit. In your case, as you are aware from the numerous grievances you have already filed, this means Chief Deputy Conlin. You have not made any attempt to contact Chief Deputy Conlin and therefore have failed to comply with the obligatory language of the contract which states, inter alia, "Grievances **shall** be processed in the following manner...or shall be deemed barred...." Article XXIII Sec. 23.03 (emphasis added)

I must insist that you comply with the provisions of the contract which contract you bargained for and which contract you demand that we comply with. You have attempted on several occasions in the past when filing grievances to avoid complying with the contract and I must insist that this will not be tolerated.

In addition, you have either erroneously or deliberately misrepresented the "date grievance is filed". You have indicated the grievance was filed on 07APR89. At no time did you contact Chief Deputy Conlin or any other supervisor outside the bargaining unit on that date or any other date concerning this matter. In fact, on 07APR89 you were on the first of several days off.

Even assuming arguendo that you had proceeded correctly under the contract (which you emphatically have not), I am concerned at the misrepresentations of the facts which you have made. You indicated that you were required to comply with a "mandatory written order from the Sheriff to make themselves available to have photographs taken at the Monroe Police Department". This is not only inaccurate, it is a blatant misre-presentation of the situation.

The memo as posted stated, inter alia, "Please make yourselves available in uniform at one of those two scheduled times in order that you may have a department ID completed." Our past practice in this department is that all memos requiring mandatory attendance at a meeting or event state specifically that the individual/s are "required" to be in attendance or that attendance is "mandatory". The language is always very clear concerning "required", "mandatory", or "expected that you will be there". In addition, you were provided on 27JAN89 a written notice by your Sergeant that if you were unable to attend the two dates initially established, makeup dates would be made available in March. Any reasonable person knowledgeable of the facts would be forced to conclude that these sessions were not mandatory. Finally, even if you choose to persist in your ridiculous interpretation of the memos provided, the second original date established was during your regularly scheduled work shift, thereby obviating the need to attend when overtime would be necessitated.

Secondly, our longstanding departmental past practice has been to require each employee to gain

authorization prior to working overtime. The reason for this requirement is so self evident it does not need further explanation. You failed to comply with our established procedure concerning working overtime and this was the reason you were counseled as is noted in the documentation placed in your personnel file.

You falsely state that counseling constitutes disciplinary action. Counseling is intended to be a constructive management tool to correct improper employee conduct. You have not been reprimanded, suspended, dismissed, or in any way damaged by this action.

You also indicate that this particular counseling was without just cause. The facts as set forth above speak for themselves and it is very clear that we, as responsible managers, need to assure that you are aware of the proper procedures for working and filing for overtime. It appears that you have missed the entire point of this counseling session.

You further indicate in your unidentifiable document that said counseling is retaliatory as a result of your grievance labelled as your thirteenth grievance of 1989 concerning denial of overtime pay for your optional attendance at a photo session on your own time. You will recall that when we agreed to resolve that grievance rather than debate the issue further, you were specifically informed in writing that we would need to deal separately with the issue of your failing to follow established departmental directives prior to working overtime. You elected to accept overtime pay thereby accepted the terms of the settlement as set forth in writing.

Finally, you demand that we remove documents from your personnel file. Even if you had procedurally complied with the contractually agreed upon steps of the grievance procedure, and even if you had any semblance of substance to your purported grievance your remedy is outside the scope of the contract and, in fact, is contrary to Wisconsin State Statutes currently in effect.

Finally, I must place you on notice that we consider the numerous frivolous grievances which you have filed to be of nuisance nature and strictly for the purpose of harassment and intimidation. The fact that we have had eleven grievances filed in four years, nine of which have been filed by the same two individuals and five of which have been filed by you alone speaks for itself.
/s/ Steven R. Elmer
Sheriff

cc: Green County Labor Counsel
Members, Law Enforcement Committee
Members, Salary and Personnel Committee

11. That on April 18, 1989 Kamholz signed and resubmitted her grievance regarding her meeting with Conlin on April 3rd; that Kamholz submitted said grievance directly to Sheriff Elmer after picking up copies of the contents of her personnel file; that Elmer stated he would not accept the grievance because she had skipped Step 1 of the grievance procedure; that Kamholz left the grievance laying on the Sheriff's secretary's desk in the Sheriff's presence and stated that she was leaving it there and he could do what he wanted with it; and that said grievance, in relevant part, read as follows:

THE LABOR ASSOCIATION OF WISCONSIN, INC
GRIEVANCE FORM

ASSOCIATION: Green County Deputy Sheriff's Association GRIEVANCE NO: 89-3-D

EMPLOYER: Green County Sheriff's Department

NAME OF GRIEVANT: Deputy Joan Kamholz

DATE OF ALLEGED INFRACTION: April 3, 1989

DATE GRIEVANCE IS FILED: April 7, 1989

ARTICLE OR SECTION OF CONTRACT VIOLATED:

Article III - Management Rights; Article VIII - Disciplinary Procedure; and all other pertinent provisions of the labor agreement.

STATEMENT OF GRIEVANCE:

1. That on April 3, 1989, the grievant was called in for "counseling" for failing to following (sic) and review the overtime policy requiring prior approval from the supervisor to work any overtime as a result of an incident on January 30, 1989, when the grievant complied with a mandatory written order from the Sheriff for all employees to make themselves available to have photographs taken at the Monroe Police Department.

2. That said counseling constitutes a disciplinary action without just cause and violates Articles III and VIII of the parties (sic) collective bargaining agreement.

3. That said counseling constitutes a retalitory (sic) action by the Sheriff against the grievant as a result of the grievant's filing of Grievance 89-13 wherein the grievant requested overtime payment for attending the photograph session on January 30, 1989, while on her off-duty time.

RELIEF SOUGHT:

1. That all documentation relating to the "counseling" of the grievant for failure to follow the overtime policy be immediately purged from the grievant's personnel records.

2. That the County cease and desist from all futher (sic) violations of this nature of the collective bargaining agreement.

. . .

12. That Bauer sent Sheriff Elmer the following letter dated April 20, 1989:

Sheriff Steven Elmer
Green County Sheriff's Department
2827 6th Street
P.O. Box 473
Monroe, Wisconsin 53566

RE: Green County (Sheriff's Department)
Grievance 89-3-D
Deputy Joan Kamholz - grievant

Dear Sheriff Elmer:

I am in receipt of a letter that you sent to Deputy Joan Kamholz on April 14, 1989, wherein you deny and respond to the above entitled grievance. Since the letter contains one-sided opinions, innuendo, falsification of the facts surrounding the grievance, and misunderstanding of the appropriate grievance procedure, I felt compelled to enlighten you of the facts in this case so that you are not "at a loss to understand what the document is".

The following is a paragraph by paragraph response to your letter of April 14, 1989:

PARAGRAPH #1 and #2: Deputy Kamholz served a document to your secretary, Ms. Tschudy, on April 14, 1989, which was labelled Grievance No. 89-3-D (a file number used by the L.A.W., Inc. office). The grievance was filed as a result of an incident occurring on April 3, 1989, wherein the grievant was counselled by Chief Deputy Patrick J. Conlin regarding the grievant's failure to follow and review the overtime policy of your department regarding an alleged incident wherein the grievant allegedly did not seek prior approval for working overtime from her supervisor.

You purport in your letter that the grievant did not follow, and in fact circumvented, the contractual grievance procedure. In fact if you would review Article VIII, of the (sic) incident giving rise to the grievance is a result of a disciplinary action, the grievance is commenced at Step 2 of the procedure (page 5, Section 8.03). The grievance alleges that the counselling received from Chief Deputy Conlin was disciplinary in nature, therefore, Deputy Kamholz appropriately commenced the grievance properly and was not required to discuss the matter with Under Sheriff Scott Pedley, whom you allege as being available at the time Deputy Kamholz served the grievance.

You further allege that Deputy Kamholz served a document that was unsigned. This fact is true. At the time of service of the grievance, i.e., April 14, 1989, Deputy Kamholz neglected to sign the grievance that she, accompanied by Sergeant LaVerne Wichelt, Association Vice-President, left with your secretary. However, after realizing her mistake, Deputy Kamholz, accompanied by Deputy Lori Steiner, reserved a signed grievance to you on April 18, 1989, which was still within the time limits of the grievance procedure in the past, and it has been the County that has failed to comply.

PARAGRAPH #3 and #4: You allege that Deputy Kamholz has attempted on "several occasions in the past" to avoid complying with th (sic) contract. In fact, Deputy Kamholz has consistently followed the guidelines of the grievance procedure in the past, and it has been the County that has failed to comply.

Further, you accuse Deputy Kamholz of either "erroneously or deliberately" misrepresenting the date of the grievance, that, in fact, she did not contact Chief Deputy Conlin or any other supervisor outside the bargaining unit on April 7, 1989, the date indicated on the grievance as "Date Grievance Is Filed". I do not expect you to know that the date indicated on the grievance form as "Date Grievance Is Filed" is for filing purposes only with the Labor Association of Wisconsin, Inc. In any case, pursuant to the provisions of Article VII, Deputy Kamholz served the grievance on you through your secretary, who accepts your correspondence.

PARAGRAPH #5 , #6, and #8: You allege that Deputy Kamholz made a "blatant representation of the situation" (sic) stated in the grievance. The statements that you have made in these paragraphs impact on the argument of the grievance between the parties. It is more appropriate to address these arguments in the grievance hearing.

However, as you obviously are not aware, you do not have the authority to determine whether or not the facts of the grievance have merit as purported by the grievant. That is an issue reserved solely to the arbitrator assigned to hear the grievance. Your step in the grievance procedure is simply to attempt to resolve the grievance. It is your prerogative whether or not you wish to make an attempt at resolution, which in this case it is obvious that you do not, wherein you can simply move the grievance onto the next step by denying it (which you have emphatically done in this case).

PARAGRAPH #9 , and #10: You allege that by excepting (sic) the terms of settlement regarding Grievance 89-13, when Deputy Kamholz accepted overtime payment (which she asked in the remedy of that grievance) for off-duty time spent at the Monroe P.D. to get her photograph taken, Deputy Kamholz "agreed to the terms of settlement as set forth in writing" is unclear as to what "terms" you are referring to.

If you are referring to the terms as set forth in your letter to Deputy Kamholz, dated March 13, 1989, this would be incorrect. In fact, as you are well aware, I responded on behalf of the grievant to you in may (sic) letter of March 20, 1989, (a copy of which is enclosed), and it is clear that the only "terms of settlement" that the grievant accepted was payment of the overtime compensation. Since you did not respond to my letter, it is clear that you had concurred with the facts of my letter as evidence in that the County compensated Deputy Kamholz pursuant to the remedy of the grievance.

PARAGRAPH #11 AND #12: I will reserve my comments as to your opinion set forth in paragraph #11, except that the grievant and the Association will accept the decision of the Arbitrator in this matter.

However, your statements in the final paragraph of your letter are arbitrary and capricious, and without merit. Further, the Association, on behalf of the grievant in the aforementioned grievance (89-3-D), will be requesting as additional remedy of this matter, that your letter of April 14, 1989, be removed from the grievant's personnel file.

Finally, it is obvious from the negativeness implied by your letter of response to Grievance 89-3-D, dated April 14, 1989, that you have denied the grievance. Therefore, I am placing you on notice that the Association, for and on behalf of the grievant, will be processing this matter to Step 3 of the Grievance Procedure.

Thomas A. Bauer
Labor Consultant

13. That Sheriff Elmer sent the following letter dated April 24, 1989 to Bauer in response to the latter's April 20, 1989 letter and copied Kamholz:

Mr. Thomas A. Bauer
Labor Association of Wisconsin
2825 N. Mayfair Road
Wauwatosa, Wisconsin 53222

Re: Correspondence Received / Purported Grievance

Dear Mr. Bauer:

I am in receipt of your most recent letter which, true to form, contains misinformation, inaccurate allegations, and blatant misrepresentations of the facts. I am unclear as to whether you are negligently failing to establish the true facts surrounding local union issues or whether you are deliberately misrepre-senting the facts in order to further the interests of two individuals before the interests of the entire association as a whole. As I indicated in my response to Ms. Kamholz, the fact that we have had eleven grievances filed in four years, nine of which have been filed by the same two individuals, speaks for itself.

The facts of this situation remain the same: Deputy kamholz left an unsigned and undated document with Secretary Tschudy. The document was labelled as still another grievance, however, at no point has Deputy Kamholz attempted to comply with step one of the contractually agreed upon grievance procedure currently in effect. That procedure states, inter alia,

"Grievances **shall** be processed in the following manner...or shall be deemed barred..."Article XXIII Sec. 23.03. These provisions simply do not allow for beginning a grievance at step two.

Deputy Kamholz has attempted before to begin a grievance at step two of the grievance procedure and, on yet another occasion, has ignored the time limits as specified in the contract. The grievance procedure currently in effect was one you bargained for allegedly on behalf of your representeds, yet you continue to advise your representeds to violate the contract and ignore the provisions of the grievance procedure.

You make reference in your letter to Article VIII of the contract and cite it as support for beginning this grievance at Step 2. You don't seem to be familiar with the contract you bargained for and provide advice to your representeds about. If you would take the time to familiarize yourself with Article VIII of the contract, you would find that it applies only to "An offense justifying immediate discharge..." Deputy Kamholz has not been discharged, she has not been suspended, she has not even been reprimanded. Deputy Kamholz has been counseled concerning her actions. Are you suggesting by referring to this section of the contract that Deputy Kamholz should be immediately discharged? If that is the case, then you are correct that an "appeal" would commence at Step 2 of the Grievance Procedure.

You continue to misrepresent an optional photo session as mandatory in contravention of the truth; you ignore established departmental past practice concerning authorization for working overtime; you misrepresent counseling as being "disciplinary"; and you have continued to encourage your representeds to violate the terms of the contract by beginning at step two of the grievance procedure.

You also continue to demand that certain documents be removed from an individual's personnel file. As you obviously are not aware, provisions of the Wisconsin State Statutes currently in effect do not allow you the authority to determine what goes into a personnel file and what does not.

As I indicated to Ms. Kamholz, the steps of the contract pertaining to the grievance procedure have not been complied with again in this case. Therefore, this purported grievance "...shall be deemed barred."

Steven R. Elmer
Sheriff

cc: Deputy Kamholz
Green County Deputies' Association
Members: Salary & Personnel Committee
Members: Law Enforcement Committee
Green County Labor Counsel

14. That Kamholz's grievance, Grievance 89-3-D, was processed to Step 3 when Bauer and Kamholz appeared before the County's Personnel and Labor Relations (PLR) Committee on May 31, 1989 and requested that Conlin's memorandum of April 3, 1989 be removed from Kamholz's personnel file; that Sheriff Elmer also appeared before said Committee at that meeting to discuss Grievance 89-3-D; that the PLR Committee voted at its May 31, 1989 meeting to deny Grievance 89-3-D; and that the County's Corporation Counsel at the time, Gordon Malaise, sent Bauer the following letter dated June 1, 1989 notifying him of the PLR Committee's decision:

Mr. Thomas A. Bauer
Labor Association of Wisconsin, Inc.
206 S. Arlington Street
Appleton, WI 54915

Re: Grievance 89-3-D
Deputy Joan Kamholz

Dear Mr. Bauer:

After careful review and due deliberation, the Green County Personnel and Labor Relations Committee hereby denies Grievance No. 89-3-D.

To resolve this matter short of arbitration, I am, however, authorized to make the following settlement offer: that Deputy Kamholz may submit a written statement for the file explaining her position, and said statement shall be attached to the disputed April 3, 1989 memorandum of Patrick J. Conlin, pursuant to sec. 103.13(4), Wis. Stats.

Gordon M. Malaise
Corporation Counsel
for Personnel and Labor Relations Committee

15. That on June 1, 1989 Bauer drafted and signed the instant complaint on behalf of the Association and Kamholz which was notarized on June 7, 1989 and received by the Commission on June 8, 1989; that the Association did not proceed to request arbitration of Kamholz's grievance 89-3-D after it was denied at Step 3; that after receiving Malaise's letter of June 1, 1989 Bauer called Malaise seeking clarification of the County's position on whether grievance 89-3-D was a valid grievance; that on or about June 12, 1989 Bauer and Malaise again discussed the matter over the telephone, and during said conversation Bauer understood Malaise to say that the County would refuse to participate if the Union attempted to process grievance 89-3-D to arbitration; and that Bauer sent Malaise the following letter dated June 12, 1989 confirming their telephone conversation:

June 12, 1989

Mr. Gordon Malaise
Corporation Counsel
Green County Courthouse
Monroe, Wisconsin 53566

RE: Green County Sheriff's Department
Grievance 89-3-D
Deputy Joan Kamholz - Grievant

Dear Mr. Malaise:

This letter is to confirm our telephone conversation on the above date wherein you stated that the County personnel Committee's position on Grievance 89-3-D was not only to deny the grievance, pursuant to your letter of June 1, 1989, but also to acquiesce to the following issues:

1. That the personnel Committee's decision to deny the grievance was based upon Sheriff Elmer's position that there was no disciplinary action.

2. That the Personnel Committee has declared that the grievance is not arbitrable.

3. That the Personnel Committee has refused to expunged (sic) any of the documentation regarding the grievance from Deputy Kamholz' personnel files.

With the above understanding, the Association, on behalf of the grievant, is advising you at this time that we are rejecting the County's offer of settlement in this matter as being unreasonable.

Thomas A. Bauer
Labor Consultant

16. That in response to Bauer's letter of June 12, 1989, Malaise sent Bauer the following letter of June 21, 1989:

Mr. Thomas A. Bauer
Labor Association of Wisconsin, Inc.
206 S. Arlington Street
Appleton, WI 54915

Re: Green County Sheriff's Department
Grievance 89-3-D
Deputy Joan Kamholz - Grievant

Dear Mr. Bauer:

In response to your letter of June 12, 1989, I did not state to you over the phone on that date that the County acquiesces to points 1, 2 and 3 of your letter. I stated that I was not really sure what the basis was for the Personnel Committee's decision and that I would have to check my notes to see if I could give you a definite answer as to the basis for the Committee's decision.

After reviewing my notes, the only basis I can give you for the Personnel Committee's decision is as set forth if my letter of June 1, 1989, in the enclosed minutes of the meeting of May 31, 1989, and in sec. 103.13(4), Wis. Stats., -- that the grievant's remedy under the law is to place a letter in the file stating her position. In no way did the Committee rule one way or the other whether this was a disciplinary action or whether the grievance was arbitrable.

Thank you for the opportunity to clear up this mis-apprehension. In the future, should further difficulties arise in our understanding each other over the phone, I would suggest that we confine our communication to written correspondence.

Gordon Malaise
Corporation Counsel

17. That the parties' 1987-1989 Collective Bargaining Agreement contained, in relevant part, the following provisions:

ARTICLE III

MANAGEMENT RIGHTS

3.01 The Association recognizes that the County retains all rights, power and authority that it had prior to this Agreement, except as herein modified. The County has the sole right to plan, direct and control the working force, to schedule and assign police work to employees, to determine the means, methods and schedules of operation for the continuance of its operations, to establish standards and to maintain the efficiency of its employees. The County also has the sole right to require employees to observe its rules and regulations, to hire, layoff or relieve employees from duties and to maintain order and to suspend, demote, discipline, transfer and discharge employees for just cause, however, the County shall not take any action which would in any way violate the provisions of the Wisconsin Statutes and/or this Agreement. All provisions of this paragraph, relating to hiring and relieving of employees, suspension, demotion, transfer and discharge shall be in the control of the Sheriff or other appropriate County Committee.

3.02 The County has the right to assign temporarily, department personnel to any other duties at such times as emergencies threaten to endanger, or actually endanger, the public health, safety and welfare or the continuation of vital municipal services. The County shall use discretion and reason in making such temporary assignments, which shall not be continued beyond the duration of said emergency. The County has the right to determine what constitutes an emergency as expressed in this Section. The provision of Article X shall apply during the term of the emergency.

3.03 In keeping with the above, the Employer shall adopt and publish rules and regulations which may be amended from time to time consistent with the terms

of this Collective Bargaining Agreement and otherwise appropriate under the law.

. . .

ARTICLE VIII

DISCIPLINARY PROCEDURE

8.01 An employee charged with an offense justifying immediate discharge will be informed of such offense in writing at the time of discharge, and a copy thereof shall be sent to the Association. The County shall give at least one (1) warning notice in writing for other offenses not involving immediate discharge against such employee to the employee and the Association. If the offense complained of in the warning letter is not repeated within one (1) year from the date of the warning letter, then such warning letter will be deemed to have served its purpose and shall no longer be in effect.

8.02 Discharge without a warning notice by the County shall be authorized in cases of gross misconduct, including but not limited to the following:

1. Dishonesty;

2. Being under the influence of liquor or drugs while on duty;

3. Unreasonable refusal to perform assigned duties or to follow instructions;

4. Endangering life or property unnecessarily;

5. Reckless conduct on duty.

8.03 Objections to any discharge must be made within five (5) working days of said discharge. The matter shall then be discussed by the County and the Association as to the merits of the case. The employee may be reinstated under such conditions as may be agreed upon by the County and the Association. All discipline shall be for just cause, and shall be subject to appeal through the Grievance and Arbitration procedure. Such appeal shall commence at Step 2 of the Grievance Procedure.

. . .

ARTICLE XXIII

GRIEVANCE PROCEDURE

23.01 Definition: A grievance shall be defined as any matter involving the interpretation or application of the terms of this Agreement.

23.02 A written grievance shall contain a statement of the grievance and indicate the issue or issues involved, the facts relating to the grievance, the relief sought, and the section or sections of the Agreement alleged to have been violated. All grievances shall be subject to the following grievance procedure unless expressly excluded by the terms of this Agreement.

23.04 Steps of the Grievance Procedure: Grievances shall be processed in the following manner, and shall be timely filed and processed, or shall be deemed barred. (Time limits shall be exclusive of Saturdays, Sundays, and holidays set forth in this Agreement):

Step 1 In the event of a grievance, the employee shall perform his/her assigned work task and grieve thereafter. An employee, or the Association, believing a grievance exists, shall orally present the grievance to

his/her immediate supervisor outside the bargaining unit within fourteen (14) days of the date of the incident or learning of the incident. If the grievance is not settled within forty-eight (48) hours after such discussion, the grievance shall be reduced to writing and submitted to the Sheriff within five (5) days.

Step 2 The Sheriff shall meet with the grievant, and an Association rep-resentative (if the grievant so desires) in an attempt to resolve the grievance. Within seven (7) days of receipt of the grievance by the Sheriff, if not satisfied with the Sheriff's response, or if the Sheriff fails to respond, the grievant, or the Association, may further process the grievance as provided in Step 3, within five (5) days.

Step 3 The grievant, or the Association, shall present the grievance in writing to the Personnel Committee. The County Personnel Committee shall respond, in writing, to the grievant and the Association representative within ten (10) days. If the grievance is not resolved, the grievant, or the Association, shall process the grievance as set forth in Step 4, within five (5) days of receipt of the Personnel Committee's reply.

Step 4 ARBITRATION PROCESS: In the event a grievance is not settled in any of the foregoing steps, the matter may be appealed by either party to arbi-tration within five (5) days of the conclusion of the Step 3 proceedings by sending notice of intent to arbi-trate to the other party. The repre-sentatives of the parties shall each select three (3) arbitrators from the list of the staff of the Wisconsin Employment Relations Commission (WERC). From these six (6) arbitrators, five (5) names will be drawn at random. The parties will then proceed to alternately strike names from the panel until one (1) name is left. (A flip of a coin will determine who strikes first.) The parties shall jointly submit a request to the WERC for the appointment of the agreed upon arbitrator. The Association will pay the filing fee, if any. If, for any reason, the parties' request for an arbitrator is denied by the Wisconsin Employment Relations Commission, either party may submit a request to the Commission for a panel of five (5) independent arbitrators. [The parties shall alternately strike names from the panel as set forth above.] The costs of the arbitration shall be borne equally by the parties, except that each party shall be responsible for the cost of any witnesses testifying on its behalf and for costs incurred by the parties' representatives.

23.04 The time limits in this Article are maximum time limits, and grievances and disputes shall be settled immediately, whenever possible. However, the time limits may be extended by mutual agreement of

the parties in writing. Waiver by the County or the Association of any such time limits in any individual case shall not constitute a waiver of the County or the Association of any such time limits, nor the right to insist on adherence to the time limits, in any subsequent case.

23.05 The decision of the arbitrator shall be final and binding upon the parties. The arbitrator shall not have the authority to add to, detract from, or modify, in any way, the terms of this Agreement. The arbitrator shall be limited to the subject matter of the grievance and the evidence and testimony presented at the hearing. Upon mutual agreement by the parties, more than one grievance may be heard by the same arbitrator.

18. That Kamholz has filed four grievances on her own behalf during her employment in the Green County Sheriff's Department, including the overtime grievance and grievance 89-3-D, the first having been filed in 1987; that Sheriff Elmer was aware that Kamholz had filed the overtime grievance and grievance 89-3-D; that of the three employes who ultimately requested overtime for obtaining the ID photo, Kamholz, Wichelt and Hasse, only Kamholz was counselled as to the procedure for obtaining proper authorization for overtime and told that future violations would result in disciplinary action against her; that said counselling on April 3, 1989 and the memorandum of that date placed in Kamholz's personnel file was done at Sheriff Elmer's direction and was motivated in part by his displeasure with Kamholz for having filed the overtime grievance; that in filing the overtime grievance Kamholz was engaging in protected concerted activity; that the counselling of Kamholz on April 3, 1989 and the memorandum placed in her personnel file commemorating the counseling constituted discipline and contained a threat of reprisal against Kamholz for having filed the overtime grievance and was motivated, at least in part, by Sheriff Elmer's hostility towards Kamholz's having filed the overtime grievance.

19. That Sheriff Elmer's memorandum to the Department on March 14, 1989 and his letter of April 14, 1989 to Kamholz, specifically the last paragraph of that letter, had a reasonable tendency to interfere with Kamholz's exercise of her rights under Sec. 111.70(2), Stats.

20. That neither Sheriff Elmer, nor the County, refused to process grievance 89-3-D filed by Kamholz.

Based upon the foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. That by causing to be posted the memorandum of March 14, 1989, Green County, its officers and agents, interfered with Deputy Kamholz and the other employes in the bargaining unit represented by the Green County Deputy Sheriff's Association in the exercise of their rights guaranteed in Sec. 111.70(2), Stats., in violation of Sec. 111.70(3)(a)1, Stats.

2. That by Sheriff Elmer's letter to Deputy Kamholz of April 14, 1989, Green County, its officers and agents, interfered with Kamholz in the exercise of her rights guaranteed in Sec. 111.70(2), Stats., in violation of Sec. 111.70(3)(a)1, Stats.

3. That initiating and processing a grievance is protected concerted activity within the meaning of Sec. 111.70(2), Stats., and that by counselling Deputy Kamholz on April 3, 1989 and issuing a memorandum to her personnel file based at least in part on her having engaged in such protected concerted activity, Green County, its officers and agents, discriminated against Kamholz in violation of Sec. 111.70(3)(a)3, Stats., and derivatively, Sec. 111.70(3)(a)1, Stats.

4. That by causing to be posted the memorandum of March 14, 1989, and by Sheriff Elmer's letter of April 24, 1989 to Bauer, Green County, its officers and agents, did not commit a prohibited practice within the meaning of Sec. 111.70(3)(a)2, Stats.

5. That Green County, its officers and agents, did not refuse to process grievance 89-3-D filed by Deputy Kamholz, and, therefore, did not commit a prohibited practice within the meaning of Sec. 111.70(3)(a)5, Stats.

6. That the Labor Association of Wisconsin, Inc., its agent Thomas Bauer, the Green County Deputy Sheriff's Association, its officers and agents, and Deputy Joan Kamholz, did not violate Sec. 111.70(3)(b)4, Stats., by filing the complaint in Case 98.

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

ORDER 2/

1. That the alleged prohibited practices in Case 98 as to alleged violations of Secs. 111.70(3)(a)2 and 5, Stats., are dismissed in their entirety.

2. That the alleged violation of Sec. 111.70(3)(b)4, Stats., in Case 99 is dismissed in its entirety.

3. That Green County, its officers and agents, shall immediately:

(a) Cease and desist from interfering with Deputy Kamholz or any of its employes in the exercise of their rights guaranteed in Sec. 111.70(2), Stats.

(b) Cease and desist from discriminating against Deputy Kamholz or any of its employes for engaging in protected concerted activity.

(c) Take the following affirmative action which the Examiner finds will effectuate the purposes of the Municipal Employment Relations Act.

1. Immediately remove the April 3, 1989 memorandum and any other mention of the April 3, 1989 counselling session, and Sheriff Elmer's letter of April 14, 1989, from the personnel file of Deputy Kamholz.

2. Notify all of its employes in the Green County Sheriff's Department by posting in conspicuous places where employes are employed in that Department copies of the notice attached hereto and marked "Appendix A". That notice shall be signed by Sheriff Elmer and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by Green County to ensure that said notices are not altered, defaced, or covered by other material.

3. Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20)

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

Section 111.07(5), Stats.

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

days following the date of this Order, as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin this 11th day of October, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
David E. Shaw, Examiner

"APPENDIX A"

NOTICE TO ALL EMPLOYES
OF THE GREEN COUNTY
SHERIFF'S DEPARTMENT

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

1. WE WILL immediately remove the April 3, 1989 memorandum issued to Deputy Kamholz and any other mention of the April 3, 1989 counseling session from the personnel file of Deputy Kamholz.

2. WE WILL NOT discriminate against Deputy Kamholz or any other employes on the basis of their engaging in protected concerted activity.

3. WE WILL NOT in any other or related manner interfere with the rights of our employes pursuant to the provisions of the Municipal Employment Relations Act.

Sheriff Steven R. Elmer

THIS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Association filed a complaint of prohibited practices with the Commission wherein it was alleged that Green County and Sheriff Elmer had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1, 2, 3 and 5 of MERA by their actions surrounding the filing of two grievances by Deputy Kamholz. Green County subsequently filed an answer denying the allegations of prohibited practices and at the same time a cross-complaint alleging that the Association, Kamholz and Bauer had committed a prohibited practice within the meaning of Sec. 111.70(3)(b)4 of MERA by filing the complaint against the County and the Sheriff, rather than proceeding to arbitration on the second grievance that is the subject of the (3)(a)5 charge.

POSITIONS OF THE PARTIES

ASSOCIATION

The Association first asserts that the County has violated Sec. 111.70(3)(a)1, Stats., by interfering with the right of Kamholz to engage in "protected activity" within the meaning of Sec. 111.70(2), Stats. Such "protected activity" includes the right to participate in the collective bargaining process, including grievance procedures and negotiations. It is asserted that the key question to be determined is "whether the conduct of the employer reasonably tends to interfere with the employe's rights." The Association cites Monona Grove School District, Dec. No. 20700-E (Honeyman, 12/85) as holding that an employer's decision to discipline an employe for filing the grievance could be construed as interference. The Association asserts that in this case similar retaliation has occurred. In that regard, the Association notes that after reading Sheriff Elmer's memo of January 20, 1989, Kamholz considered the ID photo session to be a mandatory attendance which occurred outside of her regular scheduled shift and that, therefore, she was only required to submit an overtime request slip without obtaining prior specific approval. After Kamholz's request for overtime payment was denied, she filed a grievance on the matter. In response to the grievance Sheriff Elmer posted the memorandum of March 13, 1989 to all the employes wherein he indicated that due to the grievance demanding payment of overtime he would "likely be forced to eliminate ID's." Since Kamholz is a member of the Association and other members knew that she had filed the grievance, the loss of the ID cards was impliedly placed upon Kamholz by the Sheriff. It is asserted that further retaliation for filing the grievance was the action requiring Kamholz to attend the "counseling" session on overtime policy. While other employes had also filed similar requests, Kamholz was the only employe to receive counseling and the only difference was that Kamholz had participated in the Association and in the grievance process. Sheriff Elmer was aware of her involvement and bore animus toward her because of those activities. Kamholz was advised at the counseling session that "future violations would result in disciplinary action with the real possibility of suspension or dismissal" and a letter relative to the counseling session was placed in her personnel file. The Association also cites the Sheriff's memo of April 14, 1989 to Kamholz wherein he indicated that he considered "the numerous frivolous grievances which you have filed to be of nuisance nature and strictly for the purpose of harassment and intimidation." The Association asserts that by his actions towards Kamholz, the Sheriff attempted to chill, and did chill, her protected right to file a grievance pursuant to state statutes and the parties' Agreement.

The Association also asserts that the County committed a prohibited practice within the meaning of Sec. 111.70(3)(a)2, Stats., by interfering with the administration of the Association. In that regard the Association cites the March 14th memorandum from the Sheriff to all department personnel as an attempt to undermine LAW and the Association and Kamholz by placing the onus for discontinuing ID pictures on those entities for filing the grievance. Secondly, in his letter of April 24, 1989 to Bauer, the Sheriff made clear his contempt for Bauer and his decisions relative to filing the grievance. The letter was distributed to all members of the Association and was an intentional attempt to undermine union confidence.

Next, the Association alleges that the County discriminated against Kamholz and attempted to discourage membership in the Association in violation of Sec. 111.70(3)(a)3, Stats., by singling Kamholz out for counseling as a result of her filing the overtime grievance. The Association contends that in determining the motivation of the employer in its decision to discipline an employe the Commission must look beyond any alleged valid reason for the actions to assure that they are not pretext for the employer's conduct. The Association cites the decision of the Wisconsin Supreme Court in Muskego-Norway Consolidated Schools Joint School District #9 vs. WERB, 35 Wis.2d 540, 562

(1967), holding that "an employe may not be fired when one of the motivating factors is his union activities, no matter how many other valid reasons exist for his firing." The Association also cites a number of Commission cases applying that decision. It is asserted that the County and the Sheriff were aware of Kamholz' position in the Association and that the County committed a prohibited practice within the meaning of Sec. 111.70(3)(a)3, Stats., when with discriminatory intent it retaliated against Kamholz for filing and processing her overtime grievance. The Sheriff's animosity towards Kamholz for filing the grievance is indicated in his letter of response dated March 13, 1989 wherein he states: "Not one other employee of the department has indicated that they felt entitled to overtime compensation or that they were mandated to attend the January 30, 1989 session." As a result of that animus and in retaliation for filing the grievance, Kamholz was forced to attend counseling on the overtime policy and a letter was placed in her personnel file relative to the counseling. While other employes submitted similar requests, Kamholz was the only employe to receive the counseling and Kamholz was also the only Association member to file a grievance on the overtime. The Association also asserts that the counseling session constituted a disciplinary action without just cause in violation of the parties' Agreement as well as retaliation by the County against Kamholz for filing the overtime grievance. The Association cites the Sheriff's letter to Kamholz dated April 14, 1989 as indicating his continuing animosity toward her.

Lastly, the Association asserts that the County violated the parties' Collective Bargaining Agreement by denying Kamholz the right to process her grievance through the established grievance procedure. The Association takes the position that the counseling session constituted discipline without just cause in violation of the parties' Agreement. The grievance was initially filed by Kamholz on April 14, 1989, but was not signed and Kamholz attempted to resubmit the grievance to the Sheriff on April 18, 1989, at which time the Sheriff stated he would not accept the grievance. Kamholz signed and dated the grievance and left it on the Sheriff's secretary's desk. The grievance, 89-3-D, was reviewed by the County's PLR committee on May 31, 1989 at which time the grievance was denied. The County's then Corporation Counsel, Gordon Malaise, sent a letter to Kamholz on June 1, 1989 advising her of the denial of the grievance and of her right to submit a written statement stating her position to be attached to the letter in her personnel file of April 3, 1989. According to the Association, Bauer spoke to Malaise over the telephone on June 12, 1989 and in that conversation Malaise stated that the issue addressed in grievance 89-3-D was not being recognized by the County as a grievance and therefore, was not arbitrable. Bauer sent a letter of that date to Malaise confirming their telephone conversation and Malaise responded with his own letter dated June 21, 1989 denying such a conversation had occurred. The Association contends that in reliance upon his telephone conversation with Malaise and his confirmation letter of that conversation, Bauer took the position that the only alternative left to the Association was to file a prohibited practice complaint against the County pursuant to Sec. 111.70(3)(a)5, Stats.

In its reply brief, the Association asserts that the County's reference to the nature of the circumstances in the matter as "trivial" or "petty" do not recognize the true issue in the case, i.e., the discrimination, intimidation and interference by the Sheriff against Kamholz, the Association and LAW. The Association also disputes that Kamholz violated department procedure on overtime and asserts that both Kamholz and Sergeant Wichelt understood the photo session to be mandatory, and argues that if the Sheriff intended otherwise, he failed to clearly communicate his intent in his memo. The Association also asserts that there is a difference between the "counseling" that Kamholz received on April 3, 1989 and other counseling sessions that had occurred in that Kamholz was counseled as a result of her having filed the overtime grievance and it was done in retaliation for that activity.

COUNTY

The County notes that it has denied all allegations of wrong doing and has filed a counter complaint against both the Association and Kamholz alleging that the matters complained of by those parties were properly the subject of the grievance procedure and that therefore they violated Sec. 111.70(3)(b)4, Stats., by filing the prohibited practice complaint, rather than filing for arbitration as required by the parties' Agreement.

With regard to the Association's complaint of prohibited practices against the County, the County asserts that the dispute revolves around the fact that Kamholz was required to attend a two minute meeting with Chief Deputy Conlin and Sergeant Wichelt at which the Department's overtime rule was explained. That rule was established years before and expressly requires an employe to obtain pre-authorization for overtime. If Kamholz had followed that established rule by obtaining authorization prior to having her photo taken, she would have been reminded that the Sheriff did not intend for her to incur overtime for that purpose. According to the County, Kamholz's testimony as to her understanding that an individual was not required to get specific approval of the overtime where he/she was required to participate in a work related responsibility while off duty and that she considered the ID photo session to

be mandatory, reveals that management was correct in concluding that she did not understand the overtime rule and how it was intended to work. The Sheriff testified that he wanted her to know and understand the rule and to realize that future violations could subject her to discipline. It is asserted that the reason for counseling is to advise an employe as to how the rule works so that there will be no further violations in the future. Such counseling is certainly reasonable and no harassing motive should be attached to it. It is asserted that Kamholz went into the meeting with Conlin with a chip on her shoulder and solely for the purpose of filing yet another grievance. This is apparent from her notes that she took of the meeting, placing herself in a defensive position and displaying her poor attitude.

With regard to the alleged union animus and discrimination, the County asserts that while the Sheriff's annoyance with Kamholz is indicated in his letters, that is not the same thing as being guilty of the various statutory violations alleged in this case. In reviewing the evidence as to motive, the County asserts there is a number of "smoking guns" that establish the falsity of the Association's allegations. The County contends that the Association alleges that the Sheriff discriminated against Kamholz because of her past and present union involvement, asserting that there were three employes who applied for overtime because of the ID photos, but that Kamholz had to file a grievance in order to get paid while the others got paid without any problem. This supposedly being clear proof of the Sheriff's anti-union bias. The County contends that the actual documents in the record indicate that is not the case. The two other employes were not paid until after they were instructed to put in for overtime by the Sheriff after the date payment to Kamholz was approved. Kamholz testified that she was certain that both Hasse and Wichelt put in for overtime before she filed a grievance. The County asserts that that testimony is "the entire foundation of virtually all of the various claims" made by the Association in alleging that the Sheriff discriminated against Kamholz because of her union activities. It is asserted that the documentary evidence clearly demonstrates that Kamholz was wrong. Kamholz's original request for overtime was dated January 31, 1989 and her grievance was filed February 13, 1989. The Sheriff's letter agreeing to pay the overtime was dated March 13, 1989 and therein he instructed Kamholz to resubmit her overtime request "if you still feel your actions so warrant." On March 14, 1989 the Sheriff posted a memorandum to all department personnel indicating that since the County was paying the grievance any other employe who had their photo taken while off duty was also authorized compensation for their time. Both Hasse and Wichelt's request for overtime were dated after the date of that memo, Hasse's request being dated March 15, 1989 and Wichelt's March 18, 1989. Thus, the proof relied upon by the Association to show discrimination is contrary to the facts.

The Association's justification for not following the grievance procedure by filing for arbitration for grievance 89-3-D is based on their claim that in a June 12th telephone conversation between then Corporation Counsel Malaise and Bauer, Malaise is to have indicated that if the grievance was taken to arbitration, the County would not participate. Supposedly, on that basis the Association chose to file the instant prohibited practice charges, however, the County asserts that the conversation described by Bauer never happened and is simply a pretext for failing to follow the parties' Agreement. The County contends that the Association's assertion that it chose to file the prohibited practice based upon the County's position as set forth in the conversation between Malaise and Bauer on June 12, 1989, is belied by the fact that the prohibited practice complaint against the County and the Sheriff were notarized on June 7, 1989 and filed with the Commission on June 8th, four days before the date of the conversation upon which the Association relied as justifying their decision to file charges in lieu of pursuing the grievance to arbitration.

The County contends that the Association and Kamholz violated Sec. 111.70(3)(b)4, Stats., by filing the prohibited practice charges against the County and the Sheriff rather than pursuing the grievance procedure as required in the labor agreement. It is undisputed that Kamholz filed a grievance concerning the counseling on April 3rd and the memorandum regarding that counseling, alleging it constituted discipline without just cause. While the Sheriff did feel the grievance procedure had not been properly followed, that was not a consideration in the ultimate denial of the grievance according to the County. In response to the grievance, the Sheriff wrote Kamholz and informed her of the procedural defects, but he also responded in great detail to the substance of the grievance on the merits. Bauer's letter of April 20, 1989 to the Sheriff makes it clear that the Association considered the Sheriff to have denied the grievance and indicated it would be processing the grievance to Step 3. The Union timely appealed the grievance to Step 3, the County's PLR Committee, and the minutes of the May 31, 1989 PLR Committee meeting reveal that all were present at that step of the grievance procedure, that grievance 89-3-D was the subject of the meeting and that the relief requested by the Association was discussed. The minutes also show that after hearing the matter in closed session, the PLR Committee voted to deny the grievance and instructed Malaise to respond to the grievant in writing informing her of her right to place her written comments regarding the matter in her personnel file.

As to the Association's position that it did not follow the grievance

procedure to the next step since it would have been a waste of time because the County would somehow have not permitted this to happen based on Bauer's conversation with Malaise, the County asserts that such an explanation makes no sense and is contrary to the facts. Malaise's letter of June 1, 1989 to Bauer indicating that the PLR Committee had denied the grievance makes it clear that the Corporation Counsel was attempting to settle the matter "short of arbitration" by offering Kamholz the opportunity to file a written statement in her personnel file explaining her position. According to the County, the letter makes it clear that Malaise assumed that if the County's offer of settlement was not accepted, he expected that the Association would proceed with arbitration. The County also asserts that Bauer's letter of June 12th to Malaise appeared to indicate that the Association intended to pursue the grievance to arbitration. Malaise responded to Bauer's letter denying certain assertions Bauer made in the letter. The County contends that Bauer made those assertions in order to provide some sort of explanation as to why he chose not to follow the grievance procedure, but rather file the prohibited practice charges. Another explanation the County offers is that the charges were filed because the time to file for arbitration had expired. The Agreement provides that a request for arbitration must be processed within five days of receipt of the PLR Committee's reply. That reply was dated June 1, 1989 and Bauer's letter to Malaise was dated June 12th, at which point the time to file for arbitration had already expired. The County also asserts that even if Bauer did think that the County had determined that the grievance was not arbitrable, this does not justify the Association's failure to follow the grievance procedure set forth in the parties' Agreement. It is asserted that the Association had the obligation to arbitrate the grievance under the express terms of the Agreement and that if it had done so, the County would have had to either participate in the arbitration or deal with the default ruling. The County asserts that there are no cases interpreting Sec. 111.70(3)(b)4 or Sec. 111.70(3)(a)5, Stats., but cites City of Green Bay, Dec. No. 18053-B, 18187-B (Greco, 1980) as providing some relevant discussion on the subject. In that case a union had filed a grievance regarding a rate of pay and the employer had initially refused to participate in the arbitration and filed a complaint of prohibited practices against the union for attempting to arbitrate a rate when there was no such rate set forth in the labor agreement. The Examiner ruled that the grievance filed by the union was the proper subject of the arbitration procedure and cited arbitral authority that the grievance procedure as described in the contract is for all grievances, regardless of the merit they are deemed to have. It is asserted that here the Association and Kamholz chose to disregard the grievance procedure and in lieu thereof filed charges against the County and Sheriff when they had "a clear and concise remedy which had been negotiated between the parties and set forth in the contract." It is asserted by the County that if Sec. 111.70(3)(b)4, Stats., is to have any meaning at all, the Association and Kamholz must be required to use the grievance arbitration procedure to settle this dispute and resort to the prohibited practice as a means of having the grievance heard must be held to be a violation of this section.

In conclusion, the County asserts that the burden of proof is on the Association to prove every allegation made and that the evidence offered in that regard falls short of the mark. It is also asserted that there is no evidence that the Sheriff had it in for Kamholz because of her union activities, the County arguing that if that were the case, the Sheriff would have taken similar action against other leaders in the Association, of which there is no evidence, and further, Kamholz has never been disciplined for anything while she has been a member of the department. The County contends that the record establishes a pattern of abuse by the Association that must be stopped, and that it should not be subjected to grievances over $5.00 of overtime or a few minutes of counseling. In order to eliminate future abuse of that kind the County requests that the Association and Kamholz be ordered to cease and desist from all future intentional violations of the Agreement; that they be required to make a public statement indicating that they will comply with the terms and provisions of the parties' Agreement in the future; and that they be required to reimburse the County for costs and attorneys fees.

DISCUSSION

(3)(a)1

The Association ultimately has asserted that the March 14, 1989 memorandum to "All Department Personnel," the April 3, 1989 "counseling" of Kamholz by Chief Deputy Conlin and the April 3rd memorandum placed in Kamholz's personnel file and the Sheriff's letter of April 14, 1989 interfered with the rights of Kamholz and the Association to engage in protected concerted activity, i.e., to file a grievance.

Section 111.70(3)(a)1, Stats., provides that it is a prohibited practice for a municipal employer individually or in concert with others:

> To interfere with, restrain or coerce employes in the exercise of their rights guaranteed in sub. (2).

Subsection (2) provides:

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

The Commission has held the following in regard to establishing a violation of Sec. 111.70(3)(a)1, Stats.:

> The Complainant has the burden of proving by a clear and satisfactory preponderance of the evidence that the statements made by the District's agents contained either some threat of reprisal or promise of benefit which would tend to interfere with, restrain, or coerce municipal employes in the exercise of rights guaranteed by Sec. 111.70(2), Stats. It is not necessary to prove that Respondent intended to interfere with or coerce employes or that there was actual interference. Interference may be proved by showing that the Respondent's conduct had a reasonable tendency to interfere with the employer's (sic) right to exercise MERA rights. In each instance, the remarks as well as the circumstances under which they were made must be considered in order to determine the meaning which an employe would reasonably place on the statement. The same statement made in two different circumstances might be coercive in one and not in the other. 3/

Hence, although the Association alleges that the Sheriff's actions were in retaliation for Kamholz's having filed the overtime grievance and actually interfered with her protected rights in that regard, it is not necessary to find actual interference in order to find a violation, it is sufficient to establish that the actions had a reasonable tendency to interfere.

The March 14, 1989 memorandum posted by the Sheriff was addressed to "All Departmental Personnel" and directly identified the grievance as the cause for management's likely decision to eliminate the ID cards. The memorandum indicated management did not feel there was merit to the grievance, but that it would be granted "rather than debate the issue further," and then ended by stating that they regretted that they might have to take such action (discontinuing the ID cards or going to the old form) but felt they "have been given little alternative." The Examiner has concluded that the memorandum contained a threat of reprisal for filing the grievance, and, as set forth in Finding of Fact 19, that it had a reasonable tendency to interfere with the rights of Kamholz and the other employes under Sec. 111.70(2), Stats.

The "counseling" session Kamholz had on April 3, 1989 with Chief Deputy Conlin and the memorandum of that date placed in her personnel file cannot be viewed in isolation, instead they must be considered in the context of the County's prior and subsequent conduct and remarks. In this case the circumstances surrounding the counseling session and memorandum include the March 14th memorandum discussed above and the Sheriff's letter of April 14, 1989 to Kamholz. Both of those documents express the Sheriff's hostility toward Kamholz's filing of the overtime grievance and her position in that grievance, and it has been concluded that the counselling and memorandum stemmed from her having requested the overtime payment and filed a grievance when it was denied. The Sheriff's letter of April 14, 1989 to Kamholz openly expressed his hostility towards her grievance activity, both as to the overtime grievance and the grievance she initially filed on the April 3rd counselling, especially by the following statement:

> Finally, I must place you on notice that we consider the numerous frivolous grievances which you have filed to be of nuisance nature and strictly for the purpose of harassment and intimidation. The fact that we have had eleven grievances filed in four years, nine of which have been filed by the same two individuals and five of which have been filed by you alone speaks for itself.

3/ Beaver Dam Unified School District, Dec. No. 20283-B (WERC, 5/84) at page 5 (footnotes deleted).

Such a statement from a person in a position of authority to a subordinate infers a threat of reprisal for engaging in protected concerted activity and as such has a reasonable tendency to interfere with Kamholz's exercise of her rights under Sec. 111.70(2), Stats. Under the circumstances, the counseling and memorandum had a reasonable tendency to interfere with Kamholz's exercise of her right to file and process a grievance. Moreover, contrary to the County's assertion, the memorandum went beyond simply informing Kamholz as to departmental procedure and constituted a warning letter, as will be discussed below.

In sum, it is concluded that the memorandum of March 14, 1989, the counseling session of April 3, 1989 and the related memorandum of that date, and the Sheriff's letter of April 14, 1989, had a reasonable tendency to interfere with Kamholz's engaging in protected concerted activity and, therefore, constituted interference under Sec. 111.70(3)(a)1, Stats.

(3)(a)2

The Association has also asserted that the March 14, 1989 memorandum and the Sheriff's letter of April 24, 1989 to Bauer were attempts to undermine LAW, the Association and Bauer and, therefore, interfered with the administration of the Association in violation of Sec. 111.70(3)(a)2, Stats. That provision makes it a prohibited practice for a municipal employer "To initiate, create, dominate or interfere with the formation or administration of any labor or Employe organization . . ." The Commission has held that "Domination requires an employer's active involvement in creating or supporting a labor organization which is representing employes." 4/ "Interference with the administration" of a union has been held to differ from "domination" only in the degree of control. 5/ In either case it must be shown that "the offensive conduct threatened the independence of the union as an entity devoted to the Employes' interests as opposed to the Employer's interest." 6/ While the memorandum has been found to contain a threat of reprisal and the letter of April 24th rebuked Bauer, neither the memorandum of March 14th nor the letter to Bauer threatened the independence of the Association so as to turn it into a proponent of the County's interests. Therefore, they do no rise to the level required by Sec. 111.70(3)(a)2, Stats., and hence, no violation has been found in that regard.

(3)(a)3

The Association contends that the "counseling" session on April 3rd and the memorandum of that date placed in Kamholz's personnel file constitute disciplinary action taken against Kamholz in retaliation for filing her overtime grievance and that she was singled out in that regard despite the fact that two other employes also requested overtime. The County contends that Kamholz was not disciplined and that the record establishes that the other two employes did not request overtime payment for the ID photo session until after the Sheriff had approved payment to Kamholz in response to her grievance and had posted the March 14th memorandum indicating he would approve such requests from other employes.

In order to establish discrimination within the meaning of Sec. 111.70(3)(a)3, Stats., the Association must prove, by a clear and satisfactory preponderance of the evidence, that Kamholz was engaged in protected activities, that the County was aware of and hostile toward those activities, and that the decision to counsel Kamholz was motivated, at least in part, by its hostility toward her participation in such activities. 7/ That the Sheriff might have had a basis for counseling Kamholz other than her filing the grievance does not avoid a finding of a violation of Sec. 111.70(3)(a)3, Stats., as long as the action was motivated at least in part by his animus toward her engaging in such protected concerted activities. 8/

4/ Kewaunee County, Dec. No. 21624-B (WERC, 4/84), at 6.

5/ Western Wisconsin V.T.A.E. District, Dec. No. 17714-B (Pieroni, 6/81), aff'd by operation of law, Dec. No. 17714-C (WERC, 7/81) and cited with approval in Kewaunee County, Dec. No. 21624-B at 6, n.10.

6/ Ibid, at 11.

7/ Milwaukee County (Sheriff's Department), Dec. No. 24498-A (Jones, 1/88), aff'd, Dec. No. 24498-B (WERC, 7/88).

8/ Ibid., Citing Muskego-Norway Consolidated Schools Joint School District #9 vs. WERB, 35 Wis.2d 540, 562 (1967).

The County asserts that Kamholz was the only employe counselled regarding the Department's overtime procedure because she was the only employe who felt she was entitled to overtime until the March 14th memorandum was posted, and that she was counselled, not disciplined. The County is correct that the record indicates that Hasse and Wichelt did not request overtime payment for attending the ID photo session until after the March 14th memorandum was posted. Under the circumstances in this situation, however, that is not sufficient to convince the Examiner that Kamholz was not "counseled" in part due to her having filed the overtime grievance and the Sheriff's hostility toward her having done so. As stated previously, both the memorandum of March 14th and the Sheriff's letter of April 14th expressed a hostility toward the overtime grievance Kamholz had filed, the latter especially indicating such hostility toward Kamholz's grievance activity. Further, contrary to the County's assertions, the action on April 3rd went beyond mere "counseling." The record indicates that Conlin explained the Department's overtime policy to Kamholz; however, he then stated (as indicated in the April 3rd memorandum placed in her file) that "future violations would result in disciplinary action with the real possibility of suspension or dismissal." As the Sheriff conceded on cross-examination, the reference to "future violations" infers there has been a violation. The wording also goes beyond explaining the procedure and threatens suspension or dismissal if the employe violates the procedure again, in other words, it is a warning that has been reduced to writing and placed in Kamholz's personnel file. Regardless of how the County has characterized the action, it constituted a warning, i.e., discipline, and the Examiner concludes from the March 14th memorandum and the Sheriff's letter of April 14th, that it was motivated at least in part by the Sheriff's hostility towards Kamholz's grievance activity. Therefore, the Examiner has found a violation of Sec. 111.70(3)(a)3, Stats.

(3)(a)5

The Association contends that the County has refused to process grievance 89-3-D to arbitration in violation of the parties' collective bargaining agreement. The record does not support the Association's contention in this regard. While the Sheriff appeared to have taken the view that the grievance was not procedurally arbitrable, he did not refuse to process the grievance and it in fact was processed to Step 3 before the County's PLR Committee where it was again denied. As the County notes, the Association's complaint was drafted on June 1 and was notarized on June 7, 1989, days before Bauer's conversation with the County's Corporation Counsel, Malaise, to which Bauer refers in his letter of June 12th and upon which he based his conclusion that the County would not participate in arbitration. Also, by the time of that alleged conversation, June 12, 1989, the time for requesting arbitration under Article 23.03, Step 4, of the parties' Agreement, had passed without the Association having requested arbitration. Those points aside, there is also not sufficient evidence in the record to establish that the County ever actually refused to participate in arbitration on grievance 89-3-D, or that had the Association timely requested arbitration on grievance 89-3-D, that it would have been engaging in a futile effort. It appears instead that Bauer chose to assume the County would refuse to participate in arbitration if the Association requested to proceed, rather than actually attempting to proceed and see how the County would respond.

Therefore, the Examiner has concluded that the Association has failed to sustain its burden in proving a violation of Sec. 111.70(3)(a)5, Stats., and that charge has been dismissed.

(3)(b)4

The County has contended that the Association, Bauer and Kamholz violated the parties' Agreement by filing their complaint of prohibited practices against the County, rather than following the Agreement and processing the grievance through the contractual grievance and arbitration procedure, and thereby violated Sec. 111.70(3)(b)4, Stats. Having concluded that the County's actions violated Secs. 111.70(3)(a)1 and 3, Stats., the Examiner cannot then conclude that by filing the complaint the Association committed a prohibited practice. The relief to which an employer would be entitled where the union filed a prohibited practice charge alleging a violation of contract without attempting to follow the parties' contractual grievance and arbitration procedure would be to refuse to assert the Commission's jurisdiction over the contractual dispute and to dismiss the charge. As to the alleged violations of Secs. 111.70(3)(a)1, 2 and 3, Stats., the Association is not required to pursue such charges through the grievance and arbitration procedure. Also, a resolution of grievance 89-3-D under that procedure would not resolve the alleged statutory violations in this case.

In this case the only contractual violation the Association is deemed to have asserted is the refusal to arbitrate charge and that has been dismissed. Under the circumstances, that is the only relief to which the County is

entitled and no statutory violation has been established by the Association's filing of its complaint. Hence, the (3)(b)4 violation has been dismissed.

Dated at Madison, Wisconsin this 11th day of October, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
David E. Shaw, Examiner