

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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| LOCAL NO. 774-D, AFSCME, AFL-CIO, | : | |
| GOLDEN AGE MANOR EMPLOYEES, | : | |
| | : | |
| Complainant, | : | Case 57 |
| | : | No. 42372 MP-2241 |
| vs. | : | Decision No. 26127-A |
| | : | |
| POLK COUNTY (GOLDEN AGE MANOR), | : | |
| | : | |
| Respondent. | : | |
| | : | |

Appearances:

Ms. Margaret McCloskey and Mr. James Ellingson, Staff Representatives, Wisconsin Council 40, AFSCME, 1203 Knollwood Court, Altoona, Wisconsin 54720, on behalf of the Complainant Local No. 774-D, AFSCME, AFL-CIO, Golden Age Manor Employees.
Mulcahy & Wherry, S.C., Attorneys at Law, 21 South Barstow, P.O. Box 1030, Eau Claire, Wisconsin 54703, by Ms. Kathryn J. Prenn, on behalf of the Respondent Polk County.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The above-named Complainant, Local No. 774-D, AFSCME, AFL-CIO, Golden Age Manor Employees, hereinafter the Complainant, having, on June 19, 1989, filed a complaint with the Wisconsin Employment Relations Commission, hereinafter Commission, wherein it was alleged that Respondent, Polk County, hereinafter Respondent, had committed unfair labor practices within the meaning of Sections 111.70(3)(a)1, 2 and 3, Stats., of the Municipal Employment Relations Act (MERA); and the Respondent having, on September 5, 1989, filed an answer, wherein it denied that it committed any prohibited practices; and the Commission having appointed David E. Shaw, a member of its staff to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5) of the Wisconsin Statutes; and a hearing on said complaint having been held at Balsam Lake, Wisconsin on September 20 and November 15, 1989; and the parties having filed post-hearing briefs herein by February 7, 1990; and the Examiner, having considered the evidence and the arguments of the parties and being fully advised of the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Local No. 774-D, AFSCME, AFL-CIO, Golden Age Manor Employees, hereinafter the Complainant, is a labor organization with its principal offices located at 1203 Knollwood Court, Altoona, Wisconsin 54720; and that at all times material herein James Ellingson was the District Representative representing Complainant.

2. That Polk County, hereinafter the Respondent, is a municipal employer with its principal offices located at 914 First Avenue North, Balsam Lake, Wisconsin 54810; that the Respondent maintains and operates the Golden Age Manor nursing home located in Amery, Wisconsin; that at all times material herein Gary Taxdahl has been the Administrator of Golden Age Manor; that at all times material herein Helen Leibl has been the Assistant Administrator at Golden Age Manor; that at all times material herein Fern Skoug has been the Director of Nurses at Golden Age Manor and as such is the immediate supervisor of the employes in the Nursing Assistant classification at Golden Age Manor; that at all times material herein Carolyn Drinkman has been the Bookkeeper at Golden Age Manor; and that at all times material herein Carl McCurdy has been the Chairman of the Respondent's Personnel Committee.

3. That Marilyn Niles was employed by Respondent as a Nursing Assistant for approximately five and one-half years prior to her leaving Respondent's employ in July of 1989; that Niles was President of Complainant from July of 1988 to July of 1989 and handled all of the grievances for the Complainant that arose during that period; that Karen Maxon was employed by Respondent for approximately fourteen and one-half years prior to her leaving the Respondent's employ on April 30, 1989; that Maxon was Complainant's President prior to Niles and was Complainant's Vice-President while Niles was president and was on Complainant's Bargaining Committee; that Helen Saleh has been employed by the Respondent for approximately ten years as a Nursing Assistant; that Saleh became the Steward for Complainant sometime in 1987; that Ellen Gilchrist-Hedges has been employed by the Respondent for approximately two years and is currently the President of the Complainant; that Jerome Greaner had been employed by Respondent in the maintenance department at Golden

Age Manor until April of 1989 and had been in the bargaining unit represented by the Complainant, but had not been a member of Complainant; and that Greaner had worked nights and weekends at Golden Age Manor.

4. That the 1988-1989 Collective Bargaining Agreement between Complainant and Respondent, in part, contained the following provisions:

ARTICLE II - MANAGEMENT RIGHTS

Section 2.01 The Union recognizes the lawful management rights repose in the County which include:

- A. To direct all operations of the County;
- B. To establish reasonable work rules;
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- D. To suspend, demote, discharge and take other disciplinary action against employees for just cause;
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- F. To maintain efficiency of County government operations;
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- I. To determine the methods, means, kinds, and amounts of services to be performed as pertains to County government operations, and the number and kinds of classifications to perform such services and to contract out for goods and services where the work force is not affected or if the work force is affected, there must be a showing of substantial savings to the County;
- J. To take whatever action is necessary to carry out the functions of the County in situations of emergency. Whether or not the Employer has been reasonable in the exercise of these management rights, A through J, shall be subject to the provisions of Article IV.

. . .

ARTICLE XXVIII - DISCIPLINE - DISCHARGE

Section 28.01 The parties recognize the authority of the Employer to discipline, discharge, or take other appropriate disciplinary action against employees for just cause.

Section 28.02 The following shall be sequence of disciplinary action:

- A. Oral or written reprimand;
- B. Suspension;
- C. Discharge.

The above sequence of disciplinary action need not apply in cases where the infraction is considered just cause for immediate discharge.

Section 28.03 Any employee who alleges that such action was not based on just cause may appeal at any step in the above sequence. Said employee shall be entitled to the presence of a designated grievance representative at any investigatory interview (including informal counseling) if he/she requests one and if the employee has reasonable grounds to believe that the interview will be action to support disciplinary action against him/her.

Section 28.04 If any disciplinary action is taken against an employee, both the employee and the Union will receive copies of this disciplinary action.

. . .

5. That on July 28, 1988 Saleh received a personal phone call while at work from her daughter in Boston, Massachusetts and the next day received another personal phone call from her daughter while at work; that the phone call Saleh received from her daughter on July 28, 1988 was in regard to what to do for a person living in the same house with her daughter who had overdosed on drugs, and was of an emergency nature; that the phone call she received from her daughter on July 29, 1988 was to let Saleh know what had happened and was not of an emergency nature; that on July 29, 1988 Skoug issued a "Job Performance Evaluation" as to Saleh wherein Saleh was found to be "above average" with regard to "quantity of work," and "attitude and relationships

with others," and "satisfactory" with regard to "quality of work," "personal appearance," "work habits" and "dependability," and was given an "overall rating" of "satisfactory"; that under the sections of the evaluation entitled "Quality of Work" and "Rater's Comments and Recommendations Regarding Outstanding Performance, Improvements, or Training Needed, Promotability, etc.," Skoug included the following remarks: "Too many personal calls being received"; that Skoug discussed the evaluation with Saleh on July 29, 1988 and Saleh informed Skoug as to the nature of the phone calls she had received at work from her daughter and Skoug indicated to Saleh that she understood the situation; that Saleh noted the following on the evaluation under "Comments of Employee": "There has been an emergency situation in the family and my daughter found it necessary to call long distance from Boston Ma (sic) two days in a row. 7-28 & 7-29"; that Saleh was aware of a policy at Golden Age Manor that employees are not to receive personal phone calls at work unless the call is of an emergency nature; that said policy has not consistently been enforced; that sometime in August of 1987 there had been a situation involving a misunderstanding with regard to a personal call at work that Saleh never actually received, but which allegedly had to do with her private business, and which situation was resolved; that the evaluation Saleh received on July 29, 1988 was placed in her personnel file; that said evaluation was approximately the second or third evaluation Saleh had received during her employment at Golden Age Manor and the first she had received in a number of years; that evaluations are rarely, if ever, done on an annual basis and are at times used as a form of reprimand; that said evaluation of Saleh was triggered by her having received the personal phone calls on July 28 and 29, 1988 and Taxdahl's complaint to Skoug in that regard; that Saleh filed a grievance with regard to her July 29, 1988 evaluation; that the July 29, 1988 evaluation of Saleh was not motivated in part by the Respondent's hostility toward her engaging in protected concerted activity; and that said evaluation did not have a reasonable tendency to interfere with, restrain or coerce Saleh or other employees represented by Complainant in the exercise of their rights under Sec. 111.70(2), Stats.

6. That late in 1988, Carolyn Drinkman reported an incident in the break room to Taxdahl; that Drinkman told Taxdahl that she was on her coffee break in the break room when another employe asked her a question regarding the effect of the employe's change in work status on her leave benefits and that Niles loudly responded to the effect that she thought it was a dirty thing for a boss to do and that Drinkman was so upset that she left the break room; that sometime in late 1988 or early January of 1989 Jerome Greaner called Taxdahl at home on a Saturday to report an incident involving Niles' using foul and obscene language in the break room in making a loud comment about the management's treatment of employes at Golden Age Manor.

7. That on or about December 28, 1988 Taxdahl and Leibl met with Niles, Maxon, Saleh and another employe, Geneva Phelps, for the purpose of discussing pending grievances; that at said meeting a grievance involving the employe Darilyn Richardson and a grievance filed by Phelps alleging the use of volunteers (Green Thumbers) to do bargaining unit work were discussed; that during said meeting Taxdahl denied the Richardson grievance as untimely and the Green Thumber grievance was resolved; that during the course of said meeting Niles and Taxdahl grew angry with each other and Niles grew angry and loud in her demeanor; that Taxdahl told Niles he was going to write her up because of her bad attitude and that he wanted to talk to her about that after the meeting on the grievances; that after the meeting on the grievances was over Taxdahl indicated he would only talk to Niles and one other person from the Complainant and Saleh and Phelps then left and Maxon stayed; that Taxdahl told Niles that she had a bad attitude, that her conduct had caused other employes to leave the break room, that she was not working enough hours because she used vacation and sick leave as she earned it and that she was not capable of doing her job in therapy; that Taxdahl complained about the number of grievances that had been filed; and that Niles denied Taxdahl's allegations.

8. That subsequent to the meeting with Niles on December 28, 1988, Taxdahl discussed Niles' conduct and attitude with her immediate supervisor, Skoug; that in said discussion Taxdahl indicated he felt that Niles was promoting what he felt were frivolous grievances and directed Skoug to issue Niles a written reprimand regarding her attitude and promoting frivolous grievances; that on January 4, 1989, Skoug and Taxdahl met with Niles and gave her a written reprimand signed by both of them that included the following:

EXPLANATION OF OFFENSE:

This is to inform above named employee of noticable (sic) poor attitude in regard to G.A.M. Per report from Administrator has been creating disharmony among some employes, also tends to promote frivolous grievances;

. . .

This warning will be made a part of your record. The issuance of further warnings may subject you to disciplinary action such as suspension or discharge.

and that Niles refused to sign the written reprimand.

9. That after the December 28, 1988 meeting with Taxdahl, but before the January 4, 1989 meetings, Niles contacted Complainant's representative,

Ellingson, regarding her conversation with Taxdahl at the December 28th meeting; and that Ellingson sent Taxdahl the following letter dated January 8, 1989:

Gary Taxdahl, Administrator
Golden Age Manor
220 Scholl
Amery, Wisconsin 54001

RE: Recent Threat to Discipline Marilyn Niles
President of Local #774-D

Dear Mr. Taxdahl:

I was recently informed that you threatened at a Union/Management meeting to have Marilyn's supervisor write her up for the "bad attitude" that she showed at that meeting.

I want to stress that Wisconsin Law 111.70 treats Unions and their officers as equals to Management in negotiations and in the processing of grievances. 111.70 also provides penalties for Employers that threaten or harass Union officers.

It is my sincere hope that such an incident will not occur again.

Marilyn has correctly noted in her conversations with you that you have caused, through your actions, a number of grievances to be filed. Management acts - the Union reacts. If you are concerned that the Union is filing a large number of grievances then you should review the actions that occur that lead to those grievances.

Sincerely,

James A. Ellingson /s/
District Representative

10. That Taxdahl sent Ellingson the following letter dated January 12, 1989:

James Ellingson
AFSCME
P.O. Box 62
Rice Lake, WI 54868

Re: Disciplinary Action of Marilyn Niles
Individual Contracts

Dear Mr. Ellingson;

Before you send me any threatening letters, you better get your facts straight.

- 1) Marilyn Niles was given a written warning about her bad attitude, because of reports I have received from union and non-union employees about how she runs Golden Age Manor down, states that individuals are being "screwed" and other derogatory statements while on the floor or in the break room.
- 2) At a prior meeting we discussed the newest grievances and there was more than one outburst by her. This last meeting was for disciplinary action only, and not connected with any prior or present meeting, but because of her continual outbursts, I instructed her that if she could not control herself, she could immediately punch-out for the rest of the day.
- 3) She was informed that all employees are disciplined equally and that she is no exception.
- 4) I informed her that I had a good working relationship with the 3 prior presidents and never had the lack of cooperation as I have had with her.
- 5) Marilyn Niles was treated as a subordinate because it was for a written disciplinary action not negotiations or processing of a grievance.
- 6) I have employee's who have worked the same position for months to 1-1/2 years filing grievances about the

original job posting. Now you tell me about action and reactions. Why would someone file a grievance 1-1/2 years after working a job that hasn't changed since they started it.

Finally, in your other letter regarding individual contracts, we have no idea what you are referring to. The only form that we can possibly think of is the "New Employee" or "Change Status" form which is enclosed.

Sincerely,

Gary Taxdahl, NHA /s/
Administrator

11. That on or about March 17, 1989, Skoug told Niles to go to Taxdahl's office to meet with him and Saleh accompanied Niles to Taxdahl's office; that at said meeting Niles was told by Taxdahl that, based on the advice of Respondent's attorney, they had rewritten the written reprimand Niles received on January 4, 1989; and that Taxdahl then gave Niles the following revised written warning for "Improper Conduct":

Revised Written Warning from 1/4/89

EXPLANATION OF OFFENSE:

This is to inform above named employee of noticable (sic) poor attitude in regard to GAM. Per report from Administrator employee was reported from union and non-union employees about how she runs GAM down, states that individuals are being "screwed" and other derogatory statements while on the floor or in the break room.

FUTURE ACTION REQUIRED: This type of behavior will cease.

This warning will be made a part of your record. The issuance of further warnings may subject you to disciplinary action such as suspension or discharge.

EMPLOYEE COMMENTS:

This warning has been explained to employee involved.

| | | |
|----------------------|--------------------------|---------|
| _____ | Fern G. Skoug RN DON /s/ | 3/17/89 |
| Employee's Signature | Supervisor's Signature | Date |

This warning was written by Gary Taxdahl NHA. 3/17/89

3/20/89 Employee refuses to sign this Counseling form. Has no comment. F. Skoug R.N.

12. That Niles processed all of the grievances filed after she became Complainant's President in July of 1988; that the written reprimand Niles received on January 4, 1989 was issued at Taxdahl's direction and was motivated in part by his displeasure with the number of grievances that had been filed since Niles had become Complainant's President and the aggressive manner in which she presented the grievances; that Niles was engaging in protected concerted activity in filing and processing grievances on behalf of the Complainant; that Taxdahl was aware of Niles' participation in the filing and processing of grievances on Complainant's behalf and was hostile toward her because of that activity; and that the written reprimand Niles received on January 4, 1989 was motivated, at least in part, by Taxdahl's hostility towards Niles' filing and processing of grievances on Complainant's behalf.

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

CONCLUSIONS OF LAW

1. That the evaluation of Saleh dated July 29, 1988 did not have the reasonable tendency to interfere with, restrain or coerce Saleh or other employes in the exercise of their rights under Sec. 111.70(2), Stats., and therefore the Respondent Polk County, its officers and agents, did not violate Sec. 111.70(3)(a)1, Stats., by making and issuing said evaluation.

2. That the evaluation of Saleh dated July 29, 1988 was not motivated by animus toward Saleh's having engaged in protected concerted activity and, therefore, the Respondent Polk County, its officers and agents, did not violate Sec. 111.70(3)(a)3, Stats., by making said evaluation and did not interfere with the administration of a labor organization within the meaning of Sec. 111.70(3)(a)2, Stats.

3. That initiating and processing grievances is protected concerted activity within the meaning of Sec. 111.70(2), Stats., and that by issuing Niles the written reprimand based in part on her having engaged in protected

concerted activity, i.e., initiating and processing grievances, the Respondent Polk County, its officers and agents, violated Sec. 111.70(3)(a)3, Stats., and derivatively, Sec. 111.70(3)(a)1, Stats.

4. That by issuing Niles the written reprimand based in part on her grievance activity the Respondent Polk County, its officers and agents, did not dominate or interfere with the administration of Complainant and, therefore, did not commit a prohibited practice within the meaning of Sec. 111.70(3)(a)2, Stats.

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

ORDER 1/

1. That the alleged prohibited practices as to the July 29, 1988 evaluation of Helen Saleh and the alleged violations of Sec. 111.70(3)(a)2, Stats., are hereby dismissed in their entirety.

2. That the Respondent Polk County, its officers and agents, shall immediately:

(a) Cease and desist from discriminating against Niles or any of its employes for engaging in protected concerted activity on behalf of Complainant.

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

1. Immediately remove the written reprimands dated January 4, 1989 and March 17, 1989 from the personnel file of Marilyn Niles and any mention of said reprimands;

2. Notify all of its employes by posting in conspicuous places in its place of business where employes are employed copies of the notice attached hereto and marked "Appendix A". That notice shall be signed by the Administrator of Golden Age Manor 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 the Respondent 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) days following the date of this Order, as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin this 14th day of May, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

Section 111.07(5), Stats.

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

By _____
David E. Shaw, Examiner

"APPENDIX A"

NOTICE TO ALL EMPLOYEES

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 written reprimands issued to Marilyn Niles dated January 4, 1989 and March 17, 1989 from her personnel file, as well as any mention of said reprimands.
- 2.WE WILL NOT discriminate against Marilyn Niles or any other employes on the basis of their engaging in protected concerted activities on behalf of Complainant Golden Age Manor Employees, Local No. 774-D, AFSCME, AFL-CIO.
- 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.

Administrator, Golden Age Manor

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.

POLK COUNTY (GOLDEN AGE MANOR)

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The instant complaint alleges that the Respondent violated Secs. 111.70(3)(a)1, 2 and 3, Stats., by evaluating the Complaints' Steward, Saleh, in July of 1988 after complaining to the Complainant's President and Vice-President that they had better do something about her because she loved to make up grievances and that she was a troublemaker, and by accusing Complainant's President, Niles, of promoting grievances and subsequently issuing her a written reprimand for conduct that included promoting frivolous grievances. In its answer the Respondent denies it committed any prohibited

practices and asserts that while the concern with regard to Niles' tendency to promote frivolous grievances was voiced, she was reprimanded for her poor attitude and derogatory remarks about Golden Age Manor and the concern with the grievances did not play a part in the decision to reprimand her. Further, an amended written reprimand was issued without any references to promoting grievances in an effort to make that clear. The answer also asserts that the evaluation of Saleh stated that she was receiving too many personal calls at work and that the timing was consistent with its practice of evaluating employes outside the normal schedule when there is a problem with an employe.

COMPLAINANT

With regard to the evaluation of Saleh, the Complainant asserts that the testimony in the record shows that evaluations of employes at Golden Age Manor are given sporadically and inconsistently; however, two days after the meeting between Taxdahl, Niles and Maxon regarding Saleh's Union activities, Saleh received an evaluation. While Taxdahl and his assistant, Leibl, denied that such a meeting took place, both Niles and Maxon testified there was such a meeting. The Complainant questions that Leibl could remember 16 months later as to whether or not Maxon and Niles had passed by her desk on their way into Taxdahl's office on July 27, 1988 and asserts that her testimony to that effect cannot be credited. However, the testimony of Niles and Maxon is more credible since it involved the welfare and credibility of a fellow Union officer and since they had nothing personal to gain from "inventing" such a meeting. Further, the timing of Saleh's evaluation is also important. Skoug testified that evaluations are at times used as a basis for reprimand in themselves and also testified that she did evaluations when she had time to and when she felt it was necessary, i.e., when it is used as a form of discipline. The fact that the evaluation followed so closely on Taxdahl's demand to Niles and Maxon that they do something about Saleh's Union activities is "highly indicative of an anti-Union animus." The allegation of "too many" personal phone calls on the evaluation also indicates that Saleh was being singled out for discriminatory treatment by management. The record demonstrates that the Respondent's policy regarding personal phone calls was inconsistent and was not in writing. While Taxdahl testified that the policy was sometimes mentioned at inservices, he could only state that he believed that Saleh had been present at such inservices. Further, the "too many" personal calls actually consisted of one emergency phone call received by Saleh from her daughter and one call she did not even receive and which occurred two years previously and was supposed to have been removed from her personnel file. That does not constitute a basis for a reprimand for receiving too many phone calls, especially considering the Respondent's "obscure policy on phone calls." According to the Complainant, that leads to the conclusion that the reprimand contained in the evaluation and the evaluation itself were used as a means to dissuade and discourage Saleh from carrying out her duties in her role as Union Steward. In its reply brief, the Complainant notes that Taxdahl admitted that emergency calls may be received by employes. Given that at most there were two phone calls and that one of these was an emergency call, there is not a basis for discipline and the evaluation should be removed from Saleh's personnel file. Complainant asserts that the issuance of the evaluation to Saleh shortly after Complainant's officers were directed to do something about her grievance processing activities is indicative of the Respondent's attempts to retaliate for past Union activities and to warn against such activities in the future.

With respect to the reprimands issued to Niles, the Complainant asserts that it is not necessary to go further than the written reprimand issued to her on January 4, 1989 which states that it was in part for promoting "frivolous grievances." It is asserted that the statement alone is a violation of MERA. The Complainant also contends that while the reprimand states it is for her "bad attitude," the only example offered in that regard was an incident in the break room where Niles allegedly made profane comments about management. The record indicates that Niles was on her break in the break room and no residents were present when the incident allegedly occurred. Drinkman testified that at the time she was discussing another employe's cut in hours. It was then that Niles, in her capacity as Union officer, intervened in the discussion. Drinkman did not testify as to any profanity, but only that Niles was upset and loud. The Complainant asserts that the testimony of Greaner as to the alleged incident is suspect due to his continued animosity toward the Complainant and its officers. In that regard, the Complainant points to the fact that Greaner was not a member of the Complainant when he was in the bargaining unit and that he testified that he was extremely angry about a grievance that had been filed as to the Green Thumbers performing bargaining unit work that he did not want to perform and that he refused to sign the grievance when asked. That grievance was dated December 23, 1988, immediately preceding Niles' reprimand. Greaner's animosity toward the Complainant is also demonstrated by his demeanor while testifying, his anger as he testified, his telephoning Taxdahl on a weekend to complain about Niles and the incident involving the lawn mower he was driving and the rock that was thrown towards Complainant's new President. Hence, Greaner's testimony must be discredited.

With regard to the meetings with Taxdahl in December of 1988 and January of 1989, Niles testified that Taxdahl was angry and "prancing around," that he threw the grievances down on his desk using phrases such as "God damned Union" and "God damned grievances," continually referring to her "bad attitude."

There is no other evidence as to that "bad attitude" other than the alleged break room incident and claims of complaints from employes who were never produced to testify. The allegations that Taxdahl made to Niles that she was using too much vacation time or that she was not capable of performing her job were rebutted by Niles at the time. Though Niles was written up by Skoug, it is clear that Skoug did not initiate the disciplinary measures but did what she was directed to do by Taxdahl. Complainant asserts that this was done in order to cover his own involvement and the fact that he had initiated the reprimands. Complainant also asserts that Taxdahl's hostile attitude with regard to dealing with grievances being processed by the Union is demonstrated by the testimony of Gilchrist-Hedges, the current President of the Complainant.

In its reply brief, Complainant asserts that the Respondent's position that since employes are paid for their break time and take their breaks in an area provided by Respondent for that purpose, they are in effect "on the job" during that time, is counter, not only to logic, but to the "broadly recognized community-wide standards." Complainant argues that it is widely accepted that break time is personal time and that this is the appropriate time and place for conducting personal -- and Union -- business. Thus, when Niles conducted Union business on break time in the break room she was engaging in "protected activities in an appropriate time and place." As to Skoug's testimony that the grievances played no part in her decision to reprimand Niles, Complainant asserts that Skoug did not make the decision, but issued the reprimand as directed by Taxdahl.

In conclusion, the Complainant asserts that while the Respondent was unable to prevent the Complainant from filing grievances, it made the attempt to restrict the number of grievances filed. That attempt, in the form of these disciplinary actions that become part of the employes' long-term "records" and possibly affecting future employment opportunities, must be deemed to have a chilling effect on the remaining Union members in terms of their participation in protected activities and recourse to the grievance procedure. Viewing the Respondent's actions indicates an overall pattern of engaging in prohibited practices in violation of State statutes. As relief, Complainant requests that Respondent be found guilty of such violations and be ordered to cease and desist from them in the future, that the evaluation of Saleh dated July 29, 1988 and the written warnings to Niles dated January 4, 1989 and revised March 17, 1989 be removed from those employes' respective personnel files, and that the Respondent be ordered to post notices indicating that it had been found guilty of such statutory violations.

RESPONDENT

The Respondent takes the position that it has not committed any prohibited practices and makes a number of arguments in support of its position. First, it asserts that the decisions to evaluate and/or discipline the two employees were consistent with the provisions of the parties' Collective Bargaining Agreement. The Respondent cites Article II, Management Rights, Section 2.01, and Article XXVIII, Discipline/Discharge, Sections 28.01 through 28.04 of the Agreement. Under those provisions the Respondent has the authority to evaluate and discipline employees and both articles provide access to the grievance procedure. The fact that neither the reprimand nor the evaluation was processed to arbitration indicates the Complainant's "tacit acknowledgment" that the Respondent's decisions were consistent with the Agreement. The Respondent asserts that its decisions to evaluate and/or discipline Saleh and Niles were also consistent with its standards, policies, practices and procedures.

With respect to Niles, it is asserted that there is an established standard that employees will not use foul language or "bad mouth" the Manor while on duty and other employees have been disciplined for a bad attitude or use of foul language. It was in that context that the situation with Niles arose that led to her being reprimanded, there having been two separate incidents of Niles' bad mouthing the Manor or using foul language while on paid work time. The first incident occurred in the break room in late 1988. Drinkman testified that Niles "just started hollering across the room that she really thought this was an inappropriate thing to do . . . and it was really a dirty thing for a boss to do . . ." The break room is a relatively small room and there were 10 to 15 employees present at the time. Drinkman further testified that other employees who were present approached her later and apologized for Niles' conduct. The second incident occurred in the break room on a weekend in late 1988 as testified to by Greaner. Greaner felt compelled to report the incident to Taxdahl even though it was a Saturday. The Respondent was also concerned about the fact that residents and visitors also had access to the break room. It was those concerns and the reported incidents that led to the issuance of the letter of reprimand to Niles. Skoug drafted the letter warning Niles about her bad attitude and the letter was issued to Niles on January 4, 1989. Taxdahl's letter of January 12, 1989 to Ellingson clarified that Niles was given a written warning about her bad attitude because of the incidents that had been reported by Union and non-Union employees. Taxdahl also clarified that there had been two separate meetings with Niles on the day she received the written reprimand. The first meeting was for the purpose of discussing several grievances, Niles' among them, and the second meeting was with Niles to discuss the pending disciplinary action. Taxdahl also confirmed that the letter of reprimand did not flow from Niles' involvement in negotiations or processing grievances. Respondent asserts that it is of special significance that Taxdahl's letter of January 12, 1989 was drafted well in advance of any knowledge that the Union would be filing a prohibited practice charge in this matter.

Taxdahl and Skoug testified at the hearing that Niles' role in processing grievances did not play a part in the decision to reprimand her for her bad attitude. Skoug further testified that the last sentence on the original letter of reprimand was added as an afterthought. In that regard a revised letter of reprimand omitting that last sentence was issued in order to clarify the purpose of the letter of reprimand. Skoug also testified she does not distinguish between regular employees and Union officers when it comes to imposing discipline and present President of Complainant, Gilchrist-Hedges, testified that she had been disciplined for using bad language around residents and that she does not condone the use of profanity at the Manor.

In its reply brief, the Respondent asserts that, contrary to the Complainant's assertion, there is no evidence that Niles was reprimanded on different occasions for her bad attitude and the inciting of grievances. There was only one reprimand and that was for her poor attitude. Secondly, the record indicates that there were at least two separate incidents involving Niles, the first reported by Drinkman and the second reported by Greaner which occurred on a weekend. The fact that Niles may not have used profanity in the first incident does not excuse her conduct. Niles' coworkers did not believe her behavior was "okay" as they apologized to Drinkman for that behavior. The fact that Niles' behavior may have occurred in the break room while she was on break does not excuse it. Break time is paid time and both residents and visitors have access to the break room. As to Greaner's testimony, the Complainant only attacks it on the basis that he was not a member of the Union while in the bargaining unit. It is asserted that Niles' crude and obscene remarks cannot be characterized as "merely fulfilling her responsibilities as a Union officer."

With regard to the written evaluation of Saleh, Respondent asserts that it is the practice and policy at the Manor to limit the receipt of personal phone calls at work to emergency situations and that employees had been advised of this during inservices as well as in the Manor's personnel manual. Saleh admitted that she was aware of such a policy. Respondent contends that in fact Saleh would have been in a better position than most to understand that policy

given that management had talked to her in 1987 regarding her receiving personal calls at work that related to her private business. In July of 1988 a concern again arose regarding Saleh's having violated the policy against receiving personal calls at work. Taxdahl conveyed that concern to Skoug, Saleh's immediate supervisor. It was in response to those concerns and the fact that Saleh had not been formally evaluated for some time that Skoug formally evaluated Saleh's overall job performance. Although the Respondent would prefer to conduct written evaluations on an annual basis, both Taxdahl and Skoug testified that other workload demands make it impossible for Skoug to do annual evaluations. Taxdahl also testified that Saleh's being a Union officer played no part in the decision to formally evaluate her job performance. Skoug testified that when there is something for the employe to improve on, she includes that in the evaluation so that when the subject of the personal phone calls arose, she figured that was a good time to evaluate Saleh. The Respondent also asserts that the evaluation itself indicated that Saleh's performance ranked as above average in two of the six areas and as satisfactory in the remaining four and even Saleh admitted the overall evaluation was very good. Further, per the Respondent's policy, Saleh was given the opportunity to include a written response to the concerns regarding her receiving personal phone calls and she took that opportunity. There is no evidence in the record that any further action was taken against Saleh in that regard.

With regard to the alleged violation of Sec. 111.70(3)(a)1, Stats., Respondent asserts that to sustain its burden of proof, the Complainant "must demonstrate by a clear and satisfactory preponderance of the evidence that the Employer's conduct or statements contained a threat of reprisal or a promise of benefit which would reasonably tend to interfere with a protected employe right." Citing, Western Wisconsin Vocational District, Dec. No. 17714-B (WERC, 6/81). The Commission has ruled that provided there is no independent violation of MERA, employer action for a valid business reason or a unilateral action in the scope of employer rights is not prohibited. Citing, Greenfield School District, Dec. No. 21157-A (1984). It is asserted that in each case the remarks, as well as the circumstances under which they are made, must be considered in determining the meaning employes would reasonably place on such statements. Respondent asserts that as to the January 4, 1989 meeting referenced in the complaint, there were two separate meetings scheduled back to back on that date. The purpose of the first meeting was to discuss several pending grievances and during that meeting it is conceded that Taxdahl accused Niles of promoting grievances and expressed concerns about grievances being filed up to 1-1/2 years later and for employes who did not want the additional work being requested. It is also conceded that during that meeting Taxdahl, in discussing Niles' grievance, did tell her that she was crazy if she thought she was going to get full-time benefits without working full-time. While the give and take of that first meeting was frank and honest, it was also productive. Two grievances were resolved and Niles' grievance was advanced to the Personnel Committee and subsequently resolved. It was after the grievance meeting was concluded that Taxdahl, Leibl and Skoug met with Niles to discuss their concerns regarding her bad attitude and to issue the letter of reprimand. Maxon was also permitted to attend that second meeting as Niles' representative. The record indicates that Respondent took steps to clearly delineate the grievance meeting from the disciplinary meeting and there is no record evidence of any conduct by Respondent that would reasonably tend to impair the free exercise of protected rights.

As to the alleged meeting on or about July 27, 1988 between Taxdahl, Maxon and Niles, Taxdahl testified he had no recollection of such a meeting and Leibl testified that it was standard procedure for her to attend meetings as Taxdahl's representative and that she had no knowledge of such a meeting. She further testified that given the location of her desk, Niles and Maxon would have had to walk by her to get into Taxdahl's office. It is also asserted that Maxon could not recall what time of day the meeting supposedly occurred or what precipitated the meeting. Even assuming arguendo, that the alleged meeting occurred, both Maxon and Niles admitted they did nothing in response to Taxdahl's alleged remarks regarding Saleh, and Saleh admitted that there were actually more grievances filed after July of 1988 when Niles became Complainant's President. In its reply brief, Respondent notes that the Union attempted to discredit Leibl's testimony regarding the alleged meeting in July of 1988 because nearly 16 months had passed since that time, yet urged that full weight be given to the testimony of two Union witnesses regarding the same meeting. Respondent asserts that Complainant cannot have it both ways. It is also asserted that the record indicates that there were two personal phone calls and not only one as alleged by Complainant. Secondly, the policy restricting the receipt of personal phone calls at work to emergency situations was known by the employes and Saleh admitted she was aware of the policy. The incident involving personal calls received in the past was resurrected only for impeachment purposes and not as part of the evaluation. Further, Saleh was given the opportunity on her evaluation form to explain the circumstances surrounding her receipt of the two personal phone calls and once she did so, no further action was taken.

As to the alleged violation of Sec. 111.70(3)(a)2, Stats., the Respondent asserts that "domination" involves the actual subjugation of the labor organization to an employer's will. The control must be such that the labor organization is presumably incapable of effectively representing employe

interests. In that regard, the Respondent asserts that as to the alleged meeting in July of 1988 where Taxdahl allegedly complained about Saleh, both Maxon and Niles admitted they did not do anything in response to those alleged remarks, and Saleh admitted that more grievances had been filed after July of 1988 when Niles became President. It is asserted that "domination" contemplates active involvement in creating or supporting a labor organization and that "interference" with the administration of the union differs only in the degree of control. In either case the offensive conduct threatens the independence of the Union as an entity devoted to employe interests as opposed employer's interests. There is no evidence in this case that the Respondent took control of the Complainant as an entity by controlling its officers, bylaws, etc., nor is there evidence the Respondent asserted such control as to impair the Complainant's independence as the employes' chosen representative. Therefore there has been no showing of a violation of Sec. 111.70(3)(a)2, Stats.

With regard to an alleged violation of Sec. 111.70(3)(a)3, Stats., Respondent asserts that to establish a violation of that provision, Complainant must prove by a clear and satisfactory preponderance of the evidence that: (1) the employe was engaged in protected concerted activity; (2) the Employer was aware of said activity; (3) the Employer was hostile to such activity; and (4) the Employer's action was based at least in part upon said hostility. Citing, Town of Mercer, Dec. No. 23136-B (WERC, 1986). The mere coincidence of adverse employment decisions and protected activity is an insufficient basis to find such a violation. Citing, Menomonie Jt. School District, Dec. No. 14811-C (WERC, 1978). Respondent asserts that the Complainant has not met its burden of proof. The decisions to discipline Niles and evaluate Saleh involved no discriminatory treatment and anti-Union considerations were totally absent from those decisions. Hence, there is no evidence that the alleged actions were intended to encourage or discourage membership in the Union.

In its reply brief, Respondent asserts that the Complainant is really advocating that the Respondent must adopt a "hands off" policy for Complainant's officers. Respondent asserts that Niles should not be permitted to use her Union leadership position as a shield against disruptive, inappropriate and crude behavior. As to Saleh, given the previous incident regarding personal phone calls, the decision to evaluate her in light of the recent situation cannot be labeled as discriminatory, especially given the fact that the overall evaluation was very good and no further action was taken following Saleh's explanation. Finally, the fact that Taxdahl expressed concerns regarding the Complainant's leadership does not support a conclusion that Respondent has committed a prohibited practice. Just as employes have the right to express their opinions, so also do public sector employers. The test is whether the statement, construed in light of surrounding circumstances, expresses or implies threat of reprisal or promise of benefit which would reasonably tend to interfere with, restrain, or coerce municipal employes in the exercise of their rights guaranteed by Sec. 111.70(2), Stats. Citing, Barron County, Dec. No. 26065-A (Burns, 1/90). Respondent asserts that the Complainant has failed to show by a clear and satisfactory preponderance of the evidence that that was the case.

DISCUSSION

Saleh Evaluation

The allegation is that on July 27, 1988 Taxdahl called in Niles and Maxon and complained that Saleh was making trouble by making up grievances and told them they had better straighten her out, and that within a day or two of that conversation Saleh received a formal evaluation that stated she was receiving too many personal calls. Taxdahl testified that he did not recall such a meeting and Leibl testified that she would normally attend such meetings and that she did not attend such a meeting on July 27, 1988 and never heard about such a meeting having occurred. Maxon testified she was at a meeting with Niles and Taxdahl on July 28, 1988 and that Taxdahl said Saleh was a troublemaker and her and Niles should talk to her. Maxon could not recall what time of day the meeting occurred, whether Saleh was present, how the meeting came about or what kind of trouble Taxdahl mentioned other than "Trouble with the Union." (Tr. I, p. 21) Maxon seemed to recall little about the meeting without prompting. Niles testified as to what Taxdahl said at the alleged meeting; however, she also seemed confused about the date, testifying that the meeting was not on July 27th, but apparently preceded that date. (Tr. II, p. 22) There was no testimony from Saleh that she was aware such a meeting had occurred or that she tied her evaluation to there having been such a meeting. Given the uncertainty of Maxon's testimony, the uncertainty in Niles' testimony as to when the alleged meeting occurred and the denials of Taxdahl and Leibl, it is concluded that there is not sufficient evidence to establish that the alleged meeting actually occurred.

As to the evaluation itself, Saleh's performance is rated as "above average" or "satisfactory" in the six categories listed. The form included comments to the effect that "Too many personal calls are being received"; however, in her "Comments" Saleh acknowledged that she had in fact received two personal calls at work on July 28 and July 29, 1988, but asserted they involved an emergency situation. There is no allegation or evidence that once Saleh

gave her explanation regarding the nature of the phone calls and added the explanation to the evaluation that anything further came of her having received the calls.

The timing of the evaluation appears to be related to Saleh's having received the calls on July 28th and 29th rather than to her grievance activity.

While it appears the policy regarding receiving personal calls has been inconsistently enforced, the prior misunderstanding involving Saleh makes it likely that the Respondent would be more sensitive to Saleh's receiving personal calls. Skoug testified that evaluations are often conducted when a problem arises that she feels needs to be addressed and does this in conjunction with the evaluation. In this case it was the personal calls Saleh received and which were brought to Skoug's attention that day, that triggered the evaluation. Whether, as a personnel practice, evaluations ought to be conducted on that basis is not the relevant issue in this case. To establish a violation of Sec. 111.70(3)(a)1, Stats., it must be demonstrated by a clear and satisfactory preponderance of the evidence that the conduct in question had a reasonable tendency to interfere with, restrain or coerce the employe in the exercise of his/her rights under Sec. 111.70(2), Stats. Without more, the fact that Saleh received a good evaluation which included a statement that she received too many personal calls, an allegation which she apparently satisfactorily explained, does not meet that standard. It also follows from the foregoing that conducting the evaluation and the evaluation itself do not constitute domination or interference with a labor organization within the meaning of Sec. 111.70(3)(a)2, Stats., nor do they constitute discrimination within the meaning of Sec. 111.70(3)(a)3, Stats.

Niles Reprimand

The Complainant alleges that Niles was reprimanded for engaging in protected concerted activities, i.e., the filing and processing of grievances, in violation of Secs. 111.70(3)(a)1, 2 and 3, Stats. The Respondent asserts that Niles was reprimanded for her bad attitude and "bad mouthing" the Manor, and not for her grievance activity. The record evidence indicates there is some confusion with regard to whether there were two meetings held within days of each other or just the one meeting on January 4, 1989 at which Niles was given the written reprimand. Niles testified there was a meeting held on December 28, 1988 at which Maxon, Saleh, Phelps and herself met with Taxdahl and Leibl to discuss pending grievances and that during the meeting Taxdahl told her he was going to have her written up for her bad attitude and would talk to her about it later. Niles further testified that she and Maxon stayed after the grievance meeting and that Taxdahl said he was going to have Skoug write her up when Skoug returned and that she later informed Ellingson as to what Taxdahl had said. Niles produced notes she had made at the December 28th meeting. Taxdahl testified there was only the back-to-back meetings held on January 4th with Niles being given the written reprimand at the later meeting.

Maxon had only a vague recollection of the January 4th meeting and Leibl recalled only the January 4th meeting, but does not recall Niles being given the written reprimand at the meeting she attended and referred to the first part of the meeting as a discussion of grievances that had been resolved. Skoug testified she was not off work in December of 1988 except for the holidays; however, she also testified she did not discuss the alleged offenses with Niles when the reprimand was issued "because Mr. Taxdahl had gone over them and he had gone over them with me prior." (Tr. II, p. 78) Ellingson's letter of January 8, 1989 states in the first paragraph that "you threatened at a Union/Management meeting to have Marilyn's supervisor write her up for the 'bad attitude' that she showed at that meeting." According to Niles, Ellingson wrote that letter after she told him of the December 28th meeting, but before she informed him of the January 4th reprimand. Ellingson's letter indicates the same by its reference to threatened action rather than the written reprimand. Based on the testimony, Niles' notes of the December 28th meeting and Ellingson's letter, it has been concluded that there was a meeting on December 28th at which Taxdahl told Niles he was going to have her written up and the meeting on January 4, 1989 where she received the written reprimand. The confusion in this regard is understandable given the similarity of the meetings and their proximity in time, as well as the passage of time.

That there were meetings on two separate days is significant in that while Taxdahl might have threatened in the course of a heated discussion to have Niles written up, it appears that he had approximately a week between the meetings to reconsider and still decided to have Niles reprimanded in part based on her grievance activity. In regard to the latter, the written reprimand issued to Niles on January 4, 1989 included the following under "Explanation of Offense" "Also tends to promote frivolous grievances." Although Skoug testified she drafted the reprimand and only added the above statement as an "afterthought," she previously testified that it was in regard to what Taxdahl had discussed with her. The statement was also consistent with the comments Taxdahl had made to Niles and Taxdahl testified that he "advised her (Skoug) on how to write it up." (Tr. II, p. 55) Thus, although Skoug prepared the January 4th reprimand, it was at Taxdahl's direction.

It is clear from the record that Niles and Taxdahl did not get along well in their respective roles and that Taxdahl was frustrated with the number and type of grievances being filed after Niles became President of the Complainant.

Despite Taxdahl's testimony to the contrary, the record also indicates that Taxdahl's frustration with Niles in filing and processing grievances, and his hostility toward that activity, played a part in his decision to issue her a written reprimand. The fact that he had a subsequent written reprimand issued to Niles dated March 17, 1989 which reworded the prior reprimand and deleted the reference to promoting frivolous grievances, does not change the fact that Niles was given a written reprimand based, in part, on her engaging in protected concerted activity.

In order to establish discrimination within the meaning of Sec. 111.70(3)(a)3, Stats., the Complainant must prove, by a clear and satisfactory preponderance of the evidence, that Niles was engaged in protected activities, that the Respondent was aware of and hostile toward those activities, and that Respondent's decision to issue Niles the written reprimand was motivated, at least in part, by its hostility toward her participation in such activities. 2/ That the Respondent might have had a basis for disciplining Niles other than her grievance activities does not avoid a finding of a violation of Sec. 111.70(3)(a)3, Stats., as long as the discipline was motivated at least in part by the Employer's animus toward the employe's engaging in protected activities. 3/ Having concluded that the reprimand was motivated in part by Taxdahl's hostility toward Niles' grievance activity, it is necessarily concluded that the reprimand constituted a violation of Sec. 111.70(3)(a)3, Stats., and derivatively, a violation of Sec. 111.70(3)(a)1, Stats.

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

3/ Ibid., Citing Muskego-Norway C.S.J.S.D. No. 9 vs. W.E.R.B., 35 Wis.2d 540, 562 (1967).

Complainant has also alleged a violation of Sec. 111.70(3)(a)2, Stats., which 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/ The reprimand issued to Niles does not rise to the level required by that standard and, therefore, no violation of Sec. 111.70(3)(a)2, Stats., has been found.

Dated at Madison, Wisconsin this 14th day of May, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
David E. Shaw, Examiner

4/ Kewaunee County, Dec. No. 21624-B (WERC, 5/85), 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.