

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 742, AFFILIATED WITH	:	:
DISTRICT COUNCIL 48, AFSCME,	:	:
AFL-CIO and PAT MERKOVICH	:	Case 2
	:	No. 45561
Complainants,	:	MP-2470
	:	Dec. No. 26931-B
vs.	:	:
	:	:
CUDAHY PUBLIC LIBRARY	:	:
	:	:
Respondent.	:	:

Appearances:

Podell, Ugent & Cross, SC, Attorneys at Law, 611 North Broadway, Milwaukee, WI 53202, by Ms. Monica M. Murphy, appearing on behalf of Complainants.

Michael, Best & Friedrich, Attorneys at Law, 100 East Wisconsin Avenue, Milwaukee, WI 53202-4108, by Messrs. Robert W. Mulcahy and John J. Prentice, appearing on behalf of Respondent Cudahy Public Library Board.

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

The above-named Complainants filed with the Wisconsin Employment Relations Commission (WERC) a complaint on April 9, 1991 and an amendment of that complaint on June 25, 1991, alleging that the above-named Respondent violated various provisions of the Municipal Employment Relations Act (MERA), Sec. 111.70, Stats., et. seq.

On July 11, 1991, the WERC appointed the undersigned to serve as examiner and to make and issue findings of fact, conclusions of law and order in the matter. Pursuant to notice, the Examiner convened hearing in Milwaukee on August 20, 1991, during which the Examiner advised the parties on the record that he intended to take administrative notice of the contents of the Commission's closed representation election case file opened as City of Cudahy (Library), Case 65, but ultimately closed as Cudahy Public Library Board, Case 1, No. 43100, ME-370. Although that file was not available at the August 20 hearing, both parties stated on the record that they did not object to administrative notice being taken of its contents. Counsel for both parties ultimately reviewed the contents of that file, and both thereafter submitted initial briefs. With their initial brief, Complainants also submitted a motion to reopen the hearing. The Examiner denied that motion by order dated November 27, 1991, in Dec. No. 26931-A. An

opportunity to submit reply briefs was also provided. The Municipal Employer submitted a reply brief, and the deadline for reply briefing expired on December 10, 1991.

Upon consideration of the record and the arguments presented by the parties, the Examiner makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Local 742, affiliated with District Council 48 AFSCME, AFL-CIO (Complainant Union) is a labor organization with its principal office located at 3427 West St. Paul Avenue, Milwaukee, Wisconsin, 53208. At all material times, James Burnham was a District Council 48 Staff Representative responsible for servicing Local 742 and certain other AFSCME locals. Burnham was acting in all respects referred to herein as an authorized agent of Complainant Union. There has been no showing herein that Complainant Merkovich was, at any time or for any purpose, an authorized agent of Complainant Union.

2. Patricia Merkovich (Complainant Merkovich), is an individual residing at all material times at 1414 Madison Avenue, South Milwaukee, Wisconsin. Complainant Merkovich was first employed by Respondent beginning in August of 1989 as a temporary part-time secretarial employe. On February 23, 1990, she became employed by Respondent on a permanent part-time basis in a retitled position of Administrative Secretary. She held that position until she was discharged effective June 28, 1991.

3. Cudahy Public Library (Respondent) is a municipal employer with principal offices located at 4665 Packard Avenue, Cudahy, Wisconsin. Respondent operates a public library serving Cudahy, Wisconsin. Its affairs are generally governed by a Library Board of which Elizabeth Bowe was a member since 1987 and acting president during material portions of 1990 and 1991, before her resignation in May of 1991. Respondent's day-to-day operations are the responsibility of its Director. Richard Nelson began work as Director of Respondent on January 6, 1990. At all material times, Robert W. Mulcahy has been Respondent's outside labor relations legal counsel. The conduct of Nelson, Bowe and Mulcahy referred to herein was engaged in within their scope of authority as agents of Respondent.

4. On July 24, 1989, Complainant Union filed a petition requesting the WERC to clarify an existing bargaining unit of City of Cudahy employes represented by Complainant Union so as to include certain positions employed at the Cudahy Public Library. The petition expressly requests inclusion of five part-time positions including "Secretary/Bookkeeper" and five full-time positions, but so as not to include the "Head Librarian" or the "Pages." That case was opened as City of Cudahy (Library), Case 65, but it ultimately became Cudahy Public Library Board, Case 1, No. 43100, ME-370. Hearings in that proceeding were conducted on January 9 and March 5, 1990. On November 9, 1990, WERC issued its Direction of Election, Dec. No. 26680, ruling that Respondent's Library Board, rather the City of Cudahy, is the municipal employer of the library employes; that three disputed positions were professional and municipal

employee positions, rather than non-professional, supervisory or managerial; and that a representation election would be conducted within the following two voting groups:

- a. All regular full-time and regular part-time employees of the Cudahy Public Library Board excluding professional, supervisory, confidential and managerial employees and the Library Pages.
- b. All regular full-time and regular part-time professional employees of the Cudahy Public Library Board excluding supervisory, confidential and managerial employees.

The status of the part-time "Secretary/Bookkeeper" position was not an issue in dispute during the representation case hearing and so it was not ruled upon in the WERC's Direction of Election. Neither party made any reference in that case to the creation or status of the "Administrative Secretary" position accepted by Complainant Merkovich on February 23, 1990.

5. On November 23, 1990, Mulcahy wrote WERC Elections Supervisor Georgann Kramer a letter, showing copies only to Bowe and Nelson, advising that he represented Respondent in the pending election matter and further stating,

We discussed your request for an election on December 21, 1990 and we would concur. We feel that the best time would be from 4:00-5:00 p.m. on that Friday.

We are in the process of preparing a list of employees. We would suggest that the election be held in the employee lounge.

If there are any further questions, please feel free to give me a call. We presume that you will finalize these details with the Union.

...

6. Mulcahy next wrote Kramer on December 6, 1990, showing copies only to the Library Board and Nelson, enclosing an alphabetical list of names and addresses of employees of Respondent. The enclosure consisted of 18 names, including Complainant Merkovich and Nelson. Finally, Mulcahy wrote Kramer a letter dated December 13, 1990, (Exhibit 20) showing copies only to the Library Board and Nelson, which read as follows:

As you discussed with us today, it is our understanding that the three professional employees, Jean Dushensky Head of Technical Services; Linda Jackson, Head of Children's Services/Reference Librarian; and Rebecca Roepke, Head of Adult Services, will be voting on a two-part ballot due to their professional status.

In addition, we have submitted a revised alphabetical list of employees eligible to vote in the election indicating those professional employees and deleting the Library Director, Richard Nelson, the pages and the Confidential Administrative Secretary, Pat Merkovich, who are excluded from the unit by virtue of the Commission's

Direction of Election on November 29, 1990. Specifically, those employees excluded as pages are the following:

...

This should substantially resolve all outstanding issues prior to the December 21 election.

Thank you for your continued assistance on this matter.

As stated in that letter, the list Mulcahy enclosed consisted of names and addresses of nine individuals, three of whom were identified as professional employees. That list did not include Complainant Merkovich.

7. The copy of Exhibit 20 contained in the representation case file bears a taped in "post-it" note stating, "Sent copy to Burnham 12-17-90 GK," from which the Examiner infers that Kramer sent a copy of Exhibit 20 by regular first-class mail to Burnham at Complainant Union's office address on December 17, 1990.

8. A few days in advance of the election, Nelson asked Complainant Merkovich to serve as Respondent's observer during the balloting. Complainant Merkovich responded that she would not be comfortable serving in that capacity. Nelson told her at that time that she needed to understand that she was a confidential employe and as such was not eligible to vote, showing her a letter to that effect which was presumably Exhibit 20. Complainant Merkovich replied that she did not share Nelson's understanding in that regard and would have to speak with her Union representative about it.

9. Complainant Merkovich conferred on one or more than one occasion with Burnham regarding whether she was eligible to vote in the election. Burnham told Complainant Merkovich that her interpretation of a confidential secretary is not the same as the Wisconsin Statutes' use of the term "confidential;" that she would be able to cast a ballot in the representation election; but that the Respondent could contest it.

10. Either at the time of Nelson's conversation with Complainant Merkovich noted in Finding of Fact 7, above, or at some other time in advance of the vote, Complainant Merkovich told Nelson that she intended to vote in the election. Nelson did not insist that Complainant Merkovich serve as Respondent's election observer, choosing instead not to have any employer observer present when the votes were being cast. The Examiner infers from the foregoing that regardless of whether or when Burnham may have received Exhibit 20 from Kramer, Burnham (and therefore Complainant Union) had reason to know from information given him by

Complainant Merkovich in advance of the date of the election that Complainant Merkovich's name did not appear on the eligibility list and that Respondent considered her ineligible to vote due to what Respondent considered to be her confidential employe status.

11. The representation case election was conducted pursuant to posted notices on December 21, 1990. Burnham was present during the vote as Complainant Union's designated observer. Respondent did not have an observer present during the time the ballots were cast, however Nelson signed the tally sheet on Respondent's behalf at the conclusion of the count. During the course of the voting, Complainant Merkovich presented herself to vote. Although she was permitted to cast a ballot, Colleen Burns, the WERC official conducting the vote, challenged her ballot because her name was not on the eligibility list. The WERC's copies of the eligibility lists for each of the two voting groups bear notations by Burns counter-initialed by Burnham to the effect that a telephone call was made to Mulcahy on the day of the vote during which Mulcahy agreed that Complainant Merkovich was not a professional employe. When the non-challenged ballots were counted, all three professionals had voted for representation by Complainant Union. Accordingly, their ballots were then commingled with the unchallenged ballots of the non-professionals and the result was 9-0 in favor of representation by Complainant Union. Because Complainant Merkovich's ballot was not outcome-determinative it was not opened or counted at the voting site. The WERC issued its Certification of Results of Elections on January 11, 1991, certifying that Complainant Union is the exclusive collective bargaining representative for a "bargaining unit consisting of all regular full-time and regular part-time employes of the Cudahy Public Library Board, including professional employes, but excluding supervisory, confidential and managerial employes, and Library Pages." In that Certification, the WERC noted that because Complainant Merkovich's challenged ballot was not outcome-determinative, it was not making a ruling about that ballot and that the ballot would remain sealed.

12. Since the Certification was issued, neither Respondent nor Complainant Union has filed a unit clarification petition concerning the status of the position held by Complainant Merkovich.

13. The terms of Complainant Merkovich's initial individual letter of employment dated August 7, 1989, specified that she would be working 15 hours per week as assigned by the then Acting Director, at \$4.50 per hour and that the termination date for the position would be set by the Library Board such that "there is no implicit or implied agreement that the position would lead to regular part-time or full-time work. . . ." In that capacity, she worked five hours a day on the mornings and early afternoons of Monday, Wednesday and Friday. When Nelson was hired and began working for Respondent as Director in early January of 1990, the Library Board directed him, among other things, to hire a permanent employe as his secretary and to develop a set of updated job descriptions for all of the positions in Respondent's employ. Nelson selected Complainant Merkovich to be employed as his secretary on a permanent basis effective in February of 1990. She accepted by letter dated February 23, 1990, a part-time position titled Administrative Secretary for which a job description was then still being developed. At that point, her rate of pay was increased to \$5.50 per hour and her hours of work were increased to 20 per week and rescheduled to 4 hours each morning, Monday-Friday. Nelson developed the description for Administrative Secretary with

the benefit of written input and discussions with Complainant Merkovich, and later with advice from Mulcahy and discussion with the Library Board. The description was typed in each of its various stages of development by Complainant Merkovich. In the form in which it was finally approved by the Library Board on May 16, 1990, that description read as follows:

ADMINISTRATIVE SECRETARY

Reports to: Library Director

Basic Function of Position: Provides confidential secretarial and bookkeeping support to the office of the Library Director.

Minimum Qualifications: High School diploma or equivalent. 50-60 words per minute typing skills. Some bookkeeping and office computer operations experience preferred.

Knowledge and Abilities Necessary to the Position: Proficiency in English grammar, spelling, and composition. Typing and filing skills. Working knowledge of generally accepted bookkeeping practices and procedures. Ability to perform routine office and clerical tasks with a minimum of supervision. Ability to develop a working understanding of current library recordkeeping and filing systems. Ability to maintain and hold in confidence information relating to personnel functions of Cudahy Public Library.

Duties and Responsibilities:

Serves as confidential secretary to the Library Director, including preparation of confidential correspondence relating to employment and personnel matters.

Types and correspondence and reports, including confidential reports relating to personnel records, evaluations, employee discipline and other confidential financial data as assigned by the Library Director.

Maintains records of personnel hours and benefits and prepares periodic reports of same for the City payroll office.

Counts and records daily cash receipts, prepares periodic deposits of same for the City Treasurer's office, and makes daily desk change.

Collects accumulated money from the library copy machines, prepares it for deposit with the City Treasurer's office, and makes change for the public as necessary.

Orders library materials and supplies as authorized by the Library Director.

Checks invoices, computes discounts, and prepares monthly bills according to proper library account categories for review by the Library Director and the Library Board.

Prepares Library Board-approved vouchers for City processing and mails out checks.

Maintains a file of paid vouchers and an established balance of library expenses by account.

Records donations received in the library's gifts notebook and sends out thank you's.

Types, organizes and sends out mailings of materials for Library Board and Committee Meetings.

Types and posts official meeting notices and agendas.

Types and distributes Board and Committee minutes.

Records and types minutes of Library Staff Meetings.

Files statements, invoices, purchase orders, reports and correspondence and maintains existing records on file.

Performs other related duties as assigned by the Library Director.

Approved by Library Board action May 16, 1990.

It was apparently Mulcahy who caused references to "confidential" to be inserted as it appears in the finally-approved version of that description. The references to "confidential" in that description were questioned when it was first discussed by Library Board at its April, 1990 meeting. For that reason, ultimate approval of the Administrative Secretary job description by the Library Board occurred at the following meeting in May.

14. Nelson had occasion to review the contents of Complainant Merkovich's May 16, 1990 job description during the course of her annual employe evaluation in November of 1990. Complainant Merkovich voiced no objection to the contents of that description during the course of that evaluation and her associated discussions with Nelson. In his overall rating of her performance, Nelson stated, "very good employe -- hardworking in a challenging job."

15. Throughout her employment by Respondent, Complainant Merkovich has been Respondent's sole clerical employe. Since at least Nelson's hiring in January of 1990, Complainant Merkovich has served as secretary to the Director who, in turn, is Respondent's sole manager/supervisor and who is fully responsible for all of Respondent's day-to-day labor relations activities including hiring, firing, maintaining discipline and enforcing work rules. Nelson and Complainant Merkovich shared a single office within which each could easily hear the other's conversations in person and on the telephone. Complainant Merkovich was the only employe besides Nelson to possess a key to the file cabinet in which Respondent's personnel records are kept. Prior to the election, in addition to typing and filing Nelson's correspondence and other documents such as drafts of job descriptions including her own, Complainant Merkovich had been assigned the responsibility: to type and send out a salary survey to other area Libraries; to type minutes of Library Board from notes taken by the Board Secretary; to take notes and type minutes of Library Staff meetings; to maintain the Employer's employe leave accounting records and call discrepancies that arose therein to Nelson's attention; and to provide Nelson with information and draft typing in the development of the Respondent's budget for presentation to the Library Board. As noted in Finding of Fact 8, above, Complainant Merkovich was also asked to serve as Respondent's election observer, but did not serve in that capacity because she said she would be uncomfortable doing so and because she said she intended to vote in the election herself. While Complainant Merkovich's access to, knowledge of, or participation in confidential matters relating to labor relations may have been de minimis prior to the February 8, 1991, meeting, at all times at least from and after the approval of her Administrative Secretary job description on May 16, 1990, she was the only employe of Respondent available to perform confidential work in clerical support of Nelson, the Respondent's sole supervisor/manager who bore all of Respondent's day-to-day labor relations responsibilities.

16. Following the election, Respondent began to prepare itself for a bargaining relationship with Complainant Union. It decided that Nelson's labor relations responsibilities would include not only attending all negotiation and bargaining strategy sessions of the Respondent's bargaining team, but also responsibility for day-to-day contract administration and grievance handling, gathering and communicating information related to bargaining; engaging in various communications with Respondent's outside labor relations legal counsel; and a variety of other labor relations functions arising out of the newly-established collective bargaining relationship with Complainant Union. Nelson, Mulcahy and Bowe were identified as members of Respondent's bargaining team. It was further decided that Complainant Merkovich, as Nelson's secretary, would be a member of the Respondent's bargaining team, as well.

17. Nelson asked Complainant Merkovich in early February of 1991, to attend a meeting scheduled for the early afternoon of Friday, February 8, 1991 to discuss her responsibilities as Respondent's Administrative Secretary in the context of Respondent's new collective bargaining relationship with Complainant Union. Nelson perceived from Complainant Merkovich's non-verbal reaction this was not welcome news to her. Complainant Merkovich reported for that February 8 meeting as scheduled. Mulcahy, Bowe and Nelson met briefly among themselves before inviting Complainant Merkovich into Nelson's office from the waiting area. Mulcahy began the meeting by explaining what Respondent expected of Complainant Merkovich now that the

Respondent was entering into a collective bargaining relationship with Complainant Union. Among the duties Mulcahy referred to were being a member of the management negotiating team, attending and taking notes and preparing minutes of negotiation sessions and of management team caucuses; and surveying other area libraries regarding employe compensation and working conditions. The meeting became tense early-on when Complainant Merkovich expressed reservations about performing the sorts of duties Mulcahy was describing. She expressed concern about working beyond 3:00 PM because her husband works second shift and her daughter needs transportation to after-school dance lessons several days a week. She voiced some reluctance to perform surveys and said that she did not think that at her current rate of \$5.72 per hour she was being paid commensurate with the \$13-\$15 per hour that other confidential secretaries were earning. Mulcahy made reference to the contents of the Administrative Secretary job description. Complainant Merkovich questioned the meaning of the term "confidential" and Mulcahy made reference to the meaning of that term as developed under Wisconsin law. Mulcahy also stressed that Respondent needed the duties he was describing to be performed, and performed by an individual loyal to the management team. Bowe commented that Complainant Merkovich had always been a loyal employe. Mulcahy stated that if Complainant Merkovich were not willing to perform them Respondent would have to get them performed by someone else, but that if Mulcahy's office provide such services it would be at a much greater cost than if they were performed by an employe of Respondent. Mulcahy stated that management would try to be flexible concerning the scheduling of meetings, noting that the scheduling of bargaining meetings with the union would be by mutual agreement. Mulcahy commented that the confidential secretary rates Complainant Merkovich had cited seemed high, at least for a part-time position without many years of experience; however he and Bowe stated that the Library Board's personnel committee was meeting the following Wednesday and would discuss to what extent Respondent would increase her salary in light of the additional workload and responsibilities that the collective bargaining relationship would mean for her Administrative Secretary position. It was agreed that Nelson would let Complainant Merkovich know the next day what the results of that meeting were regarding her rate of pay, and that Complainant Merkovich would then let Nelson know the following day, Friday, whether she was willing to perform the full range duties set forth in her job description. After Complainant Merkovich left the meeting, Nelson, Mulcahy and Bowe continued meeting for some time both to discuss what had happened during the meeting and how the Respondent would approach the upcoming negotiations with the Union.

18. Complainant Merkovich was absent from work for an extended period of time due to illness (chest pains and headaches) beginning with the workday following the February 8, 1991 meeting. Accordingly, after Respondent's Library Board personnel committee met as planned on Wednesday, February 13, 1991, Nelson wrote Complainant Merkovich on February 14, 1991, a letter (typed by Nelson personally) as follows:

This letter is to inform you that the Cudahy Public Library's Personnel Committee voted at their February 13, 1991 meeting to recommend to the full Library Board that you be granted an additional \$2.00 per hour in compensation (effective February 20, 1991) for your currently held position of confidential Administrative Secretary at this library. This rate is contingent upon your acceptance and

performance of the full scope of the job duties for the position of confidential Administrative Secretary at this library (Copy enclosed).

In addition, as we discussed, flexible work hours on your part may be required in the future to meet the needs of the library.

Once you have had a chance to consider this offer, we require a written response from you by no later than 4:30 p.m. on February 19, 1991 as to whether or not you will accept the position under these terms and conditions.

19. Complainant Merkovich did not respond as directed in Respondent's February 14 letter, above. However, on or shortly after February 18, her sister delivered to Nelson a doctor's "Certificate of Disability" dated February 18, 1991 from the Fine-Lando Clinic stating that Complainant Merkovich had seen Dr. J. Christianson on that date; that she has been disabled since February 11; and that she is to remain off work until the next scheduled visit. An accompanying appointment card from that Clinic also supplied to Nelson at the same time showed that the next appointment was scheduled for the morning of February 28, 1991.

20. Nelson responded by sending Complainant a letter by certified mail on February 22, 1991 which read as follows:

I have received your certificate of disability dated February 18, 1991 from Dr. J. Christianson of the Fine-Lando Clinic.

I presume that you have received my letter to you dated February 14, 1991. You were asked to respond to the job offer regarding the confidential secretary position by 4:30 p.m. on February 19, 1991. As of this date, you have still not responded to our request.

As you know, we must move forward on this matter as we need to fill this position as soon as possible especially in light of the upcoming Union negotiations. Accordingly, we need your response no later than 4:30 p.m. on February 28, 1991 as to whether or not you will accept this position under the terms and conditions outlined in my February 14, 1991 letter. This means that you would be granted an additional \$2.00 per hour increase in compensation and that you would have to perform the full scope of the job duties for the position of confidential administrative secretary at the Library.

Also enclosed please find a medical release for you to sign authorizing us to obtain the appropriate medical information from Dr. J. Christianson. We also need you to tell us your prognosis and the expected date of your return to employment. You should stay in close contact with the Library and keep us advised as to your physical condition. This is your ongoing responsibility in this matter.

I am enclosing a self-addressed stamped envelope for you to utilize in returning to us: 1) the doctor's release; 2) your response to the offer for the position of confidential secretary as outlined herein; and 3) your prognosis and expected date of return to work. We would also like to know why you did not respond to my February 14, 1991 letter by 4:30 p.m. on Friday 19, 1991.

If we do not hear from you on these matters by 4:30 p.m. on February 28, 1991, we will be forced to proceed. If there are any questions, please do not hesitate to contact me.

The consent form Nelson enclosed with that letter read as follows:

I hereby consent to the disclosure of information from the patient health care records of Patricia Merkovich to Richard W. Nelson, Cudahy Public Library, for the purpose of their analysis and use.

This consent is for the disclosure of all patient health care records as defined in Sec. 146.81, Wis. Stats. It is my specific intention to also include x-rays, laboratory and diagnostic reports and the referral of those x-rays, laboratory and diagnostic reports to another health care provider for review and analysis. This consent also includes records for billings and payments for such health care services.

I further agree that a photostatic copy of this consent shall be considered as effective as valid as the original.

It is my specific intention that this informed consent and request shall be effective for a period of five (5) years or until completion of the purpose for which this consent was given, unless this consent is specifically withdrawn by me in writing.

21. Complainant Merkovich responded to Nelson by letter dated February 27, 1991, as follows:

I have not as of yet responded to your offer of work for the confidential secretary position for two reasons. First, since the time of our initial meeting with Mr. Mulcahy, Ms. Bowe, and yourself I have been experiencing health problems that my doctor is very concerned about. He told me I needed complete rest, that I should not go to work, and has prescribed two medications that I am continuing to take. I believe my sister, Lu Ann Geldon, explained this to you when she brought in the disability certificate from Dr. Christianson on February 18, 1991. I have an appointment to see him again tomorrow and he will determine at that time my prognosis and if and when I can return to work. I will provide you with information as soon as I have it. My doctor has offered to speak with you directly if you so desire.

The second reason I have not responded to the offer of the confidential secretary position is my confusion and uncertainty as to the proper way to handle these matters. My understanding is that should I decide to take this new position I will no longer be a member of the bargaining unit represented by Local 742. I feel the appropriate way to handle this is for you to meet with my staff representative Jim Burnham and I to discuss the implications of any changes in my job. Mr. Burnham is willing to make himself available for any such meeting as will I provided my doctor will allow it. I will wait to hear from you regarding such a meeting.

22. On the early afternoon of February 28, 1991, Complainant Merkovich delivered to Nelson at the Library another appointment card from the Clinic stating that she was scheduled for a March 14, 1991 appointment with Dr. Christianson. Nelson next wrote Complainant Merkovich the following letter dated February 28, 1991, showing copies to Bowe and Mulcahy:

I have received your letter of February 27, 1991.

I thought I would reiterate to you what I told you today regarding your employment status. First of all, I told you that we need a written doctor's excuse before we will allow you to return to work. This is for our mutual protection.

As you know, you were given a second deadline of today with regard to responding as to your continuation as the confidential secretary. The terms of that position were set forth to you previously.

For your information, I have been advised that this is not an appropriate subject to be discussing with AFSCME Local 742 and that we do not intend to negotiate regarding your confidential status. Therefore, be advised that we need an immediate answer from you so that we may proceed. You are making this extremely difficult for us and you are placing us into a very precarious position. We would expect an answer from you by 4:30 p.m. tomorrow, March 1, 1991.

This is the final request that we will be making to you for an answer in regard to the confidential secretary position and if you choose not to respond, we will assume that is a "no" answer and that you do not wish to comply with the requirements of the job.

If there are any questions, please do not hesitate to contact me.

Complainant Merkovich apparently did not receive that letter until Saturday, March 2, 1991.

23. On or about Monday, March 4, 1991, Nelson received a letter dated March 1, 1991, from Dr. Christianson, who is identified on the Clinic letter as specializing in Internal Medicine and Cardiology. The doctor wrote Nelson as follows:

I am the attending physician at this time for your employee, Mrs. Patricia

Merkovich. She has been a long-term patient here at the Fine Lando Clinic. She is a 42 year old female who first consulted me on February 13, 1991. She was noting headaches with nausea. In addition to this, she had had an episode of chest heaviness which had been intermittent but relatively consistent for the previous three days, not accompanied by shortness of breath or nausea. At that time, she had a sinus x-ray series which was unremarkable and an EKG which showed major ST, T-wave changes anterolaterally. Because of her previous history of atypical chest pain and normal coronary arteriography in 1985, she was treated conservatively with medication and rest. However, despite this, she continued to have this atypical chest pain and saw me in recheck on February 18th.

At this time, EKG had mildly improved, but had not normalized, and she was set up for exercise treadmill test with thallium at Trinity memorial Hospital which was performed February 25, 1991. She was seen in recheck with her chest pain being significantly improved and was told to continue medications and to return to work on March 1, 1991.

Her major complaint through all of this is that she has been put through a severe amount of stress primarily with her work situation, and most recent episodes of chest pain have been triggered primarily by her stress. With the results of her treadmill test, she should be able to return back to work without restrictions; however, I feel that this stress has been adversely affecting her health and wish you would take this into consideration.

I have excused this patient from work from the time of my initial evaluation on February 13, 1991 until March 1, 1991. Unfortunately, without the patient's consent, I am unable to answer any further questions for you. I hope that this letter suffices, and it is being sent at the patient's request.

24. On or about March 6, 1991, Nelson received the following letter in the mail from Complainant Merkovich, which was dated March 4, 1991:

I did not receive your letter until Saturday, March 2, 1991. Please do not assume anything in regards to my acceptance or refusal of the confidential secretarial position. I again say at this time that I have not made a decision on that position because I do not feel qualified to do so. It is my understanding that the work that I have been performing is not confidential and is part of the bargaining unit represented by AFSCME Local 742. You are asking me to take a position which I understand to be outside of the bargaining unit. For this reason I believe any changes in my position must be discussed with my staff representative Jim Burnham and myself.

I am not trying to make things difficult for you. If anything, you have made the situation more stressful for me by asking me to make this decision by myself

without fully informing me of the implications of my acceptance or refusal of the position.

I am anxious to get back to work and resume my job. By this time you should have received the letter from my doctor releasing me to go back to work. I am awaiting your instructions as to when I can do so.

25. After conferring about the situation with Mulcahy, Nelson responded by letter dated March 11, 1991, as follows:

I have received your letter of March 4, 1991.

I understand that you wish to return to work and you are free to do so. Unfortunately for everyone involved, you have failed and refused to sign an medical release form. Therefore we are forced to proceed based on the known facts. We assume that you are able to perform all physical aspects of the job.

Be advised, however, that you will be paid at your old wage rate of \$5.72 per hour due to your failure and refusal to accept the position of confidential Administrative Secretary. As you know, you have been off of work since February 8, 1991 and we need to proceed.

Furthermore, please understand that we intend to immediately post for the position of confidential Administrative Secretary in order that this needed position be filled as quickly as possible.

26. Following her receipt of Nelson's March 11 letter, Complainant Merkovich promptly returned to work on March 13, 1991. On that date Nelson reiterated that the confidential secretary position would be posted and asked if she understood that. Complainant Merkovich said she understood and asked what would happen to her position, to which Nelson replied that he did not know. Similarly, at a Library Staff meeting on March 26, 1991, when Nelson announced in Complainant Merkovich's presence that the posting of a part-time 20-hour per week Confidential Administrative Secretarial position, another employe asked if Respondent was planning to have two secretaries. Nelson replied that he could not say what staffing changes might occur.

27. Notwithstanding the Respondent's communications to her described in the Findings of Fact, above, Complainant Merkovich never informed Respondent whether she would or would not perform the full range of her duties as described in the Administrative Secretary job description. In the circumstances, her failure to affirmatively express a willingness to perform those duties constituted a refusal on her part to perform significant aspects of the duties set forth in that description.

28. At its March 20, 1991 meeting, the Library Board directed Nelson to go forward with Cudahy Civil Service Commission processing of a Confidential Administrative Secretary position

at a wage rate of \$7.72. The Civil Service Commission posted an position called "Library Administrative Secretary," consisting of the duties as described in the May 16, 1990 Administrative Secretary description. That posting stated that the individual selected would be required to become a City of Cudahy resident within six months after completion of the six month probationary period. The inclusion of that reference to a residency requirement in that posting followed shortly after the issuance of an opinion by the Cudahy City Attorney to the effect that a City of Cudahy residency ordinance applied to Respondent's employes, as well. As of the time of the hearing in this case, however, no determination had been made whether that requirement would be applied to individuals already employed by Respondent. While the Civil Service Commission Library Administrative Secretary posting was up, Nelson reminded Complainant Merkovich that she could apply for the posted position. Complainant Merkovich neither responded to that posting nor inquired whether the residency requirement would apply to her were she to do so. Following written and typing testing and interviews, the Civil Service Commission wrote Nelson on May 15, 1991, identifying the three highest ranking applicants. Nelson and the chairperson of the Library Board's committee interviewed the highest ranking applicant, Adele Roy, and took the steps necessary to finalize her hiring.

29. On May 30 and 31, 1991, Complainant Merkovich and Nelson discussed and completed her annual job review and performance appraisal. In his appraisal of her performance, Nelson stated, "Noticeable drop in performance since last evaluation. Repeated refusal to accept and perform all aspects of job description a problem." In her written response dated June 7, 1991, Complainant Merkovich stated, in part, "I feel this evaluation is not a true reflection of my work performance, but is based upon the Director's prejudiced attitude against me since December when the library staff voted for the union. Since then, I feel that he has continuously pressed [the] issue of me joining the union with my co-workers--therefore I feel my evaluation is biased. . . . If my work has been (so called by the Director) noticeably dropping in the past year, why was this not called to my attention before this evaluation with specific instructions or guidelines to improve?"

30. Thereafter by letter dated June 14, 1991, showing a copy to the Library Board, Nelson wrote Complainant Merkovich as follows:

As you are aware, the Cudahy Public Library has posted and interviewed for a confidential secretary for the Library. It is my understanding that you did not apply for this position, which has now been filled.

On this date, I am hereby giving you two weeks' notice of your severance of employment at the Cudahy Public Library from the position of confidential secretary. The reason for this was that you failed and refused to perform the job duties as assigned.

This two week notice will allow you time to secure other employment and to finalize any necessary paperwork with the Cudahy Public Library. Please be advised, however, that this two week notice is preconditioned upon your cooperative

attitude. In the event that you do not cooperate with regard to your job duties, you will be terminated immediately.

If there are any questions, please feel free to contact me directly.

31. Both Bowe and Nelson knew in advance of the December 21, 1990 representation election that Complainant Merkovich had expressed a desire and intention to vote in the representation election despite having been told by Nelson that her name was not on the eligibility list for that election. Bowe and Nelson also knew at the time of the February 8, 1990 meeting described in Finding of Fact 17, above, that Complainant Merkovich had in fact cast a ballot in that election and expressed a preference not to serve as management's observer during the vote. Both Bowe and Nelson were concerned about Complainant Merkovich's attitude and actions in those regards because they appeared inconsistent with the attitudes and cooperation needed by Respondent of its Administrative Secretary in light of the Union's selection as exclusive representative. Complainant Merkovich's responses during the February 8 meeting further heightened Nelson's and Bowe's concerns about whether Complainant Merkovich could be trusted not to leak sensitive labor relations information to the Union. As a consequence of those concerns, Nelson avoided exposing Complainant Merkovich to information and work assignments involving sensitive labor relations matters after the after the February 8, 1991, meeting. Nelson's doing so caused him considerable inconvenience as regards the times of the day and the means by which he communicated with Mulcahy and other agents of Respondent concerning various labor relations matters. However, Nelson's and Bowe's abovenoted concerns about Complainant Merkovich's attitudes and loyalties arose out of their belief that Complainant Merkovich's position was that of a confidential employe. Neither Bowe nor Nelson nor any other agent of Respondent has been shown to have been hostile to the concept of municipal employes in Respondent's employ (i.e., those who were not confidential employes) desiring to or in fact voting in such election or otherwise exercising their Sec. 111.70(2), Stats., rights.

32. Respondent's February 22, 1991, request for medical release described above in Finding of Fact 20, was the first and only such request Respondent has ever made of an employe. Nelson sent that form to Complainant Merkovich on the advice of Mulcahy, who drafted and supplied the form utilized. Previously, another employe of Respondent had been absent from work for about six weeks from January 25, 1990 through the second week of March of that year due to a full hysterectomy and the accompanying period of recuperation. That employe was not requested to sign and submit a consent for release of medical information. At the time of that absence, Nelson had only been Director for a short time and had not developed or implemented any personnel or other policies. The nature, extent and prognosis regarding Complainant Merkovich's chest pains and headaches were substantially less clear than were those regarding the other employe's disability. Respondent did not ultimately condition Complainant Merkovich's status, benefits or return to work on her submission of the February 22 consent form.

33. Because Complainant Merkovich has not been shown to have been an authorized agent of Complainant Union, her requests that Respondent meet with her and her Union representative to discuss her employment status and the consequences of her agreeing or not agreeing to perform the

full range of her duties as described in her job description did not constitute requests on behalf of Complainant Union to that effect. There is no showing herein that Complainant Union ever requested that Respondent meet with it concerning those subjects or the Respondent's decision to create the Administrative Secretary position or the impact of that decision on bargaining unit employees' wages, hours and other conditions of employment. Respondent's failures and refusals to participate in such a meeting, including that contained Respondent's February 28, 1991 letter in Finding of Fact 22, above, did not constitute a refusal of a request by Complainant Union for such a bargaining meeting.

34. Respondent's conduct described in the Findings of Fact, above, was not motivated, in whole or in part, by animus on the part of Respondent or any of Respondent's agents toward Complainant Union or toward municipal employees' exercise of Sec. 111.70(2), Stats.

35. Respondent's conduct described in the Findings of Fact, above, was not such as would reasonably tend to discourage municipal employees' in Respondents' employ from voting in representation elections or from exercising their other Sec. 111.70(2), Stats., rights.

CONCLUSIONS OF LAW

1. Under Sec. 111.70(4)(d)2.a., Stats., no action or inaction by Complainant Union or Respondent concerning the processing of the representation election case or the non-filing of a post-certification unit clarification petition, estops either of them from asserting in this complaint proceeding that the position held by Complainant Merkovich was, at any material time(s), that of a confidential employe or was that of a municipal employe within the meaning of Secs. 111.70(1)(i), Stats.

2. At all times after at least May 16, 1990, the Administrative Secretary position held by Complainant Merkovich was that of a confidential employe and not that of a municipal employe within the meaning of Secs. 111.70(1)(i), Stats.

3. Because Complainant Merkovich was not a municipal employe at least as regards all times after May 16, 1990, Complainant Merkovich had no Sec. 111.70(2) rights after that date as regards her employment relationship with Respondent. Therefore, Respondent could not have

and did not interfere with, restrain or coerce Complainant Merkovich in the exercise of Sec. 111.70(2) rights when it engaged in the actions described in the Findings of Fact, above.

4. Because Complainant Merkovich was not a municipal employe after May 16, 1990, she was not entitled to the protection of Sec. 111.70(3)(a)3, Stats., in her employment relationship with Respondent after that date. Accordingly, Respondent has not been shown herein to have discriminated as regards hire or tenure for the purpose of discouraging membership in Complainant Union within the meaning of Sec. 111.70(3)(a)3 and 1, Stats., when it terminated Grievant's employment effective June 28, 1991 or when it engaged in any of the other conduct described in the Findings of Fact, above.

5. Because Complainant Merkovich was not a municipal employe after May 16, 1990, her position fell within the express exclusion of confidential employes from the bargaining unit for which Complainant was certified as collective bargaining representative. Therefore, Respondent did not commit a refusal to bargain in violation of Sec. 111.70(3)(a)4 and 1 when it individually bargained with Complainant Merkovich concerning her wages, hours and conditions of employment after that date.

6. Because Complainant Union was not the exclusive bargaining representative of any of Respondent's employes either at the time Complainant Merkovich accepted employment in the Administrative position on February 23, 1990 or at the time Respondent's Library Board approved the job description for that position, Respondent was not subject to a duty to bargain collectively with Complainant Union about those decisions or their impact on municipal employes in Respondent's employ or about any other subjects at either of those times. Therefore, Respondent did not commit a Sec. 111.70(3)(a)4 and 1, Stats., refusal to bargain by its failure to notify and offer to bargain with Complainant Union about those decisions or their impact.

7. Respondent's decision to create an Administrative Secretary position with duties that render it a confidential employe position is not a matter primarily related to the wages, hours and other conditions of employment of bargaining unit municipal employes represented by Complainant Union. Therefore, any refusal on Respondent's part to bargain with Complainant Union about such a decision would not have constituted a Sec. 111.70(3)(a)4 and 1, Stats., refusal to bargain.

8. Complainant Merkovich's requests for a meeting among Complainant Union, Respondent and herself concerning the impact of Respondent's creation of a confidential employe position of Administrative Secretary on her wages, hours and conditions of employment did not constitute requests by Complainant Union for collective bargaining on that subject with Respondent. Respondent's responses to Merkovich's requests in those regards did not constitute a refusal of a request by Complainant Union for bargaining on that subject and were not such as would render futile a request for such bargaining by Complainant Union. Therefore, Respondent cannot be found herein to have refused to bargain in violation of Sec. 111.70(3)(a)4 and 1, Stats., with Complainant Union on that subject even if that subject was a mandatory subject at any time after Complainant Union became the exclusive representative of a bargaining unit of Respondent's employes.

9. Respondent's conduct with regard to Merkovich described in the Findings of Fact, above was not such as would, in the circumstances, reasonably tend to undermine Complainant Union or otherwise interfere with, restrain or coerce any municipal employes in the employ of the Respondent as regards the exercise of their right to vote in representation elections conducted pursuant to MERA or of their other Sec. 111.70(2), Stats., rights. Therefore, by that conduct, Respondent did not commit a Sec. 111.70(3)(a)1, Stats., prohibited practice.

10. Respondent has not been shown to have initiated, created, dominated or interfered with the formation or administration of any labor or employe organization or to have contributed financial support to it within the meaning of Sec. 111.70(3)(a)2, Stats.

ORDER 1/

1. Complainants' complaint, as amended, is dismissed in its entirety.
2. Respondent's request for costs and attorneys fees is denied.

Dated at Shorewood, Wisconsin this 1st day of May, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

Marshall L. Gratz, Examiner

1/ (see next page for text of footnote)

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- 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.:

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.

CUDAHY PUBLIC LIBRARY

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

THE PLEADINGS

As initially filed on April 9, 1991, the instant complaint alleged that Complainant Union is the certified representative of a bargaining unit of Respondents' employes which unit has at all material times included Complainant Merkovich. It further asserts that Respondent violated Secs. 111.70(3)(a)1., 2., 3., and 4, Stats., beginning on or about February 8, 1991, by bargaining directly with Complainant Merkovich regarding terms and conditions of her employment; by failing and refusing to contact or bargain with Complainant Union regarding Complainant Merkovich's terms and conditions of employment, even when requested by Merkovich to do so; and by conducting itself on several occasions in a manner designed to intimidate and harass Complainant Merkovich causing her emotional and physical distress and undermining Complainant Union's status as Complainant Merkovich's bargaining representative. As amended on June 25, 1991, the complaint further alleged that Respondent had violated the above sections of MERA on June 14, 1991, by informing Complainant Merkovich that her employment was terminated as of June 28, 1991 and that she was being replaced with a new hire. At the complaint hearing, Complainants were permitted to further amend the complaint to allege that Respondent also failed or refused to bargain with the Union concerning the impact on bargaining unit wages, hours and conditions of employment of the creation of a confidential secretary position. The amended complaint requests that Respondent be ordered: to reinstate Complainant Merkovich to her position as administrative secretary; to bargain with Complainant Union regarding changes in the terms and conditions of employment of Complainant Merkovich; to cease and desist from committing prohibited practices against Complainant Union, its agents and the employes it represents; to make Complainant Merkovich whole for any losses suffered as a result of Respondent's prohibited practices; and to provide such other relief as appears to be just and proper.

In its Answer filed on July 5, 1991, as amended at the hearing to meet Complainants at-hearing complaint amendment, Respondent denied that it committed any of the alleged prohibited practices. Respondent asserted that the amended complaint fails to state a cause of action under MERA because Complainant Merkovich was not a member of the bargaining unit represented by Complainant Union but rather was employed at all material times employed in a confidential position such that she was not a "municipal employe" within the meaning of Sec. 111.70(1)(i), Stats. Respondent notes in that regard that Complainant Merkovich was not on the eligibility list used in the election and that when she attempted to vote in the election, her ballot was challenged. Respondent's answer also asserts that the complaint constitutes harassment of the Respondent by Complainant Union and an attempt "to force Respondent to be without any confidential secretary in its upcoming initial contract negotiations and for other matters." Respondent requested in its answer that the amended complaint be dismissed and that

Complainants be ordered to pay Respondents' costs and attorneys fees and such other relief as may be deemed appropriate.

POSITION OF THE COMPLAINANTS

Complainant Merkovich was at all material times a member of the bargaining unit represented by Complaint Union. Her position was within the scope of the bargaining unit Complainant Union sought to represent by its July 24, 1989 petition initiating the representation case. Respondent sought to exclude various positions from the bargaining unit, but it did not seek to exclude Complainant Merkovich's position during the representation case hearings and the WERC did not exclude her position in its Direction of Election. The WERC's only mention of confidential employees in the Direction was its standard exclusion of supervisory, managerial and confidential employees from the description of the appropriate bargaining unit. That standard exclusion language does not constitute a WERC determination that Complainant Merkovich was a confidential employee.

While the eligibility list used at the election did not include Complainant Merkovich, that was because Respondent's attorney, by Exhibit 20 dated December 13, 1990, provided the WERC with a list that improperly removed Merkovich from the list on the grounds that she was a confidential employee. Respondent's attorney sent a copy of that letter only to the WERC and to other agents of Respondent, but not to Complainant Union or its attorney of record in the representation case. When Complainant Merkovich presented herself to vote on December 21, 1990, her ballot was challenged, but that challenge was never resolved by the WERC because it was not election outcome-determinative. Complainant Merkovich's non-inclusion on the eligibility list was the result of her improper removal by Respondent's attorney and not by any determination to that effect by the WERC. "Given his vast experience before the WERC, [Respondent's attorney,] Mr. Mulcahy must know that picking and choosing names for an eligibility list is not the appropriate method for a unit clarification!" Union brief at 7. Rather, Complainants assert, that is the WERC's role pursuant to Sec. 111.70(4)(d)2.a., Stats.

The job duties performed by Complainant Merkovich never involved access to or participation in any confidential matters relating to Respondent's strategy or position in collective bargaining, contract administration or litigation. She performed no confidential labor relations duties concerning the representation case and election. The descriptions of her duties as they existed when Richard Nelson became Library Director (in early January of 1990) do not include traditional confidential labor relations duties. When a new description was developed by Nelson and Complainant Merkovich, it was reviewed and revised by Respondent's attorney, to insert "confidential" at several places, even though the attorney had no first-hand knowledge of the position's duties and despite questions raised by members of Respondent's governing Library Board as to why the references to "confidential" had been included. Where, as here, Complainant Merkovich did not in fact perform the confidential labor relations duties described in that new job description, the job description alone cannot control as to the nature of Complainant Merkovich's position, just as the WERC ruled in the representation case creating the instant unit that the job descriptions of other employees of Respondent could not be deemed controlling as to their claimed

professional status. Citing, Dec. No. 26680 (WERC, 11/90). The record makes clear that Grievant was not, in fact, performing significant confidential labor relations duties at any material time and hence never became a confidential employe.

The Respondent had a right to have at least one confidential employe. In this case, however, the Union objects to the "back door" manner in which the employer sought to gain such an excluded position. "If the [Respondent] wants to eliminate a bargaining unit position and replace it with a confidential position the decision and its impact must be negotiated with the bargaining representative. The [Respondent's] other alternative is to file a unit clarification petition and seek a WERC ruling excluding the position. Neither of those methods were followed here."

The Respondent interfered with Complainant Merkovich's rights within the meaning of Sec. 111.70(3)(a)1, Stats. Library Director Nelson admitted that his distrust of Complainant Merkovich and his feelings of uncomfortableness towards her started when she sought to vote in the representation election. He apparently felt she could not be trusted to perform certain duties when she expressed reluctance at a February 8, 1991 meeting to accept a position outside the bargaining unit, even though her main concern about the position seemed to be pay commensurate with duties and the requirement that she work some evenings. After that meeting, Nelson subjected Complainant Merkovich to hostile and disparate treatment for no apparent purposes other than to harass. Nelson requested that she sign an excessive and improper release of medical records including billing and payment information and for a period of the preceding five years, without a legitimate business need for that information. Nelson refused for two weeks to allow her to return to work despite her providing an unconditional doctor's release to return from work following her illness. Respondent refused on several occasions to clarify her job status despite her requests that it do so. Respondent refused her requests for Union involvement in discussing changes in her job and the implications of those changes for her personally, and she was told that she was making things extremely difficult and was putting the library in a precarious position. Complainant Merkovich was also both given a poor evaluation and discharged for allegedly refusing to perform duties which she was never asked to perform because she was considered untrustworthy because she attempted to vote in the representation election.

Complainant Merkovich's attempt to vote in the representation election was protected concerted activity and Respondent's abovenoted to that activity have a chilling effect, whether or not Complainant Merkovich should or should not have been included in the bargaining unit. Citing, Fennimore Community Schools, Dec. No. 18811-A (Malamud, 1/83).

Respondent also discriminated against Complainant Merkovich in violation of Sec. 111.70(3)(a)3., Stats. The testimony of both Respondent's then acting Board president Betsy Bowe and its Director, Nelson, shows that they were hostile and disenchanted with Complainant Merkovich because they perceived to be desirous of being a part of the bargaining unit. Complainants have proven all four elements needed to provide (3)(a)3 discrimination. Citing, City of Brookfield, Dec. No. 20702 (Nielsen, 7/84). Complainant Merkovich engaged in protected activities by voting in the representation election and by asking for Union participation in discussions about her terms and conditions of employment. Respondent's agents knew about those

activities and demonstrated their hostility to them by changing their opinion of Complainant Merkovich to a view that she was untrustworthy, a problem and a concern. Respondent imposed sanctions in the forms of harassment, intimidation, a poor job evaluation and termination. At least part of Respondent's motivation for those sanctions was her participation in concerted activities which made her untrustworthy, which led to her not being assigned certain duties for non-performance of which she was ultimately fired. Citing, Muskego-Norway Schools, 35 Wis. 2d 540, 562 (1967)(motivation in part sufficient to support finding of anti-union discrimination).

Respondent refused to bargain within the meaning of Sec. 111.70(3)(a)4, Stats., with Complainant Union about the impact of creation of a confidential position which resulted in the elimination of a bargaining unit position. The statutory duty to bargain extends to all matters primarily related to bargaining unit members' wages, hours and conditions of employment and to the impact of policies affecting the wages, hours and conditions of employment of bargaining unit members. Merkovich asked at least twice in writing that Respondent meet with her and Complainant Union's Staff Representative James Burnham to discuss the implications of the changes in her job. She also asked for information as to what would happen to her job if she did not take the confidential position. Respondent ignored, and in one instance flatly refused those requests, asserting in response that Complainant Merkovich's confidential status "is not an appropriate subject to be discussing with Complainant Union." Respondent thereby made it clear that it refused to negotiate with the Union regarding the implications of the change in Complainant Merkovich's job. Despite its ongoing negotiations with Complainant Union, Respondent's bargaining representatives at no time brought to the table a proposal regarding the elimination of the bargaining unit position caused by its creation of a confidential one. By its abovenoted refusal and inaction, Respondent has failed to meet its bargaining obligation to Complainant Union.

For those reasons, the Examiner should order the relief requested in the amended complaint.

POSITION OF THE RESPONDENT

In its initial brief, Respondent argues as follows. As a confidential clerical employe, Complainant Merkovich was not a municipal employe and was properly excluded from the bargaining unit, such that Respondent had no duty to bargain with Complainant Union about the terms and conditions of her employment. Complainant Union should be estopped from objecting to exclusion of her Administrative Secretary position from the bargaining unit because Complainant Union knew of the existence of that position and of its exclusion from the bargaining unit and raised no objection. The discharge was appropriate in the circumstances because Complainant Merkovich knew of the Administrative Secretary position duties and of the significance of her confidential position and refused to agree to perform those duties. There is

also nothing about the Library's conduct in this matter that could reasonably constitute intimidation and harassment.

Complainant Merkovich wanted to be a part of Complainant Union. She repeatedly refused to perform confidential duties as assigned. Complainant Union, could have but did not file a unit clarification petition to remove any doubts as to whether that position was or was not confidential in nature. Respondent has no obligation to bargain with Complainant Union about the wages, hours and conditions of employment of a confidential position excluded from the unit nor about the impact of the creation of a new position that was created and in existence prior to Complainant Union being certified as the exclusive representative of a bargaining unit of Respondent's employees. Respondent did not intimidate or harass Complainant Merkovich, and her refusals to perform the duties specified in her job description constituted just cause for her termination.

Complainants cannot be permitted to succeed in their "back door" efforts to accrete a confidential position to the bargaining unit by means a prohibited practice complaint proceeding.

In response to Complainant Union's contentions, Respondent argues in its reply brief as follows.

The position held by Complainant Merkovich was not the subject of Complainant Union's representation petition. The petition as initially filed listed the part-time Secretary/Bookkeeper. It was never amended to address the Administrative Secretary position which involved a wider-range of duties, more pay and more hours. When Complainant Merkovich accepted that new position in writing on February 23, 1990, she thereby abandoned her previously-held Secretary/Bookkeeper position that was the subject of the representation petition. The Respondent did not make reference to the Administrative Secretary position during the representation case hearings because Complainant Union had not included that position on the list of positions it sought to represent. Complainant Union was aware of the new Administrative Secretary position. It could have but did not amend its petition to include the new clerical position among the positions listed by Complainant Union in the petition as proposed to be included in the bargaining unit.

The voter eligibility list properly excluded Complainant Merkovich from the bargaining unit. The representation case file shows that on December 17, 1990, i.e., prior to the vote conducted on December 21, 1990, the WERC forwarded to Complainant Union's Staff Representative a copy of Attorney Mulcahy's letter expressly identifying among others, "the Confidential Administrative Secretary, Pat Merkovich" as individuals "who are excluded from the unit by virtue of the WERC's Direction of Election on November 29, 1990." Complainant Union knew Respondent considered Complainant Merkovich a confidential prior to that list being sent to Complainant Union because she called Burnham and discussed the statutory definition of a confidential secretary after being told that she could not vote in the election due to her confidential employee status. The eligibility list drafted by Attorney Mulcahy was provided to Complainant Union by the WERC prior to the election because it is the WERC that sends out that list. Complainant Union's election observer was also put on notice that Complainant Merkovich was not included on the eligibility list when her ballot was challenged on that basis at the election. If

Complainant Union had any objection to the exclusion of Complainant Merkovich it should have raised those objections in a unit clarification petition, not by filing a prohibited practice complaint. It was Complainant Union's burden to include the newly-created administrative secretary position in its pre-election representation petition or in a post-election unit clarification petition. There was nothing for Respondent to do since "confidential" employees were expressly excluded from the unit in the WERC's Direction, Notice of Election and Certification of Representative.

Complainant Merkovich's duties as set forth in her Administrative Secretary job description, coupled with her status as the sole clerical in Respondent's employ, make it clear that her position was that of a confidential employe and therefore expressly excluded from the unit by the WERC in its various descriptions of the instant bargaining unit. Complainant Union's reliance earlier documents describing Complainant Merkovich's duties as a part-time Secretary/Bookkeeper are not particularly significant because she did not become a confidential employe until she accepted the Administrative Secretary position and a job description was developed and finalized for that position. Furthermore, the need for the performance of sensitive labor relations confidential clerical work intensified once Complainant Union prevailed in the election and the Respondent had to staff and prepare itself for upcoming contract negotiations. Yet, when that need arose, Complainant Merkovich repeatedly refused to agree to perform the confidential duties as outlined in her job description. It was Attorney Mulcahy's anticipation of those legitimate needs -- rather than an effort to reduce the size of the bargaining unit -- that led to his advice regarding insertion of several references to the "confidential" nature of certain of the Administrative Secretary's duties.

The WERC's decisions support the Respondent's right to at least one confidential clerical employe. Citing, inter alia, Village of East Troy, Dec. No. 26553 (WERC, 7/90) and Village of Saukville, Dec. No. 26170 (WERC, 9/89). Especially so where, as here, Respondent had only one clerical position and that position was already performing some work of a confidential labor relations nature for her boss who has always had the full range of day-to-day labor relations responsibilities for Respondent including hiring, firing, discipline, work rule enforcement, and who became a member of the Library's negotiating team. Contrary to the Complainants' assertions, the WERC decisions also hold that when an employe provides clerical assistance to an individual charged with significant labor relations responsibility, confidential duties assigned to that employe by virtue of a job description will confer confidential status even if the employe is not currently or has not previously performed the duties outlined in the job description. Citing, Village of East Troy and Village of Saukville, above. Prior to the February 8, 1991 meeting, Complainant Merkovich was assigned confidential tasks associated with development of the budget and mailing out a survey questionnaire regarding employe compensation to gather information for the Respondent's use from other employers. Her position was confidential in nature and excluded by the express description of the bargaining unit in the WERC's Certification of Complainant Union as exclusive representative.

Respondent did not interfere with Complainant Merkovich's rights in violation of Sec. 111.70(3)(a)1., Stats. Nelson's request for medical information was for all practical purposes the first opportunity for Nelson to request a Library employe's records because the only other instance of record occurred very shortly after he became Library Director. Complainant Merkovich's vague condition differed materially from the clear-cut condition and time-off requirements in the other

case. The time taken for Nelson to return Grievant to work was reasonable in light of the fact that Respondent was also awaiting Complainant Merkovich's response concerning her willingness to perform all of her job duties, and Respondent's need to consult with labor relations counsel in light of the gravity of the labor related issues raised in Complainant's letter dated March 4, 1991. Nelson's March 4, 1991 letter should have made it clear to Complainant Merkovich that the Respondent would post her job and fill it as quickly as possible if Complainant Merkovich failed to perform the duties of that job. The Respondent's failure and refusal of Complainant Merkovich's requests to involve Complainant Union in discussions about her employment were proper since Respondent has no obligation to involve Complainant Union in any employment matters concerning its confidential employe. Complainant Merkovich was negatively evaluated because she repeatedly did not agree to perform the confidential aspects of her job even though she had been asked to perform those aspects of the job during the February 8, 1991 meeting. While her voting in the election despite Nelson's having told her it was his understanding that her position was excluded as confidential did "raise the issue of her possible union sympathies" (Respondent's Reply Brief at 11), Nelson and Mulcahy still attempted to persuade her to make a commitment to the management bargaining team pursuant to her job description, but she would not do so. Respondent cannot fairly be described as having treated her in a harassing or intimidating manner.

Complainants' claim, that Respondent has interfered with Complainant's protected concerted activities in a manner that chilled employe election participation, is an allegation being improperly raised for the first time in Complainants' brief, and one not supported by the record. The evidence shows that the actions taken against Complainant Merkovich were taken not because she voted in the representation election, but because she refused to perform the duties outlined in her job description. She was not chastised by any agent of Respondent for having voted in the election, and Respondent continued to seek and encourage her participation on the management team. She does not complain of any adverse, disparate, harassing or intimidating treatment prior to the February 8, 1991 meeting. Respondent's representatives attempted to be cordial during that meeting and to dissipate the tension that arose from Complainant Merkovich's resistance to performing the duties required of her job. Following the meeting, Respondent cordially and professionally drafted and sent her correspondence for nearly a month repeatedly offering her opportunities to perform the duties that her job description required.

Respondent also did not commit an anti-union discrimination prohibited practice. Nelson found Complainant to be "untrustworthy" and a "problem" in the full context of her lack of allegiance to Respondent's management team, not merely because she wanted to vote in the representation election after Nelson told her he thought was ineligible as a confidential employe. Similarly, Ms. Bowe's testimony shows that Respondent found itself with a problem in meeting its staffing needs because Complainant Merkovich's evident desire to be a part of Complainant Union called into question whether she would be a committed member of the management bargaining team in order to provide that team with the clerical support that her job description called upon her to provide. The record does not support the claim that any of Respondent's agents were hostile toward Complainant Merkovich's participation in the representation election or that such hostility in whole or in part led to harassment, a bad evaluation and/or to her termination. She was terminated because she refused to do her job, despite Respondent's offer of a pay raise and an assurance that

Respondent would take her preference not to work nights into account in scheduling negotiation sessions.

Respondent did not unlawfully refuse to bargain with Complainant Union regarding the impact of the creation of a confidential position which resulted in elimination of a bargaining unit position. The Administrative Secretary position was created in February of 1990 and Complainant formally accepted that position on February 28, 1990. The representation election was not held until December 23, 1990. Since the position was created and accepted prior to Complainant Union being certified as exclusive representative of the bargaining unit in question, Respondent has never had a duty to bargain the impact of the creation of the position with Complainant Union.

For the foregoing reasons, Respondent requests that all of the claims advanced by the Complainants be dismissed.

DISCUSSION

The factual background is set forth in detail in the Findings of Fact, so it will not be reiterated again here.

Disputed Status of Complainant Merkovich

Most of the amended complaint allegations rest on the premise that Complainant Merkovich was a municipal employe entitled to the protections of MERA on and after February 8, 1991 when Respondent is alleged to have violated her MERA rights. The Examiner has concluded that she was not a municipal employe, but rather that hers was a confidential employe position at those times.

Both parties argue strenuously, in effect, that the other is estopped from claiming in this proceeding that Complainant Merkovich was or was not a confidential employe at material times on and after February 8, 1991. It is the Examiner's opinion, however, that neither the representation election case nor the failure of the parties to file a post-certification unit clarification petition concerning Complainant Merkovich's status deprives either of them of the right to argue herein about what her status was at times following the Certification of Respondent Union as representative of the bargaining unit described in Finding of Fact 11. The WERC did not have occasion to hear evidence on or to rule on Complainant Merkovich's status in the Direction of Election which it issued, because that issue was not raised during the course of the representation case. At most, the absence of a dispute about the Union's proposed inclusion of the Secretary/Bookkeeper position might be viewed as a stipulation to the inclusion of that position in the bargaining unit. However, there were some significant developments in the nature of Complainant Merkovich's job as well as a change in its title during the pendency of the representation case. Specifically, the job changed from temporary to permanent; the pay rate was increased; weekly hours were increased from 15 to 20; work days were changed from Monday-Wednesday-Friday to every weekday; and a new and materially expanded description of duties and responsibilities was approved by the Library Board, as set forth in Finding of Fact 13. In

these circumstances, Respondent cannot be deemed foreclosed from asserting herein (as it has) that the Administrative Secretary position had become that of a confidential employe by the time of the events on and after February 8, 1991 which comprise the prohibited practices alleged in the amended complaint. By so concluding, the Examiner is definitely not to be understood as treating union silence in the face of unilateral eleventh-hour eligibility list correspondence from the employer as sufficient to bind anyone regarding the legal status of Complainant Merkovich's position. Rather, notwithstanding all of the contentions and counter-contentions about which of the parties had the burden of doing what, when, about the status of Complainant Merkovich's position, the bottom line is that her status as a municipal employe or a confidential employe at any given point in time turns on the nature of her job at the point of time in question, rather than on any of the litigation-related considerations advanced by the parties. In other words, as Complainant Merkovich and Respondent jostled with one another during and after the representation case about Complainant Merkovich's status, they both were acting at their peril, i.e., taking the risk that they might subsequently turn out to be incorrect about what her status was at critical points in time.

The WERC's standards for determining whether a position is that of a confidential employe so as to be excluded from the Sec. 111.70(1)(i), Stats., definition of municipal employe are well established. As reiterated in, Village of Saukville, Dec. No. 26170 (WERC, 9/89), those standards are as follows:

It is well-settled that, for an employe to be held confidential, such employe must have access to, knowledge of, or participation in confidential matters relating to labor relations; for information to be confidential, it must (A), deal with the employer's strategy or position in collective bargaining, contract administration, litigation or other similar matters pertaining to labor relations and grievance handling between the bargaining representative and the employer; and, (B), be information which is not available to the bargaining representative or its agents. 1/

While a de minimis exposure to confidential materials is generally insufficient grounds for exclusion of an employe from a bargaining unit, 2/ we have also sought to protect an employer's right to conduct its labor relations through employes whose interests are aligned with those of management. 3/ Thus, notwithstanding the actual amount of confidential work conducted, but assuming good faith on the part of the employer, an employe may be found to be confidential where the person in question is the only one available to perform legitimate confidential work 4/ and, similarly, where a management employe has significant labor relations responsibility, the clerical employe assigned as her or his secretary may be found to be confidential, even if the actual amount of confidential work is not significant, unless the confidential work can be assigned to another employe without undue disruption of the employer's organization. 5/

1/ Dane County, Dec. No. 22976-C (WERC, 9/88)

- 2/ Boulder Junction Joint School District, Dec. No. 24982 (WERC, 11/87)
- 3/ Cooperative Educational Service Agency No. 9, Dec. No. 23863-A (WERC, 12/86)
- 4/ Town of Grand Chute, Dec. No. 22934 (WERC, 9/85)
- 5/ Howard-Suamico School District, Dec. No. 22731-A (WERC, 9/88)

Complainant Merkovich's exposure to confidential matters was perhaps de minimis prior to Respondent's calling the February 8, 1991 meeting to make sure she was willing to perform the full range of her duties in the context of the newly-established collective bargaining relationship with Complainant Union. However, the record evidence amply reflects the elements necessary under the applicable case law standards to render her position that of a confidential employe at least as of the Library Board's approval of her revised job description on May 16, 1990, if not as of her earlier written acceptance of the Administrative Secretary position. The development and approval of her new and expanded job description making clear and specific reference to the confidential labor relations responsibilities of the position was not merely a paper exercise. As noted above, it was accompanied by a change from temporary to permanent employment status, to working every weekday, for \$1.00 per hour more pay and for five more hours each week. She was Respondent's sole clerical employe. Her boss had sole day-to-day labor relations responsibilities. She and her boss shared a small office and possessed the only keys to the locked file cabinet containing Respondent's personnel and leave accounting records. It would have been unduly disruptive of Respondent's operations to have the confidential work assigned to another employe of Respondent. The Examiner has therefore concluded that as of at least May 16, 1990, and hence at all times material to the amended complaint, Complainant Merkovich's position was that of a "confidential employe" and hence not that of a "municipal employe" within the meaning of Sec. 111.70(1)(i), Stats.

Alleged Prohibited Practices As Regards Complainant Merkovich

It follows that Respondent could not have committed any of the alleged prohibited practices as regards Complainant Merkovich because her position was not within the "municipal employe" class protected by MERA at any time material to the alleged unlawful conduct of Respondent, and not within the bargaining unit as to which Complainant Union was certified as exclusive representative.

Alleged Prohibited Practices As Regards Bargaining Unit Employes Generally

In their post-hearing arguments, Complainants contend that Respondent also violated the rights of individuals who, unlike Complainant Merkovich, were municipal employes and members

of the bargaining unit represented by Complainant Union following the WERC Certification. Complainants assert that Respondent's treatment of Complainant Merkovich on and after February 8, 1991 was such as would have a reasonable tendency to unlawfully undermine the Union and to chill other municipal employees' exercise of the Sec. 111.70(2), Stats., right to vote in representation elections conducted by WERC pursuant to MERA. The Examiner has concluded, however, that the record evidence does not support such a contention.

As noted in Finding of Fact 31, the record reveals that certain of Respondent's agents knew of and were concerned about Complainant Merkovich's interest in and activities of voting in the representation election. Similarly, they knew of and were similarly concerned about her preference not to serve as Respondent's election observer and her reluctance to affirm her willingness to be a member of the management bargaining team and to perform various of the duties described in her job description that related to Respondent's relationship to Complainant Union. A variety of Respondent's actions toward Complainant Merkovich were taken because of Respondents' agents concerns and arguable hostility toward her interest in voting in the election and toward her reluctance to commit to performing the full range of her duties and to be a member of the management bargaining team. Among those were having the sort of discussion that was had on February 8, 1991 with her, pressing her in subsequent correspondence for a commitment regarding willingness to perform the full range of her duties, the decision not to assign her work that would expose her to sensitive labor relations information, the less-favorable May, 1991 evaluation, and, ultimately, her discharge. However, while Respondents viewed Complainant Merkovich's attitudes and conduct as regards the representation election negatively, and while they acted adverse to Complainant Merkovich in various respects because of their negative views in that regard, Respondents' conduct in those regards must be analyzed in the contexts that Respondent considered Complainant Merkovich to be a confidential employe and not a member of the bargaining unit at all material times and that Respondent turned out herein to be on firm legal ground in so viewing her position.

Respondent's agents' abovenoted negative perceptions about and adverse actions toward Complainant Merkovich were all directly related to the fact that Respondent expected -- and, based on the determinations reached herein regarding her status, had a right to expect -- that she would accept the reality that as a confidential employe she was not eligible to vote in the representation election, and that she would affirm her willingness to perform the full range of her duties in the context of the newly established collective bargaining relationship. Respondent's abovenoted actions in relation to Complainant Merkovich were directed toward assuring that Respondent's labor relations sensitive information would not be leaked to the Union. Respondent did not act in a manner that would have suggested to its other employes that by having voted in the election or shown an interest in doing so Complainant Merkovich was irretrievably suspect or of no further use to the Respondent as an employe. Rather, Respondent attempted in various ways -- obtaining authority to and offering her a \$2 per hour raise, expressing Respondent's willingness to do what it could to schedule meetings to meet Complainant Merkovich's personal needs, and repeated requests for an affirmation of her acceptance of the role of confidential employe despite the passage of deadlines for her to do so -- to meet its needs while retaining Complainant in its employ.

Only when its repeated efforts to cause Complainant Merkovich to affirm her willingness to

perform the full range of her job duties proved unsuccessful did Respondent post those duties to find a different employe to perform them. Even then it took steps to remind Complainant Merkovich that she too could apply for the position as posted. Despite Nelson's inexplicable failures to tell Complainant Merkovich -- even when she and other employes specifically inquired -- that she would lose her job if and when Respondent found it necessary to hire another clerical to perform its confidential secretarial duties, Complainant Merkovich's conduct, taken as a whole, amounted to a refusal to perform the significant aspects of the duties set forth in her job description approved by the Library Board on May 16, 1990 and reviewed without objection by Complainant Merkovich in her performance appraisal discussion and documentation completed at the end of that month. Respondent did not have to actually assign Complainant Merkovich confidential work and thereby risk leaks of its sensitive labor relations information in order to reasonably determine whether Complainant Merkovich was willing in the instant circumstances to accept the role of a member of the management bargaining team to perform the full range of her job duties. Moreover, there is simply no merit to Complainant Merkovich's contentions that her failure to affirm her willingness to perform the full range of her job duties was justified or excused by Respondent's refusal to meet with Complainant Union and her on the subject.

While the medical consent forms Respondent asked Complainant Merkovich to complete appear unduly broad, Respondent's illness (headaches and chest pains), unlike the prior instance of a well-defined surgery and recuperation, were such as would raise questions Respondent could legitimately seek to answer by means of a request for medical consent. Respondent did so on advice of legal counsel and by means of a form supplied by legal counsel. Notably, Respondent did not press Complainant for completion of the medical consent form after it received a letter from Complainant's treating physician. For those reasons the Examiner does not find Respondent's request for medical consent forms to have constituted an action that would have interfered with bargaining unit employes' exercise of Sec. 111.70(2), Stats. rights.

While the letter Respondent ultimately received from Dr. Christianson (set forth in Finding of Fact 23) described her condition and treatment and made reference to Complainant Merkovich's being released for work as of March 1, 1991, it also contained a passage that would reasonably give Respondent a basis for continuing concern regarding her ability to safely and healthfully return to work without special precautions being taken on Respondent's part. The letter states, "With the results of her treadmill test, she should be able to return back to work without restrictions; however, I feel that this stress has been adversely affecting her health and wish you would take this into consideration." That letter was apparently received by Respondent on or about Monday, March 4 and was followed closely by Respondent's receipt on or about Wednesday, March 6 of Complainant Merkovich's response to Respondent's February 28 "final request" for an answer. Given the above-quoted passages in the doctor's letter and the importance of the legal and health/safety issues involved, Nelson reasonably sought Mulcahy's advice in the matter before writing Complainant Merkovich on the following Monday, March 11, 1991, that she was free to return to work. In all of the circumstances, the delay between the effective date Complainant Merkovich's doctor released her to work and the date Complainant received Respondent's authorization to return to work was not unreasonable or such as would reasonably tend to chill bargaining unit employes free exercise of Sec. 111.70(2), Stats., rights.

In the foregoing circumstances and for the foregoing reasons, the Examiner has concluded that Respondent's agents have not been shown to have been hostile toward municipal employees exercising their MERA voting or other rights and that Respondent's conduct is not such as would be reasonably likely to unlawfully undermine Complainant Union or to otherwise interfere with, restrain or coerce any municipal employees in Respondent's employ in the exercise of their Sec. 111.70(2), Stats., rights.

Alleged Violations of Duty to Bargain with Complainant Union

The Examiner finds Complainants' allegations of Sec. 111.70(3)(a)4 and 1, Stats., refusals to bargain to be fatally flawed in several respects. While Respondent engaged in individual bargaining with Complainant Merkovich about her wages, hours and other conditions of employment, Respondent did not thereby violate MERA because, for reasons noted above, Complainant Merkovich was neither a municipal employe nor therefore a member of the bargaining unit represented by Complainant Union when the individual bargaining took place on and after February 8, 1991. Because Complainant Merkovich was not a member of Complainant Union's bargaining unit at any time material to the complained of refusals, Respondent owed Complainant Union no duty to bargain as regards her wages, hours and other conditions of employment. The decisions to create the Administrative Secretary position, to offer it to Complainant Merkovich, and to approve the revised job description for that position were made in February and May of 1990, during the pendency of the representation case and hence well before Respondent's duty to bargain with Complainant Union about anything arose. Furthermore, the decisions themselves would not be mandatory subjects of bargaining. See, City of Green Bay, Dec. No. 12402-B (Schurke, 1/75) esp. at 17, aff'd by operation of law, -C (WERC, 2/75), citing, City of Beloit, Dec. No. 12606-B (WERC, 11/74). Finally, the evidence does not establish that Complainant Union ever requested bargaining with Respondent on any of those subjects despite evidence that Respondent Union had knowledge of the creation of the Administrative Secretary position and that Respondent considered it to be that of a confidential employe. Complainant Merkovich's requests that Respondent meet with Complainant Union and her about the implications of her agreeing or not agreeing to perform the full range of her job duties were not -- in appearance or in record fact -- requests for bargaining made by or on behalf of Complainant Union. Hence, Respondents' refusals of Complainant's requests that it convene and participate in such a meeting did not contravene Sec. 111.70(3)(a)4 and 1, Stats.

The Complainants advanced no arguments in their brief regarding their amended complaint allegations that Respondents' violated Sec. 111.70(3)(a)2., Stats., and the Examiner has found no merit in those additional allegations, either.

The Examiner's Order

For the foregoing reasons, the Examiner has dismissed the amended complaint and all of the associated claims advanced herein by Complainants.

The Examiner has also found no merit in, and hence has also denied, the Respondent's request in its answer for attorneys fees and costs.

Dated at Shorewood, Wisconsin this 1st day of May, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Marshall L. Gratz, Examiner