STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MONROE WATER UTILITY EMPLOYEES LOCAL UNION and DISTRICT COUNCIL 40, AFSCME, AFL-CIO, Complainants, vs. MONROE WATER DEPARTMENT and DALE R. NEIDL, Respondents.	Case 20 No. 46079 MP-2510 Decision No. 27015-A

Appearances:
Lawton & Cates, S.C., Attorneys at Law, by Mr. Bruce Ehlke, 214 West Mifflin Stree
Brennan, Steil, Basting & MacDougall, S.C., Attorneys at Law, by Mr. Howard Goldberg, 433 West Washington Avenue, Suite 100, P.O. Box 990, Madison, Wisconsin 53701-0990, appearing on behalf of the Respondents.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

On August 2, 1991, the Monroe Water Utility Employees Local Union and District Council 40, AFSCME, AFL-CIO filed a complaint with the Wisconsin Employment Relations Commission alleging that the suspensions of Jack Morris and Don Gaulrapp and the termination of Jack Morris' employment from the Monroe Water Utility constituted prohibited practices in violation of Secs. 111.70(3)(a)1 and 3, Stats. The Commission appointed Raleigh Jones, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.07(5), Stats. Hearing was held in Monroe, Wisconsin, on November 6 and 18, 1991 and January 14, February 18 and 19, 1992 at which time the parties were given full opportunity to present their evidence and arguments. Both parties filed briefs whereupon the record was closed June 24, 1992. The Examiner, having considered the evidence and arguments of counsel and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Complainant Monroe Water Utility Employees Local Union is an affiliate of Complainant AFSCME Council 40. Both are labor organizations with

offices located at 5 Odana Court, Madison, Wisconsin 53719-1169. At all material times, Jack Bernfeld was the AFSCME Council 40 Staff Representative servicing the local union.

2. Respondent Monroe Water Department is a public utility which provides water to the residents of the City of Monroe. Hereinafter, the Water Department is referred to as the Utility. The Utility's mailing address is P.O. Box 200, Monroe, Wisconsin 53566. The Utility is a separate legal entity from the City of Monroe. The Utility is governed by the Monroe Water Commission. The President of the Commission is Sebastian Laeser and Robert Collins is a Commission member. Respondent Dale Neidl is the current General Executive Officer of the Utility. Neidl is not a member of the Utility Board, and has no vote on same, but has impact on same. As General Executive Officer, Neidl is not empowered to discharge employes on his own volition, but can invoke lesser forms of discipline. Only the Board is empowered to discharge employes.

3. In September, 1989, the Wisconsin Employment Relations Commission certified AFSCME Council 40 as the exclusive collective bargaining representative, for the purposes of collective bargaining, of a bargaining unit consisting of: ". . .all regular full-time and regular part-time employes of the Monroe Water Utility, excluding supervisory, managerial and confidential employes. . ." There are six in the bargaining unit. Of the six, two are clerical employes and four are field employes. At the time the Union was certified, the four field employes were Jack Morris, Don Gaulrapp, Kenny Indergand and Don Miller. Morris was a six-year employe, Gaulrapp an 18-year employe, Indergand a 30-year employe, and Miller an eight-year employe. Gaulrapp and Morris took lead roles in organizing the employes.

4. After becoming certified, Gaulrapp became the chairman of the local union bargaining committee. In October, 1989, Gaulrapp stepped down as chairman and Morris became the new chairman of the local union. As chairman, Morris attended all the bargaining sessions with the City and acted as the contact person for District Council 40 and for the other employes. In communications involving the bargaining unit, Morris was referred to as the union spokesman for the other employes.

5. At the time the Union was certified, the superintendent of the Utility was Orville Beck. Prior to Beck, the superintendent was Kenny Mayer. Both Beck and Mayer had been promoted to that position from within the Utility. When Beck announced his intent to retire in early 1990, the Utility Board decided not to promote his successor from within the Utility but to instead hire someone from outside. The Board's reason for doing so was their belief that the Utility under Beck was not being run efficiently, was not keeping up with technology and that a strong supervisor was needed.

6. The Utility advertised the job opening and there were 20 to 30 applicants, one of which was Don Gaulrapp. Of these applicants, the Board decided to interview three persons. Gaulrapp was not one of the three selected to be interviewed.

7. These three applicants were interviewed by certain members of the Utility Commission. The interviews were conducted at the Utility offices on a Saturday in February, 1990. Both Kenny Indergand and Jack Morris, who were working at the Water Utility offices on the day the interviews were conducted, saw these three applicants arrive for their interviews. During the interviews, Indergand and Morris were working at the workbench which was on the wall adjacent to the office in which the interviews were conducted. Because of their proximity to the office, Indergand and Morris either overheard or eavesdropped on the job interviews being conducted between the board members

and the interviewees. Both Indergand and Morris heard Robert Collins, the chairman of the interviewing committee, ask each of the three applicants how they would handle the fact that one of the (Utility) employes (Don Gaulrapp) had applied for the job but was not being considered for it. Collins was also heard to ask each applicant how they would handle the fact that the employes had just voted to be represented by a union. Indergand and Morris did not hear the response of any of the three applicants to these questions.

8. The Utility Commission decided to hire Dale Neidl and he began his employment with the Monroe Utility as General Executive Officer on March 1, 1990. Prior to assuming the position with the Monroe Utility, Neidl had been the Superintendent of the Water Utility in Plymouth, Wisconsin for eight years. The employes at the Plymouth Utilities are also represented by AFSCME, Council 40. The record indicates that when Neidl worked in Plymouth, that local union filed several grievances against management but none went to arbitration. In the course of processing one of these grievances, Neidl told the (Plymouth) union steward he would be charged with insubordination unless he "lay low" on that particular grievance. On one occasion, Neidl told a Plymouth employe that he was going to get rid of the union (at Plymouth) if it was the last thing he did. Insofar as the record shows, Neidl never did so and the Plymouth Utilities union still exists.

9. Sometime before Neidl began working in Monroe, Beck briefed him on the status of negotiations with the union and the bargaining issues. Neidl also attended a bargaining session before moving to Monroe from Plymouth. About two weeks prior to starting his employment in Monroe, Neidl met with the four field employes (Jack Morris, Kenny Indergand, Don Gaulrapp and Don Miller) for a short get-acquainted session. At that time Neidl told the employes that they were going to be a team: he was the coach and they were the players. Neidl advised the employes that if they played ball on his side of the fence they would be fine; however if they got on the wrong side of the fence, or crossed that line, or "shit on him", they would be out the door. Neidl also told the employes that it was his way or the highway.

10. Neidl's management style, which some employes characterized as strict and authoritarian, was not popular with all the employes. On several dates not identified in the record, the employes held informal meetings among themselves at which Neidl was topic one. On these occasions, Morris urged the Utility employes to stick together and go to the Utility Board to complain about Neidl. Morris wanted Neidl removed as superintendent of the Utility. None of the Utility employes ever went to the Utility Board about Neidl.

11. On March 7, 1990, six days after Neidl started working at the Utility, Kenny Indergand tendered his resignation. His stated reason for retiring two years earlier than originally planned was that he did not care for the way Neidl was operating the Utility. Indergand was replaced by Mike Kennison who started working for the Utility in May of 1990.

12. About two weeks after Neidl started his employment, the field employes met with him to discuss a variety of matters. During this meeting Morris told Neidl that he was chairman of the local union. Neidl subsequently attended several of the negotiating sessions between the Union and the Utility for an initial labor agreement.

13. On several occasions not identified by date in the record, Neidl told the field employes that they did not have a union. When he did so, the employes never questioned him or contradicted him on the matter because they were afraid to do so.

14. Shortly after Neidl started working at the Utility, his personal

life became the subject of intense speculation among the employes. Specifically, it was rumored that Neidl was having an affair with a woman in Monroe. By Neidl's own admission, his marriage was not going well at the time. When he moved from Plymouth to Monroe to take the new job, his wife stayed behind in Plymouth.

15. A month or two after Neidl started working, the Utility Board asked Neidl how he was getting along with the employes. Neidl responded that by and large everything was going well, but he had one employe who was not "fitting in" and was causing problems for him by not "being a member of the team". Although Neidl did not mention the employe by name at the time, he was referring to Jack Morris. Board member Collins instructed Neidl to make sure he documented the specifics of any incident where Neidl felt an employe was not doing their job.

16. In May, 1990, Neidl told Morris that he was not acting as a "team player" as he should. Insofar as the record shows, this was the extent of Neidl's comment. The record does not indicate what incident triggered Neidl's comment. Neidl subsequently recorded this matter in a work diary he kept with the following diary entry:

> May 7, 1990
>
> Since March 1, 1990 after becoming G.E.O. of the Monroe Water Utility, I have noticed several items of neglect & insubordination of some employees, in particular Jack Morris.
>
> I find this person very disruptive to the rest of the work force. He is not a team player.
>
> If his attitude continues, I highly recommend suspension without pay - period of time to be determined.

Neidl did not say anything to Morris at the time about a possible suspension for not being a "team player".

17. One day in early June, 1990, Morris used the cutting torch at the Utility for the first time. Prior to the day in question, Morris had never been instructed how to use it or been told what safety precautions to take. At the time, there were no written rules at the Utility about safety and no superintendent had ever instructed the field employes that they should wear safety goggles when using the cutting torch. On the day in question, Morris was using the cutting torch to cut bolts off an old ramp. He was not wearing safety goggles at the time although goggles were available. The torch did not cut the bolts away completely, so Morris had to use a hammer to knock the bolts off. In doing so, he was hitting the cut bolts away from his body. Another employe who was helping Morris, Mike Kennison, hit a cut bolt towards Morris, causing hot metal to fly and hit Morris' glasses, damaging the lenses. At the time of the incident, Kennison was not wearing safety goggles either, as he had never been told to do so. After his glasses were damaged, Morris remembered having talked with employes of the (Monroe) Street Department who had had their glasses replaced by the City after they had been damaged, so he decided to ask whether the Utility would reimburse him for the cost of new glasses. Neidl was not in the office at the time, so Morris asked the Utility secretaries, Marvel Rusheisen and Nancy Pilz, whether the damage to his glasses would be paid by the Utility. One of them responded that it would be up to the Utility Board to decide. When Neidl returned to the Utility offices, Rusheisen told him that Morris had asked whether the Utility would pay for his damaged glasses. Neidl

said he would look into it, which he did. Later, when Morris asked Neidl whether the Utility would reimburse him for new glasses, Neidl told him that the Utility would not pay for new glasses because he (Morris) had not been wearing safety goggles at the time as he should have. Neidl did not say anything else to Morris about the matter at that time. Neidl later told Kennison he also should have been wearing safety glasses when using the cutting torch. Neidl recorded this matter in his work diary with the following entry:

> Friday, June 8, 1990
>
> Jack Morris failed to use proper eye protection while operating burning torch - splashing slag on glasses - He then tried to have the Water Dept pay for his new lenses - he was turned down - He still has a bad attitude which I feel is detrimental to the operation of the Dept.

18. On July 30, 1990, Neidl spoke to Don Gaulrapp about the fact that an unnamed plumber had entered the Utility's offices and taken a "key" used for opening and closing city water mains. Prior to that time, Neidl had written Monroe area plumbers and informed them that a previously existing practice of their using Utility "keys" would henceforth not be permitted. The new policy required the plumber to get advance approval before the "key" was made available. Neidl had also informed all of the employes of this new policy. When this incident happened, Neidl determined that Gaulrapp was responsible for permitting the plumber to obtain the "key" since Gaulrapp works part-time for the unnamed plumber. Neidl thereupon reiterated the new "key" policy for Gaulrapp and admonished him not to violate it again. Neidl recorded this matter in his work diary with the following entry:

> July 30, 1990 Monday
>
> 7:15 a.m. on Sat. 7/28/90, plumber came and took street key off truck at Water Dept. without Executive permission. Feel he was told to do so by Don Gaulrapp. This is total insubordination after letters were sent to inform plumbers of our new policy.

19. In early August, 1990, Morris needed some information about the name and address of the City's new health insurance carrier. Morris asked Neidl who it was and Neidl told him that he did not know. Morris asked Neidl if he could call City Hall and see if they had this information and Neidl told Morris he could do so. Morris spoke with a woman at City Hall who advised him that she did not have the information in question yet. The following Monday, August 6, Morris was at the Street Department when Judy Nelson, a secretary, told him that she had received the health insurance information he had been looking for, and that she would type it up for him to pick up later. Two days later, Morris picked up the typewritten information from Nelson. When he returned to the Utility, he handed this information to Neidl. Upon his doing so, Neidl became upset with Morris and yelled at him: "You sit down in the goddamn chair and you'll get the information like everybody else. I'm sick and tired of everybody going over my head and trying to undermine my authority. The director of the water works don't run this department and the union don't run this department." Morris responded as follows in a normal tone of voice: "Are you talking to me?" Neidl shouted at him: "I'm talking to anybody that goddamn thinks they can undermine my authority and go over my head." When this exchange occurred, Morris was sitting at a table with a pen in his hand. He dropped the pen. When this happened, Neidl said: "That's right, throw your goddamn pen on the table. That just shows your immaturity. You got a bad attitude. If you don't like it here, maybe you should look for a different job." Neidl did not record this incident in his work diary.

20. About this same time, Kennison went to Neidl and complained that Morris was not letting him (Kennison) learn to install water meters, but was instead only letting him hold the flashlight while Morris did the actual installation. Later, at a meeting with all of the field crew, Neidl told the assembled employes that he did not want anyone pulling seniority on anyone else and that he wanted everyone to learn everyone else's job. He also told them he wanted a team and he wanted his experienced employes to work with newer ones. Insofar as the record shows, Neidl's comments were directed to all the employes and Morris was not singled out for any reason. Later, Neidl made the following entry in his work diary:

> August 7, 1990 Tuesday 7:30 a.m.
>
> Jack Morris has a problem with seniority & continues to disrupt the labor force with statements of seniority in areas with fellow employees - others want to do their work & learn & Jack continues to use seniority as a reason for not allowing fellow workers to learn different areas of their position.
>
> If his attitude does not change I feel he must be dismissed from the Water Dept.

Neidl did not say anything to Morris at the time about being discharged if his attitude did not change.

21. On Saturday, September 22, 1990, Don Gaulrapp was working at the main water plant. Just before his shift ended, the telephone in the Utility offices rang and Gaulrapp answered it. He said: "Hello, Water Department" whereupon a woman's voice on the other end of the line said: "I love you Dale." At this point Neidl answered the telephone from another extension and Gaulrapp hung up. Shortly thereafter, a friend of Gaulrapp's stopped in unexpectedly to visit. The two of them were talking when Neidl walked out of his residence (which is attached to the Utility offices) with his wife. Neidl saw Gaulrapp and his friend talking and walked up to Gaulrapp and asked him who the person was. Gaulrapp replied that it was a friend of his. Neidl then instructed Gaulrapp to have his friend wait outside, which he did. Neidl was clearly agitated with Gaulrapp and told him that he would deal with him on Monday. Later, Neidl made the following entry in his work diary:

> 9-22-90
>
> 4:55 p.m.
>
> Don G. had individual in Main Plant while doing his well runs.
>
> This is not allowed at anytime by anyone. People may wait for you outside but not while I'm paying wages.
>
> Action: Told person to wait outside and told Don I wanted to see him on Monday.

Neidl did not meet with Gaulrapp as planned on Monday due to the work load but met with him the next day (Tuesday, September 25). On that day, Neidl told Gaulrapp that he was going to suspend him for one day, without pay, and he selected September 27th as the day. Neidl wrote the following letter to Gaulrapp concerning same:

September 25, 1990

Mr. Donald Gaulrapp
1053 - 8th Avenue
Monroe, Wisconsin 53566

RE: One Day Suspension

Dear Don:

This letter will confirm my action of September 24, 1990, to suspend you for one (1) day without pay, this day will be chosen at my discretion. The day I have chosen is Thursday, September 27, 1990. Your actions of September 22, 1990, and several other occasions have prompted this action.

I sincerely hope that you will come to realize that the Water Department is a place of business and there is room for only one (1) man in charge, which is myself.

In the future, I expect you to strive to make this a better department, and a better employee of (17) seventeen years as you could be!

Very truly,

Dale R. Neidl /s/
Dale R. Neidl
General Executive Officer
Monroe Water Utility

When Gaulrapp was suspended, the Union and the Utility were still negotiating for an initial labor agreement. Neither Gaulrapp nor the Union objected to the above-noted discipline at the time and no letter of complaint or grievance concerning same was ever filed.

22. Following Gaulrapp's suspension, Morris felt that as chairman of the local union, it was his obligation to "do something" about Neidl's "general behavior." What he decided to do was to contact the employes at the Plymouth Water Utility where Neidl had worked before coming to Monroe to learn how they had dealt with Neidl. On October 8, 1990, Morris called Helen Isferding, an AFSCME Council 40 staff representative, to obtain the names of employes in Plymouth who perhaps could answer his questions. Isferding gave Morris the names and telephone numbers of two men in the Plymouth Utilities union. Morris then called one of the men who referred him to another man, Dan Frye. Morris called Frye's home that same evening, but he was not in. Morris called back later, and Mrs. Frye answered the telephone this time. During their subsequent conversation Neidl's personal life was discussed. At one point during this conversation, Mrs. Frye asked Morris whether Neidl had a girlfriend in Monroe, to which Morris replied yes, Neidl did have a girlfriend, but he did not know whether they were having an affair. The following night, October 9, 1990, Morris called Frye's home again and this time spoke directly with Frye. Morris told Frye that he and other employes in Monroe were having a tough time with Neidl. Frye said that they had the same problems with Neidl in Plymouth and

that they had dealt with it by filing grievances against him. Following his phone call with Frye, Morris shared the information he had obtained with the other Utility employes.

23. A week or two after Morris told Mrs. Frye that Neidl had a girlfriend in Monroe, word of same reached Neidl's wife and father-in-law. This occurred when a person not identified in the record called Neidl's father-in-law in Plymouth and told him that Neidl had a girlfriend in Monroe. Neidl's father-in-law, in turn, called his daughter, Mrs. Neidl, and told her what he had been told. Mrs. Neidl then called Neidl and told him what she had heard.

24. Neidl subsequently learned of Morris' phone calls to Plymouth. Although Neidl knew that Morris had made calls to Plymouth, he did not confront Morris with this information at the time nor did he take any disciplinary action against Morris at that time concerning same.

25. At a staff meeting in mid-October, 1990, Neidl apologized to the assembled employes for letting his personal life interfere with his work. Neidl told the employes that he was going to get things straightened out and that his wife was moving to Monroe from Plymouth. In the beginning of November, 1990, Neidl's wife moved from Plymouth to Monroe to live with him. Shortly after Thanksgiving, 1990, Neidl's wife left him and returned to Plymouth.

26. At a staff meeting on either January 2 or January 7, 1991, Neidl told the assembled employes that someone from the Utility had called Plymouth to try to dig up dirt on his personal life. Neidl did not single out Morris at this meeting as the person who had made phone calls to Plymouth. Neidl told the employes he was upset and disgusted by the phone calls, that he felt it was an invasion into his private life and that he felt it was a tort-like situation. Neidl also told the assembled employes that if they wished, they could attend the Utility Board meeting the following night to discuss his personal life with them. No employes accepted Neidl's invitation to talk to the Utility Board about his (Neidl's) personal life. Neidl recorded this matter in his work diary with the following entry:

> January 2, 1991
>
> Approximately 2 P.M. a meeting was called of the men - There have been several calls to my home town of Plymouth & Plymouth Utilities to try to dig up dirt on my personal life - this is a gross infringement on my privacy & is very close to a tort situation - I informed the men of my disgust w/these actions & gave them the opportunity to speak to the Board.
>
> I feel they have tried to damage my character & create a poor working environment for all water dept personnel.

27. In February, 1991, certain remodeling was in progress at the Water Utility offices. Roger Blum of Monroe was the electrical contractor for the project. No formal plans were drawn up for the project so planning was done informally with Neidl and Blum making decisions where the electrical receptacles and other items would go as the work progressed. While the remodeling project was ongoing, Morris offered his unsolicited opinions concerning such things as where the electrical switches should go. Some of his ideas were accepted by Neidl and some were not. On the day preceding the day in question, Neidl and Blum had discussed electrical switch locations and they decided to not put one on the south wall of the meter room. Morris later

suggested that they put one on that wall. Neidl then changed his mind and directed Blum to do that. On the day in question, Morris was eating dinner in an adjoining room when he heard Blum and Neidl talking about putting the switch on the south wall underneath a water bench. Morris left his meal, entered the room and tried to convince Neidl to have the switch located higher up on the wall. Neidl rejected Morris' proposal saying he didn't want water splashing up on it (i.e. the switch). Neidl then left the room, whereupon Morris said to Blum: "I should have kept my mouth shut." Blum then began running conduit for the switch. Most of the conduit was buried in holes in the 2 x 4's, but on this switch he just ran it to the outside of the studs, leaving it exposed. When Morris asked him whether he was going to tuck it in or not, Blum got upset, raised his voice and said: "Dammit. If you want to do it, here's the drill." At that point, Neidl was on the phone in another part of the building about 30 feet away. Prior to Blum's outburst, Neidl could not hear the conversation between Blum and Morris. When Blum yelled at Morris, Neidl said to the person he was talking to on the phone "Oops, sounds like a little disturbance. I have to go check on the problem. I'll get back to you." Neidl then rushed into the room and asked what in the world was going on. Blum told Neidl that Morris had tried to get him to locate switches at locations other than the places previously selected by Blum and Neidl. Upon hearing this, Neidl yelled at Morris that he (Morris) was to stop interfering with Blum because Blum was working for him (Neidl), not Morris. Neidl then added that if he (Morris) were to put half the effort into his work that he did refereeing volleyball, he might be worth something. Neidl also told Morris that this was his "last warning", and if he engaged in further insubordination he could be terminated. Neidl also told Morris if he was unhappy with everything that was going on at the Utility, he (Neidl) would help Morris prepare his resignation. Neidl also told Morris that if he did not like it, he could go cry to his "fucking union." At no time during this entire incident did Morris raise his voice to Blum or Neidl. Neidl later recorded this matter in his work diary with the following entry:

> Feb 8, 1991 12:15 p.m.
>
> Jack Morris again has disrupted the work force & a contractor hired to do electrical work for the utility - Complaining about location of electrical items in the meter room - he upset the contractor to the point of a shouting match & I informed him that this was his last warning & if he was not happy I would help him write out his resignation - Any further insubordination & he will be terminated!

28. On March 25, 1991, Neidl discovered that the Utility had mixed different brands of meter equipment on some residences and businesses serviced by the Utility. Specifically, Utility employes had mixed Badger brand meter equipment with Rockwell brand meter equipment. This had been the case since at least 1985. The reason Utility employes had mixed components from different water meter manufacturers was because the Utility sometimes lacked components from the same meter manufacturer. These mixed brands had been installed over time at the Superintendent's directive. When Morris was a new employe, he inquired about these mixed hookups and was instructed that Badger and Rockwell products could be used together. Morris, whose job was to install meters, continued this practice during his employment. In a meeting with a Badger meter salesman shortly after Neidl was hired, Morris asked the salesman if it was okay to use Badger and Rockwell products together. Exactly what the salesman said in response to Morris' question is disputed. In any event, Morris thought the salesman told him it was okay to mix brands. Upon learning that the different meter products had been mixed, Neidl called the field employes together and told them that henceforth, Badger and Rockwell meters and

remotes were not to be used interchangeably. He indicated that in his view, it was improper to mix brands. Prior to that date (March 25, 1991) Utility field employes, including Morris, had never been told either verbally or in writing by Neidl or any other superintendent that Badger and Rockwell products were not to be used together.

29. After the meeting referenced above ended, Neidl called Morris into his office. Neidl told Morris that since he (Morris) was responsible for the mixed (i.e. mis-matched) meters, he was facing a suspension for sure, and beyond that, Neidl was not sure. During this meeting, Neidl also told Morris that he knew Morris had made telephone calls to Plymouth back in October, 1990, stating: "You and I both know who made the phone calls to Plymouth." Neidl later recorded this matter in his work diary with the following entry:

> March 25, 1991
>
> Jack Morris has taken upon himself to be insubordinate to the operations of the utility dept. While changing meters he left the Rockwell remotes on the house changed w/ a Badger meter - this will not work. Suspension without pay.

30. The next day, March 26, 1991, Morris asked to talk to Neidl. At this short meeting Morris told Neidl that he had made telephone calls to Plymouth and he apologized for having done so. Neidl told Morris he would be hearing something the second week in April.

31. On April 1, 1991, just before the end of the workday, Neidl told Morris to meet with him the next morning. When Morris went home that day, he found he had received the following letter in the mail from Neidl:

> April 1, 1991
>
> Mr. Jack Morris
> 1525 - 31st Avenue
> Monroe, Wisconsin 53566
>
> RE: Three Day Suspension
>
> Dear Jack:
>
> This letter will confirm my decision to suspend you for (3) three working days without pay, these days will be chosen at my discretion. These days are to be April 3, 4, and 5 respectively.
>
> Your actions dating back to February 8, 1991, and several other occasions have prompted this action.
>
> You are directed to return to my office Monday, April 8, 1991, at 7:30 A.M. to discuss your future with the City of Monroe Water Utility.
>
> Very truly,

Dale R. Neidl /s/
Dale R. Neidl
General Executive Officer
City of Monroe Water Utility

There were no enclosures with this letter. When Morris read the letter, he assumed that the reference therein to his "actions dating back to February 8, 1991" referred to the incident with Roger Blum. Later that day, Morris called Council 40 staff representative Jack Bernfeld for advice. Bernfeld told Morris that he was not available to attend the meeting the next day, but he advised Morris to have a union representative present during any meetings involving discipline.

32. The next day, April 2, Morris had fellow employe Don Miller accompany him to Neidl's office. Before their meeting started at noon, Morris told Neidl that if the meeting involved discipline, he wanted Miller to be present as his union representative. Neidl responded: "No, absolutely not. You guys don't have a union." Neidl refused to permit Don Miller to be present at the meeting. During the ensuing short meeting, Neidl told Morris he was being suspended for three days and that he would get a letter in the mail that day concerning same. When Neidl told Morris this, Morris already knew he was going to be suspended because he had received Neidl's letter a day earlier than Neidl thought. Neidl then ordered Morris to turn in his work keys, and told him that he could either finish out the day or he could go home right then and there. Neidl also told Morris that the letter would explain the reasons for the suspension and would instruct him to report to the Utility office the following Monday, April 8th. After Neidl finished speaking, Morris told Neidl that he was not going to fight the suspension and that he would serve it. He told Neidl that he wanted to continue working for the Water Utility, but that he did not know what the union was going to do with regard to the suspension. Neidl responded to Morris as follows: "You don't have a union. All you have is a bargaining committee. Jack, don't push it."

33. While Morris was serving his suspension, Neidl drafted six written charges against him. These charges dealt with the incidents noted in Findings of Fact 15, 16, 17, 20, 22, 26, 27, 28 and 29. Each of these charges was based on the entries made in Neidl's personal work diary, but none were verbatim with the entry in Neidl's work diary and most contained additional comments not contained in the diary entry. Neidl dated each charge with the entry date found in his work diary, not the actual date the charge was prepared. The six charges against Morris were as follows:

First Charge

Date of warning: May 7, 1990

Nature of violation: Conduct, disobedience,
Insubordination

. . .

Remarks

We find this person very disruptive to the rest of the labor force. He is not a team player. If his attitude continues, I highly recommend suspension without pay!

. . .

Action To Be Taken

Suspension in future without pay.

. . .

Second Charge

Date of warning: June 8, 1990

Nature of violation: Carelessness, Conduct, Disobedience

Remarks

Jack failed to use proper eye protection while operating burning torch. Splashed slag on glasses and demanded the Water Dept. pay for new glasses - He was denied and displayed a bad attitude which is detrimental to the operations of the dept.

. . .

Action To Be Taken

Employe needs help - Suspension - No Pay if Continues

. . .

Third Charge

Date of warning: August 7, 1990

Nature of violation: Conduct, Disobedience Uncooperative

. . .

Remarks

Jack has a problem with authority and continues to disrupt the labor force with statements of I have seniority; you can't do this work, etc. Others want to learn and do the work and Jack continues to use seniority as a reason for not allowing other workers to do different areas of their positions - "Very Poor Attitude"

. . .

Action To Be Taken

Dismissed from the Water Dept.

. . .

Fourth Charge

Date of warning: January 2, 1991

Nature of violation: Conduct, Invasion of Privacy, Slander

Remarks

January 2, 1991, 2:00 P.M.

A meeting was called with the men - There have been several calls by Jack Morris to my home town of Plymouth, Wisconsin & to Plymouth utilities to try to dig up dirt on my personal life - I do not know if the

business phone of the Monroe Water Utility was used to perform this gross infringement on my privacy - This is very close in my mind to a tort cituation (sic) - I informed the men of my discust (sic) with these actions especially those of Jack Morris - The men were given the opportunity to speak to the Utility Board - No one appeared at the meeting.

I strongly feel Jack Morris has tried to damage my character and has created a poor working environment for all Water Dept. personnel.

I am strongly considering a law suit against Jack Morris.

. . .

Fifth Charge

Date of warning: February 8, 1991

Nature of violation: Conduct, Disobedience
Uncooperative, Rude

Remarks

February 8, 1991 12:15 P.M.

Jack Morris again has disrupted the work force & the electrical contractor - Blum Electric hired by the Water Utility to do electrical wiring for the meter room & Main offices - Jack Morris did not approve of the location of several electrical items which I had drawn plans for the contractor to install - He upset the contractor to the point of a shouting match - I was on the phone at the time with a client & had to end our conversation to clear the air as it were - Jack Morris was warned this would be his last warning & stated if he was so unhappy I would aid him in writing his resignation from the Water Dept. - I also informed him if any further insubordination he could be terminated.

I questioned Jack Morris if he understood what I had told him & his reply was yes.

. . .

Sixth Charge

Date of warning: March 25, 1991

Nature of violation: Conduct, Disobedience
Caused Dept lost revenue

Remarks

March 25, 1991 7:30 A.M.

Jack Morris has taken upon himself to be totally disobedient & grossly insubordinate to my directions &

> the operating procedures of the Water Dept. - He was given directions that while changing water meters that Badger Meter Products go with Badger Water Meters & Rockwell Meter Products go with Rockwell Water Meters -
>
> While changing these meters Jack left wrong products with others, out side registers, etc. These components will not interchange - They do not give proper readings then causing the Water Dept to lose revenue for the Dept - duplication of labor efforts had to be done to correct Jack's errors to the tune of (44) forty-four meters to be checked and installed
>
> Public Service Commission rules state this has to be for it can effect (sic) our rates etc. - Guidelines must be followed.
>
> The above actions brought on the suspension of Jack Morris & the extension presented to him April 8th, 1991 @ 7:30 A.M.
>
> The water (sic) will discuss all of these warnings at our April 9, 1991 meeting.

After he prepared the above charges against Morris, Neidl did not give or mail copies to Morris at that time.

34. On Monday, April 8, after serving his three-day suspension, Morris reported to Neidl's office at 7:30 a.m. as he had been instructed to do. He did not bring a union representative with him this time because he was afraid that if he did, this would just make Neidl angry and make matters worse. Morris hoped that the three-day suspension would be the end of it, that the whole thing would blow over and that he could get back to work. At this meeting, Neidl informed Morris that his suspension was extended indefinitely. He further indicated that he (Morris) had two options: resign or be fired. Neidl told him that if he resigned, the Water Board would not fight his receipt of unemployment compensation, while if he was fired the Board would fight his receiving unemployment compensation. Morris did not respond to either of the alternatives Neidl presented. Neidl also instructed Morris to stay away from the Water Utility and its employes. Neidl also told Morris that the Utility Board would be discussing his employment status at their meeting the next night, April 9th, and that he could attend the meeting if he wanted. Neidl made it clear to Morris that he intended to recommend to the Utility Board that Morris be terminated. At some point during this meeting the telephone calls to Plymouth were also discussed. When they were, Neidl told Morris that someone had called his wife and his father-in-law at late hours of the night. Morris told Neidl he did not make those calls.

35. After the above-referenced meeting, Morris called Bernfeld and relayed what had happened to him. Bernfeld told Morris that he was unable to attend the scheduled April 9 Board meeting, so he (Morris) was to take Don Miller with him, find out what the specific charges against him were, and then set up another meeting where he could have representation and have his co-workers testify on his behalf.

36. Morris went to the Board meeting on April 9, 1991. Don Miller accompanied him as a representative of the union. When it came to that part of the agenda concerning Morris, Neidl came out into the hallway to call Morris into the meeting. At that time Morris asked Neidl if Miller could attend the meeting as his union representative. Neidl said "no" and refused to permit Miller to attend the meeting. No one from the Board heard this exchange or was

aware that Morris' request to have Miller present had been denied by Neidl. Morris then went into the meeting unaccompanied. In the meeting, Neidl told Morris he could have his say. Morris then made an initial statement wherein he thanked the Board members for their time, apologized for anything he might have done that was inappropriate, told the Board that he did not feel he had done anything to deserve the treatment he was receiving and said that he would never intentionally do anything to harm the Utility. Morris then stated that he was not aware of the specific charges against him. Neidl responded: "You already know what they are." Morris replied that he only knew of the charge regarding the incident with Roger Blum. At this point, Neidl handed Morris the six written charges he had prepared while Morris was suspended (i.e. those contained in Finding of Fact 33). After giving the six charges to Morris, Neidl told Morris to state his defense against each one. At this point Morris asked if he could be given some time to read over the charges because this was the first time he had seen the written warnings. Board member Robert Collins then asked Morris if this was the first time he had seen the charges, to which Morris responded that it was. Collins then indicated that Morris was entitled to see the charges against him. The Board then directed Neidl to meet with Morris and show him the charges. From that point, there was no further discussion of any of the specific charges. Morris then told the Board that he would like another meeting where he could have his co-workers testify on his behalf and be represented by his union. At this point, Morris asked what his employment status was and Neidl responded that his suspension was extended and that he would get a certified letter the following day that would direct him to return Wednesday, April 17th, to find out what the Board had decided to do. After Morris left the Board meeting, the Board did not take any action against him that night.

37. Morris received the aforementioned letter the following day, April 10, 1991. It stated:

> April 9, 1991
>
> Mr. Jack Morris
> 1525 - 31st Avenue
> Monroe, Wisconsin 53566
>
> RE: Suspension Extension
>
> Dear Jack:
>
> Per our conversation April 8, 1991, at 7:30 A.M., your suspension has been extended a minimum of seven (7) days effective April 8, 1991 through and including April 16, 1991.
>
> You are hereby directed to appear at my office Wednesday, April 17, 1991, to review decisions of the Water Board and the actions you have taken against the Water Department and its staff.
>
> Very truly,
>
> Dale R. Neidl /s/

Dale R. Neidl
General Executive Officer
City of Monroe Water Utility

38. On April 17, 1991, Morris reported to Neidl's office at 7:30 a.m. Don Miller accompanied Morris to the meeting. Before the meeting started Morris told Neidl that if there was going to be any further discussion concerning discipline, he wanted to have Miller present as his union representative. Neidl refused stating: "No. This involves nobody but you." Morris then went into Neidl's office unaccompanied by Miller. The only people present were Neidl and Morris. The first thing Neidl did was to turn on a tape recorder to record what was said. Neidl then had Morris sign a statement acknowledging that he had received the first letter of suspension on April 1, 1991. Neidl then handed Morris the six written charges he had prepared and shown Morris at the April 9 Board meeting. Neidl indicated that he wanted Morris to read the six written charges and sign them. Morris asked him what he was signifying by signing the charges, whereupon Neidl told him that by signing them, he was signifying he had read them, understood them, and agreed with them. Morris refused to sign any of the written charges. Neidl thereupon verbally read each of the six charges contained in Finding of Fact 33 to Morris. After Neidl read each one, a discussion ensued concerning same. When all six charges had been discussed, Morris asked Neidl why he had not received any written warnings prior to being suspended in accordance with the City's rules. Neidl responded that the Utility did not follow the City's rules. At some point during the meeting Neidl turned off the tape recorder which had been on until then. After he turned off the tape recorder he told Morris: "I don't care if you're the president of the union." He then told Morris that even if the Board reinstated him in his employment, it would be difficult for him to work at the Utility because he (Neidl) was still the boss. As the meeting ended, Neidl tried to get Morris to resign. Morris refused to do so. After Morris refused to resign, Neidl indicated he was going to have to get the Board together for another meeting to decide Morris' employment status.

39. After the aforementioned meeting ended, Morris went home, called Bernfeld and told him what had happened. At about 11:00 a.m. that same day, Neidl called Morris and told him there would be a special closed Board meeting the following night, April 18th, at which time the Board would decide Morris' future with the Utility. Neidl told Morris he would call him on April 19th to inform him of the Board's decision.

40. The Utility Board held a special meeting on April 18, 1991. The only item on the agenda was the status of Morris' employment with the Utility. Morris did not attend the meeting. During the meeting, the Board solicited Neidl's recommendation concerning Morris. Neidl recommended to the Board that Morris be terminated immediately. In making their ultimate decision, the Board relied solely on Neidl's verbal recommendation. The Board did not consider or even read any of the six written charges contained in Finding of Fact 33. The meeting ended when Board President Sebastian Laeser moved to terminate Morris. Collins seconded the motion and the motion passed.

41. The next day, April 19, Neidl called Morris about 8:00 a.m. and told him to come down to the Water Utility offices, which he did. Neidl told Morris that he had been terminated effective as of the Board's meeting the previous night. Neidl then gave Morris a paycheck for the two days he had worked prior to his suspension, said that a check would be coming for his severance and vacation pay, said that his insurance would be paid through the end of May, and said that the Utility would not oppose his unemployment compensation claim.

42. At the time Morris was suspended and subsequently discharged, the

Union and the Utility had not yet entered into an initial labor agreement but were involved in interest-arbitration proceedings under Sec. 111.70(4)(cm), Stats., for that purpose. A major reason the parties' initial contract was not settled voluntarily was because of the dispute involving Morris' discharge. The Union's certified final offer for interest-arbitration contained a proposal that Morris' discharge be submitted to a grievance arbitrator and reviewed under a just cause standard. The interest-arbitration award issued in that matter is not part of the instant record.

43. At the time of the instant hearing, the Utility did not have any work rules of its own governing the imposition of discipline. Insofar as the record shows, no employes at the Utility had been disciplined until Neidl was hired.

44. Neidl's suspension of Gaulrapp was not motivated by anti-union considerations.

45. Neidl's suspension of Morris was not motivated by anti-union considerations.

46. The Utility Board's decision to discharge Morris was not motivated by anti-union considerations.

47. Neidl's comments noted in Findings 13 and 32 had a reasonable tendency to interfere with the exercise of rights guaranteed by Sec. 111.70(2), Stats.

48. Morris' request for union representation in his meetings with Neidl on April 2 and 17, 1991 were based upon his reasonable belief that said meetings could result in additional disciplinary action being taken against him. Neidl's refusal to let Morris have representation in those two meetings interfered with Morris' protected employe rights.

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

CONCLUSIONS OF LAW

1. The Respondents did not violate Sec. 111.70(3)(a)3, Stats., by suspending Don Gaulrapp from his employment with the Utility for one day on September 27, 1990.

2. The Respondents did not violate Sec. 111.70(3)(a)3, Stats., by suspending Jack Morris from his employment with the Utility from April 3-18, 1991 and subsequently discharging him on April 19, 1991.

3. Respondent Utility did not interfere with, restrain or coerce municipal employes in the exercise of their rights guaranteed in Sec. 111.70(2), Stats., and therefore did not violate Sec. 111.70(3)(a)1, Stats., by the acts of Utility Board member Collins noted in Finding 7, above.

4. Respondent Neidl did not interfere with, restrain or coerce municipal employes in the exercise of their rights guaranteed in Sec. 111.70(2), Stats., and therefore did not violate Sec. 111.70(3)(a)1, Stats., by the acts noted in Findings 9, 19, 27 and that portion of 38 not addressed in Conclusion 7.

5. Respondent Neidl interfered with, restrained and/or coerced municipal employes in the exercise of their rights guaranteed in Sec. 111.70(2), Stats., and therefore violated Sec. 111.70(3)(a)1, Stats., by the acts noted in Findings 13 and 32, above.

6. Respondent Neidl did not violate Sec. 111.70(3)(a)1, Stats., by denying Morris' request to have union representation at the April 9, 1991 Utility Board meeting.

7. Respondent Neidl violated Sec. 111.70(3)(a)1, Stats., by denying Morris' request to have union representation at disciplinary meetings held April 2 and 17, 1991.

8. The Respondents' failure to utilize the progressive disciplinary procedure contained in the City's written work rules when it suspended Gaulrapp and Morris and discharged Morris did not violate Sec. 111.70(3)(a)4, Stats.

Based on the above Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER 1/

IT IS ORDERED that the Respondents Monroe Water Utility and Dale R. Neidl shall immediately take the following action which will effectuate the purposes of the Municipal Employment Relations Act:

1. Cease and desist from:

   a. Interfering with employes in the exercise of their rights guaranteed in Sec. 111.70(2), Stats.

   b. Refusing to allow union representation during meetings involving employe discipline.

2. Post the Notice attached hereto as Appendix "A" in conspicuous places in the workplace. The notice shall be signed by a representative from the Utility and shall remain posted for a period of 30 days. Reasonable steps shall be taken to ensure that the Notice is not altered, defaced or covered by other material.

3. Notify the Wisconsin Employment Relations Commission within 20 days of this Order what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that, with the exception of the violations of Sec. 111.70(3)(a)1, Stats., found in Conclusions of Law 5 and 7, the complaint is hereby dismissed in its entirety.

Dated at Madison, Wisconsin this 12th day of October, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Raleigh Jones /s/
Raleigh Jones, Examiner

(Footnote 1/ appears on the next page.)

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

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and 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.

APPENDIX "A"

NOTICE TO ALL EMPLOYES

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

WE WILL allow employes, upon request, to have union representation during meetings which may

reasonably lead to employe discipline.

WE WILL NOT interfere with the rights of our employes to have union representatives present during meetings which may reasonably lead to employe discipline.

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

MONROE WATER UTILITY

By _____

Dated this 12th day of October, 1992.

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

CITY OF MONROE (WATER DEPARTMENT)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

BACKGROUND

This complaint concerns the discharge of Jack Morris from his employment with the Monroe Water Utility on April 19, 1991, the prior suspension of Morris and Don Gaulrapp from their employment with the same employer from April 3 to April 18, 1991, and on September 27, 1990, respectively, and Morris' denial of representation at meetings where disciplinary action against him was the subject of discussion. The Union alleged that these actions constituted prohibited practices in violation of Secs. 111.70(3)(a)1 and 3, Stats. The Utility answered the complaint by denying it had committed any prohibited practices by its conduct herein.

Hearing on the complaint was taken on five different days. Almost 1100 pages of testimony is reported in the transcript.

The issues raised in the proceeding are addressed in the DISCUSSION.

POSITIONS OF THE PARTIES

Complainant's Position

It is the Complainant's position that the Utility unjustly suspended Gaulrapp and Morris and unjustly discharged Morris. In the Complainant's view, neither employe engaged in misconduct and no reasonable or responsible employer would have disciplined either Gaulrapp or Morris and certainly would not have discharged Morris for the reasons given. According to the Complainants, hereinafter referred to as the Union, the charges against Morris and Gaulrapp were contrived and were a mere pretext.

With regard to Gaulrapp's suspension, the Union points out that Gaulrapp was supposedly suspended because a friend of his was in the water plant for a minute or two at the end of his shift. It asserts that until Gaulrapp was suspended, Neidl had never disciplined anyone else for engaging in the same behavior (i.e. having a friend in the plant). Additionally, the Union contends that Neidl was not really angry about the fact that Gaulrapp was visiting with a friend in the plant during working hours, but rather that Neidl was mad at Gaulrapp for answering the Utility's phone and hearing someone he couldn't identify say "I love you Dale".

With regard to Morris' suspension and subsequent discharge, the Union strongly argues that the charges against him were contrived after the fact, were untrue and were belied by the record evidence. It points out that many of the incidents cited by the Employer occurred months before Morris was fired and no disciplinary action was imposed when they occurred. It also notes that all six of the formal written charges were written up by Neidl after Morris had already been suspended. The Union submits that when Neidl wrote up these formal charges, he either fabricated new facts or embellished existing facts to make each incident appear different from what really happened.

Against this backdrop, the Union responds in detail to the six allegations against Morris. With regard to the first charge (i.e. that Morris was disruptive to the work force and not a team player) the Union contends that the record is devoid of any testimony from Morris' coworkers that they found him to be a disruptive force or that he was not a team player. In the Union's view, there is substantial testimony from other bargaining unit employes which demonstrates just the opposite, namely that Morris always did what he was told and was not disruptive to the other employes.

With regard to the second charge (i.e. that Morris failed to use proper eye protection while operating a cutting torch and then "demanded" that the Utility pay for new glasses) the Union asserts that Morris never "demanded" that his glasses be paid for. In support thereof, the Union cites the testimony of Marvel Rusheisen who testified that when Morris asked her about the glasses, he was not demanding, angry or upset, and that his behavior was not at all offensive. The Union also notes that when Neidl later told Morris that the Utility would not pay for new glasses because Morris had not been wearing safety goggles at the time his glasses were damaged, Neidl did not seem upset, did not say anything about Morris having a bad attitude, and did not tell Morris that he might be suspended over the incident. The Union asserts that in recording this incident on the warning form, Neidl embellished the facts of this incident to make it look more serious than it actually was. In support of this premise it notes that in his original diary entry regarding the matter, Neidl did not state that Morris "demanded" reimbursement, but merely that he "tried to have the Water Dept. pay for his new lenses." The

characterization of Morris' request as a "demand" was added ten months after the fact when Neidl prepared the written warning. The Union therefore argues that the Utility's reliance on this incident is without merit.

With regard to the third charge (i.e. that Morris asserted seniority in relation to coworkers and prevented them from learning different jobs) the Union submits that once again Neidl made the factual situation appear to be much different in his written report than what it actually was. In support of this premise it notes that twice in the written warning Neidl wrote that Morris "continues" to pull seniority on "other workers". The Union believes there are misrepresentations in both these statements. First, it submits that the word "continues" implies that the alleged problem has been an ongoing one and that Morris had been warned about "pulling" seniority before when, in fact, Kennison only had one conversation with Neidl regarding his interest in learning different aspects of his work. Second, the Union also submits that the reference therein to "other workers" gives the impression that Morris "pulled" seniority on employes other than Kennison. The Union asserts that is simply not true. In support thereof, it notes that it would have been impossible for Morris to pull seniority on the other field employes (i.e. Don Miller and Don Gaulrapp) because both were senior to Morris. The Union therefore asserts that Neidl's written warning concerning the incident was meant to make the matter appear more significant than it actually was.

With regard to the fourth charge (i.e. that Morris made telephone calls to Plymouth to dig up dirt on Neidl's personal life) the Union contends there are several reasons why this charge cannot be relied upon to justify Morris' discharge. To begin with, the Union acknowledges that Morris did make telephone calls to members of the Plymouth Utilities union. However, the Union asserts that these calls were only to find out whether they had similar problems with Neidl and how they had dealt with them -- it was not to "dig up dirt" on Neidl's personal life. It notes in this regard that it was Mrs. Frye, not Morris, who initiated a discussion regarding Neidl's personal life; all Morris did was respond truthfully to her questions. The Union acknowledges that Morris told Mrs. Frye that Neidl was having a relationship with a woman in Monroe. Be that as it may, the Union opines that the reason Neidl's wife left him was because of that relationship -- not because Morris mentioned the relationship to Mrs. Frye. The Union also argues that any consequence Morris' calls may have had for Neidl were outweighed by his (Neidl's) own conduct of choosing to conduct an extramarital affair in plain view of the public. Next, the Union notes that while Neidl found out about Morris' phone calls in October, 1990, Neidl did not tell Morris that he knew Morris made the calls until March 25, 1991 -- five months later. According to the Union, this delay in confronting Morris over same shows that the phone calls did not really disturb Neidl and that the calls became significant only after Neidl and the Board needed an excuse to discharge Morris.

With regard to the fifth charge (i.e. that Morris got into a shouting match with an electrical contractor over the location of electrical switches) the Union asserts that this charge, like the other charges, significantly misrepresents what really happened. In support of this premise it notes that Neidl's report of the incident characterized it as a "shouting match", when both Morris and Blum confirmed that at no time did Morris raise his voice in the least.

With regard to the sixth charge (i.e. that Morris caused the Utility to lose money by using Badger meters and remotes with Rockwell meters and remotes) the Union acknowledges that Morris did indeed use these products interchangeably. Be that as it may, the Union contends this practice was not inconsistent with an existing Water Utility practice. It notes in this regard that prior to March 25, 1991 the Utility field employes, including Morris, had never been told by Neidl or anyone else that Badger and Rockwell products

should not be mixed or used together. The Union also asserts that Morris was told by a Badger sales representative that it was okay to use Badger and Rockwell products together. According to the Union, common sense suggests that in the context of trying to make a sale to the Monroe Utility, the Badger sales representative would not have told the Monroe Utility, which earlier used primarily Rockwell equipment, that Badger products would not work with Rockwell products. The Union believes that the more likely scenario is that in order to make a sale and establish a "foothold" in the Monroe market, it is most likely that the Badger salesman told Morris that the Badger and Rockwell products were interchangeable. Finally, the Union contends there is no credible evidence that using Badger and Rockwell products together resulted in any inaccurate meter readings or in a loss of revenue for the Utility. While the Utility offered documentation relating to twelve residences or businesses where Morris had installed Badger equipment with Rockwell equipment, or vice-versa, and claimed that these documents represented situations where the mixing of different product lines had resulted in inaccurate readings, the Union asserts that in every one of these cases when the mismatched equipment was replaced, the readings on the remote and the inside meter were exactly the same. That being so, there were no discrepancies whatsoever. The Union therefore argues that this charge is also baseless and cannot be relied upon to justify Morris' suspension or discharge.

Next, the Union argues that in the course of disciplining Gaulrapp and Morris, Neidl and the Utility completely ignored the disciplinary procedures found in the City's rules. According to the Union, the Utility had a past practice of using the City's written work rules; that these rules provide for progressive discipline; and that Neidl and the Utility Board failed to follow these rules of employe discipline when it suspended Gaulrapp and Morris and discharged Morris. It notes in this regard that when Neidl suspended Gaulrapp for one day, Neidl essentially skipped the first two steps in the disciplinary process - an oral warning followed by a written warning - and went straight to suspension. The Union also argues that Morris, like Gaulrapp, did not receive progressive discipline because he did not receive any oral or written warnings outlining the charges against him until the fifth day of his suspension.

It is also the Union's position that the discipline of Gaulrapp and Morris was colored by Neidl's anti-union animus. In support thereof, it asserts that Neidl's anti-union animus is demonstrated by both his words and actions. Concerning Neidl's words, it notes that on a number of occasions, Neidl told the employes that they did not have a union. It also notes that Neidl told Morris: "I don't care if you're the president of the union" and "If you don't like it, you can go cry to that fucking union." Concerning Neidl's actions, it notes the following: that Neidl's relationship with the Plymouth Utilities union was anything but cooperative (despite Neidl's claims to the contrary); that Neidl allegedly told the union steward in Plymouth to "lay low"; that the two people who Neidl took disciplinary action against in Monroe (Gaulrapp and Morris) were active in the union; and that the Monroe field employes themselves feared retaliation by Neidl for union activities. According to the Union, these words and actions, when considered individually or in their totality, demonstrate Neidl's anti-union bias.

The Union further asserts that the Utility and Neidl denied Morris access to union representation at meetings at which time they considered whether to discipline or terminate him. According to the Union, this denial of Morris' right to assistance from a union representative came at critical points during the meetings that led up to Morris' suspension and termination. One denial came during a Board meeting while the other two denials involved meetings with Neidl. The Union submits that in all these meetings, discipline against Morris was contemplated and discussed with him. The Union opines that a union representative could have served as Morris' advocate at these meetings and

helped clarify the facts and issues surrounding each of the six allegations of misconduct. The Union argues that these Employer actions also constitute prohibited practices under the Municipal Employment Relations Act.

The Union asks the Examiner to declare the foregoing actions of the Utility and Neidl to be prohibited practices. As a remedy for these alleged prohibited practices, the Union asks the Examiner to issue a cease and desist order, reinstate Morris in his employment with full back pay, make both Morris and Gaulrapp whole for their respective suspensions, and expunge from all personnel records any reference relating to said actions.

Respondents' Position

It is the Respondents' position that the Complainants have not proved that Neidl or the Utility Board was anti-union or that the discipline imposed on Gaulrapp and Morris was motivated, in any part, by anti-union animus. According to the Respondents, Gaulrapp and Morris were disciplined solely because of their own actions; their union activities had absolutely no bearing or impact on the discipline that was imposed.

The Respondents submit that throughout this entire proceeding, the Union has put in its case in such a way so as to directly challenge Neidl's personal integrity. The Respondents believe this personal attack on Neidl was not warranted by the facts nor was it justified in relation to any of the issues alleged in the complaint. It asserts that the Union's trial tactic of attacking Neidl personally had the effect of causing extreme personal pain to Neidl and his family.

According to the Respondents, the Union raised additional charges and innuendo at the hearing that were not pled in the complaint. In its view, the only allegations in issue here are those made in the complaint, specifically those found in paragraphs 5 and 6. It believes it was not obligated to anticipate unspecified charges and cannot be expected to deal with innuendos. Nevertheless, it does respond to one such Union argument, namely the argument that the Utility has adopted the City's rules for its employes. In this regard the Utility argues that it never adopted the City's rules as its own.

Against this backdrop, the Respondents restrict their analysis to only the pled issues. For purposes of its brief, it takes the allegations contained in paragraphs 5 and 6 of the complaint, breaks them down into the following separate allegations, and responds in detail to each.

With regard to the first allegation (i.e. that "Dale Neidl, acting in his individual capacity and on behalf of the Monroe Water Department, made repeated derogatory statements regarding the Union to employes represented by the Union and to others") the Respondents contend there is virtually nothing in the record that supports this charge. In its view, the only testimony on this subject is the testimony that Neidl allegedly told the employes that they "did not have a union", that he is alleged to have said they "did not have a union, only a bargaining committee" and that he is alleged to have referred to the union as the "fucking union" when talking to Morris. Responding to the first two alleged statements, the Respondents assert that there is no way that anybody could believe that Neidl was of the opinion that the employes were not represented by a union. In support thereof, it submits that Neidl knew about unions as he had been involved with them before on both sides of the table. It argues that it makes no sense for Neidl to have said this unless he was trying to say something else. It believes that if Neidl said this at all, what he meant was that there was no union contract in effect at the time. In its view, this gives some meaning to the curious statement: "You don't have a union, only a bargaining committee". The Respondents also contend that this allegation was

not proved by the testimony of the Plymouth Utility employe who said Neidl told him he was going to get rid of the damn union if it was the last thing he did. The Respondents submit that even if this testimony is accepted as true, it applied to events that occurred long ago and long before the time Neidl was employed by the Monroe Utility. Further, it opines that none of this testimony applied to the Monroe union nor was it ever put into context as to what was going on in Plymouth that might have caused Neidl to say what he is alleged to have said.

With regard to the second allegation (i.e. that "Dale Neidl, acting in his individual capacity and on behalf of the Monroe Water Department repeatedly threatened disciplinary action against the employes represented by the Union for no reason at all or for reasons having no basis in fact") the Respondents contend that the Union did not address this contention, as such, in their brief. It notes that of the six employes in the bargaining unit, only two (Morris and Gaulrapp) were disciplined; the other four employes were not. It therefore asserts that the Union has failed to meet its burden on this allegation.

With regard to the third allegation (i.e. that "Dale Neidl, acting in his individual capacity and on behalf of the Monroe Water Department, on September 27, 1990, suspended without pay Don Gaulrapp, an employe represented by the Union, for no reason at all or for a reason that had no basis in fact") the Respondents assert that Gaulrapp was suspended for legitimate reasons. In support thereof, it notes that on September 22, 1990, Neidl caught Gaulrapp visiting with a friend in the plant during working hours. The Respondents argue that Neidl was justified in disciplining Gaulrapp for permitting a non-employe to be in the building. In support of this premise it notes that Gaulrapp failed to comply with a directive Neidl had previously given that employes were not to have their friends come in and visit them on weekends in the main plant. The Respondents dismiss as unfounded the Union's contention that Neidl was not really angry about the fact that Gaulrapp was visiting with a friend in the plant during working hours, but rather that Neidl was mad at Gaulrapp for answering the phone and hearing someone he couldn't identify say: "I love you Dale". The Respondents submit that there is nothing in the record to show that Neidl ever knew these words were spoken on the phone and even if this inference could somehow be made, it has nothing to do with anti-union bias. The Respondents also point out that Gaulrapp's suspension letter indicates there was another incident for which he was suspended. That incident, it submits, was that on July 30, 1990, Neidl had spoken to Gaulrapp about the fact that an unnamed plumber had entered the Utility plant and taken a "key" used for City water mains. The Respondents note that prior to that time, Neidl had written to area plumbers informing them that a previous practice allowing same would henceforth not be permitted and that the new policy required the plumber to get advance approval before the key was made available. When this key incident happened, Neidl determined that Gaulrapp was responsible for allowing the plumber to obtain the Utility's key.

With regard to the fourth allegation (i.e. that "Dale Neidl, acting in his individual capacity and on behalf of the Monroe Water Department, on April 3 through 18, 1991, suspended the chairman of the local union bargaining committee, Jack Morris, and as of April 19, 1991, Morris was discharged from his employment with the Department") the Respondents acknowledge that Neidl suspended Morris from his employment. It notes though that it was the Utility Board, not Neidl, that actually discharged Morris.

With regard to the fifth allegation (i.e. that "When Morris or other employes met with Neidl to discuss these actions, prior to their being implemented, Neidl expressly denied any request to be represented by the Union") the Respondents answer as follows. To begin with, they assert that there is nothing in the record that indicates that any employe other than

Morris made a request to be represented by the Union. Next, concerning Morris' request to have co-employe Don Miller accompany him at three meetings with Neidl, the Respondents note that Miller was not a union steward nor did he hold any formal office in the Union at the time these meetings took place (i.e. before Morris was discharged). Third, the Respondents argue that Weingarten is not applicable to any of three meetings involved. In support of this premise the Respondents aver that both Weingarten and the cases applying it have held that its principles only apply to those situations where the employe asks to have the union represent him at an investigative session with management where the employe reasonably believes that disciplinary action might result from the interview. According to the Respondents, none of the three meetings with Neidl were investigative in nature; instead the purpose of each was to provide information to Morris as to the discipline that was going to be imposed. It cites the following to support this proposition. In the Respondent's view, at the first meeting (i.e. the one which occurred April 2, 1991) Morris already knew the discipline he was to receive (i.e. a three-day suspension). Additionally, it asserts that no conversation occurred concerning the discipline. That being so, it contends no Weingarten violation occurred on that occasion. Next, the Respondents note that the second meeting (i.e. the one which occurred April 9, 1991) was the Board meeting which Morris was not required to attend. It emphasizes that Morris attended that meeting voluntarily; he was not directed to do so. Finally, the Respondents assert that the third meeting was not investigative either since Neidl already knew the pertinent facts. The Respondents argue that this third meeting resulted from Morris' request to the Board to learn the formal charges against him. It also contends that Morris had no "reasonable basis" to believe that this particular meeting would result in any discipline since Neidl told Morris that the next decision concerning Morris' future with the Utility would be made by the Board. The Respondents therefore argue that neither Neidl nor the Board violated the Weingarten doctrine.

With regard to the sixth allegation (i.e. that "The actions of the Monroe Water Department and Dale R. Neidl, described above, were done blatantly and maliciously, and for the purpose of interfering with, restraining and coercing the employes represented by the Union in the exercise of their rights, and did in fact constitute an interference, restraint and coercion of municipal employes in the exercise of their rights") the Respondents argue that each of the six incidents cited by Neidl in his written charges actually occurred and formed the basis for Morris' discipline. According to the Respondents, these reasons were not bogus or a pretext. In support thereof, it notes that Neidl recorded all the pertinent incidents in his work diary and that he used the diary entries to prepare the written charges against Morris. Additionally, it emphasizes that Morris acknowledged that each incident occurred and that Neidl spoke with him about it when they happened. Finally, the Respondents emphasize that this is not a "just cause" hearing, so the Examiner is not to determine if the Employer had "just cause" for the discipline it took.

Against this backdrop, the Respondents contend the following six incidents were the reasons Neidl disciplined Morris. The first charge was that Neidl believed Morris was disruptive to the work force and not a team player. The Respondents acknowledge that Neidl could not remember the incident that triggered Neidl's verbal warning to this effect to Morris, but it asserts the underlying incident is not important. What is important, in its view, is that Neidl told Morris to shape up.

The second charge was that Morris failed to use proper eye protection while using a cutting torch and later sought reimbursement from the Utility for new glasses. The Respondents submit that what is important about this incident is that Morris acknowledges the event took place and that he received a verbal warning concerning same.

The third charge was that Morris asserted seniority in relation to co-worker Mike Kennison and would not let him install water meters because he did not have enough seniority. According to the Respondents, Morris was simply playing the big shot and was out of line in saying this to Kennison.

The fourth charge was that Morris called Plymouth, Wisconsin and told the wife of a Plymouth Utilities employe things about Neidl's personal life. As a result of that call, word got back to Neidl's wife and father-in-law what Morris had said. According to the Respondents, Morris' calls put into motion a series of events which resulted in personal harm to Neidl and his family. It contends that in making these calls, Morris was not only insubordinate but also interfered in areas that were none of his business. It opines that in spreading gossip about Neidl's private life to a complete stranger, it is hard to imagine anything Morris could have done which would have been more destructive of his relationship between himself and Neidl. The Respondents dispute the Union's assertion that Morris' calls did not have any effect on Neidl. In its view, common sense indicates that no employer is going to tolerate any employe interference in their private life and Morris' interference in Neidl's private life was beyond the bounds.

The fifth charge was that Morris interfered with the work being performed for the Utility by a private contractor. The Respondents argue that this incident, like the one where Morris attempted to obtain some health insurance forms from the City, illustrate Morris' constant attempts to impose his own views on the management of the Utility. The Respondents note that Neidl told Morris at the time that this was his "last warning" and that if there was any further insubordination, he would be terminated.

The sixth charge was that Morris was responsible for the Utility having mixed the brands of meters used by the Utility. According to the Utility, this resulted in it having to spend time and money to replace the meters so that they were no longer mixed. The Respondents contend that Neidl had previously told the employes not to mix meter brands. It also cites the testimony of the Badger meter salesman for the proposition that he told Morris to not mix brands. In any event, the Respondents argue that the Examiner does not need to decide whether the salesman and Neidl were correct when they said that the brands were not to be mixed. Instead, the Respondents see the situation as Morris being previously told not to mix brands and Morris then mixing brands in spite of Neidl's instructions. It argues that Neidl was justified in disciplining Morris for disregarding that order.

The Respondents contend that it was the foregoing legitimate reasons that formed the basis for Neidl's recommendation to the Board to fire Morris, not Morris' union activities. It therefore requests that the complaint be dismissed.

DISCUSSION

(3)(a)3 - Discrimination

Section 111.70(3)(a)3, Stats., makes it a prohibited practice for a municipal employer to encourage or discourage membership in a labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment. By its explicit reference to "other terms or conditions of employment," Section (3)(a)3 covers disciplinary action. 2/

2/ Green County (Sheriff's Department), Dec. Nos. 26080-B and 26081-B (Shaw, 10/90), aff'd by operation of law, Dec. Nos. 26080-C and 26081-C (WERC, 11/90); Fennimore Community Schools, Dec. No. 18811-A (Malamud, 1/83),

Therefore, taking disciplinary action against an employe because of his/her union activity falls within this proscription. In order to establish a violation of this section, a complainant must show all of the following elements:

1. The employe was engaged in protected activities; and

2. The employer was aware of those activities; and

3. The employer was hostile to those activities; and

4. The employer's conduct was motivated, in whole or in part, by hostility toward the protected activities. 3/

It is well-settled under Wisconsin's "in-part" test that anti-union animus need not be the employer's primary motive in order for an act to contravene this statute. 4/ If such animus forms any part of the decision to deny a benefit or impose a sanction, it does not matter that the employer may have had other legitimate grounds for its action. 5/ An employer may not subject an employe to adverse consequences "when one of the motivating factors is his union activities, no matter how many other valid reasons exist" for the employer's action. 6/ If it is established that an adverse (personnel) consequence was in any part motivated by the employe's union activity, then the Examiner is obligated to grant appropriate relief.

Applied to the facts involved here, the above-noted Section (3)(a)3 test requires that the Complainants demonstrate that Morris and Gaulrapp engaged in union activity; that the Respondents knew of their union activity; that the Respondents were hostile to it; and that the Respondents' decision to discipline Morris and Gaulrapp was based, at least in part, on said hostility.

Elements one and two are not in dispute. It is undisputed that Morris and Gaulrapp engaged in lawful concerted activity by serving as chairmen, at different times, of the newly-formed local union. It is also undisputed that Neidl had knowledge of same. Elements three and four are in issue though, with the Respondents denying hostility towards that union activity and also denying their union activity played any part in imposing the discipline involved here.

Evidence of hostility and illegal motive (factors three and four above) may be direct (such as with overt statements) or, as is usually the case,

---

aff'd by operation of law, Dec. No. 18811-B (WERC, 10/83).

3/ Milwaukee Board of School Directors, Dec. No. 23232-A (McLaughlin, 4/87) aff'd by operation of law, Dec. No. 23232-B (WERC, 4/87); Kewaunee County, Dec. No. 21624-B (WERC, 5/85); City of Shullsburg, Dec. No. 19586-B (WERC, 6/83).

4/ Muskego-Norway C.S.J.S.D. No. 9 v. W.E.R.B., 35 Wis. 2d 540 (1967); Employment Relations Department v. WERC, 122 Wis. 2d 132 (1985).

5/ Ibid.

6/ Muskego-Norway, supra, at p. 562.

inferred from the circumstances. 7/ Here, the record will be reviewed for evidence of both types. If direct evidence of hostility or illegal motive is found lacking, the Examiner will then look to the total circumstances of the case. In order to uphold an allegation of a violation, these circumstances must be such as to give rise to an inference which is reasonably based upon established facts that can support such an inference. 8/ Where a Respondent gives a reason for disciplinary action, and it is shown that the reason is pretextual, then the inference is that the disciplinary action was based on anti-union animus.

In support of its assertion that Neidl was hostile to Gaulrapp's and Morris' union activity, the Union cites the following incidents contained in the record:

1. Neidl's clashes with the Plymouth Utilities union, which is also represented by AFSCME, over grievances (Finding of Fact 8);

2. Neidl's threatening the union steward at the Plymouth Utilities with charges of insubordination unless he "lay low" on a particular grievance (Finding of Fact 8);

3. Neidl's saying he was going to get rid of the union in Plymouth (Finding of Fact 8);

4. Neidl's telling the employes when he first arrived at the Monroe Utility that it was "his way or the highway" (Finding of Fact 9);

5. Neidl's telling Morris that the union would not run the Utility (Finding of Fact 19);

6. Neidl's telling the Monroe employes that they did not have a union (Finding of Fact 13);

7/ Thus, in Town of Mercer, Dec. No. 14783-A (Greco, 3/77), the Examiner stated that:

> ". . .it is well established that the search for motive at times is very difficult, since oftentimes, direct evidence is not available. For, as noted in a leading case on this subject, Shattuck Denn Mining Corp. v. N.L.R.B. 362 F 2d. 466, 470 (9 Cir., 1966):
>
> "Actual motive, a state of mind being the question, it is seldom that direct evidence will be available that is not also self-serving. In such cases the self-serving declaration is not conclusive; the trier of fact may infer motive from the total circumstances proved. Otherwise, no person accused of unlawful motive who took the stand and testified to a lawful motive could be brought to book."

8/ City of Stevens Point, Dec. No. 26525-A (Jones, 2/92), aff'd by operation of law, Dec. No. 26525-B (WERC, 3/92).

7. Neidl's telling Morris that the employes did not have a union, only a bargaining committee (Finding of Fact 32);

8. Neidl's telling Morris he didn't care if Morris was president of the (local) union, it would still be difficult for Morris to (continue) to work at the Utility because he (Neidl) was the boss (Finding of Fact 38);

9. Neidl's telling Morris that if he didn't like what was happening, he could go cry to his "fucking union" (Finding of Fact 27); and

10. Neidl's telling Morris that he should not push a complaint/grievance over his suspension (Finding of Fact 32).

Attention is focused first on Neidl's previous employment at the Plymouth Utilities and what happened there (items 1, 2 and 3 above). There is no question that Neidl and the Plymouth Utilities union clashed on several occasions when they were dealing with grievances. In and of itself, this clashing proves nothing because it is common for the processing of grievances to generate the angry expression of strong differences of opinion over the merits of a grievance. Beyond that though, the Examiner is convinced that Neidl made the statements attributed to him in items 2 and 3 above. In my view, these statements clearly move beyond anger generated by the merits of a grievance into the realm of hostility toward grievance activity itself. That being so, it constitutes hostility against union activity within the meaning of the third element of the (3)(a)3 test. However, in so finding the Examiner cannot overlook the obvious fact that these matters occurred at Plymouth, not Monroe. As a result, the question here is whether Neidl's statements in Plymouth regarding the union there can be bootstrapped to prove that hostility also existed against the union in Monroe. The Examiner concludes they cannot.

Having so found, attention is now turned to the remaining matters cited by the union (i.e. items 4 through 10). The Examiner finds that it is unnecessary to go through each of the six statements Neidl made to determine if each one constitutes evidence of hostility. Instead, the Examiner finds that at least one of those, namely item 10, constitutes evidence of hostility by Neidl against grievance activity, per se. On the occasion referred to in item 10, Morris was meeting with Neidl concerning his suspension. Morris told Neidl that although he planned to serve his suspension, he did not know if the union would grieve it, whereupon Neidl replied: "Jack, don't push it." The Examiner interprets Neidl's statement to be a threat to Morris to not file a grievance over his discipline. Threatening an employe for filing a grievance constitutes direct evidence of hostility against that union activity. As a result, it is held that this conduct by Neidl, in and of itself, satisfies the third element of the above-noted (3)(a)3 test.

Having found evidence of direct hostility by Neidl against Morris' union activity of challenging his suspension, this still leaves the question of whether the Utility Board was also hostile toward union activity, per se. The Examiner finds that there is no direct evidence of hostility by the Utility Board against Gaulrapp's or Morris' union activity. Additionally, the Examiner concludes that the record evidence will not support an inference that the Utility Board was hostile toward union activity, per se.

The focus now turns to the fourth and final element necessary to prove a (3)(a)3 claim, namely illegal motive. As previously noted, this element

involves the question of whether the Respondents' conduct in disciplining either Morris or Gaulrapp was motivated, in whole or in part, by hostility towards their union activity. In making this call, the Examiner must decide whether the reasons given for the Employer's decision to discipline were genuine or whether instead they were pretextual.

Before reviewing those reasons, it is noted at the outset that this case is not a Sec. 111.70(3)(a)5 case where an examiner determines if the employer's conduct violated a collective bargaining agreement. In this case there was no labor agreement in effect between the parties when the Employer disciplined Gaulrapp and Morris. Additionally, the parties had still not reached an initial collective bargaining agreement when the instant record was closed. As a result, there was no labor agreement in effect when the discipline was imposed for the Employer to have violated. This means that the Examiner is not serving as a de facto grievance arbitrator in this case nor is he deciding whether the Employer had just cause to discipline Gaulrapp and Morris. 9/ This point was acknowledged by union representative Bernfeld at the first day of the instant hearing. That being so, the Examiner will not be applying any of the commonly accepted notions of just cause such as procedural due process, progressive discipline, disparate treatment, mitigating or aggravating factors, or proportionality to Gaulrapp's and Morris' discipline. Additionally, the Examiner is not charged with determining whether the Employer's conduct in this case was appropriate, reasonable or justified. Instead, as previously noted, the Examiner's task in the context of this (3)(a)3 case is solely to determine if the reasons offered by the Employer for Gaulrapp's and Morris' discipline were pretextual.

In defense of its conduct herein, the Respondents offered a number of alleged non-discriminatory reasons for disciplining Gaulrapp and Morris. These reasons will now be reviewed. If it is found that the discipline imposed on Gaulrapp and Morris was for legitimate work-related reasons, as argued by the Utility, then the discipline did not violate (3)(a)3. However, if it is found that the reasons put forward by the Respondents are pretextual, and that a true motive for the discipline was hostility to their union activity, as argued by the Union, then their discipline violated (3)(a)3.

Gaulrapp's Discipline

Attention is focused first on Gaulrapp's discipline. As noted in Finding of Fact 21, Neidl suspended Gaulrapp for one day, namely September 27, 1990. According to the Utility, Gaulrapp was suspended for two work-related reasons:

1. Having a friend in the main plant on the weekend contrary to a directive from Neidl; and

2. Letting an unnamed plumber use the Utility "key" contrary to a directive from Neidl.

The Examiner concludes that the foregoing reasons were not pretextual.

9/ The question of whether just cause existed for Morris' discharge may be addressed in a different forum, namely before a grievance arbitrator. This is because the Union included a proposal in its interest-arbitration final offer that Morris' discharge be submitted to a grievance arbitrator and reviewed under a just cause standard. The instant record does not indicate whether or not the Union's final offer was selected by the interest-arbitrator. Assuming for the sake of discussion that it was, a grievance arbitrator will review Morris' discharge and apply a just cause standard.

To begin with, there is no question that each of the foregoing incidents actually occurred. Additionally, there is also no question that Neidl was displeased with each incident and that he told Gaulrapp so in no uncertain terms. Neidl also made entries concerning each incident in his work diary.

Next, even if the Union is correct in its theory that Neidl was not really angry at Gaulrapp for visiting with a friend in the plant during work hours, but rather was angry at Gaulrapp for answering the Utility's phone and hearing someone he could not identify say: "I love you Dale", this still has nothing to do with anti-union bias. That being so, it proves nothing in terms of establishing the fourth element of a (3)(a)3 charge.

Finally, it cannot be overlooked that both of the foregoing incidents were quite removed in time from Gaulrapp's tenure as chairman/front man of the local union. Gaulrapp stepped down as chairman in October, 1989 (six months before Neidl was hired) and he was suspended about a year later. Given this passage of time, plus the fact that there is neither direct nor indirect evidence that the suspension was related to Gaulrapp's previous union activity, it is held that Gaulrapp's suspension did not violate Sec. 111.70(3)(a)3, Stats.

Morris' Discipline

Attention is now turned to Morris' discipline. As noted in Findings of Fact 31-41, Morris was suspended by Neidl from April 3 to April 18, 1991 and was discharged by the Utility Board effective April 19, 1991. According to the Utility, Morris was suspended, and later fired, for the following reasons:

1. Being disruptive to the workplace and not being a team player;

2. Failing to wear safety glasses while using a cutting torch;

3. Asserting seniority in relation to another employe and preventing that employe from learning different jobs;

4. His telephone calls to Plymouth;

5. Interfering with an electrical contractor who was working for the Utility;

6. Mixing different brands of water meter components.

While the Union contends that the foregoing reasons for Morris' suspension and discharge were pretextual, the Examiner is persuaded otherwise. This conclusion is based on the following rationale. To begin with, except for item 1 above which is simply Neidl's subjective opinion, Morris acknowledged that the other incidents (i.e. items 2-6) actually occurred. Additionally, there is also no question that Neidl was displeased with each incident and that he told Morris so in no uncertain terms. Neidl also made entries concerning each of these incidents in his work diary.

Next, while the Examiner agrees with the Union that Neidl embellished some of the above-noted incidents when he later wrote them up into the written charges contained in Finding of Fact 33, these embellishments do not affect the ultimate outcome here. That is because the Utility Board did not rely on, nor even see, the formal charges Neidl prepared against Morris which are contained

in Finding of Fact 33. Instead, the Board received an oral recommendation from Neidl that Morris be discharged, which it accepted. Since the Board members did not rely on Neidl's formal written charges (i.e. those contained in Finding of Fact 33) in making their decision to discharge, the Examiner will likewise not rely on same.

Against this backdrop, attention is now turned to a review of each of the six charges. With regard to the first charge (i.e. that Morris was disruptive to the work force and was not a team player), the Union notes that Morris' fellow employes thought he did what he was told and that he was not disruptive to the work force. Be that as it may, their view of Morris was not shared by Neidl. As a practical matter, Neidl's views on the subject outweigh those of the bargaining unit employes since he (Neidl) is the boss and it is Neidl's subjective opinion that was expressed in item 1.

With regard to the second charge (i.e. that Morris failed to use proper eye protection while operating a cutting torch), there is no question that Morris did not wear safety glasses while using the cutting torch. In so doing, he splashed slag on his glasses, damaging them. Morris later sought reimbursement from the Utility for new glasses, and Neidl denied the request. Both Morris and Neidl agree that Neidl warned Morris he should use safety goggles in the future if he were to use the cutting torch again.

With regard to the third charge (i.e. that Morris asserted seniority in relation to a co-worker and prevented that employe from learning different jobs), there is no question that on one occasion Morris did not let Kennison, a junior employe, install water meters because he (Morris) had more seniority and experience than Kennison. Kennison later went to Neidl and told him what Morris had said and done. Neidl never talked to Morris privately about the matter. Instead, he told all the employes at a staff meeting that he did not want employes to pull seniority and that he wanted the experienced employes to work with the newer ones.

With regard to the fourth charge (i.e. that Morris called Plymouth and told the wife of a Plymouth Utilities employe things about Neidl's personal life), it is undisputed that Morris made the call in question and told the person he was talking to (a Mrs. Frye) that Neidl had a girlfriend in Monroe. As a result of that call, word got back to Neidl's wife (who was living in Plymouth), and his father-in-law and ultimately Neidl himself, of what Morris had said. Several months later, Neidl informed the Utility employes at a staff meeting that someone from the Utility had called Plymouth to try to dig up dirt on his personal life. Neidl told the employes he was upset and disgusted over same.

With regard to the fifth charge (i.e. that Morris interfered with an electrical contractor who was working for the Utility), the evidence established that Morris aggravated and upset the electrical contractor by second-guessing how he was performing his work. When this happened, Neidl told Morris that this was his "last warning", and if he (Morris) engaged in further insubordination he could be terminated.

With regard to the sixth charge (i.e. that Morris mixed different brands of water meter components), the record confirms that Morris mixed Badger brand meter equipment with Rockwell brand meter equipment. In Neidl's mind, it was improper to mix different brands and Morris was solely responsible for mixing them. Neidl decided to have Utility employes undo what Morris had done by replacing the mis-matched meters so that they were no longer mixed.

Of the six above-noted incidents, unquestionably the most damaging to Morris, insofar as his relationship with Neidl was concerned, was his phone

calls to Plymouth. While Morris denied that his original purpose in calling Plymouth was to spread gossip about Neidl's personal life, as a practical matter that is what happened. In one of those phone calls, Morris told the wife of a Plymouth Utilities employe (a Mrs. Frye) that Neidl had a girlfriend in Monroe. Whether or not the statement was true, Morris' making such a statement was an indiscretion of monumental proportions. Said another way, it is hard to imagine anything else Morris could have said or done which would have been more destructive of his relationship with his boss. What was particularly damaging to Morris about what he told Mrs. Frye was that it made its way back to Neidl's wife and father-in-law, with Neidl learning later that Morris was the source. The Union's contention that Morris' call did not have any effect on Neidl or did not really disturb him is belied by Neidl's testimony to the contrary. On this point, who is to better say than Neidl? Lest there be any question about Neidl's reaction to the foregoing call, it is noted that Neidl told the Utility employes in January, 1991 that he was upset and disgusted (by the phone calls to Plymouth) and that he felt it was an invasion into his private life. Additionally, Utility Board member Collins also testified that Neidl was very upset about the phone calls to Plymouth.

It does not require a great leap in logic to conclude that Morris' phone calls to Plymouth, specifically the one where he told Mrs. Frye that Neidl had a girlfriend in Monroe, poisoned the feelings Neidl had for Morris. By that, I mean that Morris' own conduct made Neidl contemptuous of Morris. In Neidl's view, Morris unnecessarily interfered with his (Neidl's) personal life. While Neidl did not confront Morris personally concerning the matter until March, 1991 (five months after it happened), the Examiner finds that Neidl's delay in doing so is of no probative value.

The Examiner finds that Morris' subsequent discipline had nothing to do with his previous union activities. Instead, the Examiner concludes that Neidl's decision to suspend Morris, and the Board's subsequent decision to discharge, were based on the reasons cited, particularly Morris' call to Plymouth wherein he told Mrs. Frye that Neidl had a girlfriend in Monroe. That being so, it is found that Morris' discipline was not based on hostility towards his previous union activities. It is therefore held that Morris' suspension by Neidl and his discharge by the Board did not violate Sec. 111.70(3)(a)3, Stats.

(3)(a)1

Interference

Section 111.70(3)(a)1, Stats., makes it a prohibited practice for a municipal employer, individually or in concert with others, to interfere with, restrain or coerce municipal employes in the exercise of rights guaranteed them in Sec. 111.70(2), Stats. Section 111.70(2) guarantees municipal employes the right to engage in "lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection." Violations of Sec. 111.70(3)(a)1, Stats., occur when employer conduct has a reasonable tendency to interfere with, restrain or coerce employes in the exercise of their Sec. 111.70(2) rights. 10/ If, after evaluating the conduct in question under all the circumstances, it is concluded that the conduct had a reasonable tendency to interfere with the exercise of Sec. 111.70(2) rights, a violation will be found even if the employer did not intend to interfere and even if the employe(s) did not feel coerced or was not in fact deterred from exercising Sec. 111.70(2) rights. 11/ A finding of anti-union animus or motivation is not

10/ WERC v. Evansville, 69 Wis. 2d 140 (1975).

11/ Beaver Dam Unified School District, Dec. No. 20283-B (WERC, 5/84); City

necessary to establish a violation of Sec. 111.70(3)(a)1. 12/

Just as employes have a protected right to express their opinions to their employers, so also do public sector employers enjoy a protected right of free speech. 13/ Recognizing that labor relations policy is best served by an uninhibited, robust and wide-open debate, the Commission has found that neither inaccurate employer statements, nor employer statements critical of the employes' bargaining representative are violative of Sec. 111.70(3)(a)1, per se. 14/ The test is whether such statements, construed in light of surrounding circumstances, express or imply threats of reprisal or promises of benefits which would reasonably tend to interfere with, restrain, or coerce municipal employes in the exercise of rights guaranteed by Sec. 111.70(2), Stats. 15/

The Union maintains that both the Utility Board and Neidl made a number of statements which constituted interference. These statements are reviewed below.

The only statement involving the Board is that noted in Finding of Fact 7 where Board member Collins was heard to ask three job applicants how they would handle the fact that the (Utility) employes had just voted to be represented by a union. The Examiner finds there is absolutely nothing about this factually accurate statement which would make it unlawful interference. Accordingly, no (3)(a)1 violation has been found in the facts involving the Board.

Attention is now turned to the following statements made by Neidl:

1. Neidl's telling the employes when he first arrived at the Monroe Utility that it was "his way or the highway" (Finding of Fact 9);

2. Neidl's telling the employes at this same meeting that if they "shit on him" they would be out the door (Finding of Fact 9);

3. Neidl's yelling at Morris in the insurance incident referenced in Finding of Fact 19;

4. Neidl's yelling at Morris in the Blum matter referenced in Finding of Fact 27;

5. Neidl's telling Morris that the union would not run the Utility (Finding of Fact 19);

---

of Brookfield, Dec. No. 20691-A (WERC, 2/84); Juneau County, Dec. No. 12593-B (WERC, 1/77).

12/ City of Evansville, Dec. No. 9440-C (WERC, 3/71).

13/ Ashwaubenon School District No. 1, Dec. No. 14774-A (WERC, 10/77).

14/ See generally: Janesville School District, Dec. No. 8791-A (WERC, 3/69); Lisbon-Pewaukee Jt. School District No. 2, Dec. No. 14691-A (Malamud, 6/76); Drummond Joint School District No. 1, Dec. No. 15909-A (Davis, 3/78); and Brown County (Sheriff-Traffic Department), Dec. No. 17258-A (Houlihan, 8/80).

15/ Id.

6. Neidl's telling the employes that they did not have a union (Finding of Fact 13);

7. Neidl's telling Morris that the employes did not have a union, only a bargaining committee (Finding of Fact 32);

8. Neidl's telling Morris he didn't care if Morris was president of the (local) union, it would still be difficult for Morris to (continue) to work at the Utility because he (Neidl) was the boss (Finding of Fact 38);

9. Neidl's telling Morris that if he didn't like what was happening, he could go cry to his "fucking union" (Finding of Fact 27); and

10. Neidl's telling Morris that he should not push a complaint/grievance over his suspension (Finding of Fact 32).

The Examiner finds that Neidl's statements referenced in items 1, 2, 3, 4, 5, 8 and 9 above do not constitute unlawful interference. The basis for this finding follows.

First, with regards to items 1 through 4, the statements contained therein have nothing whatsoever to do with union activity. That being the case, these statements are not governed or regulated by the Municipal Employment Relations Act. It follows from this finding that these statements do not constitute unlawful interference. Next, with regards to items 5 and 8, it is held that while Neidl referred to the "union" in each of these statements, that is not sufficient to bootstrap an interference violation. In item 5, Neidl stated his personal, and therefore subjective, opinion concerning who was in charge of the Utility. Simply put, it was not unlawful interference for him to express his views on the subject as he did. In item 8, Neidl essentially told Morris that the two of them were going to have difficulties working together should Morris stay with the Utility. The Examiner interprets the first part of Neidl's statement (i.e. the part where Neidl said he didn't care if Morris was the president of the local union) to mean that their difficulties in working together were not due to the fact that Morris was union president, but rather were in spite of the fact that Morris was union president. Since Neidl's statement did not tie their difficulties in working together with the fact that Morris was union president, it did not constitute unlawful interference. Finally, with regard to item 9 above, it is held that Neidl's characterization of the union as the "fucking union" did not constitute unlawful interference either. The reason for this finding is that there is nothing in the Municipal Employment Relations Act that protects unions from being the recipients of harsh language.

Neidl's statements in items 6, 7 and 10 above require a contrary finding. With regard to item 6, Neidl told the employes on several occasions that they did not have a union. In saying this, he was just plain wrong; of course the employes have a union. Neidl knew from the day he was interviewed by the Utility Board that the Monroe Utility employes were represented by a union. The Employer contends that what Neidl meant to convey with his statement was that there was no union contract in effect at that time. Had Neidl in fact made that statement, there would not have been any problem with it because it would have been factually accurate. However, Neidl did not make that particular statement. Instead, he said the employes did not have a union. Obviously, this was an inaccurate statement. While inaccurate statements do

not automatically constitute interference, the Examiner finds that it did here. The basis for this finding is that the Examiner is convinced that this statement, coming from a person in a position of authority to his subordinates, was made for the purpose of intimidating them, specifically raising doubts in their minds concerning what the union could do to protect them. Even if that was not what Neidl intended by his statement, several employes testified to the effect that that was the way they interpreted it. Given the foregoing, it is held that Neidl's statement in item 6 above had a reasonable tendency to interfere with the employes' right to engage in protected concerted activity pursuant to Sec. 111.70(2), Stats. It therefore constituted interference under Sec. 111.70(3)(a)1, Stats.

The rationale and conclusion reached above applies to item 7 as well. This is because the statement referenced in item 7 was almost the same as that in item 6. In item 7, Neidl told an employe (specifically Morris) that he did not have a union, only a bargaining committee. Since the first part of this statement has been found to constitute unlawful interference, the question here is whether the additional reference to "only a bargaining committee" alters the outcome from that reached concerning item 6. The Examiner concludes it does not. In the opinion of the Examiner, the statement noted in item 7, like the one noted in item 6, had a reasonable tendency to interfere with the employes' (specifically Morris') right to engage in protected concerted activity. It therefore constituted unlawful interference in violation of Sec. 111.70(3)(a)1, Stats.

Next, concerning item 10, the Examiner finds that Neidl's statement referenced therein also constitutes unlawful interference. On that occasion Neidl told Morris not to push a complaint/grievance over his suspension. Specifically, he said: "Jack, don't push it." The Examiner interprets the foregoing statement, and the word-to-the-wise manner in which it was made, to promise, albeit indirectly, that Morris would be treated better if he refrained from challenging or grieving his discipline. Conversely, Neidl's statement indirectly threatened that Morris will be treated less favorably by Neidl if Morris challenged his discipline by filing a grievance. As a result, Neidl's statement referenced in item 10 interfered with Morris' MERA rights. It therefore violated Sec. 111.70(3)(a)1, Stats.

Right to Representation

Attention is now turned to the issue of whether Morris was deprived of a right to union representation on three different occasions as claimed by the Union.

Before making this call, it is obviously necessary to review the legal standard that will be applied. In Weingarten, 16/ the United States Supreme Court held that employes covered by the National Labor Relations Act, as amended, have the right to the presence of a union representative during a compelled appearance at an investigatory interview which the employe reasonably believes might result in discipline. The Commission applied the basic standards of Weingarten to the Municipal Employment Relations Act in Waukesha County. 17/ Waukesha County held that a right to union representation exists under some, but not all, circumstances. It held:

16/ NLRB v. Weingarten, Inc., 420 U.S. 251, 88 LRRM 2689 (1975).

17/ Waukesha County, Dec. No. 14662-A (Gratz, 1/78), aff'd., Dec. No. 14662-B (WERC, 3/78).

> The pertinent statutory and case-law developments do not. . .require the conclusion. . .that municipal employes enjoy an absolute right under MERA to be represented in every conference they have with their municipal employer or its representatives on questions of wages, hours and conditions of employment. 18/

The decision established that whether a right to representation exists depends on the purpose of the employer-employe interaction and whether protected rights could reasonably be impaired by denying representation in such circumstances. This criteria differs from Weingarten to the extent that it is not limited to simply investigatory interviews. Applying this legal standard, the Commission has held that there is no statutory right to representation if an employe is under no compulsion to appear before the employer, 19/ if there is no reasonable cause to believe that an employer-employe meeting may result in discipline, 20/ or if the meeting is to impose discipline that has already been decided on. 21/ Conversely, the Commission has held that an employer's refusal to permit representation is considered interference with protected employe rights if an employe has requested representation and the scheduled interaction could reasonably affect a decision to discharge or discipline, 22/ or if the meeting's purpose is to determine whether an employe should be retained. 23/ It is the above-noted Commission decisions, rather than Weingarten per se, that establish the applicable law under MERA.

The analysis now turns to a review of the pertinent facts. They are as follows.

On April 1, 1991, Neidl directed Morris to meet with him the next morning, April 2. Although Neidl did not tell Morris what the purpose of the meeting was, Morris assumed it concerned discipline. The basis for this assumption was that several days earlier, specifically March 25, Neidl had told Morris "he was facing a suspension for sure" over the mis-matched meters. Morris' assumption about the meeting's purpose was confirmed when he received a suspension letter from Neidl in the mail that same day (April 1). On April 2, Morris and fellow employe Don Miller reported to Neidl's office. Before the meeting started, Morris told Neidl that if the meeting involved discipline, he wanted Miller present as his Union representative. Neidl denied Morris' request and refused to let Miller attend the meeting. Morris then went into Neidl's office unaccompanied by Miller. At the start of the meeting, Neidl told Morris he was being suspended for three days. When Neidl told Morris this, Morris already knew it was coming because he had received the suspension letter the previous day. Morris responded that he was not going to fight the suspension, and that he would serve it, but that he did not know what the union

---

18/ Waukesha County, Dec. No. 14662-A, supra., p. 21.

19/ City of Milwaukee, Dec. No. 17117-A (Davis, 1/80), aff'd. by operation of law, Dec. No. 17117-B (WERC, 2/80).

20/ City of Madison (Police Department), Dec. No. 17645 (Davis, 3/80), aff'd by operation of law, Dec. No. 17645-A (WERC, 4/80).

21/ Waukesha County, Dec. No. 18402-C (Crowley, 1/82), aff'd, Dec. No. 18402-D (WERC, 9/82).

22/ City of Milwaukee, Dec. Nos. 14873-B, 14875-B, 14899-B (WERC, 8/80).

23/ Boscobel Area School District, Dec. No. 18891-B (WERC, 12/83).

would do about the suspension. Upon hearing this, Neidl responded in pertinent part: "Jack, don't push it."

After Morris had served his three-day suspension, he reported to Neidl's office as directed. He did not bring Miller with him this time. At this meeting Neidl informed Miller that his suspension was extended indefinitely. Neidl also told Morris that the Utility Board would be discussing his employment status at their meeting the next night, April 9, and that Morris could attend the meeting if he wanted. Neidl informed Morris that he intended at that time to recommend to the Utility Board that Morris be fired. Morris went to the Board meeting on April 9 accompanied by Don Miller. When it came to that part of the meeting's agenda concerning Morris, Neidl left the meeting room and went out into the hallway where Morris and Miller were waiting. He invited Morris into the meeting. Morris then asked Neidl if Miller could attend the meeting as his union representative. Neidl denied Morris' request and refused to let Miller attend the meeting. None of the Board members heard this exchange between Neidl and Morris. Morris then went into the meeting unaccompanied by Miller. During the meeting Neidl handed Morris the six written charges he had prepared against Morris and told him (Morris) to state his defense against each one. Morris responded that this was the first time he had seen the charges and he asked for time to read them. The Board granted Morris' request and directed Neidl to meet with Morris and show him the charges. There was no further discussion of the specific charges against Morris at the meeting. Morris then asked what his (employment) status was and Neidl responded that his suspension was extended. Neidl then directed Morris to return to the Utility on April 17 to find out what the Board had decided to do. No action was taken against Morris that night.

On April 17, 1991, Morris and fellow employe Don Miller reported to Neidl's office. Before the meeting started, Morris told Neidl that if there was going to be any further discussion concerning discipline, he wanted Miller present as his union representative. Neidl denied Morris' request and refused to let Miller attend the meeting. Morris then went into Neidl's office unaccompanied by Miller. During the ensuing meeting all of the charges against Morris were reviewed in detail. Afterwards, Neidl tried to get Morris to resign, but Morris refused to do so.

The aforementioned legal framework will now be applied to the above-noted facts. First, with regard to the April 2 meeting, there is no question that Morris asked for Don Miller to be present as his union representative and that Neidl denied this request. While the Employer correctly notes that Miller was not a union steward and did not hold any formal office in the Union at the time of this meeting, and infers these points are significant, the Examiner is not so persuaded. Simply put, there is no requirement that an employe's "union representative" meet either of these requirements. Additionally, it cannot be overlooked that Morris was the sole union officer in the local union at that time. None of the other three field employes held official office. Given these circumstances, plus the fact that Council 40 representative Bernfeld could not be present that day, it is understandable why Morris pressed Miller into service as his "union representative" for his meeting with Neidl.

The Examiner finds that Neidl's refusal to let Miller sit in on the April 2 meeting as Morris' representative interfered with Morris' protected employe rights. The basis for this finding is as follows. First, the meeting was mandatory - Morris was directed to appear. Second, while the Employer correctly notes that the purpose of the meeting was not investigative in nature, there is no requirement under Waukesha County and subsequent cases that it be. Instead, it is sufficient that the meeting's purpose be disciplinary in nature. Morris knew from the outset that this meeting's purpose was disciplinary in nature because he had received Neidl's suspension letter the

previous day. Third, while Neidl's original purpose in having the meeting may simply have been to impose discipline that had already been decided on, it is clear that more than that happened. Contrary to the Employer's assertion, the discipline Neidl imposed was discussed because Neidl essentially threatened Morris with additional discipline (beyond a suspension) if it (i.e. the suspension) was challenged. It is therefore held that Neidl's refusal to let Morris have representation at their April 2 meeting constituted unlawful interference which violated Sec. 111.70(3)(a)1, Stats.

Attention is turned next to the April 9, 1991 Board meeting. Once again, there is no question that Morris asked for Don Miller to be present as his union representative and that Neidl denied this request. Assuming for the sake of argument that Morris had a right to representation at the April 9 Board meeting, it was Neidl and not the Board that denied the request. Insofar as the record shows, the Board members at the meeting never knew that Morris had asked to have Miller present as his union representative and that Neidl had denied that request. That being so, if it is found that Morris was entitled to representation at this meeting, a violation cannot be attributed to the Board.

Nevertheless, the Examiner finds that Neidl's refusal to let Miller sit in on the April 2 meeting did not interfere with Morris' protected employe rights. The rationale for this finding rests on the fact that Morris was not directed to appear at this meeting; instead, he was permitted to attend. He was under no compulsion whatsoever to appear before the Board at the meeting. While it is understandable why Morris would want to appear and argue his side of the story to the Board, the fact remains that it was his choice and his choice alone to appear at the Board meeting and have contact with the Board. Under the Commission case law previously cited, there is no statutory right to representation if an employe is under no compulsion to appear before the employer, and such was obviously the case with the April 9 Board meeting. That being so, Neidl's refusal to let Morris have representation at the April 9 Board meeting did not constitute unlawful interference.

Finally, the focus turns to the April 17, 1991 meeting between Neidl and Morris. Once again, there is no question that Morris asked for Don Miller to be present as his union representative and that Neidl denied his request. The Examiner finds that Neidl's refusal to let Miller sit in on the April 17 meeting as Morris' representative interfered with Morris' protected employe rights. This finding is based on the premise that the April 17 meeting, like the April 2 meeting, was disciplinary in nature. That being the case, it logically follows that the legal conclusion for this meeting (April 17) should be the same as the April 2 meeting. In so finding, the Examiner is aware that this meeting resulted from Morris' request to the Board to learn the factual charges against him. Be that as it may, this was not a voluntary meeting for Morris. Instead, he was directed by Neidl to appear. Next, since Morris had left the April 9 Board meeting with his employment status unresolved, he had a reasonable basis to believe that this meeting (the April 17 meeting) could affect a decision to impose additional discipline or possible termination. Given these circumstances, Morris was legally entitled to have his request for representation at that meeting honored. It therefore follows that Neidl's refusal to let Morris have representation at the April 17 meeting constituted unlawful interference which violated Sec. 111.70(3)(a)1, Stats.

(3)(a)4 - Unilateral Change

Although the instant complaint did not plead a unilateral change violation, nor did the Union indicate at hearing that it was pursuing such a claim, the Union's brief raises such a claim. Specifically, the Union alleges that the Monroe Water Utility, which at the time of the hearing did not have any work rules of its own, had a practice of following the City of Monroe's

written work rules; that the City's rules provided for progressive discipline; that Neidl and the Board failed to follow the City's rules governing the imposition of discipline when it discharged Morris and suspended Gaulrapp; and that this unilateral departure from an established procedure while collective bargaining was in progress constitutes a prohibited practice under MERA.

Sec. 111.70(3)(a)4, Stats., makes it unlawful for a municipal employer "to refuse to bargain collectively with a representative of a majority of its employes in an appropriate collective bargaining unit." Absent a valid defense, a unilateral change in existing wages, hours, or conditions of employment is a per se violation of the MERA duty to bargain. 24/ Unilateral changes are tantamount to an outright refusal to bargain about a mandatory subject of bargaining because each of those actions undercuts the integrity of the collective bargaining process in a manner inherently inconsistent with the statutory mandate to bargain in good faith. 25/ In addition, an employer's unilateral change evidences a disregard for the role and status of the majority representative, which disregard is inherently inconsistent with good faith bargaining. 26/

The Union's unilateral change claim rests on the premise that the Utility previously followed the progressive disciplinary sequence contained in the City's work rules when it disciplined employes, but that it failed to do so when it disciplined Morris and Gaulrapp. The problem with this claim is that the premise is faulty. Specifically, the latter component is dependent on the existence of the former component and the Union has not proved the former's existence. Insofar as the record shows, no employes had ever been disciplined at the Utility until Neidl was hired. Since no employes had previously been disciplined, there is no established "practice" of progressive discipline being imposed upon Utility employes.

Having thus held that no past practice was shown to exist that the Utility always imposed progressive discipline upon employes pursuant to the City's work rules, it follows that there is no basis for finding an unlawful unilateral change here. Consequently, the Union's unilateral change claim is rejected.

Remedy

Having found that Neidl interfered with protected employe rights by the acts noted in Findings 13 and 32 and also by denying Morris' request to have union representation at disciplinary meetings held April 2 and 17, 1991, the Examiner is obligated to rectify that misconduct by granting appropriate relief. In crafting remedies, the Examiner is to order that relief necessary to restore the status quo ante and effectuate the purposes of MERA. Generally speaking, such remedies are designed to cure, not to punish. These remedies are not intended to place the affected employe in a better position than what they were in prior to the employer's unlawful conduct.

With regard to the first violation noted above (i.e. Neidl's interference by the acts noted in Findings 13 and 32), the Examiner finds that the traditional cease and desist order and notice posting requirement will remedy

---

24/ School District of Wisconsin Rapids, Dec. No. 19084-C (WERC, 3/85).

25/ City of Brookfield, Dec. No. 19822-C (WERC, 11/84) at 12 and Green County, Dec. No. 20308-B (WERC, 11/84) at 18-19.

26/ School District of Wisconsin Rapids, supra.

Neidl's misconduct.

The remedy for the other interference violation (i.e. Neidl's denying Morris' request to have union representation at two disciplinary meetings) presents a much tougher call. The Union argues that a make-whole remedy consisting of reinstatement, backpay and expungement of all disciplinary records should be ordered.

Insofar as the Examiner can determine, the Commission has not previously decided what remedy is appropriate for an employer's failure to allow union representation at a disciplinary meeting. Thus, it appears that the issue is one of first impression for the Commission. Given the absence of Commission precedent on the matter, the Examiner has looked to the decisions of the National Labor Relations Board (NLRB) for guidance.

The remedies imposed by the NLRB for violations of what is now known as Weingarten rights have varied substantially over the years. For example, in the first case to find that an employer acted unlawfully when it rejected an employe's request for union representation at a meeting scheduled to investigate his alleged theft of company property, 27/ the Board declined to make the employe whole for lost pay and benefits, saying this would involve a "speculative consideration". Later, however, the Board adopted the practice of ordering a make-whole remedy such as reinstatement and backpay whenever an employe was suspended or discharged for conduct that had been the subject of an interview conducted in violation of Weingarten. 28/ The Board changed this practice in 1980 in Kraft Foods. 29/ In that decision, the Board limited remedies for Weingarten violations to a cease and desist order if the employer could show that the decision to discharge was not based on information obtained at the unlawful interview. This policy was spelled out as follows:

> In determining the appropriate remedy for a respondent's violation of an employee's Weingarten rights, the Board applies the following analysis. Initially, we determine whether the General Counsel has made a prima facie showing that a make-whole remedy such as reinstatement, backpay, and expungement of all disciplinary records is warranted. The General Counsel can make this showing by proving that respondent conducted an investigatory interview in violation of Weingarten and that the employee whose rights were violated was subsequently disciplined for the conduct which was the subject of the unlawful interview.
>
> In the face of such a showing, the burden shifts to the respondent. Thus, in order to negate the prima facie showing of the appropriateness of a make-whole remedy, the respondent must demonstrate that its decision to discipline the employee in question was not based on information obtained at the unlawful interview. Where the respondent meets its burden, a

---

27/ Texaco, 66 LRRM 1296 (1967).

28/ See the dissent of Member Jenkins in Kraft Foods, 105 LRRM at 1235, where he criticized the Board's majority in that decision for altering the Board's "long-standing practice of ordering a make-whole remedy" for Weingarten violations.

29/ Kraft Foods, 105 LRRM 1233 (1980).

> make-whole remedy will not be ordered. Instead, we will provide our traditional cease-and-desist order in remedy of the 8(a)(1) violation. 30/

The above-noted test will be applied here. Its application yields the following conclusions. As previously noted, the meetings held on April 2 and 17 between Neidl and Morris were not investigative in nature. Said another way, Neidl did not meet with Morris on either of those days to learn the facts. He already knew the facts. Instead, the purpose of both meetings was to decide what discipline was going to be imposed for those events Neidl had noted in his work diary. Insofar as the record shows, nothing came out of either of these meetings that Neidl did not already know. Had Neidl learned something at either of these meetings that he did not already know, and then relied on that new information to justify Morris' discharge, then the Union would have a much stronger claim for reinstatement. However, the simple fact is that nothing new came from either meeting. That being the case, the Utility Board's ultimate decision to discharge Morris was not based on anything new that Neidl learned during the two foregoing meetings. This finding therefore precludes the granting of a make-whole remedy.

Having found that a make-whole remedy is not warranted under the test utilized above, it follows that the only alternative remedy for Neidl's unlawful interference is a cease and desist order. Such an order has therefore been issued.

Dated at Madison, Wisconsin this 12th day of October, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Raleigh Jones /s/
Raleigh Jones, Examiner

30/ Id.