STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

Appearances:

Lawton & Cates, S.C., Attorneys at Law, by Mr. Bruce Ehlke, 214 West Mifflin Street, Madison, Wisconsin 53703-2594, on behalf of the Complainants.

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, on behalf of the Respondents.

ORDER AFFIRMING IN PART AND REVERSING IN PART EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On October 12, 1992, Examiner Raleigh Jones issued Findings of Fact, Conclusion (sic) of Law and Order with accompanying Memorandum in the above matter. He therein determined that: (1) Respondents had not violated Sec. 111.70(3)(a)3 or 4, Stats. by suspending Don Gaulrapp and by suspending and discharging Jack Morris; and (2) Respondents had violated Sec. 111.70(3)(a)1, Stats. by certain conduct but had not violated Sec. 111.70(3)(a)1, Stats. by other actions taken. To remedy the prohibited practices, the Examiner ordered Respondents to post a notice and to cease and desist from engaging in the prohibited conduct.

By letter received October 28, 1992, Respondents advised the Commission that they were complying with the Examiner's Order.

On October 30, 1992, Complainants filed a petition with the Wisconsin Employment Relations Commission pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats., seeking review of portions of the Examiner's decision. The parties thereafter filed written argument, the last of which was received on December 11, 1992.

Having reviewed the record, the Examiner's decision and the parties' positions on review, and having consulted with the Examiner as to his impressions of the demeanor of Morris and Neidl, the Commission makes and issues the following

ORDER 1/

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

A. Examiner's Findings of Fact 1-17 are affirmed.

B. Examiner's Finding of Fact 18 is modified by deletion of the over-stroked words and the addition of the underlined words:

> 18. On July 30, 1990, Neidl spoke to Morris, ~~Don~~ Gaulrapp, Miller and Kennison 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~~ previously informed all of the employes of this new policy. When this incident happened, Neidl suspected ~~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"

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

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

Continued

1/ Continued

> (a) Proceedings for review shall be instituted by serving a petition therefore personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.
>
> (b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.
>
> . . .
>
> (c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

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

policy ~~for Gaulrapp~~ and admonished ~~him~~ employes 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.

C. Examiner's Findings of Fact 19-21 are affirmed.

D. Examiner's Finding of Fact 22 is modified by deletion of the over-stroked words and the addition of the underlined words:

> 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~~ Early in the 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. Morris proceeded to describe for Mrs. Frye the various situations in which Neidl and the woman in question had been seen together. 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.

E. Examiner's Finding of Fact 23 is affirmed.

F. Examiner's Finding of Fact 24 is modified by deletion of the over-stroked words and the addition of the underlined words:

> 24. In November, 1990, 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.

G. Examiner's Findings of Fact 25 and 26 are affirmed.

H. Examiner's Finding of Fact 27 is modified by deletion of the over-stroked words:

> 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 pre-ceding 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 ad-joining 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!

I. Examiner's Findings of Fact 28 and 29 are affirmed.

J. Examiner's Finding of Fact 30 is modified by deletion of the overstroked words and the addition of the underlined words:

> 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~~ "any inconvenience" the calls had caused Neidl. Morris also told Neidl that he wanted to work their problems out and to continue working at the Utility. Neidl told Morris he would be hearing something the second week in April.

K. Examiner's Findings of Fact 31-33 are affirmed.

L. Examiner's Finding of Fact 34 is modified by deletion of the overstroked words and the addition of the underlined words:

> 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. Morris apologized to Neidl for the calls he had made but advised Neidl that he had not called Neidl's wife or father-in-law. Neidl responded by telling Morris he was not accusing Morris of making those calls. ~~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~~.

M. Examiner's Findings of Fact 35-43 are affirmed.

N. Examiner's Findings of Fact 44-46 are reversed and set aside and the following Findings are made:

44. The suspension of Gaulrapp was motivated in part by Neidl's hostility toward Gaulrapp's lawful concerted activity.

45. The suspension of Morris was motivated in part by Neidl's hostility toward Morris' lawful concerted activity.

46. The discharge of Morris was motivated in part by Neidl's hostility toward Morris' lawful concerted activity.

O. Examiner's Finding of Fact 47 is affirmed.

P. Examiner's Finding of Fact 48 is set aside and the following Finding is made:

48. The denial of Morris' request for union representation during meetings held April 2 and April 9, 1991 did not interfere with Morris' rights under Sec. 111.70(2), Stats. The denial of Morris' request for union representation during a meeting held April 17, 1991 did interfere with Morris' rights under Sec. 111.70(2), Stats.

Q. Examiner's Conclusions of Law 1 and 2 are reversed and set aside and the following Conclusions are made:

1. Respondent Monroe Water Utility committed prohibited practices within the meaning of Secs. 111.70(3)(a)3, Stats. and derivatively, Secs. 111.70(3)(a)1, Stats. by suspending Don Gaulrapp and by suspending and discharging Jack Morris.

2. Respondent Dale R. Neidl committed

prohibited practices within the meaning of Secs. 111.70(3)(c), Secs. 111.70(3)(a)3, Stats. and derivatively, Secs. 111.70(3)(a)1, Stats. by suspending Don Gaulrapp and by suspending and discharging Jack Morris.

R. Examiner's Conclusion of Law 3 is affirmed.

S. Examiner's Conclusion of Law 4 is modified to read:

> 4. Respondents did not commit prohibited practices within the meaning of Sec. 111.70(3)(a)1 and (3)(c), Stats. by the acts of Respondent Neidl stated in Findings of Fact 9, 19, 27 and that portion of Finding of Fact 38 not addressed in Conclusion of Law 7.

T. Examiner's Conclusions of Law 5 and 6 are affirmed but modified as follows:

> 5. Respondents committed prohibited practices within the meaning of Secs. 111.70(3)(a)1 and (3)(c), Stats. by the acts of Respondent Neidl noted in Findings of Fact 13 and 32.
>
> 6. Respondents did not commit prohibited practices within the meaning of Secs. 111.70(3)(a)1 and (3)(c), Stats. by Respondent Neidl's denial of Morris' request for union representation at a April 9, 1991 meeting.

U. Examiner's Conclusion of Law 7 is affirmed in part and reversed in part to read:

> 7. Respondents committed prohibited practices within the meaning of Secs. 111.70(3)(a)1 and (3)(c), Stats. by Respondent Neidl's denial of Morris' request for union representation at an April 17, 1991 meeting. Respondents did not commit prohibited practices within the meaning of Secs. 111.70(3)(a)1, and (3)(c), Stats. by Respondent Neidl's denial of Morris' request for union representation at an April 2, 1991 meeting.

V. Examiner's Conclusion of Law 8 is set aside and the following Conclusion of Law is made:

> 8. Complainant's allegation that Respondents committed prohibited practices within the meaning of Secs. 111.70(3)(a)4 and (3)(c), Stats. by failing to follow the status quo when disciplining Gaulrapp and Morris was not filed and/or litigated in a manner sufficient to meet the standards of General Electric v. WERB, 3 Wis.2d 227 (1957) and thus will not be decided on its merits.

W. The Examiner's Order is affirmed in part and reversed in part and is modified as follows:

ORDER

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 under Sec. 111.70(2), Stats.

   b. Discriminating against employes with regard to their terms and conditions of employment because employes have exercised rights under Sec. 111.70(2), Stats.

2. Immediately offer to reinstate Jack Morris to his former position with the Utility and make him whole in all respects including payment of a sum of money with interest 2/ which he would have earned at the Utility between the date of his initial suspension and the effective date of the offer of reinstatement less any unemployment compensation benefits and any earnings which would not have been received but for the suspension and discharge. Expunge all refer-ences to the suspension and discharge from Morris' personnel file. In the event that Morris received Unemploy-ment Compensation benefits during any portion of the period for which the employe is entitled to make whole relief under the foregoing, reimburse the Unemployment Compensation divi-sion of the Wisconsin Department of Industry, Labor and Human Relations in the amount received as regards that period.

3. Make Don Gaulrapp whole with interest for the one-day suspension and expunge all references to the

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2/ The applicable interest rate is the Sec. 814.04(4), Stats. rate in effect at the time the complaint was initially filed with the agency. The instant complaint was filed on August 2, 1991, when the Sec. 814.04(4) rate was "12% per year." See generally Wilmot Union High School District, Dec. No. 18820-B, (WERC, 12/83) citing Anderson v. LIRC, 111 Wis.2d 245, 258-9 (1983) and Madison Teachers Inc. v. WERC, 115 Wis.2d 263 (CtApp IV, 1983).

suspen-sion from his personnel file.

4. 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.

5. 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 the portions of the complaint as to which no violation has been found are hereby dismissed.

Given under our hands and seal at the City of Madison, Wisconsin this 28th day of April, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairperson

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner

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 NOT interfere with the rights of our employes under Sec. 111.70(2) of the Municipal Employment Relations Act.

WE WILL NOT discriminate against employes based upon hostility toward their exercise of rights under Sec. 111.70(2), Stats.

WE WILL offer reinstatement to Jack Morris and make him whole for his suspension and discharge.

WE WILL make Don Gaulrapp whole for his suspension.

MONROE WATER UTILITY

By _____

Dated this _____ day of _____, 1993.

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 ORDER AFFIRMING IN PART AND REVERSING IN PART EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Pleadings

The complaint in the instant matter alleged the following:

> 1. The Complainants, the Monroe Water Utility Employees Local Union, an affiliate of AFSCME District Council 40 (Union), is a labor organization as defined at Sec. 111.70(1)(h), Wis. Stat. AFSCME District Council 40 is the duly certified exclusive bargaining representative of certain employees of the Monroe Water Department. The Chairman of the local Union Bargaining Committee until April, 1991 was Jack Morris, who resides at 1525 - 31st Avenue, Monroe, Wisconsin 53566, and the current Chairman is Donald Miller who resides at 819 -11th Street, Monroe, Wisconsin 53566. The District Council Staff Representative is Jack S. Bernfeld, who has his offices at 5 Odana Court, Madison, Wisconsin 53719.
>
> 2. The Respondent, Monroe Water Department, is a political subdivision and agency of the State of Wisconsin, established pursuant to Sec. 198.22, Wis. Stat., and an employer as defined at Sec. 111.70(1)(j), Wis. Stat. The President of the Monroe Water Commission is Sebastian Laeser, Jr., who has his offices at the Monroe Water Department, P.O. Box 200, Monroe, Wisconsin 53566.
>
> 3. The Respondent, Dale R. Neidl, is the General Executive officer of the Monroe Water Department and a person as defined at Sec. 111.70(1)(k), Wis. Stat. He has his offices at the Monroe Water Department, P.O. Box 200, Monroe, Wisconsin 53566.
>
> 4. On September 6, 1989 the Wisconsin Employment Relations Commission issued its Certification of Representative, certifying the Union as the exclusive 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. . . ."
>
> 5. Subsequent to said certification and to date, Dale Neidl, acting in his individual capacity and on behalf of the Monroe Water Department, made repeated derogatory statements regarding the Union to employees represented by the Union and to others, and repeatedly threatened disciplinary action against the employees

represented by the Union for no reason at all or for reasons having no basis in fact. On September 27, 1990, acting on behalf of and in concert with the Department, Neidl suspended without pay Don Gaulrapp, an employee represented by the Union, for no reason at all or for a reason that had no basis in fact, and on April 3-18, 1991, he did the same thing to 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. When Morris or other employees met with Neidl to discuss these actions, prior to them being implemented, Neidl expressly denied any requests to be represented by the Union.

6. The actions of the Monroe Water Department and Dale R. Neidl set forth at Paragraph 5 of this Complaint were done blatantly and maliciously, and for the purpose of interfering with, restraining and coercing the employees represented by the Union in the exercise of their rights, and did in fact constitute an interference, restraint and coercion of municipal employees in the exercise of their rights guaranteed at Sec. 111.70(2), Wis. Stat., and anti-union discrimination. Said actions constitute prohibited practices in violation of Secs. 111.70(3)(a)1 and 3, and (3)(c), Wis. Stat.

WHEREFORE, it is prayed that the Wisconsin Employment Relations Commission enter its Conclusions of Law and Order, declaring the actions of the Monroe Water Department and Dale R. Neidl set forth in Paragraph 5 of this Complaint to be prohibited practices in violation of Secs. 111.70(3)(a)1 and 3, and (3)(c), Wis. Stat., and unlawful; ordering the Department and Neidl immediately and forthwith to cease and desist from said unlawful actions and to reinstate Jack Morris in his employment and to restore to him all benefits relating to said employment, retroactive to April 19, 1991, and to make Jack Morris and Don Gaulrapp whole for their unlawful suspensions from employment on April 3-18, 1991 and September 27, 1990, respectively, and to (sic) from all personnel records any reference relating to said unlawful actions; and granting such other and further relief as may be appropriate.

The Respondents filed an Answer denying that they had committed any prohibited practices.

The Examiner's Decision

As to the suspension and discharge of Morris, the Examiner concluded that although Respondent Neidl had displayed hostility toward the lawful concerted activities of Utility employes, said hostility played no role in the discipline. In reaching this conclusion, the Examiner concluded that the reasons for the suspension and discharge cited by the Respondents were not pretextual and that one of the reasons cited involved conduct by Morris which "was an indiscretion of monumental proportions." Therefore, the Examiner

concluded that Morris' discipline by Respondents did not violate Sec. 111.70(3)(a)3, Stats.

As to the suspension of Gaulrapp, the Examiner again concluded that hostility by Respondent Neidl toward Gaulrapp's lawful concerted activity did not play a role in the suspension decision. The Examiner determined that Gaulrapp had engaged in the activity cited by the Respondents as a justification for the suspension and noted the time lag between Gaulrapp's Union leadership role and the suspension in question. Thus, the Examiner found that the Gaulrapp suspension did not violate Sec. 111.70(3)(a)3, Stats.

Turning to the allegation that Respondents made remarks which interfered with the exercise of rights protected by Sec. 111.70(2), Stats., the Examiner rejected the Complainants' assertion that it was improper for a Board member of Respondent Utility to ask job applicants for a supervisory position how they would handle "the Union represented status of the Utility employes." Turning to the numerous allegations as to remarks made by Respondent Neidl to Utility employes, the Examiner concluded that certain of Respondent Neidl's remarks violated Sec. 111.70(3)(a)1, Stats. In this regard, the Examiner found that Respondent Neidl's comment to employes on several occasions that they "did not have a union" was made for the purpose of intimidating employes and raising doubts as to whether the Complainant Union could protect them. Further, the Examiner concluded that Respondent Neidl made remarks to Morris which indirectly threatened Morris if he challenged his suspension by filing a grievance.

Turning to the allegation of whether Respondents improperly denied Morris access to union representation, the Examiner concluded that in two of the three incidents cited by the Complainants, the denial of representation violated Sec. 111.70(3)(a)1, Stats. As to an April 2, 1991 denial of representation, the Examiner concluded that Morris was entitled to representation because the meeting was mandatory and its purpose was disciplinary in nature. As to an April 9, 1991 meeting, the Examiner concluded that because Morris was not required to attend the meeting in question, there was no right to representation and thus the denial did not violate Sec. 111.70(3)(a)1, Stats. As to an April 17, 1991 meeting, the Examiner concluded that because the meeting was mandatory for Morris and was disciplinary in nature, Respondent Neidl's denial of Morris' request for representation violated Sec. 111.70(3)(a)1, Stats.

Although he determined that "the instant complaint did not plead a unilateral change violation, nor did the Union indicate at hearing that it was pur-suing such a claim" the Examiner considered the merits of a Sec. 111.70(3)(a)4, Stats. allegation contained in the Complainants' post-hearing brief. The Examiner dismissed this allegation on its merits based on his determination that the Respondents had not altered the status quo in effect as to discipline.

To remedy the prohibited practices found, the Examiner concluded that reinstatement and back pay were not warranted and that a cease and desist and notice posting order was sufficient.

The Parties' Positions on Review

In their initial brief, Complainants assert the Examiner erred by concluding that Respondents had not violated Sec. 111.70(3)(a)4, Stats. by failing to utilize the progressive disciplinary procedure contained in the City of Monroe's Rules and Regulations when disciplining Gaulrapp and Morris.

Complainants argue the record establishes that the Rules and Regulations had been followed by the Utility in the past and that the employes reasonably believed that the Rules and Regulations applied to them. Because the employes thus had a right to rely on the Rules and Regulations, Complainants contend that the Utility's failure to follow them here constitutes an unilateral change and therefore violated Sec. 111.70(3)(a)4, Stats.

Turning to Gaulrapp's suspension and Morris' suspension and discharge, Complainants argue that several of the Examiner's Findings should be modified to better reflect the record as to Morris' conduct. As to the Examiner's reasoning, Complainants assert it is flawed in two respects. First, Complainants assert that the Respondent Utility is clearly responsible for the conduct of its agent, Respondent Neidl. Thus, contrary to the Examiner's reasoning, Neidl's hostility is attributable to his principal, Respondent Utility. Complainants contend that this is especially true where, as here, the employer has adopted its agent's actions as its own without any apparent independent consideration of his recommendations. Secondly, Complainants argue that the Examiner dodged the issue by simply concluding that because the incidents cited to support discipline occurred, said incidents provided the basis for the discipline in question. Complainants assert that the Examiner should have concluded that although the incidents occurred, they did not provide a reasonable, rational basis for discipline and thus were pretextual. Given the pretextual nature of the asserted basis for discipline, Complainants argue the Examiner should have concluded that Neidl's animus toward lawful concerted activity played a role in the discipline of Gaulrapp and Morris. Therefore, Complainants contend that the Commission must reverse the Examiner in this regard and conclude that the discipline of the two employes violated Sec. 111.70(3)(a)3, Stats.

Turning to the denial of Morris' request for union representation, Complainants initially argue the Examiner erred by concluding that Respondent Utility was not responsible for Respondent Neidl's denial of Morris' requests for union representation. Complainants further urge the Commission to reverse the Examiner's determination that the denial of union representation at the April 9, 1991 Utility Board meeting did not violate Sec. 111.70(3)(a)1, Stats., because Morris was not compelled to appear before the Board. In this regard, Complainants argue that although existing Commission precedent supports the Examiner's conclusion, the Commission should use this case to reexamine existing precedent and conclude that when an employe is offered and accepts the opportunity to attend a meeting which may reasonably be expected to affect the employer's decision regarding disciplinary action, the employe is entitled to union representation.

As to the issue of remedy, Complainants assert that even if the Commission affirms the Examiner's decision in all respects, Respondents' denial of Morris' request for union representation forms a sufficient basis for a reinstatement and make-whole remedy. Thus, Complainants argue that the Examiner's failure to award such a remedy in this case was error.

In their responsive brief, Respondents urge the Commission to affirm the Examiner. As to the Complainants' request that the Commission modify certain Examiner Findings, Respondents contend that the record fully supports the Examiner's Findings. In this regard, Respondents assert that the record amply supports the Examiner's determination that hostility toward lawful concerted activity played no role in Respondents' decision to discipline Morris and Gaulrapp. As to both employes, Respondents argue the record establishes that the employes engaged in conduct which provided a reasonable basis for discipline.

Turning to the question of whether Morris was improperly denied access to union representation, Respondents initially argue that the Examiner erred to the extent that he found a right to representation to exist where the meeting was not investigatory in nature. However, assuming the Examiner correctly applied the law, Respondents assert that the expansion of the right to union representation sought by Complainants herein is not warranted and should be rejected. Further, should the Commission affirm the Examiner's conclusions as to the denial of representation on two occasions, Respondents argue that said violations do not warrant a back pay or reinstatement remedy. In this regard, Respondents contend there has been no showing that Morris was harmed in any way by the denial. Thus, the remedy imposed by the Examiner is appropriate.

As to the Sec. 111.70(3)(a)4, Stats. allegation, Respondents contend that this matter is not properly before the Commission because the allegation was not pled in the complaint. Should the Commission erroneously consider the merits of the allegation, Respondents urge the Commission to affirm the Examiner's dismissal. In this regard, Respondents argue the record clearly establishes the Utility never adopted the City of Monroe Rules and, further, that because no employe had ever been disciplined prior to this dispute, no disciplinary practice existed. Thus, Respondents assert that there has been no showing of a unilateral change.

Given all of the foregoing, Respondents urge the Commission to affirm the Examiner in all respects.

DISCUSSION

Our Order reflects the modifications of the Examiner's decision we find appropriate. Before discussing the allegations of the complaint, we note the following amendments to his Findings.

We have revised Examiner Finding 18 to reflect our view that although Neidl's diary entry demonstrates a belief that Gaulrapp was culpable, Neidl did not advise Gaulrapp of his belief. In this regard, we note that Gaulrapp's testimony on the subject is unequivocal (Tr. 11/6/91 p. 179) while Neidl's is some what contradictory (Tr. 1/14/92 pp. 44-46, 157-158).

Finding 22 has been revised to more precisely reflect the content of the conversation between Morris and Mrs. Frye (Tr. 11/18/91 pp. 139-140).

Finding 24 has been revised to contain the specific time frame when Neidl learned of Morris' phone calls to Plymouth (Tr. 1/14/92 pp.70, 172-173, 181-183).

Finding 27 has been revised to reflect the involvement of employes, including Morris, in the remodeling planning (Tr. 11/6/91 pp. 101-102, 104-106).

Finding 30 has been revised to more accurately reflect the substance of the conversation between Neidl and Morris on March 25, 1991 (Tr. 2/19/92 pp.81-84).

We have revised Finding 34 to more completely describe the substance of an April 8, 1991 conversation between Neidl and Morris (Tr. 2/19/92 pp. 89-90).

Lastly, we have modified ultimate Findings 44-46 and 48 consistent with our reversal of certain Examiner Conclusions of Law.

Turning to the allegations of the complaint, we look first at the

question of whether Morris' suspension and discharge were based, at least in part, on hostility toward Morris' lawful concerted activity. The Examiner concluded that Morris' discipline was based entirely upon Morris' conduct as an employe. We conclude the Examiner erred when reaching this conclusion and we have reversed his decision in this respect.

The Examiner essentially reasoned that because the six bases for discipline cited by Respondents 3/ all related to incidents which occurred or to the subjective but rational beliefs of Respondent Neidl, these bases were not pretextual and thus formed the exclusive basis for Respondents' actions. We find that the six bases cited provide only part of Respondents' motivation and that Respondent Neidl's hostility toward the lawful concerted activity of Morris played a role in the Morris discipline.

In our view, the evidence of Neidl's hostility toward lawful concerted activity is pervasive. 4/ As found by the Examiner, Neidl's relationship with

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3/ 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;

Continued

3/ Continued

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.

4/ In his memorandum, the Examiner summarized the evidence of hostility presented by the Complainants as follows:

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

the employe union when employed by the Plymouth Utility was marred generally by conflict and specifically by a threat to a union official in response to grievance activity and by a vow to get rid of the union. However, in our view, the Examiner understated the impact of this evidence on the case before him. The Examiner correctly noted that hostility toward lawful concerted activity in Plymouth does not in and of itself establish hostility toward lawful concerted activity in Monroe. However, where, as here there is ample evidence that the same hostility exists toward the lawful concerted activity of Monroe Utility employes, the activity in Plymouth serves to enhance the probability that the Monroe hostility played a role in Neidl's disciplinary actions against Morris. The pattern of conduct is indicative of feelings of sufficient strength to provide at least a partial motive for disciplining Morris.

Similarly, we find that the Examiner understated the impact which his Findings as to Neidl's Monroe hostility should have had upon his analysis. While he correctly concluded that Neidl's threat to Morris regarding a potential suspension grievance (Finding 32) was direct evidence of hostility toward Morris' lawful concerted activity (and an independent violation of Sec. 111.70(3)(a)1, Stats.) he chose not to rely on Neidl's comments to employes that "they did not have a union" (also independent violations of Sec. 111.70(3)(a)1, Stats.) as part of his analysis. We are satisfied that in the context of the record as a whole, these remarks are additional indications of the depth of Neidl's hostility toward lawful concerted activity.

As noted by the Court in Employment Relations Department v. WERC, 122 Wis.2d 132 (1985), determining whether illicit hostility played a role in a disciplinary decision is difficult, particularly where the employer has established the existence of the events which it asserts formed the exclusive basis for the discipline:

> The WERC in this case explains,
>
> As the key element of proof involves the motivation of (the employer) and as, absent an admission, motive cannot be definitively demonstrated given the impossibility of placing oneself inside the mind of the decisionmaker, (the employee) must of necessity rely in part upon the inferences which can reasonably be drawn from facts or testimony. On the other hand, it is worth noting that (the employer) need not demonstrate 'just cause' for its action. However, to the extent that (the employer) can establish reasons for its

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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);

Continued

4/ Continued

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).

> action which do not relate to hostility toward an employe's protected concerted activity, it weakens the strength of the inferences which (the employee) asks the (WERC) to draw.

Here, as evidenced by the Examiner's resolution of this issue, the presence of job performance conflict between Morris and Neidl as well as Morris' telephone call weaken the inference that Neidl's hostility played a role in the disciplinary decision. However, as discussed earlier herein and particularly as evidenced by Findings 8, 13, and 32, we find Neidl's hostility to be so strong that it inevitably played a role in Morris' suspension and discharge. Thus, we have reversed the Examiner in this regard and found a violation of Sec. 111.70(3)(a)3, Stats., and derivatively, Sec. 111.70(3)(a)1, Stats.

We also reverse the Examiner as to the issue of whether Gaulrapp's suspension was based at least in part upon Neidl's hostility toward lawful concerted activity of employes. We acknowledge that the existence of the events relied upon by Respondents for the suspension and the time gap between the suspension and the end of Gaulrapp's tenure as Union head both lessen the strength of the inference that illicit hostility played a role. However, as with Morris, we are satisfied that Respondent Neidl's hostility was so strong that it was a partial motive for the suspension. Thus, we have found a Sec. 111.70(3)(a)3, Stats. and a derivative Sec. 111.70(3)(a)1, Stats. violation in this regard as well.

We now turn to the issue of whether the Examiner properly resolved the Sec. 111.70(3)(a)1, Stats. allegations related to denial of Morris' requests for union representation.

As to the April 2, 1991 meeting when Neidl denied Morris' request for representation, the Examiner made the following Finding, which we have affirmed:

> 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."

Citing Waukesha County, Dec. No. 14662-A (Gratz, 1/78), aff'd Dec. No. 14662-B (WERC, 3/78) which we reaffirmed in City of Milwaukee, Dec. No. 14899-B (WERC, 8/80) the Examiner correctly held that where the meeting is for the purpose of imposing already determined discipline, no right to representation exists. In our view, because the purpose of the April 2 meeting was to impose the suspension, no right to representation existed. Contrary to the Examiner's analysis, the fact that Neidl concluded the meeting with an illegal threat does not transform the otherwise appropriate denial of Morris' request for representation into a separate additional violation of Sec. 111.70(3)(a)1, Stats. Thus, we have reversed the Examiner in this regard.

Turning to the April 9, 1991 meeting when Neidl denied Morris' request for representation, Findings of Fact 34-36 set forth the context in which the denial occurred.

> 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. Morris apologized to Neidl for the calls he had made but advised Neidl that he had not called Neidl's wife or father-in-law. Neidl responded by telling Morris he was not accusing Morris of making those calls.
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> 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 any-thing 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.

Applying existing Commission precedent, the Examiner properly concluded that because Morris was not compelled to appear before the Board, he had no right to union representation. Although Complainants argue that we should expand existing representational rights to cover situations such as the April 9 meeting, we find no persuasive basis for doing so. Thus, we have affirmed the Examiner in this regard. However, we would note that contrary to the Examiner's stated view, if Respondent Neidl's denial had been improper the resultant violation would have been committed both by Neidl (the agent) and the Utility.

Lastly, Finding 38 details the circumstances surrounding the April 17, 1991 denial of representation.

> 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 con-tained 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.

As noted in the Finding, the meeting was compulsory for Morris and the charges against him were discussed. Thus, we conclude that the mandatory April 17 meeting was sufficiently investigatory in nature to generate a right to union representation. Thus, Neidl's denial of Morris' request is violative of Sec. 111.70(3)(a)1, Stats. and we have found such a violation as to both Neidl and the Utility.

Finally, we examine the Sec. 111.70(3)(a)4, Stats. allegation first raised in Complainants' post-hearing brief to the Examiner. Under the holding of General Electric v. WERB, 3 Wis.2d 227, 241-246 (1957) it is improper to decide issues as to which all parties have not been apprised and heard. Complainants' motion at the end of the hearing to amend the complaint to

"conform to the evidence presented" is not sufficient to meet the General Electric standard, particularly when viewed in light of the subsequent exchange between counsel at pages 155-156 of the February 19, 1992 hearing transcript. Thus, we have dismissed this allegation without reviewing its merits.

To remedy the prohibited practices found, we conclude a reinstatement and make whole remedy is appropriate under the facts and circumstances of this case.

Dated at Madison, Wisconsin this 28th day of April, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairperson

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner