

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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NANCI KAPPES,	:	
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Complainant,	:	
	:	Case 326
vs.	:	No. 47257 MP-2579
	:	Decision No. 27279-A
	:	
MILWAUKEE COUNTY MEDICAL COMPLEX,	:	
	:	
Respondent.	:	
	:	
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Appearances:

Ms. M. Elizabeth Burns, Shindell & Shindell, 411 E. Wisconsin Avenue,
Mr. Timothy R. Schoewe, Deputy Corporation Counsel, Milwaukee County,

Milwaukee
901 N.

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER

Nanci Kappes, filed a complaint on March 30, 1992 with the Wisconsin Employment Relations Commission alleging that Milwaukee County Medical Complex had committed prohibited practices within the meaning of Sec. 111.84 of the State Employment Relations Act. 3/ Thereafter, hearing on the complaint was held in abeyance pending efforts to settle the dispute, until June 1, 1992, when Sharon A. Gallagher was appointed by the Commission to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats. The hearing herein was scheduled and occurred at Milwaukee, Wisconsin on June 25, 1992 and it resumed and concluded on July 24, 1992. The parties filed briefs and reply briefs, the last of which were exchanged on September 28, 1992. The Examiner, having considered the evidence and arguments of counsel, makes and issues the following Findings of Fact, Conclusions of Law and Order.

3/ On June 16, 1992, Complainant filed an amended complaint to allege that the Milwaukee County Medical Complex had committed prohibited practices within the meaning of Sec. 111.70(3), of the Municipal Employment Relations Act (MERA) by the conduct alleged in the original complaint. On June 29, 1992, Complainant filed a verification of her complaint pursuant to ERB 12.02.

FINDINGS OF FACT

1. Nanci Kappes, an individual who resides at 8237 W. Honeycreek Pkwy., Milwaukee, Wisconsin (hereafter Complainant or Kappes), has been an employe within the meaning of Sec. 111.70(1)(i), Stats., employed by Milwaukee County Medical Complex (hereafter MCMC) for 19 years in various capacities, and was employed as Unit Clerk at the Eye Institute, also known as the Eye Operating Room, (hereafter EOR) from 1988 or 1989 until she was involuntarily transferred on October 15, 1991 to a different Unit Clerk position at MCMC. Kappes has been a member of Local 1055, affiliated with District Council 48, AFSCME, since her employment at MCMC. Kappes served as a union steward for an eight year period of time prior to 1991. Kappes' representative at all relevant times herein has been Attorney M. Elizabeth Burns.

2. Milwaukee County Medical Complex, MCMC, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., that operates the Medical Complex, located at 8700 W. Wisconsin Avenue in Milwaukee, Wisconsin on behalf of the County.

3. The unit clerk position in the EOR involves the following duties: answering the telephone and making calls for the EOR; making and posting the OR daily schedules; entering information on the computer regarding logging of cases, patient charges, billing information and indicating if and when surgeries are added or cancelled; preparing and sending forms of various kinds. The desk for the EOR unit clerk is adjacent to an area where patients wait to be admitted into one of the four operating rooms of the EOR. As a general matter, patients have no personal contact with the EOR unit clerk although they can overhear the unit clerk's conversations with others due to the proximity of the clerk's desk (approximately 10 feet) to the patient waiting area.

4. In the Fall of 1989, Carole Albrecht Hoover took over the responsibility of overseeing and working with the Clinical Supervisor of the EOR and she continued in that capacity (among her other management capacities) until she was asked to take a different assignment in the Fall of 1991. Until October, 1991, Hoover's superior was Associate Administrator of Patient Care, Ann Navera. Navera left MCMC to take a better job at another hospital in the Fall of 1991 and Paula Lucey was promoted to the Associate Administrator's position. Lucey then became Hoover's superior. Lucey, however, had had responsibility for the EOR since August, 1988 while she represented management on the Eye Operating Room Committee. The EOR Committee met monthly regarding issues in the EOR.

5. For many years, Respondent and District Council 48, AFSCME, AFL-CIO, Local 1055 have had a collective bargaining relationship covering certain non-professional employes (such as unit clerks, nursing assistants, operating room technicians) and the labor agreements between MCMC and District Council 48 have contained a final and binding grievance arbitration procedure for disputes regarding discipline and employe transfers. In 1967 and again in 1972 Arbitrator Zeidler, acting as Permanent Umpire, determined that involuntary transfers were permitted so long as they were not unreasonable or capricious; that transfers that were reasonable, that were designed, "to get better working relationships between employees" and to avoid "friction between employees that might lead to discipline" would be permitted.

6. On October 15, 1991, a meeting was called by Carole Hoover. Present were Kappes, Union representatives Love, Stegall and Robakowski, MCMC representatives Lucey, Hoover and Wadzinski, and R.N.'s Turner, Levin and Lichtenwald. After being requested by telephone to attend this meeting, Kappes asked EOR employe Novella Hardrick for the notes taken by employes at a July, 1991 get-together at Kappes' home. Hardrick responded that she would have to look for the notes. Hardrick never produced the notes for Kappes. Kappes

thereafter attended that October 15th meeting. At the October 15th 1991 meeting, Hoover gave Kappes the memo (quoted in relevant part below) and told Kappes that she was being immediately transferred.

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BACKGROUND

2/90 Sue Malsack, RN, resigned as Clinical Supervisor.
2/90 Maryann Ertl, RN, hired as Clinical Supervisor.
Spring/Summer/1990 Group Sessions with Dr. LeCann (10).
12/90 Maryann Ertl, RN, resigned as Clinical Supervisor.
12/90 Marie Golanowski, RN, appointed interim Clinical Supervisor.
Winter 90/91 Interview process for new Clinical Supervisor including OR/E staff.

3/91 Marcia Lichtenwald, RN, hired as Clinical Supervisor.
10/91 Marcia Lichtenwald, RN, resigned as Clinical Supervisor.
Summer/91 Nanci Kappes, hosted meeting at home to plan strategy to get M. Lichtenwald to resign.

Civil Service Rule Violation

Section 4--Causes for Discharge, Suspension or Demotion and/or Re-evaluation.

- (c) Unauthorized use of County premises.
- (M) Threatening, intimidating, coercing or harassing employees or supervision at any time.
- (w) Engaging in any unauthorized activity which distracts or disrupts employees in the performance of their duties.
- (X) Interference with normal work flow or departmental procedures.
- (ff) Offensive conduct or language toward the public or toward county officers or employees.

MD #48 Contract

1.05 Management Rights--Administrative Transfer

Action

1. Assigned to another area beginning 10/16/91.
2. Provide appropriate orientation.
3. Escort to OR/E--clean locker and turn in keys.
4. OR/E off limits.

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No mention was made in this document to Kappes' conduct being a threat to patient care. There was no discussion at the October 15th meeting of any other reasons for Kappes' transfer other than her having hosted the July, 1991 EOR employe get-together. The contents of the memo itself was not discussed at the October 15th meeting. Kappes was either not allowed to defend her actions at this meeting or she did not feel free to speak in her own defense. Hoover gave Kappes three options regarding where she could transfer. The Union representatives present did not speak for Kappes, but they suggested that they should be allowed to speak to Kappes in private about the transfer options. After going to a separate room with her Union representatives, Kappes stated that she had been a good employe for 18 years and that the July, 1991 get-together had not been a hanging party. Kappes then selected the unit clerk job on the 7th Floor South on the day shift. After the meeting concluded, Employer representative Wadzinski and Hoover escorted Kappes back to the EOR, gave her a few minutes to clean out her desk and locker, took her keys and told her never to return to the EOR or to use the door to the EOR to enter MCMC. Such an escort and removal of an employe from a unit is highly unusual. At this time, the EOR work day was still in progress and at least one employe saw Kappes and spoke to her before Kappes left the building.

7. The Clinical Supervisor of the (EOR) from 1989 until February, 1990 was R.N. Sue Malsack. From 1989 forward, Malsack's immediate supervisor was Carole (Albrecht) Hoover, Director of Ambulatory/Emergency Services. During Malsack's tenure as EOR Clinical Supervisor, there were significant attendance, tardiness and staffing problems in the EOR, and there were a significant number of employes (8 or 9 of the 18 employes) who were in the progressive disciplinary system for attendance/tardiness problems. During Malsack's tenure as clinical supervisor, there was a physical altercation between EOR employes. Malsack discussed these problems with Hoover as they arose and Malsack and Hoover dealt with them. Employes involved in this altercation were also disciplined. Malsack resigned in February, 1990.

8. Maryann Ertl, an experienced OR nurse who had a Masters degree, was hired to replace Malsack as Clinical Supervisor of the EOR in February, 1990. Ertl remained employed as the EOR Clinical Supervisor until she resigned in December, 1990. Ertl tendered her resignation in December, 1990. During the Summer of 1990, Hoover and her supervisor, Ann Navera (then-Associate Administrator for Patient Care) decided to employ a psychologist, Dr. LeCann, to help the EOR employes deal with conflict and tension in their work relationships with each other. Dr. LeCann conducted nine weekly sessions before regular work hours which Ertl attended along with EOR R.N.s and non-professional staff. The EOR functioned on its normal work schedule during this time. Dr. LeCann met with Hoover and Navera twice during his sessions with the EOR group and he wrote at least one report which indicated that the EOR staff as a group was dysfunctional, there being tensions, confrontation, anger and long-standing complaints between some staff members. Dr. LeCann's report indicated that the employe complaints were due to a lack of consistency in policies, over-delegation of duties from the Clinical Supervisor to the change

nurse, (then, Carol Michalski), and a lack of communication between the EOR nurses and the rest of the hospital. Dr. LeCann ultimately recommended that MCMC management work one-on-one with EOR staff to improve relations between staff members. LeCann did not identify Kappes as a disruptive person in his written report to Hoover and Lucey but he did state that it appeared Kappes had very little to contribute to the group.

9. In December, 1990, after Ertl resigned, MCMC appointed Marie Golanowski to act as interim Clinical Supervisor of EOR, which then employed 15 employees. Golanowski was then one of the two supervisors of the Main Operating Room at MCMC and she continued in that capacity while acting as EOR Supervisor. Attendance and tardiness problems with the EOR staff continued. Golanowski found there was significant tension and bickering among staff and that employees were sometimes unwilling to do their jobs or to assist others in their work. Golanowski identified Kappes as well as two other EOR employees as contributing to the tension and problems in the EOR during her tenure there. Golanowski never disciplined Kappes. Kappes was not a part of the infighting and bickering among the staff nor had she ever had any problem with absenteeism or tardiness during Golanowski's tenure. Golanowski did not attempt to deal with the EOR staff one-on-one (as Dr. LeCann had recommended) but dealt with them as a group.

10. In the Winter of 1990/1991, MCMC conducted interviews to fill the Clinical Supervisor job in EOR. Marcia Lichtenwald had applied for an eye surgery R.N. part-time position prior to this time. Carole Albrecht Hoover encouraged Lichtenwald to apply for the EOR Clinical Supervisor position, which Lichtenwald did. Carol Hoover was on the MCMC interviewing team that made the decision to hire Marcia Lichtenwald as the EOR Clinical Supervisor in March, 1991. Prior to Lichtenwald's hire as EOR Clinical Supervisor, MCMC had conducted extensive interviews and internal and external candidates had been considered. The EOR Supervisor job was a promotion for Lichtenwald. After Lichtenwald's hire, Marie Golanowski put Lichtenwald through a brief orientation program in which Golanowski told Lichtenwald a history of the unit -- that the staff had been through therapy with a psychologist to help them get along better among themselves and with the EOR surgeons. Golanowski then remained at MCMC in her job as one of the Main OR supervisors. Golanowski left MCMC in April, 1991 to take a better job at a different hospital.

11. Upon taking over as EOR Clinical Supervisor, Lichtenwald did not observe conflict between EOR staff and EOR doctors but she did observe conflict and tension among EOR R.N.'s and non-professional staff. Lichtenwald also observed lack of eye contact and negative body language by EOR staff, including Kappes, when she spoke to EOR staff. Lichtenwald named Kappes as well as three others (only one of whom had also been identified by Golanowski) as EOR employees who contributed to the tensions in the EOR.

12. During her tenure as Clinical Supervisor, Malsack had conducted weekly staff meetings with EOR staff. At these meetings, EOR staff were brought up to date on EOR concerns and problems and allowed to voice their opinions thereon. Subsequently, EOR Clinical Supervisors Ertl, Golanowski and Lichtenwald did not conduct such weekly staff meetings. Lichtenwald conducted only daily "morning reports" which were intended merely to give EOR staff specific information necessary to begin and complete their daily work and employees were specifically discouraged by Lichtenwald from giving their opinions or venting any feelings at these morning reports.

13. During the Spring and Summer of 1991, tensions in the EOR and bickering among staff worsened. At this time, attendance and absenteeism problems with some employees were exacerbated by two employees who took extended approved sick leave and paternity leave. Several employees were also dissatisfied with Clinical Supervisor Lichtenwald's management style. Lichtenwald, believing that staff meetings would merely devolve into gripe

sessions, had refused employe requests to hold weekly staff meetings, unless employes gave her an agenda in advance which indicated that relevant topics would be discussed. Employes never brought any such agenda(s) to Lichtenwald and regular staff meetings were never held. Some employes also disliked Lichtenwald's method of conveying and resolving employe complaints about the conduct of other employes: Lichtenwald never gave the offending employe a chance to confront his/her accuser but she would tell the offending employe that "everybody is talking/complaining about you" for a reason or reasons. During approximately May, June and July, 1991 there were two or three EOR morning report meetings at which employes openly criticized Lichtenwald and name-calling occurred. One of these incidents which occurred in July, 1991, began with a comment made by Kappes regarding Lichtenwald's treatment of EOR employe Donna Mrugarla. Lichtenwald had previously removed supply ordering duties from Donna Mrugarla and had given the job to R.N. Holly Conferra, stating, in the presence of other employes, that Mrugarla was doing a "terrible job" and that "no one could find anything". Conferra was later injured on the job and was off work for some time. Lichtenwald then reassigned Mrugarla to order supplies. At a morning report in July thereafter, Kappes called Lichtenwald's actions toward Mrugarla "very cruel" and stated, "Donna when you die you'll go to heaven because no way would I have done the ordering for this department after the way you were treated." At this point other employes (not Kappes) began venting their feelings at Lichtenwald, stating that Lichtenwald was a "liar" and "I wouldn't trust you in a room with my dog." On at least one other occasion, employes openly criticized Lichtenwald at morning report for disparate treatment of employe Ruby Ellis (regarding the taking of personal phone calls at work) and/or for Lichtenwald's discipline of one employe who attempted to take sick leave after his/her vacation had been cancelled due to lack of staff. Upon each occasion, Lichtenwald orally warned Kappes and other employes not to criticize her (Lichtenwald) at morning report. Lichtenwald also told Kappes that she would write Kappes up if Kappes ever again spoke critically of Lichtenwald at a morning report. Lichtenwald never wrote up Kappes for any comments she made at morning report or for any other conduct. Lichtenwald felt "bashed" by Kappes and EOR employes during these incidents and she did not feel free to defend herself to the group.

14. In June, 1991, some employes (including Ruby Ellis, Sandy Radyiking, Nelda Beck and Nanci Kappes) began talking about having a get-together for EOR staff to discuss and try to resolve the problems in the EOR. Several possible locations were discussed. A restaurant/bar was suggested. R.N. Sandy Radyiking offered her house. Radyiking's house was too far out of the City for most EOR staff to travel and some employes felt a restaurant/bar would not provide a conducive atmosphere for discussions. Kappes volunteered to hold the get-together at her house (which was close to MCMC) and this was agreed upon. Employes involved in planning the event then informally invited other EOR staff by word-of-mouth, but Lichtenwald and other MCMC Supervisors were not invited. District Council 48 president Martha Love was also invited to the get-together (which employes told her was to develop issues of concern to the EOR for later presentation to the Union and management) but Love declined to attend as she did not consider the get-together to constitute an official Union meeting. Approximately two weeks before the get-together occurred, Lichtenwald found out about the get-together from EOR staff member Lori Hunter.

15. In early July, 1991, Lichtenwald invited Carole Hoover to a morning report in EOR to show support for Lichtenwald. Hoover attended this meeting. At this morning report, Hoover and Lichtenwald attempted to clear the air and to get staff back to work and get them off their "petty arguments," such as their requests for regular staff meetings and their concerns about why certain employes were treated differently than other employes. After this morning report, Lichtenwald heard rumors that EOR staff were saying, "look what Marcia pulled now, she pulled in the top guns to scare us out of having our meeting

tonight." The get-together at Kappes' home occurred sometime in early July, 1991 on or about the 8th or 9th after 3:30 p.m. Not all EOR staff attended the get-together. Present were Kappes, Ruby Ellis, Nelda Beck, Sandy Radyiking, Carol Michalski, William Keelis and Novella Hardrick. Lori Hunter did not attend. The actual purpose of the meeting was not to plan ways to get Lichtenwald to resign but to discuss EOR problems and to have the staff write down issues they wanted to take to management and the Union. Several employees took notes at the get-together, as the staff discussed such problems as Lichtenwald's disparate treatment of employees; that Lichtenwald changed the rules for the EOR almost daily and never sought EOR staff input before making changes; that employees wanted to have regular weekly staff meetings in the EOR; that EOR nurses aides wanted to attend morning reports so that they could feel more a part of the EOR team; that EOR employees should form a support group for each other; that Lichtenwald's habit of criticizing employees by saying that "everybody is talking about you, that you are not doing your job . . ." did not give the criticized employee the opportunity to confront and/or apologize to their accuser. These issues were written down by several people at the get-together. Novella Hardrick collected the notes at the end of the meeting with the intention of organizing them and copying them for later presentation to management and the Union. On the day after the July, 1991, get-together Ruby Ellis had possession of the notes made by employees at the get-together and on that day Ellis gave those notes back to Novella Hardrick. Ellis later asked Hardrick several times to return the notes to Ellis but Hardrick never returned them to Ellis.

16. The notes were never presented to management. In July, 1991, someone gave a list of EOR issues to District Council 48 President, Martha Love who kept them in her mailbox at work for a time. Love made herself available for a meeting but she did not perceive the items listed to be grievance material. After October 15th, Love threw the list of concerns/issues away because no employees had requested her to act upon them. Love stated that the list contained mostly policy and procedure issues and issues of changing past practice and covered such items as starting time, changing time, and when a person is considered tardy.

17. At this time, Lichtenwald heard conflicting rumors at MCMC regarding whether the get-together had occurred. After early July, 1991 Lichtenwald believed that EOR staff withheld information from her regarding late-scheduled eye operations in order to make her job more difficult. Lichtenwald never spoke to Kappes about this matter, nor did she further investigate the situation. Also, in July, 1991, Nelda Beck again asked Lichtenwald for regular staff meetings to be held in the EOR. Lichtenwald refused. In mid-July, Lichtenwald perceived that EOR staff animosity toward her had increased. At this time Lichtenwald believed the staff had had their get-together at Kappes' home by the way the staff was acting, they were "feeling tough." In early August, Lichtenwald first spoke to Hoover about the possibility that she (Lichtenwald) would resign. Lichtenwald tendered her resignation in mid-September, 1991 to Hoover and she later spoke to Lucey and Dr. Schultz about the resignation. When Lichtenwald resigned, she initially told Hoover that she was "choosing not to work in a threatening work environment every day." Lichtenwald discussed EOR problems and staff but did not mention Kappes at this time. Hoover asked Lichtenwald to take some time and reconsider her resignation and Lichtenwald agreed to continue to work for two weeks in another area of MCMC. Thereafter, Lichtenwald also took four weeks of personal leave granted by MCMC.

18. Also, in September, 1991, Hoover was asked by management to take a different management position and to relinquish her supervision of the EOR. At the same time, a new interim clinical supervisor was appointed to run the EOR during Lichtenwald's personal leave of absence. Hoover, however, retained

authority to deal with personnel actions in the EOR until shortly after Kappes' involuntary transfer. Lucey remained Hoover's supervisor as Associate Administrator for Patient Care.

19. Some time in October, 1991, Lucey and Hoover met again with Lichtenwald. Lucey stated that Lichtenwald reported to Lucey and Hoover that employes had said they would file more grievances to get Lichtenwald to leave and that Kappes had told employes "you don't have to take direction from her, we can help to get rid of her." Only one grievance was filed during Lichtenwald's tenure as EOR Clinical Supervisor and that grievance did not involve and was not filed by Kappes. It involved the discipline of the employe who had attempted to take sick leave after his/her vacation request had been denied. Lichtenwald did not confirm that she had made the above comments to Lucey and Hoover.

20. Some time during the Fall of 1991, EOR Surgical Chief, Dr. Schultz had told Lucey to get rid of EOR staff who were rude or engaging in inappropriate behavior. Dr. Schultz did not mention Kappes by name at this time but he did mention the EOR unit clerk. Hoover and Lucey met and they later decided to involuntarily transfer Kappes, in part, because she had hosted the July, 1991 get-together. Hoover and Lucey also believed that Kappes was one of the "informal leaders" of the group fomenting the constant turmoil in the EOR, that she had been a "leader in organizing employes" and in "undermining" Lichtenwald, that she had engaged in frequent side comments and facial expressions when EOR supervisors spoke to staff, that Kappes had been identified as a troublemaker by each of the series of EOR supervisors employed during Kappes' tenure in the EOR, and that Kappes had "influence" within the EOR group. Both Hoover and Lucey weighed heavily Kappes' role in hosting the July, 1991 get-together, in reaching their decision to transfer Kappes. Before making their decision, neither Hoover nor Lucey investigated the circumstances surrounding the July, 1991, get-together. Nor did they investigate the veracity of any of Lichtenwald's statements. Hoover and Lucey did not review Kappes' personnel file before reaching the conclusion that Kappes should be transferred out of the EOR and they had not talked to any of the EOR supervisors other than Marcia Lichtenwald immediately prior to deciding to transfer Kappes.

21. Regarding the "Civil Service Rules Violation" section of the memo quoted in Finding No. 4, neither Hoover nor Lucey actually concluded that Kappes had violated any of the listed rules. They had decided to transfer Kappes before considering civil service rules. These rules were listed on the October 15 memo because Hoover and Lucey thought there was "some potential" that these rules had been violated by Kappes. Hoover and Lucey never investigated whether Kappes had actually violated any Civil Service Rules and Lichtenwald never gave Hoover and Lucey any specific examples of how Kappes might have violated these rules prior to Hoover and Lucey's decision to transfer Kappes.

22. After October 15, 1991, Kappes was assigned as a float unit clerk on the day shift until the construction on 7 South was completed. As a unit clerk employed outside the EOR, Kappes worked five day per week and every other weekend from 6:45 a.m. to 3:15 p.m. Kappes had to hire a babysitter or have her parents to watch her teenage son on the weekends she had to work.

23. Kappes filed a grievance which the Union processed through the First Step. The Union did not pursue the grievance past Step One. At the First Step grievance meeting, held on November 11, 1991, Kappes sought information regarding her transfer. In a memo dated November 12, 1991, Hoover responded in relevant part as follows:

I have reviewed your concerns expressed in our meeting of November 11, 1991, with Martha Love, Ray Robakowski, and Paula Lucey present. My understanding of your concerns are regarding the reason for your reassignment, an alleged six (6) month probationary period, and alleged affidavit and a delay in this meeting. The section of the contract cited as being violated was 4.07 Representation at disciplinary hearings, (2) (c) which has to do with proper notice to an employee of a disciplinary hearing. The relief sought is return to the Unit Clerk position from which you were reassigned in the Eye Institute Operating Room.

The reasons for your reassignment were discussed at the meeting with you on October 15, 1991. You were also provided with a copy of a memo outlining background events, Civil Service Rule violations, the section of the MD #48 contract that allows an administrative transfer and the actions taken.

There was no imposition of a six (6) month probationary period and no mention of an affidavit by myself or Paul (sic) Lucey at this meeting. The delay in the November 11, 1991 meeting was related to conflicts in scheduling and my vacation.

. . .

There was no suspension imposed and in fact there were two (2) union representatives present, Carol Stegall and Ray Robakowski. Your behavior in your work area was considered of such a serious nature that patient care was in jeopardy. In this case, the administrative transfer was a first step in the progressive disciplinary procedure. This action is supported in section 1.05 Management Rights which allows "the right to suspend, discharge, demote or take other disciplinary action" and further "to take whatever actions are reasonable and necessary to carry out the duties of the various departments and divisions". You will be expected to continue your current assignment.

. . .

24. After Kappes' involuntary transfer, Hoover and Lucey met with the remaining members of the EOR staff: nursing assistants, OR technicians and R.N.'s. Hoover was present for meetings with three nursing assistants, three OR technicians and two or three of the R.N.'s. Lucey conducted the remaining meetings with EOR staff without Hoover present. At each meeting, Lucey and Hoover gave the employees the opportunity to have a Union representative present and some employees took advantage of this opportunity. Each employee was told what behaviors had been exhibited in the EOR that were unacceptable, that things had to change in the EOR and if changes were not made, management would begin reassigning them as they had Kappes. R.N. Sandy Radyiking voluntarily transferred out of the EOR effective December, 1991. Hoover and Lucey would have involuntarily transferred Radyiking had she not requested a transfer. Hoover stated that Radyiking was "extremely verbal and opinionated," "more of a negative tone than a positive one," and that Radyiking had been identified by the various EOR Clinical Supervisors as a troublemaker. Kappes and Radyiking

were the only employes who left the EOR at this time.

25. Some time before the Fall of 1989, an eye surgery patient complained about a lack of professionalism among staff and lack of cleanliness in the EOR. The patient first complained to MCMC and then to the State of Wisconsin. The State Hospital Accreditation committee inspected MCMC as a result of this complaint. The EOR passed this inspection. Of the perceived problems with the EOR's functions at this time, Kappes was directly involved in only one problem, the lack of productivity. All EOR employes were directly responsible for this productivity problem, in Hoover's opinion. Other EOR problems that were identified by Hoover and Lucey at and after the time of this patient complaint were decreased caseloads, provision of clean and properly maintained surgical instruments and equipment, scheduling of operations, security and safety problems, problems with absenteeism and tardiness. Some of these problems were due to the eye surgeons' preferences for certain EOR staff to work in certain operating rooms and for specific starting and ending times for their surgeries. These preferences also created or exacerbated case load, scheduling and productivity problems. Also, in the Summer of 1991 (a peak vacation time), although all EOR staff positions were filled, there was one employe absent on paternity leave and one R.N. was on duty-incurred disability leave.

CONCLUSIONS OF LAW

1. Nanci Kappes is a "municipal employe" within the meaning of Sec. 111.70(1)(i), Stats.

2. Milwaukee County Medical Complex is a "municipal employer" within the meaning of Sec. 111.70(1)(i), Stats.

3. Carole Albrecht Hoover and Paula Lucey were at all times relevant herein "supervisors" within the meaning of Sec. 111.70(1)(o), Stats. Marcia Lichtenwald at all times relevant herein was an agent of MCMC as well as a "supervisor" within the meaning of Sec. 111.70(1)(o), Stats.

4. The activity of employes of the EOR with respect to:

- (a) Kappes' volunteering her home and her participation along with that of other EOR employes in the July, 1991 get-together at Kappes' home;
- (b) At the July, 1991 get-together, employes' discussing and writing down their concerns about working conditions in the EOR and giving them to Novella Hardrick for copying and presentation to management and the Union,

constituted the lawful exercise of concerted acts for the employes' mutual aid and protection with respect to their conditions of employment protected by Sec. 111.70(2), Stats.

5. Respondent, by its agent, Marcia Lichtenwald knew in June, 1991 that the get-together had been planned at Kappes' home for early July, 1991. In early July, 1991, Lichtenwald requested and Carole Hoover attended an EOR morning report where Lichtenwald and Hoover exhorted employes to get back to work and get off their petty arguments regarding Lichtenwald's refusal to have regular staff meetings and her disparate treatment of EOR employes. In mid-July, 1991, Lichtenwald also knew that the get-together had occurred, and in early August, 1991, Lichtenwald told Hoover that it had occurred and that she (Lichtenwald) was considering resigning.

6. Respondent, by Hoover and Lucey's decision to involuntarily transfer Kappes, effective October 16, 1991, was based at least in part upon Kappes' lawful concerted activities in organizing and hosting the July, 1991 employe get-together at her home and Respondent has thereby engaged in and is engaging in prohibited practices within the meaning of Sec. 111.70(3)(a)3 and 1, Stats.

ORDER 2/

To remedy its violation of Sec. 111.70(3)(a)3, Stats., the County, its officers and agents, shall immediately:

1. Cease and desist from:
 - a. Discriminating against Nanci Kappes by involuntarily transferring Kappes because she exercised her rights protected by Sec. 111.70(2) Stats., including her right to organize and host an employe get-together at her home for the purpose of discussing and listing issues relating

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

Section 111.07(5), Stats.

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

to terms and conditions of employment in the Eye Operating Room for later presentation to management.

- b. Interfering with, threatening or coercing Nanci Kappes because of activity protected by Sec. 111.70(2) including organizing and hosting an employe get-together at her home.
2. Take the following affirmative action which the Examiner finds will effectuate the purposes and policies of the Municipal Employment Relations Act:
- a. Notify employes by posting in conspicuous employe notice locations in the Medical Complex a copy of the notice attached to this Order and marked "Appendix A". This copy shall be signed by a responsible official of the Medical Complex, shall be posted immediately upon receipt of a copy of this Order, and shall remain posted for a period of 30 days thereafter. Reasonable steps shall be taken to insure that this posted notice is not altered, defaced or covered by other material.
 - b. Notify the Wisconsin Employment Relations Commission within 20 days of this Order what steps the Board has taken to comply with the Order.
 - c. Reinstate Nanci Kappes to her former position as unit clerk of the Eye Operating Room, also known as the Eye Institute at the Medical Complex. 4/

Dated at Madison, Wisconsin this 29th day of December, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Sharon A. Gallagher, Examiner

4/ There having been no change in Kappes' wages or benefits while she worked as a float unit clerk after October 15th, no backpay is due or owing, and is not ordered.

APPENDIX "A"

Notice to All Employees

As ordered by the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, we notify our employees that:

1. WE WILL NOT discriminate against Nanci Kappes by involuntarily transferring Kappes because she engaged in lawful activities protected by Sec. 111.70(2), Stats., including her right to organize and host a get-together for Eye Operating Room employees at her home for the purpose of discussing and listing issues relating to terms and conditions of employment in the Eye Operating Room for later presentation to management.
2. WE WILL NOT interfere with, threaten or coerce Nanci Kappes because she engaged in activities protected by Sec. 111.70(2), Stats., including organizing and hosting an employe get-together at her home.
3. WE WILLL reinstate Nanci Kappes to her former position as Eye Operating Room unit clerk.

Dated at Milwaukee, Wisconsin

MILWAUKEE COUNTY (MEDICAL COMPLEX)

By _____
(Name)

(Title)

MILWAUKEE COUNTY MEDICAL COMPLEX

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW

Complainant's Position:

Complainant urged that Kappes' activity in hosting the July, 1991 get-together was protected activity because it pertained to the work-related concerns of the EOR staff. Complainant asserted that only one witness who attended the get-together (Hardrick) indicated negative comments had been made about Lichtenwald at the meeting -- that those present felt that Lichtenwald was not a competent supervisor. Thus, Complainant contended even if some supervisor "bashing" had occurred at the get-together, it would still constitute protected concerted activity because the "crux of many union organization attempts is supervisor bashing and derogation. . . ." Complainant argued pursuant to Commission precedent that Respondent's conduct need only to tend to interfere with protected rights to run afoul of Sec. 111.70(3)(a)1, Stats., and here MCMC's transfer of Kappes actually and implicitly interfered with employe rights to engage in protected concerted activity. The fact that Kappes was escorted back to the EOR and then removed by management from the EOR during the EOR work day and in front of EOR staff in Complainant's view, sent a message to remaining EOR employes that they should not meet and discuss EOR problems. In addition, Complainant asserted that MCMC management's having counseled EOR employes that they too would be transferred if their behavior did not change and, Complainant claimed, the fact that management told employes that Kappes was the "sacrificial lamb" for management also interfered with EOR employe rights.

Complainant noted that jeopardizing patient care was not given as a reason for transferring Kappes until after the October 15, 1991 meeting and after management had counseled remaining EOR staff. Further, Hoover and Lucey's repeated claims that Kappes had the party to get rid of Lichtenwald were neither investigated nor substantiated by Hoover and Lucey while Hoover and Lucey freely admitted that Kappes had been transferred because she had hosted the July, 1991 get-together (where employes could discuss EOR problems including staff problems with Lichtenwald). These facts showed that Kappes was transferred in retaliation for engaging in protected concerted activity, Complainant argued.

Complainant contended that a violation of Sec. 111.70(3)(a)(3), Stats., had been proven because the evidence demonstrated (1) that Kappes had engaged in activity protected by Sec. 111.70(2), Stats.; (2) that MCMC (through Lichtenwald) knew of Kappes' protected activity; (3) that MCMC (through Lichtenwald) was hostile toward Kappes because she engaged in protected activity; (4) that MCMC then discriminated against Kappes at least in part because she had engaged in protected concerted activity. Complainant contended that the reasons given by Respondent for transferring Kappes at the hearing were clearly pretextual and that the true reason for the transfer was Kappes' hosting the July, 1991 get-together and Respondent's animus against her therefor. Indeed, Complainant urged that Respondent had entirely failed to prove that Kappes had had anything to do with the perceived EOR problems, the EOR patient complaint or the resulting State inspection of the EOR. In addition, testimony by Lucey and Hoover that patient care and accreditation by the Joint Committee were threatened by Kappes' activities in the EOR was unsupported by any evidence that Kappes' work impacted on this process in any way.

Hoover and Lucey's final articulated reason for transferring Kappes -- because she was a long-standing leader in the EOR -- was based on hearsay which

remained uninvestigated and unsubstantiated at the time of the transfer. Complainant observed that neither Hoover nor Lucey had attempted to begin the progressive discipline process against Kappes despite the alleged consistent reports of Kappes' misconduct. Hoover and Lucey's assertions that Dr. LeCann had also identified Kappes as a ring leader were unsupported by the record, the Complainant asserted. Indeed, Complainant noted, Dr. LeCann's advice and recommendations were never followed by Hoover or Lucey or any other MCMC supervisors.

In conclusion, Complainant sought attorney's fees and costs in the amount of \$8,375.71 because, Respondent's defenses were assertedly frivolous. Complainant also sought Kappes' reinstatement to her former position in the EOR and an order requiring Respondent to cease and desist from retaliating against Kappes because of her protected concerted activity.

Respondent's Position

MCMC contended that Complainant Kappes' transfer was permissible under its agreement with AFSCME District Council 48 and that it was consistent with past arbitration awards. MCMC noted that after her involuntary transfer, Kappes filed a grievance pursuant to the labor agreement which the Union thereafter decided not to pursue and Kappes filed the instant complaint. MCMC reasserted its affirmative defenses to the complaint which it had alleged in its answer and asserted at the hearing. 5/

In addition, MCMC asserted that that complaint does not allege and there was no evidence presented to prove that Kappes engaged in any protected concerted activity by merely having the July, 1991 get-together in her home. MCMC noted that Kappes admittedly took no notes and she did not participate in the discussions at her home during the get-together. On the other hand, however, MCMC contended that the facts clearly showed that Kappes was a troublemaker in a troubled and dysfunctional unit at MCMC. Thus, MCMC asserted, management's decision to transfer Kappes was designed to eliminate the stress and friction between EOR staff members so that quality patient care would be assured in the EOR and that decision had nothing to do with Kappes' alleged protected concerted activity.

MCMC urged that the stress and friction in the EOR had been on-going since 1989 and it had been so bad that MCMC had hired a psychologist, Dr. LeCann, to try to analyze and resolve the problems. MCMC claimed that the evidence showed that Dr. LeCann had identified Kappes as one of the "informal leaders which were causal of turmoil in the unit"; that former EOR Clinical Supervisor Sue Malsack also identified Kappes as having "involvement in staff-to-staff bickering"; and that Kappes had been identified by all EOR supervisors since 1989 as one of the informal leaders or troublemakers of the unit. Supervisors Lucey and Lichtenwald had also identified Kappes as an intimidating force in the unit, and as a person who frequently subjected others to "criticism or snide, derisive remarks." Lichtenwald also informed Lucey and Hoover that Kappes and others were plotting to get Lichtenwald to resign by

5/ MCMC's affirmative defenses can be summarized as follows: That the WERC lacks jurisdiction over Respondent under the terms of Sec. 111.84, Stats., as alleged by Complainant; that Complainant has failed to comply with ERB 12.02(1) by failing to allege any violation of Sec. 111.70(3) in her complaint, by failing to have the complaint properly sworn and by failing to allege that the \$25.00 filing fee had been paid; that the Complainant's claims are barred by the doctrine of "Collateral Estoppel"; and that the complaint is barred by the "clean hands doctrine" because Complainant's conduct violated Sec. 111.70(3)(b)1, 4 and 6, Stats.

filing more grievances, MCMC contended.

MCMC further contended that Lucey decided to transfer Kappes in order to change the way business was being done in the EOR, and she chose Kappes, based in part on discussions of inappropriate matters Kappes allegedly had discussed in front of patients confirmed by Malsack, Golanowski and Dr. Schultz. Lucey then decided "to remove the irritant which was one of the roots of the problem in the unit" -- Kappes -- because Lucey was concerned about patient care, staff behavior and morale. Lucey had also received reports from Lichtenwald regarding Kappes' central role as troublemaker and verbal abuser. In addition, MCMC contended, Lichtenwald had no knowledge of Kappes' "hanging party" until September when she tendered her resignation to Lucey and Hoover.

MCMC urged that it not only had no knowledge of Kappes' supposed protected concerted activity at the time it discharged her, but that Complainant failed to prove that she had actually engaged in any such activity.

In addition, MCMC observed that Kappes had spent years as a Union steward and that she filed a grievance regarding her involuntary transfer and that the determination, adverse to Kappes, of that grievance should be final and binding of all issues regarding Kappes' transfer.

In further support of the transfer, MCMC also pointed to its long-standing past practice of involuntarily transferring employes, in order to eliminate friction and promote better work relationships, pursuant to its labor agreements with District Council 48 and as supported by prior arbitration awards sustaining such involuntary transfers. Finally, MCMC argued that Kappes' conduct had been "utterly reprehensible" and the Commission should not grant essentially equitable relief to one with such unclean hands. MCMC therefore sought that the complaint be dismissed in its entirety.

Complainant's Reply Brief

Complainant stated that MCMC's initial brief contained the following (assertedly) false statements: that Complainant's witnesses presented conflicting testimony regarding the purpose of the July, 1991 get-together; that Radyiking testified that the friction between EOR staff members had nothing to do with Lichtenwald's management; that Radyiking had been counseled and threatened with involuntary transfer after Kappes' transfer; and that Kappes' testimony showed that she had not participated in the July, 1991 get-together.

Complainant further asserted that MCMC's main witnesses, Hoover and Lucey, had no direct contact with those working in the EOR and so they could not have determined that patient care was jeopardized by Kappes. Indeed, Complainant asserted that the evidence showed that Kappes had no involvement in any of the problems in the EOR which impacted on patient care. Complainant noted that Dr. LeCann had not identified Kappes as an informal leader. The true reason for Kappes' transfer was stated by Hoover and Lucey -- Kappes' involvement in hosting an employe meeting at her home which constituted activity protected by law.

Complainant asserted that MCMC was incorrect in its assertion that because Kappes initially invoked the grievance procedure and the grievance was thereafter dropped by the Union, that the Commission therefore lacks jurisdiction to decide this case. Complainant argued that it was only after it appeared that there would be no satisfactory resolution of her grievance with MCMC, that Kappes filed the instant complaint case. The Complainant contended that in these circumstances, she was not obliged to further pursue the grievance before pursuing her other legal remedies.

In conclusion, Complainant sought Kappes' immediate reinstatement to the

unit clerk position in the EOR, a cease and desist order against MCMC restraining it from retaliating against Complainant for "past or future participation in protected concerted activity" and reimbursement for attorney's fees and costs.

Respondent's Reply Brief

MCMC took issue with Complainant's characterization in its initial brief of evidence regarding Lichtenwald's supervisory abilities, Lichtenwald's credibility and what inferences should be drawn from Kappes' immediate removal from the EOR following the October 15th meeting. MCMC objected to and moved to strike Complainant Counsel's offer to place in evidence her notes of a November 21, 1991 hearing regarding Kappes' transfer before Mr. Faulwell. MCMC also objected to Complainant's citation of cases not provided or introduced at the hearing and it moved to strike these from consideration by the Examiner. In addition, MCMC reasserted its previous arguments that Kappes' acts did not constitute protected concerted activities and that MCMC had no knowledge of Kappes' alleged protected concerted activity and harbored no animosity toward Kappes for her alleged protected conduct. Rather, MCMC observed, over the years Kappes had been consistently identified as a troublemaker and ring leader of negative conduct in the EOR. Finally, MCMC objected to and sought to strike Complainant's request for attorney's fees and costs, which MCMC noted was not part of the complaint and upon which issue no evidence had been adduced at the instant hearing. In sum, MCMC urged that the complaint be dismissed and it asked that it be awarded fees and costs herein.

Discussion

The amended complaint alleges violations of Secs. 111.70(3)(a)1 and 3, Stats. The issues involved in this case are whether MCMC through the acts of Hoover, Lucey and Lichtenwald toward Kappes has interfered with, threatened, restrained, coerced and discriminated against Kappes because she "engaged in lawful, concerted activities for the purpose of . . . mutual aid or protection . . ." pursuant to Sec. 111.70(2), Stats. Section 111.70(3)(a)1, Stats. enforces the rights listed in Sec. 111.70(2) by making it a prohibited practice for a municipal employer to "interfere with, restrain or coerce municipal employes in the exercise of their rights guaranteed in sub. (2)." As a practical matter, the Commission has interpreted the language of Sec. 111.70(3)(a)1, Stats., to prohibit employer conduct that has a reasonable tendency to interfere with an employe's right to exercise his/her Sec. 111.70(2) Stats., rights, so that it is unnecessary to prove actual interference or that the employer actually intended to interfere with employe rights. 6/

Based upon the record of this case Kappes and those who attended the July get-together were engaged in "lawful, concerted activity." The overwhelming testimony of those who attended the July get-together demonstrated that it was intended and that it in fact produced discussion and enumeration of EOR concerns and issues for later presentation to management and the Union. Only one of those who testified who also attended the get-together, Novella Hardrick, stated that a specific negative comment was made about Lichtenwald's competence at the meeting. None of the witnesses actually stated that the meeting had been intended as a "hanging party" for Lichtenwald (to get Lichtenwald to resign).

I note that only Novella Hardrick stated that no notes or minutes were taken at the get-together. All other witnesses who had been present at the get-together asserted that notes and minutes had been taken by various employes at the meeting and that Hardrick had then taken those notes away with her, purportedly in order to copy them and later present them to the Union and management for discussion. Ruby Ellis confirmed that Hardrick had possession of the notes at MCMC after the get-together occurred. District Council 48 President Martha Love confirmed that she was given a list of issues but that she later threw them away when no employes asked her to act upon them. Based upon the facts adduced, I believe that the purpose of the July get-together was to discuss and list EOR issues of concern regarding working conditions for later presentation and discussion with management and the Union, not to plot ways to get Lichtenwald to resign. 7/ As such, the organization of the get-together and its conduct and the creation of documents at the get-together constituted lawful protected activity within the meaning of Sec. 111.70(2), Stats. The get-together and what occurred at the get-together manifested clearly more than purely individual concerns. 8/

In addition, I believe the evidence demonstrated that Lichtenwald knew that the get-together was intended to do more than merely find ways to get her to resign (as Lichtenwald had mistakenly concluded). In fact, Lichtenwald's

6/ See, e.g. Beaver Dam Unified School District, Dec. No. 20283-B (WERC, 5/84).

7/ Even if the meeting had also been to plot ways to get Lichtenwald to resign, the Undersigned does not believe this would be unlawful or that this would remove the meeting from the protection of MERA.

8/ See, City of LaCrosse et. al., Dec. No. 17084-D (WERC, 10/83).

testimony reveals that she not only knew when the get-together would be and approximately when it occurred but that she also knew that the get-together was intended to bring out EOR employe concerns about working conditions. At p. 411 of the transcript, Ms. Lichtenwald stated:

(By Ms. Schoewe) Q And after the meeting occurred, did anyone tell you what the purpose -- what happened at the meeting?

(By Ms. Lichtenwald) A For awhile there were rumors going around that the meeting never occurred. It just so happened that my boss, Carole Hoover, came up for a meeting with me for the a.m. report, just as kind of a backup support, reminding people that their arguments were petty, that they were there, in fact, to work. And the rumors were that, well, look what Marcia pulled now, she pulled in the top guns to scare us out of having our meeting tonight when, in fact, I was -- I wasn't even aware of the date of the meeting. So that was going around for awhile. Then it wasn't until later in September after I resigned that I found out that, in fact, there was a meeting. However, the actions through the rest of the summer, there was no doubt that there was a concerted effort by many people in the department from withholding information from me and basically trying to make any job more miserable.

Again at pages 423 and 424, Ms. Lichtenwald testified:

(By Ms. Burns) Q Did you hear about the meeting which occurred in July of 1991 at Nanci Kappes' house before or after the meeting occurred?

(By Ms. Lichtenwald) A Before.

Q Do you recall how long before the meeting occurred?

A My understanding that it was going to occur sometime in the next couple of weeks.

Q Okay. In relation to the time that you -- strike that. When did you have Carole Hoover come to the morning report?

A I believe it was in early July.

Q Why did you have her come to the morning report?

A Just based on our meetings together, we both thought it was a good idea to clear the air and the people in the department needed to get off the petty arguments and get back to work.

Q At the time that you and Carole decided she should come to morning report, had you already heard a meeting was going to take place?

A Right, but we weren't dwelling on it. We didn't know when it was.

Q The petty arguments that you just referred to, was Nanci Kappes involved in any of those?

A Yes. Those were regarding we need bitch sessions and we need staff meetings, those kinds of things, and why was this employee doing that, why was that employee allowed to do that, all that kind of like sibling bickering.

. . .

(By Ms. Burns) Q You stated that you felt that the behavior escalated -- strike that. You stated that you felt that after mid-July the animosity toward you increased; is that a correct characterization?

(By Ms. Lichtenwald)

A Yes. I would even say that the animosity matched from the time they knew they were going to have a meeting. I remember myself saying, oh, they are feeling tough, you can tell by the way they are acting.

. . .

It is clear from this testimony that Marcia Lichtenwald knew of the July get-together, that she knew that one purpose for that get-together was to air EOR staff concerns about working conditions for their mutual aid and protection and that she attempted to discourage and interfere with the occurrence of the get-together by having Hoover attend a morning report in early July and that Lichtenwald harbored animus against Kappes for having hosted the get-together.

In any event, both Hoover and Lucey knew of the July get-together at Kappes' house prior to making their decision to involuntarily transfer Kappes. In addition, on the memo of October 15th, they listed as the sole reason for transferring Kappes, the fact that she had engaged in protected activity -- that is, hosting the July get-together at her home. The fact that Respondent may have had other legitimate reasons for transferring Kappes is not a defense

where, as here, it is established that hostility toward Kappes' protected concerted activity was in part the basis for Hoover and Lucey's decision to involuntarily transfer Kappes. 9/

Therefore, because the Employer clearly stated its reason for transferring Kappes in its October 15, 1991 memo and thereby clearly revealed an unlawful motive for that transfer, an exhaustive analysis of the Employer's other reasons for transferring Kappes only becomes relevant insofar as it impacts upon the fashioning of an appropriate remedy here. State of Wisconsin (DER) v. WERC, supra.

The facts clearly showed that the EOR had been in turmoil for many years before Kappes' transfer; that the EOR was a dysfunctional unit; that the Employer had taken the extraordinary step of calling in a psychologist, Dr. LeCann, to assess and attempt to assist EOR staff to get along better; that there had been an unusually high turn-over rate among EOR supervisors (four supervisors resigned in 20 months); and that EOR Chief Surgeon Schultz asked Hoover and Lucey to take action to correct the problems in the Fall of 1991. However, it is also clear that MCMC failed to prove that Kappes was responsible for these problems. 10/

In weighing the evidence proffered by MCMC's Hoover and Lucey, the undersigned is struck by the lack of any connection between the various problems in the EOR which Hoover and Lucey blamed on Kappes. Notably, MCMC showed no connection between the patient complaint in 1988 or 1989 and Kappes; no specific connection between Kappes' acts and the supervisors' resignations; no connection between Kappes and any physician or patient complaints; no specific negative impact that Kappes would have had on EOR patient care, cleanliness, professionalism, security or EOR accreditation; no specific

9/ See, e.g. Muskego-Norway Joint School District No. 9 v. WERC, 35 Wis.2d 540 (1967); Marathon County, Dec. No. 25757-C (WERC, 3/91); State of Wisconsin (Department of Employment Relations v. WERC, 122 Wis.2d 132 (1985).

10/ It is significant that the only former EOR supervisors who testified herein were Lichtenwald and Golanowski. Notably, the latter merely served as acting EOR supervisor for less than a four month period, from December, 1991 until Lichtenwald was hired in March of 1991. Golanowski appeared to be a straightforward, believable witness. Golanowski stated that in her view, the major problems the EOR related to personal problems, how employes should do their jobs, that employes were not willing to work to get the job done, that employes engaged in "infighting and bickering." In regard to Kappes, Golanowski stated that it had irritated her that Kappes did not appear willing to take on more work and that she would leave her station for errands which took longer than Golanowski deemed appropriate, but Golanowski admitted she never spoke to or disciplined Kappes about either problem and that she never asked Kappes to do more work. Golanowski did not link Kappes to any of the other problems she perceived existed among EOR staff. Golanowski also stated that Kappes was not part of the "infighting," that Kappes did not intimidate her (Golanowski) and that she could not comment on whether Kappes was a vindictive person. Golanowski also admitted that she did not follow Dr. LeCann's recommendations to work with EOR employes one-on-one and she admitted that, with hindsight, that she should have followed LeCann's recommendations on this point. Doctors LeCann and Schultz did not testify.

problem identified by Dr. LeCann regarding Kappes' group session conduct; and no specific problems with Kappes' work or her comments in front of patients. Therefore, in all of the circumstances of this case, the undersigned is convinced that the appropriate remedy to effectuate the purposes and policies of the Municipal Employment Relations Act is an order of reinstatement for Kappes as well as the posting of the attached notice (Appendix A).

MCMC has asserted that the fact that Kappes did not take any notes at the get-together and that she did not join in the discussion with employees requires a conclusion that Kappes did not engage in protected activity. The case law is clear that an employee need not actually be a leader of the group in all ways but only that the employee be engaged in lawful activities regarding conditions of employment which are concerted and are for the mutual aid and protection of employees. The record demonstrates that Kappes' activities rose to this level and are therefore protected by Sec. 111.70(2), Stats.

MCMC asserted and Hoover and Lucey stated that the problems in the EOR were resolved by transferring Kappes. MCMC presented no proof that the resolution was due to or causally connected to Kappes' transfer. It is equally as likely that the action of transferring Kappes and Hoover and Lucey's counseling of the remaining EOR employees thereafter, had the affect of discouraging any further exercise of Sec. 111.70(2), Stats., rights by EOR employees.

MCMC contended that the Union's adverse disposition of Complainant's grievance should be binding on the merits of this case and that the Examiner must therefore dismiss this complaint in its entirety. However, the Complainant has alleged and proven violations of Secs. 111.70(3)(a) 3 and 1 which are separate and distinct from any contract violation she may have alleged in a grievance. The fact that Arbitrator Zeidler may have arrived at different outcomes in the grievance arbitration cases he heard has no bearing on the instant statutory case.

MCMC's other technical affirmative defenses including MCMC's proposed application of the equitable doctrines of estoppel and clean hands (upon which MCMC did not elaborate), simply miss the legal thrust of Secs. 111.70(2) and (3)(a)1 and 3, Stats., which protect employees who engage, as Kappes did, in lawful concerted activities. In addition, I note that although MCMC asserted in its answer that Kappes' actions violated Secs. 111.70(3)(b)1, 4 and 6, Stats., MCMC failed to support these assertions by any proof. Finally, MCMC failed to show how it was prejudiced by, *inter alia* Complainant's mistaken allegation of a violation of Sec. 111.84, Stats. Complainant corrected this error well within the statute of limitations period, by her amendment of the complaint to allege violations of Sec. 111.70(3)1 and 3 Stats., by the same conduct described in the original complaint. Complainant counsel's failure to state that she had tendered the \$25.00 filing fee for processing the complaint was not significant because WERC records reflect that Complainant paid this fee to the Commission and the Examiner hereby deems the complaint to be amended to reflect this fact. Finally, Complainant counsel's failure to have the complaint sworn was also cured by counsel's submission of such verification, again without asserted prejudice to MCMC and well within the statute of limitations period. The Examiner allowed this correction pursuant to her authority contained in ERB 12.02 (5). 11/

Regarding MCMC's motions to strike certain documents, assertions and case law citations made or submitted by Complainant in her initial brief, I agree with MCMC that Complainant counsel's notes of the November 21, 1991 hearing

11/ See e.g. Stanley-Boyd Area Schools, Dec. No. 12504-B (WERC, 1/76).

before Mr. Faulwell constitute inadmissible hearsay and they have not been considered in reaching the instant decision. In regard to case citations by Complainant, neither the Commission's rules nor the statutes it administers require advance disclosure of legal authorities and Complainant's citations in her brief were therefore appropriate and were considered in reaching this decision.

Regarding MCMC's motion to strike Complainant's request for attorney's fees and costs because such request was not contained in the complaint and was not supported by any evidence submitted at the hearing, and MCMC's (counter) request for attorney's fees and costs in its reply brief, I note that claims for attorney's fees need not be alleged in the complaint under ERB 12. Also, proof of the reasonableness of such fees is not necessarily adduced at prohibited practice hearings. Third, reasonable attorney's fees and costs are normally only granted by the Commission in cases where a party's assertions/defenses are not debatable or are made in bad faith. In Marathon County, et al., Dec. No. 25908-C (WERC, 3/91), the Commission set forth its position regarding the payment of attorney's fees and costs to the "winning" litigant (Musgrave) in the prohibited practice case therein, as follows:

Before the Examiner, Musgrave filed a motion for costs of litigating his complaints. Costs are only available to litigants before the Commission in instances where: (1) a party refuses to implement a Sec. 111.70(4)(cm) interest arbitration without good cause; (2) the position of an opposing litigant demonstrates extraordinary bad faith; or (3) a union's breach of the duty of fair representation has caused an employe to incur the expense of litigating an underlying breach of contract claim before the Commission (citing State of Wisconsin, Dec. No. 11457-H (WERC, 5/84). (Other citations omitted).

In the instant case, the County's defenses were at least "debatable" (there being credibility resolutions involved herein) and no proof of extraordinary bad faith was offered or found. See, e.g., Wisconsin Dells School District, Dec. No. 25997-D (WERC, 8/90). Therefore, Complainant's request for fees and costs has been and hereby is denied. The County's request for attorney's fees and costs is also hereby denied based upon the above analysis of precedent.

Dated at Madison, Wisconsin this 29th day of December, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Sharon A. Gallagher, Examiner